Macharia & 13 others v Gichana & another (Petition E057 of 2022)
[2022] KEELRC 12809 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12809 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E057 OF 2022

MA ONYANGO, J

OCTOBER 5, 2022

BETWEEN

FREDRICK MWANGI MACHARIA ..... 1ST PETITIONER

ADAH OWUOR ANYANGO ..... 2ND PETITIONER

NANCY CHERONO MUTAI ..... 3RD PETITIONER

AHMED SHIRO MAKOHA ..... 4TH PETITIONER

CHRISTINE MADARAH ..... 5TH PETITIONER

EDWARD ATANGA ..... 6TH PETITIONER

JUDITH AARON ..... 7TH PETITIONER

EVERLYN AKINYI ..... 8TH PETITIONER

FARAH GABOW ..... 9TH PETITIONER

GLADYS MWENDA ..... 10TH PETITIONER

DAISY MWEMA ..... 11TH PETITIONER

JOLIDA WANGUI ..... 12TH PETITIONER

HELLEN MUTIE ..... 13TH PETITIONER

BRIAN YAMBO ..... 14TH PETITIONER

AND

EDWARD OMBWORI GICHANA ..... 1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD ..... 2ND RESPONDENT

RULING

1. Before me for determination is the petitioners' application dated 13 May 2022 (the application) seeking my recusal from the hearing of this petition. It also seeks an order that this petition be consolidated with ELRC Petition No E073 of 2021: Paul Mureithi Kamau vs Edward Gichana and ELRC Petition No E0160 of 2021: Edward Gichana vs Adah Onyango & The Nairobi County Assembly Service Board, both of which are pending before Mbaru J.

2. The application is brought under the provisions of articles 1(1) and (2), 3(1), 10(1) & (2), 27, 50, 73(2)(b) & 232 of the *Constitution*, regulation 9(1) and 21(1)(c)(d) & (e) of the Judicial Service (Code of Conduct and Ethics) Regulations 2020, the inherent jurisdiction of this court and any other enabling provisions of the law.

3. It is premised on the grounds set out on the face of the application and the supporting affidavit sworn by Adah Onyango on 13 May 2022. The grounds in summary are that the applicants are apprehensive that should I conduct and preside over the hearing of this petition, I will not be impartial. The factual particulars as set by the petitioners are as follows: -

    i. On August 5, 2020, this court issued case management directions for the expeditious determination of ELRC Petition No 194 of 2019 and made a finding that the Clerk of the County Assembly was Muvengei Jacob Ngwele and there was no vacancy in the office of the clerk. That, the 1st respondent's appointment as Clerk of the Assembly was null and void

    ii. That the 1st respondent, dissatisfied with the directions/rulings issued on August 5, 2020 filed Civil Application No E305 OF 2020: Edward Obwori Gichana v The Clerk Nairobi City County Assembly & 2 others being an application for stay pending appeal against this court's directions.

    iii. The Court of Appeal delivered its ruling on December 18, 2020 and dismissed the applicant's appeal by striking out the notice of appeal.

    iv. On the basis of the appeal being dismissed, the directions/ruling issued on August 5, 2020 are still in place "as the final position" of the court on the question of the 1st respondent's appointment as the Clerk of the County Assembly.

    v. That there is a pending complaint before the Judicial Service Commission by the petitioner in ELRC Pet 194 of 2019, Jacob Ngwele, filed on November 16, 2019 (*sic*) against my conduct while delivering a judgment in the matter on October 16, 2020.

    vi. The gist of the complaint against me being that I am biased in favour of the 1st respondent by deleting his name in the judgment. That, the audio version as compared to the written version released to the parties were materially different in content and was done on the advice of the respondents, intended to pave way for the 1st respondent's assumption of office.

    vii. That, on February 14, 2022, during the hearing of the appeal against ELRC Pet 194 of 2019 at the Court of Appeal in Civil Appeal No E255 of 2021, all the parties filed a consent dated February 14, 2022 that the judgment read by me in open court on October 16, 2020 was altered and was materially different from the written judgment. That, the consent order formed part of the final determination of the Court of Appeal and remains an order of the court.

4. In light of the above facts as deposed on behalf of the petitioners, it is alleged by the petitioners that I am biased in favour of the 1st respondent, Mr Edward Gichana and have vested interests to protect his employment. That my hearing of this petition will be used to "clear" myself from a complaint currently pending before the Judicial Service Commission.

5. The 1st respondent on his behalf and in his capacity as the Clerk of the County Assembly, opposed the application by way of replying affidavits sworn on May 23, 2022 and May 28, 2022.

6. The 1st respondent deposed therein that the application is frivolous and an abuse of the process of the court. That whereas this court dealt with ELRC Pet 194 of 2019, its final and penultimate finding was made *vide* its judgment of 16 October 2020 wherein it discharged any orders that preceded its judgment.

7. That whereas the 1st respondent wanted to be joined in this matter, the court declined to grant the orders for joinder and as such the 1st respondent was never a party to the proceedings and neither were the petitioners.

8. It was deposed by the 1st respondent that Civil Application No 305 of 2020 in the Court of Appeal, was a stay application brought under rule 5(2)(b) that was lodged pursuant to the court's directions of August 5, 2020 – which application was dismissed. That, as such the substantive appeal was never lodged.

9. That the complaint before the Judicial Service Commission cannot be adjudicated before this court. That in addition, none of the parties in the present petition are parties to the alleged complaint.

10. The 1st respondent deposed that the petitioners distorted the facts in the application he filed in the Court of Appeal which was a stay application. That in any event the judgment of the Court of Appeal upheld this court's judgment of October 16, 2022.

11. Pursuant to directions of this court issued on May 17, 2022, the parties disposed of the instant application by way of written submissions. The petitioners filed their submissions dated June 17, 2022 while the respondents filed theirs dated September 20, 2022.

Determination

12. I have carefully considered the instant application, the responses filed by the respondents and the submissions filed by the respective parties. The substantive issues for my determination are whether the petitioners have established a case to warrant the grant of orders in their application for my recusal and whether the present petition ought to be consolidated with ELRC Petition Nos E073 of 2021 and E160 of 2021 pending before Mbaru J.

13. The petitioners submitted that it is a cardinal principal of law that a judge while presiding over a matter should not be biased against or in favour of any of the parties to the proceedings. They invoked the provisions of regulation 21 (a) of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 and emphasized the provisions that a judge ought to recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questions where the judge:

    (c) has person 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 relationship with a person who has personal interest in the outcome of the matter;

14. It is the petitioners' submission that I have an actual bias in favour of the 1st respondent on account of the facts already recounted hereinabove. That the 1st respondent's continued occupation and exercise of the powers and functions of the office of the Clerk of the Nairobi City County Assembly against the orders issued by this court on 8 August 2020 is the subject matter and central question of the present petition.

15. That it is only fair and equitable for me to recuse myself as my impartiality towards Mr Gichana is already in question in a complaint before the Judicial Service Commission.

16. They relied on the cases of *Philip K Tunoi & another v Judicial Service Commission & another* [2016] eKLR and *Kalpana H Rawal v Judicial Service Commission & 2 others* [2016] eKLR for their submissions on the applicable principles for recusal of a judicial officer.

17. It was the submission of the respondents on the other hand that the application has not satisfied the requisite ingredients to overcome a judge's duty to sit and similarly relied on the case of *Philip K Tunoi* (*supra*) in submissions on the applicable principles for recusal. They also relied on the Supreme Court case of *Robert Tom Martins Kibisu v Republic* [2018] eKLR where recusal on grounds of bias was considered at length.

18. The respondents relied on the provisions of regulation 9 and 21 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020. They submitted that recusal is extremely serious and fact sensitive and not merely an opportunity for forum shopping. They referred the court to the cases of *Nathan Obwana v Robert Bisakya Wanyera & 2 others* [2013] eKLR and *Republic v Mwalulu & others* [2005] 1 KLR.

19. The respondents submitted that merely because this court rendered an unfavourable decision in a previous case does not automatically form a basis for recusal. They relied on the cases of *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited* [2021] eKLR, *Republic v IEBC & another Ex-Parte Coalition for Reforms and Democracy (CORD)* [2017] eKLR, *John Karani Mwenda v Japhet Bundi Chabari* [2017] eKLR and *Kaplan & Stratton v LZ Engineering Construction Limited & 2 others* [2000] eKLR in support of their submissions.

20. The Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (the Code) sets out the circumstances warranting recusal of a judge which have long been based on judicial precedents. Specifically, regulation 21(1) of the Code provides as follows: -

    1. A judge may recuse himself or herself in any 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.

21. For the avoidance of doubt, I am not a party to these proceedings, nor have I acted as a counsel for any of the parties in this matter. I am not a material witness in the suit and do not have any knowledge of its material or evidentiary facts. I do not have any bias or prejudice against any of the parties and neither myself nor any members of my family or person I am closely associated with have an interest in the outcome of this suit.

22. I certainly have never known or met the 1st respondent in any capacity and there is no vested interest that I have in his appointment or removal. The court proceedings show that this file was referred to myself by my brother Nzioki Wa Makau J pursuant to directions issued on April 20, 2022. I did not have any hand in the file being placed before me.

23. The petitioners' main objection is based on a claim of bias arising from proceedings in ELRC Pet No 194 of 2019 where none of the petitioners was a party. The petitioners' contention is that the judgment delivered in ELRC Pet No 194 of 2019, in open court on October 16, 2020 was different from the written judgment issued to the parties.

24. The contention by the petitioners is that the difference shows bias in favour of the 1st respondent. The said judgment in the said matter was the subject of Civil Appeal E255 of 2021 wherein the decision was upheld it in its entirety. My reasoning was thus found to be sound by the appellate court.

25. Indeed, the law allows a judge or judicial officer to amend a judgment after delivery. Section 99 and 100 of the *Civil Procedure Act* are explicit and provides as follows –

> 99. Amendment of judgments, decrees or orders
>
> Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.
>
> 100. General power to amend
>
> The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

26. The said provisions are reiterated in rule 34 of the *Employment and Labour Relations Court (Procedure) Rules* provides as follows –

> 34. Correction of errors
>
> The court shall, either at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification.

27. There is therefore nothing unique about the amendments that I made to the judgement in Petition No 194 of 2019. If the petitioners herein perused the said file, they would realise that the 1st respondent herein was never a party to the said proceedings. It was therefore in error that the court made adverse orders against him and the reasons for correction of the judgment.

28. The foregoing was the import of the Court of Appeal in *Leonard Mambo Kuria v Ann Wanjiru Mambo* [2017] eKLR where the court cited with approval the case of Jersey Evening Post Limited v Ai Thani [2002] JLR 542 at 550 in which it was stated as follows:

> " The application of these two sections [sections 99 and 100 of the Civil Procedure Act}}, cap 21] has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of 'functus officio'-- the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked or varied by the decision-maker. As the court stated in the case of Jersey Evening Post Limited vs Ai Thani [2002] JLR 542 at 550:-
>
> > "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available".

29. It is material that the issue of the alleged changes in the judgment were never made the subject of the appeal that was filed against the judgment. The petitioners are therefore making an issue out of a nonissue by deliberately relying on "directions" when there is a final judgment of this court and the Court of Appeal which supersedes the said directions.

30. The petitioners have also made reference to an alleged complaint against me in response to the judgment that is supposed to be pending before the Judicial Service Commission. I am not aware of any such complaint as none has been brought to my attention. In any event, not every complaint filed before the Judicial Service Commission is brought to the attention of the officer. If the complaint is frivolous the Judicial Service Commission deals with it summarily. This may be the fate of the alleged complaint against me as it is more than two years since the same is stated to have been filed.

31. Returning to the crux of the ruling which is my recusal, in the *Philip K Tunoi case* (*supra*) cited by both parties, the Court of Appeal held that a judge should not recuse himself unless he either considers that he genuinely cannot give one or the other party a fair hearing or that a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased.

32. There is nothing that has been put before this court to establish a real or perceived bias in favour of the 1st respondent. A complaint against a judicial officer is not a substantive ground to warrant their recusal.

33. Mativo J (as he then was) in the case of *National Water Conservation & Pipeline Corporation v Runji* (*supra*) aptly addressed such concerns which I quote at length below:

> " One issue emerging from the case law concerns personal attacks against adjudicators. Strongly-worded personal attacks against adjudicators do not by themselves constitute appropriate grounds for recusal. Neither do threats or complaints to the Judicial Service Commission all designed 'to force recusal and manipulate the judicial system, rather than arising from actual malice. [51] If such threats, personal attacks to judges or even complaints

to the Judicial Service Commission were to constitution a recusal of a judge a dishonest, vexatious or disgruntled litigant would: -

> "Readily manipulate the system, threatening every jurist assigned on the 'wheel' until the defendant gets a judge he preferred. Also, the defendant could force delays, perhaps making the cases against him more difficult to try, perhaps putting witnesses at greater risk. Such blatant manipulation would subvert our processes, undermine our notions of fair play and justice, and damage the public's perception of the judiciary."[52]

The above excerpt buttresses the need for a robust application of the standards. The Supreme Court of Papua New Guinea similarly confirmed in Yama v Bank South Pacific [53] that it "is not the law that a judge should disqualify himself just because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous." Sedley LJ continued:- "Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation." Ward LJ said that the judicial duty must be "performed both without fear as well as without favour."

60. Lord Neuberger (the President of the Supreme Court of the United Kingdom and lead judge of the Judicial Committee of the Privy Council) in 'Judge not, that ye be not judged' : judging judicial decision-making FA Mann Lecture 2015 (29 January 2015) stated:-

> "36. ... It is all too easy for a litigant who does not want his case heard by the assigned judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court."

61. Stanley Burnton J in R (Toovey and Gwenlan) v The Law Society [54] stated:-

> "Applications for the court to recuse itself have become increasingly fashionable of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the court when he perceives his case if failing, but that is no justification for counsel to make the application ... it is for counsel to satisfy himself that there are reasonable grounds for making such an application."

62. Sir Stephen Sedley in his foreword to Judicial Recusal by Hammond (2009) stated:-

> "The judicial oath in England and Wales, widely echoed in the common law world, is to do justice 'without fear or favour, affection

> or, ill-will'. Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. That makes the law relating to recusal a serious business...

Recusal – an odd word, signifying withdrawal, originating in the religious concept of a recusant – is both an assurance of the impartiality of justice and a field of opportunity for manipulation. If not only every litigant who thinks the judge is going to be against him but every party who has waited for judgment and lost cost of litigation will become uncontrollable, legal certainty will become a chimera and the principle that litigants cannot handpick the court will be shot through with exceptions. Thus, there is a risk that a doctrine designed to assure the quality of justice may be used to the opposite effect. But few laws and procedures are not capable of being abused, and the risk of abuse is a price that has to be paid for ensuring, so far as can be done, that judges are independent and impartial."

The legal test to be applied as to whether a judge should recuse himself from sitting on a particular case was set out in Eurotrust International Limited and others v Barlow Clowes International Limited and Others: [55] "it was whether a fair minded and informed observer, who had knowledge of all material facts, would conclude that there was a real possibility that the tribunal was biased." In determining an application to recuse a court must take great care to ensure that such application was not merely a vehicle for `forum shopping, a position stated in South Africa (President) v South African Rugby Football Union [56]where, at 177, the court stated: -

a. The fair-minded and informed observer is a person who has knowledge of all material background facts and not just a 'casual' observer notwithstanding the warning that over-zealous acceptance of this point might lead the observer to be in a position akin to that of a judge.

b. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither complacent or naive nor unduly cynical or suspicious.

c. Regard must be had to the judicial oath and a judge's ability to disabuse their minds of any irrelevant personal belief and predispositions. Judges must take account of the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves but they must disqualify themselves if there are reasonable grounds on the part of a fair-minded and informed observer for apprehending that the judge will not be impartial.

d. A judge would be as wrong to yield to a tenuous or frivolous objection as he would be to ignore an objection of substance.

e. A must take great care to ensure that a recusal application is not merely an opportunity for 'forum shopping.'

64. The Court of Appeal in Republic v Mwalulu & others [57] addressing the question of disqualification of a judge stated: -

    i. When the 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 specifically be alleged and established.

ii. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the judge, magistrate or tribunal.

iii. The court dealing with the issue of disqualification is not; indeed, it cannot, go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself."

34. I agree fully with the findings of Mativo J (as he then was) and it behoves me to state that the petitioners have not placed any evidence before this court to warrant my recusal.

35. On the consolidation of this petition with ELRC Pet E073 of 2021 and E0160 of 2021 currently pending determination before Mbaru J, it is trite law that for an order of consolidation to be effected, parties ought to lay a basis on the similarity of the parties and issues raised in the other matters and demonstrate that the consolidation will serve to ensure the comprehensive determination of the matter, save judicial time and avoid conflicting being made decisions by the courts handling the matters.

36. The pleadings in the two petitions sought to be consolidated with this one have not been placed before this court. There has been no tangible reason put forth before this court to enable it determine whether consolidation is necessary.

37. In conclusion, I find that the petitioners have failed to prove the allegations of probable or perceived bias or to establish that any of the grounds set out in regulation 21(1) of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 are applicable in the instant suit to warrant my recusal. Further, the petitioners have not laid a basis to justify the consolidation of the present petition with ELRC Pet E073 of 2021 and E0160 of 2021.

38. I find the petitioners' application without merit. It thus fails and is dismissed with costs.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE