Case Number:	Constitutional Petition Nos15, 16 & 17 of 2014 (Consolidated)
Date Delivered:	16 Dec 2015
Case Class:	Civil
Court:	High Court at Kisumu
Case Action:	Ruling
Judge:	Hilary Kiplagat Chemitei
Citation:	Julius Otieno Polo & another v Director of Public Prosecutions & another [2015] eKLR
Advocates:	none
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed with costs.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NOS.15, 16 & 17 OF 2014

JULIUS OTIENO POLO.....1ST PETITIONER

JENIPHER ANYANGO NDEGE ….....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ….....1ST RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

R U L I N G

1. The petitioners/applicants filed a Notice of Motion on 12th October, 2015 under Section 3 and 3A of the Civil Procedure Act Cap 23 Laws of Kenya and Order 5- Rules 1 of the Civil Procedure Rules. The petitioners pray that the honourable Judge do recuse himself from hearing this petition and the accompanying application and transfer the same to another judge to hear and determine the same.

2. The application is supported by the affidavit of Geoffrey O Yogo, Counsel for the petitioners, sworn on 12th October, 2015. It is his case that this court recently heard and determined a similar petition and application and made judgment on the same being **CONSTITUTIONAL PETITION NO.6 OF 2015 COLLINS MAKHOKHA & FELIX MBUVI VRS DPP & THE INSPECTOR OF POLICE**. In that case the court held that it would not interfere with the prosecutorial powers of the DPP. Mr. Yogo contended that the facts in petition No.6 of 2015 and the current petition herein are ***pari material*** and the petitioners are thus afraid that the court will arrive at the same decision as the one it arrived at in Petition No.6 of 2015. He was of the view that it is only good practice that this court is not called upon to pronounce itself on the same issue again when there are no intervening circumstances to warrant any change of mind as this would result in biasness.

3. The 2nd respondent filed grounds of opposition in opposition of the application. The 2nd respondent argued that no reasonable ground had been set out for assuming the possibility of bias on the part of the court and he could therefore not recuse himself on unsubstantiated suspicion. The 2nd respondent further stated that the fact that a judge has heard similar causes in the past cannot be a sufficient reason in law for him to disqualify himself. It was further argued that it cannot reasonably be expected of any judicial officer to only hear cases of a kind that he has never heard before. The 2nd respondent concluded by stating that the application did not meet the standards set in Rule 5 of the Judaical service Code of Conduct and allowing the same would set a precedence where parties can apply for a judicial officer to recuse himself so that they can appear before a court which they think would rule in their favour.

GENERAL PRINCIPLES AND THE COURT'S RENDITION

4. The petitioners have alleged bias against this court because the judge has made findings and orders in a previous petition with similar facts. Judicial bias is the judge's bias towards one or more of the parties to a case over which the judge presides and judicial bias is not enough to disqualify a judge

from presiding over a case unless the judge's bias is personal or based on some extra-judicial reason, (see definition of judicial bias in Black's Law Dictionary, 9th Edition). In **ANDREW ALEX WANYANDAH VRS THE ATTORNEY GENERAL & KENYA RAILWAYS CORPORATION – NAIROBI MILIMANI HCCCC NO.844 OF 2005,** Justic**e Hatari** W**aweru** was asked to disqualify himself on the allegations of begin biased due to several comments he had made when the matter was proceeding. The judge noted as follows:

> **"There is nothing like a litigant veto of the court or judge**
>
> **hearing his matter; litigants cannot choose their judges.**
>
> **Applications for disqualification of judges would not be**
>
> **lightly allowed., that would tend to erode public confidence**
>
> **in the courts and the determination of justice."**

5. In J**OSEPH MAINA THEURI VRS GITONGA KABUGI & 3 OTHERS [2013] e KLR** the court stated as follows:

"**The court considers that the judge carries an ethical obligation for refusal if the judge knows the reason to do so. Where no such reason is known or is not established, the court holds that the judge similarly carries an ethical obligation to hear and determine the case at hand. Thus, a judge hold an obligation to hear and determine matters brought before the court until a valid bias for recusal is established and, a judge should not invoke recusal unless a valid reason to do so exists. The court hold that the threshold and compelling obligation for recusal of a judge in an appropriate case in every measure, equals to the threshold and compelling obligation for hearing and determining the case for which the presiding judge is vested with the jurisdiction to decide and in absence of a valid disabling reason against the judge. Thus, in deciding for or against recusal, the presiding judge must carefully balance the thin line separating the two ethical obligations."**

6. In the present case, the petitioners' application is not based on the conduct of this court in the present petition. It is based on a decision that the court made in a different matter. The petitioners' feel that the court should not be made to pronounce itself on the same issues again as there are no prevailing circumstances that would warrant a change of the court's mind on the issues raised. The question that arises is: does it mean that once a judge has pronounced himself on a certain issue he can never handle such a matter again" I find the reasoning by the petitioners to be lame.

7. It is not enough for a party, like in the present case, to simply allege that the party is dissatisfied or not happy with a decision that the judge made in a different matter and attribute the same to speculative and unsubstantiated allegations of bias in applying to seek recusal of the presiding judges. It is only where genuine reasons are established to doubt a judge's impartiality that the judge should be required to recuse or may *suo sponte* recuse because the disabling grounds are visibly present. If a party is unhappy with a decision made by the court in a previous matter with similar facts, the right thing to do is to file an appeal but not to require a judge to recuse himself from adjudicating on similar matters in future. That is the reason our court system is hierarchical so that dissatisfied parties can find resource in the Court of Appeal.

8. As it has been judicially decided again and again, the test is objective. It is not what rests in the

mind of the judge to decide fairly but what a reasonable person with knowledge of all the circumstances and facts of the case will perceive of the judge's capacity to decide the case fairly. (See J**OSEPH MAINA THEURI VRS GITONGA KABUGI & 3 OTHERS (supra).**

9. I find no proof of bias. The apprehension by the applicant that he will not get justice in the court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts., the aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter.

10. For the foregoing reasons the application is dismissed with costs.

Dated. Signed and delivered this 16th day of December, 2015.

H. K. CHEMITEI

J U D G E