



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC PETITION NO. 1524 OF 2016**

**NAZMUDIN HABIB KASSAM KURJI.....PETITIONER**

**VERSUS**

**FRANK LOGISTICS LIMITED.....1<sup>ST</sup> RESPONDENT**

**FRANCIS NYAGA NJERU.....2<sup>ND</sup> RESPONDENT**

**JUDY MUTHONI NGUGI.....3<sup>RD</sup> RESPONDENT**

**SWAMI CONTRACTORS LIMITED.....4<sup>TH</sup> RESPONDENT**

**NAIROBI CITY COUNCIL.....5<sup>TH</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....6<sup>TH</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....7<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....8<sup>TH</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....9<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....10<sup>TH</sup> RESPONDENT**

**RULING**

1. Through the application dated 21/2/2020, the 2<sup>nd</sup> Respondent sought to have proceedings in this matter stayed and my recusal from the proceedings in this matter. The application was made on the grounds that this court declined to grant the 2<sup>nd</sup> Respondent an adjournment on 28/3/2019 on account of his advocate being unwell and that the court allowed the hearing to proceed on that day which the 2<sup>nd</sup> Respondent contended infringed on his right to a fair trial as he was precluded from testing the veracity of the testimony of the witnesses who testified on that day. The 2<sup>nd</sup> Respondent added that he applied to have the evidence taken on 28/3/2019 expunged from the court record but in its ruling delivered on 27/9/2019 this court declined to grant that application.

2. Further, that on 18/11/2019 the 2<sup>nd</sup> Respondent sought leave to change advocates and when the case came up for hearing on 20/2/2020 this court refused to grant his advocate a mere seven minutes to appear in court and represent him yet the advocate had gone to attend to an emergency upon being informed that her father had suffered a stroke. The 2<sup>nd</sup> Respondent averred that the court proceeded with the hearing of the case in the absence of his counsel and forced him to proceed with the case without any paper work to refer to. He added that I had persistently been very rude and intimidating to him and that he was having trouble getting a lawyer to represent him given the history of the matter and hostility this court displayed towards him.

3. He added that he was reasonably apprehensive that this court had already predetermined the position as to his guilt and continuing to hear the matter will merely be a charade. He added that he had stated things in court which on perusal of the court record he noted that I deliberately omitted to record and which he believed was an attempt to prejudice him. He swore the supporting affidavit and urged that I was biased and would not be impartial in hearing and determining this matter. He sought to have the case transferred to another court for hearing and determination while contending that the Petitioner and the other Respondents would not suffer any prejudice if the orders sought were

granted.

4. The Petitioner filed a preliminary objection together with a replying affidavit in opposition to the application. The Petitioner contended that the 2<sup>nd</sup> Respondent was represented by Omondi Odegi and Company Advocates who came on record as his counsel on 18/2/2020 and that the 2<sup>nd</sup> Respondent had not filed a Notice of Intention to Act in Person contrary to Order 9 Rule 8 of the Civil Procedure Rules. The Petitioner also contended that paragraphs 1 A, B and C of the application were an attempt to litigate once more issues previously decided by this court against which no appeal had been preferred.

5. The Petitioner swore the replying affidavit setting out the proceedings in this matter. He deponed that he was the registered owner of the suit land situated in Parklands area, Nairobi County. He applied for extension of the lease over the land and legitimately expected to have the lease extended. They were illegally evicted from the suit land early in the morning on 4/12/2016 by the 2<sup>nd</sup> Respondent's agents. The town house he resided in was demolished by the 2<sup>nd</sup> Respondent's agents without allowing the Petitioner and his family the opportunity to salvage their possessions. He averred that he filed this petition to vindicate his right of ownership of the suit land and to seek compensation for the wrongful eviction and the demolition of the Suit Property. He added that the suit was part-heard with the hearing having started on 6/12/2017.

6. The Petitioner contended that the 2<sup>nd</sup> Respondent had no respect for this court and had sought to delay the hearing of the case on various occasions including 14/5/2018 when his advocate informed the court that the Hon. Dr. Otiende Amollo had been instructed to lead Mr. Osundwa Advocate appearing for the 2<sup>nd</sup> Respondent and that Hon. Amollo had been taken ill. He added that the court was not sitting on 15/5/2018 when the hearing was scheduled to go on. The hearing proceeded on 23/5/2018 and Hon. Amollo did not attend court to lead Mr. Osundwa in the case as earlier intimated by the 2<sup>nd</sup> Respondent's Advocate. In fact Hon Amollo had never attended court in this matter which raised doubt as to whether the letter claiming he was to lead Mr. Osundwa was genuine or it was an attempt to delay the hearing of the case.

7. Mr. Kurji pointed out that when this matter came up for hearing on 22/10/2018, the 2<sup>nd</sup> Respondent applied for an adjournment claiming that they were unable to call their witness and the court granted the adjournment and fixed the case for further hearing on 28/3/2019. On 28/3/2019 Mr. Osundwa, the advocate representing the 2<sup>nd</sup> Respondent sent Mr. Titus Ochich to hold his brief and inform the court that he was indisposed. Mr. Osundwa presented a sick note from Nairobi Women Hospital indicating that Mr. Osundwa had been given off duty from 27<sup>th</sup> to 28<sup>th</sup> March 2019. The court declined to grant the adjournment. The Attorney General had obtained summons in respect of three witnesses on 22/10/2018 and Mr. Osundwa was aware that the three witnesses would be testifying at the next hearing date. The three witnesses Mr. Gilbert Okelo, Mr. Charles Ng'etich and Mr. Onyino Mukobe had travelled overnight from Kisumu to attend court. When the parties returned to court at 11.00 a.m. Mr. Ochich was joined by Mr. Wasonga who urged the court to revise its orders directing that the hearing would proceed. When the court declined to adjourn the hearing of the case and directed the Attorney General to present his first witness, Mr. Ochich and Mr. Wasonga abruptly left court.

8. He averred that the 2<sup>nd</sup> Respondent then filed the application dated 12/4/2019 seeking to have the proceedings of 28/3/2019 expunged from the court record and to have the witness statements together with the replying affidavits filed by the Attorney General on 21/3/2019 struck out. The court delivered its ruling on 27/9/2019 and declined to expunge the documents filed by the Attorney General from the court record. The court directed the Attorney General to recall his witnesses for cross examination by the 2<sup>nd</sup> Respondent's advocate. The hearing was scheduled to continue on 18/11/2019. On 18/11/2019 when the case was called out the 2<sup>nd</sup> Respondent informed the court that he had a dispute with Mr. Osundwa advocate and needed to instruct another advocate. Mr. Osundwa was in court on that day and confirmed that he lacked instructions to act in the matter. The Petitioner averred that the court indulged the 2<sup>nd</sup> Respondent and granted him two weeks to appoint another advocate. The hearing was put off to 20/2/2020 with the Petitioner's advocates urging the court to mark that as the last adjournment.

9. The Petitioner contended that there was no dispute between the 2<sup>nd</sup> Respondent and his advocate Mr. Osundwa because Mr. Osundwa still represented the 2<sup>nd</sup> Respondent in **Criminal Case No. 1998 of 2016, R v. Francis Nyaga Njeru** and in **Nairobi High Court Miscellaneous Criminal Application No. 416 of 2019** in which Mr. Osundwa appeared for the 2<sup>nd</sup> Respondent. He stated that the criminal matters came up on 11/12/2019, 28/1/2020, 3/2/2020 and 25/2/2020. The court directed the Attorney General to bring his witnesses to court for the third time for cross examination by the 2<sup>nd</sup> Respondent's counsel. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to avail their witnesses so that their case would be heard and closed.

10. Mr. Kurji's advocate wrote to Mr. Osundwa on 17/2/2020 informing them that any application for adjournment of the hearing would be opposed when the matter came up on 20/2/2020. A notice of change of advocates was filed on behalf of the 2<sup>nd</sup> Respondent on 19/2/2020 and served on the Petitioner's advocates. Mrs Opiyo attended court on 20/2/2020 when the matter was called out and informed the court that she was holding brief for Mr. Omondi. She confirmed that she was ready to proceed with the hearing and would be calling one witness being the 2<sup>nd</sup> Respondent who was present in court. The Attorney General had arranged for two witnesses to attend court including Mr. Mukobe who had travelled from Kisumu. The court directed that the hearing would proceed after going through the cause list. Mrs. Opiyo was not in court when the court was ready to hear the matter and the 2<sup>nd</sup> Respondent was given time to contact his advocate and inform her that the case was proceeding. The Petitioner deponed that Mr. Omondi did not attend court and no explanation was provided by the 2<sup>nd</sup> Respondent.

11. Mr. Kurji averred that the court directed that the hearing would proceed and the 2<sup>nd</sup> Respondent gave evidence with the court guiding him to adopt his written witness statement as his evidence in chief and the production of the documents filed as his evidence in the matter. It was only when the 2<sup>nd</sup> Respondent attempted to produce the photographs of the suit land that the Petitioner's advocate objected while insisting that they wanted the maker to produce them. The court directed the 2<sup>nd</sup> Respondent to avail Mr. Collins Kweyu, the photographer for cross examination on 24/2/2020. The 2<sup>nd</sup> Respondent requested the court to adjourn the hearing of the case to enable his advocate attend court and cross examine the Attorney General's witnesses following which the court granted the adjournment and directed that the Attorney General's witnesses were to attend court for cross examination for the fourth time on 16/3/2020. When the Petitioner's advocate attended

court on 24/2/2020 they were served with the application for the court to recuse itself. The court directed that the application would be heard on 16/3/2020.

12. Mr. Kurji objected to the allegation of bias against the 2<sup>nd</sup> Respondent by the court and stated that his summary above of the proceedings demonstrated that the court had indulged the 2<sup>nd</sup> Respondent on his requests for adjournments on several occasions to the extent that this suit had entered its fourth year without the hearing being concluded. He urged that the 2<sup>nd</sup> Respondent was given an opportunity by the court to cross examine the Attorney General's witnesses but he failed to utilise that opportunity. He added that the 2<sup>nd</sup> Respondent did not raise the issue of the medical emergency with respect to his advocate on 20/2/2020. In any event, the Petitioner contended that seven minutes would not have been sufficient for the 2<sup>nd</sup> Respondent's advocate to attend to the medical emergency and get back to court for the hearing. He added that no affidavit had been filed by the 2<sup>nd</sup> Respondent's advocate and no medical records were provided to confirm the true position of the matter.

13. The Petitioner denied that the 2<sup>nd</sup> Respondent was coerced to proceed with the hearing of the matter or that he did not have any papers to refer to in court. He averred that the 2<sup>nd</sup> Respondent was guided by the court in adopting his written witness statement and in the production of his bundle of documents. He added that the 2<sup>nd</sup> Respondent had confirmed to the court that he had other matters in court and it would not therefore be impossible to obtain a suitable advocate in this case.

14. The Petitioner urged that there was no indication that this court would not be impartial to necessitate the matter being transferred to another court and added that the court had demonstrated willingness to indulge the 2<sup>nd</sup> Respondent on various occasions when he sought adjournments. Mr. Kurji averred it would not be in the interest of justice for the court to grant the orders the 2<sup>nd</sup> Respondent seeks because the Petitioner and the other Respondents would suffer great prejudice if the orders are granted for it would delay the determination of the case. He added that the 2<sup>nd</sup> Respondent had testified and what was left was the cross examination of the photographer who took the photos the 2<sup>nd</sup> Respondent wishes to rely on and the cross examination of the Attorney General's witness who were recalled at the 2<sup>nd</sup> Respondent's instance.

15. He added that it would be grossly unjust for this case to be transferred from this court which had had the benefit of hearing the testimonies of 10 witnesses and that the case was a complicated matter involving copious amounts of documents. He stated that it was apparent that the 2<sup>nd</sup> Respondent wished to prolong the disposal of the case for his own interest and that any further delay in the suit would prejudice his own right to access justice under the Constitution and that it would also be an affront to his seniority of age and poor health which the 2<sup>nd</sup> Respondent and the court were aware of. He added that his family had faced financial hardship in seeking alternative accommodation and purchasing various household items and personal effects following the inhumane demolition of the suit land.

16. The Attorney General filed grounds of opposition contending that the 2<sup>nd</sup> Respondent had an advocate on record and that he had not filed a notice of intention to act in person. The Attorney General stated that the facts and circumstances of this suit do not raise a reasonable apprehension of bias in the mind of a reasonable, fair minded and informed member of the public that this court would not apply its mind to the case impartially. Further, that the court had no personal interest in the fruits of its judgment or the case and there was no possible apprehension of bias established by the 2<sup>nd</sup> Respondent. In addition, that the conduct of the 2<sup>nd</sup> Respondent since the institution of this suit had been to delay the hearing of the case and the court had pursuant to Sections 1A, 1B and 3 of the Civil Procedure Act had always ensured that the case proceeded.

17. The Attorney General added that the application for this court's recusal was occasioned by the fact that the 2<sup>nd</sup> Respondent had been unable to delay the hearing of the case. Further, that court proceedings are not conducted at the whims of a party regardless of the status pursued by such a party. The Attorney General contended that the application was an abuse of the court process and had not demonstrated any tangible grounds for recusal and that the 2<sup>nd</sup> Respondent merely held the view that a different judge would be lenient to his delaying tactics. The Attorney General added that the judiciary was constrained by the numerous matters and the delay tactics employed by the 2<sup>nd</sup> Respondent on various dates when the case was set down for hearing should not be allowed since it wasted precious judicial time that would be utilised for other serious litigants.

18. Parties filed submissions which the court has considered. The Applicant submitted that when the three witnesses gave evidence in the absence of its advocate on 28/3/2019 it impeded his right to a fair hearing. He contended that allowing the witnesses to be recalled for cross examination was not the same as the witnesses giving evidence real time in the presence of its advocates since he would be deprived of the opportunity of testing the veracity of their evidence and objecting to questions asked during examination in chief. He added that he instructed his previous advocate Mrs. Osundwa to appeal against the court's ruling of 27/9/2019 and when his advocate failed to do so the 2<sup>nd</sup> Respondent changed advocates on 19/2/2020. He maintained that the fact that the medical emergency of his advocate was not captured in the proceedings of 20/2/2020 was another reason why he believed this court was biased against him and would not be impartial in hearing and determining the matter. He referred to Articles 22 and 25 of the Constitution guaranteeing all persons who come to court the right to a fair hearing.

19. The 2<sup>nd</sup> Respondent submitted that when a judge is unable to maintain impartiality or has given the impression of being unable to maintain impartiality the judge should recuse himself. He relied on the case of **Barnaba Kipsongok Kenai v Republic [2014] eKLR** which he attached to his submissions. He also referred to other decisions including **Charity Muthoni Gitabi v Joseph Gichangi Gitabi and another [2017] eKLR** and **Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 others**. In the last case, the court held that the test for establishing the judges' impartiality is the perception of a reasonable person who is well informed and thoughtful observer who understands all the facts and has examined the record and the law.

20. The Petitioner submitted that the 2<sup>nd</sup> Respondent had failed to establish bias on the part of this court to warrant its recusal from hearing the case. The Petitioner summarised the key events in the hearing of this case and referred to the various occasions when this suit came up for hearing and the court granted adjournments at the instance of the 2<sup>nd</sup> Respondent. This was on 28/3/2019, 11/7/2019 and 18/11/2019. The

hearing of the suit started on 6/12/2017 and the Petitioner closed his case on 22/10/2018. Following the 2<sup>nd</sup> Respondent's application to strike out of proceedings conducted of 28/3/2019, the court directed the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents to recall their witnesses for cross examination by the 2<sup>nd</sup> Respondent's advocates. Those witnesses attended court on several occasions when the 2<sup>nd</sup> Respondent was not prepared to have the case proceed for hearing.

21. The Petitioner pointed out that this court granted the 2<sup>nd</sup> Respondent time on 18/11/2019 to instruct another advocate when the matter came up for hearing. He did instruct an advocate who attended court on 19/2/2020 and confirmed to the court that the 2<sup>nd</sup> Respondent was ready to testify when the matter was called out while the court was settling the cause list in the morning. He added that the 2<sup>nd</sup> Respondent was afforded an opportunity by the court to call his advocate and inform him the hearing was proceeding. He did not inform the court that his advocate had an emergency and only raised this issue for the first time in his present application for the court's recusal.

22. The Petitioner contended that the 2<sup>nd</sup> Respondent's application ought to be struck out firstly, for being contrary to Order 9 Rule 8 of the Civil Procedure Rules which requires a party who was previously defended by an advocate to give notice of his intention to act in person and an address for service. Under that rule, the provisions applicable to a notice of change of advocate apply to a notice to act in person with the necessary modifications. Secondly, the Petitioner contended that the 2<sup>nd</sup> Respondent was attempting to re-litigate before the same court issues that were already determined by this court against which no appeal had been preferred by the 2<sup>nd</sup> Respondent.

23. The Petitioner submitted that the grounds set out by the 2<sup>nd</sup> Respondent in support of the allegation that this court is biased and will not be impartial in hearing and determining this matter neither proved any bias on the part of this court nor do they give the impression of bias by the court. The Petitioner contended that the 2<sup>nd</sup> Respondent's advocate attended court when the matter came up for hearing and confirmed readiness to proceed with the hearing of the case. The 2<sup>nd</sup> Respondent could not explain the whereabouts of his advocate when the hearing started despite the court giving the 2<sup>nd</sup> Respondent sufficient time to contact his advocate and inform him that the hearing was proceeding.

24. The Petitioner submitted that the court had been very accommodating of the 2<sup>nd</sup> Respondent and had granted him adjournments on numerous occasions. The Petitioner submitted that the 2<sup>nd</sup> Respondent had failed to specify the matters which he alleged the court had failed to record and relied on Section 107 of the Evidence Act on the burden of proof being on the person who wishes to rely on that fact.

25. The Petitioner relied on **Nathan Obwana v Robert Bisakaya Wanyera & 2 Others [2013] eKLR** in which Chitembwe J. stated that an objective test must be applied when determining whether or not there was bias and the facts alleged to constitute bias must be specifically pleaded and established. The Judge further stated that the court must carefully scrutinize the affidavits while bearing in mind that when some litigants lose cases they may not see the correctness of a verdict and were apt to attribute that verdict to a bias in the mind of the judge or magistrate. The Petitioner submitted that the 2<sup>nd</sup> Respondent had failed to prove the allegations of bias and that the grounds he relied on were not factual and were in some cases misleading and an untruthful narration of the proceedings of this court. Further, that based on the reasons given by the 2<sup>nd</sup> Respondent, a reasonable and fair minded person would not come to the conclusion that this court was biased or was likely to be biased against the 2<sup>nd</sup> Respondent.

26. The Petitioner further relied on the decision of Lakha J in **Kaplan & Stratton v Z Engineering Construction Limited & 2 Others [2000] KLR** where he held that it was important for judicial officers to discharge their duty to sit and not readily accede to suggestions of appearance of bias which encourages parties to believe that by seeking the disqualification of a judge they will have their case tried by someone who is more likely to decide the case in their favour.

27. The Attorney General submitted that this court's conduct of this suit does not raise a reasonable apprehension of bias in the mind of a reasonable, fair minded and informed member of the public that this court will not apply its mind to the case impartially. The Attorney General cited several decisions on the issue of bias including **Attorney General v Anyang Nyong'o and others [2007] 1EA12** where it was held that the court must guard against litigants who often blame their losses in court cases to bias on the part of the judge. The court observed that while litigants have the right to apply for the recusal of a judicial officer where there is a reasonable apprehension that the court will not decide the case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believed that such persons are not likely to decide the case in their favour.

28. The Attorney General also cited the case of **Philip K. Tunoi and another v Judicial Service Commission and another [2016] eKLR** where it was stated that the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased. The Attorney General submitted that it was the duty of the 2<sup>nd</sup> Respondent to establish facts and the basis for its application for the court's recusal so as to succeed. Further, that anxiety was not a ground for recusal and that a litigant must not be allowed to use recusal to choose the judicial officers who will hear their matter.

29. The issue for determination is whether this court should grant the orders sought by the 2<sup>nd</sup> Respondent or strike out the application as the Petitioner sought. The court agrees with the Petitioner that the 2<sup>nd</sup> Respondent who has an advocate on record should have filed a notice of his intention to act in person and served it on all the parties as stipulated by Order 9 Rule 8 of the Civil Procedure Rules. In the court's view, it would not serve the interests of justice to strike out the application. The 2<sup>nd</sup> Respondent is directed to file and serve a notice of intention to act in person within 7 days of the date of this ruling.

30. The court is inclined to agree with the Petitioner that the 2<sup>nd</sup> Respondent is attempting to re-litigate issues that this court delivered a decision on in the ruling delivered on 27/9/2019 on his application to expunge the proceedings of 28/3/2019 from the court record. The 2<sup>nd</sup> Respondent could have appealed against that decision but he cannot raise the same issues afresh.

31. The other issue for determination is whether I should recuse myself from hearing this matter on the allegation that I am biased against

the 2<sup>nd</sup> Respondent. The sequence of events captured by the Petitioner in his Replying Affidavit gives a true picture of the proceedings in this case in which the hearing commenced on 6/12/2017. On 18/11/2019 when the 2<sup>nd</sup> Respondent indicated that he had differed with his advocate Mr. Osundwa and needed time to instruct another advocate, he informed the court that Mr. Osundwa had failed to lodge an appeal against this court's ruling delivered on 27/9/2019. No appeal was lodged. The 2<sup>nd</sup> Respondent has not shown what matters the court failed to record. There is no evidence that the 2<sup>nd</sup> Respondent's advocate had an emergency on 20/2/2020 after he had confirmed that he was ready to proceed with the hearing.

32. An objective test must be applied in determining whether or not the court is likely to be biased against the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent needed to specifically plead and establish the facts alleged to constitute bias on my part. Looking at the reasons given by the 2<sup>nd</sup> Respondent as the basis for his apprehension of bias by this court, they do not raise a reasonable apprehension of bias in the mind of a reasonable, fair minded and informed member of the public that this court will not apply its mind to the case impartially. When one looks at the facts of this case and the conduct of the 2<sup>nd</sup> Respondent they will notice that the 2<sup>nd</sup> Respondent is only keen to delay the conclusion of the hearing of this case. The court record shows that this court has indulged the 2<sup>nd</sup> Respondent on several occasions when he sought adjournments when the matter came up for hearing. No facts have been established by the 2<sup>nd</sup> Respondent that would lead a reasonable and fair minded person to conclude that this court was biased or is likely to be biased against the 2<sup>nd</sup> Respondent.

33. The court declines to grant the orders sought in the application dated 21/2/2020. The costs of the application shall be in the cause.

Dated and delivered at Nairobi this 30<sup>th</sup> day of September 2020

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. Tabitha Raore for the Petitioner

Mr. Francis Njeru – the 2<sup>nd</sup> Respondent in person

Mr. Donald Omondi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Benson Njagi for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents

Mr. V. Owuor- Court Assistant

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