Nalianya & another v Prichani & 3 others (Environment & Land Case 124 of 2014) [2022] KEELC 15658 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15658 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 124 OF 2014

BN OLAO, J

NOVEMBER 17, 2022

BETWEEN

VICTOR HONORARY NALIANYA ..... 1ST PLAINTIFF

JACK BENEIAH TUMWA, DAVID SALIM NYONGESA NAMUTALI & MARGARET NASIMIYU WESONGA (SUING AS TRUSTEE OF ELGON RELIGIOUS SOCIETY OF FRIENDS) ..... 2ND PLAINTIFF

AND

JOSECK SIMIYU PRICHANI ..... 1ST DEFENDANT

EDWARD WANYAMA WANYONYI ..... 2ND DEFENDANT

JOSEPH MASIKA WANYONYI ..... 3RD DEFENDANT

EVANS BARASA WANYONYI ..... 4TH DEFENDANT

RULING

1. This ruling is really academic but must be delivered nonetheless. This is because, it seeks my recusal from hearing this case and transfer it to another judge. However, by the time it is delivered on October 18, 2022 I will already have moved to my new station in Busia ELC the ruling date having been taken before I received my letter of transfer dated August 3, 2022. Nonetheless, this academic excursion is still necessary because, as will shortly become clear, both Mr GM Maengwe Advocate and his clients the 2nd, 3rd and 4th defendants appear not to appreciate the basic on principle that a party aggrieved by a judgment, ruling or order of a court has the liberty to file an appeal to the superior court or apply for a review of the same. The solution is not to rant and rant or to write letters to the court threatening it as happened in this case.

> " ... that they will not participate in the proceedings ...."

2. And counsel who advices a party to boycott proceedings will only have succeeded in squandering his client's right to a fair hearing enshrined under Article 50 of the *Constitution* because such conduct cannot be said to constitute a denial of a right to be heard. However, should the party elect, as has happened in this case, to apply for the recusal of a judicial officer on the grounds of bias, then such apprehension must be well founded and reasonable. I believe that the foundational principles relating to an application by a party seeking the recusal of a judicial officer are now well settled.

3. On November 2, 2021, and upon an application by Joseck Simiyu Prichani, I delivered a ruling in which I made by substantive order consolidating this suit and Kimilili SPMC ELC Case No. 33 of 2019 which I transferred to this court. I also ordered that the two cases be mentioned on November 8, 2021 for further directions as to their disposal.

4. In addition, I also made an order dismissing the 2nd, 3rd, and 4th defendants appeal being ELC Appeal No. 3 of 2021.

5. It is that ruling delivered on 2nd November 2021 consolidating Kmililili SPMC ELC Case No 33 of 2019 with this suit and the order dismissing ELC Appeal No 3 of 2021 that has piqued the 2nd, 3rd and 4th defendants (the 2nd, 3rd and 4th Applicants herein) into filing the Notice of Motion dated June 13, 2022 seeking the following orders:

    1. That Hon Justice Boaz N. Olao be pleased to disqualify himself from hearing this case.

    2. That the Honourable court do issue directions forwarding and transfer this suit to any other judge of the Environment and Land Court either in Kakamega or before any visiting judge for determination.

    3. That costs be provided for.

6. The application which is the subject of this ruling is predicated on the provisions of Articles 22 and 50 of the *Constitution* as well as sections 1A, 3A and 63(e) of the *Civil Procedure Act*. It is premised on the grounds set out therein and supported by the applicant of Edward Wangama Wanyonyi (the 2nd Applicant herein).

7. The gist of the application is that I was not guided by the law in my ruling delivered on 2nd November 2021 consolidating this case and Kimilili SPMC ELC Case No 33 of 2019 and also dismissing ELC Appeal No 3 of 2021. The applicants, other than filing this application proceeded to file a complaint before the Judicial Service Commission and therefore the Applicants might not get justice before this court because they have a prima facie case with high probability of success. That the ruling delivered on November 2, 2021 and the dismissal of the appeal No 3 of 2021 were "pure impunity" which has served them "a lot of pain, mental anguish, loss and suffering" and unless I recuse myself from hearing this case, the Applicants stand to "suffer irreparable loss and damages which might not be adequately compensated (sic) in monetary terms."

8. Annexed to the application are the following documents:

    1. Ruling delivered by Hon. D. Ogal (senior Resident Magistrate) In Kimilili SPMC ELC Case No 33 of 2019 on March 8, 2021.

    2. Memorandum of Appeal filed in Bungoma ELC Appeal No 3 of 2021.

    3. Ruling delivered by this court on November 2, 2021.

9. The application is opposed by Joseck Simiyu Princhani the 1st defendant (1st Respondent) and by Elgon Religious Society of Friends The 2nd plaintiff (2nd Respondent).

10. The 1st Respondent filed grounds of objection describing the application as baseless in fact as in law and is only a shopping forum for a court suitable to the Applicants. That the Applicants have gone into the merits and demerits of the substantive case and the allegations made can only be proved on way of evidence. Further that the Applicant can only seek redress by way of appeal or review.

11. In her replying affidavit dated July 26, 2022, Margaret Nasimiyu Wesonga the 2nd Respondent's treasurer has deponed inter alia, that the application is frivolous bad in law, a non-starter and an abuse of the court process. That what the Applicants are doing is forum shopping and they have not demonstrated the parameters to warrant the recusal of this Honourable court. That the Applicants are raising trivial issues now and have failed to prove any bias or conflict of interest on the part of this Honourable Court. The 2nd Respondent has deponed further that the consolidation of this case and Kimilili ELC Case No 33 of 20119 was proper since the two cases relate to the same subject matter and a judge can only refuse to hear a case for extremely good reason. And since no such reasons have been advised, this application should be dismissed with costs.

12. When the application was placed before me for directions, I directed that it be canvassed by way of written submissions. These have been field both by Mr Maengwe instructed by the firm of G. M. Maengwe & Company Advocates for the Applicants and by Mr Kadten instructed by the firm of B.S. Advocates LLP for the 2nd and 1st Respondent.

13. I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by counsel.

14. It must be clear from all the above that in the guise of prosecuting their application for my recusal, the Applicants were also prosecuting their own case which is not proper. For instance, in paragraph 12 of his supporting affidavit, Edward Wanyama Wanyonyi has deponed thus:

> 12 "That the land in question L.R No. Kimilili/kamukuywa/1407 is our ancestral land even when our parents died in 1989 and 2000 we inferred (sic) their remains in the same land and by enjoining the 1st defendant/Respondent and a stranger to our case who has never lived in the land even a single day is impunity and that is disinheriting the family of the late Henry Wanyonyi Wekesa from their late father's property".

15. All that this court did in this ruling delivered on November 2, 2021 was to consolidate two cases. The reasons for that consolidation are found in page 9 of the said ruling as follows:

> " I have looked at the pleadings in Kimilili SPM ELC Case No 33 of 2019 and Bungoma ELC Case No 124 of 2014. Both of them involve the land parcels No Kimilili/kamukuywa/2268 and 2209 the Elgon Religious Society Of Friends which is the 2nd plaintiff in Bungoma Elc Case No. 124 of 2014 is also the plaintiff in Kimilili Spmc Elc Case No 33 of 2019. Joseck Simiyu Prichani the Applicant herein, is the defendant in Bungoma Elc Case No 124 of 2014 and he also applied to join the Kimilili Spmc Elc Case No 33 of 2019 as an interested party. The 3rd, 4th and 5th Applicants herein are also the 1st, 2nd and 3rd defendants respectively in Kimilili Spmc Elc Case No 33 of 2019 and their late father Henry Wanyonyi Wekesa was the proprietor of the land Parcel No. Kimilili/kamukuywa/337 which has been sub-divided to create other parcels of land including the land parcels No. Kimilili/kamukuywa/2268 and 2209. There is merit in the application to have the two cases consolidated."

16. The other ground upon which the Applicants seek my recusal from handling this case is because I dismissed Elc Appeal No 3 of 2021.

17. Consolidation of suits and dismissal of appeals and applications are matters that courts do on a daily basis. I do not see how an order consolidating two suits can be considered as "enjoining ... a stranger to our case" as alleged by the Applicants. The reason for consolidating the two cases was because they involved the same parcel of land. A party who has been enjoyed in proceedings can no longer be described as a "stranger". In any event, a ruling consolidating two cases and an order dismissing an appeal are all judicial decisions which are appealable to a superior court even if the aggrieved party does not want to pursue a review in the same court. I do not see how those decision can be the basis for seeking the recusal of a judicial officer. If that were the case, then Judicial Officers would be inundated with application for recusal each time a party is aggrieved by a ruling or order. There would hardly be any time left to determine the court disputes before the courts. That is why recusal is not a matter to be taken lightly because judicial officers have a responsibility to determine matters before them. Any application for recusal must be supported by valid reasons.

18. The application appears rather convoluted. In paragraph (h) and (1) of the grounds of the same, the Applicants contend that this court was not "guided by law" in delivering the ruling dated November 2, 2021 and further, that I dismissed their appeal "before even admission". That allegation suggests incompetency on my part. Not all judges can be like Lord Denning. But I doubt if incompetency can be a ground for recusal from handling a case. Rather, it is a ground for removal from office under Article 168(1) (d) of the Constitution. An incompetent Judicial Officer cannot remove himself/herself from one case and impose himself/herself upon other litigants. And with regard to the dismissal of an appeal without hearing the Applicants, section 79B of the *Civil Procedure Act* empowers the court to dismiss any "appeal summarily". Such an order is also appealable and once a judge dismisses an appeal summarily, there is nothing left in the file which can form the basis of an application for dismissal.

19. In paragraph (O) of the grounds upon which the application is premised, the Applicants content that unless I recuse myself from these proceedings, they "stand to suffer irreparable loss and damages which might not be adequately compensate (sic) in monetary terms". And in paragraph (p), the Applicants raise yet another startling ground:

> (P) "That the Applicants have a prima facie case with high probability of success."!

I must confess that I found it extremely difficult to comprehend the relevance of the above grounds in application for recusal. The less said about them, the better.

20. From what I can glean out of the supporting affidavit of Edward Wanyama Wanyonyi, the grounds on which the application is premised and the submissions by counsel, it would appear to me that the Applicants' main reason for my recusal is that I am likely to be biased against them because of my ruling dated November 2, 2021 and having dismissed their appeal. In paragraph 13 of the said supporting affidavit, Edward Wanyama Wanyonyi has deponed, inter alia, that "we have no faith to appear before Justice Boaz N. Olao again as he has already taken sides." In paragraph 14 of the same affidavit, he depones that my ruling delivered on November 2, 2021 reeks of "blackmail" while in paragraph 12, the Applicants take the view that my orders enjoining the 1st Respondent in these proceeding, was an act of "impunity." Finally, in his submissions, counsel for the Applicants makes the following remarks:

> "Your Lordship, the 2nd, 3rd and 4th defendants apprehensive believes (sic) that this court cannot impartially and fairly render justice to them because of the earlier ruling delivered on 2nd November 2021 in Bungoma Elc Misc No E006 of 2021 and the decision of dismissing their Bungoma Elc No E03 of 2021 on November 3, 2021. And even if the court was

impartial, that impartiality may not be seen in the defendants mind. And as such there will be no loss of justice if another court was to hear this matter."

21. The Applicants are therefore imputing bias and impartiality on the part of this court as their basis for seeking my recusal. Judges have a duty to sit. In the case of *Gladys Boss Shollei -v- Judicial Service Commission & Another,* Petition No 34 of 2014 [2018 eKLR], the Supreme Court described that duty in the following terms at paragraph 25:

> " 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 read 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 protest, administer and defend the Constitution! It is a doctrine that recognizes that having taken an oath of office, a judge is capable of raising above any prejudices, save for those rare cases where he has to recuse himself. The doctrine also safeguards the parties right to have their cases heard and determined before a court of law."

22. The same court cited with approval Justice Rolston F. Nelson In His Treatise "judicial Continuing Education Workshop, Recusal, Contempt of Court And Judicial Ethics May 4th 2012 where the judge said:

> " 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 he 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 refer to hear a case for an extremely good reason". Emphasis added.

23. Rule 5 of the Judicial Service Code Of Conduct And Ethics states that a Judicial Officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which:

    a. He has personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him;

    b. He has served as a lawyer in the matter in controversy;

    c. He or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or

    d. He or his spouse or a person related to.

    All judges are therefore bound by this code.

24. The term "actual bias" is defined in *Black's Law Dictionary 10Th Edition* as:

> " Genuine prejudice that a judge, juror, witness or other person has against some person or relevant subject".

Judicial bias is defined in the same Dictionary as follows:-

> " A judge's bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually not enough to disqualify a judge from presiding over a case unless the judges' bias is personal or based on some extra judicial reason".

25. I have never met any of the parties in this case and neither am I familiar with the subject matter of this case, which is a parcel of land in Kimilili. Indeed during my 4 years tour of duty in Bungoma County between June 2018 and October 2022, I only made one official visit to Kimilili Court on 14th February 2020 over 2½ years ago and in the company of JUSTICE RIECHI, the then DEPUTY REGISTRAR HON. MWENDA and other staff from BUNGOMA COURT during the usual inspection tour. Other than that visit, I have not returned to KIMILILI either officially or privately. I do not know and neither have I met Mr MAENGWE counsel for the Applicants. Indeed the application that gave rise to my ruling delivered on November 2, 2021 was canvassed by way of written submissions. The ruling itself was delivered by way of electronic mail in keeping with the COVID-19 pandemic guidelines and even when the matter was mentioned in open court either before me or the Deputy Registrar for directions, only Mr Khakula, Mr Wekesa and Mr Kapten Counsel for the 1st plaintiff, 2nd plaintiff and 1st defendant respectively have been appearing in court as is clear from the record herein. Mr Maengwe has never once appeared before this court in this matter and neither do I recall him appearing before me in any other matter. If the has done so and I have demonstrated bias against him nothing would have been easier than for him to remind me, if I have forgotten, of one suit incident. In light of all the above, it is difficult to understand how counsel and his clients can suggest that I have "already taken sides" in this dispute. How can a Judicial officer take sides in a dispute between parties who are strangers to him or her. Unless, as is now abundantly clear, Mr Maengwe needs to familiarize himself about this topic. He would do well to peruse Professor Groves M's Observations In "the Rule Against Bias [2009] v Monash Lrs 10 where the writer observes that:

> " Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision maker approached the issue with a closed mind or had prejudiced the matter and, for reason of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair-minded and reasonably well informed observer might conclude that the decision maker did not approach the issue with an open mind."

26. And as Lord Denning Stated In *Metropolitan Properties Co (fgc) Ltd v Lannon* 1968 3 All Eir 304:

> " There must be circumstances from which a reasonable men would think it likely or probably that the justice ... would or did favour one side unfair at the expense of the other. The court will not inquire whether he did infact favour one side unfairly. Suffice it that reasonable people might think he did." Emphasis mine.

27. No reasonable person guided by the above circumstances, can conclude that this court is likely to be biased simply because I have delivered a ruling consolidating two cases and dismissed an incompetent appeal. It is therefore not surprising

28. that in response to this application, Margaret Nasimiyu Wesonga on behalf of the 2nd plaintiff has deponed in paragraph 6 and 7 of her replying affidavit as follows;

> 6. "That I have further been informed by my counsel on record that the application lacks merit as the Applicants have not demonstrated parameters that warrant recusal and/or disqualification of this Honourable Court."

7. "That the Applicants have raised issues that are very trivial and have failed to demonstrate bias and/or conflict of interest on the part of the Honourable Court."

29. On his part, the 1st defendant states in his grounds of objection at paragraph 4, that:

4. "The Applicant herein is out for blackmail and is busy shopping for a suitable court."

30. I fully endorse those sentiments. It is the duty of the party alleging bias or lack of impartiality on the part of a judicial officer to prove it on the bias of good reasons. Merit un-substantiated suspicious of bias, prejudice or partiality will not suffice. Neither can it be a good reason for recusal that the judicial officer has previously made a ruling or order unfavourable to a party and neither should it be about placating counsel's ego.

31. It must be clear to the Applicants by now that they have not mustered the threshold for securing orders of my recusal from hearing and determining this dispute.

32. As I stated at the commencement of this ruling, it is now purely for academic purposes as I have since moved to another jurisdiction. This case will be heard by another judge. Hopefully, however, counsel will have benefitted from this discourse.

33. The up-shot of all the above is that the Notice of Motion dated June 13, 2022 is devoid of any merit. It is accordingly dismissed with costs to the 2nd plaintiff and 1st defendant.

BOAZ N. OLAO

JUDGE

17TH NOVEMBER 2022

Ruling dated, signed and delivered at BUSIA on this 17th Day of November 2022 by way of electronic mail with notice to the parties.

BOAZ N. OLAO

JUDGE

17TH NOVEMBER 2022