



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 265 OF 2009

IN THE MATTER OF THE ESTATE OF GITERE KAHURA (DECEASED)

SAMUEL MBURU GITERE.....1ST APPLICANT

ANNE WANJIRU GITERE.....2ND APPLICANT

-VERSUS-

KENNETH KIMARI GITERE.....1ST RESPONDENT

DAVID WAKANGU GITERE.....2ND RESPONDENT

CHABRIN AGENCIES LIMITED.....3RD RESPONDENT

PREVIEW REALTORS LIMITED.....4TH RESPONDENT JUSTUS

RULING

1. This case was listed for Mention on 4th February, 2019 for purposes of allowing the Respondents to comply with the directions of the Court requiring that the 1st and 2nd Respondents render accounts of the management of the estate herein.

2. The 1st and 2nd Respondents together with the two Applicants are the four administrators of the Estates of GITERE KAHURA (Deceased) and MARY NYOKABI (Deceased) which are the subject of this Succession Cause. The court ruled that the two Estates be administered separately.

3. The 30 days granted to the 1st and 2nd Respondents to comply with the Court Orders lapsed on 21.01.2019 but on that day the Respondents through Ondabu Advocate who was holding brief for the Respondents' Advocate sought an extension of two weeks to enable Mr. A. G. N. Kamau for the Respondents to file the accounts.

4. Instead of filing the accounts as required, the Respondents filed an undated application bearing Court Stamp of 31st January, 2019 seeking for orders that I recuse myself from hearing this matter and that the matter be heard and determined by a different Judge.

5. GROUNDS FOR RECUSAL OF A JUDGE FROM A MATTER.

Legally a judge can recuse himself or herself in the following circumstances;

1. In matters of conflict of interest.
2. If a judge is biased or seen to favor one party.
3. If a judge handled the matter previously as a lawyer in private practice.
4. If there is ex parte communication between the judge and one of the parties.
5. When a judge predicts that he or she may be impartial in a matter.

6. Under **the Duty to sit doctrine**, unless a judge is required by law to disqualify himself or herself, he or she must remain on the case.

7. In the case of **Republic v Independent Electoral and Boundaries Commission & 3 others ExparteWavinyaNdeti [2017] eKLR**

The following sentiments were laid down:

"The foundation for the principal underlying recusal of judicial officers was restated by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** as follows:

"Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in *Black's Law Dictionary*, 8th ed. (2004) [p.1303]: "*Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.*" From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

8. In this particular case the record will bear me out that the Respondents have not only in several occasions failed to appear in Court as directed but have not attempted to file accounts with respect to the Estate herein. This Court reserved the right to deal with the said parties for contempt of Court for failure to comply with Orders of this Court to file accounts in respect of the Estate herein.

9. I find that the allegations of bias have no basis in view of the conduct by the Respondents. This Court is mandated to resolve disputes amicably under Article 159 of the Constitution of Kenya 2010 by promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and even dispute mechanisms.

10. Article 159 of the Constitution of Kenya 2010 provides as follows;

59. Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

11. Mr AGN Kamau is not being honest when he says that this Court is forcing the parties to go for mediation and that this suit has been finalized when there is evidence that the Estate is being plundered by his clients who are the 1st and 2nd Respondents in this case. The Estate has not been administered as the four administrators are not able to agree and file a summons for confirmation as directed and the 1st and 2nd Respondents refused to attend meetings at the mediation. This Court is mandated by Article 159 of the Constitution to refer parties to mediation if the same is deemed fit.

12. The undated Application filed in Court on 31st January 2019 is supported by an Affidavit full of lies and the same is meant to embarrass and intimidate this Court. I take great exception to the threats in paragraph 39 of the Supporting Affidavit sworn by KENNETH KIMARI GITERE on 30th January, 2019 that the said deponent has instructed their advocate to lodge a Formal Complaint with the Judicial Service Commission.

13. Mr AGN kamau and Miss Kemunto have little or no respect for the Court and they are bent on misleading their clients who are the 1st Respondents. I find that there no grounds for this Court to recuse itself.

14. Mason J in a judgment given by him in the High Court of Australia [In Re J.R.L.:Exparte C.J.L. (1986) 161 CLR 342 at 352.]:said;

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour...It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.” [Emphasis mine].

On the views held by judges the Court held:

“It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.”

In conclusion, the Court decreed:

“It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training...and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.

While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself. ”

15. To paraphrase the above decision, Judges do not go to heaven in the evening and return to earth in the morning. Judges are human made of flesh and bones. When you prick them they bleed and when you tickle them they laugh. I find that having been falsely accused by Mr AGN Kamau I cannot rule out the possibility that from now henceforth I may be inclined to look at the Respondents as my accusers and for that reason, I recuse myself from handling this matter and I refer it to the Presiding Judge of the Family Division on 18th February, 2019 for further directions.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 8TH DAY OF FEBRUARY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI