



**Ndiga v Said & another (Environment and Land Case E018 of 2024)
[2025] KEELC 6442 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E018 OF 2024
AE DENA, J
SEPTEMBER 25, 2025**

BETWEEN

CHARLES OCHIENG NDIGA PLAINTIFF

AND

NEREAH MICHAEL SAID 1ST DEFENDANT

KENYA COMMERCIAL BANK 2ND DEFENDANT

RULING

1. This ruling relates to the Notice of Motion application dated 10/02/2025 brought by the 1st defendant. The applicant seeks the following orders; -
 1. That Honourable Lady Justice A.E Dena be pleased to recuse herself from further presiding over the instant suit.
 2. That Honorable Court be pleased to order that the matter be heard and determined in a different and/or another Court.
 3. That the costs of this application be provided.
2. The application is premised on the following grounds
 - a. That the 1st Defendant/Applicant was a party in Kwale ELC No. 144 of 2021 Thomas Schiering -versus- Nereah Michael Said & 2 Others wherein the Honourable Lady Justice presided over the suit and delivered judgment on 12th April, 2024.
 - b. That the 1st Defendant/Applicant does not have trust in this Honourable Court following the outcome of the proceedings and judgment in Kwale ELC No. 144 of 2021.



- c. That the 1st Defendant/Applicant is apprehensive that the Honourable Court may having presided on the Kwale matter is likely to be influenced by issues raised and determined in that case thereby occasioning absence of neutrality.
 - d. That it is only fair and just that the judge in this matter recuses herself from the proceedings and allows a different court to hear the present suit.
 - e. That no party will suffer any prejudice if this application is allowed.
 - f. That it is in the interest of justice that the application be heard and orders sought be granted.
3. The application is also supported by the depositions in the affidavit sworn on even dated by NEREAH MICHAEL SAID the 1st defendant. Restating the grounds highlighted above it is averred that the Judge having presided over Kwale ELC No. 144 of 2021 there would be apprehension of neutrality by both the Plaintiff and the 1st defendant. That the suit herein was filed in Ukwala MCEL No. E017/2022 and only moved to this Court when the plaintiff learnt of the judgment in E144 OF 2021.

Response to the Application

- 4. The plaintiff Charles Ochieng Ndiga in a rejoinder by way of replying affidavit sworn on 19/02/2025 avers that the application has been brought in bad faith in a bid to either buy time and or forum shop for a Court which may hand in decisions favourable to the Applicant.
- 5. That the applicant has not demonstrated that the learned judge has any interest whatsoever be it personal or financial to warrant recusal. That there is no connection whatsoever linking the learned judge to any of the parties that has been brought out by the applicant and hence no ground to support the recusal. That it has not been demonstrated in any way that the judge was a lawyer in the case, potential witness, a party and or that the judge has expressed any bias.
- 6. It is urged that the judge should not recuse herself based on whims as no substantive grounds have been offered to show impartiality on the side of the judge. That if every litigant was allowed to ask recusal of every judge they don't like, then the justice would never be dispensed to Kenyans. It is also deponed that the applicant, having been the plaintiffs' spouse and as a person whose conduct of matters is not very straight some hinging on criminality wants a Court which is capable of doing justice to all in accordance with the law recuse herself from hearing this matter. That the Court is a new Court duly transferred to Siaya and has never heard any of the parties' cases which are plenty and therefore the accusation of likelihood of bias is far-fetched.
- 7. The plaintiff states that to give in to the demands of the applicant would form a basis of litigants being allowed to choose Courts of their wish and in accordance to their whims which is unacceptable. That the plaintiff was not party to the suit in Kwale. That an applicant filing such an application must give consideration to the quorum of the court and which the applicant has deliberately disregarded. That were the applicant not satisfied with the determination in the suit in Kwale, recourse lay on appealing the same. That to accuse the Court of any likelihood of bias without basis is to undermine the dignity, their oath of office and the due process. Moreover, this suit was filed long time ago, way before this Court was transferred to the present station and the respondent was not aware of this Court being transferred to the current station.
- 8. It is deponed that an unfounded or unreasonable apprehension concerning a judicial officer will not sustain an application for recusal against the officer. The court is urged not to cede to the whims of the Applicant and instead determine this suit in accordance with evidence and Law obtaining and on issues drawn for determination.



Applicants Further Response

9. The applicant responded further to the above depositions in her affidavit sworn on 2/05/2025. The applicant avers that there is no malice in the instant application and further that she has never entertained any idea of forum shopping save that she is aware that the suit property, at the instance of the Plaintiff, has been subject of 3 suits, one in Siaya Magistrates' Court and another before the High Court at Siaya and finally before Ukwala Magistrates' Court.
10. That all she has done is to state that she was a party to the suit in Kwale. Further that some of the materials considered by the Court included agreements between the applicant and the Plaintiff or those relating to properties which have been subject of disputes between the parties herein. The applicant annexed the said documents as NS-B. 4.
11. That premised on the fact that some of the materials presented in the Kwale case touch on the parties before Court, the test of 'mind of the reasonable man' and apprehension have been met. That the allegations of criminality attributed to the applicant are misplaced. Additionally, any party to a suit has an obligation to notify a Court of law, timeously, of the likely or potential conflict of interests or likely prejudice. That demands by the plaintiff that the applicant should have kept quiet to allow the Court discover the issues raised in the application on its own are efforts by the plaintiff to stifle the applicants rights under Article 50(1) of the Constitution.
12. The 2nd defendant did not participate in the application.

Submissions

13. The application was disposed of by way of written submission. The applicants' submissions are dated 5/05/2025 filed by the firm of Abidha & Company Advocates. Mr. Otieno for the plaintiff informed the court they would rely on their replying affidavit. The court has considered the submissions and the depositions in the affidavits filed in the application.

Analysis and Determination

14. I have read the affidavits sworn in support of the application and those sworn in reply. I have also given due consideration to the submissions of the learned counsel appearing for the applicant. What this court needs to decide is whether the applicant has established that there exists a likelihood of bias that would justify the court to recuse itself from the hearing of this suit.
15. The application has been brought under Article 50 (1) of the Constitution of Kenya, 2010; the provisions of Section 1A, 1B and 3A of the Civil Procedure Act. Article 50 of the Constitution is on the right to a fair hearing.
16. As regards section, 1A, 1B and 3A of the Civil Procedure Act I will adopt the below rendition my brother Justice C.K Yano in John Kilonzo Ndivo v Everton Coal Enterprises Limited & 3 Others [2020] eKLR where he stated thus:-

...The overriding objective provided for under Sections 1A and 1B and the inherent power of the court under Section 3A are meant for the attainment of justice to the parties who come to court. The court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of proceedings at a cost affordable by the respective parties.'



17. I also agree with Mr. Abidha on the Judicial Service (Code of Conduct & Ethics) Regulations, 2020 as the guiding law on recusal. The same provide as follows; -

A judge may recuse himself or herself in any 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) A member of the judge’s family has economic or other interest in the outcome of the matter in question.

18. Counsel for the applicant has addressed the court on existence of reasonable ground for assuming the possibility of a bias, perception of fairness, all looked at from the context of a reasonable man and not the mind of the judge. Further that in many instances perception may override the truth. Counsel cited a number of authorities to buttress these positions to wit Jan Bonde Nielson – Versus - Herman Philipus Steyn & 2 Others HCCOMM No. 332 of 2010 [2014] eKLR; Jasbir Singh Rai & 3 Others – Versus - Tarlochan Singh Rai & 4 Others [2013] eKLR; Justice Philip K. Tunoi & Another -vs - Judicial Service Commission & Another[2016] eKLR; Attorney General of Kenya v Professor Anyang’ Nyong’o & to 10 others EACJ application No. 5 of 2007 and Esther Muguru Njeru Njoroge Micheni -vs - Ian Karani Kamunde & 2 Others [2021] eKLR.

19. From the case of Jan Bonde Nielson – Versus - Herman Philipus Steyn & 2 Others (supra) I have noted that the courts observation that decision to apply for recusal of a judge is a serious matter and the test applied is stringent to accord with the constitutional desire to attain the independence of the judiciary as an indispensable facet of the right to fair hearing and access to justice. However, a practice that may encourage parties to ‘shop’ for the judges who will hear their cases in the belief that those judges will be favourable to their causes should also be avoided.

20. Counsel on record for the applicant laid emphasis on the following dictum

....test laid out in 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”.

21. The main ground upon which my recusal is sought is that I presided over a matter where the applicant was a party. That in the said proceedings some of the documents the court considered in arriving at its decision involved agreements between the plaintiff herein and the applicant. The apprehension is that the mind of the court will be clouded based on the said determination and which will compromise the courts duty to impartiality and neutrality premised on the test of the reasonable man. I hear the applicant to be saying that this court will be biased against the defendants defence in this suit based on its judgement in Kwale ELC No. 144 of 2021.



22. In the case of Jan Bonde Nielson – Versus - Herman Philipus Steyn & 2 Others (supra) Judge F. Gikonyo persuasively emphasized thus; -

I repeat for the sake of clarity that the applicant ought to have established such material facts that attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons or that the observation amounted to a preconceived judgment formed without a factual basis. By establishing those facts, he will have shown that real likelihood of bias would occur as the matters complained of are capable of creating a reasonable doubt in the minds of the public about the fairness in the administration of justice in this particular case-which criterion goes beyond mere apprehension or belief or desire of the party into a more concrete and cogent grounds based on proven judge's interest, pre-disposition or prejudice in the case.'

23. In *Accredo AG & 3 others v Stefano Ucceli & another* [2018] eKLR the Court of Appeal cited the case of *President of the Republic of South Africa v The South African Rugby Football Union & Others* Case CCT 16/98 where the Constitutional Court of South Africa quoted with approval the following sentiments of Cory J in *R. v S. (R.D.)* [1977] 3 SCR 484:

Courts have rightly recognized that there is a presumption that judges will carry out their oath of office.....This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

24. Applying the foregoing to the current application the question that emerges at the top of my head is whether a decision of a court can constitute bias or be the basis for an application for recusal? It is my humble view that this court rendering a judgement in a matter where the applicant was a party cannot constitute bias. I'm emboldened by the case of *Republic vs Mwalulu & 8 Others* [2005] KECA 344 (KLR), wherein the Court of Appeal setting the principles on which a judge would disqualify himself from a matter stipulated that a single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.

25. The burden is upon the applicant to establish that this court is biased against it and that it will not get a fair hearing before the court in this matter. This court has not been led to any specific complaint attributed to it that is capable of creating a reasonable doubt in view of the stringent test set. The court only dealt with the matter in the normal course of business and any discomfort arising therefrom is a matter for appeal.

26. I must add that no reference has been made to any specific content of the said judgement that has made reference to the agreements that are said to have been considered by this court and the manner in which the courts comments attached thereto would influence my determination in the instant proceedings. Unsubstantiated suspicion of personal bias or prejudice will not suffice. In this regard I'm guided by the following dictum in *Jasbir Singh Rai and 3 Others vs Tarlochan Singh Rai and 4 Others* (2013) eKLR, where the Supreme Court of Kenya addressed the issue of judicial recusal cited with approval the American case of *Perry vs Schwarzenegger*, 671 F. 3d 1052 (9th Cir. February 7, 2012), wherein it was held that:

"...the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts," and who has



“examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.”

27. I have read the decision of Esther Muguru Njeru Njoroge Micheni -vs - Ian Karani Kamunde & 2 Others [2021] eKLR cited by the applicant in which the Honourable Mr. Justice P. M. Njoroge recused himself. I must distinguish it in the sense that the judge was called to address whether a party in the suit had made improper contact with the court and whether there were any family or personal relationship with one of the parties. This was very specific as opposed to the current case where the bias is not expounded as earlier observed.
28. It is therefore my finding that the applicants have failed to demonstrate that there is a reasonable likelihood of bias on my part as seen from the mind of the reasonable fair minded informed member of the public which would hinder me from determining the present suit impartially.
29. The upshot is that the application for recusal lacks merit and is hereby dismissed costs be in the course.

DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF SEPTEMBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

25/09/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mutua Holding Brief for Abidha Nicolus for the Applicant/1st Defendant

Ms. Anoro for the 2nd defendant

Mr. Otieno for the Plaintiff

Court Assistant: Ishmael Orwa

