



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APPLICATION NO. 59 OF 2016

1. LABAN WACHIRA

2. JAMLECK MAINA (Suing as the legal representatives of the estate

of MACHARIA MUCHUNU.....APPLICANTS

VERSUS

WANJAU PHILIP KIGUTA.....RESPONDENT

RULING

What is before me is a Notice of Motion application dated 25th November, 2014 in which the applicants have sought an order for the withdrawal from the Business Premises Rent Tribunal and transfer to this court for hearing and determination Business Premises Rent Tribunal Case No. 429 of 2014. The application is supported by an affidavit sworn by the 1st applicant, Laban Wachira. The applicants have averred that the respondent is a tenant in their premises known as Plot No. 95 Gikomba and that they issued him with a notice terminating his tenancy on the ground that he had persistently delayed in the payment of rent. The applicants have averred that the respondent challenged the said notice by filing a reference at the Business Premises Rent Tribunal (hereinafter referred to as “the tribunal”) that was assigned Tribunal Case No. 429 of 2014.

The applicants have averred that the tribunal as currently constituted is composed of one Chairman only by the name, Mbichi Mboroki (hereinafter referred to as “Mr. Mboroki”. The applicants have contended that while practising as an advocate, Mr. Mboroki represented the respondent herein in another tribunal case that involved the same parties namely, Tribunal Case No. 372 of 2011. The applicants have averred that to avoid conflict of interest, the parties entered into a consent before the tribunal to the effect that Mr. Mboroki recuses himself from hearing the respondent’s reference. The applicants have contended that after the disqualification of Mr. Mboroki, it is only this court that can hear and determine Tribunal Case No. 429 of 2014 pending before the tribunal.

The application was opposed by the respondent through a replying affidavit sworn on 13th April, 2015. The respondent has contended that the applicant’s application is misconceived since matter falling within the jurisdiction of the tribunal cannot be adjudicated by this court. The respondent has contended that the jurisdiction conferred upon this court by section 15 of the Business Premises (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya is appellate in nature and there is no right of appeal to the Court of Appeal. The respondent has contended that if the applicants do not want Mr. Mboroki to preside over the respondent’s reference, they should wait until his term comes to an end. The respondent has contended further that the applicants have not shown how they will be prejudiced if the respondent’s reference is heard by Mr. Mboroki. The respondent has averred that the matter pending before the tribunal was never handled by Mr. Mboroki when he was an advocate and as such there would be no conflict of interest if he determines the same.

Submissions:

The application was heard by way of written submissions. The applicants filed their submissions on 2nd February, 2016 while the respondent filed his submissions on 15th December, 2017. The applicants filed their submissions while this application was still before the High Court where it was filed. The applicants did not file further submissions after the application was transferred to this court from the High Court. The submissions by the applicants by and large dealt with the powers of the High Court. There was no mention of this court and its jurisdiction. The applicants submitted that the High court under Article 165(3) (a) of the Constitution has unlimited original jurisdiction in both criminal and civil matters. In support of this submission, the applicants cited the case of *Atta (Kenya) Limited v Nestlefood Industries Limited (2012) eKLR*. The applicants submitted further that the Civil Procedure Act provides for the transfer by the High Court of suits from subordinates courts to itself and that the tribunal is a subordinate court by virtue of Article 196(1)(d) of the Constitution. The applicants submitted that the fact that Mr. Mboroki agreed to recuse himself from Tribunal Case No. 429 of 2014 was itself an admission that he would be biased if he handled the matter. The applicants submitted that the respondent did not object to the recusal of Mr. Mboroki and as such it was hypocritical for him to oppose the application for transfer of the tribunal case.

In his submission in reply, the respondent submitted that the jurisdiction of the tribunal is conferred by the Business Premises (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya. He submitted that a party who is aggrieved by the decision of the tribunal has a right of appeal to this court pursuant to section 15 of the said Act. He submitted that it would be a mockery and an abuse of this court's jurisdiction to adjudicate over a matter in respect of which it has no jurisdiction as a court of first instance. He submitted further that Article 165 of the Constitution is not an answer to the situation in which the applicants have found themselves. The respondent submitted that the applicants should have waited for Mr. Mboroki to hear and determine Tribunal Case No. 429 of 2014 and appeal thereafter if the decision was not in their favour.

Determination:

I have considered the applicants' application and the affidavit filed in opposition thereto by the respondent. I have also considered the submissions by the advocates for both parties. I am of the view that the application before me has no merit and must fail. To begin with, the application has been brought on the ground that the chairman of the tribunal Mr. Mboroki has recused himself from hearing Tribunal Case No. 429 of 2014 following a consent that the parties entered into. The applicant did not place before the court the recusal order so that the court may appreciate the circumstances under which Mr. Mboroki is said to have recused himself from handling the said case. Secondly, the applicant has alleged that the reason for Mr. Mboroki's recusal was that he acted for the respondent herein while he was an advocate in another case that involved the applicants and the respondent before the tribunal. In the applicants' application, that case is mentioned as Tribunal Case No. 372 of 2011. In his affidavit in support of the application, the applicants mentioned that he had annexed as annexure "LW3" copies of documents relating to Tribunal Case No. 372 of 2011. There is no such annexure. The document that is annexed as annexure "LW3" is an affidavit of service filed in Tribunal Case No. 324 of 2006 and drawn by Mbichi Mboroki & Co, Advocates. The applicants and the respondent are not parties to that case. For the foregoing reasons, there is no material before the court on the basis of which the court can exercise its discretion in the application before me.

Assuming that Mr. Mboroki had recused himself from handling Tribunal Case No. 429 of 2014 can this court take over and determine a dispute reserved for the tribunal by the Business Premises (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya? In the circumstances of this case, I do not think so. This court has original and appellate jurisdiction in all disputes touching on environment and land. However, with regard to disputes falling under the Business Premises (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya, the law has conferred upon this court an appellate jurisdiction only. The jurisdiction is conferred by section 15 of the Business Premises (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya. Neither the Environment and Land Court Act, 2011 nor the Business Premises (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya has given this court jurisdiction to determine disputes that fall within the jurisdiction of the tribunal in the first instance when the tribunal is duly constituted. I am of the view that this court can only assume the jurisdiction of the tribunal in extraordinary circumstances like where the term of the chairman of the tribunal has ended and another chairman has not been appointed for the purposes only of maintaining law and order pending such appointment.

I have taken judicial notice that the tribunal is presided over by only one chairman at the moment. I am of the view however that on account of the doctrine of necessity, where there is only one chairman presiding over the tribunal, the chairman should be very slow to recuse himself from presiding over any matter that is taken before the tribunal because such recusal would leave a litigant with no court to determine his grievance thereby denying him a right to access justice. In the Supreme Court case of Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR, Njoki Ndungu JSC, stated as follows:

"[52] I am conscious that the majority and my learned brother judge Ibrahim have expressed themselves on this issue. I will only add the following. In my view, it is undisputable that a party is entitled to be heard, by a Court before which he or she appears even though it is perceived to be conflicted, if there is no other Court to which he or she can go. The doctrine of necessity and the duty to sit would have to apply.

[53] It must always be remembered that there is a presumption of impartiality of a Judge. In The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999] the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters."

In the instant case where the parties are said to have agreed to have the only presiding chairman of the tribunal recuse himself from hearing the dispute between them, they will have to either move the tribunal for the chairman to review his recusal order and hear the dispute or wait until the term of the chairman ends and another one is appointed. I am not satisfied that valid grounds have been advanced to warrant this court taking over and determining a matter pending before the tribunal. I am of the view that a dangerous precedent would be created if I was to allow the present application. The parties before the tribunal would treat this court which is a superior court as an extension of the tribunal and would seek to have their disputes heard by this court if for whatever reason, they are unhappy with the tribunal. Such practice should not be allowed to take root.

The upshot of the foregoing is that I find no merit in the Notice of Motion dated 25th November, 2014. The application is dismissed with each party bearing its own costs.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Mulako h/b for Mr.Karanja for the Applicants

Mr. Kithinji for the Respondents

Catherine-Court Assistant