



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wang'ombe & 2 others (Suing as officials of the African Independent Pentecostal Churches of Kenya) v (Mwangi, Adewa & Kariuki (Suing as officials of the Specialized Healing Miracles Center) & 4 others (Environment and Land Appeal E083 of 2022) [2023] KEELC 16435 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16435 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND APPEAL E083 OF 2022**

**OA ANGOTE, J**

**MARCH 16, 2023**

**BETWEEN**

**FREDRICK WANG'OMBE ..... 1<sup>ST</sup> APPELLANT**

**CHARLES CYRUS NJUGUNA ..... 2<sup>ND</sup> APPELLANT**

**PAUL KAMAU MWANGI ..... 3<sup>RD</sup> APPELLANT**

**SUING AS OFFICIALS OF THE AFRICAN INDEPENDENT PENTECOSTAL  
CHURCHES OF KENYA**

**AND**

**ELIJAH NJIIRI MWANGI , ABSALUM NAMEMIA ADEWA & RHODAH N  
KARIUKI SUING AS OFFICIALS OF THE SPECIALIZED HEALING MIRACLES  
CENTER ..... 1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI NOW NAIROBI CITY**

**COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE KINUTHIA ..... 3<sup>RD</sup> RESPONDENT**

**DAVID KIMANI ..... 4<sup>TH</sup> RESPONDENT**

**ANSELMO RUIGA ..... 5<sup>TH</sup> RESPONDENT**



## RULING

1. Before the court for determination is a Notice of Motion dated 3<sup>rd</sup> November 2022 and brought under Articles 25(c) and 51(1) of the Constitution, Section 5(1) of the Public Officers Ethics Act and Rules 3 and 5 of the Judicial Service Code of Conduct. The Appellants are seeking for the following orders:
  - a. The Honourable Justice O.A Angote do recuse himself from hearing or deciding any further any aspect of these proceedings.
  - b. Upon the issuance of Order (b) above, the matter be forthwith and expeditiously mentioned before the Principal Judge for allocation to any other ELC Judge in Nairobi for further orders on the hearing of the matter.
  - c. The costs of the application be in the cause.
2. The application is supported by the affidavit of Paul Kamau Mwangi, the 3<sup>rd</sup> Appellant, who has averred that he is the Chairman of Kayole AIPCA where the suit property is located and was present on 3<sup>rd</sup> November 2022 when the Hon. Justice Angote called out the matter in the virtual court.
3. According to the 3<sup>rd</sup> Appellant, the conduct of the Judge on 26<sup>th</sup> September 2022 and 3<sup>rd</sup> November 2022 was unfair, biased, irrational and in contravention of Articles 25 and 50 of the Constitution and Principle 52 of the Bangalore Principles of Judicial Conduct.
4. It was deponed that on 26<sup>th</sup> September 2022, the judge declined to issue the Appellants with interim relief orders whereas there was plain urgency and that the Judge failed to note and at least verify their claims of urgency and fixed the matter for hearing on 27<sup>th</sup> October 2022 but since he was away, the matter was heard by Hon. Justice Mwangi who gave interim orders in favour of the Appellants.
5. It is the Appellants' case that when the matter came up before Justice Angote on 3<sup>rd</sup> November 2022, the Appellants' advocate sought to have their application dated 23<sup>rd</sup> November 2022 allowed since it was unopposed despite having been served on all the Respondents. However, it was deponed, the Judge heard and entertained allegations from the 1<sup>st</sup> Respondent that they had not been properly served despite the Appellants' advocate alerting the Judge about the Affidavits of Service.
6. The 3<sup>rd</sup> Appellant deponed that the Respondents were properly served; that there was communication between the Appellants' and Respondents' advocates; that nevertheless, the Judge ignored this and in contravention of Order 9 Rule 5 of the Civil Procedure Rules ordered the Appellants to serve the Respondents in person.
7. It is the deposition of the 3<sup>rd</sup> Appellant that the Judge irrationally trashed the interim orders issued by Hon. Justice Mwangi when he declined to extend the same; that the Judge made remarks that were indicative of a premeditated negative outcome against the Appellants and that the impugned remarks were to the effect that whoever was unhappy with the Judge's orders could take whatever steps they deemed fit.
8. According to the Appellants, the 1<sup>st</sup> Respondent's advocate accessed and addressed the Court on 3<sup>rd</sup> November despite not having filed his responses as required by law; that a fair minded person would not have entertained the 1<sup>st</sup> Respondent's advocate and that in view of the foregoing, the Judge should recuse himself and the matter be heard by another judge who will be impartial and objective.



9. In his submissions, the Appellants' advocate maintained that the Judge should recuse himself as the application dated 23<sup>rd</sup> September 2022 which was unopposed was not allowed; that the directions given by the Judge on matters service were against the law as Order 9 of the Civil Procedure Rules is clear that service should be done on the advocate who appeared in the lower court and that the insistence to serve a party individually was in violation of the law.
10. On the issue of the judge's refusal to extend the interim orders, the advocate submitted that there was no basis for refusing to extend the interim orders and substituting the same with an order for maintenance of status quo and that the Judge was blind to the urgency of the original application as no orders were given. This, it was submitted, was indicative of the original bias.
11. In conclusion, the advocate submitted that it was unlikely that the Appellants would get a fair trial as espoused in Articles 25 (c) and 50 of *the Constitution* and Principle 52 of the Bangalore Principles.
12. The 1<sup>st</sup> Respondent's advocate stated that he was neither opposed to the application nor had any issue with the conduct of the judge.
13. The Appellants have stated that this court should recuse itself on the ground of bias. Several aspects of the purported bias have been set out. The first is that the court refused to grant interim orders at the first instance when there was clear urgency in the Appellants' application.
14. The second aspect of bias is that the court did not allow the orders sought in the application dated 23<sup>rd</sup> September 2022 when it came up for inter partes hearing yet it was unopposed and directed that the Respondents be served in person and lastly that the court declined to extend the interim orders issued by Justice Mwangi and instead gave orders for the maintenance of the status quo.
15. Regulation 21 (1) (d) of the Judicial Code of Conduct and Ethics, 2020 provides as follows:
 

“A Judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge has actual bias or prejudice concerning a party.”
16. In the case of *Attorney General vs Ndiu & 73 others* (Petition 12 (E016) of 2021) [2021] KESC 15 (KLR) (Civ) (9 November 2021) (Ruling), the judges of the Supreme Court disallowed an application for recusal on several grounds including the fact that in the absence of supporting evidence, claims of impartiality and bias were farfetched and speculative. The Supreme Court held as follows:
 

“In the absence of the petition by the applicant against the judges before this court either directly or through the Judicial Service Commission, the possibility of bias or impartiality is farfetched and speculative.”
17. Lord Justice Edmund *Davis in Metropolitan Properties Co. (FGC) Ltd. vs Lannon* [1969] 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in *R vs Liverpool City Justices, ex parte Topping* [1983] 1 WLR 119 elaborated on the test applicable. 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.
18. It has always been stated that for a court to recuse itself on the ground that it is biased, the claim of bias must be actual and not speculative. The Courts have discussed what amounts to actual bias in cases



of recusal in several instances. In the case of *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 Others* [2013] eKLR the Supreme Court stated as follows:

“It is an insightful perception in the common law tradition, that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a “constructive intuition which operates after learning and analysis are exhausted” [in G. Lewis, *Lord Atkin* (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.”

19. The issue of how this court exercised its judicial discretion is one of the grounds that the Appellants are basing on in their application for recusal of the court. The question that arises is whether in the exercise of such discretion, the judge can be accused of having exhibited actual bias. Regulation 7(d) of the Judicial Code of Conduct (Supra) states as follows:

“A judge shall exercise judicial authority independently and shall exercise judicial function on the basis of the judge’s own assessment of the facts of the case, in accordance with a conscientious understanding of the law, and without reference to any extraneous influences.”

20. The first ground relates to the order made by this court on 26<sup>th</sup> September 2022. The said order reads as follows:

“This matter coming up on 26<sup>th</sup> September 2022 for directions on the Notice of Motion dated 23<sup>rd</sup> September 2022 before Honourable Justice O.A Angote. Upon reading the application in the absence of parties it is hereby ordered:

1. That the application be served for hearing inter partes on 27<sup>th</sup> October 2022.”

21. I do not find any biasness in the said order. The court acted within its authority after assessing the facts of the case and saw it fit that the application should be set down for inter partes hearing rather than dealing with it by way of giving interim orders at the 1<sup>st</sup> instance. Indeed, it is common knowledge that the grant or refusal to grant ex parte orders is the discretion of the court.

22. The Appellants have not proven that this court was influenced by extraneous factors when it declined to issue the ex parte orders, or when it subsequently substituted the interim orders given by Mwangi J with an order for the maintenance status quo. The Appellants were entitled, and they still are, to file an appeal challenging the exercise of the court’s discretion.

23. According to the Appellants, the court ignored the urgency in their application and that they should have been issued with interim orders. This in my view is tantamount to forcing the court to agree with the Appellants at the first instance, which undermines the authority and independence of the Court, which this court will not entertain.



24. Judges have the authority to exercise a judicial function based on their assessment of the case. Justice Mwangi's assessment led him to issue interim orders. This court's assessment led it to decline to extend the interim orders as follows:

“In view of the contradictory submissions on the status of the land, I direct that the prevailing status quo as at now be maintained until 16/1/2023.”

25. I do not think that a reasonable and fair-minded man sitting in Court would have a reasonable suspicion that a fair trial was not possible for the Appellants because the court refused to extend the interim orders. The court did so after considering the rivalling submissions put forth by the opposing parties with regard to the status of the suit property. This in my view was a judicious exercise of discretion.

26. The Appellants also took issue with the fact that on 3<sup>rd</sup> November 2022, the court did not allow their application dated 23<sup>rd</sup> September 2022 despite the fact that it was unopposed. They also took issue with the fact that the court ordered the Appellants to serve the 1<sup>st</sup> Respondent personally despite having served their advocate by email.

27. Again, I do not find that the court was biased in ordering that the Respondents be served physically and an affidavit of service be filed to that effect. The advocate for the 1<sup>st</sup> Respondent had informed the court that the email addresses on which they had been purportedly served was wrong.

28. The affidavit of service filed by the Appellants and dated 24<sup>th</sup> October 2022 states that the documents were emailed to njugiadvocates@gmail.com while in the correspondence to the Court and on the Notice of Appointment of Advocates (dated 1<sup>st</sup> November 2022) shows the 1<sup>st</sup> Respondent's advocate's email address as njugibgadvocates@gmail.com.

29. Indeed, the Appellants' right to a fair hearing has to be balanced with that of the Respondents. It would have been against the rules of fairness for the court to allow the application dated 23<sup>rd</sup> September 2022 as unopposed while it was plausible that the Respondents had not been served with the said application.

30. The fourth reason for the Appellants' application for recusal is that the court made remarks to the effect that those dissatisfied with its orders could take the steps they deemed fit. It is trite that litigants who are dissatisfied with the orders given by the court can appeal against such orders. That was the context of the remarks made by the court.

31. In view of the foregoing, I find that no actual bias has been proven against the court in respect of how it has handled this matter. The application dated 3<sup>rd</sup> November 2022 for recusal has no merit and is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Kinyanjui for Appellants

Mr. Njugi for 1<sup>st</sup> Respondent

Court Assistant - June

