



Madison Insurance Company Limited v Mitome & another (Suing on their on behalf and on behalf of the Estate of Patrick Mwenda Thiane - Deceased) (Miscellaneous Application E044 of 2022) [2023] KEHC 21661 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEHC 21661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E044 OF 2022**

SM GITHINJI, J

MAY 8, 2023

BETWEEN

MADISON INSURANCE COMPANY LIMITED APPLICANT

AND

DORINE MUKUBA 1ST RESPONDENT

JOSEPH THIANE MITOME 2ND RESPONDENT

**SUING ON THEIR ON BEHALF AND ON BEHALF OF THE ESTATE OF
PATRICK MWENDA THIANE - DECEASED**

RULING

1. The Applicant filed a Notice of Motion dated July 1, 2022 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to withdraw and transfer Mariakani PMCC No E229 of 2021 *Joseph Mithome and Another vs Madison Insurance Company Limited* to this Honourable Court for trial and final disposal.
 4. That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to grant as to meet the ends of justice.
 5. That costs of this Application be provided for.
2. The Notice of Motion is brought under Articles 20 and 47 of the [Constitution](#) of Kenya, Sections 8, 1A and 1B of the [Civil Procedure Act](#), and Order 51 rule 1 of the [Civil Procedure Rules](#), 2010.



3. The application is premised on the grounds listed on the face of the motion and supported by the affidavit of Kennedy Mokaya, counsel on record for the Applicant, sworn on the even date. It is deposed that the learned Magistrate in Mariakani PMCC No E229 of 2021 *Joseph Mithome and another vs Madison Insurance Company Limited* is biased for reasons outlined in the affidavit as summarized below.
4. That the Applicant filed an application to set aside interlocutory judgment before the lower court which subsequently issued directions on March 9, 2022, that the Applicant do file its submissions within 1 day and the Respondent within 7 days. The application was eventually dismissed on March 17, 2022. This prompted the Applicant to file an appeal HCCA E022 of 2022 which was determined vide a consent order allowing the Applicant to file and serve their statement of defence within 21 days at the lower court.
5. Counsel added that the lower court registry declined to accept their documents for filing prompting him to write two letters on May 12, 2022 and May 18, 2022 seeking the magistrate's and this court's intervention. Despite his efforts, the registry did not comply until May 20, 2022 when he threatened to take action against the registry in-charge. It is then his documents were received and filed.
6. Thereafter, the Respondent filed an application dated June 22, 2022 which according to counsel, was unexplainably, mentioned within three days and ex-parte orders issued on disposal of the said application without the Applicant being served.
7. The Respondents opposed the application. They filed a Replying Affidavit sworn on December 2, 2022 by Simon Njoroge, counsel for the Respondents, who deposed that the Respondents filed the application dated June 22, 2022 a month after the Applicant had filed its defence and memorandum of appearance. That the application sought to strike out the Applicant's defence. Counsel added that the application was served upon the Applicant on June 27, 2022, two days after the court had issued directions on how to proceed.
8. Counsel deposed that the Applicant then filed the present application where *ex-parte* directions were issued by this court just as it was the case in the lower court.
9. The application was canvassed by way of written submissions which I have carefully considered. I find that the sole issue arising for determination is whether this court ought to transfer Mariakani PMCC No E229 of 2021 to this court for a final determination.
10. Section 18 of the [Civil Procedure Act](#) provides as follows: -

“Power of High Court to withdraw and transfer case instituted in subordinate court

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or



- (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

11. Article 165(6) and (7) of the Constitution of Kenya gives this Court supervisory powers over the subordinate courts and such powers include the calling of any proceedings before a subordinate court and making such appropriate orders to ensure there is fair administration of justice. It follows therefore that for the court to grant an order of transfer the Applicant must satisfy the court as to the reasons for granting such orders.
12. The application herein is based on the ground that the trial magistrate is biased against the Applicant. The particulars of this contention are as aforementioned.
13. The court in Isaya Oyoo, The DCIO, Nyeri Police Station v Joseph Wachira Gitai [2015] eKLR aptly discussed the test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of bias. The Court stated; -

“The test applicable ...was enunciated in the case of President of the Republic of *South Africa and Others v South African Rugby Football Union and Others*[3] . At paragraph 48, the court said the following: -

“It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. 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 submission of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by 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 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 a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

It is settled law that not only actual bias but, also a reasonable perception of bias disqualifies a judicial officer from presiding over the judicial proceedings. Once this is established, the disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.”



The court further explained that; -

“The principles upon which transfer may be granted has been crystalized in several authorities one being *Shilenje vs The Republic*[7]cited above which lays down the law that for the High Court to order a transfer there must be reasonable apprehension in the applicant’s or any right thinking person’s mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

The principles which come out clearly are that the High Court will always require some strong grounds for transferring a case from one judicial officer to another. The court has to consider whether there has been any real bias in the mind of the presiding judge and/or magistrate and also whether incidences have happened which might create in the mind of the parties a reasonable apprehension that he/she may not have a fair and impartial trial.

It is clear from the authorities that in an application to transfer a case from one magistrate to another or for recusal on account of bias, the applicant has to show he entertains an apprehension of bias on the part of the court, which apprehension must be reasonable.”

14. The allegations raised by the Applicant in the present case are that first, the lower court’s registry staff frustrated his efforts to file his Memorandum of Appearance and Defence. This to me is not proof of any bias on the part of the judicial officer. The Applicant indeed admitted that the registry needed confirmation that the consent order from this court was genuine before receiving the documents. It appears to me that once the confirmation was received by the registry, in one way or another, the Applicant’s documents were duly received.
15. Second, that the magistrate proceeded to issue directions for canvassing the application dated June 22, 2022 in the Applicant’s absence or before they were served with the same. I find no basis in this allegation for reasons that the said application has not even been heard. Again the directions issued were as follows and not as claimed by the Applicant herein; -
 1. That the Notice of Motion dated June 22, 2022 be served forthwith but not later by close of business June 28, 2022.
 2. That upon service the respondent to file and serve Replying Affidavit latest by close of business on 5th July.
 3. That upon receipt of the Replying Affidavit, the applicant shall file and serve written submissions thereon latest by July 12, 2022.
 4. That upon service the respondent shall file hers latest by July 19, 2022.
 5. That the matter shall be mentioned on July 20, 2022 for ruling date.
16. That the learned magistrate ordered for service of the application, and granted the Applicant seven days to file a response and further time to file submissions as evidenced above is a clear indication of no bias against either party.
17. In the end, I do find that the Applicant has not established good reasons to warrant a transfer of the suit in Mariakani PMCC No E229 of 2021 to this court for a final determination. The upshot is that the application dated July 1, 2022 is unmerited and is hereby dismissed.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF MAY, 2023.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Njoroge for the Respondent

Ms Nyambane holding brief for Mr Mokaya for the Applicant

