



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 186 OF 2018

KASAINA OLE SELEKA.....1ST PLAINTIFF
JAMES MOKOIRE MOONKA.....2ND PLAINTIFF
JOHN MILIA MULI.....3RD PLAINTIFF
KILELO OLE SEITA.....4TH PLAINTIFF
MANINA RIKOYIAN.....5TH PLAINTIFF

VERSUS

DANIEL KIRIA LENTURESH.....1ST DEFENDANT
ELIJAH KEEN NAINI.....2ND DEFENDANT
JOSEPP KIPAIPAI NTAANI.....3RD DEFENDANT
EUSTANCE K. KITHUMBU.....4TH DEFENDANT
JOSIAH K. LESSAN.....5TH DEFENDANT
DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT
MINISTRY OF LANDS & PHYSICAL PLANNING.....6TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' application dated the 3rd June, 2019 brought pursuant to section 1A and 3A of the Civil Procedure Act and Article 159 (1) (a) of the Constitution. The Applicants seek that the Honourable Judge recuse herself from this matter and the file transferred to another ELC Court in the area of jurisdiction of the suit land or any other ELC Judge.

The Application is premised on the summarized grounds that the reluctance of the Judge to render a verdict on the interlocutory motion is unfair and supports a conclusion of partiality. Further, the failure by the Judge to render a ruling legitimately supports a preconception that she is supporting the 1st, 2nd and 3rd Respondents who are illegally in office. The applicants moved the court on 27th November, 2018 and were supposed to get a ruling date on 11th February, 2019 in respect of the Notice of Motion as well as Preliminary Objection but on 11th February, 2019 the Judge was absent and on 23rd May, 2019 she still failed to render the ruling which legitimately supports the assumption that she is not neutral. Conduct of the Judge contradicts her oath of office and reinforces perception of bias. The 4th to the 6th Defendants filed a reply which the Plaintiffs' advocates have not been served with and this is not a valid excuse to fail to render a verdict on the interlocutory motion. Further, refusal to render a ruling expected on 23rd May, 2019 and directions which were not sought tendered by the Judge protect the Defendants illegal stay in office.

The application is supported by the affidavit of EVELYN KOKI MBULU who is the advocate having conduct of this matter on behalf of the Plaintiffs'. She claims the Plaintiffs confided in her other matters the net effect of which militate against the Judge to further adjudicate on the said matter. She contends that the Judge made sarcastic remarks on the 27th March, 2019, which were uncalled for, and including failure to render the Ruling militates the assumption that she is not independent. Further, that the actions of the Judge violate her oath of office.

The 1st Defendant DANIEL KIRIA LENTURESH opposed the application and filed a replying affidavit where he deposes that the allegations and insinuations in the instant application including the supporting affidavit are baseless and malicious. He contends that the Plaintiffs have not sworn an affidavit to confirm the nature of the allegations made against the Judge. He narrates that the Plaintiffs filed an application on 27th November, 2018 which was fixed for hearing on 17th December, 2018. Further, that on 17th December, 2018 the Court directed the parties to file their submissions to the Preliminary Objection dated the 14th December, 2018 as well as Notice of Motion Application dated the 27th November, 2018 with the matter fixed for mention on 11th February, 2019 to confirm compliance. He contends that the Plaintiffs were given 21 days to comply but filed their submissions on 1st February, 2019 which was more than 30 days and therefore the Court was accommodating. He confirms that on 11th February, 2019 the Court was not sitting and all matters were called out in the open court by the Registry staff on which date the Plaintiffs' Counsel was absent. Further, on 15th February, 2019 his lawyer received a letter from the plaintiff's counsel addressed to the Deputy Registrar alleging that the date was corruptly given, which letter his lawyers responded to while expressing concern on the baseless allegations raised therein. He avers that the Deputy Registrar vide his letter dated the 13th February, 2019 guided the parties to disregard the mention date fixed for 11th February, 2019 and the Plaintiffs' Advocate vide a letter dated the 22nd February, 2019 invited his Advocates to fix a date on 28th February, 2019 on which date they failed to agree on fixing a mutually convenient date. Further, the Plaintiffs filed a Notice of Motion application dated the 4th March, 2019 which was mentioned on 7th March, 2019 seeking for a ruling date to their application dated the 27th November, 2018 which was scheduled on 23rd May, 2019. He explains that on 23rd May, 2019 the Court advised that she wanted to hear all the parties since the suit land was a large parcel of community land and she was of the opinion that instead of giving a Ruling, the main suit was to proceed to be heard on a priority basis. Further, the matter was scheduled for mention on 3rd June, 2019 to confirm that parties had complied with Order 11 of the Civil Procedure Rules. He states that the Judge informed parties that there was an affidavit on record from the Attorney General which she felt it was important for the Plaintiffs to respond to the averments therein. He reiterates that the Judge has not been biased and treated the matter fairly. Further, that the preposterous allegations on the part of the Plaintiffs and their Advocates' is a mischievous scheme to besmirch the Judge. He insists the Ruling that was scheduled to be delivered was in respect of the Plaintiffs' application dated 27th November, 2018 and 4th March, 2019 as well as 1st – 3rd Defendants' Notice of Preliminary Objection dated 14th December 2018 where parties had filed their submissions. Further, the allegations that the ruling was only in respect of the Plaintiffs' application dated 27th November, 2018 reflect the Plaintiffs' Counsel deliberate misapprehension of the proceedings. He disputes that the Judge made sarcastic remarks and insists this is not part of the record. On the allegations by the Plaintiffs' that no Ruling would be rendered on 23rd May, 2019, he contends that their lawyer was present to receive the Ruling; has never had any contact with the Judge or Court staff outside Court and no evidence has been tendered to this effect. He further reiterates that the application is an abuse of the process of the Court.

Both the Plaintiffs' as well as 1st, 2nd and 3rd Defendants' Counsel made their oral submissions in respect of this application on 17th July, 2019 which I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 3rd June, 2019 including the parties' affidavits and oral submissions, the only issue for determination is whether the Judge should recuse herself from hearing and determining this case.

From the Court records, I note the Court issued directions on 23rd May, 2019 which I have partly reproduced herein below: **'Parties are directed to comply with Order 11 and matter to be heard on a priority basis since the prayers sought in the application dated the 27th November, 2018 are similar to the prayers within the Plaint. Further, by delivering a ruling on the application dated 27th November, 2018, it will culminate in determining the suit without giving parties a chance to ventilate their respective claims. Since the fulcrum of the suit revolves around management of a group ranch which in effect is affecting many people, I direct that matter be heard expeditiously by parties complying with Order 11 within 7 days from the date hereof.'**

It is this direction from the Court that culminated in the Plaintiffs' seeking for the Judge to recuse herself as she was deemed to be biased. Further, the Plaintiffs claimed that the Judge made a sarcastic remark in Court, which they felt was unjustifiable. The Plaintiffs' Counsel in her submissions contended that the Attorney General who is acting for some of the Respondents should not have been allowed to file an affidavit late when a ruling was pending. Further, that that when the Court informed them that a Ruling scheduled on 23rd May, 2019 was early enough, it depicted an element of sarcasm.

According to the provisions of the Environment and Land Court Act, which govern this Court, the overriding objective of the said Act is that the Courts are expected to deal expeditiously with cases before them. By this Court giving directions on the 23rd May, 2019 for the matter to proceed expeditiously and not dwell on interlocutory applications, it was adhering to the provisions as laid down in the Environment and Land Court Act.

In the case of **Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR**, the Court of Appeal held that: **'In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.'**

I note from the Court Records, the Plaintiffs have always been suspicious of the Court to dispense justice to them. This is evident from the correspondence they sent in respect of a date that was issued by the Registry Staff when the Judge was absent. Further, the Plaintiffs have accused the Judge of biased and aiding the 1st, 2nd and 3rd Defendants to be illegally in office, yet it is evident in prayer No. 4 in their application dated the 28th November, 2018, that they sought for reinstatement of the former officials prior to the elections, yet the 1st Defendant was actually the former Chairman, while the 2nd Plaintiff was the Secretary with the 3rd Plaintiff being the Treasurer. From the Replying Affidavit herein, the 1st to 3rd Defendants were ready to adhere to the direction of the Court to expedite the hearing of the matter, which the Plaintiffs seem to be opposed to. Since this matter herein touches on a large community and with the suspicion of the Applicants from the onset and relying on the above-cited Court of Appeal decision, this Court finds the Plaintiffs' false allegations of questioning its

integrity rather unfortunate and will proceed to recuse itself.

In the circumstances, I will allow the instant application and transfer the matter to the ELC Nairobi for the same to be placed before the Presiding Judge Environment and Land Court for further directions.

Costs will be in the cause.

Dated signed and delivered in open court at Loitoktok this 8th day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Sankale for the 1st, 2nd, 3rd respondents

Court Assistant -Mpoye