



**Kilonzo v Muathe (Tribunal Case E1102 of 2023)
[2024] KEBPRT 1304 (KLR) (10 September 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1304 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1102 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
SEPTEMBER 10, 2024**

BETWEEN

PATRICK MUISYO KILONZO TENANT

AND

JOHN MUISYO MUATHE LANDLORD

RULING

1. The tenant/applicant moved this Tribunal vide a reference dated 7th November 2023 under Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 with a complaint that the landlord/respondent herein had been harassing and threatening to forcefully evict him from the suit premises despite having made a rent overpayment.
2. The tenant/applicant simultaneously filed a Notice of Motion under a Certificate of urgency dated 7th November, 2023 in which he sought for the following orders; -
 - i. That the application be certified urgent.
 - ii. That pending the hearing and determination of the application, the respondent be restrained by an order of temporary injunction from evicting or in any way interfering with the applicant/tenant's occupation of the business premises known as Plot No. 57 Mwatate Butchery.
 - iii. That the reference in the matter be admitted out of time.
 - iv. That pending the hearing and determination of the reference, the respondent be restrained by an order of temporary injunction from evicting or in any way interfering with the applicant's/tenant's occupation of the business premises known as Plot No. 57 Mwatate Butchery until the rent overpayments is spent.
 - v. That the orders be enforced by O.C.S Tala Police Station.



- vi. That costs of the application be borne by the landlord/respondent.
3. The application was disposed of by way of written submissions and in a ruling delivered on 22nd March 2024, this Tribunal made the following disposal orders in respect thereof: -
- a. The Notice of Termination of Tenancy dated 15th August, 2023 issued by the landlord is invalid.
 - b. Prayers 4 and 6 are hereby granted pending the hearing of the main reference.
 - c. The matter shall proceed by way of viva voce hearing and parties shall comply with Order 11 of the Civil Procedure Rules and file all statements of rent payment/overpayments together with evidence of rent payment for the period in dispute within the next 30 days hereof.
 - d. Costs of the application shall abide the outcome of the reference.”
4. The matter was thereafter set down for mention on 20th May 2024 to confirm compliance with the Tribunal’s directions made in the ruling. On the said date, both parties attended and confirmed that they had complied. The landlord sought for time to seek for legal representation and he was granted 30 days to do so. He was also required to comply with the directions issued in the ruling of 22nd March 2024 within the same period. The matter was therefore fixed for mention on 20th June 2024.
5. On 20th June 2024, the landlord appeared in person and drew the Tribunal’s attention to his application dated 5th February 2024 stating that it should have taken precedence. He sought for closure of the suit premises and for setting aside of the orders of 8th November 2023 issued in favour of the tenant. The landlord was directed to file documents in regard to his claim for hire of furniture to the tenant. The matter was therefore set down for directions on 1st July 2024.
6. On 1st July 2024, the tenant submitted that he had filed a document seeking recusal of this Tribunal ahead of the ruling initially scheduled to be delivered on 18th March 2024. The tenant indicated that he would be filing an application for review of the ruling delivered in BPRT CASE NO. E086 OF 2023. He also reiterated that this Tribunal should disqualify itself from hearing this matter in line with his application dated 5th February 2024. The tenant’s Counsel sought for 7 days to file a response to the recusal application. As a result, the matter was set down for mention on 30th July 2024 to enable the tenant to respond to the application.
7. We note that the landlord’s application dated 5th February 2024 is in the nature of submissions through which he appears to complain about how his previous case No. E086 of 2023 was handled by this Tribunal which was differently constituted. He complains that his claim in regard to unpaid furniture was not considered nor mentioned in the ruling of 19th June 2023 delivered in the said case. All the issues raised in the landlord’s recusal application relates to the previous case.
8. The landlord finally seeks that “the entire presiding officers of this honorable Tribunal to disqualify themselves from presiding over this case as soon as possible.”
9. It is clear from the above analysis that the landlord does not have any crystalized grounds upon which he would justify an application for our recusal from the instant proceedings. It is not enough that he feels that the previous case was improperly handled as he would have preferred an appeal or review of the ruling therein.
10. This Tribunal has no jurisdiction to sit on appeal against a decision made in a different case even if it involved the same parties. We cannot on the other hand be called upon to disqualify ourselves from hearing this matter on account of perceived injustice visited upon the landlord in the previous case.



11. This Tribunal is the only body conferred with jurisdiction to adjudicate over disputes relating to controlled tenancies. The landlord appears to suggest that all members of this Tribunal should not handle the instant dispute but has made no suggestion on where the same should be referred to for hearing and determination.
12. The parameters for recusal of a judge have been ably discussed and settled by Superior Courts in several decided cases and we can only cite one or two such cases.
13. In *Kaplan & Stratton -Vs- Z. Engineering Construction Ltd & 2 Others* [2000] eKLR, the Court stated thus:

“If disqualification issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. When, a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts, which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar. The converse is also true (See also *Galaxy Paints Co. Ltd v. Falcon Guards Ltd*, CA No. 219 of 1998).

Secondly, the point urged by the interested party to the effect that bias on the part of one out of seven judges is of no consequence, is equally doubtful. The Constitution guarantees a litigant trial by an independent and impartial court. For present purpose, the Constitution guarantees the applicant the right to be heard by an independent and impartial court made up of seven judges. If one were to be partial, it matters not that the other six are not, the constitutional guarantee will have been violated. The Court is constituted by all the judges sitting, not some of them only. That is the reason why, we believe, the judgment of the House of Lords in *Re Pinochet* (supra) was vitiated purely by the fact that one and only one of the judges was reasonably perceived to have been biased.

In the *People* case, the Court expressed itself as follows in relation to the application for disqualification of the members of the bench.

How should Judges treat the subject of disqualification when raised before them?

...when the courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of 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.”

14. The right of a party to apply for recusal of a Judge must be balanced with the equally important doctrine of a judge’s duty to sit. Justice Rolston F. Nelson of the Caribbean Court of Justice in his treatise “Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012 observes as follows:

“A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason.”



15. The test for recusal of a judge was ably discussed by the late Justice D.S Majanja in the case of *Rachuonyo & Rachuonyo Advocates Vs National Bank of Kenya Limited* [2021] eKLR at paragraphs 22-25 as follows: -

“22. The main issue is whether I should recuse myself from dealing with the present matter and other references involving the parties herein. The principles governing recusal in this jurisdiction are now well settled. In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* HC Comm No. 332 of 2010 [2014] eKLR the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali and others* C.A Criminal Application No Nai 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Amp; Others* C.A. Civil Application No Nai 310 of 2004 (Unreported) where the Court of Appeal stated that: “...

When courts are faced with such proceedings for 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...”

16. 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.”

17. 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 as follows;

“23. 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.”

24. The principles in the cases I have cited buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the 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.
25. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge.

Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the Constitution and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices”.

18. Having analyzed the applicable principles vis-a vis the facts of the instant case, we find and hold that the landlord has totally failed to establish any legal basis for our recusal from hearing and determining this case.
19. In the premises, the application dated February 5, 2024 is hereby dismissed with costs to the tenant.
- It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER 2024.

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON JOYCE A. OSODO - MEMBER

In the presence of:

Munguti for the tenant

Landlord in person

