



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 144 OF 2012

THOMAS KHAMALA BIFWOLI.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

WILLIAM NDIYA OMOLLO.....3RD DEFENDANT

MICHAEL OGOLA AGOT.....4TH DEFENDANT

RULING

1. The Plaintiff seeks vide the motion dated 9th November 2018 for the Judge to recuse himself from presiding over this suit and Kisumu Constitutional Petition No. 29 of 2017; stay of further hearing, determination and or ruling in the said two files; and for the original file in Kisumu Constitutional Petition No. 29 of 2017 and this file to be placed before the Chief Justice for further directions; plus costs. The application is based on the fourteen (14) grounds on its face, among them that the court allowed the Defendants to amend their defence without filing a single document; that the court allowed the Defendants to withdraw a prior substantive admission without following the minimum requirements of withdrawal of admission; that the court allowed the filing of fake/forged survey report dated 1st August 2017; that the court has not issued signed rulings to enable the Plaintiff pursue his appeals and further that the court has refused to order the 1st and 2nd Defendants to disclose public documents in their custody and control to establish the genuineness of the 3rd Defendant's certificate of lease. The application is also supported by the affidavits sworn by the Plaintiff, Thomas Khamala Bifwoli, on the 9th November 2018 and 5th February 2019.

2. The application is opposed by the 3rd Defendant vide their grounds of opposition dated the 21st January 2019 setting out thirteen (13) points.

3. The Learned Counsel for the Plaintiff and the 3rd Defendant filed their written submissions. The submissions by the Plaintiff referred to various decided cases including the **South African Commercial Catering & Allied Workers Union & Others versus Irvin & Johnson Ltd [2000] ZACC 1020; 2000 (3) SA 705 (CC) at paragraph 13** where it was observed that **"a cornerstone of any fair and just legal system is the impartial adjudication of disputes...."** The 3rd Defendant's Counsel submitted that the application was an unfair attack on the court and is aimed at forum shopping. That the unsubstantiated allegations and suspicion of personal bias or prejudice were insufficient for recusal as they were matters peripheral and imagined. That those matters were based on the Plaintiff's belief or opinion and are not within circumstances that can constitute doubt as to the partiality of the court. The Counsel referred to various decisions including **Gladys Shollei vs Judicial Service Commission** and **Barnaba Kipsongok Tenai vs Republic**.

4. The following are the issues for the court's determinations;

- a) **Whether the Plaintiff has established the existence of real possibility of bias on the part of the Judge in the two matters cited.**
- b) **Whether the Plaintiff has made a case for the two matters to be placed before the Chief Justice for directions.**
- c) **Who pays the costs of the motion.**

5. The Court has carefully considered the grounds on the motion and of opposition, affidavit evidence, written submissions, the record and come to the following findings;

a) That **Article 22 of the Constitution 2010** on the enforcement of Bill of Rights read with **Article 50 of the same Constitution** on fair hearing, guarantees persons coming to court a fair and public hearing of the disputes they pursue. That parties to any litigation are unlikely to get, or believe they have gotten a fair hearing, if there is evidence that the Judge is impartial and or biased. That the application subject matter of this ruling raises the issues of bias and impartiality, and calls for the Judge to recuse himself and that to refer this matter and the Constitutional petition No. 29 of 2017 to the Chief Justice. That the Court of Appeal in the **Kalpana H. Rawal vs Judicial Service Commission & 2 Others [2016] eKLR** stated as follows in considering an application for recusal;

“An application for recusal of a Judge is a necessary evil. On one hand it calls into question the fairness of a Judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the two evils. The alternative is to risk violating a cardinal guarantee of the Constitution namely the right to fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the Constitutional guarantee of a trial by an independent and impartial court.....”

An application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties. The Judge must, without move, recuse himself. Such is the situation where the Judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario, bias is presumed to exist and the Judge is automatically disqualified....”

That further, in the Court of Appeal case of **Phillip K. Tunoi & Another vs Judicial Service Commission & Another [2106] eKLR**, the court stated as follows at **paragraph 46 to 48**;

“46. We take cognizance that the right to fair hearing is embedded in our Constitution which emphasizes that justice must be done to all without delay or undue regard to procedural technicalities. The Constitution has vested in the Courts Judicial authority and mandate and has expressly stated that the right to fair hearing cannot be limited or abridged. It is absolute.

47. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to Section 5 (1) of the Public Officer Ethics Act, 2003 contains general rules of conduct and ethics to be observed by Judicial Officers so as to maintain the integrity and independence of the Judicial Service.....

48. Specifically, under Rule 5 of the Code, a Judicial Officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by Judicial Officers of integrity and independence of the Judicial Service.....”

That in the two decision of the Court of Appeal, whose decisions are binding on the court, the test to be applied in determining applications for recusal, as I understand it, is of a reasonable and right minded, or fair minded and informed persons, applying themselves to the question and obtaining the required information.

b) That one of the basis of the application is the allegations surrounding or relating to the court having allowed the amendment of the defence by the 1st Defendant pursuant to an oral application, and after hearing the Counsel present. That the general power of the court in amending pleadings is found in **Section 100 of the Civil Procedure Act, Chapter 21 of Laws of Kenya and Order 8 Rule 3 of the Civil Procedure Rules**. That the amendments may be made at any time before closing of pleadings and with leave thereafter. That the criteria for allowing amendments are that it is necessary for the purposes of determining the real questions or issues raised, and where it is just to do so. That decisions from the Superior Courts on amendments of pleadings are many and the Court of Appeal in the case of **Central Kenya Ltd vs Trust Bank Ltd & 5 Others [2000] eKLR** made reference with approval to **Vol. 2, 6th Ed. At page 2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chattarley and Rao**, on the rule with regard to amendment of pleadings, in which the learned authors stated;

“that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

That in view of the wide discretion given to the court by the law, and as expounded in the Court of Appeal decision above, and applying the test of a reasonable right minded or fair minded and informed person, the court finds the Plaintiff has failed to show how the Judge’s exercise of the discretion to allow amendment can lead to an inference of bias or impartiality on his part.

c) That on the filing of the Surveyor’s report, failure to issue signed rulings and to order the 1st and 2nd Defendants to disclose public documents in their custody and control, there is nothing presented to specifically lead a reasonable, right minded or fair minded and informed person to infer the possibility of impartiality or bias in the way the relevant proceedings and orders were conducted and issued. That the record shows that all the orders, rulings and Judgment in the two matters were duly signed by the Judge on the date they were issued. That thereafter the parties’ Counsel have the responsibility to extract the order or decree to be executed by the Deputy Registrar.

d) That it is apparent from the record of this file, and Kisumu Constitutional Petition No. 29 of 2017, that the Plaintiff has already lodged Notice of Appeal touching on the orders/rulings and Judgment made by the Judge, and upon which the Plaintiff's allegations of bias and impartiality appear to be grounded. That the record will show the hearing of the main suit has not commenced in this case, and there has been no order or ruling admitting or refusing to admit the surveyor's report of 1st August 2017 as evidence or exhibit. That **Section 35 (1) of the Evidence Act, Chapter 80 of Laws of Kenya** is relevant in the admission of documents. That the Plaintiff's allegation on the admission of the Surveyor's Report are therefore unfounded and unsupported by the law, record, and practice. That at the trial in this case, the Plaintiff will have the opportunity to challenge the evidence being tendered by the other parties, including the surveyors report, in the same way they will also have had the opportunity to do likewise.

e) That the grounds upon which this application is based had been the raised by the Plaintiff in his complaint of 6th June 2018 against the Judge to the Judicial Service Commission. The complaint has been considered and dismissed vide the Commission's Secretary's letter dated the 14th January 2019 copied to the Chairperson, Judicial Service Commissioner and addressed to the Judge.

f) That the Plaintiff has not laid before the court the nature of the reliefs or directions he intends to seek from the Chief Justice to warrant the original record of Kisumu Constitutional Petition No. 29 of 2017, and this matter, being referred to him. That the petition has already been heard and determined. That the Plaintiff, who is the Petitioner thereof, has filed a Notices of Appeal. That as this court is therefore *functus officio* in that matter, the Petitioner should consider moving the Court of Appeal for the desired orders. That there is therefore no reasonable case made for the court to refer the two matters to the Chief Justice for directions.

g) That in the case of **Attorney General vs Anyang Nyong'o & Others [2007] I EA 12**, the court held as follows;

“The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A “suspicious mind” in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind...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 merely because they believe that such persons will be less likely to decide the case in their favour.”

That having considered the decided cases and the law cited by the parties' Counsel, the court finds that the Plaintiff has failed to demonstrate any instance of, or likelihood of personal bias, or prejudice or impartiality attributed to the Judge. That he has also failed to show that the Judge has personal knowledge of the facts relating to the proceedings in petition which has already been finalized, or any interest in the outcome of this case, upon which the Judge can be asked to recuse himself from further handling it.

h) That as the Plaintiff has failed in his quest and in accordance with **Section 27 of the Civil Procedure Act**, it is only fair and just that he meets the Defendants costs of the application.

6. That flowing from the foregoing, the Plaintiff's application is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Ndemaki for Simba for Plaintiff

M/s Langat for 1st & 2nd Defendants

Mr. Orengo for the 3rd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE