



**Paragon Electronics Limited v Chief Land Registrar & 2 others;  
Ngum & 2 others (Interested Parties) (Environment & Land Petition  
1 of 2021) [2022] KEELC 2943 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2943 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 1 OF 2021  
LC KOMINGOI, J  
JULY 28, 2022**

**BETWEEN**

**PARAGON ELECTRONICS LIMITED ..... APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**OUSINOU NGUM ..... INTERESTED PARTY**

**KHADIJATOU FRANCES NGUM ..... INTERESTED PARTY**

**MWANIKI GACHOKA ..... INTERESTED PARTY**

**RULING**

1. This is the Petitioner's Notice of Motion application dated 16<sup>th</sup> February 2022.
2. It is brought under the inherent powers of the Court, Article 47, 50, 57, 159 & 164 of the Constitution, Sections 2,3A of the *Civil Procedure Act*, Rule 5 of the Judicial Services Code of Conduct & Ethics of Kenya, Principle 2 of the Bangalore Principles and all other enabling provisions of the law.
3. The Petitioner seeks orders:-
  - a. The Learned Hon. Lady Justice Komingoi do recuse herself from further handling, hearing, and /or determining this matter and/or any other matter between the Applicant, the Respondent and the Interested Party.



- b. Spent.
  - c. The Honourable court be pleased to grant any further orders and /or directions as it may deem just and expedient in the circumstances of this application.
  - d. The costs of this application be provided for.
4. The Application is based on thirty-five (35) grounds set out on the face of the Notice of Motion. It is supported by the supporting affidavit sworn on 1<sup>st</sup> February 2022 by Washiba Abdul, a director of the Petitioner.
  5. Mr. Abdul deponed that this matter is related to and touches on arbitral proceedings in the matter of the arbitration between the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and the arbitration is presided over by the 3<sup>rd</sup> Interested Party as sole arbiter. He further deponed that this matter is related to other matters being Nairobi ELC No.215 of 2017, Nairobi ELC Misc.234 of 2017, Nairobi Misc. ELC No.37 of 2020 and Nairobi ELC Misc.E048 of 2020 all arising from the arbitration proceedings.
  6. He deponed that the Applicant is apprehensive that all the matters related to the arbitration proceedings have ended up before Honourable Lady Justice Komingoi even where the matters would ordinarily be handled by any Judge on duty or any other Judge in the Milimani Environment and Land Court. He further deponed that the Honourable Judge has formed an opinion and holds a negative predisposition against the Petitioner in so far as this and the other related matters are concerned.
  7. He pointed out that her ruling of 4<sup>th</sup> June 2020 in one of the related matters being ELC Misc 234 of 2017, she expressed herself as follows, “As stated earlier in my ruling dated 17<sup>th</sup> October 2018, the Applicant has brought numerous applications with the sole aim of frustrating the arbitration process. This is one of those applications.”
  8. He deponed that on 10<sup>th</sup> November 2021 the Applicant requested the Judge that the application for her recusal which had already been filed in ELC Misc. E048 of 2020 does apply to all the proceedings since the prayer was expressed to apply to all the matters but the judge directed that the Applicant must split up the application and duplicate the application in each of the files separately in spite of the clear connection of the matters in so far as the Judge’s apparent bias is concerned.
  9. He also deponed that he attended a virtual court where the Applicant’s Counsel’s request for leave to file a supplementary affidavit when the Applicant’s related matters came up in Court on 14<sup>th</sup> February 2022 was angrily denied. He added that from the Court’s body language, it is apparent that the Judge does not record the representations being made by the Applicant and on behalf of the Applicant in Court.
  10. Mr. Abdul also deponed that he is aware that that the grant of interim orders is in the discretion of the judge but it is striking that the judge has never granted any conservatory order in circumstances where an application has been filed challenging the jurisdiction and praying for the removal of the arbiter.
  11. On the 20<sup>th</sup> April 2022, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

### **The Petitioner’s/Applicant’s submissions**

12. They are dated 28<sup>th</sup> March 2022. Counsel for the Petitioner submitted that while it is a common practice for judges in Kenya to hear and preside over applications for their own removal, this application should be heard by another judge. He urged the trial judge to either cede the hearing of



the application to another judge or to only consider whether the application herein meets the legal threshold for an application of this kind then cede it to another judge for determination.

13. It was counsel's submission that the Honourable Judge's conduct, omissions and comments when handling this matter and other related matters invite the inevitable inference of bias. Relying on the Supreme court case of *Jabir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR; *Charles Koigi Wamwere & 2 others v Republic* [1992] eKLR and *Kipkoech Kangogo & 62 others v Board of Governors, Sacho High School & 5 others* [2015] eKLR, counsel submitted that the impression of bias is a sufficient for recusal.
14. It was also his submission that the judges conduct is inimical to the principles of balanced, fair and unbiased determination of disputes as enunciated in Rule 3 of Judicial service code of conduct and Ethics of Kenya and is in breach of principle 2.2 on impartiality under the Bangalore principles, Principle 2.3 and the right to a fair hearing guaranteed under Article 50 of the Constitution.

### **The 1st and 2nd Interested Party's submissions**

15. They are dated 14<sup>th</sup> April 2022. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party submitted that no legitimate nor valid reasons whatsoever, have been put forth by the Applicant to warrant recusal of the Honourable Judge from this matter. He relied on the case of *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021]eKLR, *Philip K Tunoi & another v Judicial Service Commission* [2016] eKLR.
16. Relying on the case of *Joyce Simitu v Stephen O Mallowah & 2 Others* [2013] eKLR, counsel submitted that the accusations levelled against the Honourable Judge are subjective, false and so general in nature that they could be levelled without any merit by a vexatious litigant against any judicial officer who a party does not find partisan enough to its cause.
17. It was also counsel's submission that the Petitioner has not established that the Judge's conduct was contrary to regulation 21 [part II] of the Judicial Code of Conduct and Ethics Regulations dated 26<sup>th</sup> May 2020 cited in the Rachuonyo case(supra). He further submitted that a person having knowledge of the Honourable Court's conduct in this matter would not reach the conclusion that the Hon court is biased in this matter and related cases. He relied on the case of *Chania Gardens Limited v Gilbi Construction Company Limited & another* [2015] eKLR.

### **The 1st and 2nd Respondents submissions**

18. They are dated 13<sup>th</sup> June 2022. The Attorney General submitted that a judicial officer is required to perform his /her duties without favoring /appearing to favour a party in the proceedings as set out in Article 159 (2) and Article 50(1) of the Constitution as well as the case of *Alliance Media Kenya Limited v Monier 200 Limited & Another* [2007] eKLR. Counsel also submitted that recusal proceedings are a necessary tool to ensure the impartiality of judicial officers and to further guard against violation of the constitution. He put forward the case of *Kalpana H Rawal v Judicial Service Commission & 2 others*[2016]eKLR.
19. Further, relying on the case of *Gladys Boss Sholei v Judicial Service Commission & another* [2018] eKLR, he submitted that parties should not misuse court processes by applying for recusal of judges and that parties are not supposed to make applications for recusal based on frivolous and unsubstantiated grounds.
20. He also relied on the case of *Republic v Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti* [2017] eKLR to submit that to seek the recusal of a judge from hearing a



matter simply on the ground that she has determined a matter with similar facts is an implication that there is a likelihood that another judge will arrive at a different decision.

21. He submitted that the instant application implies that this court is incompetent and /or unqualified to make its own directions in matters referred to it for hearing by the Presiding Judge thus it does not meet the principles to warrant orders of recusal.
22. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The sole issue for determination is whether the Applicant has satisfied the criteria for recusal of a judge.
23. The Petitioner’s application is based on ground of likely bias on the part of the judge. It argues that it is apprehensive that the judge is not likely to be impartial due to her conduct in this matter and other related matters since she has made a predisposition against the Petitioner and is unlikely to be objective. The Petitioner also argued that inexplicably, this matter and other related matters have ended up being handled by the judge even when they are brought under certificate of urgency and they would ordinarily fall with the duty judge. The Petitioner appears to be questioning administrative duties of the Presiding Judge of this court who allocates matters to judges.
24. The Petitioner also contended that this matter was first filed before the High Court. It alleged that when the parties appeared before the Constitutional and Human Rights Division of the High Court, the Judge of that Court directed that the file be transferred to the Environment and Land Court and placed before the Presiding Judge of the Environment and Land Court, Hon Mr. Justice Okong’o for directions and thereby gave a date for that purpose but the matter ended up being mentioned before Lady Justice Komogoi instead of being mentioned before the Presiding Judge. That allegation is an outright lie. The record indicates that the matter was placed before the Presiding Judge on 26<sup>th</sup> February 2021 who directed it to be heard by this court.
25. Courts have set out criteria to be applied in determining an application for recusal of a judge on the ground of likely bias. In *Kalpana Rawal v Judicial Service Commission & 2 Others* (2016) eKLR the Court of Appeal stated as follows:- “An application for recusal of a judge in a case 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 behavior or conduct of a judge.....”
26. The Court of Appeal in *Republic v Mwalulu & Others* [2015]1 KLR as cited in [\*National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited\*](#) [2021] eKLR stated as follows;
  - i. When the courts are faced with such proceedings for 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 specifically be alleged and established.
  - ii. 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 bias in the mind of the Judge, Magistrate or Tribunal.



- iii. The court dealing with the issue of disqualification is not; indeed, it cannot, go into the question of whether the officer is or will actually be 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.
- iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.”
27. As stated earlier, the record indicates that this matter was first placed before Honourable Justice Makau of the High Court’s Constitutional & Human rights Division. It was then transferred to the Environment and Land Court and on 26<sup>th</sup> February 2021, the Presiding judge of this court allocated it to Honourable Lady Justice Komingoi. On 22<sup>nd</sup> April 2021, even before the matter could take off, the Petitioner applied for the Judge’s recusal on ground that the Judge has exhibited biased conduct in other related matters.
28. Applying the criteria in the authorities above, the Petitioner’s apprehension that the judge is likely to be biased in this matter has no basis. This court has not made any orders in this matter so that it can be said that the judges conduct has exhibited bias. The mere fact that the court has made decisions against the Petitioner in related matter is not a sufficient ground for recusal from hearing this matter since the Petitioner has a right of appeal against those decisions.
29. There was also an allegation that the Judge does not record the representations being made by the Applicant and on behalf of the Applicant in Court. While dealing with an application for recusal where the judge was accused of leaving out details while recording proceedings in *Charles Koigi Wamwere & 2 others v Republic* [1992] eKLR, the court stated, “...A judge is enjoined to record in as detailed a manner as is practicable all the relevant matters. The choice of words in that regard is his. The manner of recording is entirely in his discretion...”.
30. The record was available for the Petitioner to point out what it alleges was left out of the record. There is no evidence that the court left out any representations made by Applicant’s counsel thus the said allegation is frivolous.
31. In *Prayosha Ventures Limited v NIC Bank Ltd & another; Beatrice Jeruto Kipketer & another (Interested Parties)* [2020] eKLR the court stated, “If Judicial Officers formed the habit of easily recusing themselves based on unproven allegations which are not reasonably capable of being plausible, then no matter would ever make headway in the courts, as the nature of our decisions is such that there will always be a loser.”
32. Similarly, in the case of *Kaplan & Stratton vs L. Z. Engineering Construction Ltd & 2 Others* [2000] eKLR the court stated as follows:-
- “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 to 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 on their favour.
33. In conclusion, I find no merit in this application and the same is dismissed with costs to the Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. However, I hereby direct that this file be placed before the Honourable Presiding Judge on 29<sup>th</sup> September 2022 to allocate it to another judge.

It is so ordered.



DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF JULY 2022.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance before the Petitioner/Applicant

Mr. Kamau for Ms Fatma for the Respondents

Mr. Obok for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties

No appearance for the 3<sup>rd</sup> Interested Parties

Steve - Court Assistant

