



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 244 OF 2019

IN THE MATTER OF: ARTICLES 3(1), 22, 23, 48, 50(1), 162(2)(a), 165(5), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 24, 27, 41(1), 47, 73, 75, 129, 153(4)(a), 279(1), 232, 249(1) & (2), 250(2), (3) & (4) AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 11(5),(6) & (7) OF THE PUBLIC AUDIT ACT NO. 34 OF 2015 AND SECTION 5 OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL THRESHOLDS FOR APPOINTMENT AS THE AUDITOR GENERAL

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE GOVERNMENT’S DECISION TO ABANDON THE RECRUITMENT OF THE NEW AUDITOR GENERAL AND TO RE-ADVERTISE THE VACANCY

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

V

THE NATIONAL EXECUTIVE OF THE REPUBLIC

OF KENYA..... 1ST RESPONDENT

THE SELECTION PANEL FOR THE APPOINTMENT OF THE

AUDITOR GENERAL.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY

RULING

1. After the close of hearing of the Petition on 4 February 2020, the Court directed that it would deliver the Judgment on notice.
2. The Court consequently gave notice of judgment for 26 February 2020 but the judgment could not be delivered because the office of the Honourable Chief Justice called for the file and by the morning of 26 February 2020, the file had not been returned to the Court.
3. When the file reached the desk of the Court on 27 February 2020, a fresh notice of judgment for 6 March 2020 was issued.

4. However, the failure to deliver judgment on 26 February 2020 took a tangent including the filing of an application by Mr Okiya (the Petitioner and now applicant), under a certificate of urgency seeking orders

1. ...

2. **THAT** the Hon. Court to declare a mistrial in these proceedings.

3. **THAT** in the interests of fairness and justice, this Honourable Court presided by the Honourable Mr. Justice Stephen Radido be pleased to recuse itself from hearing or rendering any judgment or ruling or directions in this matter.

4. **THAT** this Honourable Court be pleased to certify that the matter herein now raises substantial questions of law and forthwith refer the case to his Lordship the Chief Justice for the appointment of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165(4) of the Constitution.

5. **THAT** costs be in the cause.

5. The grounds advanced by the applicant in support of the application were that the decision by the Honourable Chief Justice to call for the file amounted to an interference with the independence of the trial Judge and was contrary to the rule of law; that the circumstances under which the Honourable Chief Justice called for the file were obscure and therefore raised serious doubts on the decisional independence of the judge as the Honourable Chief Justice had not responded to requests to explain under what circumstances the file was called for; that judicial independence required that judges be insulated from outside pressures or influences; that independence of the judiciary assures the public of confidence in the dispensation of justice and that there was a real likelihood of bias thus creating reasonable doubt in the minds of the public on the right to a fair hearing.

6. The applicant cited in further support of the application Rule 5 of the Judicial Code of Conduct and Ethics on disqualification of judicial officers where impartiality has been questioned.

7. According to the applicant, the Court would be advancing the cause of justice and the right to a fair hearing by granting the orders sought.

8. The 1st Respondent filed grounds of opposition to the application on 5 March 2020.

9. In the view of the 1st Respondent, the Honorable Chief Justice had administrative powers over the judiciary under Article 161(2)(a) of the Constitution, and in exercises of those powers had the authority to *suo moto* call for a file for purposes of giving directions.

10. In exercising the administrative powers to call for the file, the 1st Respondent contended, the Honourable Chief Justice would not be interfering with the decisional independence of a judicial officer(s).

11. Citing the authority of *Kalpana H. Rawal v Judicial Service Commission & 2 Ors* (2016) eKLR, the 1st Respondent asserted that the applicant had not demonstrated *reasonable apprehension of bias* using the test of a fair-minded and informed member of the public to warrant recusal.

12. On the limb of the application seeking that the file be referred to the Honourable Chief Justice to empanel an uneven number of judges, the 1st Respondent countered that the application had come too late in the day as the Issues raised in the Petition and interim orders issued therein had led to a paralysis in the public audit function.

13. Emerging from the above, the 1st Respondent contended that there was no factual or legal basis to declare a mistrial.

14. The application, the 1st Respondent affirmed was not only an abuse of the court process but was meant to delay the conclusion of the dispute contrary to the principle objective enshrined in this Court's establishing Statute.

15. The 2nd and 3rd Respondents opted to make oral submissions without filing any formal response to the application.

16. These Respondents took the position that there is a rebuttal presumption of impartiality on the part of a judicial officer(s) and that the applicant had not rebutted the presumption.

17. The applicant, according to the 2nd and 3rd Respondents had not established any iota of *conflict of interest* on the part of the Court as contemplated in *R v IEBC & 3 Ors ex parte Wavinya Ndeti* (2017) eKLR.

18. On the plea to declare a mistrial and refer the file to the Honourable Chief Justice to empanel an uneven number of judges, these Respondents asserted that the applicant had not met the test for certification set in *Okiya Omtatah & Ar v Ann Waiguru, CS, Devolution & 3 Ors* (2016) eKLR.

19. These Respondents, in the same fashion, were of the view that the application had come late in the day and was for dismissal.

20. In a brief reply, the applicant conceded that he had not alleged bias on the part of the Court, but reiterated that the decision of the Honourable Chief Justice to call for the file was an affront to the perceived judicial autonomy of the Court. Declaring a mistrial and referring

the file to the Honourable Chief Justice, the applicant maintained, would enhance public confidence in the administration of justice.

21. The Court has given anxious consideration to the application, the grounds advanced in support and opposition thereof, the oral highlights and the authorities cited.

Substantial questions of law warranting a Bench

22. The threshold for *certification* that questions posed in a dispute raises substantial points of law meriting the appointment of an uneven number of judges to determine is well settled (see *Okiya Omtatah & Ar v Ann Waiguru, CS, Devolution & 3 Ors* (2016) eKLR).

23. The applicant did not seek a certification at the onset of the proceedings that the questions raised in the Petition required more than one judicial mind to confront. It is after the close of hearing and on the throes of a judgment that he now seeks a referral.

24. The plea by the applicant must have been prompted by the circumstances leading to the Honourable Chief Justice calling for the file and causing the postponement of the delivery of judgment on 26 February 2020.

25. In the view of this Court, the mere assertion that there has been untoward interference with a judicial officer does not meet the test for *certification* that a case raises substantial questions of law meriting consideration by more than one judicial mind.

26. The Court would also agree with the Respondents that the application came too late in the day, and allowing it would run contrary to the obligation placed on the Court to expeditiously and proportionately determine disputes placed before it.

Recusal

27. The test for recusal of a judge was well set out in the *Kalpana Rawal* case (*supra*).

28. The test is one of *reasonable apprehension of bias* on the part of the judicial officer. The standard is that of a fair-minded and informed member of the public.

29. The applicant in the instant case has not alleged any bias or *conflict of interest* on the part of the judge. His major concern was the perception likely to be created in the public mind by the decision of the Honourable Chief Justice to call for the file just before the delivery of judgment without any disclosed reason for the decision.

30. The Court in the circumstances does not find much assistance in the *Kalpana Rawal* authority.

31. The Respondents, however, saw no probability of interference with the decisional independence of this Court because according to them, the Honourable Chief Justice could call for a file in the exercise of his administrative authority over the judiciary.

32. The right to a fair hearing and access to justice are foundational ingredients in our Constitutional democracy as are the principles underpinning judicial authority and independence of the judiciary.

33. These foundational norms have long been recognised universally under the principle of *open justice*.

34. The *open justice* principle envisages openness in judicial processes and transparency. The public should be able to participate in and understand judicial processes including the adjudication and determination of disputes. *Open justice* enhances democracy by assuring public confidence in the judicial adjudication of disputes.

35. Under the principle, the public and litigants should be able to fully access judicial records and/or files and keep track of the adjudication process at all times.

36. *Open justice* acts to ensure judicial officers behave *properly*. The conduct or behaviour of a judicial officer is underpinned by the oath of office.

37. In *R v Legal Aid* (1999) QB 966, Justice Woolf stated about *open justice*

This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.

38. In addition to the legal and statutory framework empowering the Honourable Chief Justice to call for a file, it is the view of this Court that under the principle of *open justice*, the Honourable Chief Justice has the *administrative authority* in the exercise of his administrative authority to call for a file pending before a Court but such decision ought to be made transparently so that litigants and the public know the reasons for such decision.

39. Undoubtedly, the Honourable Chief Justice's power as head of the judiciary to call for files and more so where complaints have been lodged with his office has legal underpinning and it is because of such underpinning that the office of the *Judiciary Ombudsperson* has been established and given prominence in the *Sustaining Judiciary Transformation Framework*. It would be expected that where there are routine complaints, the office of the Judiciary Ombudsperson which falls under the office of the Honourable Chief Justice would play its expected role.

40. However, that is a digression but what is of note is that like any other power or discretion, the power and or discretion should not be exercised irrationally, unreasonably, capriciously or unlawfully.

41. The applicant did not demonstrate that there had been an irrational, unreasonable or unlawful act of power or discretion on the part of the Honourable Chief Justice, and the Court should be slow to recuse itself from the adjudication seat, for the individual judicial officer must at all times keep in mind the sanctity and solemnity of the oath of office.

42. The applicant and the Interested Party wrote to the Honourable Chief Justice requesting to know under what circumstances the file was called for, but by the time of filing the application, no response had been made.

43. As a result, the applicant informed the Court from the Bar that he had petitioned the Judicial Service Commission to look into the lawfulness of the decision. Since those proceedings are pending, it would not be proper for this Court to delve any further on the issue.

44. The application is dismissed with no order on costs.

Delivered, dated and signed in Nairobi on this 12th day of March 2020.

Radido Stephen

Judge

Appearances

Petitioner in person

For 1st Respondent Mr. Nani Mungai instructed by Muriu, Mungai & Co. Advocates

For 2nd & 3rd Respondents Mr. Ogosso, Senior State Counsel/ Ms. Wangeci, State Counsel, Office of the Attorney General

For Interested Party did not appear

Court Assistant Judy Maina