REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 2046 OF 2013

(Before D.K.N. Marete)

BENJAMIN LANGWEN……..……...…….CLAIMANT

Versus

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY……RESPONDENT

RULING

This is an oral application for recusal by the claimant/applicant. It was firstly intimated after ruling of court made on 17th March, 2014.

The matter came to court on 2ndApril, 2014 when the claimant insisted and submitted that the respondent makes a formal application for recusal. When it came for hearing on 1st July, 2014, the claimant chose not to take sides in the matter and therefore this oral application by the respondent.

Counsel for the respondent submitted that the basis of the application is bias or the apprehension or likelihood of bias. The applicant was quick to point out that this court is not on trial or impugned but the application rests on the doctrine of justice being done and also being seen to be done. It is on the issue of apprehension of bias but not actual bias. The applicant also emphasizes that this application comes in despite the fact that they are indeed the winners of the initial application in this cause.

Counsel further submits that the success or failure of the application before court lies on the sense of justice of the presiding judge of the court and his fidelity to the law. This is also based on the judge's commitment to the principle that litigants should have confidence in courts as arbitrators of disputes before them. He also submits that in the instant case, he may have won the battle but feared he may loose the war.

The subject of the recusal has been variously handled by our courts. And having analysed the parties submissions on the subject, I find that the next recourse is an analysis of the general principles on recusal. These were analysed by my brother, Ongaya, J., in the authority of **Joseph Maina Theuri - vs – Gitonga Kabugi & 3 Others [2013] eKLR.**

> *The principles that guide the courts in applications for recusal have largely been discussed in the authorities that the parties submitted in this case. The cases essentially dealt with cases of causes of recusal rooted in extra-judicial sources such as a disabling conflict of interest of the presiding judicial officer, a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary to include that the presiding judge made interlocutory orders in favour of the claimant and against the respondents despite the respondent's opposition; the respondents are not satisfied with some of the interlocutory orders; allegedly that the judge may not have*

considered some of the material before the court; and generally that the respondents are not happy with the interlocutory orders.

This court also had occasion to analyse the subject in the case of **Kenya National Union of Nurses –vs- Kenyatta National Hospital, Industrial Cause No. 756 of 2012** where in borrowing from other authorities thrashed the subject matter as follows;

*Thus, in **Tumaini –V- Republic [1972] E.A 441** cited for respondents, the appellant was convicted of fraudulent false accounting and theft by a public officer. On appeal, he alleged he had not received fair trial because the trial magistrate was a friend to the appellant's superior officer. The magistrate had also transferred the case from the court it had been originally allocated to. The High Court as the appellate court held that in considering the possibility of bias, it was not the mind of the judge which is considered but the impression given to reasonable persons and in that case there existed a real likelihood of bias.*

*The respondents also referred to **Jasbir Singh Rai &3 Others –V- Tarlochan Singh Rai & 4 Others [2013] eKLR,** where it was considered that if the nature*

of the interest of the presiding judge is such that public confidence in the administration of justice required that the implicated judge disqualifies himself, it was irrelevant that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any suspicion of bias on the fact of the particular case.

*For the claimant, it was submitted that the presiding judge in the instant case suffered no disabling interest and the court was referred to the opinion in the ruling by Kariuki, J., in **R P M – V – P K M [2011] eKLR** on the applicable principles. In that case, the court pointed out that in the Constitution, a trial must accord parties a fair hearing, parties have a right for justice not to be delayed, the right for justice not to be administered without undue regard to procedural technicalities and that the national values and principles in Article 10 of the Constitution bind a judge when applying or interpreting the Constitution or any other laws (as per Articles 10, 50(1) and 159(2) of the Constitution). It was further submitted for the claimant that the applicants had not established parameters set out in rule 5 of the Judicial Service Code of conduct and Ethics on disqualification and as referred to in the cited case. The rule states that a judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which:*

a. *he has a personal bias or prejudice concerning a property or his lawyer or personal knowledge of facts in the proceedings before him;*

b. *he has served as a lawyer in the matter in controversy;*

c. *he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or*

d. *he, or his spouse, or a person related to either of them or spouse of such person or a friend is property to the proceedings.*

*The claimant also referred the court to the opinion in **Republic –V- Mwalulu & Others [2005]1KLR 1 at 4-5**, where it was stated that in applications like the present case, sight must not be lost of the fact that losing litigants might be more inclined to explain their loss on the alleged wickedness of other people rather than on the weakness of their own case.*

*The court finds the grounds of inter alia impartiality and bias unsubstantiated and in the circumstances, hollow. They are especially based on falsehoods and cannot therefore support a case for recusal and I find as such. Ongaya, J., in the **Joseph Maina Theuri** matter (Supra) observes thus;*

The court considers that the judge carries an ethical obligation for recusal if the judge knows the reason

to do so. Where no such reason is known or is not established, the court holds that the judge similarly carries an ethical obligation to hear and determine the case at hand. Thus, a judge holds an obligation to hear and determine maters brought before the court until a valid basis for recusal is established, and, threshold and compelling obligation for recusal of a judge in an appropriate case in every measure, equals to the threshold and compelling for hearing and determining the case for which the presiding judge is vested with the jurisdiction to decide and in the absence of a valid disabling reason against the judge. Thus, in deciding for or against recusal, the presiding judge must carefully balance the thin line separating the two ethical obligations.

The court has again carefully considered the grounds the applicants have advanced for recusal in this case. It has not been shown that the judge has an entrenched or deep-rooted favouritism or antagonism for or against any of the parties or in the subject matter before the court in the instant case and, spreading beyond the court's legitimate duty to judge; it has not been shown that the parties have been denied the due process of justice including the rights to apply for review or to appeal or to be accorded the relevant rules of procedure to urge their respective cases.

The claimant/respondent agrees with the applicant as relates to the finding of Majanja, J. in ***Okiya Omtata – vs – Attorney General Petition, No. 451 of 2012*** *whereby the right to a party to recusal is analyzed as hereunder;*

> *The right of a fair hearing an independent impartial and unbiased tribunal is enshrined in Article 50 of the Constitution. This right is buttressed by Article 159(2) (a) which requires that judicial authority should be guided by the principle that justice shall be done to all, irrespective of status and Article 160 (1) which emphasizes the independence of the judiciary.*
>
> *At common law, the rule against bias, the nemo judex rule underpins the fair process and public confidence in the administration of justice.*
>
> *It is within this context that this application should be determined.*

but also urges the court to appreciate the seriousness of an application for recusal by a party in ***L.H. Limited & 2 Others – vs – J.W. & 4 Others*** *where the court made the following observation;*

> *Requesting a judge to recuse himself is a serious matter going to the heart of the administration of justice and that is why the court of Appeal in Galaxy Paint Company Ltd v Falcon Guards Limited Civil Appeal No. 219 of 1998 (Unreported) stated that, "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 suggestions 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."*
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> *Further Justice Mabeya held in paragraph 5 that: "It would be disastrous if this were to be the practice. The Administration of justice through the court would be adversely affected ….. mischievous parties would obtain disqualification of judges at ease.*

In the instant case, the fact of the matter is that on disposal of an application brought in under a certificate of urgency dated 8th January, 2014, a case for recusal springs out. A clear observation of the manner this comes in and the grounds thereof are indicative of apprehension not of bias as such but of losing the cause. The claimant/applicant submits as hereunder;

…it is a grave matter of the conscious for a party to make an application of this nature, more so bearing in mind that we won the claimant's application for stay of the recruitment dated 8th January, 2014. This is an indicator of how deep seated this apprehension is. We won the battle but fear we shall loose the war.

I also wish to state that this court is not on trial . The integrity of the court is not impugned. It is inged

upon the doctrine that justice ought to be done and be seen to be done. Occasion may not arise for me to raise the grounds of our application for the court is not on trial. This is an apprehension of bias: not actual bias.

It would appear that the applicant has his own agenda in so far as the application is concerned. The application and the grounds thereof do not meet the legal criteria for a case for recusal of a judge. From them actual words of counsel for the applicants above cited, the issue is more of an apprehension of loss of the application but not necessarily bias. The application is therefore a camouflage for other things and does not meet the parameters of the law on recusal. I am therefore inclined to dismiss this application with no orders as to costs.

Delivered, dated and signed the 30th day of September 2014

D.K. Njagi Marete

Judge

Appearances

1. Mr. Kalii instructed by Nyaberi & Co. Advocates for the Respondent/Applicant.

2. No participation/opposition by the Claimant.