Talam v Barngetuny (Environment & Land Case 121 of 2021)
[2023] KEELC 17486 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17486 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAPSABET

ENVIRONMENT & LAND CASE 121 OF 2021

MN MWANYALE, J

MAY 18, 2023

FORMERLY ELDORET ELC CASE 104 OF 2021

BETWEEN

PAUL KIPROBOM TALAM ..... PLAINTIFF

AND

WILLIAM KIPKOSGEI BARNGETUNY ..... DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated 22/2/2023 which seeks the substantive order which seeks the substantive order that;

   Hon. Justice M. N. Mwanyale do recuse himself from further conduct of this matter

2. The application is founded on Article 2,10,20, 25 (i) and 159 of the *Constitution*, Sections 3 and 3A of the *Civil Procedure Act*; Regulation 9 and 21 of the Judicial Service (Code of Conduct and Ethics) Regulations (2020) and Order 51 Rule 1 of the Civil Procedure Rules and is grounded on grounds interalia;

   a. The Plaintiff in his pleadings is alleging to have gained possession to Nandi/Baraton258 by way of adverse possession, having gained entry in the year 1969. The Plaintiff makes reference to a case between himself and the Defendant's late mother Kobot Nyongio being Eldoret HCC No. 142 of 1991 in which the Court ruled in his favour with reference to 4 acres yet in the instant case the Plaintiff is laying claim to 6.4 acres.

   b. During the hearing of the Plaintiff's case, he and his witnesses have been making reference to entry in 1969 and their case is not entirely based on the 1993 High Court decision, but when the Defendant's Counsel had sought to cross – examine them regarding the actual year or date of entry; the Court has curtailed the extent of cross – examination insisting that he could only allow questions regarding post 1993 – period.

c. The Defendants defence is entirely based on the fact that the entry was initially with the licence and/or consent of the original owner Jeboit Kobot Tarbachok but subsequently refused leave upon termination of the lease/and or licence.

d. That even if there was a Judgement and/or decree issued in 1993 the same was never extracted and/or registered against the sit property within 12 years hence if no longer has the force of law due to effluxion of time under the *limitation of Actions Act*.

e. That although the Plaintiff freely made reference to events of 1969 all the way to the current time, the Court unfairly restrained the Defendant from making references to events of the same period.

f. The Court further became personal against the Defendants Counsel to the extent of threatening to embarrass him in front of his clients without any provocation. That the Court has thus predetermined the outcome of the matter and has locked the Defendant from the seat of justice by having a fixed mind.

g. That the Court has clearly demonstrated open bias and prejudice in favour of the Plaintiff by allowing him latitude to refer to events way back to 1969 but against the Defendant who has been severely reprimanded and directed to only relay events post 1993.

h. That as a result the Defendant has lost confidence in the Court independence and ability to conduct a fair hearing of the matter and that the same is expressly prejudicial to the Defendant the Court is unable to discharge its mandate faithfully, independently and justly in accordance with the oath of office which mandates and requires the Judges conduct to be completely beyond reproach and to enhance confidence of the public and litigants in the fair administration of justice.

3. On the strength of the above grounds the Defendant/Applicant has sought the Court's recusal.

4. The application is supported by the Supporting Affidavit of the Applicant who reiterates the above grounds on oath.

5. The Application is opposed by the Grounds of Opposition on grounds interalia;

i. Neither the Defendant nor his Advocate on record has conclusively established and demonstrated the propriety of their motive for seeking recusal of the Hon. Judge.

ii. There are no valid and cogent reasons so as to justify the recusal of the Judge in this proceeding/hearing.

iii. The Defendant not his Advocate has demonstrated the violation of Article 2, 10, 27, 73(2) of *the Constitution* by way of favoritism, nepotism, and cronyism, religious and cultural bias or engaged in corrupt or unethical practices in this proceedings.

iv. The Defendant and his Advocate ought to know the applicable law on adverse possession the claim before Court being founded on adverse possession in respect of L.R. NO. Nandi/Baraton/258.

6. A summation of the events leading to the filing of the application subject of this ruling is necessary.

7. As indicated by the Applicant and Respondent, the suit before Court is premised on adverse possession. While testifying in Court, the Plaintiff produced proceedings and judgement delivered in 1993 between him and the Defendants mother in Eldoret case HCCC No. 142 of 1991; which decision

has found interalia that the Plaintiff was entitled to adverse possession of 4 acres with the suit property Nandi/Baraton/258.

8. While cross – examining the Plaintiff, the Defendants Counsel sought to cross – examine on issues that related to the judgement in Eldoret case No. 142 of 1991at which point the Court pointed out that the in view of the existence of the judgment in Eldoret case number No. 142 of 1991, the entry or otherwise of the Plaintiff in 1969 or otherwise was dealt with in the said judgement and in so far as there was no appeal nor a review of the judgment, this Court could not re-open issues that a Court of concurrent jurisdiction had conclusively dealt with, and I the Court proceedings of 2/2/2023 the indicated that it had overruled the question in view of the said judgment.

9. During the course of the Plaintiffs case, the Court on a number of occasions guided the defence Counsel that it was not permissible to re-open issues that were finalized in the judgment in Eldoret HCCC case number 141/1991 and that the Defendant could only deal with issues post 1993 after delivery of the judgment.

10. During the defence hearing the Defendant once again sort to re-open and relitigate the issues of entry in 1969 that had been dealt with in the judgment in Eldoret HCCC No. 141/1991 whereupon the Court did again caution the Defendant and his counsel not to reopen the same but to concentrate on the post judgment; (1993) issues whereat the Defendant Counsel thus made an oral application for the recusal of the Court, stating that the Court was biased and the Court thus directed a formal application to be filed so that the grounds whereof would be examined and the other party would get a chance to respond.

11. In directing the Defendant and his Counsel that the Court could not re-open issues covered by the 1993 judgement this Court was expounding the legal position as has been held by various Court decisions.

12. The Court of appeal in the decision in Thika Coffee Mills Limited vs Gakuyu Farmers Co-operative Society and 2 others at paragraph 30 observed as follows;

> " On the issue raised by the Appellant that the Trial Court sat on appeal over a similar ruling by a Judge of concurrent jurisdiction, we note that there was an application made earlier by the 1st and 2nd Respondents seeking the dismissal of the Appellant's suit for want of prosecution for inaction from 8th December 2014. The same was heard by Ochieng J, who in a ruling delivered on 27/2/2017dismissed it by holding that as at 27th February 2017, there was no indolence by the Appellant and that there was evidence of the steps taken by the Appellant to fix the suit for hearing and the explanation for the delay was in any event sufficient. However Kasango J, in her ruling on a subsequent similar application dated 30/5/2019 which dealt with the period commencing 27/2/2017, while acknowledging that the period between 2006 and 2016 had been considered in the ruling of Ochieng J, was of the view and indeed proceeded to consider the said period again despite the same having been taken into account earlier. Having considered that period, and which was one of the reasons that led the trail Court to reach a different conclusion than that of Ochieng J, it is obvious to us that the trail Court was either reviewing and/or sitting on appeal over a decision of a judge of concurrent jurisdiction which was not permissible."

13. This position was again adapted by the Court of Appeal in Bellevele Development Company Limited vs Francis Gikonyo & 7 others; where the Court held;

> " it would be a strong arbitration for a Judge to embark on what is essentially an examination of the judicial conduct and pronouncement of Judges of the same status as himself, a task that is left to Courts and judges of higher status in hierarchy by way of appeals.
>
> Pronouncement by judges of the High Court on this point are germane and demonstrative of this understanding. In *Kombo vs Attorney General* 1995 – 1998 E.A. 168 cited by Ole Keima J (as he then was) properly rejected and repulsed an invitation to scrutinize and interrogate the conduct and decision of a judge of concurrent jurisdiction mounted by way of an application for enforcement of fundamental rights under Section 84 of the retired constitution."

14. Similarly the High Court in *Salasio Mati Mwirichia vs Fredrick Mugambi and another* (2017) eKLR, Alvin Mbae & 2 others vs Kinyua Muketha & 2 others all relate to the same legal position.

15. Having set out the background of the application, the issue for determination is whether the Court was biased in disallowing the cross – examination and examination in chief of the events and period covered in the 1993 judgment, so as to invite an inference that the Court acted with a predetermined mind.

16. The Court in directing the Defendant counsel not to re-open or relitigate issues covered by the 1993 judgment was only pointing to the Defendants Counsel of the legal position as explained in the decisions cited above which Counsel ought to have known and was not in any way actuated with bias and/or favour towards the Defendant and/or his counsel.

17. The remark that the Defendant Counsel was embarrassing himself in front of his clients was made in the realization that the Defendants Counsel had previously been cautioned on a number of occasions not to re-open issues that had been finalized in the 1993 judgment.

18. Accordingly the Court does not find that it acted with bias towards the Defendant, it only directed the Defence on the legal position with regard to an already concluded matter which is in any event the legal position and does not amount to bias or favoritism.

19. The principles for recusal of a judicial officer were et at in the decision in the Court of Appeal case of *Uhuru Highway Development Limited vs Central Bank of Kenya* Civil Apeal No. 36/1996 as well as *Galaxy Paints Company Limited vs Talion Guards Limited* (1999) eKLR; which decisions were cited by the High Court in its decision in *Tuff Bitumen Limited vs SBM Kenya Limited & Keysian Auctioneers* Civil Case No. E 018/2022 delivered on 14th April 2023.

20. The application before Court does not meet the threshold in the above cited decisions and the Court finds no merit in the application before it which must have been made without sound and proper advice from the Defendant's Counsel.

21. The application is therefore dismissed.

22. Costs in the cause.

DATED AND DELIVERED AT KAPSABET THIS 18TH DAY OF MAY, 2023.

HON. M. N. MWANYALE – J

JUDGE

In the presence of;

Mr. Lagat holding brief for Mr. Magut for Defendant

Mr. Omboto for the Plaintiff