

UGANDA / JUDGMENT

Mabirizi v Kabaka of Buganda (Civil Appeal 13 of 2018) [2021] UGSC 32 (18 May 2021) [2021] UGSC 32

COURT

Supreme Court of Uganda

BEFORE

Tuhaise, JSC

CASE / FILE NUMBER

Civil Appeal 13 of 2018

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 13 OF 2018

(ARISING OUT OF COURT OF APPEAL CIVIL APPEAL NO 184 OF 2017) (Arising Out of High Court Civil Division Miscellaneous Application No. 41 of 2017)

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MALE MABIRIZI K. KIWANUKA.....

VERSUS

THE KABAKA OF BUGANDA.....

Coram: Opio Aweri; Mwondha; Mugamba; Tuhaise; Chibita; JJSC

Ruling on the Appellant's request for the recusal of Tuhaise, JSC

Introduction

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When this appeal was called before this Court, the Appellant (referred to as "Applicant" for purposes of this ruling), who was representing himself, informed Court that he had earlier written to all the members on the coram through the Registrar of this Court requesting for their recusal from hearing and determining the instant appeal. The Appellant's misgivings about the

coram related to a complaint he had made against each of us to the Judicial Service Commission (JSC), and also, specifically against myself regarding a case I earlier handled, as extracted from his letter, that:-

" \$1\$

2. I now write to request for your recusal pursuant to Paragraphs 6(1), \$6(2)(a)\$, \$7(1)(b)\$ -c & 8(1) of The Constitution (Recusal of Judicial Officers) (Practice) Directions, Legal Notice No. 7 of 2019.
3. By letters dated 19th March 2012 to Judicial Service Commission, I sought your respective removal from office of a Justice of Supreme Court on grounds of conduct in a manner prejudicial to the good image, honour, dignity and reputation of judicial service and discrimination of Justice Dr. Esther Kisaakye on basis of her sex, in contravention of The Code of Judicial Conduct & abuse of Judicial authority.
4. This surely breeds animosity amongst you and me and indeed your impartiality in a case where I am appellant will be necessarily questioned.
5. Justice P. N Tuhaise has personal knowledge on the facts of the appeal, herself having made a ruling in Court of Appeal Misc. Application No. 257 of 2017 at pages 229 – 247 of the Supplementary record of Appeal which Ruling is sought to be set aside vide prayer no. 4 of the Amended *Memorandum of Appeal, hence, she will be sitting in her own appeal.*
6. This application is supported by my affidavit hereto attached.

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The other members on the coram respectfully declined to recuse themselves immediately after the Applicant had presented the application. However, in my case, since, in addition to being referred to with the other members on the coram in the said paragraphs, the Applicant had also specifically singled me out under paragraph 5 of the same application as having made a ruling in **Court of Appeal** Miscellaneous Application No. 257 of 2017, my response or decision on the application for my recusal was deferred by this Court to allow me time to peruse the record referred to by the Applicant, so as to be in position to determine from a position of knowledge, whether the Applicant's application for my recusal had merit. It is in that connection that I now proceed to make this ruling.

Consideration of the application for my recusal

Before delving in the merits of this application, I will put it on record that I had had no opportunity to read the written application for my recusal until when it was brought to my attention during the court sitting after the Applicant had presented it orally. Curiously, it, together with the supplementary record of appeal containing my ruling at the Court of Appeal Civil Application No 257 of 2017 Male H. Mabirizi K. Kiwanuka V The Kabaka of Buganda, had not been included in the court documents that were placed in my chambers for perusal before the

hearing. I only got to see the said documents or record after the matter was orally raised in this Court by the Appellant, upon which the Clerk brought them over to where I was seated. That notwithstanding however, I have now had opportunity to peruse the said written application and supplementary record of appeal.

Rule 5 of The Constitution (Recusal of Judicial Officers) (Practice) Directions, Legal Notice No. 7 of 2019 provides that a judicial officer may, on application by any of the parties or on his or her own motion, recuse himself or herself from any proceedings in which his or her impartiality will reasonably be in question.

The instances under which my recusal was sought by the Applicant are that he has sought my removal from the office of Justice of the Supreme Court, which, according to him, "surely breeds animosity"; secondly, that I have personal knowledge of the facts of the appeal, having made a ruling in *Court of Appeal Miscellaneous Application No. 257 of 2017*; and thirdly, that the said ruling is sought to be set aside in the appeal before this Court. I will address the application on what I have, for easy reference, categorized as three aspects or grounds, as follows:-

The Applicant's questioning of my impartiality

I have carefully considered grounds 3 and 4 of the application, details of which are quoted above that, because the Applicant sought my removal

from office of a Justice of Supreme Court, it surely breeds animosity between me and him and that, indeed, my impartiality in a case where he is Appellant is questioned. This clearly falls under rule 6 (1) of the cited Practice Directions on Recusal, which provide that a judicial officer shall refrain from participating in any proceedings in which his or her impartiality may be questioned. The Uganda Code of Judicial Conduct also prohibits it under Clause 2.

In the case of **The Attorney General of the Republic of Kenya V Prof. Anyang' Nyong'o & 10 Others**, East African Court of Justice Application No. 5 of 2007 cited by the Applicant, the court observed that a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court clearly stated that where the judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, he or she can only be disqualified if there is likelihood or apprehension of bias arising from such circumstances as relationship with one party or pre conceived views on the subject matter in dispute. This disqualification is not presumed. The Applicant must establish that bias is not a mere figment of his imagination. The court cited the case of **The President of the Republic & 2 Others V South African Rugby Football Union & 3 Others** (Case CCT 16/98), at paragraph 45, that;-VAN

"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application."

This test, known as the objective test of "reasonable apprehension of bias", requires the court 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 all the circumstances of the case.

The judicial oath I took, as required under Article 149 of the Constitution of the Republic of Uganda, requires me to exercise my judicial functions

by doing right to all manner of people in accordance with the Constitution and the laws of Uganda, without fear or favour, affection or ill will. This is also well reflected in the Uganda Code of Judicial Conduct and the Mission, Vision, and Values of the Judiciary which emphasize Transparency, Professionalism, Accountability, Equality and Respect. A reasonable and fair minded person who appreciates the nature and implications of a Judicial oath and concept of judicial ethics which sets standards for ethical conduct of judges, namely independence, impartiality, integrity, propriety, equality, competence and diligence, would definitely not perceive me to be biased against the Applicant merely on basis of the Applicant's unsubstantiated perception of bias against me. The Applicant has not substantiated his claim that I have animosity towards him. This makes me conclude that his claims that his seeking my removal from the office of a Justice of the Supreme Court "surely breeds animosity" between me and him is, with respect, his own fertile imagination.

Thus, for reasons given, I would decline to recuse myself from the appeal before this Court on the ground of impartiality.

The Applicant's claims that I have personal knowledge on the facts of the appeal

The Applicant's claim that I have personal knowledge on the facts of the appeal is a ground for recusal under rule 6 (2) (a) of the cited Practice Directions on Recusal, and under Clause 2.4.1 of the Uganda Code of Judicial Conduct.

The cited Practice Directions and the Uganda Code of Judicial Conduct do not define what amounts to having personal knowledge of the disputed facts concerning proceedings. Black's Law Dictionary, ninth edition, at page 951, defines "personal knowledge" as:-

"Knowledge gained through first hand observation or experience, as distinguished from a belief based on what someone else has said... An affidavit must also be based on personal knowledge, unless the affiant makes it clear that a statement relies on 'information and belief'-

Also termed as firsthand knowledge." (emphasis mine).

I have carefully perused my ruling in Court of Appeal Miscellaneous Application No. 257 of 2017. The ruling was on a Reference made by the Applicant (who was also Applicant in that Reference). The Reference was challenging the ruling of the Court of Appeal's Deputy Registrar where she declined to tax the Applicant's bill of costs in respect of an appeal which had been withdrawn before the Applicant was served with the same. The basis for the Deputy Registrar's decision was that the bill of costs was hanging and had no basis. My ruling disposed of the Reference at a preliminary stage before addressing the merits, because the head suit, Miscellaneous Application

No. 162 of 2016 Male H. Mabirizi Kiwanuka V The Kabaka of Buganda, out of which it had arisen, had long been dismissed by the High Court, and it would only be moot or academic to proceed with it.

My ruling on the said Reference would not, in any given circumstances, and by any stretch of imagination, make me have personal knowledge of the facts of the appeal before this Court for which my recusal is sought. I have never been privy to any transactions of the Respondent in the appeal before this Court, in whatever capacity, as to get personal knowledge of the facts pertaining to this appeal.

I hasten to add that, having knowledge of the facts of a case (or an appeal), which is information that is essential to understanding a dispute, situation or problem for purposes of resolving it, or as a result of having handled the same as a judicial officer, is very different from having personal knowledge of its facts. This is simply because a judicial officer who handles a case bases his or her knowledge of the facts of a case from the pleadings and what is adduced as evidence in court. He or she does not have firsthand knowledge of the facts of that case, otherwise he or she would qualify to be a witness in the case, in which case he or she would have to recuse himself or herself. Thus, while a person who has personal knowledge of the facts of a case is competent to be a witness in that case, a judicial officer who gets background knowledge through its proceedings or hearing does not necessarily qualify to be a witness in that case.

I would for the foregoing reasons, decline to recuse myself on the ground that I have personal knowledge of the facts of the appeal.

The Applicant's statement that I will be sitting in my own appeal

The Applicant further states in his application that my ruling in *Court of* Appeal Civil Appeal 257 of 2017 is sought to be set aside vide prayer number 4 of the Amended Memorandum of Appeal, that I will hence be A sitting in my own appeal.

I have carefully perused the Amended Memorandum of Appeal filed in this Court on 30/07/2018. Paragraph 5 (it is not paragraph 4 as the Applicant states) of the said memorandum of appeal, which is a prayer to this Court, states as follows:-

"5. The setting aside of the costs awarded to the appellant in High Court Civil Division Misc. Application No. 395 of 2017, Taxation Appeal No. 1 of 2018 and the Respondent's withdrawal of the Court of Appeal vide the Ruling on Respondent's Preliminary objection on a Reference in Civil Application 257 of 2017 be set *aside.*" (emphasis mine).

This is supported by paragraphs 21 and 22 of the Applicant's supporting affidavit.

Thus, on the face of it, without prejudice to the merits of his appeal or the credibility of his evidence, it is apparent the Appellant/Applicant wishes to set aside my Court of Appeal Ruling in *Civil Appeal No. 257 of* 2017.

It is a principle of natural justice, expressed in the Latin maxim that, "**Nemo iudex in causa sua**" meaning, literally, that no one is judge in his or her own cause. This principle is well embodied in Article 28 of the Constitution of Uganda which guarantees the right to a fair hearing, as well as in the Uganda Code of Judicial Conduct and the Judicial Oath. It is therefore a cardinal principle applied very strictly in our jurisdiction to any appearance of a possible bias, even if there is actually none, hence the saying that "justice must not only be done, but must be seen to be done."

Since it is clear, on the face of the record, that the Applicant seeks to set aside my Court of Appeal Ruling in *Civil Application No. 257 of 2017*, I would be inclined to agree that sitting on the coram of an appeal where the Applicant is seeking to set aside my Ruling would tantamount to being a Judge in my own cause.

Therefore, on grounds that I should not be a judge in my own cause, I would recuse myself from the hearing of this appeal, and I hereby do so.

Dated at Kampala this..... **KANulause Percy Night Tuhaise**

Justice of the Supreme Court.

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