

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC SUIT NO. E046 OF 2022**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....
PLAINTIFF**

VERSUS

DAVID KINYAE ISIKA.....1ST RESPONDENT	DEFENDANT/1ST
DAVINKA SUPPLIERS & GENERAL MERCHANTS LIMITED.....2ND RESPONDENT	DEFENDANT/2ND
WANGA-TECH GENERAL ENTERPRISES LIMITED.....3RD RESPONDENT	DEFENDANT/3RD
BRUCE ISIKA KINYAE T/A BRYCEN SMART INNOVATIONS.....4TH RESPONDENT	DEFENDANT/4TH

RULING

1. What is before the court for determination is the 1st, 2nd and the 4th defendants' application dated the 29th day of July, 2025. The same has been brought under **Regulations 9 and 21 (1)(d)** of the **Judicial Service Code (Code of conduct and Ethics) Regulations 2020, Article 50** of the **Constitution** and all the other enabling provisions of the law. Through the application, the applicants are seeking the following Orders;

- 1) Spent.**
- 2) THAT the Honourable Lady Justice Lucy Njuguna of the High Court recuses herself from hearing this suit.**
- 3) THAT the file be designated to another judge to hear and determine the suit.**
- 4) THAT each party to bear its own costs.**

2. The application is premised on the grounds in support of the same and on the annexed affidavit sworn by David Kinyae Isika, the 1st defendant herein.
3. The 1st defendant avers that on the 9th July, 2025, when this matter came up for hearing, his counsel raised an objection to the production of documents from the Business registration services that PWI, Inspector Margaret Wambeti, sought to produce.
4. That the objection was met with opposition from his counsel, and in the process of giving submissions on the same, the judge made reference to the proceedings in HCACEC E027 of 2022 on 28th March, 2025 and when giving directions on how the objection was to be addressed, the Judge expressed discomfort at handling both this matter and E027 of 2022 where he is also the 1st defendant, given the Judge's perception of his counsel's conduct in the two matters.
5. That in the circumstances, he is reasonably apprehensive that the court would not accord him a fair hearing in this matter, given the

sentiments expressed by the Judge when dealing with this matter and the objection raised therein.

6. That the Judge while giving directions told his counsel that upon filing submissions the court will deliver it's ruling on the objection so that counsel may proceed to file an appeal if not satisfied, an opinion which in his view, rendered the Judge opinionated on his objection.
7. That in the light of the foregoing, it is only fair that the Judge do allow the matter to be transferred to another Judge in the Division.
8. The application is opposed on the following grounds;
 - a) ***The Motion lacks cogent evidence that would reasonably lead to an apprehension of bias.***
 - b) ***It is a well-established principle that judicial officers have a duty to sit and hear matters unless clear, objective grounds for disqualification exist***
 - c) ***Granting recusal on the basis of mere speculation or unsubstantiated allegations would undermine judicial independence, encourage forum shopping, and prejudice the fair and expeditious determination of cases***
 - d) ***Mere dissatisfaction with judicial rulings and assumptions about views or purported comments concerning conduct of counsel, without specifics, do not ordinarily fulfil the threshold.***
 - e) ***The test is not only subjective but objective: Whether a reasonable person , appraised of facts, would think the Judge's impartiality might reasonably be questioned, which the Motion fails to show.***
9. The application was disposed of by way of written submissions.

Applicant's Submissions

- 10.** The applicants submitted that the application has merits as the Judge had previously expressed discomfort at hearing both matters whilst admonishing counsel for the applicant, a fact which would reasonably suggest difficulty at maintaining an impartial lens in the determination of both matters. Reliance was placed on the case of Jasbir **Singh Rai & Others Vs Tarlochan Singh Rai & Others (2013) KESC 20 (KLR) (2013) eKLR.**
- 11.** The applicants averred that the Judge made comments that a reasonably informed and impartial viewer of the proceedings would find disconcerting and detrimental to the applicant's right to a fair hearing. That these comments bring into question the impartiality of the Judge in determining the two matters and as such, it is prudent for the application to be allowed as it falls within **Regulation 21 (1) (d) of Regulations** cited above and the same is not based on mere speculation, as incorrectly alluded to by the respondent.
- 12.** That though the two matters are different, the evidence relied upon by the respondents is substantially similar meaning that the Judge is able to glean intimate and advance knowledge of the proceedings in both matters.

- 13.** Submitting on **Regulation 21(3)** of the **Judicial Service (Code of conduct and Ethics) Regulations, 2020** that provide for situations that a Judge should not recuse themselves, the applicants contended that the current application does not fall under the grounds listed under Regulation 21 as there are other Judges in the Division who can deal with the suits and there are no urgent circumstances necessitating the Judge to continue sitting.
- 14.** On the principle that Judges have a duty to sit and hear matters, reliance was placed on the case of **Gladys Boss Shollei V Judicial Service Commission (2018) eKLR** and that of **Rex vs Sussex Justices (1924) 1KB 256**.
- 15.** On whether the applicants have met the threshold for recusal, the applicants relied on the case of **Porter vs Magill (2002) 1ALL ER 465** on the applicable test when dealing with an application for recusal, and in this regard, the applicants averred that they are reasonable and well informed participants in both cases making them well placed to note the interactions of counsel and the bench. That reasonable and well informed observer of the proceedings in the two cases would conclude, based on the facts herein, that there is real possibility the court may not be impartial as it has expressed discomfort based on the perception of the

counsel for the applicant's demeanor in its treatment of the applicant and ought to recuse itself.

- 16.** The applicants submitted that their right to a fair hearing Under Article 50 of the Constitution is not limited and that their application is made in furtherance to that right.

Respondents Submissions

- 17.** The respondent has submitted that the application is without merit, lacking both factual foundation and legal basis as described in the Grounds of opposition.
- 18.** The respondent avers that the applicant bears the burden of demonstrating the grounds for recusal exist which should be supported by concrete facts and not mere allegations, speculation or subjective belief.
- 19.** That the applicants have not attempted to particularize that which they are accusing the Judge for, and for that reason, their assertions fall short of establishing any real likelihood or reasonable apprehension of bias. Reliance was placed on the case of **Philip K. Tunoi & another Vs Judicial Service Commission & Another (2016)** by emphasizing that allegations of bias must be supported by cogent evidence. Further reliance was placed on the case of **Republic vs Mwalulu & 8 others (2005) 1KLR**

which adopted the position that bias must be specifically alleged and established.

- 20.** The court was urged to consider the case of **Moilo & 2 Others (Suing on their own behalf and in their capacity as National Officials of Bethel Church) Vs Kariuki & 8 Others (Being sued on their own behalf and on behalf of the members of Bethel Church) (2022) KEELC 133316 (KLR)** which acknowledged the high standard of proof required when the court is confronted with allegations of bias.
- 21.** On whether adverse rulings and findings constitute bias, the respondents relied on the case of **Saad Yusuf Saad vs Independent Electoral and Boundaries Commission (IEBC) (2017) eKLR** where it adopted the jurisprudence of the Court of Appeal in England in **Locabail (UK) Ltd Vs Bayfield Properties Ltd (2000) QB 451** that recusal of a Judge based on unfavourable rulings and adverse findings should not be raised.

Analysis and Determination

- 22.** The court has considered the application and all the material that has been placed before it including written submissions. The only issue for determination is whether the application has met the threshold for recusal.

23. The application has been brought **under Regulations 9 and 21 (1) (d) of the Judicial Service (Code of conducts and Ethics) Regulations 2020 and Article 50 of the Constitution. Regulation 21** provides for recusal and it states 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 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.”*

24. On the other hand, **Regulation 21(3)** of the same Regulations provides for situations in which a Judge should not recuse themselves. It reads:-

- “A Judge may not recuse himself or herself if-*
- a) No other Judge can deal with the case; or*
 - b) Because of urgent circumstances, failure to act could lead to a serious miscarriage of justice;*

c) The merits of the application for recusal has been considered by a plural bench of Judges, and recusal held to be unnecessary.

25. The test for application for recusal was expressed by the House of Lords in the case of **Porter Vs Magill (supra)** and it was mentioned with approval in the Court of Appeal Decision in **Philip K. Tunoi (Supra)** as follows; The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

26. It is a well-established doctrine that Judges have a duty to sit and hear cases unless clear, objective grounds for disqualification exist. The court in the case of **Shollei (supra)** had this to say about that Doctrine;

“Tied to the Constitutional argument above, is the doctrine of the duty of a Judge to sit. Though not profound in our jurisdiction, every Judge has a duty to sit, in a matter which he should sit. So that recusal should not be used to cripple a Judge from sitting to hear a matter, this duty to sit is buttressed by the fact that every Judge takes an oath of office “to serve impartially; and to protect, administer and defend the Constitution.” It is a doctrine that recognizes that having taken the oath of office, a Judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties’ right to have their cases heard and determined before a court of law.”

- 27.** The applicants herein have alleged that the Judge made some remarks about the counsel for the applicants when the counsel raised an objection to the production of some documents from the Business Registration Services by PW1. That the Judge took great exception and made negative comments over the matter.
- 28.** It is also the applicant's assertion that when his counsel made an oral application for adjournment in E027 of 2022, the Judge made reference to the proceedings in HCACES E027 of 2022. The applicants alleges that the comment made by the Judge did create a reasonable perception of bias in the applicants.
- 29.** As submitted by the respondent, a high standard of proof is required when a court is confronted with an allegation of bias. All what the applicants are doing in this application is giving the chronology of events and not leading any evidence as to the bias. Mere dissatisfaction with judicial rulings, and assumptions about views or purported comments concerning conduct of counsel as in this case, do not ordinarily fulfill the threshold.
- 30.** In my considered view, the applicants have not proffered good grounds why the Judge should recuse herself. However, in the interest of justice, I will allow the application and refer the matter

to my colleague in the Division, Hon. Justice Musyoki, for hearing and final determination.

31. No order is made on the costs of the application.

Signed, dated and delivered virtually on this 12th day of November 2025.

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L.M. NJUGUNA
JUDGE

In the presence of:-

Miss Ochola for the Plaintiff

No appearance for the Respondent

Court assistant - Aden

ORIGINAL