THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 237& 431 OF 2019

MALE H MABIRIZI K KIWANUKA:::::::::::::::::::::::::::: APPLICANT
VERSUS
ATTORNEY GENERAL::RESPONDENT
AND

1. **HON.LUKWAGO ERIAS**
2. **HON.AMURIAT OBOI PATRICK**
3. **HON.SALAAMU MUSUMBA PROSCOVIA**
4. **HON.NAMBOOZE BETTY**
5. **HON.MICHEAL KABAZIGURUKA**
6. **HON.SABIITI CHRISSY JACK**
7. **HON.WAFULA OGUTTU**
8. **HON.OKELLO ALBERT CHARLES ODUMAN:::::::APPLICANTS**
9. **CLLR. NYANJURA DOREEN**
10. **CLLR.OKELLO KENNEDY**
11. **MS. INGRID TURINAWE**
12. **DR. OKELLO GEORGE EKWARU**
13. **DR. WAKABI DOMINIC**
14. **MS. NABATANZI CISSY**

VERSUS

1. **ELECTORAL COMMISSION**
2. **BYABAKAMA MEGENYI SIMON ::::::::::::::::::RESPONDENTS**
3. **RWAKOOJO SAM**

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

This is a ruling arising out of an oral application for a recusal by the applicants in the two matters filed differently. The application was made under the new rules governing recusal of judicial officers.

The applicants filed applications against different parties but they seem to seek the same remedies although the in the second application 431of 2019 they seek more orders against the different respondents.

When the two applications came up for hearing, the applicants who represented themselves made oral applications to cross examine different parties i.e the applicant (Male Mabirizi) sought to cross examine Hon Justice Byabakama Simon Mugenyi while the 1st applicant Lukwago Erias sought to cross examine Justice Byabakama Simon and Rwakoojo Sam.

The court heard the application on 17th December 2019 in the morning and adjourned the matter for a ruling in the afternoon at 4:00pm. When the matter came up for a ruling, the applicant in application 237 of 2019(Male Mabirizi) sought to raise a preliminary objection in order to arrest the ruling. The court overruled him and the ruling on whether leave could be granted to cross examine the parties was delivered.

Immediately after delivery of the ruling, the applicant (Male Mabirizi) made a forceful oral application asking the judge to recuse himself since he has ever represented the 1st respondent (Electoral Commission). As the trial Judge, I indeed conceded to that fact and confirmed that fact and further clarified that I have represented them in different Election Petitions as an external lawyer since 2005.

The 1st applicant-Lukwago Erias also repeated the same application in choreographed manner and passionately submitted that I should recuse myself since in the eyes of the public I will not be seen to have been impartial in the determination of the application.

The applicant-Male Mabirizi who raised the recusal premised on myself being a lawyer for Electoral Commission, did not file his application against Electoral Commission and it was surprising that he objected on behalf of Lukwago Erias. His case is only against Attorney General on appointment of Justice Byabakama and not against Electoral Commission.

The court reserved the ruling in the matter and hence the ruling on recusal.

ISSUE

Whether the trial judge should recuse himself from hearing and determining the two applications 237 & 431 of 2019?

Determination

It should be noted that the applicant sought the courts recusal premised on the ground of conflict of interest since trial judge had represented Electoral Commission in several election matters.

Application for recusal of a judicial officer is the occupational hazard every judicial officer must face in the course of her/his judicial career. Any judge will tell you that listening to an application for judge's recusal and making a ruling on that application are some of the biggest challenges judges face in the course of their judicial duties.

The judicial officer is the subject of the recusal proceedings and yet he/she is expected to rise above the proceedings and determine the matter rationally. The stamina to do this is drawn from the judicial oath a judge takes before siting as a judge. A judicial officer swears to impartially do justice in accordance with the Constitution, the laws and usage of the Republic of Uganda, without any fear or favour, affection, ill will.

The effect of this oath raises the judge above being just a mere human being to a higher calling. This calling is something greater than a judge's personal feelings of any judge. Judges need this if they are to serve in their capacities as administrators of justice. See ***Republic vs Raphael Muoki Kalungu HIGH COURT CRIMINAL CASE NO. 77 OF 2014(K)***

Asking a judge to recuse herself is a serious matter. One who comes to court to ask the presiding judge in a case to recuse herself must come fully and properly armed with all the necessary material to support such an application. This is so because it is a matter that goes to the core of the administration of justice. We are all familiar with the principle that justice

must not only be done but must be seen to have been done. In **Galaxy Paint Company Ltd v Falcon Guards Ltd [1999] eKLR** the Court of Appeal had this to say on this issue:

"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."

The Constitutional Court of South Africa had this to say on the issue of recusal of a judge in **President of the Republic of South Africa vs South Africa Rugby Football Union (1999) (4) SA 147 at page 177:**

> **"……the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."**

All judicial functionaries have necessarily to have unflinching character to decide a case with unbiased mind. One of the requirements of the right to a fair hearing under Article 28 of the Constitution is that the hearing should be before an independent and impartial court or tribunal established by law. An essential requirement of judicial adjudication is that the judge is impartial, unbiased and neutral and is in position to apply his mind objectively to the facts of the case put up before him.

This court contends that the reasonableness of the apprehension that the judge will not bring an impartial mind to bear on the adjudication of this case must be addressed in the light of the oath of office taken to administer justice without fear or favour. As stated in **South African Rugby**

case above, it must be assumed that this judge can disabuse her mind of any irrelevant personal beliefs or predispositions.

'Bias' means an operative prejudice, whether conscious or unconscious in relation to a party of issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a particular case in a particular manner, so much so that it doesnot leave the mind open.

In other words bias may be generally defined as partiality or preference which is not founded on reason and is actuated by self-interest-whether pecuniary or personal. Therefore, the rule against bias strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record and in accordance with the law.

If the reasonable lay observer would gain the impression that there is a real likelihood of bias that the judicial officer is biased, he or she should recuse himself or herself. The facts which give rise to that impression must relate to the particular case and not merely be based on vague conjecture. See ***S v Collier 1995 (8) BCLR 975***

The test to be applied is an objective one, requiring not only that the person apprehending the bias must be a reasonable person but also that the complaint must be a reasonable one. There is therefore a double requirement of reasonableness. Therefore mere apprehension on the part of a litigant that a judge will be biased-even a strongly and honestly felt anxiety-is not enough. ***See South African Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 CC; 2000 (8) BCLR 886 (CC)***

The question in every case is:

Whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, which is a mind open to persuasion by the evidence and the submission of the case. See ***President of South Africa vs South African Rugby Football Union***

It therefore implies that both the person who apprehends bias and the apprehension itself must be reasonable. This, coupled with the presumption of impartiality, underscores the 'formidable' burden on a litigant alleging judicial bias or its apprehension.

The role of a judge in administration of justice is that a judge will decide any and every case according to law. Impartiality is at the core of independence of the judiciary. In order to be impartial, the judge must be independent of the parties to the case, independent of judicial colleagues and independent of any and every form of pressure (whether from government or others) to depart from the due administration of justice according to law.

Impartiality must mean more than freedom from corruption by a party to a case. The Judge who, for any reason, fears what may happen to his or her life or career as a judge if the case is decided one way rather than the other is not impartial. The judge who, for any reason, believes that he or she will gain, personally or professionally, from deciding a case one way rather than the other is not impartial.

Justice Florentino Feliciano explained how a judge must exceed the standards of "average goodness":

A judge passes judgment upon his fellow human beings. To be morally entitled to do so, to merit respect for his judgments, our society demands more from a judge than from those who are subject to the authority and jurisdiction of the judge. It is not easy to be a good man: it is even more difficult to be a good judge, for he must constantly strive to be better, morally speaking, than the average person or the man of average goodness. The quality of justice a judge renders is necessarily reflective

of the quality of a judge as a moral person, as a principled man.(Florentino P Feliciano, "Qualities of a Good Judge"address before the 28th judicial Orientation Program, Supreme Court, Manila (14th January 1994) Cited in ***'Core Values of an Effective Judiciary****-by Singapore Academy of Law, Academy Publishing 2015.*

As a judge of a few years standing, I have observed the two applicants (Male Mabirizi and Lukwago Erias) in my court trying to allege bias at the onset of the trial as a way of intimidation and the same has been extended to other judges.

I have tried to be a good judge and continue to aspire being a good or better judge and the allegations made by the likes of the applicants shall not make me a bad judge. After taking the judicial oath before assumption of office, it has always been at the back of mind and I have administered justice without fear or favor, ill will or affection.

Like all other judges/justices we have had different background employment and this shall never mean that we remain with allegiance to such employment or collegiality. Even before I became a judge, notwithstanding being an external lawyer of Electoral Commission, I filed cases against The Electoral Commission and argued them in court and won against them and lost some. Refer to the *Hon Robert Kasule Ssebunya v Wakayima Musoke Nsereko & Electoral Commission Election Petition No. 04 of 2016; Electoral Commission v Hon Kasule Robert Ssebunya Election Petition Appeal No….of 2016; Oboth Oboth vs Otaala Sam & EC Election Petition Appeal 2011; Mulimba John vs Onyango&EC Election Petition Appeal; Mutembuli Yusuf vs Nagwomu Moses Musamba & EC Election Petition Appeal No. 43 of 2016.*

Recently, as a judge, I have heard some matters-Election petitions against Electoral Commission and they have lost some of the cases before me and such wild and baseless allegations of bias or impartiality where never raised. Refer to *Agaba Peter v EC Election Petition Appeal No. 01 of 2018, Achola Christine vs EC Election Petition No. 02 of 2018, FDC vs EC & AG,*

Nantege Roy &another vs EC & AG, EC vs Acacia Place and Lui Ming Shu. All these matters and many more have been heard without impartiality.

I can draw an example of my fellow judges & justices who had been employed by Office of Directorate of Public Prosecution or Attorney General's chambers or have held other positions in Government as Ministers or Public Servants. Should they recuse themselves since they were in employment of different government departments? We all took the judicial oath and it must be respected and we are all bound by the oath to administer justice to all persons alike without fear, favour and prejudice.

As a judge, I will never put myself in a situation where I cannot judge rightly. Therefore my conduct is always free from the appearance of impropriety. Fairness and impartiality are the fundamental qualities to be possessed by a judicial officer.

Secondly, I have always worked in a way that my mind and soul can be seen in my work. Every line in my opinion must be the product of genuine reflection and a commitment of self. This has also been evident in every piece of work(Judgments and rulings).

Judicial functions, sometimes, involve performance of unpleasant and different tasks, which require asking questions and soliciting answers to arrive at a just decision. If assertions of bias are to be accepted, it would become impossible for a judge to seek clarifications and answers. A litigant should impute bias merely because the judicial officer has sought clarification as it was in this case; when the applicant (Male Mabirizi) was asked why he never added Justice Byabakama to his application and he alleged bias immediately.

The judge is the presiding officer of the court and must guide its operations and proceedings without fear of being asked to recuse himself/herself. If judges were to be asked to recuse themselves on any comment they make in the course of guiding proceedings and that is perceived to be biased against a party or on every application they allow or disallow the other

party to a case then I wonder how many recusals there would be. We may run short of judges to preside over trials!

The litigant, without any firm basis, should not be permitted to raise such objection without any reasonable basis. Litigants should also not be encouraged to challenge the judicial qualities of those assigned to sit in judgment without cause.

There is of course a real concern that a judge should not be overly ready to recuse himself. Judges after all are there to decide cases and to decline to hear a case merely for fear of criticism is itself dereliction of duty and demonstrates lack of judicial integrity.

The Court of Appeal of Kenya has re-echoed similar views on recusal in the case ***Mary Ann Njuguna v Joseph Njuguna Ngae Civil Application No. 195 of 1997***:

"Judges ought not to disqualify themselves on unsubstantiated, flimsy and hearsay grounds, if they do disqualify themselves on such ground, the administration of justice would suffer. Any disgruntled litigant would make wild allegations hoping that the judge would disqualify himself/herself and thereby delaying the due process of the law to the detriment of the other side. Judges ought to be slow and careful in disqualifying themselves from hearing suits or applications. Judges take an oath in terms of Article 63 of the Constitution of Kenya. A judge is not concerned with what litigants brag or boast. He is only concerned with dispensing justice according to law, and any boasts made by litigants ought not perturb or even bother a judge…"

An overly-generous policy of recusal will undermine and weaken the confidence in the judiciary as opposed to strengthening it.

If a judge/court recuses on the word of a litigant, it may fall into a practice and descend into forum-shopping.

Lawyers/litigants have resorted to using underhand methods to get the judge out of a case, by requesting judges recuse themselves from cases if they feel that they are not going to receive a favourable verdict.

Other litigants, like present applicants are trying to politic in court and invite the press in order to make some political capital out of a case as we are nearing national elections. This court shall keep in its lane of administering justice to all manner of people.

Lastly, the Supreme Court of Uganda has also taken a swipe at increasing and growing tendency to level charges of bias or likelihood of bias against judicial officers;

"We would like to make it clear that litigants in this country have no right to choose which judicial officers should hear and determine their cases. All judicial officers take oath to administer justice to all manner of people impartially, and without fear, or favour or ill will. That oath must be respected."See ***Uganda Polybags Ltd v Development Finance Co. Ltd SCCiv App 2 of 2000.***

The applicants have not persuaded this court why I should recuse myself. I find no merit in the application for my recusal. I will and do hereby dismiss the application for recusal. I shall proceed to determine this matter even if I was transferred to High Court of Uganda at Mbarara as Senior Resident Judge.

The directives earlier given to file submissions still stand and I shall proceed to determine the matter without any further delay.

I make orders accordingly.

Ssekaana Musa
Judge
21st January 2020.