



REPUBLIC OF KENYA



**Attorney General v Ndi & 73 others (Petition 12 (E016) of 2021)
[2021] KESC 15 (KLR) (Civ) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 15 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL
PETITION 12 (E016) OF 2021
PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
NOVEMBER 9, 2021**

BETWEEN

ATTORNEY GENERAL PETITIONER

AND

DAVID NDII & 73 OTHERS RESPONDENT

*(Being an application for the recusal of two of three
judges by Isaac Aluochier, the 21st Respondent)*

The duty of a judge to sit does not amount to the derogation of the right to a fair hearing, where an application for recusal was speculative

Recusal of three judges was sought by a party that said that he had filed a petition before the Judicial Service Commission (JSC) against them. The applicant said that the sitting of those judges would violate the right to a fair trial. The said JSC petition was based on alleged gross misconduct and breach of the applicable code of conduct for judges. The court held that there was no evidence that a such petition had been filed before JSC. It also held that a specific allegation that would impair the judges in the handling of the matter had not been set out. Under the circumstances, the court held that the issue on violation of the right to a fair trial did not arise.

Reported by Ribia John

Judicial officers – recusal – recusal of judicial officers – where judicial officers had an alleged pending petition filed against them at the Judicial Service Commission by one of the parties before the court - whether judicial officers could recuse themselves on grounds that a complaint or a petition had been lodged against the judicial officers at the Judicial Service Commission – Constitution of Kenya, articles 73(2)(b) and 166(2)(c).

Constitutional Law – fundamental rights – right to fair trial – right to fair hearing – recusal - where judicial officers had an alleged pending petition filed against them at the Judicial Service Commission by one of the parties before the court - what was the distinction between the right to fair trial and fair hearing - whether the necessity and duty of judicial officers to sit where the judicial officers had a petition filed against them by an applicant at the



Judicial Service Commission amounted to the derogation of the right to fair hearing of the applicant - Constitution of Kenya, articles 25 and 50.

Brief facts

The 21st respondent (applicant) sought the recusal of Honourable Justices Mohammed Khadhar Ibrahim, Smokin Wanjala and Njoki Ndungu Susanna from hearing and determining the petition of appeals arising from the judgment of the Court of Appeal delivered on August 20, 2021 in Civil Appeal No. E291 of 2021 as consolidated with Civil Appeal Nos. E292 of 2021, E293 of 2021 and E294 of 2021.

The applicant contended that it had lodged with the Judicial Service Commission a petition on April 6, 2016 for the removal of six judges on account of a breach of the code of conduct prescribed for judges and for gross misconduct which petition was still pending, the Judicial Service Commission being non-responsive leading the applicant to institute Petition No.301 of 2016 *Isaac Aluoch Polo Aluochier v Ahmed Issack Hassan & 24 others* [2016] eKLR. The application was opposed on grounds that the application was an afterthought, ill-conceived and intended to convolute and delay the hearing and determination of the petition; that the applicant had not demonstrated and/or adduced any such evidence in support of the allegations on bias by any of the cited judges and that the application was self-defeating for the reason that whereas the applicant cited three judges for recusal he sought recusal of only two of them. Lastly, the application was opposed on grounds that the application offended the doctrine of the duty of a judge to sit.

Issues

- i. Whether judicial officers could recuse themselves on grounds that a complaint or a petition had been lodged against the judicial officers at the Judicial Service Commission.
- ii. Whether the necessity and duty of judicial officers to sit where the judicial officers had a petition filed against them by an applicant at the Judicial Service Commission amounted to the derogation of the right to fair hearing of the applicant.

Held

1. The instant court established from the Judicial Service Commission the existence of the applicant's petition against the three judges. The Judicial Service Commission reported that it did not have evidence of ever having received any such petition in its records. The three judges were similarly not aware of the existence of any petition for their removal filed with the Judicial Service Commission by the applicant. The applicant had not adduced any evidence as to the nature and contents of his alleged petition to the Judicial Service Commission against the judges to enable the instant court determine the extent to which the applicant was aggrieved against each of the judges. In the absence of the petition by the applicant against the judges before the court either directly or through the Judicial Service Commission, the possibility of bias or impartiality was farfetched and speculative.
2. The applicant had not spelt out any specific allegation that was likely to impair the judges in dealing with a matter against the applicant as the applicant indicated willingness to have either of the three judges he was accusing to be part of the bench and to have his petition resolved through alternative dispute resolution mechanisms. The applicant having instituted his petition against the judges to the Judicial Service Commission, the same should have been allowed to take its course as the Judicial Service Commission was an independent constitutional body and operated separately from the Supreme Court.
3. Article 25 of the Constitution protected the right to fair trial under article 50(2) of the Constitution which only applied to accused persons in criminal proceedings. That was distinguishable from fair hearing alluded to by the applicant under article 50(1) of the Constitution. The doctrine of necessity and duty to sit necessitated the instant matter being heard on merits. That was owing to its public interest nature. None of the other parties in the instant matter had supported the instant application. The Supreme Court under article 163(7) of the Constitution and section 3 of the Supreme Court Act



was mandated to make authoritative findings and settle points of law such as those raised in the instant appeal.

4. The issue as to whether the necessity and duty to sit amounted to the derogation of the right to fair hearing under article 50(1) of the Constitution did not arise under the circumstances. The judges having been appointed in their position under the Constitution including satisfying the provisions of article 73(2)(b) and 166(2)(c) of the Constitution, their impartiality and integrity could only be negated following due process which the petitioner alleged to have invoked but which was inconclusive.

Application disallowed.

Orders

No order as to costs.

Citations

Cases

1. *Shollei, Gladys Bossv Judicial Service Commission & another* Petition 34 of 2014; [2018] eKLR — (Followed)
2. *Rai, Jasbir Singh & 3 others v Turlochan Singh Rai & 4 others* Petition 4 of 2012; [2013] eKLR — (Followed)

Statutes

1. Constitution of Kenya, article 25, 50(1)(2); ; 66(2)(c); 73(2)(b); 159(2)(c); 163(7) — (Interpreted)
2. Supreme Court Act, 2011 (Act No 7 of 2011) section 3 — (Interpreted)

Advocates

None mentioned

RULING

1. Upon perusing the notice of motion application dated 26th October 2021 and filed on 27th October 2021 by Isaac Aluochier, the 21st respondent herein, seeking recusal of honourable Justices Mohammed Khadhar Ibrahim, Smokin Wanjala and Njoki Ndungu Susanna from hearing and determining the petition of appeals arising from the judgment of the Court of Appeal delivered on 20th August 2021 in Civil Appeal No E291 of 2021 as consolidated with Civil Appeal Nos E292 of 2021, E293 of 2021 and E294 of 2021;
2. Upon reading the grounds on the face of the application; the applicant's supporting affidavit sworn on 26th October 2021; the written submissions by the applicant dated 26th October 2021; the affidavit and submissions filed on 27th October 2021, respectively, and in particular the grounds in support of the application, mainly that:
 - a. The applicant lodged with the Judicial Service Commission a petition on 6th April 2016 for the removal of six judges on account of a breach of code of conduct prescribed for judges and for gross misconduct which petition is still pending, the Judicial Service Commission being non responsive leading the applicant to institute Petition No 301 Of 2016 *Isaac Aluoch Polo Aluochier v Ahmed Issack Hassan & 24 others* [2016] eKLR.
 - b. The applicant's right to fair hearing under article 50(1) of the Constitution is non derogable and has to be balanced with the same right for other parties in arriving at a just conclusion which right cannot be superseded by the doctrine of necessity and duty to sit as enunciated by the court in *Jasbir Singh Rai & 3*



others v Turlochan Singh Rai & 4 others [2013]eKLR and *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR.

- c. It is in the interests of the administration of justice that the court be objective and impartial, pursuant to article 73(2)(b) and article 166(2)(c) of the Constitution requiring each judge to observe the guiding principles of leadership and integrity including objectivity and impartiality in decision making;
3. And considering the grounds of opposition dated 1st November 2021 filed by Paul Mwangi & Company Advocates on behalf of the 20th respondent, Building Bridges to a United Kenya, National Secretariat (BBI Secretariat) and Raila Amolo Odinga, the 23rd respondent. The said respondents oppose the application on *inter alia* the following grounds:
 - a. The application is an afterthought, ill-conceived and intended to convolute and delay the hearing and determination of the petition;
 - b. The applicant has not demonstrated and/or adduced any such evidence in support of the allegations on bias by any of the cited Judges.
 - c. The application is self-defeating for the reason that whereas the applicant cites three judges for recusal he seeks recusal of only two of them.
 - d. The application offends the doctrine of the duty of a judge to sit.
4. And further considering the applicant's further submissions dated and filed on 3rd November 2021 in which he proposes that pursuant to article 159(2)(c) of the Constitution, the appeals instead be heard and determined by arbitration conducted under the supervision of the court, the modalities of which can be dealt with during the case management conference.
5. The court took the liberty to establish from the Judicial Service Commission the existence of the applicant's petition against the three judges. The Judicial Service Commission reports that it does not have evidence of ever having received any such petition in its records. The three Judges are similarly not aware of the existence of any petition for their removal filed with the Judicial Service Commission by the applicant.
6. In the above context, we make the following determination:
 - a. The applicant has not adduced any evidence as to the nature and contents of his alleged petition to the Judicial Service Commission against the judges to enable the court determine the extent to which the applicant is aggrieved against each of the judges.
 - b. In the absence of the petition by the applicant against the judges before this court either directly or through the Judicial Service Commission, the possibility of bias or impartiality is farfetched and speculative.
 - c. The applicant has not spelt out any specific allegation that is likely to impair the judges in dealing with a matter against the applicant as the applicant indicates willingness to have either of the three judges he is accusing to be part of the bench and to have his petition resolved through Alternative Dispute Resolution mechanism;



- d. The applicant having instituted his petition against the judges to the Judicial Service Commission, the same should be allowed to take its course as the Judicial Service Commission is an independent constitutional body and operates separately from the Court. Indeed, the applicant indicates that he took out proceedings in *Isaac Aluoch Polo Aluochier v Ahmed Issack Hassan & 24 others* which proceedings we have not had sight of and in any event are not subject of our determination.
- e. Article 25 of the Constitution protects the right to fair trial under article 50(2) of the Constitution which only applies to accused persons in criminal proceedings. This is distinguishable from fair hearing alluded to by the applicant under article 50(1) of the Constitution.
- f. The doctrine of necessity and duty to sit as set out in *Jasbir Singh Rai & 3 others v Turlochan Singh Rai & 4 others* [2013]eKLR and *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR and appreciated by the applicant necessitates the present matter being heard on merits. This is owing to its public interest nature. We note that none of the other parties in this matter has supported the present application, and as rightly noted by the 20th and 23rd respondents, this court under article 163(7) of the Constitution and section 3 of the *Supreme Court Act* is mandated to make authoritative findings and settle points of law such as those raised in the appeal before the court.
- g. The issue as to whether the necessity and duty to sit amounts to the derogation of the right to fair hearing under article 50(1) of the Constitution does not arise under the circumstances.
- h. The judges having been appointed in their position under the Constitution including satisfying the provisions of article 73(2)(b) and 166(2)(c) of the Constitution, their impartiality and integrity can only be negated following due process which the petitioner alleges to have invoked but which is inconclusive.

7. Having found the foregoing determination, we make the following orders:

- i. The notice of motion application dated 26th October 2021 lacks merit and is hereby disallowed.
- ii. There shall be no order as to costs.

8. Orders accordingly.

DATED and DELIVERED at NAIROBI this 9th day of November 2021

P.M. MWILU

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DEPUTY CHIEF JUSTICE

& VICE PRESIDENT

OF THE SUPREME COURT COURT

M. K. IBRAHIM



.....
JUSTICE OF THE SUPREME COURT
NJOKI NDUNGU

.....
JUSTICE OF THE SUPREME COURT
I. LENAOLA

.....
JUSTICE OF THE SUPREME COURT
W. OUKO

.....
JUSTICE OF THE SUPREME COURT
I certify that this is a true copy of the original
REGISTRAR,
SUPREME COURT OF KENYA

