



Paragon Electronics Limited v Gachoka; Gu & another (Interested Parties) (Environment and Land Miscellaneous Application E048 of 2020) [2022] KEELC 15513 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15513 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E048 OF 2020
LC KOMINGOI, J
NOVEMBER 24, 2022

BETWEEN

PARAGON ELECTRONICS LIMITED APPLICANT

AND

MWANIKI GACHOKA RESPONDENT

AND

OUSAINOU GU INTERESTED PARTY

KHADIJATOU NGUM INTERESTED PARTY

RULING

1. This is the Notice of Motion dated February 16, 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 Applicant seeks orders:-
 - a) That 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) That 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 twenty-five (25) grounds set out on the face of the Notice of Motion. It is by the supporting affidavit sworn on February 16, 2022 by Washiba Abdul, a director of the Applicant.
 5. Mr Abdul deponed that this matter is related to and touches on arbitral proceedings between the Applicant and the 1st and 2nd Interested Parties and the arbitration is presided over by the 3rd Respondent as sole arbitrator. He further deponed that this matter is related to other matters being Nairobi ELC Misc. Appl. No 37 of 2020, Nairobi ELC Misc Appl. No.234 of 2017, Nairobi ELC No 215 of 2017 and Nairobi ELC Constitutional Petition No.1 of 2021 all arising from the arbitration proceedings.
 6. He deponed that all the said matters related to the arbitration proceedings have ended up before Hon. Lady Justice Komingoi even where the matters would ordinarily be handled by any Judge on duty or any other Judge of the ELC Court at Milimani. He further deponed that the Hon Judge has by her conduct, omissions and comments when handling this matter and other related matters demonstrated that she is biased against the Applicant and as such she is incapable of delivering a just and fair hearing in this matter. He added that she has formed an opinion and holds a negative predisposition against the Applicant in so far as this and other related matters are concerned.
 7. He pointed out that her ruling of June 4, 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 October 17, 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 November 10, 2021 the Applicant requested the Judge that the application for her recusal which had already been filed in this matter 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 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. The application is opposed by the 1st and 2nd Defendants vide the replying affidavit sworn on April 21, 2022 by the 1st Defendant. He deponed that Florence Kahiro named as the 3rd Defendant is not a party in this matter.
 12. He further deponed that this application has not been brought in good faith and it is solely designed to frustrate the arbitration between the parties. He added that the Applicant has filed numerous parallel proceedings in court and continues to make endless applications to the Honourable Arbitrator with a view ultimately to scuttling the arbitration from within, notwithstanding that it was the Applicant itself which in the first place proposed the name of the Honourable Arbitrator.



13. He added that he has not witnessed any apparent anger or bias or lack of objectivity or dismissive treatment or spite allegedly displayed by the Honourable Court towards the .
14. On the March 9, 2022 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Plaintiff's/Applicant's submissions

15. They are dated March 28, 2022. Counsel for the Applicant 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.
16. 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 Kogi Wamwere & 2 others v Republic [1992] eKLR and Kipkoech Kangogo & 62 others v Board of Governors Sacho High School & Sothers [2015] eKLR, counsel submitted that the impression of bias is a sufficient for recusal.
17. 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 Defendants'/Respondents' submissions

18. They are dated April 22, 2022. Counsel for the 1st and 2nd Defendants 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 and the case of Philip K. Tunoi & another v Judicial Service Commission [2016] eKLR.
19. Relying on the case of Joyce Simitu v Stephen O Mallowah & 2 Others [2013] e KLR, Counsel submitted that the accusations levelled against the Hon 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.
20. It was also counsel's submission that the Applicant 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 May 26, 2020 cited in the Rachuonyo case (supra). He further submitted that a person having knowledge of the Hon. 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.
21. 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 issues for determination is whether this application is merited.
22. The Applicant'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 Applicant and is unlikely to be objective. The Applicant 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 Applicant appears to be questioning administrative duties of the Presiding Judge of this court who allocates matters to judges.

23. The law of recusal is now well settled. In the case of Attorney General of the *Republic of Kenya v Anyang Nyong'o & Others*; East Africa Court of Justice at Arusha Application No 1 of 2006, the court held thus:

“Where a judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is a likelihood or apprehension of bias arising from such circumstances as the relationship with one party or perceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The Applicant must establish that bias is not a mere figment of his imagination”.

24. Similarly, in *Kaplan & Stratton v L.Z Engineering Construction Ltd & 2 Others* [2000] e KLR 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 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”

The Plaintiff's/Applicant's Application has not been brought in good faith. It is another of its attempts to frustrate the ongoing arbitration between the parties.

25. The Applicant/Applicant has filed a total of seven matters relating to the said arbitration, all of which are pending. The record speaks for itself.
26. The Court of Appeal in *Republic v Mwalulu & Others* [2015] e KLR as cited in *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited* [2021] e KLR 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. Applying the criteria set by the Court of Appeal, in the above case and having examined the facts that allegedly constitute bias on this court’s part, I find that the Plaintiff/Applicant has not established sufficient grounds for recusal.
28. The alleged bias is based on untruths as the record shows.
29. The Plaintiff/Applicant has no reasonable ground for assuming the possibility of bias based on the court’s previous decision as it had a right to appeal against those decisions.
30. It is important to note that I have now been transferred to ELC Kajiado.
31. In conclusion, I find no merit in this application and the same is dismissed with costs to the 1st and the 2nd Interested Parties

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Applicant

No appearance for the Respondent

No appearance for the 1st and 2nd Interested Parties

Mutisya – Court Assistant

