Kenya Hotel Properties Limited v Attorney General & another; Willesden Investments Limited & 2 others (Interested Parties) (Petition 438 of 2015) [2016] KEHC 6631 (KLR) (Constitutional and Human Rights) (4 February 2016) (Ruling)

Kenya Hotel Properties Limited v Attorney General & 4 others [2016] eKLR

Neutral citation: [2016] KEHC 6631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 438 OF 2015

JL ONGUTO, J

FEBRUARY 4, 2016

BETWEEN

KENYA HOTEL PROPERTIES LIMITED ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

AND

WILLESDEN INVESTMENTS LIMITED ..... INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

KENYA REVENUE AUTHORITY ..... INTERESTED PARTY

RULING

1. When the Petitioner's Notice of Motion dated 15th October 2015 came up for hearing on 2nd February 2016, the Petitioner's counsel Mr. Allen Gichuhi made an informal application for my recusal. The basis was: apprehended bias in my consideration and determination of any matter related to these proceedings. Counsel stated that I had earlier expressed doubts as to this court's remit to entertain the application, nay the Petition in its entirety.

2. The application for recusal was opposed by the counsel representing the 1st and 2nd Respondents as well as the 1st Interested Party. The 2nd and 3rd Interested Parties on the other hand left the decision as to recusal to the wise judgment of the court.

3. In the persuasive Australian High Court case of *Re JRL ex parte CJL* [1986] 161 CLR 342, 352 , Mason J (later Mason CJ) stated thus:

> " 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".

4. In my view, the value of the guidance by Mason J, was and still is ,that there has to be a proper and appropriate factual foundation for any recusal as a judge is expected to discharge his duties unless disqualified by the law. An appropriate reason must be advanced for any recusal otherwise litigants may effectively succeed in influencing the choice of judges in their own cause.

5. Ordinarily, the question to be answered by the court once the facts are laid before the court is whether a reasonable and informed fair minded man sitting in court with all the facts would have a reasonable suspicion that a fair trial for the applicant was not possible. The test for disqualification by reason of apprehended bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the court is biased: see *Musiara Ltd v Ntimama* [2005] 1 EA 317 (CAK) and *Porter v Magill* [2002] 1 All ER 465. It must be said loudly and clearly that the test is objective and the court must shut its eyes to the fact that the applicant may be left dissatisfied and bearing a sense that justice would not or might not be done. It is not enough to simply seek a recusal.

6. In the instant case the recusal is sought on the basis of informal inquiries or observations made by the court.

7. Observations made by presiding judicial officers if they reveal a particular mind-set will create justifiable perceptions of bias. If such observations are limited to basic routine inquiries or touch on the ordinary case management strategies adopted or to be adopted or even on the merit of the applicant's case then, bias ought not to be imputed. I do not subscribe to the faculty that a judicial officer ought to be a mute listener. He should not maintain a stony silence out of fear of an application for his recusal. He should be able to genuinely but reservedly engage counsel or the parties. However, such inquiries or observations made in the course of or before commencement of the hearing should not leave behind an air of predetermination or prejudgment of the pending or continuing dispute.

8. Reasonable apprehension of bias on the basis of prejudgment or predetermination should nevertheless be firmly and clearly established. Instances of previous decisions by a judicial officer on matters of law as well as fact which may generate an expectation that the judicial officer is likely to decide an issue in a manner unfavorable to one of the parties should not mean that the judicial officer will approach the case with partiality and prejudice unless the previous decisions were rendered with utmost trenchant and conviction as to shut out any other line of thought. Likewise , the mere fact that a party has been previously unsuccessful before the same judge should not prompt and lead to a recusal.

9. In the instant case, my recollection tells me that when on 9 November 2015 I made the inquiries as to the issue of jurisdiction, the only counsel present were counsel for the 2nd and 3rd Interested Parties as well as for the Petitioner. I recollect stating that I needed counsel to satisfy me as to the court's jurisdiction. The Petitioner's counsel, Mr Gichuhi, however now states that there was more. That I appeared convinced in my statements that there is no jurisdiction. The 2nd and 3rd Interested

Parties' counsel who were present in court on the material day however opted not to state what their recollection of the events of 9 November 2015 entailed.

10. The version of the inquiries made by the court on 9 November 2015 would, in my view, not necessarily lead an informed and fair-minded man to conclude that there would be bias on the basis of predetermination. On the other hand, Mr. Gichuhi's version if true would lead a reasonable and informed fair-minded man to conclude that there would be bias. My denial of having made statements along the lines alluded to by Mr. Gichuhi cannot settle the question whether a reasonable and informed fair-minded man would impute bias. Yet too, it would be unnecessary to engage in a duel to determine the correct version. I do believe that perception of partiality must however be rid of at all costs to help maintain the legitimacy of the triadic system of dispute resolution where a judge is the third party.

11. In conclusion, the circumstances of this case dictate that the Petitioner be entitled to the benefit of the doubt. Only counsel who were present in court on 9 November 2015 may introspect and determine whether my inquiries or observations of 9 November 2015 amounted to a genuine engagement as to jurisdiction or a predetermination. For now, I can only regret the lack of automated court recording to help capture proceedings verbatim. It would be appropriate if I let go of these proceedings.

12. I consequently disqualify myself from hearing this matter and direct that the same be placed before the presiding judge for his further directions.

13. The costs of the informal application for recusal are to abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY FEBRUARY, 2016

J.L.ONGUTO

JUDGE