



Ali (as personal representative of Mehboob Mohamed Abdul Gafoor Mohamed Mullah also knoen as Mehboob Mohamed Abdul Gafoor and Mehboobmullah) v Vescon Properties Limited & another (Environment & Land Case E142 of 2022) [2023] KEELC 18334 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E142 OF 2022**

NA MATHEKA, J

JUNE 20, 2023

BETWEEN

SHAKILA BEGUM ALI PLAINTIFF

**AS PERSONAL REPRESENTATIVE OF MEHBOOB MOHAMED ABDUL
GAFOOR MOHAMED MULLAH ALSO KNOEN AS MEHBOOB MOHAMED
ABDUL GAFOOR AND MEHBOOBMULLAH**

AND

VESCON PROPERTIES LIMITED 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

RULING

1. The application is dated February 16, 2023 and is brought under article 50 (1) of the [Constitution](#) of Kenya, sections 1A and 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. That the Honorable Lady Justice Nelly Matheka be pleased, in the interests of justice, to recuse herself from the hearing and determination of this matter.
 2. That this matter be placed before another judge of the Environment and Land Court for its hearing and determination.
 3. That costs of this application be in the cause.
2. It is based on the grounds that the plaintiff herein, had *vide* Mombasa ELC case number 171 of 2014 instituted a suit against the defendants in respect of the same parcel of land as the instant suit. That the said suit was dismissed by Honourable Lady Justice Nelly Matheka for want of, prosecution on the November 1, 2018 despite the plaintiff's explanations as to why the suit had not been prosecuted for a period of more than a year. That given that the said suit was never determined on its merits



but dismissed on procedural grounds, the plaintiff has rightfully instituted a fresh suit. That the 1st defendant has now filed an application dated the January 16, 2023 seeking to strike out the suit on the ground that suit is an abuse of the court process. That it is the 1st defendant's chief argument in the said application that the instant suit is an abuse of the court process because the earlier suit had already been dismissed for want of prosecution. That the plaintiff has come to learn that the instant suit has been allocated to Honourable Lady Justice Nelly Matheka for its hearing. That since Honourable Lady Justice Nelly Matheka had earlier dismissed the initial case for want of prosecution after having considered the plaintiff's sentiment as to why the same should not be dismissed; then the plaintiff is extremely apprehensive that hearing of an application seeking to strike out the instant suit which is based on an initial dismissal through the same honorable judge would potentially prejudice the plaintiff's chances of receiving justice with respect to that application. That the plaintiff feels she shall suffer no prejudice should the matter have been proceeding before the said Lady Justice Nelly Matheka for its hearing based on its merits, however the said impending application raises real apprehension on the part of the plaintiff as to its neutral determination based on the said circumstances as justice should not only be done but must also be seen to be done. That as seen above, the instant application is directly linked to the earlier ruling of Honourable Lady Justice Nelly Matheka, it is highly unlikely that justice will not be seen to be done to the prejudice of the plaintiff. That justice would be seen to done and administered if the application were to be handled by another judge who has never adjudicated on the said issue between the parties herein. That the defendants would not in any way whatsoever be prejudiced should the orders in this application be granted. That in the foregoing, it is in the great interests of justice that the instant. application be allowed as prayed.

3. The 1st defendant stated that the application as conceived and formulated is bad in law, untenable and the orders sought therein are not for granting. That no cogent grounds and or valid reasons(s) have been advanced to warrant the recusal of the presiding judge from hearing and determining the suit herein. That the subject application is an abuse of the due process of court as there is only one High Court in Kenya, and that any order made by one High Court is binding on all other courts of equal status and thus shopping for a forum is not an opt cure for the applicant's predicament.
4. This court has considered the application and the submissions therein. The main issue is whether I should recuse myself from dealing with the present matter and/or other references involving the parties herein. The principles governing recusal in this jurisdiction are not well settled. In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* [2014] eKLR the court stated that;
5. 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...”



6. In *Philip K. Tunoi & another v Judicial Service Commission &* [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 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.”

7. 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 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.

8. 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.”

9. As was stated in *Kaplana Rawal v Judicial Service Commission and 2 others* [2016] eKLR:

10. An application for recusal of a judge is a necessary evil.” On the one hand, It calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with the *Constitution* without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence, In such application, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is too human and above all the *Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial judge.”



11. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating the cordial guarantee of the Constitution, namely, the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial court.
12. We would, with respect, agree with the Constitutional Court of South Africa v The South African Rugby Football Union and others case CCT 16/98:

“ At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel’s duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront. “[emphasis added]”
13. In the same Court of Appeal decision of Kalpana Rawal v JSC (supra) the Court of Appeal observed quite correctly that;

“ An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary Interest in the outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however arises where like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a Judge?”
14. The Court of Appeal in the Kalpana Rawal case further acknowledged that for quite some time, there was contestation in several commonwealth jurisdictions regarding the proper test to be applied in such case: was it real likelihood of bias or reasonable apprehension of bias by a reasonable person?
15. In Attorney General of Kenya v Professor Anyang’ Nyong’o & to 10 others EACJ application No. 5 of 2007 the court stated:
16. 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.”
17. In the Supreme Court of Canada R v SCRD) [1977]. 3SCR 484 cited by the Court of Appeal in the Kalpana Rawal v JSC (supra) it was held:
18. The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically and having thought the



matter through conclude. This test contains a two-fold objective element:- the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold.

19. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The Jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”
20. In the instant case, *vide* Mombasa ELC case number 171 of 2014 instituted a suit against the defendants in respect of the same parcel of land as the instant suit. That the said suit was dismissed by Honourable Lady Justice Nelly Matheka for want of, prosecution on the November 1, 2018. Their application for reinstatement was also dismissed on the November 28, 2019. The plaintiff was granted leave to appeal the said decision. The plaintiff has now instituted a fresh suit with the same parties and the same subject matter. The plaintiff state that they are extremely apprehensive that hearing of an application seeking to strike out the instant suit which is based on an initial dismissal through the same honorable judge in a different suit would potentially prejudice the plaintiff’s chances of receiving justice with respect to that application. The test here is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that a Judge was biased. I think not. I find that this is application for recusal is forum shopping and set out to have another judge with concurrent jurisdiction to arrive at a different conclusion. The principles governing recusal have not been established in this case. For all the above reasons, I refuse to recuse myself. I find this application devoid of merit, it is frivolous and vexatious and is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE

