



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E143 OF 2019

LYNA G. VENTURES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

NORTHERN CONSTRUCTION LIMITED.....DEFENDANT/APPLICANT

RULING

NOTICE OF MOTION

The Applicant filed an Amended Notice of Motion Application dated **23rd December 2020** for orders;

1. Seeking the recusal of Hon. Lady Justice Muigai from hearing this matter including the Defendant/Applicant's Notice of Motion dated 28th July 2020 and the suit or the Application hereof be placed before the Presiding Judge for urgent directions and/or re-allocation to another Court in the Commercial Division of the Court.

Which Application is supported by the sworn Affidavit of **Abdi Mohamed** dated 23rd December 2020 on the grounds that; -

1. On 28th July 2020, the Defendant filed a Notice of Motion under Certificate of Urgency on even date seeking a review of the Ruling/Order of the Court given on 2nd July 2020.
2. On 27th August 2020 and 17th September 2020, the matter was listed before this court and I certified the Application urgent, directed filing of responses, prosecution of the Application by written submissions and a mention for highlighting on 14th October 2020 which was adjourned for highlighting on 23rd November 2020.
3. On 23rd November 2020 when parties appeared to highlight submissions, the Applicant alleges that this Court made adverse, partial and prejudicial comments orally off record against the Defendant's Application and which comments demonstrated apparent bias and pre-determined outcome of the Application.

“ How many rulings do you want me to write in this matter? I have already written a ruling. I looked at the matter and the amount is admitted. The Plaintiff has no any other recourse.....you tell us whether your Client has no money due to the pandemic and let him offer something, be it a bank guarantee or so. I want to hear what your Client (Defendant) is ready to pay.”

4. The matter was adjourned to a mention on 30th November 2020 but following the said prejudicial comments on the Defendant's Application for review of Order of 2nd July 2020, the Applicant is apprehensive that it will not be accorded fair, impartial and just hearing of the dispute between the parties herein including the pending Defendant's Application for review.

5. The Defendant's pending Application for Review of the Order based on **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules** raises *prima facie* case for review, is arguable and should be determined on its merit.

SUPPLEMENTARY AFFIDAVIT

The Application was opposed vide the sworn Supplementary Affidavit of **Naftali Maina Mugo** dated **3rd February 2021** and stated that; -

1. The Court gave off record innocent comments within the meaning of **Article 159 (2) (c) of the Constitution** in good faith. The Court made objective and impartial remarks which the Defendant took out of context.
2. The Court had already made a ruling on the issue on 2nd July 2020 and the apprehension about the Court having made up its mind does not arise.
3. The Defendant is forum shopping for courts purposely to delay the fair adjudication of the issues as the Court never made any adverse or biased comments.
4. A consent on the issue was never demanded by the Court but each stakeholder was allowed to carry out consultation as obligated by **Section 4A and 4B of the Civil Procedure Act**, which obligates lawyers to assist the court to come to a just determination within the meaning of **Article 159 (2) (c) of the Constitution** which is a legitimate mechanism for dispute resolution.
5. Recusal is the sole discretion of the Court and the test is real possibility of bias not suspicion and the Defendant has not demonstrated that the Court might be biased.

APPLICANT'S SUBMISSIONS

The Applicant submitted that the comments by this Court would raise a perception in a reasonable person who understands the facts of the case that the party would not get justice. In the Supreme Court case of **Jasbir Singh Rai & 3 Others –versus- Tarlochan Singh Rai & 4 Others [2013] eKLR** stated that;

“In an American case, Perry vs Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that that the test for establishing a Judge’s impartiality is the perception of a reasonable person, this being a “well informed, thoughtful observer who understands all the facts” and who has ‘examined the record and the law’ and thus ‘unsubstantiated suspicion of personal bias or prejudice’ will not suffice.”

The Applicant sought the recusal of this Court not because of pecuniary interest in the matter but because a reasonable person would perceive that there was a likelihood that it would not get justice because of the comments made in this Court on 23rd November 2020.

DETERMINATION

The issue is whether the Court ought to disqualify itself from hearing and determination of the pending application for review due to prejudicial remarks made during the mention for directions matter.

COURT RECORD

On 4th October 2019, the Court delivered Ruling on Preliminary Objection that the issue raised factual issues and therefore it was not a Preliminary Objection.

On 2nd July 2020, the Court delivered Ruling on Applicant’s application of 4th December 2019 and found;

I am satisfied from pleadings filed the Plaintiff & Defendant had an arrangement/Agreement as admitted in Paragraph 4 of Defendant’s Defense.....These are issues to be canvassed and ventilated at the hearing of the suit. To do so, the subject matter ought to be preserved.

On 15th December 2020, the Court rendered Ruling to allow Applicant amend its Affidavit in support of the instant Application.

The cited excerpt is from the Court transcripts which do not fully disclose the full import of the Court’s statement. Secondly, it is not certified as legally required to be certified by the Deputy Registrar to confirm what was typed and what was said are in tandem and emanate from the Court.

The Court will not rely on illegally obtained evidence as it is not lawfully obtained and certified and does not reflect what the Court actually stated verbatim.

On reliance of illegally obtained evidence see ***Renita Choda vs Korir Kaput Rajput Constitutional Petition no E 406 of 2020*** which held; ***illegally obtained evidence is not admissible as long as it was obtained illegally and as such it was procured unconstitutionally.***

I therefore expunge the uncertified alleged transcript as part of evidence.

The Court was of the view that it heard several applications by the parties as shown by the Rulings set out above. Therefore, instead of writing another Ruling the issues raised in the application for review were issues for an appeal.

The Court of Appeal in the case of **National Bank of Kenya Limited versus Ndung’u Njau [1997] eKLR** established the guiding principles as follows; -

“A review maybe granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

The refusal to write another Ruling was not pre judicial to the Applicant but to both parties if at all as it would mean that both parties to submit on the application and the Ruling would be to and/or both parties.

The Court record confirms that after the Ruling of 2nd July 2020, Counsel for the Applicant applied to Court and the Court granted leave to appeal.

Secondly, instead of pursuing the application, the same could be compromised by parties through Counsel negotiating on how much could be deposited as security and vary the Court Ruling of 2nd July 2020 where the full amount was to be deposited in a joint interest earning Account and the Court may appeal the Court Ruling if not intent on pursuing the hearing *inter partes*.

Article 159 2 (c) COK 2010 provides;

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted,

This Court implored parties to consider the negotiation as form of dispute resolution process and amicably agree on amounts to be deposited as security pending appeal, which Counsel for the Applicant rejected.

At the same time, the Court intimated that due to the adverse impact occasioned by Corvid 19 pandemic, and has consequently affected businesses, it would be better if parties considered reasonable amounts due to deteriorating economic and financial state.

The Applicant’s advocate stated that the Court said his client has no money. This Court knows neither parties or Counsel personally and such evidence was not adduced, how would the Court know a party’s financial status well enough to comment on it?

This Court took judicial notice under **Section 60 (o) of Evidence Act ‘of all matters of general or local notoriety’** in this case

of general economic and financial impact due to Corvid 19 pandemic to society and not specifically Applicant’s client. Strangely, this part of the statement was willfully omitted in the transcript.

The Court of Appeal in CAPITAL MARKETS AUTHORITY vs ALNASHIR POPAT & 8 OTHERS [2019] eKLR considered the test for impartiality or apprehension of bias relying on the cases of;

KAPLANA H. RAWAL vs JSC & 2 OTHERS thus;

It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which an inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable Grounds must be presented from which an inference may be drawn.

PROF ANYANG NYONGO & 10 OTHERS EACJ where the Court held;

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 a reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially.

The facts illustrated by the Counsel for the Applicant do not disclose any prejudice, bias or impartiality. The statement made by this Court were taken out of context. The alleged transcript is not complete and certified by Deputy Registrar of Commercial & Tax.

DISPOSITION

Mr Litoro for Northern Construction Limited seems aggrieved by the orders of this court in previous Rulings and apprehensive that the Court would employ Article 50 of COK2010. The position is mutual, the Court will not pursue hearing a matter where the party upfront casts aspersions as to the conduct of the proceedings in line with Article 50 COK2010.

The matter shall be heard in ANY OTHER COURT in the DIVISION.

DELIVERED SIGNED & DATED IN OPEN COURT ON 30th JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M. W. MUIGAI

JUDGE