



Omar & 2 others v Kithindi & 2 others (Environment & Land Case 81 of 2019 & E051 of 2021 (Consolidated)) [2023] KEELC 21569 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 81 OF 2019 & E051 OF 2021 (CONSOLIDATED)
MN GICHERU, J
NOVEMBER 8, 2023**

BETWEEN

SALIM BIN MAHFUDH OMAR 1ST PLAINTIFF

MBARAK SALIM MAHFOUDH 2ND PLAINTIFF

AND

JOSEPH WACIRA KITHINDI RESPONDENT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E051 OF 2021**

BETWEEN

ROBERT MUTUKU MUTINDA PLAINTIFF

AND

JOSEPH WACIRA KITHINDI 1ST DEFENDANT

LAND REGISTRAR, KAJIADO 2ND DEFENDANT

RULING

1. This ruling is on the notice of motion dated 12/10/2023. The motion which is brought under articles 25 and 50(1) of the *Constitution of Kenya*, section 1A, 1B and 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law seeks the following orders.
 - i. Recusal of myself from any further participation and or dealing with this matter so that it may be allocated to another judge.



2. The motion which is supported by an affidavit sworn by Abdulrahman Mohamed, counsel for the applicant which has one annexure. There are also fourteen (14) grounds also dated 12/10/2023. The gist of the above material is as follows.
3. Firstly, the Applicant filed suit No. 131 of 2018 which is the lead suit in the consolidation having been filed at Machakos in the year 2008. This suit is no longer listed as among the suits before the court.
4. Secondly, on 13/3/2023, this court issued substantive orders during a mention which orders are tantamount to a summary determination of the suit.
5. Thirdly, the court has made a comment on the pending application for contempt before the same has been heard.
6. Fourthly, the court has granted exparte orders for the benefit of some parties hence creating confusion as well as lack of faith in the court.
7. Fifthly, the Applicant believes that the manner in which the orders have been granted imply that he will not obtain a fair hearing before this court.
8. Sixthly, the Applicant's application for review has not been certified urgent for six months.
9. Seventhly, the trial judge's attitude, behavior and conduct demonstrates bias herein and if the trial continues before him, there is likelihood of miscarriage of justice.
10. Eighthly, the Applicant feels that his right to a fair hearing under article 50(1) of the Constitution will be infringed if the trial continues in this court.
11. The motion is opposed by Robert Mutuku Mutinda who has sworn a replying affidavit dated 26/10/2023 in which he replies as follows.

Firstly, the lead case is 81 of 2019 and not case No. 131 of 2018 as per the order dated 30/10/2021. It is therefore misleading to say that the Applicants' case is the lead one.
12. Secondly, the motion is an abuse of the court process as it is based on hearsay, misrepresentation and falsehoods and does not meet the threshold for recusal.
13. Thirdly, the motion is meant to interfere with the decisional independence of the court. For these and other reasons, he prays for dismissal of the motion.
14. I have carefully considered the motion in its entirety including the affidavits, the annexure and the record. I find that the motion has no merit for the following reasons.
15. On the first ground, the Applicants' counsel has not brought to the attention of this court the fact that case no. 131 of 2018 is not listed among the consolidated cases. For the ten times that the case has been before me, the Applicant was represented on 9/6/2022, 9/11/2022, 17/4/2023 and 5/10/2023. He should have raised his concerns in court. He could also have done it administratively by writing the Deputy Registrar or through the various forums that we have like the court users committee or the bar/bench committee. This ground therefore lacks merit.
16. On the second ground of issuing substantive orders on a mention date, the record of 9/11/2022 will show that the Applicant and all other parties who were opposing the motion dated 1/8/2022 were given 7 days within which to file their responses. The case did not proceed on 30/11/2022 but by the time it came up on 13/3/2023, the Applicant had not yet filed his response. His counsel was also absent. The motion was not responded to within the seven days given on 9/11/2022. It was therefore



unopposed and an unopposed motion can be allowed at any time after the lapse of the timeline set for compliance. This finding covers the fifth and seventh grounds.

17. On the third ground of the court making a comment on the pending application for contempt before the same has been heard, neither the comment nor the date on which it was made have been given. Since the comment is unknown, there is nothing to say about it.
18. Looking at the fourth ground, it is not correct to say that the orders of 13/3/2023 benefited some parties. The order required the rent collected from suit premises be deposited in a joint account operated by three (3) counsel pending the determination of the rightful owner of the suit premises. Only the lawful owner would eventually benefit from the order and at the time of making the order and even now, we do not know that person.
19. The applicant's application for review was filed during the Easter recess. By then, the hearing date of the main suit had been fixed for the months of November and December. The application was not certified urgent for good reasons but orders for its expeditious disposal were given on 17/4/2023. As a rule only very urgent applications such as injunctions to stop sale of land or those to stop evictions are certified urgent. The application by the Applicant did not meet this threshold primarily because the money was to be deposited in a joint account and would be released to the rightful owner ultimately.
20. The *Judicial Code of Conduct and Ethics* provides the circumstances in which a judge may recuse himself in proceedings in which his impartiality might be reasonably questioned. They are to be found in paragraph 20(1) (a) of the Code and include the following.

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 the 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. Has 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. A member of the Judge's family has economic or other interest in the outcome of the matter in question.
21. In my case, the accusation against me is that of actual bias which falls under paragraph 20 (1) (d) of the code. The courts have come up with an objective test when considering whether a judicial officer shows a real possibility of bias. The test is as follows.

“Do 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 will not apply his mind to the case impartially?” See *Kalpna Rawal v Judicial Service Commission & 2 others* (2016) eKLR.

22. Applying the above test to the facts of this case, we find that the Applicant is not an informed member of the public. He does not know that his counsel was given sufficient time to reply to the application



that resulted in the order in question but failed to do so. He does not know that an application which is not opposed can be allowed ex-parte. He does not know that under Section 1A(3) of the *Civil Procedure Act*, a party and his advocate have a duty to assist the court to further the overriding objective of the Act and to participate in the processes of the court and to comply with directions and orders of the court. He does not know that his advocate failed to raise the issue of the non-listing of case No. 131 of 2018 even when he had ample opportunity of doing so. Had he known all this, probably he would not have instructed his counsel to file the application for recusal. The applicant in this case therefore fails the objective test.

For the above stated reasons, I find no merit in the motion dated 12/10/2023 and I dismiss it with costs.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 8TH DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

