



**Ethics & Anti-Corruption Commission v Otieno & 5 others (Anti-Corruption and Economic Crimes Civil Suit 24 of 2018) [2023] KEHC 2435 (KLR)  
(Anti-Corruption and Economic Crimes) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 24 OF 2018  
EN MAINA, J  
MARCH 23, 2023**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**BOB KEPHAS OTIENO ..... 1<sup>ST</sup> DEFENDANT  
CAROLYNE CHEPKEMOI SANG ..... 2<sup>ND</sup> DEFENDANT  
MAURICE ODIWUOR AMEK ..... 3<sup>RD</sup> DEFENDANT  
MICHAEL OWINO OORO ..... 4<sup>TH</sup> DEFENDANT  
JUDITH AKINYI OMOGI ..... 5<sup>TH</sup> DEFENDANT  
ISAAC OUSO NYANDEGE ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant/Applicant's Notice of Motion dated January 10, 2023 which is brought under Order 51 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 50 of the *Constitution* seeks the following orders:-
  - 1) Spent.
  2. The Honourable Justice Esther Nyambura Maina be pleased to recuse herself from any further conduct of this matter.
  3. This matter be placed before any other court having sufficient jurisdiction for its just and conclusive determination.



4. The costs of this application be in the determination.”
2. The grounds for the application as stated on its face and the supporting affidavit are that:- this suit was filed on September 20, 2018, simultaneously with the proceedings in Homabay CMAcc No 1 of 2018 where the Applicant together with 6 others were charged with 11 counts relating to the embezzlement of public funds amounting to Kshs 27,872,278 belonging to the County Assembly of Homabay; that the applicant and his co-Defendants herein were on June 14, 2022 convicted in the said ACC 1 of 2018; that the Defendants preferred an Appeal against the judgment in this court vide ACEC Appeal No 4 of 2020 consolidated with ACEC Appeal No E005 of 2022 which was heard and determined by the Hon Lady Justice Esther Maina; that in her judgment delivered on December 15, 2022 this court upheld the conviction of the 3<sup>rd</sup> Defendant/Applicant and his co-defendants; that the Applicant is apprehensive therefore, that they will not get a fair and impartial trial in this court; that the judgment delivered by this court on December 15, 2022 was prejudicial to the Applicant and as such there is sufficient cause to warrant granting of the orders sought as there is a reasonable probability that the Honourable Judge would be influenced by its findings in the judgment in HCACEC Appeal No 4 of 2022 delivered on December 15, 2022.
3. The Plaintiff opposed the application through a replying affidavit sworn by Jarso Dida on February 20, 2023 and submissions dated March 14, 2023. The Plaintiff contends that the mere apprehension of bias cannot be a basis for recusal. That the allegations of bias must be factual and proven. That this court should not recuse itself simply because it has pronounced itself on a question of law in a related matter. Further, that this court has a duty to sit on a matter on which it ought to sit and should not recuse itself where there is no bias and that to entertain such a proposition would amount to an abdication of duty. It was also argued that the consolidated appeals in HCACEC Appeal No 4 of 2022 were heard and determined on merit and the Applicant has not appealed.

#### **Issues for determination**

4. Whether the Hon Lady Justice Esther Maina should recuse herself from these proceedings.

#### **Analysis and Determination**

5. The recusal of Judges and judicial officers is guided by the *Judicial Service (Code of Conduct and Ethics) Regulations 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. 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.”
6. The above principles are to be considered together with the *Bangalore Principles of Judicial Conduct* which provide as follows in regard to bias:-

“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...”

7. In the case of *Phillip Tunoi & Another v Judicial Service Commission & Another* (Civil Application No 6 of 2016) [2016] eKLR the Court of Appeal stated as follows:-

“41. 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.

.....

44. The facts of this case would not in our view, on the authority of *Porter v Magill* (*supra*) lead a fair-minded and informed observer to conclude that there is real possibility that the Presiding Judge will be biased. It was not shown that circumstances exist that are likely to show that a real possibility exists that the Presiding Judge's integrity or impartiality might reasonably be questioned.

.....

46. We take cognizance that the right to fair hearing is embedded in our constitution which emphasizes that justice must be done to all without delay or undue regard to procedural technicalities. The *Constitution* has vested in the courts judicial authority and mandate and has expressly stated that the right to fair hearing cannot be limited or abridged. It is absolute.

47. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to Section 5(1) of the *Public Officer Ethics Act*, 2003 contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of the *Constitution*.

48. Specifically, under Rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.



.....

50. In conclusion and applying the test in *Porter v Magill* [2002] (supra), no fair-minded and informed observer, having considered the facts, would conclude that there is a possibility that the Presiding Judge or this Court will not be impartial or fair or will be biased. In the result, we dismiss the notice of motion dated February 15, 2016 with costs to the respondents.”
8. The same position was taken by the Supreme Court (as per Ibrahim SCJ) 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.”
9. It is clear therefore that the test to be applied in an application for recusal of a judge is an objective one. The test is that of a fair minded and informed observer.
10. The gist of the Applicant’s application is that he is apprehensive that the Judge is likely to be biased against him by virtue of having heard an appeal and hence made a finding in a matter directly related to this suit. That this court has had the benefit of interacting with the facts and evidence produced in the related criminal case and therefore has a pre-determined mind on the matter. The question then would be whether a reasonable man who is well informed would conclude that having heard the appeal and dismissed it this court is likely to be biased against him in this suit. My answer to that question is in the negative. In the case of *Republic v IEBC ex parte Wavinya Ndeti* [2017] eKLR the court held as follows:-
- “To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment”. (Emphasis mine)
11. I associate myself fully with the above finding. There is no possibility that a reasonable person, properly informed and viewing the circumstances of this case would conclude that the Honourable Judge would be biased against the Applicant merely on account of having dealt with the Applicant’s appeal. No factual circumstances and/or proof of bias has been shown by the Applicant. This court



is an independent umpire and is expected to apply its mind to the facts and the law and make a determination in favour of any of the parties to the suit. In my view, this application is a serious affront to Judicial independence as guaranteed under Article 160 of the *Constitution*. It would also be an abdication of duty for a court to recuse itself on the grounds cited. Should the Applicant be aggrieved by the outcome of his appeal in ACEC Appeal E004/2022, the proper remedy would be to file an appeal against the judgment but not to ask this court to step aside every time a case related to the criminal one is brought before it. (See the case of *Republic v Kenya Motorsports Federation Ltd & Another ex parte Rory Hugh Thomas Mckean and another (Suing through the parents and next friend)* [2021] eKLR).

12. In the circumstances, the Applicant has failed to meet the threshold for grant of orders sought and accordingly, it is my finding that the application dated January 10, 2023 lacks merit and it is hereby dismissed with costs to the Plaintiff/Respondent.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**E N MAINA**

**JUDGE**

