REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELCLOS No. E006 OF 2024

EDWIN MBAKA MATARA ……..…… PLAINTIFF

VERSUS

MOCHUMBE OSINYO MEROKA ……. 1ST DEFENDANT

MARY MOCHUMBE ……. 2ND DEFENDANT

LAND REGISTRAR NYAMIRA COUNTY ……. 3RD DEFENDANT

RULING

1. By Notice of Motion dated 2nd November 2025, the Plaintiff is seeking the following orders:

    i. *That Hon. Justice Dalmas Ohungo be pleased to recuse himself from further handling, or determination of ELCLOS/E006/2024: Edwin v The Land Registrar of Nyamira County & Mary Mochumbe & Another, on grounds of apparent bias, procedural unfairness, and loss of public confidence in the impartiality of the proceedings.*

    ii. *That the matter be referred to the Presiding Judge of the Environment and Land Court for reallocation to another judge of competent jurisdiction.*

    iii. *That costs of this application be in the cause*.

2. The application is premised on the grounds listed therein and is supported by an affidavit sworn by the Plaintiff. He deposed that the Judge delivered a ruling in the case on 3rd April 2025, which ruling revealed conduct and reasoning that have caused him “to reasonably apprehend bias, lack of impartiality, and unfair treatment, thereby eroding [his] confidence in the Court's ability to dispense justice fairly and objectively.” That the Judge fully adopted the Defendants' position, notwithstanding that the Defendants had filed no affidavits, annexures, or evidence in response to his pleadings, and that his evidence of continuous possession and occupation since the year 2006 were completely ignored.

3. The Plaintiff further deposed that the Judge made a serious error of fact by stating that the Plaintiff’s father, Christopher Matara Onsongo was the registered owner of parcel number Manga Settlement Scheme/1347, yet the official search produced in Court showed that the registered owner was Zakariah Onsongo. He added that the Judge further misapplied the law by conflating his claim for adverse possession with HCCHRPET E010 of 2024 which was a different matter in which he was not a party.

4. That as a result, there was wrongful denial of interim reliefs, contrary to legal principles governing adverse possession and injunctive reliefs. He also deposed that the cumulative effect of the foregoing demonstrated a predisposition against him

and created an appearance of bias and procedural unfairness, contrary to Article 50 (1) of the Constitution.

5. The First and Second Defendants opposed the application through a Replying Affidavit sworn on 14th November 2025 by the Second Defendant. She deposed that the application was an abuse of the Court process, un-merited, ill-advised and could only be ground of an appeal and not recusal of a Judge. She added that there was nothing wrong when the Court found that an application was lacking in merit.

6. The Second Defendant further deposed that the application was intended to vex and intimidate the Court into issuing orders sought by the Applicant. That it was trite that a Court could agree with and find in favour of the position of one of the parties in an adversarial system and that the fact that a decision was made in favour of one party was not a ground for vilifying the Court. She urged the Court to dismiss the application with costs.

7. Directions were given that the application be canvassed through written submissions. Timelines within which parties were to file and serve submissions were also given. When there was non-compliance with the initial timelines, final timelines were given, with an order that any submissions filed beyond the given timelines would stand struck out.

8. The Plaintiff/Applicant filed submissions dated 25th February 2026. The said submissions were filed beyond the specified

deadline in respect of the Plaintiff and therefore stood struck out upon filing. On their part, the First and Second Defendants filed submissions dated 19th January 2026, before the specified deadline. The Third Defendant neither responded to the application nor filed submissions.

9. The First and Second Defendants submitted that the Court should be slow to disqualify or recuse itself to avoid a situation where parties engage in forum shopping by provoking the Court into disqualifying itself simply because the litigation is scheming to scout for a judicial officer whom he feels would be friendly to their cause.

10. Relying on the case of **Yaga v French Embassy & another; Transparency International (Interested Party) (Constitutional Petition 365 of 2017) [2023] KEHC 1913 KLR) (Constitutional and Human Rights 10th March 2023) (Ruling)**, it was further submitted by the First and Second Defendants that the grounds raised by the Plaintiff/Applicant did not satisfy the test for recusal but instead amounted to an attempt to vex the Court. Consequently, the First and Second Defendants urged the Court to dismiss the application with costs.

11. In the course of the proceedings, Mr Okundi who appeared for the Plaintiff/Applicant stated from the bar that the Plaintiff/Applicant had lodged a complaint against the Judge at the Judicial Service Commission. I must however state that no

such complaint was referred to in the application or annexed to the supporting affidavit. The Judicial Service Commission will no doubt deal if a complaint that meets the set threshold is filed.

12. I have carefully considered the application, the affidavits and the submissions. The sole issue for determination is whether recusal should be ordered.

13. The Court of Appeal discussed the test for recusal of a Judge in **Salaries & Remuneration Commission v Gachuiri & 3 others (Civil Appeal E533 & E169 of 2024 (Consolidated)) [2026] KECA 692 (KLR) (25 March 2026) (Judgment)** thus:

> ***The standard for recusal of a Judge is the one set out by the Constitutional Court of South Africa in the case of the President of the Republic of South Africa & others v South African Rugby Football Union (Case No 16/1998) 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) (Surf case), where the said court stated at paragraph 48 that:***
>
> ***"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. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." This is the Constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself.

14. In **The Attorney General v Rajan Mahthani (Appeal No. 4 of 2020) [2025] ZMSC 16 (24 July 2025)**, the Supreme Court of Zambia held as follows:

The standard of proof required to sustain an application for recusal is high and the burden of proof lies with the one making the allegations….

It is also not enough for an applicant to merely suspect or apprehend that the Court may be biased;

Mere apprehension on the part of a litigant that a judge will be biased, including a strongly and honestly felt anxiety, is not enough…

For an allegation of apprehension of bias to be sustained, it must be founded on the correct facts. In other words, if the factual foundation of bias is wanting then the apprehension is also wanting and the application for recusal will be refused.

15. The Plaintiff/Applicant's basis for seeking recusal is that, according to him, the ruling delivered by the Judge on 3rd April 2025 revealed conduct and reasoning that leads him to fear impartiality on the part of the Judge. The Plaintiff/Applicant has made it clear that he believes that the Judge erred in the decision.

16. The ruling that the Plaintiff/Applicant referred to was on an application through which he sought an interlocutory injunction both as ordinary injunction and as a prohibitory

order. Upon considering the application, the Court concluded that he had not established a *prima facie* case. The Court found no merit in the application and consequently dismissed it with costs to the First and Second Defendants. On 4th June 2025, Mr Okundi who appeared for the Plaintiff/Applicant informed the Court that his client had filed an appeal against the ruling.

17. The question that must be answered is whether a reasonable, objective and informed person would conclude that dismissal of an application for an injunction, even if on the basis of errors of law and facts, would lead to a reasonable apprehension that the Judge would not be impartial in the adjudication of the case. In making that assessment, it is to be borne in mind that an application for an interlocutory injunction is determined principally by making an assessment as to whether the applicant has established a *prima facie* case. Judges take an oath of office to administer justice without fear or favour. They are also professionally equipped by training and experience to handle cases brought before them. A litigant will need to go an extra mile, beyond mere allegations, to demonstrate bias from a decision on an application for an interlocutory injunction.

18. In his own words, the Plaintiff/Applicant has sought correction of any error, real or perceived, through an appeal. Until the appeal is determined, it cannot be said that there was any error. The Judge had a duty to decide and discharged that

duty. Even if it ultimately emerges that there was any error, that alone does not amount to bias. To allow recusal based on the grounds advanced by the Plaintiff/Applicant would encourage forum shopping and would be an injustice to other parties in the proceedings. While the Plaintiff/Applicant is entitled to his opinion on the decision of the Court, let him advance his arguments and opinion in his appeal.

19. I find no merit in Notice of Motion dated 2nd November 2025. I dismiss it with costs to the First and Second Defendants.

Dated, signed, and delivered at Nyamira, this 13th day of May 2026.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Okundi for the Plaintiff

Mr Otieno for the First and Second Defendants

No appearance for the Third Defendant

Court Assistant: Edinah N