



**Board of Management Visa Oshwal Primary School, Nairobi v Shree Visa Oshwal Community
Nairobi Registered Trustees; Ministry of Education & 2 others (Interested Parties)
(Environment & Land Case E176 of 2022) [2023] KEELC 17650 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E176 OF 2022**

MD MWANGI, J

MAY 25, 2023

BETWEEN

**BOARD OF MANAGEMENT VISA OSHWAL PRIMARY SCHOOL,
NAIROBI PLAINTIFF**

AND

**SHREE VISA OSHWAL COMMUNITY NAIROBI REGISTERED
TRUSTEES DEFENDANT**

AND

MINISTRY OF EDUCATION INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

ATTORNEY GENERAL REPUBLIC OF KENYA INTERESTED PARTY

*(In regard to the Plaintiff's application dated 21st March
2023 seeking the recusal of the Judge from hearing the case)*

RULING

Background

1. The application by the plaintiff seeks that the Hon Judge recuses himself from hearing this matter on the basis that he has already made up his mind about their case. The Plaintiff avers that they are constrained to make the application due to the position expressed by this court in an earlier ruling in this matter on November 24, 2022.
2. The Plaintiff affirms that this court in the cited ruling, particularly at paragraph 20 thereof in very clear terms took the position that the suit property is private property going by an earlier decision of the



Court of Appeal. The Plaintiff states that the court pronounced itself in such a way that did not leave any chance or indication that the issue was open for argument. The pronouncement by the court led the Board of Management of the Plaintiff to conclude that their case was more or less concluded since the main issue in the case is actually whether the subject property is private or public.

3. The plaintiff therefore feels already prejudiced by the court's pronouncement. The plaintiff pleads that I disqualify myself from the case and allow the case to be heard by another judge.
4. The defendant vehemently opposed the application by the plaintiff arguing that the plaintiff's allegations are baseless and the application therefore unmerited. The defendant avers that there is no justifiable cause demonstrated by the plaintiff to justify my recusal from the case.
5. The defendant avers that the only recourse available to the plaintiff is to either appeal from the said ruling or apply to review it before me. It is the defendant's position that the application by the Plaintiff is an abuse of the process of court and an attempt to delay the expedient disposal of this suit. The defendant urges the court to strike out the plaintiff's application with costs.
6. None of the interested parties replied to the application.

Court's Directions

7. The court's directions were that the application be canvassed by way of written submissions. Both parties (the plaintiff and the defendant) have complied and the court has had the opportunity to read through the submissions. The issue for determination is whether the plaintiff's application meets the threshold for recusal of a Judge.

Analysis and Determination

8. Chadwick LJ, in the case of *Triodos Bank NV vs Dobbs* (2005) EWCA, Civ 468, rightly observed that;

“It is always tempting for a Judge against whom criticisms are made to say that he would prefer not to hear any further proceedings in which the critic is involved. It is tempting to take that course because the Judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the Judge who hears his case will feel that, if he loses, he has in some way been discriminated against.”

9. Chadwick LJ, however, argued that it is important for a Judge to resist that impulse to recuse himself any time an application is presented before him.

10. The Court of Appeal of Kenya in the case of *Kaplan & Stratton vs Liz Engineering Construction Ltd & 2 others* quoted Callaway JA, in the case of *Cleane Property Ltd Vs Australia and New Zealand Banking Group Ltd* (1999) VSCA 35; (1999) 2 KR 573, where he had stated that,

“As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions a Judge or Magistrate should not accede to an unfounded disqualification application.”

11. Recusal of a Judge is certainly a grave matter that must not be taken lightly at any one time. Precedents have established the threshold that must be met in order for an application for recusal to be successful. The defendant in this case has in its submissions made reference to a number of those decisions.



12. In the case of *Kaplana H Rawal vs Judicial Service Commission & 2 others* (2016) eKLR, the Court of Appeal of Kenya cited with approval the decision of the East African Court of Justice in the case of the *Attorney General of Kenya vs Anyang Nyong'*, App No 1 of 2006 (EACJ) which set out the test for bias in the following words;

“We think that the objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this; do the circumstances give rise to a reasonable apprehension in the mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially?

Needless to say, a litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case.”

13. In the South African case of *South African Commercial Catering and Allied Workers Union and others Vs Irrin & Johnson Limited Seafoods Division Fish Processing* CCT 2/2000 (Constitutional Court of S. Africa), the court expressed itself in the following words regarding the ‘test for recusal’,

“In *Sarfu*, this court formulated the proper approach to recusal as follows-

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel.

The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reasons of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit on any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer must not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the Judicial Officer, for whatever reasons, was impartial.”

14. It is clear that the applicant bears the onus of rebutting the presumption of judicial impartiality. have carefully considered the Plaintiff’s application against the principles and the objective test spelt out in the above cited decisions. At paragraph 20 of the ruling of November 24, 2022, this court did not make a finding; rather, the court merely pointed out at the decision of the Court of Appeal. Indeed, the court at paragraph 34 of the ruling expressed its wish not to ‘summarily and finally determine the contested issues in the case’ at that stage. I am conscious that this case is yet to be heard and will therefore go no farther than I have already done.
15. The apprehension by the plaintiff that the court has already made up its mind cannot therefore, in the circumstances, by all standards be said to be reasonable. The application, with due respect falls short of the objective test. This court remains true to its oath of office, to diligently serve the people and the republic, to impartially do justice without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence.



16. The upshot is that I find no merit in the application by the plaintiff and hereby dismiss the same with costs to the defendant.

17. It is so ordered.

Dated, Signed and Delivered at Nairobi this 25th day of May 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kimani for the Defendant

N/A for the Plaintiff

N/A for the 1st Interested Party

N/A for the 2nd Interested Party

N/A for the 3rd Interested Party.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

