



**Charles Muchui Mugwika, Liquidator of Abogeta Farmers Cooperative Society Ltd v CECM Lands, Housing, Urban Areas And Physical Planning Of The County Government of Meru & 8 others; Meru Youth Service & 3 others (Interested Parties) (Environment and Land Case Judicial Review Application E001 of 2024) [2024] KEELC 6519 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6519 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E001 OF 2024**

**CK NZILI, J**

**OCTOBER 2, 2024**

**BETWEEN**

**CHARLES MUCHUI MUGWIKI, LIQUIDATOR OF ABOGETA FARMERS COOPERATIVE SOCIETY LTD ..... EXPARTE APPLICANT**

**AND**

**CECM LANDS, HOUSING, URBAN AREAS AND PHYSICAL PLANNING OF THE COUNTY GOVERNMENT OF MERU ..... 1<sup>ST</sup> RESPONDENT**

**CECM PUBLIC SERVICE AND LEGAL AFFAIRS OF COUNTY GOVERNMENT OF MERU ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER LANDS, HOUSING, URBAN AREAS AND PHYSICAL PLANNING OF COUNTY GOVERNMENT OF MERU ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR PHYSICAL PLANNING COUNTY GOVERNMENT OF MERU ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**EVANS MAWIRA KAARIA, MCA MITUNGUU WARD ..... 6<sup>TH</sup> RESPONDENT**

**ROYFORD KIMATHI MITUNGUU WARD ADMINISTRATOR .... 7<sup>TH</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MERU ..... 8<sup>TH</sup> RESPONDENT**

**OFFICE OF THE MERU COUNTY ATTORNEY ..... 9<sup>TH</sup> RESPONDENT**

**AND**

**MERU YOUTH SERVICE ..... INTERESTED PARTY**



**POOR HANDMAIDS OF JESUS CHRIST CONGREGATION .... INTERESTED PARTY**

**EAST AFRICAN PENTECOSTAL CHURCH AND SCHOOL .... INTERESTED PARTY**

**MWAMBA FAMILY ..... INTERESTED PARTY**

### **RULING**

1. When this matter first came up under a certificate of urgency on 12.2.2024 before the presiding ELC Judge Hon. Mr. Justice Charles Yano the court certified the application urgent and allocated it to this court for consideration on 20.2.2024.
2. Counsel for the *ex parte* applicant appeared before this court on 20.2.2024 and argued the certificate of urgency.
3. By a ruling dated 21.2.2024, leave to commence judicial review proceedings was granted. The substantive notice of motion was directed to be filed and served within 21 days. Leave was also to act as a stay of the implementation, alienation subdivisions, transfer, leasing, charging or any other action taken without the concurrence knowledge, involvement and consultation with the liquidator. The suit land was also inhibited until the proceedings herein are heard and determined.
4. The *ex parte* applicant was ordered to furnish security by way of an undertaking as to damages for Kshs.10,000,000/= within 3 days otherwise the stay orders would lapse. Lastly, the court ordered for service of the notice of motion by way of a newspaper advertisement for any parties affected by the proceedings to participate in the hearing.
5. A mention date of 22.5.2024 was issued by the court. Pursuant to the directions, the undertaking was filed on 23.2.2024 by the liquidator Abogeta Farmers Cooperative Society Ltd. The advertisement was also placed in the newspaper.
6. The 6<sup>th</sup> & 7<sup>th</sup> respondents filed a preliminary objection dated 20.5.2024. On the other hand, the 2<sup>nd</sup> interested party filed a replying affidavit dated 31.5.2024.
7. Further the 8<sup>th</sup> and 9<sup>th</sup> respondents filed a preliminary objection dated 29.5.2024 that the term of the liquidator had expired hence he had no *locus standi* to institute the proceedings and the instant notice of motion suffers the doctrine of *res judicata* in view of judgment in ELC Petition No. E003 of 2020 and that the court lacks jurisdiction.
8. The *ex parte* applicant also filed a further affidavit sworn on 29.5.2024. Of importance to this notice of motion is Gazette Notice No. 2121 annexed as CMM – 09, showing that the mandate of the liquidator had been extended from 8.3.2024 for six months before the 6<sup>th</sup> and 7<sup>th</sup> respondents entered appearance.
9. The *ex parte* applicant averred that in the citation he has sued as the liquidator of Abogeta Farmers Cooperative Society Ltd.
10. On 22.5.2024 this court gave directions regarding a notice of motion and a preliminary objection by the 8<sup>th</sup> and 9<sup>th</sup> respondents all dated 28.2.2024 and 29.5.2024 respectively. The directions were that the respondents and the interested parties file and serve any responses to the notice of motion within 7 days. That both the preliminary objection and the notice of motion be canvassed together by way of



written submissions to be filed by 15.6.2024. That all parties to the case to be served and the matter to come for judgment on 3.7.2024.

11. On 4.6.2024 the 8<sup>th</sup> and 9<sup>th</sup> respondents filed the application dated 4.6.2024. The same was directed to be served for hearing on 17.6.2024. Due to network problems, the court directed the same be served for hearing on 25.7.2024. The respondents were given time to respond to the application by 15.7.2024 and the same be canvassed by way of written submissions. The judgment due for 3.7.2024 was also stayed.
12. In the application before the court, the court is asked to stay, vary and or set aside directions and orders issued on 22.5.2024, arrest or stay delivery of the judgment regarding the notice of motion dated 22.5.2024 to recuse itself from the matter and place it for hearing by another court.
13. The grounds are set out on the face of the motion and in the supporting affidavit of Dr. Kiambi J.T Atheru sworn on 4.6.2024. On the grounds, the 8<sup>th</sup> and 9<sup>th</sup> respondents state that after the judgment in Meru ELC Petition No. E003 of 2020 delivered on 6.7.2022 the court made a ruling dated 14.2.2024 on applications dated 11.7.2023, 30.7.2023 and 11.7.2023 regarding L.R No. Nkuene/Mitunguu/190, the contention being between Abogeta Societies and Abogeta Farmers Cooperatives Society Ltd to which this court has already made a determination and where the 8<sup>th</sup> respondent has preferred an appeal.
14. Further, the 8<sup>th</sup> respondent contends that the issue is whether the land was reserved for Abogeta Farmers Cooperative Society Ltd or Abogeta Societies. Again, the 8<sup>th</sup> respondent states that due to the pending appeal, the instant motion is anchored on the decision now before the Court of Appeal as Appeal No. 101 of 2024, where the court ignored evidence tendered before it and therefore its mind is already made and or can be perceived as such, based on its findings in the former decisions.
15. The 8<sup>th</sup> respondent avers that the tenets for natural justice call not for not only justice to be done but to be seen to be done and that the applicant feels and has demonstrated that having preferred an appeal as to ownership of L.R No. Nkuene/Mitunguu/190 and the same subject land being at the core of the instant motion it is only fair and in the interest of justice for the application to be heard and determined by another court.
16. The gist of the application is that the court handled Meru ELC Petition No. E003 of 2020, where it made some findings in paragraph 78 and also in the ruling delivered on 14.2.2024 over was the reserved owner of the suit land was.
17. That since the 8<sup>th</sup> respondent has prepared an appeal on the said ruling as Nyeri Civil Appeal No. E101 of 2024, the court has already rendered its mind based on the previous decision. That the court has decided relevant information for instance striking out of the land registrar's affidavit and that of the 8<sup>th</sup> respondent in its ruling of 14.2.2024 and fails to distinguish Abogeta Societies, Abogeta Cooperative Society Ltd and Abogeta Farmers Cooperative Society Ltd which issues are subject for determination in the appeal so preferred.
18. That the 8<sup>th</sup> & 9<sup>th</sup> respondents fail to understand what information the court's decision not to address the issue of the *locus* of the *ex parte* applicant that was brought to its attention taking into account the expiry of the latter's mandate as per the Gazette Notice number and notice of appointment of liquidator dated 10.3.2024.
19. The applicants urge that unless the orders sought were granted the course for justice shall not be secured and rightly so.
20. The application is opposed through a replying affidavit of the *ex parte* applicant sworn by Charles Muchai Mugwika on 10.6.2024. It is averred that after the judgment in Meru ELC Petition No. E003



- of 2020, the decree was extracted and served upon the land registrar who acted on it and titles for L.R No's. Nkuene/Mitunguu/1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and 1975 were canceled and reverted to the original title L.R No. Nkuene/Mitunguu/190.
21. The *ex parte* applicant averred that the decree of this court in the previous suit was not challenged on appeal or at all and that in the judgment of 6.7.2022 as per the annexed decree paragraph 84-88 was clear the effect of a cooperative society already during liquidation and the status of its assets.
  22. The *ex parte* applicant averred that once the title to the parcel reverted to the original status, the respondents deliberately and in abrogation of the decree moved in a purported public participation exercise on 10.8.2023, to alienate the land passed minutes and completely ignored the *ex parte* applicant and the decree of the court.
  23. Similarly, the *ex parte* applicant termed the court as *functus officio* after its judgment of 6.7.2022 and in the ruling of 14.2.2024, where it analyzed the facts and the law in the motion dated 11.5.2023, 11.7.2023 and 30.7.2023.
  24. Equally, the *ex parte* applicant averred that the applicants cannot approbate and reprobate simultaneously and it cannot be that when it suits them, albeit through misinterpretation of the judgment dated 6.7.2022 it is good but when their tricks are discovered, the presiding judge is bad and should recuse himself.
  25. The *ex parte* applicant averred that annexure KA "4" was a mere draft which has not been lodged with the Court of Appeal. Additionally, the *ex parte* applicant averred that the applicants were just playing politics and have not demonstrated any case for recusal otherwise what the court has done is demonstrated consistency in the application of the law and this cannot be a basis for recusal.
  26. The *ex parte* applicant averred that the route to drinking from the water of justice is straight and narrow and it would not be obstructed by spurious unnecessary applications and allegations. He added that this court will apply the law as it is and the fear by the applicants that it will be so applied, is not a basis for seeking the recusal of a judicial officer.
  27. Moreso, the *ex parte* applicant averred that the very obvious likelihood of bias is what should lead to the recusal of a judicial officer, which the applicants have not demonstrated.
  28. With leave of court parties filed written submissions to the application the applicants rely on written submissions dated 13.6.2024.
  29. On the guiding principles to apply the applicants relied on [\*Jan Bonde Nielsen vs Heramn Phillipus Steyn & others\* \(2024\) eKLR](#), [\*P.K Tunoi & another vs Judicial Service Commisison & another\* \(2016\) eKLR](#), [\*Jasbir Rai & others vs Tarlochan Singh Rai & others\* \(2013\) eKLR](#), [\*Metropolitan Properties \(F.G.C\) Ltd vs Hannon & others\* \(1969\) 1 QB 577](#), [\*Charity Muthoni Gitahi vs Joseph Gichangii Gitahi\* \(2017\) eKLR](#), [\*Kalpana H Rawal vs J.S.C & others\* \(2016\) eKLR](#) and [\*Republic vs Assa Kibagendi Nyakundi\* \(2022\) eKLR](#).
  30. The *ex parte* applicant relied on written submissions dated 10.6.2024. Relying on [\*Jan Bonde Nielsen vs Herman Phillip\* \(supra\)](#) and [\*Rai vs Rai\* \(supra\)](#) the *ex parte* applicant submitted that the test had not been met by the applicants since the mere fact of participation in the previous suit and the ruling made on 6.7.2022 and 14.2.2024 were not a basis for alleging bias. Further it was submitted that mere pendency of an appeal against the ruling dated 14.2.2024 was not a basis to justify recusal.
  31. The application before this court seeks for an order of *certiorari* to call for and bring into this court for purposes of quashing the minute's proceedings and decisions made by the respondents on 10.8.2023 purporting to change reservations, plans and survey plans of L.R No. Nkuene/Mitunguu/190. The



second prayer is for prohibition from implementing the decision made on 10.8.2023, 25.8.2023 and 22.8.2023.

32. The basis upon which the court is asked to grant the reliefs sought set out on the face of the application is that; the liquidator was not involved in the process of alienation of its land yet the property vests on it by virtue of Section 65 of the *Cooperative Societies Act* that liquidation is still on the purported public participation exercise to award the land to interested parties was unlawful and illegal; the change of reservation was illegal; the respondents purported to rely on the decree of this court in the previous suit but acted in contempt of the same and the clear guidelines set therein.
33. In *Rawal v JSC & another* (*supra*) the court observed that an application for recusal of a judge was a necessary evil since on the one hand, it calls into question the fairness of a judge who has sworn to do justice impartially, by the *constitution* without any fear, favour, bias, affection, ill-will, prejudice, political or other influence, while on the other hand, the oath of office notwithstanding, the judge is also human and the *constitution* guarantees all litigants a right to a fair hearing by an independent and an impartial judiciary.
34. In *Republic vs Gombg* (1993) A.C 646 the test for bias was set as whether a fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the judge was biased.
35. In *Attorney General (K) v Prof Nyong'o & others* (EACJ) Application No. 5 of 2017 the court observed that the test is whether 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 did not and will not apply his mind to the case impartially.
36. The test is twofold, an objective test that the person considering the alleged bias must be reasonable and the apprehension of bias must also be reasonable in the circumstances of the case. See *R.V v SRD* [1977] 3 SCR 484.
37. In *Gladys Boss Shollei v J.S.C & another* [2018] eKLR, the court held that recusal and re-assignment of matters should not be lightly undertaken but in a proper case, the court must recuse themselves if there are valid reasons, since a court must sit if there are no grounds for disqualification in law and in fact. The court observed that the duty to sit helps protect the independence of the court against maneuvering by parties hoping to provide their chances of having a matter determined by a particular judge so as to gain forensic delay and interpretation of proceedings.
38. In *K.H Rawal vs J.S.C* (*supra*), the court warned that a court ought not to accede to every application for recusal primarily when it is not based on reasonable grounds otherwise it would encourage litigants to believe that in seeking the disqualification of a judicial officer, they will have their cases tried by someone who they think will likely decide the dispute in their favour.
39. In *Republic v C.S for Transport and Infrastructure & others* [2014] eKLR, the court held that mere apprehension on the part of a litigant that a judge will be biased, since a strongly and honestly felt anxiety is not enough. See C.S
40. In *David Onyancha v J.S.C & another* [2018] eKLR the court observed that even where a judge finds that even after holding a particular position he is still able to rise above that position and is willing to be persuaded in such a case he can still persuade the parties that he wishes to hear the matter and will be open-minded. See *NBK v Anaj Ware housing Corp Ltd* Petition No. 36 of 2014.



41. In *Rai v Rai* (*supra*) the court held that the circumstances calling for recusal were not cast on stone and that the perception of fairness of conviction of moral authority to hear the matter is the proper test of whether or not participation of judicial officer is called for.
42. The court said that the object of recusal is that justice between the parties is uncompromised, that the due process of law be realized and be seen to have had its role and that the profile of the rule of law in the matter in question be seen to have remained uncompromised.
43. Regulation 21 of the *Code of Conduct & Ethics* 2020 under the *Judicial Service Act* stipulates instances when a judge can recuse himself. They include where his impartiality might reasonably be questioned and has actual bias or prejudice against a party.
44. In *Joseph Maina Theuri vs Gitonga Kabugi & 3 others* (2013) eKLR, the court observed that such matters or grounds that would entitle an applicant to apply for review or appeal were not themselves sufficient grounds for judgment recusal.
45. The court said that the judge equally has, where there are no grounds for an ethical obligation, to hear and determine matters brought before the court until a valid basis for recusal is established and that in deciding for or against recusal the presiding judge must carefully balance the thin line separating the two ethical obligations.
46. The court has carefully considered the application and has cautioned itself that it is not sitting on appeal against its own past decisions alluded to by the parties. The court does not doubt its fidelity to its oath the constitutional national principles and values and the Bill of Rights. The applicants allege bias of the court in the manner it interpreted Abogeta Societies as the same as Abogeta Farmers Cooperative Society Ltd.
47. The 8<sup>th</sup> & 9<sup>th</sup> respondents have not appealed against the decree of this court. Instead, the decision sought to be brought for quashing was made by the 8<sup>th</sup> & 9<sup>th</sup> respondents in implementing the decision's judgment or decree of this court.
48. Judicial bias is the judge's bias toward one or more of the parties to a case over which the judge presides. Finding in favor or against a party is the order of the day in an adversarial jurisdiction such as ours. The 8<sup>th</sup> & 9<sup>th</sup> respondents have not appealed against the judgment delivered by this court on 2.6.2022. Directions were given by this court that the preliminary objection raised by the 6<sup>th</sup> – 9<sup>th</sup> respondents be canvassed alongside the main motion.
49. Other than recusal, the applicants seeking for stay, variation and or setting aside the directions and order issued on 22.5.2024. The discretion of the court on the manner to hear an application for judicial review is governed by law and the *constitution*. The court has to hear and determine matters without delay. The directions were aimed at fast-tracking the hearing and determination of the notice of motion preliminary objection. How the 8<sup>th</sup> and 9<sup>th</sup> respondents were aggrieved by those directions is not clear. The purpose to be served by the said relief if granted is not clear.
50. Between 22.5.2024 and the filing of this application on 4.6.2024 the applicants have not said that they were impeded from complying with the court's directives. As a matter of fact the application before this court is on a cause of action which took place almost a year after the judgment delivered on 6.7.2022, which the 8<sup>th</sup> & 9<sup>th</sup> the respondents were happy to implement.
51. The basis upon which the applicants holds a strong view that Abogeta Societies and the *exparte* applicant are distinct requires factual evidence to adduce.



52. The 8<sup>th</sup> & 9<sup>th</sup> respondents are not saying that the directives made on 22.5.2024 and the pending judgment will deny them an opportunity to ventilate their defence to the notice of motion. Further, they have not tendered material on the distinction between Abogeta Societies and Abogeta Farmers Cooperative Society Ltd which this court has failed to consider or is not likely to consider in view of an alleged perceived bias.
53. Finding a party before a court horrible or wonderful cannot be a ground of recusal. See [Joseph Maina Theuri v Gitonga Kabugi \(supra\)](#) it is not enough for a party to simply allege that the party is dissatisfied or not happy with interlocutory orders and attribute it to speculative and unsubstantiated allegations of bias in applying to seek for recusal of a judge. Genuine reasons must be put forward.
54. In [Farah & another v Adan & another](#) [2024] KEELC 3751 (KLR) 18<sup>th</sup> April 2024 (Ruling) the court cited [Philip K. Tunoi v JSC \(supra\)](#) & [Republic v EPZA & others London Distillers \(K\) Ltd & others Exparte Erderm Property Ltd](#) [2020] eKLR, that for a judge to recuse himself the applicant must show that a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not and will not bring an impartial mind to bear on the adjudication of the case.
55. The court said that under Article 159 of the [constitution](#), it has to expedite the delivery of justice and administer justice with impartiality and in accordance with the law.
56. This court in determining the cases before it is duty-bound to apply the law and the [constitution](#) on facts and evidence presented by the parties. The court has a constitutional duty to sit in matters where it has a duty to sit to serve impartially to protect administer and defend the [constitution](#).
57. In [Michael Kungu Kigia v Agriculture Finacne Corporation & 5 others](#) [2019] eKLR the court held that recusal should not be used to cripple a judge from sitting to hear a matter. The court said that the doctrine and duty to sit recognizes the fact that having taken an oath of office a judge is capable of rising above any prejudices and also safeguarding the party's right to have their cases heard and determined before a court of law.
58. The applicants have raised issues of *res judicata* lack of jurisdiction and *locus standi*. All these are contained in a preliminary objection and not a replying affidavit to the notice of motion herein. The applicants have questioned what informed the court yet its attention was drawn to the lack of *locus* as per KA “S”.
59. Unfortunately, the 8<sup>th</sup> & 9<sup>th</sup> respondents are making spurious allegations when this court is yet to hear the preliminary objection. The application dated 4.6.2024 was made after the *exparte* applicant produced a gazette notice extending its mandate. Needless to say, I take it that the 8<sup>th</sup> & 9<sup>th</sup> respondents have blamed this court for not withholding its preliminary objection dated 29.5.2024 out of ignorance.
60. This court would not bend the law and act out of fear to avoid upholding the [constitution](#) especially when it is obvious that there is a gazette notice in place that has extended the mandate of the liquidator.
61. As to the distinctions of Abogeta Societies and Abogeta Farmers Cooperative Society Ltd being used as a ground of recusal again the 8<sup>th</sup> & 9<sup>th</sup> respondents appear unaware of all the pleadings in this matter including a further affidavit of the chairpersons of Gikongoro Farmers Cooperative Society Ltd, Kithangari Farmers Corp, Mt. Kenya East Cooperative Society Ltd who swore on 29.6.2024 attaching certificates of incorporation and denying shares in L.R No. Nkuene/Mitunguu/190.
62. While aware of all these pleaded facts, it is unfortunate that the applicants would wish the court to ignore the pleadings.



63. The upshot is I find no valid ground to recuse myself from this matter. The application dated 4.6.2024 is hereby dismissed with costs to the *ex parte* applicant. Judgment shall be delivered on 9.10.2024.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024**

**HON. C K NZILI**

**JUDGE**

In presence of;

C.A Kananu

Kerubo for the *ex parte* applicant

Wambua for 8 & 9<sup>th</sup> Respondents and holding brief for Mwirigi B for 6<sup>th</sup> & 7<sup>th</sup> Respondents

Mwirigi for 1<sup>st</sup> - 4<sup>th</sup> Respondents

Mutual for 2<sup>nd</sup> Interested party

