REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 15 OF 2013

DAVID KIPTUM YATOR

LUKA TOROITICH KIRATON

JOSEPH CHEPTARUS.....PETITIONERS

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA FOREST SERVICE.....2ND RESPONDENT

ZONAL FOREST MANAGER, MARAKWET.....3RD RESPONDENT

THE DISTRICT COMMISSINER, MARAKWET EAST.....4TH RESPONDENT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

AND

KATIBA INSTITUTE.....INTERESTED PARTY

RULING

The petitioners/applicants have come to court praying that I recuse myself from this matter and that the petition be placed before another Judge in the region for hearing and determination. The application is based on grounds that the applicants were granted conservatory orders on 25.3.2013 restraining the Kenya Forest Service and other respondents from interfering with petitioner's occupation, control and quiet enjoyment of the land they and the members of the Sengwer community live on at Embobut Forest.

The respondents disobeyed the orders of the court and attacked the members of the Sengwer community and destroyed their property in all. The honourable court heard the application dated 17.1.2014 seeking the enforcement of the orders of granted by Justice Fred Ochieng and Hon. Mr. Justice Sila Munyao granted orders authorizing for the enforcement of the court orders. The applicants/petitioners claim to have had a legitimate expectation that the respondents would desist from forcefully evicting members of the Sengwer community and that the County Police Commandant would move to stop the eviction and file a report confirming that the eviction had stopped.

The petitioners state that the respondents did not stop in the attacks in disobedience of court order despite being served. It is further claimed that the County Commandant went ahead to claim that they had successfully and forcefully evicted members of the Sengwer community.

The applicants/petitioners instituted contempt proceedings against the respondents which application was dismissed. The petitioners appear to have been dissatisfied with the ruling but did not appeal.

It is true that this court advised the parties to fast track the petition and maintain the status quo. However, the court went ahead to define the status quo to mean that the petitioners had left the forest. The order for status quo was made on 18.2.2015. The petitioners claim to have been shocked that the court had made an observation that on 18.2.2015 that status quo meant that they remain out of the forest pending hearing of the petition.

It is claimed that the court made the order of status quo without hearing the parties and without considering any evidence and therefore, the petitioners were not heard. The petitioners claim that the conclusion was arbitrary, without any application and an abatement of contempt.

The applicants believe that the conclusion by myself will prejudice their interests in the entire petition since the court order fundamentally altered the character and gist of the petition which moves towards asking for mandatory orders that the Sengwer community be put back in the Embobut forest, a fact which would be inimical to claim on community land rights under Article 63 of the Constitution of Kenya.

When the matter came for hearing, ***Mr. Cheruiyot*** learned counsel holding brief for Mr. Kenei for petitioners submitted that the application is for substantive justice and that there is no intention to buy any judge or to intimidate any judge.

Mr. Lempaa learned counsel for the interested party submits that the application raises fundamental issues that the Petitioner pleads that the court disqualifies itself. The right to fair hearing is not limited and not derogable. The right to dignity and to be treated in a non-degrading manner is to be taken seriously. He relies on the authority of ***Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others (2013) eKLR***.

According to Mr. Lempaa, the objective test is of a fair-minded person. The basis of the application is that this court has exposed them to risk having interpreted that they are not in the forest. He further relies on the decisions of **Civicon Ltd Vs Kenya Revenue Authority** and **Philip Tunoi and another Vs Judicial Service Commission (2016) eKLR.**

Mr. Wabwire learned state counsel on behalf of 1st and 4th respondents did oppose the application dated 1.1.2017 as being an abuse of court process as the applicant did not place before court any evidence of potential bias. According to the learned state counsel, the petitioners and interested party are relying on the decision of the court made that the status quo be maintained without looking at the proceedings of the day. The petitioners stated that they were out of court and were suffering as per the status report dated 10.2.2014. The petitioners are not telling the court that the forest is free from any human occupation. The court ordered that the status remains the same as per the status report which report has not been challenged. Based on the status quo order, the petitioners have not filed an appeal or review.

Katiba Institute is appearing as interested party but filed another petition and would have gone before another court but chose to come before this court.

The 2nd respondent filed grounds of opposition stating that the Application is mischievous and made in bad faith to merely delay judgment and frustrate the just conclusion of this matter given that it is being made at the judgment stage the Petition having proceeded by way of submissions and some parties having already filed their closing submissions in readiness for judgment.

The 2nd respondent argues that the application is an abuse of the court process as it is coming so late in the proceedings at the submissions stage when parties have begun filing the respective closing submissions on the Petition. According to the second respondent, this Petition having been compromised by the Government's having paid the Petitioners, the Petitioners seem to have lost interest in prosecuting it because is a Constitutional Petition that was brought to this honourable court in the year 2013 and has been in court for four years now hence should be concluded as Rule 3 (5) of the Mutunga Rules 2013 disposed of timely without delay Constitutional Petitions.

The Petitioners' incessant threats for recusal of presiding judges in this matter as well as this application are efforts aimed at arm-twisting, blackmailing and intimidating the judges into submission hence are an affront to the rule of law and the independence of the judiciary. A similar trail of events and Application were unleashed by the Petitioners in this same matter on similar grounds to the previous presiding Judge in this court (Sila Munyao J,) who firmly stood his ground and upheld the rule of law by rejecting the Petitioners' call for recusal.

According to the 2nd respondent, the grounds cited by the Petitioners in support of their application for my recusal are so flimsy, meritless, far-fetched and do not meet the legal threshold for an application for a court's recusal and that the grounds for urging a presiding judge to disqualify himself should be weighty and hinge on bias.

The Petitioners' principal ground of their Application for this court's recusal from this Petition is that this court on 18/2/2015 made a ruling on the Petitioners' Contempt Application in this Petition. According to the 2nd respondent, if a party is unhappy with or dissatisfied with a ruling of a judge, its recourse is to Appeal against the same to a higher court, and not asking the judge to recuse himself from the matter. It is over one year since the said ruling was delivered yet the Petitioners have never appealed or challenged the said ruling in the Court of Appeal, and instead now wants to use it as an excuse to urge and unfairly obtain an unjust and undeserved recusal of this court. This is an attempt to delay the conclusion of this matter, frustrate the cause of justice. This amounts to forum shopping. According to professor Sifuna, baseless allegations should not be used to cause a Judge recuse himself. The applicants have never appealed against the ruling of 2015.

I have considered the application, the responses and the rival submissions and do find that the single reason that has informed the petitioners' application for my recusal is that this court granted an order of status quo and the court went ahead to define status quo to mean the petitioners were out of the forest. This order was made after hearing all parties in the dispute. The order was read out in court on the 18.2.2015. The grounds rendered by the petitioners in the application herein are good grounds for appeal or review but not for my recusal. The petitioners are aggrieved with the finding by the court made that the petitioners had left the forest which position the court took after interrogating all counsels on records after delivery of ruling.

The question that should be addressed is whether a fair minded and informed observer, looking at the facts above would conclude that there is a likelihood of bias or apparent bias. The applicants appear to suggest that due to my finding that the petitioners were not in the forest I am likely to be biased and therefore I will not be impartial.

The test initially applied in such a case of apparent bias was whether there is a real danger of bias. In the English case of **Porter *Vs Magill (2002) 1 All E.R. 465***, the House of Lords held that the question is whether a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the Tribunal was biased.

In Taylor Vs Lawrence [2003] QB, 528, the House of Lords in the judgment of Lord Woolf CJ stated that the court must ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. The court must then ask whether those circumstances would lead a fair minded and informal observer to conclude that there was a real possibility, or real danger or the two being the same, that the Tribunal was biased.

In the famous case of "The people" ***R v David Makali and three others,*** the court of appeal observed as follows: --

"How should Judges treat the subject of disqualification when raised before them?

> ***...when the courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of 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.***

Contrary to the allegations by the petitioners that their right to hearing was breached by the court, they were heard before the order was made. The order was read to then on 18.2.2015. The application for recusal was made on the 3.1.2017 more than 18 months after the order of status quo was made. It has taken the petitioners more than 18 months after the order made on 18.2.2015 to realize that the court was likely to be biased.

I do believe that the application is meant to delay the hearing of the petition because the petitioners have never been interested in pursuing the petition despite being given a hearing date and direction to file submissions.

The petition was filed with an application for conservatory orders under Certificate of Urgency in the year 2013 but five years down the line, the petition is still pending in court. This court ordered for status quo and advised the parties to adjourn all applications and be heard on priority basis and issued an order of status quo and observed that the petitioners were not in the forest. The petition was slated for hearing on 20.3.2015.

On the 20.3.2015, the petitioners informed the court that they were not ready to proceed with hearing but were ready to pursue an appeal. Since there was no formal application, the court ordered that the petitioners file a formal application. During this period, no application for recusal was made despite the fact that the court had already made an order of status quo.

The interested party, Katiba Institute filed an application dated 16.4.2015 seeking to be enjoined as an interested party. The application was heard and granted. No issue of bias was raised by the parties. The interested party has filed submissions but the appellant is yet to comply. Many applications have been filed subsequently without raising the issue of recusal by myself. The question is at what time have the petitioners realized that I am likely to be biased and yet they have been enjoying directions of the court.

My conclusion is that there are no grounds for my recusal in this matter the application is an afterthought. The grounds raised are flimsy as the petitioners can appeal against the order made by this court in respect of the application for contempt and the subsequent order for status quo. No fair minded and informed observer having considered the facts herein would conclude that there is a possibility that the court will be biased.

Ultimately, the notice of motion dated 15.2.2016 is dismissed with costs to the respondents.

Dated and delivered at Eldoret this 2nd day of November, 2018.

A. OMBWAYO

JUDGE