



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 05 OF 2019**

**IN THE MATTER OF ARTICLES 10, 20, 21 (1), 40 (1), 40 (3), 40 (4), 47, 50, 60, 64, 67, 232 (1), 232 (2), OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**-AND-**

**IN THE MATTER OF SECTION 14 AND 15 (2) (d) & (3) (e) OF THE NATIONAL LAND COMMISSION ACT, 2012**

**-AND-**

**IN THE MATTER OF SECTIONS 27 (a) AND 28 (a) OF THE REGISTERED LAND ACT**

**-AND-**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**OLOOLOLO GAME RANCH LTD.....PETITIONER**

**-VERSUS-**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**IKAREKESHE GROUP TRUST.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA.....3<sup>RD</sup> RESPONDENT**

**-AND-**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> INTERESTED PARTY**

**THE MINISTRY OF LANDS.....2<sup>ND</sup> INTERESTED PARTY**

**THE DIRECTOR OF LAND ADJUDICATION**

**AND SETTLEMENT.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

By a Notice of Motion dated 17<sup>th</sup> June, 2019 and brought under Order 51 of the Civil Procedure Rules, section 1A and 1B and 3A, Article 50 and 159 the Petitioner/Applicant sought for the following orders: -

1. That the Application be certified urgent, heard on priority basis and service on the Respondents be dispensed with in the first instance.
2. That pending the interparties hearing of this Application there be an order of stay of proceedings including writing and/or delivery of any ruling in relation to the subject petition.

3. That pending the hearing and determination of this Application there be an order of stay of proceedings including writing and/or delivery of any ruling in relation to the subject Petition.
4. That the Hon. Justice M. Kullow be pleased to recuse and/or disqualify himself from any further conduct of this matter.
5. That this matter be placed before any other court of competent jurisdiction, for its just and conclusive determination.
6. That the costs of this Application be in the determination.

The Application was based on the grounds set on the face of the Application being that when the substantive Petition came up for hearing on 19<sup>th</sup> March, 2019 for the hearing of the Petitioner's Application the proceedings on that day started late at around 11.00am and the court file disappeared until counsel for the Petitioner arrived and on the 3<sup>rd</sup> May, 2019 the 2<sup>nd</sup> Respondent had filed a Cross Petition together with an Application seeking that counsel for the Petitioner be disqualified from acting for the Petitioner and all documents filed by the said counsel be expunged from the court's record. The Petitioner had filed a Notice of Preliminary Objection challenging the Jurisdiction of the court and the court having given its directions on the matter and on the manner and order of which application be heard in the following terms: -

- (i) That leave is granted to the 1<sup>st</sup> Respondent to file and serve his replying affidavit within 14 days.
- (ii) Corresponding leave to the Petitioner to file a supplementary affidavit within 7 days of service of the 1<sup>st</sup> Respondent's Replying Affidavit.
- (iii) Leave to the cross Petitioner to file a supplementary affidavit within 14 days
- (iv) The Preliminary Objection dated 2<sup>nd</sup> May, 2019 be disposed off by way of written submissions.
- (v) The Petitioner to file and serve his submissions within 14 days of receipt of the Cross Petitioner's responses.
- (vi) The Cross Petitioner and the Respondent to have 14 days upon receipt of the Petitioner's responses.

The Application is further based on the grounds that the court proceedings of that day did not capture what had happened in court and hence there is perception that the court is compromised and thus the instant application and the reasons of the alleged compromise is that the court had recorded the Petitioner's counsel submissions verbatim and failed to record that of the Cross-Petitioner and there is reasonable apprehension the court will not hear and determine the matter impartially. In support of the aforesaid grounds and annexed to the application was a supporting affidavit sworn by one Ratik Ole Kuyana and annexed to the supporting affidavit were the court proceedings of 19<sup>th</sup> March, 2019 and he was apprehensive that the court will be biased and he would suffer prejudice if the court continues to preside over the matter herein.

The Application was opposed by the Petitioner who filed a Replying Affidavit sworn by Mr. Kuya Kijabe who deponed that the Applicant has made a subjective and unfounded allegation. The Petitioner contends that the averments that the Applicants allege to not have been recorded were those that the court made clear went into the substance of the Application for disqualification of counsel for the Petitioner when the Judge directed that the Notice of Preliminary Objection touching on the court's jurisdiction be heard.

The Respondent averred that all the parties in the matter were accorded ample opportunity to ventilate their position on the directions and further that the 2<sup>nd</sup> Respondent's counsel did not raise any issues unconcern during the said proceedings.

The Application was disposed off by way of written submissions filed by the parties.

I have carefully considered the Application before me and I will first consider prayer for my recusal. The court is alive to the fact that it is within the Applicant's rights to file an application for recusal and/or disqualification. In **REPUBLIC –VERSUS- RAPHAEL MUOKI KALUNGU(2015)EKLJ JUSTICE S.N. MUTUKU** observed:-

**“An application for recusal of a Judge is the occupational hazard every judge must face in the course of his/her Judicial career.....”**

It must be known that the instant Application is resultant of proceedings that took place in court on 3<sup>rd</sup> May, 2019 when the substantive Petition, Cross Petition and a number of applications were filed by the Petitioner and the Cross Petitioner. During the said proceedings it was essential for the court to give directions on the manner and the order of preference that the Application before it was to be canvassed and ultimately the court directed that the hearing of the substantive Petition will await the hearing and disposal of three Applications one by the Petitioner and two by the Cross Petitioner. The Petitioner's Application touched on whether the court had jurisdiction to hear the Cross Petition, and an accompanying Preliminary Objection, whereas the Cross Petitioner had an Application for the court to forward the file to the Chief Justice to constitute a bench of an even number of Judges and another Application for disqualification of Counsel acting for the Petitioner.

The court having considered the circumstances had engaged with counsel on the issues before it as is common with trial Judges in an adversarial jurisdiction like ours and eventually gave its direction which the Cross Petitioner not being satisfied sought to appeal against and leave accordingly granted and later the filing of the instant Application.

I have carefully perused the entire Application and the grounds upon which it is based and the affidavit in support. It is not alleged that the court had an inappropriate contact or communication with the Petitioner, its agents or advocates that the court is conflicted in any other manner save that it gave its direction in fulfilment of its function which directions the Applicant has sought to appeal.

The Application of this nature is about reconciling two competing interest in the administration of justice, that of the duty of the Judge to sit and determine matters which is the primary duty of a judge. The other being to ensure that justice must only be done but plainly be seen to have been done and the test to be used to determine the appropriate balance between the two interests in the East Africa Court of justice in the case of **ATTORNEY GENERAL –VERSUS- PROF. ANYANG NYONGO** held that:-

**“we think the objective test of reasonable apprehension of bias is good law”** In this, the court simply stated whether the allegations made will give rise to reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public.

It is now well settled that not every allegation of bias would result in the recusal of a judge. The allegations must not only be well founded but must be proved. It does not mean that with every such allegation a judge will automatically recuse himself. It would be wrong to yield to every tenuous and frivolous application and I find the instant application does not meet that threshold.

This court having fully and keenly considered the Application before it and the material contained therein against the test for recusal as earlier explained the only grounds upon which the Applicant seeks my disqualification is that the proceedings of 3<sup>rd</sup> May, 2019 were not recorded that is his own personal and subjective view and in the circumstance I find that the Applicant has not laid forth legitimate and well-founded grounds for the court to disqualify itself on the objective test and I find that he has failed to proof the allegations of bias in the circumstances of the case and I thus find that the

Application dated 17<sup>th</sup> June, 2019 lacks merit and I dismiss the same with costs.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **31<sup>st</sup>** day of **July, 2019**

**Mohammed Noor Kullow**

**Judge**

**31/7/19**

In the presence of: -

Mr Kemboy for the Petitioner

Mr Kilele with Ogolla and Ocholla for the 2<sup>nd</sup> Respondent

Ms Kerubo holding brief for 3<sup>rd</sup> Respondent/Interested Party