Githii v County Government of Nyeri; Mwangi (Interested Party) (Petition E016 of 2024) [2025] KEHC 765 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEHC 765 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PETITION E016 OF 2024

DKN MAGARE, J

FEBRUARY 3, 2025

BETWEEN

PETER KARIUKI GITHII ..... PETITIONER

AND

COUNTY GOVERNMENT OF NYERI ..... RESPONDENT

AND

PETER NDEGWA MWANGI ..... INTERESTED PARTY

RULING

1. The petitioner filed this petition in Kerugoya High Court. It appears it was in order to avoid appearing before the Nyeri High Court, which was handling other related matters. The Honourable Justice Richard Mwongo J, saw through the façade and made the following order:

   The matter concerns the laws of the county government of Nyeri and its people, prima facie. As such, the matter ought to have been filed in Nyeri High Court, the station with nearest access for parties in terms of section 12 of the High Court (Organisation and Administration *Act No. 27 of 2015*.

   Accordingly, this file is immediately placed before the presiding judge, Nyeri for further action.

2. The presiding judge directed that the matter be placed before me. At that time, I was handling Petition No. E005 of 2024. Though filed as a petition, the said petition was an amalgam between a petition and a plaint. The same has since been concluded, and final orders have been made.

3. When the matter came before me, the Applicant sought interim orders, which I duly declined as the Applicant had not served for the third time.

4. When the matter came for interpartes, I directed that nothing was demonstrated that could not be reversed after hearing the parties. I gave directions for filing of submissions and set 23.1.2025 as a date for further directions. Instead of complying, the Petitioner filed an application dated 11.1.2025.

The same was placed before Muya J during the vacation, who gave directions. The application dated 11.1.2025 was placed before me for further directions. The said application sought the following orders:

a. Spent

b. N/a

c. N/a

d. That the Orders contained in that ruling be set aside or vacated as they are prejudicial to the Plaintiff/Petitioner and the interested party therein.

e. That the Hon. Mr. Justice Magare Dennis Kizito Ngwono does recuse himself forthwith from further presiding over matters between the Plaintiff/Applicant and the interested party versus the Respondent herein.

f. That the file be placed before Hon. Lady Chief Justice of the Republic of Kenya to appoint another judge to handle this matter forthwith.

g. That the costs of this application be provided for and any other relief as the court may deem fit.

5. The main issue is that the ruling in Petition E005 of 2024 is not signed, contrary to Order 2, Rule 3(1) of the Civil Procedure Rules. The Applicant indicated that he had an issue with the Ruling in Petition E005 of 2024. It is unnecessary to deal with the matters related to Petition E005 of 2024 as it is not an appeal to this court. However, it is important for parties to note that a ruling is sufficient if filed on the CTS and an automatic barcode indicated thereon. I digress.

6. The Applicant's main contention is that they will fail in this hearing. They stated that they wrote a letter to the court and points to note. When the parties appeared before me, the Respondent did not wish to respond and prayed for a date for judgment. The Petitioner indicated that their main issue was that they feared the outcome.

7. The Applicant contended that this court should not handle their matters as it is biased, having handled previous matters.

Analysis

8. When the Japanese set out the concept of Ikigai, where life has a reason for living or a sense of purpose, they had no idea that it could be taken to the extreme. The concept encourages people to find what is important to them and live a fulfilling and joyful life. Filing cases should always be to find an answer to the issues parties are disputing over and deciding on. The court should not decide whether to decide a case, unless it is absolutely necessary.

9. There have been a series of cases, some of which I have decided on, some of which are pending, and some were pending. The ruling relates to an application for the court to recuse itself. It is not lost on the court that forum shopping did not start with this application. It started by avoiding the Nyeri High Court, which was nipped in the bud by Justice Mwongo. The petitioners sought conservatory orders without serving the Respondents, which I declined. The matter was fixed for directions on 23.1.2025. However, the application for recusal was filed to scuttle the court's directions.

10. The subject matter is the Nyeri Alcoholic Drinks and Control Bill, 2023, which later became the Nyeri Alcoholic Drinks and Control Act 2024. There have been several cases filed over the dispute as follows:

a. Nyeri Constitutional Petition No. E003 of 2024 - Nyeri County Bar Owners Association - Versus- County Government of Nyeri.

b. Petition E005 of 2024 - Karanja Wanjeru v county government of Nyeri and others

c. Petition E016 of 2024 formerly Kerugoya Petition E016 of 2024.

d. Petition E013 of 2024 - Teobald Nyakundi v County government of Nyeri

11. I have handled these matters, which are in various stages. Some of the matters are concluded. The Applicant seeks to remove the matter from this court because they fear it will suffer the same fate as other matters before me relating to the Nyeri Alcoholic Drinks Act, 2024, and the Rules made thereunder.

12. The Judicial Service Commission made the Judicial Service (Code of Conduct and Ethics) Regulations 2020 pursuant to Section 47(2)(a) of the *Judicial Service Act*, Section 37 of the *Leadership and Integrity Act*, 2012, and Section 5(1) of the *Public Officer Ethics Act*, 2003.

13. Under regulation 21(1), a judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge— that is: -

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.

14. In this regard, none of the grounds relied fall within the clauses above. Consequently, the most proximate could be the sufficient cause.

15. Regulation 21(2) requires that a judge's recusal be based on specific grounds to be recorded in writing as part of the proceeding. This is supplemented by regulation 21 (3), which forbids a judge from recusing himself otherwise.

16. The effect of the said regulations is that the court must guard against its independence and not recuse itself in circumstances that do not merit it. However, a judge should recuse himself in circumstances that merit, either due to the surrounding facts or the appearance of bias. If, for example, a family member is involved, the court should not wait for an application for recusal.

17. This even occurs in cases where the judge's conscience points to discomfort due to a legal or clandestine relationship. However, where there is no merit and the case is based on unfounded speculations, the court should and must not recuse itself.

18. Under Regulation 7 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020, a judge shall exercise judicial authority independently and shall:-

a. uphold the independence and integrity of the judiciary and the authority of the courts;

b. maintain an independence of mind in the performance of judicial duties;

c. take all reasonable steps to ensure that no person, forum, or organ of state, interferes with the functioning of the courts;

d. exercise judicial function on the basis of the judge's own assessment of the facts of the case, in accordance with a conscientious understanding of the law, and without reference to any extraneous influences; and

e. exercise judicial function without being influenced by personal feelings, prejudice, or bias.

19. The independent exercise of judicial authority is affected by bias or ill will toward a party. It is also compromised if the court succumbs to machinations and intimidation by parties.

20. However, where a party wants to waste the court's time or otherwise forum shop, the court should be firm and clearly indicate to parties so. Unnecessary applications for recusal are an affront to the judiciary's and the judges' decisional independence. On the other hand, a biased court is anathema to the judiciary's independence and image. A prior decision, or a series of matters, does not ipso facto become a ground for recusal.

21. The petitioners filed an application challenging certain aspects of the Nyeri Alcoholic Drinks Act of 2024 and regulations. The court gave directions for filing submissions. After a while, this application was filed because I had already decided on another matter challenging other aspects of the Nyeri Alcoholic Drinks Act of 2024.

22. The test used in cases for recusal of such a nature is what the House of Lords in R versus Gough (1993) AC 646 calls the real danger test, though not of universal application. It is whether there is a real danger that a fair trial is likely to be denied. To me, such a test is too restrictive and may not be achieved by most parties applying for recusal.

23. I prefer the test of the real likelihood of bias. In this case, it is not necessary to prove actual bias, but a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. In paragraph 39 of the decision of Michael Obare Tago versus Fredrcik Ambrose Otieno (2020) eKLR, the court posited as follows: -

> " In the Attorney General of Kenya Versus Professor Anyang Nyong'o & 10 Others EACJ Application No. 5 Of 2007, the court stated: -
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> > "We think 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"

24. The test is not what the litigant feels. It is a public member who is reasonable, fair-minded, and informed about all the case circumstances. There is no reasonable apprehension of bias. The question is not the bias or likelihood of bias but that prior unmeritorious petitions were filed and were, upon being heard, dismissed by the court.

25. The court is entitled to exercise its judicial independence and make decisions, some of which can and may be wrong. Wrong and unreasonable decisions are not evidence of bias but falling into an error of

law. The question of compliance with the law, of decisions made in another case, has no bearing in this case. In *Doshi v Central Bank of Kenya (Civil Suit 27 of 2023)* [2023] KEHC 24096 (KLR) (24 October 2023) (Ruling), faced with a similar question, I posited as follows:

> 23. Lord Denning, J. Master of Rolls in Central London Property Trust, Ltd. V. High Trees House, Ltd. King's Bench Division [1947] KB 130, [1956] 1 All ER 256, [1946] WN 175, Stated as doth: -"It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of Hughes v. Metropolitan Ry. Co. (7) (1877) (2 App. Cas. 439), Birmingham & District Land Co. v. London & North Western Ry. Co. (8) (1888) (40 Ch.D. 268), and Salisbury v. Gilmore (9) ([1942] 1 All E.R. 457), show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and equity leads to that result, so much the better. At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense."
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> 24. What the good lord was saying is that equity was being fused into the law. The parties and the courts before him did not address the issue, which was later developed into propriety estoppel. The same applies here. The court is not bound by parties' submissions, it is the case before the court. In the case of Attorney General of Kenya Vs. Professor Anyang' Nyong'o & to 10 Others EACJ Application No. 5 of 2007 the Court 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-"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."

26. The Supreme Court of Canada R Vs. S.C.R.D [1977]. 3SCR 484 cited by the Court of Appeal in the Kalpana Rawal Vs. J.S.C. (supra) held:

> "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 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."

27. The fact that I have decided other cases does not make the court biased. It gives the court a fairly good inkling of what the dispute is. In the case of *Republic v Land Registrar Nyandarua & 4 others; Ngugi (Exparte Applicant) (Environment and Land Miscellaneous Application 9 of 2023*) [2023] KEELC 21500 (KLR) (2 November 2023) (Ruling),YM Angima, J, while addressing the question of recusal, held as follows:

> Regarding any other pending matters, proceedings or cases involving the suit property or properties, the Court has already found and held that the Applicant has not demonstrated a legitimate reason to have the pending suits heard by a different judge or judges. In paragraph 14 of her supporting affidavit the Applicant stated that the other cases are 'interconnected' and that they all touch on the suit property or properties. If that be the case, then it would be prudent for all such interconnected cases to be heard before the same Court to avoid the risk of different judges coming to conflicting or contradictory decisions on related cases. In fact, the Applicant has a pending application in this file for consolidation of the instant suit with Nyahururu ELC No. 12 of 2022. Some of the grounds put forward in the application are that the two cases raise similar questions of law and fact and that the Court may give divergent directions or orders if the cases were tried separately. In the premises, the Court is not inclined to grant the Applicant's prayer for recusal from the other matters or proceedings.

28. In the case of Wambua v Republic (Miscellaneous Application E025 of 2023) [2024] KEHC 10375 (KLR) (29 July 2024) (Ruling), M. W. Muigai, J stated:

> The main issue is whether the trial magistrate should recuse herself from dealing with/ handling the criminal matters. The principles governing recusal in this jurisdiction are not well settled. 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 C.A Criminal Application No Nai 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See R v JAckson Mwalulu & Others C.A. 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..."

26. 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 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."

29. Reviewing the position of the matter, it is my considered view that a fair-minded person, knowing the circumstances of this case, will not have any doubt that the case will be heard fairly. The fear that the case will not be heard fairly, is not a ground for recusal. Forum shopping should be discouraged at all times. Recusal should be made only on serious grounds as there are no proper judgments in Kenya to hear matters where the court needlessly recuses itself. In the case of Macharia & 13 others v Gichana & another (Petition E057 of 2022) [2022] KEELRC 12809 (KLR) (5 October 2022) (Ruling), Justice M. Onyango posited as doth:

> The legal test to be applied as to whether a judge should recuse himself from sitting on a particular case was set out in Eurotrust International Limited and others v Barlow Clowes International Limited and Others: [55] "it was whether a fair minded and informed observer, who had knowledge of all material facts, would conclude that there was a real possibility that the tribunal was biased." In determining an application to recuse a court must take great care to ensure that such application was not merely a vehicle for `forum shopping, a position stated in South Africa (President) v South African Rugby Football Union [56]where, at 177, the court stated: -a. The fair-minded and informed observer is a person who has knowledge of all material background facts and not just a 'casual' observer notwithstanding the warning that over-zealous acceptance of this point might lead the observer to be in a position akin to that of a judge. b. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither complacent or naive nor unduly cynical or suspicious. c: Regard must be had to the judicial oath and a judge's ability to disabuse their minds of any irrelevant personal belief and predispositions. Judges must take account of the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves but they must disqualify themselves if there are reasonable grounds on the part of a fair-minded and informed observer for apprehending that the judge will not be impartial.
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> d. A judge would be as wrong to yield to a tenuous or frivolous objection as he would be to ignore an objection of substance.
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> e. A must take great care to ensure that a recusal application is not merely an opportunity for 'forum shopping.'64.The Court of Appeal in Republic v Mwalulu & others [57], addressing the question of disqualification of a judge, stated:
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> i When the 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 specifically be alleged and established.
>
> ii. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the judge, magistrate or tribunal.
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> iii. The court dealing with the issue of disqualification is not; indeed, it cannot go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself."

34. I agree fully with the findings of Mativo J (as he then was) and it behoves me to state that the petitioners have not placed any evidence before this court to warrant my recusal.

30. The fear that the petitioner's case will be dismissed is not a ground for recusal. There has to be more than subliminal fear. Bias must be based on actual or real apprehension, based on the judge's conduct. Supposition, conjecture, and surmises do not count. There was no evidence of the likelihood of bias set forth in the application. However, the fact that a petitioner fears that they have a hopeless case is not grounds to show that a different judge may reach a different conclusion and does not show bias or evidence that the judge's mind is predetermined.

31. In this particular case, the advocates have not laid any basis, both factual and legal, for my recusal. There is no way of knowing what is in a person's mind. Without tangible evidence that would lead to questioning the impartiality, I decline to recuse myself as the allegations have not reached an evidential threshold for recusal.

32. In the circumstances, I find the application for recusal bereft of merit and dismiss the same with costs. The matter shall now proceed for judgment, which shall be delivered on April 3, 2025.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF FEBRUARY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Applicant – present

Interested Party – present

Ms. Muraguri for the Respondent

Court Assistant – Jedidah