



REPUBLIC OF KENYA



**Kamau & another v Kingdom Bank Limited (Civil Suit E001 of 2022)  
[2025] KEHC 2545 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL SUIT E001 OF 2022  
DKN MAGARE, J  
FEBRUARY 27, 2025**

**BETWEEN**

**JONAH WAWERU KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**LIONS SECURITY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KINGDOM BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff herein filed an application dated 30.1.2025 under urgency seeking the relief that the Judge handling this matter, Honourable Mr. Justice Kizito Magare recuses himself from further handling and or hearing this matter forthwith and Hon. Chief Justice appoint another judge to handle the matter.
2. The application was supported by the affidavit of Jonah Waweru Kamau, the 1<sup>st</sup> Plaintiff and was principally based on the following grounds:
  - a. The continued dealing by the Judge was detrimental to the Plaintiff's right to fair hearing by an independent and impartial Judge under Article 25 and 50 of the Constitution.
  - b. Justice must not just be done but also seen to be done.
  - c. The Defendant has numerously failed to comply with the order of the court but has not been sanctioned despite the Plaintiff's protest.
  - d. The Application seeks to preserve the administration of justice.
3. The Defendant filed its Replying Affidavit sworn by Rurige Mwangi, Advocate on 6.2.2025 opposing the application on the grounds that:



- a. The Plaintiff sought recusal of Hon. Justice Muya and when the matter was moved to be heard by Hon. Justice Kizito Magare, they still filed the same application meaning their true motive is not recusal of the judge.
  - b. The filing of this application when the matter is pending a ruling shows that the Plaintiffs are not keen on prosecuting this matter to conclusion.
  - c. The Honourable Judge has not exhibited any bias and cannot be ousted from conducting the proceedings.
4. The Plaintiff filed written submissions dated 11.2.2025 supporting the application. They submitted that the judge was biased, hence the application. They relied on Michael Obare Tago v Fredrick Ambrose Otieno (2020) eKLR to support the submission that the Plaintiff had satisfied the objective test of bias.
  5. It was submitted that the Judge was unlikely to be impartial and, as such, biased. They cited DPP v Charles Kiprotich Tanui & 2 others Nairobi HC Anti-Corruption Criminal Revision Number E003 of 2024, where my brother Justice Prof. (Dr.) Sifuna, held that:
    - “24. Needless to say, recusal applications should not be used by litigants for intimidation, insubordination, blackmail, arm-twisting, capture the boxing of a judge into confirming with litigants whims; or for throwing him to into panic, subservience or dishonor, such ulterior motives if allowed have the undesirable consequence of chipping away on the authority, dignity, integrity and independence of courts”.
  6. The Defendant did not file its submissions.

### **Analysis**

7. On recusal of Judges and Judicial Officers, the Judicial Service Commission made the Judicial Service (Code of Conduct and Ethics) Regulations 2020 pursuant to Section 47(2)(a) of the *Judicial Service Act*, Section 37 of the *Leadership and Integrity Act*, 2012 and section 5(1) of the *Public Officer Ethics Act*, 2003.
8. Under regulation 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 is: -
  - 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.



9. Regulation 21(2) requires that recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceeding. This is supplemented by regulation 21 (3) which forbids a judge from recusing himself or herself if in the circumstances set out therein.
10. The effect of the said regulations is that the court must guard against its independence and not to recuse itself in circumstances that do not merit. However, in circumstances where there is merit either due to the surrounding facts or appearance of bias, a judge should recuse himself. If for example a family member is involved, the court should not wait for an application for recusal.
11. This even occurs in cases where, the judge's conscious points to discomfort due to relationship, either legal or clandestine. However, where there is no merit and the same is based on unfounded speculations, the court should and must not recuse itself. Under Regulation Rule 7 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020, a judge shall exercise judicial authority independently and shall: -
  - a. Uphold the independence and integrity of the judiciary and the authority of the courts;
  - b. Maintain an independence of mind in the performance of judicial duties;
  - c. Take all reasonable steps to ensure that no person, forum, or organ of state, interferes with the functioning of the courts;
  - d. Exercise judicial function on the basis of the judge's own assessment of the facts of the case, in accordance with a conscientious understanding of the law, and without reference to any extraneous influences; and
  - e. Exercise judicial function without being influenced by personal feelings, prejudice, or bias.
12. Independent exercise of judicial authority is affected by bias or ill will against a party. It is also compromised if the court succumbs to machinations and intimidation by parties.
13. However, where a party wants to waste the court's time or otherwise forum shop, the court should be firm and clearly indicate so to parties. Unnecessary application for recusal is an affront to the independence of the judiciary and decisional independence of the judges. On the other hand a biased court is anathema to the independence of the court and the image of the judiciary.
14. In this matter, there is no allegation of actual or perceived bias arising from the relation between parties. The court is accused of entertaining contempt and noncompliance of the directions by the court on the part of the Defendant. The same has not been said of the manner in which the court prejudicially assists the Defendant to the disadvantage of the Plaintiff on the beam balance of justice.
15. There is no contempt of court application that the court has declined to determine. A reasonable, objective, and informed person would, on the correct facts, reasonably find no apprehension that the Court has not or will not bring an impartial mind to bear on the adjudication of this case based on a mind open to persuasion by the evidence and by the Plaintiffs herein. In the case of *National Water Conservation and Pipeline Corporation v. Runji & Partners Consulting Engineers and Planners Limited* (2021) eKLR the Court stated as follows: -
  30. I cannot think of a more eloquent exposition of the law on recusal of judicial officers than the succinct exposition proffered by the Constitutional Court of South Africa in *President of*



the Republic of South Africa and Others v South African Rugby Football Union and Others which indisputably articulated the proper approach as follows:-

“... 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.”

31. Because of the relevancy of the above elucidation to the issues at hand, some of the salient facets of the judgment merit some emphasis in the present context. In articulating the test in the terms quoted above, the court observed that two considerations are built into the test itself. First, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. One, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. Two, the presumption is not easily dislodged. It requires “cogent” or “convincing” evidence to be rebutted
32. Second, the other in-built aspect of the test is that “absolute neutrality” is something of a chimera in the judicial context.<sup>[12]</sup> This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality; a distinction the above cited decision vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party, or to the judge’s own predilections, preconceptions and personal views - that is the keystone of a civilized system of adjudication. Impartiality requires in short “a mind open to persuasion by the evidence and the submissions of counsel” and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. This is because: -

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.”

16. The Plaintiffs have themselves delayed their case through numerous applications and cannot turn the blame on the court. I consider it a mere inquiry upon this court to decide whether or not it should resolve the pending matter. I choose to proceed and deal with this matter for no reason that justifies my recusal, whether self-imposed or imposed by the Plaintiffs or any other party. The test used in cases for recusal of such a nature is what the house of Lords in R –vs- Gough (1993) AC 646 calls the real



danger test, though not of universal application, the test is whether, there is real danger that a fair trial was likely to be denied. To me such a test is too restrictive and may not be achieved by most parties applying for recusal.

17. I prefer the test of the real likelihood of bias. In this case, it is not necessary to prove actual bias, but whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. In paragraph 39 of the decision of Michael Obare Tago versus Fredrick Ambrose Otieno (2020) eKLR, the court posited as follows:-

In the Attorney General of Kenya vs Professor Anyang Nyong'o & 10 Others EACJ Application No. 5 Of 2007, the court stated: -

“We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amount to this- do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially”

18. The test is not what the litigant feels. It is a member of the public, who is not only reasonable but also fair minded and informed about all the circumstances of the case. *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR, Justice D.S. Majanja, held as follows: -

“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 (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 that, “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.”

19. In this matter, a fair-minded person, knowing the circumstances of this case, will not have any doubt that the case will be heard fairly. In the case of *In Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR (supra) the court proceeded as doth: -

“On the test of a ‘fair minded and informed observer’ and the provisions of the Code of Conduct above, can it be said that taking into account all circumstances of this case, I am likely to be biased against the Advocates and deny them a right to a fair trial? I think not. The Advocates have not laid any factual basis for a reasonable observer appraised of the facts to demonstrate a possibility of real bias.”

20. In this particular case, the Plaintiffs have not laid any factual and legal basis for my recusal. There is no way of knowing what is in a person's mind.

21. The matter was initially before High Court No. 2. On transfer to this court, it was placed before me. There were about 11 applications filed by the Applicant. One of them was a recusal application for that court. I gave omnibus directions on all applications. I gave directions on the filing of submissions on all applications. Some were withdrawn, leaving seven of them. I fixed the matter for directions for giving



a ruling date. On the said date, I gave a ruling date of 6.3.2025. In the middle of writing the ruling, this application found its way to the court. I gave directions for filing submissions and replies and eventually ruling. It appears the same is meant to delay the actual hearing. As part of case management, I also gave directions for pretrial proceedings.

22. The Applicant, for some strange reason, has an unfounded feeling of entitlement. The only question remaining in the court is for me to determine the myriad applications filed. As per directions given for backlog reduction, the court must strive to have merit determination. Any attempt to use unlawful and unjust means to derail a hearing through forum shopping must be stopped in its tracks.
23. Without tangible evidence leading to question the partiality, I decline to recuse myself. The allegations laid out have not reached an evidential threshold for recusal. In the case of the Attorney General of Kenya Vs. Professor Anyang' Nyong'o & to 10 Others EACJ Application No. 5 of 2007 the Court Stated:

We think that the Objective test of “reasonable apprehension of bias” is good Law. The test is stated variously, but amounts to this -do the circumstances give rise to a reasonable apprehension in the mind of the reasonable, fair-minded, and informed member of the public, that the Judge did not (will not) apply his mind to the case impartially? Needless to say-

“A litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable, but also fair minded and informed about all the circumstances of the case.”

24. The reasonableness of the allegations of absence of impartiality on the part of this court is conspicuously lacking. In the Supreme Court of Canada R Vs. S.C.R.D.) [1977]. 3SCR 484 cited by the Court of Appeal cited by the Court of Appeal in Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) (Civil Appeal 1 of 2016) [2016] KECA 534 (KLR) (27 May 2016) (Judgment) it was held that:

“The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. This test contains a two-fold Objective element:- the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold.

The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The Jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the



facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

25. Therefore, the Plaintiffs have not succeeded in demonstrating matters that would call into question the fairness of this court in dealing with their case. In *Kaplana Rawal Vs. Judicial Service Commission and 2 Others* [2016] eKLR, the court stated:

“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, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such application, 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 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 two evils. The alternative is to risk violating the cordial guarantee of the Constitution, namely, the right to 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 an independent and impartial Court.

“... An application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties the Judge must, without more, recuse himself. Such is the situation where a Judge is a party to the suit or has a direct financial or proprietary Interest in the Outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however arises where like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a Judge?

26. All the above decisions demonstrate how the courts of contemporary and higher jurisdiction, home and abroad, have reasoned on this question of the recusal of a judicial officer from conducting judicial proceedings; on allegations of bias.
27. The application for recusal herein is based on speculation, conjecture and sheer paranoia and falls short of the legal threshold to recuse a judge from handling a case. Justice Prof. Dr. Sifuna, in *Tuff Bitumen Limited Versus SBM Bank (Kenya ) Ltd and Another* 2023 (unreported) stated as doth: -

“...the bedrock of this determination rests on the that a recusal is necessitated where it is proved beyond peradventure, speculation, conjecture and sheer paranoia, that a judicial officer will not impartially handle a case before him as a result of actual bias or a reasonable apprehension thereof; and never on unfounded or unreasonable apprehension. Where an Application is based on apprehension rather than actual bias, the apprehension should be that of a reasonable person and must be assessed in the light of the true facts as they emerge at the hearing of the Application; and the test t weight the apprehension should be objective one, and not a subjective one based for instance, on mere paranoia.

The Supreme Court of Uganda in *Uganda Polybags Limited v Development Fiance Company Ltd & Others* (1999) 2 EA 337 was of the view that litigants have no right to choose which judicial officer should hear and determine their cases, since all judicial officers take oath to administer justice to all manner of people impartially without fear, favour,



affection or ill will and the oath must be respected the case applied in all cases of apparent bias was whether having regard to the relevant circumstances, .

Here at home, our Court of Appeal in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* Civil Appeal N0. 836 of 1996 stated as follows:

“except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was real danger of bias on the relevant member if the tribunal in question in the sense that he might unfairly regard or unfairly regarded with favour or disfavor the case of a party to issue under consideration by him; the real test is in the nature of real danger as opposed to real likelihood to ensure that the court is thinking in terms of possibility rather than probability of bias. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to suggestions of appearance of bias encourage parties to believe that by seeking the disqualification of a Judge they will have their cases tried by someone thought to be more likely to decide the case in their favour. although most litigants would much prefer theta they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants”.

28. The application also falls short of the requirement of a real danger of bias on this court, in the sense that the court might unfairly regard with favour or disfavor the case of the Plaintiffs. The Court of Appeal in *Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others* Civil Appeal No. 36 of 1996 held:

“Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants.”

29. The court is prepared to deal with this matter to conclusion. The parties do not choose the forum. Put conversely, courts do not choose which cases to hear or not to hear. It is a fishing net. We hear all cases from all and sundry. Some parties sometimes have a false sense of self-importance and do not take kindly losses. They take recusal as a means of getting or hoping to get specific courts to hear them.



Unfortunately, both the parties and court have no such luxury. The court in the case of Tuff Bitumen Limited Versus SBM Bank (supra), Justice Prof. Sifuna stated as doth:

“...by so doing, courts will deal with the improper habits of parties and their advocates filing recusal applications and later (failing or even electing not to prosecute them; simply abandoning them, or (c) withdrawing them. They do this after having embarrassed or humiliated the subject judicial officer and caused him mental anguish. proceeding to determine those Applications despite such failure, abandonment tor withdrawal will most likely discourage the habit of the parties or their advocates making recusal Applications and later failing to prosecute them, abandoning them, choreographically and dramatically withdrawing them before they are heard. Such mischief makers sometimes with draw their Applications on the eve of the hearing, while the Application is pending Ruling or on the day of the Ruling as attempted in this case.”

30. In the end, the application lacks merit. The court is convinced that it is still true to its oath of neutrality. The Plaintiffs have to elect what to do with the case but it is important to prosecute the cases once filed. It cannot be that the courts are a repository of cases awaiting a favourable court.
31. The application is dismissed for lack of merit. The application was directed to the court. The Defendant found themselves in the mix. In the circumstances they can be assuaged by costs. The Respondent shall have costs of Kshs. 20,000/= for the said application payable within 30 days.

#### **Determination**

32. The upshot of the foregoing is that the court makes the following orders: -
  - a. The application dated 30.1.2025 lacks merit and is dismissed with costs of Kshs. 20,000/= to the Defendant payable within 30 days, in default execution to issue.
  - b. The ruling date for the pending applications shall now be on 26<sup>th</sup> March 2025, having been derailed by this application.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Plaintiff/Applicant present

No appearance for the Defendant/Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

