REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

CONSTITUTIONAL PETITION NO. 05 OF 2019

IN THE MATTER OF ARTICLES 10, 20, 21 (1), 40 (1), 40 (3), 40 (4), 47, 50, 60, 64, 67, 232 (1), 232 (2), OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

-AND-

IN THE MATTER OF SECTION 14 AND 15 (2) (d) & (3) (e) OF THE NATIONAL LAND COMMISSION ACT, 2012

-AND-

IN THE MATTER OF SECTIONS 27 (a) AND 28 (a) OF THE REGISTERED LAND ACT

-AND-

IN THE MATTER OF SECTION 4 OFTHE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

OLOOLOLO GAME RANCH LTD.....….....…PETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION…….1ST RESPONDENT

IKAREKESHE GROUP TRUST……...……..….2ND RESPONDENT

THE ATTORNEY GENERAL OF KENYA…..….3RD RESPONDENT

-AND-

THE CHIEF LAND REGISTRAR…….…....1ST INTERESTED PARTY

THE MINISTRY OF LANDS...……2ND INTERESTED PARTY

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT……..……..3RD INTERESTED PARTY

RULING

By a Notice of Motion dated 22nd July, 2020 and brought under Order 51 of the Civil Procedure Rules 2010, Section 1A, and B, and 3A of the Civil Procedure Act and Articles 50 and 159(2) (d) of the Constitution of Kenya 2010 the Applicant had sought the following orders: -

1. That this matter be certified urgent, heard on priority basis and service of the same be dispensed with in the first instance.

2. That the Honourable Justice Mohamed N. Kullow pleased to recuse and/or disqualify himself from any further conduct of this matter.

3. That there be an order of stay of proceedings including writing and/or delivery of any rulings or judgements in relation to the subject petition pending the hearing and determination of the application.

4. That this matter be placed before any other court of competent jurisdiction, for its just and conclusive determination.

5. That the costs of this application be in the determination.

The Application was based on the grounds that the applicant had a perception of bias as the court had previously not recorded proceedings of the applicant while recording that of the petitioner verbatim. The applicant further contended that on 1st July, 2020 the court had dismissed its application dated 4th March, 2019 in the absence of all the parties and gave its directions which the applicant had termed as unfair and further that the petition was not certified as ready for hearing and a judgement date set without confirming that parties had filed their submissions in respect of the petition. On account of the above reasons the applicant stated that there was reasonable apprehension that justice will not be dispensed in the matter.

The application was supported by the affidavit of one Francis Leshila Ole Ramet in which he deponed to the grounds upon which the application was based. The applicant in his affidavit stated a raft of grievances including that the court while sitting on 3rd May, 2019 did not record what transpired in court in that the court was recording the petitioners' arguments verbatim while failing to record the submissions by the said respondent.

The applicant in its averments further contended that the court had delivered what its called a devastating blow ruling in respect of its application dated 4th March, 2019 arguing interlia that the said ruling was delivered without notice and that directions or manner in which the petition was to be heard amounted to unfair hearing and with likelihood that a fair trial will be denied to the applicants.

The application was opposed by the petitioner through a replying affidavit sworn by Kuya Kijabe a Director of the petitioner in which he deponed that the orders that the applicant are contesting are procedural orders and that it was not possible to see what hardships the applicant will face. The petitioners with respect to the ruling delivered on 1st July, 2020 averred that the applicants counsel had knowledge of the same as the same was deferred to 30th June, 2020 when all parties were present in court and that further that there absence notwithstanding the orders and the directions given by the court on the said date was conveyed to the applicants advocates by the petitioners advocates vide a letter dated 2nd July, 2020 and further that the Deputy Registrar of the court had also upon receipt of a letter from the applicants advocates requesting the file to be placed before the Judge so that they could be heard by way of viva voce evidence with regard to the petition and in view of the above the respondents did not at all complain about the ruling delivered in their absence.

The petitioners further stated that the application is flawed for lack of candour and delay on the averments by the 2nd respondent that the ruling of 1st July, 2020 was delivered without notice is a fabrication and a bare faced lie and that the applicant had not seen diligent and did not seek for review without undue delay.

The petitioner with regard to manner in which directions were taken for the hearing of the petition contend that all the parties had filed their responses to the petition and cross-petition save for the fact that the 2nd respondent insisted on the hearing of the notice of motion dated 4th March, 2019 and hence the 2nd respondent is not forthright and hence disingenuous by purporting that the petition was not ready for hearing.

On the application for recusal, the petitioner averred that the allegation of bias is unfounded and untrue and that the grounds of

apprehension on the proceedings of 3rd May, 2019 which were subject of the applicants Notice of Motion dated 17th June, 2019 which was heard and determined is inviting the court to sit on an appeal against its own decision. The petitioners further argued that the orders issued on the 1st July, 2020 are perfunctionary and cannot give rise to bias and that the application is not meant to delay the expeditious hearing and determination of the petition.

The petitioners further contend the application is an abuse of the process of court since this is the second time that the applicant is seeking the recusal of the Judge in the matter on allegations of bias more so when the petition is seeking to quash the decision of the 1st respondent and neither the 1st respondent, 3rd respondent nor the interested parties have alleged any bias on the presiding Judge and further that the 2nd respondent had sought the disqualification of the petitioners advocates from the conduct of this matter which was found to be unmerited and consequently the conduct of the 2nd respondent in this matter amounts to forum shopping and thus an abuse of the process of the court and urged the court to dismiss the application as the same lacks merit.

I have considered the application before me and the supporting affidavit in support thereof and the petitioner's replying affidavit and the submissions filed by both counsel. This is an application in which the applicant is seeking two fundamental orders namely that I recuse myself from the conduct and presiding over the hearing of the petition herein on grounds of apprehension of bias and another order that order for stay of proceedings including the writing and delivery of any ruling or judgement in relation to the subject petition pending the hearing and determination of the instant application. When the application was placed before me on the 22nd July,2020 I had on exparte basis issued an order of stay of proceedings and the delivery of any ruling and/or Judgement pending the hearing and determination of the instant application and in the circumstances the issue for determination before me now is the first limp of the Notice of motion dated 23rd July, 2020 on whether I should recuse myself from the conduct of the petition.

It is the applicant's contention that there are apprehensive of bias on the part of the court in the hearing of the petition on the basis that the court had issued a ruling on the 1st July, 2020 without notice and further that the court had issued directions on the hearing and disposal of the petition when the same was not ready for hearing and therefore this demonstrates bias on the part of the court. The applicant further argued that I had previously failed to record the submissions by their counsel verbatim on 3rd July, 2019 and the above factors looked accumulatively point to bias on the part of the court and thus necessitating it to recuse itself from further hearing of the petition.

The petitioners on its part opposed the application stating that there is no reason advanced by the 2nd respondent to warrant the court to recuse itself as the reason advanced would not give rise to prejudice and the allegations are flimsy and baseless. The petitioner further argued that the applicant lacks condor on the allegations that the ruling of 1st July, 2020 was in their absence since they had notice of the same.

From the application and the averments contained in the affidavit in support of the application, the applicant is aggrieved by the conduct of the proceedings of the court on 3rd May, 2019 and the delivery of the ruling delivered by the court on 1st July, 2020in their absence and subsequent directions issued by the court on the hearing and determination of the substantive petition. On the first issue as regards the conduct of the proceedings of the court on 3rd May, 2019 in which the applicant postulates as grounds for my recusal from the matter I wish to point out that this is a matter that I had conclusively dealt with and made a determination thereof in the Notice of Motion dated 17th June, 2019 in which I refused to recuse myself on the grounds that the said application did not raise any grounds to warrant my recusal from the matter and in view of my determination of the said application I will refrain from touching on the same as will amount to sitting on appeal against my own decision.

I have looked at the record of the court and the ruling that was delivered on the 1st July, 2020 was in respect of the petitioners notice of motion dated 5th April, 2020 seeking conservatory orders pending the hearing and determination of the substantive petition directions on the hearing and disposal of the application were issued on 24th February, 2020 in the presence of Mr Kemboy Advocates for the petitioner and Mr.Okiro advocate appearing together with Mr Kilele advocates for the 2nd respondent in which I granted leave to the petitioner to file a further affidavit and submissions before close of business on 28th February, 2020 and the Respondents to file their submissions within 14 days of service of the petitioner's submissions

and the matter fixed for mention on 17th March, 2020 for parties to highlight their submissions. On the 15th March, 2020 communication was received that all court's countrywide were to close down in view of the covid 19 pandemic that hit the county and consequently the highlights of the submissions did not take place on the 17th March, 2020 as envisaged because of the lockdown until when the court's operations were upscaled on 30th April, 2020 when I directed in the presence of Mr Kilele Advocate holding brief for Mr.Ogolla Advocate for the 2nd Respondent and Mr. Tanyasis Lemein advocate holding brief for Mr.Kemboy advocate that the orders with regard to the highlighting of the submissions are set aside because of the prevailing covid 19 situation and that the

ruling will be delivered on 17th June,2020 on the stated date none of the advocates appeared save for three representatives of the petitioners, the ruling was not delivered again because the 1st and 3rd respondents and interested parties had not filed their submissions and consequently I directed that the ruling will be delivered on the 30th July, 2020 at 2.30pm with directions that the Deputy Registrar issues Notice on all the parties.

From the chronology of events and proceedings it is clear that the 2nd respondents had notice of the ruling made on the 1st July, 2020 from 30th April, 2020 and that there was no explanation given on their absence on day of the ruling and in the circumstances it is grossly dishonest and lack of candour for the applicant to allege that a ruling was delivered in their absence and consequently claim that there exists bias on the part of the court with regard to the conduct of the matter.

On the directions that were issued by the court with regard to the disposal of the petition, the court took judicial notice of the prevailing covid 19 protocols with regard to the hearing of matters. The petition herein is hinged on a Gazette notice that was issued by 1st respondent and since all the parties had complied with all pre-trial directions that the court had issued and that all the parties had filed their responses to the petition and the cross petition by the 2nd respondent there was nothing pending for disposal save for the petition.

Having extensively reproduced the facts and the issues preceding the application for recusal I must now determine whether the application for recusal meets the threshold for a judge to recuse himself. As stated earlier and as record shows this is the second application for recusal that the applicant had filed a similar application to have the petitioners counsel recuse also on conflict of interest in which I found both applications lacked merit. Judicial recusal is underpinned by constitutional, statutory and common law principles and the rule against bias and the notion that justice must not only be done but seen to be done from the common law principal for recusal. Under Article 160 of the Constitution of Kenya 2010, the courts are enjoined to exercise and exhibit independence and not subject to the control and directions of any party and justice must be done to all irrespective of their status.

Under Rule (5) of the Judicial code of conduct the circumstances that warrant for recusal have been outlined as whether a judicial officer has personal biases or prejudice concerning a party before him, was served as a lawyer in the matter in controversy or has close family or financial relation or any interest in the matter. In the instant application the only allegation that applicant contends is that there exists bias and in considering whether a judicial officer exhibits bias the courts have developed an objective test.

The court of appeal in **Kalpana H. Rawal-Versus-Judicial Service Commission and 2 others (2016)EKLR (Nairobi court of appeal and cited in the holding by the East Africa court of justice in AG of Kenya –Versus-Anyang Nyong'o ApealNo.5 , Ref No. 1 of 2006 set out the test for bias as follows:-**

"we think the objective test of reasonable apprehension" is good law" the test is stated variously, but amounts to this: do the circumstances give raise to a 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 about the circumstance of the case.

From the above decision it is clear that there must be a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the mind of right thinking, well informed and reasonable member of the public reasonable doubt about the fairness of the administration of justice.

In the instant case the applicant has alleged bias on the ground that the ruling delivered on 1st July, 2020 was made without notice when the court record shows otherwise and that the directions issued for the hearing and determination of the substantive petition was biased and will deny them a fair hearing where all parties have been directed to file submissions and the petition is premised on the quashing of a Gazette notice by the 1st respondent. Having looked at the existing jurisprudence and the affidavits on record by the parties I find that the instant application does not meet the reasonable test and thus the facts do not establish the alleged bias nor establish the same. **The supreme Court of Kenya in Gladys Boss Sholei-versus-the JSC and Another (2018)EKLR cited with Authority the case of Simonson –Versus-General Motor Corporation USDCP 425 RSupp574,578(1978) in which the court stated**

"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 case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a "duty to sit".

From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge's duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manouvering by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the Newzeland court of appeal in Mnir-versus-Commissioner of Inland Revenue(2007)3NZLR 495.

From the above and considering the fact of the application before me I find that the allegation of bias is unsubstantiated and is tantamount to wanting to stop this court from the conduct of judicial function and I consequently dismiss the same with costs.

DATED, SIGNED and **DELIVERED** in open court at **NAROK** on this **22nd day** of **October, 2020**

Mohammed N. Kullow

Judge

22/10/2020

in the presence of: -

CA:Chuma

Mr Kemboy for the petitioners

Mr Mbuthia for the 1st respondent

Mr Kilele together with Mr Ogolla for the 2nd respondent

N/A for the interested party

Mohammed N. Kullow

Judge

22/10/2020