



Le Plead Investment Ltd v Athur & another (Environment and Land Appeal 33 of 2023) [2024] KEELC 3273 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 33 OF 2023**

**EK MAKORI, J
APRIL 11, 2024**

BETWEEN

LE PLEADI INVESTMENT LTD APPELLANT

AND

ABDULLAHI DAKANE ATHUR 1ST RESPONDENT

MOHAMMED ABDULLAHI SHEIKH 2ND RESPONDENT

RULING

1. This Court has been asked to recuse itself vide the application dated 24th November 2023.
2. The reasons proposed by the applicant is that on 27th July 2023, the parties herein entered a consent that the access road remain open as the appeal progressed. This Court reminded the parties the same on 22nd of August 2023, but that the orders were later to be defiled and on 4th October 2023 the Court insisted that no such orders were made hence the applicant is of the view that the Court is biased.
3. The respondent sees nothing to make this Court recuse itself, stating that no reasonable cause has been proposed to warrant this Court to down tools.
4. The single issue for the determination of this Court is whether the Court should recuse itself from handling this matter based on the averments by Mr. Otaru for the applicant.
5. When a Court is being asked to recuse itself, it is placed right in the middle of the litigation before it. The Court becomes the subject matter. Its impartiality is questioned. The oath of office is at stake. The *Bangalore Principles of Judicial Code of Conduct* come into play. And so is the *Judicial Service (Code of Conduct and Ethics) Regulations* 2020.
6. I need not go into so many judicial authorities on the principles to consider before one accedes to recusal see for example the case of *Republic v Assa Kibagendi Nyakundi* [2022] eKLR: citing the decisions in



Charity Muthoni Gitabi Versus Joseph Gichangi Gitabi [2017] eKLR, and *Kalpana H. Rawal Versus Judicial Service Commission and 2 others* [2016] eKLR, where the Court of Appeal held;

“An application for recusal of a Judge is a necessary evil. On the one hand, it calls into a question the fairness of a judge who has sworn to do justice impartially, the accordance with the constitution without any fear, favour bias, affection, ill will, prejudice, political, religion, or other influence. In such applications, the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human, and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the 2 evils. The alternative is to risk. Violating a cardinal guarantee of the constitution, namely the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial court”

7. The principles are as simple as laid above – two-tier, the Judge living up to his oath of office and a litigant who has a constitutional right to a fair hearing. The two have to be balanced with the result being to do justice when looked at from the lens of a reasonable man.
8. When the Committee (I was there. A member representing Magistrates in Kenya) formulating the *Judicial Service (Code of Conduct and Ethics) Regulations* 2020 was discussing Regulation 21 on recusal which provides as follows:

“21.

- (1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge—
 - (a) is a party to the proceedings;
 - (b) was, or is a material witness in the matter in controversy;
 - (c) has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (d) has actual bias or prejudice concerning a party;
 - (e) has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - (f) had previously acted as a counsel for a party in the same matter;
 - (g) is precluded from hearing the matter on account of any other sufficient reason; or
 - (h) a member of the judge’s family has economic or other interest in the outcome of the matter in question.



- (2) Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings.
- (3) A judge may not recuse himself or herself if—
 - (a) no other judge can deal with the case; or
 - (b) because of urgent circumstances, failure to act could lead to a serious miscarriage of justice;
 - (c) the merits of the application for recusal have been considered by a plural bench of judges, and recusal held to be unnecessary.
- (4) In the case of a collegiate bench, the decision to dispense with the disqualification of any judge shall be made by the bench.”

9. It was discovered that some of the Judges and Judicial Officers recuse themselves from a matter for all manner of excuses and without providing reasons for recusal and electing to state verbally that ‘I recused myself due to personal reasons’ that are never recorded. It was also discovered in doing so that some of the Judges and Judicial Officers when faced with complex matters, I will give an example of terrorism and anti-corruption related cases whenever a chance arise recuse themselves to avoid complaints to the Judicial Service Commission to retain a ‘clean’ name when faced with recusal applications or when recusal is uttered. The Committee felt that to do so amounted to dereliction of duty and a burden to fellow Judge and Judicial Officer who was to take up a matter that had already been taken up and perhaps heard almost to finality by the recusing Judge or Judicial Officer recusing for no reasonable grounds at all. This I will dare say is akin (*sic*) to cowardice provided as an offence under Section 64 of the [Kenya Defence Forces Act](#) 2012, for our active members of the Disciplined Forces:

- “(1) A person who is subject to this Act commits an offence if that person, when before an enemy, and in such a manner as to show cowardice—
- (a) leaves the post, position or other place where it is the person’s duty to be;
 - (b) throws away the person’s arms, ammunition or tools;
 - (c) otherwise behaves in such a manner as to show cowardice;
 - (d) induces other persons subject to this Act to commit an offence of cowardice under this section;
 - (e) runs away; or
 - (f) shamefully abandons, surrenders or delivers up any command, unit, place, or military property which it is his or her duty to defend under this section.”

10. When one recuses himself from a matter without a reasonable cause, it is like leaving a post unattended. Dereliction of the duty one swore to perform.

11. In this matter I am dealing with an appeal arising from a ruling on a preliminary point of law raised in the Lower Court (Hon. Ongondo PM). No hearing on merit has been undertaken. The matter still pends for trial in the Lower Court. The issue of an access road was raised and on 27th July 2023 parties



consented to have the said access road opened pending the hearing of the main appeal. The proceedings show later that a contempt application was filed. It is at this point I am accused of having said that this Court issued no such orders. But later proceedings will show I dispatched the Deputy Registrar of this Court to check whether there was an access road or not. Her report dated 4th October 2023 shows that the access road remains open but with a banner hanging on a rooftop of an adjacent building that there was no such access road. If I had not reckoned that the orders existed, I would not have directed the Deputy Registrar to go to the ground to confirm for me what was up.

12. At best what I can state is that perhaps the applicant mistook my interjections to mean bias. I am conscious that parties need to be heard but then not at the expense of gagging a Judge or Judicial Officer from providing active case management directions for the expeditious disposal of a matter, at best we have deviated from the main appeal. The issues for trial have been parked.
13. Having said so I see no reasonable or genuine grounds for my recusal. The application dated 24th November 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 11TH DAY OF APRIL 2024.

E.K.MAKORI

JUDGE

In the Presence of:

Mr. Nyongesa for the Appellant

Mr. Otara for the Respondent

Court Assistant: Happy

