



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
COMM CASE NO. E029 OF 2025

BETWEEN

SARAH NJOKI NYAGA 1ST PLAINTIFF/APPLICANT
BONFIRE ADVENTURES AND EVENTS LTD 2ND
PLAINTIFF/APPLICANT

VERSUS

SIMON WAITHAKA KABU 2ND
DEFENDANT/RESPONDENT

RULING

Background and Introduction

1. For determination is the Notice of Motion application dated 9th February 2026, filed by the 1st plaintiff. The applicant seeks my recusal from further hearing the present matter. Additionally, she prays that the matter be referred to the Presiding Judge of the Commercial and Tax Division for purposes of reallocation to a different judge and that costs of the application be provided for.

- 2.** The principal ground advanced is that circumstances have arisen which, taken cumulatively, give rise to a reasonable apprehension of bias on my part as the Court. More specifically, the applicant argues that the substantive application dated 20th January 2025 has remained undetermined for over a year despite being ripe for hearing and determination, causing prolonged delay and prejudice to the plaintiffs.
- 3.** She contends that remarks made by this Court on 27th January 2026 in relation to the application suggested that the Court had pre-judged the matter by stating that granting the reliefs sought could cripple the Company, even though no such prayer was sought. The applicant further asserts that repeated referrals to negotiations and mediation, despite a Mediator's Report confirming failure, have stalled judicial determination and perpetuated a prejudicial status quo that has continued to benefit the defendant and harm the Company, its shareholders, and employees. The applicant also points to statements allegedly made within the defendant's circle which purportedly point to association or knowledge of the Judge.

4. The respondent opposes the application, noting that the referral to mediation was initially directed by Justice A. Visram. He maintains that the remarks impugned by the applicant were merely *obiter dicta*, intended to safeguard the Company as a going concern and to promote the expeditious resolution of the dispute. He further emphasizes that on 27th January 2026, when the applicants and their counsel were absent, the Court merely advised the parties to maintain the status quo pending the hearing of the main suit, solely for the purpose of facilitating an efficient determination.
5. The respondent contends that the allegations touching on dividends and company records are extraneous to the application dated 20th January 2025. He submits that insinuations of undue influence are scandalous, unsubstantiated, and amount to intimidation of the Court. In his view, no objective or legal basis has been demonstrated to warrant recusal.

Analysis and Determination

6. The application was canvassed by way of written submissions, which I have equally considered. The legal principles governing the recusal of a judge from

a matter are well established in jurisprudence. The guiding standard is that of a reasonable apprehension of bias assessed from the perspective of a fair-minded and informed observer.

7. The question that I must answer is, '*do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded and informed member of the public, that I did not (or will not) apply my mind to the case impartially?*' (See **Attorney General of Kenya V Prof. Anyang' Nyong'o & 10 Others, EACJ Application No. 5 of 2007**) and **Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others, Petition No. 4 of 2012 [2013] eKLR**). *If the answer is in the affirmative, disqualification will be inevitable.*
8. In determining this matter, I am acutely aware of the delicate balance that exists between safeguarding the perception of impartial justice and ensuring that judges fulfill their obligation to hear and decide cases that are properly before them. The Court of Appeal in **Galaxy Paints Co. Ltd v Falcon Guards Ltd, [1999] eKLR** was emphatic that while it is essential for justice to be seen to be done, it is

equally imperative that judicial officers do not abdicate their duty to sit.

- 9.** The appellate court cautioned that undue readiness to accept claims of bias and recusal may foster the belief that parties can secure a judge perceived as more favorable by simply seeking disqualification. This guidance directs this Court to weigh the applicant's apprehensions against the broader duty of judicial officers to discharge their mandate without yielding to unsubstantiated allegations.
- 10.** From the authorities cited, it is clear that the standard for recusal is not satisfied merely by a party's displeasure with the outcome of a ruling or by the existence of adverse procedural directions. The jurisprudence establishes that recusal must rest on a demonstrable and objective basis.
- 11.** The applicant's first grievance relates to the delayed determination of the application dated 20th January 2025. The issue for consideration is whether, as alleged, such delay is attributable to this Court's failure to discharge its duty to hear and determine the matter.

12. A review of the court record clarifies the position. The record shows that upon filing the application, Justice Aleem Visram on 21st January 2025 directed that the matter be referred to court-annexed mediation. On 10th April 2025, the matter was mentioned before the Deputy Registrar. The respondent, through counsel Mr. Githinji, was present, while the plaintiffs were absent. Counsel reported that three mediation sessions had already been held and that another was scheduled for 25th April 2025.

13. On 12th May 2025, the matter was again mentioned, with the plaintiffs still being absent. Mr. Githinji informed the Deputy Registrar that mediation was at an advanced stage. It was only on 10th July 2025, when both Counsels appeared, with Mr. Wambugu holding brief for Mr. Mwenda Njagi, that the parties confirmed that mediation had failed. In view of the plaintiffs' absence on two prior occasions and the submissions made by the respondent, it is evident that a reasonable, fair-minded, and informed observer would appreciate that the Court was inclined to permit the mediation process to proceed to its logical conclusion. Ultimately, the mediation process came to an end, having proved

unsuccessful, and a report to that effect was duly filed on 17th July 2025.

- 14.** While it is correct that this Court encouraged the parties to thereafter pursue negotiation of the application dated 20th January 2025 even after the mediation process had failed, such encouragement was directed solely at expediting the hearing of the suit. Any remarks made in that regard would reasonably and fairly be understood within their proper context. Such guidance is consistent with the practice of the Commercial Division, as reflected in the immediate referral of the matter to mediation. As in many similar cases, the Court's overriding concern was to preserve the Company as a going concern, proceeding on the assumption that the application that was before the Court was advanced for its benefit, and not with any intention of prejudging the merits of the application.
- 15.** Most importantly, even as the Court was suggesting a possible compromise of the application, such suggestions were made in the intervening circumstances where the parties themselves had not fully complied with the directions of the Court. As late as 22nd September 2025, counsel Mr. Githinji and

Mr. Wambugu, holding brief for Mr. Njagi, sought and were granted 14 days each to file and exchange their written submissions. The Court thereafter reserved 27th January 2026 for highlighting of submissions, should the need arise.

- 16.** It is therefore inaccurate for counsel for the applicant to attribute the entire trajectory of this matter to what he characterizes as repeated calls for negotiation and mediation. Equally, it is unfounded to suggest that the application was ripe for hearing and that delay was occasioned solely by the Court's insistence. The record demonstrates that there were several other contributing factors, including the absence of the applicant's counsel on two occasions when he could have confirmed or challenged the ex parte submissions of the respondent's counsel. Advocates, as officers of the Court, are expected to conduct themselves with candour and good faith, and this duty cannot be abdicated.
- 17.** While delay in the determination of an application is regrettable in any circumstance, the chronology reflects that the Court remained actively engaged in moving the application forward. I am satisfied that a fair-minded and informed observer, apprised of all

these circumstances, would not reasonably apprehend the possibility of bias on the Court. The delay cannot be attributed to any abdication of judicial duty, but rather to the procedural steps taken by the Court and the conduct of the parties themselves.

- 18.** With respect to the insinuation that the respondent belongs to circles in which I am allegedly known, no evidence by way of specific names, contacts or social connection has been placed before me to substantiate such a claim. It would be wholly improper for parties to rely on mere suspicion or conjecture in support of an application for recusal, given that the threshold for such relief is set at a very high standard. If judges were to recuse themselves whenever litigants levelled criticism or advanced unverified allegations, the administration of justice would be exposed to abuse, and result in an untidy situation where parties could engage in forum-shopping by disqualifying judges at will in the hope of securing a bench perceived to be more favourable.

Disposition

19. The upshot of this is that I find no merit in the application dated 9th February 2026 and the same is dismissed. I make no orders for costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 6TH DAY OF MARCH 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:
Mr Githinji for the defendant
Mr Njagi for the plaintiff/applicant
Court Assistant: Lillian