



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. NYR 129 OF 2019 (UR 92/2019)**

**BETWEEN**

**IKAREKESHE GROUP TRUST.....1ST APPLICANT**

**AND**

**OLOOLOLO GAME RANCH.....1ST RESPONDENT**

**NATIONAL LAND COMMISSION.....2ND RESPONDENT**

**ATTORNEY GENERAL.....3RD RESPONDENT**

**CHIEF LAND REGISTRAR.....4TH RESPONDENT**

**MINISTRY OF LANDS.....5TH RESPONDENT**

**DIRECTOR, LAND**

**ADJUDICATION & SETTLEMENT.....6TH RESPONDENT**

*(Application for injunction and or stay of proceedings pending the hearings and determination of an intended appeal against the ruling and order of the Environment and Land Court of Kenya at Narok (Kullow, J.) dated 31st July 2019)*

*in*

*ELCC Pet. No. 5 of 2019)*

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**RULING OF THE COURT**

In its motion on notice dated 9th August 2019, **the applicant, Ikarekeshe Group Trust** seeks stay of proceedings in **ELC Petition No. 5 of 2019** which is before the **Environment and Land Court of Kenya at Narok**. The motion is founded on the applicant's apprehension that the court (Kullow, J.) is biased against it and may render in favour of the 1st respondent decisions that are not legally sound or supported by evidence.

The applicant further asserts that there is a real danger that it will be denied a fair trial if the trial proceeds and that its intended appeal will also be rendered nugatory. It is the applicant's contention that the learned judge has not been recording its submissions and that it has lost a merited application for the learned judge to recuse himself from the suit. The applicant is also unhappy with, and reads bias into directions given by the learned judge requiring that a preliminary objection by the 1st respondent to an application by the

applicant for disqualification of the 1st respondent's counsel, be heard first.

The application for stay of proceedings now before us was provoked by a ruling dated 31st July 2019 in which the learned judge declined to recuse himself from the matter as requested by the applicant on the basis of the allegations we have set out above. The learned judge noted that the applicant did not allege that the court had an inappropriate contact or communication with the opposite party, its agents or advocates or that the court was conflicted in any manner save only that it had issued directions that the applicant was not happy with.

The learned Judge further noted that not every allegation of bias justified recusal of a judge and that allegations of bias must be well founded and established. In the learned judge's view, it would be wrong to yield to every tenuous and frivolous application for recusal. Finally the learned judge found that the general allegations of bias made by the applicant did not meet the objective test of reasonable apprehension of bias propounded in ***Anyang Nyong o & 10 Others, EACJ Application No. 5 of 2007.***

The 1st respondent opposed the application, submitting that the applicant had failed to establish an arguable appeal which stood to be rendered nugatory if the order for stay of execution was not granted. It was contended that the applicant had not presented a draft memorandum of appeal from which an arguable appeal could be discerned and that the supporting affidavit contained only wild and generalised allegations of bias. As regards whether the intended appeal would be rendered nugatory, the 1st respondent submitted that the hearing of the petition had since proceeded before the learned judge and was only awaiting the filing of submissions by the parties.

We have anxiously considered this application. As both parties correctly submit, to justify the orders sought by the applicant for stay of proceedings, the applicant must satisfy us, firstly, that its intended appeal is arguable and secondly, that if successful, the appeal will be rendered nugatory. (See ***Githinji v Amrit & Another [2004] eKLR***). We reiterate that an arguable appeal need not disclose a multiplicity of issue, but even one *bona fide* issue that deserves full consideration by the court will suffice. Again, an arguable appeal is not one that must of necessity succeed. It is simply one that is not frivolous. (See ***Stanley Kangethe Kinyanjui v. Tony Letter & 5 Others [2013] eKLR*** ).

In determining whether the applicant's intended appeal is arguable we cannot avoid to look at the applicant's allegations against the principles on recusal of a judge. It cannot be gainsaid that the test is an objective one of reasonable apprehension of bias. (See ***Kaplana H. Rawal v. Judicial Service Commission & 2 Others [2016] eKLR***). The circumstances upon which an application for recusal is based should give rise to reasonable apprehension, in the mind of a *reasonable, fair minded and informed* member of the public that a judge will not apply his mind to the case in an impartial manner. That objective principle seeks to balance the need to maintain trust and confidence in the justice system with the need to ensure that the administration of justice is not undermined or held hostage by recusal of judges, who have taken oaths to do justice without fear or favour, malice or ill will, on flimsy and baseless grounds.

We are not persuaded that the general and roving allegations made by the applicant can constitute the basis of an arguable appeal. The applicant's alleged apprehension is based on the fact that the learned judge has handed down directions and a ruling that the applicant does not agree with. The applicant also claims that the learned judge may reach a decision not founded on law or evidence. With respect, the applicant will be hard-pressed to persuade the Bench that will hear the intended appeal how his generalised apprehensions constitute the kind of bias that would justify an order of recusal or stay of the proceedings before the learned judge.

To the extent that the applicant has not presented before us a cogent case objectively demonstrating possibility of bias, we have no hesitation to find that the intended appeal is not arguable. Having failed to jump the first handle in the twin considerations, this application is dismissed with costs to the 1st respondent.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**