



**Republic v Land Registrar Nyandarua & 4 others; Ngugi (Exparte Applicant) (Environment and Land Miscellaneous Application 9 of 2023) [2023] KEELC 21500 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21500 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 9 OF 2023  
YM ANGIMA, J  
NOVEMBER 2, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAND REGISTRAR NYANDARUA ..... 1<sup>ST</sup> RESPONDENT**

**PETER NGUGI KAINAMIA ..... 2<sup>ND</sup> RESPONDENT**

**JOHN MURAYA KAINAMIA ..... 3<sup>RD</sup> RESPONDENT**

**PETER MURAYA KAINAMIA ..... 4<sup>TH</sup> RESPONDENT**

**MICHAEL NGOTHO GITAHU ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**ELIZABETH WANGARI NGUGI ..... EXPARTE APPLICANT**

**RULING**

**A. Introduction and Background**

1. Vide a chamber summons dated April 27, 2022 brought under Sections 3 & 3A of the *Civil Procedure Act*, Cap 21, Order 53 of the Civil Procedure Rules, the *Law Reform Act* Cap.26 and all other enabling provisions of the law Ex Parte Applicant (the Applicant) sought leave to apply for the judicial review order of mandamus to compel the 1<sup>st</sup> Respondent and the holders of Title Nos. Nyandarua/Ol-Kalou/173 & 174 to restore the name of the late Munyao Kakunia (the deceased) in the register and to restore the deceased as the sole proprietor of the original Title No. Nyandarua/Ol Kalou/90.
2. The record shows that the leave sought was granted by the High Court sitting at Nyahururu on June 23, 2022. The Applicant thereafter filed a notice of motion dated 04.07.2022 seeking an order of



mandamus against the Respondents in terms set out in the chamber summons. The motion was based upon the statutory statement and verifying affidavit both dated April 27, 2022 which were filed with the application for leave.

3. The Applicant stated that she was acting for the successor or heir of the deceased who was the legitimate owner of Title No. Nyandarua/Ol Kalou/90 (later sub-divided into Parcel Nos. 173 & 174) who was wrongfully deprived of the parcel in Nairobi HCCC No. 1994 of 1979 (later Milimani ELC No. E060 of 2022). It was contended that the late father of the 2<sup>nd</sup> – 4<sup>th</sup> interested parties did not prove his claim for any portion of the suit property in the said suit. It was also denied that the deceased had sold any portion of Parcel 90 to the 5<sup>th</sup> Respondent party hence he was not entitled to be registered as proprietor of Parcel 173.
4. When the matter was listed for directions before the High Court on September 21, 2022 the court noted that the matter concerned a land dispute among the parties hence an order for transfer of the suit to this court was made.
5. When the matter was listed for directions before me on November 16, 2022 the Applicant protested the transfer of the matter to the Environment and Land Court. She stated that she had specifically filed her application for judicial review before the High Court hence she did not understand why and how the matter ended up before me. She consequently requested me to disqualify myself from the matter and transfer it to another judge for hearing.
6. The advocate for the 2<sup>nd</sup> – 4<sup>th</sup> Respondents requested that the Applicant should file a formal application for disqualification so that all concerned parties may formally respond thereto. The court consequently directed that the Applicant should file a formal application for consideration.

## **B. Applicant's Instant Application**

7. By a notice of motion dated May 15, 2023 expressed to be based upon Articles 1, 2, 3, 10, 20, 25(1), 50(1), 165(4) & 259 of the Constitution of Kenya, 2010 and all enabling provisions of the law the Applicant sought the following orders:
  - a. That the Hon. Mr. Justice Angima do recuse himself from this matter.
  - b. That the Hon. Mr. Justice Angima do recuse himself from ELC 245 of 2017.
  - c. That the Hon. Mr. Justice Angima to disqualify himself from all matters, proceedings and cases that touches the Applicant and the suit property herein.
  - d. That all matters presented by the Applicant and/or touching the Applicant be transferred to another court.
  - e. That this Hon. Court be pleased to grant orders for fresh litigation.
8. The application was based upon the grounds stated on the face of the motion and the contents of the supporting Affidavit sworn on May 15, 2023 by the Applicant. The Applicant contended that she had lost confidence in the court for the following reasons:
  - a. That there was a cozy relationship between the judge and the Respondents.
  - b. That the judge had allocated himself the matter without any order or directions from the High Court.
  - c. That the judge may be influenced by other cases touching on the suit property which he has previously handled.



- d. That there was a likelihood of bias against the Applicant.
- e. That the continued hearing of this matter and other related matters would be a violation of her constitutional right to a fair hearing by an independent and impartial court.
- f. That justice must not only be done but it must also be seen to have been done.

### **C. Responses by the Respondents**

9. There is no indication on record of the Respondents having filed any responses to the application.

### **D. Directions on Submissions**

10. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling, none of the parties had filed submissions.

### **E. Issues for Determination**

11. The court has perused the Applicant's notice of motion dated May 15, 2023 and is of the opinion that the following key issues arise for determination herein:
  - a. Whether the Applicant has made out a case for the recusal of the judge from handling this matter.
  - b. Whether the judge should disqualify himself from handling any other suits and matters involving the Applicant and the suit property.
  - c. Who shall bear costs of the application.

### **F. Analysis and Determination**

#### **(a) Whether the Applicant has made out a case for the recusal of the judge from handling this matter**

12. The court has considered the Applicant's application for disqualification of the judge as well as the material on record. The test to be applied in determining whether or not a judge ought to recuse himself from a suit or proceeding on account of alleged bias was considered by the East African Court of Justice in the case of Attorney General of Kenya –vs- Prof. Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 as follows:

“We think that the objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise 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,

The 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 and informed about all the circumstances of the case.”



13. Similarly, in the South African case of *President of the Republic of South Africa v South African Rugby Football Union* [1994] 4SA 147 at 1-77 the test for recusal of a judge was rendered as follows:

“... the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the Applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.”
14. The Applicant gave a number of reasons why she was apprehensive that the judge is likely to be biased and not impartial. It was alleged that there was a cozy relationship between the judge and the Applicant’s adversaries in the proceedings. It was also alleged that the Respondents had at times failed to comply with the directions of the court but the judge had failed to sanction them for such non-compliance. However, no particulars of such non-compliance were given in the application and supporting affidavit.
15. The Appellant also alleged that a perusal of all the directions, orders and rulings made in this matter and related cases such as Nyahururu ELC No. 245 of 2017 indicated bias on the part of the judge. In particular, it was claimed that the judge had issued an eviction order on 07.07.2021 in that suit without any application to that effect. It was also claimed that the judge had issued an eviction order on 07.08.2020 for Parcel No. 1698 whereas the relevant application had sought eviction from Parcel No. 174. The Applicant annexed copies of orders marked EN1 and EN2 in a bid to demonstrate the alleged bias and partiality.
16. The judge is unaware of any cozy relationship between him and the Applicant’s adversaries or even their respective advocates. Apart from the Applicant who has been a regular litigant before this court the judge can hardly recognize the other parties to the application for judicial review. The court is further aware that a new Land Registrar for Nyandarua County has been posted to serve Nyandarua and Samburu Counties in the recent past. The Applicant has not pleaded particulars of the alleged cozy relationship. There is no allegation that the judge is personally known to any of the Respondents in this matter. There is no allegation that they have any business, social, religious, or other close connections or associations which would make a reasonable person suspect that the judge may not be absolutely impartial whilst handling cases involving them. There is no allegation or demonstration of any inappropriate association or communication between the judge and the Respondents or advocates representing them. The court is unable to find any evidence on record of the alleged cozy relationship.
17. The Court is also unable to find any evidence on record to demonstrate that the Respondents have habitually disobeyed the Court’s directions. No particulars of such non-compliance were laid out in the application and the supporting affidavit. There is no indication on record that the Applicant ever applied for the Court to sanction the Respondents for non-compliance with any particular directions. On the contrary, the record shows that the Court has extended considerable indulgence to the Applicant in this matter. For instance, when the matter was listed for directions on November 16, 2022 the Applicant stormed out of the Court room in protest in the presence of the Respondents but the Court did not penalize her in costs or dismiss her application. Instead, the Court simply adjourned the matter and stood it over to February 6, 2023 for directions. When the matter was listed for directions on February 6, 2023 the Applicant was absent once again but the Court did not dismiss her application or penalize her in costs. The Court simply gave directions in the presence of the Respondents and directed the Interested Parties to communicate the directions to her in writing and file an affidavit of service.



18. The record further shows that when the application for judicial review was slated for judgment on May 11, 2023 the Court deferred the same to enable the Applicant to file and prosecute her application for disqualification of the judge. None of the other parties to the proceedings have been granted such indulgence.
19. The Court has perused copies of the orders dated August 7, 2020 and July 7, 2021 in Nyahururu ELC No. 245 of 2017 contained in the exhibits marked EN1 and EN2. A perusal of the two orders reveals that they were issued by Hon. M.C. Oundo who was then serving as the Environment and Land Court Judge at Nyahururu. The order of July 7, 2021 was actually made on August 7, 2020 and formally extracted on July 7, 2021. So, the judge cannot be properly accused of bias on account of orders made long before he reported to Nyahururu Law Courts.
20. The Applicant further alleged that the judge had allocated himself the instant suit without any order or directions from the High Court where she had filed the proceedings. The Applicant contended that she had filed the instant proceedings before the High Court hence she did not understand why and how the matter ended up before the Environment and Land Court Judge. The Court believes that the Applicant raised this issue because she did not peruse the Court file diligently. The record shows that on September 21, 2022 the matter was listed for directions before the High Court when a preliminary objection was raised by the Respondents to the effect that the matter concerned a land dispute which should be handled by this Court. As a consequence, the High Court upheld the preliminary objection and referred the matter to the Environment and Land Court at Nyahururu for disposal. It is, therefore, not true that the judge “auctioned” the matter to himself as the Applicant put it in her application and supporting affidavit. For the record, I do not hold an auctioneer’s licence and I am not authorized to practice that profession as a full time employee of the Judiciary.
21. It was also contended by the Applicant that the judge might be improperly influenced by other previous matters he has handled touching on the Applicant and the suit property. It was further contended that justice should not only be done but should also be seen to have been plainly done. The Court has perused the various files referred to by the Applicant as “other cases”. It would appear that those other cases were actually heard and determined by other judges a long time ago. For instance, Nyahururu ELC No. 245 of 2017 was heard and determined by Hon Justice M.C. Oundo on December 10, 2019. What this Court handled were merely consequential applications such as stay of execution, review and contempt of Court. Similarly, Nyahururu ELC No. E008/2023 (previously NBI HCCC No. 1994 of 1979) was heard and determined by Hon. Justice Msagha Mbogholi who delivered a judgment on 29.04.1999. What is pending in that matter is an application for review of the decree.
22. The Court is unable to accept the Applicant’s contention that once a judge has handled an application of whatever nature involving one litigant, then he should forever recuse himself from handling any other cases or disputes involving that party or his property. If the Applicant’s proposition were to be followed to its logical conclusion it may lead to absurd results. For instance, if a litigant has 7 cases in one station then it would mean that once the available judge has heard the first case, then the other 6 pending matters should be transferred to another station to avoid improper influence on the judge. If, for some reason the 6 files were to be transferred to a second station then it would mean that the available judge would only handle one case and transfer the remaining 5 to another station or judge. The cycle would then proceed until the last suit is heard. It would be a rare case where such a string of transfers would be necessary.
23. It has been held that it is not every allegation of bias which would justify the recusal of a judge. The allegation must not only be well founded but must also be proved to the required standard. In the case



of Kalpana H. Rawal –vs- Judicial Service Commission & 2 Others Civil Application No. 1 of 2016 [2016] eKLR the Court of Appeal made the following relevant observations:

“... Before we consider the merits of the application, however, there are a few issues raised by the parties which we must dispose of. First, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically disqualify himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary, decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in *Locabail UK Ltd Vs Bayfield Properties Ltd* [2000] Q.B. 451 a judge

“would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance.”

24. Whereas a judge may recuse himself from a suit where legitimate reasons for recusal have been demonstrated, a judge should not easily recuse himself on flimsy or baseless allegations. In the case of *Galaxy Paints Co. Ltd –vs- Falcon Security Guards Ltd* [1999] eKLR the Court of Appeal made the following observations on recusal:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers should discharge their duty to sit, and do not, by acceding too readily to suggestions of bias, encourage parties to believe that by seeking disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour ...”

25. The Court finds no good or legitimate reasons for recusal have been demonstrated in this matter. The Court is not satisfied that a reasonable, fair-minded and well informed member of the public having a correct appreciation of all the relevant facts would come to the conclusion that the judge would be biased in handling the Applicant’s application for judicial review. In the premises, the Court is not inclined to allow the application for recusal and to transfer the instant file to another judge or station for disposal.

**(b) Whether the judge should disqualify himself from handling any other suit and matters involving the Applicant and the suit property**

26. The Court has considered the material and submissions on record on this matter. In her motion, the Applicant asked that the judge should disqualify himself from Nyahururu ELC No. 245 of 2017 and all matters, proceedings and cases touching on the Applicant and the suit property or properties. The Court has already found that ELC No. 245 of 2017 is a concluded suit in which judgment was delivered by Hon. Justice M.C. Oundo way back in 2019. So far as the Court is aware, all consequential applications in that suit were heard and determined. There is really nothing pending hearing in that suit. Moreover, the record in that file shows that the Applicant had filed a similar application dated September 23, 2022 for disqualification of the judge which was dismissed with costs on October 5, 2022.
27. Regarding any other pending matters, proceedings or cases involving the suit property or properties, the Court has already found and held that the Applicant has not demonstrated a legitimate reason to have the pending suits heard by a different judge or judges. In paragraph 14 of her supporting affidavit the Applicant stated that the other cases are ‘interconnected’ and that they all touch on the suit property or properties. If that be the case, then it would be prudent for all such interconnected



cases to be heard before the same Court to avoid the risk of different judges coming to conflicting or contradictory decisions on related cases. In fact, the Applicant has a pending application in this file for consolidation of the instant suit with Nyahururu ELC No. 12 of 2022. Some of the grounds put forward in the application are that the two cases raise similar questions of law and fact and that the Court may give divergent directions or orders if the cases were tried separately. In the premises, the Court is not inclined to grant the Applicant's prayer for recusal from the other matters or proceedings.

### **c. Who shall bear costs of the application**

28. Although costs of an action or proceeding are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The Court has noted that the Respondents did not file any documents in opposition to the application. In the premises, the Court is of the opinion that costs of the application should abide the outcome of the application for judicial review.

### **G. Conclusion and Disposal Order**

29. The upshot of the foregoing is that the judge finds no merit in the Applicant's application for his recusal. Accordingly, the Applicant's notice of motion date 15.05.2023 is hereby dismissed in its entirety. Costs of the application shall be in the cause.

Orders accordingly.

**RULING DATED AND SIGNED AT NYANDARUA THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

N/A for the Ex Parte Applicant

N/A for the Attorney General for the 1<sup>st</sup> Respondent

Mr. Ndichu for the 2<sup>nd</sup> – 4<sup>th</sup> Respondents

Mr. Nderitu Komu for the 5<sup>th</sup> Respondent

**Y. M. ANGIMA**

**JUDGE**

