



**Lungui v Mwikya & another (Environment and Land Miscellaneous Application E013 of 2022) [2024] KEELC 4235 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4235 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2022**  
**TW MURIGI, J**  
**MAY 15, 2024**

**BETWEEN**

**ANNAH MBELELE LUNGUI ..... PLAINTIFF**

**AND**

**DAUDI MWIKYA ..... 1<sup>ST</sup> DEFENDANT**

**KYUMA MBEVI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 22<sup>nd</sup> December 2022 brought under Section 1B of the Civil Procedure Act Cap 21, Article 50 of the Constitution of Kenya 2010 in which the Applicant seeks the following order:-
  - a. That the Honourable Court do withdraw this suit pending at Makindu Principal Magistrates Court for trial/disposal/Transfer to any subordinate court to it and competent to try it or dispose of the same.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Daudi Mwikya sworn on even date.

**The Applicant's Case**

3. It is the Applicant's case that the ruling delivered on 24<sup>th</sup> October 2022 was irregular as it was based on the application dated 16<sup>th</sup> November, 2021 and instead of the application dated 17<sup>th</sup> June 2022 which was pending for determination.
4. The Applicant contended that the Trial Magistrate is biased in favour of the Plaintiff as he appointed the same Surveyor to carry out the survey despite his objection to his appointment. He stated that



the Surveyor who is a friend to the Plaintiff, conducted a site visit and prepared a false report whose findings are subject of appeal to the Land Registrar and in Criminal Case No. 354/2020.

5. The Applicant lamented that the Trial Magistrate has been biased throughout the hearing and has even insisted that they must contribute towards the Surveyor's costs despite having informing the court that they cannot afford the same. He stated that the Trial Magistrate did not bother to take any action after they complained to him that the Surveyor had changed the boundary between the disputed parcels of land. He further stated that the Trial Magistrate failed to determine the application which was pending for determination and instead determined the application where the Plaintiff had filed his submissions. For those reasons, he urged the court to allow the application as prayed.
6. Despite being duly served the Respondent did not file any response to the application.

### **Analysis And Determination**

7. Having considered the application, the only issue that arises for determination is whether this suit should be transferred to any other subordinate court for hearing and determination.
8. The Applicant is seeking to have the suit transferred to another court for hearing and determination on the grounds that the trial Magistrate is biased in favour of the Respondent. The power to transfer suits is governed by Section 18 of the [Civil Procedure Act](#) which provides as follows:

- “(1) On the application of any of the parties and after notice to the parties and after hearing each of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –
- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
  - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –
    - (i) try or dispose of the same; or
    - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
    - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.”

9. In the case of [Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd](#) (2012) eKLR the court addressed the conditions to be considered in determining whether or not to grant an order transferring a suit as follows:

“..the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must



be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.

10. The Applicant has cited the reasons for his intention to have the case transferred from the trial magistrate to any other magistrate for hearing and determination. The two principal reasons are that the Trial Magistrate is biased in favour of the Respondent and that his ruling was based on the wrong application.
11. This court is called upon to determine whether the Applicant has demonstrated that the Trial magistrate is biased in favour of the Respondent.
12. The *Blacks Law Dictionary*, 8th Edition defines the word bias as;

“Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation and not to any vies that he may entertain regarding regarding the subject matter involved”.
13. The test to be applied where an allegation of bias is raised was espoused by the Court of Appeal in the case of *Philip Tunoi v Judicial Service Commission & Another* (2016) eKLR where 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.”
14. The objective test of reasonable apprehension of bias was also adopted by the Court of Appeal in the case of *Kalpna H Rawal v Judicial Service Commission & 2 Others* (2016) eKLR which quoted with approval the decision of the East Africa Court of Justice *Attorney General of Kenya v Prof Anyang Nyóngo & 10 Others* (EAC) where it was held as follows:-

“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously but amounts to this: do the circumstances give rise to a reasonable reasonable apprehension, in the mind of the 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”.
15. In the matter at hand, the Applicant did not adduce any evidence to show that there is reasonable apprehension that the Trial Magistrate will not decide the case impartially or is biased in favour of the Respondent. In the circumstances, I am not satisfied that the Applicant has any reason or cause to make the application for transfer of the suit. The Applicant’s allegations that the ruling delivered by the trial magistrate was based on a different application is not backed by any cogent evidence.
16. In the end, this court finds that the application dated 22<sup>nd</sup> December 2022 is devoid of merit and the same is hereby dismissed with no orders as to costs.



**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

**HON. T. MURIGI**

**JUDGE**

In the presence of:-

Court assistant Alfred.

Mukula for the Applicant.

