REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

MISC CIVIL APPLICATION NO. E002 OF 2025

PAUL HIRBO ISATU ……..……APPLICANT

VERSUS

ABDIKADIR D. DALACHA ……...……RESPONDENTS

RULING

1. What is before me is [sic] the undated Notice of Motion Application filed by and on behalf of the Applicant and wherein the applicant has sought the following reliefs:
    (i) *That this Honourable court be pleased to call for and examine the records in ELC case No. 6 of 2020 and 14 of 2019 pending before the senior resident magistrate's court at Marsabit and issue such supervisory orders or directions as may be just in the circumstances.*
    (ii) *That pending the hearing and determination of this application, there be a stay of proceedings in ELC Case No. 6 of 2020 and ELC 14 of 2019.*
    (iii) *That this honorable court be pleased to transfer the said matters to another magistrate's court of competent jurisdiction for hearing and determination.*
    (iv) *That the Honourable magistrate currently presiding over the said matters be recused or disqualified from further conduct thereof on account of demonstrated or apparent bias, prior prejudicial rulings and judicial delay.*
    (v) *That the costs of this Application be provided for.*

2. The subject application which is escorted by the certificate of urgency dated 8th May 2025, is premised on various grounds. The grounds have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of one Paul Hirbo Isatu [the applicant] sworn on 8th May 2025 and wherein the applicant has reiterated the grounds contained at the foot of the application. In particular, the deponent has contended that same has lost faith in the learned magistrate who is handling the cases, *namely*; Marsabit ELC No. 6 of 2020 and Marsabit ELC No. 14 of 2019 respectively.
3. Additionally, the deponent has contended that the cases under reference have been pending before the senior resident magistrate for more than 7 years and thus the necessity to disqualify the trial court from continuing to entertain the said proceedings.

4. Furthermore, the deponent has also contended that the trial magistrate has exhibited and displayed bias and recently the trial magistrate imposed costs of Kshs.80,000/= only, against same when he [deponent] sought time to instruct/retain new counsel.

5. The respondent filed a response to the application *vide* Replying affidavit sworn on 19th May 2025; and to which the deponent has annexed assorted documents including; a copy of the proceedings in respect of Marsabit ELC No. 6 of 2020; Judgment of the ELC Court Vide Isiolo ELC appeal No. 1 of 2023 and ruling of the court of appeal in respect of civil application No. E050 of 2024 – Nyeri.
6. In particular, the respondent has posited that the subject application constitutes an attempt by the applicant to window shop for a magistrate of choice to hear and entertain his suits. Moreover, it has been contended

that the applicant herein is the one who is responsible for delaying the hearing and determination of the named suits. Additionally, it has been contended that the subject application constitutes an abuse of the due process of the court.

7. The instant application came up for hearing on 19th November 2025; whereupon learned counsel for the applicant intimated to the court that the hearing date had been duly served upon the respondent. Nevertheless, the respondent was absent. In this regard, learned counsel for the applicant sought directions of the court as pertains to the hearing of the application. Suffice it to state that the court issued directions and confirmed that the respondent had been duly served. In this regard, the application under reference proceeded for hearing.

8. Learned counsel for the applicant adopted the grounds at the foot of the application and thereafter reiterated the contents of the supporting affidavit and the annexures thereto. Moreover, learned counsel for the applicant sought to highlight two [2] issues for consideration and determination by the court.

9. Firstly, learned counsel for the applicant has submitted that the applicant herein has developed apprehension and fear that same shall not be able to obtain justice before the learned magistrate. In particular, it was contended that the applicant has developed fear as pertains to the impartiality and fairness of the learned magistrate. In this regard, learned counsel invited the court to find and hold that basis has been laid to warrant the recusal/disqualification of the learned magistrate.

10. Additionally, it has been submitted that once the magistrate is disqualified, then this court ought to decree the withdrawal and transfer of the two suits for hearing and determination before another court of competent jurisdiction. In any event, it was posited that this court ought to ensure that the applicant's rights to access to justice and fair hearing are protected and preserved.

11. Secondly, learned counsel for the applicant has submitted that the subject application ought not to be declined on the basis of technicalities. In particular, it was contended that the application beforehand can be entertained and adjudicated upon by this court and not necessarily the magistrate whose recusal is being sought. Simply put, learned counsel for the applicant invited the court to invoke and deploy the provisions of article 159 (2) (d) of the Constitution 2010, which underpins the legal position that justice shall be rendered without undue regard to procedural technicalities.

12. Flowing from the foregoing, learned counsel for the applicant has invited the court to find and hold that the application is meritorious and thus warrants the issuance of the orders sought.

13. *In a nutshell*, learned counsel implored the court to grant the reliefs sought.

14. Having reviewed the Notice of Motion Application; the supporting affidavit thereto; and upon consideration of the oral submissions rendered on behalf of the appellant, I come to the conclusion that the determination of the subject application turns on two [2] key issues, *namely*; whether

this court is seized of the requisite jurisdiction to entertain the application and essentially the limb pertaining to disqualification of the learned magistrate; and whether the application constitutes an abuse of the due process of the court.

15. Regarding the first issue, *namely;* whether this court has jurisdiction to entertain and adjudicate upon the limb dealing with the disqualification of the learned magistrate, it is important to recall and reiterate that the judicial officers and the judges alike, do take oath to administer justice in accordance with the constitution and the law. The taking of oath of office bestows upon the judicial officers and the judges the obligation or duty to sit and hear all legal disputes placed before same for adjudication.

16. The duty to sit is fundamental and it enables the judicial officers and the judges to discharge their mandate without fear or favour. The duty to sit also enables the judicial officers and judges to act without intimidation by any party.

17. The significance of the duty to sit was highlighted by the Court of Appeal in the case of ***GALAXY PAINTS COMPANY LIMITED vs FALCON GUARDS LIMITED [1999] KECA 136 (KLR),*** where the court stated thus;

> *Although it is important that justice must be seen to be done,* ***it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge****, they will have their case tried by someone thought to be more likely to decide the case in their*

favour. See ***Raybos Australia Pr operty Limited & another v. Tectram Cooperation Property Ltd. & Others 6 NSWLR 272.***

18. Notwithstanding the foregoing, it is common ground that there are instances where a judicial officer or judge may be called to recuse or disqualify self from entertaining or hearing a particular matter. The Judicial Service Act and the Judicial Service (Code of Conduct) Regulations 2021 highlight instances where recusal/disqualification may arise.

19. In particular, **Regulation 21 of the Judicial Service [code of standards and ethics] Regulations 2020** states as hereunder;

"21 (1) 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 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."

20. I have pointed out that instances often arise where recusal or disqualification becomes necessary. However, it is imperative to underscore that the application for recusal/disqualification must of necessity be mounted before the judicial officer or the judge, whose recusal is sought. Moreover, it behooves the applicant to substantiate the allegations underpinning recusal. In addition, it is not lost on me that an order for recusal or disqualification does not issue for the mere asking.

21. It is also important to highlight that orders for recusal or disqualification ought to issue only in appropriate cases. Unless this is done, there is a likelihood of disgruntled, dissatisfied or displeased parties invoking recusal as a tool for vengeance and convenience. Such an endeavor must not be countenanced.

22. *In a nutshell*, my answer to issue number one [1] is to the effect that the motion for recusal or disqualification of the trial magistrate, who is handling Marsabit ELC No. 6 of 2020 and Marsabit ELC No. 14 of 2019, respectively, ought to have been mounted and prosecuted before the said court.

23. It is the said court that would have the jurisdiction to interrogate the allegations; accusations; or charges being mounted and thereafter discern whether the assertions have been proven to the requisite standard or otherwise. [See ***Gachagua & 5 others v Maingi & 80 others (Civil Appeal E829 of 2024 & E022 of 2025 (Consolidated)) [2025] KECA 790 (KLR) (9 May 2025) (Judgment),***

24. Turning to the second issue, *namely;* whether the subject application constitutes an abuse of the due process of the court, it is important to highlight that the applicant is aware that the recusal of a trial court is not a light matter. Furthermore, the applicant is aware that before a court can recuse/disqualify itself, the allegations underpinning the plea for recusal must be proven/established to the requisite standard.

25. Other than the foregoing, it is not lost on me that the applicant herein is alive to the fact that same has been substantially responsible for the delay in the hearing of the matter before the magistrate. These facts are evident from the proceedings which have been annexed to the replying affidavit by the respondent and which replying affidavit forms part of the record of the court.

26. Nevertheless, the applicant herein still has the temerity to approach this court and to contend that the trial magistrate has been responsible for delaying the hearing of this matter in question. I am afraid that the applicant herein has resorted to the subject application merely for the sake of it. Moreover, the applicant herein seems to be engaging in a game of forum shopping, for reason[s] only known to him.

27. In my humble, albeit considered view, the depositions [averments] contained in the body of the supporting affidavit and the circumstances surrounding the instant matter demonstrate an endeavor to abuse the due process of the court.

28. What constitutes an abuse of the due process of the court has been elaborated in a plethora of decisions.

29. In the case of ***Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR),*** the Court discussed the concept of abuse of the due process of the court and highlighted various perspectives.

30. For coherence, the court stated thus;

> *30. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process.[20]The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in Court proceedings. These are, first, that the Court protect its ability to function as a Court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the Court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.[21]*
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> *31. The concept of abuse of process overlaps with the obligation of a Court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience. [22]The obligation on a court is to provide a fair trial in accordance with law. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained.[23]*

31. In my humble albeit considered view; and without belabouring the point, I come to the conclusion that the subject application constitutes an abuse of the due process of the court.

32. Finally, and before concluding on this matter, it is appropriate to address the submission by learned counsel for the applicant who contended that the filing of the subject application before this court in lieu of the court whose disqualification was sought is a procedural technicality.

33. I beg to state that the filing of an application or a matter before a court which is not seized of the requisite jurisdiction cannot be termed a procedural technicality. Instructively, jurisdiction is a substantive issue. Moreover, jurisdiction goes to the root of the matter. Notably, an issue that touches on the substance and jurisdiction of a court cannot be cured by the invocation and deployment of Article 159 (2) (d) of the Constitution 2010.

34. Lastly, it is important to draw the attention of learned counsel for the Applicant to the holding of the Court of Appeal in the case of ***Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR) (26 July 2013) (Judgment)***, where a Five-Judge bench of the court stated as hereunder;

> *In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to* ***Article 159*** *of the Constitution and the overriding objective principle under* ***section 1A*** *and* ***1B*** *of the Civil Procedure Act (Cap 21) and* ***section 3A*** *and* ***3B*** *of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just*

determination of cases. [see also the holding in the case of Scope Telematics Sales International vs Stoic Ltd & another (2017) eKLR].

35. Flowing from the foregoing, I find and hold that the application before me is premature, misconceived and legally untenable. Having found that the crux of the application is misconceived, no basis arises for purposes of transferring the matter to any other magistrate with competent jurisdiction. Suffice it to state that a transfer of a matter from one court to another can only be undertaken for sufficient cause or reason shown; and not whimsically, or arbitrarily.

FINAL DISPOSITION.

36. For the reasons which have been highlighted in the body of the Ruling, it must have become crystal clear that the Notice of Motion Application before me is legally untenable.

37. Same courts, and is a sure candidate for dismissal.

38. In the upshot, the final orders that commend themselves tome are as hereunder;

(i) The undated Notice of Motion Application, [albeit escorted by the certificate of urgency dated 8th May 2025] be and is hereby dismissed.

(ii) No orders as to costs.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 19TH DAY OF NOVEMBER 2025.

OGUTTU MBOYA, FCIArb, CPM [MTI].

JUDGE.

In the presence of:

Hussein/Mukami – Court Assistants

Mr. Kiget for the Applicant

No appearance for the Respondent