



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**HC MISC APPLICATION NO. 65 OF 2018**

**SYMON NDAMBIRI NJAGI ..... PLAINTIFF**

**RULING**

1. The application pending before the Court is dated 07/12/2018 filed by the applicant seeking stay of proceedings in **Gichugu Succession Cause No. 154 of 2017** scheduled on 19/12/2018 until further orders. In addition, he sought for transfer of the case for hearing to any other court or magistrate other than G.K. Odhiambo.

2. It is based on the affidavit of his advocate Macharia Muraguri who stated that on 04/12/2018 at 10:00 o'clock, in his absence the trial court made orders that the protest filed shall be heard on 19/12/2018. That at 11:30 a.m he went to court and requested to reschedule the hearing date since he will have a part heard succession cause before **Kerugoya High Court Succession No. 348 of 2013 (in the matter of the Estate of Bedan Gachibiri)** which had been fixed earlier.

He persuaded the magistrate to give any other date in the month of December but he declined his request and furthermore did not record his request in the court file at all. That he persuaded the court that the High Court takes priority over subordinate court that he ought to accommodate but he could not hear any of it and stated that the case would proceed on 19/12/2018 with or without his presence. That he sensed bias, lack of neutrality and it downed on him that his client was destined to suffer.

3. That the magistrate has exhibited bias to the applicant causing the applicant to fear that a fair hearing shall not be accorded. That his client has a constitutional right to representation by counsel which right stands to be violated.

4. The allegation is based on acts by the trial Magistrate which are stated that they show the Magistrate failed to show neutrality. The chronology of the allegation is that the Magistrate gave a hearing date in the absence of the Advocate. The Advocate has not explained why he was not in court at 10.00 a.m.

5. In the absence of the Advocate the Magistrate could give any hearing date. It is extending the allegation of bias too far in the circumstances. Judicial bias is a Judge's inclination towards one party which may influence the Judge to make decisions in favour of one party to the detriment of the other. It is not enough to disqualify the Judge unless the bias is personal and based on some extra Judicial reason.

**Julius Otieno Polo & another v Director of Public Prosecutions & another [2015] eKLR**

Justice Waweru stated:-

**Judicial bias is the judge's bias towards one or more of the parties to a case over which the judge presides and judicial bias is not enough to disqualify a judge from presiding over a case unless the judge's bias is personal or based on some extra-judicial reason,.....**

**In ANDREW ALEX WANYANDAH VRS THE ATTORNEY GENERAL & KENYA RAILWAYS CORPORATION – NAIROBI MILIMANI HCCC NO.844 OF2005, Justice Hatari Waweru was asked to disqualify himself on the allegations of begin biased due to several comments he had made when the matter was proceeding. The judge noted as follows:**

***“There is nothing like a litigant veto of the court or judge hearing his matter; litigants cannot choose their judges.***

***Applications for disqualification of judges would not be lightly allowed., that would tend to erode public confidence in the courts and the determination of justice.”***

6. In view of the above, the applicant has not proved any bias on the part of the Magistrate. The Magistrate made orders which she was entitled to make. In this case the counsel is alleging bias and not the party. The allegation of bias is not enough. It is not enough to allege bias simply because the Judge has failed to let him have his way. The party must have cogent reason to show that the Judge would not be

impartial.

7. The test is objective. What matters is not the mind of the Judge but what a reasonable person with some knowledge of some matters which he perceives that the ability of the Judge to decide the case fairly and impartially is not guaranteed. The Judge will be deemed to be biased and will be called upon to recuse himself.

8. I find that in this case the trial Magistrate remained firm as he was required. There is no prove that he so acted out of bias.

9. I find that the applicant has not proved the allegation of bias. The upshot is that the application lacks merits and is dismissed.

**Dated at Kerugoya this 8<sup>th</sup> Day of February 2019.**

**L. W. GITARI**

**JUDGE**