Kidero & 13 others v Ethics and Anti-Corruption Commission (Civil Suit E008 of 2021) [2023] KEHC 3363 (KLR) (Civ) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3363 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E008 OF 2021

EN MAINA, J

APRIL 20, 2023

BETWEEN

DR. EVANS ODHIAMBO KIDERO & 13 OTHERS ..... APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION ..... RESPONDENT

RULING

1. This Ruling is in respect of the Applicant's Notice of Motion Application dated 24th January 2023 which seeks an order of stay of the suit herein and my recusal from bearing the suit. It is also sought that the suit be referred to the Honourable Presiding Judge of the Division for reallocation to another judge.

2. The Application is made under the provisions of Article 47,50,159(2) and 160 of the *Constitution*, Sections 1 and 3 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 3 and 12 of the *Fair Administrative Actions Act* and Section 3 of the *Judicature Act*.

3. The Application is premised on the following grounds stated on its face thereof and reiterated in the supporting affidavit of Dr. Evans Kidero, 1st Defendant/Applicant: -

    1. .The Applicant filed an Application dated 21st June 2021 seeking orders that proceedings in the present suit being, ACEC Civil Suit No. 008 of 2021, *Ethics and Anti-Corruption Commission v Dr. Evans Kidero and others*, be stayed pending hearing and determination of both ACEC No 30 of 2019 *Dr. Evans Kidero vEACC* (formerly High Court Petition No. 366 of 2019 Dr. Evans Odhiambo Kidero EACC & 19 Others) and Chief Magistrate's ACC No. 8 of 2019 *Republic v Dr. Evans Odhiambo Kidero & Others* or in the alternative, that the Honourable Court be pleased to strike out this suit in its entirety for being an abuse of court process.

2. On 25th November 2021, the Learned Lady Justice Maina delivered and issued a Ruling dated on even date, dismissing the said Application and going further to state that criminal proceedings can in fact proceed alongside civil proceedings and that the Applicant would face no prejudice if all three matters proceed concurrently.

3. Owing to the Ruling dated 25th November 2021, the Applicant filed an Application dated 4th May 2021 seeking orders that the Honourable Justice recuse herself from hearing the same, which Application she dismissed.

4. From the nature, character and trajectory that the Rulings Lady Justice Maina has rendered in so far as ACEC No. 008 of 2019, ACEC Civil Suit No. E008 of 2021 and Petition No. 30 of 2019 are concerned, it is evident that her mind is predetermined in so far as the proceedings in relation to the Applicant's alleged unlawful obtaining benefit of Ksh. 14,000,000.00 from the firm of Wachira, Mburu, Mwangi, and Company Advocates.

5. Furthermore, the Applicant is apprehensive that Lady Justice Maina's mind is predetermined in so far as his alleged culpability is concerned and nothing awaits him but a finding of guilt from her.

6. It is also apparent that the Learned Judge in finding no wrongdoing in the 1st Respondent instituting civil proceedings alongside another civil and criminal proceeding, laid bare her opinion as to the lengths that the 1st Respondent, is allowed to go to in discharging its duties under the *Constitution* and the *Anti-Corruption and Economic Crimes Act*.

7. The Applicant is therefore apprehensive that the Court is biased against him and that he stands to suffer prejudice if the Learned Judge does not recuse herself from hearing the present suit.

8. The Applicant is also apprehensive that he is unlikely to get any justice from this Honourable Court in the event that Lady Justice Maina remains seized with the present suit.

9. It is trite that the principles of fair hearing, justice and the rule of law are anchored on the litigant's trust in the judicial process and the fact that judicial officers are impartial and unbiased umpires of the law.

   It is therefore in the interest of justice and fairness that the Learned Lady Justice Maina recuse herself from any further conduct of the hearing the present suit and that the same is referred to the Honourable Presiding Judge of the Division for reallocation and directions on the conduct and disposal of the same".

Response by the Respondent

4. The Respondent opposed the Application through a replying affidavit sworn on 2nd February 2023 by Mulki Umar, an investigator with the EACC/Plaintiff.

5. The grounds cited are: that the issues raised in the Application are res judicata, as the same were directly and substantially in issue in the Application dated 4th May 2022 filed in ACEC Petition No. 30 of 2019 (formerly Petition No. 366 of 2019) Dr. Evans Odhiambo Kidero v EACC & Others) which was determined by this court and a Ruling delivered on 1st December 2022 and it is therefore an abuse of court process; that the allegations that the Hon Lady Justice E Maina is biased are unfounded, as an adverse finding by the court against a party is not a ground for imputing bias; that the apprehension of bias cannot be a ground for recusal as these allegations must be factual and proven; that the court has a duty to sit and it should not recuse itself where there is no bias; that to entertain such a proposition would result in an abdication of duty; that the Applicant/1st Defendant has a right of appeal against

any decision that this court makes and that the attack on the court is a decoy to delay the matter and further that the Defendant seeks to forum shop in the hope of a favorable outcome.

Issues for Determination

a. Whether this Application is res judicata

b. Whether I should recuse myself from hearing this suit (whether hearing and determining this case).

Analysis and determination

Whether this Application is res judicata

6. The Respondent contested this court's jurisdiction to hear and determine this Application on the ground that the application is res judicata, in light of the Ruling delivered by this court on 1st December 2022 in ACEC Petition No. 30 of 2019(formerly Petition No. 366 of 2019) Dr. Evans Odhiambo Kidero v EACC & Others) The Ruling was in respect of the 1st Defendant/Applicant's application dated 4th May 2022 seeking that I recuse myself from the matter.

7. Section 7 of the *Civil Procedure Act* states the law on re judicata as follows:

> 7. Res judicata
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> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

8. The 1st Defendant/Applicant is the Petitioner in ACEC Petition No. 30 of 2019 (formerly Petition No. 366 of 2019) Dr. Evans Odhiambo Kidero v EACC & Others) while the Plaintiff herein is the 1st Respondent. The parties in the two suits are essentially the same, as the 2nd to 14th Defendants in ACEC Petition No. 30 of 2019 are the 2nd to 16th Interested Parties herein. The 1st and 8th Interested Parties and the 2nd to 4th Respondents in the Petition are however not parties to this suit.

9. In ACEC Petition No. 30 of 2019 through an application dated 4th May 2022 the 1st Defendant/ Applicant sought orders for my recusal from the matter on grounds that I had disallowed an application for stay of proceedings, thereby directing that the civil recovery suit could proceed simultaneously with the criminal case facing the 1st Defendant/Applicant in the magistrate's court. It was argued that that decision disclosed that I had a predetermined mind against the Applicant and that as such he was apprehensive that I would be biased against him.

10. The Applicant has raised a similar issue in this Application: that the Applicant is apprehensive that from the nature, character and trajectory of the Learned Judge's Rulings, the court's mind is predetermined against the Applicant in favour of the Respondent; that it is in the interest of Justice that a different Judge hears this matter.

11. As was held in the case of *Abok James Odera v. John Patrick Machira* Civil Application No. Nai. 49 of 2001; It is trite that the doctrine of res judicata applies to both suits and applications. In that case it was held that a party seeking to rely on the doctrine of res judicata must meet the following conditions:

    i. There must a previous suit in which the matter was in issue;

    ii. the parties were the same or litigating under the same title;

iii. a competent court heard the matter in issue;

iv. the issue has been raised once again in a fresh suit.

12. In *Independent Electoral & Boundaries Commission –v- Maina Kiai & 5 Others* (2017)eKLR the Court of Appeal held that the rationale for the doctrine is to bring finality to litigation. It pronounced itself thus:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.."

13. It is crystal clear that the parties in the ACEC Petition No. 19 of 2019 are substantially the same as those in this suit and are all litigating under the same title. This court dismissed a similar application which was brought on the very ground that the 1st Defendant/Applicant was apprehensive this court would be biased given its previous decisions in matter concerning the 1st Defendant/Applicant. This issue was conclusively determined by this court through a ruling delivered on 1st December 2022 wholly dismissing the Applicant's Application for lack of merit.

14 The present application raises the very issue raised in the earlier application in my view it is a relitigation of the same issue and hence res judicata and it ought to fail on that basis.

15. It is also my finding that it must also fail on the merits. The test of bias in an application for recusal is a subjective one: It is "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". (See the Bangalore principles of Judicial Conduct).

16. In the case *Phillip Tunoi & Another –v- Judicial Service Commission & Another*. Civil Application No. 6 of 2016) [2016]eKLR the Court of Appeal stated:-

> 41 ..... In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.
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> 46. We take cognizance that the right to fair hearing is embedded in our constitution which emphasizes that justice must be done to alt without delay or undue regard to procedural technicalities. The *Constitution* has vested in the courts judicial authority and mandate and has expressly stated that the right to fair hearing cannot be limited or abridged. It is absolute.
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> 47. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to Section 5(1) of the *Public Officer Ethics Act*, 2003 contains generate rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In

carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of the *Constitution*.

48. Specifically, under Rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge off acts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service....."

17. The above finding was adopted by Ibrahim SC (J) in the case of *Jasbir Rai & 3 others –v- Tarlochan Singh Rai & 4 others* SCK Petition No 4 of 2012 [2013]eKLR when he observed:-

> " The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.

18. Similarly, in the case of *Republic –v Independent Electoral and Boundaries Commission and 2 others Ex-parte Wavinya Ndeti* Misc. Civil Application No. 301 of 2017 [2017]eKLR it was held that:

> " 38 To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the taw provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. In the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. I that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment". (Emphasis mine).

19. The test is therefore that of a fair minded and informed observer not the subjective opinion of the Applicant. There must be reasonable ground in the mind of that fair minded and informed observer 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. In the instant application the 1st Defendant/Applicant seeks my recusal merely upon the ground that I have previously heard applications by himself which I have dismissed. He is therefore so to speak seeking to have his case heard by another judge who hopefully will give orders in his favour. In my view to recuse myself on that ground would amount to abdication of duty. As was stated by Mason (J) in the case of *Re; JRL,*

exp CJL (1986) 161 CLR 342 at 352 cited with approval in the case of *Kaplan and Stratton versus L.Z Engineering Construction and 2 others* [2000]eKLR:-

> " 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 believing 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".

20. I would also echo the words of Achode (J), as she then was in the case of *Hassan Omar Hassan & Another –v- Independent Electoral & Boundaries Commission & 2 others* Election Petition No. 10 of 2017 [2018]eKLR when she stated:-

> " 36. The Application by the Petitioner appears to be a critique of the decisions of the court which have gone against him and the proper forum for such contention would be the appellate arena. The decisions of the Court per se do not amount to evidence of bias on the part of the Court. The unsubstantiated suspicion of bias or prejudice by the Petitioner herein, does not suffice as reasonable grounds for recusal".

21. My finding also finds support in the case of *Attorney General versus Anyang Nyongo & Others* [2009] IEA 21 where it was observed that:-

> " The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the courts with which there is a disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgment.....
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> A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour".

22. The upshot is that the 1st Defendant /Applicant has not proved on a balance of probabilities that a fair minded and informed observer having considered the facts of this case and indeed all the other cases referred to by the Applicant, would conclude that there was a real possibility that this court is biased. Accordingly, the application is not merited and it is dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF APRIL 2023.

E.N MAINA

JUDGE