



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 456 OF 2015

SABASTIAN PAUL MUINDE KATHILU (suing through his Attorney

MARCELLA MBITHE KATHILU).....PLAINTIFF

=VERSUS=

BENL DEVELOPMENT LIMITED.....DEFENDANT

RULING

1. On 2/7/2018, the defendant's Notice of Motion dated 4/4/2018 came up for hearing *inter partes*. The said application seeks a review of the consent orders recorded in court by the parties' respective advocates on 12/3/2018. The plaintiff was represented by Mr James Njuguna while the defendant/applicant was represented by Mr P L O Lumumba, Mr Kimani Wachira and Mr Anami. When Counsel for the defendant rose to argue the application, he intimated to the court that he had important preliminary issues to raise. He proceeded to raise the issues.

2. Firstly, counsel urged the court to deny the plaintiff the right to participate in the proceedings of the court on the ground that the plaintiff had not complied with a previous order made by Okongo J requiring the plaintiff to file an undertaking. He contended that the document dated 23/9/2015 attached to the replying affidavit of Yasin Ismail was not the contemplated undertaking because the Deputy Registrar of the Court had written a letter indicating that the undertaking was not filed. The second issue raised by counsel related to the question as to who the plaintiff before the court is. Counsel contended that the purported substitution effected through the consent recorded on 12/3/2018 cannot stand because substitution on medical grounds ought to be founded on a medical report by a medical practitioner appointed by the court. Thirdly, counsel contended that there is a question as to whether a person suffering from dementia has capacity to grant power of attorney.

3. In response, Mr Njuguna submitted that the undertaking in relation to damages was duly filed and served and that the oral application seeking to bar the plaintiff from participating in the proceedings on the ground of non-compliance with the order of the court requiring the plaintiff to file an undertaking was an ambush on the plaintiff. He urged the court to grant him time to furnish the court with evidence of full compliance. Secondly, counsel submitted that the plaintiff before court is Mercella Mbithe who was substituted in place of Sebastian Paul Muinde Kathilu.

4. In a brief ruling, the court directed that the issues raised by counsel for the defendant were substantive and called for a proper formal application. The court directed counsel for the defendant to bring a formal application, if necessary, to ventilate the issues.

5. As soon as the court rendered the above brief ruling, Counsel for the defendant rose and made an oral application for the recusal of the judge handling this matter. Counsel submitted that the court had expressed discomfort in handling this matter because the defendant had made a complaint to the Chief Justice. He further submitted that the court had intimated that if counsel made a mistake, it is prudent to own up to the mistake because to err is human. Counsel contended that the defendant feels that this court cannot dispassionately handle this matter against that background. Secondly, counsel urged the court to expunge any order previously made by this court in this matter.

6. Mr Njuguna, counsel for the plaintiff opposed the oral application for recusal of the judge. He submitted that the oral application was a furtherance of the false accusations by the defendant against all the judges who have handled this matter. He contended that it was apparent that the defendant was not keen to prosecute its application dated 4/4/2018. He further submitted that it would be sad if litigants were allowed to malign, intimidate and harass the courts. He added that he had sworn an affidavit to demonstrate that counsel who had sworn affidavits in support of the application for review of the consent orders were lying. He added that an application of this nature ought to be formal. Lastly, he contended that the plea to have all previous orders expunged was a way of seeking a review of the consent order recorded on 12/3/2018. He urged the court to disallow the oral application for recusal of the judge.

7. I have considered the parties' respective oral submissions. I have also considered the background to the application as captured in the record before the court. The issue for determination in the oral application is whether the defendant/applicant has satisfied the criteria for the recusal of the court as presently constituted on the ground of apprehended bias.

8. The right to a fair hearing before a properly constituted forum is underpinned by Article 50 of the Constitution. The Constitution obligates the courts to protect that right. It is against that background that our courts have oftentimes held that where there is a proper basis for seeking the recusal of a judge and the established jurisprudential criteria is satisfied, the judge ought to step aside and allow another judge to handle the dispute.

9. The jurisprudential criteria which guides our courts in determining applications for recusal of the court on ground of apprehended bias was articulated by the Court of Appeal in the case of **Kalpana Rawal v Judicial Service Commission & Others (2016) eKLR** as follows:

An application for recusal of a judge in a case 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.....”

10. The East African Court of Justice in **Attorney General v Prof Anyang Nyongo & Others (EACT) Application No 5 of 2007** similarly outlined the criteria as follows:

We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.

11. Prior to the above decisions, the Supreme Court of Canada had spelt out the criteria as follows:

The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude. This test contains a twofold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that forms a part of the background and appraised also of the fact that impartiality is one of the duties the judge swears to uphold. A real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. 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

12. Two grounds were cited in support of the oral application for recusal. The first ground is that the court had expressed discomfort in handling the matter and indicated that the defendant had written a complaint to the Chief Justice. Secondly, it was contended that the court had indicated that if counsel makes a mistake it is prudent to own up because to err is human.

13. It is true that the court brought the attention of all the counsel and the parties to the fact that the defendant had written a formal complaint to the Chief Justice against the previous judge who handled this matter and against the current judge. It is also true that the complaint was investigated and was found to be without merit. The first complaint raised against the current court was that the judge had declined to transfer this suit to Machakos Environment and Land Court. This allegation was false because this matter was assigned to this court after Okongo J recused himself at the behest of the defendant’s counsel who made a similar oral application for recusal of the judge and who subsequently stormed out of the court when the application was disallowed. At no time has the defendant made an application before the current judge seeking a transfer of this suit to Machakos.

14. Because neither the defendant nor his advocate had brought the complaint to the attention of the court, the court drew the attention of the parties and their advocates to the complaint and indicated that it would not object to a transfer of the suit if the parties consented to the transfer of the suit. The court also cautioned against maligning of judges by litigants and counsel.

15. The question to be answered at this point is whether the above actions constitute a basis for a reasonable apprehension in the mind of a reasonable, fair minded and informed member of the public that the judge will not apply his mind to the case impartially. Counsel did not demonstrate how the two observations concerning the undisclosed actions of the litigant and caution against counsel constitute reasonable apprehension of bias on the part of the court. The court’s view is that the observations do not constitute a reasonable basis for apprehensive. The first observation was a factual statement on what had transpired. The second observation was a general caution to counsel not to engage in conduct that malign the court.

16. It is not lost to the court that the oral application for recusal was triggered by the court’s direction that the defendant brings a formal application for an order barring the plaintiff from participating in the proceedings. Prior to that, the defendant did not have any issue with the court. Without saying much, an order barring a litigant from participating in proceedings of this nature is a weighty decision which should be made after giving the parties adequate opportunity to be heard. This is the view which informed the decision of the Court.

17. Consequently, the court’s finding on the oral application for recusal is that it does not satisfy the jurisprudential criteria for recusal of a judge on the ground of apprehended bias.

18. No basis was laid for the second limb of the oral application which sought to expunge all orders previously made in this matter. Consequently, I find no merit in that limb of the application.

19. The upshot of the above findings is that the oral application for recusal of the judge and for expunging previous orders of this court is dismissed

20. Having made the above findings, I have deeply reflected on the unmerited allegations made by the defendant against Judge Okongo and against myself through a formal complaint to the Chief Justice. The complaint was investigated and found baseless. I have also reflected on the conduct of the defendant's counsel on 12/3/2018 and subsequent thereto. They both constitute unwarranted attack against the court. This matter was assigned to me after Judge Okongo acceded to urgings by the defendant to recuse himself on the ground of apprehended bias. I do not know any party in this suit. I have no personal interest in the matter. To avoid being the focus of unnecessary drama and unwarranted attacks, I will, on my own motion and on account of the above reason, allow another judge to handle this matter henceforth. The File shall be taken to the Presiding Judge of the Environment and Land Court to appoint another judge to handle this matter henceforth.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Njuguna for the plaintiff

Mr Wachira for the defendant

Ms Halima Abdi - Court clerk