



Muhia v Kuria & 2 others; Registrar of Companies & another (Interested Parties) (Petition E003 of 2020) [2021] KEHC 399 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)

Neutral citation: [2021] KEHC 399 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E003 OF 2020
DAS MAJANJA, J
DECEMBER 22, 2021
N THE MATTER OF HOTSTAR INVESTMENTS LIMITED
AND
IN THE MATTER OF AN APPLICATION FOR
LEAVE TO COMMENCE A DERIVATIVE ACTION
AND
IN THE MATTER OF PROTECTION OF MEMBERS AGAINST
OPPRESSIVE CONDUCT AND UNFAIR PREJUDICE

BETWEEN

SIMON MUHIA PETITIONER

AND

EUNICE MUTHONI KURIA 1ST RESPONDENT

MARGARET WANJIRU KURIA 2ND RESPONDENT

PETER KURIA 3RD RESPONDENT

AND

REGISTRAR OF COMPANIES INTERESTED PARTY

HOTSTAR INVESTMENTS LIMITED INTERESTED PARTY

RULING

1. The 3rd Respondent has filed the Notice of Motion dated 2nd December 2021 made under inter alia Rule 5 of the Judicial Code of Conduct and Ethics, sections 1A and 1B of the [Civil Procedure Act](#) and



Article 72(1) (c) of Constitution seeking my recusal from presiding over this matter. The application is supported by the 3rd Respondent's affidavit sworn on 25th November 2021 and opposed by the 1st and 2nd Respondent's affidavit sworn on 14th December 2021 and also by Mwaura Kelvin Kuruga, the former advocate on record for the 1st and 2nd Respondents sworn on 15th December 2021. The 3rd Respondent has also filed written submissions to underpin his position.

The Application

2. The 3rd Respondent accuses the court of conducting this matter in an unfair manner and violating his right to be heard as protected by Article 50(1) of the Constitution. He states that the court has escalated the dispute between the parties spilling over to other civil and criminal suits that have completely paralyzed distribution of the properties of the estate of Eliud Njoroge Kuria (deceased) to which this matter is linked.
3. The 3rd Respondent claims that the court failed to hear and determine his Preliminary Objection (PO) dated 30th April 2020 in which he contended that the matter was res judicata. That in the ruling dated 14th September 2020 the court, while recognizing that he had filed a replying affidavit sworn 30th April 2020 and written submissions, failed to acknowledge his PO. He accuses the court of directing the parties to make submissions on how an Annual General Meeting (AGM) of the Company was to be held, thus moving the parties away from their pleadings in a manipulative manner so as to avoid resolving the dispute.
4. The 3rd Respondent also refers to the ruling delivered on 9th April 2021 in HCCOMM Misc. E1305 of 2020, Hotstar Investments Ltd v Muigai Commercial Agencies dismissing his application for joinder to that matter and refusing him leave to appeal thus frustrating his right of appeal. He complains that the court held that any aggrieved party should seek redress in this matter in order to avoid parallel litigation on the grounds that issues and parties in the two matters were linked even though the matters were not consolidated. He thus submits that the court avoided resolving the dispute and moved away from their pleadings in a manipulative manner. He further contends that the holding by the court that the parties and issues in HC COMM Misc. E1305 of 2020 in a matter in which the court refused to set aside the consent in that matter is tantamount to imposing consent orders upon him which is in contravention of fair Alternative Dispute Resolution practices.
5. The 3rd Respondent alleges that from the totality of the aforesaid contention, there is a clear pattern of the court issuing directions that are geared towards moving the parties from their pleadings in a manipulative manner so as to avoid resolving court matters in accordance with the provision of *Civil Procedure Act*, Civil Procedures Rules and fair ADR Practices which amounts to resolving disputes through shortcuts.
6. The 3rd Respondent further states that the court has been acting contrary to decisions issued by other judges. He states that on 22nd September 2020, the court issued orders in this Petition relating to distribution of 90 shares of the Estate of Eliud Njoroge Kuria ("the Deceased") in the Company that they be distributed equally, when the exact same issue and prayer was pending in NRB HC FD Succession Cause No. 2423 of 2010 (also "the Succession Cause") hence sub judice in contravention of section 6 of *Civil Procedure Act*. He avers that the order contradicts the orders issued by Musyoka J., in the judgment dated 24th April 2020 in the succession cause and in violation of his right to be heard and protected by Article 50(1) of the Constitution to enable him ventilate his issues before the Family Division.
7. The 3rd Respondent submits that on 30th December 2020, the court issued a consent order in HCCOMM Misc. E1305 of 2020 that purported to exclude the 3rd Respondent as a director of the



- Company that was not only in contradiction with the consent order issued by Muigai J., on 6th June 2019 in Civil Suit No. 51 of 2019, which clearly stated that he is a director of the Company. He argues that this was in violation of Article 50(1) as the said consent order was an ex parte order disguised as consent order obtained in contravention of fair ADR Practices.
8. The 3rd Respondent also accuses the court of acting in a biased manner by stating that after Meoli J., dismissed suit HC Misc. of E052 of 2021 with costs, Counsel Mwaura Kelvin Karuga, who was acting for the applicant therein, requested her to have the file re allocated to this court which was nothing but forum shopping. The 3rd Respondent avers that Meoli J., declined the request but it was not lost on the persons present in court on that day that Mwaura Kelvin Karuga favoured this court to handle his matters. Therefore, the 3rd Respondent states that he would prefer any other Judge in Kenya to handle a matter that he is involved in other than this court due to open bias.
 9. The 3rd Respondent depones that on 18th November 2021 the court accused him of impeding the execution of the orders dated 22nd September 2020, which amounts to proclaiming a position of the court before hearing the parties as the application dated 28th June 2021, which alleges that the administrators of the estate of Eliud Njoroge Kuria in general and not the 3rd Respondent had acted in contravention of the said orders had not been heard and determined and was still pending before the court on the said date. Further, that on 18th November 2021, the court denied him a chance to make oral submissions in court like the other parties because he had used the word ‘hijack’ by stating that his application for linking of the Company had been ‘hijacked’ by the applicant in the application dated 28th June 2021 that is pending before the court on the grounds that the use of such a word is inconsistent with the decorum of the court. The 3rd Respondent attributes the court’s hostile and biased attitude towards him to the fact that he complained about the manner the court has been conducting this matter in general and failure to render a decision to his PO.
 10. On escalating disputes between the parties, the 3rd Respondent avers that due to the manner the court has been conducting this matter, it has spread to several other divisions of this court and the court stationed in Murang’a as follows:
 - a. Summons for Revocation of Grant in Succession Cause No. 2423 of 2010, which was before Mutuku J., but is yet to be heard as no directions have been issued.
 - b. HC COMM Misc. E1305 of 2020 which is not closed.
 - c. HC Misc. of E052 of 2021 that is currently before Meoli J.,
 - d. HC COMM 51 of 2019 that is currently before Mshila J.,
 - e. Misc. CR Case No. 27 of 2020 that is currently before Kimondo J.
 11. The 3rd Respondent further avers that on 10th November 2021, the court reprimanded Mr Mwaura Kelvin Karuga for unprofessional conduct towards Mr Hagai Okeyo and ordered him to apologize but this is just, “a tip of the iceberg”. That when I issued orders on 22nd September 2020, Counsel Mwaura Kelvin Karuga moved into the building of the Company that is located on Plot No. LR 209/2788/17 where he converted one of the rooms into his permanent residence and has been living there for free over the last one year until he was evicted last month. That apart from using the said premises as his permanent residence, Counsel Mwaura Kelvin also converted one of the rooms into an office from where he has been running his private practice over the last one year and it is from the said office that he



launched all the above five court cases that were largely geared at undermining members of the second family of the Deceased and the 3rd Respondent.

12. The 3rd Respondent states that as a result of the said disputes, not a single property of the vast properties of the Deceased's estate has been distributed save for funds held with the Unclaimed Financial Assets Authority (UFFA) whose distribution commenced before this Petition was filed and even then, Mr Karuga handed over the Authority's payment cheques of the Petitioner and members of his family together with that of the 3rd Respondent as lien to Muigai Commercial Agencies who are one of the parties in HC COMM Misc. E1305 of 2020 pending determination of HC Misc. of E052 of 2021 where they are the subject matter.
13. In sum, the 3rd Respondent submits that this court's involvement in the matter has caused enormous damage to the Company as it is still operating in contravention of the Companies Act more than one and half years after this Petition was filed and whose primary objective was to ironically ensure compliance of the various statutory obligations. That unprecedented damage has also been caused to the estate of the Deceased because the court has been treating this Petition as a succession matter instead of commercial matter to the extent of interfering with issues and prayers that were pending in the Succession Cause thereby denying the parties the opportunity to be heard in it.

Analysis and Determination

14. Based on what the 3rd Respondent has set out, the issue for determination is whether I ought to recuse myself from further proceeding with this matter. The 1st and 2nd Respondents together with Mr Karuga have set out the chronology of events in the case and the decisions and their position is that the 3rd Respondent has not made out a case for my recusal based on the circumstances of this case.
15. The Court of Appeal in *Philip K. Tunoi & another v Judicial Service Commission & another* NRB Civil Application No. 6 of 2016 [2016] eKLR dealt in great detail with the issue of recusal and considered the test to be applied in determining whether a judge ought to recuse themselves as follows:
 39. The House of Lords held in *R v. Gough* [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.
 40. 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.”
 41. 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.



42. 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-minded 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.” [Emphasis mine]

16. The Judicial Service (Code of Conduct and Ethics) Regulations 2020 cited by the 3rd Respondent at Regulation 21 Part II provides that a Judge can recuse himself or herself in any of the 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. [Emphasis mine]

17. Regulation 9 of the Judiciary Code of Conduct aforesaid also emphasizes the importance of impartiality of a Judge. Regulation 9(1) thereof provides:-

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the Constitution and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

18. The 3rd Respondent calls for my recusal by impugning my conduct and alleging bias in the manner I have handled this matter and other incidental proceedings. Applying the test of a 'fair minded and informed observer' and the provisions of the Code of Conduct above, can it be said that taking into account all circumstances of this case and others, I have been biased and unfair to the 3rd Respondent



to the point that I have denied him a right to a fair hearing? I think not and a review of the record demonstrates so as well.

19. It must be recalled that this matter was commenced by the petitioner seeking relief from oppressive conduct by the majority shareholders and for permission to institute a derivative suit against the Respondents under provisions of the Companies Act, 2015. After hearing all the parties, I came to the conclusion, in my ruling dated 9th May 2020, that the matter complained of could only be resolved at a General Meeting of the Company which the court has power to call under section 280 of the Companies Act.
20. In providing relief, I took into account the fact that the Grant issued and confirmed by Musyoka J., in the Succession Cause was not contested. According to the Certificate of Confirmation of Grant issued therein, 90% shares of the estate of the Deceased in the Company were distributed between the first and second houses in the ratio 70:30. In order to ensure full participation of family members, including the 3rd Respondent, in the affairs of the Company, in my ruling dated 22nd September 2020, I directed the widows, the 2nd Respondent and Phylis Wangari, in compliance with the relevant provisions of the Law of Succession Act (Chapter 160 of the Laws of Kenya) to exercise their power of appointment and award each beneficiary his or her shares according to the certified distribution.
21. The 3rd Respondent complains that I failed to consider his PO. The substance of the PO was that there were other suits including the Succession Cause pending before other courts. Apart from the fact that I considered the fact that the Succession Cause had been finalized by confirmation of the grant, it is important to recall this was a different cause of action founded on the provisions of the Companies Act. All in all, the orders I made were within the law and were made after hearing all the parties in order to ensure that the dispute, which concerned oppression of shareholders, was resolved by ensuring all beneficiaries of the Deceased's estate are included in running of the Company. That was the thrust of the dispute and any fair minded person would not come to the conclusion that I was biased.
22. In HC MISC. 1305 of 2021, I delivered a ruling dated 9th April 2021 in which I declined to re-open a consent order that had been recorded between the Company and the managing agent of the Company property. It was my view, that allowing the 3rd Respondent and other parties to join the matter would prolong and re-open other avenues of litigation when the issues of management of the Company property would be resolved through the orders I issued in this matter. I came to this conclusion after hearing all the parties and any party aggrieved by the order would be entitled to appeal. The fact that I declined leave to appeal, does not preclude any party from applying for leave in the Court of Appeal. Further and contrary to what the 3rd Respondent states, HC MISC. 1305 of 2021 is now a closed matter.
23. I am now aware that there is other litigation concerning the Company and the estate of the Deceased but this case concerns the Company. The duty of the court is to ensure that proliferation of disputes is avoided to save the parties costs and utilize court's time efficiently. The allegation that the court has veered from the pleading or manipulated the proceedings in such a way as to avoid resolving the dispute is ill founded as the court has already determined the dispute and all that remains for implementation is the final orders made in the petition. As I understand, the Company resolved on 8th November 2020 to have all beneficiaries, who are all adults, obtain their shares and become shareholders of the Company and resolutions are now being executed.
24. The 3rd Respondent raised issue about the conduct of Mr Karuga. Since this is an application for recusal, I do not see the relevance of his conduct to the matter in issue as it has not been shown that I have any relationship with him. In any case, if it is in relation to the Company and its assets, any action against him must be taken by the Company. Further and in relation to his conduct in these



proceedings, Mr Karuga apologized to Mr Okeyo as directed by the court and the court considered the matter closed.

Conclusion and Disposition

25. In all the applications brought by the parties before me, I considered all their arguments and rendered decisions to the best of my judgement and fairness giving elaborate reasons for my conclusions and dispositions.
26. From the totality of circumstances, I find and hold that the 3rd Respondent has failed to demonstrate that any person cognizant of the facts of the case would come to the conclusion that I am biased. I refuse to recuse myself from dealing with this matter.
27. The 3rd Respondent's application dated 2nd December 2021 is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Okeyo instructed by Kioko Munyoki and Company Advocates for the petitioner.

Mr Mwaura instructed by Mwaura Kelvin Karuga and Associates Advocates for the 1st and 2nd Respondent
Peter Kuria, 3rd Respondent in person.

