



**Virji v Barngetuny (Environment & Land Case 157 of 2016)  
[2022] KEELC 14744 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 157 OF 2016  
SM KIBUNJA, J  
NOVEMBER 9, 2022**

**BETWEEN**

**SHIVJI NARAN VIRJI ..... PLAINTIFF**

**AND**

**OGLA JEMELI BARNGETUNY ..... DEFENDANT**

**RULING**

[Notices of Motion by the Defendant dated the December 21, 2021, February 11, 2022, and March 14, 2022 Plus the Plaintiff's Chamber Summons dated the February 22, 2022]

1. This ruling relates to the above four (4) applications filed by the parties herein that the Court on March 22, 2022 directed they be dealt with together through written submissions in order to fast track the matter.
2. The first application is one dated December 21, 2021, and seeks for orders:
  - a. That the respondent/defendant was not a party in execution proceedings as she was not served as provided by law.
  - b. That Court Ruling dated March 15, 2021 be set aside and the same to operate as stay order of any intended execution of Decree/Judgement of this Honorable Court dated August 29, 2019 pending termination of Constitutional Petition No 013 of 2021.
  - c. That Costs of this case be provided for.

The application is based on the various grounds, including that the Plaintiff conspired with the firm of Arusei and Company Advocates and others and proceeded with the case without the defendant's consent; that the said firm of Arusei is not the defendant's advocates on record as their services were terminated on September 11, 2020; that the Plaintiff misled the Court and the ruling of December 15, 2021 was entered without hearing the defendant; that the correction of the judgement of August 29,



2016 as per Constitutional Petition No 013 of 2021 will determine the truth; that it would be prudent that the court stays execution of the judgement dated August 29, 2019 pending the outcome of the petition filed. The application is supported by the affidavit sworn by the defendant wherein she reiterated the grounds in support of the application. She further deposed that she did not swear to the affidavit of December 15, 2021 in respect of Civil Application Number 14 of 2021. She indicated that she discovered the existence of Civil Application Number 14 of 2021 by chance since her advocates had not informed her about it. She thus deposed that the ruling delivered on December 15, 2021 be set aside and she be given a chance to be heard on merit for the reasons that the said firm of advocates acted to her detriment without her instructions.

3. In response to the application, the plaintiff filed a replying affidavit sworn by Shivji Naran Virji on the January 31, 2022 deposing to among others that the orders sought in the application have been overtaken by events since the order issued on March 15, 2021 has already been executed through the Deputy Registrar of this court by executing the transfer forms and releasing the title document; that the suit property has already been transferred to his name as evidenced through the attached copy of the title document.; that this Court should therefore not issue orders in vain as there is nothing to be stayed; that the application is misconceived as the orders sought to be stayed are in reference to a Constitutional Petition No 013 of 2021, which is a distinct suit from this one, and this Court is functus officio having rendered its judgement which was upheld by the Court of Appeal; that there is evidence all over that the defendant was indeed represented by the firm of Arusei and Company Advocates who have never ceased to act for her in this matter and the her assertions that she was not aware of the issues regarding the case are baseless, and only aimed at just throwing a spanner in the works to stop the execution process; that the defendant has abused Court process to an extent of filing a Constitutional Petition to quash the decisions of this Court and that of the Court of Appeal; that since it is a fundamental legal principle that litigation must come to an end, the defendant's application must therefore be dismissed as it lacks merit.
4. The second application is dated February 11, 2022, and the orders sought are that Advocates William Arusei, Job Kiplimo Rugut and James Okao, as well as the Advocates of Mbaluka and Company Advocates be summoned by the Court in order for the defendant to cross examine them on the affidavits.
5. In response to the application the plaintiff filed grounds of opposition among others that the defendant is seeking to have this court examine and pronounce itself on the affidavit evidence that was adduced before the Court of Appeal in Civil Appeal Number 262 of 2019 as well as the Court of Appeal Civil Application (SUP) No 14 of 2021; that since the above two matters are separate from this one, this Court cannot entertain the said application; that the application infringes the rights of the plaintiff under Article 40 of the *Constitution* to own property and is a delaying tactic; that the application is a tactic aimed at frustrating this Court as the defendant has not followed the due process of changing representation since a litigant cannot just verbally decide to fire and hire counsel without involving the Court in the procedural manner; that the defendant is a vexatious litigant and in contempt of court orders having refused to abide by the orders issued by the Court; that the application has not been made honestly and for a proper purpose; and that the defendant has not demonstrated before this Court that she is deserving of the orders sought.
6. The third application is the Chamber Summons dated February 22, 2022 wherein the plaintiff sought for eviction orders against the defendant who has refused to grant him vacant possession of the suit property. The orders sought in the application are that;



- a. That this Honourable Court issues eviction orders against the Judgement Debtor/ Respondent or her representatives or her agents from Land Parcel Eldoret Municipality Block 13/886.
- b. That this Honourable Court to order the Officer Commanding Station Eldoret Police Station to offer security and supervision to Femfa Auctioneers to enable them to carry out eviction from the decree holder's/applicant's land parcel Eldoret Municipality Block 13/886 as per this Honourable Court's decree dated August 29, 2019, orders dated March 15, 2021 and Court of Appeal decree dated January 29, 2021 in Kisumu Appeal No 262 of 2019.
- c. That costs of this application be provided for.

The application is based on the grounds inter alia that pursuant to several Court decisions, the Land Registrar transferred the title in Land Reference No Eldoret Municipality Block 13/886 to the plaintiff's name; that the plaintiff has since issued notice to the defendant to vacate the land; and that the OCS Eldoret Police Station should supervise the eviction. The application is supported by an affidavit sworn by Shivji Naran Virji on February 22, 2022 wherein he re-iterated the grounds in support of the application in its entirety. The defendant has not filed any response to this application despite the Court having issued directions to do so.

7. The final application is the one dated the March 14, 2022 and seeks for orders that;
  - a. That Honourable Justice SM Kibunja to recuse himself from hearing any matter of ELC Cause No 157 of 2016 in any other related matter or alternatively strike out the following legal technicalities captured in the face of written submissions dated February 21, 2022.
    - I. The narrative 'overtaken by events.'
    - II. Technicality which may sanitize Arusei & Company Advocates criminal acts of forging affidavits and representation without instructions.
  - b. That Honourable Justice SM Kibunja be pleased to interpret the Judgments referred to in Chamber Summons application dated February 22, 2022 in relation to certified Court proceedings, Plaint dated June 13, 2016 and its affidavit in support or alternatively disqualify himself from hearing the same.
  - c. That the hearing of application dated December 21, 2021, its subsequent interlocutory application dated February 11, 2022 and chamber summons application dated February 22, 2022 be stayed pending the directions of disposing legal technicalities as claimed in this suit.

The application is premised on the grounds that Hon Justice Kibunja delivered a Ruling dated December 15, 2021 that was obtained fraudulently by the plaintiff, with the help of Arusei & Company Advocates who purported to act as the defendant's advocates. It was averred that the Court entertained the said firm of Advocates who acted for the defendant without proper instructions, and that the Court's pronouncement that no urgency had been shown in the application dated December 21, 2021 was questionable. Further it was averred that this Court entertained Arusei and Company Advocates during the hearing of the plaintiff's application dated October 22, 2021 without granting the defendant a chance to prepare her defense. The defendant further averred that the eviction ought not to proceed since there was no proper representation, and that the suit property was a matrimonial home and thus any eviction should be halted. The application was supported by a supporting affidavit sworn by the defendant on the March 14, 2022 wherein she re-iterated the grounds in support of the application. She further deposed that the eviction ought not to proceed until such time when



her application dated December 21, 2021 is heard and determined. The Defendant further made a raft of allegations on the nature in which the proceedings were conducted by this Court, including orders requiring parties to take dates in the registry in the usual way, as well as directions on filing of submissions. In summary the issues raised by the defendant touch on the proceedings, orders issued by Court and generally how the matter proceeded. Further the issue of her representation by the firm of Arusei and Company Advocates was a major component of the application as the defendant insists that the said firm of Advocates did not have instructions to represent her in the matter.

8. The plaintiff responded to the said application vide grounds of opposition dated April 12, 2022, among others that the said application is without merit and amounts abuse of Court process; that the same is vexatious, scandalous and frivolous and is fit for dismissal.
9. The common issues for determinations by the court in all applications are as follows;
  - a. Whether the applicant in each of the application has discharged their legal duty and satisfied the threshold for the orders sought therein to be issued.
  - b. Who pays the costs in each application.
10. The parties filed written submissions which this Court has perused and shall consider them in the determination of the four applications.
11. The court has carefully considered the grounds on each of the applications, grounds of opposition, affidavit evidence, submissions and come to the following findings;
  - a. On the application dated December 21, 2021, that seeks the setting aside and stay of the execution of the ruling dated March 15, 2021, pending the hearing and determination of the Constitutional Petition No 013 of 2021, no compelling reasons have been presented to the court upon which such an order can be based. Secondly, as to whether the defendant was represented by the firm of Arusei and Company Advocates, there are several documents on record to demonstrate that indeed she had engaged the firm of Arusei and Company Advocates to act for her in the matter. The consent order duly signed by Ms Mbaluka & Company Advocates as the outgoing counsel and Arusei & Company Advocates as the incoming counsel dated the February 9, 2021, is one such document. By the time the ruling the defendant seeks to be stayed was delivered, the defendant had not indicated to the Court her intention to act in person, and was under the representation of the firm of Arusei and Company Advocates. It therefore follows that the defendant was well aware of the proceedings in Court and cannot be allowed to belatedly come before this Court late in the day and purport not to have known anything regarding the progress of the suit. In view of the above, I find that the application lacks merit and is hereby dismissed in its entirety.
  - b. The second application for determination is that dated February 11, 2022 which seeks orders that the defendant's advocates be summoned and be cross examined on the proceedings before Court and affidavits that allegedly happened without her instructions. The plaintiff's case is that the defendant wants this Court to pronounce itself on the affidavit evidence that was adduced before the Court of Appeal in Civil Appeal No 262 of 2019 and No 14 of 2021 and that since those matters are separate and distinct from the instant matter, this Court cannot entertain the said application, which in their view was a manifestation that the defendant is hell bent on delaying this matter. The law provides the procedure to be adhered to where a litigant wish to change legal representation. The [Civil Procedure Rules](#) provides for clear ways of doing so, and thereby affording all the litigants/advocates an orderly atmosphere and sufficient notice for effective service, as opposed to the alternative where a party/counsel just



wait until proceedings take place and then seek to invalidate them later in the day, without good reason. In view of this, I find that the application has not been made in good faith and agree with the plaintiff's contention that the application is only intended to delay the resolution of this matter.

- c. The third application is the Chamber Summons dated the February 22, 2022 that sought for eviction orders against the defendant. It was averred that there are very clear Court orders that have been issued requiring the defendant to vacate the suit property, which orders she has failed to abide by. In order to ensure compliance with the Court orders it is therefore the plaintiff's case that it is paramount that this Court issues eviction orders against the defendant so that the integrity of this Court is safeguarded. Title to the suit property has been issued to the Plaintiff, and therefore the defendant is illegally in occupation of the suit property. It is not contested that there have been several court matters touching on the suit property and several Court orders have been issued requiring the defendant to yield vacant possession of the property to the plaintiff. The said orders have not been obeyed by the defendant despite various follow ups which even led the Deputy Registrar to be empowered to sign transfer forms in respect of the property after the defendant failed to comply with the Court orders.
- d. A certificate of title to property is conclusive evidence of ownership as was held by this Court in *Magdalene Wambui Mubia Vs Joseph Mwangi Wanjau & 2 Others, HCCC 2424 of 1995*. In the case of *Margaret Karwira Mwangera -vs- Francis Kofo (2019) eKLR* the court allowed eviction in the matter where the applicant was the registered proprietor and held title to the land. The registration of a person as proprietor and the issuance of the certificate of title thereof, to such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. Section 26 (1) of the *Land Registration Act, 2012* provides as follows;

' The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

The upshot of the foregoing is that I find and hold that the plaintiff's application is merited, and is hereby allowed as prayed in prayers (a) and (b) with costs.

- e. The final application seeks orders that I recuse myself from hearing this matter because of various allegations made by the defendant that have been detailed above. The principles governing recusal are fairly well settled. In *Kalpana H Rawal Versus Judicial Service Commission and 2 others (2016) eKLR*, the Court of Appeal held;

' An application for recusal of a Judge is a necessary evil. On the one hand, it calls into a question the fairness of a judge who has sworn to do justice impartially, in accordance with the *Constitution* without any fear, favour bias, affection, ill will, prejudice, political, religion or other influence. In such applications, the impartially



of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the 2 evils. The alternative is to risk violating a cardinal guarantee of the Constitution, namely the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial court.'

In Philip K Tunoi & Another Versus Judicial Service Commission & Another (2016), the Court of Appeal held;

' In determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is real possibility of bias.'

In Jan Bonde Nielson V Herman Philipus Steyn & 2 Others Hc Comm No 332 Of 2010 [2014] eKLR the court observed that:

' The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali And Others Ca Criminal Application No Nai 4 And 5 Of 1995 (unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & Others Ca Civil Application No Nai 310 OF 2004 (Unreported) where the Court of Appeal stated that:

'When 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 be specifically alleged and established.'

In Philip K Tunoi & another v Judicial Service Commission & Another CA Civil Application NAI No 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in Porter v Magill [2002] 1 All ER 465, where it stated that;

' The question is whether the fair minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased.'

The same position was taken by the Supreme Court in Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No 4 of 2012 [2013] eKLR where it was observed that;

'The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.'

- f. The Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated May 26, 2020 provide a basis under which a judicial officer may recuse himself. Under Regulation 21 Part II



of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned 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 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) Had 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) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.

Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the Constitution and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

Considering the facts of this case, it is clear that the allegations made by the defendant seeking that I recuse myself from this matter are not anything that fall within the parameters that have been enumerated in the regulations and the superior Courts decisions as cited above. However, as fate would have it, the judge the defendant wanted to recuse himself has since October 1, 2022 left the station on transfer to another station, and hopefully this translate to some relief for the defendant.

g. The other prayers in the application for the striking out of alleged technicalities in the submissions dated the February 21, 2022, interpreting chamber summons dated the February 22, 2022, plaint dated the June 13, 2016, and staying of the applications dated the December 21, 2021, February 11, 2022 and February 22, 2022 are also found to be without merit. In any case, and in view of the above, this Court finds the application dated the March 14, 2022 is without merit and is hereby dismissed with costs.

12. From the foregoing the court finds and orders as follows;

- a. That the defendant's notices of motion dated the December 21, 2021, February 11, 2022 and March 14, 2022 are without merit and are dismissed with costs.
- b. The plaintiff's application dated the February 22, 2022 has merit and is hereby allowed with costs in terms of prayers (a) and (b).

**It is so ordered.**

S. M. Kibunja, J.

DATED AND VIRTUALLY DELIVERED THIS 9<sup>th</sup> DAY OF NOVEMBER 2022.

IN THE PRESENCE OF;

PLAINTIFF .....



DEFENDANT .....

COUNSEL .....

.....

WILSON .. COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

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