



REPUBLIC OF KENYA



KENYA LAW
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**Simpson Senda Kwayera t/a Tele-News Africa and Atlantic Region v Maosa
Thomas Gichana Nyakambi t/a Maosa and Co. Advocates (Civil Case
E063 of 2024) [2024] KEHC 14544 (KLR) (Civ) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14544 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E063 OF 2024

AM MUTETI, J

NOVEMBER 6, 2024

IN THE MATTER OF

AN APPLICATION FOR

DISQUALIFICATION AND/OR RECUSAL OF THE

TRIAL JUDGE IN THE PRESENT PROCEEDINGS

IN THE MATTER OF

THE ENGLISH COMMON LAW DOCTRINES, PRINCIPLES

AND PRACTICES IN THE COMMONWEALTH ON FAIR TRIAL

IN THE MATTER OF

ARTICLE 47 OF THE CONSTITUTION, 2010 ON (ON FAIR ADMINISTRATIVE ACTION)

IN THE MATTER OF

SECTIONS 4 AND 12, OF THE FAIR ADMINISTRATIVE ACTION ACT, ACT NO 4 2015

IN THE MATTER OF

ARTICLE 50 (1) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

ARTICLE 159 (2) OF THE CONSTITUTION OF

KENYA 2010, REGULATIONS, 2020 OF KENYA

IN THE MATTER OF

REGULATIONS 8 OF THE JUDICIAL SERVICE [CODE

OF CONDUCT & ETHICS], REGULATIONS , 2020

BETWEEN



**SIMPSON SENDA KWAYERA T/A TELE-NEWS AFRICA AND ATLANTIC
REGION APPLICANT**

AND

**MAOSA THOMAS GICHANA NYAKAMBI T/A MAOSA AND CO.
ADVOCATES RESPONDENT**

RULING

Introduction

1. The applicant vide his application dated 20th September 2024 - seeks to have this court recuse itself from the hearing of the matter principally on the ground that he is unlikely to get a fair hearing and in his assessment so far there is a predetermined outcome of the matter.
2. According to him the court has consistently ruled in favor of the respondent thus he believes the court is biased against him.
3. He believes therefore the court should recuse itself from presiding over this matter.

Analysis

4. The applicants notice of motion as well as the affidavit in support does not contain anything touching on the integrity of the court.
5. Mr. Maosa Advocate who happens to be the applicant stated repeatedly in his oral submissions that his application had absolutely nothing personal against the court and he believed in the court's capacity and competence to deal with the matter save for the happenings in the matter which he believes elicit a perception and reasonable apprehension of bias.
6. The application for disqualification or recusal of the Court appears to have been prompted by a letter written to Mr. Maosa advocate by counsel for the respondent Mr. Busiega.
7. In the said letter Mr. Busiega advocate for the respondent raise the concern of Mr. Maosa's failure to file written submissions pursuant to directions of this court issued on 22nd July 2024 requiring parties to file and serve written submissions in order for the court to be able to determine the matter.
8. According to Mr Busiega in his letter the respondent was not prepared to concede to any application for adjournment that would be made by Mr. Maosa on 23rd September 2024 when the matter was scheduled for highlighting of submissions.
9. The gist of the letter which is annexed to the applicant's application was that the failure to file submissions by Mr. Maosa Advocate was a calculated move to delay the matter which the respondent was not prepared to countenance.
10. The letter was copied to the Deputy Registrar of the Court asking the Deputy Registrar to place it on record for the judges attention when the matter comes up for hearing.
11. Mr. Maosa has taken a serious issue with the letter submitting that it amounts to a direction to the court on how it should handle the matter.
12. Mr. Maosa went on to say the letter was an expression of the court's mind. And for that reason he believes the court should recuse itself.



13. Mr. Busiega on his part maintained by way of a replying affidavit sworn by his client that the application was simply another attempt to delay the hearing of the matter.
14. Counsel for the respondent urged this court to find that the application has no legs to stand on and is presented for no other purpose but to distract the court from hearing and determining the matter during the RRI period set by the court.
15. MR. BUSIEGA contends that the impugned letter is nothing but an ordinary communication between counsel in a matter geared towards ensuring that the applicants counsel complies with lawful directions of this court.
16. In his view the applicant is simply out to derail the matter for no justifiable cause and the application should be dismissed.
17. Counsel for the respondent further submitted that the multiple applications that the applicant has been filing are meant to ensure that this matter is not heard and finalized during the period that the judiciary has set aside for hearing of matters identified for hearing during the period set aside for the Rapid Results Initiative (RRI).
18. This court is alive to the fact that a party who for whatever reason entertains reasonable apprehension of not getting a fair hearing before a particular judge has the right to petition for the recusal of the particular judge.
19. However, a party wishes to have a judge disqualify or recuse himself from hearing a law suit must be able to demonstrate bias, prejudice or self interest of the judge in the outcome of the matter.
20. The Blacks's Law Dictionary defines "recusal" as the process by which a judge is disqualified on objection of either party or disqualifies himself/herself from hearing the lawsuit because of self interest, bias or prejudice. Applications seeking to have a judge disqualify himself from the hearing of a matter should be made on the basis of either reasonable apprehension or bias or conflict of interest on the part of the judge which may arise out of a judges personal interest in the matter which may come in the form of financial or other interests that may raise in the mind of a reasonable observer.
21. A party may also present such an application based on the conduct of a judge in the handling of a matter that raises in the mind of the concerned party a reasonable apprehension of bias.
22. It cannot be gainsaid that impartiality in the making of judicial decisions is of paramount importance. It is for this reason that a judge should not shy away from recusing himself from a matter where reasonable grounds are presented that in the mind of the judge leave no doubt that a reasonable observer of proceedings before that judge would be inclined to deduce impartiality on the part of the judge.
23. In situations where judicial impartiality or bias is alleged that allegation must overcome the presumption of judicial impartiality and integrity which permeates any judicial system. The burden of dislodging the presumption of judicial impartiality lies upon the party alleging judicial impartiality or bias. It is important to emphasize here that judges must not shy away from hearing a matter out of flimsy and unsubstantiated allegations of bias or impartiality. The applicant must present cogent evidence to support the alleged bias.
24. It is not enough for a party to say that simply because a court has made decisions that have gone against a party that by itself is evidence of bias.



25. The applicant in this matter has placed heavy reliance on a letter written to himself by counsel for respondent indicating to him that the respondents counsel would object to any application for adjournment that the applicant would make on account of the applicant's failure to comply with lawful directions issued by the court.
26. It is not clear to this court how the position held by counsel for the respondent can be interpreted as being a representation of the mind of the court and therefore form a basis for the party to seek a court to disqualify itself from a matter because the party believes that the court is likely to agree with its opponent.
27. A reading of the application reveals that the applicant is simply unhappy with previous decisions made by the court that did not go in his favor, and for that reason the applicant believes that he is unlikely to get justice before this court.
28. In my considered view, the apprehension by the applicant is unreasonable for he has not demonstrated what it is that the court has done that makes him believe that if at all they were to return to this court on an application for adjournment the court would obviously decline to allow the same.
29. The applicants fear is unfounded and this court cannot simply accede to a request to recuse itself on the basis of a speculative assumption by the applicant that he is unlikely to secure an adjournment before this court.
30. The insistence by the applicant to rely the insistence by the counsel for the applicant to rely on a letter by the opposing party as a basis for a recusal application betrays one fact, that the applicant is prepared to clutch at anything that he finds and use it as a basis of getting the matter out of the hands of this court.
31. The court of appeal in *Galaxy Paints Company Limited Vs Falcon Guards Limited*[1999] eKLR had this to say about applications for recusal:

“ 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.” See *Raybos Australia Property Limited & another v. Tectram Cooperation Property Ltd. & Others* 6 NSWLR 272.
32. In the above quoted case the party seeking disqualification of particular judges was unhappy about decisions made by those judges, and for that reason alone believed that they were unlikely to get justice before the court. The applicant in this case is seemingly unhappy with previous decisions of this court and for that matter is apprehensive that he may not get justice.
33. It is important to indicate here that when this matter went before the Honourable Mr. Justice Julius Nangéa the Honourable referred the matter back to this court since this court had already substantially dealt with the case. The applicant has raised concerns about the movement of the file but he did not come out clearly on what was the role of this court in the movement of the file to Honourable Nangéa, J and back to this court.
34. I believe if the applicant believes that the matter was improperly placed before this court then nothing would have been easier for him than to specifically state so in his application. In any event the Honourable Mr. Justice Nangéa independently made the decision to return the file to this court. This court had absolutely nothing to do with the allocation of files to judges undertaking the RRI exercise.



35. It is important therefore for the applicant to appreciate that the cohort of judges assigned to undertake the RRI exercise has specific directions which were timeously communicated to counsel by the respective divisions of the high court regarding the purpose for the exercise and the need to have matters scheduled for hearing during the exercise expedited.
36. Article 159 of *the Constitution* emphasizes the need for courts to deliver justice expeditiously. It is in the spirit of that article that the RRI exercise was conceived and implemented. All parties whose matters are marked under the RRI have to cooperate with the courts in order to have the matters dealt with expeditiously.
37. In conclusion, I find and hold that the application for recusal is without merit and ought to be dismissed. The applicant has not placed before this court material that would demonstrate a reasonable apprehension of bias. To the contrary, the applicant has through the filing of this application demonstrated a desire to forum shop which this court cannot allow.
38. In the end this application is dismissed with costs to the respondent.
39. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Maosa for the Applicant

Busiega for the Respondent

Respondent present

