Ethics and Anti-Corruption Commission v Holdings & 13 others (Environment & Land Case E203 of 2021) [2023] KEELC 22045 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22045 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E203 OF 2021

JO MBOYA, J

NOVEMBER 23, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION .... PLAINTIFF

AND

MITEMA HOLDINGS .... 1ST DEFENDANT

MAYWOOD LIMITED .... 2ND DEFENDANT

NOVA CONSTRUCTIONS CO. LIMITED .... 3RD DEFENDANT

SHITAL BHANDARI .... 4TH DEFENDANT

ROSEMARY WANJIKU IRUNGU .... 5TH DEFENDANT

FATMA ABDALA AHMED .... 6TH DEFENDANT

HANNAH WANJIKU IHIGO .... 7TH DEFENDANT

ALI MALEKYA MWANZI .... 8TH DEFENDANT

JULIA OJIAMBO .... 9TH DEFENDANT

SAMUEL GATHOGO MWANGI .... 10TH DEFENDANT

FREDRICK KIMANI KIMEMIA .... 11TH DEFENDANT

WILSON GACHANJA .... 12TH DEFENDANT

CONSOLIDATED BANK OF KENYA LTD .... 13TH DEFENDANT

REGISTRAR OF TITLES .... 14TH DEFENDANT

RULING

Introduction and Background:

1. The instant matter came up for hearing on the 28th September 2023; whereupon the Plaintiff, namely, Ethics & Anticorruption Commission, called her first witness, who testified pertaining to and concerning (*sic*) the investigations undertaken by and on behalf of the Plaintiff herein, as pertains to the suit property.

2. During and in the cause of his testimony, namely, Evidence in chief, cross examination and re-examination by the advocates for the respective Parties, the witness alluded to inter-alia, that the suit property which is the subject of dispute houses assorted water works (*inter-alia*, house and various connected pipes which are the properties of Nairobi Water and Sewerage Company Ltd).

3. At the conclusion of the testimony of PW1 and after the instant matter had been adjourned and various dates agreed upon by the advocates for the respective Parties, this Honourable court suggested to the advocates for the Parties whether or not the issues at the foot of the dispute beforehand could be negotiated between the Parties in the spirit of alternative dispute resolution mechanism/alternative justice system; and taking into account the various decisions which have since been rendered by the Supreme Court of Kenya.

4. Furthermore, this Honourable court ventured forward and suggested to the advocates for the concerned Parties that the Supreme Court of Kenya has since rendered two notable decisions which impact substantially on allocation and alienation on what was hitherto Public land.

5. For good measure, the Honourable court drew the attention of the advocates to the decisions in the case of *inter-alia*, *Dina Management Ltd v The County of Government of Mombasa & 6 Others*; as well as the decision in the case of *Torino Enterprises Ltd v The Attorney General*; respectively.

6. Thereafter, the Honourable court suggested to the Parties to discern and/or decipher whether the issues could be settled vide the alternative dispute resolution mechanism, albeit taking into account the pronouncement by the Supreme Court of Kenya.

7. Despite the fact that the foregoing sentiments were made and mounted with a view to prompting and inspiring the Parties to embrace the import and tenor of Article 159(2)(c) of *the Constitution*, 2010; the 4th Defendant/Applicant, has now approached the Honourable court vide an Application dated the 5th October 2023.

8. For brevity, the reliefs sought at the foot of the Application are as hereunder;

    i. ....Spent.

    ii. This Honorable Court do recuse himself from further hearing this suit.

    iii. That upon such recusal, the suit be transmitted to the Principal Judge of the court [Environment and Land Court], for allocation to another court for hearing and determination.

    iv. Costs of this Application be provided for.

9. The instant Application is premised and anchored on various grounds which have been alluded to at the foot thereof. Furthermore, the Application is supported by the affidavit of Shital Bhandari, namely, the 4th Defendant/Applicant sworn on the 5th October 2023.

10. Upon being served with the subject Application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 18th October 2023; whereas the 14th Defendant/Respondent filed Grounds of opposition dated the 1st November 2023.

11. Other than the foregoing, the 8th Defendant also filed Grounds of opposition dated the 17th October 2023; and wherein the 8th Defendant/Respondent has, inter-alia, averred that the subject Application constitutes and/or amounts to an attempt to delay, obstruct and/or defeat the scheduled hearing of the suit, which currently has assorted hearing date(s) which were fixed by consent of the advocates for the Parties.

12. Be that as it may, the instant Application came up for hearing on the 19th October 2023, whereupon the advocates for the Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed timelines for the filing and exchange of the written submissions.

13. Suffice it to point out, that the Applicant thereafter proceeded to and filed written submissions dated the 26th October 2023; whereas the Plaintiff filed written submissions dated the 3rd November 2023. Besides, the 2nd and 3rd Defendants/Respondents filed written submissions dated the 3rd November 2023, whilst the 8th Defendant/Respondent filed written submissions dated the 3rd November 2023.

14. For the sake of completeness, the Honorable Attorney General, who appears from the 14th Defendant/ Respondent, filed written submissions dated 1st November 2023; together with a host of decisions, underpinning the circumstances where recusal of a Judge does arise.

15. For coherence, all the Written submissions, (details in terms of the preceding paragraphs) are on record.

Parties' Submissions:

16. Following the directions of the Honourable court that the Parties do file and exchange written submissions pertaining to and in respect of the Application dated the 5th October 2023, the various Parties proceeded to and indeed filed their respective submissions.

17. For coherence,[the details of the submissions filed by and on behalf of the respective Parties], have been alluded to in the preceding paragraphs and hence there is no need to rehash the details pertaining to and concerning the submissions filed.

18. Finally, it suffices to point out that the written submissions filed by and on behalf of the respective Parties shall be considered and taken into account whilst crafting the instant Ruling.

Issues For Determination:

19. Having reviewed the Application dated the 5th October 2023; and the various Responses filed thereto; and upon consideration of the written submissions filed by and on behalf of the various Parties, one [1] salutary issue, does arise and is therefore worthy of consideration and determination by the Honourable court;

20. Notably, the issue that does emerge and which must be disposed of, relates to whether or not the Applicant herein has placed before the Honorable court sufficient material to warrant a finding that the court (Judge) is biased in his assessment and appreciation of the facts pertaining to the instant

matter and thus ought to recuse/disqualify himself from the hearing of the instant matter, either as sought or at all.

Analysis and Determination

Issue Number 1 Whether Plausible or credible basis has been established to warrant Recusal/ Disqualification of the Judge.

21. Before venturing to analyze and resolve the singular issue for determination, it is appropriate to put the matter beforehand into perspective.

22. Upon the close of the proceedings that were conducted before the court on the 28th September 2023, and subsequent to the fixing of the matter for further hearing on various dates, inter-alia, the 6th December 2023, 17th January 2024, 23rd January 2024 and 30th January 2024, all dates inclusive; the Honourable court thereafter intimated to the advocates for the Parties to consider whether it would be appropriate to embrace Alternative Dispute Resolution Mechanism (ADR); and in particular, to consider negotiating the dispute beforehand, with a view to reaching (*sic*) some mutual understanding.

23. Furthermore, the Honourable Court ventured forward and reminded the advocates for the Parties that the issues pertaining to and concerning allocation and alienation of public land, has since been highlighted by the Supreme Court of Kenya in various decisions, which are in the Public domain.

24. Premised on the foregoing and based on the import of Article 159(2)(c) of *the Constitution* 2010; as read together with Sections 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, the Honourable court therefore implored the Parties to consider and embrace Alternative Justice System or better still, Alternative Dispute Resolution Mechanism [ADR].

25. Despite the bona fides of the statements that were made by the Honourable court and which are well anchored on the provisions of *the Constitution* 2010 ; as well as the *Civil Procedure Act*, Chapter 21, Laws of Kenya, the 4th Defendant/Applicant herein now contends that the sentiments pertaining to the Alternative Justice System/Alternative Dispute Resolution, connotes that the 4th Defendant was being implored to donate the land to the Government of Kenya, even before the case has been heard and determined.

26. Furthermore, the 4th Defendant and his Learned counsel have thereafter ventured forward and contended that the citation and the intimations by the court that the Parties should consider negotiations, taking into account the decision by the Supreme Court of Kenya, amounts to and constitutes biasness.

27. Premised on the foregoing, the 4th Defendant/Applicant and his Learned counsel have therefore contended that proper basis has arisen to warrant recusal by the Honourable Judge and to have the instant matter transmitted to the Principal of Environment and Land Court [the court], for (*sic*) re-allocation.

28. Despite the contentions by and on behalf of the 4th Defendant/Applicant, it is important to point out and to underscore that Judges and Judicial officers before whom cases are placed for hearing are not meant to sit and conduct the proceedings, without making suggestions and prodding Parties in such an objective manner, meant to highlight and thrash out the issues which may ultimately help the court in determining the dispute.

29. Furthermore, it is not lost on this Honourable court that by dint of the provisions of Article 159(2)(c) of *the Constitution*, 2010, the Court is obligated to embrace, facilitate, inspire and foster Alternative Dispute Resolution [ADR].

30. for brevity, it is imperative to reproduce the Article 159(2)(c) of *the Constitution*, 2010 as hereunder;

159.

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

31. My reading and understanding of the provisions of Article 159(2)(c) of *the Constitution*, 2010; (supra), drives me to the conclusion that the obligation to facilitate, promote, inspire and/or foster Alternative Dispute Resolution [ADR], inheres in the court and the presiding officers thereto and not otherwise.

32. Consequently, it is within the mandate of a Judge, taking into account the nature of the issue in dispute to suggest and/or intimate to the Parties to endeavor and embrace Alternative Dispute Resolution Mechanism [ADR], where appropriate and expedient.

33. Nevertheless, despite the fact that a Judge or such other Judicial officer intimates and/or suggest to the Parties and their advocates the option of undertaking and/or engaging in Alternative Dispute Resolution Mechanism [ADR], does not by any imagination, connotes that such a Judge is conflicted and/or bias.

34. Further and in any event, the mere suggestion that Parties can engage in discussions towards promoting Alternative Dispute Resolution [ADR], and taking into account assorted decisions, handed down by the Apex court, does not ipso facto found and/or forms a basis for a conscientious or a reasonable minded person to file an Application for recusal or disqualification of a Judge.

35. To my mind, if the suggestion and or intimation to Parties and their advocates to embrace and promote Alternative Dispute Resolution [ADR], would be used as basis for recusal, then the Honorable courts will be flooded with endless, nay, baseless applications, whose net effect would be to delay, obstruct and/or better still, defeat the expeditious hearing and disposal of the matters before the court.

36. On the other hand, the Judges and Judicial officers would be gagged from promoting and facilitating Alternative Dispute Resolution [ADR], or prompting Parties to consider certain issues that may impact on the determination of the dispute before the court.

37. Notably, in such a situation, the inherent, intrinsic and residual mandate of a Judge/Judicial officer would be impaired and the Rule of law would be negated, nay, restricted.

38. To buttress the foregoing exposition, it suffices to adopt, restate and reiterate the holding of the Court in the case of *Mumias Sugar Company Ltd versus Mumias Outgrowers Company (1998) Ltd* (2012)eKLR, where the court stated and held thus;

> " 27. While I appreciate the substratum or the persuasive intent of these cases, I must distinguish the same from what is commonly called "judicial bias". A Judge or an Arbitrator is not expected to demonstrates at all times that he is not biased. The judicial function by its very nature allows and intends an element of elementary bias which enables a judicial officer to give direction to his thoughts. This elementary bias is controlled by the Judge throughout the proceedings. It allows the Judge to prod into the issues before the court in order to prevent any miscarriage of justice. It allows the Judge to comment on the matters before him and give particular directions in the interest of justice. This kind of bias does not go into the decision of the Judge.
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> 28. "Bias" is defined in Black's law dictionary as:-
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> > "inclination, prejudice, predilection; actual bias is a genuine prejudice that a Judge, juror etc has against some other person. Implied bias is a prejudice that is inferred from the experiences or relationship of a Judge, Juror or other person. It is also termed presumed bias."

39. Other than the foregoing decision, it is also imperative to underscore that the test for recusal/ disqualification of a Judge or Judicial officer must be based on reasonable apprehension of bias in the mind of a reasonable litigant and not otherwise. Instructively, the test is an objective one devoid of paranoia and such other prejudices, [if any], that a particular litigant or legal counsel may hold.

40. Remarkably, it is not enough for one, the Applicant herein, not excepted, to throw an omnibus allegation on a Judge or a Judicial officer and thereafter expect that such a Judge [who has taken Oath of Office], ought to recuse and/or disqualify him/herself.

41. In my humble albeit considered view, if such a situation were to be fostered, nurtured and watered, then any litigant or legal counsel, neither keen nor desirous to progress a matter to hearing, would thus have a very fertile ground to frustrate, delay, obstruct and/or defeat the expeditious hearing of matters.

42. Be that as it may, it must be stated and reiterated that whereas in deserving situations and with a view to ensuring that the Right to Fair Hearing [Article 50 of *the Constitution*, 2010], is observed and respected, a Judge/Judicial officer, who is conflicted ought to recuse him/herself; the issue(s) of recusal, however should be resorted to sparingly and with necessary circumspection and not for the mere asking by a disgruntled Litigant or Legal counsel.

43. To buttress the foregoing discourse, it suffices to cite and adopt the ratio decidendi in the case of *Kalpana H Rawal versus Judicial Service Commission & 2 Others* (2016)eKLR, where the court of appeal stated 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.

44. Furthermore, it is also not lost on this Honourable court that any application for recusal/ disqualification of a Judge must be balanced against the Doctrine of the Duty of a Judge to sit. In this regard, it is common ground that Judges, given the nature of their work are called upon to take oath of office to dispense justice without fear, favor, ill-will or affection.

45. Instructively, unless an extremely good and bona fide reason is espoused, canvassed and proven to demonstrate conflict of interests or real biasness, it behooves a Judge to discharge his/her constitutional mandate without fear or favor, whilst always remembering that his/her office is a Constitutional one and not otherwise.

46. As pertains to the import, tenor and implication of the Doctrine of the Duty of a Judge to sit, it suffices to highlight the dictum of the Supreme Court of Kenya in the case of *Gladys Boss Shollei versus Judicial Service Commission & another* [2018] eKLR, where the court stated as hereunder;

"(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.

(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:

> "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 –v- 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."

47. Notwithstanding the holdings alluded to in the various decisions which have been highlighted and amplified in the preceding paragraphs, there is yet one more critical issue that deserves mention and short address.

48. For good measure, the issues herein relates to the obligation of litigants and their Legal counsel to assist the Honorable Court(s) in achieving the Overriding objectives as espoused and underpinned in terms of Sections 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

49. Notably, the obligations of Litigants and their Legal counsel, [the ones in the instant matter, not excepted], is underscore vide Section 1B of the *Civil Procedure Act*, and same stipulate as hereunder;

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

50. To my mind, it ought not to be lost on the Legal counsel/advocates for the Parties that even though they are representing their respective clients, same remain Officers of the court and thus have a corresponding duty and an obligation to help and assist the Court in attaining/achieving the Overriding objectives of the court.

51. Given the nature of the obligations, alluded to and espoused by dint of Section 1B of The *Civil Procedure Act*, it behooves the Legal counsel for the Parties to avoid scurrilous attacks on Judges and Judicial officers, merely because certain suggestions/sentiments whose import is to inspire, foster and promote alternative justice system, were echoed and/or disseminated.

52. Additionally, it is also imperative to underscore that Applications for recusal/ Disqualification, ought not to be made merely on the belief and perception that the making of such application shall gag the Judges or Judicial officer; and thereby detract same from discharging their core mandate, namely, the disposal of the matters before them proportionately, justly but without undue delay.

53. Before departing from the issue beforehand, it is imperative to re-echo the holding of the Court of Appeal in the case of *Galaxy Paints Company Limited v Falcon Guards Limited*[1999] eKLR, where the court held thus;

> " 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 Pr operty Limited & another v. Tectram Cooperation Property Ltd. & Others 6 NSWLR 272.

54. In my humble, albeit considered view, the sentiments of the Honorable Court of Appeal, [as captured and quoted in the excerpt alluded to in the preceding paragraph], holds sway in respect of the instant matter, taking into account the conduct of the 4TH Defendant and Legal Counsel.

55. Finally, it bears repeating that the Doctrine of stare decisis, is one of the key pillars upon which the Judicial edifice of the Kenyan system is anchored. For coherence, the doctrine of stare decisis is well provided for in *the constitution* of Kenya 2010.[See Article 163(7) of *The Constitution* 2010].

56. Consequently, if there be a decision of, say, the Supreme Court of Kenya, which speaks to a particular issue, then such a decision shall continue to be relevant and applicable, whether today, tomorrow and for posterity.

57. Consequently and in this respect, it thus defeats logic for a Legal counsel, to contend that the mere citation of a decision of the Supreme Court by a Judge, who then ventures forward to implore the Parties to consider same, should therefore be used as a basis for recusal.

58. In a nutshell, my answer to the salutary issue, which was highlighted herein before, is to the effect that the 4th Defendant/Applicant, has neither established nor demonstrated the requisite basis, to negate the Doctrine of the Duty of a Judge to sit or at all.

59. In short, no basis has been laid to warrant recusal/ Disqualification of the Court, which in any event, should be invoked and adopted sparingly and not for the mere asking of a Party, keen to delay, obstruct and/ or defeat, the expeditious hearing of a matter.

Final Disposition:

60. Having reviewed the submissions which were tendered by the respective Parties and upon taking into account the circumstances underlying the Application for recusal, this court comes to the conclusion that the impugned Application was inspired by (sic) unfounded apprehension and misconceived perception, albeit devoid of any objectivity or at all.

61. Consequently and in the circumstances, the Application dated the 5th October 2023; is devoid and bereft of merits.

62. In this regard, the Application be and is hereby dismissed with costs to be borne by the Advocate for the 4th Defendant/Applicant Personally.

63. Other than the foregoing, it is appropriate to reiterate that the instant matter shall proceed for hearing before this court on the scheduled dates, namely, the 6th December, 2023; 17th January 2024; 23rd January 2024 and 30th January 2024, all the dates inclusive.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. Ogara h/b for Mr. Khakula for the 4th Defendant/Applicant

Ms. Judith Shamala for the Plaintiff/Respndent

Mr. Arthur Ingutia fr the 2nd and 3rd Defendants/Respndents

Mr. Alphonse Mutinda for the 8th Defendant/Respondent

Mr. Justus Obuya for the 9th Defendant/Respondent

Mr. Allan Kamau Principal Litigation Counsel for the 14th Defendant/Respondent

Mr. Onsembe h/b for Mr. Ongegu for the 10th and 11th Defendants/Respondents

Mr. Kiprotich for the 12th Defendant/Respondent