EMM v CWN (Civil Appeal E147 of 2024)
[2025] KEHC 18588 (KLR) (Civ) (18 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E147 OF 2024

H NAMISI, J

DECEMBER 18, 2025

BETWEEN

EMM ..... APPLICANT

AND

CWN ..... RESPONDENT

RULING

1. This Ruling relates to the Notice of Motion dated 27 November 2024, brought by the Appellant/ Applicant under Articles 50 and 159 of *The Constitution* and Sections 1A, 1B, 3, 3A, and 63 of the *Civil Procedure Act*.

2. The application seeks a singular, substantive order: that I, Lady Justice Namisi Helene Rafaela, do recuse myself from further hearing of this appeal.

3. The application is premised on the grounds that the Applicant's right to a fair trial, as guaranteed by Article 50 of *The Constitution*, has been contravened or is threatened with contravention. Specifically, the Applicant alleges that during a mention of this matter on 21 November 2024, I made comments that demonstrated bias and a predetermined mind regarding the issues in dispute.

4. The Application is supported by the Affidavit of the Applicant's Counsel, Paul Mwangi, sworn on 27 November 2024. The crux of the Applicant's complaint arises from an oral application made by his Counsel on 21 November 2024, seeking the suspension of warrants of arrest issued by the lower court pending the hearing of a formal application for stay of execution.

5. The Applicant avers that during this engagement, I made the following remarks:

> " I do not issue stay of execution orders in children matters."

6. Further, the Applicant depones that upon Counsel explaining that the appeal concerned the Appellant's ability to pay, I purportedly inquired what the children were eating. When counsel responded that the mother was capable of caring for them, the Applicant alleges I closed the matter with the words:

> " Even street families feed their children."

7. It is the Applicant's contention that these remarks demonstrate that I have already taken a position on the matter—specifically, that I will effectively never issue the orders sought regardless of the facts or legal arguments—and that I harbor actual bias against the Appellant. He argues that any further hearing before this Court would be a derogation of his constitutional right to a fair hearing.

8. The Application is opposed by the Respondent, through a Replying Affidavit sworn on 20 January 2025 and written submissions dated 26 May 2025.

9. The Respondent contends that the Application is based on speculation and a misapprehension of the law regarding children's matters. She submits that the Court's remarks were not indicative of bias but were reflective of the settled legal principle that stay of execution of maintenance orders is rarely granted as it is generally not in the best interest of the child.

10. Regarding the specific comments, the Respondent argues they were taken out of context. She avers that the Court was exercising its judicial discretion to seek clarification and to prioritize the welfare of the minors, which is paramount. She relies on the decision in LAK v COO [2024] KEHC 7968 (KLR) to support the position that suspending maintenance orders is generally disfavoured where paternity is undisputed.

11. The Respondent submits that the Applicant has failed to meet the high threshold required to prove bias and urges this Court to dismiss the Application with costs.

Analysis & Determination

12. Having considered the Application, the Affidavits, the submissions, and the authorities cited, the single issue for determination is: Whether the Applicant has established sufficient grounds to warrant my recusal from the further conduct of this matter.

13. Recusal is a grave matter. It goes to the very heart of the administration of justice and the confidence litigants and the public repose in the Judiciary. The right to a fair trial under Article 50(1) of *The Constitution* includes the right to be heard by an independent and impartial court.

14. The test for bias in Kenya is well-settled. It is an objective test: whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This test was famously enunciated in Magill vs Porter [2002] 2 AC 357 and has been adopted by our courts in numerous decisions, including Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013] eKLR and the recent Court of Appeal decision in H.E. Rigathi Gachagua v. Thomas Kimotho Maingi & Others [2025] KECA 790 (KLR).

15. In Gachagua (supra), the Court of Appeal reiterated at paragraph 185:

> " The test is objective: whether a fair-minded and informed observer, having considered all the circumstances, would conclude that there exists a real possibility of bias. This standard is concerned, not with the judge's actual state of mind, but with the appearance of partiality as perceived by a reasonable observer."

16. It is important to emphasize that the apprehension of bias must be reasonable. It must be held by a fair-minded and informed observer, not a litigant who is merely disgruntled or overly sensitive. As held in Standard Chartered Financial Services Ltd & 2 Others vs Manchester Outfitters (Suiting Division) Ltd & 2 Others [2016] eKLR:

> " The reasonable person must be taken to know the oath of office of a judge and the fact that a judge is trained to disabuse his mind of irrelevant matters."

17. While a Judge must recuse themselves where there is a real danger of bias, there is a countervailing obligation known as the "duty to sit." A Judge should not accede to a recusal application merely because a party is uncomfortable or because it is the path of least resistance.

18. In Kalpana H. Rawal vs. Judicial Service Commission & 2 Others [2016] eKLR, the Supreme Court cautioned that:

> " Recusal should not be used to cripple a judge from sitting to hear a matter and the 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*."

19. Similarly, the Supreme Court in Gladys Boss Shollei vs Judicial Service Commission & another [2018] eKLR emphasized that the recusal of a Judge is not a step to be taken lightly and must be based on solid grounds, not mere conjecture.

20. I now turn to the specific comments complained of.

"I do not issue stay of execution orders in children matters."

21. The Applicant argues this statement shows I have closed my mind to his Application. A fair-minded observer, however, would view this remark in the context of the law governing children's matters.

22. Article 53(2) of *the Constitution* mandates that a child's best interests are of paramount importance. The courts have consistently held that staying a maintenance order is rarely in a child's best interest. As correctly cited by the Respondent, in LAK vs COO [2024] KEHC 7968 (KLR), the Court stated:

> " The accepted principle in applications for stay of execution of maintenance orders in children's cases is that the suspension of the maintenance order is not in the best interests of the child."

23. When I stated that I do not issue stay orders in such matters, it was a judicial observation reflecting the general position of the law and the high threshold required to obtain such orders. It was not a declaration of personal animus against the Appellant, but a restatement of the heavy burden he faces. A Judge expressing a preliminary view on the law or the difficulty of a party's legal position does not amount to bias.

24. In Arab Bank plc vs Mercantile Holdings Ltd [1994] Ch 71, it was held that the expression of a provisional view by a Judge, even in robust terms, does not constitute bias, provided the Judge remains open to persuasion. My remark was an indication of the legal hurdle the Applicant faced, not a refusal to hear him.

"Even street families feed their children."

25. The Applicant takes great exception to this remark, viewing it as derogatory.

26. Judicial proceedings are often robust. While Judges must always be courteous, they are also guardians of the vulnerable—in this case, the children. The context of this remark was an inquiry into the welfare of the minors during the pendency of the appeal. The duty to maintain a child is statutory and mandatory.

27. A fair-minded observer would understand this comment not as an insult, but as an emphatic judicial reminder that the duty to provide food and sustenance to one's children is absolute and transcends social or financial status. It was a rhetorical emphasis on the non-negotiable nature of a parent's obligation to feed their children, a principle deeply embedded in Article 53 of *The Constitution*.

28. In Galaxy Paints Co. Ltd vs Falcon Guards Ltd [2000] 2 EA 385, the Court of Appeal of Kenya held that:

> " There is a distinction between a judge who has a closed mind and one who expresses himself strongly on the merits of the case... A judge is not disqualified from hearing a case merely because he has expressed his views, even strongly, on a point of law or on the merits of the case during the hearing."

29. The Applicant suggests that because of these remarks, I will not listen to the appeal regarding his ability to pay. This is a leap in logic. The refusal to grant an interim stay of execution, which denies the children immediate support, is distinct from the final determination of the appeal, which assesses the correctness of the Magistrate's quantum. One deals with immediate survival; the other with legal correctness. A refusal to starve the children in the interim does not mean the Court will not fairly assess the Appellant's financial documents during the main appeal.

30. I have examined the allegations against the "double reasonableness" test: is the apprehension of bias reasonable, and is it held by a reasonable person?

31. The Applicant is undoubtedly unhappy with the Court's reluctance to stay the maintenance orders. However, dissatisfaction with a court's legal stance or its robust language regarding parental duties does not equate to bias.

32. To recuse myself on these grounds would be to abdicate my duty to sit. It would set a dangerous precedent where a litigant can force a Judge off a bench simply because the Judge has expressed a strong, legally grounded view on the paramountcy of a child's welfare.

33. I find that a fair-minded and informed observer, knowing that the law heavily disfavours staying maintenance orders, would not conclude that I am biased. They would conclude that I am applying the strict rigors of the *Children Act* and *the Constitution*.

34. Consequently, I find no merit in this Application.

35. Accordingly, the Notice of Motion dated 27 November 2024 is determined as follows:

    i. The application for recusal is dismissed.

    ii. Costs of this application shall be borne by the Applicant.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Applicant: Ms Wangui H/b Paul Mwangi

For the Respondent: No appearance

Court Assistant: Lucy Mwangi