



REPUBLIC OF KENYA



KENYA LAW
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Adano v Chairman IEBC of Kenya National Chamber of Commerce and Industry & 12 others (Civil Suit E002 of 2023) [2024] KEHC 13929 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL SUIT E002 OF 2023
JN NJAGI, J
OCTOBER 31, 2024**

BETWEEN

GURE ALI ADANO PLAINTIFF

AND

**CHAIRMAN IEBC OF KENYA NATIONAL CHAMBER OF COMMERCE AND
INDUSTRY 1ST DEFENDANT**

**KENYA NATIONAL CHAMBER OF COMMERCE AND
INDUSTRY 2ND DEFENDANT**

SALIM HAROUB 3RD DEFENDANT

ALI NOOR 4TH DEFENDANT

FATUMA JAMA CHURQO 5TH DEFENDANT

JOHN UMURO GALGALLO 6TH DEFENDANT

HASSAN HUSSEIN HASSAN 7TH DEFENDANT

KORA CHOKE GOLICHA 8TH DEFENDANT

GUYO HUKA ISSACK 9TH DEFENDANT

JATANE BONAYA 10TH DEFENDANT

JUMA BORU HALAKE 11TH DEFENDANT

ABDI AZIZ IBRAHIM 12TH DEFENDANT

AHMED ALI 13TH DEFENDANT



RULING

1. The plaintiff herein has filed an application dated 10th July 2024 seeking for orders that this court recuses itself from hearing this matter and that the matter be transferred to Nairobi for hearing and disposal.
2. The application is premised on grounds stated on the face of the application that the court is not independent and non- partisan to handle the matter fairly. The application was supported by the affidavit of the plaintiff sworn on 10th June 2024 in which he avers that he on the 5th June 2024 met the 3rd defendant at Jumbo Hotel in Hurlingham in Nairobi when the 3rd defendant boasted to him that the court was going to dismiss his (plaintiff's) application which was at the time pending before this court because the judge was "in his pocket". That on the following day the application was decided in favour of the 3rd defendant just as the 3rd defendant had told the plaintiff.
3. The plaintiff further avers that after the court dismissed his application, the 3rd defendant sent him a copy of the ruling to brag that the judge had indeed ruled in his favour.
4. It was the averment of the plaintiff that the statements by the 3rd defendant creates the impression that the court has been compromised and is not independent and non-partisan. That it is in the interest of justice that a different judge hears and determines this matter as the plaintiff has a constitutional right to have his dispute resolved by an independent and impartial court.
5. The application was opposed by the 3rd defendant vide his replying affidavit sworn on the 16th July 2024 in which he denied ever meeting the plaintiff at a hotel on the 5th June 2024. He averred that he was busy in meetings all day and later went to pick his vehicle at a garage at Yaya after which he went home.
6. The 3rd defendant said that he sent the applicant the court ruling on the 11th June after he received it from his advocate. That at 5.05 the applicant sent him a message with the exact words he now purports to have been his (3rd defendant) words.
7. The 3rd defendant further averred, without prejudice, that all he was quoted saying is that his application would be allowed and that the same was done out of speculation and expectation having been aware that he had a strong and meritorious case.
8. The application was disposed of by way of written submissions of the respective counsels for the parties. The plaintiff submitted that the test for recusal is an objective one where it has to be considered whether a reasonable and fair minded observer would have a reasonable apprehension of bias. That it is not a subjective test as perceived by the judicial officer in his or her mind.
9. It was submitted that the statements by the 3rd respondent creates a reasonable apprehension of compromise and manipulation of the judge by the 3rd respondent. That the statements could reasonably lead to a perception that the judge is not impartial. The plaintiff in this respect relied on the case of Republic v David Makali & 3 others (1994) eKLR where the court held that judges should disqualify themselves if there is reasonable suspicion of bias, even if they believe themselves to be impartial. He also cited the case of Philip K. Tunoi & another v Judicial Service Commission & another (2016) eKLR where the Supreme Court emphasized that the test for recusal is not whether the judge is actually biased but whether there is reasonable apprehension of bias based on the facts. It was submitted that this test has been achieved in the present application.



10. The plaintiff further relied on Article 50 of *the Constitution* that guarantees every person the right to a fair hearing to be conducted by an impartial and independent tribunal. It was submitted that the essence of this right is that justice should not only be done but should manifestly and undoubtedly be seen to be done. The case of Gladys Boss Shollei v Judicial Service Commission & another (2018) eKLR was cited where the Court of Appeal reiterated that the right to a fair hearing includes the right to be heard before an impartial tribunal. That in this case the right to fair hearing is likely to be compromised due to the statements made by the 3rd defendant.
11. The plaintiff submitted that the appearance of bias by a judge can be as damaging to public confidence in the judicial process as actual bias. The case of Republic v Mwalulu & others (2005) 1 KLR 547 was referred to in this respect. The plaintiff further cited the case of Metropolitan Properties Co. (FGC) Ltd v Lannon (1969) 1 QB 577 where the court stated that “justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: the judge was biased”. It was submitted that the 3rd defendant’s statement that the “judge was in his pocket” and that the ruling would be favourable to him have cast a long shadow of doubt over the impartiality of the proceedings. That there are compelling grounds warranting recusal of the judge in this matter so as to ensure that justice is not only done but is seen to be done, thereby preserving the integrity and public confidence in the judicial process.

Respondent’s Submissions

12. The 3rd defendant on the other hand submitted that the application is grounded on unfounded speculation and unsupported by evidence.
13. It was submitted that in an application for recusal, an applicant must demonstrate a reasonable apprehension of bias. The case of Republic v Mwalulu & others (2005) 1 KLR 31 was cited where it was held emphasized that bias must be demonstrated through cogent evidence and the perception must be reasonable to an objective observer.
14. It was submitted that the plaintiff’s assertions are based with mere dissatisfaction with the court’s ruling which does not meet the threshold of establishing bias. The case of *Gathuri v Attorney General & another Kenya Judges Welfare Association & another (interested parties) [Constitutional Petition E304 of 2023]* (2024) KEHC 1632 was cited where it was stated that:-

“The onus is on the party seeking recusal to establish the usually high standard because the request for recusal impugns the integrity of the Judge.”
15. It was submitted that the plaintiff’s claim falls far short of the high standard required to justify such a drastic remedy. That a mere allegation of bias in unsupported by tangible evidence, cannot suffice as a basis for recusal. The defendant cited the case of National Water Conservation and Pipeline Corporation & Runji Partners consorting Engineers (2021) KECA 291 (KLR) where the Court of Appeal held that:

“It is not sufficient for an applicant to allege bias simply because of an adverse ruling or decision. There must be evidence of actual bias or a real possibility of bias.
16. It was submitted that the application is nothing more than an attempt to shop for a favourable decision. That the allegations are based on hearsay and conjecture with no credible evidence to substantiate the claims. It was submitted that the application amounts to abuse of court process and is meant to delay the conclusion of the proceedings and to harass the defendants. The defendants urged the court to dismiss the application with costs as it does not meet the threshold for recusal.



13. I have considered the grounds adduced in support of the application and the grounds in opposition thereto. The issue for determination is whether there are sufficient grounds for this court to recuse itself from the matter.
14. The plaintiff herein alleges that he had an encounter with the 3rd respondent at a hotel at Hurlingham in Nairobi wherein the 3rd defendant told him that the ruling that was pending before this court would be delivered in his favour as the judge was “in his pocket”. The 3rd respondent denied ever having such an encounter with the plaintiff. He denied making the statements alleged.
15. I have considered the issues raised in the application. This court is being asked to recuse itself from the matter over statements allegedly made by the 3rd defendant which insinuated that the judge had been compromised. The 3rd defendant denied making the statements complained of and denied meeting the plaintiff on the material day.
16. From the averments, what is before the court is simply the word of the plaintiff that he had an encounter with the 3rd defendant when the 3rd defendant uttered the words complained of against the word of the 3rd defendant that he never met the plaintiff on that day and never uttered the statement complained of. Whether there was an encounter between the two parties is something only known to themselves. Whether the 3rd defendant uttered the words complained of is only known to the two of them. One of them is definitely lying on what happened on that day and it may not be known as to who between them is the telling the truth.
17. It is unfortunate that the court is being dragged into the kind of accusations and alterations between the two parties. Truth would be the first casualty in that kind of game. The two parties are involved in a vicious war over the control of Marsabit Chapter of National Chamber of Commerce and Industry. It is acceptable for them to drag the court into dispute. It is telling that the plaintiff never raised the complaint before the court delivered its ruling but only waited for the court to deliver the ruling and then came up with the complaint upon the court dismissing his application. It may be a question of sour grapes after losing the application. Whatever the case, it will no longer be tenable for me to continue hearing the matter in face of these new developments.
18. Having weighed my conscience on the matter, I do hereby recuse myself from the case. As I am on transfer the matter will proceed before the incoming judge.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 31ST DAY OF OCTOBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Plaintiff

Mr. Wanyonyi holding brief Mr. Mwendani for 3rd – 13th defendants

Court Assistant – Jarso

