



**Juja Coffee Exporters Ltd & 3 others v Kaab Investment Limited & another  
(Commercial Petition 57 of 2016) [2023] KEHC 1707 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1707 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL PETITION 57 OF 2016  
DKN MAGARE, J  
MARCH 9, 2023**

**BETWEEN**

**JUJA COFFEE EXPORTERS LTD ..... 1<sup>ST</sup> PLAINTIFF  
TSS TRASPORTER LTD ..... 2<sup>ND</sup> PLAINTIFF  
TSS INVESTMENT LTD ..... 3<sup>RD</sup> PLAINTIFF  
TAHIR SHEIK AHMED ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**KAAB INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
BANK OF AFRICA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. An application to recuse myself from this matter was made by the Plaintiffs in this matter. I heard the same and reserved the ruling for today.
2. The application was opposed by the respondent, who termed it as strange. The respondent opted to use the court Record and points of law in their Response. They posit that the threshold for recusal has not been met.

**The complaint**

3. The applicant posits that I gave very little time between the time of hearing the proposed application for Amendment and hearing of the suit and as such I was minded to dismiss that application. Further that by ordering that no other application be filed while giving trial directions, I was biased against the Plaintiff since they intended to file further Applications including an application to transfer the suit to a land court. They also feel that I am hurrying them to conclude the matter.



## The applicable law

4. 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.
5. 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.
6. In this regard, non of the grounds relied fall within the clauses above. Consequently the most proximate could be the sufficient cause.
7. Regulation 21(2) requires that Recusal by a judge shall 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 or herself if in the circumstances set out therein.
8. The effect of the said regulations is that the court must guard against it independence and not to recuse itself in circumstances that do not merit. However, in circumstances where there is merit either due to the surrounding facts or appearance of bias, a judge should recuse himself. If for example a family member is involved, the court should not wait for an application for recusal.
9. This even occurs in cases where, the judge’s conscious points to discomfort due to relationship, either legal or clandestine. However, where there is no merit and the same is based on unfounded speculations, the court should and must not recuse itself.
10. Under Regulation Rule 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.
11. Independent exercise of judicial authority is affected by bias or ill will against a party. It is also compromised if the court succumbs to machinations and intimidation by parties.
12. However, where a party wants to waste the court's time or otherwise firm shop, the court should be firm and clearly indicate to parties so. Unnecessary application for recusal is an affront to the independence of the judiciary and decisional independency of the judges. On the other hand a biased court is anathema to the independence of the court and the image of the judiciary.

### **Background to the application**

13. The Plaintiff filed suit against bank of Africa and KAAB investment limited in 2016 though the firm of M/s Gikandi and Company Advocates of Mombasa. The matter was placed before Hon Lady Justice Njoki Mwangi on 6/6/2016 under certificate of urgency. The court certified the matter as urgent and issued interim orders against the Defendants. The application dated 6.6.2016 was argued inter partes on 20.6.2016 and interim orders of injunction were extended to 21.6.2016. A Ruling was delivered in the presence of parties. Upon delivery of Ruling parties took directions on filing of pleadings and the file was to be mentioned on 20/9/2016 for directions.
14. Before the said date, another application was placed before justice P. J. O Otieno J, who directed the matter be placed before Lady Justice Njoki Mwangi for directions. This was duly done.
15. The court delivered a second Ruling in the matter on 14.10.2016. There was a lull till 1/3/2018 when an application dated 27/2/2018 was filed and placed before Justice P. J .O Otieno who redirected the matter back to Lady Justice Njoki Mwangi.
16. Before that application was concluded another application was filed dated 7.3.2018 and placed before Lady Justice Njoki Mwangi. The court declined to issue orders exparte and ordered service for inter partes hearing.
17. On 19/3/2018 the applications dated 27/2/2018 and 7.3.2018 were placed before the court, Lady Justice Njoki Mwangi. After due amendments to the Application, prayers 2 and 3 were allowed in the interim. The application and the preliminary objection were set down for hearing.
18. On 5.4.2018 the court delivered its ruling against the Applicant herein. Mr Kongere, instructed by the firm of M/s Gikandi and Company Advocates, sought orally leave to Appeal and stay pending appeal at the time of Ruling.
19. The Ruling of 5/4/2018 sustained the preliminary objection on res judicata and allowed the application for release 2,000,000/= to the firm of M/s Wamae and Allen advocates being money for the auctioneer's costs. On 11/7/2018 an application to cease acting was allowed on part of the 3<sup>rd</sup> Defendant.
20. When the ruling of 5/4/2018 was given, on application by the Plaintiff, the court granted leave and declined to grant interim orders. Lady Justice Njoki ordered that the Ruling be supplied to the parties. Again on 8.5.2018 another application dated 30/4/2018 was listed for hearing.
21. Further on 12/8/2021 an application dated 11/8/2021 was placed before Lady Justice D. Chepkwony and interim orders were granted in terms of prayers 1 & 2. It was set for inter partes hearing on 17/8/2021. It was argued before judge Nyakundi and a Ruling given.



22. On 10.9.2021 another application dated 1.9.2021 was placed before justice Onginjo. The same was for setting aside interim injunctive orders. The matter was then set for inter hearing before Justice Mativo, as then, he was, on 7/10/2021. After adjournment, the matter was slated for Ruling on 25/1/2022. The court dismissed the application dated 11/8/2021 with costs to the interested parties and the 1<sup>st</sup> Defendant.
23. There appears to have been an appeal to the court of appeal, wherein the court of Appeal directed that this matter be listed for hearing and be disposed of expeditiously. This was not to be.
24. In his penultimate paragraph of the impugned Ruling Justice Mativo lamented the chequered history of this matter including advise from the court of appeal to fix the matter for hearing. In consideration therefore he ordered the matter be fixed for hearing within 120 days. No appeal was preferred. However, there were no consequences given for failure to fix for hearing.
25. The matter was then fixed for mention on 31/3/2022. It was placed before Judge Njoki on 20/4/2022. On that date the application for joinder of new parties was to be filed. Meanwhile, the matter was fixed for hearing on 26/7/2022 at 11.30 am in open court.
26. Before that could happen parties were again in court on 10/5/2022 for an amended Notice of Motion dated 1.4.2022. The court heard the application and slated ruling on 22/7/2022. This was 4 days before the main hearing. The court declined to issue interim orders.
27. The Ruling was delivered on 14/10/2022. In that ruling, the preliminary objection was upheld and the Amended notice of motion dated 1/4/2022 was dismissed with costs.
28. The case was left to lie till 6/2/2023 when again an Application dated 3.2.2023 was filed by the interested parties. Hon Lady Justice Njoki Mwangi, who was proceeding on transfer, ordered that the matter be placed before me for directions.
29. The parties appeared before me on 15/2/2023. This was my third day in Mombasa High Court. I had been posted effective 1/2/2023. However, as fate will have it we proceeded to Diani for Commercial Judges' Conference. The week that followed, I was not on the cause list as we were writing judgements for RRI matters.
30. I took over the entire docket by Lady Justice Njoki Mwangi with effect from 13.2.2023. On the 3<sup>rd</sup> day, this case happened.
31. Mr Kongere appeared before me and stated that they cannot sustain a case against the 4<sup>th</sup> and 5<sup>th</sup> Defendants unless they amend. Prior thereto I had declined to hear the interested parties as they were never joined to the suit. Mr Kongere was lamenting that he cannot set the suit for hearing for factors beyond his control.
32. Upon considering the circumstances of the case I struck out the application by the proposed interested parties as they were not party to the suit. I directed all parties to file their documents before then. This was because the suit had earlier been fixed for hearing on 26/7/2022 but did not proceed due to the pending ruling. I also directed that the application for amendment, if any be filed by 17/2/2023 and be heard on 6/3/2023.
33. Instead of filing that application, the applicant sought leave to appeal against an order directing that there be no other application. I noted that, there have been plethora of Applications since 2016 which stopped the suit from proceeding. The plaintiff was to file an application for amendment. I did not find any basis for leave to appeal over order 11 directions.



34. When the matter came up on 6/3/2023 for hearing of the proposed application for amendment, the applicant had filed an application for recusal. He did not file the application for amendment.
35. The main reason is that the time given for hearing and the time for the Application is so close that it is clear that I was meant to dismiss the application. They thus apprehend that I am biased. the source of bias is 15/2/2023. The question they ask, is if am not biased, why am I fixing this matter for hearing. Why am I closing filing of further applications? He cited several cases in a list field by Muriu Mungai and company advocates.
36. I asked them whether I know any of the parties, Mr Kongere was honest that this is the first time he was dealing with me and does not have instructions on any actual bias. His worry is my enthusiasm to proceed.
37. The Respondent responded that the applicants have disobeyed the court orders with abandon and should not be heard to say that there is bias on part of the court. He narrated that the current application is in violation of orders of 15/2/2023. Secondly, the application for an order for amendment of Plaintiff has also not been filed in violation of the court order of 15/2/2023.
38. They argue the orders goes are discretionary based on the history of the matter he pointed out that orders to set the suit for hearing was issued by the Court of Appeal in CACA 158 of 2018. In that matter the Court of Appeal dismissed an interlocutory appeal and ordered the Plaintiffs to set the matter for hearing.
39. According to the Respondents, instead of filing the for hearing, they filed other applications. In spite of that, justice Mativo had also issued orders to fix the matter for hearing within 120 days from 28/1/2022. The hearing date, in compliance with justice Mativo was to be taken by 28/4/2022.
40. Further, in disobedience of the order by Justice Mativo, the Applicant filed other application which were heard by justice Lady Justice Njoki Mwangi. Counsel for the defendant was against hurried hearings, in principle, but in this case, the plaintiff cannot be heard to say that the matter ought to be delayed, any further.
41. In response, the Applicant noted that what is before court is not an application for contempt. The plaintiff deserved to be heard.

## **Analysis**

42. In spite of my order that no further applications be filed, I decided to have this matter heard given the nature so that it does not hung on the parties like the domacles sword. In this matter, there is no allegation of actual or perceived bias arising from the relation between parties. It is based on the order of the court to proceed for hearing. This is what was referred to in the case of Kalpana Rawal as the case of appearance of bias based on the conduct of the judge.
43. 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 of real danger test, though not of universal application, the test is whether, there is real danger that a fair trial was likely to be denied. To me such a test is too restrictive and may not be achieved by most parties applying for recusal.
44. I prefer the test of the real likelihood of bias. In this case, it is not necessary to proofs actual bias but whether, a fair minded and informed observer, having considered the facts, would concluded that there



was a real possibility that the judge was biased. In paragraph 39 of the decision of Michael Obare Tago versus Fredrick 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: -

“we think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amount 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”

45. The test is not what the litigant fees. It is a member of the public, who is not only reasonable but also fair minded and informed about all the circumstances of the case.
  - a. The circumstances of the case were that the Court of Appeal had directed the parties way back over three years ago to fix the matter for hearing.
  - b. Secondly justice Mativo had ordered the matter be listed for hearing within 120 days, This is a period of 4 months. The time lapsed on 28/4/2023.
  - c. The hearing date of 22/7/2022 did not proceed as the court was dealing with an application that had been field and ruling was delivered on 14/10/2022 rendering the hearing date otiose. It was thus necessary, in my wisdom or otherwise, I ensure that no file leaves my court without a date. None of the propose dates were convenient to counsel of the Applicant, hence the need to give a date convenient to the court.
  - d. At the time of giving date for the hearing, there was no pending application as at today’s date, the application for amendment was not filed, therefore that date for hearing that application became academic.
  - e. A no point did the applicant get locked out of proceedings.
46. A court cannot give standalone date for an application that is not in the court file.
47. There is no reasonable apprehension of bias. The parties admit there is nothing untoward between the judges and parties.
48. 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.
49. Being aggrieved with a decision forcing you to proceed, in a matter both the court of appeal and review. It is not within the province of recusal. Recusal has to have something personal to the judge.
50. The application is real a means of not taking a date for hearing as per the order of the court of Appeal and Justice Mativo. In such scenarios, the Plaintiff’s tactics are apparent. It is my considered view that there is no factual basis has between the Parties.
51. In *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR, justice D.S. MAJANJA, held as follows: -

“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.”

52. In this matter, a fair minded person knowing the circumstances of this case, will not have any doubt that the case will be heard fairly. Being given a near hearing date is not evidence of bias. The is over 5 years old. The application that the Applicant is apprehensive will be dismissed has not been filed. There is nothing in the conduct of the judge that shows bias or evidence that the judges mind is predetermined.
53. From the history of the case, this is not the first application to be dismissed. The fact that I had dismissed other applications are not a ground for recusal. Recusal has to go to the personal question touching on the judge. Mere apprehension, conjecture and hyperbole does not count.
54. In the case of *In Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR (supra) the court proceeded as doth: -
- “On the test of a ‘fair minded and informed observer’ and the provisions of the Code of Conduct above, can it be said that taking into account all circumstances of this case, I am likely to be biased against the Advocates and deny them a right to a fair trial? I think not. The Advocates have not laid any factual basis for a reasonable observer appraised of the facts to demonstrate a possibility of real bias.”
55. 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 mind of a person. Without tangible evidence leading to question the impartiality, then, I decline to recuse myself.
56. The allegations laid out have not reached an evidential threshold for recusal.
57. In the circumstances I find the application for recusal is dismissed bereft of merit and dismiss the same with costs of 10,000/= payable within 30 days in deficit execution do issue.
58. The matter should proceed to full hearing on the date already set in court to for the interest of justice to be met.

DATED, ISSUED AND DELIVERED AT MOMBASA VIRTUALLY 9<sup>TH</sup> MARCH THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, MOMBASA**

**In the presence of;**

Ms Randa holding brief Kongere for the Applicant

No appearance for the Respondent

Oliver Musundi - Court Assistant.

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