



Accredo AG v Salama Beach Hotel Limited & 4 others (Civil Suit 118 of 2009) [2023] KEHC 21314 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 118 OF 2009
SM GITHINJI, J
JULY 31, 2023**

BETWEEN

ACCREDO AG PLAINTIFF

AND

SALAMA BEACH HOTEL LIMITED 1ST DEFENDANT

HANS JUERGEN LANGER 2ND DEFENDANT

ZAHRA LANGER 3RD DEFENDANT

STEFFANO LUCELLI 4TH DEFENDANT

ISAAC RODROT 5TH DEFENDANT

RULING

- 1 The 4th defendant filed a notice of motion dated July 10, 2023 seeking the following orders;
 - a. Spent
 - b. That the hon Justice Stephen M Githinji (myself) be pleased to forthwith recuse and/or disqualify himself from further conduct of this matter and that this matter be placed before any other judge of the Republic of Kenya having a similar jurisdiction.
 - c. That consequent upon such recusal such direction as to reallocation of the matter to a different judge for hearing and determination be issued to ensure fair and expeditious disposal of the matter.
 - d. That this honorable court be pleased to give further orders and/or directions as it may deem fit and just to grant so as to secure the applicant’s right to a fair and just trial.
 - e. That the costs of this application be in the cause.



- 2 The application is founded on the grounds set out on the face of it and the supporting affidavit of Stefano Uccelli the applicant herein who deposed that he is a shareholder and director of Salama Beach Hotel, the 1st defendant and he has filed a complaint/petition to the Judicial Service Commission against the presiding judge on several grounds with an ultimate prayer seeking his removal from office for violation of his oath, on gross misconduct and misbehaviour.
- 3 It is stated that as a result of the foregoing the 4th defendant/applicant, has lost faith and trust in the presiding judge and he is reasonably apprehensive that the said judge shall be partial and/or biased while handling the matter thus denying Salama Beach Hotel and its lawful shareholders Stefano Uccelli and Isaac Rodrot their constitutional right to a fair hearing. It is also stated that there is an appearance of bias by the learned judge which has and continues to defeat a manifestation of justice for him and his proprietary rights over Salama Beach Hotel Limited.
- 4 There was no response by the other parties to this application nor written submissions, probably for the reason that the application is more about my conduct rather than their claimed rights in the matter.

Disposition

- 5 I have considered the application and examined a copy of the petition to the Judicial Service Commission annexed to it. The petition raises the following issues;

That I was transferred to Malindi High Court in the year 2021 and I was subsequently appointed to preside the bench of three dealing with the consolidated petition and also handle all high court cases in Malindi related to Salama Beach Hotel limited. That the applicant herein had his passport retained in court following a criminal case and thus filed a Miscellaneous Application Number 11 of 2022 before me which matter I did not certify urgent. As a result, he withdrew the application and filed another one in Mombasa where the matter was heard expeditiously.

- 6 It is also alleged in the petition that within the time of filing the application, the 4th defendant (the applicant herein) was informed by the 5th defendant that he (the 5th defendant) had been called one evening urgently to see a gentleman who is my close friend and knows me well to a bar called Mabeshte and when he arrived there, he met me, the gentleman and the applicant's lawyer where they were introduced and in the process all the High Court cases were discussed.
- 7 In the petition, it is also alluded that I have issued orders adverse to the applicant in an application dated November 22, 2022 which allegedly arose from a trip to Dubai and a fund raising in Naivasha. Further, the petition states that I am in gross violation of various articles of the Constitution as cited by the applicant and therefore I am in breach of oath of office and in gross misconduct.
- 8 I wish to confess to parties herein that I am not used to writing rulings involving my conduct in a matter and this is the first one of the kind. Unlike in other kind of rulings where the truth on issues may be strange to the Presiding Officer, at least for a ruling of this kind the Presiding Officer knows the truth. The truth as is well known, sets us free.
- 9 The truth of the matter is that sometimes back on a date I cannot specifically recall, at a time when I was fairly new in Malindi High Court, I was joined for lunch by a friend known as Michael Wambugu at Mabeshte Sports Pub. When we got in we found Advocate Kibunja seated at the counter. He waved at us and we waved back. We sat at a table in an open place. Before our meal was availed Advocate Kibunja was joined by two gentlemen. By then none of them was known to me. They deliberated shortly and then walked to where we had sat. They greeted us and the 5th defendant who was among the three



gentlemen introduced himself to me. He said he had a matter in court before me and sought for my audience. I immediately told him if that is the case he should not be there with me. I was uneasy and he noticed of it. He immediately suggested he could organize for a trip to Dubai for deliberations. I got annoyed and told them that his conduct is wrong, it's unacceptable and should simply present his issues in court. I said I do not engage in such. We were set to leave, and they noticed and left us. We deliberated nothing at all about the matters.

10 As a seasoned Judicial Officer I thought I had dealt with the issue instantly and sufficiently. I never felt the need to push it beyond that. As expected I never heard from them or saw them again.

11 For the decisions I have made in matters involving the applicant/petitioner, they were informed by the facts presented to me and the applicable law. I hold no grudge or bias against him and the 5th defendant. Save for doing justice in the matters, I hold no any other personal interest in them. Apart from the name Steffano Lucelli, I do not know the 4th defendant otherwise.

12 Deep thoughts on what may have influenced the application and the petition to the JSC for my removal, drives me to these scenarios; -

1. 4th and 5th defendants would wish their matters heard by a Judicial Officer whom they can be able to reach and influence, and having noted I am not the kind wants me out of their matters.
2. They may be in misinformed fear and discomfort probably thinking I reprimanded them without giving them an ear, out of influence by the Plaintiff.
3. They may as well be in fear that given my noted character, where I abhor corruption, I held a grudge for them and I am likely to punish them through the decision in the matters. They could be wrongly reading the same from the decisions I have made.
4. They may be out to buy time if they are benefiting from the status quo having noted I was inclined to have the matters expeditiously determined.

13 I hold a strong view that the petition to Judicial Service Commission is meant to place me in a catch 22 situation, where they have driven me into a serious dispute with them and therefore making me unsuitable to preside over matters involving them during pendency of the said petition.

14 Having expressed the foregoing facts and views, I now move to consider the legal position on recusal.

15 The principles governing recusal in this jurisdiction are well settled. In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* HC Comm No 332 of 2010 [2014] eKLR the court observed that:

“The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali and Others* C A Criminal Application No Nai 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Others* C A Civil Application No Nai 310 Of 2004 (Unreported) where the Court of Appeal stated that:

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...”



16 In *Philip K Tunoi & another v Judicial Service Commission & Another* CA Civil Application NAI No 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in *Porter v Magill* [2002] 1 All ER 465, where it stated that; -

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.” The same position was taken by the Supreme Court (per Ibrahim J) in *Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others* SCK Petition No 4 of 2012 [2013] eKLR where he observed that, “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.”

17 The principles in the cases I have cited buttress the standards of conduct enacted in the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* dated May 26, 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality can reasonably be questioned if the Judge;

- a. Is a party to the proceedings;
- b. Was, or is a material witness in the matter in controversy;
- c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;
- d. Has actual bias or prejudice concerning a party;
- e. Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
- f. Had previously acted as a counsel for a party in the same matter;
- g. Is precluded from hearing the matter on account of any other sufficient reason; or a member of the Judge’s family has economic or other interest in the outcome of the matter in question.

18 Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

“A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with articles 10, 27, 73(2) (b) and 232 of the *Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.”

19 Turning to the facts of this case, as aforementioned there is a petition by the applicant before the JSC for my removal from office for allegedly being in breach of the oath of office. The petition is yet to be processed and determined. In the circumstances, I am of the considered view that it would not be fair for me to continue with the hearing and determination of this matter involving the applicant, given that I may have deliberations before the JSC with him. Given the circumstances, any decisions I may make in the matter might be perceived biased. Therefore, I recuse myself from this matter and all other matters related to it, and direct that the file be placed before the Principal Judge in Nairobi for directions. Costs shall abide by the outcome of the suit.

20 The Deputy Registrar will liaise with the Principal Judge’s Office for a mention date before him for directions. Parties will be notified by the Deputy Registrar of the next mention date.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 31ST DAY OF JULY, 2023.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

PARA 1.

Mr Makambo for the Plaintiff

PARA 2.

Mr Karanja for the 4th Defendant/Applicant

PARA 3.

Mr Wafula for the intended 6th Defendant

PARA 4.

Mr Kombo holding brief for Mr Munyithya for the 5th Defendant in the matter.

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