Moilo & 2 others (Suing on their own behalf and in their capacity as National Officials of Bethel Church) v Kariuki & 8 others ((Being sued on their own behalf and on behalf of the members of Bethel Church) (Environment and Land Case Civil Suit 863 of 2015) [2022] KEELC 13316 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13316 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 863 OF 2015

JA MOGENI, J

SEPTEMBER 28, 2022

-AND BY WAY OF COUNTER CLAIM-

BISHOP JOHN NJUKI KARIUKI.....1ST DEFENDANT

JAMES MURIGI WANJIKU.....2ND DEFENDANT

PETER MUIRURI KABIRU.....3RD DEFENDANT

GERALD WAMBUGU.....4TH DEFENDANT

(ALL SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF BETHEL CHURCH OF GOD)

JOHN MUTUNGA NGATARA.....5TH DEFENDANT

ALICE NYAMBURA MUTUNGA.....6TH DEFENDANT

ISAAC KARIUKI GITAU.....7TH DEFENDANT

PAUL MBURU MBUGUA.....8TH DEFENDANT

ROSE WAMBUI MBAGARA.....9TH

DEFENDANT

=VERSUS =

BISHOP JOHN NJUKI KARIUK

FRANCIS KAGIA

(BEING SUED ON THEIR OWN BEHALF AND ON BEHALF OF

RULING IN ELC SUIT NO. 863 OF 20152

THE MEMBERS OF BETHEL CHURCH 1ST

DEFENDANT

SAMUEL MAINA 2ND

DEFENDANT

PATRICK MACHEHU 3RD

DEFENDANT

PETER THAIRU.....4TH

DEFENDANT

SAMUEL MACHIRA.....INTENDED 5TH

DEFENDANT

BETWEEN

JOSEPH M. MOILO ..... 1ST PLAINTIFF

FRANCIS NDUNGI KAGGIA ..... 2ND PLAINTIFF

JOSEPHAT GITAU ..... 3RD PLAINTIFF

SUING ON THEIR OWN BEHALF AND IN THEIR CAPACITY AS NATIONAL OFFICIALS OF BETHEL CHURCH

AND

JOHN NJUKI KARIUKI ..... 1ST DEFENDANT

JAMES MURIGI WANJIKU ..... 2ND DEFENDANT

PETER MUIRURI KABIRU ..... 3RD DEFENDANT

GERALD WAMBUGU (SUED ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF BETHEL CHURCH OF GOD) ..... 4TH DEFENDANT

JOHN MUTUNGA NGATARA ..... 5TH DEFENDANT

ALICE NYAMBURA MUTUNGA ..... 6TH DEFENDANT

ISAAC KARIUKI GITAU ..... 7TH DEFENDANT

PAUL MBURU MBUGUA ..... 8TH DEFENDANT

ROSE WAMBUI MBAGARA ..... 9TH DEFENDANT

(BEING SUED ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF BETHEL CHURCH

RULING

1. The ruling relates to the application instituted by the applicant on the February 24, 2022 seeking that the Hon Judge be pleased to recuse herself from further hearing and or proceedings in this matter. The application is brought under order 51 rule 1-3, order 40 rule 10 of the *Civil Procedure Rules*, and sections 1A, 1B and 3A of the *Civil Procedure Act* and sections 3(2) of the *Judicature Act* and article 50 of the *Constitution*.

2. The application is supported by the grounds thereto and the supporting affidavit of Samuel Mwangi Gateri, a member of Bethel Church of God whose leaders are the 1st to 4th defendants. The grounds are that the applicant is apprehensive that the Hon Judge is biased against it; The defendants/applicants fear that when the two pending applications dated February 11, 2022 and February 23, 2022, suit and counter-claim shall be heard they will not get justice.

3. Further allegations of evidence of bias are that the court issued a status quo order on February 11, 2022, that the court allowed the plaintiffs to make an application for leave to reply to the application dated February 11, 2022 when they are in contempt of court, thus the court acted without jurisdiction in hearing the counsel for the plaintiffs to have the orders made on February 11, 2022 vacated yet they are in contempt. He further alleges that the judge did not give a chance to the counsel holding brief for the counsel for the defendants when they sought to have the matter set aside to allow the lead counsel to attend court and argue both the two pending application and the main suit.

4. The plaintiffs/ respondents opposed the defendants/applicants application and filed a replying affidavit dated April 29, 2022 sworn by Bishop Joseph Moilo and stated that there is no proof of bias by the court. Further that the court has discretion to determine how proceedings before it should be conducted. He stated that it is a common practice in court that whenever there is a pending application it is disposed off before the main suit.

5. Finally, that this is not the first time the application for recusal has been made in this matter. That a similar application was made on March 20, 2017 and disposed off on May 11, 2018. That the defendants/applicants have not provided any proof of bias by Hon Justice Mogeni and this application is made to just cause delay in disposal of this matter which has been in court since 2015.

6. The defendants/applicants filed their submissions on May 30, 2022. The plaintiffs/respondents filed no submissions. I have considered the application and the response and the filed submissions.

7. From the application I see that the main issue arising from the instant application is whether there are good grounds for recusing myself from the hearing of this suit. The grounds upon which the application is made have been set out herein above.

8. I note that on some occasions, litigants have felt that they do not have confidence in a judge and in such instances they are perfectly entitled to apply for his or her self-recusal provided they can establish good grounds for it.

9. It is quite possible that an application for recusal may be misused by mischievous litigants and so a court ought to examine such an application exhaustively so that no prejudice is occasioned to one party out of sheer mischief on the part of another party.

10. In the case of *Richard Onyino Simwa v Joshua Angelei and others* Kitale ELC case No 69 of 2019 stated that self-recusal is not

> "a proposal that should be readily acceded to by judges, partially for the reason that sound grounds must be first proved, and secondly judges have a duty to sit that should not be incommoded by frivolous applications for self-recusal. That duty is based on the oath of office they took. Finally, forum-shopping by crafty litigants should be discouraged."

11. This observation followed the court's examination of decisions such as *Hon Kalpana H Rawal v Judicial Service Commission & 2 others* civil appeal (application) No 1 of 2016 [2016]; *Galaxy Paints Co Ltd v Falcon Guards Ltd* [1999] eKLR; J *G K v F W K* [2019] eKLR; *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR; *Andrew Alex Wanyandeh v The Attorney General & Kenya Railway Corporation*; Nairobi Milimani HCCC No 844 of 2005 and *Republic v Mwalulu & 8 others*: [2005] 1 KLR.

12. In the *Hon Kalpana H Rawal* the Court of Appeal of Kenya stated as follows:

> "... Before we consider the merits of the application, however, there are a few issues raised by the parties which we must dispose of. First, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr Khaminwa, where a judge must automatically disqualify himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr Khaminwa did not cite any. On the contrary, decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in *Locabail UK Ltd v Bayfield Properties Ltd* [2000] QB 451 a judge "would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance."

13. The *Galaxy Paints Co* case emphasized that although it is important that justice must be seen to be done, it is equally important that judicial officers should discharge their duty to sit, and do not, by acceding too readily to suggestions of bias, encourage parties to believe that by seeking disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

14. In the case of *J G K v F W K* [2019] eKLR Gikonyo J also emphasized that recusal should not be taken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, for example, bias or prejudice or conflict of interest or personal interest on the part of a judge and that the administration of justice ought to be free from blackmail. At the same time he observed that what must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favourable to their causes.

15. As I already pointed out this is not the first application by the defendants/applicants for recusal. A similar application was made on March 20, 2017 when Justice Okongo had the conduct of this matter. A decision was made on May 11, 2018. Justice Okongo said in his decision stated as follows;

> "I am of the view that the defendants have not established valid grounds that would justify my recusal from hearing this suit. The mere fact that I have made successive decisions against the defendants is not a sufficient ground for my recusal from hearing this matter.....the defentants' apprehension that I am not likely to be impartial in tis matter has no basis.."

16. Justice Hatari Waweru in *Andrew Alex Wanyandeh v The Attorney General & Kenya Railway Corporation*; Nairobi Milimani HCCC No 844 of 2005 observed that litigants cannot choose their judges and concurred with earlier decisions stating that that applications for disqualification of judges should not be lightly allowed as that would tend to erode public confidence in the courts and the determination of justice.

17. In the case of *Republic v Mwalulu & 8 others*: [2005] 1 KLR the Court of Appeal stated that the test is objective and the facts constituting bias must be specifically alleged and established and that that would be achieved by scrutinizing the affidavits filed by either side.

18. I have scrutinized the affidavits of both the applicants and the respondents and I find that there is no evidence that has specifically provided that show that the applicants will be prejudiced if I hear this matter and that I will be impartial. The applicant has alleged that the fact that I did not allow the file to be set aside so that the lead counsel could come to court and argue the application and proceed with the suit is being partial. There is no proof of the partiality alleged.

19. It may be quite tedious to adequately restate the background of this suit here. It is sufficient to state that this case has been in the cause list since September 2015, seven (7) years since it was instituted and the main suit has not been heard the court has been dealing with one application after the other. Even in determining this application there are pending two applications dated February 11, 2022 and February 23, 2022. As the history of this litigation will demonstrate shortly courts have of late, in their quest to eliminate backlog of suits, been between a rock and a hard place, trying to force some unwilling litigants in ancient cases to proceed with their claims to conclusion while at the same time maintaining the principle of natural justice that requires every person to be heard out to the fullest.

20. To save much effort on providing the history of the matter and to give a better perspective I will only provide brief facts of what is contained in the plaint and the defence. The crux of the suit by the plaintiff is that Bethel Church was the registered owner of LR NoLimuru /Bibirioni /T.249 & Limuru/ Bibirioni /T. 252, Limuru / Rironi /531 & Limuru / Rironi /893 and Limuru / Ngecha / T.217 among other properties. It was registered around 1975. Further that the defendant were until late 2014 members of Bethel Church but in February 2015 they decamped and registered a church by the name Bethel Church of God with the defendants as the current officials. It is the view of the applicant that the defendants are holding titles belonging to Bethel Church.

21. In their joint amended defence and counter-claim the defendants/applicants contend that this suit has been filed by the plaintiffs in disobedience of the orders which were given by the court in Nairobi ELC No 453 of 2015 where the parties were directed to settle their differences through mediation by the registrar of societies. The defendants aver that this suit is intended to open up a bargain that the parties had entered into on December 15, 2014 where the parties had agreed to share the properties registered in the name of Bethel Church which however the plaintiffs breached in February 2015 by claiming all the properties registered in the name of Bethel Church as belonging to the plaintiffs only.

22. The defendants/applicants have averred that under the bargain the defendants were entitled to LR No Limuru / Bibirioni / T.249, LR No Limuru / Ngecha / T.252, LR No Limuru / Riron / 531, LR No Limuru / Rironi / 893 and LR No Limuru / Ngecha / T.271. The defendants have claimed that the plaintiffs have evicted them from their places of worship which they lay claim to in the counter-claim seeking to have the bargain of December 15, 2014 to be declared as binding. That the said bargain/agreement being binding then a permanent injunction should issue against the plaintiffs from interfering with properties of Bethel Church of God.

23. The applicant now seeks to have the trial court recuse itself on the basis of biasness. That the court showed biasness when it failed to place aside a file to allow the lead counsel to conclude their matter in the Court of Appeal so that he could argue the applications dated February 11, 2022 and February 23, 2022 and proceed with the main suit. The failure to grant this application by the defendants means that the parties will not receive a fair trial before this court.

24. The issue for determination therefore will be whether the learned judge should recuse herself.

25. The considerations that a court must take into account when determining an application for recusal of a judge are well settled. These considerations were highlighted by the Supreme Court in the case of *Gladys Boss Shollei v Judicial Service Commission* [supra];

> " 25: Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he has a duty to sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court."

26. A judge has a duty to the *Constitution* (fidelity to the *Constitution*) and a duty to court to the extent that he/ she must be a neutral arbiter. The Bangalore Principles as captured in the judicial code of conduct mandates every judge to be independent and impartial in the course of dispensing justice.

27. The state counsel in the *Gladys Shollei Case*(supra) when looking into the issue of recusal quoted the writings of Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; where he observed:

> " A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason"

28. Further, the court observed the reasoning in *Simonson v General Motors Corporation* USDC p.425 R. Supp, 574, 578 [1978], the United States District Court, Eastern District of Pennsylvania, had this to say:-

> " Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

29. What is the test to be applied to the considerations? The Court of Appeal in the case of *Kaplana H. Rawal v Judicial Service Commission* (supra) relied on the decision in *Magill v Porter* (2002) 2 AC 357, where the House of Lords modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. In the

case of The East Africa Court of Justice adopted the same test in *Attorney General of Kenya v Prof Anyang' Nyong'o & 10 others* EACJ application No 5 of 2007 when it stated:

> "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, 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."

30. Further the Supreme Court of Canada expounded the test in the following terms in *R v S (R.D)* [1977] 3 SCR 484:

> "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. 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 acknowledgement 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."

31. Further the test for recusal of a judge was laid down by the Court of Appeal in the case of *R v David Makali and others* CA criminal application No 4 and 5 of 1995 Nairobi (unreported) as reinforced in *R v Jackson Mwalulu & others* CA civil application No 310 of 2004 Nairobi, where the Court of Appeal stated that;

> "……The test is objective and the facts constituting bias must be specifically alleged and established".

32. Drawing from the above, an order for recusal must be critically analyzed before it can just be issued. It should be observed as not to be used to bar judicial officers from sitting. The Judicial Service (Code of Conduct and Ethics) Regulations 2020 under regulation 21 provides:

(1) A judge may recuse himself or herself in any 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.

(2) Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings. (3) A

33. The basis for recusal in the present case is on bias. The Bangalore Principles of Judicial Conduct defines "bias" as bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another of a particular argument. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view that sways or colors judgment and renders a judge unable to exercise his or her functions impartially in a particular case.

34. The case of Nairobi Court of Appeal Civil App No 6 of 2016 *Philip K Tunoi & another v Judicial Service Commission & another* [2016] eKLR sets the test for recusal of a judge on allegations of bias. The court held that determination of bias is discernable from the material placed before court. The test applied will be that of a fair minded and informed observer.

35. As already stated, the defendants/applicants have not tabled before this court any evidence pointing on possible bias by the court. The applicant has a duty to lay ground upon which allegations of bias is drawn as was established in the case of *Philip Tonui* (supra). All the applicant is doing is giving the chronology of events and not guiding evidence as to the bias.

36. The standard of proof on allegation of bias on recusal is high as was settled *Accredo A.G Case* (supra). In the case, the Supreme Court found that the test applicable would be perception of fairness, of conviction, of moral authority to hear the matter. As stated above, the applicant has not discharged its evidential burden of proving the existence of bias or the apprehension of it.

37. Having considered the material placed before this court, the case law and precedent cited by parties and foregoing principles, I find that the applicant has not demonstrated any bias that would warrant the recusal of this court.

38. I find in conclusion that the defendant/applicants have not presented anything to prove bias on the part of the court. The applicant has not presented any facts upon which a reasonable member of public who is fair minded would find that the facts give rise to a reasonable apprehension that the judge will not apply her mind to the case impartially.

39. The defendants/applicants have not demonstrated any evidence of partiality or biasness by this court in this matter in any way. In the case of *Anyang' Nyong'o & others* (supra), the court held that:-

> " The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge."

40. The upshot of this analysis is that I find that the applicant's application dated the February 24, 2022 seeking the recusal of this court on apprehension of bias fails to meet the objective and reasonable test of the right-minded person and is hereby dismissed with costs to the plaintiffs/respondents.

41. I direct that the two applications dated February 11, 2022 and February 23, 2022 which have been long pending be canvassed by way of written submissions as had earlier been directed on February 24, 2022. The matters shall be mentioned on October 19, 2022 to confirm compliance and take a ruling date.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF SEPTEMBER, 2022.

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MOGENI J

JUDGE

In the Virtual Presence of:-

Mr Ndungu holding brief for Dr.Kamau for Defendant/Applicant

Mr Okeyo for Plaintiff/Respondent

Mr Vincent Owuor: Court Assistant

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MOGENI J

JUDGE