



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 102 OF 2020

PALE KENYA LIMITED.....PLAINTIFF

=VERSUS=

PAULINE NGOMI MWANGANGI.....DEFENDANT

RULING

1. Two applications fall for determination in this ruling. The first application is the defendant's notice of motion dated 25/11/2020 through which the defendant seeks police assistance in enforcing the *status quo* orders issued by this court on 30/10/2020. The defendant contended in the application that the plaintiff's directors had placed goons with dangerous weapons inside and outside the suit property, to prevent the defendant from having quiet possession of the suit property.

2. The second application is the plaintiff's notice of motion dated 1/12/2020, through which the plaintiff seeks the recusal of the Judge seized of this suit, contending that the Judge was biased in the preceding ruling rendered on 30/10/2020. Because the plaintiff's application dated 1/12/2020 questions the impartiality of the court in the adjudication of the dispute in this suit, I will determine it first before making any pronouncement on the defendant's application dated 25/11/2020.

3. The plaintiff's application was premised on twenty-one grounds, largely focusing on the merits of the Court's ruling rendered on 30/10/2020. The same grounds were replicated in the supporting affidavit sworn on 1/12/2020 by Hon Onesmus Kimani Ngunjiri. The plaintiff, through Hon Ngunjiri, imputed bias on part of the Judge on account of the Court's ruling dated 30/10/2020. Lastly, Hon Ngunjiri swore a further affidavit in support of the application for recusal. He deposed in the further affidavit that there was need for recusal of the Judge because he (Hon Ngunjiri) had filed a petition before the Judicial Service Commission, seeking initiation of removal proceedings against the Judge on account of the Judge's handling of this matter, specifically the ruling dated 30/10/2020. He exhibited a copy of the petition.

4. The defendant, Pauline Ngomi Mwangangi, opposed the application through a replying affidavit sworn on 8/2/2021. She deposed that the plaintiff's directors had refused to comply with the court order issued on 30/10/2020 relating to possession of the suit property and had proceeded to "arm goons in the premises" and force tenants to pay rent to the plaintiff in relation to the defendant's developments on the suit property. She added that the application for recusal was intended to delay and "embarrass fair proceedings" of the matter following the filing of an application for an order for police assistance in enforcing the order of 30/10/2020. She further deposed that the application for recusal did not disclose any reasonable justification for recusal of the Judge. Lastly, she deposed that the grounds upon which the applicant was seeking recusal of the Judge were grounds of appeal, not grounds for recusal.

5. The application for recusal was canvassed orally in the virtual court on 1/3/2021. Mr Kago, counsel for the plaintiff, submitted that the plaintiff had profound apprehension of bias against it because: (i) the court considered extraneous issues that were outside the pleadings before it in the ruling rendered on 30/10/2020; (ii) the orders made by the court in the ruling dated 30/10/2020 were final in nature and contra-statute; (iii) the court irregularly disposed the plaintiff's application dated 5/11/2020 through a dismissal order in the absence of the file folder relating to **ELC Case No E071/2021**; and (iv) vide a petition dated 22/2/2021, the plaintiff had petitioned the Judicial Service Commission seeking the removal of the Judge from serving as a Judge hence the plaintiff could not get a fair hearing from the same Judge.

6. On his part, Mr Mutemi, counsel for the defendant, submitted that the grounds which the plaintiff was relying on to seek recusal of the Judge were grounds for appeal, not grounds for recusal. Counsel argued that there was mischief in a party who had refused to comply with court orders seeking the recusal of the trial Judge.

7. I have considered the application for recusal, the response thereto, and the parties' respective submissions. I have also considered the relevant jurisprudence on the subject of recusal on the ground of apprehended bias. The single issue falling for determination in the said application is whether the applicant has satisfied the criteria for recusal of a judge on the ground of apprehended bias.

8. The jurisprudential criteria to be applied when considering a plea for recusal of a judge on the ground of likely bias was, not too long ago, outlined by Kenya's Court of Appeal in the Case of **Kaplana H Rawal v Judicial Service Commission & 2 Others [2016]eKLR [Civil Appeal Application No 1 of 2016]**. The Court of Appeal adopted the test of "*whether a fair minded and informed observer, having*

considered the facts, would conclude that there was a real possibility that the Judge would be biased". This is the test that the House of Lords had propounded in **Magill v Porter [2002] 2 Ac 357**. This is also the test which the East African Court of Justice similarly adopted in the case of **Attorney General of Kenya v Prof Anyang Nyong'o & 10 Others, EACJ Application No 5 of 2007** where the Court rendered itself thus:

"We think 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) a 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 the public who is not only reasonable but also fair minded and informed about all the circumstances of the case"

9. The Court of Appeal in the Rawal case further adopted the exposition of the above test by the Supreme Court of Canada in **R - VS (RD) (1977)3 SCR 484** in the following words:

"The apprehension of bias must be a reasonable one held by reasonable and right minded person, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude.

This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that forms a part of the background and appraised also of the fact that impartiality is one of the duties the judge swears to uphold. A real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence

10. The gist of the first and second limbs of the plaintiff's application for recusal of the trial Judge is that the court misapprehended the law and the evidence before it and came to a wrong finding in its ruling rendered on 30/10/2020; a finding that did not find favour with the plaintiff. Without saying much, the applicant's disapprovals of the considered findings and orders of the court, such as the grounds canvassed by the plaintiff, are questions against the merits of the findings and disposal orders of the court. Put differently, they are the applicant's personal perceptions of what the findings of the court ought to have been. Kenya's civil legal system provides an elaborate appeal mechanism for challenging judicial decisions such as the ruling rendered on 30/10/2020. That is the route which the applicant ought to take. I find absolutely no element of bias in the grounds focusing on the merits of the ruling dated 30/10/2020.

11. The third limb of the plaintiff's application focuses on the disposal of the plaintiff's review application dated 5/11/2020 through a dismissal order occasioned by non-attendance by counsel for the plaintiff. At the time the plaintiff's counsel drew and electronically filed the application dated 5/11/2020, this suit was in existence and had been designated as **ELC Case No. 102 of 2020**. Instead of counsel for the plaintiff uploading the said Application on the portal of **ELC Case No 102 of 2020**, he uploaded it as **Case Number ELCC/E071/2020**. Upon the application being electronically assigned to me, I made the following electronic orders:

"1. That this e-file is the same as Nairobi ELC 102 of 2020 and should not exist as a separate file.

2. That the Application shall be uploaded on the correct platform and served for hearing interpartes on 25/1/2021"

12. Subsequently, the Court Registry downloaded, printed, and collapsed the two electronic files into one physical file. The matter was subsequently listed as No 6 of the Cause list of 25/1/2021 and dealt with procedurally on the basis of the physical file which was before court. Counsel who uploaded the application as **ELC/E071/2020** was aware of the hearing directions issued electronically on 12/11/2020. The allegation that the court dealt with this matter when it was not supposed to deal with it is therefore false. The matter was on the cause list of 12/11/2020 listed as **ELC/E071/2020**.

13. At this point, there is no proper ground disclosed for recusal of the Trial Judge. The applicant has in the circumstances failed to satisfy the test for recusal of the Judge up to this point.

14. The last limb of the application is that the plaintiff has filed a petition with the Judicial Service Commission seeking removal of the trial Judge, hence they cannot get a fair hearing from the same Judge. This, in my view, is an excuse or strategy for avoiding adjudication of this dispute by this particular judge rather than a proper ground for recusal. The applicant is unhappy because the Judge considered the history of the suit property in issuing the orders that were issued, hence the need to move the file from the Judge. It is not lost to the court that litigants who lose interlocutory applications embark on forum-shopping through frivolous petitions to the Judicial Service Commission raising grounds that should ordinarily be canvassed before the appellate courts. This is what the plaintiff's director, Hon Onesmus Kimani Ngunjiri, is engaged in. I will nonetheless give him the benefit of doubt and refrain from adjudicating this suit during the pendency of his petition, notwithstanding that the application for recusal is devoid of any merit.

15. In light of the decision to refrain from adjudicating this dispute during the pendency of the petition against me, the application for police assistance in the enforcement of the existing orders shall be canvassed afresh before a different Judge.

16. In light of the foregoing, I make the following disposal orders:

a) The plaintiff's application for recusal of the Trial Judge is without merit and is dismissed with costs.

b) I will nonetheless refrain from adjudicating this dispute during the pendency of the petition presented to the Judicial Service Commission by Hon Onesmus Kimani Ngunjiri.

c) This file shall be mentioned before the Presiding Judge or Acting Presiding Judge on 11/5/2021 for allocation to a different Judge who will dispose the pending application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Mutemi for the Defendant

Mr Macharia holding brief for Mr S Wamboi for the Plaintiff

Court Assistant: June Nafula