IN THE HIGH COURT OF KENYA AT GARISSA

ABDIWAHAB ABDULLAHI ALI….....…APPLICANT

GOVERNOR, COUNTY GOVERNMENT OF GARISSA……1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF GARISSA.3RD RESPONDENT

RULING

This Notice of Motion is brought under the provisions of the Constitution of Kenya 2010 (Articles 22 and 159), Rule 19 of the Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law). The application seeks three orders as follows:

1. That this application be certified as urgent and be heard *exparte.*

2. That this Honourable court recuse itself from hearing Petition No. 8 of 2013 and any other application pending in the said Petition.

3. That this Honourable court do forward the court file to the Honourable Chief Justice for directions on how the matter should proceed.

The application is supported by grounds found on the face of the application and in the affidavit sworn by the applicant on 14th September 2013. The application was presented to me on 16th September 2013 when I directed that the same be served on the Respondents for hearing on 23rd September 2013 thereby disposing of prayer 1 of that application. On 23rd September 2013 the application was adjourned to 30th September 2013 for reasons that appear on the court record.

The applicant is aggrieved. The reasons for that emotion can be summarized in words of paragraphs 14 and 15 of his affidavit in support of the application:

14. That from the foregoing trend I believe that I will not get justice and fair trial of this petition and I pray that the Honourable Judge withdraws from further hearing the petition and any other application on the same

15. That from how things have proceeded since the inception of this petition I feel that the actions of the court is inimical to my rights as guaranteed by the Constitution and in particular the right to fair hearing as guaranteed by Articles 48 and 50 of the Constitution and the court is preoccupied with undue regard to technicalities contrary to Article 159 of the Constitution.

The applicant deposes that upon filing the application dated 26th July 2013 seeking leave to file contempt of court proceedings, leave was granted and the application for contempt of court was scheduled for hearing on 26th August 2013 but prior to that date the applicant got information from members of the

Garissa County Government that the application would not be heard on 26th August 2013 as scheduled but that it would be adjourned to 9th September 2013 and that the same would be dismissed with costs. That true to that information the application was on 26th August 2013 adjourned to 9th September 2013 and was actually dismissed as predicted.

The applicant believes that the Respondents have inside information on how the court is conducting the Petition and believes the allegations that the Petition will actually be dismissed with costs.

Another contentious issue is the application for interim orders to stop interviews and recruitment of staff of the County Public Service Board and also to enjoin the said Board to the Petition. This application was filed on 26th August 2013 and it is claimed that the court did not hear the application but ordered the same to be served and heard on 9th September 2013 when the court did not hear or give directions in respect of the said application.

In his oral submissions, counsel for the applicant, Mr. Ndegwa who told the court that he was holding brief for Mr. Nzaku, argued that the petitioner does not have confidence that he will get fair trial before this court and that justice will not be done and be seen to have been done. Counsel cited the **Criminal Case No 29 of 1991 Charles Koigi Wamwere & 2 Others v. Republic** in which Justice Bosire as he then was, while citing with approval various cases including **Metropolitan Properties Co (F.G.S) Ltd v. Lannon & Others (1969) 1QB 577, Maina wa Kinyati v. R Criminal Appeal No 60 of 1983** and **The Queen v. Watson; Ex. Parte Armstrong [1976] 136 C.L.R 248** stated that the test to be applied in recusal cases is the objective one that **"there must be circumstances which a reasonable man would think it likely or probable that the trial Court did or would favour one side unfairly at the expense of the other".** The standard of proof, it was submitted, is on a balance of probabilities.

Counsel further submitted that the Petitioner came to court to help the court guard its integrity but the court dismissed the application with costs; that this was a public interest litigation and the Petitioner should not have been condemned to costs; that this court is biased against the Petitioner and he is apprehensive that he will not get justice; that the court is being asked to recuse itself in the interest of justice for the citizens of the County of Garissa and Kenya at large; that the Petitioner is not shopping for forum as he is seeking to have the file submitted to the Honourable Chief Justice to constitute a bench to hear the Petition; that the Petitioner does not know how the bench will be constituted.

Before submitting in reply, Mr. Mogaka for the 1st and 3rd Respondents and who was also holding brief for Mr. Mohamed for the 2nd Respondent, the Honourable Attorney General, cross examined the applicant on the contents of the affidavit in support of the application. Mr. Mogaka had earlier applied for summoning of the applicant for cross examination and the same had been allowed by this court.

Mr. Abdiwahab, the applicant and deponent of the affidavit dated 14th September 2013 told the court on cross examination that he was present in court on 26th August 2013 and he followed what transpired in court. He confirmed that he was represented by a legal counsel, Mr. Nzaku, on that day; that he saw his counsel address the court; that what is recorded on the proceedings of 26th August 2013 is what his counsel told the court; that in view of the court record of 26th August 2013, paragraph 6 of the affidavit dated 14th September 2013 is an error.

The applicant was again taken through the proceedings of 9th September 2013 and confirmed that his counsel Mr. Nzaku was present on that day and that he addressed the court; that he applied to be allowed to put in written submissions. The applicant was referred to paragraph 7 of his affidavit. He said he did not understand what paragraph 7 means. This was translated to him in Kisomali by the Court Clerk Mr. Abdikher after which the applicant stated that what his advocate told him on paragraph 7 is not what appears on that paragraph and that what appears on that paragraph is not true.

In respect to paragraph 10 the applicant stated that he had never met the 1st and 3rd Respondents since filing the Petition; that he was approached by other persons and given the information contained in

paragraph 10 and that he has told the court his apprehension as told by members of the County Government. He denied that he has been holding sessions outside the court where information is shared. He was reexamined and said he stands by what he deposed in his affidavit.

Mr. Mogaka submitted that the records of the court on 26th August and 9th September 2013 speak for themselves; that counsel for the applicant applied to be allowed to put in written submissions and to turn around and state that they were not heard is an outright lie that ought to attract sanctions as per section 11 of the Oaths and Statutory Declarations Act. Counsel submitted that the grounds for recusal are settled. He cited Black's Law Dictionary 9th Edition on this and submitted that the grounds for recusal include (a) friendship or enmity between the judge and a party, (b) close kinship of judge and party, (c) where the judge has taken a bribe, (d) where the judge may have been an advocate to a party and (e) where it is demonstrated clear ignorance of the law.

Counsel further submitted that none of these have been demonstrated in this case; that anarchy will reign if courts will entertain parties who lose a case and instead of appealing they seek to have a judge recuse herself/himself. He asked the court to impose sanctions on the applicant and his counsel under section 11 of the Oaths and Statutory Declarations Act.

In response Mr. Ndegwa for the applicant submitted that the grounds for recusal are not limited to those in the Black's Law Dictionary; that the grounds include the objective test; that the application is not meant to undermine the integrity of the court.

One of the "occupational hazards" for serving as a judge is having to sit and adjudicate on an application such as this one. This is when the test of a judge's character comes into sharp focus. In an application for recusal a judge or judicial officer is called upon to take down evidence that touches on his/her office and sometimes her character. It takes the strength that is beyond human capacity. One is called upon to sit tight and determine that application in a detached manner as though her/his office as a judge is not the subject matter. One is supposed to remain "cool and collected" and to objectively determine the matter at hand without emotion, bias or ill will! To me, being a judge is akin to answering to a higher calling and nothing should cloud one's eyes to that calling.

The applicant like any person who feels aggrieved has a right to come to court. The main bone of contention is what transpired in court on two different occasions, 26th August and 9th September 2013 but let us trace the matter farther backwards to put this application into perspective. On 18th July 2013 Mr. Nyasani, then counsel for the applicant, filed an application under certificate of urgency seeking, inter alia, to stop the forwarding of the list of nominees of the County Public Service Board to the County Assembly for approval and staying the vetting, gazettement and appointment of the nominees. The court certified the matter urgent and granted interim prayers pending inter partes hearing on 25th July 2013. The court directed service to the Respondents. On 19th July 2013, Mr. Nyasani for the applicant was back in court with an application dated the same day seeking orders to stop the gazettement and swearing in of the members of the County Public Service Board pending the hearing and determination of the Petition. The reasons advanced were that despite service of the restraining orders of 18th July 2013, the 3rd Respondent and the County Assembly went ahead and approved the nominees to the Board. Counsel again appeared before me and I directed him to serve the Respondents to enable inter partes hearing on 25th July 2013.

On 25th July 2013 all parties were represented with Mr. Nyasani appearing for the applicant. On that date Mr. Nzaku was one of the counsels who appeared before me. He had filed an application dated the same day 25th July 2013 and filed on the same day. He sought to have Ali Ismael and Mohamed Aden Karbat joined to Petition No. 8 of 2013 as interested parties. Mr. Mogaka for 1st and 3rd Respondents as well as Mr. Mohamed for the 2nd Respondent opposed this application submitting that they wished to have the Preliminary Objection in respect of the 1st and 3rd Respondent and the Grounds of Opposition in respect of the 2nd Respondent, all aimed at the Petition, argued first before the application to join third parties is heard. This was for obvious reasons. A preliminary Objection is capable of disposing of a case on points

of law before the same is heard. Mr. Nyasani told the court that he had just been served with the Preliminary Objection and the Grounds of Opposition that morning and that he had not been served with the application for interested parties. He sought more time to respond.

This court gave a ruling allowing the adjournment to give counsel for the Petitioner time to respond to the issues raised by the Respondents. The court further gave directions as follows:

1. Counsel for the Petitioner is granted leave to file a further affidavit in response to the issues raised in the replying affidavit by the Respondents.
2. The Preliminary Objection and the Grounds of Opposition, both of which raise points of law, will be argued first to enable the court determine the issues raised and direct the way forward.
3. The application for the intended interested parties will be held in abeyance pending the hearing and determination of the Preliminary Objection. Thereafter the court will direct how to proceed.
4. This matter is adjourned to another date to be agreed by the parties and the court when the Preliminary Objection and the Grounds of Opposition can be argued.
5. This court will not interfere with the interim orders as granted.

After these directions, the three counsels, Mr. Mogaka, Mr. Nyasani and Mr. Mohamed agreed to put in written submissions and to come to court on 26th August 2013 for highlighting of the submissions. By the time the court convened on 26th August 2013, the landscape in respect of this Petition had changed. Mr. Nyasani had been replaced by Mr. Nzaku for the Petitioner now applicant. The Notice of Change of Advocates was filed on 26th July 2013 and on 6th August 2013 Mr. Nzaku had filed an application under certificate of urgency in Misc. Civil Application No. 10 of 2013, for leave to file contempt of court proceedings. Leave was granted and the application for contempt scheduled for hearing on 26th August 2013. I directed this file be consolidated with Petition No 8 of 2013.

Another application mentioned in the affidavit of 14th September 2013 is the application dated 26th August 2013 seeking orders to join the Garissa County Public Service Board as a Respondent in Petition No 8 of 2013. It is alleged that the court has not given directions on this application. The application was brought to my attention by the Deputy Registrar on 26th August 2013 in chambers and I directed that the same be served for inter partes hearing and the hearing date be given for 9th September 2013. It will be recalled that on 9th September 2013 this court read the ruling on contempt of court. Record of proceedings does not show that Mr. Nzaku who appeared for the applicant moved this court on that application. However, the court ordered that the application of 26th August 2013 will be held in abeyance pending the hearing and disposal of the Preliminary Objection. The reasons are obvious as I have stated elsewhere in this ruling. It is therefore not true to depose that the court has not given directions on that application.

This now brings me to the other contentious proceedings. In paragraph 6 of the affidavit dated 14th September 2013, the applicant deposes that:

That prior to this hearing date (26th August 2013) I was informed by members of the County Government that the contempt application would not be heard on the 26th August 2013 and that the matter will be adjourned to the 9th September 2013. Further that the said application would be dismissed with costs to the Respondents. This information was actually circulating within the public domain in Garissa.

Simply put, this means that sometimes after 25th July 2013 and before 26th August 2013, word was out in the market places in Garissa that the application for contempt of court will not be heard on 26th August 2013 and that it will be adjourned to 9th September 2013. On 26th August 2013, the judge and all the counsels were in court. Mr. Nzaku told the court this:

“We have put in written submissions and we are seeking to have the same adopted and take a date for ruling. We are also seeking directions on the application”.

The other counsels confirmed having filed submissions and also asked for directions on the way forward in regard to the Petition. This was in compliance with the order of 25th July 2013. The court gave the parties 9th September 2013 as the ruling date. The practice of the court is that where all parties are present in court, the date for the next appearance in court is normally taken by consultation. The court checks its diary and informs the parties of on the available dates. Parties consult and confirm a convenient date to all of them and inform the court. This is what happened on that day. This is an exercise whose minute details on how the parties are consulting are not normally recorded. Anyone telling this court that he or she had knowledge that they knew the date the court was going to give on that day is lying more so because the decision on the date was dictated by what counsels told the court and by consultations between the parties and the court. It was not the court that dictated and I must state that even the court had no prior knowledge that the parties would take 9th September 2013 as the date for ruling.

It is true the court read the ruling on 9th September 2013 and dismissed the same with costs. The record of that ruling speaks for itself and I do not need repeat the same here. The judge takes precautions to ensure no party has access to a file with a ruling/judgement that has not been read. There is no way any party, including the court clerks and court staff would have known what the judge has decided. Again it is a lie to say anyone knew the outcome of that ruling. The procedure of determining cases is that once a party files a suit or application, our law dictates that one party will emerge the winner and the other the loser. It is called adversarial system. The law gives the loser the reprieve of going to a higher court on appeal. That is the recourse the applicant ought to have taken. Costs in that application were awarded to the Respondents. They are subject to taxation and the amount that will finally be paid is not known until taxation is complete. The taxing master is the Deputy Registrar of this court. No one should come with stories that so much will be paid as costs. As to whether the Petition is public interest litigation, the less I say about that the better for fear of prejudicing the same.

The 1st and 3rd Respondents have in their replying affidavits denied that they had inside information on how the court is conducting the proceedings in this Petition.

This court has the singular duty to determine whether the applicant has established on a balance of probabilities that he will not get fair trial in this court and that "the actions of this court are inimical to his rights".

I agree with Mr. Ndegwa for the applicant. The list of the grounds for recusal of a judge is not limited to those found in the Black's Law Dictionary as quoted by Mr. Mogaka**.** There are many reasons for recusal of a judge including the objective test in the various cases cited here. In the **Koigi Wamwere case** above the court stated that:

"The jurisdiction to disqualify oneself from a case is derived from the common law. It is a discretionary jurisdiction. It must, therefore, be exercised on the basis of facts and sound legal principles. The test to be employed must of necessity be objective…… An applicant who alleges bias must either prove bias or grounds which suggest bias or raise a reasonable apprehension of it. It is not what the accused thinks. It is what any reasonable man observing the conduct of proceedings is likely to conclude."

In the same case, the court went on to state that the duty to disqualify oneself is however, matched by an equal duty not to disqualify oneself. I believe in the statement that justice must not only be done but it must be seen to have been done but care must be taken not to misuse this. In **Re Renaud, Ex Parte CJL [1986] 60 ALJ.R. 528**, the court held 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."

I have applied my judicial mind to the issue before me. I have objectively considered the case for the

applicant. It is not lost to me that the applicant admitted on oath that he was wrong in what he deposed to in paragraph 6 and 7 of his affidavit. This was after he was taken through the proceedings of 26th August 2013 and 9th September 2013. My question is would a reasonable person, aware of the circumstances of this case think it likely or probable that the judge was biased? Would a reasonable man, being aware that the applicant's counsel was in court on 26th August and 9th September 2012 and had addressed the court and the case was adjourned from 26th August to 9th September 2013 not because the judge was biased towards the applicant but to make a ruling after all parties agreed to that adjournment think the judge was biased against the applicant? I do not think so!

In the words of Tunoi JA while quoting the case **Metropolitan case above** in **Republic v. David Makali & 3 Others Criminal Application Nos NAI 4 & 5 of 1994** (unreported):

"……it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce 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 facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize 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, magistrate or tribunal."

I think I have said enough to demonstrate that the applicant has not established on a balance of probabilities any of the grounds for my disqualification or any reason that this court and its presiding officer has handled this matter in a biased manner. Whoever is giving information to the applicant is misleading him. A lot of time is being spent on sideshows instead of following the directions of the court for timely determination of this matter. This is evidenced by the myriad of applications coming from the applicant. He is on record for having filed an application for judicial review before the Constitutional Division Nairobi on issues relevant to this case. Given the applicant's statements that he could not understand the legal jargon when he was under cross examination, this court gets a feeling that in the course of changing legal counsels, it is possible that the applicant is missing out on what is happening. This court has always been willing to explain its processes to the parties but because the applicant is represented, this court assumes, maybe wrongly, that he is getting benefit of legal representation. Consequently this application is dismissed.

Finally I wish to state that the applicant has admitted under oath that he is wrong in his affidavit. In my view the applicant and his counsel have not approached this issue objectively. This court and the officer presiding over it have no interest in any party and operates independently without taking instructions from anyone. Let the applicant listen to counsel of court instead of other persons who have no business in the operations of this court. This application has no basis and must fail. The applicant must be made aware that costs follow the event. He dragged the respondents to court on this application he must pay costs of this application. I make orders accordingly.

I hesitate to impose sanctions on the applicant but I want to remind and I caution him that lying under oath attracts sanctions.

One last word of unsolicited advice to my brothers, legal counsels involved in this case; the same way this court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, the same way the court and the presiding officer demands respect from the parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practicing before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party who is not satisfied with a ruling of this court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era when it used to be a "jungle out there".

I wish to remind all counsels that you are all aware of your mandates. The duty to client must be balanced with duty to court. You must ascribe to a higher duty or calling, that of the rule of law and due process.

Representing a client is not just a means of putting food on the table. Give them guidance. Be patient with them and explain all processes and procedures. Most of the court procedures, no matter how simple they are, are “legal jargon” to the common man!

S.N. MUTUKU

JUDGE

Signed, dated and delivered this 5th day of November 2013