



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO.2 OF 2018

(Before D. K. N. Marete)

PHILIP KIPSANG KEMBOI.....PETITIONER

VERSUS

SPEAKER, COUNTY GOVERNMENT OF KERICHO.....1ST RESPONDENT

COUNTY ASSEMBLY OF KERICHO.....2ND RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF KERICHO.....3RD RESPONDENT

COUNTY GOVERNMENT OF KERICHO.....4TH RESPONDENT

RULING

This is an application by way of Notice of Motion dated 22nd June, 2018 for orders that;

- a) *THAT this application be certified as urgent AND IN COMPLIANCE WITH THIS Court's Orders in the first instance AND the Respondents and one intended interested party be served on priority bases for its hearing.*
- b) *THAT the Petitioner/Applicant seeks the disqualification of the presiding judge, the Hon. D. K. NJAGI MARETE from hearing this Petition No. 2 of 2018.*
- c) *THAT this matter be placed before any JUDGE in the Republic of Kenya having a similar jurisdiction other than Hon. D. K. NJAGI MARETE for the hearing and determination of this matter.*
- d) *THAT the inclusion of the Intended Interested Party herein by the said Judge is null and void.*

The application is grounded as follows;

- I. *That the Petitioner's Constitutional guarantee of a fair trial by an independent and impartial court has dismissed irreparably.*
- II. *That HON. D.K NJAGI MARETE has openly in court taken sides in this matter.*
- III. *THAT its HON. D.K. NJAGI MARETE who informed the Petitioner in Court that there were adverse Orders he issued in Petition No.12 of 2017 that affects Petition Number 2 of 2018.*
- IV. *THAT the same HON. D.K. NJAGI MARETE granted leave to the intended interested party to*

be a party in this proceeding on his own Motion and contrary to the law.

V. *THAT there is doubt by conduct that HON. D.K NJAGI MARETE is prosecuting this matter on behalf of the Intended Interested Party.*

VI. *THAT the petitioner has never been a party to Petition No.12 of 2017 and neither has the intended Interested Party been a Party to Petition Number 2 of 2018 until Hon. D. K. NJAGI MARETE insisted that he be served.*

VII. *THAT there is no doubt that HON. D.K NJAGI MARETE issued the adverse orders in Petition Number 12 of 2017 legislating mechanisms and procedure for vetting the intended Interested Party in this matter.*

VIII. *THAT the said Judge has demonstrated widely biasim against the Petitioner/Applicant herein and sits to determine the issues raised against him for being biased and having issued Orders of Mandamus and quashing the proceedings in Page 41 of the committee of Appointment report (sic.)*

The Intended Interested Party opposes the application on the following grounds;

1. *That the application has been brought before court in bad faith, is incompetent, misconceived, bad in law and a waste of precious judicial time and resources as the applicant sought and was granted leave to file recusal proceedings in respect of the intended interested party's joinder application dated 7th June 2018 yet his application dated 22nd June 2018 now before court is for the Honorable Judge to disqualify himself from hearing the entire petition.*

2. *The application contains numerous errors and the applicants conduct of the whole matter is mischievous and amount to abuse of the court process.*

3. *The applicant on the face of the notice of motion dated 22nd June 2018 is a total stranger to these proceedings.*

4. *The applicant has made grave misrepresentation of the following fact of this matter;*

a) *In his prayer No. (d) he seeks to have purported inclusion of the interested party herein declared null and void yet this Honourable Court has not delivered its ruling to that effect.*

b) *In ground No.IV, the applicant erroneously states that the Honourable Judge has already granted leave to the intended interested party to (be?) joined as a party.*

5. *The applicant has not laid a basis for the recusal or disqualification of the Honourable Judge hearing the intended interested party's application for joinder in the petition and that even the perceived judicial bias alleged by the applicant herein is usually insufficient to justify disqualification (of) a Judge from presiding over a case and further that to justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason such as the judicial officer being a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.*

6. *Whereas the circumstances calling for recusal, for a Judge, are by no means cast in stone, there is a presumption that the Honourable judge who is already sworn to administer impartial justice, will carry out his oath of office and that the threshold for a successful allegation of perceived judicial bias is high.*

7. *The applicant has not specifically alleged and established the facts constituting bias and has not demonstrated that justice as between the parties will be compromised; that the due process of law shall not be realized, and that the profile of the rule of law in the matter in question is likely to be compromised.*

8. *The applicant has not demonstrated the Judge's partiality as would be perceived by well informed reasonable person, thoughtful observer who understands all the facts, and who has examined the record and the law and thus the unsubstantiated suspicion of personal bias or prejudice does not suffice.*

9. *The record for Petition No.12 of 2017 is available and once enjoined in the instant petition the intended interested party will demonstrate the correlation between the two petitions and indeed the parties' herein, save for the petitioner, were enjoined in the said other petition.*

10. *No prejudice will be suffered by the Petitioner herein if the orders joinder are granted.*

During the proceedings, counsel for the Intended Interested Party submitted that the 3rd and 4th respondents associated themselves with the Grounds of Opposition mounted by the said Intended Interested Party. They, (3rd and 4th respondents), have however filed a Replying Affidavit sworn on 11th July, 2018 where they submit and aver as follows;

- That the application is fatally defective and the application for recusal is not sustainable as it is not backed by facts and fails miserably to meet the threshold and grounds for recusal of a judicial officer.
- That the application is frivolous, vexatious and an abuse of the process of court and as such it should collapse like a house of cards.
- That the applicant is guilty of concealment of material facts in that Petition No. 12 of 2017 is in the public domain and the applicant's denial of his knowledge is a lie.
- The applicant was served with orders issued by this honourable court, an annexure of a Replying Affidavit in response to the petition. He can only be a busy body claiming ignorance of goings on in a county he claims to represent.
- That the judge in this court took oath of office and is committed his oath and would pronounce himself unbiased and is ready and willing to own up to his constitutional mandate of dispensing justice in matters falling within his jurisdiction.
- That every judge has a duty to sit, in a matter which he should sit and recusal should not be used to cripple a judge from sitting to hear a matter.
- That the duty to sit is buttressed by the fact that every judge takes an oath of office to serve impartially; and to protect, administer and defend the Constitution and that doctrine recognizes that having taken the oath of office, a judge is capable of rising above any prejudices and that the said doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.
- That the applicant has not established any valid grounds for recusal, factual or legal and this is an attempt to gain forensic or strategic advantages through delay and interruption of proceedings and the court should not accede to the fiasco camouflaged as bias.
- That recusal is not a sword to be wielded by the applicant to steal a match and deny a chance to other parties to participate in this cause and this is impactive and detrimental to the interests of the entire population of the county.
- ...that the *valid basis for recusal is bias (ness?) on the part of the Judicial Officer, person or extra judicial reason such as being a party to the suit, being related to a party of the suit, being a material witness in the matter, having financial interest in the outcome of the matter or has previously acted as counsel for one of the parties. The Applicant herein has not demonstrated any of the above mentioned grounds and that the said grounds ought to be sufficiently proved and*

not on mere allegations.

- The applicant has not established facts constituting bias or demonstrated the justice among the parties would be compromised, or that due process of law shall not be realized. He has also not demonstrated that the rule of law in the matter in question is likely to be compromised.
- The applicant has not demonstrated the judge's partiality as viewed by a well informed reasonable man, a thoughtful observer who has examined the record and the law and therefore fails in this endeavour.
- That the applicant has made grave misrepresentation in the application by alleging that the court has already granted leave to the Intended Interested Party to be enjoined whereas this application still pends determination in court.
- That this application lacks merit, has non disclosures and is brought out in bad faith and therefore an abuse of the court process. It is intended to delay delivery of justice and ought to be dismissed with costs to the respondent.

The parties with the exception of the 3rd and 4th respondent's failed to file written submissions in support of their respective cases. However, the 3rd and 4th respondent's in their elaborate submissions dated 7th November, 2018 came out boldly in an analysis of the law and practice relating to recusal or disqualification of judicial officers.

In this, the 3rd and 4th respondent's sought to rely on the authority of **Kalpna Rawal vs. Judicial Service Commission & 2 Others (2016) eKLR** where the court observed as follows;

An application for recusal of a judge in a case 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...(Empahsis added)

They further sought to buttress their case by relying on the authority of **Attorney General vs. Prof. Anyang Nyong'o & Others (EACJ), Application No. 5 of 2007** where the court observed as follows;

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 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.

A re-echo of this in the same matter came out as follows; (**EACJ Application No.5 of 2007 Attorney General of the Republic of Kenya and Prof. Anyang' Nyong'o & 10 Others**)

Asking a judge to recuse herself is a serious matter. One who comes to court to ask the presiding judge in a case to recuse herself must come fully and properly armed with all the necessary material to support such an application. This is so because it is a matter that goes to the core of the administration of justice. We are all familiar with the principle that just must not only be done but must be seen to have been done.

This is further illustrated in the authority of **Galaxy Paint Company Ltd v Falcon Guards Ltd [1999] eKLR**, also relied on by the 3rd and 4th respondent where the Court of Appeal had this to say on this

issue;

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestion of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

The respondents climax their presentation by revisiting the authority of **Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007** where the court had this to say;

“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)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.”

The law and practice on recusal is now settled. We may not have much more to add. This has been fully expressed and articulated in the respective cases of the parties, particularly the Intended Interested Party and the 3rd and 4th respondents above cited.

This application is suspicious. From day one, it is not clear as to where the recusal is intended to apply. Is it the petition or the application for joinder dated 7th June, 2018. The application was conscribed during proceedings touching on the application for joinder. This court issued directions for an application for recusal under these circumstances. What we have on record and for determination is different. It touches on the entire suit.

The application is also riddled with misrepresentation and half truths. This court has not made any determination on joinder, or at all. It has hesitated, her powers to do this *suo moto* notwithstanding. This is on account of the tempo in which the application and suit has so far arisen. It is roughshod. The application appears a disruption of proceedings in this cause. This has been the order of the day in the proceedings. It is public knowledge and does not require any genius to fathom.

I agree with the respondent's. This application falls short of the ingredients of an application for disqualification of a judicial officer. It does not even meet the basics for such applications. There is no demonstration of the allegations of bias subscribed and these remain mere allegations. Courts must be protected to partake their duty to society. This is a natural right to human kind.

I further agree with the respondents and Intended Interested Party that this application is desolate, frivolous, vexatious and an abuse of the process of court. It is bad in law and lacks merit whatsoever. It is an unnecessary endeavor to muddle and confuse the issues for determination. It comes out as an attempt to scuttle and needlessly delay the outcome of this suit. It must be combated.

I am therefore inclined to dismiss the application with costs to the respondents and Intended Interested Party.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyaingiri instructed by Nyaingiri & Company Advocates for the petitioner/applicant.
2. Mr. Ochieng instructed by Sila Munyao & Company Advocates for the 1st and 2nd respondents.
3. Mr. Lemayang instructed by Kamau, Langat & Company Advocates for the 3rd and 4th respondents.
4. Mr. Lang'at instructed by Onesmus Langat & Company Advocates for the Intended Interested Party.