

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC LC E109 OF 2024

DAWSON MWALUANDU MZEHEDO.....
PLAINTIFF

VERSUS

MORRIS NZING’U KIOKO.....1ST
DEFENDANT

RACHAEL KASANA KIOKO.....2ND
DEFENDANT MORGAN NZING’U.....
.....3RD DEFENDANT

MOSDELL NZING’U.....4TH
DEFENDANT

MOFFAT NZING’U.....5TH
DEFENDANT

RULING

A. Introduction

1. By a plaint dated 17.12.2024 the plaintiff sued the defendants seeking, *inter alia*, orders of eviction against them from parcel No. 10756/1/MN (*the suit property*), damages for trespass, recovery of unpaid rates and costs of the suit. The plaintiff pleaded that he was the registered owner of the suit property which he acquired through

transmission from the estate of his late father, William Temani (*the deceased*).

2. It was the plaintiff's case that although the deceased had entered into a sale agreement with the 1st defendant in 2002 for the sale of a portion of the suit property, the latter had failed to pay the balance of the purchase price despite request with the consequence that the sale agreement expired due to effluxion of time.
3. In paragraph 17 of the plaint, the plaintiff specifically pleaded that the value of the suit property was approximately Kshs. 25 million hence this court had jurisdiction to entertain the suit.
4. The defendants filed a statement of defence dated 03.02.2025 denying liability for the plaintiff's claim. They admitted the existence of the sale agreement with the deceased for the sale of the suit property but pleaded that the plaintiff had no *locus standi* to file suit since he was not party to the agreement.
5. The defendants conceded that the balance of the purchase price was never paid but contended that was due to the demise of the deceased. They pleaded that they were not

made aware of the appointment of the administrator of his estate hence they were unable to pay the balance. They also offered to pay the outstanding balance of Kshs. 45,000/= to the lawful administrators of the estate.

6. Vide paragraph 12 of their defence, the defendants denied that the value of the suit property was Kshs. 25 million and contended that the court had no jurisdiction to entertain the suit on that account.

B. Defendants' application

7. By a notice of motion dated 21.01.2026 expressed to be brought pursuant to *Sections 1A, 1B and 3A of the Civil Procedure Act, Regulation 4(c) (e), (g), 9 and 16 of the Judicial Service (Code of Conduct and Ethics) Regulations, Value 2 and 6 of the Bangalore Principles of Judicial Conduct & Order 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law*, the defendants applied for the court to recuse itself from handling the suit. The application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st defendant on even date.

8. The defendants stated that the court had refused to hear their notice of preliminary objection dated 03.02.2025 and instead directed that the issues raised therein be canvassed at the hearing of the suit. It was the defendants' contention that by failing to hear and determine the preliminary objection first there arose a "serious question" of competence of the Judge and whether or not he was well versed with the law on preliminary objections. The defendants contended that the conduct of the Judge "reeks of incompetence and impartiality".

C. Plaintiff's response

9. There is no indication on record of the plaintiff having filed a response to the application for recusal despite having sought and obtained leave to do so on 22.01.2026. There was no response on record by the time of preparation of the ruling.

D. Directions on submissions

10. When the application came up for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective

submissions. However, by the time of preparation of the ruling none of the parties had filed submissions.

11. The court has considered the defendants' notice of motion dated 21.01.2026 as well as the material on record. The court is of the view that the main issue for determination is whether or not the defendants have made out a case for the recusal of the Judge.

E. Analysis and determination

12. A perusal of the material on record shows that upon filing their defence dated 03.02.2025 the defendants also filed a notice of preliminary objection of the same date contending that;

1. ***That*** the plaintiff lacked locus standi to institute the instant suit.
2. ***That*** the court lacked jurisdiction to entertain the suit.

13. It is true that when the defendants to argue the said notice of preliminary objection the court directed that the said points should be canvassed at the trial. There is no indication on record to show that the plaintiff objected to the hearing of the said notice as a preliminary issue. The direction on the

disposal of the preliminary objection was made by the court of its own motion.

14. As indicated before, the issue of the plaintiff's *locus standi* to file suit was also raised in the defence. The defendants pleaded in paragraph 4 of their defence that the plaintiff's had no *locus standi* to file suit because he was not party to the sale agreement between the 1st defendant and the deceased.
15. The question of the court's jurisdiction to entertain the suit was similarly raised by the defendants in their defence. In paragraph 12 thereof, they denied the plaintiff's allegation that the suit property was worth about 25 million and contended that the court lacked *jurisdiction* to entertain the suit.
16. In view of the fact that the suit is still pending hearing and the issues in controversy are yet to be determined, the court shall refrain from delving deeply into the case in order to avoid possible prejudice to the trial of the action.
17. The nature and scope of a preliminary objection were considered in the well known case of *Mukisa Biscuit*

Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA

696. Sir Charles Newbold P stated thus at page 701;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way or preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

18. In the same case, Law JA, described a preliminary objection at page 700 as follows;

“So far as I am aware, a preliminary objection consists of a point on law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are

bound by the contract giving rise to the suit to refer the dispute to arbitration."

19. The court took the view that the points raised by the defendants were not pure points of law which could be determined *in limine*. The issue of the court's pecuniary jurisdiction to entertain the suit could not be determined on the basis of the disputed proximate value of the suit property. Whereas the plaintiff contended that the suit property was worth Kshs. 25 million, the defendants contended otherwise. The latter did not, however, give their preferred value and none of the parties placed any valuation reports before court.
20. There is no way the court could embark on determination of the value of the suit property at the preliminary stage and without the benefit of a hearing at which valuation reports and other evidence may be tendered. Similarly, the issue of the plaintiff's standing to file suit could not be determined **solely** on the question of whether or not he was party to the sale agreement of 2002. *Locus standi* to file suit may be established on another basis. In this case, the plaintiff pleaded that he was the land owner of the suit property and

that he acquired the same through succession proceedings from the estate of the deceased.

21. The court takes the view that it is not every notice which is christened as a notice of preliminary objection should be heard first. If the court is of the view that the objection raised should be canvassed in the normal manner at the trial, it can direct so in order to expedite the process of hearing and disposal of a case. A court of law is not obligated to act mechanically and squander judicial time whenever improper preliminary objections are raised in the course of judicial proceedings.
22. It is evident from the material on record that the only reason why the defendants filed the instant application for recusal was because the court directed that the points raised in the notice dated 03.02.2025 should be canvassed at the hearing. They considered the court's decision to have been completely erroneous. They stated in their application that the Judge was not familiar with the law on preliminary objections and considered him to be utterly competent. They expressly pleaded that his conduct was "reeking" of "incompetence."

23. The defendants also relied upon another ground in their application. They stated both in their motion and supporting affidavit that the conduct of the Judge was “reeking” of impartiality. The defendants may have intended to refer to partiality as opposed to impartiality. The fact that the same error was repeated twice could be an indication of the hurry with which the application was drawn and filed. It was dated and filed on 21.01.2026 which is the same date the matter was coming up in court for the purpose of fixing a date for hearing of the main suit.
24. Be that as it may, the defendants did not provide any particulars of the alleged partiality in the supporting affidavit. The application simply disclosed dissatisfaction with the court’s failure to hear the preliminary objection accompanied by sweeping statements of alleged incompetence and partiality. Even assuming that the court’s failure to hear the defendants’ purported preliminary objection amounted to incompetence, the court is not aware of any law which would enable a litigant to solely and subjectively determine which

Judge is incompetent and then apply for his recusal on that ground.

25. The issue of disqualification or recusal of a Judge was considered by the Supreme Court in *Petition No. 34 of 2014- Gladys Boss Shollei vs Judicial Service Commission and 2 Others [2018]eKLR*. In the said case Ibrahim SCJ held as follows;

“25: Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he has a duty to sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This 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.” It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties’ right to have their cases heard and determined before a court of law.”

26. At paragraph 28 of the same case Ibrahim SCJ stated thus;

“28: It is useful to refer to the case from the New Zealand Court of Appeal Muir -v- Commissioner of Inland Revenue [2007] 3 NZLR 495 in which the Court stated as follows:-

“the requirement of independence and impartiality of a judge is counter balanced by the judge’s duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 “it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion 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.”

27. The test to be applied in an application for recusal on account of alleged bias was succinctly summarized by the East Africa Court of Justice in the case of *Attorney General of Kenya vs Prof. Anyang Nyong’o & 10 Others EACJ Application No. 5 of 2007* as follows;

"We think that the objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say,

a) The litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case."

28. Similarly, in the South African case of *President of the Republic of South Africa vs South Africa Rugby Football Union* [1999] 4 SA 147 the test for recusal was rendered as follows;

"...the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the Applicant. The question is whether 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, that is a mind open to persuasion by the evidence and the submissions of counsel."

29. The court takes the view that it is not every allegation of bias or partiality, however unfounded, would result in the recusal

of a judge. The allegation must be well founded and must be demonstrated with credible evidence. It has been held that a judge should not recuse himself on flimsy or baseless allegations. In the case of *Hon. Kalpana H. Rawal vs Judicial Service Commission & 2 Others Civil Appeal (Application) No.1 of [2016e]eKLR* the Court of Appeal pronounced itself as follows;

*“... Before we consider the merits of the application, however, there are a few issues raised by the parties which we must dispose of. First, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically disqualify himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary, decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in *Locabail UK Ltd Vs Bayfield Properties Ltd [2000] Q.B. 451* a judge*

“would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance.”

30. The court is not satisfied that on the basis of the material on record that a reasonable and fair minded person would come

to the conclusion that that a judge who directs that points raised in a notice of preliminary objection should be canvassed at the trial can only be an incompetent and biased judge. The court is not satisfied that a level-headed and well informed member of the public would hold a similar view. The court also finds it hard to believe that a reasonably competent and well informed counsel would honestly believe that such direction by a judge could fairly be termed as reeking of incompetence and partiality.

F. Conclusion and disposal orders

31. The upshot of the foregoing is that the court finds no merit whatsoever in the defendants' application for recusal. No wonder the defendants did not even bother to file their submissions on time or at all. It was probably filed in bad faith in order to scuttle or delay the hearing of the suit bearing in mind that it was filed on the day when the suit was to be fixed for hearing. And if the defendants were hoping to provoke the judge into recusing himself through the use of strong and defamatory language in the application, then they are definitely looking in the wrong direction. The defendants'

notice of motion dated 21.01.2026 is hereby dismissed with costs.

It is so ordered.

Ruling dated and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this **12th day of March, 2026.**

.....
Y. M. ANGIMA
JUDGE

In the presence of:

Court assistant- Gillian

Mr. Oddiaga for the plaintiff

Ms. Malombo for the 1st - 5th defendants