Spacebuster Limited v Kisumu City Board & another (Civil Case E006 of 2022) [2024] KEHC 16621 (KLR) (24 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16621 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL CASE E006 OF 2022

MS SHARIFF, J

DECEMBER 24, 2024

BETWEEN

SPACEBUSTER LIMITED ..... PLAINTIFF

AND

KISUMU CITY BOARD ..... 1ST DEFENDANT

COUNTY GOVERNMENT OF KISUMU ..... 2ND DEFENDANT

RULING

1. The defendants have moved this court through a notice of motion dated 17/7/2024 which is supported by the affidavit of Edwin Omari Mongeri sworn on even date and his further affidavit sworn on 23/9/2024, craving for the following orders:

    i. Spent

    ii. Spent

    iii. That the Honourable Lady Justice M.S.Shariff to recuse herself from further hearing this matter.

    iv. That consequential directions be given for the hearing and disposal of this matter before another judge of this honourable court.

    v. The Honourable court be pleased to grant leave to the applicant to file and/or mount an appeal against the ruling and/or order of Honourable Lady justice M.S.Shariff made on Tuesday 11th June 2024 where the Honourable Court (sic) dismissed the applicants' oral application to adjourn the hearing.

    vi. Pending the hearing and determination of the intended appeal, the Honourable court be pleased to grant an order of stay of proceedings

vii. Consequent to prayer (5) above being granted, the Applicants do lodge the intended appeal within 14 days from the date of the order.

viii. Such further and/or orders be made as the court may deem fit and expedient.

ix. The cost of this application be in the cause.

2. The nub of the defendants' application for leave to appeal against the ruling of this court that declined to grant them an adjournment during the hearing of the plaintiff's case is that the order of the court is not appealable as of right and given that this court declined to grant them leave on the first instance, they deserve to the grant of such leave at this juncture. In the interim the defendants pray that the proceedings herein be stayed pending the intended appeal.

3. The defendants' counsel one Edwin Omari Mongeri has deposed in his further affidavit that the defendants' witness one Michael Abala Wanga, the City Manager was the one who was to cross examine the plaintiff's witness hence the necessity of his being present during the hearing of the plaintiff's case.

4. It is further deponed by Edwin Omari Mongeri that this court exhibited bias when it disallowed the defendants' preliminary objection on 11th March 2024 without costs. Further that the court's ruling disallowing a stay of proceedings, recusal and leave it ruled that the defendants were out to intimidate the court and in the defendants' counsel's conviction, that ruling bespoke of bias towards the defendant.

5. This application was resisted by the plaintiff through an affidavit in reply sworn by Mourice Carlos Ouma on 23rd July 2024 wherein he deposes that no precipitate action had been taken by the defendants either by way of appeal or a review application against the ruling of the court made on 11th March 2024 and that the hearing date was fixed by consent of the parties.

6. It is the plaintiff's position that if the defendants had issues with any order made by this court, then they ought to have raised their misgivings timeously and not await a decline of their adjournment application for them to do so.

7. The plaintiff's counsel maintains that the defendants have never been keen on having the case proceed to hearing and were thus employing all tactics to scuttle the hearing and thus acted contrary to the court's direction that required the parties and their advocates to be physically present in court.

8. It is further deposed that whereas the defendants' advocates notified the plaintiff's advocates late on the eve of the hearing date that the 1st defendant's witness had travelled to Ghana and that the defendants would not be ready to proceed, the plaintiff's counsel had all along been opposed to the idea of adjourning the hearing of his client's case and thus left it to the defendants' advocates to make their application for an adjournment during the hearing date.

9. The plaintiff states that Ms Masenge had rightfully apologized to him and court when she submitted that this court and the plaintiff's advocate would be acting with malice were the plaintiff's case to proceed for hearing in the absence of Mr Abala Wanga. Further that this court indulged Ms Masenge when she requested for rescheduling of the hearing from 11.15 a.m to 12 noon, to allow her prepare for the hearing.

10. The plaintiff maintains that the defendants are out to intimidate and arm twist this court into allowing them to dictate the pace and conduct of this case and that in any event the application herein lacks merit, is defective, is bad in law and is an abuse of court process wherefore it ought not be allowed.

11. Parties were directed to file written submissions. The defendants/applicants duly complied.

Applicants' Submissions

12. The defendants/Applicants counsel has submitted that the defendants have duly complied with Order 43 Rule 1(3) in that they had in the first instance, applied, without success, for leave to appeal against the ruling made on 11/6/2024 wherein this court declined to adjourn the hearing of the plaintiff's case and that they have thus made this formal application for leave, wherefore the same ought to be allowed. Upon being granted leave the applicants submit that the proceedings herein ought to be automatically stayed least their intended appeal be rendered nugatory. Reliance has been placed on the decision of Onyango-Otieno J in Niazsons (k) Ltd Vs China Roads & Bridge Corporation (Kenya) (2001) eKLR as followed in the case of Port Florence Community Health Care Vs Crown Health Care Ltd (2022) eKLR.

13. It is the defendants' stand that this court is biased against the defendants and that the first instance where in their view this court exhibited open bias was when it disallowed their preliminary objection without costs, and without allowing them to prosecute their preliminary objection. The defendants' advocates submit that the act of calling for the lower court's file by this court was strange and un procedural. Further that the decision of this court in declining to adjourn the matter at the instance of the defendants leads any reasonably person who is privy to the facts herein to infer bias. The case of Porter Vs Magill (2002) 1 All ER 465 was cited wherein the House of Lords rendered itself that an applicant in a recusal application need not prove the existence of real danger of bias but:

> " The question was whether the fair minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased."

14. The defendants also relied on the case of Mtaani *Vs Judicial service commission & Another (Petition E160 of 2023*) (2024) HEHC 3487 (KLR) where the court quoted with approval the decision in Metropolitan Properties (Fg-C) Ltd Vs Lannon & Others (1969) 1 QB 577 thus :-

> " Disqualification is imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias"

15. The defendants maintain that the right to a fair hearing is a constitutional imperative and justice must not just be done but must be seen to be done. Further that notwithstanding the oath of office taken by a judge to do justice impartially, where the impartiality of a judge is impugned, then however unpleasant as it may be, an application for recusal is the panacea. The defendants maintain that this court has exhibited open bias wherefore it should recuse itself. See Kaplana H Rawal Vs Judicial Service Commission & 2 Others (2016) eKLR and Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 Others (Petition No 4 of 2012) (2013) KESC 20 (KLR)(6/2/2013) (Ruling)SCJ – MK Ibrahim dissenting).

Analysis and Determination

16. I have considered the application herein, the two affidavits sworn by Edwin Omari Mongeri one in support thereof and the other in furtherance of the supporting affidavit and the one in reply sworn by Mourice Carlos Ouma. I have also considered the submissions of the defendants and the issues that emerge for determination are as follows:-

    i. Whether the applicants have made out a case for grant of leave to appeal against the ruling made on 11.6.2024.

ii. Whether leave to appeal if granted should operate as a stay of proceedings pending the hearing and determination of the intended appeal.

iii. Whether the judge should recuse herself from hearing this case and the case be heard by a different judge.

iv. Who should bear the costs of this application.

Whether the applicants have made out a case for grant of leave to appeal against the ruling made on 11/6/2024.

17. The order that the defendants intend to appeal against is not appealable as of right and leave to appeal has to be obtained first pursuant to the provisions of Order 43 (2) (3) of the *Civil procedure Act* which provide that:-

> " 43 (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
>
> (3) an application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order."

18. Whereas the defendants had made that application for leave to appeal orally in the first instance, the same was disallowed and the defendants then opted to take 36 days instead of 14 days, as provided for in Order 43 (3) of the Civil Procedure Rules, in making a formal application for leave. This delay of 22days has not been explained. Save for saying that their oral application had been declined, the defendants have not adduced any reason as to why this court ought to grant them leave to appeal. No draft memorandum of appeal has been attached to the supporting affidavit wherefore this court has been denied the opportunity to gauge whether the grounds of the intended appeal are arguable or not. Where an appeal does not lie as of right, an intended appellant has the onus of persuading the court that the intended appeal raises arguable issues hence the necessity of the leave to appeal. In this instance no effort has been made to so persuade this court.

19. It is noteworthy that this court was not persuaded by the defendants when they made their application to adjourn this matter on 11/6/2024 on grounds of absence of the 1st defendant's witness. Order 17 Rule 1 of the *Civil Procedure Act* provides as follows:-

> " Once the suit is set down for hearing, it shall not be adjourned unless a party applying for an adjournment satisfies the court that it is just to grant the adjournment".

20. In the further affidavit of Edwin Omari Mongeri at paragraph 9 thereof, the defendants' advocate deposes as follows:-

> " That indeed the defendants are entities with many workers but it would be an absurdity to request for just any person to appear and conduct cross examination yet it was only Mr Wanga who was materially privy to the chain of events and proceedings."

21. This court finds the above statement absurd given that it states that Mr Michael Abala Wanga was the one who was to conduct the cross examination of the plaintiff's witness, yet he is neither a partner nor an associate in the law firm of Mongeri Kinyanjui & Company Advocates. This rather alien procedure

that Edwin Omari Mongeri Esquire advocate intended to adopt in these proceedings explains his decision not to participate in the proceedings and he thus sat by, folded his hands, assumed the role of a spectator, declined to cross examine the plaintiff's witness and remained mute as his clients' case was closed. The question that begs an answer is to what end do the defendants seek leave to appeal save for their advocates to justify raising a fee note that will eventually be settled using funds from the public coiffeurs? I thus find that any intended appeal against my decision to proceed with the case on 11/6/2024 will, if leave is grant, be at best an academic exercise, contrary to public policy and will not advance the interest of justice for the defendants. This court cannot make orders in vain. I thus decline to grant such leave as sought.

Whether leave to appeal should operate as a stay of proceedings

22. It is instructive to note that both the plaintiff's and the defendants' cases were closed on 11/6/2024 and the case herein is pending delivery of judgment. The defendants have not made any prayer for arrest of judgment wherefore there is literally nothing to stay, unless it is the desire of the defendants that the judgment herein be rendered by a different judge who never heard the case. In any event, given my decision hereinabove this issue is rendered moot.

Whether the judge should recuse herself and the case be heard by a different judge.

23. Recusal finds definition in Black's Law Dictionary 11th Edition, thus :-

> "Removal of oneself as a judge or a policy maker in a particular matter especially due to conflict of interest."

24. In the case of President of the Republic of South Africa and Others v South African Rugby Football Union and Others (1999 (4) SA 147; 1999 (7) BCLR 725 (CC) the Constitutional Court of South Africa pronounced itself on the approach that a court facing a recusal application should adopt thus:-

> "a. The fair-minded and informed observer is a person who has knowledge of all material background facts and not just a 'casual' observer notwithstanding the warning that over-zealous acceptance of this point might lead the observer to be in a position akin to that of a judge.
>
> b. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither complacent or naive nor unduly cynical or suspicious.
>
> c. Regard must be had to the judicial oath and a judge's ability to disabuse their minds of any irrelevant personal belief and predispositions. Judges must take account of the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves but they must disqualify themselves if there are reasonable grounds on the part of a fair-minded and informed observer for apprehending that the judge will not be impartial.
>
> d. A judge would be as wrong to yield to a tenuous or frivolous objection as he would be to ignore an objection of substance.
>
> e. A court must take great care to ensure that a recusal application is not merely an opportunity for 'forum shopping.'

25. In Kaplan & Stratton vs Z Engineering Construction Limited & 2 Others (2000)KLR {{^}} the court stated:

> " Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

26. In the case of National Water Conservation & Pipeline Vs Runji & Partners Consulting Engineers & Planners Limited (2021)eKLR Justice Mativo encountered a similar scenario and he rendered himself as hereunder:

> " First, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. One, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. Two, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted."

27. In the above cited case Justice Mativo (currently a Judge of the Court of appeal) quoted with approval the case of Yama v Bank South Pacific (2008) SC921 where the Supreme Court of Papua New Guinea pronounced itself on the issue of recusal of a judge as under:-

> " is not the law that a Judge should disqualify himself just because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous." Sedley L.J. continued:- "Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation."
>
> Ward L.J. said that the judicial duty must be "performed both without fear as well as without favour."

28. Justice Mativo further placed reliance on the writings of Lord Neuberger (the President of the Supreme Court of the United Kingdom and lead judge of the Judicial Committee of the Privy Council) in 'Judge not, that ye be not judged': judging judicial decision-making FA Mann Lecture 2015 (29 January 2015) where he stated:-

> " It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court."

29. This court takes cognizance of the necessity of maintaining it's fidelity to the rule of law and it's adherence to the oath of office of a Judge; to discharge it's mandate with not only impartiality, but

also without fear and favour. Indeed as the old adage pronounces, a judge must conduct himself akin to Ceasar's wife; beyond reproach, yet it is the impartiality of the judge that the defendants have now impugned.

30. The defendants posit that this court dealt with their preliminary objection summarily without according them the opportunity to prosecute the said preliminary point. The gist of the defendants' preliminary point was inter alia that this case is sub judice Kisumu CMCC No. E0191 of 2021 wherein the plaintiff herein has sued the two defendants herein and one Micheal Abala Wanga and further that the agreement between the parties provided for arbitration wherefore this court lacks the requisite no jurisdiction to hear this suit.

31. This court rendered it's ruling on the said preliminary objection on 11.3.2024 and thereafter this case was set for hearing by the consent of parties. Whereas the order made was per section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, appealable as of right, no appeal was proffered against it, neither did the defendants move this court for review wherefore they cannot now raise it as a ground for the recusal of this court.

32. One Edwin Omari Mongeri Esquire advocate categorically states that this court was overhanded in the way it treated the defendant's advocate Ms Masenge and forced an apology from her yet none of her oral submissions were out of order. Respectfully I beg to disagree. Ms Masenge had in her application for an adjourned submitted that if the same was to be disallowed and the case ordered to proceed, then both the plaintiff's counsel and the court would be acting out of malice. This court found that line of submission to have been unjustified, scandalous, derogatory and that it amounted to contempt in the face of the court. I thus called upon Ms Masenge to purge her contempt, which she did by tendering an apology to the plaintiff's counsel and the Court.

33. It is instructive to note that when the Defendants' counsel Ms Masenge sought court's indulgence for rescheduling of the time indication from 11.15 a.m to 12 noon so as to enable her prepare for the hearing, this court indulged her. At no time did she introduce herself as either holding brief for Mr Mongeri nor as appearing alongside him. The decision of Mr Mongeri to appear in court at noon in the place of Ms Masenge and then orally seek for orders the stay of proceedings and for recusal of the presiding judge for reasons to be stated in the future, is a clear indication of the fact that the defendants' advocates were persistent in their endeavour to get an adjournment through all means possible including but not limited to attacking the impartiality of this court.

34. Whereas perception of fairness in the hearing of a case is essential, where a party assaults the impartiality of the judge, the apprehension of bias must be reasonable. In the case of Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others (Petition No 4 of 2012) (2013) KESC 20 (KLR) (6/2/2013) (Ruling)SCJ – MK Ibrahim dissenting) the Supreme Court stated that the there is a double requirement of reasonableness; in that the person apprehending bias must be a reasonable person and the apprehension must be reasonable.

35. The apprehension of bias, has in this case, been raised by Edwin Omari Mongeri, counsel for the defendants whom this court has always perceived to be a reasonable man until he swore the further affidavit and unreasonably deposed that the 1st defendant's witness Michael Abala Wanga was the one who was to conduct the cross examination of the plaintiff's witness. What then is the role of the law firm of Mongeri Kinyanjui & Company Advocates in this suit if they can only discharge their duty of representing the defendants in this case, during the presence of the 1st defendant's witness and not otherwise.

36. Even if Mr Michael Abala Wanga was to be present during the hearing, this court would not have allowed him to cross examine any witnesses for two reasons. Firstly, he is neither a party nor

unrepresented litigant in this suit. Secondly, he is neither an authorized agent of the defendants nor their advocate.

37. As to whether the apprehension of bias was reasonable, it is noteworthy that the said apprehension surprisingly coincided with the ruling that declined an adjournment application by the defendants. I do find that the said apprehension of bias was unreasonable given its timing and the grounds therefor. In any event the fact that a judge has made decisions that are not palatable to a party has never been a ground for recusal of the judge from handling the case. An aggrieved party can either move the court for review or approach an appellate court.

38. No reasonable man sitting in court on that material day would have inferred bias on the part of the court. On the other hand, such a reasonable man would have discerned a concerted endeavor by the defendants to adjourn the hearing of the plaintiff's case.

39. This court takes judicial notice of the fact that case backlog is real a challenge in our courts wherefore any efforts made by courts to expedite the hearing of cases ought to be commended by the court users.

40. The defendants' counsel Edwin Omari Mongare has queried the procedure of calling of the lower court file in Kisumu CMCC NO E0191 of 2021 by this court for perusal. Article 165 (6) of *the Constitution* vests in this court supervisory jurisdiction over inter alia subordinate courts. Under article 165(7), this court is clothed with the jurisdiction to call for a file from the subordinate court wherefore this court acted within it's mandate when it called for the other file from the lower court.

41. The impartiality of this court has thus principally been assaulted due to the fact that it made rulings that were not favourable to the defendants. It is not the business of this court to please parties in a case but rather to ensure that each party gets a fair hearing as envisaged under article 150 of *the Constitution*.

42. Article 160 of *the Constitution* of Kenya 2010 underscores the independency of the judiciary thus :-

> " 160 (1) In the exercise of judicial authority, the Judiciary as constituted by article 161, shall be subjected only to this Constitution and the law and shall not be subject to any control or direction by any person or authority."

43. This court will not recuse itself so as to appease the defendants who are out to forum shop as so to do will be to act at their whim, control and direction. It is apparent that the defendants are out on a forum shopping spree. I take judicial notice of the fact that the 1st defendant's witness Michael Abala Wanga has during the pendency of this ruling presented himself in the chambers Justice Aburili in the evening of the 25th of October 2024 in an overt bid to forum shop. Further, this same witness, while making reference to another case involving inter alia the 2nd defendant made a press statement on 31st October 2024 wherein he made utterances that are defamatory to the judge handling this matter and further intimated that he shall call for her recusal and be a witness in a complaint that he intends to lodge against the judge before the Judicial Service Commission. This is intimidation at it's best.

44. The mere fact that a party has been aggrieved by a decision of a court is not a ground for rebuttal of the impartiality of this court. So far no iota of cogent evidence has been placed before this court to demonstrate that this court is biased. The defendants squandered their opportunity of presenting their defence and of prosecuting their counter- claim simply because they prefer a different judge. I would be failing in my mandate if I were to recuse myself on this ground.

45. On the balance I find that the defendants' application herein must fail on all the prayers sought. Each party shall bear its own costs.

DELIVERED, SIGNED, AND DATED AT KISUMU THIS 24TH DAY OF DECEMBER 2024.

MWANAISHA S SHARIFF

JUDGE.

HCCC E006/22: Ruling M.S.Shariff J