



**EJ v JKN (Matrimonial Cause E4 of 2020) [2024] KEHC 1608 (KLR) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1608 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE E4 OF 2020  
HM NYAGA, J  
FEBRUARY 19, 2024**

**BETWEEN**

**EJ ..... APPLICANT**

**AND**

**JKN ..... RESPONDENT**

**RULING**

1. Every case before a court of law will inevitably exhibit some kind of theatrics or drama.
2. At times, such histrionics tend to extend to the realm of absurdity, as will come out clearly in this case.
3. Before I handle the application before me, a brief history of the matter is necessary.
4. The plaintiff and the defendant were once a happily married couple. After close to forty (40) years of apparent marital bliss, their union met turbulent waters and they parted ways. The plaintiff filed Civil/ Environment and Land Court Case Number 81 of 2019 at the Chief Magistrate’s Court at Nakuru. Thereafter in 2020 the plaintiff also filed this cause, under the *Matrimonial Property Act*, 2013 seeking an order that the following properties be declared to be their matrimonial property;-
  - a. Plot 1X8 Nyota Farm
  - b. Parcel No. Kericho/Kabianga/1X8
  - c. Motor vehicle Reg. No. KPE 8XX
  - d. Motor vehicle Reg. No. KAH 5XXM
  - e. Tractor KXX
5. The plaintiff also filed a Divorce Cause in the Chief Magistrate’s Court. The same is still pending determination.



6. Nothing much happened in this case and when the parties appeared before me on 19<sup>th</sup> April, 2023, the plaintiff sought leave to file further documents which leave was granted. The matter was then set down for hearing on 14<sup>th</sup> June 2023. Came that day, parties testified. They were given a date for confirmation of filing of submissions, on 20<sup>th</sup> September, 2023. On that day, counsel for the plaintiff informed the court that she had filed an Application dated 18<sup>th</sup> September 2023 which sought to have her case re-opened, in order to allow her tender new evidence of alleged harvesting of trees by the defendant in the land at Nyota Farm. I gave the parties directions which they complied with and in my Ruling delivered on 18<sup>th</sup> October 2023, I allowed the application. I gave the defendant leave to file his own report.
7. It was at this point that the defendant filed the application dated 23<sup>rd</sup> October, 2023, in which he sought my recusal from the case.
8. The application in question is supported by the defendant's affidavit sworn on even date. In a nutshell, the Applicant states that the court is biased against him. He further avers that he was informed by his Assistant Chief where the property is situated, that, I had personally instructed the OCS Keringet Police Station, to deal with him and not allow him to be near his property.
9. The Applicant further avers that he also sought the assistance of the area Member of Parliament one Hon. A. Mutai, who confirmed to him that the said OCS Keringet, had informed him that he had once worked with me in the past and he was under my instructions to ensure the applicant did not enter upon the suit property. He took exception to the fact that the suit property is under the jurisdiction of Sirikwa Police Station and not Keringet Police Station.
10. The Applicant further states that upon perusal of the Ruling delivered on 18<sup>th</sup> October 2023, he became apprehensive that he would not get justice if I continue to handle this case. He states that he has suffered in the hands of the trial court and has lost trust in its ability to do justice to him. That owing to the trend of the court favouring the plaintiff, there is likelihood that a fair trial is likely to be denied.
11. Owing to the nature of the allegations made, I directed that the OCS Keringet Police Station, the area chief in question and the area Member of Parliament to be served with the application and to file their responses. I will deal with their responses shortly.
12. The Plaintiff/Respondent opposed the application vide an affidavit sworn on 30<sup>th</sup> October 2023. In a nutshell, the Respondent states that after the parties were heard, the Applicant went to the land in dispute and harvested trees worth millions of shillings. That this prompted her to report the matter to the police. Thereafter, she applied to have her case re-opened so that she could tender the valuation report, prepared by the Forest Department which application was allowed and the Applicant was given an opportunity to present his own report.
13. The Respondent further states that instead of appealing against the Ruling if he was aggrieved, the Applicant has come up with the present application.
14. The Respondent further avers that the Honourable Member of Parliament named by the Applicant is an Interested Party as he had leased 20 acres of their land. That the injunction orders against the Applicant were not issued by this court, but the Chief Magistrate's Court in Nakuru ELC. No. 81 of 2019. That the Applicant's attempt to have the orders lifted was thwarted by the Chief Magistrate's Court that declined to grant the orders.
15. The Respondent further states that the present application is meant to stagnate the proceedings herein and to spite the court for making a Ruling that the Applicant was not happy with.



16. As I stated earlier, the court summoned the three (3) people mentioned by the Applicant. The first to appear was No. 235780, Chief Inspector Ogutu Jobando, the OCS Keringet Police Station. He stated that the Respondent informed him that there was a court order issued by the court at Nakuru that was being contravened. The Respondent gave her the Assistant Chief's number and upon calling him, the chief said he was aware of the court order but at the time he gave an okay to the harvesting of the trees he was not aware of it. That he referred the Respondent to the forest office.
17. The OCS further stated that the Assistant Chief called him saying that Mr. N (Applicant) wanted to see him but he declined to meet him. He denied that he discussed this case with the chief, as he was not even aware of the same.
18. The OCS further stated that he learnt that there was a tractor on the farm. He called the driver, the number he was provided with by the Respondent. The driver told him that the land belonged to the area Member of Parliament and there was no way he could be prevented from ploughing it, later the Member of Parliament called him seeking to enquire how long a court order lasts. He said that it took six (6) months to lapse, but he advised the MP that the order in question was a permanent injunction. The MP insisted that he would till the land.
19. The OCS further stated that when the MP questioned why the order was being executed by Keringet Police Station and not Sirikwa Police Station, he advised him that the order was addressed to his station, and that when the order was issued he was not the OCS.
20. The OCS was categorical that at no time has he ever received a call from the "Judge" as alleged or from any judicial officer. He stated that he had worked at Nakuru until 2008, but at no time had he interacted with the "Judge" personally. He stated that he went to the land using an official police vehicle and saw a number of lorries there.
21. The OCS admitted that the land in question is under Kuresoi North which is administratively averred by Sirikwa Police Station. He added that his station is less than 5 kilometres from the land's location.
22. Hon. Alfred Mutai, the Member of Parliament, Kuresoi North Constituency appeared in compliance with the court summons on 27<sup>th</sup> November 2023. He acknowledged that he knew the Applicant herein. That the Applicant alerted him that the OCS Keringet Police Station was harassing him on his farm. He called the OCS seeking to know why the latter was handling a matter out of his jurisdiction. The OCS told him that he had a court order and in the course of their discussion, he mentioned the name "Nyaga" and said that he has once worked with, but did not state where.
23. The Hon. Member of Parliament denied that he had leased any land from the Applicant. He denied that he was made aware of any court order. He denied ever discussing the matter with the chief.
24. The Assistant Chief, one Raphael Tuei, appeared in court on the same day. He stated that he received a call from the OCS Keringet, who told him that no one was allowed to enter Mr. N's land as there was a court order. He then called the Applicant and told him not to enter the land. He stated that he was never informed of the name of the Judge who issued the order.
25. The Assistant Chief added that he was aware that the area Member of Parliament had leased part of Mr. N's land. He admitted that he had endorsed a permit for the felling of trees. He also denied seeing the court order in question.
26. The Applicant also took to the stand. He said that he was called by the chief, while he was at Kericho, and he was informed that no one should enter the property. That he was further informed that the



- OCS had gone to the land using a “probox”. That he sent someone to the land but the Respondent denied that person access.
27. The Applicant stated that he then called the area Member of Parliament asking for intervention since the land was not under his station’s jurisdiction. That he learnt from the Member of Parliament that a judge, who was not specified, had issued the order. He said that he never went to meet the OCS but relied solely on the information he received from the area Member of Parliament.
28. The Applicant stated that he was aware of the allegation even before the Respondent made her application to re-open her case but he never took an action. He said that the area Member of Parliament told him that Judge Nyaga was pushing him (OCS) in the case. That the Chief did not mention Judge Nyaga.
29. The Applicant admitted that he was aware of a court order issued by the Chief Magistrate’s Court, but complained that interim orders taking four (4) years was unjust. He also admitted that there are no orders issued by this court restraining him from entering the land. He denied harvesting any trees as alleged and that the Ruling delivered by the court is what made him make the application. He conceded that he had not appealed against that Ruling and that it is the Chief Magistrate’s Court that barred him from going to the land. He complained that the said order is being used to prosecute him. He admitted that he had leased a portion of the land to the area Member of Parliament before this case began.
30. The parties filed submissions which I have considered and will address them.
31. The only issue for this court to determine is whether there are sufficient grounds adduced for the court to recuse itself. The parties have correctly cited the legal principles and the case law on the threshold for an application of this nature.
32. The parameters of an application such as the present one are well known. In *Kalpna H. Rawal vs The Judicial Service Commission* (2016) eKLR, cited by the applicant, the court held that;
- “we think the objective test of reasonable apprehension” is good law” the test is stated variously, but amounts to this: do the circumstances give raise 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”
33. The supreme Court of Kenya in *Gladys Boss Sholei v the JSC and another* (2018)eKLR cited the case of *Simonson vs General Motor Corporation* USDCP 425 RSupp574,578(1978) in which the court stated;
- “Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.
- From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge’s duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manouvering by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the Newzeland court of appeal in *Mnir-vs-Commissioner of Inland Revenue* (2007) 3NZLR 495.”



34. Similar in *Jasbir Singh Rai & 3 Others vs Tarlachan Singh Rai* (2013) eKLR, also cited by the applicant, the court held that:-

“Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.”

35. The Supreme Court held that the test to be applied when a party requests a judicial officer to recuse himself is;

“the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts”, and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.

36. The Judicial Code of Conduct sets out the grounds upon which the Judge of Judicial Officer may recuse himself or herself. These includes;

- a. Personal bias against a party or advocate.
- b. The Judicial Officer acted as an advocate for a party in the suit.
- c. Close relationship with a party to the suit.
- d. The Judge or spouse have a financial interest in the case.

37. Further in the Commentaries on the *Bangalore Principles of Judicial Conduct*, at paragraph 81 it is stated:-

“The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulas have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from “a high probability” of bias to “a real likelihood”, “a substantial possibility”, and “a reasonable suspicion” of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. The test is “what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.”

38. As has been stated in the above cases and legal commentaries, the apprehension of bias must be founded on reasonable grounds. In other words, whether the apprehension of bias by the applicant is a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. Personal feelings or prejudices will not suffice, otherwise every party will be asking for matter to be heard by a Judges or Judicial Officer of their liking.

39. A Judge of Judicial Officer owes a duty to uphold the Constitution, the oath of office and fidelity to the law. That is the cornerstone of the rule of law. If any of the above is compromised, then the court has to recuse itself from the matter before it.



40. The above notwithstanding, the court has to be wary of wily litigants who want everything to go their way, by hook or crook. Such litigants must not only be reminded of the role of the court, but also be called out and if necessary, be reminded of the equality of all parties before the court.
41. A court that genuinely feels that it may not be objective in delivering justice has no option but to recuse itself. That said it is not every application for recusal that ought to be allowed, if that were the case, then cases will never end. Once a party is denied an order, or an order is made in favour of 'another' party, they would rush with similar Applicants.
42. In the instant case, it is noted that all the parties concede that there has been no order by this court barring anyone from entering the suit land. The said order was issued by the Chief Magistrate's Court. The Applicant in his Affidavit sworn on 29<sup>th</sup> January 2021 at paragraphs 34 and 35, acknowledged the existence of the orders of injunction. He went to allege as he had done herein, that the said orders are oppressive against him.
43. Having acknowledged that the oppressive orders were issued by the Chief Magistrate's Court, then why has the Applicant set his sight on this court?
44. Evidently, the Applicant has not complained to any authority against the court that issued the orders in question. It is also apparent that he did not appeal against them once his application to discharge them was disallowed. So what he has done is to go on a frolic of his own, ranting about the orders, but to the wrong forum.
45. The Applicant was aware of the orders since 2021, so why did he, in 2023, decide to call his Member of Parliament? Why not his advocate?
46. The area Member of Parliament who clearly has a vested interest in the matter alleges that the OCS told him that Judge Nyaga had ordered that the Applicant be kept away from the land. He never even sought to examine the order in question, although he was made aware of the same.
47. As a lawmaker, the Member of Parliament ought to have given the Applicant the correct guidance. Instead, without any proof, he drags the name of the Judge into the matter, knowing very well that this court has never issued any orders.
48. Is the Member of Parliament someone to be believed? I don't think so. This is someone who has denied leasing any part of the land from the applicant. The Applicant himself acknowledged the fact that the MP had leased his land. The Chief did so too, as did the Respondent.
49. So here is a man who denied the obvious, and he wants the world to believe his unsubstantiated allegations against the court.
50. There is a growing trend among the politicians trying by all means to influence the courts in their decision making. They have used intimidation, threats as their *modus operandi*.
51. Evidently, the Member of Parliament knows, and wisely so, that he has no power or leverage to intimidate this court, so he sought another way, that of making scandalous and malicious allegations against the court.
52. As a lawmaker, if he knew that the OCS was acting outside of his area of jurisdiction, all he needed to do an intervene through the OCS's superiors namely the Division Commander, or the County Commander. He never made any such complaint, so it is hard to swallow his explanation that he was merely questioning the OCS for acting in excess of his jurisdiction.



53. The truth, it appears, is that with an interest in the matter, the M.P. was not happy that his employee/ agent was stopped from further activities on the land in question.
54. The Applicant claims to have been aware of the push by the Judge, even before the Ruling was made. Is that really so? The OCS had not intervened in the matter as there was no reason to do so then. Therefore, the Applicant's sentiments must be taken with a massive pinch of salt.
55. The real reason, I suspect, for the present Application, is the Ruling that was delivered on 18<sup>th</sup> October 2023 allowing the Respondent to open her case and adduce a forester's report showing the extent of the trees allegedly harvested while this case was awaiting determination. Instead of appealing or if he chose not, to file a counter report, the Applicant sought to have the court recuse itself.
56. Ironically, the Applicant was full of praise of the same court he was asking to recuse itself. I am therefore in doubt that his complaint is genuine. I think he has ulterior designs but I will not go into details.
57. To me, this Application smacks of malice, propagated by the Member of Parliament who thinks that he can have his way around. The era of judicial interference is long gone. Everyone, and I repeat, everyone, is subject to the rule of law. The sooner this sinks in the better for everyone.
58. As for this Application, I find that it is based on hearsay, misinformation and obvious malice. It holds no substance. This court is only concerned with the matter before it, that is whether the property constitute matrimonial property and any subsequent orders. Any other issues arising outside the cause are just 'hot air' and should be treated as such.
59. Thus, the application is dismissed, but there will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

C/A Dickson

Mr. Langat for Applicant

N/A for Respondent

(Mrs Njoroge for Respondent)

