



Kuria & 27 others v Mott & 12 others (Environment & Land Case 23 of 2021) [2024] KEELC 4219 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 23 OF 2021**

FO NYAGAKA, J

MAY 14, 2024

BETWEEN

DAUDI A KURIA & 27 OTHERS PLAINTIFF

AND

GW MOTT & 12 OTHERS DEFENDANT

RULING

1. This matter came up for the hearing of interlocutory applications by the parties severally before two judges who were my predecessors in the station and myself. The Plaintiffs appear in person but are said to have given the 1st and 7th Plaintiffs to plead on their behalf. In the course of the proceedings before me I indicated to the Plaintiffs that for reason of the complexity of matters herein and the apparent paucity of drafting pleadings and arguing the matter it was advisable that they seek the services of learned counsel. But that did not go down well with the 1st Plaintiff who had confidence in his actions. From then the 1st Plaintiff began accusing the judge of being biased and impartial. The Court should have expected the Applicants to appreciate that it was in their best interest to heed to the proposal. Anyway, the Court left it at that, hence instant application or ‘document’. How this Court wishes that the 1st Plaintiff or Plaintiffs heeded to the proposal because, as will become clear in this ruling, the defect on the instant Application is incurable! Perhaps it could have been avoided if the Applicants had sought legal advice.
2. This Court is one that believes in carrying its mandate very strictly in accordance with the oath of office for reason that from his legal training, social and spiritual upbringing, the learned judge always bears in mind that he took the oath of office to execute his work impartially, independently, truthfully and with propriety since an oath is binding and has consequences for breach. Moreover, the learned judge is always reminded by the spirit of the Holy God whom he serves that he is only a representative of the Great Just Holy Judge who has only delegated this responsibility of judging the acts and issues of men for a season, and that this earthly judge shall, at the end of time give account of how he executed the



small mandate of representing the Holy One - the Ancient of Days (Daniel 7: 9-10, for those who believe in the Holy Bible) before whom we all shall appear and give an account of what we have done (2 Cor. 5: 10). Thus, this judge will forever do justice to parties as required of him by the Oath of Office and the Just God of the universe.

3. The above background in mind, in the course of this Court handling the proceedings herein it became apparent that the 1st Plaintiff who is a lay person in legal matters and was said to have been given authority by all others to plead and prosecute the instant suit was disadvantaged in the manner he drew his pleadings and prosecuted the suit. Believing in working towards substantive justice to all parties, the learned judge at one time took his time to inform the Plaintiffs that it would be wiser for them to engage the services of learned counsel to handle the matter. This was not heeded to. Nevertheless, the Court exercised patience and understanding that the Applicant was not trained in legal matters gave him all the opportunities and time he would wish in order to prosecute this matter.
4. It turned out that in the course of time, particularly on 25/10/2023, the 9th, 12th and 13th Defendants filed a Preliminary Objection to the suit herein. Before the objection which was dated the 24/10/2023, could be heard the plaintiffs moved this Court through a document, which the Court formed an opinion that it was an Application dated 14/12/2023. The application was titled, "RE: Notice of Withdrawal of Honorable Justice Dr. iur Fred Nyagaka." From the title, this Court was not sure whether the document was an Application or a mere notice of withdrawal of a judge. However, since the law does not provide for a party to issue a notice to a judge or judicial officer to withdraw from conducting a matter but rather for an application for recusal supported by evidence of any allegations against the officer, the learned judge was of the view that the document titled as indicated above was an Application. This was because the opening sentence of the document reads as follows: "This application is for you to withdraw from this matter coming up on 19th December 2023 before you. For the following reasons." The document is not supported by any Affidavit. Also, apart from the introduction sentence indicated above, it does not specifically pray for anything. Instead, it proceeds to list reasons the Applicants believed warranted the judge to "withdraw" from the matter. I hereby give a summary of the content here below, most of it fairly directly quoted since most content was vague, confusing or mixed up. The reader needs to exercise patience as he/she reads the next five (5) paragraphs which constitute the contents.
5. The judge "had allowed the unappointed persons in entering and addressing the court without a filed memorandum of appearance without any Supported affidavit and the statements of their representatives as required by law." The judge had "enstopped" the Applicant when he started addressing his issues unconstitutional, illegality and unlawful (sic). The judge had told the Applicant in April, 2022 that if he would not hire an advocate he would dismiss his application openly (sic). The judge dismissed the Applicant's first application while they were still waiting for the court and while knowing that there was electricity interruption, which was illegal to dismiss such an application. Further, that the Applicant had told the judge to withdraw from hearing this matter when the judge forced them to hire an advocate of his ("your") own choice and the judge disregarded to do so even when the Applicant had told the judge not to proceed until the Chief Justice did allocate another judge the matter. And the judge disregarded the Applicant in June, 2022.
6. Further, that the judge moved the plaintiffs' case from open court illegally yet all of them were persons who did not have smartphones, and they were old. The judge stopped all of them from coming to court up to a time he would call them back to court, which was unreasonable and unlawful. The judge told the learned state counsel for the 9th to 13th defendants that they do not come to court because they did not have money for transport and meals. Further the judge said the learned counsel could come to Court if the plaintiffs could afford to pay their transport and meals which meant that the judge was



- assisting them as their chief counsel in this matter, and for that reason they not attend court in any fixed mentions and hearings.
7. The judge had been using his firm in discernible choreographed pattern, willing to kill the case by attrition, have it die a “natural death”. He stated further, that the judge’s action had to be condemned and he was condemning it “loudly”. That the judge had abused the Applicant severally by stating the Applicant couldn’t address the issues before the judge while he was not an advocate (sic), and that was why the judge delayed the matter for 2 ½ years unlawfully.
 8. The other ground was that as judge he was not supposed to exercise a double standard in any matter as the judge and the Chief Counsel Advocate for the 9th to 13th defendants. While in the same subject. Being before him. That on 18/10/2021 the judge did not allow the plaintiff to address his issues. Instead he disregarded him. This showed that the judge had a special interest in the matter and that’s why he dismissed the plaintiffs application, meaning the judge “had a relationship with the counsel who filed the P. O”, which was not even served and it was unlawful. The judge had kept the Court file in his offices so that the judge’s friends could remove the plaintiffs’ true documents and replace them with illegal ones, so that it could pave way for dismissing the plaintiffs’ application and the ruling delivered 30/06/2021. For them the judge had unclear motives other than the promotion of the rule of law, the protection of the rights and administration of justice. The issue was not only a waste of the Court’s time, but hypothetical and illiterate (sic) the Chief Justice performance (sic).
 9. The other ground was that the judge had rejected the plaintiffs’ application with the illegal documents (sic) and uncertified documents by the court unlawfully (sic). The Applicant had warned the judge in August and November, 2022 to stop doing the matter and wait until the Chief Justice allocated another judge who would hear the plaintiffs but the judge disregarded by force (sic). “That manifestly made in bad faith and intentions of intimidating, blackmailing, arm twisting, frustrating me (read the applicant) and subdue to dancing your (read the judges) whim clearly, and your wish to withdraw this case”, and yet the judge was illegally continuing to force them to continue serving mention notices and hearings in an unlawful manner and causing adjournments without any grounds.
 10. The application was opposed by the 10th Defendant through an Affidavit sworn by one Brian Ikol who filed it on 02/02/2024. He deposed that the said Defendant Independent Commission established under Article 67(1) of *the Constitution* of Kenya and operationalized under the *National Land Commission Act*. It was mandated to manage public land on behalf of the National and County Governments.
 11. The application was freelancing, competent, misconceived, untenable, bad in law and an abuse of the court’s process. The application was fatally defective in form and substance as it was not accompanied by a Supporting Affidavit as required by law. The prayers sought were untenable and could not be granted by a court. The judge was under an obligation to sit and determine cases and not to recuse himself without valid reasons. Further, an Applicant would not justify an application for recusal simply because it was not pleased with how the court is conducting its proceedings. The judge had performed his duty in a fair independent manner and there had been no proof of the alleged bias and predetermined findings of the court and the Applicant had proved any ground worthy of recusal of the judge.
 12. He relied on the case of Oloololo Game Ranch Ltd v National Land Commission and 2 others; Chief Land Registrar & 2 (Interested Parties) [2020] eKLR which cited the Supreme Court of Kenya decision of Gladys Boss Sholei -vs- The JSC & Another (2018) EKLR which also cited with Approval the case



of *Simonson -vs- General Motor Corporation* USDCP 425 RSupp574,578(1978) where the learned judges held as follows:

“Recusal and reassignment is not a matter to be lightly undertaken by a distinct judge, while in proper cases, we have a duty to recuse ourselves, in the case such as the one before us, we have a concomitant obligation not to recuse ourselves; absent valid reasons for recusal there remains what is to be termed as a “duty to sit”.

13. Mr. Ikol deponed further that the Application was an afterthought, lacked merit, was an abuse of the process of the court and a means by the Applicant to further derail the matter. He prayed for the dismissal of the application with costs.
14. In the course of the parties getting ready for the hearing of the Preliminary Objection came up for hearing Mr. Munga appearing for the 11th defendant, indicated that his client would be supporting it and he would find their submissions. Nevertheless, as at the time of preparing this Ruling the Court has not come across submissions from the said party. Be that as it may, since submissions do not constitute evidence or pleadings of parties, their absence does not affect the outcome of the Ruling: the Court will still apply the law to the facts and determine the matter judiciously.
15. When both the Preliminary Objection and Application came up for hearing the Applicant, Mr. Daudi A. Kuria, submitted that he was waiting for the judge to disqualify himself because the judge had said that he was not a lawyer. That this he did in November, 2021, when the parties were in open court and in the presence of the learned State Council, one Mr. Peter Kuria. The other reason was that the judge had indicated that the parties should not keep coming to court but the matter be heard online yet the people he represented were illiterate and they only wanted to attend court. Further, the judge had indicated that if the parties wished the matter to be heard in open court the Applicants should be paying the attendance fares and meals of the Respondents. He submitted further that he wondered where the other learned State Counsel got their fares from in order to attend the court in order matters. He submitted that he was of the view that the judge was defending the other state counsel.
16. Further, he submitted that he had not been served with any documents and by the 9th to 13th defendants indicating that they appeared in the matter. Therefore the learned State Counsel, Madam Jepkemei, who argued the application had come “from nowhere”. And also learned Counsel, Mr. Nathaniel for the Kenya National Highway Authority (KENHA) had he gotten into the matter recently yet the suit had started in 2020. He was absent all along.
17. The Applicant complained further that the court had directed that he serves the National Land Commission physically, yet he had not seen any response from them. Lastly, that the matter had been in court for two years and adjournments were occasioned by the court.
18. But he submitted that he had been served with all the documents the Court ordered that he be served by the parties.
19. On her part the learned State Counsel submitted that she, on behalf of the Attorney General, did not represent the 10th defendant which had appointed counsel, were represented and that they had filed their Replying Affidavit on 06/02/2024. She submitted further that the National Land Commission was acting in public interest in this matter. Further, that to argue that the Commission be excluded from proceedings was unattainable.
20. In response to the submission on representation by the Attorney General for the 9th, 12th, and 13th defendants learned counsel submitted that Article 156 (4) (b) of *the Constitution* provided for the Attorney General to represent government in cases that were against the public and for them, the



government departments which had been sued had their right to be represented by the Attorney General. And also Act No. 49 of 2012, which established the Office of the Attorney General, gave the Public Service Commission authority to employ State Counsel under the Act who would represent the Attorney General in all matters the Attorney General appeared, and she was duly qualified and employed as a State Counsel.

21. Regarding the physical attendance of the Applicants and the directions the Court had given earlier that parties should be heard online she submitted that the instant matter was at the application and or mention stages. The other matters where the other State Counsel had been attending physically were those scheduled for hearing and not mentions or applications. Therefore, in the instant case, when learned counsel did not have fuel to travel from Eldoret to Kitale for the hearing of an application or mention, it was unnecessary have the matter heard physically. She submitted that the Preliminary Objection be upheld and the application dismissed.
22. On his part, learned counsel who represented the 11th defendant, the Kenya National Highways Authority (KENHA) supported the argument by the learned State Counsel. He submitted further that as an advocate, he had been on record in this matter since he had filed a Notice of Appointment of advocates. The plaintiff knew the 11th defendants had been sued in this matter, he had been attending court sessions, and when the Applicant did not appear the previous time, it was him who called the plaintiff to appear online. He submitted he was an in-house counsel and that is why he represented the KENHA under Section 4 of the [Kenya Roads Act](#) of 2007. It was the first plaintiff who sued the KENHA due to the construction of the Endebess-Suam-Kitale's Road. Therefore, to argue that the 11th Defendant be excluded, would be unjust. The plaintiffs had sued KENHA over compulsory acquisition of their alleged parcels. Lastly, he objected to the application for recusal of the judge because no matter had been placed before the court to show that the judge acted contrary to the law.
23. In response 1st Plaintiff submitted that he did not agree with submissions of both learned counsel. But he admitted that he was served by both parties with the documents the court had directed that he be served with.
24. I have considered the Application, the law and the submissions of the rival parties.
25. First it is important to put the record straight. This Court record bears it out that this Court has not adjourned this matter on its own accord but rather on account of the parties, particularly the Plaintiffs. Thus, it is unfair for the said parties to blame the Court for their own mistakes and actions. The record shows that the learned judge accused of delaying this matter took over the same on 26/10/2021. On the material date only the 1st Plaintiff attended Court. On that date he had not served the other parties. Even so, he sought to add other parties who, to him, may be affected by the order of the Court. The Court proposed to him that due to the complexity of the matter that he did not seem to understand he and the Plaintiffs should seek services of learned counsel to advise them on how to file the relevant documents.
26. On 16/11/2021 when the matter came up for mention the Attorney-General's office informed the Court that the Plaintiffs were yet to comply for reason of the matter involving many departments from which they were trying to obtain information. The Court gave a further mention for 17/01/2022 when all parties did not appear. The Court fixed the matter for virtual mention on 22/02/2022 on which date the 1st Plaintiff though logged in the Session was unable to communicate.
27. The Court matter was fixed for mention the following date when he was able to communicate and it turned out that he had not served the Amended Plaint on the parties the Plaintiffs introduced in the matter. The Court gave a further mention on 25/04/2022. On the material date the Court carefully



- examined the Affidavit of service filed by the Plaintiffs and found that it did not satisfy the provisions of Order 5 of the Civil Procedure Rules as to service. It directed that service be effected again and the parties appear on 19/05/2022 on which date the 1st Plaintiff stated that he served all parties but sought time since his co-plaintiff the 7th one Teresia C. Keny, with whom they had instructions to prosecute the suit was hospitalized at Referral Hospital. The State Counsel also sought more time to comply and it was extended. It turned out that on the material date, although the 1st Plaintiff opposed the extension of time for the Attorney General, he has not served the National Land Commission, the 10th Defendant. The Court directed once more that he serves, and fixed the matter for 13/09/2022.
28. Since the 13/09/2022 fell on a date during the Recess, the Court mentioned the matter earlier, being 26/07/2022, to fix another date, which was the 24/10/2022. It transpired that the NLC and KENHA were served on 15/09/2022 and there was a proposal to try and settle the matter out of Court. The Court gave the parties upto 7/11/2022 when it turned out again that the Plaintiff had not served the 11th Defendant for this date. The Court gave the Plaintiff another chance to serve the party for mention on 23/11/2022 when the 11th Defendant appeared upon service and sought to file Responses. The Court gave the parties to respond, serve and the rest to file Replies to the Pleadings if need be, all be done within 30 days. The matter was fixed for mention on 31/01/2023. On this material date the 1st Plaintiff moved the Court that he has filed an Amended Notice of Motion dated 23/01/2023 which he wished to be heard first.
29. The Court fixed it for hearing on 28/02/2023. By that date the Plaintiff had not served the Notice of Motion on the NLC yet he wanted to proceed with it. For reason of that failure the Court fixed the same for hearing on 27/03/2023 on which date the Plaintiff claimed that the Attorney-General had not filed a response to the Application. It still turned out that the Plaintiff did not once again serve the NLC with the Application. That morning learned counsel for the NLC obtained a copy from the State Counsel. The Court had to give the NLC time to respond to the Application. It fixed the matter for 13/04/2023. On this date, the Plaintiffs did not attend Court and gave no explanation for that yet the date was taken by consent. The Court dismissed the Application.
30. The Plaintiffs then applied vide an application dated 27/04/2023 to set aside the order of dismissal. It would be allowed by the consent of the parties on 31/05/2023 and the earlier application fixed for hearing on 21/06/2023. On that date the Court heard the Application and fixed it for Ruling on 19/10/2023 when the Court struck out the Application and fixed the matter for mention. But the 9th, 12th and 13th Defendants filed the Preliminary Objection dated 24/10/2023.
31. From the record, at no point in time did the Court delay the matter. It was more on the part of the Plaintiff than the other parties. That aside, the 1st Plaintiff has been attending the Court virtually since the time the Court directed so, and when he did not, the prejudicial orders granted were set aside. This Court notes that for unknown reasons, in addition to whipping emotions, the Plaintiff would cause old and frail litigants to travel long distances all the way from their rural homes to attend Court for mentions or applications. That is not good practice especially in this era of virtual proceedings.
32. Additionally, and far from the truth, the 1st Plaintiff's arguments that this Court allowed persons unauthorized to address it or represent parties, learned counsel Md. Jepkemei who represented the 9th, 12th and 13th Defendants during the hearing and determination of this matter is a State Counsel duly appointed to act as such under the Office of the Attorney General Act and is stationed, as at the time of this application, in the Eldoret Office which handles this matter. Similarly, Mr. learned counsel Mr. Munga and any that represented the 10th and 11th Defendants respectively had the legal authority to so do. All the respective learned counsel filed documents of representation on various dates.



33. Having said that, the instant Application was filed in the form described at paragraph 4 above. It was not supported by an Affidavit. Order 51 Rule 4 provides that

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

34. All the issues the Plaintiffs wanted to raise against the judge are factual. They cannot be raised by way of grounds in support of an application but through an affidavit. The instant application having not been supported by any factual matter is wholly defective and cannot stand. It does not raise any point of law so much so that the Plaintiffs might argue that it therefore required no evidentiary support by way of an Affidavit. The defect is not curable. It is not one of those the Article 159(2)(d) of *the Constitution* of Kenya can apply to in order to be salvaged as a mere technicality. In terms of Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, he who alleges must prove. The Plaintiffs allege so many issues against the judge herein but none is proved leave alone attempted to be proven.

35. This is the reason why the Plaintiffs should not have despised the proposal by the Court that they seek legal counsel to help them conduct their matter. They did not. They can only have themselves to blame. The upshot is that the Application dated 14/12/2023 is incompetent, bad in law and an abuse of the process of the Court and is hereby dismissed with costs to the Respondents.

36. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

