



Kerai v Mudaliar & another; Maseno University (Interested Party) (Commercial Case E184 of 2022) [2023] KEHC 20404 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E184 OF 2022**

A MABEYA, J

JUNE 16, 2023

BETWEEN

SURESH KURJI KERAI PLAINTIFF

AND

ARUL SELVARAJ MUDALIAR 1ST DEFENDANT

YUVI CONSTRUCTION LIMITED 2ND DEFENDANT

AND

MASENO UNIVERSITY INTERESTED PARTY

RULING

1. Before court is an application by the interested party dated 14/12/2022. It was brought under Articles 1, 2, 3, 10, 25(c), 48 and 50(1) of *the Constitution*, Section 1A, 1B & 3A of the *Civil Procedure Act*, order 51(1) of the *Civil Procedure Rules* 2010 and Part II of the Judicial Code of Conduct and Ethics.
2. The application sought that this Court recuses itself from the present proceedings and the matter be transferred to Hon. J. D.S. Majanja or any other judge for further hearing. It also sought the stay of the orders made on 14/12/2022.
3. The grounds for the application were set out on the face of the Motion and in the supporting affidavit of Joy Akoth Akinyi sworn on 14/12/2022. It was contended that the applicant was apprehensive that this Court was biased against it and justice would not be done if this Court continued hearing the matter.
4. That this Court had disregarded the applicant's documents and had been lenient with the plaintiff. That despite the applicant filing its pleadings on 3rd and 8th November, 2022, the Court joined the



- applicant in the suit on 9/11/2022 and directed it to deposit Kshs. 48,368,664.97 which the Court suo moto amended on 14/12/2022 to Kshs. 10 million. That the orders were granted ex parte without indication that the applicant was served with the mention notice by the plaintiff.
5. That the Court joined the proposed party yet the application to join dated 29/9/2022 and the application to set aside the orders of 9/11/2022 dated 14/11/2022 had not been heard.
 6. That despite the applicant filing an application dated 14/11/2022 seeking a stay of the ex parte orders issued on 9/11/2022, the plaintiff filed an application dated 14/11/2022 citing the applicant's Vice Chancellor for contempt.
 7. That vide orders dated 11/12/2022, the court misdirected itself and issued orders to the detriment of the interested party which granted summons for the personal attendance of the Vice Chancellor to cite him for contempt of the orders of 10/12/2022 yet the application and order were yet to be served on the applicant. That the orders of 10/11/2022 did not provide for a 14 days timeline for the applicant to deposit the sum in court.
 8. That when the applicant's application came up for directions on 14/12/2022, this Court interrupted the respondent's Counsel mid-stream and on resumption the Court disregarded the Counsel citing that there were many matters on the Cause List.
 9. That this Court further declined the interested party a chance to address court due to many matters on the list. That there was no prayer for payment of Kshs. 10 million and the Court misdirected itself in directing the applicant to pay thus the Court had become a litigant and was drafting and granting orders. That the Court disregarded the defendant's submission that the money was secured and it was unnecessary to drag the interested party into the suit.
 10. That the Court was condemning the interested party unheard and it was only rational that the application seeking to set aside the orders of 9/11/2022 be heard on merit before the application for contempt. That from this Court's conduct, the Court had set its position and would not fairly determine the matter.
 11. The plaintiff opposed the application vide the replying affidavit of Suresh Kurji Kerai on 19/1/2023. He averred that the interested party was a contemnor having failed to obey the orders of 14/12/2022 directing it to deposit Kshs. 10 million in court and there was a pending contempt of court application against it which had been served contrary to the allegations that it had not been served. That the applicant lacked audience in court until it purged its contempt.
 12. That the application did not meet the threshold for granting of the orders sought. That though the interested party claimed personal biases and prejudice against it yet there was no evidence to support those claims. That the plaintiff filed its application dated 29/9/2022 and on 4/10/2022 the Court directed that it be served and mentioned on 7/10/2022 for directions.
 13. That the same was served on the interested party as evidenced by the affidavit of service but the interested party failed to attend Court on 7/10/2022 when directions on filing responses and submissions were given and a mention date of 9/11/2022 fixed. That the interested party served its response on 8/11/2022.
 14. That the application to set aside the Court's orders was filed and the same came up for hearing on 14/12/2022. That the interested party's Counsel was given an opportunity to be heard but declined to address Court despite being called out thrice and insisted that the defendant's Counsel be given more time to be heard yet he had already submitted.



15. That after hearing the defendant’s Counsel, the Court varied the orders it had made and ordered for the deposit of Kshs. 10 million as it had been submitted that substantial payments had been made. That the interested party had a chance to address the Court contrary to its allegation of being condemned unheard as its Counsel declined to make submissions.
16. That the interested party was forum shopping and was the author of its misfortune by failing to attend Court with no good reason tendered, and failing to comply with the Court orders. That the plaintiff stood to suffer prejudice by the conduct of the interested party. That to-date, the interested party had not complied with the orders made.
17. The application was canvassed by way of written submissions. The main issue for determination is whether I should recuse myself from this matter. The principles governing recusal in this jurisdiction are now well settled. In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* HC COMM No. 332 of 2010 [2014] eKLR the court observed that: -

“The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali and others C.A Criminal Application No NAI 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & others C.A. Civil Application No NAI 310 OF 2004 (Unreported) where the Court of Appeal stated that:

“... 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 ...”
18. 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 was 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.”
19. 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.”
20. The principles in the above cases buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26/5/2020. 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.”
21. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:
- “A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.”
22. Turning to the facts of the case, the interested party relies on the ground that I have actual bias or prejudice against it.
23. It is contended that the Court wrongly joined the interested party to this suit, that on 14/6/2022, the Court declined to give the Counsel for the interested party an opportunity to be heard and that the Court has summoned the Vice Chancellor of the interested party for contempt.
24. I have now had an opportunity of considering the record carefully and in its totality. The suit was filed against the defendants vide a plaint dated 24/5/2022. It was for a liquidated claim as specifically set out therein. The defendants entered appearance on 13/6/2023 but failed to file a defence within time. They seem to have filed one out of time and dated 25/8/2022.
25. The plaintiff applied for interlocutory judgment and vide a ruling dated 12/9/2022, the deputy registrar entered judgment against the defendants as prayed in the plaint.
26. It would seem that instead of the plaintiff proceeding with normal execution, he lodged in Court an application dated 29/9/2022 under a certificate of urgency. In that application, he sought amongst other orders, the joinder of the interested party, an injunction to restrain the interested party from releasing to the 2nd defendant a sum of Kshs.48,368,664/97, an order to strike out the defence and in the alternative, to enter judgment on admission.
27. That application came up ex-parte on 4/10/2022 and the Court ordered it be served for directions on 7/10/2022. On 7/10/2022, the Court declined to give any interim orders but gave timebound directions for the filing of responses as well as submissions and fixed the matter for mention on 9/11/2022 to give a ruling date. Up to that point, no order had been made.
28. Come the 9/11/2022, neither the defendant’s nor the interested party had complied with the directions of 7/10/2022. The defendants filed and served the replying affidavit only the previous day, 8/11/2022. Further, the interested party neither appeared on 7/10/2022 nor the said 9/11/2022.



29. The failure by the defendant and the interested party to respond to the application as ordered on 7/10/2022, caused an adjournment as the Court could not reserve the matter for ruling as had been scheduled. Instead of either reserving the matter for ruling and therefore locking out the defendants and the interested party from being heard on that application as they were clearly in breach of section 1A (3) of the *Civil Procedure Act*, the Court chose the lesser evil which was to extend time for compliance but grant prayers 1 and 2 of the Motion dated 29/9/2022. These were: -
- “ 1. THAT pending the hearing and determination of this application this honourable court be pleased to issue an order prohibiting the Proposed Interested Party from releasing to the 2nd defendant and/or its agents the proceeds of the construction project payable to it;
 2. THAT pending the hearing and determination of this application this honourable court be pleased to issue an order directing the proposed interested party to deposit in court KShs. 48,368,664.97 from the proceeds of the construction project payable to the 2nd defendant;”
30. It is clear from the foregoing that the interested party had not responded to the application for joinder. I never joined it to the proceedings but I did give orders against it for failure to oppose the application and for being in breach of section 1A (3) of the *Civil Procedure Act*.
31. On the allegation that I declined to give its Counsel a hearing on 14/14/2022, nothing can be further from the truth. I have gone back to the proceedings of that day. The date was secured to give directions on three applications that were before Court.
32. Counsel for the defendants, Mr. Khalwale submitted that the prayers granted on 9/11/2022 in relation to the application dated 29/9/2022 were couched in final terms thus compromising the entire application. I adjourned the matter to consider the original record to confirm that submission.
33. When the Court resumed, I asked Ms. Akinyi Learned Counsel for the interested 3 times to address the Court. She kept on insisting that I should give Mr. Khalwale more time to submit. Counsel was reminded that the matters were not for hearing on that day but for directions on those 3 applications. Ms. Akinyi stood her ground.
34. The Court then let Mr. Khalwale for the defendants make some remarks. He brought to the Court’s attention that that the amount of Kshs. 48 million sought to be deposited was erroneous as already Kshs. 40 million had been paid. When Mr. Khalwale wanted to argue his application, the Court again indicated to him that the matter was only for mention and no substantive hearing could take place.
35. Again the Court asked Ms. Akinyi to make her remarks but she did not. In that regard, the Court indicated that it had a long Cause List and cannot waste a lot of time on mentioning one matter while there were 47 others waiting. The Court proceeded to give its directions. Noting that there was indication that already a sum of Kshs.40 million had allegedly been paid, the Court varied the order of 9/11/2022 and reduced the amount to be deposited from the Kshs. 48 million earlier ordered to Kshs. 10 million.
36. The Court also gave directions on the three applications including the applicant’s application to set aside the above orders. The applications were to be responded to within 14 days and within 30 days thereafter, parties were to exchange submissions beginning with the subject applicant.



37. It was at that point that Ms. Akinyi attempted to address the Court after directions had been issued. The Court noted that she had been given an opportunity to address Court but kept quiet and parties were directed to reconvene on 9/2/2023 as directed.
38. From the foregoing, it is quite clear that the Court did give Ms. Akinyi the opportunity, three times to address it, but she declined. She kept insisting that Mr. Khalwale Counsel for the defendants be given more time to make submissions as if Mr. Khalwale was leading her, which was not the case.
39. Further, the reduction of the amount of the deposit was informed by what Mr. Khalwale had informed the Court that a substantial amount had already been paid. The allegation that the Court prepared pleadings and made the order for reduction of the deposit amount is therefore unfounded. Where is the bias?
40. Further, though the applicant alleged that it was not served with the plaintiff's application, the evidence before this court suggests otherwise. There is the email from the plaintiff's advocate dated 13/12/2022 forwarding the application dated 6/12/2022 as well as the court directions for service. There is also the affidavit of service dated 7/10/2022 indicating that service of the application dated 29/9/2022 was effected on the interested party. The allegation that the applications were not served is therefore untrue.
41. Though the applicant alleges that this Court is biased against it, this Court notes that the directions issued on 14/12/2022 were for all the three applications before Court. There was no application that was given priority before the other. All those applications are still pending before Court awaiting to be determined together.
42. It would seem that the interested party is dissatisfied with the orders of 9/11/2022 directing it to deposit Kshs. 48 million. That is money owed to the 2nd defendant. Before making that order, the Court noted that when the application was filed under certificate, interim orders were not granted with the aim of expediting the matter to hearing by way of responses and submissions. However, when the defendants and the interested party failed to comply with those orders and instead of issuing a ruling date whereby the application could have been allowed as being unopposed, the Court had to adjourn and give another hearing date.
43. It was against this background that the orders of 9/11/2022 were issued. Till date, the interested party has not complied. Whether or not it is in contempt of those orders, that is an issue to be decided after the application for contempt is determined on merit.
44. That being the case, a court cannot be said to be biased for merely issuing orders in favor of one party against another. In *Dari Limited & 5 others vs East African Development Bank & 2 Others* (2020) Eklr, the court held that: -
- “Having addressed the chronology of the events in this matter it is clear that, the trigger for the applications for recusal is the applicant's presumed “unfavorable orders” given by the court, in particular the failure to extend the ex parte orders and stay the hearing of the respondent's application... That cannot amount to bias and a reasonable prudent person cannot arrive at the conclusions.”
45. The circumstances of this case do not meet the threshold to justify my recusal. I find that the application was made in utmost bad faith, lacks merit and the same is dismissed with costs to the plaintiff.
46. As I have already noted, there is already a valid judgment on record. The same was entered on 21/9/2022. It has not been set aside. That being the case, it was wrong for the plaintiff to have sought



either to enforce it by way of the application dated 29/9/2022 or to side step it and pursue the defendants as he did through that application. That application and the subsequent proceedings were, in my view, completely unnecessary and unwarranted for reason of the judgment already entered.

47. Accordingly, all the proceedings subsequent to the entry of that judgment were unnecessary and irregular. They are set aside and all orders made discharged forthwith. Let either execution proceed in the normal manner or suitable proceedings be undertaken in accordance with the law.

48 It is so ordered.

DATED and DELIVERED at Nairobi this 16th day of June, 2023.

A. MABEYA, FCIArb

JUDGE

