



Continental Credit Finance Limited (In Liquidation) v Wanjohi & 2 others (Environment & Land Case 339 of 2011) [2024] KEELC 651 (KLR) (12 February 2024) (Ruling)

Neutral citation: [2024] KEELC 651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 339 OF 2011
JA MOGENI, J
FEBRUARY 12, 2024
FORMERLY HCCC NO. 209 OF 2005**

BETWEEN

CONTINENTAL CREDIT FINANCE LIMITED (IN LIQUIDATION) PLAINTIFF

AND

ISAAC GATHUNGU WANJOHI 1ST DEFENDANT

IGAINYA LIMITED 2ND DEFENDANT

PRINCIPAL REGISTRAR OF TITLES 3RD DEFENDANT

RULING

1. Before me is the 1st Defendant/Applicant's application dated 13/12/2023 brought pursuant to Section 6, 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules}} and all other enabling provisions of the law. The application seeks for the following orders:
 1. Spent.
 2. That this Honorable Court be pleased to direct that this suit be heard by a different judge from the judge who will be hearing ELC Case No 162 of 2019 (Spartan Developers Ltd v The Official Receiver and Interim Liquidator of Continental Credit Finance Ltd) (Hereinafter referred to as "ELC No 162 of 2019).
 3. That costs of this application be provided for.
2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Isaac Gathungu Wanjohi, the 1st Defendant/Applicant herein sworn on the 13/12/2023. I do need to reproduce the same.



3. The application is opposed. There is a Replying Affidavit by Cyrus Njenga, counsel for the Plaintiff/Respondent herein, sworn on 25/01/2024. The Plaintiff/Respondent argues that this application is not only frivolous but another blatant attempt on the part of the 1st Defendant to delay these proceedings, previous attempts having been unsuccessful. It is the Respondent's contention that the Applicant has not provided a justifiable reason for the case to be heard by a different judge, suggesting that the Applicant is engaging in forum shopping. The Plaintiff/Respondent highlights that ELC 162 of 2019 has been stayed pending the determination of this case, indicating that moving this case to a different court would not be necessary.
4. Additionally, counsel clarified that while both cases involve the same property, they have different causes of action. The Respondent accuses the Applicant of attempting to delay proceedings, citing previous instances where the Applicant sought adjournments and made additional applications. They assert that the continuous delays are a denial of access to justice and a violation of constitutional rights. Therefore, they request that the application be dismissed with costs to the Plaintiff/Respondent.
5. On 29/01/2024, counsels agreed to file written submissions to the application and the Court gave directions on the same. Both parties duly submitted and I have considered them. The 1st Defendant/Applicant's written submissions are dated 31/01/2024 and filed on the even date while the Plaintiff/Respondent's submissions are dated 6/02/2024 and filed on the even date.
6. I have considered all the arguments raised herein. The question for determination is whether the present application is merited.
7. The Applicant has sought for an order to be made by this Court directing that this suit be heard by a different judge from the judge who will be hearing ELC Case No. 162 of 2019 (Spartan Developers Ltd v The Official Receiver and Interim Liquidator of Continental Credit Finance Ltd) (Hereinafter referred to as "ELC No 162 of 2019). It has been contended that ELC 162 of 2019 is pending before this Court.
8. The 1st Defendant/Applicant's counsel has submitted that though it is possible for justice to be done, it is also necessary that justice is seen to be done. The Applicant argues that both this suit and ELC No. 162 of 2019 involve the same subject matter, namely the ownership of the "Suit Property." In both cases, different parties are claiming ownership based on their own set of facts. They assert that each party has the right to be heard impartially by a court that has not taken a position on the matter.
9. The Applicant contends that if the same judge hears both cases, it may lead to a violation of Article 48 of *the Constitution*, as the outcome of one case could influence perceptions or decisions in the other. Therefore, they advocate for one of the matters to be transferred to a different court for determination by a different judge to ensure fairness and impartiality. He asserts that this approach aligns with the principles of fairness and justice, and they request that the application be allowed.
10. The Applicant also submitted that he will demonstrate in the course of his submissions that it is not practically possible for one judge to hear two cases involving 3 different parties with reference to the same suit property whose ownership is in conflict and present an impartial judgment in both matters guarantee an equal right to fair hearing to both parties. He submits that the Plaintiff's argument that ELC Case No. 162 of 2019 seeks specific performance rather than ownership of the property is flawed.
11. The 1st Defendant/Applicant argues that any decree for specific performance in ELC Case No. 162 of 2019 would effectively determine ownership of the property. Alternatively, if ELC No. 339 of 2011 is heard with reference to ownership, it would result in a decision in rem, affecting the rights of all parties. The Applicant asserts that the same judge hearing both cases would lead to influence from the first



case, compromising impartiality. He highlights the interconnected nature of the suits and the potential for one judgment to affect the outcome of the other.

12. The Applicant emphasizes the importance of fair hearing and access to justice, advocating for each case to be heard by a different judge to ensure impartiality and unbiased decision-making. He argues that a stay of proceedings in one case does not address the fundamental issue of potential influence on subsequent cases. Therefore, he recommends separate judges for each case to achieve fair and independent determinations.
13. On the other hand, the Plaintiff/Respondent's counsel submitted that this suit was instituted in 2005 and the Plaintiff's prosecution case had been closed and was subsequently re-opened to admit crucial evidence. On 7/12/2022, the court granted leave to the Defendants to file additional list and bundles of documents and/or witness statements if necessary which they have failed to do so to date. That the 1st Defendant has always actively participated in these proceedings from its institution and has had numerous opportunities to have the issues resolved but chose not to raise them.
14. Counsel added that on 9/12/2019, parties to ELC No. 162 of 2019 taking notice of this suit entered into a consent to have that matter stayed pending determination of this suit; the stay continues to be in force since then. That the stay of ELC 162 of 2019 does not prejudice the determination of this matter in any way. The alleged bias on the judge is speculative/unfounded and does not warrant recusal. That notwithstanding, the circumstances of the two transactions are separate and the alleged transaction in issue herein occurred first. The plaintiff being the common party in both suits intends to successively prosecute this matters in an expeditious manner with the present suit being concluded first.
15. Further to the above, the Plaintiff/Respondent submitted that the Applicant has failed to clearly bring out his case against the grounds for judges to recuse themselves. The present application does not satisfy any of the grounds listed in the [*Judicial Service \(Code of Conduct and Ethics\) Regulations*, 2020](#). That the alleged "bias" by the judge is speculative/unfounded and does not warrant a recusal in this instance. Under the doctrine of the duty to sit, a judge is not required to recuse themselves unless there are compelling reasons not to sit. Recusal is a matter of judicial discretion and Judges must recuse themselves whenever they feel they may not appear to be fair or where they feel their impartiality would be called into question the test for recusal of a member of the bench is clearly brought out in [*Gladys Boss Shollei v Judicial Service Commission & another*](#) [2018] eKLR and *JRL EX CJL* (1986).
16. On the orders of stay of proceedings, the Plaintiff/Respondent submitted that the instant Application is marred with material non-disclosure of facts and bases its grounds on speculation and unsubstantiated prejudice which will undoubtedly not even give if a leg to stand. In asking this Court to grant the prayers herein, the applicant is feigning unfairness and injustice. The submission of the claim that there will be occasioned prejudice in the ruling of the two suits owing to the similarity of facts is false and misleading. As the facts in ELC No. 162 of 2019 are different to that of this suit and so are the cause of action and remedies sought. Furthermore, stay of proceedings is not justified as stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct litigation.
17. Indeed, it is a well-established principle that justice must not only be done but should always be seen to be done. In the case of [*Alliance Media Kenya Limited v Monier 2000 Limited & Njoroge Regeru*](#) HCCC No. 370 of 2007 (eKLR), Warsame J did state as follows;

“In my understanding, the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice.....justice is deeply rooted in the public having confidence and trust in



the determination of disputes before the court. It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made.”

- 18 I will begin by citing from the Ruling of Majanja J in the case *Okiya Omtatab Okoiti & Another v Attorney General & 3 Others* [2014] eKLR, which I wholly adopt as follows-

“It is the right of every litigant to make an application for the Judge to recuse himself or herself. The Court is obliged to consider it and the test for determining such an application now propounded by our Courts in several cases including *R v Jackson Mwalulu and Others* CA Civil Appl. No. NAI 310 of 2004 (Unreported) is whether a reasonable person seized of the facts will conclude that the Judge hearing the matter will be biased. In *Republic v David Makali and Others*, CA Criminal Application Nos NAI 4 and 5 of 1995 (Unreported) Tunoi JA stated that,

“the test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where such allegation is made, the Court must carefully scrutinize the affidavit on either side ...” In both cases the Court emphasized the need to disallow frivolous application which would tend to undermine the public confidence in the Judiciary.”

19. The main ground relied upon by the 1st Defendant/Applicant in support of his application is that this Court will not arrive at a fair and just determination of the suit because of bias. It is the 1st Defendant’s counsel’s submission that each party has the right to be heard impartially by a court that has not taken a position on the matter. I note that the 1st Defendant is not a party to ELC No. 162 of 2019. The Plaintiff/Respondent has also submitted that the said suit has been stayed pending the determination of this present suit. The stay order has not been set aside.
20. The test to be applied in determining whether a judicial officer should recuse/disqualify himself or herself over allegation of bias has been set by courts both within and beyond our jurisdiction. In the case of *Attorney General of Kenya v. Peter Anyang Nyong'o & Others*, East African Court of Justice Application No. 5 of 2007 (Ref. No. 1 of 2006), the East African Court of Justice stated at paragraphs 34 and 35 as follows: (emphasis added)

“There are two categories of scenarios. In the first, where it is established that the judge is a party to the cause or has relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause... In the second category, where the judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances or relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination.”

21. The 1st Defendant/Applicant’s only concern is that he is apprehensive that this court is likely to be biased because it has preconceived views on account of the contention that this Court is also handling ELC No. 162 of 2019 which involves the same subject matter and/or issue of ownership. I have considered the parties’ submissions and their authorities. It is my considered view that the 1st Defendant did not present either fact or law to substantiate their prayer for my recusal.



22. I am guided by the decision in the case of *The President of the Republic & 2 Others v South African Rugby Football Union & 3 Others* (Case CCT 16/98) where the court dealt with the test of bias in its judgment and stated as follows at paragraph 45:

“The test of bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in the dissenting judgment by de Grandpre J in *Committee for Justice and Liberty et al v National Energy Board*:

“...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is 'what would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude.'”

...the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case...

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application.” (emphasis mine).

23. In the case of *Kaplan & Stratton v. L.Z. Engineering Construction Ltd & 2 Others* [2001] eKLR, the Court of Appeal stated as follows:

“Shah JA in *Kenya Shell Limited v James G.K Njoroge* (Civil Application No. Nai. 292 of 1998) (unreported) in which case there was an informal application for his disqualification referred to an English House of Lords decision in *Locabail Ltd v Bayfield Properties Ltd* [2000] 1 All. E.R. 65. At page 77 of that report their Lordships referred to a passage in the judgment of Callaway JA in the case of *Clenae Pty v Australia & Newzeland Banking Group Limited* (1999) VSCA 35, Vic SC wherein Callaway JA observed at para 89(e):

'As a general rule, it is the duty of the judicial officer to hear and determine the case allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.’” (emphasis mine)

24. For the reasons given hereinabove, it is my view that the 1st Defendant/Applicant has not laid sufficient basis upon which this Court should recuse itself. The 1st Defendant’s apprehension of bias in the circumstances of this case are unreasonable and unfounded. In the premises, I therefore decline to grant the orders sought in the 1st Defendant’s Notice of Motion dated 13/12/2023 and I hereby dismiss the same with costs to the Plaintiff.

25. Further order, hearing of this suit to proceed as scheduled on 12/03/2024.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2024

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MOGENI J

JUDGE

In the virtual presence of :-



Ms Maina holding brief for Dr. Arwa for the Applicant/Defendant

Ms Osicho appear with Ms. Mumo for the Plaintiff/Respondent

Ms. C. Sagina : Court Assistant

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MOGENI J

JUDGE

