



**Nyabomite Farmers Cooperative Society v Chief Land Registrar & 5 others (Environment & Land Case 130 of 2020) [2022] KEELC 3090 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3090 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 130 OF 2020  
LC KOMINGOI, J  
MAY 5, 2022**

**BETWEEN**

**NYABOMITE FARMERS COOPERATIVE SOCIETY ..... PLAINTIFF**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**SAMSON REALTORS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**SAMWEL ONDIEKI MARAK ..... 4<sup>TH</sup> DEFENDANT**

**DAVID NYARIBO MASEGEGE ..... 5<sup>TH</sup> DEFENDANT**

**JOSIAH OYARO ONCHERA ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Plaintiff's Notice of Motion dated 31<sup>st</sup> May 2021. It is brought pursuant to Article 25 and 50(1) of the Constitution of Kenya [2010] Section 1A, 1B, and 3A of the Civil Procedure Act, Order 51 Rue 1 of the Civil Procedure Rules and all enabling provisions of the law.
2. The Plaintiff/Applicant seeks orders;
  - a) Spent.
  - b) That the current trial Judge in this cause, Hon. Justice L. Komingoi, be pleased to disqualify and recuse herself from any further participation of and /or dealing with this matter, which should then be referred to the presiding Judge for directions regarding appointment of another judge to proceed with the matter; and



- c) That the costs of the application be in the cause.
3. The grounds in support of the application are set out at paragraph 1 to 11 of the motion. In summary, the Plaintiff alleges that from the trial Judge's attitude, behavior and conduct in the matter, the Honourable Judge is likely to be biased against the Plaintiff and there is a likelihood of miscarriage of justice and its right to a fair hearing protected under Article 50(1) of the Constitution of Kenya (2010) has been infringed or is likely to be infringed.
  4. The Applicant also relied on ground that it made an application seeking preservation of Title No.I.R5074/1 against the Defendants which orders were granted on 27<sup>th</sup> January 2021. It contended that the 3<sup>rd</sup> Defendant sought to set aside the said orders *vide* its application dated 9<sup>th</sup> February 2021 but its application was disallowed. It further relies on ground that the 3<sup>rd</sup> Defendant filed a subsequent application dated 12<sup>th</sup> March 2021 seeking similar orders which was allowed *ex-parte* to the Plaintiff's detriment and exposed the suit property to interference by the 3<sup>rd</sup> Defendant and others and its effort to reinstate the preservation orders has been unsuccessful.
  5. The application is supported by the annexed supporting affidavit. It is sworn on 31<sup>st</sup> May 2021 by one Stanley Michira Kibore but the averments are said to be made by one Geoffrey Nyansete Nyaenya who describes himself as the Secretary/Manager of the Plaintiff. In my view, the said affidavit ought to be expunged from the record for being incompetent.
  6. In opposition to the Plaintiff's application, the 3<sup>rd</sup> Defendant filed a replying affidavit sworn on 11<sup>th</sup> August 2021 by Sadi Aden Dirir, the 3<sup>rd</sup> Defendant's director. He deponed that the Plaintiff was granted interim orders on 27<sup>th</sup> January 2021 but the said orders were not served upon all the parties within 3 days as is required under Order 40 Rule 4(3) of the Civil Procedure Rules, 2010. He added that it was neither the 3<sup>rd</sup> Defendant's fault nor the Court's fault that counsel for the Plaintiff failed to serve the orders as required. He also deponed that the 3<sup>rd</sup> Respondent's application dated 9<sup>th</sup> February 2021 was not disallowed but rather it was not found urgent and the same was to be served, heard and determined thereafter. He added that it was the 3<sup>rd</sup> Defendant's subsequent application dated 15<sup>th</sup> March 2021 was allowed in terms of prayer 2.
  7. He also deponed that the Plaintiff's replying affidavit is defective and annexed the affidavit sworn on 30<sup>th</sup> June 2021 by Geoffrey Nyansete Nyaenya who deponed that his name is placed on the supporting affidavit sworn on 31<sup>st</sup> May 2021 but he has nothing to do with it as he did not make the averments therein nor appear before a commissioner for oaths. He disowned it and asked the court to take action against the person who placed his name there.
  8. The 6<sup>th</sup> Defendant/Respondent also filed the replying affidavit sworn on 30<sup>th</sup> July 2021 in opposition to the application. He deponed that the application is defective and a forgery for the reason that the supporting affidavit is sworn by Geoffrey Nyansete Nyaenya who distanced himself from it. He further deponed that the Advocate allegedly acting for the Plaintiff acquired an interim injunction but failed to serve it upon all parties herein within 3 days as required by law and as a result the injunction lapsed automatically which is not the Honourable Judge's fault. He added that there is no evidence that warrants the Honourable judge to recuse herself.
  9. On the 21<sup>st</sup> July 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.



### **The Plaintiff's written submissions.**

10. They are dated 13<sup>th</sup> September 2021. Counsel for the Plaintiff submitted that the trial Judge exhibited open bias against the Plaintiff. He further submitted that the principles governing recusal were set out in *Philip Tunoi & Another v Judicial Service Commission & Another* [2016]e KLR and its statutory basis is outlined in the Judicial Service ( Code of Conduct and Ethics) Regulations 2020 which provides as follows at Regulation 21; “a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned 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 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 has economic or other interest in the outcome of the matter in question.
11. He submitted that actual bias is evident in matters where the Judge is so committed into a particular outcome regardless of the evidence of the witness while apprehended bias is shown where a fair reasonable minded person can notice the ruling of the Judge may not be impartial. He added that in this suit, despite all the evidence produced which tilts in favour of the Plaintiff, the trial Judge has adamantly denied it the well-deserved orders to preserve the suit property hence she is likely to be biased against the Plaintiff herein and if she proceeds with the trial, there will be a miscarriage of justice. He put forward the case of *Rex v Sussex Justices* [1924]1 KB to submit that justice must not only be done but must also be seen to be done.

### **The 3rd Defendant's written submissions.**

12. They are dated 21<sup>st</sup> September 2021. Counsel for the 3<sup>rd</sup> Defendant framed the 3<sup>rd</sup> Defendant's issues for determination as follows;
- a) Whether there is actual bias or prejudice to warrant recusal of the trial judge.
  - b) Whether the supporting affidavit annexed to the application dated 31<sup>st</sup> May 2021 is defective.
13. The 3<sup>rd</sup> Defendant's counsel urged the court to consider the principles governing recusal within our Kenyan jurisdiction which are spelt out in various authorities. He pointed out the case of *Jan Bonde Nielson v Herman Philipus Steyn & 2 Others* [2014]e KLR and the case of Philip Tunoi & Another (*Supra*). He further submitted that in determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias. He put forward the case of *Sylvia Wangechi Njoki & Another v John Chege*



Njoki [2021] e KLR to submit that in order for a court to make a finding that the trial court was biased, the apprehension must be real and based on facts.

14. He also submitted that there is no indication of any aspect of bias from the trial judge that has come to light so far as the trial Judge discharged her duties as expected. He added that the Plaintiff is trying to blame the court for its wrong doing as the orders initially issued to it were set aside for the Plaintiff's failure to serve the said orders upon all the parties within the timeline provided under Order 40 Rule 4(3) of the Civil Procedure Rules.
15. On the issue of the validity of the replying affidavit annexed to the Plaintiff's motion, he submitted that the Plaintiff's supporting affidavit is defective and incurable since the person who swore the affidavit in the beginning is Geoffrey Nyaenya but it is signed by Stanley Muchiora Kibore and it has been disowned by Geoffrey Nyaenya.
16. I have considered the notice of motion and the affidavit in support. I have considered the affidavit in response, the written submissions on behalf of the parties and the authorities cited. The issues for determination is whether the Plaintiff/Applicant has satisfied the criteria for recusal of a Judge on the ground of apprehended bias.
17. The Plaintiff accuses this court of open bias in this matter. The law on recusal is now well settled. In the case of *Attorney General of the Republic of Kenya v Prof. Anyang Nyong'o & Others*; East African Court of Justice at Arusha Application No 5 of 2006 arising from Reference No 1 of 2006 the court held among others that:-

“Where a 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 a likelihood or apprehension of bias arising from such circumstances as the relationship with one party or perceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The application must establish that bias is not mere figment of his imagination.”

18. Similarly in Kaplan & Stratton v L. Z. Engineering Construction Ltd & 2 Others [2000] eKLR the court stated as follows:-

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

19. In Alvin Kamande Njenga & Another v Esther Njeri Njenga & 5 Others [2018] e KLR the Court cited the case of President of the Republic of South Africa v The South Africa Rugby Football Union & 3 Other, Case CCT 16/98, where the Court held that:-“At the very outset we wish to acknowledge that a litigant and her or his Counsel who found it necessary to apply for recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable, it is Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full application of the admission that she or he should not be unduly sensitive and ought not to regard an application for his/her recusal as a personal effort... A cornerstone of any fair and just legal system is the impartial adjudication of disputes which comes before the courts and tribunals..... Nothing is merely likely to impair confidence in such proceedings whether on the part of litigants or the general public that actual bias on the appearance



of bias in the official or officers who have the power to adjudicate on disputes ..... in applying the test for recusal. Courts have recognized a presumption that Judicial Officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradicting evidence....This consideration was put as follows by Corying in *R... Vs..(R.D) 37*;-“Courts have rightly recognized that there is a presumption that judges will carry out their oath of office.....This is one of the reasons why the threshold for successful allegation of recurred judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidences that demonstrates that something the Judge has done gives rise to a reasonable apprehension of bias”.

20. From the above authorities it is clear that any party wishing to have the judge recuse himself/herself must demonstrate bias. The Plaintiff did not adduce demonstrable evidence of bias. It was dishonest by claiming that the court granted the 3<sup>rd</sup> Defendant orders on its Notice of Motion dated 12<sup>th</sup> March 2021 yet the record clearly indicates that the court granted prayer 2 of the motion and directed that the application be served for interparties hearing. The court had initially issued the Plaintiff with interim orders but they were set aside for the Plaintiff's failure to serve them upon all the parties within the timeline provided under Order 40 Rule 4(3) of the *Civil Procedure Rules*. Recusal cannot be allowed where it is clear that the application is only intended to shield the Applicant from its inaction by getting a Judge out of a case in the hope that they will escape accountability.
21. Further, the affidavit filed in support of its motion is not proper as already mentioned and it was disowned by the alleged deponent. In *Gideon Sitelu Konbellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR, the Supreme court of Kenya found a Replying Affidavit to be fatally defective as the same contravened all the legal requirements for the making of an affidavit and it was found to be of no value for not being signed, commissioned and dated. The supporting affidavit on record cannot be said to be a proper affidavit.
22. In conclusion, I find no proper ground disclosed for the recusal of the trial judge.
23. I find no merit in this application and the same is dismissed with costs to the Defendants/Respondents.
24. I will however. refrain myself form handling this matter. The matter will be placed before the honourable Presiding Judge on 25<sup>th</sup> May 2022 to reallocate it to another Judge. The interim orders are extended till then.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2022.**

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**L. KOMINGOI**

**JUDGE**

In the presence of:-

No appearance for the Plaintiff

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Lusweto for Mr. Saad for the 3<sup>rd</sup> Defendant and for Mr. Mbuthia for the 4<sup>th</sup> Defendant.

Steve - Court Assistant

