



**David & 303 others v Governor, County Government of Kilifi & 2 others
(Petition E003 of 2023) [2025] KEELRC 1066 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1066 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E003 OF 2023**

M MBARŪ, J

APRIL 3, 2025

BETWEEN

**EMMANUEL MAITHA DAVID 1ST PETITIONER
FESTUS BARAKA 2ND PETITIONER
EVE KAFKO MNENE 3RD PETITIONER
GRAHAM KATANA MWERI 4TH PETITIONER
JONATHAN KITHI KAZUNGU 5TH PETITIONER
VICTOR KOMBE NZAI 6TH PETITIONER
SAMUEL MAITHIA JONATHAN 7TH PETITIONER
MILLICENT KHAYANGA NASIMIYU & 296 OTHERS & 296 OTHERS & 296
OTHERS 8TH PETITIONER**

AND

**THE GOVERNOR, COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT
THE COUNTY SECRETARY, COUNTY GOVERNMENT OF
KILIFI 2ND RESPONDENT
KILIFI COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT**

RULING

1. The petitioners filed an application dated 4 February 2025 under articles 25, 48, 50, 74 and 75 of *the constitution*, the Judicial Service Code of Ethics and Section 5 of the Public Officers Ethics Act, Rule 5 and 10, seeking orders;

1. Spent.



2. The Hon. Lady Justice Monica Mbaru, recuse herself from hearing, handling and or dealing with this matter, in the interests of justice.
 3. The file be forwarded immediately to the Hon. Chief Justice for assignment to another judge.
 4. The costs of this application be provided for.
2. The affidavit of Shitakha Tom Ambwere supports the application and advocate because the petitioner's counsel informed the Judge of the personal contact with the respondent. On 27 July 2024, in the presence of Mr. Muthama and Ambwere, the Judge agreed to talk to the respondents. The subject of the talks is unknown. The Judge seems unmoved by this unethical and immoral conduct and the fairness in the entire process. The Judge looks unbothered that she had been compromised, and she knows the impact on the court's integrity.
 3. Ambwere advocate avers in his affidavit that the Judge has failed to enforce the court orders issued, and here, the conduct seems to be of a judge who has been compromised. The petitioners, having already filed more than 85 petitions for her removal from office by the JSC, the Judge will not be impartial and such recusal.
 4. Ambwere advocate also avers in his affidavit that **on 25 July 2025**, he was accompanied by 4 petitioners and went to the court premises. Mr. Muthama, for the respondents, requested a meeting with the Judge in the chambers. He told the Judge of the seriousness of the allegations, and the Judge conceded to talking to the respondents but said it was a meeting of colleagues and that she could not be expected to live in isolation. At the end of the meeting, the Judge asked Mr Muthama to settle the matter and ensure that the matter was finalized at the next court appearance.
 5. Ambwere advocate further avers that the petitioners were surprised when the Judge continued to interact with the respondents, who continued to threaten them that nothing would come out of the petition. On 29 January 2025, when the petitioners appeared in court, he informed the Judge about continued allegations by the respondents, including the refusal to pay the petitioners their salaries for 8 months, but the court did nothing.
 6. In total disregard of the basic expectation to ask for the enforcement of court orders, the Judge required the respondents to appear in court to explain where they met the Judge and help instil confidence in the court's independence and impartiality, yet the Judge was unbothered and unresponsive.
 7. The court, as a place of redress, the Judge has failed to address the suffering of the petitioners, showing a total lack of sympathy or addressing the grave grievances of the petitioners. The Judge is unsuitable to continue hearing the matter. The petitioners have asked for sympathy in this matter and payment of their salary, and the contact of the Judge and the respondents brings her conduct into question. For this reason, 85 petitioners have applied for the removal of the Judge to the JSC; hence, it will be untenable for the Judge to continue presiding over the matter, and the same should be placed before the Chief Justice allocates it to another judge.
 8. In reply, the respondents filed the Replying Affidavit of Hon. Martin Mwaro, head of the public service at the County Government of Kilifi, aversing that the petitioners are seeking the recusal of the Judge herein over alleged inappropriate personal contact with the respondents, which she conceded. Still, as alleged, there is no inappropriate direct or indirect engagement between the Judge and any of the respondents. The deponent has never met the Judge or spoken over any matter currently pending in court or in which the respondents are directly or indirectly parties.
 9. In this regard, the Judge, other judges, and judicial officers from the Malindi Law Courts may have met in public functions. A replying Affidavit dated 6 November 2024 concerns the same events. The



grounds for recusal stated by the petitioners, thus addressed, are without evidence or merit and should be dismissed.

10. Hon. Mwaro avers that he is aware that the petitioners have presented an application dated 8 September 2024 seeking to cite the 1st respondent and himself for contempt of court on the basis that they have disobeyed court orders pending the hearing of the petition. The respondents filed a Replying Affidavit, and the matter was coming up for hearing on 29 January 2025. On the hearing date, the petitioners' counsel declined to be heard on the pending application, compelling the court to adjourn the matter. The respondents were ready for the hearing.
11. Hon. Mwaro avers that the petitioners declined to proceed with the hearing on the condition that he be summoned to court with the 1st respondent to purge the contempt of court. This was before the court had heard the subject application on its merits, and consequently, there was no ruling or order that there was any contempt of court as alleged by the petitioners.
12. On the court's directions, the petitioners' counsel became enraged and declined to take any further directions from the court.
13. Hon. Mwaro avers that parties or their advocates are not entitled to direct how court proceedings are to be conducted. Where the petitioners were aggrieved by the court's order directing the disposal of the contempt application, they ought to have filed an appeal to the Court of Appeal on the court's orders and directions rather than seek to scandalize and embarrass the court over unsupported allegations.
14. The petitioners incorrectly allege, without tendering evidence, that the Judge has declined to enforce existing court orders in the petition. The grounds set out for recusal are without merit and should be dismissed.
15. The mere existence of a petition where a litigant has filed a petition to the JSC for the removal of the Judge is insufficient grounds for recusal. This would encourage litigants to forum shopping for a judge who will rule in their favour and destroy all confidence in the dispensation of justice. This would affect the rule of law.
16. Hon. Mwaro also avers that in reply to the contempt of court application by the petitioners, he filed his affidavit dated 6 November 2024. He noted that the petitioners are making bare allegations without evidence that there was inappropriate contact or communication between the Judge and the respondents. Based on the facts herein, there is no evidence of impartiality in addressing the petition. This is demonstrated by the fact that the Judge granted both counsels an audience in chambers and explained the public meeting held with the 1st respondent at the Court Users Committee Meeting held in Malindi. This open meeting included legal practitioners, members of the public, and the petitioners. The allegations of inappropriate contact are only meant to scandalize and embarrass the court and intimidate the Judge to rule in favour of the petitioners.
17. The petitioners seek to infer that the respondent's counsel, while in the judge's chambers, deliberately made presentations to contribute to the grounds for recusal proceedings. This was not the case, and the petitioners' counsel was present and should not have used the discussion for other purposes.
18. Hon. Mwaro avers that he has never had contact with the Judge as alleged. The first respondent or the County Attorney have not had personal contact, save for the Malindi Open Day forum/Court Users Committee, which was a public engagement. There is no evidence on record of any form of inappropriate contact.
19. Hon. Mwaro avers that, as outlined in his Replying Affidavit of 6 November 2024, the delays in paying salaries to the petitioners are explained. No legal or factual basis exists to require the court to summon



the respondent's officers until the subject application dated 8 September 2024 is heard and determined. The orders sought should be dismissed with costs.

20. Both parties attended and made oral submissions. The affidavits the submissions are analyzed, and the issues for determination are;

Whether there exists sufficient grounds for recusal.

Should the matter be placed before the Chief Justice to allocate another judge?

Who should pay the costs?

Determination

21. At the heart of the application by the petitioners is that the Judge presiding has had inappropriate contact and communication with the respondents; the Judge has failed to enforce the court orders issued herein requiring the payment of salaries to the petitioners by the respondent; and that there are 85 petitions filed with the JSC against the Judge and hence will not be impartial and should recuse herself. Through the Supporting Affidavit of their advocate, the petitioners, Amwere, assert that on 27 July 2024, counsels for the petitioners and respondents attended in chambers. The Judge conceded that she had met with the respondent officers at a public forum, Malindi Court Users Committee/ Malindi Open Day, yet despite that contact, the court is unmoved by this unethical and immoral conduct, and the continued allegations by the petitioners that the court is compromised should lead to recusal.
22. It has been an honourable and fair practice between members of the Bar and Bench to consult wherever things are not working well in open court. Counsels are allowed to seek an audience with the Judge and bring any matters of concern to the judge's attention. Such consultations are not ordinarily recorded or part of the court record.
23. This practice has sustained relations and has served the Bar and Bench well. It should be preserved for posterity.
24. Indeed, Amwere Advocate, counsel for the petitioners, sought an audience in chambers on 27 July 2024 and, in the company of Mr. Muthama, counsel for the respondents, attended, and a mutual discussion was held. The concern for counsel for the petitioners was that word in the village, and larger County of Kilifi, was that I, as presiding Judge herein, had met with the officers of the respondent, and they had, in turn, gone out in public and claimed that the petition herein would not succeed.
25. Based on this information, I confirmed that the respondents and their officers were not personally known to me.
26. On 16 0000000 00000 2024, during the Malindi Open Day held at the Malindi Grounds, I was in attendance together with the Presiding Judge, Malindi High Court and Environment and Land Court, and the Judicial Officers under the leadership of the Head of Station, the Chief Magistrate. His Excellency, Governor Gideon Mungaro, the 1st respondent, graced the event as the chief guest. He was accompanied by various officers from the Kilifi County Government. Of importance, members of the Malindi Law Society, led by the chairperson, were present. The 1st respondent opened the Open Day and had to leave to attend to other matters of the County and hence did not stay to allow for interactions over any direct or indirect discussions of the instant petition as alleged. There was no particular need to discuss the petition or have an audience with any respondents. This live matter has been ongoing at the Mombasa Law Court since the court only attends at Malindi court during brief circuit sessions. The allegations by the petitioners that there were public discussions of the matter by the respondents are not within the court's knowledge and cannot form a proper basis for recusal.



27. Interactions between the judiciary and court users, justice actors, administrators, and the public are a matter dear to all of us. This is reiterated in the Social Transformation through Access to Justice (STAJ) strategy of the Chief Justice, the JSC, and the Judiciary, which calls for a people-centred approach to justice delivery and social transformation. Under such a strategy, the Judiciary has revolutionized the concept of justice by securing outreach activities, including Open Days in public spaces, to build enhanced public trust and confidence in the judicial system. Such forums have allowed judges and judicial officers to interact with members of the public and directly respond to concerns, save ongoing cases must be addressed in context and principles well addressed under the Judicial Code of Ethics. These interactions are not meant to damage but to build relations.
28. Any contact or communication with the respondents during the Open Day, Malindi Law Court, was not inappropriate, unethical, or immoral as alleged. This is an accepted judicial function. To take it otherwise would negate the purpose and objectives thereof.
29. In addressing a matter similar to that herein, the court in *Owner of Motor Vessel "Mirembe Judith" v Jade International Shipping Line DMC* [2023] KECA 452 (KLR), upon the parties' alleged improper contact and communication with the other party, evidence of such matter should be presented. In *Kinyua Muyaa Advocate v Republic* [2016] KEHC 4340 (KLR), the court held that call logs, phone calls, and such matters would suffice as evidence in a given matter.
30. This position is reiterated in the case of *Saad Yusuf Saad v Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2017] KEHC 2657 (KLR), where similar allegations as herein were raised. In analyzing the facts stated about the alleged inappropriate contract with respondents in the matter, the court held that the unsubstantiated suspicion of personal contact or communication, bias, or prejudice by the Petitioner cannot suffice as a ground for the Hon. Judge's recusal.
31. On these principles and jurisprudence, it is imperative to consider the history of the matter.
32. On 21 May 2024, during a Malindi ELRC circuit, I took over the matter from my colleague, Her Ladyship Honourable Justice Agnes Kitiku Nzei. Both parties attended, and the petitioners' counsel indicated they wanted a hearing date allocated for 11 June 2024. The parties agreed to physically attend the Mombasa Law Court, ELRC.
33. The petitioners prepared 4 witnesses for the scheduled hearing on 11 June 2024. All witnesses were called, and the petitioners closed their case.
34. Before calling its witnesses, the respondents requested to audit all the petitioners, including 8 listed petitioners plus 296 others. The respondent sought to engage the petitioners to file a consent.
35. The court allowed parties to engage and allocated a hearing date for 25 July 2024.
36. On the due date, the counsel for the respondent indicated that one of the witnesses had been taken ill and had communicated this to the counsel for the petitioners. The matter was adjourned to 2 October 2024.
37. On the due date, counsel for the respondent submitted that 127 petitioners had agreed to take up employment with the respondents on fixed-term contracts and had signed employment contracts. The full details had not been shared, and it needed time to file an Affidavit attaching the list of the 127 petitioners with contracts.
38. The counsel for the petitioners protested this turn of events. He blamed the respondents for coercing the petitioners to abandon it through intimidation. He noted that the respondents were on the ground and making public statements that the petition would not see the light of day. He protested that the



- petitioners had not been paid for months, and the court should intervene, summon the respondents to court, and issue directions to make payments.
39. The court directed the respondent to proceed with the hearing on the filed pleadings, considering that the petitioners had closed their case and would be prejudiced by any new evidence introduced at this stage.
 40. The court further noted that the petitioners had raised various serious issues regarding the conduct of the parties outside the court. To secure the rule of law, such matters should be addressed through a formal application for the court to consider on the merits. Where the respondents had failed to adhere to court orders, there exists a procedure to bring them to account if the application is meritorious.
 41. The hearing was adjourned to allow the petitioners to address and file a formal application.
 42. The petitioners filed an application dated 8 October 2024. The petitioners were seeking contempt proceedings against the respondent officers. They cited Hon. Gideon Mungaro, Governor of Kilifi County, Hon. Martin Mwaro, County Secretary of Kilifi County, and Henry Luganje, County Attorney, Kilifi County.
 43. The hearing was allocated for 11 November 2024.
 44. The respondents filed their Replying Affidavit on 6 November 2024.
 45. On the due date, the court was not sitting.
 46. Mention was allocated for 16 December 2024, and parties were allocated a hearing date for 29 January 2025.
 47. On the due date, the counsel for the petitioners declined to proceed with the hearing unless 3 things were addressed;
 - a. The court is to order the respondents to attend court within 7 days;
 - b. The court to order and direct the respondents to pay the due salaries to the petitioners;
 - c. The court to summon the 1st respondent, who was said to have met the Judge, and to give an explanation why there was no payment of salaries to the petitioner; and
 48. Counsel for the petitioners was adamant that he would not proceed with the hearing unless the set conditions were met.
 49. The respondents were ready to be heard on the application dated 8 October 2024.
 50. Hearing was allocated at 11 am to allow the petitioners to consult and attend.
 51. Counsel for the petitioners protested and insisted that he would not attend the hearing unless the given conditions were met.
 52. The court adjourned the matter to allow the petitioners to move the court as appropriate.
 53. This is the background to the instant application seeking recusal.
 53. In this case, Mr Ambwere, for the petitioners, has declined to proceed with the hearing of the application he filed on their behalf. He has given conditions that must be met before deciding whether to proceed.
 54. The court cannot allow counsel to hold all parties at ransom.



55. This is a court of justice. Without taking the due process to prosecute the application dated 8 October 2024 concerning contempt proceedings, Mr Ambwere cannot circumvent the process and demand that the respondents and their officers be summoned to court first and answer to matters addressed in the application. Due process and the rule of law demand that the application be heard on its merits. Where the respondents are found to be in contempt, a procedure exists to bring them to account. To direct that the respondents and their officers should attend court before prosecuting the instant application would be to condemn them unheard.
56. Mr. Ambwere has further asserted that the petitioners have material evidence from the respondents' public utterances that they are in contact with the judge. Whatever happens outside the court proceedings is not in the judge's control unless such matters are brought to the court's attention. The alleged utterances by the parties out in the community are not by the judge's direct or indirect instructions.
57. I will reiterate the words of Thande J in the case of Saad Yusuf Saad v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] KEHC 2657 (KLR), cited above, that;
- “ ... Mr. Ambwere stated severally that the prosecution of the application was complicated for him but that he was only carrying out his client's instructions. That may very well be the case. It, however, behoves all counsel to advise their clients to avoid baseless and unwarranted attacks on Judges, which do nothing but taint the image of the Court in the eyes of the public. Unsubstantiated allegations made by parties through their counsel against a Judge who is dutifully discharging her judicial functions compromise the dignity of the Court and the relationship between the bar and the bench.”
58. Counsel cannot hide behind their clients and make various allegations without evidence. As an officer of the court, he is responsible for protecting the court's dignity and that of the court users, including his clients. To refuse to prosecute an application he has filed on behalf of his clients dated 8 October 2024 and set conditions for the court to meet is a violation of the very seat of justice he invokes in the recusal application. Such intimidation and conduct cannot be sanctioned through forum shopping to be heard by a judge who will allow one party to meet the conditions of one party without any basis.
59. I will also reiterate the words of Mutuku J, who stated in Abdiwahab Abdullahi Ali v Governor, County Government of Garissa & 2 others [2013] eKLR;
60. One last word of unsolicited advice to my brothers, legal counsels involved in this case; the same way this court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, the same way the court and the presiding officer demands respect from the parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practicing before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party who is not satisfied with a ruling of this court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era when it used to be a “jungle out there.
61. On 29 January 2025, when the counsel for the petitioners declined to be heard on the application dated 8 October 2024, I was informed by the Deputy Registrar and the Judiciary police in charge, Mombasa, that a large crowd had gathered outside the courthouse. There were various media houses, and there was a security concern about the increasingly large crowd.
62. I went out and held a *kamukunji* with the members of the public, who, the majority were the petitioners and media practitioners. We could not discuss the petition in the absence of counsel but I



gave my commitment to deliver justice to all in accordance with my oath of office without any fear or favour, bias, affection, ill will, prejudice or any political, religious or other influence is and has always been and will continue to be unwavering.

63. I do not know any of the parties in this Petition and have no interest whatsoever, personal or otherwise, in the outcome of the Petition. Once the petitioners are ready to prosecute the application for contempt of court, the main petition, or other matter, I will render my ruling, judgment, or issue appropriate directions based on known legal principles.
64. Any fair-minded and informed person observing these proceedings and having the facts herein would conclude that there is no possibility that the presiding judge has unreasonable, inappropriate contact or communication with any of the parties, particularly the respondents. There is no basis for not being fair or impartial. The petitioners have since closed their case without any apprehension.
65. The due process requires each party to be given their day in court without intimidation.
66. What is pending is the respondents' case. The intervening applications have stalled the conclusion of the matter.
67. The Petitioners' apprehension is both unfounded and unreasonable and cannot form a justifiable basis for recusal. The Court shall not accede to an unfounded application for recusal. The demand to place the file before Her Ladyship, the Honourable Chief Justice, to appoint another judge to preside is not necessary.
68. In the circumstances, the Application dated 4 February 2025 is hereby dismissed with costs to the Respondents. The petitioners remain the rights-holders of this petition and shall secure a hearing date at the registry.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 3RD DAY OF APRIL 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Davis Wekesa

..... and

