



Lococo & 2 others v Director of Public Prosecutions & 10 others; Rafiki Resort Management Limited & another (Interested Parties) (Petition E006 of 2024) [2025] KEHC 10247 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
PETITION E006 OF 2024
M THANDE, J
JULY 11, 2025**

BETWEEN

**DANIELE LOCOCO 1ST PETITIONER
MASSIMO NATIVI 2ND PETITIONER
RAFIKI LIMITED 3RD PETITIONER**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT
DAVID K SIELE 4TH RESPONDENT
COSIMO ARMENO MODUGNO 5TH RESPONDENT
MARIA GRAZIA MOSCONE 6TH RESPONDENT
FIORENZO GIROLA 7TH RESPONDENT
ROSY TETTAMANTI 8TH RESPONDENT
RITA NAPPO 9TH RESPONDENT
SENIOR RESIDENT MAGISTRATE, KILIFI 10TH RESPONDENT
ATTORNEY GENERAL 11TH RESPONDENT**

AND

**RAFIKI RESORT MANAGEMENT LIMITED INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY**



RULING

1. The Petitioner filed a Petition dated 31.5.24 against the Respondents, seeking a raft of reliefs, in respect of criminal charges against the 1st and 2nd Petitioners relating to sale of villas in Rafiki Village on Plot No. Kilifi/Jimba/1544. Contemporaneously with the Petition, the Petitioners filed an Application of even date seeking in the main, orders prohibiting their prosecution in Kilifi Senior Principal Magistrate Criminal Case No. 328 of 2024 (the criminal case) and further criminal investigations of the Petitioners on any matter arising from the sale and occupation of any Villa at Rafiki Village, Watamu. The Petitioners also filed an application dated 20.11.24 seeking stay of proceedings and orders issued in the criminal case. By its rulings dated 25.4.25, the Court granted the said orders.
2. Following the rulings, the Petitioners filed an application dated 30.4.25 seeking consequential orders requiring the trial court in the criminal case to release the passports of the 1st and 2nd Petitioners. Directions for this application were to be given on 8.5.25. However, prior to that date an application dated 5.5.25 was filed, seeking the orders:
 1. Spent.
 2. That the Hon. Lady Justice Thande do recuse herself from adjudicating over this matter and that upon such recusal, the Honourable Court be pleased to forward the file to the principal Judge for purpose of having the same allocated to an impartial judge.
3. The Application is filed by the firm of Ndegwa & Ndegwa Advocates who in the main Petition represents the 5-9th Respondents. However, in the Application, it is indicated that all the Respondents are applicants. It is this Application that is the subject of this ruling.
4. The grounds upon which the Application is premised are contained in the Application and in the supporting affidavits sworn on even date by Ritta Nappo (Ritta) and Cosimo Armeno Modugno (Cosimo). Their case is that they have been advised by their advocate on record that the Judge did not disclose to the parties that she was related to Mr. Kinyua, advocate for the Petitioners. Further, that prior to delivery of the rulings, Mr. Kinyua was seen visiting the private residence of the Judge in Malindi where they both had a meeting for about 2 hours. It was further averred that following the meeting, the Judge was compromised and delivered the ruling in favour of the Petitioners without taking into consideration the prejudice occasioned to the Applicants or how the same would affect the criminal case. Additionally, that the ruling was delivered without a substantive appeal or benefit of the lower court file which had the effect of setting aside the lower court orders of 6.9.24 and 20.11.24. Further, that the action of the Judge is a clear indication of ill intention on the part of the Judge allowing, aiding and facilitating the 1st and 2nd Petitioners to leave the jurisdiction of the lower court, thereby compromising the criminal case. The deponents contended that the Judge is conflicted in the matter and that if she does not recuse herself, great prejudice and injustice will be occasioned to the Applicants.
5. In his replying affidavit sworn on 7.5.25 in opposition to the Application, Mr. Kinyua stated that he was extremely saddened by the false and malicious information that Mr. Ndegwa Njiru gave to his clients regarding the alleged relationship between Mr. Kinyua and the Judge and his alleged visit to the Judge's private residence.
6. Mr. Kinyua averred that he is not related by blood or marriage or in any manner whatsoever to the Judge. He has never been to her residence nor does he know where she resides. Further, that he has



never had any contact with the Judge outside Court in Mombasa and in Malindi. He stated that the allegations are extremely damaging to his personal and professional character as they depict him as one who is not able to fairly win cases for his clients with his own abilities but compromises Judges. Further that when Mr. Ndegwa informed his clients the 5th and 9th Respondents of the alleged relationship and visit, he should have given them the details of the relationship, the date, the time and the address of the arranged meeting. Further that Mr. Ndegwa should have disclosed whether he has placed the Judge or her residence under surveillance.

7. It is Mr. Kinyua's contention that the Application and the affidavits are false and that swearing false affidavits constitutes perjury contrary to Section 108 of the *Penal Code*. He asserted that Mr. Ndegwa who drew and filed those affidavits is guilty of subornation of perjury under Section 108(2) of the *Penal Code*. He further stated that at a time when the independence of Judges is under attack from the executive and from some members of the bar it is a sorry day for this Country when foreigners like Rita and Cosimo have the courage to attack a sitting Judge seized of the Petition against them. He urged the Court to summon Mr. Ndegwa and the deponents of the affidavits physically attend court to be examined on the serious allegations and in default warrants of arrest be issued to compel them to attend. He further urged that the Court to refer Mr. Ndegwa to the Advocates Complaints Commission for gross misconduct and to the DCI for subornation of perjury and his clients. Further that the Court should refer the perjury by Rita and Cosimo to the DCI.
8. Mr. Kinyua further asserted that it is contempt of Court to make false and damaging allegations against a Judge and against opposing counsel in order to force the Judge to recuse herself and thereby delay the hearing of the Petition particularly as there is no other Judge of the High Court at Malindi. Any recusal would cause further inordinate delay. The Petition and applications were certified urgent in June and November 2024. The applications were determined on 25.4.2025 because of pressure of work. Additionally, any recusal will mean that the 1st and 2nd Petitioners will continue to be held in Kenya against their wish doing nothing as further investigations and proceedings in the criminal case have been stayed pending the hearing and determination of the Petition. Additionally, that the false allegations were made against him and the Judge in an attempt to delay and frustrate the hearing and determination of the Petition after the investigating officer testified in the criminal case admitting that his covering report was wrong in material aspects, retracting his allegation that the 3rd Petitioner was not the owner of the property upon which Rafiki Village is built.
9. Mr. Kinyua's further contention is that a Judge cannot recuse herself or himself based on insults and malicious and false information by Mr. Ndegwa Njiru to his clients. As it happens, all investigative agencies are parties in this Petition. Mr. Ndegwa Njiru, Cosimo and Rita should have given that information to the 2nd and 3rd Respondents for investigations. The allegations are so serious because a Judge guilty of those accusations could be removed from office under Article 168 of the *Constitution*. He asserted that it is in the interest of justice and in the exercise of the powers of the Court under Article 10(2), 25(c), 50(1), 159, 160 and 259(1)(a) of the *Constitution* the Court has a duty to refer the criminal defamation and perjury to the Director of Criminal Investigations and the Inspector - General of the National Police Service.
10. I have given due consideration to the Application, the depositions upon which it is predicated, the response as well as the rival submissions by Counsel and the authorities cited. The Applicants' complaint as set out in the Application is that as the Judge presiding over the matter herein, I am conflicted and that great prejudice and injustice will be occasioned to them if I do not recuse myself from the matter. The issue for my consideration and determination therefore is whether the Applicants' have placed before the Court such material as may justify this apprehension that I am conflicted.



11. The grounds upon which the Applicants have raised that give rise to the apprehension are that I failed to disclose that I am related to Mr. Kinyua. Further that prior to delivering the rulings in question, Mr. Kinyua was seen visiting my private residence of the Judge in Malindi where we had a meeting for about 2 hours. Following the meeting, I was compromised and delivered the ruling in favour of the Petitioners without taking into consideration the prejudice occasioned to the Applicants or how the same would affect the criminal case.
12. When a Court is faced with an application for recusal such as the present application, it is necessary to consider whether there is a reasonable ground for possibility of 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.
13. In the case of Philip K. Tunoi & Another v Judicial Service Commission & another [2016] eKLR, the Court of Appeal observed regarding bias:

The House of Lords held in *R v. Gough* [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

The test in *R v. Gough* was subsequently adjusted by the House of Lords in *Porter v. Magill* [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly held that –

[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

14. In an ordinary application for recusal of a Judge, the question a court would have to determine is not whether an applicant perceives bias on the part of the court but whether the fair minded and informed observer having the facts would, adopting a balanced approach, conclude that there was a real possibility that the court would be biased. The test to be applied is that of a reasonable and independent fair-minded and informed observer of the court’s conduct and proceedings.
15. The Application before me is no ordinary application for recusal. I say so because the same is based on utter lies. In their averments, Rita and Cosimo stated that they were advised by their advocate on record, that I failed to disclose that I was related to Mr. Kinyua. Further that prior to the delivery of the rulings in question, counsel and I had a 2 hour meeting in my private residence in Malindi, following which I was compromised. What the deponents they have carefully failed to disclose the nature of the relationship. They have also not stated the location in Malindi of my residence nor the date and time the Advocate visited me thereat. Also not disclosed is the manner in which I was compromised. It would appear that their advocate on record did not give them details of the very serious allegations they made. Rita further averred that prior to delivery of the rulings, Mr. Kinyua was seen visiting my private residence. She did not however say by whom Mr. Kinyua was seen visiting me. The allegations are thus false and unsubstantiated.



16. For the record, I must state categorically that Mr. Kinyua and I are not related in any way. Further, while Mr. Kinyua often appeared before me in the 5 years I served in the High Court at Mombasa and has continued to appear before me during the close to 2 years that I have served in the High Court at Malindi, I have never had contact with him outside the courtroom. The allegations are therefore false and ought to be treated with the contempt they deserve.
17. In Arbitration Cause E002 of 2020 *Runji Partners Consultant Engineers and Planners v National Water Conservation and Pipeline Corporation* (unreported), Mativo, J. (as he then was) considered an application for recusal based on spurious allegations and had this to say:

30. I cannot think of a more eloquent exposition of the law on recusal of judicial officers than the succinct exposition proffered by the Constitutional Court of South Africa in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹ which indisputably articulated the proper approach as follows: -

... The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

Because of the relevancy of the above elucidation to the issues at hand, some of the salient facets of the judgment merit some emphasis in the present context. In articulating the test in the terms quoted above, the court observed that two considerations are built into the test itself. First, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. One, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. Two, the presumption is not easily dislodged. It requires “cogent” or “convincing” evidence to be rebutted.

18. I concur with the learned Judge. This Court and indeed all courts enjoy the presumption of judicial impartiality which is not easily rebutted. The onus was on the Applicants herein to rebut that presumption. However, rather than basing their application on cogent and convincing evidence, they came up with spurious and absurd allegations which are not supported by an iota of evidence and lack credibility.
19. It is quite evident that the Applicants are aggrieved by the rulings in question which prohibited the prosecution and investigation of the 1st and 2nd Petitioners. Rather than availing to themselves their right of appeal, the Applicants have chosen to employ the unorthodox means of making spurious and ludicrous allegations against me and counsel, with a view to scuttle and delay the hearing and

¹ 1999 (4) SA 147; 1999 (7) BCLR 725 (CC).



determination of the Petitioners' application dated 30.4.25 in which they seek release of their passports by the trial court, and which was scheduled for directions on 8.5.25.

20. In the cited decision, Mativo, J. (as he then was) went on to address the issue of personal attacks and stated:

58. One issue emerging from the case law concerns personal attacks against adjudicators. Strongly-worded personal attacks against adjudicators do not by themselves constitute appropriate grounds for recusal. Neither do threats or complaints to the Judicial Service Commission all designed 'to force recusal and manipulate the judicial system, rather than arising from actual malice.'² If such threats, personal attacks to judges or even complaints to the Judicial Service Commission were to constitute a recusal of a judge a dishonest, vexatious or disgruntled litigant would: -

readily manipulate the system, threatening every jurist assigned on the 'wheel' until the defendant gets a judge he preferred. Also, the defendant could force delays, perhaps making the cases against him more difficult to try, perhaps putting witnesses at greater risk. Such blatant manipulation would subvert our processes, undermine our notions of fair play and justice, and damage the public's perception of the judiciary."³

21. The personal attacks and indeed damaging false allegations against me by the Applicants do not constitute appropriate grounds for my recusal in this matter. To grant the orders sought by the Applicants would be to allow them to manipulate the system which would subvert judicial processes, undermine all notions of fair play and justice, and damage the public's perception of the Judiciary. The Court must discharge its duty to guard against this and protect itself from abuse of its process by unsuccessful litigants and their advocates.

22. It behoves all advocates to advise their clients to avoid baseless and unwarranted attacks on Judges which do nothing but taint the image of the Court in the eyes of the public. Unsubstantiated allegations made by parties on the advice of their advocates, as in the present case, against a Judge who is dutifully discharging her judicial functions compromise the dignity of the Court and the relationship between the bar and the bench. It was Mutuku, J. who stated in *Abdiwahab Abdullahi Ali v Governor, County Government of Garissa & 2 others* [2013] eKLR:

One last word of unsolicited advice to my brothers, legal counsels (sic) involved in this case; the same way this court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, the same way the court and the presiding officer demands respect from the parties and counsels (sic) appearing before it. It is a mutual relationship. The parties and counsels (sic) practicing before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party who is not satisfied with a ruling of this court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era when it used to be a "jungle out there".

² See *US v Cao*, No. 11-50200 (9th Cir. May 31, 2013); *US v Holland*, above, fn.10, at 915;

³ [2008] PGSC 41, at [27].



23. I concur with the learned Judge. In order to safeguard the smooth administration of justice, there must be reciprocal respect between the Court on the one hand, and the advocates and litigants who appear before it, on the other hand.
24. Let me then state that my commitment to administer justice to all in accordance with my oath of office without any fear or favour, bias, affection, ill will, prejudice or any political, religious or other influence is and has always been and will continue to be unwavering. In this regard, it bears repeating that I am not related to Mr. Kinyua and have not over the years in which he has appeared before me, had any contact with him outside the courtroom.
25. After considering the Application and the grounds in support thereof which are totally false, I find the same to be utterly disrespectful to the Court and to Mr. Kinyua. The circumstances are aggravated by the fact that Rita and Cosimo have stated that in making the said false averments, they were advised by their advocate, which advice they verily believed to be true. The false allegations, the source of which is an advocate of the High Court, are an affront to common decency and to the high professional conduct expected of counsel.
26. Section 56 of the *Advocates Act* provides:
- Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.
27. Perjury and subornation of perjury are offences under the *Penal Code*. Section 108 (1) (a) provides:
- Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.
- Subsection (2) provides:
- Any person who aids, abets, counsels, procures or suborns another person to commit perjury is guilty of the misdemeanour termed subornation of perjury.
28. It is quite evident from the affidavits that Mr. Ndegwa has aided and counselled and procured his clients to make false averments on oath in the proceedings herein. In light of this, it is imperative that investigations be carried out against Rita and Cosimo for perjury and Mr. Ndegwa Njiru, advocate for subornation of perjury and professional misconduct.
29. In the end, it is my finding that the requirements for recusal have not been satisfied. I accordingly make the following orders:
- i. The Application dated 5.5.25 being unmerited is dismissed with costs to the Petitioners.
 - ii. The Deputy Registrar of this Court is directed to forward this ruling, the Application dated 5.5.25 and the affidavits sworn on even date by Rita Nappo and Cosimo Armeno Modugno, to the Directorate of Criminal Investigations for investigation of Rita Nappo, Cosimo Armeno Modugno and Mr. Ndegwa Njiru, advocate, in respect of the false allegations made herein and for necessary action.



- iii. The Deputy Registrar of this Court is directed to forward this ruling, the Application dated 5.5.25 and the affidavits sworn on even date by Rita Nappo and Cosimo Armeno Modugno, to the Advocates' Complaints Commission for investigations into the conduct of Mr. Ndegwa Njiru, advocate and for necessary action.

DATED SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF JULY 2025

M. THANDE

JUDGE

