



In re Estate of David Kimeto Maina (Deceased) (Succession Cause E049 of 2021) [2022] KEHC 13249 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE E049 OF 2021
AN ONGERI, J
SEPTEMBER 23, 2022**

BETWEEN

NAOMI C. KIMETO & ANOTHER APPLICANT

AND

EDWIN K KIMETO & 17 OTHERS RESPONDENT

RULING

1. The application coming for consideration is the one dated December 23, 2021 seeking the following orders:-
 - (i) That for reasons to be recorded this application be certified urgent and be heard *ex-parte*, in the first instance in respect of prayer 2 hereof.
 - (ii) That the honourable court be pleased to set aside orders issued by the court on the December 15, 2021 as the same were issued through a manifestly unfair and unprocedural process.
 - (iii) That for reasons set out herein, the honourable judge be pleased to recuse herself in this matter.
 - (iv) That the honourable court be pleased to order that this matter be transferred for hearing and determination by another court of equal jurisdiction in Nairobi.
 - (v) That the honourable court be pleased to issue such orders as may be fair and just to secure the applicants rights to a fair and just trial as guaranteed by the Constitution of Kenya, 2010.
 - (vi) That the costs of this application be provided for.
2. The application is based on the grounds on the face of it and supported by the affidavits of Naomi Chepkosgei Kimeto, Wellington Kipchirchir Ruto and that of Dr John M Khaminwawhich are all undated but attached to the application dated December 23, 2021.



3. Naomi Chepkosgei Kimetoin in her supporting affidavit dated December 23, 2021 deponed that she is an administrator of the deceased's estate.
4. She avers that she attended court on November 15, 2021 and December 15, 2021 in pursuit of justice in the instant matter and on both occasions, she observed that the court was provocative, demeaning and abusive towards her and her advocate on record.
5. She was therefore apprehensive that the court was partial and biased on the basis of various open statements which she particularized in her supporting affidavit that were directed to her and her advocate on record.
6. She was apprehensive that she would not receive a fair hearing in the petition.
7. Wellington Kipchirchir Ruttoh in his supporting affidavit dated December 23, 2021 deponed that he is one of the beneficiaries of the deceased's estate.
8. He avers that he attended court on November 15, 2021 and December 15, 2021 in pursuit of justice in the instant matter and on both occasions, he observed that the court was provocative, demeaning and abusive towards him and his advocate on record.
9. He was therefore apprehensive that he would not receive a fair hearing in the petition and further that the interests of justice would be served by granting the reliefs sought in the instant application.
10. Dr John M Khaminwa in his supporting affidavit dated December 23, 2021 deponed that he had been retained by the applicants to act in the instant matter alongside the firm of Kimeto & Associates Advocates.
11. He avers that the applicants visited his chambers on December 23, 2021 and informed him what had transpired in court on November 15, 2021 and December 15, 2021 and further that the applicants' efforts to address the court themselves or through the advocate on record were thwarted.
12. He avers that the applicants are yet to be given audience to ventilate their issues. The applicants were no longer comfortable in pursuing the matter in this court due to the appearance of real and actual bias against the applicants.
13. The applicant's counsel Dr John Khaminwa said he did not wish to file submissions in the application.
14. The respondents opposed the application and were adamant that the instant application was an attempt at forum shopping by the applicants in pursuit of a favourable outcome they filed a replying affidavit dated March 25, 2022 and submissions of even date.
15. The respondents submitted that Kericho High Court has the territorial jurisdiction over the adjudication of the estate of the deceased. The respondents cited the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* (1989) eKLR where the courts stated that jurisdiction is everything, without which the court downs its tools.
16. The respondents relied on section 15 of the *Civil Procedure Act* which stipulates that in instances where the subject matter of the litigation is immovable property, the suit shall be instituted in the court within the local limits within which the said property is situate.
17. Further to this, the respondents cited the case of *Korea Nyamai v Neema Parcels Limited* [2021] eKLR where the court expounded on the concept on territorial jurisdiction. The respondents therefore, sought to have the prayer to have the file transferred to Nairobi dismissed for lacking merit.



18. The respondents submitted that the allegation of bias on the part of the presiding judge in the instant application did not meet the reasonable test for bias set out by the [Bangalore Principles for Judicial Conduct](#), the [Judicial Code of Conduct](#) and a robust body of case law.
19. The respondents further reiterated that the facts in the application did not establish the alleged bias.
20. The respondents contended that the mere fact that the applicants were not pleased by the ruling rendered by the court on July 1, 2020 did not mean that there was bias warranting recusal of the presiding judge.
21. On the issue of costs the respondents submitted that it was trite law that costs follow the event. The respondents cited the Supreme Court case of [Jasbir Singh Rai & Amp & 3 others v Tarlochan Singh Rai & Amp & 4 others](#) [2014] eKLR.
22. The sole issue for determination is whether this court should recuse itself. The standards of conduct of a judicial officer are set out in the [Judicial Service \(Code of Conduct and Ethics\) Regulations](#) 2020 dated May 26, 2020.
23. 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 might reasonably be questioned where 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
 - (h) Or a member of the Judge’s family has economic or other interest in the outcome of the matter in question.”
24. The allegations by the applicants do not fall under any of the categories stated above and therefore they do not meet the threshold to warrant recusal of the presiding judge.
25. This court bent backward over to accommodate the widow of one of the beneficiaries namely Naomi Chepkosgei Kimeto who is the 1st applicant and appointed her one of the administrators of the estate but she declined.
26. In [Attorney General of Kenya v Professor Anyang’ Nyong’o & 10 others](#) EACJ Application No 5 of 2007 the East African Court of Justice restated the test for bias as follows;

“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) 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.”

27. I find that this application does not meet the criteria for recusal. In *R v Jackson Mwalulu & others* CA Civil Application No Nai 310 OF 2004 (unreported) 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...”[Emphasis mine]

28. I dismiss the application dated December 23, 2021 with costs to the respondents.

29. Since the grant of letters of administration was issued on April 21, 2022, the parties to take a date in October, 2022 for further directions.

30. This is not the final court of record, if the applicants are aggrieved with the orders of this court, they have a right of appeal to the Court of Appeal.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF SEPTEMBER, 2022

A. N. ONGERI

JUDGE

