Mursal & 4 others v Abdi (Environment & Land Case 126 of 2019) [2023] KEELC 18685 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18685 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 126 OF 2019

JO MBOYA, J

JULY 13, 2023

BETWEEN

HABIBA ALI MURSAL ..... 1ST PLAINTIFF

ABDIAZIZ MOHAMED ADAWE & ASHA MOHAMUD ADHAWE (SUING AS THE ADMINISTRATORS OF THE ESTATE OF AMINA SHEIKH AHMED) ..... 2ND PLAINTIFF

KALI MOHAMED HASSAN ..... 3RD PLAINTIFF

MUHUBA SHEIKH OMAR ..... 4TH PLAINTIFF

MAYLUN AHMED AMIR ..... 5TH PLAINTIFF

AND

MARIAM NOOR ABDI ..... DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 18th May 2023; the Third Plaintiffs/Applicant, (who is the only remaining Plaintiff in respect of the Instant matter) herein has approached the Honorable court seeking for the following reliefs;

    i. .....(Spent).

    ii. Pending the hearing and determination of this Application, this Honorable court be pleased to issue a stay of the Further pending proceedings in this matter.

    iii. Honorable Justice Oguttu Mboya be pleased to recuse and/or disqualify himself from any further conduct in these proceedings, and the Presiding Judge be pleased to re-allocate the file to any Judge to have conduct of the matter.

iv. This Honorable Court be pleased to issue any further orders as it may deem fit;

v. Costs of the Application be provided for.

2. The subject Application is premised and anchored on various grounds which have been alluded to and enumerated in the body of the Application. Further and in addition, the Application is supported by the affidavit of Khali Mohamed Hassan sworn on the 18th May 2023; and in respect of which the Applicant has exhibited three documents.

3. For good measure, upon being served with the instant Application, the Defendant/Respondent herein filed Grounds of opposition dated the 23rd May 2023; and in respect of which same contended inter-alia that the subject Application is not only misconceived but amounts to forum shopping, by and at the instance of the Applicant.

4. Instructively, the instant Application came up for hearing on the 24th May 2023; whereupon the advocate for the respective Parties agreed to canvass and ventilate the Application by way of written submissions. Consequently and in this regard, the Honorable court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.

Submissions by the Parties

a. APPLICANT'S SUBMISSIONS:

5. The Applicant herein filed written submissions dated the 9th June 2023; and in respect of which same has raised, highlighted and canvassed two (2) issues for consideration by the Honourable court.

6. Firstly, Learned counsel for the Applicant has submitted that there is need to grant an order of stay of proceedings over and in respect of the instant matter pending the hearing and determination of the subject Application.

7. Furthermore, Learned counsel has proceeded and contended that the limb of the Application which seeks for stay of proceedings has not been controverted and/or opposed by the Defendant/Respondent and hence same ought to be granted unopposed.

8. Secondly, Learned counsel for the Applicant has submitted that the current suit was filed by and on behalf of 5 Plaintiffs, who each had a separate and distinct cause of action, albeit arising out of the same transaction precipitated by the Defendant/Respondent.

9. Additionally, Learned counsel for the Applicant has submitted that even though the current suit was filed by 5 Plaintiffs, the suit by and on behalf of Four (4) Plaintiffs were struck out by this court pursuant to and by dint of a ruling rendered on the 18th March 2022.

10. In any event, Learned counsel has submitted that the suit by and on behalf of the four Plaintiffs were struck out on a technicality, insofar as the named 4 Plaintiffs had not filed the requisite Written authority to authorize and mandate the 3rd Plaintiff (the Applicant herein), to swear affidavit for and on their behalf.

11. Nevertheless, Learned counsel for the Applicant has contended that the basis upon which the suit by the four Plaintiffs was struck out was a human error on the part of the Applicant's advocates and thus same could have been cured by granting Leave to file the impugned written authority.

12. On the other hand, Learned counsel for the Applicant has also submitted that subsequently the four Plaintiffs whose suits had been struck out filed fresh suits, namely, ELC NO. E234 of 2022; ELC NO. 235 of 2022 and ELC NO. 236 of 2022, respectively.

13. Furthermore, Learned counsel for the Applicant has submitted that upon the filing of the subsequent suits, whose details have been enumerated in the preceding paragraph, the suits were placed before this court and thereafter the Defendant/Respondent took out and canvased yet another preliminary objection.

14. Be that as it may, Learned counsel has submitted that confronted with the preliminary objection raised and ventilated by the Defendant/Respondent, this court proceeded to and again struck out the subsequent suits.

15. Premised on the foregoing, Learned counsel for the Applicant thus submits that the current Applicant is fearsome and apprehensive that his suit, (the current suit) which is pending before this court is likely to meet the same fate as the ones for the other Plaintiffs.

16. Further and in addition, Learned counsel has submitted that it appears that this Honourable court has a premeditated opinion and position about the outcome of the instant suit and hence the Applicant will not receive fair treatment and impartial disposition of the matter.

17. Lastly, Learned counsel has mentioned that arising from the various rulings which have been rendered by this court and touching on suits related to the one beforehand, it is apparent that the Judge has vested interest in the matter before him.

18. Consequently and in view of the foregoing submissions, Learned counsel for the Applicant has thus contended that it is appropriate and expedient that this court does proceed to recuse and disqualify himself from hearing and entertaining the subject matter.

19. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on various decisions, inter-alia, the case of Kalpana H Rawal & 2 Others versus Judicial Service Commission & 2 Others (2016)eKLR; Philip Tunoi versus Judicial Service Commission & 2 Others (2016)eKLR, Bernet v ABSA Bank Ltd (2010)ZACC 28, Republic versus Assa Kabagendi Nyakudi (2022)eKLR; Charity Muthoni Gitagi versus Joseph Gichangi Gitabi (2017)eKLR and Barnaba Kipsongok Tenai v Republic (2014)eKLR, respectively.

b. Respondent's Submissions:

20. The Respondent herein filed written submissions dated the 7th June 2023; and in respect of which same has raised and canvassed one salient issue for consideration by the Honourable court.

21. For good measure, Learned counsel for the Respondent has submitted that the suits by the four Plaintiffs which were struck out, were indeed struck out on the basis of a legal question, which was raised and canvassed by the parties, culminating into the rendition of the decision/ Ruling of the court made on the 18th March 2022.

22. Furthermore, Learned counsel has submitted that even as the suits by the four other Plaintiffs were being struck out, the current suit by and on behalf of the Applicant was not struck out; and hence the reason why same remains subsisting to date.

23. Additionally, Learned counsel has also submitted that the subsequent suits which were filed by and on behalf of the four Plaintiffs (whose suits had hitherto been struck out), were thereafter struck out again on the basis that the suits were filed outside the statutory duration prescribed under the *Limitation of Actions Act*.

24. Premised on the foregoing, Learned counsel for the Respondent has therefore contended that the circumstances under which the impugned suits were struck out were distinct and incapable of being applied to and in respect of the subject matter.

25. Further and in any event, Learned counsel for the Respondent has submitted that this is a clear case where the Applicant and his counsel are endeavoring and engaging in forum shopping; most probably to get a Judge who may be lenient and sympathetic.

26. Finally, Learned counsel for the Respondent has submitted that an Application for recusal or disqualification of a Judge/ Judicial Officer, ought to be anchored and premised on reasonable grounds and evidence, which however are stated to be absent and lacking in respect of the instant matter.

27. In support of the foregoing submissions, Learned counsel for the Respondent has implored the Honourable court to take cognizance of and to apply the objective test which was enunciated and elaborated upon in the case of Philip K Tunoi versus Judicial Service Commission & Another (2016)eKLR.

Issues for Determination:

28. Having reviewed the instant Application and the Response thereto; and upon considering the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus germane of determination;

    i. Whether the prayer of stay of proceedings sought on the face of the Application is Legally tenable.

    ii. Whether the Applicant herein has established and demonstrated reasonable basis to warrant recusal of the Judge.

Analysis and Determination

Issue Number 1: Whether the prayer of stay of proceedings sought on the face of the Application is Legally tenable.

29. Learned counsel for the Applicant herein has contended and submitted that the prayer for stay of proceedings which has been sought vide the current Application has neither been controverted nor opposed by the Defendant/Respondent.

30. Consequently and in the premises, Learned counsel for the Applicant has therefore ventured forward and implored the Honourable court to find and hold that the prayer for stay of proceedings is thus merited and ought to be granted.

31. Despite the submissions by Learned counsel for the Applicant, it is imperative and worthy to note that the prayer for stay of further proceedings, which the Applicant has sought for, is one pending the hearing and determination of the instant application and not otherwise.

32. Evidently, there is no gainsaying that the moment the instant application is heard and determined in terms of the current ruling; then the limb of the Application seeking for stay of proceedings automatically lapses and becomes redundant.

33. Put differently, the prayer for stay of proceedings, was one that was being sought for in the intervening period, pending the hearing and determination of the current application and post/ subsequent to the hearing and determination of the instant application, the impugned limb is rendered otiose.

34. Arising from the foregoing, I am unable to discern the import and significance of the prayer for stay of proceedings, pending the hearing of the instant application and more particularly, at this juncture when the Application is being disposed of and determined vide the subject ruling.

35. Consequently and in the circumstances, I come to the conclusion that the aspect of the Application seeking for stay of proceedings pending the hearing and determination of this application is no longer tenable and thus cannot be granted, even though the Applicant contends that the said limb is unopposed.

36. For good measure, I am unable to buy the submissions by and on behalf of the Applicant. Consequently, I decline to grant the impugned orders, which in any event, would amount to acting in futility.

Issue Number 2

Whether the Applicant herein has established and demonstrated reasonable basis to warrant recusal of the Judge.

37. Before venturing to address and resolve the issue herein, it is appropriate to delve in and to supply some background facts culminating into the filing of the subject application, which

38. First and foremost, it is worthy to note that the current suit was filed by and on behalf of 5 Plaintiffs, the Applicant being one of them.

39. Subsequently and upon the filing of the instant suit, the Plaintiffs took out summons to enter appearance and thereafter served same upon the Defendant/Respondent, who thereafter proceeded to and entered appearance and filed a statement of defense.

40. Furthermore, the Defendant/Respondent also took out and filed a notice of preliminary objection, wherein same raised various issues, inter-alia, the contention that the suit by and on behalf of the named four Plaintiffs had been filed without the requisite Written authority and/or authorization as prescribed under the law.

41. First forward, the Notice of preliminary objection raised by and on behalf of the Defendant/Respondent was thereafter canvassed and ventilated before this court, culminating into the delivery of a ruling rendered on the 18th March 2022. For good measure, this court found the suit by the named four Plaintiffs to be incompetent and proceeded to strike out same.

42. Instructively, upon the delivery of the ruling under reference, the named four Plaintiffs, excluding the Applicant herein, filed/lodged Notices of Appeal, exhibiting their intention to appeal to the Court of Appeal.

43. Somehow, it appears that the desire to appeal to the court of appeal was abandoned and the four Plaintiffs whose suit had been struck out chose to file fresh/new suits, namely, ELC NO. 234 of 2022; ELC No. 235 of 2022; and ELC No. 236 of 2022, respectively. For clarity, the subsequent suits were filed through the same law firm.

44. Be that as it may, it is important to point out that the case tracking system (CTS) allocated the new suits to Hon. Lady Justice Mogeni, Judge; who was therefore the relevant Judicial officer designated to entertain and adjudicate upon the subsequence suits.

45. However, Learned counsel for the Applicant herein and counsel for the Respondent intimated to Lady Justice Mogeni, Judge that same would be keen to have the new suits transferred to and be heard by

this court. For good measure, by the time Learned counsel for the Applicant herein was conceding to the transfer of the new suits to be heard by this court, this court had already rendered the ruling dated the 18th March 2022 and struck out the suits on behalf of the four Plaintiffs.

46. Interestingly, at the time when Learned counsel for the Applicant was entering into that consent to transfer and reallocate the subsequent suits to this court, in his mind, this court was neither conflicted nor biased.

47. Moreover, upon the new suits being brought before this Honorable court, it is imperative to recall that a preliminary objection premised on the law of limitation was raised and canvassed by and on behalf of the Respondent.

48. Importantly, it is appropriate to underscore that when Learned counsel for the Applicant herein was confronted with the preliminary objections by the Defendant/Respondent; same quickly and tactically filed applications for extension of time within which the suits were to be filed and thereafter to deem the new suits as duly filed.

49. Nevertheless, it is not lost on this court that the subsequent suits were based and anchored on the issue of illegal and unlawful eviction, which turned out to be a cause of action in tort and in any event; one that could not be subject to extension of time in line with Sections 27 and 28 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

50. Confronted with the salient and pertinent issues of law that were placed before the court, the Honorable court came to the conclusion that the fresh suits, were clearly filed outside the statutory timeline. Consequently and in accordance with the law, this court had no alternative but to strike out the fresh suits.

51. It is the foregoing backgrounds that has now led to the filing of the current Application and wherein this court is now being accused of being biased and having vested interest in the suit proceedings and (sic) the outcome thereof.

52. However, what Learned counsel for the Applicant is not laying on the table is the fact that the legal impediments which led to the striking out of the various suits, was as a result of a fault, lapse, failure and/or inaction, on his part and more particularly; the failure to comply with peremptory provisions of the law.

53. Clearly and to my mind, the allegations that color the instant Application and the clamor for recusal, is tantamount to a scenario where one refuses to see log in his own eye, but endeavors to see and discern the peck in the eyes of the perceived adversary, namely, the Judicial officer who has made the unfavorable ruling/decision.

54. Sadly for Judicial officers, whenever an advocate and/or the litigant fails to comply with and/or adhere to peremptory provisions of the law and their suits are terminated by application of the law; the problem must be seen to be somewhere else, albeit without prior introspection by the Accuser.

55. I have endeavored to elaborate the foregoing circumstances because the accusation being ventilated beforehand is clearly misconceived and is calculated to massage the ego/ultra-ego of someone who failed to exercise and/ or display the requisite diligence.

56. To my mind and taking into account the totality of the circumstances, (details enumerated elsewhere hereinbefore) and coupled with the very elaborate rulings which were rendered by this court, I come to the conclusion that no reasonable mind, would discern any scintilla of bias or apprehension of same.

57. Furthermore, if the current Applicant herein apprehends that his suit would meet the same fate as those of the four other Plaintiffs, then the question is why was the suit not struck out on the 18th March 2022 when the rest were struck out.

58. In my humble view, the answer to the foregoing questions negates the utopian apprehension that is being propagated and bandied at the foot of the instant Application.

59. Finally, I beg to point out and to underscore that it is not any other apprehension or perceived bias that should cause a Judge or such other judicial officer to recuse/disqualify self.

60. However and to the contrary, the apprehension that should occasion recusal and disqualification should be reasonable and plausible in the mind of a fair-minded person and not a subjective, nay naïve person; who does not bring any objectivity to the facts in question.

61. To this end, it is appropriate to take cognizance of the ratio decidendi in the case of Kalpana H Rawal versus Judicial Service Commission & 2 Others (2016)eKLR, where the court stated and held thus;

> (99) The Court held that the test for recusal which had been adopted by the Court was whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. Further, it was stated that judicial officers are required by *the Constitution* to apply *the Constitution* and the law 'impartially and without fear, favour or prejudice. That their oath of office requires them to administer justice to all persons alike without fear, favour or prejudice, in accordance with *the Constitution* and the law.

62. Furthermore, the reasonableness of the test to be applied prior to and before a Judicial officer can venture to disqualify self from the handling of a particular matter was also elaborated upon in the case of Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR, where the Supreme Court (per Ibrahim SCJ) held thus;

> (25) Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend *the Constitution*." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.
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> (26) In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:
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> > " A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine)

(27) In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

> " Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

(28) It is useful to refer to the case from the New Zealand Court of Appeal Muir -v- Commissioner of Inland Revenue [2007] 3 NZLR 495 in which the Court stated 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."

63. From the elaborate analysis emanating from the concurring Judgment of Justice Ibrahim SCJ, (supra), it is apparent that each and every judge/judicial officer, who has taken oath of office has a Duty to sit and discharge Constitutional mandates, unless there exists compelling circumstances to warrant recusal.

64. Further and in addition, it is also imperative to underscore that recusal and disqualification of a Judge, who has taken oath of office and thus has a Duty to sit, should not be taken lightly and/or exercised merely because a Party is not happy with a previous ruling/decision of the concerned Judge.

65. In any event, where a Party is not happy with a previous decision or a ruling of the concerned Judge, it behooves the aggrieved Party to exercise his/her right of appeal, as espoused and entrenched in *the Constitution* 2010.

66. Lastly and before departing from the issue herein, it would be remiss of me to conclude this particular issue without mentioning and citing the decision of the Court of Appeal in the case of Galaxy Paints Ltd versus Falcon Guard Ltd (1999)eKLR, where the court expressed itself in the following terms;

> " As a result of the failure on the part of counsel to observe the Rules, many like Mrs Dias, have turned to scurrilous abuse and unfounded allegations against the learned Judges and applications to disqualify them, which were formerly very rare, are now a common feature. As we have said elsewhere this practice is nothing but an attempt to shop around for Judges favourable to their cause. It is strongly deprecated.
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> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions 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. See Raybos Australia Property Limited & another v. Tectram Cooperation Property Ltd. & Others 6 NSWLR 272.

67. Instructively, the facts and circumstances surrounding the current matter, fit within the analysis and explication of the law, as elaborated upon by the Honorable Court of Appeal. For good measure, I did point out elsewhere herein before that the accusation beforehand are being made merely because someone does not want to undertake self-introspection.

68. In a nutshell, I hold a firm and clear conscience that no reasonable and plausible grounds have been canvassed and ventilated to warrant recusal and/or disqualification, either as sought or at all. In any event, if any bias were to be alleged, same ought to have been alleged by the Plaintiffs' whose suits were struck out and not the current Applicant.

69. For good measure, the current Applicant has suffered no harm and no loss. Consequently, what strikes the eye is the loud cry of someone who has not lost, but appears to be mourning louder that the bereaved.

70. I shall say no more.

Final Disposition

71. Having calibrated upon the twin issues, which were enumerated in the body of the Ruling herein, it is evident and/or apparent that every Judge has a duty to sit and discharge Constitutional mandates, without fear or favor.

72. Further and in addition, it also behooves every Judge, myself not excepted, to act with a clear conscience and endeavor to discharge Judicial functions in accordance with Bangalore principles of Judicial Independence, unless compelling grounds are raised and established.

73. Strictly and without fear of contradiction, I come to the conclusion that no plausible and/or credible basis has been raised and ventilated to warrant the impugned recusal/disqualification. Indeed, the grant of the current application would only propagate a perception that any time a Judge makes an adverse decision, such a Judge is biased and must recuse himself from hearing the concerned matter.

74. Consequently and as a matter of principle, the Application dated 18th May 2023; be and is hereby Dismissed with costs to the Defendant/Respondent.

75. Nevertheless and to avoid the back and forth in a matter which needs to be heard and disposed of in compliance with and adherence to the provision of Article 159 (2) (b) of *the Constitution*, 2010; I hereby refer the subject matter to the Honorable Presiding Judge of the Environment and Land Court, for purposes of re-allocation to any other Judge.

76. In the premises, the subject matter shall now be mentioned before the Honorable Presiding Judge on the 26th July 2023 for further directions and necessary re-allocation.

77. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Amos Wandogo for the Defendant/Respondent.

N/A for the Plaintiff/Applicant.