Philip & 22 others v National Housing Corporation & another (Environment & Land Petition E006 of 2023) [2024] KEELC 3370 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3370 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION E006 OF 2023

NA MATHEKA, J

APRIL 23, 2024

BETWEEN

JOYCE WANZIA PHILIP ..... 1ST PETITIONER

EVERYLNE WANGARI WAMBUGU ..... 2ND PETITIONER

GABRIEL IHWAGI GIKONYO ..... 3RD PETITIONER

FRANCIS THUKU WAWERU ..... 4TH PETITIONER

ROBERT AMUKO OLIMBA ..... 5TH PETITIONER

JUMAA KARISA KOI ..... 6TH PETITIONER

LEAH WAMBOI MAINA ..... 7TH PETITIONER

JUDY MUENI WAMBUA ..... 8TH PETITIONER

ZADOCK KILAVUKA KIHIMA ..... 9TH PETITIONER

ELIJAH OMWWA NYAWEYA ..... 10TH PETITIONER

LYDIA NDIA KIROGO ..... 11TH PETITIONER

EZEKIEL KALO ..... 12TH PETITIONER

DAVID OKOTH OCHOLA ..... 13TH PETITIONER

EUNICE MWASAHA ..... 14TH PETITIONER

FREDRICK MURIITHI KING' ANGI ..... 15TH PETITIONER

PAUL MATHENDU ..... 16TH PETITIONER

ZAKARY G. NGUGI ..... 17TH PETITIONER

BRUCE ASHIKOYE ..... 18TH PETITIONER

ERASMUS JOSHUA KANGIO ..... 19TH PETITIONER

DAVID TELELA NGALA ..... 20TH PETITIONER

TITUS MWENGÅ MUTAMBU ..... 21ST PETITIONER

E. KAMAU M. GIKA ..... 22ND PETITIONER

KEFA OTURI MARANGA ..... 23RD PETITIONER

AND

NATIONAL HOUSING CORPORATION ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. The application is dated 29th February 2024 and is brought under Articles 25(c), 27, 48, 50(1) & 159 of *the Constitution* of Kenya, Section 1A, 1B and 3B of the *Civil Procedure Act*. Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, Section 3 of the *Magistrate's Court Act* seeking the following orders;

    a. That the Honourable trial judge, Honourable N.A Matheka be pleased to disqualify and/or recuse herself from further proceeding with this matter or any further conduct of this matter.

    b. That costs of this Application be in the cause.

    c. That this Honourable Court be pleased to grant such further and/or other orders be made as the court may deem fit and expedient.

2. It is based upon the annexed affidavit of Joyce Wanzia Philip, the 1st Petitioner herein, and on the following grounds that the Honourable Trial Judge, Honourable N.A Matheka has failed, refused and/or neglected to exhibit impartiality. That from the onset of the case, the judge has been hostile to the petitioners. She was not sensitive to the petition and applications despite the urgency in the matter. The petitioners are faced with imminent evictions that the identified site for demolition has already been horded, and the court insensitively removed the status quo orders. That asbestos roofing being highly hazards and poisonous were being removed in the petitioners' presence despite them occupying the houses. This was done despite the petitioners having the orders restraining the same, and the court has so far refused to prioritize and listen to the contempt application. The application of contempt of courts orders, the judge rejected the application out rightly without consideration. She also rejected the certificate of urgency for conservatory orders twice, flagrantly advancing the respondents interests. That upon granting the conservatory orders upon filing a third application, the judge removed them after a short while thus exposing the petitioners to danger, eviction, unhealthy environment, insecurities, Noise pollution from the ongoing demolitions. That it is obvious that the National Housing was aware of the ruling before it was delivered. That on the day of the ruling when the judge dismissed the applications and removed the status quo orders, the construction workers had assembled ready for work that early morning as they were aware of the outcome of the ruling even before the judge delivered its ruling officially. There is a foul play against the petitioners who are the common mwananchi in the matter and the judge is not independent nor impartial. That the Honourable judge has failed, refused to address her mind to the gravamen of the Notice of Motion dated 6th November 2023 and the main suit therefore rendering both nugatory/ superfluous. That it's trite that where an issue of contempt of court arises, the court ought to first deal with the issue unlike what the judge did in this matter. That the failure /refusal to listen to the application for contempt of court coupled with the immediate lifting of orders that the respondents were violating reeks and

undermines due process and rule of the same. That in view of the foregoing, there exist special and peculiar circumstances to warrant this Application being granted and the Trial Court recusing herself from hearing or in any way dealing with this matter in its entirely. The judge negates the principle of justice being not only being done but also being seen to be done and seem to be in court sitting over the matter with a fixed and or predetermined mind set.

3. The 1st Respondents stated that, the Applicants herein commenced these proceedings vide a Petition dated 31st August, 2023 in which the Petitioners pleaded at paragraph 16 that they were served by the 1st Respondent Notices to vacate the houses for redevelopment way back in 2018. However, in an Application dated 31st August, 2023, the Petitioners sought conservatory orders in the form of injunction restraining the 1st Respondent from evicting them from the houses. That having disclosed that the Notices were served in 2018, the Court declined to certify the matter as urgent but fixed the Notice of Motion dated 31st August, 2023 for inter partes hearing on 17th October, 2023. That subsequently the Application was heard and ruling delivered on 13th December, 2023 dismissing the application for conservatory orders. The Petitioners being dissatisfied with the decision of the Court, filed a Notice of Appeal pursuant to Rule 77 of the Court of Appeal Rules 2077 signifying their intention to appeal the decision to the Court of Appeal. That whereas the ruling was delivered on 13th December, 2023, the 1st Respondent actually carried out the eviction and demolition of its structures on 26th January, 2024, which was way more than a month from the date of the ruling and that the said eviction was widely publicized in the mainstream media. That it is therefore incorrect to allege that the eviction was carried out on the date of the ruling (which would be on 13th December 2023). These false allegations are orchestrated to disparage this Honourable Court. That in an application for recusal, it is not enough for a party to allude to unsubstantiated or speculative claims of bias. Genuine reasons must be proffered. That the Application is frivolous and specifically aimed at undermining public confidence in this Honourable Court and the same should be rejected. That allowing this Application would open a pandoras box for litigants who disagree with the decisions of the Court to resort to recusal which will be a dangerous precedent.

4. This court has considered the application and the submissions therein. The main issue is whether I should recuse myself from dealing with the present matter and/or other references involving the parties herein. The principles governing recusal in this jurisdiction are well settled. In *Jan Bonde Nielson vs Herman Philipus Steyn & 2 others (2014)* eKLR the court stated that;

> "The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali and others C.A Criminal Application No Nai 4 And 5 Of 1995 (UNREPORTED), and reinforced in subsequent cases. See R v Jackson Mwalulu & Others C.a. Civil Application No Nai 310 of 2004 (Unreported) where the Court of Appeal stated that:
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> > "...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..."

5. In *Philip K. Tunoi & another vs Judicial Service Commission & (2016)* eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in Porter vs Magill (2002) 1 All ER 465, where it stated that,

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court (per Ibrahim J.) in Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR where he observed that, "The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

6. The principles in the cases I have cited buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;

   (a) Is a party to the proceedings;

   (b) Was, or is a material witness in the matter in controversy;

   (c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;

   (d) Has actual bias or prejudice concerning a party;

   (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;

   (f) Had previously acted as a counsel for a party in the same matter;

   (g) Is precluded from hearing the matter on account of any other sufficient reason; or

   (h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.

7. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

> "A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices."

8. As was stated in *Kaplana Rawal vs Judicial Service Commission and 2 Others (2016)* eKLR;

> "An Application for recusal of a Judge is a necessary evil." On the 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 application, 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 too human and above all *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial Judge."

9. 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 two evils. The alternative is to risk violating the cordial 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.

10. We would, with respect, agree with the Constitutional Court of South Africa Vs. The South African Rugby Football Union and Others case CCT 16/98:

> "At the very outset we wish to acknowledge that a litigant and her or his Counsel who find it necessary to apply for the recusal of a Judicial Officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a Personal affront. "[Emphasis added]"

11. In the same Court of Appeal decision of *Kalpana Rawal vs JSC* (supra) the Court of Appeal observed quite correctly that;

12. 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 more, recuse himself. Such is the situation where a 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. The challenge however arises where like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a Judge?"

13. The Court of Appeal in the Kalpana Rawal Case further acknowledged that for quite some time, there was contestation in several Commonwealth Jurisdictions regarding the proper test to be applied in such case: was it real likelihood of bias or reasonable apprehension of bias by a reasonable person?

14. In *Attorney General of Kenya Vs. Professor Anyang' Nyong'o & to 10 Others EACJ Application No. 5 of 2007* the Court Stated;

> "We think that the Objective test of "reasonable apprehension of bias" is good Law. The test is stated variously, but amounts 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) 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."

15. In the Supreme Court of Canada R Vs. S.C.R.D.) [1977]. 3SCR 484 cited by the Court of Appeal in the Kalpana Rawal vs. J.S.C. (supra) it was held;

> The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically

and practically and having thought the matter through conclude. This test contains a two-fold 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 form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold.

The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. 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 who is alleging its existence."

16. In the instant case, I have perused the court file and find that the Petitioners had filed two applications dated 31st August 2023 and 18th October 2023 for conservatory orders. After careful deliberations on the facts, law and relevant case law and exercising the court's discretion judiciously, the court found that the Petitioners had not established a prima facie case and dismissed the same. The Petitioners are extremely apprehensive that they would not get a fair hearing going forward hence this application. They question the court's discretion and accuse it of lacking impartiality and being bias. The test here is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that a Judge was biased. I think not. I am reminded of the words of Socrates where he stated that;

> "A judge has four things that belong to him. To hear courteously; To answer wisely; To consider soberly and; To decide impartially."

17. I always abide by these virtues and the oath I took to uphold the rule of law. Be that as it may, the Applicants feel aggrieved and feel strongly that they would not get justice from this court. Due to their lack of confidence in this court I will allow the application and grant it as prayed. The costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF APRIL 2024.

N.A. MATHEKA

JUDGE