In re Estate of Jedidah Wanjiru Karau (Deceased0 (Succession Cause 2692 of 2006) [2025] KEHC 10581 (KLR) (Family) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 2692 OF 2006

HK CHEMITEI, J

JULY 17, 2025

IN THE MATTER OF JEDIDAH WANJIRU KARAU (DECEASED)

BETWEEN

JOHN THIONG'O THANDE ..... APPLICANT

AND

PENINAH NJERI NDOMBI ..... 1ST RESPONDENT

RITA WABUGI GITU ..... 2ND RESPONDENT

RULING

1. This ruling relates to the application dated 1st February, 2025 filed by the Applicant, John Thiong'o Thande, seeking for Orders That:-

    1. Spent.

    2. Spent.

    3. Honourable Justice Chemitei be pleased to recuse himself from hearing the pending applications herein dated 10th April, 2022, 20th April, 2023, 10th April, 2024 and 3rd July, 2024 respectively.

    4. This honourable court be pleased to grant a stay of further proceedings in this successions cause pending the hearing of this application.

    5. The costs of this application be provided for.

2. The application is based on the grounds thereof and supported by affidavit sworn by John Thiong'o Thande on 1st February, 2025 where he avers *inter alia* that he is one of the administrators of the

deceased's estate and seeks the court's permission to rely on his applications dated 10th April, 2022, 10th April, 2024, as well as the present summons.

3. He deponed that on 12th June, 2023, Lady Justice Odero directed that his application dated 10th April 2022 and another summons dated 20th April, 2023 be heard through oral testimony on 9th October, 2023. However, the Judge was transferred from the station later that month. He now seeks the court's leave to also refer to directions issued on 3rd April, 2024 and 22nd January, 2025, by which he is aggrieved for the reasons detailed in his application.

4. On 22nd January, 2025, this court directed that all pending applications - those dated 10th April, 2022, 20th April, 2023, and 10th April, 2024 - be determined through written submissions. This, in effect, denies him the opportunity for an oral hearing, as sought in his application dated 10th April, 2024. He is unable to comply with the said directions without abandoning his request for leave to appeal the 3rd April, 2024 order to the Court of Appeal, which he does not intend to forgo, nor does he wish to waive his right to seek a stay of further proceedings.

5. The application is opposed vide replying affidavit sworn by Andrew Kuria Wanguyu on 20th March, 2025.

6. He avers inter alia that he seeks to adopt the contents of his affidavit dated 30th April, 2024, which he swore in response to the same Applicant's application. He contends that the Applicant has not established any valid basis for seeking the judge's recusal. The recusal of a Judge is a serious matter that must be supported by clear and compelling evidence - mere suspicion of bias is insufficient.

7. That the claim that the Judge's directions, which modified earlier procedural directions regarding the handling of the applications, amount to a review is misguided. Directions are procedural tools the court uses to facilitate the efficient resolution of matters, and their modification does not constitute a review, which is governed by distinct legal principles.

8. Further the earlier direction issued by Justice Odero on 12th June, 2023, requiring viva voce hearing, was also just a procedural directive, not based on any formal application. That decision was not appealed because it was within the court's discretion, just as this court is entitled to use a different procedural approach to meet the objective of expeditious justice. A hearing does not necessarily mean it must be conducted through oral testimony (*viva voce*). Resolving a matter through other lawful means does not violate Article 50 of the *Constitution*. Suggesting otherwise is a misunderstanding and distortion of constitutional principles.

9. The Applicant's statement in paragraph 10 of his supporting affidavit - that he cannot comply with the directions - reflects arrogance. A party does not have the liberty to selectively obey court orders, and any intentional non-compliance is done at their own risk.

10. For a Judge to recuse themselves, there must be actual or apparent circumstances suggesting a lack of impartiality. The present application offers no such evidence or even a suggestion of such circumstances. There is also no claim that public confidence in the Judiciary would be compromised by proceeding without viva voce evidence. The mere fact that a party disagrees with the court's chosen procedure does not prove bias. Even rulings made against a party's wishes, following a proper hearing, do not in themselves demonstrate bias. Accepting such a view would render the judicial process unworkable. Consequently, the Applicant's application should be dismissed at the outset.

    1. Top of Form

    2. Bottom of Form

11. Both parties have not filed written submissions on the instant application.

Analysis And Determination

12. I have read the application before this court and the response thereto, address it as follows:-

13. In *Wambua v Republic* (Miscellaneous Application E025 of 2023) [2024] KEHC 10375 (KLR) (29 July 2024) (Ruling) the court stated as follows:-

> "... . The principles governing recusal in this jurisdiction are now 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 NoNai 4 and5 Of1995 (Unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Others*C.A. Civil Application NoNAI 310 of2004 (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."

27. The principles buttress the standards of conduct enacted in the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* dated 26th May 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge; (a) 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.

28. Regulation 9 of the *Judiciary Code of Conduct* emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides: A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the *Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices..."

14. In *Mbiti & another v Thome & another* (Civil Appeal E010 of 2024) [2024] KEHC 5441 (KLR) (20 May 2024) (Ruling) where the court pronounced itself as follows:-

> "... 14. On the questing of stay of proceedings, this court takes the position that a stay of proceedings is unlike stay of execution because it has serious ramifications. It has the effect to completely stall proceedings which in turn interferes with the right of a litigant to conduct litigation and access justice. A court can only issue a stay of proceedings in exceptional circumstances where such proceedings are likely to infringe on constitutional right of one of the parties or prejudice the interest of justice.

15. In *Halsbury's Laws of England*, 4th Edition, Vol. 37 at p. 330: The authors say: "The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case."

16. A 5-judge Bench of the High Court in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR laid down six principles for the grant of stay of proceedings pending the hearing and determination of an appeal as follows; "A scan of our decisional law reveals that our Courts have established the following principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court.

    See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR:

    a. First, there must be an appeal pending before the higher Court.

    b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly

    c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.

d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted.

e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and

f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay."

17. This court has considered the grounds raised in this application and in fact went to some lengths trying to find out from the counsel of the Applicant's what the Applicant's stand to suffer in the event that the trial court proceeds in entertaining the matter and all I could decipher was that there is a pending appeal that ought to be determined first. The parties herein are brothers and sisters. The deceased was their father and the issues raised in the appeal regarding revocation of grant are basic questions of fact and law which would not take long to determine. This court does not find it just or expedient to stay the proceedings..."

18. I have extensively cited the above authorities to reflect on whether the application herein comes closer to it.

19. The issue before the court as clearly suggested by the Respondent is merely procedural. Although my sister Odero J was of the view that the matter could be determined by way of oral evidence, I found cumulatively that the affidavit evidence on record did not in my view warrant to go that way.

20. In any case the Applicant if he felt there were issues which were not spelt out in his affidavits then he was free to seek the leave of the court to file supplementary affidavits. I doubt if the court would have denied him.

21. It is also not lost that the decision of my sister was purely persuasive and not binding on me for want of concurrent jurisdiction.

22. The Applicant has failed to demonstrate any biasness on the part of the court or any prejudice he may suffer should the applications be determined through the pleadings on record.

23. In the premises the court does not find any merit in the application and the same is hereby disallowed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 17TH DAY OF JULY 2025.

H K CHEMITEI

JUDGE