THE REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 653 OF 2012

JOYCE N. SIMITU ……..CLAIMANT

VERSUS

STEPHEN O. MALLOWAH ……1ST RESPONDENT

LAWRENCE M. BOKORO ……..2ND RESPONDENT

ANTI-COUNTERFEIT AGENCY ……3RD RESPONDENT

RULING

This an application dated 16th May 2013 brought by Notice of Motion under Section 3A of the Civil Procedure Act, section 12 and 20 of the Industrial Court Act and all enabling provisions of the law. This application is brought under Certificate or Urgency seeking for orders that;

1. The Hon. Justice Monica Mbaru handling this matter do disqualify herself from proceedings with the matter for giving a biased ruling against the applicant on 5th October 2012
2. Those directions are issued on another judge to handle the matter forthwith in the interests of justice.

This application is supported by the Affidavit of Joyce Simitu the claimant herein on the basis and grounds that

1. *That by an application dated 20th April 2012 under Certificate of Urgency sought orders against the 1st and 2nd respondents from subjecting her to unfair disciplinary action and from discriminating or intimidating her in the course of her duties which orders were granted by Hon. E.K. Mukunya on the same date*
2. *That the respondents subsequently failed to comply with the orders and the applicant subsequently made an application dated 2th April 2012 again under Certificate of Urgency seeking orders that contempt proceedings be started against the 1st and 2nd respondent and that they be jailed or fined for failure to comply with court orders*
3. *That the Hon. Justice Mukunya issued some of the orders as prayed on the same date ordering the applicant access to her office and that the Officer Commanding Police Station Nairobi to ensure their enforcement*
4. *The after the Hon. Justice Mukunya stopped handling the matter and the contempt proceedings were heard by Justice Monica Mbaru*
5. *That on the 5th October 2012 she made a ruling dismissing the application for commencement of*

contempt proceedings against the 1st and 2nd respondents

6. *That by failure to find that the 1st and 2nd respondents were in contempt of court, the judge acted in favour of the respondents and the applicant is now very apprehensive that justice may not be done should she continue handling the matter*
7. *That by the Judge disqualifying herself and another judge taking over the matter, the respondents will not be prejudiced in any manner whatsoever and that it is in line with the overriding objective of dispensing justice that these orders be granted*
8. *It is fair and just to grant the orders sought.*

These grounds form the bulk of the averments of the affidavit attached to the application. That the contempt proceeding were exparte and to the dismay of the applicant the court rejected her application despite the blatant disregard of the court orders in writing by the respondents, evidence of which was produced in court but the court proceeded to reject this evidence and ruled against the applicant on 5th October 2012 on the commencement of contempt proceedings. That as a result the court clearly favoured the respondents despite their disregard of the court orders and thus the applicant has become very apprehensive that justice may not be done in this matter unless the judge disqualify herself. That by the court granting the orders sought the respondent will not be prejudiced in any way and another judge be assigned who will not only be impartial but also appear impartial.

The respondents on the other hand filed their Grounds of Opposition to the application dated 20th may 2013 on the grounds that the application is bad in law, fatally flawed and that the applicant failed to lay any sound basis on which justification may be found for seeking to have the judge disqualify herself and that the application is a ploy and attempt to intimidate the court and the Judge by misrepresenting facts in alleging that the application of 26th April 2012 was an application to start contempt proceedings.

The Respondent further opposes the application on the grounds that the applicant has concealed material facts in failing to annex the ruling or decision of the Hon. Judge which they allege they are aggrieved or meet the threshold or disclose any tangible grounds upon which the court can be asked to disqualify itself and that a decision made by a court of competent jurisdiction without any other or further overt act is not sufficient ground to cause disqualification and thus the application before court is an affront to justice and direct prejudice to the litigants and the court itself. That the applicant fails to state what, if anything the Hon. Judge did or failed to do as required by her mandate and office and as such the application lacks merit.

The subject of a judge disqualification is not new to Kenyan courts; this has been a subject of many courts and jurisdictions all over the world. Where used in its strict sense, disqualification of a judge from a matter has typically been reserved for situations which involve the statutory or constitutional mandated removal of a judge, upon a request of a moving party as against a request for recusal which is traditionally been used to refer to a judge to stand down from a matter voluntarily. Therefore to ask a judge to disqualify oneself, clear constitutional and statutory requirements not met by the judicial officer must be outlined and the principle here is that judges should be fair and impartial with good examples being that a judge should not participate in a matter in which a litigant is his or her friend, a kinsman or someone whom is personally disliked to the judge. There must be a legitimate basis for a party to enjoy such provisions by application of statute or the constitution and mere suspicions or fear for bias is no basis enough to warrant a judge disqualification in a matter.

However there has been an expansion of the judicial disqualification right where a party show a good cause for disqualification of a judge which can be used in a disqualification motion. In addition to a judge's pecuniary interest in a matter it must be demonstrated that there is likelihood of bias by the judge having an interest in the outcome of a matter or proceedings and therefore prejudiced the law and

facts of the case or has improperly come into possession of knowledge of disputed evidentiary facts; has engaged in improper ex parte communications; or previously acted for one of the parties or has made impermissible comments regarding the proceedings; or has engaged in improper behaviour in conducting it.

This has led to formulation of statutes and constitutional provisions which outline the parameters of judicial impartiality. It has been a topic of wide discussion and even ended in the formulation of what is now commonly known as the Bangalore Principles. Large texts have expounded on the impartiality principles. And while parties are not entitled to a judge with a liberal or generous attitude, it is generally agreed, at least, that they are entitled to nothing less than a neutral and detached decision-maker, operating in an atmosphere of total fairness and impartiality. Indeed, judicial impartiality has been considered to be the keynote of chapter 10 of the Kenyan Constitution. Where under Article 166 the President in appointing judges of the superior courts **shall** make such an appointment from persons who have a high moral character and impartiality. At Article 166 (2) (c);

*(2) Each judge of a superior court **shall** be appointed from among*

Persons who—

(a)

(b)

(c) Have a high moral character, integrity and impartiality. [emphasis mine].

These are mandatory provisions as set out under the Constitution of Kenya.

While the right to seek judicial disqualification is intended only as guarantee to litigants of the right to a fair and impartial trial or hearing, the same should not be used as a means for improving their odds with another judge who may be more receptive to their cause. The obvious potential for abuse is intrinsic in making judicial disqualification widely available to litigants; the same should be used upon good reason and upon one warning oneself of the danger of abuse and the availability of other judicial action like right of appeal or right of review. Therefore before making or moving a court with a disqualification motion a party or advocate must apply and exercise the duty of reasonable inquiry into the matter. The advocate responsibility being that of a reasonable inquiry under the circumstances must be satisfied. This must be done with an objective mind to ensure the accuracy of information before it is presented to court.

Consequently, while advocates who use professional care and circumspection in exercising the right to seek judicial disqualification should not have to be apprehensive of chastisement or penalties for having courage to raise questions as to a judge's disqualification to preside, but on the other hand a motion to disqualify does not offer such an advocate safe haven for taking aimless shots at a judge, or filing frivolous motions, and because this is so, such an advocate is well adviced to be circumspect both by seeking judicial disqualification in the first place, and how he characterises the need for disqualification when he does.

As pointed out by the Respondents in their submissions, this is a subject that the Supreme Court has already gone into in the case of ***Jasbir Singh Rai and 3 Others versus Tarlochan Singh and 4 Others, petition No. 4 of 2012 (2013) eKLR*** where the 5 judges seating were confronted with the questions as to whether a judge as a matter of personal conviction or of ethical considerations, can

recuse himself/herself from decision making and how the Court should guide itself on the issues of recusal in light of unique position to the integrity provisions in the Constitution and went on to hold;

According to the definition in the Black's Law dictionary, it was evident the circumstances calling for a recusal for a judge are by no means case in stone. The perception of fairness of conviction of moral authority to hear the matter was the proper test of whether or not the non-participation of the judicial officer was called for. The objective view in the recusal of a judicial officer is that

a. *Justice as between the parties be uncompromised;*
b. *The due process of law be realised and be seen to have had its role and lastly;*
c. *The profile of the rule of law in the matter in question is seen to have remained uncompromised.*

This was a case for recusal as unlike the case for disqualification. One is voluntary the other moved by the party seeking disqualification. But the principles applicable in both scenarios apply and I note the Supreme Court Justices went on to hold;

[It must be] invoked for good cause and it is not to be invoked without weighing the merits of such invocation against the constitutional burdens of the court and the public interest.

Similarly, the superior courts have a constitutional duty to undertake and only for good cause should a party apply or move the court upon reasonable inquiry to disqualify itself. This was buttressed by the citation from the Court of Appeal decision in ***Republic versus Mwalulu and 8 Others [2005] eKLR*** where the Judges of Appeal at Page 5 the case of ***Metropolitan Properties Co. (FG.C) Ltd versus Lannon and others (1969) 1 Q.B.***

That being the position as I see it when the courts in this country are faced with such proceedings as these (i.e. proceeding 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 be produced 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 fact constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinise the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge.

In the case of ***R. versus S. (R.D), (1997) 118 CCC, 353*** the judge held that courts have recognised that there is a presumption that judges will carry out their oath of office with due diligence;

… this is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.

A reasonable litigant should take these considerations into account when making an application for a disqualification of a judicial officer in a matter. The presumption in favour of a judges' impartiality must therefore be taken into account whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased. This is simply because absolute neutrality on the part of a judge can hardly if ever be achieved. In the words of **Benjamin N. Cardozo in *The Nature of the Judicial Process (1921) at 12 to 13;***

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives

coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherent instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social need …. In this mental background every problem finds its setting. We may try to see things objectively as we please. Note the less, we can never see them with any eyes except our own. … deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habit and convictions, which make the person, whether she or he be the litigant or judge.

Like in this instant case, the above decision was made in contempt proceedings. I would thus find that these are principles applied over a wide number of cases and scenarios and not specific to the current case and application of the applicant. What the court can only do is to examine the facts which are alleged to show bias and from those facts drawn an inference, any reasonable and fair-minded person would do, that the judge is biased or likely to be biased. What I have before me is allegations that the applicant is '… ***apprehensive that justice may not be done …'*** based on the court ruling against the applicant in a contempt application that was ex parte.

So why should this court disqualify itself from hearing this matter" I note this application is brought under the general provisions of the Civil Procedure Act section 3A and the Industrial Court Act sections 12 on jurisdiction and general powers of this court. It seems the only reasons from the application and affidavit of the applicant is this apprehension that justice may not be done. No reason of impartiality is cited or any other impropriety of the court in arriving at the decision cited as the source of the apprehension. This is not a constitutional or legal basis for a court to disqualify itself in a matter. This is not the first time the applicant is before this court and the applicant does not expect the court to go out of its way to please her or rule in her favour to appease her even in a case where the court in its application of the law finds otherwise. This is reasonably to be expected by all parties coming to court that the court in its interpretation of the law and facts before it whether ex parte or in a defended suit, the court must rule. The court must always apply the law or use its discretion in a reasonable manner to ensure the ends of justice are achieved and for this court to meet the objectives outlined as under Section 3 of the Industrial Court Act that of enabling the Court facilitate just, expeditious resolution of disputes.

No ulterior purpose has been established to exist. No impropriety has been established either. It has equally not been demonstrated that the rules of natural justice designed to ensure that a person before the court will not be given a fair hearing. A party dissatisfied with a decision of this court has an avenue for appeal unlike in a situation where one is before the Supreme Court. This right herein is available to the parties at any stage of these proceedings.

While litigants have the right to apply for the disqualification of a judicial officer when there is a reasonable apprehension that the court will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe such persons will not be likely to decide the case in their favour, than would other judicial officers drawn from a different court or other segments of society. The nature of the judicial function involves what the Constitutional Court of South Africa in ***President of the Republic of South Africa and Others versus South Africa Rugby Football Union and Others CCT 16 of 1998 read on 4th June 1999*** in the famous 'Judgment in the recusal application' said includes the performances of difficult and at times unpleasant tasks. Judicial officers are nevertheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with their Oath, the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it is comes from. This is the Constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

There is therefore no basis in law or in fact upon which this court should disqualify itself, and that being the case, I reject the application and direct that parties take a hearing date for the main suit that should proceed on merit and final determination.

The claimant to meet the costs of the motion for disqualification.

Parties to take new hearing dates at the registry.

Read in open court and dated this 31st May 2013

M. Mbaru

Judge

In the presence of
Court Clerk: Jacob Kipkirui

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