



Nurani & another (Suing as the Legal Administrators of the Estate of Sadrudin Shmsudin Ismail Nurani) v Gulam & 2 others (Environment & Land Case 596 of 2014) [2023] KEELC 16055 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 596 OF 2014
OA ANGOTE, J
FEBRUARY 23, 2023**

BETWEEN

**FARAH SADRUDIN NURANI 1ST PLAINTIFF
FEISAL SADRUDIN NURANI 2ND PLAINTIFF
SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SADRUDIN
SHMSUDIN ISMAIL NURANI**

AND

**GALEB GULAM 1ST DEFENDANT
SUNSHINE COTTAGES LIMITED 2ND DEFENDANT
DIAMOND TRUST BANK 3RD DEFENDANT**

RULING

1. Through the notice of motion dated June 20, 2022, the 2nd defendant/ applicant sought the following orders from this court:
 - a. That Hon Mr Justice O Angote does recuse himself from hearing and determining this suit.
 - b. That such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the dignity of this honourable court.
 - c. That costs be provided for.
2. The grounds of the application, as set out on the face of the application and the Supporting Affidavit sworn by the 2nd Defendant's Director are that recently, he learnt that the judge herein is a close family friend of Mr Steve Luseno advocate for the Plaintiffs in this suit and that the judge previously worked with Mr Luseno's wife at the then Kenya Anti-Corruption Commission.



3. It is the 2nd Defendant's Director's deposition that such relationship creates a reasonable apprehension in the Plaintiff that he will not receive a fair hearing.
4. The 1st Plaintiff opposed the application vide an Affidavit in which she deponed that the application lacks merit and is an abuse of court process and that since the conclusion of the hearing of the Plaintiffs' and the 1st Defendant's case on 7th and March 8, 2022, the 2nd Defendant has employed dilatory tactics to frustrate the continuation of the case, including making applications for adjournment of the hearings and filing of applications.
5. It was deposed that the 2nd Defendant filed an application to recall the 1st Plaintiff for cross-examination on April 1, 2022 which was dismissed on May 19, 2022 and that the 2nd Defendant filed another application to suspend proceedings pending determination of its intended appeal against the court ruling of June 6, 2022 which.
6. The 1st Plaintiff further deponed that the Applicant has not disclosed from whom he received the information that this court has a close relationship with the 1st Plaintiff's Counsel, Steve Luseno and has failed to produce any evidence to substantiate these allegations.
7. Counsel for the 2nd Plaintiff, Steve Luseno, swore an affidavit in which he deponed that the application in this matter is traced to an application seeking to recall the 1st Plaintiff; that he is not a party to these proceedings; that he has no familial relations with the court and has never interacted with the judge at a family level and that this application is not merited as it was not brought within the Bangalore Principles.
8. Counsel for the 2nd Defendant/Applicant submitted that the facts in this matter have created an impression of bias against the Applicant; and that the court has a responsibility to disclose any information that could give rise to an apprehension of bias.
9. Counsel for the 2nd Defendant/Applicant submitted that this court failed to disclose that it previously worked with Ms Judith Shamalla, Mr. Luseno's wife at the Kenya Anti-Corruption Commission, yet it had a duty of disclosure. He argued that should an observer consider the record of this suit, they would have a reasonable apprehension of bias. This, according to counsel, arises from the dismissal of an application for perjury as well as the manner in which the court made substantive orders.
10. Counsel relied on the book G Hammond's *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) and the cases of *Ajay Shah v Attorney General & Another & 2 others* [2013] eKLR, *President of the Republic of South Africa & others v South African Rugby Football Union and others* CCT16/98 [1999] ZACC 9 and *Barnaba Kipsonyok Tenai v Republic* [2014] eKLR and *R v Sussex Justices Exp McCarthy* [1924] 1 KB 256.
11. The 1st plaintiff submitted that the application did not disclose any reasonable ground and that the employment history of a judge is not a basis for recusal. Counsel urged that while the onus to prove is upon the Applicant, they have not substantiated the allegation of friendship between the court and the 2nd plaintiff's advocate. Counsel submitted that the application was made in bad faith.
12. Counsel for the 2nd plaintiff submitted that the applicant has not produced any evidence to substantiate the allegations that this court and Mr Luseno's families are friends and that the mere fact that the judge previously worked with Mr Luseno's wife does not prove the said relationship nor does it translate to actual bias or prejudice.
13. The 2nd plaintiff's counsel sought to rely on regulation 21, *Judicial Service (Code of Regulations and Ethics) Regulations, 2020*, and the Supreme Court's decision in *Jasbir Singh Rai & 3 others v Tarlochan*



Singh Rai & 4 others [2013] eKLR, *Lawrence Kinyua Mwai vs Nyaringu Farmers Company Limited* [2017] eKLR and *Abdikadir Mohammed Ali & another v Ali Digale & 9 others* [2020] eKLR.

14. It was submitted by the 2nd Plaintiff's counsel that this application was filed after the 2nd Defendant's application to recall PW1 to the stand was disallowed and that courts have frowned upon parties who seek recusal of judicial officers after they have made an adverse decision against them or to intimidate the Court into ruling in its favour. The 2nd Plaintiff's counsel relied on the cases of *Prayosha Ventures Limited v NIC Bank Ltd & another, Beatrice Jeruto Kipketer & another (Interested Parties)* [2020] eKLR and The Court of Appeal's Decision in *Miller v Miller* [1988] eKLR.
15. The 2nd Plaintiff submitted that the Applicant is creating a relationship where none exists; that the court should not recuse itself because it worked with someone else; that this application was brought after the court disallowed the application to recall the 1st Plaintiff's witness; that he (the 2nd Plaintiff's counsel) had lost matters before this court and that there is no friendship between himself and the court.

Analysis and Determination

16. The central issue for determination in this matter is whether this court should recuse itself from hearing and determination of this suit. The Applicant has averred that the court failed to disclose that it is a close family friend of Mr. Steve Luseno, the 2nd Plaintiff's counsel in this suit and that it previously worked with the said counsel's wife at the then Kenya Anti-Corruption Commission (KACC).
17. According to the 2nd Defendant, such a relationship creates a reasonable apprehension that the 2nd Defendant/Applicant will not receive a fair hearing.
18. Rule 21 of the *Judicial Code Service (Code of Conduct and Ethics) 2020* provides the grounds on which a judge ought to recuse themselves as follows:
 - “(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) or a member of the judge's family has economic or other interest in the outcome of the matter in question.”
19. The Supreme Court in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 others* [2013] eKLR, quoted with approval the American case of *Perry v Schwarzenegger*, 671 F 3d 1052 (9th Circuit February 7, 2012) where it was held that the test for establishing a Judge's impartiality is the perception



of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts”, and who has “examined the record and the law” and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.

20. The Supreme Court in *Robert Tom Martins Kibisu v Republic* [2018] eKLR quoted with approval the local jurisprudence on an application seeking recusal of a judge and as recounted in *Nathan Obwana v Robert Bisakaya Wanyera & 2 others* [2013] eKLR:

“In Kenya the Court of Appeal in the case of *Republic v Mwalulu & 8 others*: [2005] 1 KLR did set up the principles on which a judge would disqualify himself from a matter and stated as follows:

1. When the courts are faced with such proceedings for the 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.
2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.
3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.
4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself.”

21. The court in the above case proceeded to hold that mere apprehension of bias cannot be a ground for recusal and that the allegations of bias must be factual and proved.

22. In the case of *Kalpana H Rawal v Judicial Service Commission & 2 others* (2016) eKLR the Court of Appeal emphasized that there must be credibility to the allegations made concerning why an officer sitting in a court or tribunal would be deemed to be biased so as to disqualify himself. The court stated as follows:

“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 behaviour or conduct of a Judge... It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegation. Reasonable



grounds must be presented from which an inference of bias may be drawn... We agree with the respondents that where a party wishes to rely on statements of information, which they cannot prove, the least that is expected is to disclose the source of the information so that its credibility may be gauged and assessed.”

23. Indeed, every person has the right to a fair and impartial hearing as provided for under Article 50 of the Constitution. A Judge is thereby bound by his or her oath of office to defend the Constitution, and to perform his/her judicial duties with fairness, independence, competence and integrity, as aptly stated by the Supreme Court in Kalpana H Rawal & 2 others vs Judicial Service Commission & 2 others [2016] eKLR.
24. In this matter, the 2nd Defendant has averred that this court is a close family friend of Mr Steve Luseno and previously worked with the Counsel’s wife, a fact which he ought to have disclosed.
25. The Applicant has neither tendered any evidence of the relationship between the Judge and the 2nd Plaintiff’s advocate, or his wife, nor has he indicated the source of this information. This is contrary to the holding of the court in Kalpana H Rawal case (supra) where the court held that “where a party wishes to rely on statements of information, which they cannot prove, the least that is expected is to disclose the source of the information so that its credibility may be gauged and assessed.”
26. The facts presented by the 2nd Defendant/Applicant are that of the previous professional relationship that this court may have had with Mr Luseno’s wife, who is neither a party in this case nor an advocate. If indeed this court worked with Mrs. Luseno at the then Kenya Anti Corruption, a government institution, how would such a professional relationship lead to an actual or perceived bias on the part of the court?
27. This court has posed the above question for one main reason. whether the mere fact that the court worked in the same government organization with counsel on record, or his wife/husband qualify the court to disqualify itself. If that was the position, it would mean that all Judges who once worked in the Attorney Generals office, the Office of Director of Public Prosecution, NEMA etc would disqualify themselves wherever their former colleagues or spouses of their former colleagues appeared before them.
28. Such a situation would not only be absurd, but would be contrary to the laid down circumstances under which a judicial officer should disqualify himself/herself from a matter. While this court appreciates the natural apprehension held by the 2nd Defendant/Applicant that this court may be biased against him, having lost an application to have PW1 recalled for cross examination, this court must find that the facts and the circumstances of this case would not lead a fair- minded and informed observer to conclude that there is a reasonable possibility of bias.
29. Indeed, it cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegation.
30. The 2nd Defendant having not established that the court is a friend to the 2nd Plaintiff’s advocate or his wife, or disclosed the source of his information, and considering that the court having worked in a government institution with the spouse of the 2nd Plaintiff’s advocate is not on its own a ground for recusal, the court declines to recuse itself from these proceedings.
31. For those reasons, The 2nd defendant’s application dated June 20, 2022 lacks merit and is dismissed with costs.



DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2023.

O. A. Angote

Judge

In the presence of;

Ms Mulindi for 1st Plaintiff

Mr. Gachohi for 2nd Defendant/Applicant

Mr. Luseno for 2nd Plaintiff

Mr. David for Shah for 3rd Defendant

Mr. Koech for 1st Defendant

Court Assistant - June

