



REPUBLIC OF KENYA



**Chege v Mathu & another (Civil Appeal (Application) 72 of 2009)
[2025] KECA 268 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 268 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 72 OF 2009
P NYAMWEYA, LA ACHODE & WK KORIR, JJA
FEBRUARY 21, 2025**

BETWEEN

JAMES MWANGI CHEGE APPELLANT

AND

BERNARD KAMAU MATHU 1ST RESPONDENT

DOMINIC NJOROGE MATHU 2ND RESPONDENT

(An application for review of the judgment of this Court (Koome JA (as she then was), Kariuki & Otieno-Odek JJ. A)) delivered on 26th May 2016)

RULING

1. The appeal herein was lodged by James Mwangi Chege (hereinafter “the applicant”), and was heard and dismissed by a judgment delivered by this Court (Koome JA (as she then was), GBM Kariuki & Otieno-Odek JJ.A) on 26th May 2016. Three years down the line, the applicant filed an application dated 3rd April 2019 seeking a review and setting aside of the said judgment; and an order that it be substituted by an order allowing the applicant’s amended appeal dated 8th July 2015 or in the alternative, an order that the applicant’s amended appeal dated 8th July 2015 be heard afresh with costs to the applicant. The application is supported by an affidavit sworn on even date by the applicant.
2. We shall reproduce the grounds for the application as set out therein, which were as follows:
 - a. The Applicant was not given a fair hearing
 - b. The rules of natural justice were not observed during the hearing and determination of this Appeal.
 - c. The Judgement of the Court was procured under conditions that were inconsistent with the Applicant’s right to a fair and impartial hearing as Hon. Martha Koome, JA. sitting as a



member of the bench that determined this matter, had acted for the Respondents herein in the superior court in Nairobi High Court Civil Suit No. 1587 of 2001 in clear conflict of interest and in gross travesty to justice.

- d. The Hon. Martha Koome, JA ought to have disclosed this fact to the parties before the hearing of the Appeal to enable the parties, especially the Applicant herein, to choose whether to make an application for her disqualification or otherwise.
 - e. The Applicant is reasonably suspicious that due to the said non- disclosure, the judgment of the court was biased against him due to the undisclosed conflict of interest.
3. There was no response to the application on record by Bernard Kamau Mathu or Dominic Njoroge Mathu, the respondents to the appeal, nor were they present during the hearing of the application held on 3rd October 2024 through this Court’s virtual platform. We also confirmed that the respondents were duly served with the hearing notice. Learned counsel Mr. Mwathe, holding brief for learned counsel Mr. Kibe Mungai, appeared for the applicant. Counsel informed us that due to an oversight they had not filed any submissions, and sought for more time to do so. After considering the age of the application and the fact that it was not opposed, we directed the counsel to make oral submissions.
 4. Mr. Mwathe reiterated in his submissions that the applicant was not granted a fair hearing and the rules of natural justice were not followed, since Koome JA (as she then was) was conflicted, having handled the matter at trial stage and not disclosed this fact. Therefore, that there was a reasonable apprehension of bias on the part of the learned Judge. The decision by this Court in *Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited & 2 Others* [2016] eKLR, was cited by counsel for the submission that this Court has residual jurisdiction to rehear the matter, and that the applicant had demonstrated exceptional circumstances to warrant a rehearing.
 5. We have considered the application and submissions made by counsel.

The issue before us for determination is whether the applicant has demonstrated sufficient cause for us to review the judgment delivered by this Court on 26th May 2016. It is trite law that, under Rule 37 of the *Court of Appeal Rules* of 2022, this Court may correct a clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission, either of its own motion or upon application, so as to give effect to the intention of the Court when judgment was given. Other than in these circumstances, the review jurisdiction of this Court may be exercised only in exceptional circumstances as held in *Benjob Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and, in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and, on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection, and only in cases whose decisions are not appealable (to the Supreme Court).”

6. In *Mukesh Kumar Kantilal Patel v Charles Langat* [2021] eKLR , this Court also held that the jurisdiction of this Court to review, vary or rescind its decisions is residual in nature, and is to



be exercised cautiously only in exceptional circumstances to avoid injustice, where it will serve to promote the public interest and enhance public confidence in the system of justice. It is the applicant's assertion that the judgment it seeks to be reviewed in the present application falls under the exceptional circumstances, as there is a reasonable apprehension that one of the Judges in the bench was biased.

7. We have perused the record of appeal and of the proceedings in the trial Court in Nairobi High Court Civil Case No. 1587 of 2001, and the only mention we found of a "Martha Koome advocate" in the record is on 3rd February 2003 as follows:

" 3. 02.03

M/s Joyce for Martha Koome advocate for the applicant Chamber summons dated 23rd October 2002 fixed for hearing on 3rd April 2003.

Notice to Issue

signed

Deputy Registrar"

8. It is also pertinent that the record shows that from 15th December 2003, when the 1st respondent indicated that he wanted to act in person, until the end of the hearing on 30th October 2008 the respondents (who were the plaintiffs in the said suit) were unrepresented and appeared in person, and also during the hearing of the appeal in this Court as noted in the impugned judgement. Lastly, we note that the applicant did not provide any evidence of any notice of appointment of Martha Koome advocate as acting for the respondents in the High Court suit.
9. In this regard, the applicable standard and test is that one must establish a reasonable apprehension of bias to be able to demonstrate judicial bias. The East Africa Court of Justice adopted this test in *Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others*, EACJ Application No. 5 of 2007 when it stated as follows:

"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." The Supreme Court of Canada expounded the test in the following terms in *R. v. S. (R. D.)*[1977] 3 SCR 484:

"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 acknowledgement 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.”

10. Therefore, there must be an evidentiary basis for the grounds of bias, either based on statements and conduct made by the judge during the proceedings or arising from the judge’s personal interest or relationship, and an inquiry of bias is therefore contextual and fact-specific. There is no such evidence that Koome JA (as she then was) personally represented the respondents or had knowledge of their suit in the High Court. We therefore find that there is no basis nor extraordinary circumstances that would warrant this Court to review the judgment delivered herein on 26th May 2016.
11. We accordingly find no merit in the application dated 3rd April 2019, which is hereby dismissed with no order as to costs, in light of the non- participation of the respondents.
12. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

