



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL SUIT NO. 120 OF 1988

LAWREBCE KINYUA MWAI.....APPLICANT/PLAINTIFF

-VS-

NYARIGINU FARMERS COMPANY LIMITED....RESPONDENT/DEFENDANT

PATRICK MWORIA.....RESPONDENT/DEFENDANT

RULING

Recusal

[1] Before me is a Notice of Motion Application filed in court on 10th November 2016, in which the Applicant seeks the following orders (in the Applicant's own words):

1. "That your Lordship Hon Justice F Gikonyo do please, my Lord, peacefully, willingly and freely to please do disqualify yourself from the above mentioned cases in your court at Meru High Court 2 I have fully lost confidence with your court you have shown that you have special interests in these 3 cases, my Lord favouring defendants.

2. The costs of this application be provided for."

The Applicant's gravamen

[2] The gist of this application is inter alia that

"...this court is very much favouring the defending counsel Mr. Mutunga and also has special interest in supporting him and that the Applicant cannot keep silent any longer with the behavior of the Hon Justice Gikonyo, that this court has decided that this application will not be heard at all, that the Hon Justice F Gikonyo has called him a hard man and has threatened him he will apply the contempt of court and put him into custody and that finally Hon Justice Gikonyo has continued to tell the Applicant that " he will teach him a lesson that he shall not forget in his live".

The Applicant therefore, contended that

"...he was worried on the kind of lesson he will be taught by the Hon Judge and that this abusement of Hon Justice Gikonyo to the Applicant shows that he had decided to assist the

defendants in these cases.”

[3] The Applicant in his submissions reiterated the grounds on the face of his application and submitted that unless this court disqualified itself, he would not get justice and asked the court to send these cases to other judges other than Nyeri. He further contended that he was being discriminated by this court and that all his applications were being denied and that counsels were being favoured because he was not represented.

Counsel for Respondent opposed application

[4] Mr. Mutunga opposed the application and submitted inter alia that the application lacked merit and it is merely meant to delay the suit herein as the Applicant had never suffered any prejudice from this court. He stated that the Applicant had never tendered any evidence to the effect that he had been threatened by this court. Consequently he urged this court to dismiss the Application as the Applicant had also tainted names of other Judges with similar claims.

DETERMINATION

[5] I have carefully considered this application and the rival contentions by the parties. From the record, it is apparent that the Applicant has on severally occasions made wild and unsubstantiated allegations imputing impropriety on the part of the Judges who have presided over his matters. I will cite a few instances, in a Ruling delivered by Kasango J on 17th March 2011, the Learned Judge inter alia observed as follows:

“Lawrence has filled more than one affidavit in support of that application. In those affidavits, he repeats the same theme. He accused the then Presiding Judge Oguk J of wrong doing alleging that after these matters were referred to arbitration, that, he, the said judge interfered with the arbitration process. Lawrence however did not produce to this court evidence of such interference with this matter. Lawrence further referred to allegations leveled against the said judge of corruption and alleged that the judge similarly involved himself in wrong doing in these two matters. Again there was no evidence of such wrong doing. It is unfortunate that Lawrence is not legally represented and I do believe that if he had legal representation he would not have made the allegations that are now before court. Suffice to say I can find no basis for these allegations as it concerns these files and I therefore reject them.”

Again on 20th June 2011, Kasango J directed as follows:

“Since I disqualified myself from handling this matter, I order it be mentioned before Court No.1 on 28th June 2011 for further orders.”

It is not clear from the record why the Learned Judge (Kasango J) disqualified herself from this matter.

Again Lesiit J on 22nd January 2013 disqualified herself from hearing this matter and rendered herself thus:

“...the court wishes to disqualify myself from hearing this matter as the applicant has experienced his displeasure to being heard by this court. Matter be mentioned before the High Court on 25th February 2013.”

Similarly on 18th September 2014, the Applicant filed an application seeking inter alia for orders for Justice Makau to disqualify himself from hearing his cases and that he ceases discussing about the Applicant with other Hon Judges in his private chambers and discussing about the plaintiff home affairs.

In that application the Applicant made wild and ridiculous allegations inter alia he had seen Mr. Mutunga

Advocate for the defendants come out from the back door of the private Judge chambers, that the judge had called him a good for nothing person who does not use his mind and that the Judge allows him only one minute to argue his application. Makau J reasoned out matters and in a Ruling delivered on 19th November 2014, he dismissed the Applicant's Application noting inter alia that all the allegations leveled against the Advocate and the court were frivolous, vexatious and an abuse of the court process and that there were no sufficient grounds for the court to disqualify itself. The court further noted that allegations raised by the applicant then were all false and malicious with the intention to intimidate the court and that the applicant was used to applying for judges to disqualify themselves whenever cases did not go his way. Consequently the court dismissed his application with costs but nevertheless, the Learned Judge on 1st July 2015, subsequently disqualified him-self from hearing the case citing personal reasons.

[6] I have set out the above history from the record not with the intention of prejudicing the Applicant but because that is the record. Nonetheless, I will determine the application purely on the merits and threshold of law. A recusal application according to *Black's Law Dictionary*, 8th ed. (2004) [p.1303] essentially asks for:

“Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.”

But, as a matter of law and I stated this in the case of **HERMANUS PHILLIPUS STEYN vs. GIOVANNI GNECCHI-RUSCONE [2015] eKLR**, recusal application should not be used: (1) for forum-shopping in the hope that the Applicant will be heard by a judge who will give favourable decision to him or (2) to intimidate or blackmail judges or (3) for other ulterior motives meant to delay cases. On this see work of court in the **Hermanus case** (ibid) that:-

In Nbi Hccc No 332 of 2010, the Court drawing from the decision in BGM HC Constitutional Petition No 3 of 2012 [2013] eKLR stated as follows:

It bears restating that the stringent test is more in accord with the constitutional desire to attain the independence of the judiciary as an indispensable facet of the right to fair hearing and access to justice. As parties submit themselves to the court, they do so to [an] independent, thoroughly fearless and impartial judicial officers. What must be avoided therefore is a practice that may encourage parties to ‘shop’ for the judges who will hear their cases in the belief that those judges will be favourable to their causes. If ‘shopping’ for judges was to be allowed ... such will be the darkest day in the administration of justice. The values, objects and purposes of the Constitution and specifically as enshrined in Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010 will be lost, and that shall surely be the death knell of the entire justice system in any civilized society.

And further:

“That law subserves legitimate interests of a litigant as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases”.

Legal threshold for recusal

[7] Therefore, recusal application must meet the legal threshold which is whether the fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the judge would be biased. See the Court of Appeal decision in the case of **REPUBLIC V MWALULU & 8 OTHERS: [2005] 1 KLR** that:

When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically

alleged and established. In such cases the Court must carefully scrutinize the affidavits on either side,, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal. The Court dealing with the issue of disqualification is not; indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself.

Applying the test

[8] I shall apply the above threshold to the facts of this case. In the instant case the Applicant has alleged inter alia;

“that this court is very much favouring the defending counsel Mr. Mutunga and also has special interest in supporting him and that the Applicant cannot keep silent any longer with the behavior of the Hon Justice Gikonyo, that this court has decided that this application will not be heard at all, that the Hon Justice F Gikonyo has called him a hard man and has threatened him he will apply the contempt of court and put him into custody and that finally Hon Justice Gikonyo has continued to tell the Applicant that “ he will teach him a lesson that he shall not forget in his live”.

I have looked everywhere; from the record to the application to the submissions and to the astute memory, mood and conscience of the judge; but I have found absolutely no scintilla of evidence as to when the judge made the alleged remarks or threats. The memory of the judge is quite alert and never has he made such remarks or threats in relation to the applicant or any other person for that matter. The judge always reminds himself to be of dignified mood and to always use measured language in all court proceedings as well as in ordinary communication to litigants and the people he encounters in his life experiences. Accordingly, the judge was under extreme anguish in trying to understand why the Applicant should make such disparaging allegations against the judge. But, drawing from the record, the conscience of the judge enters into peace upon realization that this is not the first time and I am not the first judge against whom the Applicant has made such allegations; and all is in the hope that the judge will recuse himself or herself from his matters which in all dimensions of time fairly old. And, I am entitled to infer that the Applicant seems to have used recusal as a tactic to temporize this case and the others for as long as he wants. Accordingly, now I understand why he has made these serious innuendoes against me. But, despite these things, has he satisfied the threshold in law.

[9] More allegations were made especially

...that he was worried on the kind of lesson he will be allegedly taught by the Hon Judge and that this abusement of Hon Justice Gikonyo to the Applicant shows that he had decided to assist the defendants in these cases.

I have always given the Applicant ample time to make his presentation- which is normally quite elaborate and leisurely. I have also given counsel for the Respondent time to submit on his replies. This is in recognition that the right to address court is part of fair trial and belongs to all parties in the suit; not only the Applicant. The Applicant has nothing absolutely which shows that the judge ever shown any favour to either of the parties herein as I preside over these cases in the normal and procedural manner. But, one thing is more startling; the Applicant submitted that on 28th April 2016 I delivered the Ruling dismissing his case i.e. MERU HCCC NO 103 OF 1998 in his absence; yet he contended in this application that he heard the Judge whispering in the course of delivering the ruling that he would teach him a lesson. It is inconceivable that the Applicant could have heard the Judge “whispering in court” when he was not present in court unless he had tapped my conversation- he is not saying so either. This only shows his intention; to make the judge recuse from these matters no matter what. As a matter of fact, despite notice,

he was absent during the delivery of the said ruling. In any case, despite very generalized but vicious statements that he made, the applicant did not substantiate or adduce an iota of evidence to prove these very serious allegations. The allegations by the applicant largely remain unsubstantiated, false, malicious and without any basis. The Applicant further urged the court to transfer this case to other judges other than Nyeri; this is rather strange as the Applicant has not stated why he wants his case to be moved to another court other than Nyeri and in my view, an aroma of forum-shopping or scheme to delay finalization of his cases rents the air. See the Court of Appeal case of **Miller –vs- Miller (1988) e KLR 1**, the Court emphasized that:-

“A matter which in our judgment must always be carefully watched is that no party to a suit should be placed in a position where he can choose his court. We are far from saying that in no circumstances it is possible for judge to disqualify himself or be reasonably expected to disqualify himself from hearing a case.”

And then:-

“It would be disastrous if this were to become the practice. The Administration of justice through the court would be adversely affected..... Mischievous parties would obtain disqualification of judges at ease.”

Similarly, in the observation of Mason J in Re JRL exparte CJL 91986) 161 CLR 342 at page 352 that:-

“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.” (Emphasis supplied)

[10] As was held by the Court of Appeal in a 5-bench application in the **Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others Case Civil Appeal No. 196/2015** it is also true of this application that:

“In an application for recusal, perception and suspicion are relevant issues to be considered. Judicial decisions indicate that there is need for a reasonable basis and foundation for having suspicion or holding a particular perception. The affidavit in support of the present application deposed by Wilson Sossion in paragraph 10 of the affidavit raises serious allegations whose veracity has not been demonstrated. The allegations in this paragraphs, without disclosure of the sources amount to hearsay and speculation. We are not satisfied that a scintilla of credible and verifiable evidence reasonably backing the suspicion or perception has been disclosed in the supporting affidavit. There is no allegation against any of the three Judges of having a personal or pecuniary interest in the appeals or allegations of impropriety. However, there is allegation of being handpicked and micro-managed by the President of the Court of Appeal. No basis for these allegations has been disclosed. Allowing the application on the basis of unsustainable allegations would not only be interfering with independence of the bench and dereliction of the constitutional duty of Judges who have taken an oath of office but also undermine the independence of the judiciary as stipulated in Article 160(1) of the Constitution.”(Emphasis mine).

[11] Before I close I must state that I swore:-

...in the name of the Almighty God to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with the Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, functions entrusted to me. I will at all times, and to the best of my knowledge and ability, protect, administer and defend the Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and

promoting fairness, independence, competence and integrity within it (So help me God.).

By this oath of office a judge must be bold and fearless in the administration of justice. By this oath of office the judge must be impartial without any ill-will and must serve and treat all Kenyans with dignity and respect. The judge so treats all those who appear before him. The Applicant should take comfort from the fact that the judge is guided only by the law and nothing else. All the allegations by the Applicant are not substantiated or based on any reasonable apprehension of bias or prejudice. They are, but classic case of forum-shopping deliberately designed to delay cases before the court. The cases dates back to 1988 and under the overriding objective of the law, the Applicant must assist the court to bring these old cases to conclusion expeditiously. Accordingly, to allow *this application on the basis of unsubstantiated allegations would not only be interfering with independence of the judge but it would be dereliction of the constitutional duty of Judges who have taken an oath of office, and also undermine the independence of the judiciary stipulated in Article 160(1) of the Constitution. The upshot is that I dismiss the application for recusal.*

Dated, signed and delivered in open court at Meru this 14th day of February 2017

F. GIKONYO

JUDGE

In the presence of:

Applicant present

Mutunga advocate for respondent

F. GIKONYO

JUDGE