



Athi Paper Mills Limited v Dakawou Transport Limited (Environment & Land Case 214 of 2016) [2023] KEELC 17854 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 214 OF 2016
OA ANGOTE, J
JUNE 8, 2023**

BETWEEN

ATHI PAPER MILLS LIMITED PLAINTIFF

AND

DAKAWOU TRANSPORT LIMITED DEFENDANT

RULING

Introduction

1. The Defendant/ Applicant has filed a Notice of Motion application dated 29th November 2022 seeking the following orders:
 - a. That the Honourable Angote J do recuse himself from any further conduct of ELC No. 214 of 2016.
 - b. That the matter be reallocated and direction on the conduct and disposal of the matter be issued.
 - c. That the Honourable court be pleased to issue such order or further orders as are fit and just in the circumstances of this case.
2. The application is supported by the Affidavit of Mohammed Ahmed Abdulle, the Defendant's Director, who deposed that the Applicant has lost confidence in the court's independence and ability to issue a fair administration; that the Applicant filed Machakos ELCJR No. 56 of 2018 which was presided and determined by Hon. Angote J and that this suit and the Machakos case relate to the same subject matter, LR No. 337/1208.
3. The Defendant's Director deposed that this suit seeks to enforce payment over the same suit land while the Machakos suit upheld the decision of the National Land Commission in revoking the title to the suit land.



4. The Defendant's Director averred that the Defendant filed a notice of preliminary objection on the ground that this suit offends the decision in Machokos ELC Miscellaneous number 56 of 2018 which declared the title illegal, null and void *ab initio*; that the court delivered a Ruling offending the principle of *ex-urpi causa non oritur actio* doctrine and that the Applicant filed an appeal that is pending before the Court of Appeal.
5. It is the Defendant's case that when this suit came up for hearing on 8th November 2022, the Plaintiff's Counsel moved the court to expunge the amended Defence and Counter-claim which the court did; and that although they sought an adjournment to seek for further instructions, with a view of rectifying the error, the court declined to adjourn the matter and the amended Defence and Counter-claim were expunged from the court record.
6. The Defendant's Director deposed that the court did not weigh the prejudice that would have been suffered by the Plaintiff if the matter was adjourned vis a vis the prejudice suffered by the Defendant by striking out the amended Defence and Counterclaim thus denying the Defendant an opportunity of a fair hearing.
7. According to the Defendant, from these facts, no reasonable observer would be convinced that this court is being impartial in determining the matter and that according to the Bangalore Principles of Judicial Conduct, this court should disqualify itself from participating in these proceedings as the Applicant is apprehensive that the court has an unconscious bias against it.
8. The Plaintiff/ Respondent opposed the application vide Grounds of Opposition dated 10th December 2022 in which it averred that the application is misconceived and bad in law; that there is no factual or legal basis upon which this court can recuse itself and that the facts constituting the alleged bias are not specifically alleged or established.
9. The Plaintiff averred that there is no evidence of circumstances that would give rise to prejudice and no fair minded and informed observer, having considered the facts, would conclude that there is a possibility that this court will be biased and that the application is made mala fides to circumvent and defeat the cause of justice.

Submissions

10. Counsel for the Defendant/ Applicant submitted that fair trial is impossible in this matter because the subject matter in these proceedings is not new to the Honourable judge and that this makes the judge biased towards himself as he would desire to render a judgement that would uphold his previous judgement.
11. Secondly, it was submitted, the court expunged the Defendant's amended Defence and Counterclaim when counsel was on her feet and the witness taken the stand, despite the Applicant pleading with the court that they would not have a Defence and would not be fairly heard without the amended defense on record.
12. According to counsel, the amended Defence was amended pursuant to an order of this court issued on 15th March 2022 and finally, that the Honourable judge visited the counsel's mistake on the Applicant knowing that the effect of this would be locking out the Applicant and denying them the right to be heard on the merits of their case.
13. The Applicant's Counsel relied on Rules 4 to 10 of the [Judicial Code of Conduct and Ethics](#) which provide for independence, impartiality, integrity, propriety and non-discrimination, professionalism, accountability and prohibition against corrupt activities by Judges. Counsel also relied on the



Bangalore Principles on Judicial Conduct. Counsel relied on numerous decisions which I have considered.

14. Counsel for the Plaintiff submitted that the Applicant does not in any way indicate or show any evidence of bias by the court; that the Applicant failed to raise the issue of bias when the matter was allocated to this court and that the Plaintiff was not involved in the previous suit nor did the Plaintiff's advocate appear before the court in the Machakos matter.
15. The Respondent's Counsel submitted that if all litigants sought recusal of judicial officers when orders are issued to their disadvantage, it would be chaotic; that the Plaintiff would have been prejudiced if the Defence and Counter-claim were not struck off the record, and that the Applicant was misled by its previous counsel that the Court had granted him leave to amend its Defence and Counter claim. Counsel for the Plaintiff relied on numerous authorities which I have considered.

Analysis and Determination

16. Rule 21 of the *Judicial Code of Service (Code of Conduct)* 2020 provides the grounds upon which a judge ought to recuse himself/herself from a matter as follows:

- “(1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge—
 - (a) is a party to the proceedings;
 - (b) was, or is a material witness in the matter in controversy;
 - (c) has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (d) has actual bias or prejudice concerning a party;
 - (e) has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - (f) had previously acted as a counsel for a party in the same matter;
 - (g) is precluded from hearing the matter on account of any other sufficient reason; or
 - (h) or a member of the judge's family has economic or other interest in the outcome of the matter in question.”

17. Recusal is defined by the *Black's Law Dictionary*, 8th ed. as:

“Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.”

18. The object of recusal, as expressed by the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others* [2013] eKLR, is that justice as between the parties should be uncompromised; that the due process of law should be realized and be seen to have had its role and that the profile of the rule of law in the matter in question, should be seen to have remained uncompromised.
19. The Supreme Court in the above decision further quoted the American case of *Perry v Schwarzenegger*, 671 F. 3d 1052 (9th Circ. February 7, 2012) where it was held 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.

20. The Supreme Court in *Robert Tom Martins Kibisu v Republic* [2018] eKLR quoted with approval the local jurisprudence on seeking recusal as recounted by Chitembwe J in *Nathan Obwana v Robert Bisakaya Wanyera & 2 Others* [2013] eKLR as follows:

“In the case of *Republic v Mwalulu & 8 Others*: [2005] 1 KLR the court did set up the principles on which a judge would disqualify himself from a matter and stated as follows:

1. When the courts are faced with such proceedings for the disqualification of a 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 alleged and established.
2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case 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.
3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.
4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself.”

21. The court in the above case proceeded to hold that mere apprehension of bias cannot be a ground for recusal and that the allegations of bias must be factual and proved.

22. In the case of *Kalpana H. Rawal v Judicial Service Commission & 2 Others* (2016) eKLR, the Court of Appeal emphasized that there must be credibility to the allegations made concerning why an officer sitting in a court or tribunal would be deemed to be biased so as to disqualify himself. The court stated as follows:

“An application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties: the Judge must, without more, recuse himself. Such is the situation where a Judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of a Judge... It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which the 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 of bias may be drawn... We agree with the respondents that where a party wishes to rely on statements of information, which they



cannot prove, the least that is expected is to disclose the source of the information so that its credibility may be gauged and assessed.”

23. The court is guided by the above decisions. The test to be applied in the current application is whether a fair minded and informed observer, considering the facts, would conclude that there is a real possibility of bias.
24. Indeed, every person has the right to a fair and impartial hearing as provided for in Article 50 of the *Constitution*. While adjudicating matters, a Judge is bound by his or her oath of office to defend the Constitution, and to perform his or her judicial duties with fairness, independence, competence and integrity. Judges ought to recuse themselves where a reasonable basis has been established.
25. In this matter, the Defendant has presented facts which it asserts would lead an observer to conclude that this court has a bias against it, on the ground that firstly, the Judge presided over Machakos Miscellaneous ELC JR No. 56 of 2018, in which he entered a judgement against the Defendant’s and secondly, that this Court entered a finding that the Defendant’s Amended Defence was filed without leave and struck the same out.
26. Machakos ELCJR No. 56 of 2018 was a Miscellaneous Judicial Review application that was filed before this court. In that case, the Defendant herein sought that the National Land Commission’s Gazette Notice No. 11710 of 9th November 2018 be quashed and a prohibition order do issue against the NLC restraining them from reviewing or purporting to have the jurisdiction to review ownership in relation to LR No. 337/1208. This court dismissed that suit, and gave reasons, as it must, for doing so.
27. When this suit came up for hearing on 8th November 2022, the Plaintiff’s advocate informed the court that the amended Defence was filed without leave in May 2022. On the other hand, the Defendant’s advocate beseeched the court not to visit on the Defendant the mistake of its counsel. The court proceeded to strike out the Defence and gave its reasons, which are on record.
28. Considering the totality of the facts in this matter, a reasonable and fair-minded person is not likely to draw an inference of any possibility of bias by this court. Indeed, the record shows that this court has been handling this matter since 15th March 2022. The Defendant had time to raise any apprehension of bias by this court in view of the contention that the court had dealt with another matter relating to the suit property while serving in Machakos.
29. That did not happen. The Defendant acquiesced to the court’s jurisdiction and defended its suit before it. Indeed, the issue of the court being biased was only raised after the court struck out a pleading that had been filed without the leave of the court.
30. Considering that this suit has been fully heard, with both parties having had an opportunity to present their evidence and witnesses, the court can only read mischief in the filing of the current application.
31. The upshot of the forgoing is that this court dismisses the Defendant’s application dated 29th November 2022 with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF JUNE, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Taib for Plaintiff



Mrs Akoko for Defendant/Applicant

Court Assistant - Tracy

