Kone Kenya Limited v Parbat Siyani Construction Limited (Civil Appeal E189 of 2022) [2025] KEHC 12956 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12956 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E189 OF 2022

MN MWANGI, J

SEPTEMBER 18, 2025

BETWEEN

KONE KENYA LIMITED ..... APPELLANT

AND

PARBAT SIYANI CONSTRUCTION LIMITED ..... RESPONDENT

RULING

1. The application before me dated 17th July, 2024 has been brought under the provisions of Articles 50(1) and 159 of *the Constitution* of Kenya, Sections 1A, 1B, 3, 3A and Section 80 of the *Civil Procedure Act* (Chapter 21 Laws of Kenya), Order 45 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. The appellant/applicant seeks the following orders –

    i. That this Honourable Court be pleased to review and set aside the Judgment of the Honourable Lady Justice Njoki Mwangi herein dated 9th February 2024 and vacate any orders made pursuant thereto;

    ii. That the said Honourable Lady Justice Njoki Mwangi recuse (sic) herself from hearing and determining this application in view of the circumstance (sic) complained of by the appellant/applicant herein including but not limited to manifest bias against the appellant/applicant and in favour of the respondent;

    iii. That this application be heard and determined by a bench of one or more different Judges of the Commercial & Admiralty Division of the High Court (as this Honourable Court may deem fit in the circumstances); and

    iv. That costs of this application be provided for.

3. The application dated 17th July 2024 is supported by an affidavit sworn on the same day by Ms Mary Andugo who states that she has been advised by the applicant's Advocates on record whose advice she believes to be true that I made fundamental mistakes and errors of fact in the Judgment which are apparent on the face of the record, which errors are so significant, serious and material as to have a direct bearing on my findings and decision.

4. The applicant contended that I made an error apparent on the face of the record by dismissing the Appeal in that I failed to appreciate the fundamental manifest and admitted fact that there is no dispute that is capable of being referred to arbitration, the respondent having an unqualified and express admission of the debt.

5. The applicant further contended that I failed to note that the respondent filed its application for reference to arbitration dated 14th March 2022 before it filed a defence, which application included a request for an order for stay of Court proceedings pending the hearing and determination of the application for reference to arbitration. Further, that there was an order for stay of proceedings made by the Subordinate Court accompanying the order for reference to arbitration made on 2nd November 2022, which precluded the applicant from filing an application for judgment on admission which I alluded to as a ground for dismissal of the applicant's Appeal.

6. Ms Andugo contended that it was clear that I did not properly recall the submissions made by the applicant because Mr. Salah Amin appeared before the Court virtually with Mr. Leroy Misaro and it was he (Mr. Amin) who highlighted the legal arguments yet I attributed the same to Mr. Misaro, who did not submit orally, yet I continued to use the wrong name for Mr. Misaro throughout the Judgment. Ms Andugo stated that Mr. Amin was the lead Counsel but I did not appreciate and record that he appeared before me which shows that I not only did not recall the oral submissions made but showed discourtesy, disregard and lack of consideration for Mr. Amin, the lead Counsel for the applicant.

7. Further contestations are that I showed open bias and hostility against the applicant and its Counsel on record, in that I attempted to wrongly and unfairly apportion blame on them for not filing an application for judgment on admission in the Subordinate Court without any proper or lawful basis for doing so.

8. It was stated that the Judgment was released to the applicant's Counsel on 29th February 2024 after the prescribed time for filing an Appeal had lapsed which meant that the applicant was obliged to wait for the actual comprehensive purported grounds for my decision to be known and for Counsel for the applicant to be able to consider whether there was any merit in them, and advise the applicant on the same.

9. Ms Andugo stated that based on the foregoing grounds and contests of the said Judgment, she believes that I acted in a manner manifestly prejudicial to the applicant thereby causing it grave injustice. She opined that the appropriate manner to address the injustice and correct the error on the face of the Court record is by way of the application herein.

10. She deposed that she believes that the Judgment is fundamentally fatally flawed and manifestly defective that it is not only gravely prejudicial to the applicant's commercial and contractual rights but has also violated its constitutional right to a fair hearing before me in these proceedings.

11. On 15th October 2024 the respondent filed grounds of opposition dated 11th October 2024 to the effect that-

    1. The application is misconceived, bad in law and a gross abuse of the process of the Court;

2. The application has not demonstrated any error apparent on the face of the record to warrant a review under Section 80 of the Civil Procedure Rules, 2010;

3. The application is a complaint and or attack on the Honourable Lady Justice Njoki Mwangi disguised as an application for review; and

4. That the application is misguided and same ought to be dismissed with costs to the respondent for being a gross abuse of the process of the Court

12. On 2nd December 2024 the law firm of Amin & Co. Advocates filed written submissions for the applicant. Having gone through the said submissions, there is no need for me to regurgitate what has already been captured in the preceding paragraphs of the applicant's averments which have been repeated in its written submissions.

13. The applicant's Counsel submitted that the intention of the applicant to file an application for judgment on admission at the appropriate time was brought to the

Court's attention by none other than Counsel for the applicant during highlighting of submissions and it was unfair and disingenuous for me to use this as a pretext for dismissing the Appeal when such an application could not have been duly filed due to the stay of proceedings order that was in place.

14. Counsel cited Succession Cause No. 691 of 2018 In the matter of the Estate of John Gichia Macharia (deceased), and stated that the law on recusal was analyzed in the said case and that in doing so, the Court cited several authorities including the case of Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others [2013] eKLR and the South African case of South African Defence Force & others v Monning & others [1993] (3) SA 482 (A).

15. He also cited the case of Rawal v Judicial Service Commission and another [2016] eKLR, to support the prayer for my recusal from hearing the instant application.

16. On the issue of review of this Court's Judgment delivered on 9th February 2024, Counsel for the applicant relied on the case of Orero v Seko [1984], where the scope of Section 80 of the *Civil Procedure Act* and Order XLIV Rule 1 (now Order 45) of the Civil Procedure Rules was considered. He also cited decisions in National Bank of Kenya Limited v Ndungu Njau [1996] KLR and UAP Provincial Insurance Company Limited v Michael John Beckett [2013] KECA 205 (KLR), to bolster his submissions in urging me to review my Judgment of 9th February 2024.

17. The applicant's Counsel also referred to the provisions of Section 6(1)(b) of the *Arbitration Act* and Article 50(1) and 25 *the Constitution* of Kenya. On the issue of the right to a fair hearing, he relied on the case of Judicial Service Commission V Mbalu Mutava Musyimi & another (Civil Appeal 52 of 2014 eKLR. He prayed for the applicant's application to be allowed.

18. In written submissions filed by the law firm of Mogeni & Co. Advocates on 20th February 2024, the respondent's Counsel gave a brief background of the genesis of this appeal arising from the suit filed in the lower Court, by the applicant herein.

19. He submitted that the effect of the Judgment delivered by me is that the order for stay of proceedings made in the lower Court remains and the parties herein ought to submit themselves to arbitration. He referred to the case of Ruwatex Ltd. v Typsa Consulting & 4 others (KEHC 1108 (KLR).

20. On the issue of review of the Judgment of this Court, the respondent's Counsel cited the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010 which address the issue of review. He stated that none of the ingredients set out in the said provisions had been demonstrated and that the claim that I had made an error in dismissing the appeal cannot stand. He

contended that the grounds in support of the application deponed to by Ms Andugo purporting to be grounds for review are grounds of Appeal, and that the application for review is an Appeal in disguise.

21. Counsel submitted that this Court having rendered a reasoned decision cannot sit on Appeal of the said decision as it is functus officio and ought to down its tools. He urged this Court to invoke the provisions of Order 45 Rule 3(1) of the Civil Procedure Rules, 2010, which provides that where it appears to the Court that there are no sufficient grounds for review, an application should be dismissed.

22. In addressing the issue of my recusal, the respondent's Counsel referenced Black's Law Dictionary 8th Edition (2004) P. 1303 which defines recusal. He submitted that recusal of a Judge is a serious matter and that a party wishing to make that application and/or Advocate has to do serious soul searching before making it because it has serious ramifications on the conditional right to fair hearing and administration of justice. He cited the decision made in Constitutional Petition E160 of 2023 [2024] KEHC 3487 (KLR) and the Judicial Service (Code of Conduct & Ethics) Regulations, 2020, under the *Judicial Service Act*. He urged this Court not to allow the prayer for recusal.

23. Counsel for the respondent contended that the application as drawn is bad in law and fatally defective and incapable of being granted as it is an omnibus application. He submitted that an application for recusal should be a standalone one and should come first, as a party cannot ask a Judge to recuse him/herself and also apply for review of his/her decision in the same application.

24. He contended that granting prayer 2 for recusal would embarrass this Court and bring it into disrepute in view of prayer 3 seeking that the same application for review and recusal be heard by a different bench. He stated that granting prayer 3 would therefore mean that a different Judge or bench of Judges would have to hear an application for my recusal and review of my order which application has to be heard by me, which request is an absurdity. He prayed for the application to be dismissed.

25. The applicant's Counsel filed further submissions dated 27th February 2025 in response to the respondent's submissions. He reiterated that the application for review falls squarely within the requirements of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. He termed the submissions by the respondent's Counsel as being fundamentally misconceived, incompetent and bad in law for being baseless, mendacious and intentionally misleading.

26. He also reiterated that the debt owed to the applicant is expressly admitted and that the respondent unconditionally undertook to settle the same but failed and/or neglected to do so. Counsel contended that there is no dispute that is capable of being referred to arbitration. He submitted that the decision in Ruwatex Ltd. v Typsa Consulting (supra), relied on by the respondent's Counsel is wholly irrelevant to the application herein and can be distinguished on facts, as it deals with a situation where the parties could not agree on the appointment of an Arbitrator and there was no admission of a debt that was being referred to Arbitration in that case.

27. He urged this Court to follow the Court of Appeal decision in UAP Provincial Insurance Co. Ltd v Michael John Beckett (supra), which case is strikingly similar on facts to this case. He contended that I failed to provide any valid reason for failing to do so.

28. In response to the authority cited by the respondent's Counsel of Sheria Mtaani v Judicial Service Commission & A.G. (supra), Counsel for the applicant stated that although it sets out the correct position in law, it can be distinguished from the facts of this case wherein the applicant has provided sufficient and convincing grounds to justify its valid apprehension that I was biased against it and that I ought to recuse myself in the interest of justice, so that justice is not only done but manifestly seen to be done.

29. Counsel for the applicant contended that the law and Rules of Civil Procedure permit the hearing of an application for review by a bench other than the Judge whose decision is being sought to be reviewed, for sufficient reason, as in this case, and the argument by the respondent to the contrary is misconceived and incompetent.

Analysis and Determination.

30. I have considered the application filed by the applicant as well the affidavit in support thereof. I have also considered the grounds of opposition filed by the respondent and the submissions made by Counsel for both parties.

31. The issues for determination are-

    i. If I should recuse myself from hearing the application dated 17th July 2024;

    ii. If the application for review should be heard by another Judge or a bench of Judges; and

    iii. If the answer to (ii) is in the negative, if I should grant the orders for review being sought in the instant application.

If I should recuse myself from hearing the application dated 17th July 2024.

32. One of the reasons given for my recusal in this matter is that I failed to attribute the submissions made by the applicant's Counsel, specifically to Mr. Salah Amin Advocate, who was leading Mr. Misaro Advocate in the Appeal that I determined, as it was Mr. Amin who highlighted the submissions and not Mr. Misaro. The applicant's deponent, one Ms Andugo claimed that by so doing, I was discourteous to Mr. Amin, who was leading Mr. Misaro in the Appeal, and that I showed open hostility against the applicant and its Counsel by unfairly apportioning blame on them for not having filed an application for judgment on admission in the lower Court, without any proper or lawful basis for so doing.

33. The issue of having attributed submissions made by the applicant's Counsel to Mr. Misaro Advocate and not to his senior Mr. Amin is neither here nor there. As far as I am concerned Ms Andugo is splitting hairs. Suffice to say that even if I had mentioned the name of the law firm that had filed the submissions for the applicant and not even mention the names of the Advocates who appeared before me on the day of highlighting of submissions, that would not render the submissions by the applicant's Counsel worthless or less valuable than if I had mentioned the name of Mr. Amin Advocate in the Judgment.

34. Indeed, in paragraph 6 of the said Judgment, it states "the appeal proceeded by way of written submissions, which were highlighted. The firm of Amin & Co. Advocates filed written submissions dated 7th June, 2023 for the appellant whereas the firm of Mogeni & Co. Advocates filed written submissions dated 28th July 2023 for the respondent."

35. If anything, paragraphs 7 to 13 of my Judgment captured the submissions made by Counsel for the applicant. If Mr. Amin would have gone through this Court's Judgment in light of the written submissions filed by his law firm, he would have realized that in my Judgment, I summarized the said firm's written submissions. It is common knowledge that whatever an Advocate states in Court by way of highlighting of submissions is drawn from written submissions. I therefore find the applicant's claim that what Mr. Amin said in his oral submissions was not considered unjustified and baseless. As far as I know, a Court cannot replicate an Advocate's written submissions and oral submissions as that would be repetitive.

36. In my view, it matters not that I mentioned the name of Mr. Misaro and not Mr. Amin in the Judgment, as Mr. Misaro was equally on record for the applicant, and he had previously appeared before this Court several times, namely, on the 16th December 2022, 22nd May 2023, 31st July 2023 and on 30th November 2023 when he appeared with Mr. Amin. Needless to say, as long as the applicant's submissions were considered, it is my view that it matters not whether the name of Mr. Amin Advocate was mentioned in the Judgment that I delivered on 9th February 2024, or not. Mr. Amin Advocate seems to be vexed by this Court because he was not individually acknowledged at all in the Judgment.

37. As to whether the name of Mr. Misaro was properly typed, a typing error of an Advocate's name cannot be sufficient reason for recusal. At all the times the parties appeared before me, I wrote down the Advocates' names as I heard them being pronounced on the virtual Court platform.

38. I find it preposterous for the applicant's deponent to claim that I showed open bias and hostility to the applicant and its Counsel. Hostility is something that is perceived by way of observation of a person's conduct and demeanour. Nowhere in her affidavit did Ms Andugo aver to having been in virtual Court on the day the Appeal was heard, and if at all she was present, she failed to list down the particulars of hostility that she observed in the cause of the hearing of the said Appeal in order for her to qualify the allegation that I was hostile to the applicant and its Advocate.

39. The fact that I dismissed the applicant's Appeal cannot be interpreted to amount to bias or hostility. In any legal duel there is a winner and a loser, and having addressed my mind to the issues that were before me, the applicant lost the appeal.

40. I decline to be drawn into the issue of there having been an admission of the debt or not, as that was an issue which I addressed with finality in my Judgment dated 9th February 2024.

41. Failure to file a Notice of Appeal against the said Judgment was of the applicant's own making as having delivered the Judgment in the presence of the Advocates for the parties, the applicant could have filed a Notice of Appeal. A Notice of Appeal to the Court of Appeal is not filed contemporaneously with a Memorandum of Appeal in which grounds of Appeal are articulated.

42. Conditions for recusal of Judicial Officers are well set out in the Judicial Service (Code of Conduct & Ethics) Regulations, 2020. Rule 47 stipulates as follows–

> "A Judicial Officer may recuse himself/herself in any proceedings in which his/her impartiality might be reasonably questioned where the Judicial Officer-
>
> a. Is a party to the proceedings;
>
> b. Was, or is a witness in the dispute;
>
> c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> d. Has actual bias or prejudice concerning a party; and
>
> e. Has personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter.

43. In this instance, I do not fall in any of the above categories as the outcome of the Appeal that was before me cannot be termed as having been arrived at, out of any prior knowledge or interaction with the respondent or its Advocate.

44. In the Austrian High Court case of Re J.R.I exparte CJL (1936) 161 CLR 342 the Court stated as follows on the issue of recusal –

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.....It needs to be said loudly and clearly that the ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. (Emphasis added).

45. Closer name, the Supreme Court of Kenya, in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (supra), stated as follows on the issue of recusal of a Judge –

> According to the definition of Black's Law Dictionary, it was evident that the circumstances calling for recusal of a Judge were by no means cast in stone. The perception of fairness of conviction of moral authority to hear the matter was the proper test of whether or not the non-participation of the judicial officer was called for. The objective view in the recusal of a judicial officer was that –
>
> a. Justice as between the parties be uncompromised,
>
> b. The due process of law be realized and be seen to have had its rule and lastly,
>
> c. The profile of the rule of law in the matter in question be seen to have remained uncompromised.

46. The criteria to be applied in a case where recusal of a Judge is sought on the ground of likely bias was set out in the case of Kalpana H. Rawal v Judicial Service Commission & 2 others (supra), where the Court of Appeal adopted the test of "Whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge would be biased."

47. The above test was also the one that was applied by the East African Court of Justice in the case of Attorney General of Kenya v Prof. Anyang Nyong'o & 10 others EACJ Application No. 5 of 2007, where the Court stated thus–

> We think the objective that 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 a fair minded 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 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 the public who is not only reasonable but also fair minded and informed about the circumstances of the case. (Emphasis added).

48. I am also guided by the decision rendered in the case of Kaplan & Straton vs L. Z Engineering & 2 others [2002] eKLR, where the Court stated thus-

> Although it is important that Justice must be seen to the done, it is equally important that Judicial Officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias encourage parties to believe that by seeking disqualification of a Judge,

they will have their case tried by someone thought to be more likely to decide the case in their favour. (Emphasis added).

49. Since each case for recusal of a Judge has to be determined in its own special circumstances and earlier on in this Ruling I set out the reasons why the applicant seeks my recusal from hearing the application herein, it is my finding that the applicant has fallen short of establishing the test laid out in the case of Attorney General of Kenya vs Anyang Nyong'o & 10 others (supra), of reasonable apprehension of bias to a fair minded member of the public, who is informed about the circumstances of the case, has also failed to meet the conditions for recusal set out by the Supreme Court in the Jasbir Rai case (supra). I therefore decline to recuse myself from hearing the application dated 17th July 2024.

If the application for review should be heard by another Judge or a bench of Judges.

50. The applicant seeks a prayer for the instant application to be heard by another Judge or bench of Judges. Its Advocate generally stated that the Civil Procedure Rules make provisions for such. The Appeal that forms the subject of the present application was heard by me and not by a bench of Judges. It is therefore misconceived for a proposition to be made for the instant application to be heard by a bench of Judges who never heard the Appeal in the first instance.

51. Secondly, such a proposition should have been backed by the relevant provisions of the law, if any, and legal precedents, but should not have been thrown at the face of this Court to make a decision on a position that was unsubstantiated by the applicant. That prayer therefore fails.

If I should grant the orders for review sought in the instant application.

52. An application for review is grounded on the provisions of Section 80 of the *Civil Procedure Act* which provides as follows –

    Any person who considers himself aggrieved -

    a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

    b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

53. Rule 1 of Order 45 of the Civil Procedure Rules, 2010, limits the scope of review to the following-

    a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made; or

    b. On account of some mistake or error apparent on the face of the record; or

    c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

54. In this instance, the applicant's Counsel relies on the argument that review of Judgment should be done on the ground of "any other sufficient reason" and submitted that this Court found that the applicant failed to file an application seeking Judgment on admission, yet the Trial Court had granted an order for stay of proceedings and had referred the dispute between the parties herein to Arbitration, although the debt was admitted and there was nothing to be referred to Arbitration.

55. The Supreme Court of India in the case of Ajit Kumar Rath v State of Orisa & others, 9 Supreme Court Cases 596 at page 608 cited by the Court in Monalisa Hotel Limited v Matseki & another (Suing as the Administrators and Legal Representatives of Francis Spinks Komora - Deceased) [2023] KEHC 23714 (KLR), discussed the scope of review and stated as follows –

> A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule. (Emphasis added).

56. My finding in the Appeal on the applicant's failure to file an application for entry of Judgment on admission does not constitute "any other sufficient reason" as contemplated under Order 45 Rule 1(c) of the Civil Procedure Rules, 2010 for me to review my Judgment rendered on 9th February 2024, as that would form a ground of appeal. Reviewing my Judgment on such basis would be tantamount to me sitting on appeal against my own Judgment, which I cannot.

57. My reasons for arriving at the decision that I made are captured in the said Judgment. Since there are no factors such as an error apparent on the face of the record or an order made on account of some mistake or discovery of new and important matter which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or order made, I decline the invitation to be drawn into matters that I considered in the Appeal on merits.

58. There is no dearth of authorities that address the issue of review, but to set matters into perspective, the Court of Appeal made it quite clear in the case of Nyamogo & Nyamogo Advocates vs Kogo [2001] 1 EA 173, that "an error apparent on the face of the record includes an omission which must also be glaring and self- evident. It is not one that requires an elaborate argument or serious scrutiny of the record to be established."

59. Further in the Court of Appeal case of John Peter Kamau Ruhangi v Kenya Reinsurance Corporation [2012] KECA 7 (KLR), the Court cited with approval the Nigerian Court of Appeal's case of Peter Cheshe & another Vs Nicon Hotels Ltd. & another, Appeal No. CA/A/83/M/98 that – "an error on the face of the record is one that can be corrected under the slip rule whose jurisdiction is limited to correcting errors, mistakes or omissions in the ruling or judgment and does not permit granting orders not made or extending the scope of the ruling."

60. I have said enough to show that the application dated 17th July 2024 is unmeritorious. It is hereby dismissed with costs to the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Salah Amin for the appellant/applicant

Mr. Chacha for the respondent

Ms B. Wokabi – Court Assistant.