

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E131 OF 2021

(Consolidated with ELC NO. E136 OF 2021)

HUSSEIN AHMED FARAH 1ST

PLAINTIFF

HUSSEIN UNSHUR MOHAMED 2ND

PLAINTIFF MOHAMED ADIKADIR ADAN

3RD PLAINTIFF

VERSUS

YUSUF ABDI ADAN

DEFENDANT

RULING

1. What is before the Court for determination is the Defendant's Notice of Motion application dated 25th September 2025 where he seeks the following Orders:

a) That the Honourable trial judge in the above matter be obligated to disqualify and/or recuse herself from further hearing the above matter.

b) That any other order which the Honourable court may deem fit and just to grant in the circumstances.

2. The application is premised on grounds on its face and on the Defendant's supporting affidavit. He avers that despite his advanced age of 86 years, the Court has been oppressive to him in that it denied him the opportunity to tender his evidence. Further, that his advanced age makes him susceptible to sickness hence occasional failure to attend Court. He explains that the Court has not been soft, ostensibly for the Plaintiffs to have undue advantage over him and secure a favourable judgement.

3. He claims that he has merited fear that the Court has been compromised and has a valid apprehension that he will not be accorded a fair trial due to the conduct of the Plaintiffs on the ground as they have warned tenants currently on the

suit premises, Bangkok Shopping Mall **LR 36/vii/405** that soon, they will evict them from the said suit premises since they are expecting to get favourable orders from this Court, confidence which comes from enjoying favours from Honourable Lady Justice Omenge. Further, that the manner in which the trial Court has been handling the matter is a pointer to the fact that the Court is not impartial.

4. He contends that there is apparent bias towards him on the part of the trial Judge orchestrated by the fact that the trial Court never gave him space to tender his evidence. Further, that the trial Court intends to hasten the process of trial so as to conclude the case for the benefit of the Plaintiffs to his detriment. He insists that the attitude of the trial Judge though subtle is hostile towards him to the advantage of the Plaintiffs.

5. The application is opposed by the Plaintiffs vide the 3rd Plaintiff's replying affidavit. He avers that it has now become routine for the Defendant to file applications containing a

wide range of unsupported allegations against every Judge who sits in the matter. He points out that this Court (Hon. Lady Justice Christine Ochieng) has only mentioned the matter once when both parties appraised her on the status of the matter and she gave a mention for directions on 30th September 2025.

6. Further, that the Defendant is in the habit of overwhelming the Court with multiple applications including complaints to the Judicial Service Commission, with the sole objective of delaying the matter and urges the Court to sanction advocates representing him for their abuse of Court process and in order to maintain the integrity of the judicial process.
7. He asserts that the Defendant does not set out to establish objectively the grounds for the Judge to recuse herself such as proving cogent evidence that demonstrates that she has done something that gives rise to reasonable apprehension of bias. He also points out that the instant application is word

for word similar to the recusal application filed herein against Hon. Lady Justice Omenge dated the 9th May 2025.

8. He contends that the application is a camouflage for an attempt to scuttle the entire proceedings and hearing as the Defendant benefits from the delay since he continues to exclusively possess, control, manage and collect all rent from the suit premises to the exclusion of the Plaintiffs who are co-registered owners. Further, that he also continues to disobey this Court's orders of 26th April 2022 that directed the tenants to deposit all the rent into a joint interest earning account in the names of the parties' advocates with effect from 1st June, 2022.
9. The application was canvassed by way of written submissions which was only filed by the Plaintiffs.

Submissions

10. The Plaintiffs reiterate the averments made in their replying affidavit

and submit that recusal requires concrete facts, not flimsy allegations or mere suspicion as presented by the Defendant which do not set out to establish objectively, the grounds or demonstrate any of the Judge's actions that would have given rise to a reasonable apprehension of bias. The Plaintiffs also submit that Article 48 of the Constitution and the overriding objective require Courts to resolve cases in a way that is just, expeditious, proportionate and cost effective thus it should not accept the Defendant's delaying tactics. It is also the Plaintiffs' submission that an advocate has a duty to the Court which takes precedence over their duty to a client and as an officer of the Court, must act with integrity to ensure the legal process is not subverted. Further, that a Court has inherent authority to sanction bad-faith conduct and manage litigants to maintain the integrity of the judicial process as an advocate cannot make unjustified allegations against a Court to scandalize its authority.

11. To buttress their averments, they relied on the following decisions: **Gladys Boss Sholei v Judicial Service Commission & 2 others [2018] eKLR, Galaxy paints company limited v falcon guards limited [1999] eKLR, Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested parties) (Constitutional Petition No. E0304 of 2023) [2024] KEHC 1632(KLR) and Bernert v ABSA Bank Ltd [2011]3 SA 92(CC)** were relied upon.

Analysis and Determination

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and Plaintiffs' submissions, the only issue for determination is whether the trial Judge should recuse herself from handling this matter.

13. The Defendant has called for the recusal of the trial judge on grounds that she is partial, biased against him and that he is apprehensive that he will be denied justice since the Plaintiffs appear to know that the outcome of the case will

favour them as they have even communicated to the tenants occupying the suit premises of their imminent eviction.

- 14.** On their part, the Plaintiffs contend that nothing contained in the application meets the high threshold for Judicial recusal nor rebuts the doctrine of the duty to sit. Further, that the Defendant has not provided the facts of the Judge's partiality. The Plaintiffs also avers that the Defendant files multiple applications to unduly delay proceedings in utter disregard of Article 48 of the Constitution.
- 15.** On recusal, Regulation 21 (d) of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 provides that actual bias /prejudice concerning a party is a ground for recusal of a Judge.
- 16.** From the Court records, it reveals that on the 18th June 2025, Hon. Lady Justice Omange released this file vide a Ruling on an application for her recusal which had been filed by the Defendant herein. This Court thereafter mentioned the matter once on 10th July 2025, when both parties appraised

her on the status of the matter and directed for the proceedings to be typed and gave a further mention date on 30th September 2025. Thereafter, the Defendant filed the instant application seeking for the Judge's recusal alleging bias. It is worth noting that the instant application is almost similar to the Application dated the 9th May, 2025 which had sought for the recusal of Hon. Lady Justice Omenge.

17. It is trite that for a party to seek a recusal of a Judge on allegation of partiality and bias, the party has to demonstrate the circumstances which culminated in showing that the trial Judge was not impartial but biased. Further, a keen observer has to conclude that there was possibility of injustice and real danger. It is worth noting that this Court has never proceeded for hearing in this matter nor denied the Defendant audience as claimed. Further, the Court has never been hostile to the Defendant as claimed.

18. In Republic v Export Processing Zones Authority & 2 others; London Distillers (K) Ltd & 3 others (Interested

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eKLR, the Court stated that:

“The facts constituting bias must be specifically alleged and established. For a Judge to recuse himself on the ground of bias, the Applicant has to show that a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case.”

19. While in the case of **Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR**, the Court of Appeal held that:

“In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias. In Taylor v. Lawrence [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased,

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the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:

"... we believe the modest adjustment in R V. Gough is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.".....The facts of this case would not in our view, on the authority of Porter v. Magill (supra) lead a fair-minded and informed observer to conclude that there is real possibility that the Presiding Judge will be biased. It was not shown that circumstances exist that are likely to show that a real possibility exists that the

Presiding Judge's integrity or impartiality might reasonably be questioned.'

20. In applying the test set out in the two decisions to the current scenario, the Court takes judicial notice of the fact that this Court only mentioned the matter once and directed that proceedings be typed after which it scheduled a further mention date. The Defendant claims that he has been denied a right to be heard but I note from the Court record, he is actually the one who sought adjournments and failed to proceed with the Defense case. Further, he even failed to adhere to an Order of the Court issued on the 26th April, 2022 that directed the tenants to deposit all the rent into a joint interest earning account in the names of the parties' advocates with effect from 1st June, 2022. I opine that the Defendant has made unsupported allegations and failed to highlight the real grounds of bias to the required test.

21. In the circumstances and in associating myself with the above cited decisions, I find that the Defendant has failed to meet the threshold set down for recusal of a judicial officer.

22. In the foregoing, I find the Notice of Motion application dated the 25th September 2025 unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Sagana for Plaintiff

Maosa for Defendant

Court assistant: Joan

ORIGINAL