



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 466 OF 2017

FORMERLY KISII ELC NO. 930 OF 2016

MICHAEL LINKATO OLOLABURA.....1ST PLAINTIFF

OLE UNUA TONGEL.....2ND PLAINTIFF

SAMUEL LEKAKENY KINANTA.....3RD PLAINTIFF

-VERSUS-

DAVID LEBOO KILISU.....1ST DEFENDANT

SKYSHIP LIMITED.....2ND DEFENDANT

ENDANKE CO. LTD.....3RD DEFENDANT

AND

OLOOLOLO GAME RANCH LTD.....INTERESTED PARTY

RULING

By a Notice of Motion dated 16/7/2020 the applicants sought for orders that: -

1. That the application herein be certified as urgent and heard on priority basis.
2. That pending the hearing and determination of this application, an order of stay of proceedings in Narok ELC Cause No. 466 of 2017 (formerly Kisii ELC No. 930 of 2016) be issued.
3. That honourable justice Mohamed Kullow be pleased to recuse himself from the conduct of the suit herein
4. That the court files in respect of this suit, Narok Elc cause no. 466 of 2017 formerly Kisii Elc No. 930 of 2016 be transferred to Nakuru Environment and Land court for urgent directions as to further proceedings.
5. Any other or further directions as the Honourable court shall deem fit to issue in the circumstances.
6. Costs be in the cause.

The Application was based on the grounds that the honourable Judge having the conduct of this matter is a close confidant of the Governor of Narok County who is an interested party in this suit and that there were contacts between the Judge and the said Governor and consequently there is reasonable apprehension that the applicant may not get justice on the matter.

The application was further supported by the affidavit of the 3rd applicant Samuel Lekakeny Kinata in which he deponed that with the Authority of the other applicants they had strained for a long time to have the suit herein transferred to be heard by another court on the grounds that there have been several meetings between the Governor of Narok and the honourable Judge at one of the defendants premises. He further stated several of his friends have called him severally having seen the Judge and the said Governor together.

The applicants contend that as a result of the above he is apprehensive that Justice on the matter may not be served and that the further hearing of the matter the court will produce some negative judgement and hence the filing of the instant application.

The application was opposed by the Defendant by filing grounds of opposition and stated that the application is bad in law and that the plaintiffs wants to further delay the hearing of the matter which has been pending in court for 12 years and thus curtail the defendants right to expeditious disposal of their case and further that the same was frivolous and vexatious.

I have considered the application before me and the grounds of opposition filed by the defendants and the applicants' submissions in the matter. This is a matter in which the applicants are seeking my recusal on the ground that there exists a friendship between the court and the Governor of Narok and that because of the aforesaid the applicants are apprehensive that justice will not be served in the matter.

The applicant further contend that he had seen the said Governor together at his business premises and was also informed by his friends who had seen the two together and the issue for determination before me is whether the said application meets the threshold for the recusal of a Judge. Judicial recusal is underpinned by constitutional, statutory and common law principles. Under Article 160 of the Constitutional of Kenya Courts are enjoined to exercise and exhibit independence and justice done to all without any fear or favour. The applicant in the instant case contends that the court may favour some of the parties herein because of the allegation of the existence of knowledge and meeting between the Governor and the presiding Judge. The applicant in his supporting affidavit contend to have seen the two together but fails to state the place, date and time. He further contends that several of his friends saw the judge and the said Governor together but he also fails to state the names of friends, places and dates and the time his friends saw the judge together with the Governor and he also fails to get such independent affidavits from them to actually qualify the said statement.

Even though the applicant states that they filed a protest note on 19/12/2020 it must be stated that the said letter was presided by the delivery of a ruling that was not favourable to the applicant. As the record shows the applicants counsel being present for the taking of the ruling applied for my recusal the soonest I concluded reading the ruling, I ask if the ruling was in their favour, would this application for recusal be made? This court had the conduct of the matter herein since 25/7/2017 and until 19/12/17 the applicants never at any time applied for my recusal on the grounds stated in the application and it is my view that making the unsubstantiated allegation of meeting between the Governor and myself after the delivery of the ruling is mischievous. The applicants have not demonstrated reasonable apprehension which are objectives and the circumstance of the instant application does give rise to such reasonable apprehension at all.

The court of appeal in **Kalpana H. Rawal-Versus-Judicial Service Commission and 2 others (2016)EKLR (Nairobi court of appeal and cited in the holding by the East Africa court of justice in AG of Kenya –Versus-Anyang Nyong'o ApealNo.5 , Ref No. 1 of 2006 set out the test for bias as follows:-**

“we think the objective test of reasonable apprehension” is good law” the test is stated variously, but amounts to this: do the circumstances give raise to a reasonable apprehension, in the mind of the reasonable fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially “needless to say

A litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the judge, the court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded about the circumstance of the case.

Having looked at the existing jurisprudence and the affidavits on record by the parties I find that the instant application does not meet the reasonable test and thus the facts do not establish the alleged bias. **The supreme Court of Kenya in Gladys Boss Sholei-versus-the JSC and Another (2018)EKLR cited with Authority the case of Simonson –Versus-General Motor Corporation USDCP 425 RSupp574,578(1978) in which the court stated**

“Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.

From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge’s duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manouvering by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings.

From the above and considering the facts of the application before me I find that the allegation of bias is unsubstantiated and is tantamount to wanting to stop this court from discharging it’s judicial function and I consequently dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at NAROK on this 26th day of January, 2021

Mohammed N. Kullow

Judge

26/1/2021

in the presence of: -

CA:Chuma

Mr. Clapton for the plaintiff/applicant

Mr. Kere holding brief for Kemboy for the defendant/respondent

Mohammed N. Kullo

Judge

26/1/2021