REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.300 OF 2013

IN THE MATTER OF THE ESTATE OF SILAS KAGINA GICHOHI (Deceased)

Christopher Ndaru Kagina.................................Petitioner/ Applicant

-versus-

Esther Mbandi Kagina

Tabitha Ikamba Kagina

Charity Njoki Kagina...Respondents

RULING

Before me is the notice of motion dated 24th November 2017 brought under certificate of urgency and under sections 3A, 1A and 63E of the Civil Procedure Act Chapter 21 Of The Laws of Kenya the Civil Procedure Rules and other enabling provisions of the law.

The applicant Christopher Ndaru Kagina seeks the following orders;

1. That the matter be certified as urgent and service be dispensed with at the exparte stage owing to the reasons of urgency

2. That pending the hearing of the application inter partes the honourable High Court judge Matheka be pleased to disqualify herself from hearing this matter.

3. That the honourable court do issue directions forwarding and transfer this file to another judge in Nyeri for allocation and further orders

The application is grounded on the supporting affidavit of the applicant where he depones inter alia that:-

i. During his appearance before the trial judge he has formed an opinion that the judge is biased

ii. That the appearance of bias has resulted to animosity between himself and the judge

iii. That he has personally written a letter of complaint in respect of the conduct of the judge to the chief justice.

iv. That in the circumstances of all these he calls for transfer of the matter from the judge to another judge in Nyeri.

v. that the judge showed a clear bias in favour of the respondent’s to the applicant’s prejudice as she kept interrupting him whenever he tried to orally submit and talked in a friendly manner to the respondent’s counsel

vi. That he felt intimidated before the judge and it is absolutely clear that he cannot have a fair hearing before the said judge.

The respondents through their counsel chose not to make any response to this application.

Background

On 3rd May 2017 this matter was placed before me for the very first time.

Mrs. Isika appeared for the first and second respondents and the petitioner/applicant was in person.

The record shows that the matter had been fixed for directions. It was confirmed that there was an application dated 23rd of October 2015 that was pending. Counsel for the first and second respondents requested that the same be heard.

The applicant told the court that he had filed an appeal against the ruling by Hon Justice Mativo of 20th September 2016 Appeal number 21 of 2017 Court of appeal, Nyeri. He stated that there was also an application for stay due to be heard on 8 th May 2017 with regard to the said appeal and therefore he was totally opposed to this matter proceeding in any way. I gave directions, based on his submission that this application for stay was pending before the court there was nothing to stop the court from proceeding and gave a date for hearing of the application dated 24th of October 2015 on 25 July 2017, with a rider that if there was a stay, then obviously the court would not proceed with the hearing of that application. It was expected that in the meantime the applicant would prosecute the application coming for hearing on eighth May 2017.

The next time the file was placed before me was on the 16 October 2017. On that date counsel for the respondents sought directions that the application dated 24th of October 2015 be disposed of by way of written submissions. Those directions were granted as there was no opposition to the same. The matter was fixed for mention on 27th of November 2017 to confirm that parties had filed their submissions.

On the 27th November 2017, the parties appeared. The first and second respondents counsel had filed submissions on the application dated 23rd October 2015 and informed the court that she had served the applicant. On his part the applicant submitted that he had not been served with any papers but had only been called on phone and told that there were some papers for him.

He went on to submit as follows;

> "*I wish to make very humble submissions that you withdraw because I believe are biased. I have formed the opinion that I cannot get justice for me from you, from your interrupting me before I finish all the time and stopping me from submitting. That before you I feel intimidated. In view of that I do not have confidence in you. It is my prayer that the matter be transferred to another judge".*

Counsel for the respondent's submitted that since the applicant had filed an application, they did not wish to comment but they would file a replying affidavit. I allocated time for the same and ordered that a hearing date to be fixed in the registry.

The matter next came before me on 15 March 2018. The applicant's prayer was that his application be determined first. It is noteworthy that the respondent did not file any replying affidavit.

The issue then is whether there is a reason for me to disqualify myself.

It is noteworthy the that the only contact that this court had with this matter before the applicant made his application for disqualification was the proceedings of 3rd May 2017. Before that the matter had entirely been heard by Justice Mativo.

It is also noteworthy that nothing substantive has ever proceeded before me. In fact, the record speaks for itself that on the material date the matter was coming for directions.

In determining the issue, I had to seek guidance from precedent.

In the Supreme Court (Kenya) case **JASBIR SINGH RAI & 3 OTHERS -VS- TARLOCHAN SINGH RAI & 4 OTHERS (2013) eKLR,** Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had this to say;

> ***"(6) 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 Edition (2004) (P. 1303);***
>
> *'Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest'*. **(emphasis mine).**

Bias is defined in the Black's Law Dictionary, 8th Edition at page 171 as;

> ***"Inclination; prejudice, …., judicial bias. A Judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason." (Emphasis added)***

First, it must be clear to the parties that I do not take this application for recusal as a personal attack. I must note it is the first one of this nature in my career as a judicial officer. It is provided for a party to seek the recusal of a judge or judicial officer in certain circumstances and I have taken advantage of it personally where I have noted conflict of interest

Secondly, in this case the parties are brother and sisters. There is no relationship of any personal kind with any of them or their counsel, neither has any evidence been placed before me that there is anything personal about me and any of them, nor evidence of conflict of interest that would inform the alleged bias.

There is nothing extra judicial alleged about me and the respondents or their counsel. None exists.

As I have stated herein above the only contact I had with this matter before this application for recusal, was at the stage of giving directions.

I find assistance in **Kalpana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR** the court of appeal cited from ***The President of the Republic of South Africa v. The South African Rugby Football Union & Others***, *Case CCT16/98*:

> ***"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront." [Emphasis added]."***

There ought to be reasonable grounds to seek the recusal of a judge from a matter. Reasonable in the eyes of the ordinary litigant or their friends or relatives seated in my court room waiting to be heard on a "Succession Week". As a judge I cannot just recuse myself on the unfounded allegations arising out of a litigant's displeasure with the court's decision. Neither should I recuse myself out of intimidation. The applicant, by deponing that he has written a complaint to the Hon. Chief Justice 'about the judge's conduct' did just that. That complaint was not annexed to the affidavit, and neither has it been served upon me

In Philip **K. Tunoi & another v Judicial Service Commission & another [2016] eKLR** **(Coram: G.B.M. Kariuki, Makhandia, Ouko, Kiage, M'inoti, J. Mohammed & Odek, JJ.A.)** ***(In an Application seeking that Hon. Mr. Justice G.B.M. Kariuki and Hon. Mr. Justice Makhandia do recuse themselves from the hearing in an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Mwongo, Korir, Meoli, Ong'undi & Kariuki, JJ.) delivered on 11th November, 2015,*** *the court applied the test in the House of Lords holding in* ***R v. Gough [1993] AC 646****;*

> *That the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.*

The court also noted that the above test was subsequently adjusted by the House of Lords in **Porter v. Magill [2002] 1 All ER 465** when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –

> ***"[T]he questions is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."***

What are the facts in this case? Is it possible at a point where the court is merely giving directions on a matter and simply makes a decision that the party is not happy with can be conceived to be bias, to the extent of even writing a complaint to the Hon. The Chief Justice?

It appears to me that the applicant is the one who came before my court, on the very first day, determined, for reasons unknown to myself and not expressed in his affidavit, not to proceed before me. To allege that I was friendly to counsel, and hostile to him, in a matter that was conducted in open court, on 'Succession week' would require substantiation as the court is usually full to capacity during those days.

To accede to his application would be to give credence to unfounded allegations and to set a dangerous precedent.

I can only adopt the words of the Court of Appeal judges in the **Philip Tunoi** case;

> *"In conclusion and applying the test in* **Porter v. Magill [2002] (supra)**, *no fair-minded and informed observer, having considered the facts, would conclude that there is a possibility that the Presiding Judge or this Court will not be impartial or fair or will be biased. In the result, we dismiss the notice of motion dated 15thFebruary, 2016 with costs to the respondents."*

The motion dated 24th November 2017 is dismissed with costs to the respondents.

Dated, delivered and signed in open court at Nyeri this 3rd day of May 2018.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Mr. Albert Atelu

Applicant: N/A

Respondents:

Counsel for the Respondents:

Mrs. Isika for 2nd and 3rd Administrators

Esther Kagina

Tabitha is unwell

Mrs. Isika-

I request for a date for directions on the application dated 23rd October 2015. The applicants had filed and served their submissions.:

The petitioner /respondent to file and serve his written submissions on or before the 14th June 2018.

The applicant to serve him with today’s orders.

Mumbua T. Matheka

Judge