M'Mukira & another (Suing through its Executive Officials, Namely Chairperson, Secretary, Treasurer and Pastor) v Magiro & another (Environment and Land Appeal E018 of 2024) [2024] KEELC 5737 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5737 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E018 OF 2024

CK NZILI, J

JULY 31, 2024

BETWEEN

JOSPEH KOOME M'MUKIRA ..... 1ST APPELLANT

INTERNATIONAL GOSPEL CENTRE ..... 2ND APPELLANT

SUING THROUGH ITS EXECUTIVE OFFICIALS, NAMELY CHAIRPERSON, SECRETARY, TREASURER AND PASTOR

AND

CHARLES MAGIRI ..... 1ST RESPONDENT

ALICE NAITORE MAGIRI ..... 2ND RESPONDENT

RULING

1. On 6.3.2024, this court rendered a ruling in Meru ELC Misc Application No. E024 of 2023, where it granted leave to the appellants to file an appeal out of time. Secondly, it granted an order for a stay of execution of an eviction decree against the applicants from L.R No. Kiirua/Naari/Maitei/472, pending hearing and determination of the intended appeal.

2. The stay orders were conditional and the appellants were to file an undertaking as to costs at Kshs.500,000/= within three days; otherwise, the stay orders would lapse.

3. Through an application dated 26.3.2024, the appellants sought orders to cite the respondents for contempt of court. The application was served upon the respondents for inter-parties hearing on 9.5.2024. The citees filed a replying affidavit dated 4.4.2024 opposing the application for contempt of court. The court made appropriate directions to ensure the attendance of the citees pursuant to the procedural law applicable in Kenya to hear and determine contempt proceedings. The respondents did not raise any objections to the directions given or seek any recusal. The applicants prosecuted

the application, and the respondents were given an opportunity to testify orally in support of their replying affidavit as PW 1, 2 and 3. After the hearing, the record indicates that counsel for the applicants sought and the applicants were placed on bail to secure their attendance at the ruling pursuant to Rule 81.7(2) of the English Civil Procedure Rules (Amendment No.3) 2020. See Christine Wangari Gachege vs Elizabeth Wanjiru Evans and others (2014) eKLR, which grants the court power to issue a bench warrant. In hearing the contempt proceedings, the court strictly was guided by Rules 81.4 - 8 of the Rules above to guarantee the parties their rights to a fair hearing as enshrined in Article 50 of *the Constitution*. See Alfred Mutua vs Boniface Mwangi (2022) eKLR.

4. Through an application dated 3.6.2024, the applicants sought to arrest the ruling and for the court to recuse itself. The grounds are set on the face of the application and in a supporting affidavit dated 3.6.2024 by Charles Magiri. He has not attached any consent to swear on behalf of the 2nd applicant.

5. The reasons are that he was arrested and put in custody before he was heard, the bond terms were heavy it was as if he was guilty of contempt of court, the court is biased and he does not expect fair hearing since it condemned him unheard, the stay orders had not been met for lack of an undertaking, the court disregarded the lower court judgment and has determined the appeal before it has even been heard, the court was openly and visibly irritated and demanded that he explains why and how the stay orders were interpreted by them; there was no equality of treatment to all the parties, the court decided to handle an improperly instituted notice of motion the court misconducted itself by putting the applicants in custody before hearing and determining the contempt application contrary to Article 50 of *the Constitution* and the judicial code of conduct; they have no faith in the court since they do not believe that the court will be fair; after all a punishment was meted to them by being put in custody and that their fears were real and not just on mere apprehension.

6. The respondents oppose the application through a replying affidavit of Joseph Koome M'Mukira sworn on 3.7.2024. They aver that the applicant must establish and demonstrate the propriety of their motive in seeking recusal for lamenting their detention lawfully sanctioned by the court over their alleged contemptuous acts.

7. Additionally, the respondents aver that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction first to obey it unless and until an order is discharged and to regard extent to an order, that a party believes to be irregular or void.

8. Similarly, the respondents aver that the court must not condone berate disobedience of its orders nor waive its responsibility to deal decisively and firmly with contemnors otherwise, court orders are not made in vain, which would expose a court to ridicule, yet it should guarantee legality and uphold the rights of all litigants. The respondents aver that the court was acting within its mandate.

9. The respondents aver that the applicants should not be allowed to justify the application for recusal simply because they are displeased with the court's conduct, as is the case in this matter when the applicants aver that the court was openly and visibly irritated or annoyed while at the same time, they do not deny that they had not complied with the court orders.

10. Further, the respondents aver that there was no proof of any alleged bias or pre-determined views by the court in the present proceedings and that the continued conduct of these proceedings will breach any provisions of constitutional law and governing laws on fair hearing. The respondents aver that the application lacks merits, for there was no evidence of prejudice view on the part of the court against them.

11. Through written submissions dated 17.7.2024, the applicants attacked the replying affidavit since it is not consumed. It is submitted that Article 50 of *the Constitution* provides for a fair hearing

before a deepened or impartial tribunal or body. Further, the applicants submit that Regulation 25 of the Judicial Service Code of Conduct and Ethics 2020 provides for the recusal of a judge in any proceedings in which its impartiality might reasonably be questioned for, among other things, actual bias or prejudice concerning a party.

12. The applicants submitted that the court had given conditional orders dated 6.3.2024, for a stay of execution that the memorandum of appeal be filed within seven days and an undertaking as to costs of Kshs.500,000/= be filed within three days; otherwise, the stay orders would lapse.

13. The applicants submitted that the respondents failed to meet the conditions until after 12 days with no extension of time. On bias, the applicants submitted that by putting the applicants in custody unheard, it was against the rules of natural justice for they had not been convicted of any contempt of court.

14. The applicants submitted that contempt of court orders being quasi-criminal requires proof beyond a reasonable doubt, yet they were put behind bars before the application was heard and determined; hence, they feel that the court is already biased, a miscarriage of justice damage has already been done and have no faith in the court. The respondents relied on written submissions dated 15.7.2024, rehearsing the contents of the replying affidavit sworn on 3.7.2024.

15. What the applicants have sought is the arrest of a ruling in an application, which this court heard after giving each party an opportunity to tender evidence for and against it. At the hearing, none of the citees complained of bias, miscarriage of justice, unfairness, irregular directions or orders, denial of rights, and or sought the recusal before or during the hearing of the application. Similarly, at no time did the applicants seek for review of any directions and or orders of the court.

16. It took the applicants close to a month after the hearing of the motion and almost ten days before the ruling to apply for the arrest of the ruling and the recusal of the court. The applicants are also unclear on what will become of the proceedings and the ruling if the orders sought are granted. During the hearing of the application, the applicants were also ably represented by a reputable law firm, which did not raise the issues at the earliest opportunity now raised in this application and more so on the applicable procedural law alluded to above, following the declaration of the *Contempt of Court Act* 2016, unconstitutional. See Kenya Human Rights Commission vs Attorney General and Anor (2018) eKLR.

17. In Rawal vs Judicial Service Commission and another Okoti (I.P.) ICJ & another (Amicus Curiae) Civil Appeal (Application No. 1 of 2016 (2016) KECA 717 (KLR) (11th March 2016) Ruling, the court observed that an application for recusal of a judge was a necessary evil since on the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, by *the Constitution*, without any fear, favor, bias, affection, ill-will, prejudice, political or other influence, while on the other hand the oath of office, notwithstanding the judge is a also human and above all *the Constitution*, does guarantee all litigants the right to a fair hearing by an independent and impartial judge. The court cited with approval the President of South Africa vs the South African Rugby Football Union and others in Cases CCT 16/1998 that a judge should not regard an application of his recusal as a personal affront.

18. As to the appearance of bias, the court cited R vs Gough (1993) AC 646 that the test is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. The court cited A.G. (K) vs Prof. Anyang Nyongo & others EACJ Application No. 5 of 2007 that the test is whether 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 and will not apply his mind to the case impartially.

19. The court cited R vs SRD (1977) 3 SCR 484, that the test is what an informed person viewing the matter realistically and practically and having thought the matter through would conclude. The court said that the test would be twofold, namely; an objective test that the person considering the alleged bias must be reasonable, and the apprehension of bias must also be reasonable in the circumstances of the case. The court said that the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the tradition of integrity and impartiality and social realities that form the background to a particular case awareness.

20. The court said that the existence of a reasonable apprehension of bias depends entirely on the facts, the threshold for the finding being high, and the onus of demonstrating bias lying with the person who is alleging its existence. The court said that on the merits of a proposal for recusal, the court must ascertain all the circumstances that have a bearing on the suggestion that the judge is biased.

21. The application seeking recusal, as indicated above, was filed almost a month after the application for contempt was heard interparty, during which the applicants were given adequate opportunity to respond both in writing and through viva voce evidence and written submissions on whether or not they willfully disobeyed a court order made in their presence in a ruling delivered on 6.3.2024. The records and proceedings of the court are expected to capture all the facts, evidence, and issues for the court's determination.

22. Notably, the orders of stay of execution by this court have not been set aside, reviewed, or appealed against. Additionally, the orders of 8.5.2024 have not been reviewed, appealed against, or set aside. This court, as indicated above, has heard the application for contempt of court after giving the applicants time to respond, give evidence, cross-examine, and tender material on whether there was the existence of a valid court order, whether it was served upon them, whether there was alleged disobedience, if it was willful and if they have purged the contempt.

23. The applicants, however, are now saying that the court, in the process of hearing the application, showed open bias and was apprehensive that the court may not be fair to them in the delivery of its ruling. In fact, they say that it is like the court has made up its mind to find them guilty of contempt of court. They now want the court to recuse itself from the conduct and presiding over the hearing of the petition, including the writing and delivery of any pending ruling. The applicants take the view that the court showed open bias, condemned them unheard, and proceeded to punish them even before the hearing and determination of the application. On the other hand, the respondents take the view that the applicants have fallen short of meeting the threshold of recusal.

24. The applicants are meekly silent on whether or not they were granted an opportunity to respond to the application of contempt of court and tendered their oral rival evidence. Article 160 of *the Constitution* provides that the court, in exercising its mandate, shall exhibit independence, including decisional independence, that should not be subject to the control and directions of any party. Justice must also be delivered irrespective of party status. Fair hearing includes being allowed to offer a defense. It also includes being allowed to apply for review and or appeal against orders that have been made against an aggrieved party.

25. A party seeking for recusal of a judge must, therefore, demonstrate reasonable grounds for assuming the possibility of bias and whether it is likely to produce in the mind of right thinking, well-informed and reasonable members of the public, reasonable doubt about the fairness of the administration of justice.

26. In Gladys Boss Shollei vs JSC & another (2018) eKLR, the Supreme Court of Kenya held that recusal and reassignment of matters should not be lightly undertaken, but in proper cases, courts must recuse

themselves if there are valid reasons since a court must sit, if there were no grounds for disqualification in fact and law. The court observed that the duty to sit helps to protect the independence of the court against maneuvering by parties hoping to improve their chances of having a matter being determined by a particular judge as to gain forensic delay and interpretation of proceedings as held in New Zealand Court of Appeal Muir vs Commissioner of Inland Revenue Par 2007 3 NZ LR 495.

27. In this application, the applicants have based their apprehension basis of recusal on the motion, the merits of the application and the appeal before the court even before the same has been determined and or admitted for hearing by this court. The applicants have even attacked the court's views on whether it should have allowed an application for a stay of execution and have even gone ahead to commend whether the conditional stay of execution orders had been met by the respondent for there to be a basis to cite them for contempt of court. The applicants further have made claims that it is the court that arrested them and put them in custody as a punishment for contempt of court. The applicants have failed to disclose that they were granted their constitutional rights to attend and hear the application of contempt of court.

28. As indicated above, there is no evidence that the applicants applied for and were denied any review orders on time or at all regarding the directions of the court before, during and immediately after they attended the hearing of the contempt proceedings.

29. An application for contempt of court is to be determined on its own merits and based on known principles of law. The basis of the applicants' suspicion that the court, despite hearing their side of the defense, would still find them in contempt is far-fetched and lacks basis.

30. In K.H Rawal vs Judicial Service Commission (supra), the court said that judicial officers ought not to accede to every application for recusal, primarily when it is not based on reasonable grounds; otherwise, it would encourage litigants to believe that seeking the disqualification of a judicial officer they will have their case tried by someone who they think will likely decide the dispute in their favor.

31. Mere apprehension on the part of a litigant that a judge will be biased since a strongly and honestly felt anxiety is not enough, as held in the South African Commercial Catering and Allied Workers Union & another vs Irvine Johnson Ltd Sea Food Division Fish Processing Case CCT 21 of 2000 as cited in Republic and others vs Cabinet Secretary for Transport and Infrastructure and others (2014) eKLR.

32. The court has to carefully scrutinize the apprehension and determine whether it is to be regarded as reasonable, the apprehension has legal value and would be countenanced in all. The court is aware that the judiciary remains vulnerable to attacks on its legitimacy and integrity. Ill-founded and misdirected challenges to the composition of the court have to be discouraged; otherwise, it would undermine public confidence in impartial adjudication of everyone who is aggrieved of an order or decree instead of appealing is allowed to turn his attack on a judicial officer.

33. In David Onyancha vs Judicial Service Commission & another (2018) eKLR, the court observed that even where a judge finds that even after holding a particular position, he is still able to rise above that position and is willing to be persuaded in such a case, he can still persuade the parties that he wishes to hear the matter and will be open-minded objective and once informed he can continue to sit as held in *National Bank of Kenya vs Anaj Ware Housing Corporation Ltd Petition No. 36 of 2014*.

34. This court does not doubt its integrity, independence, and fidelity to *the Constitution*. There is nothing laid before me that the applicants will not get justice in the ruling of the application for contempt of court. There is nothing before me to suggest that the applicants were not accorded a fair hearing in the hearing of the application. As to whether the court shall hear the appeal, directions are yet to be taken. The appeal is yet to be placed before the duty judge for the admission.

35. The doctrine of necessity comes into play. Having heard the application for contempt thoroughly before the recusal application was filed, it demands that the ruling be delivered accordingly. The application is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31st DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Kerubo for Aketch for the applicants

Parties

HON. C K NZILI

JUDGE