



Kainamia & another v Munyao & 4 others (Environment & Land Case 245 of 2017) [2022] KEELC 13385 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 245 OF 2017
YM ANGIMA, J
OCTOBER 5, 2022
(FORMERLY NAKURU ELC.41 OF 2016)**

BETWEEN

**PETER NGUGI KAINAMIA 1ST APPLICANT
JOHN MURAYA KAINAMIA 2ND APPLICANT**

AND

**TABITHA WAMBUI MUNYAO 1ST RESPONDENT
GREGORY KANIA MUNYAO 2ND RESPONDENT
ISAAC NJENGA MUNYAO 3RD RESPONDENT
PETER GITHINJI MUNYAO 4TH RESPONDENT
STEPHEN MUNYAO KANIA 5TH RESPONDENT**

RULING

A. The Respondents' application

1. By a notice of motion dated 23.09.2022 expressed to be based upon Sections 1, 3 & 3A of the [Civil Procedure Act](#) (Cap.21) and all enabling provisions of the law, the Respondents sought the following orders:
 - a. That the Hon. Justice Angima immediately disqualify himself from the proceedings.
 - b. That the suit be taken out of the ELC Nyahururu and transferred to another court outside Nyahururu.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Elizabeth Ngugi on behalf of all the Respondents. It was contended



that the judge was biased for at least two reasons. First, it was contended that the judge had failed to stay the instant proceedings on the application of the Respondents. Second, the judge had erroneously decided that the outcome of Nyahururu J.R. No. E005/2022 and Nairobi ELC Misc. No. E060 of 2022 would not affect the instant suit and proceedings. The Respondents consequently wanted the judge to disqualify himself from handling the proceedings and transfer the file to another judge. At the hearing hereof, the Respondents prosecuted their application orally by reiterating the contents of the application and the supporting affidavit.

B. The Applicants' response

3. The Applicants were served with the application on 28.09.2022, that is, one day before the same was scheduled for inter partes hearing. The Applicants did not file a replying affidavit to the application but addressed the court orally thereon on the hearing date. The Applicants submitted that the application was merely a delaying tactic to prevent them from enjoying the fruits of their judgment and to delay the conclusion of the pending contempt of court proceedings. The court was consequently urged to dismiss the application.

C. Summary of previous proceedings

4. The court has noted from the material on record that judgment was entered against the Respondents on 10.12.2019 by Hon. Justice M.C. Oundo. The record further shows that vide a notice of motion dated 23.12.2019 they applied for stay of execution pending the lodging, hearing and determination of an intended appeal to the Court of Appeal. By a ruling dated 23.06.2020 the court (Hon. M.C. Oundo J) granted them a conditional stay which subsequently lapsed due to their failure to meet the stipulated conditions.
5. The material on record also shows that vide a notice of motion dated 15.11.2021 the Respondents applied for a review and setting aside of the judgment and decree dated 10.12.2019. The said application was heard before me and dismissed with costs on 02.02.2022.
6. The record further shows that vide a notice of motion dated 27.04.2022 and amended on 30.06.2022 the Respondents sought a stay of the decree and all consequential orders pending the hearing and determination of NBI ELC Misc. Application No. E060 of 2022 and Nyahururu H.C. Judicial Review No. E005 of 2022. By a ruling dated 28.07.2022 this court dismissed the said application for stay with costs.
7. When the Applicants' notice of motion dated 21.03.2022 for contempt of court proceedings against the Respondents was canvassed, the Respondents again asked the court to stay any further proceedings herein pending the hearing of the Nairobi matter in NBI ELC Misc. No. E060 of 2022. The court declined to grant a stay and proceeded to consider and determine the application for contempt of court. Vide a ruling dated 22.09.2022 the court found the 5 Respondents guilty of contempt of the order of permanent injunction made on 10.12.2019 and convicted them accordingly. However, the court deferred sentencing to 29.09.2022 to allow the Respondents to attend court personally and tender mitigation.

D. Analysis and determination

8. It was during the pendency of mitigation and sentencing that the Respondents filed the instant application for disqualification of the judge and for transfer of proceedings to another court. The court has considered the Respondents' said application as well as the material on record. The test to be applied in determining whether or not a judge should disqualify himself from a suit on account of



alleged bias was considered by the East African Court of Justice in the case of *The Attorney General of Kenya –vs- Prof. Anyang’ Nyong’o and 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,

- a. 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.”

9. Similarly, in the South African case of *President of the Republic of South Africa –vs- South Africa Rugby Football Union* [1999] 4SA 147 at 177 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.”

10. The court is of the opinion that the mere fact that the court has previously dismissed the Respondents’ application for stay of the decree and all consequential orders is not per se evidence of bias or apparent bias. No reasonable, objective and well informed person would attribute bias on the basis of dismissal of such previous application. The Respondents also took the view that the court was wrong in holding in a previous ruling that the instant proceedings ought not to be stayed to await the conclusion of NBI ELC Misc. No. E060 of 2022 and Nyahururu H.C. J.R. No. E005 of 2022. Even if the court were wrong on that point, that can only form a basis for an appeal and not an application for disqualification of the judge. No reasonable and fair minded person would attribute bias to a judge only on the basis that he has made an erroneous decision on a point of law. The court is thus far from satisfied that the Respondents have made out a case for the disqualification of the judge from handling the pending proceedings.
11. The court finds the timing of the instant application somewhat suspect. The Respondents did not apply for disqualification of the judge earlier despite the fact that the application for contempt of court was filed way back in March, 2022 and the judge has heard and dismissed two previous applications by the Respondents. The Respondents did not even object to the Judge hearing the application for contempt of court on 28.07.2022. They strategically waited for a conviction to be entered before seeking disqualification while the matter was pending mitigation and sentencing. The Respondents’ conduct bears all the hallmarks of delaying tactics. They are probably seeking to buy more time by delaying the conclusion of the pending application for contempt of court.
12. Whereas a Judge may legitimately recuse himself from a suit where legitimate reasons 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 Guards Ltd* [1999] eKLR the Court of Appeal made the following observations on the issue:

“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 ...”

E. Conclusion and Disposal

13. The upshot of the foregoing is that the court finds and holds that the Respondents have failed to demonstrate any legitimate grounds for recusal or disqualification of the judge on the basis of the objective test outlined in the authorities cited herein. Accordingly, the Respondents’ notice of motion dated 23.09.2022 is devoid of merit and the same is consequently dismissed with costs to the Applicants. It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 5TH DAY OF OCTOBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Ndichu for the Applicants

Elizabeth Ngugi for the 1st – 5th Respondents

C/A - Carol

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Y. M. ANGIMA

JUDGE

