



REPUBLIC OF KENYA



KENYA LAW
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**Omu v Kiso Enterprises Limited & 3 others (Environment & Land Case
3B of 2016) [2023] KEELC 22247 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 3B OF 2016
MAO ODENY, J
DECEMBER 8, 2023**

BETWEEN

AGGREY ANZALA OMU PLAINTIFF

AND

KISO ENTERPRISES LIMITED 1ST DEFENDANT

THE CHIEF LANDS REGISTRAR 2ND DEFENDANT

THE HONORABLE ATTORNEY GENERAL 3RD DEFENDANT

KETAN DOSHI 4TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 9th March 2023 by the 4th Defendant/Applicant seeking the following orders;
 - a. That the honorable Lady Justice Dr. M.A Odeny do recuse herself from further proceeding and determining the consolidated suits herein.
 - b. That costs of this application be in the cause.

Applicant's Case

2. The application was supported by the annexed affidavit of Ketan N. Doshi sworn on 9th March 2023 where he deponed that the learned Judge presided over ELC No. 136 of 2018 that was between Hon. Justice Charles P. Chemutut v Peter Walker & 5 Others where he was the first third party.
3. The Applicant stated that he was aggrieved by the Judgment delivered on 15th February 2023 and has filed an Appeal. He further deponed that the facts in ELC Case No. 136 of 2018 are similar to the present matter and that the witnesses who testified in the said matter also testified in the present matter.



4. The Applicant also stated that as a reasonable man, he has no confidence that this court will be objective in its analysis and determination and is unlikely to reach a different conclusion than the one that was reached in ELC Case No. 136 of 2018.
5. It was the Applicant's case that he was not accusing the learned Judge of any misconduct but only had doubts as to the judge's objectivity having already determined a similar matter and prayed that the application be allowed.

1st Defendant's Case

6. The 1st Defendant filed a Replying Affidavit sworn on 20th May 2023 by Jafar Sharif Omar and deponed that the Applicant had not provided any evidence of bias on the part of the court and has not demonstrated the breach of any provisions of the law.
7. He further deponed that to seek the recusal of a judge solely on the ground that the judge had determined a matter with similar facts on an assumption that another judge will arrive at a different decision is speculative and that the 4th Defendant has not brought his application in good faith.
8. He further deponed that the Applicant has failed to specifically allege and establish facts constituting bias in a matter that met the objective test.

2nd and 3rd Defendants; Case

9. The 2nd and 3rd Defendants filed grounds of opposition on 11th October 2023 which were as follows;
 - a. The application is devoid of merit since it does not satisfy the necessary conditions for recusal of a judge.
 - b. The applicant has failed to specifically allege and establish facts constituting bias in a manner that meets the objective test.
 - c. There is no evidence or cogent facts before the court to demonstrate real proof of actual bias and/or prejudice and/or manifest risk of partiality or imputed bias on the part of the learned judge.
 - d. The applicant is undeserving of the reliefs sought as the application as filed is frivolous for having been filed after at the conclusion of the suit.
 - e. That the application is brought in bad faith and is merely meant to frustrate, delay and/or disrupt the court process.

4th Defendant/applicant's Submissions

10. Counsel gave a brief background to the case and relied on the cases of *Taylor v Lawrence* [2003] QB 528 (Neutral Citation [2002] EWCA Civ 90), *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR and reiterated that the issues in consideration in the present matter are similar to the ones that were raised in Malindi ELC No. 136 of 2018 that has already been determined.
11. Counsel for the 4th Defendant made reference to various paragraphs of the judgment delivered in ELC Case No. 136 of 2018 and submitted that since the present suit raised similar issues, the perception of a fair-minded and informed observer would be that the court will make a similar determination in the present matter. Counsel urged the court to allow the application as prayed.



Plaintiff's Submissions

12. Counsel for the plaintiff relied on the case of *Republic v Independent Electoral & Boundaries Commission & another ex parte Coalition for Reforms and Democracy (CORD)* [2017] eKLR and sought that the 4th defendant's application be dismissed with costs.

1st Defendant's Submissions

13. The 1st Defendant's counsel submitted on whether the 4th Defendant's application has met the threshold of the principles governing recusal of a judge. Counsel relied on the cases of *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR, *Kaplana H. Rawal v Judicial Service Commission & 2 Others* [2016] eKLR and submitted that the 1st defendant had a legitimate expectation that litigation should come to an end and allowing the 4th Defendant's application would prolong the matter and urged the court to dismiss the application with costs.

2nd and 3rd Defendants' Submissions

14. Counsel relied on the cases of *R v David Makali and others* C.A Criminal Application No. Nai 4 and 5 of 1995 (unreported), *Philip K. Tunoi & another v Judicial Service Commission & another* [2016] eKLR, *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR and submitted that any reasonable person who has knowledge that the learned Judge had determined ELC Case No. 136 of 2018 would not reach the conclusion that the learned judge would be biased.
15. Counsel further submitted that bias cannot be simply inferred from presiding over a matter concerning a similar party before the court and sought that the application dated 9th March 2023 be dismissed with costs.

Analysis and Determination

16. The issue for determination is whether this court should recuse itself from determining this matter.
17. The Court of Appeal in the case of *Kaplana H. Rawal v Judicial Service Commission & 2 others* [2016] eKLR held as follows;

“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 applications, 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 all too human and above all *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial judge. 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 a cardinal 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.”

18. The court in the case of *Republic v Assa Kibagendi Nyakundi* [2022] eKLR also held as follows;

“The law on recusal of a Judge from a trial on the grounds of bias or likelihood of bias are well settled as shown on the submissions of the applicant and conceded to by the Respondent.



The many authorities relied on by the parties confirm the position that for the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who would adopt a balanced approach on the same.

The application for recusal of the Hon Justice Ogembo seems to arise out of the ruling the Honourable Judge made in HCCR case No. 35 of 2019, dismissing an application by the applicant herein. Sections of the ruling have been reproduced by the applicant at paragraph 29 of the affidavit in support of this application. With respect, these were considered findings of the Honourable Judge which in our considered view can only be properly challenged by way of appeal. Indeed the applicant has intimated to court that he has accordingly filed an appeal against the same at the Court of Appeal. This, in our view, on its own cannot amount to a bias or proof of likelihood of bias.”

19. The 4th Defendant/Applicant seeks that this court recuses itself on the ground that it delivered a judgement in Malindi ELC No. 136 of 2018 where the 4th Defendant was a party. The 4th Defendant argued that the issues that were raised in ELC No. 136 of 2018 are similar to the issues that are raised in the present matter and so he is apprehensive that the court is likely to be biased.
20. The Court of Appeal further held in the *Kalpana Rawal Case* (*supra*) as cited in the case of East Africa court of justice in *AG of Kenya v Anyang Nyong'o* Apeal No.5 , Ref No. 1 of 2006 as follows:

“We think the objective test of reasonable apprehension” is good law” the test is stated variously, but amounts to this: do the circumstances give raise 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.”
21. This matter has been heard fully and the only issue remaining is the writing of the judgment. The 4th Defendant admits that he has preferred an appeal against the said judgment and that he is not accusing the learned Judge of any misconduct but only had doubts as to the judge’s objectivity having already determined a similar matter As was held in *Republic v Assa Kibagendi Nyakundi* (*supra*), the grounds upon which the 4th Defendant is seeking that this court recuses itself neither amounts to bias nor proof of likelihood of bias. If there was any bias or likelihood of bias, the Applicant should have raised it earlier during the hearing of the case not after the case has been fully heard.
22. The Applicant must establish a reasonable ground that the judge is likely to be biased in the case. Recusal of a Judge is a matter that should not be taken lightly as the party seeking for such recusal must have a good reason why the judge should recuse him/herself. If there were good reasons then the judge would recuse him/herself in the interest of justice and fair administration of justice. If every application for recusal of a judge is allowed, then this will lead to forum shopping. It will be that if a litigant does not like your face, then he will ask you to recuse yourself. The courts will be dealing with numerous applications for recusal. Luckily the courts have given guidance through precedents on the principles to be followed when faced with such applications.
23. In the case of the supreme Court of Kenya case of *Gladys Boss Sholei v the JSC and Another* (2018)eKLR cited with Authority the case of *Simonson v General Motor Corporation* USDCP 425 RSupp574,578(1978) the court stated that:

“Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.



From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge's duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manouvering by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the Newzeland court of appeal in *Mnir v Commissioner of Inland Revenue*(2007)3NZLR 495.”

24. Even if the judge were to recuse herself in this matter and the matter given to another Judge to determine, what would be expected from the new judge hearing and determining the matter while this judgment is still subsisting without being overturned.
25. I have considered the application, the affidavits, the submissions by counsel and the relevant authorities and find that the application dated 9th March 2023 lacks merit and is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF DECEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

