REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA CONSTITUTION PETITION CASE NO 41 OF 2017

FORMERLY MERU CONSTITUTIONAL PETITION CASE NO. 4 OF 2015

IN THE MATTER OF ARTICLES 2 (1), (4) 19 (2), (3), 21(1), 23(1), 27, 28, 0, 159(2) AND 165 (3) (b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES AND FREEDOMS UNDER ARTICLES 28, 40 AND 45 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT (REPEALED) CHAPTER 300 LAWS OF KENYA SECTIONS 159

AND

IN THE MATTER OF THE JUDICATURE ACT, CHAPTER 18 LAWS OF KENYA SECTION

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT SECTION 3

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT (CAP 160) SECTION 48

IN THE MATTER OF THE ESTATE OF CHABARI KAJIATHI (DECEASED)

BETWEEN

JOHN KARANI MWENDA.....PETITIONER

VERSUS

JAPHET BUNDI CHABARI.....RESPONDENT

RULING

1. This application is dated 17th March, 2016 and seeks orders:

> 1. THAT the Honourable Justice P. M. Njoroge recuses himself from adjudicating over this matter due to conflict of interest.
>
> 2. THAT the costs of this suit be provided for.

2. This application is supported by the affidavit of JOHN KARANI MWENDA, the petitioner, and has the following grounds:

> 1. The Honourable Judge presided over HCCA NO. 2 of 2011, which (sic) parties were the same as in the present suit.
>
> 2. THAT in the said Appeal, the Honourable Judge ruled in favour of the Respondent Josphet (sic) Bundi Chabari thereby violating the Petitioner/Applicant's rights.
>
> 3. THAT for the Judge to preside over this case would in effect be expecting him to review his own decision.

3. This application is supported by the affidavit of John Karani Mwenda, the petitioner, sworn on 17th March, 2017 and which states:

> ***"I, JOHN KARANI MWENDA Post Office Box 983-10100 Nyeri within the Republic of Kenya do hereby make oath and state as follows:***
>
> 1. THAT I am adult male of sound mind and the Petitioner herein and thus competent to swear this Affidavit.
>
> 2. THAT I am the registered proprietor of Title No. Mwimbi/Central-Magutuni/680, which land parcel, is the subject matter of this dispute.
>
> 3. THAT I purchased the suit land from Mwii Chabari and Mugia Chabari, who acquired it through transmission in Succession Cause 184 of 1993.
>
> 4. THAT the Respondent herein disputed my proprietorship at the Land Dispute Tribunal which Tribunal gave an award in his favour on 29th May, 2009.
>
> 5. THAT I appealed before the Provincial Tribunal which appeal was dismissed and the illegal award of the Land Dispute Tribunal upheld. (Now shown to me and produced as JKM1 are copies of the Provincial Tribunal dated 8.11.10)
>
> 6. THAT I further appealed at the High Court at Meru. The appeal was dismissed by Hon. P. M. Njoroge (Now shown to me and produced as JKM 2 is a copy of the judgment delivered on 14.1.15)
>
> 7. THAT the Honourable Judge, P. M. Njoroge, who presided over my appeal, is the same Judge who has conduct over this matter.
>
> 8. THAT my Advocates on record advise me that a judge can be asked to disqualify himself from hearing a matter if he has had conduct and delivered a ruling pertaining to matters in dispute.
>
> 9. THAT my Advocates on record advise me that it is a general rule that bias does not have to be real or proved, the test is merely possibility of bias, that is, perceived bias whether it influences the Judge or not. In my case I would not believe it possible to expect the Honourable Judge to go against a ruling he previously made in favour of the Respondent.

10. THAT it is the interest of Justice that my petition be handled by a Judge who has no previous knowledge or conduct of the matter.

11. THAT I swear this Affidavit in support of my Application to have the Judge recuse himself.

12. THAT I am advised by my Advocates that the Tribunal's attempt to adjudicate over the matter was ultra vires.

13. THAT despite knowing that the Tribunal had no jurisdiction over matters pertaining to land the Honourable Judge Njoroge upheld the decision, thus violating my constitutional rights.

14. THAT the issue of ownership of the suit land was dealt with by Succession Cause NO. 184 of 1993.

15. THAT what is deponed herein is true to the best of my knowledge, information and belief.

4. In opposition to the application, the respondent filed the following grounds of opposition:

1. The petitioner's application does not satisfy the requisite ingredients for the recusal of a Judicial Officer from adjudicating over a dispute.

2. The Petitioner's application is frivolous and an abuse of the court process.

5. The parties filed written submissions. The firm of SICHANGI PARTNERS, ADVOCATES, filed the Petitioner's submissions. The firm of BASILIO GITONGA, MURIITHI AND ADVOCATES, filed the respondent's submissions.

6. In his submissions the petitioner lays down what claims to be facts as follow:

1. The Applicant made an appeal to the High Court of Kenya from the Provincial Tribunal which had upheld an illegal award by the Land Dispute Tribunal.

2. The High Court upheld the decision made by the Land Dispute Tribunal.

3. The Honourable Judge P.M. Njoroge is the judge who heard and dismissed the appeal challenging the award of the Provincial tribunal to (sic) the respondent and is the same judge who is handling the conduct of the matter that rises (sic) almost similar issues before decided upon by the same judge.

4. The petitioner seeks the judge to disqualify himself on the ground of possibility of bias, because he does not believe it is possible to believe a judge can go against a ruling he had previously made.

5. The petitioner reasonably believes that the same judge who heard the appeal in the same court cannot hear a constitutional petition arising from the same case without bias or undue influence arising from his/her prior knowledge and judgment in the same matter.

6. The petitioner seeks the petition be handled by a judge who had no previous knowledge and conduct of the matter to ensure he gets a fair hearing.

7. The Petitioner framed the issues in this application as he perceived them to be:

a) Can a Judge who has handled a matter on appeal handle the same matter as Constitutional petition in the same court without a possibility of bias.

b) Should the Honourable Judge recuse himself on the grounds of possibility of bias?

8. In his submissions, the Petitioner cited the case of Attorney General of Kenya versus Prof. Anyang Nyongo and 10 others – EACJ Application NO. 5 of 2007. He proffered that the court stated;

> ***"We think that the apprehension of bias is good law. The law is stated variously, but amount to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge.***
>
> ***The court however has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."***

9. The petitioner goes on to submit that Article 25 (c) of the Constitution provides that the Right to a fair hearing is among the rights and fundamental freedoms that cannot be limited. He also says that Article 50 (1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.

10. The petitioner submits that a Judge must disqualify himself or herself if there is likelihood of bias; that it is not the mind of the Judge, which is considered, rather, it is the impression given to reasonable people; that bias can be discerned where a Judge has a relationship with a party who has interest in the case.

11. The petitioner without any elaboration submits that it is a basic principle of law that a Judge should not sit to hear a case in which 'the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that (he) was biased. The petitioner states that this proposition was upheld by Lord Hope of Craighead in the case of Porter versus Magill [2002] 2 AC 357. The petitioner continues to say that a Judge should not try a case if he is actually biased against one of the parties. He opines that bias includes issues such as perceived interest in the case or friendship with the participants, possibility of closed mind or any objective view that he might have 'prejudged" the case.

12. The petitioner quotes the preamble to the Judicial Code of Conduct and Ethics as providing as follows;

> "***the legal system of the Republic of Kenya is based on the principle that an independent, fair and competent Judicial Service will interpret and apply the law of the land, the role of the Judicial Service is Central to the concepts of Justice and the rule of law, intrinsic to all parts of the Code are the precepts that judicial officers individual and collectively, must respect and honour the judicial office they hold as a public trust and strive to enhance and maintain public confidence in the system.''***

13. The petitioner says that Rule 10(1) of the code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with law. He goes on to say that in carrying out their duties Judges of Superior Courts are required not to violate the rights and freedoms of any person under part V of the constitution.

14. The petitioner stresses that 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 bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him.

15. The petitioner goes on to say that since I had already made a determination in favour of the respondent in Meru Civil Appeal No. 2 of 2011,I cannot hear this constitutional petition without a possibility of bias based on my judgment in the Appeal. The petitioner proffers that in the case of Philip K.Tunoi and Another Versus Judicial Service Commissioner [2016] eKLR it was stated that:

"By long tradition, the rule has been that justice must not only be done, but it must also manifestly and undoubtedly be seen to be done. In short, there must be impartiality. At the core of this maxim is the need to inspire and maintain public confidence in the administration of justice and to obviate not only the appearance of unfairness but also the risk of unfairness."

16. Reliant upon his submissions, the petitioner wants me to recuse myself.

17. The Respondent has opposed this application. He opines that through this motion, the petitioner is complaining that through his judgment in Meru HCCA NO. 2 of 2011, the Judge violated his Constitutional right to win a case and therefore since his client did not win that case, the Judge will be biased in this case. He submits that for this reason, the petitioner seeks to have the matter heard by a judge who has no previous knowledge or conduct of the matter.

18. The respondent recapitulates that in his grounds of opposition, he had raised two grounds of opposition to the effect that the application did not meet the requisite threshold to require a judge to recuse himself and also that the entire application was tainted with frivolity and was an abuse of the court process.

19. The respondent postulated that there was no statutory provision that addressed the issue of recusal of Judges and said that he would make reliance on previously decided cases and the regulations governing the recusal of judicial Officers as set out in the Judicial Service Code of Conduct and Ethics. He opined that in the instant matter, the Petitioner/Applicant's complaint was that he was apprehensive that the Judge would be biased against him on the basis of a previous decision delivered in another suit.

20. The respondent postulates that the test to be applied by the court in applications seeking perusal is elaborated in the case of Attorney General versus Prof. Anyang Nyongo and others – EACJ Application No. 5 of 2017 which was quoted by the Court of Appeal in Kalpana H. Rawal versus Judicial Service Commission and 2 others [2016] EKLR. I need not reproduce what the Court stated as this has already been reproduced in the Appellant's submissions. The upshot of the ruling in this case in that the court has to envisage the perception of " a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

21. The respondent submits that the Court of Appeal in the Kalpana H. Rawal Case (op.cit) cited with approval the test set forth by the Supreme Court of Canada in R Versus (R.D) [1977] 3 SCR 484. The court had observed;

"The test is what an informed person, viewing the matter realistically and practically – and having thought the matter through – concludes. This test contains a twofold objective element:- the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that forms part of the background and appraised also of the fact that impartiality is one of the duties the judges swear to uphold."

22. The respondent further proffers that the Canadian Supreme Court went on to opine as follows:

"The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person alleging its existence."

23. The respondent says that the petitioner's apprehension of bias is spawned by the Judge's Judgment in Meru HCCA NO 2 of 2011 where the applicant/petitioner had appealed against the decision of the Provincial Land Disputes Tribunal that was rendered in favour of the respondent. The respondent proffers that in dismissing the appeal, the court had observed that it lacked merit for failing to adhere to the strict timelines set by statute, and that the appeal raised issues of fact as opposed to law, contrary to

the provisions of the applicable law and that the issue of Jurisdiction was introduced inappropriately having not been raised before the Provincial Appeals Tribunal and finally that no certification was obtained from the appellate court to the effect that the appeal raised only points of law prior to prosecution of the appeal as provided by law. On the other hand, this suit raises constitutional issues. The respondent submits that the two should not be conflated. The two cases are different and in the respondent's view, the apprehension of bias is unfounded and does not pass the test of reasonableness as propounded by applicable authorities.

24. Finally, the respondent submits that many times courts have ruled that the mere fact that a Judge has rendered an unfavourable decision in a suit is not an automatic ground for recusal of a judge at the instance of the unsuccessful litigant. The respondent proffers the following cases to buttress this propositions;

(a) CIVICON LIMITED VERSUS KENYA REVENUE AUTHORITY AND TWO OTHES [2014] eKLR

(b) JUMA KIPRONO KANDIE AND TWO OTHERS VERSUS COMMUNICATIONS AUTHORITY OF KENYA [2015] eKLR.

(c) ISMAIL TULAMALI AND TWO OTHERS VERSUS STEPHEN KIPKATAM KENDUIYUA AND SEVEN OTHERS [2010] eKLR

25. Reliant upon his submissions, the respondent prays that this application be dismissed with costs.

26. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their respective propositions.

27. A conspectus of the petitioners submissions amounts to the following:

a) The Judge in HCCA No 2 of 2011 delivered a Judgment in which the Petitioner lost to the Respondent.

b) Because of that Judgment the Judge has a conflict of interest.

c) Because of that Judgment the judge is biased against the petitioner

d) The Judgment delivered by the Judge in HCCA No. 2 OF 2011 denied the petitioner his constitutional right to win a disputed suit.

e) If the Judge did not recuse himself, he would be acting against Article 25(c) of the Constitution concerning the right to fair hearing being a fundamental right that cannot be limited.

f) If the Judge did not recuse himself he would be denying the Petitioner his right to have his dispute resolved by the application of the law in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body which right is enshrined in Article 50 (1) of the Constitution.

g) If the Judge refused to recuse himself the Judge would be going against Rule 5 of the Judicial Service Code of Conduct and Ethics as he would be exhibiting impartiality in a matter 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.

h) Rule 10 (1) of the Code of Conduct requires Judges of the Superior Court as public officers to carry out their duties in accordance with the law. By inference, if the Judge refused to recuse himself, he would have breached the Judicial Code of Conduct by not carrying out his duties in accordance with the law.

28. The first prayer and the only substantive one in this application is framed as follows:

> ***"THAT the Honourable Justice P. M Njoroge recuses himself from adjudicating this matter due to conflict of interest."***

29. I did not personally know the litigants in Meru HCCA NO. 2 of 2011. I do not personally know them now even as they are involved as litigants in this petition. It is, therefore, misplaced and outrageous for the petitioner and his advocates, Sichangi Partners' Advocates, to laconically and with apparent alacrity to claim I have a conflict of interest in this matter or had a conflict of interest when I adjudicated over HCCA NO. 2 of 2011 where the Petitioner lost.

30. I have carefully perused the Judicial Service Code of Ethics and outrightly debunk the propositions made by the petitioner through his advocates. Nowhere does the Code of Ethics say that a Judicial Officer Judicially applying his mind to the facts at hand and the apposite law cannot independently make his decision and deliver his judgment just because one of the parties will lose. If we embraced this proposition, the wheels of justice would grind to a halt. Judges and other judicial officers would be reticent to make their decisions and to deliver judgments. Indeed the role of Judges is not to propitiate themselves to the litigants. Their duty is to deliver justice in accordance with the law and with the available evidence. Invariably, in a system such as ours which is adversarial in nature, there is always a winner and a loser.

31. I agree that Article 25 (c) of the Constitution stipulates that the right to a fair trial is a right that cannot be limited. However, I hasten to add that arbitrating a Civil suit, applying one's mind to the facts of the case and the applicable law and delivering a Judgment does not amount to limiting the right to a fair trial. Indeed it contributes to the enhancement of enjoyment of that right when a Judge moves diligently and delivers his Judgment, as I did in HCCA NO 2 of 2011, without undue delay.

32. I also opine that by delivering a judgment in a dispute and having given the litigants a fair hearing and having conducted the apposite proceedings publicly, and not secretly, a Judge does not go against Article 50 (1) of the Constitution. In Meru HCCA No. 2 OF 2011, I resolved the dispute in a fair and public hearing and the apposite Judgment was delivered in an open court.

33. I do not agree with the Petitioner's proposition that by deciding Meru HCCA NO. 2 against the defendants, I automatically became a biased and impartial person. If this proposition is embraced every Judge would become a biased and impartial person upon delivery of every Judgment as in invariably every case there would be a winner and a loser. According to the petitioner and his advocates, the Judge automatically becomes biased and impartial as against the loser. Such a scenario would spawn deleterions ramifications in as far as the system of administration of Justice is concerned.

34. It seems to me that the Petitioner is asserting that his constitutional right to be declared the winner in HCCA NO 2 of 2011 had not been upheld. What about the respondent's right to be declared the winner in a deserved suit? I opine that a Judge, by hearing a suit, assessing the available evidence and delivering the apposite judgment does not infringe upon the constitutional rights of the litigants, whether the winners or the losers. Indeed I opine that a winner has got a constitutional right to obtain a judgment in a matter a judge has adjudicated upon and found him or her the successful party.

35. The Appellant has proffered 2 cases. In Attorney General versus Prof Anyang Nyongo and 10 others (OP. cit) the court crafted the test to be used by a Judge in considering recusal as:

> "***Do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable fair minded member of the public that the Judge did not (will not) apply his mind to the case impartially."*** I opine that a reasonable fair minded member of the public can not, just because the Judge has delivered a Judgment against one of the parties, impute and ascribe impartiality upon the Judge who delivered the impugned Judgment in the cause of his Judicial duties.

36. The petitioner has cited the case of Philip K. Tunoi & Another versus Judicial Service Commission

and Another (op.cit) as stating;

> "By long tradition, the rule has been that Justice must only be done, but it must also manifestly and undoubtedly be seen to be done. In short, there must be impartiality. At the core of this maxim is the need to inspire and maintain public confidence in the administration of Justice to obviate not only the appearance of unfairness but also the risk of unfairness."

37. I opine as I have already said, that by timeously and Judicially delivering a ruling or Judgment a Judge does not, Ipso facto, evince impartiality or manifestly show that Justice has not been seen to be done.

38. I agree with the respondent's submissions that the mere fact that a Judge has rendered an unfavourable decision in a suit is not an automatic recusal of the Judge at the instance of the losing party. I find that the authorities the respondent has proffered to buttress this proposition are relevant to the circumstances of this case. These authorities are:

(a) Civicon Limited versus Kenya Revenue Authority and 2 others (op.cit)

(b) Juma Kiprono Kandie & 2 others versus Communication Authority of Kenya (op.cit).

(c) Ismail Tulamali & 2 others versus Stephen Kipkatan Kenduilyva & 7 others (op.cit).

39. I agree with the respondent's submissions that a Constitutional petition raises issues which are different from those raised in a Civil appeal. I opine that the appellant has conflated the two. There is need to bifurcate the two.

40. As stated in the case of R. Versus (R.D) (op cit) which case was cited with approval in the case of Kalpana Rawal and the Judicial Service Commission et al (op cit) in the Court of Appeal

> ***"the existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."***

41. That recusal cannot be taken casually is demonstrated by the statement in Locaball (UK) Ltd versus Bayfield Properties Limited [2000] QB 451 where the court opined that a judge would be as wrong to yield to a tenous or frivolous objection as he would to ignore an objection of substance."

42. That recusal must be given serious attention is demonstrated by a statement of the court in Kaplan & Stratton Versus Z. Engineering Construction Ltd & 2 others [2000] KLR where the court stated:

> ***"if discrimination issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. When a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts, which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar."***

43. Having considered the totality of issues raised in this application including the submissions proffered by the parties in support of their respective assertions, I find that this application lacks merit and glaringly invites deserved dismissal.

44. As already pointed out, our system of Justice is adversarial. Everyday litigants win and lose cases. If every loser accuses the concerned Judge of bias, and we embraced the propositions postulated by the petitioner, there would be need to have an infinite number of Judges ready to be called upon to hear matters raised by the losing parties in future disputes. This would be a veritably ridiculous scenario

bordering on the phasmagoric. It would promote untrammeled Judge shopping and unbridled forum shopping.

45. If the petitioner's propositions are embraced by this court, every Judge in this planet who applies his mind to the facts and the law apposite to the particular case and decides it in favour of one of the parties will be in conflict in as far as the losing party is concerned.

46. A judge cannot just recuse himself because he had handled an earlier dispute involving the parties. A litigant cannot through contrivance of oblique traducent allegations, postilutating unsubstantiated generalities thrown around with unabashed alacrity and abandon attain the threshold needed for a Judge to recuse himself.

47. By embracing the propositions postulated by the petitioner, this court would be asserting that every loser in a dispute is a victim and every winner is a villain. The villainy of the winner would finally be foisted on the Judge who arbitrated over the dispute. This would amount to embracing veritable escapism in the delivery of justice. Such a scenario deserves deprecation.

48. As I have already said, this application lacks merit. It deserves dismissal.

49. This application is dismissed.

50. Costs will follow the event.

51. Costs are awarded to the Respondent.

52. It is so ordered.

Delivered in open court at Chuka this 12th day of April, 2017 in the presence of:

CA: Ndegwa

Manasses Kariuki h/b Kioni for the Petitioner

Mark Muriithi for the Respondent

P. M. NJOROGE,

JUDGE.