



**Mburu t/a JM Mburu & Company Advocates v Malombo p/a OM
Robinson & Company Advocates (Civil Miscellaneous Application
E243 of 2023) [2023] KEHC 23658 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL MISCELLANEOUS APPLICATION E243 OF 2023
DKN MAGARE, J
OCTOBER 17, 2023**

BETWEEN

**JOHN MBAU MBURU T/A JM MBURU & COMPANY
ADVOCATES APPLICANT**

AND

**ROBINSON ONYANGO MALOMBO P/A OM ROBINSON & COMPANY,
ADVOCATES RESPONDENT**

RULING

1. This matter came up for hearing before me for directions on an Application for transfer. This are those run off the mills Applications that ordinarily have no controversy. I listened to the parties and as usual in this kind of matters, I gave directions for submissions all the way to delivery of Ruling. The Ruling was ready and proof read ready for delivery.
2. As I was winding up my cases on Friday, it was brought to my attention that there was an envelope that is addressed to me indicated as private and confidential. I declined to handle the same as it did not indicate the origin. I returned it with instructions that it be checked first. As a rule I prefer all my letters open and out of the envelope before reading to avoid mischief. The only ride is that the yellow envelope containing my payslip should be brought unopened. On Monday morning, the said letter was brought to me. It was a prolixious letter tilted complaint. I have neither read nor considered the said letter as I consider the same highly irregular and a waste of judicial time.
3. I enquired and found it relates to this matter. I directed it be filed away till today and a notice be issued to the parties to appear before me today. I will at this point read the entire letter and ask that it be filed on the online portal to be read by the Respondent. Given that the letter is in a form of complaint, by someone I have never met but to have a false sense of self-importance, I neither have time and drive to engage in a wild goose chase game.



4. There are serious matters to be handled not dealing with parties doing forum shopping. I am aware that Judicial Service Commission gazetted 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. I note that the party herein was meting out vitriol and verbal incontinence throughout the proceedings and now through these letters. Whichever way I rule, the private communication will linger in the minds of the parties. The Applicant neither had the courtesy to copy the counterpart nor file the private communication in the CTS. It is at this point that courts consider recusal. 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. 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.
7. I need to consider whether I am precluded from hearing the matter on account of any other sufficient reason. This is informed by Regulation 10 which provides as follows: -
 1. A judge shall not initiate, permit or consider private communication relating to a matter or case directed to the judge regarding a pending or impending matter in court.
 2. If a judge receives private communication under sub regulation (1), the judge ensure that other parties concerned are promptly informed and shall keep th record of the same.
 3. A judge shall primarily speak through his or her judgment and shall not enter into correspondence with a litigant or other person relating to a matter pending or impending before the court or determined by the court.
8. Given that I have to speak through my judgment, which I take to include rulings, I have to set the record straight in this Ruling. 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. In this case, the court is uncomfortable that while handling a matter, a complaint has been raised. The complaint relates to a matter the court is handling. It is untenable to continue without bias being alleged. Since the complaint is pending, whatever its worth, it is untenable to handle this matter. This is made worse by what appears to be stalking by the Applicant. As I was finalising this extempore ruling, it came to my attention that another letter had been written requesting for handwritten notes I made for perusal.
11. This level of voyeurism it is neither advisable nor prudent to continue in this matter. This is so, because Mombasa is an e-filing station. The court has forbidden physical documents. However, these letters have found themselves in the sanctum of my chambers. I have taken advise from my security advisers and taken several pre-emptive steps to ensure my personal safety and security, of body mind and soul.
12. 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.
13. 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. It however may not be able to be exercised in a situation where vitriol is of cataclysmic proportions.
14. However, where a party wants to waste the court's time or otherwise forum 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. However, in this court, there is no application for recusal.
15. The court is acting *suo moto* in lines with regulation 10. Further, this is, so important when the matter being dealt with is a simple one for transfer of a suit because the counter claim overshoot the 20,000,000/= limit.
16. The test used in cases for recusal of such a nature is what the house of Lords in [R v 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.
17. I prefer the test of perception of real likelihood of bias. In this case, it is not necessary to prove 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 v Fredrick Ambrose Otiemo* (2020) eKLR, the court posited as doth: -

“In the *Attorney General of Kenya v 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”

18. In the circumstances, I will recuse myself from handling this matter any further for reasons of the vitriolic outbursts and intensive negative energy directed in a sustained manner to the court and increasingly acts by the applicant who caused to be written to the court and had neither the decorum nor the courtesy to file on the e-filing platform and or copy his counterparts.

Determination

19. The upshot of the forgoing I make the following orders: -
- a. I find it neither tenable not advisable to continue with this matter in view of the muddying of practice waters by the Applicant.
 - b. The matter shall be mentioned on 23/11/2023 before court number 5 to give fresh directions on hearing of the matter.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 17TH DAY OF OCTOBER 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

O.M. Robinson & Company Advocates for the Respondent

J.M. Mburu & Co. Advocates for the Applicant

Court Assistant - Brian

