Republic v Njoka & another (Environment and Land Judicial Review Case E001 of 2022) [2025] KEELC 838 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 838 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022

A OMBWAYO, J

FEBRUARY 20, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

LUCY WANJIRU NJOKA ..... 1ST RESPONDENT

THE COUNTY LAND REGISTRAR ..... 2ND RESPONDENT

RULING

Applicants Case

1. Elizabeth Wanjiku Njoka the legal representative of Alice Kahaki Njoka (deceased) (hereinafter referred to as the interested party/ applicant) has filed a notice of motion dated 22nd November, 2024 which is supported by her two affidavits sworn on 22nd November, 2024 and 14h February 2025 respectively. In her said application, the interested party/applicant is seeking orders that Honorable Justice Ombwayo be pleased to disqualify himself from hearing this Judicial Review application and that this honorable Court be pleased to refer this suit to the Presiding Judge for allocation to another court. That the costs of this application be in the cause.

2. The application is founded on the grounds that in the ruling of Lady Honorable Justice Omollo, delivered on 27th July 2023, her ladyship observed that His lordship Hon Justice Ombwayo had considered the merits of the applicants case as set out in in her Notice of Motion dated 16th November, 2022 filed in opposition to this judicial review application of the exparte applicant, found no merit in it and had decided that the judgment which had been reserved should not be arrested. A lot of ink and paper has been used in this application but basically the accusation against the judge that forms the basis of the application for recusal is as above stated. In the supporting affidavit the applicant states that her applications dated 16th November 2022 and 2nd August 2023 were heard by Lady Justice Lynette Omollo who allowed them.

3. According to the applicant, Justice Ombwayo gave direction on the 11th November 2024 to facilitate the disposal of the case dated 16th March 2022. In the course of preparing for the hearing she realized that the judge had made up his mind about her defence and that the defence has no merit and therefore she will not get justice. The rest of the allegations are not against Hon Mr Justice Antony Oteng'o Ombwayo. Such allegations are that through the disobedience of the exparte applicant and her co-legal representatives of the orders made on 3rd December, 2024, they have made it impossible for the interested party to prosecute her application expeditiously.

4. The applicant states that according to the directions, made on 3rd December, 2024, the 4 legal representatives ought to have filed their replying affidavit long before 16th December; 2024 when the ex parte applicant herself filed a replying affidavit leaving behind her co-legal representatives deliberately to stall the interested party application for recusal. The interested party applicant alleges that although the date for the ruling was given on 19th December, 2024, the interested party chose to file her submissions on 7th February, 2025 knowing that the interested party could not file the submissions and further affidavit in time for the ruling to be delivered as, scheduled.

4. The applicant states that because Teresia Njeri, Margaret and Joseph Njuguna have not replied to the application dated 22nd November, 2024 they must be deemed to have accepted the facts as deponed to by the interested party in her affidavit sworn on 22nd November 2024. The law is that if a party does not controvert facts, he or she is deemed to have accepted them.

5. The applicant submits that the ex-parte applicant was a co-respondent in Nakuru ELC JR No.l of2024 R -v- The Executive Member of Nakuru Count Executive Committee in Charge of Physical Planning in which his Lordship delivered a judgment on 30th May 2024 in her favour and in the favour of her co-legal representatives and that is not disputable .

6. The interested party applicant submits that it is not disputed and cannot be disputed that' Hon Justice Omollo in her ruling pointed out the fact that his Lordship declined to certify the application for arrest of Judgment as urgent. The subject matter of both this JR and that of 2024 the subject matters are some of the properties which the estate of the applicant's mother is seeking separation of in Nakuru High Court Family Division Civil Suit NO 33 of 2016 Elizabeth Wanjiku Njoka -v- Juma Kiplenge & Others which is part heard before Lady Justice Matheka and in which she is represented by her advocates in this suit and also in Nakuru High Court Succ Cause No 497 of 2013 in the Matter of The Estate of Philip Njoka Kamau Deceased.

7. The applicant submits that this suit was filed by the ex-parte applicant with a view to stealing a match, on the interested party and she and her advisors know this.

8. It is submitted that her failure to include her co-legal representatives in both her replying affidavit sworn on, 16th December, 2024 and her submissions which she filed on 7th February 2025 is both dishonest and mischievous.

9. The application is premised on the reasonable apprehension of bias, which has arisen from the conduct and rulings of His Lordship Hon. Justice Ombwayo in related matters, as well as the directions issued in this case. The Applicant contends that the circumstances surrounding this matter have created a reasonable perception that she will not receive a fair and impartial hearing before His Lordship as clearly shown in her application dated 22nd November 2024.

10. The Applicant submits that she has demonstrated through her supporting affidavit and the annexed documents that His Lordship has made rulings in related matters that have directly impacted the subject matter of this Judicial Review Application. Specifically, His Lordship's- ruling on 11th

November 2024, in which he issued directions that effectively pre-judged the merits of the applicant's defense, has created a reasonable apprehension of bias;

11. According to the applicant, in the ruling delivered by Lady Justice Omollo on 27th July 2023, it was noted that His Lordship had already considered the merits of the Applicant's case and found no merit in it. This pre-judgment of the Applicant's defense before it has been fully heard and determined, is a clear indication of bias and warrants the recusal of His Lordship.

12. The applicant submits that His Lordship's conduct in this matter; including his refusal to stay the proceedings pending the determination of the part-heard suit, has created a reasonable apprehension that he is predisposed to ruling in favour of the Ex-Parte- Applicant. Lucy Wanjiru Njoka. This perception is further reinforced by His Lordship's prior rulings in related matters which have consistently favoured the Ex-Parte Applicant and her associates;

13. The Applicant submits that she has also demonstrated that His Lordship has failed to adhere to judicial precedents and rulings made by other judges in related matters. For instance, the rulings of Hon. Justice Ndungu and Lady Justice Matheka in the part-heard suit have clearly established that the ownership dispute should be determined in the Family Division. That the Lordships conduct in this matter suggests that he is inclined to disregard these rulings and proceed with the determination of the ownership dispute in the Environment and Land Court:

14. The Applicant submits that the principles of judicial impartiality as enshrined in *the Constitution* of Kenya 2010 and various judicial precedents mandate that a judge must recuse himself or herself when there is a reasonable apprehension of bias. This application is not made lightly but is grounded in the legitimate concern that justice must not only be done but must also be seen to be done. The applicant submits that the right to a fair hearing before an impartial tribunal is a cornerstone of the Kenyan Judicial system. Article 50 of *the Constitution* of Kenya. 2010, guarantees every person the right to have any dispute resolved by an independent and impartial tribunal. This right is further reinforced by the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, which provide guidelines on the circumstances under which a judge should recuse himself.

15. The Applicant submits that the test for recusal has been met in this case, as the conduct and rulings of His Lordship have created a reasonable apprehension of bias in the mind of the Applicant and any fair-minded observer. The applicant submits, that the Privy Council in Lesage v The Mauritius Commercial Bank Ltd (2012) UKPC 41 has elaborated on that test at paragraphs 47 and 49 of its judgment as follows;

> "This formulation has been followed by the Board in, for instance, Attorney General of the Cayman Islands v Tibbetts (2010) UKPC 8, para 3, Prince Jefri Bolkiak V The State of Brunei: Darussalam (20071 UKPC 62. para 15and Belize Bank Ltd v The Attorney General of Belize [20111 UKPC 36. paras 34 and 35. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. "

16. The applicant submits that in considering how the notional observer would approach this task, one should recall Lord Steyn's approval in Lawal v Northern Spirit Ltd [20031 UKHL 35. 2004 1 All ER 187 of Kirby J's comment in Johnson v Johnson (2000 201 CLR 488,509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in Gillies v Secretary of State for Work and pensions (Scotland) [20061 UKHL 2, [20061 1 All ER 731, para 17: " "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it Is the appearance that

these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

17. The applicant submits that the East African Court of Justice has stated in application. no. 5 of 2006: Attorney General of the Republic of Kenya vs Anyang Nyongo and others judicial impartiality is the bedrock of every civilized and democratic judicial system and has incidents described in (b) show, the perception is that in this suit that impartiality is not there. The system requires a judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute. There are two modes in which the Court guards and enforce impartiality. First, a judge, either on his own motion or on application by a party, will recuse himself from hearing. a cause before him, if there are circumstances that are likely to undermine, or that appear to- be likely to undermine his impartiality in determining the cause, Secondly, through appellate or review jurisdiction, a court will nullify a judicial decision if it is established that the decision was arrived at without strict adherence to the established principle that ensure judicial impartiality. The first is that a man ought not to be a judge in his own cause. The second, which additionally is intended to. preserve public confidence in the judicial process, is that justice must not only be done but must be seen to be done.

Ex-parte Applicants Reply

18. In reply, the exparte applicant states the allegation of bias has no factual basis in that:

    i. The perceived allegation of bias against the Honorable Judge is not backed by specific pleadedfact of bias.

    ii. The Applicant has not pleaded and demonstrated how the Judgment in Nakuru ELC J.R No. 1 OF2024 is related to this application, and particulars of bias thereof.

    iii. No facts are pleaded on the alleged bias on the side of Margaret Damat and Joseph Njoka whoare not yet parties to this application.

19. The Applicant having sensed deficiency of her defense in the pending Judicial Review Application is laying precautionary grounds for further attack on the character of the Honorable Judge if the ruling doesn't go her way- thus arm- twisting and holding the court as captive. According to the exparte applicant, the Applicant has not established any valid grounds for recusal. This court has constitutional and statutory mandate to dispense justice without fear or favour. The mere fact that this court has previously made finding in other suits unfavourable to the Applicant cannot be legal ground for recusal. The application is based on malice and vengeance and intended to avenge and embarrass the court for previous loss jn Nakuru E.L.C Judicial Review No. 1 of 2024. The Applicant has acquired a unique and weird attitude of savage attack and undermining Judicial Officers dealing with pending litigation where she is a party as demonstrated by recent ruling by Hon. Justice Mohochi, delivered on31st October 2024 relating to similar application for recusal. This application lacks merit and should be dismissed as an abuse of court process and wastage of state resources. The application is a clear case of the abuse of the court process and calculated tool of harassment, blackmailing, arms-twisting and/ or capture of the Honorable Judge in that in case the pending application for Judicial Review does not favour the Applicant, this would affirm the allegedly existence judges of partiality, bias and further attack.

20. The application for recusal does not meet the basic guideline that governs recusal as laid down under Rule 21 (1) of the Judicial Service (code of conduct and Ethics) Regulations, 2020. The application for recusal lacks bonafide is unsubstantiated, unfounded/ unmeritorious and falls short of legal principles governing recusal of as laid down within the judicial precedents postulating the test for recusal.

21. A Court of Law has a constitutional and statutory duty to determine cases without fear or favour and not to recuse without sound reasons which are lacking in the present application.

22. The mere fact that this court has made previous judgement /orders unfavorable to the Applicant cannot be a legal basis for recusal and the Applicant ought to follow legal channel of appeal to challenge those decisions. The Applicant is now proven vexatious and frivolous Litigant abuser of court process and should be declared so.

23. The exparte applicant submits that a casual perusal of PWN 3 clearly indicates the same to be a Judgment Notice dated 2nd November 2024 and signed by the firm of M/S Kamau Kuria & Company Advocates and not direction issued by Hon. Justice Ombwayo as alleged. It is submitted that the reason for recusal is irrational, fictitious and imaginary as the court is yet to determine the pending Judicial Review on merits. It's the submission of the Applicant the main intention of filing this application is to intimidate, harass and blackmail the court so that in case the Judicial Review decision is unfavorable against the Applicant she has a reason to accuse the Judge of partiality. This is a clear case of abuse of court process and should be discouraged by dismissing the application, Legal principles governing recusal of a Judicial Officer: The importance of judicial impartiality is foundational to the administration of justice, as enshrined in Article 50 (1) of *the Constitution* of Kenya, 2010 which guarantees every individual the right to a fair hearing before an impartial tribunal. Further, The Judicial Service (Code of Conduct and Ethics) Regulation, 2020 establishes guidelines that govern the conduct of judicial officers and the circumstances under which they may recuse themselves from handling a matter before them. Rule 21 (1) of the Regulations provides as follows: -

"21,

(1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge

(a) is a party to the proceedings;

(b) was, or is a material witness in the matter in controversy;

(c) has persona/ knowledge of disputed evidentiary facts concerning the proceedings;

d. has actual/ bias or prejudice concerning a party;

e. has a persona/ interest or is in a relationship with a person who has a persona/ interest in the outcome of the matter.

f. had previously acted as a counsel for a party in the same matter;

g. is precluded from hearing the matter on account of any other sufficient reason; or

h. or a member of the judge's family has economic or other interest in the outcome of the matter in question.

24. The exparte applicant submits that none of the foregoing circumstances apply to the present case. None have been alluded to by the Applicant herein. She does not allege or demonstrate on any of the laid down circumstances herein,

The test for Recusal: There are endless judicial precedents in this country postulating the test for recusal, The test/ an Applicant seeking recusal' of a judge on allegation of bias or

partiality must demonstrate, with factual proof, reasonable apprehension of bias as would be perceived by reasonable right- minded persons applying themselves to the question, and sized of all relevant information. This test has clearly not been met in this instant case. The exparte applicant relies on the case of Philip K. Tunoi &anor -vs- Judicial Service Commission & Anor [20161 eKLR the Court of Appeal reiterated the position that was held in the case of Peter -vs- Magill (200211 AL ER 465 ER 465/ that:-

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The exparte applicant submits that in the instant case, there are absolutely no facts of circumstances bespeaking of any bias or partiality of the court herein."

Analysis And Determination

25. Judicial recusal is a fundamental principle that upholds the integrity and impartiality of the justice system. It ensures that judicial officers presiding over cases have no conflicts of interest and can deliver fair and unbiased decisions. It is essential for judicial officers to exercise their discretion judiciously when considering recusal, balancing the principles of fairness, independence, and the efficient administration of justice. Ultimately, the goal is to maintain the integrity of the judicial system and safeguard the fundamental right to a fair and impartial trial for all parties involved. The judge should recuse himself on proper grounds for the same and not just because the issue of recusal has been raised by a party because to do so will be encouraging forum shopping.

26. On the issue of recusal, the applicant relied on the case of Charity Muthoni Gitabi Versus Joseph Gichangi Gitabi (2017)eKLR, and Kalpana H. Rawal Versus Judicial Service Commission and 2 others (2016) eKLR, is relevant were the Court of Appeal held;

> "An application for recusal of a Judge is a necessary evil. On the one hand, it calls into question the fairness of a judge who has sworn to do justice impartially, the accordance with *the constitution* without any fear, favour bias, affection, ill will, prejudice, political, religion or other influence. In such applications, the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human and above all *the constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the 2 evils. The alternative is to risk. Violating a cardinal guarantee of *the constitution*, namely the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial court ....."

27. In the case of Philip K. Tunoi & Another Versus Judicial Service Commission & Another (2016), the CA held;

> "In determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balance approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is real possibility of bias."

28. I have considered the application for recusal and do find that the grounds for recusal have no basis as this court has not made any determination in this matter and that Hon. Lady Justice Omollo did not

conclude that this court had made a determination as what she stated were remarks in a ruling that were an Obiter dictum that do not bind this court. The applicant does not raise any discernable ground that calls for the judge to recuse himself.

29. At Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;

(a) Is a party to the proceedings;

b. Was, or is a material witness in the matter in controversy;

c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;

d. Has actual bias or prejudice concerning a party;

e. Has a personal interest or is in a relationship with a person who has a personal interest in theoutcome of the matter;

f. Had previously acted as a counsel for a party in the same matter;

g. Is precluded from hearing the matter on account of any other sufficient reason; or

h. Or a member of the Judge's family has economic or other interest in the outcome of the matter inquestion.

30. This court is bound by principle 52 of the Bangalore Principles to which Kenya is a signatory underpins the importance of impartiality of a Judge in the course of conducting proceedings. Regulation 9 of the Judiciary Code of Conduct aforesaid also emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:-

> "A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices."

31. The court is also bound by the doctrine of the duty to sit which flows from *the Constitution* and Common law. It has been held that all judicial officers take an oath to serve and administer justice, it is implied that there is a duty to sit imposed upon them by the value and the principle of the rule of law. Judicial officers should thus resist the temptation to recuse themselves simply because it would be more convenient to do so.

32. The doctrine requires judicial officers not to recuse themselves unless there are compelling reasons not to sit. The doctrine was discussed by the Supreme Court (Ibrahim, SCJ) in his Lordship's concurring opinion in Gladys Boss Shollei v Judicial Service Commission (2018) eKLR stating that the doctrine safeguards a party's right to be heard and determined before a Court of law:

> "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 dushould 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 has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a Court of law."

33. Recusal is a matter of judicial discretion and judicial officers should recuse themselves whenever they feel they may not appear to be fair or where they feel their impartiality would be called into question. Regulation 21 of the Judicial Service Regulations, behoves a judicial officer to disqualify oneself in proceedings where his or her impartiality might reasonably be called into question. Judicial officers must therefore take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. They should therefore not readily succumb to bullying or intimidation by a party to recuse themselves.

34. In the case of Prayosha Ventures Limited vs NIC Bank Ltd & Others (2020) eKLR the Court (Omondi, J – as she then was) dismissed a recusal application and found thus:-

> "It is not lost to me that the issue of recusal was spontaneously announced once I declined to extend the orders, and there should be no pretence by Mr. Lagat that the Interested Party instructed him to apply for my recusal... I have no lien over the matter, and would be more than willing to have this matter taken over by another judicial officer, except that the manner in which the recusal is sought reeks of mala fides clothed with sharp practice, outright bullying and intimidation. That where a litigant does not call the tune and pay the piper, then the bias flag is waved all over. Indeed, for good measure, Dr Kiprono reminded this Court that his client would be considering presenting a complaint to the Judicial Service Commission over my conduct in this matter. If that was not intended to scare the daylights out of me, then I do not know why the name of my employer was being invoked at that point."

35. Similarly, in Dobbs v Tridios Bank NV (2005) EWCA 468 the Court cautioned itself as follows with respect to the antics of a certain Mr. Dobbs:

> "... But it is important for a Judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If Judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select Judges to hear their cases simply by criticizing all the Judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a Judge felt obliged to recuse himself simply because he had been criticized – whether that criticism was justified or not. That would apply, not only to the individual Judge, but to all Judges in this court; if the criticism is indeed that there is no Judge of this court who can give Mr. Dobbs a fair hearing because he is criticizing the system generally. Mr. Dobbs' appeal could never be heard."

36. The court has not discerned any evidence of actual bias or impartiality in the supporting affidavits. The applicant alleges bias and relies on the directions of the court which if read by a right thinking person does not demonstrate the alleged bias or conflict of interest. Moreover, there are no sufficient grounds to require me to recuse myself from hearing the matter. The applicant is only accusing this court of having handled Nakuru ELC JR NO 1 OF 2024 in a manner that did not please her. This court should guard against being boxed in a corner of fear by an applicant who has no basis in her application for recusal but merely wants another judge to hear the case based on previous determinations. The applicant has not demonstrated to this court the alleged bias or conflict of interest arising from this court's decision in the above mentioned decided matter or ay sufficient reason for recusal and therefore the application has no basis and is dismissed with costs

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2025-02-20 17:55:51