



**Showcase Properties Limited v John Mugambi t/a Mugambi and Company Advocates (Civil Case E938 of 2021) [2022] KEHC 14485 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14485 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL CASE E938 OF 2021**  
**DAS MAJANJA, J**  
**OCTOBER 28, 2022**

**BETWEEN**

**SHOWCASE PROPERTIES LIMITED ..... PLAINTIFF**

**AND**

**JOHN MUGAMBI T/A MUGAMBI AND COMPANY  
ADVOCATES ..... DEFENDANT**

**RULING**

1. The plaintiff have moved the court by the notice of motion dated July 8, 2022 seeking recusal of Honourable Justice Majanja from hearing or handling of this suit and that the file be placed before the presiding judge of the commercial division for further orders and directions. The application is supported by the supporting and further affidavit of the plaintiff's Managing Director, Francis Muhoro Gachanja, sworn on July 8, 2022 and July 29, 2022 respectively. It is opposed by the defendant through his affidavit of July 20, 2022.
2. The plaintiff commenced this suit by a plaint dated December 2, 2021 and amended on February 10, 2022 against the defendant who was its advocate in a matter; HCCC No 577 of 2011; Showcase Properties Limited v Bamburi Special Products Limited where it claimed Kshs 50,066,851.00 for breach of contract. It accuses the defendant of professional negligence in the manner he handled the suit and seeks a declaration in that regard. It also seeks a declaration that due to professional negligence, the plaintiff was coerced into filing another suit HC Comm No 305 of 2015; Showcase Properties Limited v Kenya Commercial Bank Limited. The plaintiff also seeks a declaration that the defendant should not be permitted to benefit from professional fees for negligently handling HC Comm No 577 of 2011 and HC Comm No 305 of 2015 and a declaration that the defendant is liable to compensate the plaintiff for excess interest charged by Kenya Commercial Bank Limited on the plaintiff's loan account. The plaintiff further seeks a declaration that the defendant had benefitted



from employing underhand methods to obtain a fraudulent decree and has continued to cause on the plaintiff continuous wrongs in a quest for fraudulent benefits.

3. Against the background of the suit, the plaintiff states that I have personal knowledge of disputed evidentiary facts concerning this suit and proceedings as they are related to the facts adduced in HCCC No 436 of 2017; *John Mugambi t/a Mugambi and Company Advocates and Beatrice Kariuki t/a Beatrice Kariuki and Associates Advocates v Showcase Properties*. That I have also handled the following related claims between the same parties yet there is no shortage of judges in the commercial division to handle the matters and there are no circumstances warranting that no other judge deal with the them:
  - a. HC Comm Misc No 232 of 2019; *John Mugambi and Associates v Showcase Properties*
  - b. HC CommIP No E172 of 2018; *John Mugambi and Associates v Showcase Properties*
4. The plaintiff accuses me of showing open bias and or incompetence in handling the matter in HC CommNo 436 of 2017 and that it has no confidence whatsoever that there would be any difference in this case. He states that I have not extended to the parties in HC Comm No 436 of 2017 the safeguard of the right of equality before the law, the right to equal protection, and the benefit of the law, without bias or prejudice.
5. The plaintiff complains that it had filed an application in HC CommNo 436 of 2017 for my recusal on the basis that I had a predetermined mindset in the suit as almost all of his applications have been dismissed usually in rulings delivered in a span of one (1) week and that those decisions have been laced with illegality, irrationality and procedural impropriety which are unfortunate attributes and that it does not expect any difference in the matter. The plaintiff avers that he has been a victim of miscarriage of justice in HC Comm No 436 of 2017 perpetrated by the Deputy Registrar whose decisions I duly affirmed and which the plaintiff feels will likely occur.
6. The plaintiff asserts that it is in the interests of justice that the dignity and esteem of the court and the integrity and confidence in the justice system be protected by my recusal from the matter.
7. The defendant opposes the application and urges that the application is made in bad faith and is intended to harass and vex the judge, the Deputy Registrar and the entire judiciary. It avers that the application is an afterthought and is intended to ensure that the defendant does not execute the decree in its favour in HC CommNo 436 of 2017.
8. The defendant states that on April 13, 2022 the Deputy Registrar referred the matter to me upon agreement by counsel for both parties and was fixed for mention on June 16, 2022. Since I was not sitting on that date, the Deputy Registrar, once again, with the consent of the parties fixed the matter for mention before me on July 1, 2022. According to the defendant, the advocates agreed that the matter should be dealt with by the judge who was privy to and had adjudicated on the matters in HC Comm No 436 of 2017 hence the plaintiff is estopped from running away from the position he had taken.
9. The defendant contends that the plaintiff has not met the threshold for recusal as it has failed to establish facts upon which the inference of bias is to be drawn. Further, that it is not correct that I determined three matters between the parties but that I only heard and determined several applications. That in fact, HC CommNo 436 of 2017 was not determined on merit and I only resolved a total of 14 rulings in the matter which have not been set aside by an appellate court.
10. As regards HC Comm Misc No 232 of 2019, the defendant states that I heard and determined a reference application filed by the plaintiff and that I granted an order of stay of execution which is still



in force. In Hcomm IP No E172 of 2019, the petition has not been heard and I only granted an order of stay in the plaintiff's favour.

11. The defendant further avers that this suit arises from HC Comm No 577 of 2011 and HC Comm No 305 of 2013 which were handled by different judges in the commercial division hence this suit is fundamentally different from the matter that I have handled. In addition, the defendant states that the plaintiff cannot use an unprosecuted application for my recusal in HC Comm No 436 of 2017 as a basis for its application in this suit. Overall, the defendant pleads that there is no basis upon which the court can grant the application.
12. The thrust of the plaintiff's case is that I have personal knowledge of disputed evidentiary facts concerning the proceedings herein related to HC Comm No 436 of 2017 and that I have consistently displayed a predetermined mindset as I dismissed almost all the plaintiff's applications within a week of hearing. The plaintiff states that he does not expect any different result in this suit and that in the eyes of a fair minded observer who, having considered the facts, would definitely arrive at the conclusion that there is a real possibility of bias.
13. Both parties filed written submissions which were supplemented by brief oral submissions in support of their respective positions. They agree on the principles to be applied when an application for recusal for a judge is made. There is a presumption that every Judge presiding over a matter acts in accordance with the oath of office as was stated by the Supreme Court in *Gladys Boss Shollei v Judicial Service Commission & another* SCK Pet No 34 of 2014 [2018] eKLR that, "[T]here is a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters." Unless an actual interest is demonstrated in which case a judge must recuse himself, a party who seeks recusal on the basis of apparent or perceived bias must demonstrate to the court that reasonable and fair minded people having knowledge of the facts of the case would conclude that the judge was biased.
14. Judges are obliged to sit and hear cases hence they must not recuse themselves on flimsy or bare allegations made by a party as this would undermine the administration of justice hence the authorities are clear that there must be a factual basis for the judge to recuse himself. 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* CA criminal application No Nai 4 And 5 of 1995 (unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & others* Ca 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..."
15. 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 was a real possibility that the tribunal was biased." The Court of Appeal concluded that the facts alleged in an application for recusal of a judge must be specifically alleged and established by the applicant and that those facts



must lead to a conclusion by the public at large of reasonable doubt of fair administration of justice. In short, the test is objective and not subjective.

16. Before I consider the substance of the application, I would like to lay to rest the insinuation by counsel for the plaintiff that I may have allocated myself this matter. This is far from the truth as the record shows that it is the parties who referred the matter to this court when the matter came up before the Deputy Registrar. In any case, there is no evidential or factual basis for suggesting that I allocated myself the matter for an ulterior motive or purpose.
17. The plaintiff's case is two pronged. First, that I have personal knowledge of disputed evidential facts concerning the related suit being HC Comm No 436 of 2017. Second, that as a result of dealing with a plethora of applications in HC Comm No 436 of 2017, there inescapable conclusion is that I am biased and will not deal with the matter fairly.
18. On the first ground, I think it is misleading for the plaintiff to suggest or assert that I have personal knowledge of the disputed evidential facts concerning the matters in the suit. By personal knowledge I mean knowledge of the dispute gleaned from other sources other than matters presented in the cases I have handled. I can affirmatively state that I do not have personal knowledge of the matters in dispute and all the facts concerning the plaintiff and the defendant I am aware of are matters of record in the matters I have handled. Of course, if I had personal knowledge of the matters in issue gleaned from other sources other than the case I have handled I would be obliged to recuse myself in this case but nothing of the sort has been suggested here. What is true and it is not disputed is that I dealt with matters concerning the plaintiff and the defendant.
19. The principal matter I dealt with is HC Comm No 436 of 2017 where I was called upon to set aside default judgment in a suit where the plaintiff has been sued by its advocates for fees. I heard the application and by a ruling dated August 24, 2020, I allowed the plaintiff's application on terms including a condition that the plaintiff deposit Kshs 5,000,000.00 in a joint account in the names of the parties' advocates or in court or provide a bank guarantee in favour of the plaintiffs for the said amount from a reputable bank within 30 days from the date of the ruling.
20. The ruling dated August 24, 2020 set the stage for a flurry of applications which I was required to consider and rule on as follows: Ruling No 2 dated October 2, 2020 where I dismissed the defendant's (the plaintiff herein) application to review the order directing it to deposit Kshs 5,000,000.00 as a condition for setting aside the judgment. Ruling No 3 dated November 3, 2020 where I allowed the defendant's application to enlarge time for compliance with the order for deposit of the Kshs 5,000,000.00. Ruling No 4 dated March 17, 2021 where I dismissed the defendant's application to set aside the decree issued by the court. Ruling No 5 dated March 26, 2021 where I dismissed the defendant's application for leave to appeal against ruling No 4. Ruling No 6 dated April 21, 2021 in which I dismissed the defendant's application to find that the court filing fee in the matter was fraudulent. Ruling No 7 dated May 13, 2021 where I allowed the plaintiffs' application to seek an order directing the defendant to pay the sum of Kshs 5,000,000.00 secured by the guarantee. Ruling No 8 dated June 8, 2021 where I dismissed the defendant's application seeking to stay ruling No 7. Ruling No 9 dated June 18, 2021 where I dismissed the defendant's application to find that its defence was properly on record. Ruling No 10 dated July 5, 2021 where I dismissed the defendant's application for stay pending appeal from original judgment of the court. Ruling No 11 dated July 30, 2021 where I dismissed the plaintiffs' application seeking to bar the defendant from filing any further applications in the matter. Ruling No 12 dated November 16, 2021 where I declined to issue a charging order in favour of the plaintiffs until Kenya Commercial Bank was heard on the matter involving property charged to it by the defendant. Ruling No 13 dated December 21, 2021 where I allowed the plaintiffs' application for a charging order in respect of the surplus proceeds of sale of the defendant's property by Kenya



Commercial Bank. Ruling No 14 dated June 13, 2022 where I dismissed the defendant's application to set aside the decree issued in this matter.

21. From the decisions I have set out above and which I made over a span of two years, it is clear that I was called upon to rule on matters consequent on the initial application to set aside the judgment. Each application, being post judgment, was built on the previous one hence the court was not called upon to consider novel or new matters. In each of the applications, I gave a considered ruling and some of the rulings are subject of appeal. To permit recusal on account of the number of rulings delivered by a judge in a matter absent a factual basis for finding bias would permit parties to pummel judges with a multiplicity of application in order to force the judge to recuse himself, a situation which would allow forum shopping.
22. I accept that some of the rulings were delivered within a week of application and indeed others were delivered ex-tempore. All these matters were dealt with within the bounds of judicial discretion and practice. There is no rule of law or practice that sets a time within which a judge must not deliver a ruling. A ruling can be delivered at any time when it is ready. What is regulated is the length of time the court takes to make a decision as this is an issue of delay in justice. I hold that a person with knowledge of the facts and the decisions would not conclude that the court was biased merely because it delivered the rulings within a week of argument or ex-tempore.
23. Further and as the defendant pointed out, HC Comm No 436 of 2017 did not involve any substantive determination. Once the plaintiff failed to comply with condition for setting aside the judgment, the judgment was reinstated thus giving rise to the applications whose rulings I have outlined.
24. As regards the other two matters I have been involved in, the subject of HC Misc. No 232 of 2019 was taxation of the advocate-client bill of costs between the plaintiff and the defendant. I heard the reference from the decision of the Deputy Registrar and by a ruling dated August 24, 2020 and I dismissed it. Subsequently, I granted an order of stay pending appeal to the Court of Appeal. The order of stay is still in force. In HC Comm IP No E172 of 2018, the defendant sought to liquidate the plaintiff on account of the decree issued by the court in HC Comm. No 436 of 2017. Upon application of the plaintiff, I allowed its application seeking to stay the petition on the ground that the judgment on which it was based had been set aside.
25. It is thus clear that while I dealt with matters concerning the plaintiff and the defendant, they are markedly different with what is before the court in the present case. In any case, the fact that I have dealt with the matters I have outlined is not a sufficient basis for recusal. In *Robert Tom Martins Kibisu v Republic* SCK Petition No 3 of 2014 [2018] eKLR the Supreme Court cited with approval the decision by Chitembwe J, in *Nathan Obwana v Robert Bisakaya Wanyera & 2 others* KKG HCCA No 138 of 2013 [2013] eKLR where the learned judge held that the single fact that a judge has sat on so many cases involving one party cannot be sufficient reason for a judge to disqualify himself (see also *Nancy Wanja Gatabaki and 2 others v Muga Developers Limited and others* HC Comm No 151 of 2017 [2021] eKLR).
26. I will reiterate what I stated in *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya* HC Comm Misc No 263 of 2019 [2021] eKLR as follows:
  - (28) Ultimately, the question for consideration is whether a person having knowledge of the fact that I heard those cases would reach the conclusion that I am biased in these cases. I think not. Each of the decisions complained about was made after arguments and if any party is dissatisfied, it is entitled to lodge an appeal. The pending reference in this matter is yet to be determined. In *Republic v Independent Electoral & Boundaries Commission & Another ex parte Coalition For Reforms and Democracy (CORD)* HC NRB Misc Appl No 648 of 2016



[2017] eKLR, Odunga J, expressed made the following observation on a similar application for recusal:

- (74) To seek the recusal of a judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another judge will arrive at a different decision. in my view, instead of subjecting another judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the court referring the matter. Whereas a judge of the High Court is not bound by a decision of a court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the court and the perception created would be that the respondent chose a judge who was sympathetic to its cause. If that were to happen the citizens of this country would be led to believe that justice depends on a particular judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.

27. I hold that the plaintiff has not established any valid grounds for my recusal. A person having knowledge of the facts of the case and in particular the matters I have dealt with and decisions I have given would not conclude that I am biased. I reject the application dated July 8, 2022. It is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2022.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Kalande instructed by Mungai Kalande and Company Advocates for the Plaintiff.

Mr Mbobu with him Mr Makhandia instructed by Makhandia and Makhandia Advocates for the Defendant.

