



**BOS Shipping (East Africa) Limited v Rehman & another (Environment & Land Case 121 of 2019) [2024] KEELC 6352 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6352 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 121 OF 2019  
SM KIBUNJA, J  
OCTOBER 2, 2024**

**BETWEEN**

**BOS SHIPPING (EAST AFRICA) LIMITED ..... PLAINTIFF**

**AND**

**ABDALLAH ABDUL REHMAN ..... 1<sup>ST</sup> DEFENDANT**

**TEXAS ALARMS (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**[Notice Of Motion Dated 18th April 2024 & Chamber Summons Dated 12th July 2024]**

1. The 2<sup>nd</sup> defendant filed the notice of motion dated the 18<sup>th</sup> April 2024 seeking for inter alia that:
  - a. The court to extend time to file the notice of appeal against the judgement delivered on 22<sup>nd</sup> November 2023.
  - b. That the notice of appeal dated 15<sup>th</sup> December 2023 that was signed and sealed by the Deputy Registrar on 12<sup>th</sup> March 2024, and served upon the counsel for the plaintiff on 14<sup>th</sup> March 2024 be deemed as filed and served within the extended time.

The application is premised on the twelve (12) grounds on its face and supported by the affidavit of Bernard Odhiambo Aduda, Group Human Resource Manager, on 18<sup>th</sup> April 2024. The 2<sup>nd</sup> defendant's case is inter alia that by the time it received professional advice from, and gave instructions to the current counsel, the time for filing the notice of appeal had lapsed. That the notice of appeal was lodged nine days out of time, but was not until 12<sup>th</sup> March 2024 that it was signed and sealed by the Deputy Registrar. That the failure to lodge the notice of appeal within the fourteen days was due to the time it took to obtain a copy of the judgement, seek alternative professional guidance, prepare and lodge the notice.



2. The application is opposed by the plaintiff through the replying affidavit of Willis O. Oluga, advocate, sworn on 24<sup>th</sup> April 2024 and notice of preliminary objection of even date that raises four grounds. It is the plaintiff's case inter alia that the court is without jurisdiction to determine the application of extension of time because the matter is already before the Court of Appeal, vide Civil Appeal Application No. E015 of 2024, in which the plaintiff seeks to strike out the notice of appeal for having been filed out of time. That there was delay in filing the application, and that it is aimed at defeating the plaintiff's application pending before the Court of Appeal, that 2<sup>nd</sup> defendant has not responded to, though having been served on 7<sup>th</sup> March 2024. That the judgement delivered on the 22<sup>nd</sup> November 2023 was already typed and was released to the parties immediately thereafter.
3. In response to the preliminary objection, the 2<sup>nd</sup> defendant filed grounds of opposition dated 14<sup>th</sup> May 2024 inter alia stating that the notice of appeal was not capable of being struck out by the time the plaintiff filed the application before the Court of Appeal, and that this court is best suited to deal with the issues of the notice of appeal, as the Court of Appeal has not given directions on the application before it.
4. The 2<sup>nd</sup> defendant also moved the court through the application dated the 12<sup>th</sup> July 2024 that has been brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Articles 22, 50 and 159 of the Constitution of Kenya, 2010 seeking for the following orders:
  1. "Spent.
  2. That the Honourable Mr. Justice Stephen M. Kibunja does forthwith recuse himself from this matter in its entirety and from hearing any applications and/or taking any proceedings in this matter.
  3. That this file be placed before the Presiding Judge of the Environment and Land Court, Nairobi for the purpose of reallocation thereof to another judge, preferably outside Mombasa or any other Judge besides Honourable Mr. Justice Stephen M. Kibunja.
  4. That costs of this application be provided for."

The application is premised on twenty-three (23) grounds on its face, and is supported by the affidavit of Bernard Odhiambo Aduda, the 2<sup>nd</sup> defendant's Human Resource manager, sworn on 12<sup>th</sup> July 2024, in which he inter alia deposed that Kibunja J entered judgment in this suit on 22<sup>nd</sup> November 2023 in favour of the plaintiff against the defendants, and awarded Kshs 1,000,000/= as damages. Being dissatisfied with the said judgement, the 2<sup>nd</sup> defendant lodged a Notice of Appeal on 15<sup>th</sup> December 2023, which was signed and sealed by the Deputy Registrar on 12<sup>th</sup> March 2024. The 2<sup>nd</sup> defendant then filed a notice of motion under certificate of urgency dated 18<sup>th</sup> April 2024 praying for an extension of time to file and serve the notice of appeal. That Kibunja J, declined to certify the application as urgent, but gave directions and fixed it for mention to fix a ruling date on 17<sup>th</sup> June 2024. In the meantime, the plaintiff's advocate filed a bill of costs dated 24<sup>th</sup> April 2024, amended on 23<sup>rd</sup> May 2023, attaching a valuation report of the suit property, that had not formed part of their pleadings. The counsel for the plaintiff thereafter served the 2<sup>nd</sup> defendant with the bill of costs, and a notice of taxation dated 21<sup>st</sup> May 2024, to which the 2<sup>nd</sup> defendant's counsel responded with a Notice of Preliminary Objection. On 5<sup>th</sup> June 2024, the taxing master declined to suspend the taxation holding that what was before the court was an application for extension of time, which should not affect costs, and directed the parties to file responses to the taxation, and fixed a further mention on 12<sup>th</sup> June 2024. When the matter was mentioned on 12<sup>th</sup> June 2024, the taxing master fixed the ruling for 18<sup>th</sup> June 2024, which ruling was



delivered on 19<sup>th</sup> June 2024 without notice to the 2<sup>nd</sup> defendant's counsel. That the Counsel for the 2<sup>nd</sup> defendant only became aware that the ruling had been delivered on 20<sup>th</sup> June 2024, when he visited the court physically, and found the taxing master had taxed the bill of costs to Kshs 4,108,006.67, based on the valuation report attached thereto. Dissatisfied with the said taxation, the 2<sup>nd</sup> defendant's counsel acted under Paragraph 11 (1) of the *Advocate Remuneration Order*, and wrote to the taxing master on 20<sup>th</sup> June 2024, indicating the items objected to. Upon delivering the said letter to the registry on 21<sup>st</sup> June 2024, he discovered that the plaintiff's advocates had already lodged a certificate of costs, decree and application for execution, and warrants of attachment and sale of the 2<sup>nd</sup> defendant's goods. In response, the 2<sup>nd</sup> defendant filed a chamber summons on 24<sup>th</sup> June 2024 under a certificate of urgency seeking to nullify the certificate of costs, stay the decree and reference to the taxation. The said application was placed before Kibunja J who found no urgency in the application and declined to grant any orders sought. The judge was said to have failed to appreciate that the plaintiff had lodged the decree for approval by the Deputy Registrar before they could serve the same to the 2<sup>nd</sup> defendant's counsel. Having failed to certify the matter as urgent, and to grant the interim orders as prayed, the 2<sup>nd</sup> defendant was served with warrants of attachment and sale on 25<sup>th</sup> June 2024 by Swiftway Auctioneers, who proceeded to proclaim their properties. As a result of the said attachment, the 2<sup>nd</sup> defendant had to amend their chamber summons seeking it to be certified urgent due to the fresh developments. The application was then certified as urgent and interim stay orders issued by Kibunja J, on condition the 2<sup>nd</sup> defendant deposit the taxed costs in an interest-earning account jointly with the plaintiff's counsel name within three (3) days, failure to which the orders would lapse. The deponent argued that the orders made by the court were grossly unfair, unjustified and demanding with an unreasonable time of three days. It was further contended that the said orders were posted on e-filing system at 18.41:56 pm, meaning that the 2<sup>nd</sup> defendant only had 2 days to deposit Kshs 4,108,006.67 on a matter that the court had assessed general damages at Kshs 1,000,000/=. The 2<sup>nd</sup> defendant was able to pay the decretal sum as ordered within the required time, and argued that the plaintiff will not suffer any prejudice if the orders herein are granted as prayed. Upon serving the plaintiff with the amended chamber summons, they responded by filing a notice of motion under certificate of costs dated 27<sup>th</sup> June 2024 which was not only certified urgent by the court, but two orders sought therein were issued. The 2<sup>nd</sup> defendant is convinced that the actions of the judge and the taxing master were calculated to ensure that execution is levied against it. The said actions were said to be an injustice and a violation of the 2<sup>nd</sup> defendant's right to be heard. The 2<sup>nd</sup> defendant strongly believes that Kibunja J is biased against the 2<sup>nd</sup> defendant, and is leaning all through in favour of the plaintiff. That the judge lacks in impartiality in determining the issues between the parties herein, and that all pending applications ought to be heard by a different judge. That due to the biases, the 2<sup>nd</sup> defendant will not get justice before the Judge, which is a gross abuse of its right to fair trial. Further, since Kibunja J is the Presiding Judge in ELC Mombasa, the 2<sup>nd</sup> defendant prays for the file to be placed before the Presiding Judge of the Court in Nairobi for reallocation to another judge, preferably outside Mombasa.

5. The learned counsel for the parties made their oral submissions on 16<sup>th</sup> July 2024, which the court has considered.
6. The issues for determinations by the court are as follows:
  - a. Whether the 2<sup>nd</sup> defendant has met the threshold for recusal of the judge in this suit.
  - b. Whether the 2<sup>nd</sup> defendant's application for extension of time to file a notice of appeal, and to deem the notice of appeal dated 15<sup>th</sup> December 2023 as duly filed and served within the extended time, can be considered by this court when the plaintiff's application to have the said notice of appeal be struck out is pending before the Court of Appeal.



- c. Who pays the costs?
7. The court has carefully considered the grounds on the chamber summons, notice of motion, affidavit evidence, grounds of opposition, preliminary objection oral submissions by counsel and come to the following conclusions:
- a. In its judgement delivered on 22<sup>nd</sup> November 2023 in the presence of Ms Ogejoh h/b for Mr Oluga for the plaintiff, and Ms Okeyo for the 2<sup>nd</sup> defendant, the court held that the plaintiff had proved their case against the defendants on a balance of probabilities. The court proceeded to enter judgment in favour of the plaintiff against the defendants and issued the following orders:
- a. “That declaratory orders in terms of prayers (a) and (b) of the plaint dated 26<sup>th</sup> June 2019 are hereby granted.
  - b. That permanent injunction in terms of prayer (d) of the said plaint is also granted.
  - c. General damages for trespass of Kshs 1,000,000/= (one million) is awarded.
  - d. The plaintiff is also awarded costs of the suit.
  - e. Under prayer (g) of any other relief, the plaintiff is awarded interests at costs rate on (c) and (d) above until payment in full.”

The record show that on 15<sup>th</sup> December 2023, the firm of Tindika & Co Advocates filed a Notice of Change of Advocates to come on record in place of Ms Okeyo Corazon as counsel for the 2<sup>nd</sup> defendant. Through the letter curiously dated 14<sup>th</sup> November 2023, the said counsel further requested for certified copies of the proceedings, judgement and decree for preparing a record of appeal. I have termed the date of the said letter to be curious as it would appear that letter was written before the judgement was delivered on 22<sup>nd</sup> November 2023.

- b. On 18<sup>th</sup> April 2024, the 2<sup>nd</sup> defendant filed an application seeking for extension of time to file and serve a notice of appeal against the judgement of 22<sup>nd</sup> November 2023. The court considered the said application on 19<sup>th</sup> April 2024, and upon finding no urgency had been shown, directed it be served and responses to the filed. That was the first application filed by the 2<sup>nd</sup> defendant through Ms. Tindika & Company Advocates in this suit. The 2<sup>nd</sup> defendant has argued that it was through that application that it first experienced bias, by the court declining to certify the application as urgent. That the court had essentially set in place a series of events that led to the 2<sup>nd</sup> defendant being attached and proclaimed by the plaintiff.
- c. It is therefore paramount for the court to determine whether there was any bias in the way it processed or handled the said application to warrant the judge’s recusal. In the case of *Mike Sonko Mbuvi Gidion Kioko v Director of Public Prosecutions & 5 Others; Council of Governors & 2 Others (Interested Parties)* [2020] eKLR, it was held that:

“What constitutes recusal in legal parlance? Under what circumstances can a Judge or Magistrate recuse himself or herself from hearing a case? The word recusal is defined under the *Black Law Dictionary* as;

“Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest.”



Pronouncing itself on what constitutes recusal of a judge, the Supreme Court in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others* (*supra*) held that circumstances calling for recusal, for a judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not participation of the Judicial Officer is called for. Their Lordships went further to state that;

“... the object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.”

Regulation 21 of the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* under the *Judicial Service Act* stipulates the instances where 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.

In the application dated 18<sup>th</sup> April 2024, seeking for among others an extension of time to file and serve the notice of appeal, the 2<sup>nd</sup> defendant inter alia stated that after judgement was delivered, the 2<sup>nd</sup> defendant instructed the firm of Tindika & Company Advocates, that filed a notice of appeal on 15<sup>th</sup> December 2023, which was 9 days late. The 2<sup>nd</sup> defendant contended that the delay in filing the notice was not deliberate, but was occasioned by the time it took to obtain the judgment and seek alternative professional guidance. It is important to restate for posterity’s sake, if nothing else, that all scheduled rulings and judgements delivered by Kibunja J, are always typed and counsel/parties are at liberty to apply and obtain copies immediately after delivery. If the 2<sup>nd</sup> defendant delayed in requesting for a copy of the judgement, then it had itself to blame, as the judgement had been typed by the time it was delivered.

- d. Section 7 of the *Appellate Jurisdiction Act* confers to this court with the jurisdiction to extend time for the filing of a Notice of Appeal. It provides that:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”



The granting of leave to file a notice of appeal outside the prerequisite time is a matter of exercise of discretion by the court. For the court to exercise its discretion and extend time, an applicant must give sufficient reasons why the notice of appeal was not filed in time. The 2<sup>nd</sup> defendant contended that the delay in filing the notice of appeal was occasioned by the time spent obtaining a copy of the judgement, and seeking alternative professional advice. That explanation for the delay by the 2<sup>nd</sup> defendant did not appear sufficient for the court to exercise its discretion and certify the matter as urgent, when directions on the application dated the 18<sup>th</sup> April 2024, were given on the 19<sup>th</sup> April 2024. In my view, the failure by the court to certify the application as urgent is not prima facie a basis of accusing the judge of bias, simply because he exercised his discretion in a manner that the 2<sup>nd</sup> defendant did not like or approve of.

- e. In any case, the application dated the 18<sup>th</sup> April 2024 was not decided on 19<sup>th</sup> April 2024, and even now, it is yet to be determined by the court. All the court did on 19<sup>th</sup> April 2024 was to decline to certify the said application as urgent. It is noted, that the application did not contain any interim prayer that the court could be faulted for failing to consider at that stage. Even if it had an interim prayer, and the court declined to consider it, like in all instances where the court has issued orders or delivered a ruling, a party, like the 2<sup>nd</sup> defendant herein, who is not satisfied, has a right to appeal against it, or seek its review as provided by the law. The mere failure to get the prayers sought by a party or being dissatisfied thereof, with the orders made by a court, is not prima facie evidence of bias or ground for recusal by the judge or judicial officer who issued the order.
- f. The plaintiff has opposed the application dated the 18<sup>th</sup> April 2024 through the replying affidavit sworn on 24<sup>th</sup> April 2024 and preliminary objection of the same date, primarily on the ground that this court has no jurisdiction to deal with the application in view of their application pending before the Court of Appeal, being Civil Application No. E015 of 2024, that seeks for the 2<sup>nd</sup> defendant's notice of appeal to be struck out. From the grounds of opposition dated 14<sup>th</sup> May 2024, in response to the plaintiff's preliminary objection, it is apparent the 2<sup>nd</sup> defendant is aware of the application pending before the Court of Appeal. In deference to the Court of Appeal, which is a superior court to this court, and whose decisions are binding upon me, I am in agreement with plaintiff's position that this court should down its tools, and let the Court of Appeal determine the questions relating to the 2<sup>nd</sup> defendant's notice of appeal dated 15<sup>th</sup> December 2023. Accordingly, the 2<sup>nd</sup> defendant's application dated 18<sup>th</sup> April 2024, should be struck out.
- g. The second application that the 2<sup>nd</sup> defendant claims the judge was biased is the chamber summons dated 24<sup>th</sup> June 2024, which seeks inter alia an order of stay of the decree, and warrants of attachment of its properties, pending the hearing and determination of the reference to the ruling of the taxing master on the plaintiff's bill of costs. The record show that the court considered the application on the same date, 24<sup>th</sup> June 2024, and found no urgency in the application. The court directed the same to be served and responses filed and matter mentioned on 16<sup>th</sup> July 2024. It is the 2<sup>nd</sup> defendant's case that after the court failed to certify the application as urgent, the taxing master signed the decree, warrants of attachment and sale of their moveable properties. The 2<sup>nd</sup> defendant was served with the said warrants on 25<sup>th</sup> June 2024, which prompted them to file amended chamber summons on 26<sup>th</sup> June 2024, seeking fresh orders, including interim orders of stay of execution of the decree and certificate of costs. The court considered the amended chamber summons on the same date, and granted the interim stay of execution, on condition that the whole taxed costs is deposited in an interest-



earning account in a bank, in the joint names of counsel for the parties, or with the court within three (3) days, and in case of default, the interim order would lapse automatically. The 2<sup>nd</sup> defendant has argued that the conditions set for the stay orders were grossly unfair, and unjustified for demanding compliance within a short period of three days. The 2<sup>nd</sup> defendant further stated that the court is biased for setting harsh conditions for a stay of execution, which amounts to bias on the judge's part. The question that begs to be answered is, whether the 2<sup>nd</sup> defendant has presented any evidence that would reasonably be taken to reflect bias or perceived bias on the part of the judge, in the exercise of the court's discretion. Having considered the affidavit evidence presented for and against the application, the oral submissions by the two learned counsel, and the record, the court finds that the 2<sup>nd</sup> defendant has simply made allegations that at best are intended to intimidate the court from focusing on its core mandate of administering justice expeditiously, and without any fear, favour, bias, or ill will.

- h. The record is clear that when the judgement was delivered on 22<sup>nd</sup> november 2023, only Ms. Ogejoh h/b for Oluga for the plaintiff applied for a copy of the judgement. Ms. Okeyo Corazon, who at the time was counsel for the 2<sup>nd</sup> defendant, was present, but neither applied for a copy of the judgement, nor for temporary stay of execution under Order 42 Rule 6 (5) of the *Civil Procedure Rules*, that allows a party to informally apply for a stay of execution immediately following the delivery of judgment, pending the filing of a formal application. In my view, the said Order 42 Rule 6(5) of the *Civil Procedure Rules* enables a party who has lost in a claim to seek temporary relief as they put their house in order to formally seek for a stay of execution order, as well as obtain the necessary documentation and advice needed for filing an appeal.
- i. The record further show that no stay of execution order was sought by the 2<sup>nd</sup> defendant from the date the judgement was delivered on the 22<sup>nd</sup> November 2023, until they amended their chamber summons on 26<sup>th</sup> June 2024. In the said application, the 2<sup>nd</sup> defendant inter alia prayed for an interim stay of execution, which the court granted on condition that the applicant deposits the whole taxed costs in an interest-earning account in a bank, in the joint names of counsel for the parties, or with the court within three (3) days, and in case of default the interim order would lapse automatically. In my view, there is no evidence of bias in the court merely exercising its discretion in the manner it did, and granting a conditional stay of execution order.
- j. An application for a stay of execution is granted upon the terms set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules*, which provides:

“No order for stay of execution shall be made under subrule (1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The conditions set by the court for the granting of a stay of execution order, especially the deposit of security for the due performance of the decree, is not a matter of choice or option on the part of an applicant, but rather for the court to determine.



- k. In addition, the deposit of security as envisaged under Order 42 Rule 6(2) of *Civil Procedure Rules* is not optional but mandatory. The court in the case of *Matata & Another v Rono & Another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) held that:

“The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.”

- l. The 2<sup>nd</sup> defendant has additionally accused the court of favouring the plaintiff in allowing their application dated 27<sup>th</sup> June 2024 on 28<sup>th</sup> June 2024, that was for clarifying that the stay order granted was in respect of only the taxed costs. The 2<sup>nd</sup> defendant stated that the acts of the court are geared towards ensuring that execution is levied against them. As stated before, the court has the discretion to determine whether an application is urgent or not, based on the evidence before it. The plaintiff’s application dated 27<sup>th</sup> June 2024 had sought for clarification that the stay orders issued by the court on the 2<sup>nd</sup> defendant’s application dated 26<sup>th</sup> June 2024 was in respect to the taxed costs only. The record confirm that the court granted that prayer clarifying that the stay order was in respect of the taxed costs only. In my view, I do not think a reasonable person with knowledge of the case, and who looks at the facts objectively, would conclude that the court was biased in the way it handled the applications before it, and the orders/directions issued thereof.
- m. The 2<sup>nd</sup> defendant is the author of its own predicament, that has led to the filing of the various applications in this matter, that could easily have been avoided had it acted promptly. For starters, it failed to informally seek for a stay of execution order during the delivery of judgment on 22<sup>nd</sup> November 2023. What followed was a delay in filing the notice of appeal, prompting the filing of the application dated 18<sup>th</sup> April 2024 for extension of time to file the notice. The court was not then, and is not now, to blame for the 2<sup>nd</sup> defendant’s predicament. It is clear what the 2<sup>nd</sup> defendant has been doing in court is trying to put out fires by filing one application after another, as it has been faced by a zealous judgment creditor, who is simply following up on the fruits of its judgment.
- n. The truth of the matter is that the applicant is simply frustrated with the litigation process that has been failing them. The court is not at any fault for exercising its discretion by applying the law on the evidence at hand. The court only exercises its discretionally powers where there are sufficient grounds to do so, and failure to exercise the discretion in favour of one party is not a ground for the court to recuse itself. Litigants should not expect that the court will always decide in their favour, and where it does not, they turn around and claim the court is biased or partial.
- o. In the case of *Joseph Maina Theuri v Gitonga Kabugi & 3 Others* [2013] eKLR, it was held that:

“Accordingly, the court holds that decisions by a judge in interlocutory proceedings against or for other party (like in the instant case) must be subjected to the very



high measure of establishing the judge's deep-rooted prejudice against a party or the subject matter that the judge cannot be trusted to decide fairly. It is not enough for a party, like in the present case, to simply allege that the party is dissatisfied or not happy with interlocutory orders and attribute the same to speculative and unsubstantiated allegations of bias in applying to seek recusal of the presiding judge. It is only where genuine reasons are established to doubt a judge's impartiality that the judge should be required to recuse or may sua sponte recuse because the disabling grounds are visibly present. As it has been judicially decided again and again, the test is objective. It is not what rests in the mind of the judge to decide fairly but what a reasonable person with knowledge of all the circumstances and facts of the case will perceive of the judge's capacity to decide the case fairly."

As noted hereinabove, granting of stay of execution order, as well as leave to file notice of appeal out of time, is an exercise of judicial discretion and failure to grant such an order cannot be equated to bias and or a ground for recusal of the judge.

- p. The court in the case of *Mohan Galot & 7 Others v Inspector General of the National Police Service & 4 Others; Galot Limited & 3 others (Interested Parties)* [2021] eKLR held that:

"It is therefore clear that the proper and correct exercise of a Court's discretion cannot be evidence of bias. I find that the proper way to challenge the decision by an aggrieved party is by way of appeal and not through a malicious and frivolous application for recusal. I find that the Applicants/Petitioners have therefore failed to demonstrate bias on part of this Court. The Applicants have indeed failed to demonstrate how the Court violated the plethora of Judicial Code of Conduct alluded to in various paragraphs, they have cited in both applications and the affidavit in support of the applications."

The court is obligated by Sections 1A & 1B of the *Civil Procedure Act* to further the overriding objective of the Act, which includes just and expeditious determination of disputes before it. The orders issued by the court have been all long in adherence to this obligation. In the premise, I find that the 2<sup>nd</sup> defendant has not demonstrated or established bias on the part of the judge, or any other sufficient reason for the judge to recuse himself, and their application dated 12<sup>th</sup> July 2024 is dismissed.

- q. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where otherwise ordered. In this instance, I find no cause to depart from this edict and the 2<sup>nd</sup> defendant will meet the plaintiff's costs.

8. Flowing from the foregoing, the court finds and orders as follows:

- a. That the 2<sup>nd</sup> defendant's applications dated the 18<sup>th</sup> April 2024 to extend time to file the notice of appeal is hereby struck out for the reason of the pending Court of Appeal, Civil Application No. E015 of 2024, that seeks for the striking out of the same notice of appeal.
- b. That the 2<sup>nd</sup> defendant application dated 12<sup>th</sup> July 2024 for recusal of the judge has no merit and is hereby dismissed.
- c. The 2<sup>nd</sup> defendant to meet the plaintiff's costs in both applications.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2<sup>ND</sup> DAY OF OCTOBER 2024.**



**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiff: Mr. Oluga

Defendants: Mr. Tindika For 2<sup>Nd</sup> Defendant.

Court Assistant – Leakey.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

