



Farah & another v Adan & another (Environment & Land Case E229 of 2022) [2024] KEELC 3751 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E229 OF 2022**

LN MBUGUA, J

APRIL 18, 2024

- 1. THIS COURT HEREBY RECUSES ITSELF FROM HEARING THIS MATTER (E229 OF 2022) AS WELL AS E156 OF 2021.**
- 2. THE PROCEEDINGS OF 23.10.2023 AND 30.10.2023 IN E229 OF 2022 ARE HEREBY SET ASIDE.**
- 3. THE APPLICATION DATED 19.10.2023 IS MARKED AS SPENT AS IT WAS OVERTAKEN BY EVENTS.**
- 4. EACH PARTY IS TO BEAR THEIR OWN COSTS OF THE APPLICATIONS.**
- 5. THE TWO FILES E229 OF 2022 AND E156 OF 2021 SHALL BE HANDLED BY ONE JUDGE.**

BETWEEN

HUSSEIN AHMED FARAH 1ST PLAINTIFF

HUSSEIN UNSHUR MOHAMMED 2ND PLAINTIFF

AND

YUSUF ABDI ADAN 1ST DEFENDANT

MOHAMMED ABDIKADIR ADAN 2ND DEFENDANT

RULING

1. There are 2 pending applications for determination in this matter filed by the 1st defendant, one dated 19.10.2023 to set aside the proceedings of 27.9.2023 and the other is dated 27.10.2023 for this court to recuse itself from handling this case.



Notice of Motion dated 27.10.2023

2. The 1st Defendant seeks orders that I recuse myself from handling this case. The application is premised on grounds on its face and on the 1st Defendant's supporting affidavit sworn on 27.10.2023. He avers that he is an octogenarian and that his health has significantly deteriorated over the years.
3. That this suit is consolidated with Nairobi ELC 156 of 2021; Yusuf Abdi Adna v Mohammed Abdikadir Adan where he is the Plaintiff and while the said suit predates this suit having been filed on 16.4.2021; it is rather suspicious that the court on its own motion made this case the lead file.
4. He avers that on 8.6.2023, the matter came up for pre-trial conference wherein his advocates on record indicated to the court that he was out of the country for medical purposes and prayed for more time to have him sign documents and instruct his advocates which request was granted and a further mention date was set for 27.9.2023.
5. That on the said date, his advocates experienced connectivity issues and requested another advocate to hold their brief and explain to the court the difficulties in securing his further instructions, approval and signature but the court directed that the matter be heard on priority basis.
6. He contends that the said decision was made without substantiated justification for the urgent nature of the matter which gives rise to a reasonable presumption of impartiality and a deliberate intent to expeditiously exclude him from the proceedings.
7. That to safeguard his interests and rights in the matter, his advocates filed an application dated 19.10.2023 seeking to set aside the court's directions and orders of 27.9.2023 and when the matter came up for hearing of the substantive suit on 23.10.2023, his advocates informed the court of the said application and the need to proceed with it on priority to the substantive hearing.
8. That the court gave directions for the disposal of the said application and set a ruling date for 25.1.2024 and despite the directions, it instructed parties to proceed with the substantive suit regardless which speaks volumes of this court's indifference to his claim.
9. He avers that his Advocates objected to the efficacy of the directions which were given in vain as proceeding with the hearing would render the application nugatory.
10. That further, the said orders were made notwithstanding his advocates objection that they were never served with any of the Plaintiffs' bundle of documents and despite plaintiff's counsel conceding to the fact that the current advocates on record had taken over the matter from Adera & Associates.
11. He avers that his advocates also objected to production of item 6 and 17 of the Plaintiff's bundle of documents by dint of Section 66 of the *Evidence Act* and for want of Certificate of Electronic evidence and Notice to produce Secondary evidence respectively but the judge overruled it and stated that it needed to urgently deliver judgment and gave a further date for hearing on 30.10.2023 just 7 days apart.
12. He contends that the parties herein connived to kick him out of Blue Bird aviation limited, and promised to; 'fight him in court' which promise the judge is openly motivated to deliver as she is a collaborator in the grand scheme of things by the Plaintiffs.
13. He avers that he is being discriminated based on age and health status and his right to hearing under Article 50 is being infringed upon.
14. In his submissions dated 12.2.2024, the Applicant (1st Defendant) argues that the application dated 19.10.2023 has been overtaken by events being 2 hearings on 23.10.2023 and 30.10.2023.



15. On whether the application for recusal is merited, it is argued that the court has exhibited bias in this matter as outlined in instances outlined in the supporting affidavit in support of the application.
16. That in considering whether a judicial officer exhibits bias, the courts have developed an objective test which was stated by the Court of Appeal in *Kalpana H Rawal v Judicial Service Commission & 2 others* [2016] eKLR and in this case, that test has been met.
17. It is argued that the instant application is not a personal affront to the Honourable Judge but a necessary evil and safeguard ensuring unimpeded access to justice to the 1st Defendant. Thus the Court has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded about the circumstances of the case. To this end, the case of *Charity Muthoni Gitabi v Joseph Gichangi Gitabi* [2017] eKLR is cited.
18. The 1st Defendant also submits that the Judge neglected to uphold precision in recording both proceedings and court records, thus endangered partiality in dispensation of justice.
19. Other cases relied upon by the 1st Defendant include; *Mohamud Itarakwa Kochale & 5 others (Suing on behalf of the residents of Laisamis Constituency and Karare Ward of Marsabit County) v Lake Turkana Wind Power Ltd & 4 others; Aaron Iltele Lesiantam & 4 others (Interested Parties)* [2019] eKLR, *Philip K. Tunoi & another v Judicial Service Commission & Another* [2016] eKLR as well as the case of *Attorney General of Kenya v Prof. Anyang Nyo'ng'o & 10 others* (EACJ) Application No. 5 of 2007.
20. The plaintiffs oppose the application vide the replying affidavit sworn on 30.10. 2023 by the 1st plaintiff. He avers that the 1st Defendant is now apparently in the country, and healthy enough to file and sign the affidavit in support of his applications, yet he failed to comply with order 11 of the *Civil Procedure Rules*.
21. He points out that the 1st Defendant filed affidavits in the months of May and June 2023 in HCCC Suit No. 100 of 2016; *Yusuf Abdi Adan v Hussein Ahmed Farah & 2 others* while in this matter, he cites his ill health when asked to comply with order 11 and the said claims are not supported by copies of passport evidencing entry and exit stamps and air tickets showing his travel history.
22. That the allegation that the present suit was consolidated with ELC No. E156 of 2021 by the court on its own motion is untrue as consolidation was done upon the Plaintiffs' application which was not opposed by the 1st Defendant.
23. He contends that if the 1st Defendant was acting in good faith, he would have seized opportunities when he is healthy and in the country to sign his witness statements and would have appreciated the efficiency and prudence of the court to hear the matter conscious of the fact of human mortality.
24. He also avers that it is not the practice that a party will serve every Advocate that a litigant appoints subsequent to the 1st service and in any case, the Advocates on record filed a change of advocates on 31.8.2022.
25. On the issue of production of item 6 and 7 of the documents contained in the Plaintiffs' bundle, it is contended that the court made a ruling on the issue, of which no appeal has been proffered.
26. In their submissions dated 27.2.2024, the plaintiffs aver that the 1st Defendant's claim that "prioritized" hearing 'gives rise to a reasonable presumption of partiality' is being utterly disingenuous, as the overriding objective of the *Civil Procedure Act* and the rules enjoins all the parties who come to court seeking justice to endeavor to expedite resolution of disputes.



27. It is submitted that the threshold to prove bias is high and allegations of judicial bias have to overcome the strong presumption of judicial impartiality which is entered in the oath of office.
28. That for allegation of bias to warrant recusal of a judicial officer, the same must be established to the requisite threshold through cogent evidence, but the Applicant has not shown any scintilla of evidence or perceive bias/reasonable apprehension on the part of the court in this matter.
29. The plaintiffs reiterate that while the 1st Defendant was failing to comply with order 11 in this case, he was filing several applications and affidavits in the High court matter No.100 of 2016. Thus failure to comply by the rules was a choice.
30. The Plaintiffs rely on several authorities including *Arsenault - Cameron v Prince Edward Island* [199] 3 RSC, *Michael Obare Tago v Fredrick Ambrose Oduor Otieno* [2020] eKLR as well as the case of *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63.

Determination

31. The issue for determination herein is whether this Court should recuse itself from hearing and determining this suit whose hearing has kicked off. The 1st Defendant has filed a lengthy replying affidavit in which he has averred that this court is not impartial and that it is biased towards him.
32. Courts have laid down what the test for bias should be. In *Philip K. Tunoi v Judicial Service Commission & another* [2016] eKLR, it was 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.”
33. In *Republic v Export Processing Zones Authority & 2 others; London Distillers (K) Ltd & 3 others (Interested Parties) Ex parte Erdermann Property Limited* [2020] eKLR, the court stated that;

“The facts constituting bias must be specifically alleged and established. For a Judge to recuse himself on the ground of bias, the Applicant has to show that a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case.”
34. Has the 1st Defendant established real bias/possibility of it in a manner that a right minded person would concur?
35. It is ironical that the top most accusation herein is that this court is; ‘suspiciously passionate and motivated to complete the matter.....’ as litigants have always pushed to have their matters determined in the shortest time possible.
36. The Overriding Objectives/principles as captured in Section 1A of the *Civil Procedure Act* calls for expeditious disposal of disputes. This court also has a constitutional duty, which is to hear matters faithfully and impartially and administer justice in accordance with the law.



37. In the case of *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & another* [2019] eKLR, while dealing with a file whose litigation history was anchored on over 18 applications and preliminary objections, including an application for my recusal, I stated as follows;

“In exercising its judicial authority this court has a duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our constitution is “the expeditious delivery of justice” –see Article 159 (2) (b) of the *Constitution* of Kenya, which in effect codifies the 17th century maxim “Justice delayed is justice denied”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide.

The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice”.

38. The record indicates that the matter was mentioned severally for pre-trial directions, to confirm compliance with Order 11 of the *Civil Procedure Rules* and in all instances, the 1st Defendant was just seeking for more time.
39. On 27.9.2023, the court was informed that the 1st Defendant was unwell and had travelled abroad for treatment. No evidence was tabled to that effect and that was the first time the issue of the 1st Defendant’s illness was coming up.
40. The court directed that the matter be heard on 23.10. 2023. Unknown to the court, the 1st Defendant had filed an application dated 19.10.2023 just 4 days before the hearing date and sought to stall the hearing on 23.10.2023. The application was also not filed under a certificate of urgency.
41. The record shows that up to date, the 1st Defendant has neither filed his witness statement nor his trial bundle. This indicates absolute bad faith on his part and goes to show that he is still not prepared to comply with order 11 of the *Civil Procedure Rules*.
42. The allegation that there is discrimination on the part of the 1st Defendant based on his age and health is untrue and was not substantiated.
43. On the issue that the court made a decision to admit item 6 and 7 of the Plaintiffs’ documents in evidence despite his counsel’s objections, the court made the decision to allow the same based on law and discretion.
44. The court is also accused of ‘fighting’ the 1st Defendant with the Plaintiffs herein who allegedly swore to “teach him a lesson” This allegation though bold was not proved. This court is also not privy to the dispute in the High court case no. 100 of 2016.
45. Applying the facts alleged to be bias, a reasonable, objective and informed person would reasonably apprehend, that the 1st Defendant is a litigant who is derailing the expeditious determination of this suit. I also conclude that this court is not biased at all.
46. That being the case, should this court continue to sit and determine the matter. In *Petition No. 34 of 2014 Gladys Boss Shollei Vs Judicial Service Commission & 2 Others* [2018] eKLR, cited in Michael



Kungu Kigia v Agricultural Finance Corporation [2019] eKLR, Hon. Justice Ibrahim SCJ held as follows in dealing with an application for recusal of some judges of the Supreme Court:

“Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he has a duty to sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: “to serve impartially; and to protect, administer and defend the *Constitution*.” It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties’ right to have their cases heard and determined before a court of law.”

47. I have keenly perused this file and I find that the same is closely related to the file E156 of 2021. The dispute concerns the same parties as well as the ownership and management of various shopping malls including Hong Kong shopping mall worth Ksh. 270 million with a monthly rental income of ksh. 2,441,540, and Dubai shopping mall (renamed Bangkok Shopping mall).
48. On 15.7.2021, the court (Judge Eboso sitting) gave orders inter alia in the file E156 of 2021 for the plaintiff in that suit (current applicant) to continue collecting rent, render to the defendant monthly half rent, the suit to be given an early hearing date within that year and the matter to be referred for mediation. On 19.12.2022, plaintiff’s counsel in the said matter (E156 of 2021) (current applicant) informed the court that “the case was consolidated with E229 of 2022.”
49. On the other hand, the file E229 of 2022 was before Judge Mogeni, who on 1.11.2023 took cognizance that there was another similar matter before me (156 of 2021), hence she referred that matter to this court. I handled the said file for the very first time on 3.11.2022 where counsel for the plaintiffs (in E229 OF 2022) informed the court that the “suits were consolidated.”
50. Two issue emerge from this record, that counsels from both side of the divide are the ones who came up with the issue of consolidation. But a perusal of the two files reveals that no order for consolidation was ever made. Further, this court was never briefed by the counsels in relation to mediation proceedings in the file E156 of 2021. These two issues puts the proceedings of 23.10.2023 and 30.10.2023 held in E229 of 2022 (when the case was heard) in jeopardy as the status of the other suit E156 of 2021 was not captured. On account of the aforementioned two issues (consolidation and mediation), the said proceedings are hereby set aside.
51. As I bow out of this matter, I state that for the sake of safeguarding the integrity of the Judiciary, even without good reason, I will recuse myself from this matter. On this point, I make reference to the case of *Mike Sonko Mbuvi Gidion Kioko v Director of Public Prosecutions & 5 others; Council of Governors & 2 others (Interested Parties)* [2020].
52. In the final analysis, I give orders as follows:
 1. This court hereby recuses itself from hearing this matter (E229 of 2022) as well as E156 OF 2021.
 2. The proceedings of 23.10.2023 and 30.10.2023 in E229 of 2022 are hereby set aside.
 3. The application dated 19.10.2023 is marked as spent as it was overtaken by events.
 4. Each party is to bear their own costs of the applications.
 5. The two files E229 of 2022 and E156 of 2021 shall be handled by one judge.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Sagana for Plaintiff

Lorot for 1st Defendant

Muriithi for 2nd Defendant

Court assistant: Eddel

