



**Isaaka Advocates v China Qingjian International Group (K) Limited; Kenyan Urban Roads Authority & another (Garnishee); Tromex Investments Company (Applicant) (Commercial Case E026 of 2022) [2024] KEHC 3040 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E026 OF 2022**

**A MABEYA, J  
MARCH 15, 2024**

**BETWEEN**

**ISAAKA ADVOCATES ..... DECREE HOLDER**

**AND**

**CHINA QINGJIAN INTERNATIONAL GROUP (K) LIMITED .... JUDGMENT DEBTOR**

**AND**

**KENYAN URBAN ROADS AUTHORITY ..... GARNISHEE**

**THE KENYA COMMERCIAL BANK ..... GARNISHEE**

**AND**

**TROMEX INVESTMENTS COMPANY ..... APPLICANT**

**RULING**

1. Before Court is an application dated 18/7/2023. It is brought under Article 50(2), 10,2,73(2)(b) and 232(1) of *the Constitution* of Kenya, section 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, regulation 5,9(1) and 21(d) of the Judicial Service (Code of Conduct and Ethics) regulations, 2020.
2. The application seeks my recusal from hearing this matter and to refer the same to the Chief Justice for reallocation and directions.
3. The application was based on the grounds on the face of it and supported by the affidavit QU Gaoleisworn on 18/7/2023. It was the applicant’s case that I have been impartial in conducting the



suit and had issued two separate rulings wherein I stated that the Court did not have jurisdiction in an arbitration matter.

4. The applicant contended that I allowed a counterclaim summarily before a substantive hearing and allowed the application dated 19/08/2022 which struck out the applicant's defence. The applicant argued that I failed to consider the responses and submissions it filed. In a nut shell it was the applicant's complaint that I am biased and that it stands no chance of a fair hearing.
5. The application was opposed by the decree holder in a replying affidavit dated 4/8/2023 sworn by Marsden Osioma. He contended that the application was a way of forum shopping after the Court had already made a judgment in his favour. He contended that the application did not meet the threshold for recusal and it served the purpose of hiding professional mistakes of Counsel on the judgment debtor.
6. The application was canvassed by way of written submissions which I have considered. The applicant submitted that the application had been filed to challenge the perceived lack of impartiality of the Court based on the two rulings delivered on 12/08/2022. That the Court had delivered contradicting decisions which seemed to favour the respondent.
7. That in the ruling dated 12/08/2022, the Court declined to handle the dispute stating that there was no jurisdiction but demonstrated bias by handling the counterclaim. According to the applicant, the said decision was contradictory and a clear indication of bias.
8. On his part, the decree holder submitted that the application was meant to derail he applicant from enjoying his fruits of the judgment. That the ruling that prompted this application was appealable but the applicant did not prefer an appeal against it. It was further submitted that the application did not meet the reasonable test of bias.
9. I have considered the pleadings, the submissions and the authorities cited. The applicant has moved the Court seeking my recusal from further hearing and handling the suit on an alleged bias in the decision dated 12/08/2022.
10. The foundation for the principal underlying recusal of judicial officers was restated by the Supreme Court in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* Petition No. 4 of 2012 [2013] eKLR as follows: -

“Recusal, as a general principle, has been much practiced 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, 8<sup>th</sup> ed. [2004] [p.1303]: “Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.” 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.”



11. In *Uhuru Highway Development Ltd. v Central Bank of Kenya & 2 Others* Civil Appeal No. 36 of 1996, the Court of Appeal 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 be 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.”

12. Further, in *Attorney General v Anyang' Nyong'o and Others* [2007] 1 EA 12, it was held: -

“The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A “suspicious mind” in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind...While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour.”

13. From the foregoing, it is clear that the test to be applied is that of a reasonable and independent observer of the courts conduct and proceedings to determine whether the court is impartial or biased against any party.
14. In the present case, the applicant is aggrieved by the ruling of the Court delivered on 12/8/2022. The applicant's position is that, the ruling gave contradicting decisions in that on one hand it was held that the court lacked jurisdiction and on the other hand allowed the counterclaim. This according to the applicant demonstrated bias.



15. I have looked at the rulings complained of. On the ruling dated 12/8/2022, there was an application filed together with a memorandum of appeal dated 4/4/2022 seeking the setting aside of the Deputy Registrars decision dated 4/3/2022. In the ruling, I held that the deputy registrar erred in dismissing the counterclaim.
16. In the 2<sup>nd</sup> ruling dated 12/8/2022, the parties had raised two preliminary objections on the suit on the grounds that the same was sub-judice as there was already a pending arbitration on the same. In this case, due to the existence of the arbitral clause and the pending suit, the court allowed the objections and the matter was struck out.
17. From the foregoing, it is clear that the plaintiff's suit was struck out because the parties were already litigating the same issues in a different forum. The existence of the arbitral clause automatically ousted the jurisdiction of the Court.
18. The second matter was counterclaim which was in respect of legal fees and was not before the arbitral tribunal. The parties had not raised any objection to it and therefore qualified as a separate suit by dint of the provisions of the Civil Procedure Rules. Under those rules, a counterclaim is a separate suit which is unaffected by the dismissal or striking out of the main suit. That is the law and it does not require any authority.
19. Rule 5 of the Judicial Service Code of Conduct and Ethics as established under section 5(1) of the Public Officers Ethics Act, 2003 provides that: -
  - “A Judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which;
    - a. He has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him.
    - b. He has served as a lawyer in the matter in controversy.
    - c. He or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or
    - d. He or his spouse or a person related to either of them or the spouse of such person or a friend is a party to the proceedings.”
20. There is no evidence that has been adduced to establish perceived bias. The Court dealt with the issues based on the facts presented to it and failure to meet the approval of the applicant cannot be held to be perceived bias or reasonable apprehension of bias on my part. It is my view that the rule of law would be defeated if every litigant asked for recusal of a judge or judicial officer if the court's decision does not favour them. In such a case no case would proceed before the courts.
21. Accordingly, I find that the applicant has not established any ground for recusal. The application lacks merit and is hereby dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

