In re Estate of Timothy Mwandi Muumbo (Succession Cause 1673 of 2015) [2025] KEHC 7089 (KLR) (Family) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7089 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1673 OF 2015

PM NYAUNDI, J

MAY 29, 2025

RULING

1. The ruling herein is with regard to two applications. The first is that dated 17th December 2024 and the 2nd is that dated 10th November 2021. The Application dated 17th December 2024 is presented under Rule 49 of the Probate and Administration rule and Article 40 of the *Constitution* and seeks the following orders

    1. Spent

    2. That this honourable Court be pleased to grant the applicants herein leave to appeal against the whole ruling of Honourable Lady Justice Nyaundi Patricia Mande SC delivered on 21st November 2024

    3. That, the Honourable Lady Justice Nyaundi Patricia Mande SC, do recuse herself from further hearing of this matter

    4. That the costs of this applications/ Summons be costs in the cause.

2. The grounds of the application are on the face of the application and the application is supported by the annexed affidavit of Carolyn K. Muumbo. The Applicant challenges the ruling delivered by this court on the basis that it contradicts two other rulings delivered earlier on 13th January 2017 and 13 July 2021. Further, it is submitted that in that ruling this court misdirected itself on the facts and the law and thereby arrived at a wrong decision. It is further submitted that the court is unlikely to reach an impartial decision as it is focused on matters extraneous to the questions or issues before the Court.

3. It is submitted that the ruling has the effect of emboldening those who are intermeddling with the estate of the deceased.

4. For the above reasons it is submitted, that justice will not be served if I do not recuse myself in the matter.

5. The Application is opposed by the 2nd and 3rd Respondent and they have sworn affidavit on 24th January 2025 in opposition. It is contended that the application is without merit as the delay in filing the appeal offends rule 41 of the Court of Appeal rules and no draft memorandum of appeal has been presented to demonstrate the merits of the intended appeal.

6. It is further submitted that the applicants have not met the threshold for the recusal of a judge as their bone of contention is that the Judge ruled against them. No bias has been demonstrated.

7. It is submitted that the application only serves to delay the conclusion of the matter which has been pending in Court since 24th January 2017. The right to appeal must be balanced against a party's right to expeditious disposal of matters.

8. None of the parties had filed their submissions by the time I retired to write the ruling.

9. The 2nd Application is presented under Section 47 of the *law of succession Act*, Rule 49 of the *Probate and Administration Rules*, Articles 40 and 50 of the *Constitution* of Kenya. The Applicant seeks the following orders

    1. Spent

    2. Spent

    3. Spent

    4. That this Court be pleased to review, vary and/ or set aside the order issued by this Honourable Court on 19th July 2021, directing the Deputy registrar to appoint an estate agent to collect rent from property known as LR No. 36/11/ 115 Eastleigh.

    5. That this Honourable Court be pleased to make all such further orders and / or directions as it may deem fit.

10. The grounds upon which the application is based are on the face of the application. It is submitted that adverse orders were made against the interested party when he was not a party in the suit. It is submitted that the property LR No. 36/11/ 115 Eastleigh does not belong to the estate

11. That the Court moved to appoint Auma Dominic Odondi trading as Adomag Valuers and Associates who has been demanding rent since 5th October 2021. He is now apprehensive that he will be evicted from the premises.

12. Further the applicant avers that the property is not even mentioned in the Will by the deceased. No prejudice will be caused to the respondents if the application is allowed.

13. At the time of writing the ruling, no party had filed papers in opposition and only the applicant had filed submissions. The applicant frames the issue for determination as; whether the applicant is entitled to the reliefs sought? It is submitted that it is not in dispute that the applicant is the registered proprietor of the subject parcel of land. It is further submitted that the mandate of the probate court does not extend to determining questions of ownership of land, as this is the preserve of the Environment and Land Court. Reference is made to the decision in Re Estate of Alice Mumbua Mutua [2017] eKLR.

Analysis And Determination

14. The issues for determination are

1. Whether the Court should recuse itself? And only if the answer to this question is in the negative,

2. Whether the Leave should be granted to the applicant to appeal?

3. Whether the Court should vacate the orders of the Court issued on 19th July 2021, directing the Deputy registrar to appoint an estate agent to collect rent from property known as LR No. 36/11/ 115 Eastleigh?

4. Who should pay costs?

15. On the 1st issue, whether I should recuse myself. Having studied the application, I gather that the applicant is aggrieved by the ruling I delivered on 21st November 2024. The applicant states that I was wrong on the law. That I contradicted two other rulings delivered earlier in the same matter. That it is evident that I am biased and there is no chance that parties will get justice unless I recuse myself from the matter.

16. In a recent decision, *Gachagua & 5 others v Maingi & 80 others* [2025] KECA 790 (KLR) the Court of Appeal elucidated on the principles to guide the court in determining whether or not recuse itself.

17. Recusal of a Judge is an important guarantee to a party's constitutionally guaranteed right to a fair trial before an impartial tribunal. In the *Gachagua case* (Supra), the Court stated that the right is 'paramount and non-negotiable' and that to safeguard the right, Judges are required to act 'free from bias, conflicts of interest, or any external influence.'

18. In *Republic v Independent Electoral & Boundaries Commission & Another Ex Parte Coalition for Reforms and Democracy (CORD)* [2017] KEHC 8519 (KLR), Odunga, J (as he then was) defined bias as follows-

> Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law.

19. The primary purpose of the rule against bias is to maintain public confidence in the impartiality of the judicial process. In *Rawal v Judicial Service Commission & Another; Okoiti (Interested Party); International Commission of Jurists & Another (Amicus Curiae)* (Civil Appeal (Application) 1 of 2016) [2016] KECA 717 (KLR) (11 March 2016) (Ruling), the Court of Appeal considered recusal applications and held thus:

> 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, religion or other influence. In such applications, the impartially of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all 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 the two evils. The alternative is to risk.

Violating a cardinal guarantee of the *Constitution*, namely, the right to a 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 independent and impartial court .....

20. The question of bias as a ground for recusal has also been addressed in the *Judicial Service (Code of Conduct and Ethics) Regulations*, regulation 21 provides 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. a member of the judge's family has economic or other interest in the outcome of the matter in question.

21. The Constitutional Court of South Africa in *The President of the Republic & 2 Others v South African Rugby Football Union & 3 Others*, (Case CCT 16/98) held, *inter alia*, that:

The test of bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in the dissenting judgment by de Grandpre, J. in Committee for Justice and Liberty et al v National Energy Board: "...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.'"...the 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...An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application. [Emphasis added]

22. In *Republic v Mwalulu & 8 Others* [2005] KECA 344 (KLR), the Court of Appeal set the principles on which a judge would disqualify them self from a matter and stated as follows:

1. When the courts are faced with such proceedings for the d is qualification 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 interference, 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." [Emphasis added]

23. In *Philip K. Tunoi & another v Judicial Service Commission & another* [2016] KECA 715 (KLR), the Court of Appeal summarised the test as

In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

24. Having reminded myself of the test, I will now consider the circumstances in the instant case. It is evident that the applicant's application was occasioned by the ruling I delivered on 21st November 2024. The reasons they seek my recusal is what they consider my interpretation of the law was wrong. They have initiated the motion of appeal against that ruling.

25. I have gone through the application and supporting affidavit and I am unable to find the basis for the claim of bias. At paragraph 6 of her the applicant states I am unlikely to 'reach an impartial decision in the matter because she had focus on matters extraneous to the questions or issues before her.' This issues are not enumerated. Evidently the applicant does not agree with my reasoning, this however is a ground of appeal not recusal. I therefore decline to recuse myself.

26. The 2nd Issue is whether the Applicant should be granted leave to appeal. This is a Constitutional right. The Applicant is granted leave to exercise their right of appeal. The Applicant to file appeal within 30 days.

27. The 3rd Issue is whether I should vacate the orders of the Court issued on 19th July 2021, directing the Deputy registrar to appoint an estate agent to collect rent from property known as LR No. 36/11/115 Eastleigh. The application has not been opposed. I have seen reports from Adomag Valuers & Associates that show rent has not been collected from these premises. Having satisfied myself that the documents of title show that the asset is registered in the name of a third party, I will vacate the orders of the Court touching on the collecting of rent by the Estate agent from LR No. 36/11/115 Eastleigh. If and when the parties are able to settle the issue of ownership in favour of the Estate, they will be at liberty to recoup from the 3rd party.

28. In conclusion, these are the orders of the Court

1. I decline to recuse myself

2. The Applicant is granted leave to file Appeal against ruling delivered on 21st November 2024 within 30 days.

3. The orders of 19th June 2021, directing the Deputy Registrar to appoint an estate agent to collect rent from property known as LR No. 36/11/ 115 Eastleigh are vacated

4. Each party to bear their own costs.

5. The matter to proceed to hearing of the Summons for revocation, mention on 18th June 2025 for parties to take a date for hearing.

There shall be no order as to costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 29th DAY OF MAY, 2025.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

No appearance by parties

Fardosa Court Assistant