

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 168 OF 2009**

**ETHICS AND ANTI CORRUPTION COMMISSION (EACC)**

***Formerly* (KENYA ANTI CORRUPTION COMMISSION). PLAINTIFF/RESPONDENT**

**VERSUS**

**BERNSOFT LIMITED..... 1<sup>ST</sup>**

**DEFENDANT**

**EQUITRONICS LIMITED ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**SAMMY SILAS KOMEN MWAITA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated 12<sup>th</sup> May, 2023, Messrs Bernsoft Limited and Equitronics Limited (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein) pray for orders:

- 1) That this Honourable Court be pleased to order the recusal of Hon. Justice Olola James Otieno from presiding over the suit of instance, Mombasa ELC Suit No. 168 of 2019 (KACC -vs- Bernsoft Limited & 2 Others);**
  
- 2) That the suit file, Mombasa ELC Suit No. 168 of 2019 (KACC -vs- Bernsoft Limited & 2 Others) be referred to the Presiding Judge, Environment and Land Court, Mombasa for further directions; and**

**3) That the costs of this application be in the cause.**

2. The Application is supported by an Affidavit sworn by Enock Tuitoek, a director of the 2<sup>nd</sup> Defendant and is premised on the grounds:

- i) That Honourable Justice Olola was previously employed by the Kenya Anti-Corruption Commission (now Ethics and Anti-Corruption Commissions - EACC), the Plaintiff in these proceedings;**
- ii) That during his tenure, he held senior roles directly connected with legal services and asset recovery;**
- iii) That the suit currently before this Honourable Court stems from investigations undertaken during the tenure of the said Honourable Judge while at EACC;**
- iv) That the Honourable Judge's prior involvement with the Plaintiff in a professional capacity creates a legitimate apprehension of bias or conflict of interest, thus undermining the right to a fair hearing guaranteed under Article 50 of the Constitution; and**

**v) That it is for the interests of justice and fairness that the present application be allowed as prayed.**

3. The Kenya Anti-Corruption Commission (the Plaintiff) is opposed to the application. In a Replying Affidavit sworn on its behalf on 21<sup>st</sup> May 2025 by its Advocate Songole B. Asingwa, the Plaintiff avers that the Defendant have sensed they have no defence in the matter and have therefore chosen to employ delaying tactics to frustrate the disposal of the case and is wasting the court's precious judicial time.
4. The Plaintiff further avers that annexure "ET 2" upon which the Defendants rely is not addressed to the Judge as purported. It is further the Plaintiff's case that that Justice Olola never participated in the investigations or the prosecution of the matter at any point and that the Judge never worked at the Commission's offices in Mombasa to warrant his recusal.
5. I have carefully perused and considered both the Defendant's application as well as the response thereto by the Plaintiff. I have similarly perused and considered the submissions and

authorities placed before me by the Learned Advocates representing the parties.

6. By their application before the court, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have urged for my recusal from this matter on account that I have previously worked with the Plaintiff. It is the Defendants' case that my previous involvement with the Plaintiff creates a legitimate apprehension of bias or conflict of interest thereby undermining their right to a fair hearing as guaranteed under Article 50 of the Constitution.
7. Indeed, Article 50 of the Constitution guarantees the right to a fair hearing and provides as follows:

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

8. In regard to the question of impartiality, Rule 9 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 provides thus:

**“9. Impartiality**

**(1) A judge shall, at all times, carry out the duties of the office with impartiality and objectivity in accordance with Articles 10, 27, 73(2)(b) and 232 of the Constitution and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.**

**(2) In the discharge of duty, a judge shall—**

- (a) uphold and apply the law;**
- (b) observe fairness and impartiality;**
- (c) cooperate with other judges in the discharge of judicial duties by ensuring unity of purpose and collegiality; and**
- (d) perform all duties of the judicial office, including administrative duties impartially, competently, diligently, and without bias.”**

9. As to the instances where a judge may recuse himself from a matter, Rule 21 of the said Regulations provides as follows:

#### **“21. Recusal**

**(1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge**  
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- (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."

10. Considering an application such as the one before me in ***Nairobi Water Conservation & Pipeline Corporation - vs- Runji & Partners Consulting Engineers & Planners Limited (2021) eKLR***, Mativo J., (as he then was) held as follows:

**"First, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. One, it**

is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. Two, the presumption is not easily dislodged. It requires “cogent” or “convincing” evidence to be rebutted....An applicant in a recusal application must meet the high threshold of satisfying the “real danger of bias” test namely that there was a real danger that the judge might unfairly regard with favour or disfavour the case of a party to the issue under consideration by him.”

11. Similarly, in the recent case of ***Gachagua & 5 Others -vs- Maingi & 80 Others (2025) KECA 790 KLR***, the Court of Appeal observed as follows:

**“The test for bias as settled by the Supreme Court in numerous cases, and adopted from the House of Lords in Porter -vs- Magill (2002) 2AC 357, is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.**

**It is not enough for a party to allege bias in general terms. The court must be satisfied that the apprehension of bias is reasonable, and not based on mere suspicion, conjecture, or the subjective perception of the party.**

**Judges take an oath of office to administer justice without fear or favour, and are presumed to be impartial unless the contrary is shown by clear and convincing evidence.**

**In applying the test of a fair minded observer, the court must resist the temptation to yield to every recusal application brought as a tactical device, especially where it is predicated on tenuous grounds or fuelled by political or public pressure.**

**The duty to sit and hear a matter must not be abdicated lightly. Judicial officers must strike a balance between the obligation to recuse where justified, and the duty to dispense justice where no credible grounds for recusal exist.”**

12. In the matter herein, it was not in dispute that I was in service of the Plaintiff in various capacities between the years 2006 and 2013. The Plaintiff as it were is a public body that was then established under the Anti-Corruption and Economic Crimes Act as the lead agency for combating corruption in Kenya. The Commission though headquartered in Nairobi later established branches in the regions including Mombasa.
13. From the material placed before the court, this matter results from an investigation conducted in Mombasa. For the record,

I never served in Mombasa during my employment with the Plaintiff.

14. While the Defendants submits that in my position I was integrally involved in the investigations, drafting and approving pleadings giving rise to the suit, there was no evidence of any such involvement. In any event, I did not think that any such involvement with such a public organization with whom I disengaged more than 13 years ago would constitute a real danger of bias towards the Plaintiff and to the prejudice of the Defendants.

15. As the Court of Appeal did state in ***Uhuru Highway Development Ltd - vs- Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996:***

**“Except where a person acting in a Judicial capacity had a pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might**

**unfairly regard or unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the court is thinking in terms of possibility rather than probability of bias...**

**...Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestion of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour.... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is luxury which is not yet available under our law to litigants."**

16. In the premises I did not find any merit in the motion dated 12<sup>th</sup> May 2025. The same is dismissed with no order as to costs.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 13<sup>th</sup> day of November, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Songole Advocate for the Plaintiff/Respondent
- c) Ms. Nyaboke holding brief for Ms. Osman Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant
- d) Mr. T.K. Ruto Advocate for the 3<sup>rd</sup> Defendant/Applicant
- e) Mr. Kingori Advocate for the proposed 4<sup>th</sup> Defendant