



**Tireito v Langat & 2 others (Environment & Land Case
441 of 2012) [2023] KEELC 18000 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 441 OF 2012**

JM ONYANGO, J

JUNE 13, 2023

BETWEEN

JOSEPH TIREITO PLAINTIFF

AND

JACOB KIPSUGUT ARAP LANGAT 1ST DEFENDANT

ANNE NGENY 2ND DEFENDANT

STEPHEN KIPYEGO LEL 3RD DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's Notice of Motion dated 6th February, 2023 seeking the following orders:
 - a. Spent
 - b. That the Honourable Lady Justice Jane Onyango do recuse herself from presiding over the hearing of this matter and that the same be referred to any other judge of the Environment and Land Court.
 - c. That there be a stay of further proceedings herein to allow for the ascertainment of the proper rights of the Applicant as per the orders of this court as previously issued by the Honourable Justice Omondi Tunya and Ombwayo J on 13th June 2002, 6th November, 2017 and 8th May, 2018.
 - d. That a determination be made of this stage (sic) as to whether Stephen Kipyego Lel is entitled to participate in these proceedings as at this stage in view of his appeal to the Court of Appeal.



- e. That further hereto, that a determination be made as whether Stephen Kipyego Lel is entitled to claim part of the plaintiff's land herein in view of the ruling of the honourable Justice Antony Ombwayo of 8.5.2018.
2. The application is predicated upon the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 6th February, 2023. It is opposed by the 2nd and 3rd Defendants/Respondents through their Replying affidavits both sworn on 9th February, 2023.
 3. Before delving into the merits of the application, it is necessary to give a brief background of this case. The Plaintiff instituted this suit against the 1st Defendant on 3rd June, 1999 claiming that he was entitled to one quarter of the undivided share in the parcel of land known as L.R No. 779/339 measuring 26.5 acres having purchased the same from the 1st defendant for the sum of Kshs.12,000 in 1971. The plaint was subsequently amended to include the 2nd defendant. It is the plaintiff's case that after he purchased the said parcel of land, he took possession thereof and the 1st defendant relocated to Kitale. However, in 1999, the 1st defendant returned and trespassed onto 2.5 acres of the plaintiff's land which he sold to the 2nd defendant. The Plaintiff also claimed that the defendants had felled trees on his land worth Kshs 40,000/=. He therefore prayed for a permanent injunction to restrain the defendants from dealing with the plaintiff's undivided share in L.R No. 779/339 measuring 26.5 acres and the sum of Kshs.40,000/= being the value of the trees as well as general damages for trespass.
 4. The 1st defendant filed a statement of defence in which he admitted that he entered into an agreement with the plaintiff for the sale of 24 acres at an agreed purchase price of Kshs. 12,000/- but the plaintiff only paid Kshs.6,000 and that the plaintiff was therefore only entitled to 12 acres. He denied the plaintiff's claim of 2.5 acres. He denied having cut any trees on the plaintiff's land.
 5. In her Defence the 2nd defendant denied the plaintiff's claim that she had trespassed into the plaintiff's land measuring 2.5 acres or interfering with his quiet possession thereof. She denied having felled his trees and stated that the plaintiff was illegally occupying a house which the 1st defendant had sold to her.
 6. By an application dated 14th February, 2002 the plaintiff sought an order of injunction restraining the defendants from interfering with L. R No. 779/359 pending the hearing and determination of the main suit. In his ruling dated 13.6.2002 Justice Omondi Tunya observed as follows:

“Nevertheless, the Applicant is entitled to protect his interest in 26.5 acres whose demarcations do not appear to be in dispute and in so far as he seeks a total restraining order over the entire suit land, the objection succeeds. But if only to the extent of his proprietary interest in the land, the objection fails and is dismissed.”

The court then recorded the following consent order:

“By consent prayer number 2 in the Plaintiff's application limited to his portion of the land being 26.5 acres is hereby granted. Costs shall be in the cause”.

7. The suit subsequently proceeded for hearing and his judgment delivered on 26th February 2014 Justice Munyao entered judgment for the plaintiff in the following terms:
 - a. “I declare the plaintiff as the rightful owner of 26.5 acres originally comprised in the land L.R No. 779/359 and which land is now comprised in the title Eldoret Municipality Block 25 (Luliet)/1 and in 2.5 acres of land parcel Eldoret Municipality Block 25 (Luliet)/2.
 - b. I hereby cancel the title of the 1st defendant in Eldoret Municipality Block 25 (Luliet)/1.



- c. I hereby order that land parcel Eldoret Municipality Block 25 (Luliet)/2 be reduced by 2.5 acres.
 - d. I direct the District Land Registrar, Uasin Gishu and the District Land Surveyor Uasin Gishu and/or any other personnel to proceed to excise 2.5 acres of the land parcel Eldoret Municipality Block 25 (Luliet) /2 and include it in the title Eldoret Municipality Block 25 (Luliet)/1 and a new title for 26.5 acres be issued to the plaintiff for land parcel Eldoret Municipality Block 25 (Luliet)/1.
 - e. I direct that this judgment and/or decree be served upon the District Land Registrar, Uasin Gishi so that he can execute the above orders.
 - f. I issue an order of permanent injunction restraining the defendants and/or their servants, agents and/or assigns from being upon or utilizing or in any way dealing or interfering with the plaintiff's occupation and possession of his 26.5 acres.
 - g. The consent order of the parties is hereby disregarded owing to the judgment herein.
 - h. I dismiss the claim for Kshs. 40,000/= and the claim for damages for trespass.
 - i. I grant the plaintiff costs of the suit to be borne jointly and/or severally by the defendants.
 - j. I dismiss the counterclaim of the 2nd defendant".
8. Being dissatisfied with the said judgment, the 2nd defendant lodged an appeal in the Court of Appeal but her appeal was dismissed on 9th July 2021. In the meantime, before the appeal was heard, the 1st defendant applied for stay of execution. In its ruling delivered on 30th September, 2014, the court only stayed the order that the suit properties be transferred to the plaintiff and directed that the plaintiff be given possession of 26.5 acres pending appeal.
 9. On 26th January, 2016 the plaintiff filed an application seeking to have the 2nd defendant committed to civil jail for disobeying the orders of 30th September, 2014. He alleged that the 2nd defendant had fenced off the road leading to his house. The 1st defendant passed away before the application was heard. Upon visiting he suit property, the court (Ombwayo – J) confirmed that the 2nd defendant had failed to surrender 2.5 acres of her land to the plaintiff as ordered by the court. In its ruling dated 6th November, 2017 the court found her guilty of contempt and sentenced her to two months imprisonment or in the alternative pay Kshs.100,000/=.
 10. On 4th December, 2017 the plaintiff filed yet another application seeking a review of the ruling of 30th September, 2014 by lifting the order of stay of execution and an order for committal of the 2nd and 3rd defendants to civil jail for disobedience of court orders. In its ruling dated 8th May, 2018, the court once again found that the 2nd Defendant had disobeyed the court order by failing to give the plaintiff possession of the 2.5 acres and selling a portion of the 2.5 acres to the 3rd defendant through her son and convicted her accordingly. The court however held that the 3rd defendant who had bought a portion of the suit property could not be punished for contempt of court as he was not a party to the suit and was therefore not aware of the court order but he was bound by it.
 11. Following the dismissal of the 2nd defendant's appeal and in an effort to implement the judgment of the court dated 26th February, 2014, the County Land Surveyor wrote to both parties to be in attendance on 14th June, 2022 as he would visit the land to implement the judgment. Both parties and their advocates were present on 14th June, 2022 when the County Surveyor assisted by 2 other surveyors



- carried out the exercise of curving out the 2.5 acres from land parcel number Eldoret Municipality Block 25 (Luliet)/2.
12. After the County surveyor prepared his report indicating how the 2.5 acres had been curved out of the 2nd defendant's land, counsel for the plaintiff wrote to the Land Registrar expressing his dissatisfaction with the manner in which the 2.5 acres had been excised and stated that he was calling for a non-partisan officer to take over the exercise. He then filed the application dated 27th June, 2022 being the third one seeking to cite the 2nd defendant for contempt of court and prayed that the Land Registrar and Surveyor be provided with security in order to implement the judgment.
 13. When the application came up for hearing on 1st November, 2022 the court directed that since there was contestation regarding the excision of the 2.5 acres from the 2nd defendant's land, the court would visit the suit property on 21st November, 2022 in the company of the Land Registrar and County Land Surveyor, Uasin Gishu in order for the County Surveyor to point out the disputed 2.5 acres.
 14. On 21st November, 2022 the court visited the suit property in the presence of the parties, their advocates, the Land Registrar and County Land Surveyor. The Surveyors took measurements and pointed out the 2.5 acres they had excised from parcel no. Eldoret Municipality Block 25 (Luliet)/2 but the plaintiff disagreed with the position of the 2.5 acres insisting that the portion of 2.5 acres must stretch upto the main road. It is at this juncture that the court directed the surveyor to come up with 3 options on how the 2.5 acres could be excised from the 2nd defendant's land so as to take care of the plaintiff's concerns for the parties to consider. This is what triggered the instant application and a Petition to the Chief Justice seeking my recusal.
 15. In support of his application the Applicant avers that on 26th February, 2014 the court delivered a judgment in his favour to the effect that parcel no. Eldoret Municipality Block 25 (Luliet)/1 be transferred to him and that parcel number Eldoret Municipality Block 25 (Luliet)/2 be reduced by 2.5 acres the said portion where the two houses are be added to parcel no. Eldoret Municipality Block 25 (Luliet)/1 so as to make his title 26.5 acres. That however, the 2nd Respondent failed to transfer the said portion to him and sold a portion of the land measuring 50ft by 126 ft to the 3rd Respondent and was accordingly fined Kshs.200,000/=for contempt of court on 8th May, 2018. That following the ruling of the court, the 3rd Respondent filed a Notice of Appeal to the Court of Appeal against the said ruling. He avers that in the circumstances the Respondents have no claim to his land
 16. He further avers that following the dismissal of the 2nd Respondent's appeal the County Surveyor visited the suit land with a view to implementing the judgment dated 26th February, 2014 by excising 2.5 acres from the 2nd Respondent's land but she refused to allow the process to continue and pleaded that he be given a portion away from the main road. That the Respondents know the location of the 2.5 acres but they are being difficult.
 17. It is his contention that the Respondents have succeeded in pleading with me to direct the surveyor to come up with reports that contradict the earlier orders of the court. That by seeking that the Surveyor files a different report other than the orders in the rulings of Justice Omondi Tunya and Justice Ombwayo the Respondents are coming up with new cases and I would be sitting on appeal over matters that have been determined by my predecessors.
 18. The application is opposed by both defendants/Respondents. In her Replying Affidavit sworn on the 9th February, 2023, the 2nd Respondent avers that the application is ill-motivated and brought in bad faith and it is only intended to frustrate her. She contends that no basis has been laid for me to recuse myself as I have not made any substantive decision that is biased against any party to warrant the prayer



for recusal. That in any event if there was such a decision the Applicant has the option to challenge the said order on appeal.

19. Regarding the prayer on whether the 3rd Respondent should participate in the proceedings herein, the 2nd Respondent contends that the mere fact that the 3rd Respondent has filed an appeal does not bar him from participating in these proceedings. She further points out that it is the Applicant who applied to join the 3rd Respondent to the proceedings and he should not complain about his participation therein.
20. The 2nd Respondent avers that contrary to the Applicant's assertion that she did not allow the process of the excision of the 2.5 acres to take place, the surveyor carried out the exercise on 14th June, 2022 in the presence of the parties and prepared his report. That it is the Applicant's dissatisfaction with the said report and his application dated 27th June, 2022 claiming that the 2nd Respondent had failed to implement the judgment that prompted the court to visit the suit property on 22nd November, 2022. That the court's directions to the surveyor were aimed at resolving the matter regarding the location of the 2.5 acres in accordance with section 34 of the Civil Procedure Act as the judgment did not specify the exact location of the 2.5 acres that were to be excised from the larger portion owned by her.
21. The 2nd Respondent avers that the Applicant's application for the judge to recuse herself was aimed at frustrating the process of implementing the judgment and is tainted with malice as he has cast aspersions on everyone including the judge so as to achieve his selfish intentions. It is her contention that no good reasons have been given to warrant the judge to recuse herself.
22. In his Replying affidavit sworn on 9th February, 2023 the 3rd Respondent avers that the application has been made in extreme bad faith and that is incurably defective, misconceived and an abuse of the court process. It is his contention that a judge's duty to sit and hear cases carries a concomitant obligation not to recuse herself without any valid reason and in this case no valid grounds for recusal have been given to warrant her recusal.
23. He confirmed that he was brought into these proceedings pursuant to the order of Justice Ombwayo issued on 7.12.2017 and he is entitled to participate in the proceedings because the plaintiff is claiming that the land he bought from the 2nd defendant forms part of the 2.5 acres to be excised from the 2nd defendant's land.
24. It is the 3rd Respondent's contention that the judgment of Justice Sila Munyao dated 26th February, 2014 stated that the 2.5 acres ought to be where the 2 disputed houses are and the surveyor had implemented the judgment by excising 2.5 acres including the said houses. He added that the only consideration to be taken into account in excising the land was the judgment and not any interlocutory or post-judgment applications. He stated that he had no pending appeal before the Court of Appeal and urged the court to dismiss the application.
25. In response to the Respondents' Replying Affidavits the Applicant filed what he termed as a "Replying Affidavit" sworn on 20th March, 2023 insisting that the 2.5 acres that was taken from him was known and had been identified in the judgments of this court and the Court of Appeal as well as the orders of Justice Omondi Tunya and Justice Ombwayo and the surveyors report dated 22.12.22 was a travesty of justice.
26. He averred that it was improper for Stephen Lel to claim that he was entitled to any portion of his land yet he had appealed against the ruling of Justice Ombwayo which ordered him to keep off the Applicant's land and in the absence of a stay, he should wait for results of the appeal.
27. It was his averment that the court is impartial and biased against him as it has failed to affirm the previous orders of the Court.



28. The Applicant proposed that the court determines prayers 2 and 4 in the first instance and the parties agreed to canvass the application by way of written submissions.

Applicant's Submissions

29. Learned counsel for the Applicant submitted that the Honourable Justice Omondi Tunya identified the plaintiff's land in his order made on 13.6.2022(sic) (this should actually be 2002), and that the Court of Appeal had acknowledged this in its judgment of 9th July, 2021. He further submitted that Justice Sila Munyao had adjudged the plaintiff as the owner of 2.5 acres of land comprised in L.R No. Eldoret Municipality Block 25 (Luliet)/2 and that Anne Jepkemboi Ngeny was found guilty of contempt vide the court's rulings of 6th November, 2017 and 8th May, 2018.
30. It was his submission that the fact that I directed the surveyor to file three options suggests that I was misled on what the court was adjudicating previously thus opening a new case that would embarrass the court as the court would be sitting on appeal over previous rulings. He referred to the ruling of Justice Omondi Tunya dated 13th June, 2002 where the court noted that the demarcations did not appear to be in dispute. He was of the view that the judge relied on the map annexed the Plaintiff's supporting affidavit in that application.
31. Counsel faulted the surveyor's report dated 19th September, 2022 and filed in court on 22nd December, 2022. He submitted that the said report did not conform to the court's rulings and had been made on 19.9.22 before the court made its order in an attempt to deprive the plaintiff of his land.
32. He submitted that Justice Munyao had declared that the plaintiff was the owner of 26.5 acres originally comprised in L.R No. 779/359 now comprised of 24 acres in Eldoret Municipality Block 25 (Luliet)/1 and 2.5 acres in Luliet/2. He submitted that it was clear that the plaintiff owned the 2.5 acres and the two houses which were to be given to the plaintiff according to the judgment of Justice Sila Munyao.
33. Counsel submitted that Justice Ombwayo had visited the suit property on two occasions, on 1st February, 2016 and 24th April, 2018. The court in its ruling dated 8th May, 2018 noted that during the visit on 24th April, 2016, the court observed that the 2nd defendant was still utilizing the disputed land and there was a building being constructed on the said portion by Mr. Stephen Lel. He thus ordered the plaintiff to comply with the court order by giving the plaintiff possession of the 2.5 acres but held that Mr. Lel could not be punished for contempt as he was not party to the suit but he was bound by the court order and was ordered to stop any further construction.
34. It was counsel's submission that the court should examine all previous rulings in the matter to avoid being misled by the 2nd and 3rd Defendants and being seen to be abetting the illegalities of the two.
35. It was counsel's contention that pursuant to section 43 of the *Evidence Act*, the court was bound to take cognizance of the earlier rulings and it had no jurisdiction to engage the surveyor to come up with options other than to implement the previous orders of the court as the matter was res judicata. He further submitted that in accordance with section 44 of the *Evidence Act* a judgment, order or decree of a competent court is conclusive proof of anything to which it declares any person to be entitled to and there was no way the 2nd and 3rd Respondents could reclaim the 2.5 acres.

2nd Respondents Submissions

36. Learned counsel for the 2nd Respondent submitted that the recusal of a judicial officer is not automatic and it must be based on good grounds. She relied on the case of *Philip K. Tunoi & Another v Judicial*



Service Commission & Another (2016) eKLR where the Court of Appeal adopted the test for recusal propounded by the House of Lords in *Porter v Magill* (2002) 1 All ER 465 where the Court stated that

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

37. It was her further submission that the Judicial Service Code of Conduct and Ethics Regulations 2020 under regulation 21 expounds on the instances when a judge can recuse herself or himself in any of the proceedings in which her or his impartiality might reasonably be questioned.
38. She submitted that based on the above-mentioned test, the Plaintiff had not made out a case to warrant my recusal.
39. Counsel submitted that that I had only handled the matter on two occasions prior to the application and I had not made any substantive orders that was against any party which could be said to be biased to warrant the prayer for recusal. She added that the Plaintiff had the option to challenge the directions issued to the surveyor on appeal which he had not done and was instead forum-shopping for a judge who would bend to his whims.
40. With regards to the prayer as to whether Mr. Stephen Lel is entitled to participate in the proceedings in view of his appeal to the Court of Appeal, she submitted that the same had no basis as the mere fact that he had appealed did not bar him from participating in the proceedings. It was her contention that the Plaintiff was the one who had applied to have Mr. Stephen Lel joined in the proceedings and he should therefore not be heard to complain about his continued participation in the matter.
41. In her Further Submissions counsel submitted that the ruling of Justice Omondi Tunya was made at an interlocutory stage and it did not determine the dispute. She submitted that it was clear that the same was not adopted in the judgment of Justice Sila Munyao. She argued that what was to be implemented by the surveyor was the judgment of Justice Sila Munyao which stated that 2.5 acres be excised from the 2nd defendant's land by including the 2 houses occupied by the plaintiff. She further submitted that the plaintiff was present during the exercise conducted by the surveyor and he could not turn around to insist the judgment be implemented on his terms.
42. It was her contention that the court could not be said to be functus officio as the court is mandated under section 30 and 34 of the *Civil Procedure Act* to settle any questions arising from execution of the decree. She submitted that the plaintiff did not want what the court awarded her in the judgment and he was therefore using the recusal card in order to have his way.

3rd Respondent's submissions

43. Learned counsel for the 3rd Respondent submitted that the consequence of a judge's duty to sit and hear cases is that there is a concomitant obligation for a judge not to recuse herself or himself without valid reasons. He relied on the case of *Rachuonyo & Rachounyo Advocates v National Bank of Kenya Ltd* (2021) eKLR for the proposition that when courts are faced with an application for disqualification, 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. He also relied on the case of Philip Tunoi (supra) and contended that the plaintiff had not provided cogent evidence which would persuade a fair-minded person that there was bias or likelihood of bias in the mind of the judge.
44. Regarding his continued participation in the proceedings, he stated that he had been joined to the suit in 2017 vide an application by the Plaintiff for contempt of court. He submitted that he was



entitled to participate in the proceedings because it was alleged that the 2.5 acres to be excised from land parcel no. Eldoret Municipality Block 25 (Luliet)/2 includes the portion he purchased from the 2nd Defendant. He submitted that it was a cardinal rule in the administration of justice that no party should be condemned unheard.

45. In his Supplementary Submissions he submitted that the judgement that was to be implemented was the one delivered by Justice Sila Munyao as the ruling by Justice Omondi Tunya was based on an interlocutory application and it could not have conclusively determined the issues in controversy. He submitted even though he had filed a Notice of Appeal the Court of Appeal against the ruling of Justice Ombwayo, he did not file a substantive appeal. It was his contention that this court being the one dealing with the enforcement of the judgment of Justice Sila Munyao was entitled to interpret the said judgment with regard to the position of the disputed 2.5 acres.

Analysis and Determination

46. There are two main issues for determination namely;
- i. Whether I should recuse myself from dealing with this matter.
 - ii. Whether Mr. Stephen Lel, the 3rd Respondent herein should be allowed to continue participating in these proceedings.
47. I will begin with the question of recusal. Under Regulation 21 Part II of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;
- (a) Is a party to the proceedings;
 - (b) Was, or is a material witness in the matter in controversy;
 - (c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (d) Has actual bias or prejudice concerning a party;
 - (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - (f) Had previously acted as a counsel for a party in the same matter;
 - (g) Is precluded from hearing the matter on account of any other sufficient reason; or
 - (h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.
48. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides as follows:
- A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.
49. In the instant case, the main ground for recusal is that I allowed myself to be misled by the Respondents by failing to instruct the surveyor to follow the map attached to the plaintiff's application for



injunction dated 14th February, 2002 in excising 2.5 acres from the 2nd defendant's land. The Plaintiff therefore accused me of being biased against him. Nothing could be farther from the truth. Having read the judgment of Justice Munyao which was affirmed by the Court of Appeal, there is no mention that the 2.5 acres to be excised from parcel no. Eldoret Municipality Block 25 (Luliet)/2 should conform to the map attached to the Plaintiff's application for injunction dated 14th February, 2002. What is mentioned are the two houses on the said parcel which were occupied by the plaintiff's sons. Furthermore, the consent that the parties recorded before Justice Omondi Tunya on 13th June, 2002 which I have reproduced earlier in this ruling makes no mention of the said map.

50. As for the rulings on the contempt applications by Justice Ombwayo, the same were made pursuant to the court's visit to the suit property on 1st February, 2016 and 24th April, 2018. There is no reference to any map. The proceedings of 1st February, 2016 at page 122 of the typed proceedings which counsel for the plaintiff has alluded to do not indicate whether there was a surveyor to point out where the 2.5 acres reached. The court simply noted that the plaintiff had not surrendered the 2.5 acres. The court also noted that the fence had been reinforced and the path to the plaintiff's house had been blocked and held that the 2nd defendant had disobeyed the order requiring her to surrender 2.5 acres to the plaintiff.
51. Similarly, the site visit by the court on 24th April, 2018 took place in the absence of a surveyor and the plaintiff's counsel pointed out where the 2.5 acres were. The court was informed that the house under construction was on the 2.5 acres. There was no reference to any map.
52. Since the parties were unable to agree on the location of the 2.5 acres at the time of implementing the judgment, this court being the one that passed the decree is mandated by section 34 of the Civil Procedure Act to determine all questions relating to the execution of the decree. The said section states as follows:

Questions to be determined by the court executing the decree

S.

34

- (1) "All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit".

53. It is against this background that I sought the input of the surveyor in resolving the question regarding excision of 2.5 acres from the 2nd defendant's land in the execution of the judgement. This was driven by my desire to achieve finality to this long drawn dispute which has been pending in court since 1999. At any rate, I had not adopted surveyor's report as the parties had not indicated whether or not they were in agreement with it and the plaintiff had no reason to panic and start making wild allegations against me. The plaintiff had every right to apply for setting aside, review or appeal against my directions rather than ask me to recuse myself.
54. Being human, I have no illusions that I am infallible. In the event that I was wrong in interpreting Justice Munyao's judgment to mean that the plaintiff should be given 2.5 acres out of parcel no. Eldoret Municipality Block 25 (Luliet)/2 without conforming to a specific map, that should not be interpreted to mean that I was biased. If every time judges made decisions that did not favour one of the parties



to a suit they would be accused of being biased, asked to recuse themselves and reported to the Chief Justice, then it would be very difficult for judges to make decisions.

55. In this case the Plaintiff's complaint to the Chief Justice received the response that the Chief Justice could not interfere with a judge's decision-making power.
56. The test for recusal has been stated in various judicial pronouncements. In the case of *Kalpana H. Rawal v Judicial Service Commission & 2 Others* (2016 eKLR the Court of Appeal relied on the decision in R. v. S. (R.D.) [1977] 3 SCR 484 where the Supreme Court of Canada pronounced itself 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 apprised 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.”

57. Similarly, the said test was applied in the Philip Tunoi case (supra).
58. Additionally, The East Africa Court of Justice adopted the same test in *Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others* EACJ Application No. 5 of 2007 when it stated:

“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not or (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 and informed about all the circumstances of the case.”

59. What is clear from the above decisions is that the applicant in a case for the recusal of a judge or judicial officer has the onus of rebutting the presumption of judicial impartiality. The test is that of a reasonable, right-minded person who has all the information about the case.
60. As counsel for the 2nd Respondent correctly pointed out, this matter had only come up for mention before me on two occasions as I had recently been transferred to Eldoret Environment and Land Court and my main focus was to interpret the judgment of Justice Sila Munyao rather than the interlocutory



or post judgment rulings. The insinuation that I had familiarized myself with the Respondents so as to be “misled” by them is therefore preposterous. Consequently, the call for my recusal is unfounded, ill-motivated and misconceived as it does not meet the test of a reasonable right-minded person having all the necessary information about this case.

61. What would be the implication of recusing myself when my conscious is clear and in the absence of proof of bias?
62. In the case of *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers and Planners Limited* (2021)eKLR the Court cited the case of *Triodos Bank NV v Dobbs 2005* (EWCA)468 where it was observed as follows:-
 - i. “It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so.”
63. The court in *Kaplan & Stratton vs Z Engineering Construction Limited & 2 Others* (2002) eKLR observed as follows:
 - i. “Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”
64. In view of the foregoing, I find no good reason to recuse myself.
65. Moving on to the second issue, it is interesting that the Plaintiff having applied to have Mr. Stephen Lel, joined to the suit is now asking the court to determine whether Mr. Lel should continue participating in the proceedings. As mentioned earlier in this ruling, this suit is at the execution stage and no new claim has been instituted by Mr.Lel against any of the parties. The Plaintiff has not applied have him struck off from the proceedings and has instead chosen an unorthodox way of asking the court to determine whether he should continue participating in the proceedings. My understanding is that he is only participating in the proceedings as the implementation of the judgment might affect him as a purchaser of a portion of the 2nd Defendant’s land. However, if the plaintiff feels that Mr. Lel should not participate in the proceedings, he should move the court appropriately.
66. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 13TH DAY OF JUNE 2023.

.....

J.M ONYANGO

JUDGE

In the presence of;

1. Dr. Chebii for the Plaintiff/Applicant
2. Ms. Odwa for the 2nd Defendant/Respondent



3. Ms. Chirchir for Mr. Kamau Langat for the 3rd Respondent

Court Assistant: A. Oniala

