



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW CIVIL APPLICATION NO. 12 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT (CAP. 26) LAWS OF KENYA

AND

IN THE MATTER OF THE RECORDS AND THE PROPRIETORSHIPS OF THE LAND PARCLES NUMBERS ATHIRU RUUJINE/1704 AND 4397 AND ATHIRU RUUJINE NUMBERS 9806, 10115, 10116, 9810, 7399, 9320, 8537 & 9714

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER-IGEMBE

NORTH DISTRICT2ND RESPONDENT

THE CHIEF LAND REGISTRAR3RD RESPONDENT

THE DISTRICT LAND REGISTRAR- IGEMBE.....4TH RESPONDENT

THE HON ATTORNEY GENERAL.....5TH RESPONDENT

HENRY KANG'ETHU.....1ST INTERESTED PARTY

MARY MUKWANJIRA.....2ND INTERESTED PARTY

LAZARUS MUTUMA MUKIRI.....3RD INTERESTED PARTY

SIMON MUKARIA KITHURE.....4TH INTERESTED PARTY

GERALD KAIBUNGA ITHIRITHIA.....5TH INTERESTED PARTY

EX-PARTE APPLICANT.....PETER MUNORU

RULING

INTRODUCTION

This ruling is in respect of two Consolidated applications dated 15th September 2020 and 28th September 2020 respectively. The first application is seeking the following orders:

- (1) That this application is heard on priority basis and the prayers numbered 2 herein be granted before service of the application done in urgency***
- (2) That there be a stay of further proceeding ones this matter until this application is heard and determined.***
- (3) That the Honourable Judge currently presiding over this matter Mr. Justice Cherono do disqualify himself and do cease from further proceeding with the matter due to bias on his part against the Ex- parte Applicant's Case.***
- (4) That the case be heard by any other Judge during the usual scheduled Court sessions.***

The second application also instituted by the Ex-parte Applicant dated 28/9/2020 is seeking the following orders:

- (a) That this application be heard on priority basis and the order (b) sought herein be first granted before the service of this application due to the urgency.*
- (b) That the Honourable Court be pleased to grant an order of stay of all proceedings in this matter pending the hearing and final determination of this application.*
- (c) That the Honourable Court be pleased to grant the order of review of the orders made on 1/09/2020 in this matter and to confirm the order made on 3/1/2020 in the matter as the proper orders of the court on account of mistake or error apparent on the face of the record and there being other sufficient reason to so review.*
- (d) Under the Order 45 rule 1(1) and 2(1) this application may be heard by other Judge than the one who made the order review of which is sought hearing.*

Both applications are supported on grounds apparent on the face of the two applications. The applications are supported by an affidavit sworn the same date. There appears to be no response to the two applications for reasons that will be explained later in the ruling.

SUMMARY OF FACTS

In the 1st application dated 15th September 2020, the Ex-parte Applicant stated that when he attended Court to participate in the proceedings on 30/01/2020, he clearly heard the Court give the directions that the interested parties in this case will be cross-examined on their filed affidavits during the hearing of the case. The Ex-parte Applicant further believes that the mode of proceeding ordered by the court on 30/01/2020 would reveal the mischief of the intended unlawful attempts to alienate the parts of the estate. He further stated that on 01/09/2020, the case was listed without any or any sufficient prior notice before the different Judge other than the Judge who was ordinarily seized of the case.

He contends that from the proceeding of the Court on 01/09/2020, the Judge who presided over the Court made decisions and orders on the mode of proceeding which directions and orders directly contradicted in their purposes and affect the directions and orders made earlier by the other Judge on 30/01/2020. He deposed that he has been informed which information he believes to be true that the directions and orders given on 1/09/2020 have the effect of short circuiting the proceedings and the whole Court process and the truth of the depositions in the affidavits of the interested parties will never be known and are therefore prejudicial to the case. The Ex-parte Applicant also deposed that he has been advised which advise he believe to be true that the proceedings and directions and orders of the 30/01/2020 were lengthy and prominently visible in the court file and that there was never any case for them not to be easily seen by anyone at the most casual glance and ought not to have been disregarded as if they were never made. He stated that he knows further that the said proceedings of 30/01/2020 were fair and impartial and were in his favor.

The Ex-parte Applicant further stated that he knows that by disregarding of the proceedings of 30/01/2020 by the court which presided over the matter on 01/09/2020 has exhibition of open bias on the part of that Court against his case. He said that he has reasonable apprehension to believe that the said Court which presided over the matter on the said 01/09/2020 will not be impartial in its future decision or judgment in this case.

He therefore sought for stay of any further proceedings with the hearing and final determination of the application filed herein and for the court which presided over the matter on 01/09/2020 to cease presiding over any further proceedings in the case and for the case to be heard by any other Judge.

As regards the second application dated 28th September 2020, the Ex-parte Applicant in his supporting affidavit made depositions more less similar to those in the affidavit in support of the application dated 15th September 2020 save that the prayers sought are for review as opposed to orders for stay of proceedings.

LEGAL ANALYSIS

I have considered the two applications dated 15th September 2020 and 28th September, 2020. I have also considered the affidavits in support the annexures thereto and the grounds apparent on the face of the two applications. This is one of the cases listed for hearing before me during the service week in Meru ELC Court on 1st September, 2020. The Chief Justice Hon. Mr. Justice Maraga had identified some Court

Station marked for reduction and/or clearance of backlog of case and Meru was one of them. When this case was called out the Counsel for the Ex-parte Applicant Mr. Karuti proposed that the case would proceed by viva voce evidence. Mr. Mutembei who appeared for the interested parties proposed that the matter being a Judicial Review proceedings can be canvassed by written submissions. The same position was taken by Mr. Kieti who appeared for the Respondents.

After hearing the counsels and their proposals on how to proceed with the matter, I took the same position proposed by the Counsel for the interested parties and the Respondents that this being a Judicial Review application where legal and not factual issues are to be considered and took directions that the matter be canvassed by written submissions. I therefore gave the parties time to file their respective submissions within 21 days each. I also give directions that judgment will be given on notice and that the Court file would be forwarded to my station of domicile upon compliance of those directions. Immediately after those directions were taken the Ex-parte Applicant filed the two applications which are the subject of this ruling. It is not clear whether the two applications were served upon the interested parties and the respondents or their legal Counsels. Be that as it may, I will go ahead and make a determination of the two applications as they basically seek orders requiring my recusal and the review of my orders and/or directions given on 01/09/2020. To begin with, the first application is seeking stay of further proceedings and my recusal from continuing this case on grounds of bias. As I have stated herein above, this was the first time I was handling the case when I was sent to the station to reduce and/or clear backlog of cases. I do not know the Ex-parte Applicant or have I even seen him. I do not also know the other parties in the suit. The counsels appearing for the Ex-parte Mr. Karuti, Mr. Mutembei for the interested parties and Mr. Kieti for the Respondents are officers of the court and acquaintance whom we interact in the course of our professional duties. The test for recusal of a judge was set out in the case of **Kalpana H. Rawal –VS- Judicial Service Commission & 2 others (2016) e KLR** where it stated that an applicant seeking such an order must demonstrate reasonable apprehension of bias using the test of a fair-minded and informed member of the public to warrant such recusal. The applicant in this application has not demonstrated any bias or likelihood of bias or any reasonable apprehension of bias in the mind of a right thinking member of the public. In the case of **Jan Bonde Nelson –VS- Herman Phillipus Steyu & 2 others (2014) e KLR** the court observed as follows:

“...The appropriate test to be applied in determining an application for disqualification was laid down by the court of appeal in R-VS- David Makau & others C.A Criminal Application No. NAI.4 and 5 of 1995 (unreported), and reinforced in subsequent cases. See R –VS- Jackson Mwalulu & others C.A Civil Application No. NAI. 310 of 2004 (unreported) where the Court of Appeal stated that: “when courts are faced with such proceedings for disqualification of a Judge, it is necessary to consider whether there is a reasonable doubt for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. the test is objective and the facts constituting bias must be specifically alleged and established.”

The court further stated in the case of **Republic –VS- Independent Electoral and Boundaries Commission and 3 others Ex-parte Wavinya Ndeti (2017) e KLR**:

“.....The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, 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”.

Applying the test set out in the decided cases, I come to the irresistible conclusion that no evidence has been adduced by the Ex-parte Applicant of any bias or reasonable apprehension of bias concerning me as the trial Judge which can make any right minded person to conclude that the administration of justice would be in danger on his part. As such, I found the first application unmerited as the same is based on conjecture and not reasonable basis. The application therefore lacks merit and the same is hereby dismissed. As regards the second application, the Ex-parte Applicant seeks to have the orders made on 01/09/2020 stayed and the same be reviewed on account of a mistake and/or error apparent on the face of record. The Ex-parte Applicant stated that there are orders giving directions on how to proceed with the hearing of this case which were issued by another Judge on 30/01/2020. The Ex-parte Applicant further contends that the orders on the method of proceeding with the hearing of the case made on 30/01/2020 was to the effect that this matter be canvassed by viva voce evidence and Cross Examination of witnesses while the orders given on 01/09/2020 directed that the matter be canvassed by written Submissions. In view of the two consecutive directions, the Ex-parte Applicant sought to review the subsequent orders of 01:09:2020 to align with the earlier orders issued on 30/01/2020.

Having carefully considered the grounds contained in the application and the affidavit in support thereof and having looked at a copy of the directions by the Presiding Judge given on 30/01/2020 which was not brought to my attention by either of the parties, and/or their counsels during the service week on 1/9/2020, I find the application suitable for review under **Order 45 Rule (1) (1) and 2(1) of the Civil Procedure Rules as Read with Section 50 of the Civil Procedure Act Chapter 21 Laws of Kenya**. Consequently, the Notice of Motion dated is allowed only on grounds that there is an apparent error and/or mistake on the face of the record and not for “other sufficient reason” as stated by the Ex-parte Applicant.

Since I have rendered myself on the first application seeking my recusal, I find the fourth prayer in the second application to be superfluous and the same is not allowed. Since the applications were not opposed on the explanation given elsewhere, I make no order as to costs. It is so ordered.

READ, DELIVERED virtually and SIGNED at GARISSA this 28th day of July, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Applicant/Advocate- Absent
2. Respondents/Advocate- Absent
3. Fardowsa ; Court Assistant- Present