



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 599 OF 1986

IN THE MATTER OF THE ESTATE OF ANDREW SAIKWA (DECEASED)

RULING

1. On 12th May 2016, Amos Potenda Saikwa and Moses Kiplangat Saikwa, hereafter known as the applicants, lodged a notice in court, of intention to make an oral application to have me recuse myself from the conduct of this matter. The two state in the notice that they were apprehensive that justice may not be served as I had given directions on 11th May 2016 that showed open bias and or patent bias in favour of the interested party, Vomorono Limited, and the executor, John Mtay Saikwa, hereinafter referred to as the respondents.
2. The factual background as set out in the notice is that the court had made orders on 9th May 2014 nullifying transactions relating to a property known as LR No. 8558 (IR No. 28222) carried out during the pendency of applications that culminated in the making of the said orders. The interested party thereafter filed an application dated 11th May 2015 to set aside and or review the orders made on 9th May 2014, whereupon I ordered on 27th May 2015 that *status quo* be maintained pending the hearing and determination of that application.
3. The contention by the applicants is that the orders that I had made on 9th May 2014 and 27th May 2015 were breached by the respondents after the two filed parallel proceedings in the Environment and Land Court in Nairobi ELCC No. 183 of 2015, against each other, where they entered into a consent order dated 20th July 2015 whose effect was to set aside the order that I had made herein on 9th May 2014. It is also contended that the said consent order had the effect of rendering the application dated 11th May 2015 spent and overtaken by the said order.
4. The applicants contend in their notice that the directions given on 11th May 2016, that the court would proceed with the application dated 11th May 2015, without staying it and addressing the contempt of the court orders made on 9th May 2014 and 27th May 2015, was against the Constitution, the Civil Procedure Act and Rules, and public policy. It is contended that I had dismissed the application dated 11th May 2016 for leave to bring contempt proceedings as one without merit and that the issues raised therein were old matters which could not bar the court from proceedings to hear the application dated 11th May 2015 the next day, 12th May 2016. The applicants view is that the respondents were guilty of blatant contempt and the court ought to have downed its tools so as to give priority to dealing with the contempt application.
5. It is in view of what is narrated in paragraph 4 here above that the applicants are said to have formed the belief that I am being biased against them and in favour of the respondents by giving directions that, in their own words, openly excused and downplayed unethical acts of contempt committed by the respondents. It was pleaded that the court had exercised discretion in favour of persons who had treated the court with blatant contempt and that that was evidence of bias.

6. It is contended that in ordinary circumstances a court would jealously guard against abuse of its processes by dealing firmly with acts of contempt of court to restore and preserve its dignity and authority as a matter of public interest and policy. It is further argued that I, by giving the directions on 11th May 2016, ignored and side-stepped the law and established practice and ratified and sanitized mischief, misdeeds and contempt of court by the respondents, without lawful justification. It is stated that the directions of 11th May 2016, the ruling dated 18th December 2015 and the general circumstances of the proceedings have elicited suspicion and apprehension on the part of the beneficiaries, who believe that there would be real likelihood of bias on the part of the Judge, and justice may not be served. It is on that basis that my recusal is sought.

7. The oral application was prosecuted on 27th June 2016. Mr. Isindu, for the second applicant, gave vent to the statements made in the notice dated 12th May 2016. He submitted that when the matter came up on 11th May 2016, he expected that the court would give directions that the contempt application would be heard first, and to his mind this was a straightforward matter. In his view a court faced with a contempt application ought to get angry that a party is subverting its orders. He submitted that when the court observed that the matters being raised were old and came into force before the interested party came into the proceedings and the court did not see anything that could bar hearing of the application that was coming up his client interpreted that to mean that the court was not interested in preserving its integrity and was happy with the conduct of the interested party, and the court appeared to be accommodating the interested party. He stressed that his client could not understand why the court was not getting very angry with the interested party and why it did not seek to protect its integrity. It was on that basis, he submitted, that his client concluded that the court was biased, and was bent on protecting the interested party by paving way for the hearing of an application that had been rendered useless by the order of the Environment and Land Court. He then proceeded to cite and discuss the various decisions that he was relying on.

8. Mr. Isundu's submissions were echoed by Mr. Obar for the first applicant. He submitted that his client's discomfort stemmed from the direction that the interested party's review application be heard in priority to the contempt application, yet the same interested party had gone to another court and trashed the orders of this court. He stated that his client was interested in establishing whether there was contempt of court by the interested party and that inquiry ought to be accorded utmost priority. He argued that the review application did not raise an issue of jurisdiction, saying that his client did not understand why such application should be given priority over a contempt application. In his view, the directions of 11th May 2016 would not sit well with a fair minded person, whose view of the directions would be that the only possible outcome would be in favour of the interested party.

9. On his part, Mr. Malinzi contended that the court abandoned its duty on 11th May 2016 to investigate the conduct of one of the parties before it. He submitted that the court ought to have examined all the issues raised and should have stayed the proceedings in order to get time to investigate the matter. He urged that an application for contempt of court ought to be given priority. In his view the court, by choosing, to go ahead with the review application portrayed itself as being biased.

10. Mr. Mutai for the executor opposed the application. He argued that there was only one ground, a disagreement with a ruling on how to proceed with matters that were before the court. He submitted that that cannot be a basis for asking a Judge to disqualify himself. He submitted that the applicants ought to have shown the kind of circumstances and the way the court had acted which would have given a reasonable man the feeling that there was bias. He argued that it had not been demonstrated that the Judge had not granted the applicants reasonable time to present their case or was not impartial or had shown favour or lacked independence in making decisions. He stated that the test is what would other people, observing the proceedings, feel, and not what the parties themselves would feel. He asserted that it was common for parties to be dissatisfied with court decisions, and if judges have to recuse themselves whenever asked to, then that would not augur well for justice. He stated that the application was designed to delay the hearing and disposal of the review application, yet the said application ought to be heard by the Judge who made the orders impugned. He urged that if I recused myself from the matter that would amount to abdicating my responsibility to hear the review application which challenges my orders. He

concluded that he had not seen any bias and there was nothing on record to indicate bias.

11. On his part, Mr. Langat, for the interested party, submitted that the application was meant to antagonize the court and was an abuse of the court process. He submitted that the directions of 11th May 2016 were in line with the provisions of sections 1A, B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, which require parties to assist the court further the overriding objectives of the court. He urged that the oral application did not meet the objective test. He submitted that under Order 45 of the Civil Procedure Rules, a review application ought to be heard by the Judge who made the orders sought to be reviewed.

12. The genesis of the matter at hand goes back to 9th May 2014, when I delivered a ruling in which I made an order nullifying any sale or transfer of LR No. 8558 (IR No. 28222), whether by the executor or by another named party, done during the pendency of the applications the subject of the ruling. That order prompted the filing of an application dated 11th May 2015 by the interested party, who claimed to have been affected by the order of 9th May 2014. The applicant sought to be enjoined to the proceedings, among other prayers. The application had been brought under certificate of urgency, and was initially placed before Achode J. on 19th May 2015, who certified it urgent and directed that it be placed before me on 27th May 2015. On the said date I directed that there be maintenance of *status quo* pending the hearing and determination of the application. It was further directed on 22nd October 2015 that the prayer on joinder be disposed of first, by way of written submissions to be highlighted, with the other prayers to be argued later should the joinder sought be allowed. There was compliance with the filing of submissions, which were highlighted on 3rd November 2015. I eventually ruled on that prayer on 18th December 2015, allowing the joinder. Up to that point none of the parties raised the issue of bias. The order of 18th December 2015 was not appealed against and no review application was ever filed with respect to it.

13. On 26th January 2016, all the parties were in agreement with respect to filing submissions on the remaining prayers of the application dated 11th May 2015. The matter was scheduled for highlighting of submissions on 1st March 2016. Come 1st March 2016, counsel for the applicants in the application dated 12th May 2016 sought adjournment on the grounds that they had just been served with an affidavit sworn by an officer from Habib Bank. Their request was acceded to, and the matter was rescheduled for hearing on 30th March 2016. By this time no issues as to bias had been raised. Come 30th March 2016, Mr. Malinzi, for one of the parties, indicated that although he was ready to proceed, there was a matter that he intended to raise, which he pleaded ought to be raised in chambers. The court retreated to chambers; whereat he stated that there was an intimate relationship between the Judge handling the matter and Prof. P.L.O Lumumba, lead counsel for the interested party. He said that Prof Lumumba had acted for the Judge in certain civil proceedings and with respect to the drafting of a deed of partnership. He sought that the matter be adjourned so that he could get a copy of the deed of partnership. Although Prof Lumumba protested that the matter had been adjourned many times, there was general consensus that the matter be adjourned to allow Mr. Malinzi procure the document he was talking about. The matter was then set down for mention for directions on 4th May 2016. When the matter came up on 4th May 2016, Mr. Malinzi indicated to the court that he had abandoned the matter he had raised on 30th March 2016, and that he had instructions to proceed with the matter as it was. On his part, Mr. Isindu stated that he had instructions to file an application to have the respondents herein cited for contempt of court, saying that an application for leave in that behalf had been filed on 3rd May 2016. He urged that there be a stay of proceedings and that the contempt application be heard first. He was supported in that quest by Mr. Malinzi and Mr. Obar; with the latter urging that leave to bring the substantive motion ought not be granted on the said date. After hearing all the sides, I reserved the matter for directions at 12.00 noon.

14. I delivered a short ruling in the afternoon of 11th May 2016. I noted that the application dated 11th May 2015 had been partially heard and written submissions had been filed in respect of the pending prayers. The matter had come up several times but did not proceed on account of adjournments sought principally by the applicants herein and the other parties who support the recusal motion. I concluded that

there was a scheme to derail the hearing and disposal of the matter on account of the nature of adjournments that had been sought in the matter by the applicants and their allies. I also commented on the application for leave to bring contempt proceedings. It was filed on 3rd May 2016 and was not founded on any new facts arising, but rather it was based on events that occurred in 2013, 2014 and May 2015. It was not therefore urgent to the extent that it did not hinge on facts that arose during the currency of the review application. The contempt application could have been brought in May and June 2015, but the applicants sought to bring it when it became clear that the court would hear arguments on the review application. I declined to stay the proceedings and to grant priority to the contempt application in the circumstances. I noted that the matter was old, the deceased having had died on 19th June 1985 and the proceedings herein commenced in 1986. I noted that distribution of the estate had not been completed by the time the directors are being given twenty years after the cause commenced, on account of the numerous applications filed in the matter. There had to be an end to litigation. In view of the above, in particular the maneuvers to delay the matter, I directed the parties to give highlights of their submissions on 12th May 2016. As if to derail the said highlights, the applicants then filed the notice which is the subject of this ruling.

15. The broad legal framework upon which I should determine the oral application encompasses the Constitution of Kenya and case law. The Constitution guarantees a right to fair trial, the right to access justice and to be heard by an impartial and independent court of law. The courts have been guided by these guarantees in a number of cases, among them *Mumias Sugar Co. Limited vs. Director of Public Prosecutions & 2 others* (2012) eKLR and *Okiya Omtatah Okiiti vs. The Attorney-General* Nairobi HC Petition No. 451 of 2012.

16. The test for determining applications for disqualification of judges has been stated in several cases, such as *R vs. David Makali and others* CA Criminal application No NAI 4 and 5 of 1995 (unreported) and *R vs. Jackson Mwalulu and others* CA Civil application No. NAI 310 of 2004 (unreported). In the *Jackson Mwalulu* case it was stated that

‘When courts are faced with such proceedings for 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.’

17. The position stated in the above cases borrows substantially from the English decision in *Metropolitan Properties C. Limited vs. Lannon* (1969) 1 QB 577, where it was said that:

‘Also in a case where bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias.’

18. In defining ‘bias,’ the court in *Pan African Credit & Finance Ltd vs. Nichu Investments Ltd & 2 others* (2012) eKLR and *Mumias Sugar Co. Limited vs. Director of Public Prosecutions & 2 others* (2012) eKLR cited *Black’s Law Dictionary*, where the same is defined as ‘inclination, prejudice; Judge’s bias usually must be personal or based on some extrajudicial reasons.’ Prejudice is defined in the same text as ‘a preconceived judgment formed without a factual basis, a strong bias.’

19. The court in *Mumias Sugar Co. Limited vs. Director of Public Prosecutions & 2 others* (2012) eKLR aptly stated what is expected of the person seeking recusal:

‘I take the view that the petitioner should establish such material facts as attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons.. Real likelihood of bias would therefore occur when the matters complained of create a reasonable doubt in the minds of the public about the fairness in the administration of justice in the particular case in question. The operating phraseology is a reasonable doubt – an elusive expression – but

ordinarily refers to an impression of doubt that goes beyond mere apprehension or belief of the parties to a more concrete and cogent grounds based on the judge's personal interest, pecuniary or otherwise in the case. The applicant must therefore specifically set out the facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of a judge ... it is absolutely necessary that the party applying should lay all relevant material before court. The best way of delivering that requirement is by adopting a method that inherently enable for some formal deposition of facts and production of evidence. On that basis, I do understand the argument by Mr. Makali that a formal application should have been made supported by an affidavit in order to bring out, under oath, all material facts.'

20. The test set out above is fairly strict. The standard of proof is equally fairly high. The burden of proof lies with the party making the application. The strict requirements are designed to give effect to the constitutional tenets of independence of the judiciary, access to justice and fair hearing. A legal regime which creates a liberal environment for judges to recuse themselves on any flimsy excuse would allow parties the freehand to shop for a bench most favorable to their cause, which is a practice which ought to be frowned upon.

21. This then brings me to the question whether the applicants have made out a case that the allegations made against me are capable of creating a reasonable doubt that I would be incapable of administering justice in this matter without bias. The applicants' complaint is that I declined to give priority to their application for leave to apply to cite the respondents for contempt of court, and instead chose to give the respondents' application priority.

22. I have cited the test as set out by the court in *Mumias Sugar Co. Limited vs. Director of Public Prosecutions & 2 others*, above, *verbatim* to bring out the steps that ought to be undertaken by the applicant to establish a case for recusal. The application is geared at driving the judge from the judgment seat, from discharging his constitutional mandate, and his oath of office. That is a serious matter that ought not be taken casually. Concrete and sufficient evidence must be placed before the court to justify recusal. That would require that the applicant file a formal written application supported by an affidavit setting out all the material facts. That was not done in this case. The application was made orally founded on a notice. There was no statement on oath setting out the applicants' case. The failure to state the alleged facts on oath, in my view, took away from the seriousness of the charge against the court.

23. A judge seized of any matter should have a freehand so as to be in control of the proceedings he is seized of. He is vested with discretion to guide proceedings and determine the course that any matter should take, of course within the bounds of what is reasonable and acceptable in law. It should be for the court, and not the parties, to determine which of several pending applications should be disposed of first. It was with that in mind that the court in *Abdiwahab Abdullahi Ali vs. Governor, County Government of Garissa & others* (2013) eKLR said;

'One last word of unsolicited advice to my brothers, legal counsels involved in this case, the same way this court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, is the same way the court and the presiding officer demands respect from the parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practising before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party who is not satisfied with a ruling of the court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical.'

24. The above statement speaks to the fact of the adversarial nature of our legal system. The parties in a matter are engaged in a legal combat, and contrasting positions are taken and arguments to back them placed before the court, from which it, as an impartial arbiter, is expected to make a determination in the best interests of the cause of justice. It would be unreasonable for any party to expect that the court would always rule in its favour in order to be able to say that the decision of the court is impartial. The decision of the court goes either way, dependent, as it should, on the evidence adduced and the arguments presented.

25. It was urged that where a contempt application is placed before the court, the same ought to be given priority. That the court ought to suspend any other business to deal with the alleged contempt. On that point, the court in *Econet Wireless Kenya Limited vs. Minister for Information & Communication of Kenya & another* (2005) eKLR, said as follows-

‘Where an application for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to persecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt. So, the court is obliged to hear the application for committal first before any other matter. This is the general rule which must be applied strictly.’

26. I agree entirely. As a matter of practice, a contempt application should be given priority over any other pending application. However, the rule is not absolute. It does not take away the discretion of the court to deal with the matter as it deems fit given the circumstances before it. In *Econet Wireless Kenya Limited vs. Minister for Information & Communication of Kenya & another*, the court was clear that there is discretion with regard to these matters. It talked of the court ‘more often’ suspending proceedings to hear the contempt matter, and it described the rule as general. In that case, the court was persuaded to give an application raising an issue of jurisdiction priority over a contempt application.

27. In any event, it is contempt of the court. The court is the aggrieved party, for it is its authority which is at stake. It has the liberty to deal with the matter at its own convenience in the circumstances, but bearing in mind the general rule that such matters ought to be given priority. The gravity of the conduct amounting to contempt of court does not go away or get erased, simply because the application has not been accorded priority. The facts upon which such application is founded are usually well documented, and lapse of time would not in any case diminish the seriousness of the offence and the capacity of the applicant to prosecute the charge.

28. A review application had been pending before me in this very old matter for quite some time. Its disposal was put off several times at the behest of the applicants, or their allies, which the court graciously permitted. A pattern no doubt emerged which suggested that the applicants were not keen on having the review application argued and were bent on frustrating it at every turn. The court was under an obligation to deal with any contempt application brought before it in line with the general rule stated above, but there was also an obligation to hear the applications filed earlier in time first. Considering the overall age of this succession cause and the timing of the contempt application, it was only fair that the first application in time be heard first.

29. I have noted from the proceedings that the applicants have used strong language to describe the alleged misconduct of the respondents. It has been submitted that the court had ignored the ‘obvious’ and ‘blatant’ contemptuous conduct of the respondents. It has further been submitted that the court excused and downplayed the ‘unethical acts of contempt’ committed by the respondents. Yet, leave to prosecute the respondents for the alleged contempt had not been granted, the substantive charge of contempt had not been brought against them and they had not been prosecuted. They are innocent until proven guilty. The court only had allegations before it, which are and were yet to be proved. The application has not been disposed of and the applicants will still have opportunity to present their case against the respondents. As the said application was never prosecuted, it is still pending, and the court cannot or could not have addressed its merits without it being prosecuted first.

30. In the end, I am not persuaded that a case has been made out for me to recuse myself from the conduct of the instant matter. No material was placed before me, in my view, from which a reasonable person can infer that I would not deal impartially with all the parties hereto with respect to the matters that are before me for determination. I shall accordingly dismiss the oral application for recusal. The directions given on 11th May 2016 shall stand. The review application shall be disposed of first, after which the court shall give directions on the prosecution of the contempt application.

DATED, SIGNED and DELIVERED at NAIROBI this 17TH DAY OF MARCH, 2017.

W. MUSYOKA

JUDGE