Ethics and Anti-Corruption Commission v Kinyua & 2 others (Anti-Corruption and Economic Crimes Civil Suit E013 of 2022) [2023] KEHC 376 (KLR) (Anti-Corruption and Economic Crimes) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 376 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E013 OF 2022

EN MAINA, J

JANUARY 26, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION .... PLAINTIFF

AND

JEREMIAH KAMAU KINYUA .... 1ST DEFENDANT

BESTLINE ENTREPRISES LIMITED .... 2ND DEFENDANT

CHERYA ENTREPRISES LIMITED .... 3RD DEFENDANT

RULING

1. The defendants/applicants filed a notice of motion under a certificate of urgency dated June 27, 2022 supported by an affidavit sworn by the 1st defendant/ applicant on even date. The application is brought under article 25(c) and 50(1) of the *Constitution*, section 5(10) of the *Public Officers Ethics Act* and Rule 3(8) of the *Judicial Service Code of Conduct & Ethics*. The same seeks the following orders:

   “ 1) Spent.

   2. The Honourable Lady Justice EN Maina do recuse herself from hearing, further hearing, or deciding any aspect of these proceedings.

   3. Upon the issuance of order number 2 above, the matter be expeditiously placed before the Chief Justice for further orders on the hearing of the pending application and suit.

   4. The costs of this application be in the cause.”

2. The application is premised on the following grounds stated on the face of it and in the supporting affidavit sworn by Jeremiah

Kamau Kinyua on June 27, 2021:-

“ 1) Article 50(1) of the *Constitution* of Kenya guarantees and demands for the parties herein and indeed the defendants the rights to a fair hearing of the dispute herein lodged before an independent and impartial court or body.

2. That the defendants have filed this application as it is contended beyond apprehension that the conduct of the presiding officer falls below this threshold.

3. That the defendants have appeared in two previous files placed before her ladyship being ACEC No E029 of2021 and ACEC No 035 of2021 (EACC vs Jeremiah Kamau Kinyua & ORS) wherein despite placing all material facts appertaining to his ownership of the assets subject of investigations, the presiding officer has failed and/or refused to consider the applications on its merits.

4. That in the said two applications argued by way of affidavit evidence, the defendants attached all its evidence and your ladyship being seized of the same, specially inherited assets failed to consider and/or uphold justice thus leading to the assumption of impartiality.

5. The general observation emanating from the said rulings have proved beyond all reasonable doubt that the fate of this current suit is already pre-determined in favor of the plaintiff/applicant.

6. The Presiding Judge has treated the defendants unequally as against the plaintiff. That in the application dated October 21, 2021 to set aside orders issued on the October 7, 2021 in MISC App Case No E029 OF 2021, we brought to the attention of the court that the plaintiff had filed a similar lower court matter in Chief Magistrate Misc Application No E1791 OF 2021 (Ethics and Anti-corruption Commission vs Jeremiah Kamau Kinyua) where the honourable magistrate issued an order giving the plaintiff 10days from the date of the judgement to take the necessary action that followed completion of investigations or alternatively return the goods if no action is intended.

7. That the defendant did indicate to the Presiding court that the plaintiff did not comply within the 10days issued and neither did they apply for an extension or sought to appeal against the ruling but instead moved this superior court for fresh orders seeking orders preserving the subject property. The same was never considered in its ruling dated January 27, 2022 as merited as the honourable court proceeded to vary and issue fresh preservation orders for another six months regardless of the time already consumed by the plaintiff.

8. That on the October 7, 2021, the presiding officer in an *ex-parte* application issued final orders for the Surrender of Motor vehicle Reg No KCH625W without affording the defendants a fair hearing thus incapacitating them and hitherto depriving them of their asset before the same was proved by the plaintiff.

9. That attempts to explain themselves on the November 4, 2021 was thwarted by the court who declined to give them audience unless the vehicle was surrendered to the plaintiff. This was despite the fact that the plaintiff was already holding the original log book and had placed restrictions on any dealings involving the said motor vehicle. Thus the motor vehicle being detained months down the line without service or movement run the risk of deterioration, wear and tear to the detriment of the defendants.

10. Thus the presiding officer has expressed open bias consistently against the defendants, ruling always in favour of the plaintiff notwithstanding the case merits.

11. The principle enshrined in article 50 of the *constitution* will have been violated to the detriment of the defendants/applicants since the presiding Judge has conducted proceedings herein on the two occasions in a manner not consistent with the principle of fairness or transparency and has pronounced herself in a manner demonstrating her favouring the plaintiff's irrationally and unfairly.

12. That being so, a fair minded and informed observer let alone the defendant having considered the similarity of the facts and rulings of the matter as complained of herein would readily conclude that there exists and is a real possibility that her Ladyship would be biased against the defendants in so far as the said Constitutional provision of article 25 (c) of the *Constitution* goes.

13. That it is apparent that your ladyship has formed and adopted a state of mind and Judgment contrary to the objective application of the principle of fairness espoused under the *constitution* which would prejudice the issues surrounding the terms of issuance of injunctive relief and forfeiture orders as against the defendants in these proceedings.

14. The defendants/applicants perceive that having already ruled in the similar applications that they are disentitled to the relief issued in the interim in their favor cannot reasonably be objective in the current suit.

15. The applicable law (rule 3 sub-rule 8 of *The Judicial Service Code of Conduct Rules & Ethics* In The *Public Officers Ethics Act*, cap 183 Laws Of Kenya) dictates that whenever a party expresses concern that they may not get a fair trial before a court, the court is obliged to recuse itself, and not hear the matter further. The hearing of the application dated May 10, 2022 or indeed any other matter herein cannot be heard by hon Lady Justice EN Maina.

16. That being aware that Lady Justice EN Maina is the only Judge in the Anti-corruption division, it's only imperative that the file be placed before the Chief Justice for allocation to another Judge of similar status to hear and determine this suit.

17. In the arising circumstances, the defendants are reasonably apprehensive of not receiving a fair and just hearing before the presiding lady justice EN Maina. It's believed that the objective of litigation in a judicial process being to decide matters on merit shall be thwarted.

18. It is in the interests of justice that the orders sought are granted."

3. The application is opposed by the respondent *vide* the replying affidavit of Danson Siba sworn on August 4, 2022. In summary the deponent states that the fact that a court has made an adverse determination against a party is not a ground for imputing bias on the court; that the applications filed by the applicants herein were determined on merit and no appeals were preferred; and that a preservation order and the same lapses upon conclusion of the investigations and filing of a forfeiture application; that contrary to the applicant's submissions this court could not interrogate the manner of acquisition of the properties at the preservation stage; that this court did not determine the application for warrants to investigate and so the applicants should not allege bias. Further that the applicants are aware that this court is the only one mandated to hear and determine anti-corruption cases and hence this application is mischievous. The deponent urges that the applicants are merely unhappy with the outcome of their application and now seek to shop for a court sympathetic to their case

The Defendants/applicants' Case

4. The applicants reiterate the grounds on the face of the Application and contend that the impugned Judge has treated them unequally as opposed to the plaintiff; that in their application dated October 21, 2021 to set aside orders issued on the October 7, 2021 in Misc App Case No E029 of 2021, they informed the court that the plaintiff had filed a similar matter in Chief Magistrate Misc Application No E1791 of 2021 (*Ethics and Anti-corruption Commission vs Jeremiah Kamau Kinyua*) where the Honourable Magistrate issued an order giving the plaintiff 10 days from the date of the Judgement to take the necessary action that followed completion of investigations or alternatively return the goods if no action was intended. That the plaintiff did not comply with the said order but instead moved this court for preservation orders which were granted in the ruling of January 27, 2022. Further that, on October 7, 2021, the court ordered the surrender of M/v KCH 625 v *ex parte* without hearing the defendants; That the presiding judge has demonstrated bias against the defendants by always ruling in favour of the plaintiff.

5. They submit that the file should be placed before the hon Chief Justice for allocation to a different Judge as the impugned Judge is currently the only Judge in the Anti-Corruption Division. They cited the following authorities to support their submisisons: *Mike Sonko Mbuvi Kioko v Director of Public Prosecutions & 5 others; Council of Governors & 2 Others (Interested Parties)* [2020] eKLR on recusal in the event of conflict of interest; *Rishad Hamid Ahmend and Another v Independent Electoral and Boundaries Commission* [2016] eKLR , *Alliance Media Kenya Limited v Monier 2000 ltd and Njoroge Regeru* HCCC No 370 of 2007; *Jasbir Singh Rai and 3 others v Tarlochan Sighn Rai and 4 others*; *South Africa Defence Force and Others v Monning and Others* [1992] (3) SA 482(A), *Jan Bonde Nielson v Herman Phillipus Steyn & 2 others* [2014] eKLR and *Itobu Imanyara & 3 others v Attorney General* [2012] eKLR.

6. The applicants urged that the matter be heard by an independent and impartial Judge in the interest of justice.

The Plaintiff/ Respondents' case

7. The plaintiff opposed the Application on the grounds that the application is frivolous and amounts to an abuse of the court process; that the defendant's apprehension of bias is unfounded and is only but a delaying tactic and an attempt at forum shopping; That the Applications filed by the defendants in ACEC No E029 of2021 andACEC no 035 of2021 (*EACC vs Jeremiah Kamau Kinyua& ORS*) seeking to discharge the preservation orders were heard on merit and dismissed by this court; that

the defendants did not appeal against the rulings and cannot be heard to claim bias against the Judge and further that mere apprehension of bias cannot be a ground for recusal. The respondent placed reliance on the case of *Nathan Obwana v Robert Bisakwaya Wanyera & 2 Others* [2013] eKLR where Chitembwe J, stated:-

> " I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this 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."

8. The plaintiff urged the court to dismiss the application with costs. Counsel also relied on the case of *John Karani Mwenda v Japhet Bundi Chabari* [2017] eKLR, the case of *Republic v Kenya Motorsports Federation Ltd & Another ex parte Rory Hugh Thomas McKean and another (suing through parents and next friend)* [2021] eKLR.

Analysis and determination

9. The gravamen of this application is that the defendants/applicants allege that based on the previous rulings of this case in the interlocutory applications in this matter, this court has already pre-determined this suit in favor of the plaintiff and as such it is biased against the defendants/applicants.

10. The issue of recusal of Judges was the subject of proceedings in the Supreme Court case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2013] eKLR, where the court held that the test is that of a "well-informed, thoughtful observer who understands all the facts, and who has examined the record and the law and thus, "unsubstantiated suspicion of personal bias or prejudice will not suffice." The rationale and objective for recusal is to ensure that justice is uncompromised, the due process of law is realized and be seen to have had its role in the matter in question.

> " The court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable (referred to *Porter V Magill* (2002) 2 AC 357".

11. The test laid by the Supreme court finds support in commentaries on the *Bangalore Principles of Judicial Conduct* by the Judicial Integrity Group, that the generally accepted criterion for disqualification is the reasonable apprehension of bias.

12. Different tests have been applied to determine whether there is an apprehension of bias or prejudgment. These range from "a high probability" of bias to "a real likelihood", "a substantial possibility", and "a reasonable suspicion" of bias.

13. However, the apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. It is therefore an objective rather than a substantive test.

14. The test is "what would such a fair-minded person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly." The question is

whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not bring an impartial mind to bear on the adjudication of the case.

15. The applicant's argument that the decisions of this court are all in favour of the plaintiff perse do not disclose any bias as those decisions arise from applications which were anchored on different facts and the law and although they concerned the issues in dispute in this suit the rulings were based on the facts, the law and circumstances brought before the court.

16. While litigants have the right to apply for the recusal of judicial officers and judges where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular Judges merely because they believe that such judges will be less likely to decide the case in their favour. Moreover, the fact that a judge has previously ruled in favour of the applicant's opponent is surely a ground for appeal but not for recusal of a judge. I would in this matter align myself with the observation of Odunga J in the case of *Republic v Independent Electoral & Boundaries Commission & Another ex parte Coalition For Reforms & Democracy (CORD)* HC NBI Misc Appl No 648 of 2016 [2017] eKLR that:-

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> " 74. To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the court and the perception created would be that the respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment."
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> I would also echo the holding of Njoroge J in the case of *John Karani Mwenda v Japhet Bundi Chabari* [2017] eKLR that:-
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> > " 44. As already pointed out, our system of Justice is adversarial. Everyday litigants win and lose cases. If every loser accuses the concerned Judge of bias, and we embraced the propositions postulated by the petitioner, there would be need to have an infinite number of Judges ready to be called upon to hear matters raised by the losing parties in future disputes. This would be a veritably ridiculous scenario bordering on the phasmagoric. It would promote untrammeled Judge shopping and unbridled forum shopping.

45. If the petitioner's propositions are embraced by this court, every Judge in this planet who applies his mind to the facts and the law apposite to the particular case and decides it in favour of one of the parties will be in conflict in as far as the losing party is concerned.

46. A judge cannot just recuse himself because he had handled an earlier dispute involving the parties. A litigant cannot through contrivance of oblique traducent allegations, postilutating unsubstantiated generalities thrown around with unabashed alacrity and abandon attain the threshold needed for a Judge to recuse himself.

47. By embracing the propositions postulated by the petitioner, this court would be asserting that every loser in a dispute is a victim and every winner is a villain. The villainy of the winner would finally be foisted on the Judge who arbitrated over the dispute. This would amount to embracing veritable escapism in the delivery of justice. Such a scenario deserves deprecation."

17. The decisions of this court and the interlocutory directions made in the two previous matters are based on the law and rules of procedure. Applying the test in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai* (supra), no fair-minded and informed observer, having considered the facts, would conclude that there is a possibility that this court will not be impartial or fair or will be biased.

18. The upshot is that the application has failed to meet the threshold for my recusal and it is therefore dismissed with costs to the plaintiff/respondent.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2023.

E N MAINA

JUDGE