



Son Hardware Limited v Development Bank of Kenya Limited & another (Environment & Land Case 10 of 2021) [2024] KEELC 4415 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 10 OF 2021**

MN GICHERU, J

MAY 30, 2024

BETWEEN

SON HARDWARE LIMITED PLAINTIFF

AND

DEVELOPMENT BANK OF KENYA LIMITED 1ST DEFENDANT

**JOSEPH M. GIKONYO T/A GARAM INVESTMENTS -
AUCTIONEERS 2ND DEFENDANT**

RULING

1. This ruling is on the notice of motion dated 17/11/2023. The motion which is brought under Sections 3 and 3A of the *Civil Procedure Act* seeks two main prayers as follows.
 2. That Justice Maxwell Gicheru do recuse himself from presiding over this matter.
 3. That this matter be remitted to the Principal Judge of the High Court for assignment of a judge other than Hon. Justice Maxwell Gicheru.
2. The motion is based on the following grounds.
 - a. That the Hon. Judge has from the start been biased against the applicant.
 - b. The manner in which the Hon. Judge has been conducting the matter offends Rules 5, 3, (e) and 3 (h) of the *Judicial Service Code and Conduct and Ethic* in accordance with Article 168 of the *Constitution*.
 - c. The applicants right to access to justice as enshrined in Article 48 of the *Constitution* will be compromised if the orders sought are not granted.
 - d. It is therefore untenable for the Hon. Justice Gicheru to continue to preside over this matter.



3. Further to the above the motion is supported by an affidavit sworn by Peter Juma Muinami, a director of the plaintiff, dated 17/11/2023. The affidavit has three annexures which include a copy of ruling dated 24/1/2022, a copy of order dated 30/11/2021 and a copy of the proceedings from 3/8/2021 to 24/1/2022.
4. The gist of the above material is as follows.

Firstly, in each of the court sessions, the presiding Judge has been very harsh to the plaintiff's advocate Mr. Dominic Muinde.

Secondly, the court has been rush and in undue hurry when dealing with the plaintiff's counsel thus denying him ample opportunity to urge his client's case.

Thirdly, owing to the open dislike and hatred of the plaintiff or its counsel, the court has severally given directions and rulings that are outrightly wrong or unfair. For example on 24/1/2022, the court gave a ruling in respect of an application which was not due for ruling instead of ruling on a preliminary objection. As a result, interim orders issued in favour of the applicant lapsed and this forced it to file a fresh application dated 2/2/2022 for status quo. In the second instance the judge harshly made an order on 23/9/2022 that the plaintiff should file evidence of loan repayment to continue enjoying the order. In the third instance, property was sold by the respondent during the active hearing of the matter and when the court was informed, it took no action to demand an explanation which forced the plaintiff to file another suit in the commercial division.
5. Furthermore, even after the sale, the court kept demanding the plaintiff pays the loan despite counsel's explanation that once the bank realizes its security, the loan account with the bank closes automatically. Currently, there are two applications and a preliminary objection which have not yet been heard yet the court has directed that the case proceeds to full hearing notwithstanding the interlocutory applications.
6. More recently, a new party known as Ariumba Limited sought to join this suit as an interested party and when the plaintiff opposed the application on very sound grounds, the judge refused to hear the plaintiff's counsel and allowed the joinder of the suit by the interested party. This allowing of an oral application makes the plaintiff fear that there will be no justice accorded to him before this court owing to the erratic manner in which the proceedings are being conducted.
7. The motion is unopposed by the defendants or the interested party. Even though the plaintiff's counsel said he filed written submissions on 17/4/2024, I have not seen them on record. Be that as it may, I will proceed to determine the application without the benefit of the learned counsel's submissions.
8. In consideration of whether a judicial officer or a judge exhibits a real possibility of bias, the courts have developed objective test. This test was set in the case of *Attorney General of Kenya v Anyang Nyong'o* in Application No. 5, Ref No. 1 of 2006 by the East African Court of Justice. It is as follows.

“We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but it amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of a 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”.



9. I wish to apply the objective test to all the instances that the plaintiff has complained of as exhibiting bias. My only handicap is failure by the deponent of the affidavit to disclose two things. His station in life and whether he attended all the stations first hand in order to establish the accuracy of what he has deponed. I will assume, rightly or wrongly, that he has at least ordinary level education and that he attended all the court sessions.
10. Regarding the 1st instance of delivering a ruling on an application that was not due, I accept that this is true. However, the ruling was on the plaintiff's own application filed under certificate of urgency and dated 16/7/2021. The application had been replied to. A reasonable, fair minded and informed member of the public who files an application under certificate of urgency would not complain if the court makes a determination on that application within six (6) months of filing it and instead ask that the court determines a preliminary objection filed later by a different party.
11. The second instance complained of is when the court is alleged to have said that the plaintiff files evidence of repayment of the loan to continue enjoying the interim orders of injunction. This is said to have been on 23/9/2022. The court record shows that there was no session on 23/9/2022. On 14/6/2022, there was a consent order made that the next mention be on 5/12/2022. There is nothing more to say about 23/9/2022. If the court asked for evidence so that the interim orders may be extended this is because Order 40 Rule 6 of the [Civil Procedure Rules](#) requires that injunctions should last for twelve months otherwise they should be vacated unless sufficient reason is given for extending them.
12. The third instance that the deponent has complained of relates to the sale of the suit property and the court taking no action. The deponent should know that an application for breach of an injunction should be formal and should be served. He did not file such an application. He has said that he was forced to file another suit in the commercial division. The jurisdiction of this court and that of the commercial court are mutually exclusive. This means that if a dispute can be heard by the Commercial Court, then it should not be filed in this court. This court exercises a very narrow jurisdiction of hearing disputes relating to the environment and the use, occupation of and title to, land. See Article 162 (2) (b) of the [Constitution of Kenya](#). It is a requirement of law that a plaint must contain an averment that there is no other suit pending, no previous proceedings, in any court between the same parties. See Order 4 Rule 1 (1) (f) of the [Civil Procedure Rules](#).
13. While the law requires that land cases be heard and determined expeditiously so that land is released to development and investment and not tied up in endless litigation as per Section 3(1) of the [Environment and Land Court Act](#), Sections 1A and 1B of the [Civil Procedure Act](#) and Article 159(2) (b) of the [Constitution](#), the plaintiff seems to be preoccupied with endless applications which only serve to delay the case. If the plaintiff has a good case, why not prosecute it?
14. The final instance that the deponent has referred to is one of 18/9/2023 when the court allowed Ariomba Limited to join the suit as an interested party because they say that they are the current owners of LR Ngong/Ngong/33632. They were aggrieved that the plaintiff had enjoyed interim orders from 16/7/2021 which directly affected them negatively. The plaintiff wished to have the said party locked out of the suit. One way of expediting the hearing and determination of a suit is to allow applications to join a suit or to amend without hearing any opposition to such applications. This court has power under Section 1A (3) to over rule frivolous objections. It provides as follows;

“A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the processes of the court and to comply with the direction and orders of the court”.

The deponent of the affidavit dated 17/11/2023 should be aware of this power of the court.



15. This is a case where the plaintiff alleges that the 1st defendant fraudulently registered an illegal charge over its land and charged the plaintiff Kshs. 12.5 million which sum was never advanced to the plaintiff. This is the evidence that the court has been waiting for and instead of plaintiff filing it, it is more interested in filing one application after other. Instead of setting the suit down for hearing, the plaintiff has filed a total of four (4) applications. If I was to include the current one, they would be five. Had the plaintiff been keen on prosecuting the case, it would have been concluded by now. There seems to be no urgency on the part of the plaintiff to have this case heard and determined.
16. From the above, it is clear that Peter Juma Muinami, the deponent of the affidavit dated 17/11/2023 has failed the objective test set in the case of *Attorney General of Kenya v Anyang Nyong'o (supra)* because he is not well informed of the key requirements of law that he has failed to comply with and neither is he aware of the reasons why some of the orders were made by the court. I therefore find no merit in the motion dated 17/11/2023 and I dismiss it. Costs in the cause.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 30TH DAY OF MAY 2024.

M.N. GICHERU

JUDGE

