



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 179 OF 2015

DURSOMA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

1. CHIRUNGA BONGO MUNDALU

2. TROPICAL TREASURE LIMITED

3. THE CHIEF LAND REGISTRAR.....DEFENDANTS

AS CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 157 OF 2015

CHIRUNGA BONGO MUNDALU

MWACHIRO BONGO MUNDALU.....PLAINTIFFS

VERSUS

1. DURSOMA INVESTMENTS LIMITED

2. THE NATIONAL LAND COMMISSION

3. THE CHIEF LAND REGISTRAR

4. DIRECTOR OF SURVEY

5. COUNTY GOVERNMENT OF KILIFI

6. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By this Notice of Motion dated 12th October 2019 two individuals named herein as Chirunga Bongo Mundalu and Mwachiro Bongo Mundalu (the Proposed Plaintiffs) pray for orders: -

1. That this Honourable Court be pleased to suspend any further proceedings in this matter.

2. That this Honourable Court Particularly Justice Olola be pleased to recuse itself from further conduct of this matter and refer the case to the Chief Justice for re-allocation.

3. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by one Chiro Mwachiro Bongo in which he deposes as follows at paragraphs 1 to 18 thereof:

1. That I am a member of Waphande Clan on whose behalf the Plaintiffs in ELC 157 of 2015 have brought the case in Court and therefore have an interest in the case directly. A copy of my Kenyan Identity Card is attached herewith marked "CMC-1".

2. That I also live on the disputed land and would be directly affected by the outcome of the case.

3. That I am aware that there is a company by the name Dursoma Investment Ltd claiming 200 acres of the land we live in as a clan and we are very alarmed by the same very much. I also know that the company was given land even before it was registered which is illegal by itself.

4. That as a clan we had appointed Chirunga Bongo Mundalu and Mwachiro Bongo Mundalu to be our representatives in the case. Unfortunately, Chirunga Bongo Mundalu who was our leader died in December 2018 after a short illness. He was the one appointed to swear all affidavits, statements and whatever else required in the case. Mwachiro was not so involved as Chirunga.

5. That I know from information received from my advocates and documents shown to me from Court that on the 05/03/2019, the Judge handling this case and the company that illegally acquired our land called Dursoma Investments Ltd and some nominal parties who have never entered appearance in this matter did sit and pass orders in favour of the company Dursoma Investments Ltd without involving us as parties to the case or our lawyers.

6. That I am advised by my advocates that we were condemned unheard in contravention of our Kenyan Constitution and the principles of natural justice that guide this Court.

7. That all this was done without our knowledge and purportedly the orders were given "un-opposed" because we believe that was the very intention of excluding us from the very beginning.

8. That the proceedings were done at a time that the Court had already been notified of the death of Chirunga Bongo Mundalu our clan representative in the case way back on the 12/02/2019. The Court was well aware and granted us an application, to substitute the legal representative and have administrators take over the case.

9. That more so the name of our representative Chirunga Bongo Mundalu was removed from the case on purpose to ensure that the illegalities intended to be achieved are so achieved without much opposition and fun-fare.

10. That at the same time our advocate who informs me that he was engaged in another matter at Mombasa before the Deputy Registrar being MBS Miscellaneous Number 361 of 2018, was put on record in this matter as having appeared in Court at Malindi and this time holding brief for an advocate who has never entered appearance in this matter.

11. That the above scenario shows a recipe for chaos and intention to defeat the course of justice and particularly as assisted by this Court and as a clan we no longer have trust with this Court to deliver justice.

12. That despite our letter of protest to Court, the Court never bothered even to acknowledge or respond to the allegations showing complacency and compromise and I believe that this Court is incapable of delivering justice in this matter.

13. That nothing short of re-allocation of this matter before another Judge can convince me that we will ever get justice in this case.

14. That the scenario indicated above is so unique and unbelievable that we can only hope that justice will not only be done but will be seen to be done by having the matter heard before another Judge.

15. That some of the witnesses who were on the side of the clan like Lennox Changawa have since recanted their evidence in unclear circumstances in a tell tale signs of comprise, corruption and bribery. This Court has done nothing about such interference with administration of justice and we do not know why.

16. That since our adversaries have shown capabilities of bribing witnesses openly, to defeat justice in a fit of desperation we believe that they are capable of bribing anyone else and if the Court is behaving in the manner described in this affidavit we do not know what could have happened.

17. That our advocates have shown us decisions of this Court where the Court has held completely opposite of the holding in this case on 5/3/2019 and the big question is why the Court had such a change of heart all of a sudden. Case in point is for example:

a) Malindi ELC No. 11 of 2010; Nicholas Kombe Pembe –vs- Kenga Pembe, Kaleso Kombe, Registrar of Land's Kilifi and the Attorney General eKLR(sic)

b) Malindi JR Application Number 3 of 2016; Republic- vs The Chief Land Registrar exported (sic) Justice Charles

18. That it would be fair and just to have this application allowed as such for purposes of justice of this case.

3. The application is opposed by the 1st Defendant-Dursoma Investment Ltd. In a Replying Affidavit sworn by one of its Directors Daniel Ndaikwa Kambi and filed herein on 6th December 2019, the 1st Defendant avers that the deponent of the Supporting Affidavit to the Motion dated 12th October 2019- Chiro Mwachiro Bongo was not one of the Plaintiffs in **Malindi ELC Case No. 157 of 2015** and therefore he has no locus standi to swear the Supporting Affidavit.

4. The 1st Defendant further avers that the Applicants herein are yet to be enjoined in this suit as their application for joinder dated 6th October 2019 is yet to be prosecuted and hence their application for recusal is incompetent and a non-starter. The 1st Defendant further avers that it is aware that the Plaintiff in the said **ELC No. 157 of 2015** has withdrawn their instructions for representation from the firm of Jackson Muchiri & Associates Advocates and that the said Advocates have no locus standi to bring the present application.

5. The 1st Defendant further accuses the Applicant's said Advocates of engaging in a callous and untoward behavior towards his colleagues and the Judicial officer handling the suit by making all manner of unsubstantiated allegations of bias and bribery without any scintilla of objectivity and evidence and urges the Court to dismiss the application and to condemn the said Advocates to bear the costs.

6. I have perused and considered the Motion for recusal and response thereto. I have also considered the oral submissions made before me by Ms Makuto Learned Counsel for the Applicant and the response thereto by Mr. Farouk, Learned Counsel for the 1st Defendant/Respondent.

7. As I understand it, whether or not a Judge should recuse himself from a matter before him is a matter of discretion for the concerned Judicial Officer and the practice as far as I could discern, is for Judges recusing themselves from hearing matters where they feel they may not appear to be fair or where they feel their impartiality would be called into question.

8. In considering such an application in **Kalpana H. Rawal –vs- Judicial Service Commission & 2 others (2016) eKLR**, the Court of Appeal observed as follows:

“An application for recusal of a Judge is a necessary evil. On the one hand it calls into question the fairness of a Judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious or other influence. In such applications, the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is also too human and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the two evils. The alternative is to risk violating a cardinal guarantee of the Constitution namely, the right to fair trial, upon which the entire Judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a manner would be in violation of the Constitutional guarantee of a trial by an independent and impartial Court....”

9. The Court of Appeal went on further in the **Kalpana H. Rawal Case (supra)** to state as follows:

“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...

It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn.”

10. In the instant matter before me, the Applicant charges at Paragraph 5 of the Supporting Affidavit sworn by Chiro Mwachiro Bongo, that he knows from information received from his Advocates and documents shown to him that on 5th March 2019, the Judge handling this case, the 1st Defendant herein and “some nominal parties who have never entered appearance in this matter did sit and pass orders in favour of (the 1st Defendant) without involving (them) as parties to the case or (their) lawyers.”

11. The Applicant goes ahead to assert that the proceedings were done at a time when the Court was aware that their clan representative Chirunga Bongo Mundalu had passed away and that the deceased's name was removed from the case on purpose to ensure that the intended illegalities were achieved without much opposition or fun-fare.

12. I have taken some time to peruse the record herein. It is apparent therefrom that the trial herein commenced before me sometime back on 20th June 2018. As at 30th October 2019 a total of six (6) witnesses had testified in support of the Plaintiffs' case. The matter was thereafter adjourned to 12th February 2019 for further hearing. However, on 7th December 2018, the 1st Respondent herein filed an application under Certificate of Urgency seeking inter alia an order restraining and prohibiting the revocation or cancellation of their Certificate of Title following a decision rendered by the National Land Commission (the 2nd Defendant herein) on 9th November 2018 in respect of the subject property.

13. When the said application was placed before me on 10th December 2018, I granted temporary interim orders and fixed the application for

inter-partes hearing on 20th December 2018. However, when the matter came up on the said date, it was evident that through the other parties who were absent had been served, the Honourable the Attorney-General appearing for the 3rd, 4th and 5th Defendants had not been served. On that ground I declined to proceed with the application and re-scheduled the same for hearing on 30th January 2019. As it turned out, on the said date, there was again no evidence of service of the hearing date on the National Land Commission and this Court stood over the application generally without a date.

14. It is however evident from the record that on 11th February 2019, some of the parties appeared in the Court Registry and fixed the application dated 7th December 2018 for hearing on 5th March 2019. That would explain how the matter came before this Court on 5th March 2019. As it turned out when the application came up, the same had not been responded to and Counsel for the National Land Commission sought a further adjournment to enable them respond. This Court did not find a basis for any further adjournment and in the circumstances allowed the Motion dated 7th December 2018 as prayed.

15. As at the time the said orders were granted, there was no evidence that the Applicant before me had been in these proceedings. Some seven (7) months down the line and by an application dated 6th October 2019, a number of individuals including the deponent of the Supporting Affidavit before me sought orders as follows:

1. That the Honourable Court be pleased to add the names of Chiro Mwachiro Bongo, Bongo Mundalu Bongo, Renson Mundalu Safari, Kidzeli Mweru Mundalu, Dzombo Juma Safari, Khamisi Mweru Kombo, John Muloka Mwachiro, (and) Omar Mrabu Mwachiro as Plaintiffs in the suit ELC 157 of 2015 and the Plaint be amended accordingly.

2. That the costs of (the) application be provided for.

16. As it were, *Malindi ELC Case No. 157 of 2015* which the Applicants sought to be enjoined to had been consolidated with this suit following a Ruling delivered by the Honourable Justice Angote on 1st December 2016. Without waiting to prosecute the application for joinder, some of the Applicants proceeded some six (6) days later to file the present application seeking my recusal on inter alia, as seen above, that I had granted orders on 5th March 2019 without giving them or their lawyer a hearing.

17. Clearly, there was no basis when the matter proceeded on 5th March 2019 to invite the Applicants into the proceedings when they were not parties thereto. From a perusal of the record herein, it is evident that the Plaintiffs in the said *ELC 157 of 2015* are members of a large family some of whom at one stage or the other have become disinterested in the suit or did not want to be represented by Messrs Jackson Muchiri & Associates Advocates.

18. That circus of representation was clear when this application came before me for hearing on 17th October 2019 and 16th December 2019 when a number of the parties said to be represented by the said Advocates stood up in Court and disowned Mr. Muchiri Advocate as their legal representative. It is also clear from Paragraph 15 of the Supporting Affidavit that the Applicants are aware of their own divisions for which they put blame on bribery by the 1st Respondent's Advocates.

19. From a perusal of a letter dated 25th June 2019 attached to the 1st Respondent's Replying Affidavit, it became apparent that Mr. Jackson Muchiri Advocate for the Applicants had in communication addressed to the 1st Respondents Advocates made all manner of unsavory remarks regarding my conduct in these proceedings including an accusation that I had held a private hearing with the 1st Respondent.

20. While the contents of that erroneous and defamatory letter will be the subject of another discussion in a different forum, suffice it to say, that from the record herein, this Court never held a private hearing with the 1st Respondent and the application for recusal being made by a stranger to these proceedings has no basis.

21. That notwithstanding however, there is an application pending in this file for the joinder of the same parties who filed the Motion dated 12th October 2019. I think in the circumstances and given the contents of the letter dated 25th June 2019 aforesaid, there is a likelihood that if I were to handle the said application, my decision may not be considered impartial and or free of prejudice, bias or ill-will. Justice as it were must not only be done but seen to be done.

22. In the premises, I recuse myself from the matter and hereby direct the Deputy Registrar of this Court to remit this file to the Honourable the Chief justice for re-allocation to another Judge.

23. The costs of this application shall be to the 1st Respondent in any event.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE