EMCO Billets and Steel Limited v Kiambu Dandora Farmers Company Ltd (Environment and Land Case Civil Suit 1518 of 2013) [2022] KEELC 12762 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12762 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 1518 OF 2013

SO OKONG'O, J

SEPTEMBER 26, 2022

BETWEEN

EMCO BILLETS AND STEEL LIMITED ..... PLAINTIFF

AND

KIAMBU DANDORA FARMERS COMPANY LTD ..... DEFENDANT

RULING

1. On August 20, 2015, the defendant filed an application herein seeking among others the following order:

> "This honourable court be further pleased to consolidate this case with ELC Petition No 47 of 2011, *Abdulahi Muiruri Muigai v National Land Commission* for hearing and final disposal of the mater relating to LR No 12504."

2. In a ruling delivered on July 1, 2016, the court stated as follows on this prayer:

> "This leaves the defendant's prayer for consolidation of this suit with Petition No 47 of 2011. In the petition, the defendant has sought among others the following reliefs: -
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> a. A declaration that the petitioner's fundamental right to protection against arbitrary deprivation of private property under article 40 of the *Constitution* have been grossly infringed and violated by the respondent purported acts to compulsorily acquire their land parcel LR No 11379/3
>
> b. A declaration that the purported compulsory acquisition of the petitioners' Land Parcel No 11379/3 *vide* Kenya Gazette Notices Nos 840 and 841 of March 15, 1974 was unlawful, null and void ab initio.

c. An order that all consequent dealings by the Commissioner of Lands in respect to LR No 11379/3 or any part thereof following the purported compulsory acquisition including issuance of any allotment letter, leases and/or titles therefrom to any third parties are null and void.

d. An order directing the commissioner of lands to cancel any such allotments, leases and or titles issued to 3rd parties and to remove forthwith from any part of LR 11379/3 persons, individuals, companies or institutions in occupation or possession thereof within 30 days of the order in default of which the petitioners be at liberty to cause the removal of such persons, individuals or companies at the respondent's costs.

> In my view, the determination of Petition No 47 of 2011 will have an impact on the suit herein. Both parties herein have made ownership claims to the suit property. In my view, some of the prayers sought in Petition No 47 of 2011 surrounding the compulsory acquisition of LR No 11379/3, if granted, will dispose of this suit... From the foregoing, I am satisfied that the defendant has made out a case for the consolidation of this suit with Constitutional Petition No 47 of 2011 for hearing and disposal by this court.

In conclusion, I will make the following orders on the two applications before me;

1. .....

2. .....

3. High Court Constitutional Petition No 47 of 2011, *Abdulahi Muiruri Muigai & 5 others v The attorney general* is transferred to this court for hearing and final determination if the same has not yet been transferred. The executive officer shall assign the court file Environment and Land Court number once the same is received at the registry.

4. The plaintiff herein, Emco Billets And Steel Limitedis joined in the said petition as interested party.

5. The petitioner shall amend the petition within 21 days from the date hereof to effect the joinder of the plaintiff in the said petition.

6. The plaintiff shall be at liberty to respond to the petition within 21 days from the date of service of the amended petition.

7. The said petition and this suit shall be heard together."

3. Following the granting of the defendant's prayer for consolidation as aforesaid, the defendant amended its petition No 47 of 2011 and added the plaintiff herein as 9th interested party in the petition. The plaintiff filed a response to the amended petition and has since then participated in the hearing of the said petition which is part heard. The defendant was an interested party in another suit namely, ELC Misc Civil Application No 35 of 2018 in which, Samuel Wachira Wanja, Davis Malombe and Joseph Waweru had sought an order for the review of a decision of the National Land Commission(NLC) contained in a letter dated 10th May 2018 in which NLC purported to review and direct the Chief Land Registrar to revoke the titles held by the said Samuel Wachira Wanja, Davis Malombe and Joseph Waweru (the applicants in ELC Misc Civil Application No 35 of 2018) in respect of several parcels of land. The NLC purported to carry out the said review pursuant to a complaint by the defendant herein. The defendant herein had contended that the said parcels of land owned by the applicants' in ELC Misc Civil Application No 35 of 2018 were illegally created from the defendant's parcel of land

known as Lr No 11379/3(the defendant's land). LR No 11379/3 is the subject of ELC Petition No 47 of 2011. When NLC purported to carry out the said review of titles, ELC Petition No 47 of 2011 was pending hearing. In the present suit, the defendant has also claimed that LR No 12504(the plaintiff's land) registered in the name of the plaintiff was created from LR No 11379/3.

4. In a judgment that was delivered on June 10, 2021 in ELC Misc Civil Application No 35 of 2018, the court stated as follows in part:

> " I am in agreement with the applicants that the 1st respondent acted contrary to the provisions of section 14(3) of the *National Land Commission Act* and violated the applicants right to a fair administrative action guaranteed under article 47 of the *Constitution*. The procedure that was adopted by the 1st respondent in the impugned determination was therefore unfair. The same was unlawful and unconstitutional. The 1st respondent was aware that its decision would affect the applicants' rights to property. Under article 47(3) of the *Constitution*, the applicants had a right to be supplied with a copy of the 1st respondent's determination containing reasons for the same. The evidence before the court shows that despite written request, the 1st respondent refused to supply the applicants with the impugned determination. In the absence of such determination, the applicants' contention that there were no reasons for the 1st respondent's decision to revoke the applicants' titles to the suit properties are not far-fetched.
>
> The applicants had also contended that the 1st respondent was biased against them in its impugned determination. The applicants contended that the 1st respondent had a premeditated decision on the 1st interested party's alleged complaints against the applicants in relation to the validity of the titles to the suit properties. The applicants' argument on this issue was based on an agreement dated August 18, 2015 between the 1st respondent and the 1st interested party in which the 1st respondent undertook to allocate to the 1st interested party some land that formed part of the suit properties and also to review the titles of the suit properties. This agreement was produced in court by the 1st respondent and was not disputed by the 1st interested party. It was not disputed that the agreement was confidential and that the applicants who were to be affected by the same were not parties thereto and were not consulted in respect thereof. After perusing the said agreement, I am in agreement with the applicants' contention that the 1st respondent had made up its mind as far back as August 18, 2015 before initiating the review process that the 1st interested party was the lawful owner of the original parcel and that the portion of the original parcel that was allocated to the 2nd interested party which was subsequently sold to the applicants was illegally created. In the absence of complaints that were made to it by the 1st interested party, it cannot be ruled out that the review of the applicants' titles to the suit properties were carried out pursuant to this agreement and not otherwise. Since the 1st respondent had a predetermined outcome on the alleged complaints by the 1st interested party, it could not purport to conduct a hearing on those complaints. It was against the rules of natural justice to do so. It could not arrive at an impartial determination. In view of its prior agreement with the 1st interested party on the alleged complaints, it could not be said of its determination that justice was done and was seen to have been done.

Conclusion.

I have held that the 1st respondent had no jurisdiction to review the titles for the suit properties and that the applicants were not given a fair hearing during the purported review. I have also held

that the 1st respondent abused it power by assuming jurisdiction over a dispute that was pending in court. I have held further that the 1st respondent was biased against the applicants. For the foregoing reasons, the impugned determination by the 1st respondent was unconstitutional, illegal, null and void. A court of law cannot allow it to stand. I am satisfied that the applicants are entitled to the orders sought in the notice of motion application dated June 13, 2018

5. The defendant herein did not oppose ELC Misc Civil Application No 35 of 2018 although it was a party to the application and had appointed a firm of advocates to represent it in the suit. The applicants in ELC Misc Civil Application No 35 of 2018 were neither parties to the present suit nor ELC Petition No 47 of 2011. The defendant herein which was a party to all the three suits did not seek the consolidation of ELC Misc Civil Application No 35 of 2018 with ELC Petition No 47 of 2011 assuming that such consolidation was possible which I doubt.

6. What is now before me is a notice of motion application dated 21st September 2021 brought by the defendant herein under section 3A of the *Civil Procedure Act*, order 50 of the *Civil Procedure Rules* and article 50 of the *Constitution* seeking the following main orders;

    1. That the court be pleased to set aside the orders made on July 1, 2016

    2. The presiding judge in this case-Hon Okongó J do recuse himself from hearing the suit.

    3. The court be pleased to disqualify Mr Maurice Otieno Omuga and the law firm of Otieno-Omuga & Co Advocates from conducting this suit on behalf of the plaintiff.

7. The application was brought on the grounds set out on the face thereof and on the affidavit of Joseph Mwangi Karanja sworn on September 21, 2021 and supplementary affidavit of Boniface Njiru sworn on October 29, 2021. In summary, the defendant contended that although LR No 11379/3 was in issue in ELC Misc. Civil Application No 35 of 2018, the court proceeded to hear ELC Misc Civil Application No 35 of 2018 separately from ELC Petition No 47 of 2011and failed to bring the existence of ELC Misc Civil Application No 35 of 2018 to the attention of all the parties in ELC Petition No 47 of 2011 or to consolidate ELC Misc Civil Application No 35 of 2018 with ELC Petition No 47 of 2011. The defendant contended further that the court proceeded to make judgment in favour of the applicants in ELC Misc Civil Application No 35 of 2018 in the absence of the defendant and in which judgment, the court made a negative remark about the settlement agreement that the defendant had entered into with NLC with a view to resolve long standing dispute over LR No 11379/3. The defendant contended that the mind of the presiding judge is already made up even before hearing the evidence and as such the defendant fears that justice may not be done to it. The defendant contended further that it came to discover that Maurice Otieno Omuga advocate acting for the plaintiff in this suit was originally a director of the plaintiff. The defendant averred that there was a conflict of interest in Maurice Otieno Omuga advocate acting on the matter for the plaintiff. The defendant contended that it would be fair and just that this suit be tried separately from ELC Petition No 47 of 2011 and for the firm of Otieno Omuga & Company Advocates to be excluded from appearing in the matter for the plaintiff.

8. The application was opposed by the plaintiff through a replying affidavit sworn Maurice Otieno Omuga on October 18, 2021. In summary, the plaintiff averred that there was no basis shown by the defendant to warrant the grant of the orders sought. On the prayer for setting aside of the orders made on July 1, 2016, the plaintiff averred that the defendant did not appeal against the said orders and that it complied with the same fully by amending the petition and adding the plaintiff as the 9th interested party. On the prayer for the recusal of the presiding judge, the plaintiff submitted that no proper basis had been laid for the same. The plaintiff averred that if the defendant was dissatisfied with the decision

of the court made in ELC Misc Civil Application No 35 of 2018, its remedy was to appeal against the same rather than seeking the recusal of the judge. On the disqualification of Maurice Otieno Omuga advocate and his firm from appearing for the plaintiff, the plaintiff admitted that Maurice Otieno Omuga advocate was one of the initial directors of the plaintiff. The plaintiff contended that the said Maurice Otieno Omuga resigned from its position as a director and a shareholder of the plaintiff some years back. The plaintiff contended that in any event, there is no law barring a shareholder or a director of a company who is an advocate from appearing for the company in court and that the issue of conflict of interest does not arise. The 7th ,10th and 11th interested parties to ELC Petition No 47 of 2011 also filed replying affidavits in opposition to the application. They contended that the application had no basis.

9. The application was argued on 1st February 2022. The parties agreed that the court should determine the question of recusal first. The advocate for the defendant submitted that the defendant's concern was over appearance of bias on the part of the court arising from the court's judgment in ELC Misc Civil Application No 35 of 2018. The defendant submitted that in the said judgment, the court appeared to have made up its mind on the defendant's claim. The defendant submitted that there was some relationship between the plaintiff's claim herein and the claim that was lodged by the applicants' in ELC Misc Civil Application No 35 of 2018. The defendant submitted that it had established that the court appears to be already biased against the defendant from its judgment aforesaid.

10. In its submission in reply, the plaintiff's advocate submitted that the defendant's application had not met the threshold for recusal of the court. The plaintiff submitted that ELC Petition No 47 of 2011 would be determined on its own merits and there is no way in which the judgment in ELC Misc Civil Application No 35 of 2018 will have a bearing on it. Mr Ligunya for the 8th, 9th and 11th interested parties in ELC Petition No 47 of 2011 adopted the said parties' replying affidavit in his submissions. He submitted that the accusations leveled against the court by the defendant had no basis. My Ligunya submitted that there was no evidence of bias disclosed in the application.

11. Mr Namada who appeared for the Petitioner in ELC Petition No 47 of 2011 and the defendant herein in ELC Misc Civil Application No 35 of 2018 submitted that the defendant had filed a Notice of Appeal against the judgment of the court in ELC Misc Civil Application No 35 of 2018 and had also filed an application for review. He submitted that he left the issue of recusal to the court. Mr Kamau for the 1st respondent in ELC Petition No 47 of 2011 submitted that the defendant's application did not meet the threshold for recusal. He cited several authorities in support of his submissions some of which I will refer to later in the ruling. He submitted that the defendant had not demonstrated that there was a likelihood of bias against it. Mr Kamau submitted that a decision of a court cannot constitute bias and should not be a basis for recusal application.

12. As I have mentioned earlier, the parties had agreed that I only deal with the issue of recusal. The other prayers in the application will be dealt with after the ruling on recusal. What I need to determine is whether the defendant has established that there exists a real likelihood of bias that would justify my recusal from hearing this suit. In *Accredo AG & 3 others v Steffano Ucceli & another* [2018] eKLR the court cited the President of the Republic of South Africa *v* The South African Rugby Football Union & Others Case CCT 16/98 where the Constitutional Court of South Africa quoted with approval the following sentiments of Cory J in *R. v S. (R.D.)* [1977] 3 SCR 484:

> Courts have rightly recognized that there is a presumption that judges will carry out their oath of office.....This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be

displaced with cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

13. In the same case *(Accredo AG & 3 others v Steffano Ucceli & another*), the court laid the test for establishing whether there exists a real likelihood of bias as follows:

> The test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias. This current position was succinctly set out by the House of Lords in *Porter v Magill* [2002] 1 All ER 465 as follows:
>
> "[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."
>
> Expounding on that test the Supreme Court of Canada in R v S (RD) (supra) had this to say:
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> "The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case." [Emphasis added]

14. In *Samuel Kazungu Kambi v IEBC & 2 others* [2017] eKLR the court stated that:

> If the parties were to move courts for recusal upon delivery of unfavourable decisions on interlocutory applications then the business of the courts would simply be reduced into hearing applications for recusal. Courts have a duty to make decisions and parties who do not agree with such decisions have recourse to appeal where that is available."

15. In *Kalpana H Rawal v Judicial Service Commission & 2 other*s [2016] eKLR, the court stated that:

> Before we consider the merits of the application, however there are a few issues raised by the parties that we must dispose of. Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr Khaminwa did not cite any. On the contrary decisions abound that judges should not recuse themselves on flimsy and baseless allegations."

16. In *Dari Limited & 5 others v East African Development Bank & 2 others* [2020] eKLR the court stated as follows:

> That, although it is important under the law that, justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not accede 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."

17. The burden was upon the defendant to establish that this court is biased against it and that it will not get a fair hearing before the court in this matter. I am in agreement with the respondents that the defendant's application has not met the threshold for recusal on the ground of bias. It is not disputed that the defendant was a party to ELC Misc Civil Application No 35 of 2018. The defendant had the

opportunity to apply to the court in that matter to either stay it or consolidate it with ELC Petition No 47 of 2011 if it felt that the two suits raised similar issues. It was not the business of the court to direct or guide the defendant on how to defendant itself in ELC Misc Civil Application No 35 of 2018. The court was not a party to that suit and only dealt with the matter in the normal course of business. It was not the business of the court to stop the applicants in ELC Misc. Civil Application No 35 of 2018 from proceeding with that suit separate from ELC Petition No 47 of 2011. In fact, in my view there was no relationship between the issues that were in contention in ELC Misc Civil Application No 35 of 2018 which was an application for judicial review and ELC Petition No 47 of 2011 in which the defendant has sought declaratory reliefs, consequential orders and compensation. This court's act of proceeding to hear ELC Misc Civil Application No 35 of 2018 separate from ELC Petition No 47 of 2011 cannot therefore constitute bias against the defendant herein.

18. The recusal of the court was also sought on the basis of an alleged negative comments that the court had made in its judgment in ELC Misc Civil Application No 35 of 2018 against an agreement that the defendant had entered into with NLC. I have reproduced earlier in this ruling the portion of the said judgment in which I had dealt with the issue of the said agreement. The issue of that agreement was raised in the proceedings and the court dealt with it on that basis. There is nothing negative at all that was said by the court in relation to that agreement. In fact, the court did not deal with the validity of the agreement which was not in issue in those proceedings. The much the court said was that the acts that were complained of by the applicants in ELC Misc Civil Application No 35 of 2018 were undertaken by NLC pursuant to that agreement. As rightly observed by the plaintiff's advocate in his submissions, the defendant has not explained the relevance of that agreement in this suit or ELC Petition No 47 of 2011. The agreement is neither a basis for the defendant's defence herein nor its petition in ELC Petition No 47 of 2011. I am therefore unable to see how the alleged negative comment would have an impact on the court's decision in this suit and ELC Petition No 47 of 2011. In any event, the defendant who was a party to ELC Misc Civil Application No 35 of 2018 had a right of appeal against the alleged negative comment. I am in agreement with the submission by Mr Kamau for the AG that an unfavourable decision of a court should be subjected to an appeal or review rather than being used as a basis to seek the court's recusal.

19. The upshot of the foregoing is that prayer 3 in the defendant's notice of motion application dated 21st September 2021 seeking my recusal from handling this suit has no basis. The same is dismissed. The matter shall proceed for the determination of the remaining prayers in the application should the defendant wish to pursue the same.

DELIVERED AND DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr Omuga for the Plaintiff

Mr. Njiru for the Defendant

Mr. Kamau for the A.G, 1st Respondent ELC Petition No 47 of 2011

Ms. Omamo h/b for Mr. Namada for the Petitioner in ELC Petition No 47 of 2011

N/A for the 8th, 9th and 11th Interested Parties in ELC Petition No 47 of 2011

Ms. C. Nyokabi - Court Assistant