



**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION**



(Coram: *Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nyachae, Richard Muhumuza & Richard Wabwire Wejuli, JJ*)

**APPLICATION NO. 19 OF 2023
(ARISING FROM REFERENCE NO. 17 OF 20218)**

PROF. PAUL KIPRONO CHEPKWONY APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA RESPONDENT**

27TH MARCH 2023

REASONED RULING OF THE COURT

A. INTRODUCTION

1. The instant **Application No. 19 of 2023** was filed by the Applicant on 6th November, 2023. The Application was made under Rules 4, 52(1) (2), (4), (5) of the East African Court of Justice Rules of the Court, 2019, (“the Rules”) and Article 26(6) of the Treaty for the Establishment of the East African Community (“the Treaty”). The Application arises from **Reference No. 17 of 2018**, where the Applicant on behalf of several minors, sought several orders against the Respondent.
2. The instant Application sought the following orders:
 - a) That this Application be certified as urgent and be heard immediately and determined;
 - b) That Hon. Mr. Justice Charles Nyachae do recuse himself from participating in these proceedings because of direct conflict of interest. His participation might not be perceived to be in the best interest of justice;
 - c) That the appointing authority be asked to appoint any other suitable person to act as Judge in these proceedings instead of the Hon. Mr. Justice Charles Nyachae in accordance with the provisions of the Treaty for the Establishment of East African Community;
 - d) That the proceedings herein be stayed until such a time the appointing authority appoints a new judge in place of Hon. Mr. Justice Charles Nyachae to sit in the bench; and
 - e) That costs of this Application be provided for.
3. On 10th November, 2023, the Court dismissed the said **Application No. 19 of 2023** and stated that it would render a Reasoned Ruling.

4. This Ruling, therefore, is the Reasoned Ruling stating the basis of the Court's decision rendered on 10th November, 2023.

B. REPRESENTATION

5. At the hearing of the Application, the Applicant was represented by Learned Counsel, Mr Joel Kimutai Bosek. The Respondent was represented by Learned Chief State Counsel Oscar Eredi.

C. BACKGROUND

6. In **Reference No. 17 of 2018**, the Applicant, Prof. Paul Kiprono Chepkwony suing for and on behalf of several minors, sought orders against the Republic of Kenya, alleging violations against the said minors, which violations allegedly contravened the Treaty.

7. Following a full hearing of the Reference, the Court found in favour of the Respondent and dismissed the Reference.

8. Subsequently, the Applicant filed **Application No. 33 of 2022**, seeking a review of the Court's Ruling.

9. The Applicant later filed the instant Application, seeking the orders set out in paragraph 2 above.

D. THE APPLICANT'S SUBMISSIONS

10. The Applicant submitted that Justice Charles Nyachae should recuse himself from being part of the judicial bench hearing the matter; first, because in the earlier proceedings he had demonstrated in his interjections, bias against the Applicant, and in particular resulting in "arm twisting" the Applicant's Counsel to withdraw **Application No. 21 of 2021**.

11. Further, the Applicant submitted that the said Justice Nyachae could not be an impartial Judge in this matter as his (the Judge's)

family, had acquired and owned land in the area of the main water tower, which allegedly was part of the area subject of **Reference No. 17 of 2018.**

12. The Applicant's Counsel further submitted that in any event, Justice Nyachae, was improperly appointed a Judge of the East African Court of Justice, by reason of influence and closeness to the President of Kenya and he was appointed to the Court merely to represent class interests. In this regard, the Judge could not be fair and impartial in a matter involving the Applicant.

13. The Applicant thus, asked that the Judge recuses himself from the bench hearing this matter.

E. THE RESPONDENT'S SUBMISSIONS

14. The Respondent submitted that the Applicant had merely made unsubstantiated allegations against Justice Nyachae, and had not laid any basis to justify recusal by the Judge.

15. The Respondent submitted that if the Applicant had reasons for the requested recusal, they should have been raised at an earlier stage, not after the Reference had been heard and concluded.

16. Further, such interjections as the Judge made during the hearing of the Reference, were no more than as are normal in judicial proceedings and, in any event, the interjections were directed to both Counsel, not just to the Applicant's Counsel.

17. The Respondent further submitted that beyond mere speculations and unsubstantiated statements from the bar, the Applicant had not by any evidence demonstrated any nexus between the Judge and the land that is the subject of the Reference.

18. It was the Respondent's further submission that the Applicant had failed to meet the established judicial threshold for bias or partiality that forms a basis for recusal.

19. Accordingly, the Respondent prayed that the Application ought to be disallowed.

F. COURT'S DETERMINATION

20. Article 24(1) of the Treaty provides that:

“Judges of the Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognized competence, in their respective Partner States.”

21. It is a fundamental requirement therefore, that a Judge of the Court must be of proven integrity, impartiality and independence. This must be the starting point of our consideration of the Application. If therefore, a person litigating is able to demonstrate in a particular matter that a Judge falls short on any of these attributes, then we hold that, the Judge would be obligated to recuse himself or herself. Indeed, we hold that, beyond any particular case, the absence of any of those attributes, would mean that the Judge ceases to be qualified to be a Judge of the Court, with the attendant consequences as contemplated in Article 26 of the Treaty.

22. We turn to the specific allegations in the instant Application. Firstly, is the timing of this Application for recusal. This Court in **Attorney General of the Republic of Kenya vs Prof. Anyang' Nyong'o and**

10 Others, EACJ Application No. 5 of 2007, made the following statement:

“We respectfully agree that a litigant who has knowledge of the facts that give rise to an apprehension of possibility of bias ought not to be permitted to keep his objection up the sleeve until he finds out that he has not succeeded. The Court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge.

In The S. A Rugby Football Union case (supra) paragraph 68 the Court observed that:

‘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 an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgement ...

Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of a judicial officer’.”

23. In the instant Application, the Applicant chose to allege bias against Justice Nyachae, long after the Reference had been heard and

concluded. There is no suggestion that the matters giving rise to the allegations were not available to the Applicant at an earlier point.

24. It is our view that this Application, like the one in the **Anyang' Nyong'o case** was brought for reasons other than a desire to ensure that the Applicant receives a fair hearing. In the **Anyang' Nyong'o case**, the Court was clear on this aspect when it stated that:

“In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the Application on this finding alone.”

25. So too, in the instant Application, we would be entitled to dismiss the Application on this ground.

26. However, we have considered the Application on its merits. In the **Anyang' Nyong'o case** (*supra*) the Court further stated:

“... a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The Applicant must establish that bias is not a mere figment of his imagination. In S. A. Rugby Football Union case (*supra*), the Court said in Para. 45:

‘An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for (a recusal) application’.”

27. It was, therefore, necessary for the Applicant to demonstrate a basis for the allegations or apprehension of bias. The Court in the **Anyang' Nyong'o case** (*supra*) stated:

“We think that the objective test of the “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public, that the Judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of judge comes to Court because of his own perception that there is appearance of bias on the part the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about what all the circumstances of the case would be.”

28. In determining whether apprehension is reasonable in the circumstances, we are persuaded by the test stated by the High Court of Kenya in **Republic vs Independent Electoral and Boundaries Commission and 3 Others, *Exparte Wavinya Ndeti* (2017) eKLR** thus:

“It must be appreciated that in matters of perception the Applicant must show that there exists reasonable perception. Such reasonable perception in my view must be based on facts and in this case the Court was not informed the perception alluded to in order for the Court to decide whether that perception is reasonable or not.”

29. So, too in **Philip K Tunoi and Another vs Judicial Service Commission and Another, (2016) eKLR**, the Court of Appeal of Kenya stated:

“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 bias.”

30. We are of the view that the Applicant, both in the supporting Affidavit and in submissions, did not demonstrate any basis that would be considered to reasonably meet the test of bias or lack of partiality on the part of the Judge.
31. The Applicant made allegations that Justice Nyachae’s late father owned land in the Mau Water catchment area, which land was acquired in a questionable manner, and which is the subject of litigation in the Courts of Kenya.
32. However, the Applicant did not offer any evidence to demonstrate ownership of such land by the Judge’s family, the location of any such land relative to the area subject of the Reference, and or such connection as would give a reasonable basis to apprehend bias. Indeed, even the bare allegations made by Counsel from the bar, were inconsistent and remained so even in the face of the questions from the bench.
33. In our view, the allegations were not helpful as regards establishing the basis of apprehension that the Judge would be biased or partial in this matter.
34. We were also unable to identify a logical connection between the allegations that the Judge was appointed to represent class interests at the Court, and those relating to the Judge’s previous assignments within the Republic of Kenya, to the instant Application.

35. In the event, Justice Nyachae declined to recuse himself and stated as follows:

“Thank you very much my Lord, the Principal Judge. My Lord, I carefully read the Application and the supporting documents and I carefully listened to submissions by both Counsel and searched myself and my position is that aside from what I would call gratuitous statements from the Bar by Counsel for the Applicant which are basically scandalous of myself, my late father and my family, I see absolutely nothing in the Application nor in the submissions from Counsel that for me would lay a basis to suggest that there is even a possibility of my being conflicted in this matter and therefore, I will state, my Lord, Principal Judge that I do not regard myself as having any conflict of interest in sitting as a Judge on the Bench in this matter, and I therefore, my Lord, decline to recuse myself. Thank you, my Lord.”

36. In the case of DARI Limited and 5 Others vs The East African Development Bank and 2 Others (2020) eKLR, the High Court of Kenya held:

“That although it is important under the law that, justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not accede 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. Further, under the common law. A judge has a duty not to recuse herself on unsupported

speculation. There is as much obligation for a judge not to recuse when there is no occasion for her to do so, as there is occasion for her to do so when there is.”

37. In the Uganda Court of Appeal case of **MEERA Investments Limited Vs the Commissioner General, URA, Civil Appeal No. 5 Of 2007**, the Court cited with approval the following statement of the Supreme Court of New Jersey decision in **CARTER-ARTIS Case 1981**:

“The challenger must adduce proof of the truth of the charges and as to the sufficiency of such proofs the Judge himself must decide. The mere filing of an affidavit of prejudice does not deprive the Judge of the jurisdiction...As to the sufficiency of such proof of disqualification, the Judge himself must decide. Not only is a Judge not required to withdraw from the hearing of a case upon a mere suggestion that he is disqualified to sit, but it is improper for him to do so unless the alleged cause of recusation is known by him to exist, or is shown by proof to be true in fact. A mere suggestion that a court is disqualified to sit is not sufficient and it is in fact improper for him to do so.” (Emphasis added)

38. We find it helpful and instructive to make reference to two further cases of persuasive authority. In **MUIR vs Commissioner of Inland Revenue, (2007) 3 NZCA 495**, the Court of Appeal of New Zealand stated as follows:

“The requirement of independence and impartiality of a judge is counterbalanced by the judge’s duty to sit, at least where grounds for disqualification do not exist in

fact or in law the duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 *'it is equally important that the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion 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'.*"

39. In WOYOME vs Ghana (merits and reparations) 3 AFCLR 235, the African Court on Human and Peoples Rights stated:

"The Court considers that, to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt. However, the Court observes that the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that 'the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge' and that 'whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding'."

40. We have carefully considered the evidence proffered by the Applicant such as it was, to demonstrate that Justice Nyachae was, or was likely to be biased or partial in this matter. We similarly heard and considered the submissions of both parties. With respect, we are in no doubt that the Applicant has failed to demonstrate any basis for a presumption of bias or lack of partiality on the part of the Judge.

41. For the reasons set out above in this Ruling, we find and hold that no reasonable basis has been set by the Applicant, for Justice Charles Nyachae to recuse himself.

42. Justice Nyachae ought not to recuse himself from Application No. 33 of 2022.

43. On costs, Rule 127(1) of the Rules provides that:

“Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order.”

44. We see no reason to depart from this Rule, and we, thus, award the costs of the Application to the Respondent.

G. CONCLUSION

45. The Application is dismissed in its entirety with costs.

46. It is so ordered.

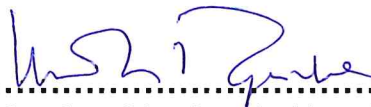
Dated, signed and delivered at Arusha this 27th Day of March 2024.



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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



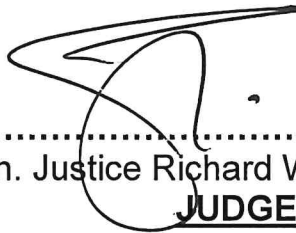
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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE



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Hon. Justice Charles A. Nyachae*
JUDGE



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Hon Justice Richard Muhumuza
JUDGE



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Hon. Justice Richard Wabwire Wejuli
JUDGE

*[Hon. Justice Charles A. Nyachae resigned from the EACJ with effect from 8th January, 2024 but he signed this Judgment in terms of Article 25(3) of the Treaty]