



**Masinde v Jivraj & 4 others (Environment & Land Case 23 of 2019)  
[2024] KEELC 13306 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13306 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 23 OF 2019  
EC CHERONO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**ALPHONCE WANJALA MASINDE ..... PLAINTIFF**

**AND**

**ALTAF ABDULALI SHARIFF JIVRAJ ..... 1<sup>ST</sup> DEFENDANT**

**NAZMUDIN ABDULALI SHARIFF JIVRAJ ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF BUNGOMA ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Applicant’s Notice of Motion application dated 10<sup>th</sup> July 2024. The said application is expressed to be brought under Article 50 of *the Constitution* of Kenya, Section 1A, 1B, and 3A of the *Civil Procedure Act*; Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following Orders:
  - a. Spent.
  - b. There be a stay of substantive hearing of the main suit pending the hearing and determination of this application.
  - c. The Honourable Mr. Justice Cheronno Enock, the Presiding Judge in this matter, recuses himself from further hearing and determination of this case.
  - d. This Honourable Court makes such further orders as it deems fit in the interests of justice.
  - e. Costs.



2. The application is based on the grounds on the face of the application supported by the affidavit sworn by Nazmudin Abdulali Shariff JivraJ-2<sup>nd</sup> Defendant therein on the 10<sup>th</sup> July, 2024.
3. In their supporting affidavit, the Applicants deposed that being aggrieved by various rulings delivered by this Honourable Court on 21<sup>st</sup> and 22<sup>nd</sup> May 2024, they have since obtained leave to appeal against the said decisions and subsequently filed a Notice of Appeal. They further stated that upon review of the Court proceedings, they became apprehensive that the Court, through its conduct and comments has shown partiality and bias against them on the following grounds;
  - i. First, on 20<sup>th</sup> February, 2024 the Court did not give proper consideration to an objection by their advocate on an irregular witness statement by one CPT Charles Masinde and dismissed the same thereby violating procedural rules and their right to a fair trial.
  - ii. Secondly, on 21<sup>st</sup> May 2024, the Court assumed the role of both the prosecutor and judge by raising objections on its own accord and preventing them from presenting evidence through their witness. (iii) Thirdly, on 22<sup>nd</sup> May, 2024 the Court falsely recorded that the objection to documents raised by the witness was made by the Plaintiff's counsel thus misrepresenting the record and breached Judicial Service Code of Conduct and Ethics.
4. It was further deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's herein have filed a complaint against the Court with the Judicial Service Commission (JSC) and as such, the court is no longer impartial and is potentially a witness in a dispute with the 2<sup>nd</sup> Defendant rendering it unfit to conduct further hearings. It was argued that the application is aimed at safeguarding the parties' right to a fair hearing under Article 50 of *the Constitution*. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's argued that the Court ought to recuse itself when its impartiality is reasonably questioned.
5. Upon being served with the said application, the plaintiff/Respondent filed grounds of opposition dated 29<sup>th</sup> July, 2024 where he averred that the application does not meet the specific special circumstances under which a judge must recuse himself as set out in Rule 46 of the Judicial Service Code of Conduct. It was argued that the application was an afterthought, an abuse of the court process and unsuitable in law as it seeks to have the trial judge recuse himself because he exercised his inherent Constitutional duty in ensuring procedural fairness and fair trial.
6. The Respondent further averred that the prayers sought in the application were far-fetched and misguided as errors, if any, made in the cause of proceedings can be cured through appropriate judicial review procedures and do not necessarily necessitate a recusal. Lastly, it was argued that the application lacks merit for failure to disclose with certainty the actual bias.
7. When the said application came up for directions, the parties agreed to have it canvassed by way of written submissions.

#### **Applicants Written Submissions.**

8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants filed submissions dated 20/09/2024 where they raised two issues. The first issue was whether allegations of judicial misconduct affect the integrity of court records and form a reasonable basis for recusal. The Applicants argued that Article 50(1) is the cornerstone of *the constitution* and submitted that when a party harbors an apprehension of bias and is able to demonstrate bias, the court loses the authority to preside over the matter and consequently must recuse itself. It was submitted that the Applicants are reasonably apprehensive that by its express and implied conduct, the court has exhibited bias against them thereby thwarting any legitimate expectation of a just and fair hearing. It was further submitted that the court has unequally treated the parties with the



plaintiff/Respondent gaining an unwarranted advantage thus undermining the provisions of Article 50(1) of *the Constitution* of Kenya, 2010.

9. The Applicants argued that the court in its proceedings falsely stated that the Plaintiff/Respondent had sought for leave to file a witness statement dated 20/05/2024 by Charles Masinde which was inaccurate and false as per the courts typed proceedings which consequently allowed the plaintiff/Respondent to rely on evidence without allowing them an opportunity to challenge or respond to the application. It was further submitted that the said evidence ought to have been struck out. It was also submitted that the courts alleged actions of deliberately manipulating judicial proceedings not only breaches the principles of natural justice but also the judicial process and meets the standards for recusal under regulation 21(1), 11 and 33 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020. Reliance was placed in the case of Francis Ndungu Wanjau vs. Republic (2011) eKLR.
10. The second issue raised was whether the application discloses direct conflict of interest which warrants recusal. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants submitted that having filed a complaint against the court through Judicial Service Commission (JSC) Petition No.60/2024, the dual involvement of the court on this case and the complaint then compromises the courts ability to adjudicate the present matter impartially. Reliance was placed in the case of In re Braswell 358 N.C. 721 600 S.E. 2d 849 (N.C. 2004) and Law Society of Kenya vs. Anne Kananu Mwenda & 5 Others I.E.B.C (Interested party) (2021) eKLR.

### **Respondents Written Submissions**

11. The plaintiff/Respondent filed submissions dated 29/07/2024 where they submitted on three issues. The first issue is whether the prayer for recusal has met the requirement/threshold to warrant such recusal or at all. It was submitted that no good or legitimate reasons for the recusal have been established as per Rule 6 and 47 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020. They relied on the case of Philip K. Tunoi 7 Another vs. Judicial Service Commission & Another (2016) eKLR.
12. The 2<sup>nd</sup> issue was whether actual bias has been proved in which it was answered in the negative and submitted that the Applicant has not demonstrated sufficient grounds for recusal or actual bias. It was submitted that courts make their determinations based on merits of the arguments and evidence by both parties and the mere fact that adverse decisions were made against the Applicant is not a ground of bias or lack of impartiality. Reliance was placed in the case of Justice Kalpana Rawal vs. Judicial Service Commission & Another, Galaxy Paints Company Limited vs. Falcon Guards Limited (1999) eKLR. The Respondent further submitted on the real likelihood test where they relied on the case by the supreme court of Canada R v. S (R.D) [1977] 3 SCR 484. Lastly, the Respondent urged the court to dismiss the application with costs.

### **Legal Analysis And Decision**

13. I have considered the application, affidavit in support of the application, grounds of opposition as well as the rival submissions by counsel. The main issue for determination is whether I should recuse myself from dealing with the present matter.
14. The gist of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Applicants' application is that being aggrieved by various rulings delivered by this court, they have reasonable apprehension that the court has shown impartiality and bias against them. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Applicants' major contention is that that the court in its ruling on 21/5/2024 admitted the plaintiff/Respondent's witness statement filed without leave. I have perused the court proceedings and note that upon hearing all parties on the admission of the said



witness statement, the court in its reasoned ruling admitted the witness statement. It is noteworthy that after the court issued the ruling and orders complained of, the 1<sup>st</sup> and 2<sup>nd</sup> defendant/applicants sought for leave to appeal against the same which leave was granted. On 22/5/2024 when this matter came up for further hearing, the parties herein proceeded with various witnesses testifying.

15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Applicants also argued that the court failed to keep proper record of the court proceedings by issuing oral orders which breached the regulations of the Judicial Service (Code of Conduct and Ethics) and Article 50 of *the Constitution* of Kenya, 2010. The court was also accused of playing the role of a prosecutor and a judge by raising objections as the Applicants presented their case. For the above reasons, the Applicants argued that they reasonably apprehend bias through the courts conduct and comments which they say, have shown outright partiality and bias against them.
16. First and foremost, it is my view that the Applicants appear not to appreciate the basic principle that a party aggrieved by a judgment, ruling, order or direction of a court has the liberty to prefer an appeal to the superior court or apply for a review of the same. As such, this grievance by the Applicants is not sufficient grounds for this court to recuse itself as there are legal avenues specifically designated for addressing such concerns.
17. Now, to discuss the merits of the application, the Applicants are mainly imputing bias and impartiality on the part of this court as their basis for seeking my recusal. I should, however mention that Judges have taken an oath of Office (an oath that this court is committed to) to sit and preside over disputes placed before them. Judges take an oath of Office which dictates that they are to serve fairly, impartiality and diligently without fear or favour, while observing the principles of law and safeguarding *the Constitution*. Lord Denning (1899-1999) of England who spoke of the candor and trust associated with the judicial appointment: “[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges” [see Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How they made the Common Law* (Cambridge: University Press, 2012), p.156.
18. In the case of Gladys Boss Sholei vs. Judicial Service Commission & Another Petition No 34 of 2014 [2018 eKLR], the Supreme Court described that duty in the following terms “Though not profound in our jurisdiction, every judge has a duty to sit in a matter which he duly should sit. So that recusal should not be read 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 an oath of office, a judge is capable of rising above any prejudices, save for those rare cases where he has to recuse himself. The doctrine also safeguards the parties right to have their cases heard and determined before a court of law.”
19. Further and in respect of this doctrine of a judge’s duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – “Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

“A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason” (emphasis mine)



20. The principles governing recusal in this jurisdiction are now well settled. In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* HC COMM No. 332 of 2010 [2014] eKLR the court observed that:

“The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali And Others* C.a Criminal Application No Nai 4 And 5 Of 1995 (unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Others* C.a. Civil Application No Nai 310 Of 2004 (Unreported) where the Court of Appeal stated that:

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...”

21. In *Philip K. Tunoi & another v Judicial Service Commission & Another* CA Civil Application NAI No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in *Porter v Magill* [2002] 1 All ER 465, where it stated that,

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.”

The same position was taken by the Supreme Court of Kenya (per Ibrahim J.) in *Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others* SCK Petition No. 4 of 2012 [2013] eKLR where he observed as follows;

“The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”

22. The principles in the cases cited above buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26<sup>th</sup> May 2020. Under 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 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.



23. Regulation 9 of the Judiciary Code of Conduct 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.

24. The term “actual bias” is defined in Black’s Law Dictionary 10<sup>th</sup> Edition as: “Genuine prejudice that a judge, juror, witness or other person has against some person or relevant subject”. “Judicial bias” is defined in the same Dictionary as follows:-“A judge’s bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually not enough to disqualify a judge from presiding over a case unless the judges’ bias is personal or based on some extra judicial reason”.
25. It is key to note at this juncture that each of the decisions complained of by the Applicants was made after arguments and it is trite that if any party is dissatisfied with a courts judgment, ruling order or directions, she is entitled to either apply for a review or lodge an appeal.
26. The applicant also contends that the court falsified the record on 22/5/2024 by stating that the Plaintiff/Respondent’s counsel raised an objection yet it was the court that raised the objection. The proceedings of the said date were such that DW1 Newton Wekesa Wangusi was called to the witness stand where he adopted his witness statement and attempted to produce as an exhibit an item attached to his witness statement. The court in its inherent duty to give directions on procedural law made an observation that the documents attached to a witness statement do not constitute a list of documents properly disclosed and filed as part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ list of documents and gave the parties an opportunity to submit on the issue. Mr.Sichangi who appears for the plaintiff/Respondent herein objected to the production of the said documents and submitted on his reasons which are on record. The Applicants and the other parties were equally given an opportunity to submit and upon considering the arguments and submissions by all parties and being guided by principles of the law, this court in its reasoned ruling upheld the objection based on the reasons and submissions by Counsel for the Plaintiff/Respondent. The Applicants herein sought leave to appeal which leave was granted.
26. It is therefore irrational for the Applicants to allege that the court falsified and manipulated court proceedings for the sole reason that the court directed the parties herein on procedural issues. It is erroneous for the Applicant to suggest that the court is expected to stay silent and only watch and record proceedings while allowing parties to flaunt rules of procedure. It is trite that courts are mandated to ensure procedural fairness and due process which requires its meaningful participation in matters before it. The Civil Procedure Rules are clear on filing of documents and it would be an error for the court to fold its arms in such a case where the law has provided for a procedure.
27. Surprisingly, on 07/07/2024, after the proceedings in question, the Applicant filed a further list of documents, which included the very same documents that were attached to the witness statement and which they attempted to produce unprocedurally. This clearly vindicates the court and demonstrates that the Applicants were indeed aware of the procedure for filing and producing documents as exhibits in court, yet they deliberately chose to ignore it, disregarding procedural rules and attempting to arm twist the court into allowing the same.
28. Ultimately, it is the responsibility of the party claiming bias or lack of impartiality by a judicial officer to substantiate it with valid, merit-based reasons. Unsubstantiated suspicions of bias, prejudice, or partiality are insufficient. Additionally, a prior unfavorable ruling or order against a party does not justify recusal, and neither should it be about placating counsel’s ego.



29. The up-shot of my finding is that the Notice of Motion dated 10/07/2024 is devoid of any merit. It is accordingly dismissed with costs to the plaintiff/Respondent.

**DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Ochieng for the defendants/Applicants.

Plaintiff/Advocate-absent.

Bett C/A.

