



**Nkoimo v District Land Registrar Transmara East, West & South Districts & another
(Miscellaneous Application E003 of 2022) [2023] KEELC 19101 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 19101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
MISCELLANEOUS APPLICATION E003 OF 2022**

EM WASHE, J

JUNE 29, 2023

BETWEEN

ANGELINE N NKOIMO APPLICANT

AND

**THE DISTRICT LAND REGISTRAR TRANSMARA EAST, WEST & SOUTH
DISTRICTS 1ST RESPONDENT**

INTONA INVESTMENTS COMPANY LIMITED 2ND RESPONDENT

RULING

1. The Applicant herein filed a Notice of Motion Application dated 12th January 2023 (hereinafter referred to as “the present Application”) seeking for the following Orders; -
 - a. That the Judicial Service Commission releases to the Applicant a copy of the Microsoft Teams recording and transcript for both ELC Case No. E005 OF 2022 and Misc Civil Application No. E003 OF 2022 at Kilgoris.
 - b. That this Honourable Court be pleased to recuse itself from the hearing and determination of this suit.
 - c. That this Honourable Court be pleased to stop dealing with any other proceedings touching on this matter pending the hearing and determination of this Application.
 - d. That this Honourable Court be pleased to allocate this file to another judge within the area of jurisdiction in this matter.
 - e. That costs of this Application be provided for.



2. The prayers sought for hereinabove have been supported by various grounds outlined in the body of the present application as well as the supporting affidavit of one Victor Tuya, Advocate sworn on the 12th of January 2023.
3. The grounds relied upon in the present Application can be summarised as follows; -
 - a. The suit herein is pending a Ruling before the Honourable Court which was to be pronounced on the 18th of January 2023.
 - b. However, the Applicant herein is unnerved by the Judge's spiteful treatment of his Counsel which treatment is based on unfounded and unjustified anger.
 - c. Further to that, the Honourable Judge has been raising his voice at nothing without provocation whenever Counsel for the Applicant addresses the Court.
 - d. The Applicant also alleged that the Honourable Judge turned hostile to the Applicant's Counsel quarrelling him virtual Court for over 10 minutes for no apparent reason.
 - e. The Applicant is also aggrieved by the Honourable Judge's decision for ignoring all the pleas to strike out certain documents from the Court record despite the said application not being opposed.
 - f. The Applicant's view is that the Honourable Judge has on several occasions extended too much friendliness, too much love and laughter to opposing Counsel whilst at the same sessions showing exact opposite to the Applicant's Counsel.
 - g. The Director of the 2nd Respondent has been boasting of his dalliance with this Honourable Court even before a Ruling was made in Kilgoris ELC No. E005 OF 2022 boasting of his being in charge thus begging the question of who he is in cahoots with.
 - h. In conclusion therefore, the Applicant is of the view that the Honourable Judge is unable to fairly determine the matter and is likely to be unfair in his decision.
 - i. The Applicant's submission is that the Honourable Court do recuse itself from this suit and the same be transferred to another Court to hear and determine the same.
4. The present Application was duly served on the 2nd Respondent who opposed the same through a Replying Affidavit sworn on the 14th of February 2023 by one Geoffrey Makana Asanyo.
5. The grounds advanced by the 2nd Respondent in opposing the present Application was that the Honourable Judge has been extremely accommodative to the Applicant even when there was none compliance with the Honourable Court's directions.
6. The 2nd Respondent's position was that the Honourable Court has been level headed in handling this suit and demonstrated fairness and patience to all the parties herein.
7. The Honourable court directed that parties to address the present Application by way of written submissions.
8. The Applicants filed their submissions on the 27th of March 2023 while the 2nd Respondent filed their submissions on the 24th of March 2023.
9. The Honourable Court upon perusing the present Application, the Replying Affidavit by the 2nd Respondent and the submissions therein, it is of the considered view that the issues for determination are as follows; -



- i. Is there sufficient evidence to point at possible bias against the applicant?
 - ii. Is the applicant entitled to the prayers sought in the present application?
 - iii. Who bears the costs of the present application?
10. This Honourable Court having identified the above-mentioned issues for determination, the same will be discussed as outlined hereinbelow.

Is there sufficient evidence to point at possible bias against the applicant?

11. The Applicant herein has filed the present Application with a view of having the Honourable Court handling this matter recuse itself henceforth.
12. The grounds upon which the Applicant is relying upon have already been outlined hereinabove.
13. The core issue is that the Honourable Court has exhibited unnecessary anger, raised its voice on the Applicant’s Counsel and shown open friendliness, too much love and laughter with the opposing Counsel.
14. Further to that, the Applicant stated that a director of the 2nd Respondent has been boasting that he is in charge even before a Ruling in another case known as Kilgoris ELC Case No. E.005 Of 2022 was pronounced thereby begging the question of whom he is in cahoots with.
15. The Affidavit in support of the present Application has been sworn by one Victor Tuya who practices in the name and style of Tuya Kariuki & Company Advocates.
16. The issue of recusal of Judges has been an issue that has bedevilled the Bench from time immemorial.
17. However, various Judges and/or Benches of both superior courts as well as the Appellate Courts have strived to create basic principles for consideration while dealing with an application for recusal.
18. The Supreme Court of Canada expounded the test in the following terms in *R. v S. (R.D.)* [1977] 3 SCR 484:

“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. This 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. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”



19. In another case at the East African Court of Justice known as *Attorney General Of Kenya v Prof Anyang' Nyong'o & 10 Others*, Eacj Application No. 5 Of 2017, the Court observed as follows; -
- “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 a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.”
20. In another case from New Zealand Court of Appeal *Muir v Commissioner For Inland Revenue* (2007) 3 NZLR 495, the Court observed as follows: -
- “the requirement of independence and impartiality of a judge is counter balanced by the judge’s duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in *JRL ex CJL* (1986) 161 CLR 342 “it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion 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.”
21. In the case of *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited* (2021) eKLR, the Court expressed itself as follows; -
- 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.
22. Turning to the present Application, it is important to give a brief background of the manner in which this suit has been undertaken.
23. On the 23rd of May 2022, the Applicant herein filed a Chamber Summons Application dated 23rd of May 2022 seeking leave to institute Judicial Review proceedings and in particular an order of Certiorari to quash the 1st Respondent’s Ruling pronounced on 19th of May 2022 regarding a caution lodged over the property known as LR No Transmara/Intona/5.
24. The Honourable Court duly considered the Chamber Summons Application dated 23rd of May 2022 on the 24th of May 2022 and granted both leave to institute Judicial Review Proceedings against the 1st Respondent and further stayed the decision of the 1st Respondent pronounced on the 19th May 2022 pending the hearing and determination of the substantive Judicial Review Application.
25. In other words, the Applicant herein was granted all the orders it sought for in this Chamber Summons Application dated 23rd of May 2022.



26. The substantive Judicial Review Application was then filed on the 6th of June 2022 and served on the 1st and 2nd Respondents therein.
27. It is only the 2nd Respondent who responded to the said Judicial Review Application dated 6th June 2022 through a Replying Affidavit dated 25th of July 2022.
28. The Honourable Court then directed that the Application dated 6th of June 2022 would be canvassed by way of written submissions and gave timelines within which submissions would be filed and exchanged.
29. Despite the Applicant in a number of times failing to comply with the Honourable Court's directions, both parties duly complied with the issue of submissions and the Applicant's Judicial Review Application dated 6th of November 2022 was fixed for Ruling on the 18th January 2023.
30. However, on the 12th January 2023, the Applicant again filed this present Application seeking to arrest the said Ruling dealing with the Judicial Review Application dated 6th November 2022 and have the Honourable Judge recuse himself from this matter.
31. The reasons adduced by the Applicant in the present Application range from the Honourable Judge raising his voice without provocation to the Applicant's Counsel, being hostile by lecturing the Applicant's Counsel for over 10 minutes on the Virtual Court, exhibiting open biasness against the Applicant, being too friendly, showing much love and laughing with the 2nd Respondent's Counsel, failing to strike out certain documents from the Court record despite such an Application not being opposed and finally refusing the Applicants to plea to highlight their submissions despite the same not being opposed.
32. The 2nd Respondent has disputed the Applicant's allegations and categorically stated that the Honourable Judge has been level headed and composed during the proceedings in this suit.
33. The 2nd Respondent has further stated that the Honourable Judge has in fact been very accommodative to the Applicant who failed to comply with various directions during the hearing of the substantive Judicial Review Application and therefore the present Application should be dismissed.
34. It is important to point out that the first application which was the Chamber Summons dated 23rd of May 2022 filed by the Applicant was an *Ex-parte* Application under the law and consequently therefore, there was no hearing of any party on the same.
35. As regards the substantive Judicial Review Application dated 6th June 2022, this Honourable Court directed the same to be canvassed by way of written submissions and parties only attended Court for taking directions and confirming compliance thereof.
36. The proceedings recorded by the Honourable Court show a smooth process of filing pleadings and/or submissions as directed by the Honourable Court despite a number of delays due to none compliance by the parties.
37. However, there is no single day that the Applicant made any application to either strike out certain documents and/or seek to make submissions of any nature.
38. The Applicant in his grounds in support of the present Application has not identified any documents that he was opposing or the date when he made the application to orally submit and the Honourable Court declined to grant him that opportunity.



39. The directive by the Honourable Court that parties file written submissions is a well provided procedure aimed at better management of Judicial time to enable the Courts deal with as many people as possible seeking justice.
40. Once parties have been directed to file written submissions, the aspect of oral submissions is usually waived as a matter of course and each litigant expected to write all their arguments in the filed submissions.
41. This practice of written submissions eliminates the aspect of surprise and/or ambush by parties on the dock and creates a level playing ground for all.
42. Consequently, failure for parties to submit orally before the Honourable Court can not be construed to mean biasness of any nature as alleged by the Applicant.
43. The other issue that the Honourable Court raised its voice to the Applicant's Counsel and/or was hostile by lecturing the Applicant's Counsel for 10 minutes on the Virtual Court is also not substantiated.
44. The Applicant did not provide any dates of when these incidents happened or what the Honourable Judge said to the Advocate that demonstrated any form of biasness against him.
45. According to the proceedings in the Court file, the matter has only come for mentions and at all times, the directions were actually agreed upon by all the parties.
46. It is therefore strange that despite directions being taken mutually and in total participation of all the Counsel, the Applicant now seems to portray a different picture which is of biasness, a fact that is not true.
47. The Applicant has sought this Honourable Court to Order the Judicial Service Commission to release a copy of the Microsoft Teams recording of both Kilgoris ELC Case No. E005 Of 2022 and the present proceedings.
48. This Honourable Court does not have any reason to deny this prayer as the said proceedings are usually done for accountability and verification of facts in instances of allegations as contained in the present Application.
49. However, the Honourable Court's view is that such an order can only be granted in these proceedings and not in Kilgoris ELC Case No. E005 Of 2022 which is a separate file.
50. The proceedings known as Kilgoris ELC Case No. E005 Of 2022 is a different file and any application relating to the same should be filed in the appropriate file.
51. Lastly, there is also the allegation that a director of the 2nd Respondent is boasting that to the Applicant that he is in charge.
52. The Applicant's submission is that such boasting by the Director of the 2nd Respondent began way back before the determination of another suit between the parties known as Kilgoris ELC Case No. E005 Of 2022 which was ultimately determined in his favour.
53. The Applicant's suggestion is that based on the 2nd Respondent's boasting and the subsequent determination in Kilgoris ELC Case No. E005 Of 2022, then it can be construed that the 2nd Respondent's boastfulness is because he is in cahoots with the Honourable Judge.
54. Consequently therefore, the Honourable Judge should recuse himself from this matter and the file is transferred to another judge to hearing and determination.



55. It is indeed true that this Honourable Court heard and determined the proceedings known as Kilgoris ELC Case No. E005 Of 2022 between the Applicant and the 2nd Respondent.
56. All the parties in the said proceedings known as Kilgoris ELC Case No. E005 Of 2022 were given an opportunity to ventilate their cases before the Judgement was pronounced therein.
57. The allegations of biasness pleaded in this suit were not raised in the proceedings known as Kilgoris ELC Case No. E005 of 2022 before the determination was pronounced.
58. The deponent of the Affidavit in the present Application is actually the Advocate and not the Applicant herself.
59. Paragraph 13 of the Supporting Affidavit in the present Application simply states that the 2nd Respondent's director has been boasting to be in charge without disclosing the source of such an allegation.
60. The Applicant in this suit who is Angeline N. Nkoimo who is alive and accessible but has not sworn any Affidavit to confirm that indeed such utterances have been by the director of the 2nd Respondent.
61. For avoidance of doubt, the Director of the 2nd Respondent is only a litigant before this Honourable Court and there is no contact and/or relationship between the Honourable Judge herein and him.
62. Be as it may, it is this Honourable Court's considered view that the Applicant has not provided any tangible evidence to prove that this Honourable Court has any direct or indirect private relationship with the director of the 2nd Respondent in a manner to imply or construe acts of biasness against the Applicant.

Conclusion

63. The Honourable Court upon considering the various allegations contained in the present Application, the Replying Affidavit of the 2nd Respondent and lastly the submissions of the parties herein, the following Orders are hereby made appertaining the Notice of Motion Application dated 12th January 2023; -
 - A. The Application by the applicant for the Honourable Judge to recuse himself from this Proceeding is denied.
 - B. The Applicant is hereby granted an Order Compelling The Directorate Of Ict Through The Chief Registrar Of Judiciary To Provide The Necessary Microsoft Teams recording of the proceedings known as ELC Miscellaneous Application No. E003 Of 2022 upon compliance of any terms and conditions that may be required in Law & Regulations.
 - C. The Costs of this application will abide the outcome of the Substantive Judicial Review Application Dated 6th June 2022.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 29TH JUNE 2023.

EMMANUEL.M.WASHE

JUDGE

