



**Masters Kenya Limited & another v Desert Runners Services Kenya Limited & 3 others
(Environment & Land Case 916 of 2013) [2023] KEELC 16279 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 916 OF 2013**

**MD MWANGI, J
MARCH 16, 2023**

BETWEEN

MASTERS KENYA LIMITED 1ST PLAINTIFF

STEPHEN KAMAU NDUNGU 2ND PLAINTIFF

AND

DESERT RUNNERS SERVICES KENYA LIMITED 1ST DEFENDANT

JOHN SALEH OKECH 2ND DEFENDANT

SYLVIA ALIVISTA LITUNDA 3RD DEFENDANT

HOUSING FINANCE CORPORTATION OF KENYA 4TH DEFENDANT

RULING

1. The application before me is the Notice of Motion dated 25th January 2023 by the 2nd Plaintiff/Applicant in this matter. The application is stated to have been brought under the provisions of Article 27, 50 (1) of *the constitution*, order 51, rule 1, 3 &4 of the *Civil Procedure Act*, Cap 21 Laws of Kenya. The application basically prays: -
 1. that this application be certified as urgent and service of the same be dispensed within the first instance and the same be placed before the duty judge or any other judge of equal jurisdiction to be dispensed of urgently.
 2. that hon. justice m.d. mwangi be pleased to recuse himself from any further conduct of hearing this suit and that the matter be referred to the honourable presiding judge of the division for re-allocation and directions on the conduct and disposal of the same.



3. that there be a stay of further proceedings pending the hearing and determination of this application or for such other period this court may deem fit and just.
 4. that the costs of this application be in the cause.
2. The application is premised on the grounds on the face of it and on the affidavit of Stephen Kamau Ndungu sworn on the 25th January 2013. The main basis upon which the application is premised and as deponed in the supporting affidavit thereof is that the court failed to correctly record the proceedings on 20th June 2022 and on 27th October 2022 when the matter came up for hearing of the main suit during the 2nd Plaintiff's examination in chief. The deponent further accuses the court of failing to record all his annexures as exhibits in the case.

Response by the 1st Defendant.

3. The 1st Defendant responded to the Plaintiff's application by way of grounds of opposition dated 30th January 2023. The 1st Defendant termed the Plaintiff's application as just 'another delaying tactic'. The 1st Defendant noted that the Plaintiffs had already closed their case with all their statements and affidavits having been produced including all their 23 exhibits. The 1st Defendant avers that this was clearly recorded in the court proceedings exhibited by the Plaintiff/Applicant.
4. The 1st Defendant further affirmed that it did not contest either the production or the content of the DCI forensic report and that was the reason why it was therefore produced with its consent and that of the 4th Defendant without the need to call its maker.
5. In any event, the 1st Defendant argues that if there was any omission or proceedings were wrongly captured as alleged by the 2nd Plaintiff, there is a provision to correct the same under section 99 of the [Civil Procedure Act](#).

Court's directions.

6. The Plaintiff's application had been brought under certificate of urgency. Considering its nature, and in order to expedite its hearing, the court directed that it be heard orally and in open court.

Submissions by the Parties.

A. Submissions by the 2nd Plaintiff/Applicant.

7. In his submissions through his advocate Mr. Mitei, the 2nd Plaintiff reiterated that the basis of his application was that the Hon. Judge who has the conduct of the matter failed to capture the proceedings as per the averments by the Plaintiff on numerous occasions. The 1st instance was on 20.6.2022 when the matter came up for a mention. The Plaintiff through his Counsel addressed the court to call his witness – the DCI to produce their findings. The 2nd Plaintiff alleged that the court did not record the proceedings as was said by the Advocate.
8. On 27.10.2022 when the matter came up for hearing of the Plaintiffs' case, the 2nd Defendant took to the stand and testified on the context of the annexures attached to his supporting affidavit dated 12th April 2022. The annexures are No. 1-23. The 2nd Plaintiff accused the court of making reference to 3 annexures only as particularized in paragraph 20 of the grounds in support of the application.



9. The 2nd Plaintiff elaborated particularly on annexure MKL – 12 which was captured as the Plaintiffs' exhibit during the hearing. He argued that despite its being recorded as an exhibit, the court did not record the testimony of the 2nd Plaintiff regarding its contents.
10. The 2nd Plaintiff accused the court of demonstrating bias by failing to record the averments and testimony of the Plaintiff. It was the 2nd Plaintiff's submissions that the court 'schemed' to weaken his case by admitting in evidence the DCI report without calling its maker. Further that it was meant to help the 2nd & 3rd Defendants go unpunished for breach of contract.
11. Explaining his paragraph 27 of the grounds in support of his application, the 2nd Plaintiff accused the court of deliberately refusing to record the evidence to the effect that the transfer of the suit property effected on 11.4.2013 could not transfer and change a good an indefeasible title since the KRA stamp duty was not paid. By operation of the law therefore, interest in the land cannot be transferred and as such any eventual transfer was not only null and void but fraudulent as well. The transfer form further was not flanked.
12. It was the 2nd Plaintiff's submission that this court should have recorded Lady Justice Gitumbi's order directing the 2nd & 3rd Respondents to submit themselves to the DCI office for forensic examination of their signatures after they had denied signing the 2nd agreement of 15.3.2013. The 2nd Plaintiff alleged that he had made testimony regarding the import of the DCI report.
13. The 2nd Plaintiff further submitted that the court failed to record his testimony in regard to the eviction notice/letter issued to him by the 1st, 2nd and 3rd Respondents which testimony was to the effect that the said notice was what stopped the Plaintiff from paying the loan. Finally, the 2nd Plaintiff submitted that the court had failed to record that the Plaintiff had produced the 23 annexures and testified on all of them. It was the 2nd Plaintiff's argument that the court left out his testimony with a view to aiding the Defendants/Respondents in their respective cases.

Submissions by the Respondents.

14. On behalf of the 1st Defendant, Mr. Makumi advocate submitted that the 2nd Plaintiff's application was baseless and not based on facts. From the record of the proceedings before the court, all the documents produced by the Plaintiff were actually admitted and marked as exhibits for the Plaintiffs. He further pointed out that proceedings should not be recorded in form of questions and answers as provided under the law.
15. It was the 1st Defendant's submissions that under the provisions of Order 11 of the Civil Procedure Rules, parties are required to file witness statements which the court is not required to replicate in the proceedings since they are already part of the court record.
16. Regarding the issue of the court denying the Plaintiffs the opportunity to call the witness from the DCI, the 1st Defendant submitted that it was the Plaintiffs' duty to call the witnesses they deemed necessary otherwise the document had already been produced in evidence with the concurrence of the Defendants/Respondents.
17. The 1st Defendant further pointed out that the advocate for the Plaintiffs was not present during the hearing of the case. He had instead sent another advocate to hold his brief. The said advocate who held brief on the material date had not sworn any affidavit in support of the 2nd Plaintiff's allegations.
18. The 1st Defendant affirmed that no evidence had been adduced by the 2nd Plaintiff to support his allegations of bias against the court. Any slips in the recording of the proceedings could be remedied under section 99 of the [Civil Procedure Act](#).



19. The Advocate for the 1st Defendant in response to the allegations that the court was biased in favour of his client concluded by submitting that neither he nor his client were personally known to the court.

Submissions on behalf of the 4th Respondent.

20. Mr. Ayieko advocate submitted on behalf of the 4th Respondent. He affirmed that this was his first matter ever before the court and he was not personally known to the court in any event. He had not been favoured by the court in any way.
21. As Advocate for the 4th Respondent, Mr. Ayieko asserted that all the issues before the court were well known to him within his personal knowledge. The application by the Plaintiff had not raised any sufficient grounds for recusal of a Judge.
22. The test for bias of a Judge according to the advocate for the 4th Respondent is that of a fair minded and informed observer expected to adopt a balanced approach on the matter before him whether for the Plaintiff's side or the Defendant's side. The 4th Defendant averred that the 2nd Plaintiff's application does not meet the threshold.
23. While addressing the issue of the production of the DCI report, the 4th Defendant asserted that the report was actually prepared as a result of his client's application not by the Plaintiff. On 20.6.2022 when the issue of its production arose, the 1st and 4th Defendant conceded to its production without the need to call the maker. That was what informed the court's direction on its production without calling the maker.
24. On the accusation that the court failed to capture the Plaintiff's testimony, and the exhibits, the 4th Defendant submitted that the allegation was baseless; unless the 2nd Plaintiff had not read the proceedings.
25. It was the 4th Respondent's submissions that it was not the business of the court to guide parties on how to present their respective cases. It was that of their own advocates.
26. In any case, the 4th Defendant submitted that the court had adopted the Plaintiff's witness statement. It was inconceivable then how the Plaintiff could accuse the court of failing to capture his evidence in chief. The 4th Respondent described the 2nd Plaintiff's application as a wild goose chase meant to antagonize the court with the intention of delaying the conclusion of the case which is already 10 years old.
27. The 4th Respondent too reiterated that the advocate who lead the Plaintiff in his evidence in chief had not filed any affidavit in support of the application before the court affirming that the court failed to record the proceedings of the day correctly. Mr. Mitei too had not sworn an affidavit in support of his client's claim.
28. Advocate for the 4th Respondent categorically stated that advocates as officers of the court had a duty to be just and truthful and to at all times, assist the court in administering justice to all parties. He urged the court to come out zealously and find that the application by the 2nd Plaintiff lacks merit as it is not backed by any material or substantive evidence. It therefore does not warrant the recusal of the Judge.
29. The 4th Defendant laughed off at the accusation that this court failed to record the order of Justice Gitumbi wondering when the court was required to do so.
30. On the issue that the court did not record evidence in regard to the eviction notice, the 4th Respondent termed it as an outright lie since it was on the proceedings. The allegation according to the 4th Defendant betrays the actual intentions of the 2nd Plaintiff/Applicant; to derail the hearing of the matter.



31. Finally, the 4th Defendant agreed with the submissions of the 1st Respondent that the issue of flanking of the KRA forms only came up during cross-examination and not during examination in chief. The 4th Respondent therefore prayed that the application be dismissed with costs since it was just but an abuse of the process of court.

Response by the Plaintiff.

32. The applicant through his advocate Mr. Mitei in response submitted that his ground number 23 had been misinterpreted. The advocate stated that it was not necessary for him to swear an affidavit in support of his client's application.
33. The advocate reiterated that the Plaintiffs had lost confidence in the court to render a fair and just determination in this matter. It was therefore the Plaintiffs' wish that the court recuses itself at that juncture.

Issues for determination

34. There is only one issue for the court to determine in this ruling: - Whether the 2nd Plaintiff's application had demonstrated a reasonable basis to warrant recusal of the Judge in this case. The rest of the prayers are incidental to the court's decision on this one issue.

Analysis and determination

35. Judicial recusal is underpinned by constitutional, statutory and common law principles which have variously been expounded and espoused by various courts in Kenya. The rule against bias and the principle that 'justice must not only be done but seen to be done' form the foundation of the common law principles for recusal. The test as pronounced by the courts is an objective test.
36. The Court of Appeal in the case of *Philip K. Tunoi & another versus Judicial Service Commission & another* [2016] eKLR held that:

The test in *R v. Gough* was subsequently adjusted by the House of Lords in *Porter v. Magill* [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –

"[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

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.

In *Taylor v. Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:

"... we believe the modest adjustment in *R V. Gough* is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-



mindful and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”

37. The Court too in the case of *Republic versus Hon. Jackson Mwalulu & others* Civil Application No.310/2004, (unreported), held that;

“That being the position as I see it when the Courts in this country are faced with such proceedings as this (i.e. proceedings for the disqualification of the 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 established. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a Court or quasi-judicial tribunal 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”.

38. The same Court in the *Kaplana Rawal vs JSC & 2 others* (2016) eKLR cited with approval the holding of the East African Court of Justice in *Attorney General of Kenya vs Anyang' Ny'ongo*, App No. 5 Ref. No. 1 of 2006 (EACJ) which set out the test of bias in the following words;

“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. Needless to say, a litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The court, however, has to envisage what would be the perception of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.”

39. The Supreme Court of Kenya in the case of *Gladys Boss Shollei versus Judicial Service Commission & another* [2018] eKLR, stated that a Judge in deciding an application for recusal must do a ‘balancing act’ between the ‘duty to sit’ and ‘the aims of maintaining the appearance of impartiality and instilling public confidence in the administration of justice’. The Court stated that;

“In respect of this 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; observed:

“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”.



40. The Court cited with approval the holding in the case of *Simonson –vs- General Motors Corporation* U.S.D.C. p.425 R. Supp, 574, 578 (1978), where the United States District Court, Eastern District of Pennsylvania, had this to say:-

“Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a “duty to sit” . . .”

41. The 2nd Plaintiff/Applicant takes issue with the court’s direction of 20.6.2022 that it was not necessary to call the maker of the report from the DCI to produce the report by the DCI since its production was not objected to by the Defendants.
42. First and foremost, if the 2nd Plaintiff was dissatisfied with the direction the court gave, he had a right to approach the court to reconsider and review the said direction/order. He did not do so.
43. Secondly, this court has a responsibility, whenever it exercises its authority and jurisdiction in a case, to facilitate just, expeditious, proportionate and accessible resolution of disputes. The court has a duty to expedite the hearing of cases and must not give in to antics by any party in the case to unnecessarily delay the hearing and conclusion of the case. This is the overriding objective expressed in section 1A of the *Civil Procedure Act*, Section 3 of the *Environment and Land Court Act* and paragraph 1 of the Environment & Land Court Practice Directions of 25th July 2014. Parties too and their advocates have an obligation to assist the court in the realization of the overriding objectives.
44. Where the production of a document is not objected to, it does not serve any purpose to call its maker to produce it. There was no contest as to the content of the document either. Where a document has been tendered and admitted in evidence, the document speaks for itself.
45. Why then would the court waste precious judicial time on an uncontested document? In any event, the Environment & Land Court Practice Directions of 2014 require a party who wishes to apply for witness summons for purposes of producing documents or testifying in the case to do so during the pre-trial conference.
46. The 2nd accusation was that the court failed to record all the Plaintiff’s annexures as evidence. On this issue, the court agrees wholly with the submissions by the 1st and 4th Defendants advocates, Mr. Makumi and Mr. Ayieko. It is clearly recorded that, “the documents annexed to the further affidavit shall be marked as ‘PE 1-23’ in the order in which they are listed”. The Court Assistant of this court went ahead and prepared a list of the Plaintiff’s exhibits sequentially numbered from 1 to 23 with a clear description of each of the documents.
47. The *Environment & Land Court Practice Directions* of 2014, at paragraph 16 make provision for the filing of witness statements and documents. In regard to documents, the directions require that they be filed in a bundle, chronologically arranged and sequentially paginated. The logical import of that requirement is that the documents shall be produced as a bundle; the obvious intention being to expedite the hearing of the case.
48. The Applicant further accused the court of failing to correctly record his testimony. He was however not specific on this.
49. The Advocate for the 4th Defendant pointed out to the court that the advocate who led the 2nd Plaintiff in his evidence in chief had not sworn an affidavit to support/corroborate the allegations by his client. This off course would have been critical evidence to authenticate the allegations by the Plaintiff.



50. I must point out that Rule 4 of Order 18 makes provision of how evidence should be recorded during the hearing of a suit. It provides that,

“The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer but in that of a narrative.”

51. It is noteworthy that the 2nd Plaintiff/Applicant in this case had recorded a comprehensive witness statement which he adopted as his evidence in chief. All that he was doing then in examination in chief, in accordance with paragraph 16 (c) (ii) of the *ELC Practice Directions*, 2014, was “minimally”, highlighting his witness statement and producing documents. The court recorded his testimony as expressed under the ‘leadership’ of his erstwhile advocate. All his evidence, both written and oral is therefore properly before the court.

52. It is mysterious to me how the Applicant arrived at the conclusion that the court was biased against him and in collusion with Defendants as he put it in his application. He did not explain his basis to justify the very serious accusations. The test for recusal as the Constitutional Court of South Africa explained in the case of *South African Commercial Catering and Allied Workers Union and Others vs Irrin Johnson Limited Seafoods Division Fish Processing* CCT 2/200 is whether ‘a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear or the adjudication of the case that is on mind open to persuasion by the evidence and submission of the counsel’.

53. The Judicial Service Code of Conduct further outlines the circumstances for recusal of a judicial officer as follows;

- a. He has 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 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 part to the proceedings.

54. No evidence or allegation for that matter was put forth to the effect that the Judge in this case has any personal bias against the Plaintiff or his advocate or personal knowledge of facts in the proceedings herein. Neither was it alleged that the Judge has an interest in the outcome of the matter at hand.

55. The dictum of the Court of Appeal in the case of *Galaxy Paints Ltd versus Falcon Guards Ltd* (1999) eKLR, in my view explains the circumstances that may have led the Plaintiff to file the application before me. The Court of Appeal stated and observed as hereunder;

As a result of the failure on the part of counsel to observe the Rules, many like Mrs Dias, have turned to scurrilous abuse and unfounded allegations against the learned Judges and applications to disqualify them, which were formerly very rare, are now a common feature. As we have said elsewhere this practice is nothing but an attempt to shop around for Judges favourable to their cause. It is strongly deprecated.

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. See *Raybos Australia Property Limited & another v. Tectram Cooperation Property Ltd. & Others* 6 NSWLR 272.

56. From the foregoing exposition of the law, it is my humble conclusion that the current application for recusal, does not meet the requisite threshold for recusal of a Judge/Judicial officer. It is dismissed with costs to the 1st and 4th Defendants.
57. I would have left it at that. However, in the course of writing this ruling, it has been brought to my attention that an enquiry is going on in regard to an oral complaint lodged by the 2nd Plaintiff against the Court Assistant who was previously attached to this court. The complaint was lodged with the office of the Deputy Registrar of this court.
58. As a matter of principle, I find it appropriate to release this file. I therefore direct that this file be placed before the Presiding Judge of the Environment & Land Court with a request to re-allocate it to any other court.
59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kamau, the 2nd Plaintiff in person.

J. Makumi for the 1st Defendant/Respondent.

Mr. Ayieko for the 4th Defendant/Respondent

No appearance for the 2nd, and 3rd Defendants/Respondents

Court Assistant – Yvette.

