Achola & another (Both Suing as the Legal Representatives of the Estate of the Late Jeckonia Oliver Achola Ndinya) v Otachi & 3 others (Environment & Land Case 361 of 2017) [2024] KEELC 7260 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7260 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 361 OF 2017

BM EBOSO, J

OCTOBER 30, 2024

BETWEEN

JOY JENIPHER ADERO ACHOLA .... 1ST PLAINTIFF

EVERLYN ODETE ACHOLA .... 2ND PLAINTIFF

BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JECKONIA OLIVER ACHOLA NDINYA

AND

KIBAGENDI ROBERT OTACHI .... 1ST DEFENDANT

FREDRICK KIMEMIA KIMANI .... 2ND DEFENDANT

NAIROBI LAND REGISTRY .... 3RD DEFENDANT

ADEN HUSSEIN MAHAD .... 4TH DEFENDANT

RULING

1. Falling for determination in this ruling are to applications by the 2nd defendant. The first application seeks the recusal of the Honourable Justice Eboso from further hearing the suit. It also seeks an order that the suit be transmitted to the Presiding Judge of the Court for hearing denovo.

2. Through the second application, the 2nd defendant seeks leave of the court to amend his statement of defence dated 15/2/2018 and file a further witness statement and list of documents. The 2nd defendant also seeks an order allowing him to re-open his case. Before I dispose the two applications, I will outline the relevant contextual background to the two applications. Part of the contextual background was outlined in the preceding ruling of the court rendered on 6/12/2023. Because the contextual background has not changed much, some of the previously outlined background will be reproduced in this ruling.

3. The estate of the late Jeckonia Oliver Achola Ndinya initiated this suit in June 2017 through a plaint dated 31/5/2017. The plaint was amended on 28/8/2017. Among other reliefs, the estate sought orders nullifying various entries that were made in the land register relating to title number Nairobi/Block 103/431, situated in Mugoya Estate, South C, Nairobi. It is important to note that one of the impugned registrations was effected during the subsistence of this suit, at a time when the Land Registrar was already seized of a court order barring him/her against registering any instrument disposing an interest in the property.

4. The court record reveals that M/s Mwangi Mwangi Associates Advocates filed a notice of appointment dated 27/6/2017 on behalf of the 1st and 2nd defendants. The said firm subsequently filed a joint statement of defence dated 15/2/2018 on behalf of the 1st and 2nd defendants.

5. Pre-trial proceedings were conducted. Trial subsequently commenced in October 2018. The plaintiff called four witness and closed their case on 28/1/2020. Hearing of defence case started in January 2021. The 2nd defendant tendered evidence and closed his case in January 2021. The 4th defendant too tendered evidence and closed his case. At that point, the Judge presiding over the case [Eboso, J] was transferred. The Chief Justice subsequently formally requested the Judge to continue hearing and conclude the part-heard matter.

6. Towards the tail end of the trial, the 1st defendant filed a fresh statement of defence, witness statement and documentary evidence. This attracted a motion from the 2nd defendant, seeking an order striking out the new documents that the 1st defendant had filed. Subsequent to that, the 1st defendant filed a notice of motion dated 24/2/2023, seeking an order striking out the pleadings that had been filed on his behalf by M/s Mwangi Mwangi Associates Advocates. He also sought leave to file pleadings and trial documents in the suit.

7. The application dated 24/2/2023 was disposed through a ruling dated 6/12/2023. While allowing the application, the court rendered itself thus:

> 8. I have considered the application, the response to the application and the parties' submissions. The key question which the court is invited to determine is whether the 1st defendant [the applicant] instructed the firm of Mwangi Mwangi Associates Advocates.
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> 9. On 17/2/2023, the court directed that the application under consideration be served on M/s Mwangi Mwangi Associates Advocates. The said firm did not file any affidavit in response to the application. None of the parties to this suit presented evidence of formal instructions given to the firm of Mwangi Mwangi Associates Advocates by the 1st defendant. All that the 2nd defendant tendered is evidence indicating that the 1st, 2nd and 4th defendants in this suit have been in communication.
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> 10. In the absence of any evidence indicating that the 1st defendant instructed the firm of Mwangi Mwangi Associates Advocates to file the papers that the 1st defendant has now disowned, the court will give the 1st defendant the benefit of doubt and will allow the application dated 24/2/2023. The 1st defendant's entire trial bundle to be filed and served within 7 days."

8. Subsequent to that, the 1st defendant filed pleadings and was granted the opportunity to be heard in the matter. On several occasions, hearing did not proceed because either the 1st defendant or the 2nd defendant were not ready. The 2nd defendant subsequently brought the two applications that are the subject of this ruling. I will first dispose the application for recusal.

Application for Recusal

9. The application for recusal is dated 6/3/2024. It was supported by the 2nd defendant's affidavit of even date. It was canvassed through brief oral submissions that were tendered in the virtual court on 20/9/24. The case of the applicant [the 2nd defendant] is that the 1st defendant informed him via a WhatsApp text message sent through phone number 0722139373 on 14/10/2018 that he was personally known to Honourable Justice Eboso, having been a client to the Judge when the Judge was still in private practice. The applicant contends that it is untenable for the Judge to continue presiding over the matter because his impartiality and non-bias are cast in doubt due to his past relationship with the 1st defendant. The applicant adds that he is apprehensive that he will not get a fair hearing as provided under Article 50 of *the Constitution*.

10. The plaintiffs opposed the application through grounds of opposition dated 14/5/2024 and oral submissions tendered in the virtual court during the hearing of the application. The case of the plaintiffs is that no demonstrated conflict of interest on the part of the Judge has been laid to warrant recusal. The plaintiffs added that despite the 1st and 2nd defendants being directed to file and serve detailed affidavits disclosing details of the briefs that the Judge allegedly handled on behalf of the 1st defendant, none had been filed. The plaintiffs added that whereas the WhatsApp message is alleged to have been exchanged two days prior to commencement of trial in 2018, no action was taken on the WhatsApp message during the subsequent trial hearings from 2018 to 2024.

11. The plaintiffs added that for apprehension of bias to constitute a basis for recusal, the apprehension must be reasonable, objective and based on solid facts. They termed the application as a dishonest propaganda being played at the court for the sole purpose of derailing conclusion of trial in this suit.

12. The court has considered the application, the response to the application and the parties' respective submissions. The single question to be determined in the application for recusal is whether the criterial for recusal on the ground of apprehension of bias has been met.

13. Our superior courts have in many decisions cited with approval the following test that was outlined by the Supreme Court of Canada in R V S (R. D) (1977)3 SCR 484 in which the Canadian Court addressed itself on the test of reasonable apprehension for bias in an application for recusal of a judge, as follows:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of

bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

14. The Court of Appeal adopted the above test in Philip K Tunoi & another v Judicial Service Commission & another [2016] eKLR. It also adopted the same test in *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) (Civil Appeal (Application) 1 of 2016*) [2016] KECA 717 (KLR).

15. In R *v Jackson Mwalulu & others Civil Application No Nrb 310 of 2004*, the Court of Appeal outlined the test as follows:

> "When courts are faced with proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established."

16. In the application under consideration, the 1st defendant is facing allegations of fraudulent transfer of the suit property from the deceased to himself and subsequently to the 2nd defendant. The 2nd defendant is facing allegations of fraudulent acquisition of the suit property and fraudulent transfer of the suit property to the 4th defendant in contempt of a court order. Initially, a common defence was filed on behalf of the 1st and 2nd defendants. The 1st defendant disowned the common advocates who filed a joint defence on their behalf and asserted that he never instructed the advocates to file the defence. The 1st defendant disowned the joint pleadings that had been filed by the advocates. Above all, the 1st defendant denied selling nor transferring the suit property to the 2nd defendant. He also denied acquiring the suit property from the deceased.

17. The 2nd defendant alleges that between the two of them [the 1st and 2nd defendants], they were in communication in 2018 and while exchanging WhatsApp messages, the 1st defendant informed him [the 2nd defendant] that during his days in private legal practice, the Hon Justice Eboso acted for him [the 1st defendant] in a brief. For reasons that only the two defendants know, they never raised that as an issue for over five (5) year when trial in this suit was conducted by Hon Justice Eboso.

18. In search of the truth, this court [Eboso J] directed the two defendants to file affidavits detailing the brief(s) in which the Hon Justice Eboso acted for the 1st defendant. None has been forthcoming. Put differently, the two defendants who are facing the above serious allegations of fraud have elected to ignore the order directing them to place before the court evidence relating to the alleged past client/advocate relationship. Consequently, there is no evidence demonstrating that the Hon Justice Eboso acted for the 1st defendant during his days in private practice. If indeed there was a client/advocate relationship, why would the two defendants withhold the information for the 5 years that Hon Justice Eboso conducted trial in this suit? Why have they failed to place before court particulars of the alleged brief?

19. Given the contextual background that has been laid in the preceding paragraphs, it is clear that the two defendants do not want this case to be finalized. That is the purpose which the application for recusal was intended to achieve.

20. For the above reasons, the court finds that the test for recusal on the basis of reasonable apprehension of bias has not been met. Consequently, the application for recusal is rejected and dismissed. The applicant will bear costs of the application.

Application for Leave to Amend Pleadings, File Additional Documents and Re-open the 2nd Defendant's Case

21. The case of the applicant [2nd defendant] is that, on 6/12/2023, the court allowed the 1st defendant to file his own defence after the 1st defendant disowned the joint defence that had been filed on behalf of the 1st and 2nd defendants. The applicant contends that through the new defence, the 1st defendant introduced new issues that were a complete departure from the previous joint defence. The applicant adds that in his testimony, he relied on the joint defence which has now been disowned by the 1st defendant. For these reasons, he wants the plea to be granted.

22. Opposing the application, the plaintiff faulted the applicant for failing to exhibit the draft amended pleadings. The plaintiff added that if there are issues as between the 1st and 2nd defendants, the two defendants are at liberty to ventilate the issues in a different suit involving the two of them.

23. The court has considered the application. The question to be answered in the application is whether a proper basis has been laid to warrant grant of leave to amend the 2nd defendant's pleadings to re-open the 2nd defendant's case; and to adduce additional evidence at this point of trial.

24. The 2nd defendant did not exhibit the draft pleadings that he intends to introduce. Consequently, the court does not know the amendments which the 2nd defendant wishes to introduce at this tail-end of the trial in this suit. Secondly, the 2nd defendant neither exhibited nor disclosed the new evidence which he seeks to introduce. In the above circumstances, the court has no proper basis upon which to exercise the discretionary jurisdiction that it is invited to exercise. Consequently, the application fails and is dismissed for lack of merit.

Disposal Orders

25. The result is that the two applications dated 6/3/2024 by the 2nd defendant are dismissed for lack of merit. The 2nd defendant shall bear costs of the two applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF OCTOBER 2024.

B M EBOSO

JUDGE

In the presence of:

Mr Mungla for the Plaintiff

Court Assistant: Hinga