



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 157 OF 2017

HARUN OSORO NYAMBOKIPLAINTIFF

=VERSUS=

KENELEC SUPPLIES LIMITED & 6 OTHERS.....DEFENDANTS

RULING

Background.

1. The Plaintiff had filed a suit against the Defendants seeking the following reliefs:-

a. A permanent injunction do issue against the 1st Defendant, its servants, employees and/or agents from encroaching into, blocking access entry, erecting any building and/or structure, preventing usage, storing any materials, developing and/or dealing in any manner whatsoever with access service lane connected to the Plaintiff's premises known as L.R No. 209/13557 situate along Lang'ata Road-Nairobi West within Nairobi area.

b. An order of cancellation do issue directing the 3rd, 4th and 5th Defendants as L.R No.209/18289 and all entries in the register and all documents of ownership.

c. An order do issue directing the 2nd, 3rd and 5th Defendants jointly and severally to restore the original service lane of 6 metres serving the Plaintiff's premises known as L.R No.209/13557.

d. General damages

e. Costs and interest.

2. The Plaintiff contemporaneously filed an application seeking injunctive orders against the 1st Defendant. The Plaintiff is the registered owner of LR No. 209/13557. The 1st Defendant is the registered owner of LR No. 209/18289 which was originally LR No. 209/10191. The 1st Defendant was given the new title because it applied for annexation of a six metre sewer line which application was granted thus the new title.

3. Prior to the annexation of the six metre public sewer line, the Plaintiff had applied to Nairobi City Council Water and sewerage Department for connection to the public sewer line. When the 1st Defendant was granted the new title annexing the six metre public sewer line, it moved to the ground and cut off the Plaintiff's connection. It is the 1st Defendant's action which prompted the Plaintiff to move to court for injunction. The Plaintiff's application for injunction was heard by Justice Eboso who in a ruling delivered on 16th July 2018 dismissed it because the Plaintiff had annexed a title which had not been signed by the Registrar and did not have the grant number and signature of the Commissioner of Lands.

4. The Plaintiff thereafter filed an application for review in which he also sought for a mandatory injunction. Before the application for review could be heard, Justice Eboso recused himself from hearing the matter on the grounds that the Plaintiff's advocate had complained against him to the Judicial Service Commission. The file was taken to the Presiding Judge who then allocated it to me. I heard the application for review which I allowed vide a ruling delivered on 4th April 2019. This is the ruling which triggered the 1st Defendant to file a complaint against me to Judicial Service Commission and finally filed an application for my recusal.

The Application

5. In the application by the 1st Defendant, the 1st Defendant contends that I am biased against it; that I am incompetent and that I lack integrity. On the issue of bias, the 1st defendant contends that I declined the request by its lawyer to file written submissions in respect of the application for review; that during the hearing of the application for review, I was openly hostile to its advocate and that I only considered the submissions of the Plaintiff in arriving at the ruling of 4th April 2019. The 1st Defendant further argues that I addressed myself to matters which were not placed before me and that I dealt with the matter hastily after bringing forward the date for hearing of the application for review which had been fixed for hearing in June 2019 by Justice Eboso.

6. On the issue of integrity, the 1st Defendant insinuates that I may have had a meeting with the Plaintiff where I may have been bribed and that I may have colluded with officials of Nairobi Water and Sewerage Company Limited who invaded its suit property armed with police officers allegedly based on orders which were granted in judicial Review Application No. 10 of 2019.

Opposition by Plaintiff.

7. The 1st Defendant's application was opposed by the Plaintiff based on a replying affidavit sworn on 15th October 2019. The Plaintiff contends that the 1st Defendant's application is malicious and is based on falsehoods and is an abuse of the process of the court. The Plaintiff wonders why the 1st Defendant complains about a matter which was handled efficiently and as per the law on review and mandatory injunctions. The Plaintiff further contends that a complaint to the Judicial Service Commission is not a ground for recusal of a Judge. The Plaintiff further states that he was not a party to Judicial Review No .10 of 2019 and even if orders were given in that case, court orders are given based on the merits of each case.

Analysis

8. I have carefully considered the 1st Defendant's application as well as the opposition to the same by the Plaintiff. On 2nd September 2019, the Court directed that parties file written submissions. The applicant was to file and serve within 14 days. The Respondents were to file theirs within 14 days of being served. As at 5th December 2019 no submissions had been filed. The 1st Defendant's counsel indicated that he was not going to file any submissions. The counsel for the 4th to 7th Respondents sought for 3 days within which to file their submissions. As at the time of writing this ruling, only the 4th to 7th Defendants had filed their submissions.

9. This application for recusal is not made in good faith. It is clear that the 1st Defendant was preparing ground for the same by making a complaint to the Judicial Service Commission after which this application was made. The issue of competency of a Judge or otherwise has never been a ground for recusal. The grounds for recusal are well known. These include bias, conflict of interest and lack of integrity. For an application to succeed, the Applicant has to prove that either of the three main reasons for recusal exist.

10. There have been a long line of authorities which state the grounds upon which a Judge can recuse himself from a matter . A litigant who wishes to have a Judge recuse himself or herself has to be honest and put forth grounds for bias, conflict of interest or lack of integrity . An application for recusal should not be made by a party who has lost in a matter or who thinks that a certain ruling ought not to have gone in the manner it did. In the East African Court of Justice in **Attorney General of Kenya Vs Anyang Ngong'o Application No. 5 Ref No 1 of 2006**, the Court cited with approval the **South African case of Republic & 2 others Vs South African Rugby Football Union & 3 Others** where it was held as follows:-

“In conclusion, we would like to borrow the words of the Constitutional Court of South Africa in the S.A Rugby Football Union case (supra) para.104.

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.”

11. In the case of **Philip K Tunoi Vs Judicial Service Commission** and another the Court of Appeal held as follows:-

“ The Judicial Service Code of Conduct and Ethics made by the judicial Service Commission pursuant to section 5(1) of the Public Officer Ethics Act, 2003 contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. Rule 10(1) of the code of conduct requires judges of the superior courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of the Constitution.

Specifically, under Rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service”.

12. From the two cases cited hereinabove, it is clear that recusal can only be allowed where there is demonstrable evidence of bias, conflict of interest or lack of integrity. Recusal cannot be allowed where it is clear that the application is only intended to achieve a certain aim of getting out a judicial officer or Judge out of a case in the hope that another Judge or Judicial officer may have a different view of the matter

which is favourable to the Applicant.

Conclusion.

13. The Applicant herein has not demonstrated any grounds of bias in this matter. The Applicant has made spurious allegations which are unsubstantiated. The insinuation of bribery has no basis at all. There is no issue of conflict of interest raised. As I have said hereinabove, the Applicant started laying ground for this application soon after the ruling of 4th April 2019. The fact that the application for review had been fixed for hearing in June by Justice Eboso and that this date was brought forward to March 2019 is no ground for bias. Each Court operates according to availability of dates in the diary. I was not bound to go by the date which had been fixed by Justice Eboso in his diary before he recused himself. I therefore find no merit in this application which is hereby dismissed with costs to the Plaintiff and the 4th to 7th Defendants. However as the 1st Defendant seems to be determined to have this case heard by a person other than myself, I direct that this file be placed before the presiding Judge to allocate it to another Judge for hearing and disposal.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 20th day of February 2020.

E.O.OBAGA

JUDGE

In the presence of:

Mr Manyara for Plaintiff/Respondent

Mr Musyoka for Mr Kago for 1st Defendant/Applicant

Mr Kamau for 4th to 7th Defendants/Respondents

Court Assistant : Hilda

E.O. OBAGA

JUDGE