



Ethics and Anti-Corruption Commission v Musuya t/a Mukuyu Petroleum Dealers; Waleghwa & 5 others (Interested Parties) (Anti-Corruption and Economic Crimes Civil Suit 16 of 2019) [2023] KEHC 19020 (KLR) (Anti-Corruption and Economic Crimes) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19020 (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 16 OF 2019

EN MAINA, J

JUNE 15, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

**ANDREW W BIKETI MUSUYA T/A MUKUYU PETROLEUM
DEALERS RESPONDENT**

AND

SALOME WALEGHWA INTERESTED PARTY

BHINDER CORPORATION LIMITED INTERESTED PARTY

MILDRED KERUBO OBARE INTERESTED PARTY

WACHENYA AUTO GARAGE INTERESTED PARTY

SACHDEVA NABHAN & SWALEH ADVOCATES INTERESTED PARTY

LOLONG CONTRACTORS LIMITED INTERESTED PARTY

JUDGMENT

1. Learned Counsel for the 4th Interested Party filed a Notice of Motion dated May 2, 2023 under Section 1A, 1B and 34 of the *Civil Procedure Act*, order 51 Rule 1 of the Civil Procedure Rules and Articles 47, 48, 50, 73, 159 and 160 of the *Constitution* seeking the following orders: -

- 1) That the Honourable Judge, Lay Justice EN Maina dos recuse herself form this matter.



- 2) That this matter be allocated to any other Judge in the Anti-Corruption and Economic Crimes Division.
- 3) That the costs of the Application be provided for.
- 4) That this Honourable Court does issue any other Orders it may deem fit to grant in the circumstances.'

2. The Application is premised on the following grounds as stated on its face and the supporting affidavit of Samwel Kiongera Advocate sworn on May 2, 2023:-

- ' 1) On May 2, 2023 when this matter came up for hearing, Mr Mukuha, an Advocate of the High Court of Kenya, and who was holding brief for Mr Bwire for the Respondent and the 1st Interested Party made an Application seeking adjournment of the hearing on the basis that Mr Bwire had a hearing on the very day before Honourable Justice Mabeya. Ms Murugi, an Advocate for the Ethics and Anti-Corruption Commission (EACC), objected the Application by Mr Mukuha. When Mr Mukuha sought to reply to the objection by Ms Murugi, the Honourable Judge told him that he did not have the right of reply and that he should sit down and await her Ruling on the Application. Towards the end, before delivering her Ruling on the Application for adjournment the Honourable Judge then asked Mr Mukuha for which parties he was appearing for.
- 2) Moreover, on the very day Mr Samuel Kiongera, an Advocate of the High Court of Kenya acting for the 4th Interested Party in the matter sought to address the Honourable Court in relation to its Ruling dated and delivered on March 16, 2023 and against which the 4th Interested Party had filed an Application at the Court of Appeal, COACAPPLE167/2023, seeking to stay this matter pending the filing, hearing and determination of the Appeal. Instead of the Honourable Judge hearing the Application being made by the Advocate for the 4th Interested Party to the end, the Judge interrupted the Advocate and told the Advocate to sit down saying that there was no stay. When the Advocate urged the Honourable Judge, that it was important that the record shows what his Application was all about, the Honourable Judge told the Advocate that: 'You can record it yourself.' Then towards the end, before delivering her Ruling on the Application for adjournment, the Honourable Judge asked the Advocate what his name was.
- 3) Equally, the treatment accorded to Mr Wasike holding brief for Mr Gituma for the 6th Interested Party and also Mr Kuloba for the 3rd Interested Party was not proper.
- 4) Consequently, on the aforesaid basis, it is crystal clear that the Honourable Judge is openly bias and that if this matter was to proceed before her to its logical conclusion, it is most likely that the parties will not be accorded a fair hearing as it appears on the face of it that the Honourable Judge has already taken a position in the matter.



- 5) It is on the aforesaid basis that we pray that Honourable Judge, Lady Justice EN Maina does recuse herself from this matter and the same be allocated to any other Judge in the Anti-Corruption and Economic Crimes Division.'
3. The Plaintiff opposed the Application through the Grounds of Opposition dated May 2, 2023 which state that:
- ' 1) The 4th Interested Party/Applicant has not met the threshold for grant of orders of recusal.
- 2) No material has been placed before this court to prove the allegation of bias.
- 3) The 4th Interested Party/Applicant has failed to demonstrate reasonable grounds and/or facts to show bias and/or for assuming the possibility of bias.
- 4) The application is a gross abuse of the court process.
- 5) The application has been brought in bad faith and is merely meant to forum shop for a Judge to hear this case, to frustrate, delay and/or disrupt the court process.'
4. This court directed Counsel to canvass the application by way of written submissions and gave timelines for doing so but no submissions were received by the court.
5. The following issue arises for determination:
- Issue for determination.
- Whether the Hon Lady Justice EN Maina should recuse herself.

Analysis and determination.

6. It is trite that a Judge or judicial officer sitting on a matter is required to be impartial and harbour no bias, whether positive or negative towards any party. The Bangalore Principles of Judicial Conduct recognize six core values of judicial conduct, key amongst them being impartiality, equality and integrity. Similarly, the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 emphasize the requirement for judges to carry out their duties in accordance with the law.
7. Under Rule 21(1) of the said Code of conduct, a judge is required to disqualify herself or himself in proceedings where their impartiality might reasonably be questioned. The Rules provides as follows:
- ' 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—
- 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) A member of the judge's family has economic or other interest in the outcome of the matter in question.'

8. Actual bias or prejudice must therefore be demonstrated before a judge can disqualify him or herself. The objective of the principle of recusal is to ensure access to justice and the right to fair hearing, which are guaranteed to all persons in Articles 48 and 51 (1) of the Constitution. In the case of Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others. Petition No 4 of 2012 [2013] eKLR the court observed:

' 6. Recusal, as a general principle, has been much practiced in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed (2004) [p.1303] 'Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.'

7. From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.'

9. An application for recusal must be supported by evidence of bias as it is a direct attack on a Judge's integrity and ethical conduct. It is a challenge on the impartiality and independence of a Judge and must be handled with the highest level of seriousness. It cannot merely be based on unproven allegations of supposed future bias or 'apprehension that this court will be biased against the Respondents' as averred by the 1st Respondent in his supporting affidavit. In the case of 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 was held as follows:

' The question is whether the fair minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased.'

10. The test in considering the evidence of bias alleged against the judge is therefore objective; that of a fair minded informed observer. It is not a subjective test based on the feelings or opinions of a party or his advocate.

11. In this case the alleged bias arose from the proceedings of May 2, 2023 in which Learned Counsel Mr Kiongera, Mr Wasike and Mr Mukuha who represent the 4th Interested Party, 6th Interested Party and Respondent and 1st Interested Party respectively all sought an adjournment of the case for different



reasons, including that the 4th Interested Party had the previous day filed an application for stay of the proceedings in the Court of Appeal and that Mr Bwire Advocate for the Respondent was before another Judge. The Plaintiff through Learned Counsel Ms Murugi however opposed the application. The parties made submissions which this court considered and ruled as follows:

' I have heard and considered the submissions of learned Counsel which are principally geared towards an application for adjournment. In my view, only that of Mr Mukuha is worth considering. That of Mr Kiongera is a non-starter as there is no stay of proceedings from the Court of Appeal. As for Mr Kuloba, he would do well to read the Ruling of this court delivered on March 16, 2023 which allowed the Plaintiff's Application to discontinue the suit against the 3rd Interested Party. For Mr Wasike, there are no medical records and hence that is not a good reason to adjourn.

As regards Mr Mukuha's Application, I take cognizant that Bwire is prevented from being here today because he is before another Judge. be that as it may, this is also an old case which must be determined before the end of June. I have however noted that we still have tomorrow and that any inconvenience suffered by the Plaintiff can be compensated by an award of costs. Accordingly, we shall adjourn for today but shall convene tomorrow morning to hear the witness. The Respondent and Interested Party shall pay today's CAF and the expenses that shall be incurred by the witness for today'

12. The application by Mr Kiongera Learned Counsel for the 4th Interested Party /Applicant is predicated on the ground that he was told to sit down and that this court asked him what his name was. In my view there is nothing unreasonable about a judge asking Counsel to repeat his name for the record as the name may have escaped the court's mind. Moreover, Order 42 Rule 6 of the [Civil Procedure Rules](#) provides that an appeal does not give rise to an automatic stay. Counsel for the 4th Interested Party would not therefore have expected this court to grant him audience on that issue unless he had an order from the Court of Appeal staying the proceedings. This is a fairly old matter and given the current zero adjournment policy in the Judiciary this court has in fact treated the parties very fairly.
13. The parties and their Counsel were accorded an opportunity to address the court on the adjournment and this court, while exercising its discretion, independently arrived at the ruling and directions best suited for the expeditious disposal of the suit. Given the facts and circumstances of this case, there is absolutely no basis for this court to recuse itself. There is no iota of bias revealed in the ruling and the directions given by this court. The allegations by the 4th Interested Party are unsubstantiated. In my view the application appears to be precipitated by a desire on the part of Counsel for the Respondent and the Interested Parties not to proceed with the hearing pending determination of the appeal of the 4th Interested Party in the Court of Appeal. It is instructive that the 4th Interested Party did not swear an affidavit to state that it supported the application by Mr Kiongera. It is evident therefore that the allegation of bias is by Mr Kiongera personally. Should an advocate be dissatisfied with the ruling or orders of a court, the appropriate forum to challenge the orders is by way of appeal and not an application for recusal as was done in this application.
14. Moreover, it would be an abdication of judicial duty for this court to readily accede to an application for recusal which is without basis. I agree with the observation of Onguto J in the case of [Kenya Hotel Properties Limited v Attorney General & 4 others \[2016\] eKLR](#) where citing the holding in the



persuasive Australian High Court case of *Re JRL ex parte CJL [1986] 161 CLR 342, 352*, Mason J (later Mason CJ) that:

' 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.' stated:-

4. In my view, the value of the guidance by Mason J was and still is, that there has to be a proper and appropriate factual foundation for any recusal as a judge is expected to discharge his duties unless disqualified by the law. An appropriate reason must be advanced for any recusal otherwise litigants may effectively succeed in influencing the choice of judges in their own cause.
 5. Ordinarily, the question to be answered by the court once the facts are laid before the court is whether a reasonable and informed fair minded man sitting in court with all the facts would have a reasonable suspicion that a fair trial for the applicant was not possible. The test for disqualification by reason of apprehended bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the court is biased: see *Musiara Ltd v Ntimama [2005] 1 EA 317* (CAK) and *Porter v Magill [2002] 1 All ER 465*. It must be said loudly and clearly that the test is objective and the court must shut its eyes to the fact that the applicant may be left dissatisfied and bearing a sense that justice would not or might not be done. It is not enough to simply seek a recusal.
 6. In the instant case the recusal is sought on the basis of informal inquiries or observations made by the court.
 7. Observations made by presiding judicial officers if they reveal a particular mind-set will create justifiable perceptions of bias. If such observations are limited to basic routine inquiries or touch on the ordinary case management strategies adopted or to be adopted or even on the merit of the applicant's case then, bias ought not to be imputed. I do not subscribe to the faculty that a judicial officer ought to be a mute listener. He should not maintain a stony silence out of fear of an application for his recusal. He should be able to genuinely but reservedly engage counsel or the parties. However, such inquiries or observations made in the course of or before commencement of the hearing should not leave behind an air of predetermination or prejudgment of the pending or continuing dispute.'
15. In the upshot it is my finding that this application has no merit and it is dismissed. Costs shall be in the cause.

Signed, dated and delivered virtually on this 15th day of June 2023.

E N MAINA

JUDGE

