



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 27 OF 2019

ERDEMANN PROPERTY LIMITED.....PETITIONER/APPLICANT

VERSUS

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

AND

LONDON DISTILLERS (K) LIMITED.....INTERESTED PARTY

RULING

1. The application for determination is the Notice of Motion dated 1st July, 2020 filed by the Petitioner/Applicant. It is brought under Articles 22 and 50 of the Constitution, Section 5(1) of the Public Officer Ethics Act, Rules 5, 10(3) and 13 of the Judicial Code of Conduct and Ethics, Section 51(1) of the Civil Procedure Rules in addition to other provisions of the law.

2. The Applicant seeks the following Orders:

i) Spent.

ii) THAT the Hon. Mr. Justice C.G. Mbogo of the Makueni Environment and Land Court do recuse himself from the hearing of this matter and any further proceedings herein.

iii) THAT this file be forthwith placed before the Principal Judge of the Environment and Land Court for further direction/reallocation to any other suitable and disinterested Court of competent jurisdiction for hearing and disposal.

iv) THAT the costs of this application be in the cause.

3. The application is supported by the affidavit of Zeyun Yang sworn on 1st July, 2020 and it is based upon these salient grounds. Firstly, the affiant, who is the Managing Director of the Applicant, has deposed that the gravamen of the dispute is the wanton pollution arising from the discharge of untreated effluents from the Interested Party's factory into the surrounding environment and also the ensuing inaction by lead agencies charged with curbing pollution by the Interested Party. That the Applicant filed an application seeking conservatory orders substantively staying and or suspending the Respondent's order dated 6th September, 2019 in so far as it applied the repealed Section 129(4), EMCA and an order prohibiting the application of the said provision of law. That this Court certified the said application as urgent on 2nd January, 2020 whereupon being convinced of the immense prejudice that was being occasioned on the Applicant, this Court granted a conservatory order.

4. That on 24th February, 2020, the Interested Party filed an application to set aside the conservatory orders issued by this Court on 2nd January, 2020. When the Interested Party's application came up for hearing on 6th March, 2020, this Court proceeded to set aside the conservatory orders it had issued on 2nd January, 2020 without according the Petitioner/Applicant a fair chance to be heard and notwithstanding that no prejudice was being occasioned on the Interested Party.

5. Secondly, that the Petitioner/Applicant was unsettled after overhearing Counsel for the Interested Party saying that he would talk to Hon. Justice Angote (ELC Machakos) asking him to have a word with this Court ostensibly with a view to ensuring that the conservatory orders were set aside. Thirdly, the affiant has deposed that he has since filed a petition dated 29th June, 2020 to the Judicial Service Commission against this Court requesting for investigations into my conduct as to whether there were acts of collusion in contravention with the cardinal principles of propriety and professionalism under the Judicial Code of Conduct and Ethics.

6. For the above reasons, the Applicant deposed that he is apprehensive that there exists a real likelihood of bias and that the Petitioner faces

the risk of not being accorded a fair hearing by this Court as guaranteed in Article 50 of the Constitution.

7. Opposing the application is the Interested Party vide the replying affidavit sworn by its General Manager of Administration, Pushpinder Singh Mann. He deposed that the Motion had been filed mala fides with the hope to disrupt and frustrate the conclusive determination of this suit. That the Petitioner/Applicant had been found guilty of filing parallel proceedings instead of pursuing the Appeal pending before the National Environment Tribunal by the Court of Appeal in **Civil Application No. Nbi 105 of 2020 Erdemann Properties Limited -Vs- National Environment Tribunal & 2 others**. That the application had been filed for extraneous purposes to intimidate this Court simply because an earlier application had been disallowed. That the Petitioner/Applicant has orchestrated similar underhanded tactics of filing applications for recusal, highlighting **Machakos ELC JR. Case No. 41 of 2019** and **Machakos ELC JR. Case No. 75 of 2019** involving the parties herein as cases in point.

8. The affiant further deposed that the allegations by the Applicant were vacuous because the Applicant had failed to establish what direct pecuniary or proprietary interest this Court has in the eventual outcome of the dispute. That the allegation that Counsel for the Interested Party, Mr. Tiego, had spoken over the telephone with Hon. Justice Angote were untrue since he has never had the Judge's telephone number. That the Petitioner/Applicant had not laid out proof or any plausible reasons as to the likelihood of bias that could be inferred by a fair-minded person and thus absent valid reasons for recusal, this Court has a duty to sit. That the present application is being wielded by the Applicant as a sword so as to improve its chances of securing a particular judge or to aid it in forum shopping. Lastly, it is deposed that the present application is an abuse of the court process intended to scuttle progress towards the full hearing of the pending applications as well as this petition. It is prayed that the application be dismissed with costs.

9. The Petitioner/Applicant filed its submissions on 24th November, 2020. It has submitted that a judge must recuse himself if a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the judge was biased. That a fair-minded observer or bystander is a person who is aware of the social reality that forms the backdrop of the case. It is further submitted that the circumstances calling for the recusal of a judge are not cast in stone and hence the objective in one's recusal is to safeguard the due process of the law and to ensure that justice as between the parties is not just uncompromised but also be seen to have remained uncompromised.

10. Additionally, it was submitted that the utterances made by learned Counsel for the Interested Party shortly before the commencement of proceedings of 6th March, 2020 followed by the subsequent setting aside of the conservatory orders manifested the absence of impartiality on the part of this Court. That such circumstances went against the grain of Rules 5 (4) and (5) of the Judicial Code of Conduct and Ethics. Not only is the complaint of bias by a judicial officer a breach of the Judicial Code of Conduct and Ethics, it was also submitted that the same counts as a breach of the oath of office and the Constitution. That the Applicant has lodged JSC Complaint No. 134/2019 before the Judicial Service Commission and the same is pending hearing and determination. Lastly, the Applicant submitted that it had met the threshold required for the orders sought citing the judicial test applied in the case of **Kalpna H. Rawal -Vs- Judicial Service Commission & 2 others [2016] eKLR**. Other cases that were relied on include: -

- 1) **Philip K. Tunoi & another -Vs- Judicial Service Commission & another [2016] eKLR;**
- 2) **Republic -Vs- Firearms Licensing Board & another; Ex parte Jimi Wanjigi [2019] eKLR;**
- 3) **Jasbir Singh Rai & 3 others -Vs- Tarlochan Singh Rai & 4 others [2013] eKLR;** and
- 4) **Kenya Hotel Properties Limited -Vs- Attorney General & 5 others [2018] eKLR**

11. The Interested Party filed its submissions on 25th January, 2021 wherein it has submitted as follows. That the Applicant had not demonstrated that this Court has a direct pecuniary or proprietary interest in the outcome of the suit so as to give rise to the conclusion of a conflict of interest. That this Court had a duty to sit in such instances where grounds for recusal did not exist in order to shield its judicial independence. That the test for bias is objective and requires that the facts constituting bias to be specifically alleged and established. That the Applicant had failed to demonstrate a real danger of bias or any likelihood thereof.

12. It was further submitted that the application had been filed to intimidate this Court from hearing the suit objectively and to condescend the Court into granting orders in favour of the Applicant. That a judicial officer ought not to recuse himself on flimsy and baseless allegations. That the Applicant had made it a habit to file applications for recusal in addition to filing complaints with the Judicial Service Commission whenever a matter was ruled against it. That the application lacked merit and thus, ought to be dismissed with costs. The Interested Party relied on the following authorities: -

- 1) **Republic -Vs- Independent Electoral and Boundaries Commission & 3 others Ex parte Wavinya Ndeti [2017] eKLR;**
- 2) **Bernard Chege Mburu -Vs- Clement Kungu Waibara & 2 others [2011] eKLR;**
- 3) **Kalpna H. Rawal -Vs- Judicial Service Commission & 2 others [2016] eKLR;** and
- 4) **Tatu City Limited & 3 others -Vs- Stephen Jennings & 6 others [2015] eKLR**

13. After a keen assessment of the pleadings, one issue arises for determination; whether the Applicant has established a cogent argument to merit the recusal of this Court from hearing any further proceedings. As I feel constrained to reply in respect of the first ground which is that this Court failed to grant the Petitioner/Applicant a fair chance to be heard on 6th March, 2020 in respect of the Interested Party's application dated 21st February, 2020 and thus showing bias, I find the argument unconvincing.

14. The record will show that I gave both counsel on record wide berth to make their case in respect to the application for setting aside of the

conservatory orders issued on 2nd January, 2020. In exercising the judicial discretion granted to this court, I was convinced *prima facie* that the order issued on 2nd January, 2020 was given after non-disclosure of material facts by the Petitioner. That there were pending parallel proceedings to this petition to wit Machakos ELC JR. No. 75 of 2019 involving the same parties and wherein, the Petitioner's construction project, which I had granted conservatory orders in favour of, had been stopped. I further directed that the Petitioner file a substantive replying affidavit if it wanted to counter the application. Ergo, the ground that this Court denied the Petitioner/Applicant a fair chance to be heard is unsubstantiated.

15. This Court's impartiality was also called into question and Rules 5(4) and (5) of the Judicial Code of Conduct and Ethics invoked for my recusal. A cursory interrogation of the grounds relied in support thereof will show that in no way was this Court part in the alleged telephone conversations involving learned counsel for the Interested Party. The Petitioner/Applicant did not provide substance to the said telephone conversation and it is thus suspicious how this Court should find itself caught in the muddle that has been wildly put forward. I shall say no more of this.

16. Lastly, the Petitioner/Applicant contends that I should recuse myself since there is a petition against this Court pending hearing before the Judicial Service Commission. The questions that spring to my mind, are shall I recuse myself on the basis of every whim of discontent which firstly, I do not have the substance of and secondly which I have neither been indicted and subsequently convicted. I do not think so.

17. The onus of establishing grounds for bias and prejudice rests upon the Applicant. As correctly submitted by both parties, the test 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 a fair-minded observer would give the opinion that a fair hearing could not be obtained contrary to Article 50 of the Constitution. To my mind, a fair-minded observer would assess the possibility of apparent bias based on the Applicant's grounds as just trifling accusations. This Court would not be justified in taking the risk of allowing this application as aborting this trial now is bad enough for all concerned.

18. While I applaud the industry of learned Counsel in the depth of their submissions and the bundle of authorities that have been relied on, I will endorse the findings of the learned judges in **Attorney-General -Vs- Anyang' Nyong'o and others [2007] 1 EA 12 (EACJ)**, where it was held as follows: -

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

19. The East African Court of Justice went on further to endorse the decision of the Constitutional Court of South Africa in **The President of the Republic and others -Vs- South African Rugby Football Union and others 1999 (7) BCLR 725 (CC)**, which held as follows: -

“While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to “administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law.” To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself.”

20. In conclusion, the Petitioner/Applicant has failed to prove any possibility of bias, predisposition or prejudgment in its application. This Court strongly denounces the Applicant's veiled intimidation in the form of unsubstantiated allegations which do no more than undermine the public confidence in this Court but more importantly, undermine judicial independence. The application dated 1st July, 2020 is dismissed with costs.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 9TH DAY OF SEPTEMBER, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi