REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM CASE NO. 151 OF 2017

BETWEEN

NANCY WANJA GATABAKI...1ST PLAINTIFF

ESTHER SUSAN WANGARI GATABAKI................................2ND PLAINTIFF

JOSEPHINE BEATRICE GATHONI..3RD PLAINTIFF

All suing as the co-administrators of the estate of

SAMUEL MUNDATI GATABAKI (DECEASED)

AND

MUGA DEVELOPERS LIMITED...1ST DEFENDANT

SURAYA SALES LIMITED..2ND DEFENDANT

SURAYA PROPERTY GROUP LIMITED...........................3RD DEFENDANT

EQUITY BANK LIMITED...4TH DEFENDANT

RULING

1. The application before the court is the Notice of Motion dated 23rd August 2021 filed by the Plaintiffs seeking an order, *"THAT Hon. (Mr.) Justice D. S. Majanja be pleased to recuse himself from any further conduct of proceedings or hearing of the applications or suits herein."* The Plaintiffs also seek a consequential order that the matter be referred to the Presiding Judge to re-allocate and give directions on the matter.

2. The application is supported by the affidavit of 1st Plaintiff, Nancy Wanja Gatabaki, sworn on 23rd August 2021. The 4th Defendant ("Equity Bank") has filed Ground of Opposition dated 25th August 2021 and relies on the replying affidavit of Moses Ndirangu, the Corporate Banking Director of the 4th Defendant, sworn on 25th August 2021. The 1st, 2nd and 3rd Defendants informed the court, through their Advocate, that they do not wish to participate in the application.

3. The basic facts upon which the application is based are not in dispute. The Plaintiffs, as registered owners of the suit property, LR 282223/33, entered into a Joint Venture Agreement with the 2nd and 3rd Defendants and incorporated the 1st Defendant. The 1st Defendant then entered into several transactions involving the suit property which was transferred to the 1st Defendant including the charging of LR No. 28223/33 to Equity Bank. All these transactions were necessary for the development of the *Fourways Junction* Estate, a real property development of the Joint Venture ("the Development"). In the present suit, the Plaintiffs' claim that they are entitled to certain units within the Development.

4. The Plaintiffs' application is founded on the fact I have dealt with and rendered decisions on matters involving the Development. They are as follows:

(a) **HC COMM 30 of 2020, Mary Wanja Gatabaki, Josephine Beatrice Gatabaki and Esther Susan Wangari Gatabaki suing as ad litem representatives of Samuel Mundati Gatabaki (Deceased) and Another v Muga Developers Ltd and 11 Others [2020] eKLR**. By a ruling dated 30th November 2020, I struck out the suit on the grounds that it was barred by the doctrine of *res judicata*, was time barred under the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)*** and an abuse of the court process.

(b) **HC COMM E052 of 2020 Lucy Wangari Kamau and 13 Others v Muga Developers Limited (In receivership) and 7 others [2020] eKLR**. By a ruling dated 13th August 2020, I dismissed an application by persons who had purchased units in the Development from the 2nd and 3rd Defendants without the consent of the chargee of certain units, in this case Transnational Bank Limited, restraining it from exercising its statutory power of sale.

(c) **HC COMM E082 of 2020 Muga Developers Limited v Equity Bank Kenya Limited and 4 Others [2020] eKLR**. By a ruling dated 14th December 2020, I granted an injunction in favour of Muga Developers Limited, the 1st Defendant herein, against Equity Bank from exercising its statutory power of sale for the period necessary for it to serve a fresh statutory notice in compliance with **section 90** of the ***Land Act, 2012***.

(d) **HC COMM China Wu-Yi Company Limited v Suraya Property Group Limited and 2 Others [2020] eKLR**. By a ruling dated 2nd November 2020, I dismissed an application for injunction by the contractor claiming a lien for construction services rendered to the 1st Defendant herein seeking to restrain Equity Bank from exercising its statutory power of sale and dealing with certain units it had acquired from the developer in that regard.

5. The respective Advocates made brief oral submissions in support of their respective positions. Counsel for Equity Bank also relied on a list of authorities supported by a digest.

6. Based on the matters outlined above, the Plaintiffs contend that they are apprehensive that the court has pre-conceived notions about the facts of the Development that may inadvertently affect its perception and evaluation of facts and ultimately the final determination. The 1st Plaintiff depones that there is a real possibility of bias if the Judge does not recuse himself from hearing the applications and suits herein and that unless the Judge recuses himself from hearing the applications and suits, the Plaintiffs doubt the fairness of the administration of justice and are apprehensive that they will not get a fair trial.

7. In his submissions, counsel for the Plaintiffs, emphasized that the application is based on the Plaintiffs' right to receive a fair trial under **Article 50(1)** of the Constitution. He submitted that justice must not only be done but be seen to be done hence the court should recuse itself having dealt with similar matters concerning the Development.

8. Equity Bank opposes the application on various grounds. On the factual issues, it asserts that the cases referred to in support of the application dealt with diverse applications founded on different facts and circumstances. It pointed out that the court has not deal with the issue in this case concerning the agreement between the Deceased and the Defendants regarding allocation of units within the Development.

9. Counsel for Equity Bank submitted that the Plaintiffs' application has not met the test for recusal set out in several decisions including ***King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) & Another v Standard Chartered Financial Services Ltd & 2 Others*** **NRB CA Civil Appeal No. 102 of 1994 [1995] eKLR** and ***Robert Tom Martins Kibisu v Republic*** **SCK Petition No. 3 of 2014 [2018] eKLR**. Counsel submitted that there was no real likelihood of bias if the court heard the matter as no reasonable person would think that it is likely or probable that the judge would favour one side unfairly at the expense of the other and that the Plaintiffs' apprehension of bias was neither reasonable nor based on facts or evidence. He pointed out that the circumstances presented by the Plaintiffs do not fall within the circumstances for recusal set out in the ***Judicial Service (Code of Conduct and Ethics) Regulations, 2020***. Counsel also accused the Plaintiffs of forum shopping.

10. The principles governing recusal in this jurisdiction are well settled. In ***Jan Bonde Nielson v Herman Philipus Steyn & 2 others*** **HC COMM No. 332 of 2010 [2014] eKLR** the court observed that:

> *The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in* **R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED),** *and reinforced in subsequent cases. See* **R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)** *where the Court of Appeal stated that: "…When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a 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…''*

11. In ***Philip K. Tunoi & another v Judicial Service Commission & Another*** **CA Civil Application NAI No. 6 of 2016 [2016] eKLR** the Court of Appeal adopted the objective test for recusal propounded by the House of Lords in ***Porter v Magill*** **[2002] 1 All ER 465**, where it stated that, *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court (per Ibrahim J.) in* ***Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR*** *where he observed that, "The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."* The Supreme Court reiterated and affirmed the objective test in ***Robert Tom Martins Kibisu v Republic*** **(Supra)**.

12. Under **Regulation 21 Part II** of the said ***Judicial Service (Code of Conduct and Ethics) Regulations 2020,*** a Judge may 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.

13. Counsel for the Plaintiffs rightly points out that the issue of impartiality and bias affects the right to a fair trial guaranteed under **Article 50(1)** of the Constitution but whether a judge should recuse himself from a matter must ultimately rest on the facts presented before the court as the Judge is also obliged to sit and hear cases in furtherance of the same duty to fulfil the right to a fair trial and guarantee the right of access to justice for every person.

14. While I agree with the Plaintiffs on one hand that the matters I have dealt with and decisions I have made deal with the Development, I also agree with Equity Bank that each case turned on its own facts as the parties and issues were different. Each decision is clearly reasoned and there is no suggestion that any of the decisions were as a result of bias. In deciding whether to recuse myself, I must apply the objective test in line with established precedent and ask whether a reasonable person having all facts before him or her would conclude that the court would be biased or that the Plaintiffs may not receive a fair trial as a result.

15. The Plaintiffs' case is that I should recuse myself because I heard and determined matters related to the present case. In ***Robert Tom Martins Kibisu v Republic*** **(Supra)**, the Supreme Court cited with approval the decision by Chitembwe J., in ***Nathan Obwana v Robert Bisakaya Wanyera & 2 Others*** **KKG HCCA No. 138 of 2013 [2013] eKLR** where the learned judge held that the single fact that a judge has sat on so many cases involving one party cannot be sufficient reason for a judge to disqualify himself. In ***Otkritie v International Investment Management Limited and Others v Urumov*** **[2014] EWCA Civ 1315**, the Court of Appeal in England considered whether the judge hearing the matter should recuse himself in a case where he made certain findings against the defendant in relation to two separate matters. The Court held as follows:

> *[13] There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise that the issue of recusal is extremely case sensitive.*

16. It cannot be gainsaid that there is a benefit for a judge to deal with related matters in order to use judicial resources optimally. It is equally important to guard against forum shopping, bench or judge hunting under the guise of recusal which would bring the justice system in disrepute. This position was clearly explained by Odunga J., in ***Republic v Independent Electoral & Boundaries Commission & Another exparte Coalition For Reforms and Democracy (CORD)*** **HC NRB Misc. Appl. No. 648 of 2016 [2017] eKLR** as follows:

> *[74] To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.*

17. Likewise, and in answer to the Plaintiffs' submission that justice must not only be done but it must also be seen to be done, the Court of Appeal in ***Galaxy Paints Company Limited v Falcon Guards Limited*** **NRB CA Civil Appeal No. 219 of 1998 [1999] eKLR** observed that:

> *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.

18. In his submissions, Counsel for the Plaintiff, submitted that the matter was being dealt with by Okwany J., and as such it should be forwarded to that court for directions. I have looked at the record and it shows that on 11th August 2021, the parties appeared before the learned Judge for directions on the 4th Defendant's pending application. She heard arguments by the parties and concluded that the matter was better handled before this court in view of other pending matters related to the Development. This position is consistent with good practice that a single judge should deal with related matters in order to save judicial time and resources and promote efficiency in litigation (see ***Alan Bates and Others v Post Office Limited*** **[2019 EWHC 871 (QB)**).

19. In conclusion, I find and hold that the Plaintiffs have not established that a fair minded and reasonable person having knowledge of the facts of this matter and in particular the matters dealt with by the court would conclude that there was a real possibility of bias. I therefore reject the application for recusal

20. I dismiss the Plaintiffs' application dated 23rd August 2021 with costs to the 4th Defendant.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Njoroge instructed by Gathenji and Company Advocates for the Plaintiffs.

Mr Otieno instructed by Murgor and Murgor Advocates for the 1st , 2nd and 3rd Defendants.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton Harrison and Mathews Advocates for the 4th Defendant.