



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 54 OF 2019

DR. EDWARD KUNGU.....1st PLAINTIFF/APPLICANT

GRACE WAMBUI KUNGU

(Suing as the legal representative of

the Estate of **JANET R. KUNGU.....2nd PLAINTIFF/APPLICANT**

VERSUS

DAVID NDUNG’U NJIHIA.....1st DEFENDANT/RESPONDENT

GABRIEL MURIRA MUTHIORA.....2nd DEFENDANT/RESPONDENT

PATRICK MACHARIA MWANGI.....3rd DEFENDANT/RESPONDENT

MARGARET WANGECHI MACHARIA.....4th DEFENDANT/RESPONDENT

SAMWUEL NGUGI KARIUKI.....5th DEFENDANT/RESPONDENT

HEZRON KAMAU WANGARI.....6th DEFENDANT/RESPONDENT

LAND REGISTRAR, NYANDARUA.....7th DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....8th DEFENDANT/RESPONDENT

AND

JESSY KARANJA MUCHEKE.....PROPOSED INTERESTED PARTY

RULING

1. Pursuant to a ruling that was delivered by this Court on the 4th day of February 2020 in which the Court found the Applicant therein had not established a prima facie case, as was held in the **Giella –vs- cassman Brown & Co Ltd [1973] EA 358 case**, to warrant the issuance of interim injunctive Orders pending the determination of the suit herein, the Applicant has now filed the present Application under certificate of urgency dated the 24th February 2020 under the provisions of Sections 1, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1-3 of the Civil Procedure Rules, Section 3 of the judicature Act and Article 159(2) of the Constitution in which he seeks for:

i. Spent

ii. Spent

iii. The Honorable Lady Justice M C Oundo be pleased to disqualify herself from trying this suit

iv. If prayer number (iii) is allowed this honorable Court be pleased to transfer this suit to the Nakuru, Meru or Murang’a Environment and Land Court for trial and determination.

v. The costs of this Application be in cause.

2. The Application was supported on the grounds therein adduced as well as on the supporting affidavit of Dr. Edward C. Kungu on the 24th February 2020.

3. In response to the Application, the Respondents filed their grounds of opposition dated the 6th April 2020 to the effect that;

i. The Application did not meet the legal threshold for recusal of a Judge and was as such incompetent and bad in law.

ii. The Application is aimed at the forum shopping and was to that extent, an abuse of the Court process.

iii. The Application is premised upon dismissal of the Plaintiffs' Application dated the 4th November 2019 which is the subject matter of Nairobi Civil Application No. NAI 36 of 2020 between Dr. Edward C Kungu and Another vs. David Ndungu Njihia & 7 Others pending before the Court of Appeal.

4. Pursuant to the filing of the said Application and response thereto and due to the present situation where the world was facing with the Covid-19 pandemic, on the 20th April 2020, the Court directed parties to file their written submissions electronically within 7 days where the matter was now scheduled for mention to confirm compliance for the 8th May 2020. On the said day, none of the parties had filed their written submissions.

5. The Court further extended time for parties to file their written submissions wherein the matter was now re-scheduled for mention for the 22nd May 2020 to confirm compliance. On is day, the Court noted that once again there had been no compliance for which leave was further granted to the parties to file their written submissions electronically within 14 days and a ruling date was then scheduled for the 17th June 2020.

6. Parties filed their respective submissions albeit out of time but which submissions I shall admit as properly on record pursuant the times we now face and in the spirit of the provisions of Section 1B and 3A of the Civil Procedure Act.

Applicant's Submissions:

7. The Applicant's submission seeking that Lady Justice M C Oundo disqualifies herself from trying this suit and while relying on the decided cases in **Shilenje -v- Republic [1980] KLR 132 at page 134, Attorney General of the Republic of Kenya – vs Anyang' Nyong'o & Others, East African Court of Justice Application No. 5 of 2006**, was based on the reasoning that vide a Certificate of Urgency dated 9th April 2020, the Applicant had specifically requested that the Application be referred to another Court in view of the pending Application dated 24th February, 2020 because they had seen the danger of the Application being overtaken by events. The Court declined to do so and instead ordered that the Application dated 24th February, 2020, be heard first.

8. The effect of that Order was that no action was taken against the Respondents who had disobeyed a Court Order made on the 7th February, 2020. The Applicants submitted that the Court refused to give them Orders before hearing them and therefore the Applicants in the Miscellaneous Application were left without a remedy.

9. The Applicants further submitted that there had been no mention of the matter on 8th May, 2020, as ordered with the consequence that the Plaintiffs never got protection at the ex-parte stage on 4th November, 2019, or, after inter-parties hearing on 4th February, 2020, or following the refusal of the Application on 4th February, 2020.

10. That while relying on the rule in **Madhupaper International Ltd**, the Applicants had sought for an Order to protect the subject matter of the suit pending Appeal when they had filed a Contempt of Court Application dated the 9th April, 2020, where the Court had been made aware of the fact that there was a Status quo Order in the Applicant's favor and that the Court of Appeal was seized of the matter, and also of the fact that between 8th February, 2020 and 7th April, 2020, the Respondents to the Application had taken possession of 2 acres of the suit subject in contempt of a Court Order.

11. The Applicants were therefore aggrieved by the Court's decision not to refer the Application dated 9th April, 2020 to another Court pending resolution therefore rendering their right to access justice under Article 48 of the Constitution nugatory by the Orders made on the 20th April, 2020.

12. That Application for recusal was therefore based on the following grounds:

i. Her Ladyship declining to grant any interim Orders despite the fact that on 3rd November, 2019, the Defendants had entered into the suit property and had constructed a temporary house, which they had walled and thatched with corrugated iron sheets;

ii. The ruling delivered on 4th February, 2020, ignored the fact on record showing that the Plaintiffs had been in possession of the suit property since 15th February, 1993 and that the 1st Defendant had, in January and April, 2019, recognized the Plaintiffs' ownership by seeking their permission to enter the suit property and say prayers to appease the spirits of their ancestor;

iii. The Court had ignored the evidence on record that the Plaintiffs bought the suit property in 1993 after doing searches and

meeting the requirements of an indefeasible title.

iv. Despite the facts set out in (i) - (iii) above, the Court declined the Plaintiffs' Application for injunction pending the making of a formal Application but instead Ordered the Applicants to make a formal Application and set it down for hearing on 24th February, 2020;

v. As a result of what is stated in (i) - (iv) above, on 8th February, 2020, four days after the Court's ruling, the Respondents endeavored to evict the Applicants and they were only saved by a decision of the lower Court.

13. That the incidents relayed above arose as a result of the refusal of the Court to grant the Applicants injunctive Orders for the preservation of the subject matter, which treatment offended the requirements laid by the Court of Appeal in **East African Safari Club Limited -vs- Safe Rentals Limited. Court of Appeal at Nairobi Civil Application No. 53 of 2010**. That the refusal of the Court to grant the Applicants an injunction at an interlocutory stage denied them justice.

14. That a party to a suit has a right to seek disqualification of a judicial officer in the course of proceedings where such event as occurred would make a reasonable person to conclude that a fair hearing will not take place.

15. The Applicants' further submitted that on the 4th November 2019, the Court declined to issue ex-parte Orders to stop further entry into the suit property pursuant to which the 2nd and 3rd Respondents herein entered on the suit land and on the 4th February 2020 and built a temporary house thereon. That in the decision in **Madhupaper [1985] KLR 840**, it was held that a Court which dismisses an injunction Application had a residual jurisdiction to preserve the subject matter by granting similar injunctions to those refused.

16. The Applicants while relying on the case in **Standard Resource Group Ltd v Attorney General & 2 others [2016] eKLR**, submitted that although the two Applications dated 24th February 2020 and 9th April 2020 had been served on the Respondents, there had been no response and therefore both Applications stood unopposed.

17. The Applicants further submitted that the incidents referred to above raised in them a reasonable apprehension that they would not get a fair hearing as envisaged in Article 50 of the Constitution. That although the incidences did not show bias on the part of the Court, yet they did create a reasonable apprehension that the Applicants would not get a fair trial in the main suit and a fair hearing of the contempt of Court Application.

18. That the ruling of the Court delivered herein on 4th February, 2020, came to a decision on matters of fact at an interlocutory stage which, in the mind of the Applicants, meant that the Court had reached a decision as to the merit of their suit as a whole and that they were unlikely, therefore to receive a fair trial. The Applicants sought that the Notice of Motion herein dated 24th February 2020 be allowed.

Respondents' Submission.

19. The Respondent's submission was that the Applicant's Application did not meet the legal threshold for the recusal of a Judge and that the same was incompetent and bad in law. That the said Application was aimed at forum shopping and was to that extent an abuse of Court process.

20. That the said Application was premised upon dismissal of the Applicant's Application dated 4th November 2019 which is the subject matter of **Nairobi Civil Application No. 36 of 2020** pending before the Court of Appeal.

21. That the Applicants were seeking to rely on matters which were not pleaded and which were not deposed to in the supporting affidavit which was untenable in law as a party was bound by his/her own pleadings and could therefore not be allowed to engage in a fishing expedition in proving its case. In so submitting, the Respondents relied on the decided case in **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** wherein they submitted that the said Application could not be granted since it did not meet the parameters set in several decided cases.

22. The Respondents further relied on the decided cases in **Phillip K Tunoi & Another -vs- Judicial Service Commission & Another [2016] eKLR** and **Gladys Boss Shollei vs Judicial Service Commission & Another [2018] eKLR** to submit that the Applicants herein had completely failed to bring themselves within the parameters set in in the foregoing cases. That the decision in the case of **R vs Shilenje** (supra) relied upon by the Applicant/Plaintiffs was not only distinguishable from the facts in the present case but was clearly not binding upon this Court being a decision of a Court of concurrent/equal jurisdiction.

23. That further the Applicant/Plaintiffs had not pleaded bias on the part of the trial Judge and therefore the Application did not lay any basis upon which recusal was being sought. That in any event, failure to obtain favorable Orders from a Court was not a ground for recusal of a Judge.

24. The Respondents further submitted that the applicants had already appealed the decision complained of and ought to wait for the Appeal to be determined. That the Application was misconceived, bad in law and an abuse of Court process and the same ought to be dismissed with costs.

Determination

25. I have considered the Application herein the Replying affidavits, the submissions as well as the authorities cited. I find the issues for determination as being;

i. Whether the Court was clothed with jurisdiction to find the Respondent in contempt in a matter not before it.

ii. Whether the instant Application raises sufficient grounds to warrant the Court to recuse itself.

26. In a Notice of Motion dated 4th November 2019 the Applicants had sought injunctive Orders against the Respondents, wherein the Court in its ruling of the 4th day of February 2020 found that:

‘...the 1st -6th Respondents having demonstrated that they were the registered owners of the suit properties having been issued with titles herein, prima facie their titles are indefeasible and the burden shifted to the Applicants to show or demonstrate that the titles are challengeable within the provisions of the law’

27. The Court further stated that;

‘ it was not possible to make a final determination at the interlocutory stage on the validity of the 1st -6th Respondents’ titles but the mere fact that they hold a duly registered certificates which on the face of it was properly acquired, is sufficient to lead the Court to hold that the Applicants have not established that there is a prima facie case....’

28. The Court was guided by the holding in the Court of Appeal in **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** where the Court had held that the sequence or steps to be followed in the enquiry into whether to grant an interlocutory injunction was only if the first step which was a “prima facie” case had been satisfied. The Court having found that the Applicants had not established a prima facie case which was the first step in the sequence as laid down in the **Giella Case** (Supra) and while guided by the finding of the Court of Appeal decision herein above stated, dismissed the Applicant’s Application that had sought for interlocutory injunction.

29. Immediately after delivery of the said ruling Counsel, for the Applicant orally sought for interim Orders of injunction pending the filing of the Appeal to which the Court directed that he files a formal Application and serves within 7 days so that parties could be heard inter-parties on the 24th February 2020, which was 20 days later.

30. The Applicants instead filed the present Application, dated the 24th February 2020 seeking for the Court to recuse itself wherein the Court again directed that the Application be served upon the Respondents within 14 days and the same be heard inter parties on the 30th March 2020.

31. Pending the hearing of the matter inter parties, Kenya reported its first corona virus case on the 12th March 2020 following which the government issued directives to all employees to work from home. On the 15th March 2020, The National Council on the Administrative of Justice issued a press statement suspending all Appeals, hearings and mentions in Criminal and Civil cases in all Courts as well as all execution proceedings with immediate effect. This was followed by practice guidelines to mitigate the Covid-19 issued by the Hon Chief Justice in support of the Government directives which guidelines limited access to Court premises and encouraged litigants to make use of the e-filing platform. On the 16th March 2020 further guidelines were issued by the Hon the Chief justice to wit that no precipitate action would be ordered in respect of existing interim Orders where parties were encouraged to extend them by consent. Court Registries were also directed to accept the filing of all pleadings. All these issues are in the public domain.

32. Following the turn of events and advisory herein, matters were strictly mentioned in chambers and directions issued appropriately.

33. It is in the course of the disruption of Court business caused by the Covid-19 pandemic that the Applicants filed another Application being Misc Application No 5 of 2020 dated the 8th April 2020 seeking the following Orders which have been painstakingly summarized, based on the nature of their lengthy drafting:

i. That the Court be pleased to hold the 1st and 2nd Respondents in contempt of the Court Orders issued on the 7th February, 2020 by the Senior Principal Magistrate's Court at Engineer in Civil Case No. 29 of 2019 and Civil Case No. 30 of 2019:

ii. That this Honorable Court be pleased to declare and hold that Counsel for the 3rd and 4th Respondents had undermined the authority of the Court wherein they had aided and abetted the 1st and 2nd Respondents in disobeying the above Court Orders and that they be committed to civil jail for a period of 6 months each or any other period, or any other or further sanction, as this Court may deem fit and appropriate.

iii. The Applicants also sought for the costs of the Application.

34. Along with the filing of the said Application, Counsel for the Applicants also wrote to the Deputy Registrar a letter dated the 20th April 2020 which was transmitted via e-mail, seeking that the Court issues Orders in the subsequent Application being Misc No 5 of 2020.

35. That Court, being aware of the prayers sought in the present Application No. 54 of 2019 where the Applicant had sought for the Court to recuse itself, and also taking into consideration that the Parties in both Applications were the same and so was the suit property herein, and further taking into consideration the executive directives as well as the practice directives issued by the Hon The Chief Justice, herein above stated, the Court in its Order of 20th April 2020 stayed the proceeding in Misc Application No 5 of 2020 pending the outcome of the present Application.

36. The said Orders were then transmitted to the Deputy registrar electronically on the same day wherein an Order dated the 20th April 2020 to that effect was extracted.

37. Going back to the Orders issued in this matter that the Application be heard inter parties on the 30th March 2020 (see No.25) and following the events that followed thereafter, on the 20th April 2020, parties were directed to file their submissions to the present Application wherein the Court was to render its ruling on the 8th May 2020 electronically. None of the parties filed their Submissions despite the Order having been extracted on the same day.

38. This trend happened on two consecutive occasions being the 8th May 2020 and the 22nd May 2020 when the Court was set to deliver the ruling in the present Application that parties had failed to submit their written submissions electronically, as directed.

39. Having had given the chronology of the issues herein above, I shall discuss the first issue for determination as to whether the Court was clothed with jurisdiction to find the Respondent in contempt of a matter not before it as follows:.

40. From the Applicant's submission, it is clear that one of the grounds they sought to have the Court recuse itself was because and I quote:

'the Applicants had specifically requested that the Application be referred to another Court in view of the pending Application dated 24th February, 2020 because they had seen the danger of the Application being overtaken by events. The Court declined to do so and instead Ordered that the Application dated 24th February, 2020, be heard first.....

.....the Applicants were therefore aggrieved by the Court's decision not to refer the Application dated 9th April, 2020 to another Court pending resolution therefore rendering their right to access justice under.....

41. From the above submission although the Applicants are submitting that the Court declined to transfer the matter in that case to another Court, yet as stated herein earlier, by the payers sought in the Application dated the 8th April 2020 and filed on the 9th April 2020, which was a matter in a different file being EIC Misc Application No 5 of 2020, it is clear that the Applicants had sought for contempt proceedings against the Respondents and their Counsel for disobeying the Orders issued in Orders issued on the 7th February, 2020 by the Senior Principal Magistrate's Court at Engineer in Civil Case No. 29 of 2019 and Civil Case No. 30 of 2019:

42. The next question that comes into mind is whether the Court had jurisdiction to find the Respondents and their Counsel in Contempt of Orders issued by Magistrates Court when the same had not been pleaded in the present application? The Applicant seeks for the Court to recuse itself for not issuing orders in a matter not pleaded in the Application dated the 24th February 2020. If this instant suit was similar to EIC Misc Application No 5 of 2020, then the prudent thing for the Applicant would have been to consolidate the two matters so as to avoid getting conflicting decisions by the Courts.

43. The Applicants are herein remained that parties are bound by their pleadings. The duty of the Court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The Court would be out of character were it to pronounce on any matter that was not pleaded by the parties as that would be plunging into the realm of speculation which might in turn aggrieve the parties or, at any rate, one of them. Reference is made to the finding in the Court of Appeal for Eastern Africa in **Gandy vs Caspar Air Charters Limited [1956] 23 EACA, 139**.

44. The issue herein is whether a Court should recuse itself simply because it did not deliver a favorable ruling, order or Judgment to a party in a matter. Is the finding that the Applicants had not established a prima facie case to warrant injunctive Orders in their favour as against the Respondents *ipso facto*, give rise to apprehension that the Presiding Judge is not impartial keeping in mind that it is the discretion of the Court to grant or deny interim Orders based on the material/evidence placed before it.

45. It is trite law that a Court should recuse itself where a fair minded and informed observer would conclude having considered the facts in issue, that there was a real possibility that the Court was biased against the Applicant.

46. The **Oxford English Dictionary** defines bias as **an 'inclination or prejudice for or against one thing or person'**.

47. The **Blacks' Law Dictionary** has defined the word bias in the following manner:

"Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders Judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of Judge, refers to mental attitude or disposition of the Judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."

48. In the case of **Tumaini v. R. Republic [1972] EA LR 441** Mwakasendo J held, that;

"in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people."

49. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real

possibility of bias.

50. The Supreme Court, in **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2013] eKLR** restated the foundation for the principle underlying recusal of judicial officers as follows:

“Recusal, as a general principle, has been much practiced in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black’s Law Dictionary, 8th ed. (2004) [p.1303]: “Removal of oneself as Judge or policy maker in a particular matter, [especially] because of a conflict of interest.” From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. 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.”

An Application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties: the Judge must, without more, recuse himself. Such is the situation where a Judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however, arises where, like in the present case, the Application is founded on appearance of bias attributable to behavior or conduct of a Judge.”

51. Based on the allegation by the Applicant, I find that the Applicant was unable or unwilling to see the correctness of the verdict and therefore was apt to attribute the Court’s verdict to a bias in the mind of the Judge. Further the Applicant has not established the fact that the Court was either a party to the suit or has a direct financial or proprietary interest in the outcome of the case. Indeed if the Applicant was dissatisfied with the exercise of judicial discretion of the Court, the most logical thing to do would have been to engage with the provision of Order 42 of the Civil Procedure Rules and to file an Appeal against the said Orders to the higher Court being the Court of Appeal which according to the Respondent it did

52. I find in conclusion that the Applicant has not presented anything to prove bias against him on the part of the Court. He has not presented any facts upon which a reasonable member of public who is fair minded would find that the facts give rise to a reasonable apprehension that the Judge will not apply her mind to the case impartially.

53. The Applicants have not demonstrated any evidence of partiality or biasness by this court in this matter in any way. In the case of **Anyang’ Nyong’o & Others (2007) 1EA 12**, the Court held that:-

“The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge.”

54. The upshot of this analysis is that I find that the Applicant’s Application dated the 24th February 2020 seeking the recusal of this Court on apprehension of bias fails to meet the objective and reasonable test of the right-minded person and is herein dismissed with costs to the Respondents.

Dated and delivered at Nyahururu this 17th day of June 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE