



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC CASE NO. 198 OF 2012

VERONICA WANJIRU NGIBUINI.....1ST PLAINTIFF

IRENE KAGENI.....2ND PLAINTIFF

AMY KUMICINSKI..... 3RD PLAINTIFF

JOHN KUMICINSKI.....4TH PLAINTIFF

VERSUS

REAH MARIE GITHAIGA & 16 OTHERS.....DEFENDANTS

RULING

Through the notice of motion dated 24/10/2019, the Advocate for the 1st, 3rd and 4th Plaintiffs applied for orders that I recuse myself from determining this suit owing to what she termed as disrespect, prejudice, disfavour, disdain and odium for the Plaintiffs' counsel, Ms. Koki Mbulu, which Ms. Mbulu contended was likely to impact the integrity, independence, decision making and my impartiality in this suit. The application sought to have the file remitted to the Presiding Judge of the Environment and Land Court for further directions.

The application was brought under Articles 2 (1)(2) & (5), 10 (2)(a) & (c), 50 (1) and Article 160 (1) & (5) of the Constitution of Kenya: Article 1A, 1B, Section 3(a), (b), (c), (e), (f), (g) & 4 (f) of the Judicial Service Act; Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules and the Judicial Code of Service, including the Bangalore Convention Principles of Judicial Conduct and all other enabling provisions of the law.

The application was based on the grounds contained in the application and those set out in the supporting affidavit of Evelyn Koki Mbulu sworn on 24/10/2019. Ms. Mbulu deponed that her clients instructed her to apply for my recusal after she explained to them that my contempt, disdain and disregard for her would have an impact on the suit. It was Ms. Mbulu's contention that I will rule against her clients as punishment towards her for challenging me after I falsely accused her of disrespecting the court. Ms. Mbulu deponed that I act with disdain and have a superiority complex coupled with an expectation for reverence and that this would have an impact on my integrity and impartiality to render justice in the case.

Further, that my ill will, odium, impetuous and ignoble behavior has been demonstrated in other suits in which Ms. Mbulu acts for clients such as **ELC 371 of 2012** and **ELC 206 of 2012**. She urged that as an advocate of twenty five years standing, she was entitled to stand her ground before the court as she had done before since she is employed by clients to resist unethical judicial conduct, and not to countenance intimidation, harassment, disrespect and complaints from a judge whenever she stands her ground. Ms. Mbulu averred that due to the unethical conduct demonstrated by me in the three cases mentioned, her American clients have instructed her to prepare a complaint against me and that the complaint letter was being audited by the 3rd Plaintiff against video and audio evidence that she availed. She added that she had agreed to testify in a complaint filed with the Judicial Service Commission in **ELC 905 of 2009** and that this would cause me to act in a punitive manner in this case. She averred that I am mistaken as to the essence of judicial power which I confuse with my own self rated power. I am not aware of the proceedings referred to by Ms. Mbulu in her application for my recusal.

I have considered the application and affidavit dated 24/10/2019. The issue for determination is whether the application has satisfied the grounds for recusal of a judicial officer from hearing a case.

What comes to the fore in the instant application is whether an advocate's dislike of a judge is a ground for her recusal and whether the Applicant has demonstrated bias on my part that would affect my impartial determination of this dispute. The affidavit in support of the application for my recusal was sworn by the advocate herself and not the Plaintiffs whom Ms. Mbulu represents.

The issue of recusal has been dealt with by several courts. In **Attorney-General v Anyang' Nyong'o & Others [2007] 1E.A. 12**, the court set the test for bias as follows:

“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 a judge did not (will not) apply his mind to the case impartially? ... Needless to say, a litigant who seeks the 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 a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...”

In paragraph 53 of the judgment in **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR** the court stated that it must always be remembered that there is a presumption of impartiality of a judge. In **The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 Others, (CCT16/98) [1999]** the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training and that they would therefore be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters.

It was further stated in **The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999]** thus:

“It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question 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 is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

The House of Lords in **Porter v Magill [2002] 1 All ER 465** stated thus:

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

The common thread in the above decisions is that it is a litigant who would be apprehensive that the court may be biased in the determination of the dispute. The circumstances in this case are unique in the sense that it is an Advocate who claims that I will be biased in my determination of the case and not the litigants.

Has Ms. Mbulu proved that I may be biased in the determination of this dispute? Would a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of this case perceive that I am likely to be biased in the determination of this dispute?

It is useful to give the background of this case. There are two related cases, this suit and **ELC Case No. 206 of 2012**. Ms. Koki Mbulu represents the 1st, 3rd and 4th Plaintiffs in this suit and is on record for the 3rd Defendant in ELC No. 206 of 2012. Kimondo J. directed on 11/5/2012 that this suit would be consolidated with ELC No. 206 of 2012 and directed that the file in respect of the instant suit would be the consolidating file in which the proceedings would be taken. Kimondo J. proceeded to set out how the parties would appear in the heading of the consolidated suit.

The court gave directions on 12/6/2018 for the Plaintiffs’ advocate to file and serve a consolidated bundle containing the pleadings, witness statements and documents in respect of all the parties for use at the trial. The court set down the trial for 30/10/2018. Ms. Mbulu applied for an adjournment on 30/10/2018 and stated that she would file and serve the trial bundle within seven days. She informed the court that her witnesses were seeking a hearing date in April 2019 and that two of them were in the United States of America (USA).

When the matter came up for hearing on 24/4/2019, Ms. Mbulu, advocate for the 1st, 3rd and 4th Defendants informed the court that the bundle prepared by Ms. Mbulu did not contain the pleadings and documents filed in ELC No. 206 of 2012. Ms. Mbulu maintained that she did not have the documents filed by the Defendants in ELC No. 198 of 2012 and that after consolidation this was to be the lead file and therefore the file in respect of ELC No. 206 of 2012 was not necessary. Ms. Mbulu clarified that Ms. Mbulu represented the Defendants in ELC No. 206 of 2012. The court put off the matter to 14/5/2019 and directed the Deputy Registrar to cause ELC No. 206 of 2012 to be brought up for directions on 14/5/2019. After the court adjourned, the 3rd Plaintiff who is Ms. Mbulu’s client asked to approach the bench. She explained to the court that she had travelled from New York, USA for the hearing of this case and was scheduled to travel back to the USA the following day. The 3rd Plaintiff requested the court to take her evidence. The court directed both Ms. Mbulu and Ms. Mbulu to attend court at 2 p.m. when the evidence of the 3rd Plaintiff was to be taken *de bene esse*. The court took the 3rd Plaintiff’s evidence that afternoon and she was cross examined and re-examined.

According to the pleadings filed in ELC No. 206 of 2012, Ms. Mbulu represented the 1st to 9th Defendants in that case, who after the consolidation of the two suits became the 10th to the 17th Defendants. This means that Ms. Mbulu acts for the Plaintiffs and the Defendants in the same suit. During the hearing Ms. Mbulu was emphatic that she was only representing the Plaintiffs and was vehemently opposed to the file in respect of ELC No. 206 of 2012 being brought to court. Her complaint against me stems from the court’s insistence that the dispute in ELC No. 206 of 2012 must be heard together with this suit with which it was consolidated. Ms. Mbulu has not only been disrespectful of the court but has treated the Defendants’ counsel with disdain, lack of respect and professional courtesy that is expected of advocates as officers of the court. On 2/10/2019 when this case came up for further hearing, the file in respect of ELC No. 206 of 2012 was not in court.

The court requested Ms. Mbulu to go to the registry and request them to retrieve the file since the court was still going through the day's cause list. She insisted that it was not her role to go to the registry to collect the court file and stated that she would be filing an application for my recusal from hearing the matter. Advocates do follow up matters in the registry with the Executive Officer when their files are not in court and once traced the files are brought to court by the registry staff. The court adjourned the case to give Ms. Mbulu time to file the application for recusal. Two days later Ms. Mbulu asked me to recuse myself in a different matter in which she appears for one of the parties.

The case came up for further mention on 29/10/2019 and was put off to 30/1/2020 because Ms. Mbulu had not filed the application for my recusal.

The Plaintiffs have testified and have closed their case. During the hearing of the application for my recusal, the advocate for the 1st, 3rd and 4th Defendants stated that the Defendants wished to proceed with the hearing of the suit and sought directions on further hearing of the case.

In the application for my recusal, Ms. Mbulu claimed that I had issued contradictory orders in this case and in ELC Case Number 206 of 2012 and ELC Case Number 371 of 2012 but did not give particulars of the contradictory orders she claimed I had issued. Ms. Mbulu has not demonstrated that there is reasonable apprehension that I have not or will not bring an impartial mind to bear on the adjudication of this case, that is a mind open to persuasion by the evidence and the submissions of counsel.

The advocate for the Plaintiffs has not established bias on my part or grounds for my recusal from hearing this case. However, in the interest of justice and for the expeditious disposal of this old dispute, the file will be placed before the Presiding Judge of the Environment and Land Court for allocation to another judge. The parties will address the judge who will be assigned the case on the issue as to whether the hearing should start *de novo* or it will proceed from where it had reached. ELC Case Number 206 of 2012 which was consolidated with this suit will also be placed before the Presiding judge alongside this file.

Dated and delivered at Nairobi this 10th day of February 2020.

K. BOR

JUDGE

In the presence of:-

Ms. Janmohammed holding brief for Ms. K. Mbulu for the Plaintiffs

Mr. Mulanya holding brief for Maina for the 1st, 3rd and 4th Defendants

Mr. V. Owuor- Court Assistant

No appearance for the 2nd and 6th to 17th Defendants