



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E037 OF 2024

M'ITHINJI

NGAINE.....APPELLANT

=VERSUS=

JOHN KINOTI MWANIRUA [*Sued as the Personal*

Representative

of CHARLES MWANIRUA -

Deceased).....RESPONDENT

(An Appeal against the Ruling of the Senior Resident Magistrate Court at Nkubu [Hon. R. Ongira - SRM] rendered on 30/4/2024 in Nkubu SPMC E & L Case No. E055 of 2021)

RULING

1. Falling for determination in this ruling is the notice of motion dated 30/7/2025, expressed as brought by **“FOR NAHASHON KARUTI, ADVOCATE”** (sic). The application seeks recusal of the Honourable Court and placement of the matter before the next nearest ELC Judge for hearing and final determination. The application is opposed by the appellant. The single issue falling for determination in the

application is whether the criteria for recusal of a judge on the ground of bias has been met.

2. The application was premised on the grounds set out in the motion and in the supporting affidavit of **John Kinoti Mwanirua**, dated 30/7/2025. It was canvassed through written submissions dated 5/9/2025, filed by **Nahashon Karuti, Advocate**. The case of the applicant is that, on 7/7/2025, this court exhibited open bias against the case and against the interest of the applicant and the beneficiaries of the estate of the deceased original respondent and showed bias in favour of the appellant. The applicant contends that on the said date, this court inappropriately and in furtherance of bias and/or prejudice, slammed on the beneficiaries of the estate of the deceased respondent an adverse order staying execution of the decree of the lower court when the position of the prevailing law and all the facts on record and all the circumstances of the matter militated against the granting of such order. He adds that the granted order was not based on the facts before the court nor on the law but was made out of bias on part of the court.
3. In his written submissions dated 5/9/2025, the applicant argued that, the court being fully aware of the position of the law; that no substantive proceedings and no substantive orders may be made against unrepresented and unidentified beneficiaries of the estate of a deceased party in a suit before substitution of the deceased is made, disregarded the law and out of bias or prejudice or being influenced by factors other than the facts on record before it, slammed

upon the beneficiaries of the estate of the deceased respondent an order staying execution of the lower court's decree, thus effectively denying them the opportunity to take possession of the suit land.

- 4.** Counsel for the appellant contended that on 7/7/2025, in disregard of the position of the law and out of bias, the court proceeded to invoke "some provisions of the Succession Act, Cap 160 Laws of Kenya, as requiring beneficiaries of the deceased respondent to take steps to pursue an order of substitution so as to hasten the prosecution of the appeal on behalf of the appellant while not bothering to write into the record the particulars or the substance of the said provisions of the Succession Act."
- 5.** Counsel added that on 7/7/2025, while aware that the appellant had done nothing to effect substitution of the deceased respondent, the court, out of bias and/or prejudice, shifted blame for the delay to the "descendants of the deceased respondent and slammed on them the adverse order of stay of execution of the decree of the lower court." Counsel contended that the court was aware that what was before it was the issue of substitution of the deceased respondent in the appeal.
- 6.** Counsel further argued that, the court being fully aware of the position of the law; that stay as an equitable remedy is defeated by inordinate delay; and being aware of the exceptional delay in bringing the application dated 7/8/2024, proceeded out of bias or out of being influenced by factors outside the record before it and granted an order staying execution of the lower court's decree when the law and the

facts on record did not avail the appellant any case for the order at all. Counsel further argued that the court being fully aware of the position of the law; that for stay to be granted in an appeal, the appellant had to demonstrate that he had an arguable appeal, proceeded on 7/7/2025, out of bias or out of being influenced by factors outside the facts and the record before it, to issue a stay order without making a finding on whether or not the appellant had an arguable appeal. Lastly, counsel submitted that while aware that the discretion of the court to order stay of execution is exercisable only judiciously and as guided by the facts before it, proceeded on 7/7/2025 to make the order of stay out of other factors not on record or out of bias.

7. Counsel argued that once a party shows that he is apprehensive that he will not get a fair trial and shows reasonable grounds for the apprehension, it becomes necessary for the court to recuse itself and let the matter be heard by another court because justice must not only be done but must also be seen to be done.
8. The appellant opposed the application through his replying affidavit dated 26/9/2025 and written submissions dated 29/9/2025, filed by **M/s Thangicia M David & Co Advocates**. The case of the appellant is that the application is hopeless, malicious, vexatious, frivolous and an abuse of the process of the court, and is only meant to spite the court and delay the expeditious hearing and determination of the appeal. He contends that the applicant has not raised any ground of impropriety, bias or conflict of interest on the part of court to warrant recusal of the Presiding Judge.

- 9.** The appellant adds that the application is meant to intimidate the court by a party whose desire is to engage in unfair play before the court of justice, which action should not be condoned. He states that the application alleges bias but no proof has been demonstrated. The respondent further states that the applicant's main grievance is the directions given by the court on 7/7/2025 but he elected not to annex the said directions to the application, hence there is no substratum of the allegation of bias.
- 10.** The appellant contends that the applicant misunderstood the purpose of an application for stay, adding that stay is not sought merely because an appeal has been lodged but is sought when there is an imminent danger, threat, or attempt to cause an applicant harm or danger while issues are pending determination. He further contends that his application dated 7/8/2024 indicates that he moved the court for a stay order because the applicant had started execution of the decree in Nkubu ELC E055 of 2021 against him, which was an imminent threat to his life and property.
- 11.** The appellant adds that there was no delay in bringing his application because the documents relating to execution were dated 22/7/2024 and he filed his application on 7/8/2024, barely 16 days later. He states that when the applicant realized that the appellant was not granted an ex-parte interim order of stay of execution at the time he presented the application under a certificate of urgency, he started moving with speed to evict him from the suit land. The appellant further states that to succeed in his scheme,

the applicant used his counsel to delay the expeditious disposal of the application for stay.

- 12.** The appellant contends that he cannot be accused of any delay in the matter because from the record, it is the applicant who has overworked to frustrate the hearing and determination of the matter. He further contends that the applicant secretly obtained a grant of letters of administration relating to the estate of the deceased respondent on 11/12/2024 in **Nkubu Miscellaneous Succession Cause No. E069 of 2024** and concealed that information from this court. The appellant adds that the grant was applied for and obtained by the applicant's counsel on record and the duo colluded to conceal that material fact from this court.
- 13.** The appellant states that when the matter was in court on 18/2/2025, the applicant had obtained the grant of representation but they concealed that information from the court. He further states that when he discovered that the applicant's counsel was representing the applicant in the lower court, he informed this court but the applicant's counsel denied having any instructions from the applicant. The appellant adds that when his counsel perused the lower court file, he discovered a grant had been issued to the applicant and he immediately filed an application for substitution under a certificate of urgency dated 28/3/2025 and the application was listed for inter-partes hearing on 29/4/2025.
- 14.** The appellant contends that on 29/4/2025, the applicant's counsel denied representing the applicant in this appeal

despite having been served with the application and acknowledging receipt of the application for substitution on 3/4/2025 without protest. He further contends that the applicant never denied service nor wrote to his advocate nor returned the application served upon his advocate, indicating his lack of instructions, adding that the applicant is a party scheming to delay the matter because he could not be prosecuting execution in the trial court with the same counsel yet they were not discussing this appeal despite his counsel having been served with a certificate of urgency.

- 15.** The appellant states that due to issues of personal representation of the deceased respondent in the appeal, the court ordered him to serve the applicant personally, which he did on 18/6/2025. He further states that by 7/7/2025, the date when the application was by consent set for hearing, the applicant had not filed any response to the application and his counsel had several excuses why they had not responded to the application. The appellant adds that the applicant had not responded to the application because he was working to execute the impugned judgment in the trial court to remove him from the disputed land.
- 16.** The appellant contends that it was in the interest of justice that the interim order of stay of execution was granted, adding that the applicant delayed the matter so that he could succeed in evicting him from the suit land before the application for stay of execution is heard and determined.
- 17.** The appellant contends that if the applicant was dissatisfied with the orders given on 7/7/2025, he ought to have applied for review or appealed against them instead of accusing the

court of bias for carrying out its mandate. He urges the court to dismiss the application with costs.

- 18.** The Court has considered the application, the response to the application and the parties' respective submissions. As observed in the opening paragraph of this ruling, the single issue to be determined in the application is whether the criteria for recusal of a judge on the ground of bias has been met. What is the criteria for recusal of a judge on the ground of bias?
- 19.** In ***Jasbir Singh Rai and 3 Others vs Tarlochan Singh Rai and 4 Others (2013) eKLR***, the Supreme Court of Kenya cited with approval the following criteria outlined in the American case of ***Perry v Schwarzenegger; 671 F 3d 1052 (9th Gr. February 7, 2012)***:

“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.”

- 20.** Our superior courts have in many decisions cited with approval the following test that was outlined by the Supreme Court of Canada in ***R v S (R.D) (1977)3 SCR 484***:

“The apprehension of bias must be a reasonable one held by reasonable and right, minded persons, applying themselves

to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of

demonstrating bias lies with the person who is alleging its existence.”

21. In ***Kalpana Rawal v Judicial Service Commission & 2 others (2016) eKLR***, the Court of Appeal, while adopting the test in the Canadian Case of ***R v S (RD) (1977)3 SCR 484*** stated as follows:

“An application for recusal of a judge in a case in which actual bias is established on the part of the judge hardly poses any difficulties; the judge must, without more, recuse himself. Such is the situation where a judge is a part to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario, bias is presumed to exist and the judge is automatically disqualified. The challenge, however, arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of a judge.....”

22. In ***R v Jackson Mwalulu & others Civil Application No. Nrb 310 of 2004***, the Court of Appeal outlined the test as follows:

- 1.** ***“When courts are faced with proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of 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.”

2. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases, they are unable or unwilling to see the correctness of the verdict and are apt to attribute the verdict to a bias in the mind of the judge, magistrate or tribunal.”

23. The application under consideration is anchored entirely on the proceedings and orders of 7/7/2025. For proper understanding of the context, the said proceedings and orders are reproduced verbatim herebelow:

“7/7/2025

Coram: Justice B M Eboso - J

CA- Tupet

Mr Karuti for the Deceased Respondent

Mr Thangicia for the Appellant

Mr. Thangicia - We served the application for joinder. We have filed an affidavit of service.

SIGNED

Mr Karuti - The intended respondent has contacted me. I pray for another date to enable me take adequate instructions.

SIGNED

Mr Thangicia - I am concerned about the back and forth by the estate. Should the court accommodate the plea for more time, I pray that there be a temporary stay. The estate is proceeding to execute.

SIGNED

Mr. Karuti - I pray for one month.

SIGNED

Court - 1. The respondent is granted 10 days within which to file and serve a response to the application dated 28/3/2025.

2. There shall be the right of rejoinder by the applicant.

3. Given that it is the estate of the deceased that is occasioning today's adjournment, prayer 4 of the application dated 7/8/2024 is granted pending interpartes hearing of the application dated 28/3/2025. The application dated 28/3/2025 shall be heard on 30/7/2025

SIGNED

24. At the time the above orders were issued, the court was seized of the following two applications:

(i) An application by the appellant, dated 7/8/2024, seeking 11 prayers. Prayer 4 was a plea for an interim order of stay of execution in Nkubu SPMC E & L Case No. E055 of 2021 pending the hearing and determination of the application.

(ii) An application by the appellant, dated 28/3/2025. Among, other reliefs, the application sought an order substituting John Kinoti Mwanirua in place of Charles Mwanirua [deceased] as the respondent in the appeal.

25. The contextual background against which the interim stay order was issued was that, Charles Mwanirua was the original defendant and counterclaimant in the case in the lower court, **Nkubu SPMC E & L Case No. E055 of 2021**. Judgment in the said case was rendered on 11/1/2024 in his favour. Subsequent to that, the appellant filed an application for review of the said judgement. The application for review was rejected vide a ruling dated 30/4/2024. The appellant subsequently brought this appeal, challenging the ruling.

26. On 7/8/2024, the appellant brought the application dated 7/8/2024 within the appeal, seeking, among other reliefs, an order of stay of execution pending the hearing and disposal of the appeal. He also sought an interim order of stay of execution pending the inter-partes hearing of the application.

- 27.** Charles Mwanirua subsequently died on 13/9/2024 during pendency of the application and the appeal. The application dated 7/8/2024 could not be prosecuted because Charles Mwanirua [*the original decree holder in the lower court and the original respondent in this appeal*] had died.
- 28.** Subsequent to that, **John Kinoti Mwanirua** filed in the trial court an application dated 31/12/2024 seeking to be substituted in place of **Charles Mwanirua** as the defendant/decreed-holder, based on a limited grant issued in **Nkubu SPMC Miscellaneous Succession Cause No. E069 of 2024** on 16/12/2024. The plea for an order of substitution in the trial court was granted.
- 29.** When the application for stay of execution came up for directions before the current Presiding Judge for the first time on 15/2/2025, Mr Karuti [*the advocate for the current respondent in this appeal*] appeared for the estate of the deceased respondent in the appeal and informed the court that the original respondent had died. He emphasized that the lower court case was “a different matter”, meaning that he had no instructions to accede to automatic substitution in the appeal. The estate took this position notwithstanding the fact that the personal representative substituted in the trial court automatically becomes the deceased party’s successor in an appeal arising from the deceased party’s case in the trial court. The court listed the matter for directions on 5/5/2025 and gave the appellant the liberty to apply for substitution.
- 30.** When the appellant subsequently brought the application dated 28/3/2025 seeking substitution orders, the application

was listed for hearing on 29/4/2025. Mr Kinoti attended court on the said date on behalf of the deceased respondent [the estate] in the appeal and indicated that he did not have instructions from John Kinoti Mwanirua. He stated that the appellant needed to serve Mr John Kinoti Mwanirua. The court listed the matter for hearing of the application for substitution on 7/7/2025.

- 31.** The proceedings of 7/7/2025 have been reproduced above verbatim. Suffice it to state that, satisfied that, while still alive, the deceased had been served with the application for stay of execution, dated 7/8/2024; and that the deceased's personal representative [John Kinoti Mwanirua] had been duly served with the application for substitution, dated 28/3/2025, but was not ready for the interpartes hearing of the application for substitution, the court, at the request of the appellant, granted an interim order staying execution of the judgement in the lower court. The order was interim in nature and was informed by the fact that whereas the applicant was not ready for the interpartes hearing of the application seeking orders of substitution in the appeal to facilitate disposal of the application for stay of execution, he was proceeding to execute the lower court's decree that was the subject of the stay application. Secondly, the plea for an interim order of stay of execution was formally sought as prayer 4 in the application dated 7/8/2024. Thirdly, the court was alive to the fact that under the Law of Succession Act, John Kinoti Mwanirua, as the duly appointed personal representative of the deceased and as the duly substituted defendant/counterclaimant/decreed-holder in the trial court, was the automatic respondent in the resultant appeal but

was delaying substitution and prosecution of the application for stay orders.

- 32.** The applicant has casually stated, severally, that the stay order of 7/7/2025 was influenced by bias and/or factors not on record. He has, however, not tendered any evidence to support the allegation. He has not stated the law that bars an appellate court from exercising discretion inter-partes to grant a properly sought temporary stay order in a case where the opposing party delays disposal of the application for stay. What is clear to the court is that, as at 7/7/2025, the applicant was not ready for hearing of the application for substitution in this appeal and was said to be busy pursuing execution in the lower court. The court has no doubt in its mind that it acted objectively and fairly in granting the interim stay order to prevent abuse of the court process.
- 33.** For the above reasons, the court comes to the finding that no proper basis has been laid to warrant recusal of the current Presiding Judge. Put differently, the application under consideration has not met the test for recusal of a judge on the ground of bias.
- 34.** Consequently, the application dated 30/7/2025 is rejected and dismissed for lack of merit. Costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF NOVEMBER, 2025.

B M EBOSO [MR]

ELC JUDGE

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