



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 145 OF 2018

MUNGAI NGARUIYA.....PLAINTIFF

VERSUS

PAUL MAINGI MAKAU.....1ST DEFENDANT

PETER GICHANE NGORU.....2ND DEFENDANT

AGOSTINE KARIUKI KITHAE.....3RD DEFENDANT

BENEDICT VALA NDINGA.....4TH DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS.....5TH DEFENDANT

GULF TIMBER & HARDWARE SUPPLIES LIMITED...6TH DEFENDANT

RULING

1. In the Notice of Motion dated 4th March, 2020, the 6th Defendant has sought for the following orders:

a) The Honourable Justice Oscar A. Angote do recuse himself from these proceedings.

b) Costs of this application be provided for.

2. The Application is supported by the Affidavit of the 6th Defendant's Director who has deponed that the Judge herein is the Presiding Judge of the Environment and Land Court at Machakos; that the 6th Defendant/Applicant wrote to the Judicial Service Commission (JSC) to lodge an official complaint and Petition against the conduct of the Judge in the manner he has handled and handles the matters before him and that the conduct of the Judge has made the 6th Defendant lose total confidence in the fair determination of the matters before him.

3. The 6th Defendant's Director deponed that the 6th Defendant is the registered owner of the suit property known as L.R. No. 12715/11 (*hereafter referred to as the suit property*); that the 6th Defendant has been in occupation and possession of the suit property for over one (1) year and that the 6th Defendant/Applicant purchased the property on or about the 20th December, 2017 and a title was issued in its name on 12th March, 2018.

4. According to the 6th Defendant's Director, the Plaintiff filed this suit seeking that he be determined as the lawful owner of the property known as L.R. No. 12715/11 (*the suit property*); that the Plaintiff later filed an Application dated 23rd September, 2019 seeking a temporary injunction against the Applicant from trespassing on the suit property and that the Plaintiff exhibited a forged title that showed he was the registered owner of the property, but failed to show how he became the owner of the suit property.

5. It was deponed by the 6th Defendant's Director that in the absence of the Applicant or its advocate, the Judge issued a temporary injunction on the 25th September, 2019 without having heard the Applicant's case and/or without affording them a hearing and that the said order was to the effect that the Applicant's Company should leave the suit property while it is the registered owner and has always had possession of the land.

6. It was deponed that the 6th Defendant/Applicant filed an Application seeking to set aside the orders of 25th September, 2019 vide its Application of 30th September, 2019; that the court directed parties to file replies to the two Applications (of 23rd September 2019 and 30th September 2019) and submissions and that a Ruling on the Applications was scheduled for the 13th February, 2020.
7. The 6th Defendant's Director deponed that on 19th November, 2019, and in the absence of all parties and their advocates, and in clear fact that there was a pending Ruling before the Judge, the file herein was placed before the Judge for a mention; that the file was purportedly brought to the Judge vide the instruction and/or direction of an Officer from Mlolongu Police Station and that the file was irregularly placed before the Judge.
8. It was deponed that there was no Application by any of the parties in the dispute for the file to be placed before the Judge on the said 19th November, 2019; that there was no request by any of the parties that the file be placed before the Judge on the said 19th November, 2019 and that the file was placed before the Judge on the 19th November, 2019 by a police officer who had arrested the purported trespassers, contrary to the criminal procedure which demanded that the police officer books the alleged offenders at the police station and thereafter takes them to the Chief Magistrate's Court for arraignment and plea-taking and not to arraign them before the Environment and Land Court.
9. It was deponed by the 6th Defendant's Director that there was no Application for any alleged contempt which would have invoked the ELC's quasi-criminal jurisdiction; that in total disregard of the fact that a police officer brought the file to the Judge on allegations of certain persons having committed a criminal offence, and in the absence of a formal Application and further in the absence of counsels for the parties and the parties themselves, the Judge purported to issue an order in the manner of a mandatory injunction directing the Applicant to remove the machines that were on the suit property.
10. It was deponed that in total disregard that the matter was for mention and in the absence of the parties and their advocates, the Judge proceeded to issue substantive orders in the manner of a purported mandatory injunction directing the Applicant to remove the machines that were on the suit property.
11. According to the 6th Defendant, the said order of 19th November, 2019 is contrary to the principles of the rule of law, equity, good governance, integrity and transparency as articulated under Article 10 of the Constitution and is an abrogation of the rights of the Applicants as protected by Articles 25, 27, 40, 47 and 50 of the Constitution and a violation of Article 162(3) of the Constitution.
12. The 6th Defendant's Director deponed that the said order is equally a violation and fails to uphold the provisions of Rules 4 to 10 of the Judicial Code of Conduct and Ethics which provide for independence, impartiality, integrity, propriety, equality and non-discrimination, professionalism and accountability and prohibition against corrupt activities.
13. According to the 6th Defendant's Director, in issuing the orders of 19th November, 2019, the Judge acted outside his mandate and jurisdiction and in total disregard to the Constitution, the Judicial Service Act and the Judicial Code of Conduct and Ethics and has therefore breached the provisions of the law and is unfit to continue holding the position of a Judge and that the Judge has equally failed to promote and facilitate the independence and accountability of the Judiciary and the transparent administration of justice.
14. It was deponed that the Applicant has a suit being ELC No. 232 of 2018 seeking that it be determined as lawful owner of the suit property and that the Applicant has consistently prayed that the two suits, being ELC No. 145 of 2018 and ELC No. 232 of 2018 be heard together but the Judge has refused to grant the said Application without affording reasons as to why the two files cannot be heard together whereas they touch on the same subject matter and have the same parties.
15. The 6th Defendant's Director finally deponed that the gross misconduct, incompetence and misbehaviour of the Judge is bringing disrepute to the office of the Environment and Land Court Judge, Machakos and that the disclosed abuse of judicial independence by the named Judge threatens the integrity of the Judiciary as a whole.
16. In response, the Plaintiff deponed that he has been the registered owner of the suit property being L.R. No. 12715/11 since the year 1988; that he constructed a borehole on the property sometime in the year 2012 and that the allegations by the Director of the 6th Defendant that he has been in possession of the suit property for a year are mischievous and incorrect.
17. The Plaintiff deponed that the issue of whether the title he holds is fraudulent ought to be canvassed during the hearing of the suit and not in such an Application; that he filed an Application dated 20th July, 2018 for orders that the 1st to 5th Defendants be restrained from trespassing on the suit property and that when he was able to establish that the 6th Defendant was a person of interest on account of a suit that was filed by it in Mavoko Magistrate's Court CMCC No. 47 of 2018, he enjoined it in these proceedings.
18. It was deponed that the 6th Defendant was enjoined in this suit but their *mala fide* actions of trying to construct on the suit property left him with no choice but to have his lawyer file an Application dated 23rd September, 2019 seeking temporary orders to restrain the said 6th Defendant from trespassing on the suit property pending the hearing of the suit.
19. It was deponed that the matter came up for directions on the 29th October, 2019 as to determine how the three pending Applications were to be heard and that while the temporary injunction was in place, the 6th Defendant continued to have their agents trespass on the said property in a blatant act of defiance, which actions are contemptuous and in full disregard of the court orders.
20. It was deponed that the orders that were made by this court were merely to preserve the suit property and to have the presiding officer determine who is the legitimate owner; that the orders mandated the Officer Commanding Station Mlolongu to execute the same, which the said officers obeyed and that the Presiding Judge, if anything, was too lenient on a person who had contravened the order and had the person

released from the custody of the arresting officer with a stern warning.

21. The Plaintiff deponed that the Police officer acted within his mandate; that the consequences of breach of any terms as ordered by the court could warrant attachment of property or imprisonment of a term not exceeding six (6) months as envisaged in the Civil Procedure Rules Order 40 Rule 3 and that it is the duty of the presiding officer to jealously and zealously safe guard the orders made in their courts until they are varied or discharged.

22. In his submissions, the 6th Defendant's advocate submitted that by issuing the orders of temporary injunction without having heard the Applicant, the Judge acted contrary to the principle of the rule of law, equity, good governance, integrity and transparency as it is clearly articulated in the Constitution of Kenya under Article 50(1) which states that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

23. It was submitted that the Judge's behavior in granting the order without giving the Applicant a fair hearing was not only an action of partiality but also as an action of incompetence, gross misconduct and abuse of Office. Counsel relied on the case of **Philip K. Tunoi & another vs. Judicial Service Commission and another [2016] eKLR**, where the Court of Appeal held that:

“By long tradition, the rule has been that justice must not only be done, but it must also manifestly and undoubtedly be seen to be done. In short, there must be impartiality. At the core of this maxim is the need to inspire and maintain public confidence in the administration of justice and to obviate not only the appearance of unfairness but also the risk of unfairness.”

24. Counsel also relied on the **Bangalore principle of Judicial Conduct, value 2** which states that:

“Impartiality is essential to the proper discharge of the Judicial Office. It applies not only to the decision itself but also to the process by which the decision is made.”

25. It was submitted that the Judge's behavior described above displayed an act of favour towards the Plaintiff and bias against the Applicant and went contrary to the **Bangalore principle of Judicial Conduct, value 2:1**, which states that a Judge shall perform his or her judicial duties without favour, bias or prejudice and that the grounds of disqualification or recusal of presiding officers in legal proceedings were stated in the case of **Philip K. Tunoi (supra)** where the Court of Appeal, in establishing the standard for disqualification of members of the bench, relied on the case of **Porter v. Magill (2002) 1 ALL ER 465** which state that:

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

26. It was submitted that the law requires that the Judge must at all times be fair in determining the matters before him/her; that the Judge has proved that he will not deliver justice on this matter and therefore should recuse himself and that the Judge is also currently under investigation by the Judicial Service Commission on his conduct of how he has handled this matter.

27. The Plaintiff's advocate submitted that the Court has powers to grant ex parte injunctions on the basis of Affidavits until the Application is canvassed *inter partes* or as the Court may decide and that in cases of disobedience or of breach of any such terms, the Court granting the injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six (6) months unless in the meantime the court directs his release.

28. It was submitted that the actions of the 6th Defendant are in blatant violation of the court order and ought to have waited for the court to determine the two Applications; that courts do not act in vain and that if the 6th Defendant wants to be heard by the Court, it ought to come to court with clean hands in accordance with the principles of Equity.

29. The Plaintiff's counsel submitted that the court did not violate any of the principles encapsulated in the **Bangalore Principles of Judicial Conduct** and that the court followed the law to the latter as mandated by the Civil Procedure Rules, the Environment and Land Court Act as well as the Trespass Act.

30. This suit was commenced by way of a Complaint dated 20th July, 2018. In the Complaint, the Plaintiff sued the 1st to 5th Defendants and sought for a declaration that he is the legal owner of L.R. No. 12715/11 (*the suit property*). Alongside the Complaint, the Plaintiff also sought for injunctive orders.

31. The record shows that vide a Further Amended Complaint dated 23rd September, 2019, the 6th Defendant/Applicant was enjoined in the suit. Alongside the Further Amended Complaint, the Plaintiff also filed a Notice of Motion dated 23rd September, 2019 under a Certificate of Urgency. On 25th September, 2019, after hearing the Application *ex parte*, the court allowed the Application as follows:

“1. That a temporary injunction be and is hereby granted restraining the 6th Defendant whether by themselves or their agents from trespassing on the property known as Land Reference 12715/11 until 9/10/2019 when the Application will be heard inter partes.

2. That the Officer Commanding Station Mlolongo do enforce the orders of this court.”

32. The 6th Defendant/Applicant was served with the Application dated 23rd September, 2019 together with the order of the court and filed a Replying Affidavit on 30th September, 2019. On same day, the 6th Defendant filed a Notice of Motion dated 30th September, 2019 in which it sought to review and set aside the *ex parte* orders of 25th September, 2019.

33. This court certified the 6th Defendant's Application as urgent and directed the Application to be heard on 9th October, 2019, which is the same day the Plaintiff's Application was to come up for hearing. However, the court did not vary its earlier orders of injunction. The said two Applications were never heard on 9th October, 2019. Instead, they were adjourned to 29th October, 2019. All the parties were directed to file submissions. The matter was then slated for mention on 20th February, 2020.

34. On 19th November, 2019, Sergeant George Mala whose police number is 86289 approached the court and informed the court he had arrested one Victor Muema who had trespassed on the suit property contrary to the order of the court. The said Victor Muema informed the court that he was employed by the 6th Defendant to guard its machines, and that although he had been arrested alongside his employer the previous day, his employer had been released.

35. While ordering for the release of the 6th Defendant's employee, this court stated as follows:

"There is no evidence of disobedience of the court order. The arrested person is released. The machines on site to be removed by the Defendants within 3 days."

36. The 6th Defendant/Applicant is aggrieved with the above order and is seeking for the disqualification of the court on the ground that the said order was given *ex parte*, and in the absence of the parties. According to the Applicant, it has lodged a complaint with the Judicial Service Commission for the removal of the Judge, and that this court is biased.

37. In the case of **Kalpna H. Rawal vs. Judicial Service Commission & 2 Others (2016) eKLR** the court emphasized that there must be credibility to the allegations made concerning why an officer sitting in a court or tribunal would be deemed to be biased so as to disqualify himself. The court stated as follows:

"An application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties: the Judge must, without more, recuse himself. Such is the situation where a Judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of a Judge... It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn."

38. In the case of **Robert Tom Martins Kibisu vs. Republic [2018] eKLR**, the Supreme Court stated as follows:

"[61] From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in Tumaini v. Republic [1972] EA LR 441 Mwakasendo J. held that "in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people."

[62] Further in Nathan Obwana v. Robert Bisakaya Wanyera & 2 others [2013] eKLR, Chitembwe J., outlined the local jurisprudence on seeking recusal of a judge thus:

"In Kenya the Court of Appeal in the case of Republic v. Mwalulu & 8 Others: [2005] 1 KLR the court did set up the principles on which a judge would disqualify himself from a matter and stated as follows:

1. When the courts are faced with such proceedings for the 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.

2. 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 a bias in the mind of the Judge, Magistrate or Tribunal.

3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually 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.

4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself."

[63] Chitembwe J, in that case proceeded to hold that more apprehension of bias cannot be a ground for recusal. That the allegations of bias must be factual and proved. In that context, he stated thus:

“I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased, then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing, then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter.”

[64] We fully agree with the foregoing jurisprudence as regards allegations of bias on the part of a judge and in the application before us, no cogent evidence has been placed before the Court to warrant a finding of bias being made on the part of the presiding judge even if we had the jurisdiction to entertain such a complaint. While a petition filed by the Justice has been cited for the Court, we find this not sufficient as evidence of bias. The applicant’s allegations are not only based on apprehension, but on conjuncture.”

39. The 6th Defendant has not denied that by 19th November, 2019 when one Victor Muema was arrested and presented to this court for disobeying the order of the court, there was an order restraining the 6th Defendant from trespassing on the suit property. The 6th Defendant has also not denied that indeed, this court had directed the OCS Mlolongo to enforce its orders. If that is so, one wonders how the police were required to enforce the orders of the court other than arresting those who disobey it.

40. The court having restrained the 6th Defendant or its agents from trespassing on the suit property, and the court having directed the OCS to enforce its orders, any reasonable man will conclude that there was no element of bias on the part of the court when he released from custody the 6th Defendant’s agent and directed the 6th Defendant to remove the machines which the arrested person was guarding from the suit property.

41. The order of this court of 19th November, 2019 was made in pursuance of an already existing order and in furtherance of the inherent powers of this court as stipulated under Section 3A of the Civil Procedure Act. Indeed, it was incumbent upon the 6th Defendant’s counsel to accompany the 6th Defendant’s agent who had been arrested to court and plead his case.

42. Instead, the 6th Defendant is accusing the same court which had released the said agent from custody for being biased, and for directing it to comply with the orders of the court by removing its machinery from the suit premises. Any reasonable person can deduce that the court was not biased while issuing the order of 19th November, 2019.

43. In any event, even if the court erred in the issuance of the orders of 19th November, 2019, the 6th Defendant’s recourse was to either move the court to set aside the said order or file an Appeal in the Court of Appeal. Just because a party is aggrieved by an order of the court, or the manner in which such an order was given, cannot be a valid ground for recusal of a Judge from the case.

44. The test for recusal of a Judge from a matter on the ground that he is biased is objective, and the facts constituting bias must be specifically alleged and established. The twin test for recusal of a Judge has not been met by the 6th Defendant in this case.

45. For those reasons, I dismiss the Application dated 4th March, 2020 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE