



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC. CIVIL CASE NO. 31 OF 2018

IN THE MATTER OF: AN APPLICATION SEEKING LEAVE TO APPLY FOR

ORDERS OF JUDICIAL REVIEW OF MANDAMUS, CERTIORARI AND PROHIBITION AGAINST THE CHIEF LAND REGISTRAR AND THE REGISTRAR OF TITLES AND THE NATIONAL LAND COMMISSION

IN THE MATTER OF: LAND REFERENCE NUMBER THIKA MUNICIPALITY BLOCK 6/1062

GEORGE GATHUKI NGANGA.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

LAND REGISTRAR, THIKA.....3RD RESPONDENT

AND

GASKI INVESTMENT LIMITED.....INTERESTED PARTY

RULING

This is a determination of the *Notice of Motion* application dated **11th October 2018**, brought under **Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 1A, 1B & 3A** of the **Civil Procedure Act** and **Article 159** of the **Constitution** and the inherent jurisdiction of the court. This *Notice of Motion* application is brought by the Applicant herein and has sought for the orders that **I be disqualified** or in the alternative, **I do disqualify** myself from further dealing with this case, and that the court do direct that this matter be placed before the **Principal Judge of Environment and Land Court, Milimani** for further directions in respect of its hearing. Further that costs of the suit be provided for.

It was premised on the grounds stated on the face of the application and the *Supporting Affidavit* of **George Gathuki Nganga**. These grounds are:-

a) There is another matter pending between the same parties over the same subject matter ELC No.192 of 2017 – George Gathuki Nganga ..Vs..Gaski Investments Ltd & 2 Others, pending hearing before Honourable Lady Justice Gacheru.

b) The Applicant has since filed an application for the Honourable Lady Justice Gacheru to recuse herself in that matter. The said application is pending hearing and determination.

c) There is reasonable apprehension that the Honourable Judge is not able to handle this matter in a dispassionate manner because there is reliable information that she has an unseemly relationship with Silas Kiogora Mburugu who is the Director of the Interested party.

d) On the 4th July 2018, ELC No.192 of 2017 – (George Gathuki Nganga....Vs...Gaski Investments Ltd & 2 Others) came up for hearing before Honourable Lady Justice Gacheru and whilst in court, the Advocate for the Interested Party, Mr. Muriuki Gitonga made assertions that the decision over the suit parcel of land had already been made by National Land Commission revoking the Applicant's title, yet the said decision was made on 11th July 2018, and also inferred indirectly that the Applicant had no chance of winning this case before this court.

e) *It is therefore a reasonable probability that the Judge is biased in favour of the 1st Defendant in this case.*

f) *The Plaintiff has reasonable apprehensive that the Honourable Judge is not able to handle this matter in a dispassionate manner.*

g) *Unless these orders are granted the Applicant stands to suffer irreparable loss and damage.*

In his **Supporting Affidavit**, the Applicant reiterated the contents of the grounds in support of the application.

The application is opposed by the Interested Party, **Silas Kiogora Mburugu** who averred that the application herein is an abuse of the court process as there is a similar application in **ELC No.192 of 2017**. He further averred that the allegations made against the Judge are baseless, uncalled for, unjustified, pure lies and falsehoods which should not be entertained by this Court. He further averred that the allegations made against his Advocate are provocative and malicious and pure lies punctuated with falsehood. Further that a simple allegation that the Judge is not passionate enough to hear this matter is not enough to have the matter stalled. He urged the Court to dismiss the instant application with costs.

The Applicant filed a **Supplementary Affidavit** and reiterated the contents of his **Supporting Affidavit**. He further averred that the application he filed in **ELC No.192 of 2017**, has been overtaken by events as the suit was heard by another Judge. That the two matters involve the same parties and that his previous Advocate had expressed fear and apprehension of bias by Lady Justice Gacheru that she may not be totally dispassionate in this matter and justice must not only be done but must be seen to be done. He also averred that he was not comfortable with the continued participation of the Judge in this matter as there is perception of bias on the part of the Judge.

On **30th October 2018**, when the matter came for hearing, the Court directed the said **Silas Kiogora Mburugu** be summoned in court for cross-examination on allegations contained in the **Supporting Affidavit** of the Applicant and on his **Replying Affidavit**. The said **Silas Kiogora Mburugu** appeared in court on **20th December 2018**, and was cross-examined at length by **Mr. Gatheru** for the Applicant. He was further re-examined by his Advocate **Mr. Muriuki**. What came out in cross-examination of **Mr. Silas Kiogora Mburugu** is that the Applicant had misgiving about the conduct of the said **Silas Kiogora Mburugu** in handling of allegations and dispute over the suit property before the **National Land Commission**. The Applicant too was not satisfied with the way the **National Land Commission** handled the matter and he had allegedly complained about abuse of office by **Mr. Silas Kiogora Mburugu** to **EACC (Ethics and Anti-Corruption Commission)**. There was no evidence brought out on the alleged bias of myself in handling of the matter involving the parties herein or any familiarity between myself and the said **Silas Kiogora Mburugu**.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law.

The application is anchored upon **Sections 1A & 1B** of the **Civil Procedure Act**, which deals with the overriding objective of the Act which is to facilitate the **just, expeditious, proportionate and affordable** resolutions of disputes. The Sections provides as follows:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

Further, the Court has a duty to facilitate the attainment of the above overriding objective. **Section 3A** of the same Act donated the inherent power to this Court to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

The application has been based on the fact that the Applicant has reasonable apprehension that I might not handle this matter in a dispassionate manner because there is a reliable information that I have an unseemingly relationship with **Silas Kiogora Mburugu**, who is one of the **Directors** of the Interested Party. However, when the said **Silas Kiogora Mburugu** appeared in court for cross-examination, that allegedly reliable information that I had a relationship with **Silas Kiogora Mburugu** was not brought out. Though the Applicant alleged that the State Counsel handling this matter one **Mr. Allan Kamau** enjoys a close personal relationship with **Mr. Silas Kiogora Mburugu**, it was not brought out clearly in court how that close relationship between the **State Counsel** and the said **Silas Kiogora Mburugu** would translate to my being bias in this matter because the office of **Attorney General** and the court are totally different offices and the **Attorney General** represent litigants who have equal standing like all other litigants in court without any preferential treatment. The Applicant did not demonstrate any relationship between myself as the Judge dealing with this matter and the said **State Counsel** or one **Silas Kiogora Mburugu** so that he can claim that I am already poisoned, prejudiced and biased in favour of the Interested Party.

Further, it was alleged that the Advocate for the said Interested Party had alleged that the Applicant had no chance of winning this case before this Court. However, this matter is newly filed and which has not even been set down for hearing and the Court finds that the fact that the Advocate for the Interested Party allegedly stated that the Applicant has no chance of winning this case before this Court has no relationship with the manner and the way I would conduct this matter because what the parties exchange and tell each other outside the court has no bearing with the way and the manner a court would conduct the matters in court. This is because Judges have taken oath of office to arbitrate matters before them without **fear** or **favour**. Further Judges and/or Judicial Officers are bound by the **Judicial Service Code of Conduct and Ethics** which contain general rules of conduct and ethics to be observed by Judicial Officers so as to maintain the integrity and independence of the court. Therefore there is always a presumption that Judicial Officers are impartial in adjudicating disputes. For that reason, any allegations that a Judicial Officer or the Judge for this matter is biased or has an unseemingly relationship with one of the parties should not be lightly made. The said allegations should not be simply made for sake of it or for purpose of bulldozing a Judge out of the matter and/or intimidating him/her or even instilling fear.

As I proceed to make a determination herein, I will be guided by the findings in the case of Attorney General...Vs...Anyang Nyongo & Others (2007) 1EA, where 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”.

The Applicant has alleged apprehension of bias on the part of myself in handling of this matter. The **Bangalore Principles of Judicial Conduct** defines **‘bias’** as follows:-

“Bias or prejudice has been defined as leaning, inclination bent or predisposition towards one side or another or a particular result. On its application to Judicial proceedings, it represents a predisposition to decide an issue or cause a certain way which does not leave the Judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view which sways or colour Judgment and renders Judge unable to exercise his or her function impartially in a particular case. However this cannot be stated without taking into account the exact nature of bias”.

Though the Applicant has alleged that he has reasonable apprehension that I might be bias in the handling of this matter, there was no tangible evidence brought out to warrant that apprehension. It is trite that he who alleges must prove as provided by **Section 107** of the **Evidence Act** which provides:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Applicant had a duty to avail instances or evidence of such bias but none was brought even when **Mr. Silas Kiogora Mburugu** was cross examined in court. Infact the Advocate for the Applicant dwelt with the integrity of **Mr. Silas Kiogora Mburugu** but not on the bias alleged on my part. As I arbitrate and determine the matters in court, I always take into account all the **Pillars of SJT (Sustaining Judicial Transformation)**, and **‘Action on Case Backlog’** is one of them. How can backlogs be reduced? By the court discouraging unexplained adjournments and if I stood firm on the issue of adjournment, that should not be interpreted at all to be a sign of **prejudice** or **bias**. As a Judicial Officer, or arbiter of matters before me, I should always take charge of the court proceedings and discouraging unnecessary adjournments is one way of taking such charge.

Further on the issue of my close relationship with **Mr. Silas Kiogora Mburugu**, no such evidence was brought out and the court finds such allegations as unfounded and without basis. It is trite that a Judge should not recuse himself or herself on **flimsy** and **baseless** allegations for it is not enough to make allegations of bias but there should be demonstration of existence of such bias by the person alleging. As was held in the case of **R...Vs...S (RD) 1977 3SCR 484, (by the Supreme Court of Canada):-**

“The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence”.

The Court finds that the Applicant herein has failed to demonstrate any existence of **bias** or **prejudice** on my part or any existence of the alleged unseemingly relationship between **Mr. Silas Kiogora Mburugu** and myself. These allegations are pure lies and full of falsehoods.

For the above reasons, the Court finds that the orders that are necessary herein as provided by **Section 3A** of the **Civil Procedure Act** in order to prevent abuse of the court process and for preservation of the integrity and independence of the court, is to find that the **application herein is not merited and accordingly the instant application dated 11th October 2018 is dismissed entirely with costs being in the cause.**

It is so ordered.

Dated, Signed and Delivered at Thika this 30th of April 2019.

L. GACHERU

JUDGE

30/4/2019

In the presence of

Mr. Kimanzi holding brief for Mr. Gatheru for Applicant

M/S Ndundu holding brief for Mr. Kamau for 1st, 2nd & 3rd Respondents

Mr, Muriuki for the Interested Party

Lucy - Court Assistant

Court - Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

30/4/2019