REPUBIC OF KENYA

IN THE KADHI'S COURT AT ISIOLO

SUCCESSION CASE NO 19 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE MOHAMED JAMA ..... DECEASED

OMAR MOHAMED JAMA ..... PETITIONER / RESPONDENT

VERSUS

HUSSEIN MOHAMED ..... RESPONDENT / APPLICANT

RULING

1. This a ruling on the respondent's Notice of Motion dated on 12th October, 2020 brought under Article 50(1), 25 (c) of the constitution of Kenya 2010, order 51 r 1 of the Civil Procedure Rules 2010, for orders:

1. THAT the application be certified urgent

2. That court be pleased to issue an order that the presiding Kadhi in this matter do recuse himself from the conduct of this matter.

3. The matter be transferred to another court of competent jurisdiction for hearing and final determination.

4. Costs

2. The applicant grounded his application on the claim that the Kadhi is not a neutral party in the matter, that he has a personal relationship with the petitioner / respondent being his personal friend and is therefore not impartial in the circumstances. The application is supported by supporting affidavit sworn by the applicant dated 12th October, 2020.

3. The application was opposed by the petitioner through a replying affidavit dated 3rd November, 2020.

Pleadings

4. The applicant averred that the Kadhi and the respondent herein are close friend and engage at a personal level, that on 7th March, 2020 the presiding Kadhi officiated a wedding involving the son of the respondent one Mr. Yasin Omar Mohamed Jama, who posted a video of the celebration on his facebook account; that he did this despite a matter pending before him between the parties filed on 24th February, 2020. He further averred that the Kadhi did not declare that he has a personal friendship with the petitioner. He contends that there is a conflict of interest that may jeopardise a fair hearing if the presiding Kadhi were to hear and determine the matter. He averred he has no confidence in the Kadhi and is apprehensive he will not handle the matter impartially. He further stated that under Islamic law, a marriage may be officiated by any Imam and the respondent could have chosen any other Imam in Isiolo to officiate the marriage, that the respondent choosing the presiding Kadhi to officiate his son's wedding shows a personal friendship exists.

5. On the other hand, the respondent averred that the application does not meet the threshold required of the grounds for recusal of a judicial officer. He averred further that the applicant failed to elucidate or impute the slightest bias that this court exhibited in how the matter has been handled thus far, that the court has been as judicious as it can be and as a result no appeal has been lodged against any of the ruling delivered thus far in relation to this matter. He contends the applicant is mischievous and desirous to forum shop and delay the finalisation of matter. He further deponed that a Kadhi has jurisdiction to officiate Muslim marriages.

Submissions

6. Mr. Majani for the applicant submitted that the presiding Kadhi was invited to officiate and / or attend a wedding of the respondent's son on 7th March 2020, that a video of the ceremony was posted on Yasin Omar's facebook account, which video was submitted to court as evidence. In the video, the Kadhi is seen rejoicing, feasting and dining with the respondent's son. He further submitted that the Kadhi refused or failed to submit the fact of his relationship with the respondent to the applicant while his application was pending and the Kadhi gave him a hearing date for his preliminary objection which he dismissed. He argued the Kadhi cannot be a fair arbiter in the matter and that the applicant he and the applicant lack confidence in the presiding Kadhi.

7. Mr. Ashaba for the respondent submitted that the application has not met the threshold required for a judicial officer to recuse himself. He submitted that there is nothing that has been put to show bias of this court, that no instance was mentioned to show they were treated unfairly. It is his submission that the court was fair to the applicant. He contends the preliminary objection lacked merit and any court would have dismissed it. He further submitted that the video failed to play the video and the certificate was not made by an expert as required by law. He also stated the image of the picture is not clear.

8. He submitted that a Kadhi has jurisdiction to sit in and officiate a Muslim marriage under the law. He posited that if the application is allowed, it will open a pandora's box for Kadhis not to officiate marriages the country. They appropriate way to do that was by way of legal review. He argued the Kadhi was not at the wedding as a relative but vide rules of Muslim marriage.

Background

9. A simple background is necessary for purpose of perspective to the issue in this application. The petitioner filed this succession matter as uncontested for determination of heirs and their respective shares under Islamic law and vesting of estate on 12th March 2019. Judgment was entered on 21st January 2020. On 24th February, 2020 the petitioner filed an application against the respondent for orders for him to give vacant possession of the estate property. On 3rd March 2020, the court, *suo moto,* enjoined the applicant in the matter as an interested party as the orders sought would adversely affect him. They had not filed a reply by the hearing date on 11th March 2020. The court encouraged parties to talk towards settlement and gave applicant more time to file reply, if settlement was not reached.

10. The country was directly affected by the Covid-19 pandemic and court operations were scaled down. Operations were scaled up in June 2020. The petitioner through his advocate set his application down for hearing.

11. The court proceeded ex-parte on 18th August, 2020 after failure of applicant's advocate to appear of file reply. A ruling date of 25th August 2020 was given for the application dated 24th February, 2020. The applicant (respondent in that application) applied for and was granted by consent, setting aside the delivery of the ruling and parties agreed to dispose the application by way of written submission. This was just one day before the dated for delivery of the ruling. The applicant filed two other applications consecutively. A Preliminary objection dated 25th August 2020 and another application, summons for revocation of letters of administration dated 27th August, 2020. The preliminary objection was given precedence, argued and ruling delivered on 30th September, 2020. Immediately after completion of delivery of the ruling in open court, Mr. Majani counsel for the applicant addressed court and stated they will be appealing against the ruling and will be applying for the court to recuse itself because he was informed that 'your relationship with Omar is too close'.

Analysis and Determination

12. Judicial officer's impartiality is one of the cornerstones of fair trial, which is a constitutional right. Where a judicial officer has a pecuniary interest in the outcome of the case or there is possibility of bias, a judicial officer should not hesitate to recuse himself from hearing the case. One cannot be a judge in his or her own case. In **Locabail (U.K.) Ltd. Vs. Bayfield Properties Ltd.**

and Another *[2000] Q.B. 451.* The court observed:

'The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice."

13. Judicial officers are presumed impartial due to the oath of office they have taken and training they have undergone. In the **President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98**, the court stated:

''…In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence…..This consideration was put as follows by Cory J in R. v. S. (R.D.):37

14. In their separate concurrence**, L'Heureux-Dube and McLachlin JJ say:38**

'The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England III . . .[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd. (1994), 133 N.S.R. (2d) 50 (C.A). at pp. 60-61*.'

15. Due to the nature and sensitivity of the application for recusal of a judicial officer, the established procedure is for the party contemplating applying for recusal to first seek to have the issues raised in chambers, if dissatisfied it may proceed in open court. This is because it touches on the integrity of a judicial officer and the court. **In the Judicial Review case No.124 of 2014,** the Judge setting out the procedure for an application for recusal in paragraph 38.

"The procedure in application for recusal is now well settled. The usual procedures in application for recusal is that the Counsel for the applicant seeks a meeting in Chambers with the Judge or Judges in the presence of her or his opponent. The grounds for recusal are put to the Judge who is given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge, the applicant would, if so advised move the application in open Court".

16. The threshold of evidence required to prove bias is high specifically beacuse it touches on judicial integrity. An application for recusal on ground of bias and impartiality must be subjected to a rigorous test. The burden of proof rests on the applicant to prove real danger than probability of bias. In the case of **Committee for Justice and Liberty et al vs. National Energy Board** the Court stipulated the threshold required to a finding of bias.

'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'

17. The court further stated:

"…the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. … [The] test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude.

"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.

18. In conclusion the court held:

"It follows from the foregoing that 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 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, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.

19. The first test in an application for recusal on ground of bias is the establishment of real danger, the possibility rather than probability of bias. The Court of Appeal in the case of **Uhuru Highway Development Ltd. vs. Central Bank Of Kenya & 2 Others Civil Appeal No. 36 of 1996** held:

"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavor the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias...

20. To sustain an application for recusal on ground of bias, the person apprehending bias must be a thoughtful and well-informed independent person who is aware of the law and all the facts and circumstances pertaining to the issue. The Supreme court In **Jashir Singh Rai & 3 others v Talchan Singh Rai & 4 others (2013)eKLR,** cited with approval the case of **Pewy v Schwarzenegger 67,F 3D 1052(9TH circ February 2012)** where the court described the qualities required of the person apprehending bias. It stated thus:

'the test for establishing judge's impartiality is the perception of bias of a reasonable person, this being a well-informed thoughtful observer who understands all the facts and has examined the record and the law and thus unsubstantiated suspicion of personal bias or prejudice will not suffice.'

21. The second test in an application for recusal of a judicial officer on ground of bias, is the double reasonableness test. Both the person and the apprehension of bias must be reasonable in the circumstances of the particular case. In **South African commercial catering & allied workers union & another v Irvin & Johnson Limited sea Food Division Fish processing case CT 2 of 2000,** the Court applied a double requirement of reasonableness test to the issue of bias in a recusal application. The court stated thus:

'The court in *sarfu* alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable.'

22. In the instant application, the applicant has apprehended bias on my presence in a wedding of the respondent's son. He concluded the respondent must have invited me to officiate the wedding and therefore was my close friend. My views on the circumstances of my presence in the wedding were not sought. As judicial officers, we only express ourselves through our rulings and judgments. I am constrained to briefly explain the circumstances.

23. My ancestral home is in Malindi, in Kilifi County. My first time to set foot in Isiolo was in September 2016 when I was posted to this station. As a Kadhi, my friends are those are I interact with in line of duties, mainly Sheikhs, Imams and some clan elders, the court stakeholders. Most Imams officiate marriages under my supervision and authority. I often give sermons and lead prayers in some mosques. Most marriages are officiated by the Imams, sometimes when requested, I also officiate some. Under the Marriage Act and Muslim marriage rules, a Kadhi is conferred with jurisdiction to officiate marriages for Muslims. The Imam of Masjid Nur, Bula Pesa – Isiolo (carwash), Sheikh Ahmad Daud invited me to attend a wedding near his Masjid that I help to lead prayers Fridays. I agreed. This is the Imam of the nearest Masjid to the respondent's home. I attended the wedding. He officiated it.

I made the marriage sermon. I realized it was the respondent's son wedding only when I had reached at the house. If I had left, the people would have been offended. I give sermon in their mosque most Fridays and accepting invitation is an obligation and a duty under Islamic law, more so to a religious leader and scholar.

24. This information could have been easily established if it had been sought by the applicant, or minor enquiries made especially among people who had attended the wedding, the Imam of Masjid Nur, Bula Pesa – Isiolo or any Imam, Sheikh or elder in Isiolo. Kadhis, under section 49 and 57 of the Marriage Act No. 14 of 2014 and section 4 of the Muslim marriage rules (Legal Notice No. 288 of 1st December, 2017) have jurisdiction to officiate and register Muslim marriages. Indeed, pre and post-Independence Islamic tradition in Kenya leaves no doubt on Kadhis' role in officiating Muslim marriages. I have and normally do officiate some marriages and register all marriages done in Isiolo Town. Even where a Kadhi officiates a marriage, he does it as an officer of the court vested with powers to so do. It cannot be construed as a friend of any of the parties to the marriage.

25. Neither the respondent nor his son invited me to officiate or attend his son's wedding. It is not true that I officiated the wedding. The wedding was actually officiated by the Imam of the closest Masjid to the respondent. It is not true the respondent is my friend, let alone a close friend. A close friend, to paraphrase **Thesaurus**, can be understood as *'somebody who you can talk to about everything, who makes you feel comfortable without fear of judgment. A close friend can also be someone who is always there for you, who cares about your wellbeing.'* **Tercmoord.eu** describes a close friend as '*somebody you can be open with and relate to on personal issues, someone you don't need to invite home because he or she at any time is allowed into your house.'* It is not true I engage with the him on a personal level. Nothing in the affidavit in support of the application or submissions by the applicant through his advocate cite any other instance, where he or anybody saw me with the respondent anywhere alone or with others. This is simply because it never happened.

26. Would any reasonable person, especially a Muslim from Isiolo, seeing a Kadhi in a wedding, invited by his fellow sheikh, apprehend bias" Does appearance in a wedding in Isiolo establish close relationship or a communal duty" How would the people of Isiolo have felt had the Kadhi left the ceremony after all were converged for a wedding ceremony" Wouldn't it have been problematic on the integrity of the court, if the Kadhi had abruptly left in the middle of a wedding ceremony" Probability of bias would remotely be possible if the Kadhi had officiated a marriage and the issue in dispute between the parties was directly related to the marriage. This is not the case in this instance. No reasonable person having regard to all these facts and in such circumstances, would comprehend even the probability of bias.

27. The timing of the application does not assist the applicant. The marriage took place in March 2020. The court resumed operations in June 2020. In August 2020 the applicant filed two other applications. One, a Preliminary objection was given priority. The applicant apparently must have had this knowledge that I attended the wedding. All this time, since March 2020, he elected not to disclose that knowledge or apply for my recusal. It was conveniently made in September and strategically immediately after delivery of the ruling on his preliminary objection after realizing his application had not succeeded. An application for recusal on ground of bias must be raised at the earliest opportunity. It cannot be raised merely as a result of failure to win an application or case. A judicial officer applying the law to the facts, unless the law clearly requires a different course, does not qualify as evidence of partiality or bias. In **Judicial review No 124 of 2014, petition No 172 of 2014,** Odunga J, stated thus:

'A litigant seeking disqualification of a judge from sitting on the ground of appearance of bias, must raise the objection at the earliest opportunity... a litigant who has knowledge of the facts that gave rise to apprehension of possibility of bias of bias ought not be permitted to keep his objection up his sleeve until he finds that he has not succeeded. The court must guard against litigants who all too often blame their losses in court cases to biases on the part of the judge. Success of failure of the government or any other litigant is neither ground for praise nor 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… a litigant ought not be permitted the liberty of participating in legal proceedings on condition that the court makes orders in its favour.'

28. Even if there had been a perception of bias (which there was none), the applicant waived his right to apply for recusal when he failed to raise it at the earliest opportunity.

29. The application fails the double reasonableness requirement test. It failed to demonstrate probability let alone possibility of bias. It failed to establish the Kadhi had any interest in the matter, pecuniary or otherwise. The alleged facts are not entirely true and put out of context. It is a clear abuse of the court process and lacks merit. It is hereby dismissed.

Dated, signed and delivered at ISIOLO on the 25th November, 2020.

This ruling is delivered through e-mail to parties' advocates to mitigate effects of covid-19 pandemic. Both counsels had consented to same.

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of:

Court assistant Mr. Adano Roba.

for the applicant Mr. Majani

for the respondent Mr. Ashaba

Directions:

There are two pending applications in this matter: the application dated 24th February, 2020 and another dated 27th August, 2020. Parties had agreed to dispose of the application dated 24th February, 2020 by way of written submissions by 7th September, 2020. The date has since passed due to the numerous other applications in this matter. The application dated 27th August, 2020 has not been set down for hearing. The application for recusal having failed, I should now retire to write the ruling on the application dated 24th February, 2020. I hereby set date for ruling of that application for Monday 14th December, 2020 at 11.00 a.m. In the interests of justice, the applicant / respondent is granted leave to file his written submissions in any event but not later than 7th December, 2020. It is so ordered.

Hon. A.H. Athman; P.K.