



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND PETITION NO. 8 OF 2016

CHARLES BARCHIGEI (*Suing as legal personal representative of*

JONATHAN KIPKOROS CHESAGUR.....**PETITIONER**

AND

WILLIAM K. KOROS (*Sued as the administrator of the estate of*

ELIJAH C.A. KOROS).....**1ST RESPONDENT**

THE HON ATTORNEY GENERAL.....**2ND RESPONDENT**

THE CHIEF LAND REGISTRAR.....**3RD RESPONDENT**

R U L I N G

1. The application dated **4th October 2018** was brought by the petitioner. He seeks that I recuse myself from the hearing and determination of this petition and that the petition be placed before another court.
2. The applicant's grounds are that he has reasonable suspicion that his petition will not be tried fairly going by the proceedings of **26/7/2018** and **26/9/2018** and that this court has exhibited open bias against him. In the applicant's own words, the circumstances of this case are such that the court should in the interests of justice recuse itself without insisting on the hearing of the present application.
3. A lengthy 32-paragraph affidavit sworn by the applicant has been filed in support of the application. It narrates the history of this petition in detail and its relationship with **Kitale ELC No. 34 of 2017** as perceived by the applicant.
4. I will confine the history in so far as it is pertinent to this application. He states that by an application dated **2nd November 2017**, he sought to stay **Kitale ELC No. 34 of 2017** pending the hearing and determination of the petition herein. The application was heard and determined. The 1st respondent herein opposed that application by filing grounds of opposition and a replying affidavit. A ruling delivered on **12th March, 2018** granted prayer 1 of the application and ordered that the suit be stayed pending hearing and determination of this petition. He deposes that none of the parties were dissatisfied by the ruling of the court and none of them challenged it. The petition was subsequently fixed for hearing on **26th July, 2018** and on the said date the 1st respondent herein filed and served a notice of preliminary objection on ground that the issues raised in this petition are res judicata. The 1st respondent also sought that an adjournment be granted and also that the preliminary objection be heard first. The petitioner's advocate opposed the 2 applications on the basis that the preliminary objection was meant to scuttle the hearing and it did not raise a pure point of law as required of preliminary objections. The court then adjourned the hearing on the ground that it needed to review the petition together with the proceedings in **Kitale ELC No. 34 of 2017** and reserved the matter for directions on 26/9/2018. On 26/10/2018 (should be 26/9/2018) the court informed the parties that it has decided to consolidate the petition and the proceedings in the suit without being prompted by the parties and that in the consolidation, the lead file would be **Kitale ELC No. 34 of 2017**, with this petition being subsumed in it. It is the applicant's opinion that the suit **Kitale ELC No. 34 of 2017** was filed in abuse of court process and in violation of **Section 6** of the **Civil Procedure Act Cap 21**. It is the applicant's opinion that the directions are calculated to confer an undue advantage to the 1st respondent. On that basis the applicant expresses his belief that this court would not be impartial in the hearing and determination of this case and his right to a fair hearing has been or is likely to be infringed if the matter proceeds before this court. It is his belief that a reasonable and a fair minded person knowing the relevant facts of the case including the findings of the Court of Appeal would have a reasonable suspicion that a fair hearing is not possible in the circumstances. He believes that there was no substance in the directions that parties address this court the issue of consolidation on **16/10/2018** and that the decision of the court on the issue of consolidation was predetermined and was as communicated to the parties on **26/9/2018**.
5. The replying affidavit of the 1st respondent was filed on **31/10/2018** in which he terms applicant's application as scandalous vexatious and a forum-shopping device. The petitioner filed the submissions **20/11/2018** while the 1st respondent filed his on **28/11/2018**.

6. The petitioner cited the case of **Philip K.Tunoi & Another -vs- Judicial Service Commission & Another 2016 eKLR, Tumaini -vs- Republic [1972] EALR 441, Barnaba Kipsongok Tenai -vs- Republic 2014 eKLR and Jasbir Singh Rai and 3 others -vs- Tarlochan Singh Rai and 4 Others.**
7. The 1st respondent relied on **President of the Republic of South Africa -vs- the South African Rugby Football Union and Others CCT 16 of 1998 and Jasbir Singh Rai** herein above.
8. I have considered the application and the response.
9. It is the correct position in our justice system that justice should not only be done but also be seen to be done. In this case what I understand the applicant to be complaining against is the court's decision to consider the consolidation of this petition with **Kitale ELC No. 34 of 2017** after it had issued an order that the latter suit be stayed.
10. There is no doubt that the ruling made on 12/3/2018 stayed **Kitale ELC No. 34 of 2017** entirely and that an order of consolidation would impliedly have the effect of having the order of stay vacated and that suit heard in consolidation with this petition.
11. However the correct position is that this petition was not heard on 26/7/2018 as had been scheduled. This court, recalling that **Kitale ELC No. 34 of 2017** existed, adjourned the matter for the purpose of considering both records with a view to coming up with a better perspective of the matter.
12. It did not help matters that the 1st respondent on 26th July 2018 filed a notice of preliminary objection which if properly construed, would also apply to the other related litigation before this court (**Kitale ELC No. 34 of 2017**).
13. Whereas the applicant would want it believed that his counsel was fully ready to proceed on 26/7/2018, it is apparent that his first statement before court on that day was that he had filed a fresh affidavit, with which action the 1st respondent's counsel expressed abysmal deprecation and prayed that it be expunged from the court record for being filed without leave.
14. However, it is not clear why the applicant would selectively prefer it to be perceived that the filing of the preliminary objection by the 1st respondent was an attempt to adjourn the hearing of the petition while the filing of a fresh affidavit by his counsel was not.
15. Another factor that plays a role in these proceedings is that this court had ordered that this petition be heard by way of *viva voce* evidence on 1/11/2017 just in the same manner that would be applicable to **Kitale ELC No. 34 of 2017** it being a civil suit.
16. Mr. Odongo for the 2nd and 3rd respondents stated to court that he could not address the court on the Preliminary Objection that day and left the matters to the court's direction.
17. Normally, when a Preliminary objection raising *res judicata* is raised an examination of the pleadings in both the current and the previous related litigation is the norm before a determination of the Preliminary Objection is made.
18. This is a court of record.
19. This court stated as follows after considering the arguments of all the parties on 26/7/2018:
- “This matter will not be heard today. The other litigation which was stayed will in view of the contents of the P.O. filed today be brought up for the court to review all the matters. Mention on 26/9/2018”.***
20. First, the contents of the order above shows that even as the court made the order, it was conscious that the civil suit **Kitale ELC No. 34 of 2017** had been stayed, and that the purpose of calling for that file record was in order to review all the matters jointly in order to arrive at a decision as to the most efficient manner of disposal of all the related litigation at once.
21. Secondly, the two matters herein involved have a hefty amount of documentation and on 26/9/2018 the court could not issue any directions and it adjourned the matters to 16/10/2018.
22. No other activity is recorded as having taken place on the 26/9/2018. The last record of any activity in the file record for **Kitale ELC No. 34 of 2017** was made on 12/3/2018. And this is the terrain in which the applicant's instant application runs into headwinds.
23. It is clear that possible consolidation of the petition and the civil suit was mentioned by the court and the parties albeit without any conclusive orders being made on 26/7/2018 and on 26/9/2018.
24. However in my view an expedition to ascertain whether matters should be consolidated is not an order of consolidation. No consolidation order was made on the record on the 26/7/2018 and on 26th September 2018 to warrant the apprehension expressed on the part of the petitioner.
25. On 26/7/2018, whose proceedings are claimed by the applicant to be the backbone of the instant application, this court merely invited parties to a further mention to determine the fate of the two matters pending before it. That mention was to be on 26/9/2018 and the time period in between was to accord the court a chance to exhaustively re-examine the record in both voluminous files.

26. The applicant erects an abstruse argument that the orders made on **26th September 2018** are in contempt of the court's earlier orders of stay of proceedings in **Kitale ELC No. 34 of 2016**; however, it is clear that an order of consolidation, if it ever came to that in the future, would effectively vacate the previous orders of stay of the civil suit, either expressly or by implication.

27. Consolidation of suits is an everyday affair in this country, for much valued judicial time should not be applied, where the court deems so, to the hearing of two consecutive suits in that order where they could be consolidated and heard as one.

28. In view of the fact that the hearing of the petition did not take off on the 27th July 2018 by reason of the fresh filing and service of documents by both sides - which documents this court was not minded to summarily expunge from the record to facilitate an immediate hearing - this court was entitled to review the strategies laid down before to ensure the expeditious disposal of both cases. It did not need the consent or the promptings of the parties or any of them to do so.

29. A court of law should be able to advance the cause of justice by engaging in active case management especially where multiple litigation on the same subject matter is pending before it especially where new developments occur, such as the filing of the preliminary objection and the fresh affidavit by opposing sides respectively in this case. No order on case management is cast in stone and in my view orders of stay of suit are not exempt.

30. The instant application proves that in case management where the subject matter is as sensitive as land, there are bound to be questions from at least one party which may, whether justified or not in their response, perceive disadvantage on their part regardless that the step taken will help dispose the litigation before court more expeditiously or efficiently. The instant application is a manifestation of such response, which though in my view is unjustified in the instant case. However, the applicant should be commended for making this application as he has laid bare his apprehensions which this court has to lay to rest in this ruling.

31. In view of what I stated above on the unfettered liberty of the court on case management strategies, I conclude that there is no good ground advanced by the applicant for his belief that the man in the streets of London - and light moments were made at the hearing as to why the applicant should not have considered the streets of Kitale for his submission - would have reasonable suspicion that the applicant's case would not be tried fairly by this court.

32. As I conclude this ruling I observe that the parties canvassed the twin issues of stay and striking out of **Kitale ELC No. 34 of 2017** in an application dated **2/11/2017** filed in that suit; the decision of the court to explore consolidation was not prompted by the parties. They have also never addressed this court on the issue of possible consolidation to date owing to the instant application. Owing to the fact that both suits have not proceeded to hearing yet, consideration of consolidation is apt.

33. I find no merits in the application dated **4th October 2018** and I hereby dismiss it with costs.

Dated, signed and delivered at Kitale on this 12th day of February, 2019.

MWANGI NJOROGI

JUDGE

12/02/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Rapando for the petitioner

Mr. Ngigi for defendant in ELC No. 34/2017

Mr. Chebii holding brief for Wafula R.M. for 1st respondent

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

12/02/2019