



Supeyo & Isaac & another (Suing as the administrators of the Estate of Keziah Gathoni Supeyo) v Millenium Dream Homes Limited & 3 others (Environment & Land Case 615 of 2017) [2022] KEELC 14907 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14907 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 615 OF 2017
MN GICHERU, J
NOVEMBER 17, 2022**

BETWEEN

**REBECCA NADUPOI SUPEYO & ISAAC 1ST PLAINTIFF
TIPANKO SUPEYO 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF KEZIAH GATHONI
SUPEYO**

AND

**MILLENIUM DREAM HOMES LIMITED 1ST DEFENDANT
WONDERS VALLEY LIMITED 2ND DEFENDANT
JOSEPH GREGORY NYAMU 3RD DEFENDANT
ATTORNEY GENERAL (SUED ON BEHALF OF THE LAND REGISTRAR,
NGONG LANDS REGISTRY) 4TH DEFENDANT**

RULING

1. On April 28, 2022, the focus in this case which has been pending in court since April 30, 2010, suddenly changed from how soon it should be concluded, to whether or not I should recuse myself from hearing it any further.
2. What precipitated the application for my recusal was simply the dismissal of the plaintiffs’ application for adjournment. Following the dismissal of the application for adjournment, the plaintiffs’ counsel made an application for stay of proceedings and leave to appeal against the orders of the court.

The application for stay of proceedings was not allowed for the obvious reason that it would have the same effect as the adjournment earlier sought and refused.



Counsel for the plaintiff then said he would withdraw from the case because the court seemed to have a problem with him.

3. Prior to the refusal of the application for adjournment, the plaintiffs' counsel had made some remarks as follows. 'Justice Nyamu has previously worked in the judiciary, and this court has been in the judiciary for long', or words to that effect. I had to cut counsel short because it seemed to me that he was about to make some unsavory remarks following this profiling.

He had also uttered words to this effect, 'Since the original plaintiff died while waiting for justice, adjourning this case is a small inconvenience to the defendants compared to the death of the original plaintiff'.

4. The plaintiffs' counsel was extremely verbose in his rejoinder after the defendants' counsel strenuously opposed his application for adjournment. He praised the third defendant for a good job when he worked at the constitutional court saying how some of the third defendant's pronouncements came to form part of Kenyan's Constitution.

He then hailed Professor Migai Akech, counsel for the first and third defendants as the guru of administrative law. He said that because of this, they should not have opposed his application for adjournment.

The plaintiffs' counsel would not heed my prompting that he was digressing too much and he should stick to the issues raised in opposing the application for adjournment. He appeared determined to make the rejoinder as long as possible.

5. The application for adjournment by the plaintiffs' counsel was rejected for four reasons all of which are on record.

His application for stay of proceedings was also rejected for reasons which are also on record. He then applied to withdraw from the case. Owing to the apparent bad mood on the part of the plaintiffs' counsel, I found it prudent to adjourn the case to the next date it was scheduled for hearing which was May 5, 2022.

6. On May 5, 2022, the plaintiffs' counsel filed the notice of motion dated May 4, 2022 which has the main prayer that I recuse myself from further hearing this case.

The grounds for seeking the said order can be summarized as follows.

- a. The court exhibited patent bias in the manner of its address and conduct which has created a hue of a compromised court.
- b. The circumstances and conduct of the court has given rise to a reasonable apprehension, in the mind of the plaintiffs that the judge will not apply his mind to the case impartially and as a consequence, justice will most certainly not be served.
- c. The honourable court on numerous occasions not only unjustifiably interjected submission being made by counsel for the plaintiffs in favour of its application for adjournment but also invariably censured counsel in a show of bias in favour of the defendants.
- d. The plaintiff does not have any confidence that the trial court, following the said proceedings, will be in a position to either give the plaintiffs a fair trial or render a just and impartial judgment in this matter.



- e. The apprehension of bias is a reasonable one as would be held by a reasonable and right-minded person, applying themselves to the question as to whether the judge did or did not apply his mind to the case impartially.
- f. Accordingly, if the judge continues to preside over this matter, it is highly unlikely that justice will be seen to be done much to the infinite prejudice of the plaintiff.
- g. It is therefore in the interests of justice that the orders sought in the application herein be granted.

In addition to the above grounds, the application is also supported by a 36 paragraph affidavit sworn by the first plaintiff which has one annexure and a 7 paragraph supplementary affidavit which has one annexure.

In a nutshell, the deposition by the first plaintiff accuses me of bias, jumping to defensive and highly subjective conclusions, being openly hostile to the plaintiffs' advocate, failing to make any remark on the oral application for recusal, failing to record proceedings made by the plaintiffs' counsel, having an insular approach to the matter, blaming the plaintiff for the delay in concluding the matter, accepting wholesale the contrived submissions by the third defendant's counsel, disproportionately allowing the defendants' counsel ample and interrupted opportunity to present their arguments and interrupting the plaintiffs' counsel and making an incomplete record of what transpired on April 28, 2022.

7. The application is opposed by the second defendant whose counsel has filed two (2) grounds of opposition namely,
 - a. No grounds or ingredients lie in the application and the supporting affidavit to justify and meet the threshold required for the recusal of a presiding judge and,
 - b. The application is an abuse of the court process.
8. The 3rd defendant has also filed a 73 paragraph affidavit dated May 16, 2022. In summary he says that the application is brought in bad faith, bad in law and abuse of the court process. He adds the following.

The applicant has deliberately exhibited her own version of proceedings of the day in order to mislead and achieve her objective of delaying the presentation of the case for the defendants, that the issue of bias has abruptly come up when it is the defendants' time to testify, that the petition to the judicial service commission annexed to the affidavit of the plaintiff is a delaying tactic as it intends to put pressure on the presiding judge to recuse himself so that this 12 year old case is not concluded, that a judge cannot be directed on how to conduct a case as this is contrary to judicial independence as set out in articles 159 and 160 of the Constitution, that the proceedings of April 28, 2022 were cordial despite the attempts by the plaintiffs' counsel to needlessly antagonize the court by making frivolous long winded and irrelevant submissions that had no bearing whatsoever on the matter at hand, and that the court was fairly accommodative of the plaintiffs' counsel on November 15, 2021 and again on April 28, 2022 by allowing all their applications except the one for adjournment.
9. In addition to the above, the third defendant has deposed on the law governing the recusal of a judge presiding over a case including the judicial code of conduct, his right to a fair trial, access to justice and speedy resolution of the case amongst other deposition.
10. Counsel for the parties filed written submissions between May 18, 2022 and October 3, 2022.
11. I have carefully considered the entire notice of motion together with the grounds, the supporting affidavits, the replying affidavit, the grounds of opposition, the submissions and the case law cited therein and I make the following findings.



12. Firstly, as correctly submitted by the counsel, it is paragraph 20 1 (a) of the judicial code of conduct and ethics that provides the circumstances in which a judge may recuse himself or herself in proceedings in which his or her impartiality might reasonably be questioned. They include the following. Where the judge –
- a. Is a party to the proceedings.
 - b. Was, or is a material witness in the matter in controversy.
 - c. Has personal knowledge of the disputed evidentiary facts concerning the proceedings.
 - d. Has actual bias or prejudice concerning a party.
 - e. Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter.
 - f. Has previously acted as a counsel for a party in the same matter.
 - g. Is precluded from hearing the matter on account of any other sufficient reason or
 - h. A member of the judge’s family has economic or other interest in the outcome of the matter in question.

Sub paragraph 3 provides for three (3) instances in which the judge may not recuse himself or herself. They include cases where –

- a. No other judge can deal with the case, or
 - b. Because of urgent circumstances, failure to act could lead to a serious miscarriage of justice,
 - c. The merits of the application for recusal have been considered by a plural bench of judges, and recusal held to be unnecessary.
13. Secondly, in my case, the only circumstance complained of is that of actual bias or prejudice. This falls under paragraph 20 (I) (d) of the code of conduct and ethics dated March 20, 2018.

None of the other seven circumstances has been raised in this application.

I will analyze this ground against the deposition by the first plaintiff in her two affidavits.

Though I am accused of jumping to defensive and highly subjective conclusions, the plaintiff has failed to mention even one conclusion that I jumped to. All the orders that I made on April 28, 2022 are on record and each of them is backed by reasons. Was I hostile to the plaintiffs’ counsel? I was not. The record will show that I let him plead his case and all the rulings on records are in his favour except the ones aimed at adjourning the case to another day. Even going by the plaintiffs’ own excerpts of the record, it is the plaintiffs’ counsel who spoke longer than any other person in court on the material date. Had I been hostile to him, he would not have spoken for so long.

The plaintiff is right to say that I missed recording her counsel’s oral application for recusal. This may be due to the plethora of applications that her counsel made on that day.

Did I fail to record everything that the plaintiffs’ counsel said? Yes. I failed to do so. I am not bound to record every word that is said. I record the point. If I were to record everything, court proceedings would be full of irrelevancies and repetitions and this would take a very long time.

This would defeat the overriding objective of the *Civil Procedure Act* and rules which is found in section 1A (I) of the *Civil Procedure Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.



Did I have an insular approach to the matter? No, I did not. I listened to the counsel for both sides on the single issue of whether or not the case should be adjourned.

I listened even to the irrelevancies that were laid bare in court. After listening to both sides, I gave a ruling and gave four reasons. It goes without saying that I was acting within my power to reject an application that was not deserved.

Instead it was the plaintiffs' counsel who had an insular approach to the matter by doing everything that he could to stall the hearing of the case on the material date.

It is the plaintiff whose counsel applied for an adjournment. The application was dismissed. Dismissing an application is not blaming a party. It is just one of the duties the court is expected to perform.

It is very rude to say that the submissions by the third defendant's counsel were contrived. Contrived has the following meanings, 'forced, planned, labored, strained, artificial, elaborate, unnatural or overdone. The submissions by that particular counsel were precise and well founded.

Did I interrupt the plaintiffs' counsel? Yes, I did but only when he digressed into irrelevancies. Under section 1A (3) of the [Civil Procedure Act](#), it is provided as follows, 'a party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court'.

On April 28, 2022, the plaintiffs' counsel would not comply with the direction of the court to cut down on irrelevancies and stick to the issue of why an adjournment should be allowed.

14. Thirdly, I agree with all counsel that when considering whether a judicial officer shows a real possibility of bias, the courts have come up with an objective test as follows, 'do the circumstances give rise to a reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public that the judge will not apply his mind to the case impartially? See '[Kalpana Rawal –versus- Judicial Service Commission and 2 others \(2016\) eKLR](#)'.

Applying the above test to the facts of this case, we have found that the first plaintiff is not well informed of the court procedures on recording of proceedings, the power of the court to limit counsel on submissions and to issue directions that must be complied with.

15. Fourthly, recusal is a very serious matter. This is because litigation is a very expensive affair in terms of time, cost and anxiety. As the Supreme Court of Kenya held in the case of [Gladys Boss Shollei –versus- Judicial Service Commission and another \(2018\) eKLR](#) 'Recusal and reassignment is not a matter to be rightfully 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 as 'duty to sit'.

In the same case, the Supreme Court had this to say about the nature of an application for recusal.

' An application for recusal is a shield, to protect an applicant's interest so that his or her matter is heard by an impartial court. It is not a sword to be wielded by an applicant to steal a match and deny a chance to the other party.

16. All the parties to this case have a right to a fair and speedy trial, access to justice and fairness irrespective of their status. A lot has been said by the plaintiff and her counsel about the status of the third defendant. In fact it seems to be the only basis of the current application.

Yet the plaintiff has not adduced even an iota of evidence to prove any favouritism or preferential treatment that he has received from this court. The record will clearly show that the court has been



very accommodative of the plaintiffs all through from November 15, 2021 to April 28, 2022 when all their applications were allowed save the one for adjournment.

For the above stated reasons, I find no merit at all in the plaintiffs' application dated May 4, 2022. I dismiss it with costs to the defendants.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF NOVEMBER, 2022.

MN GICHERU

JUDGE

