



REPUBLIC OF KENYA



KENYA LAW
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**Makena v Kirera & 2 others (Civil Case 18 of 2019)
[2023] KEHC 20153 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 18 OF 2019
TW CHERERE, J
JULY 13, 2023**

BETWEEN

CATHERINE MAKENA PLAINTIFF

AND

KIBITI KIRERA 1ST DEFENDANT

CAPITAL SACCO LIMITED 2ND DEFENDANT

I.G RINGERA T/A VIEWLINE AUCTIONEERS 3RD DEFENDANT

RULING

1. By an application dated April 26, 2023, Plaintiff seeks that I recuse myself from handling this case. The application is based on grounds among others this case was on February 14, 2023 fixed for hearing on July 3, 2023 which was five months away since 2nd Respondent was determined to sell the suit land.
2. Mr Otieno for the 1st Defendant did not oppose the application. Mr Mwirigi for the 2nd Respondent opposed the application on the grounds that dates are fixed depending on their availability

Analysis and Determination

3. I have carefully considered the rival submissions for the parties and the main issue is whether I should recuse myself from dealing with the present matter. The principles governing recusal in this jurisdiction are not 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* Ca Criminal Application No Nai 4 And 5 Of 1995 (unreported), And Reinforced In Subsequent Cases. See *R V Jackson Mwalulu & Others* Ca 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...”.

4. 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.”
5. 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.”
6. The *Judicial Service (Code of Conduct and Ethics) Regulations* 2020 particularly Regulation 21 Part II provides that 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.
7. Regulation 9(1) of the *Judiciary Code of Conduct* emphasizes the importance of impartiality of a Judge and 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 favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.
8. The Applicant seeks my recusal not on any of the grounds set out in the cases I have cited or for breach of any of the Regulations in the *Judiciary Code of Conduct* but for the reason that her case was fixed for hearing 5 months away.
9. As rightly submitted for the 2nd Defendant, dates are fixed depending on their availability bearing in mind that the court has numerous matters to deal with on a daily basis. There is no evidence that a date was available before the date fixed for hearing and the court declined to fix the matter for hearing on that particular date.



10. I have considered *Re Reunad ex Parte CJL* (1986) 60 ALJR 528 where the court observed as follows:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty and do not, by acceding too readily to suggestions and 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”

11. Applicant has not placed any material before the court that warrants my recusal. I decline the invitation to encourage the Applicant to believe that an application for disqualification of a judge can be acceded to too readily even when it is unmerited. For the foregoing reasons, I decline to recuse myself.

DELIVERED THIS 13TH DAY OF JULY 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

For Plaintiff - Ms. Aketch for Vivian Aketch & Co. Advocates

For 1st Respondent - Mr. Otieno for Otieno C & Co. Advocates

For 2nd Defendant - Mr. Mwirigi for Mwirigi Kaburu & Co Advocates

For 3rd Defendant - N/A

