



REPUBLIC OF KENYA



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**In re Estate of Jackson Kalo Katesi (Deceased) (Succession Cause
593 of 1999) [2023] KEHC 27195 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 593 OF 1999
PJO OTIENO, J
DECEMBER 21, 2023**

IN THE MATTER OF THE ESTATE OF JACKSON KALO KATESI (DECEASED)

BETWEEN

EZEKIEL KALO 1ST PETITIONER

WELLINGTON KALO 2ND PETITIONER

AND

JOHN MWANZI KALO OBJECTOR

RULING

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking disqualification of a Judge, they will have their case tried by someone though to be more likely to decide the case in their favour.”

Re JRL exp, Re [1986] 161 CLR -342- quoted with approval in *Dhanjal Brothers Ltd v Joginder Singh Dhanjal & another* [2020] eKLR

1. In this matter, one wellington Kalo, the 2nd petitioner, has by a notice of motion dated March 24, 2023 sought one order from the court by a prayer that

“That the trial Judge disqualify himself from entertaining this matter and the applicant a chance to pursue his intended appeal in the Court of Appeal.”

2. The grounds proffered to premise the application are given on the face of the motion and on the affidavit sworn by the applicant to be that the cause was heard and finally in 2012 but this court in alleged determination purported to sit on appeal over own decision by failure to read and appreciate



its record by appearing to unfairly protect the objector. It is added that when aggrieved by the decision of the Court, Musyoka J, he chose to appeal by filing notice of intension to appeal (sic) but was late in filing the record of appeal due to lack of proceedings hence he filed and fixed for hearing an application for extension of time to appeal but the same was sidestepped by the Court which opted to fix the objector's application for confirmation and distribution in a design to defeat the application for extension of time.

3. For good measure it is added that 1st Petitioner, Wellington Kalo had filed a complaint which the Court has ignored yet there is a decision by the court in a land case between the same parties which the court has equally ignored by continuing to allow the Objector to file documents and thus appearing that justice cannot be done in the eyes of a reasonable man.
4. When served, the respondent resisted the application by swearing and filing a replying affidavit on the May 17, 2023. In that affidavit it is contended that the thresholds for recusal have not been made due to lack of substantiation of the allegations and that there was no merit on the allegations that the application for extension of time had been sidestepped adding that the same had never been served upon the respondent. The affidavit thus concludes that the goal of the application is to delay the conclusion of the matter because the facts set out do not reveal reason for reasonable apprehension of bias by a right-minded person and hence the same is a good candidate for dismissal.

Contact with the file

5. A perusal of the file shows that a Judgment was delivered by Musyoka, J. on the June 10, 2022 by which the grant initially issued and confirmed was revoked and dealing with the estate land pursuant to those documents were reversed and cancelled. Ezekiel B Kalo and John Mwanzi Kalo were appointed joint administrators and directed to apply for confirmation within ninety (90) days from the date of the Judgment. Leave was granted to any party aggrieved thereby to file an appeal. The matter was then set for mention on October 27, 2022.
6. Before the set date, the file was placed before me on the 21.9.22 at which occasion the counsel for the applicant prayed that he gets a date for hearing of the application dated September 8, 2022. Because the matter was allocated to Musyoka J as Court 1, the application was scheduled for hearing on the already set date before the trial Court. For completeness of record, the application dated September 8, 2022 sought stay of execution of the decree pending an appeal to the Court of Appeal.
7. Before the parties attended before the trial court on a date requested by the instant applicant, and just seven (7) days after being given a date for hearing, on the September 16, 2022, the applicant had filed the following documents;
 - a. A complaine (sic) addressed to the, Chairman, Judiciary Ombudsman dated August 28, 2021.
 - b. Request for interpretation of law in relation to this Cause, addressed to the Attorney General dated August 8, 2022.
 - c. A complaint to the Chief Justice dated June 14, 2022.
 - d. Letter to the deputy registrar and applying for disqualification of the Judge.
8. And so, when the matter was called before the Judge, on October 27, 2022, Judge recused himself and directed that the matter be handled by me being the only other court at the station. It is of note that



when parties through counsel appeared before Musyoka J, counsel for the applicant chose to pour cold water over his application for stay and told the Court;

“Mr. Munyendo: We can take a date for mention. We shall be filing protest.”

That was in response to the address by Counsel for the Administrators which sought for indulgence for failure to serve Mr. Muleshe who had earlier acted in place of Mr. Munyendo.

9. As a consequence of the recusal by Musyoka J, the file was placed before this court on the November 28, 2023 when administrators’ counsel sought leave to file a supplementary affidavit detailing the specific shares of distribution and the counsel for the applicant once again, took no steps to pursue his application for stay by reiterating his intention to file a counter proposal on distribution or protest to distribution within 14 days after the supplementary affidavit was filed and served upon him. The request was allowed by Court and matter stood over to the February 8, 2023.
10. Yet again, before the date taken by consent could pass, on the December 9, 2022, the applicant filed yet another motion seeking extension of time to give notice of appeal or leave to appeal. That application even though lodged under a certificate of urgency appears not to have been fixed for hearing. On February 8, 2023, when the matter was called out, Mr Munyendo did not appear in Court but was called by the Court Assistant and he did address the Court in that media and said that Musyoka J, had given a date for hearing of the application for leave to appeal out of time. He told the court that he took the view that the matter would not proceed hence he was in Kitale and therefore had not filed the Affidavit of protest or response to the application for confirmation of grant. He sought seven (7) days to file a response to the summons for confirmation of grant. That request was once again acceded to and matter stood over to the March 21, 2023.
11. Come to set date, and even though Mr Munyendo had filed a protest to confirmation, Mr Munyendo was not ready to proceed but instead indicated intention to pursue the application for extension of time to appeal. However, it was brought to the attention of the court by counsel for the administrator/ objector that that application had not been served. That counsel equally informed the court that the date was for confirmation of grant and all beneficiaries had attended court.
12. It was at that juncture that Mr Munyendo Advocate then informed the Court that even though beneficiaries were present in Court, one Wellington Kalo who had written several complaints about the Court, and against him, now intended to ask the Court to recuse itself.
13. The foregoing account set out how this Judge has interacted with the file and how much he had done in the file prior to the May 17, 2023 when the application for recusal was filed. This account is important for the decision on whether anything has happened that disclosed bias or reasonable apprehension of fear of real bias. It shall serve to shed light on whether the complaint that this Judge has acted on the file oblivious of prior court orders and in obvious undue favour and protection to the Objector and whether it has frustrated the hearing of the application for extension of time.
14. A perusal of the court file reveals that when filed under a certificate of urgency on the December 9, 2022, the same was never given a date nor was the same placed before a duty judge as is the practice in the registry. The consequence is that it has never been listed for hearing and more disturbing is that as late as March 21, 2023, more than three months after filing the same had not been served. It was therefore an outright dishonesty on part of the Counsel, Mr. Munyendo, to falsely allege that the same had been given a date by Musyoka J, on a date after the Judge had recused himself from conduct of the file. It was equally dishonest and utterly lacking in condour to premise the application for recusal on failure to hear the application when the counsel who ought to have sought and obtained date neither sought a date nor served the application. In fact, the fact that by the March 21, 2023, the counsel for



- the objector was yet to be served, one gets the impression that there was never genuine desire to pursue that application.
15. In the course of preparing this ruling, I have seen that the proceedings were made ready and collected by Mr. Munyendo Advocate on the December 2, 2022, a whole month before the application for recusal was made. If good faith and good counsel was to reside in the advocate, nothing would have been easier than to seek a certificate of delay in terms of rule 8 of the *Court of Appeal Rules* and lodged the appeal without the need for the application dated December 9, 2023. In failing to comply with the law choosing to pursue an unnecessary application for extension of time, the counsel must be seen to have forsaken his duty to the court and client. That is never honourable a conduct expected of an officer of the court. It must be frowned upon.
 16. On the alleged undue protection by the court in favour of the objector and evidence for failure to hear the application for extension of time, the court holds and finds that that accusation is grounded on falsehood and cannot be the basis of a recusal. It is the law that a Judge ought not recuse himself on flimsy and non-cogent demonstration of a real or reasonable appearance of bias.
 17. On that falsehood when taken together with the complaint by the Applicant dated January 20, 2023 by which he asserts being unable to file the appeal when the proceedings, have been availed to them, only show that the intention is to stall the process of the law and the Court from executing its mandate in determining disputes.
 18. In deed for all the five complaints lodged so far, the gravamen emerges to be that it was not permissible for Musyoka J, to revisit the decision by Chitembwe J, made on 2012. That is a matter that ought to be argued as an appeal and not used as a weapon of intimidation against any Judge. I only wish that counsel would answer to his professed oath and render to his client an honest advice based on the law under the *Law of Succession Act*.
 19. When aligned to the application under consideration there cannot be any truth that this Judge has made any orders contrary to the record of the file. It thus calls for the second finding that no material has been availed to lead any reasonable person, given all the true facts and circumstances of the case, that the Applicant would not be treated without prejudice. Rather it comes out that the only object and purpose is to forestall the conclusion of the dispute now rising in court for the third decade.
 20. In conclusion the court finds that no material has been availed to merit an order of recusal being issued. This Judge is repeatedly kept reminded of his oath of office to serve the Republic and people of Kenya by impartially administering justice in accordance with the *Constitution* and as by law established, without fear, favour, bias, affection, ill-will, prejudice or any ulterior influence. With the oath in mind, it worries not and it must be reiterated that merely that one has lodged a complaint with the office of the Chief Justice, Judicial Service Commission or the Judiciary Ombudsman should not be the only reason to recuse myself. Never when the only reason to seek recusal is so that a Judgment delivered by Musyoka J, on the June 10, 2023 may be wished away, ignored or just rubbished otherwise by legal avenue of appeal.
 21. The application is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 21ST DAY OF DECEMBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:



Mr. Munyendo for the 1st Petitioner

The 2nd Petitioner in person

No appearance for the Objector

Objector present in person

Court Assistant: Polycap

