



**Muri Mwaniki & Wamiti Advocates v Caritas Mariana Holy Family Children's Home
(Miscellaneous Application 74 of 2017) [2024] KEELC 13766 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 74 OF 2017**

JG KEMEI, J

DECEMBER 10, 2024

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES APPLICANT

AND

CARITAS MARIANA HOLY FAMILY CHILDREN'S HOME RESPONDENT

RULING

1. Vide a Notice of Motion dated 10/11/2023 premised on Section 3A of the *Civil Procedure Act* and Order 51(1) of the Civil Procedure Rules the Respondent/Client seeks in the main that the Hon. Lady Justice J.G Kemei recuses herself from the conduct of this matter and the matter be assigned another Judge forthwith. That costs of the Application be provided for.
2. The Application is based on the grounds thereat that the Respondent has lost faith in the Honorable Judge for reasons namely; that while delivering judgment in ELC No. 43 of 2017 where the Respondent was a defendant, the Hon Judge indicated that the Respondent had not filed its submissions yet it had filed the submissions on 14/12/2022 and the Judge proceeded to dismiss its case; that in the said Judgment, the Court indicated that the Respondent's Advocate was absent yet the Advocate was in attendance; that in the assailed Judgment the Hon Judge awarded costs to the Applicant when the said Advocates neither participated in the proceedings nor filed any responses and lastly that the Respondent has a right to be heard in an impartial Court.
3. The Application is supported by the Affidavit of even date of Fr. Bernard Nwachukwu who runs the Respondent's organization. He averred that on 26/4/23 he expressed his concerns vide a letter annexed as BN1 requesting for recusal of the Hon Judge.
4. The Application is opposed vide the Applicant/Advocate's Replying Affidavit sworn by Martin G Mwaniki on 27/2/24. He deponed that the Applicant/Advocate filed an Application dated 12/8/2021 being a reference to the Hon Judge against the Ruling of the Deputy Registrar in taxation of the Bill of



- costs. That in the objection to reference, the Respondent/Client filed a notice of Preliminary Objection dated 30/3/2022 annexed as ‘MGM1’ which was found unmerited and dismissed with costs vide a Ruling delivered on 13/2/2023 (MGM2). That save for not filing submissions which fact was noted by the Court, the Applicant/Advocate participated in the Preliminary Objection proceedings and that any dissatisfaction to the said Ruling, can only be challenged by way of Appeal and/or Review. That in totality the Application does not raise valid reasons to call for the Hon. Court’s recusal and as such the Application ought to be dismissed with costs.
5. On 28/2/2024 directions were taken and parties agreed to canvas the Application by way of written submissions.
 6. The Respondent/Client through the firm of Kenyariri & Associates filed submissions dated 19/6/2024. The Respondent relied on the Black’s Law Dictionary definition of recusal as ‘the removal of oneself as a Judge or policy maker in a particular matter, because of conflict of interest’. That under Rule 5 of the Judicial Code of Conduct a Judicial Officer is required to disqualify himself/herself in proceedings where his/her impartiality might reasonably be questioned which in this case the Court exhibited impartiality by failing to acknowledge the filing of the Respondent’s submissions and the decision to award costs in favor of the Advocate/Applicant.
 7. It was further submitted that in exercise of their mandate, Judges are obliged to observe fundamental principles some of which have been codified in the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 and in particular Rule 36 requires every Judicial Officer to carry out his/her duties with impartiality and objectivity. Citing the Supreme Court decision in *Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others* [2013] eKLR the Respondent urged that some of the fundamental principles underlying recusal of a Judicial Officer include perception of fairness, of conviction and of moral authority to hear the matter.
 8. In rebuttal the Applicant/Advocate filed submissions dated 19/4/2024 through the firm of Muri Mwaniki Thige & Kageni LLP Advocates. A singular issue was framed for determination; whether the Hon Judge should recuse herself from the conduct of the instant matter. Answering the issue in the negative, reliance was made on Regulation 9, 21 (1) and (2) of the Judiciary Code of Conduct and Court of Appeal decisions in *Philip K Tunoi VS JSC & Another* [2016] eKLR and *Rawal Vs JSC and another; Okoiti (Interested Party); ICJ & another (amicus curiae)* [2016] KECA 717 KLR on the subject. That the Respondent bears the burden to prove its accusations to the required standard and mere accusations do not suffice. That the grounds alluded to relate to *Thika ELC 43 of 2017* which are separate and distinct proceedings from the instant proceedings. That such an Application if at all ought to have been made in *ELC 43 of 2017*. That the Respondent’s dissatisfaction with the impugned Ruling can be pursued by way of appeal or review.
 9. The sole issue for determination is whether the Application is merited.
 10. The legal provision for recusal of a Judge or Judicial Officer is contained in Regulation 21 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 which 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 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) a member of the Judge's family has economic or other interest in the outcome of the matter in question.
- (2) Recusal by a Judge shall be based on specific grounds to be recorded in writing as part of the proceedings.
 - (3) A Judge may not recuse himself or herself if—
 - (4) In the case of a collegiate bench, the decision to dispense with the disqualification of any Judge shall be made by the bench.”

11. The threshold for recusal was laid down in the English case of Metropolitan Properties (Fg-C) Ltd Vs. Lannon & Others [1969] 1 QB 577 that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Closer home, the Supreme Court in Jasbir Singh Rai supra gave the following guidelines to apply in determining recusal Applications:

- “(6) Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303]:“Removal of oneself as Judge or policy maker in a particular matter, [especially] because of a conflict of interest.”
- (7) From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.”

12. It is also trite that whereas a party is entitled to apply for recusal when circumstances of the case are warranted, this Court has to strike a balance between the principles of recusal of a Judge against the



exception to the rule which is the Court's paramount duty to sit. See the case of C.G Wathana & Company Advocates Vs. Peter Mwangi Kariuki (2020)eKLR where it was held that:

“It is the right of every party to apply for a Judge to recuse himself. This proceeds from the fact that justice must not only be done but be seen to be done and if a basis is established that justice will not be seen to be done, then the Judge must give way. On the other hand Judges have a duty to sit, hear and determine a case and it is assumed that absent a direct conflict of interest, they will discharge justice in accordance with the oath of office.”

13. Turning to the gist of the Respondent's motion, the Respondent firstly contends that in the assailed Judgment delivered on 13/2/2022 (sic), the Hon Judge observed that the Respondent had not filed submissions yet the Respondent insists that it filed submissions on the ELC email. I have perused the Judgment in Thika ELC No. 43 of 2017 delivered on 13/2/2023 and I confirm that at para. 10 of the Judgment the Court noted that as at the close of business of 20/12/2022 which was the deadline for filing submissions, neither of the parties had complied. Indeed, the file does not contain any submissions to that end. With respect, I find it suffice to state that this allegation does not meet the threshold for recusals in light of the above precedents. I say so because firstly submissions are not evidence. They are persuasive arguments advanced by parties at the close of a case. They can be oral or written. The determination of a case squarely falls on evidence presented before a Court of law and the analysis rendered by the Court thereto.
14. Secondly, the Respondent has expressed dissatisfaction with the recording of coram which according to it, excluded its Advocate Dr. Christopher Kenyariri. Again, a perusal of Thika ELC 43 of 2017 explicitly indicates the Counsel's name in the coram of the Judgment and the Court proceedings of that day. At this point it is my view that the instant Application is improperly in this file since THIKA ELC 43 of 2017 is a separate suit and any protests to it, ought to have been filed therein. Further the Respondent already filed its Notice of Appeal therein dated 14/2/2023 against the impugned Judgment.
15. The last contention refers to the Court's Ruling delivered on the same day in ELC Misc No. 74 of 2017. It is averred that the Hon Judge proceeded to award costs in favor of the Applicant yet the Applicant's advocates neither participated in the proceedings nor filed any response to the Preliminary Objection, the subject of the Ruling. The award of costs is purely at the discretion of the Court as outlined under Section 27 of the *Civil Procedure Act*. If a party is aggrieved with such award or non-award as the case maybe, there are laid down mechanisms to challenge the decision of the Court to that end. Certainly, an Application for recusal is not one.
16. From the forgoing, I reach the irresistible conclusion that the instant Application fails to satisfy the threshold for recusal as prayed.
17. The upshot of the forgoing is that the Application is bereft of merit. It is dismissed with costs to the Applicant/Advocate.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 10TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Lundi for the Applicant



Dr. Kenyariri for the Respondent

Court Assistant – Phyllis/Ann

