



Republic v National Land Commission & 2 others; Kimasas Farmers Co-operative Society & another (Interested Parties); Eastern Produce Kenya Limited (Exparte Applicant) (Environment and Land Judicial Review Case 1 of 2023) [2024] KEELC 4764 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2023
MN MWANYALE, J
JUNE 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE PRINCIPAL SECRETARY STATE DEPARTMENT FOR LANDS & PHYSICAL PLANNING 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

AND

KIMASAS FARMERS CO-OPERATIVE SOCIETY INTERESTED PARTY

COUNTY GOVERNMENT OF NANDI INTERESTED PARTY

AND

EASTERN PRODUCE KENYA LIMITED EXPARTE APPLICANT

RULING

1. This Ruling is in respect of the Notice of Motion application dated 12th January 2024, that was brought under a Certificate of Urgency.
2. The Application filed by the Exparte Applicant, Eastern Produce Kenya Limited, seeks the following orders; -
 - i. That Hon. Mr. Justice M. N. Mwanyale does recuse himself from hearing and determining this suit.



- ii. That such other or further orders as may be just to meet the ends of justice
 - iii. That costs be provided for.
3. The grounds in support of the application are interalia;
- a. That on 8/11/2023, the Court directed that the matter would proceed in the afternoon despite the fact that parties had not filed submissions, additionally the Court indicated that the 1st Respondent National Land Commission would not be permitted to file a response since it had delayed in filing a response, and the Exparte Applicant Counsel Ms. Opiyo pointed to the Court the need to await the response by the 1st Respondent who were the authors of the letter which was subject of the proceedings and the Exparte Applicant's said Counsel request to highlight submissions was initially turned down by the Court. Counsel for the Exparte Applicant indicated that in previous matters parties had been allowed to highlight their submissions and wondered why there was haste in dealing with the matter that had been filed in August to the extent that the Applicant would not be allowed to highlight its submissions, where after the Court directed parties to highlight submissions on 29th November 2023 as the Court was not sitting in December 2023 and Ms. Opiyo indicated that she was not available on the said date and despite that the Court fixed the matter on the said date at 8.00am.
 - b. That on 29th November, 2023, Ms. Opiyo logged in at that time when the Court was not sitting. At 9.20am when she logged in on the virtual platform she was informed by Court that direction had been issued on filing of submissions and judgment reserved for January 2024. That Mrs. Opiyo sought highlighting of submissions which the Court declined highlighting of submissions while it had previously agreed to it; and that on 8th of November 2023, none of the parties had objected to highlighting of submissions.
 - c. The haste in which the Court is handling the judicial review matter gives a perception that the Court is not impartial, is high handed and there seems to be a predetermined outcome in respect of the pending applications in Kapsabet JR E001/2023 and Kapsabet E006/2023 and the Applicant has filed a similar recusal application in Kapsabet E006/2023, as the Applicant is apprehensive that it will not obtain justice in the present matters.
 - d. The Applicant is concerned with the matter in which the Court is concerned with the manner in which the Court is unilaterally accelerating the matters whilst breaching its right to a fair hearing under Article 50 (i) of *the constitution*. The two Court cases related to serious and important issues pertaining to trespass of the Applicant's land and 1st Respondents action.
4. The application is supported by a supporting affidavit deponed by Mr. Dennis Gitaka the Legal Manager of Exparte Applicant who reiterates the grounds in support of the application and a further affidavit by the same deponent deponed on 19th March 2024 where the Court transcript were annexed.
5. In opposition to the application a Replying Affidavit by Mr. Brian Ikol a Director of Legal Affairs and Dispute Resolution with the 1st Respondent as well as the replying affidavit of Daniel Biwott, the chairman of the Interested Party, Kimasas Farmer's Co-operative Society.
6. Mr. Ikol deposes interalia, the role of the National Land Commission under Article 67 of *the Constitution* of Kenya and the National Land Commission, Act No. 5/2012. The deponent deposes that they are set timelines within which judicial review proceedings ought to be concluded and that highlighting of submissions is not a right of any party but is discretionary and that the Applicant was given a chance to file submission and that there was no proof that the Court acted in a bias manner or had a predetermined finding.



7. On the strength of the above the 1st Respondent sought dismissal of the application.
8. On his part Mr. Daniel Biwott in his replying affidavit on behalf of the interested party deposed interalia;
 - i. That the application is without merit, brought in bad faith and is meant to frustrate, delay and/or dispute the Court process and enable the Applicant enjoy interim orders issues Exparte on 22/8/2023.
 - ii. That on 8/11/2023 all Counsels were given an opportunity to address Court and directions issued with regards to filing of submissions and a date for highlighting given
 - iii. That even without highlighting submissions a party cannot claim to have been denied a right to be heard while it had been given a chance to file written submissions.
 - iv. That directions were issued at 9.00am when the Applicants Advocate was absent though in the presence of the 1st Respondent and Interested Parties Advocates, and the same could not be reviewed at 9.20am when the Applicants Advocate logged in as the other Advocates had logged out.
 - v. That the allegation of bias is this unfounded and untrue and the Applicant has not demonstrated facts constituting bias that meets the objective test and Applicant has not demonstrated the violations of Article 50 of *the Constitution* of Kenya by way of favoritism and/or bias and therefore it is not true that parties will not get justice.
9. On the strength of the above depositions the Interested Party sought the dismissal of the application with costs.
10. The 2nd and 3rd Respondents represented by the Hon. The Attorney General did not file any response to the application having sought not to participate in the said application.
11. The Applicant through Mr. Denis Gitaka filed a further affidavit pursuant to leave granted to it; in which he deposed interalia, that the Applicant is keen to have the judicial review matter heard expeditiously but certainly not in a manner that clearly breaches its constitutional right to a fair hearing which includes a right to highlight its submissions in a case which involves the revocation of its title to land. That procedural fairness in the hearing of matters particularly those concerning land is imperative annexed thereto, is a letter date 21st February 2024 and cause lists for the Court in December 2023.
12. That Applicant is apprehensive that he it will not get justice in the present matters as it is concerned the way the Court is unilaterally accelerating the matters while breaching the Applicant's right to a fair hearing under Article 50 (i) of *the Constitution* as it is not clear why the matters are being accelerated without reference to the Applicant's due process, rights and rules of natural justice.
13. On the strength of the above deposition the Applicant urged the Court to rescues itself; by allowing the application.
14. Directions were issued for the parties to file written submissions and Applicant sought and was allowed to orally highlight the submissions, while the 1st Respondent and Interested Parties filed their written submissions, the 2nd and 3rd Respondents did not file submissions having opted not to participate in the application.
15. It is important to put the matter into context, before I dwell in the application.



16. The Judicial Review matter pending for hearing and determination seeks orders of certiorari to quash a letter dated 19th May 2023 by the 1st Respondent to the Principal Secretary State Department of Lands, and Physical Planning as well as prohibition orders prohibiting the Principal Secretary State Department of Lands and Physical Planning from acting and implementing the National Land Commission's directive in the letter dated 19/5/2023 relating to revocation of the Exparte Applicant's title No. LR. 9285/3 and issuing a title to Kimasas Farmers' Co-operative Society in respect of LR. NO. 9285/3. (3) A declaratory order be issued that the National Land Commission directive in the letter dated 19th May 2023 was issued without jurisdiction is unconstitutional unlawful and tainted with illegality for contravening the doctrine of his panders Section 80 of the Land Registration Act Section 4 (3) (a and b) and 4 (b) of the Fair Administrative Action Act, the National Land Commission Act, and Article 10 (2) and c, 40 (i) 47 (i) and 50 of the Constitution and consequently, the letter dated 19th May 2023 is null and void.

Applicant's Submission: -

17. For the Applicant its Advocate on record filed written submissions and Mrs. Opiyo highlighted the same. In a nutshell the Applicant submits that for the Court to have change its direction issued on 8/11/2023 on the 29/11/2023 it curtailed the Applicant's right to orally highlight submissions, and confirmed the Applicants perception of bias and that there would be a predetermined outcome of the Judicial Review proceedings. The directions issued on 29th November 2023, was a clear violation of the Applicant's right to a fair hearing under Article 50 Ii) of the Constitution.
18. That the Applicant is keen to have the Judicial Review matters heard expeditiously but certainly not in a manner that clearly breaches its constitutional right to a fair hearing which right includes a right to highlight its submissions in a case which involves the revocation of its title to land.
19. The Applicant places reliance on Judicial Service (code of conduct and ethics) Regulations 2020 Regulation 21 provides for recusal where the Judge has actual bias or prejudice concerning a party and the Supreme Court decision in Jasbir Singh Rai and 3 others vs Tralochan Singh Rai & 4 others where the Court held that " the test for establishing a Judges impartiality is the perception of a "reasonable person" this being a well informed , thoughtful observer, who understands all the facts and who has examined the record and the law...."
20. Reliance was also placed in the decision in the President of the Republic of South Africa & others vs Sought African Rugby Football Union and others (judgment on recusal application), Barnaba Kipsongok Tenai vs Republic, RV Sussez Justices Exp M. C. Carthy.
21. The Applicant also placed reliance in the Supreme Court decision in Alnashir Popat & others vs Capital Markets Authority which held interalia, that the "right to a fair administrative action cannot be sacrificed at the altar of effience or public interest."
22. The Applicant submits that the expeditious disposal of a matter cannot be an excuse to deprive the Applicant of its constitutional right to a fair hearing and submits that the application is merited and it ought to be allowed.
23. Mr. C. F. Otieno who filed a Notice of Appointment to appear, alongside the firm of Kaplan & Strakon for the Applicant did not file any submissions on the application and he did not therefore highlight any submissions.



Respondents Submissions: -

24. The 1st Respondent filed a Replying Affidavit but its submissions in respect of the application were not on record hence the 1st Respondent did not highlight. The 2nd and 3rd Respondents did not participate in the application at all, and did not file a response or submissions, while the Interested Party filed submissions but opted not to highlight the same.

Interested Party's Submissions: -

25. The Interested Party framed and submitted on a sole issue for determination, as to whether the Applicant has met the threshold required for recusal of the Judge in this matter.
26. The Interested Party submits placing reliance in *Mohan Galot & 7 others vs Inspector General of National Police Service & 4 others*; *Gulot Limited & 3 others (interested parties)* 2011 eKLR which decision discussed in details the Regulation 21 of the Judiciary Code of Conduct relied upon by the Applicant.
27. The interested Party submits that for a Judicial Officer to recuse himself or herself from a matter it must demonstrate that a Court is biased and not impartial.
28. The Interested Party submits that the Applicant's rights under Article 50 were not breached since all the parties had agreed to proceed with the substantive notice of motion by way of written submissions.
29. It is the Interested Party's further submission that from the application the grounds do not support how the standard of conduct have been breached by the Court, so as to create a perception of that the Court is not impartial, is high handed and there seems to be a one-determined outcome.
30. Reliance was placed on the decision of the Supreme Court in *Gladys Boss Shollei versus Judicial Service Commission & another* citing the decision in the case of *Simsonson versus General Motor Corporation*. As well as the decision in the case of *Accredo AG & 3 others vs Seffano Ukelli & another* (2018) eKLR.
31. It is common ground between the Applicant and the Respondents in the application subject of this ruling that there ought to be an expeditious hearing of Judicial Review matters as is the case herein. The point of divergence between the Applicant and the Respondent is that the Applicant submits that the expeditious disposal of matters should not violate the constitutional right to a fair hearing which includes a right to highlight oral submissions.
32. Having analyzed the application, the affidavit in support and in opposition to the application, the annexures, thereto, the rival submissions, the Court frames the following as issues for determination.
 - i. Whether the denial to highlight oral submissions infringed the Applicant's Constitutional right to a fair hearing under Article 50 (i) of *the Constitution*, so as to infer bias against the Applicant on the part of the Court.
 - ii. Whether the application is merited and meets the threshold for recusal
 - iii. What reliefs ought to issue?
 - iv. Who bear the costs of the application?



Analysis And Determination: -

33. Upon leave been granted to the Exparte Applicant to file the substantive Notice of Motion on 22/8/2023, the matter was slated for a mention before this Court for further directions on 20th September 2023. On 20th September 2023, the Court issued the following directions;
 - i. “ The Applicant to supply the Notice of Motion dated 25/8/2023 by close of business 21/9/223 and serve via email the 1st Respondent within the same timelines.
 - ii. The 1st, 2nd and 3rd Respondents to file and service their respective response within 14 days from today.
 - iii. Leave granted to the Applicant to file a further affidavit if need be within 7 days of service of the replying affidavits but in any event not later than 21 days from today.
 - iv. Parties to file written submissions with the Applicant to file within 28 days from today and the Respondents and Interested Parties to file submissions within 10 days after service of the Applicant’s submission.”
34. Matter was slated for mention on 8th November 2023. On 8/11/2023, the 1st Respondent had not filed their response and the Court was prepared to hear the matter at 2.30pm on the same date, where upon Mrs. Opiyo for the Exparte Applicant urged the Court to grant the 1st Respondent time to file their response. The 2nd and 3rd Respondent had already filed their response and submissions as at that date.
35. The Court allowed the 1st Respondent to file its response within 5 days from that date, and the Applicant was granted leave to file a further affidavit within 3 days of service of the responses, and 14 days to file submissions from the said date and the Respondents was to file submissions within 7 days of service of the Exparte Applicant’s submissions, highlighting of submissions was slated for 29/11/2023 at 8.00am.
36. On 29/11/2023, the Court logged at 8.00am and there being no one on the platform started the cause list at 9.00am. whereupon the Court was informed that the Applicant had not filed its submissions and the 1st Respondent again had also not filed a response; and sought for more time.
37. The Applicant’s Advocate were not present and having not filed submissions, the highlighting could not take place and the Court granted time for the Applicant and first Respondent to file their submissions by 15/01/2024 and reserved judgment for 30/01/2024.
38. The Applicant is aggrieved that its constitutional right to highlight oral submissions were infringed and has now filed this application seeking the recusal of the Court and is further aggrieved that on 8/11/2023, the Court did not give a date in December 2023 and it acted highhandedly as it did not give a date in December 2023, while it sat in the said month.
39. The record shows that on 28/11/2023 the Applicant and the 1st Respondent had not filed their submissions and there was nothing they would have highlighted on the same date.
40. It is important to put into perspective that the Court had planned leave days in the month of December from 15th December to 22nd December 2022 and save for the matters it had already fixed it could not fix any new matters then and on 28/11/2023, the leave having been approved, the Court gave directions for filing of submissions by 15th January 2024 on the first day it was scheduled to resume and had reserved the judgment.



41. As noted elsewhere, the Applicant and Respondents both agree that Judicial Review matters are to be heard expeditiously, this in line with Section 8 of the *Fair Administrative Action Act* which provides for conclusion of matters under the said Act within 90 days. This Judicial Review application is premised on the provisions of the said Act as captured at paragraph 16 interalia, and it was thus to be concluded in the statutory timelines if possible.
42. The submission and the contention that the Court was in a haste to conclude the matter, should thus be taken in light of the said statutory provisions.
43. Had the 1st Respondent complied with directions issued on 20/9/2023, and had the Applicant also complied with directions issued on 8/11/2023, it is possible that the matter may have been concluded within the prescribed time lines.
44. It is also to be noted that the Applicant had been given a chance to file submissions through the directions issued on 20/9/2023 and again on 8/11/2023 and time extended once more on 28/11/2023, the 1st Respondent on its part had also been directed to file a response and its submissions on the very dates that the matter came up.
45. The Court shall now answer issue 1 - 6. The issue of whether denial of highlighting of oral submissions violates the Constitutional to a fair hearing right under Article 50 (i) of *the Constitution*, the basis of this application was addressed by Supreme Court in its recent decision delivered on 12/4/2024, in the case of *Kampala International University vs Housing Finance Company Limited (Petition 34 (035 of 2022))* KESC 11 KLR where at paragraph 62, the Supreme Court while addressing this issue observed as follows; “62. The Appellant submits that by being denied the opportunity to make oral submissions in support of its argument challenging the jurisdiction of the Arbitrator, the High Court violated its right to a fair hearing under Article 50 of *the Constitution*. This submission did not find favour and rightly so in our view, with the Court of Appeal.....”
46. It follows from the Supreme decision cited above that the denial of highlighting oral submissions does not infringe the right to a fair hearing under Article 50 of *the Constitution*.
47. Having found so, it follows that the basis of this application and the apprehension that the Applicants rights were violated by the denial of the right to highlight submission was based on a misapprehension of the law as stated by the Supreme Court.
48. In answer to issue number 1 the Court finds that the Applicants right were not violated by denial of highlighting of oral submissions, and that having been given time to file written submissions which time was extended twice, the Applicant’s right to a fair trial was accorded to them.
49. The Court shall now determine whether Applicant has demonstrated actual or perceived bias against it. The Applicant while placing reliance on Regulation 21 of the Judicial Service (Code of Conduct and Ethics 2020). Submitted that the Court was biased and had a predetermined outcome and it ought to recuse itself.
50. The directions issued in this matter were issued to all the parties. When the Court was prepared to proceed without the 1st Respondent having filed its response the same cannot be said to have been a biased direction against the Applicant, similarly when on 28/11/2023, when both the 1st Respondent and the Applicant had not again complied with the Courts directions firstly issued on 20/9/2023 and secondly on 8/11/2023 the Court extended time to all the parties to file their submissions by 15/01/2024.



51. It cannot therefore be said that the Applicant was singled out for unfair directions by the Court so as to infer actual or perceived bias under Regulation 21 of the Judicial Code of conduct.
52. In issuing directions to all the parties, the Court availed equal protection of the law under Article 27 (i) to all the parties despite them not having complied with previous Court directions.
53. There is no allegation of a conflict of interest so as to raise a perception of bias and the only allegation of infringement of constitutional right by denial to a fair hearing, oral submissions, has since been found to have been a misapprehension of the law, the Court finds therefore that the test of a reasonable man set out in *Jasbir Singh Rai & 3 others vs Tralochan Singh*. In the form of “a reasonable person being a well-informed, thoughtful observer who understands all the facts and who has examined the record and the law has not been met.”
54. On issue 2, the Court returns a finding that, the application having been based largely on the apprehension of violation of right to fair hearing by denial of highlighting of submissions which has been found to be a misapprehension of the law, is thus not merited and has also not met the threshold of proof of bias.
55. Having found the application unmerited, the inevitable conclusion is that the application hereby is destined to fail as the same is hereby dismissed with costs to the 1st Respondent and Interested Party.

RULING, DATED AND DELIVERED AT KAPSABET THIS 13TH DAY OF JUNE 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mrs. Opiyo for the Applicant

Mrs. Nderitu for the Interested Party

Mr. Kwame for 2nd and 3rd Respondent

Ms. Obino for the 1st Respondent

