REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 2 OF 2018 CONSOLIDATED

WITH CIVIL CASE 58 OF 2015

KIKAMBALA HOUSING ESTATE LIMITED.....PLAINTIFF

VERSUS

1. **AKASH DEVANI**
2. **MONA K DOSHI**
3. **KARIM ANJARWALLA**
4. **ATIQ ANJARWALLA**
5. **AMYN MUSSA**
6. **ANNE KIUNUHE**
7. **ROSA NDUATI – MUTERO**
8. **AISHA ABDALLA**
9. **DOMINIC REBELLO**
10. **ALEEM THARANI**

(All trading as ANJARWALLA & KHANAA .....1ST DEFENDANT

BANK OF AFRICA KENYA LIMITED.....2ND DEFENDANT

R U L I N G

1. By an application dated 7th day of February 2020, the plaintiff herein has sought orders that:-

i. *Spent*

ii. THAT the Honourable Court be pleased to recuse itself from further hearing of this entire lead suit together with the consolidated suit herein as the Plaintiff/Applicant has lost faith in this court as the court has shown bias in the proceedings.

iii. *Spent*

iv. THAT the Honourable Court be pleased to order that the proceedings in this entire case do start a fresh before another High Court Judge in this jurisdiction.

v. THAT the Honourable Court be pleased to issue any such order as it may deem meet and just

vi. THAT costs of this Application to be provided for.

2. The grounds shown on the face of the application as well as the Affidavit in support sworn by Osman ERDINC ELSEK, the director of the plaintiff, were that:-

i. That the court issued an order on 2/11/2018 irregularly and erroneously in the nature of capturing agreed and disagreed contents of the partial settlement agreement dated 11/6/2018.

ii. That the court has severally neglected

and refused to hear the applications on the plaintiff dated 26/11/2018 and 8/11/2019.

iii. The court by its orders of 3/2/2020 erroneously and irregularly against the law directed parties to charge the suit property while there are eight different suits at Malindi ELC in which prohibitory orders had been issued.

iv. That there being a pending complaint before the Judicial Service Commission by the 2nd defendant against the judge, he is likely to lean on the side of the defendant so as to show face before the commission and therefore it is just, convenient and expedient that the court grants the orders sought because no prejudice would be occasioned to the defendant.

3. To the application was annexed and exhibited an application dated 23/09/2018 seeking several orders including injunction to compel giving of a report by the 1st & 2nd defendant on steps taken by them to pursue issuance of title documents over the suit property, to compel forthwith freeze of application of interest on the plaintiffs account, compelling handing over of the title to the suit property and that audit be undertaken to determine the exact debt owned [OEE 1], orders issued on how to deal with the application [OEE 2], the partial settlement agreement [OEE 3], orders adopting the court annexed mediation report [OEE 4 & 5]. various orders and correspondences from the plaintiff, an application dated 26/11/2018 seeking to set aside the consent order appointing PKF to audit the accounts between the parties and the audit report [OEE 12]. Various orders issued in Malindi suit were also exhibited. The plaintiff's counsel also swore an Affidavit in which he said the application was filed because the plaintiff was aggrieved by the directions of 3/2/20.

4. When served, the defendants opposed the application on the basis of a Replying Affidavit by BEN MWAURA. That Affidavit gives the historical steps taken in the file just like the plaintiffs own Affidavit and takes the singular stand that there has not been demonstrated a justification for recusal. In particular it was asserted that the Order of 2/11/2018, accurately captured the terms of the settlement agreement it being added that during the mediation the parties did resolved voluntarily that the outstanding debt be ascertained by an auditor appointed by both and to act independently.

5. The parties having preceded thus, the 2nd defendant took the position that the plaintiff was imploring the court to step into the auditors shoes and to interrogate the conclusions reached and thereby negate the parties' intention to have an independent audit of the accounts. To the Respondent the application was mischievously brought to set aside court orders, partial settlement agreement and the mediation report as well as court directions.

6. On the assertion that the pendency of a compliant before the JSC would influence the judges, the 2nd defendant took the position that the defendant is not complaining of bias and that the complaint is independent and unrelated to the suit herein. It was thus concluded that the threshold of recusal had not been met and therefore the application was subject to being dismissed for having been made bereft of good faith and merit.

7. On the date, the matter came up hearing MR. KEVIN D. MCOURT filed an affidavit whose sole purpose was to record that the mediator had directed that him and Mr. Mkan for the plaintiff visit the offices of the Land Registrar, Kilifi, and find a position and practical possibilities of having the charge registered when lodged. In that Affidavit an attempt is made at showing that the plaintiff was acting in a manner that could only show that it was obstructing implementation of the agreements made before the mediator. He exhibited phone logs to show the attempts at meeting Mr. Mkan for purposes of visit the registrar but that the counsel's phone was not reachable till 1.57pm on 2/3/2020.

8. The counsel for the defendant also filed a list of authorities dated 28/2/2020 and cited for court some six decisions largely on when a court would recuse itself. The application was argued orally by both counsel presenting oral submissions.

9. In his submission Mr. Mkan advocate essentially reiterating the facts in the application and the Affidavit without much insight save that he said that in his clients view the decision by the court have been biased. His evidence of bias was that there are two applications which are yet to be heard but which touch on serious issues regarding audit. To him failure to have the two applications heard and determined, simply command that none of the directions by the court can be complied with.

10. He then underscored what he called conflict of interest owing to the fact that the 2nd defendant has lodged a case against the judge and therefore the judge is likely to lean in favour of the 2nd defendant so as to have face (sic) with the commission.

11. In conclusion, counsel conceded, very gracefully, and took the view that only auditing was the pending and outstanding issue but it is the issue the court did not address in its directions of 3/2/2020.

12. Mr McCourt Advocate also made lots of reliance on the Affidavits filed but with emphasis on the decided cases filed. The defendant's mainstay was the partial settlement agreement which both parties had exhibited and which had an express agreement by the parties that audit be carried out by a firm of auditors appointed by the parties. It was contended that the appointment of an auditor was effected pursuant to the partial settlement and an audit report has been filed in court and therefore it was not in good faith that the plaintiff now wanted to have the

matter started a fresh all over against to ignore the parties' settlement and the court order ensuing therefrom.

13. On the agreement to charge the suit property, it was pointed out that the parties agreed that partial discharge be done whereafter the property be charged for an agreed sum but the plaintiff was now intent on running away from the term of the settlement Agreement.

14. On the directions of 3/2/2020, counsel took the view and made submissions that the import and purpose was actualize and enforce the parties' contract and cannot be construed as bias. He then added that the truth of the matter is that whether the court recuses itself or not. To the defendant, the recusal was the excuse when the goal was to open afresh for the plaintiff to run away from the consent and partial settlement agreement. He sought and prayed that the application be dismissed with costs.

15. In his rejoinder to the defendants submissions, the plaintiff's advocate admitted that an auditor was appointed by consent but the auditor chose to file the report through the defendant's advocate hence was not independent.

16. On failure to register the charge, counsel submitted that the same was incapable of being implemented because audit had not been conducted. He then added that evidence of bias was failure to hear and determine two applications dated 22/01/2019 and 9/12/2019 when asked by the court the effect of prayer 4 seeking that the matter starts afresh, counsel conceded that the import would be to set aside the consent orders and partial agreements which the law does not allow unless by another consent.

17. I had commented that the defendant did file a list of authorities while the plaintiff did not file or cite any decision to the court. Based on what the parties told the court in the Affidavits as well as orally, my duty in this determination is to establish that material has been placed before me to demonstrate that there is a real likelihood or reasonable fear of likelihood of, bias prejudice or conflict of interest as to disable the court from rendering an impartial and uninterested decision in the matter. In other words, I must be persuaded that owing to the allegations made a reasonable and uninterested by-stander would conclude and perceive that the court lacks fairness, conviction and moral authority to hear and determine the outstanding questions in the suit.

18. In considering the matter, it however must be appreciated that it is the court that stands accused hence it has to do the very delicate balance between the duty to maintain impartiality and instilling the public confidence in the administration of justice and the concomitant duty to sit and decide the cases assigned to the particular judge. That balance can only be struck by scrutinizing the allegations made and how they tend to prove bias and impartiality. I see the grounds set to be three;

i. Failure to decide two applications dated 26/11/2018 and 8/11/2019.

ii. Issuing orders of 2/11/2018 irregularly and giving directions of 3/2/2020 erroneously.

iii. Facing a complaint by the 2nd defendant before the judicial service commission.

19. I will address the three in the seriatim manner, and in doing so, establish whether there is bias and impartiality demonstrated. In doing so, I will seek to juxtapose each complaint to the known developments in the file as they did unfold.

Failure to determine the applications dated 26/11/2018 and 8/11/2019

20. The Notice of Motion dated 26/11/2018 was filed some 11 days after the court had issued orders of 15/11/2018 and it essentially sought discharge of the orders of 15/11/2018 and also mandatory orders compelling the 2nd defendant to provide to the auditor certain named documents and further order that the plaintiff and the 2nd defendant do jointly verify the documents requested by the plaintiff. The application was timeously placed before me on the 26/11/2018 and I discerned no urgency disclosed and directed that a date be taken at the registry in the usual manner. Pursuant to that direction the application was fixed to be heard on the 22/1/2019.

21. However by the time the application was filed, the matter had been scheduled for the 28/11/2018 for parties to report the progress made with the auditor. When the two counsel appeared before court, Mr. Mcourt for the second defendant reported that he and the director of the plaintiff had held a meeting with the auditor and later on the auditor wrote to them to set out their terms of engagement making it clear that they would not entertain being superintended upon by any of the parties. One Mr. Aziz, who attended on behalf of the plaintiff said that he had just been given a copy of the letter in court and that he needed time consult with the director on the same.

22. However both parties committed to provide any needed documents to the auditor within 14 days. Having heard both sides, it was ordered that Mr Mcourt's client avails all documents demanded by the auditor within 14 days and to serve copies thereof by courier upon the plaintiff and the other defendants' advocate. The plaintiff was equally granted an opportunity to provide to the auditor any document deemed necessary for the audit. The matter was then stood over to the 18/12/2018 to record the progress made. On the 18/12/2018 Mr. MCourt is recorded to have told the court that the bank had written to say they had retrieved some but not all the documents and sought more time to retrieve all the documents.

23. The plaintiff's director did not object to the request save that he contended that before the documents are given to the auditor, the same should be verified by the plaintiff. A new date was set for the 4/2/2019 to report on the progress made with assembling the documents. The record shows that instead of the plaintiff having its application dated 26/11/2018 placed before the court on 22/01/2019, it opted to go before the Deputy Registrar for taxation and the application was never brought to court.

24. When the matter was again before the court on 4/2/2018, the 2nd defendant reported having availed all the documents to the auditor and the plaintiff but the plaintiff reported that it had not received all with the consequence that parties agreed to wait till 8/4/2019 for all the documents to be availed. When the matter came next before court, on 22/2/2019, even though the date had been taken by consent only the defendants counsel attended with information that documents had indeed been availed to the plaintiff and auditor and further that the fees had

been paid for which reason the court directed that the audit work proceeds and timelines set for the report to be filed in court.

25. My reading of the file reveal that the plaintiff never pursued the application dated 26/11/2018 but opted to file two other application dated 16/4/2019 and 18/11/2019. When filed, the two applications were placed before Njoki Mwangi and Dorah Chepkwony Judge on the respective dates and the two judges decline to issue any interim orders having certified the applications urgent.

26. Judge Njoki gave a date for hearing after service while judge Chepkwony directed that a date be taken at the registry. Even though Njoki J had scheduled the matter for hearing on 25/4/2019, the file never came up before the court and no attempts have since been made to prosecute that application. Instead, parties were in court on the 3/5/2019 and regard was given to the ongoing audit exercise with parties agreeing to come back on 17/5/2019 to confirm if the report would have been filed.

27. That was confirmed by the plaintiff's counsel to have been served upon him on the 22/7/2019. However to Mr. Mcourt, what was given to parties was a draft report for discussion of the work in progress and that plaintiff had failed to pay its portion of the audit fees. In order to enforce compliance the court gave timelines to comply with a default clause being imposed. The audit report was ultimately availed to the court and the parties for which reason the 2nd defendant requested that the matter be referred back to the mediator for further mediation sessions to progress on the partial mediation agreement.

28. That request by Mr. Mcourt was never conceded by the plaintiff's counsel who said Mr. Mcourt had become an impediment to the resolution of the matter by unnecessarily shielding the auditor from the plaintiff demands including demanding audit fees and serving the reports upon the plaintiffs through the defendants. He added that the plaintiff concerns could not be resolved by the mediator but by the court itself. Having taken the rival positions by the parties, it was directed that the parties go back to the mediator for purposes of furthering the partial agreement on surrender, partial discharges and registration of charges.

29. Soon after that order the application was filed and placed before Chepkwony J as said hereinabove. Pursuant to the direction by the Judge that a date be taken at the Registry on priority basis the plaintiff had the application fixed for the 9/12/2019. While the date was so scheduled, parties appeared before the mediator and Mr. Mkan did report to court on the 27/11/2019 that indeed they attended, mediated and reached an agreement save that the counsel sent by Mr. Mcourt declined to sign partly on the basis that the plaintiff had not complied with parts B, E & F of the partial settlement agreement. It is those submissions that the court considered and upon reading the file came by the directions of 3/2/2020.

30. From this analysis of the court record, it is clear that while the two applications were indeed filed and presented under certificates of urgency, no proactive steps were taken to prosecute them. Throughout their pendency in court, nobody urged the court to have them argued. It cannot therefore be said with an iota of honesty that the court refused, neglected or failed to hear the same as a basis to allege bias.

31. The court takes the view that the dispute belongs to the parties and it is the parties and counsel that need to prioritize what would best protect and enhance their interests in the litigation. We have not reached the level where parties merely file papers and leave it to the court. The best custodian of ones rights, including the right to be heard and access to Justice must remain to whom the right is bestowed.

32. Based on the history of the proceedings in this matter, I do determine that there has not been a failure by the court to determine the two applications by the plaintiff and that it is the plaintiff who by conduct abandoned the two just like it appears to have abandoned that application dated 16/4/2019.

Did the court irregularly and erroneously Issue the orders of 21/11/2018 and directions of 3/2/2020?

33. On 12/6/2018, parties appeared before court, pursuant to the orders of 9/4/2018, for purposes of recording, the outcome of mediation. On that 9/4/2018, Mr. Elsek, the director of the plaintiff, then appearing in person, informed the court that mediation had taken place and the agreement was being done by the mediator.

34. Therefore, when both parties attended court on 12/6/2018 all the court did was to adopt the parties' agreement at mediation as an order of the court. In fact the court directed the parties to reduce the agreement into a consent letter and have same filed within 30 days for the said 12/6/2018. It is therefore evident that there was no order granted by the court on the 2/11/2018 but that is the date the court orders of 12/6/2018 were extracted by the parties. A reading of that order and the partial agreement dated 11/6/2018 reveal to me no disparity at all.

35. It is to me a consent order merely extracted to summarize what the parties had voluntarily agreed to do. The plaintiff's complaint seems to me that two orders were extracted pursuant to the proceedings of 12/6/2018. That is not disputable. However what is the import and property of the two versions of the order. In resolving that question, I take the view and take notice that in law and practice, courts do not extract orders for the parties. It is the parties to draft the court orders, with impute for both sides the present it to court, the Deputy Registrars for sending and signatures.

36. Accordingly, I take it that both orders must have been drafted by either or both of the parties before the court issued them. I further take it that both sides to this litigation understand, that the court is governed by the Civil Procedure Rules and that the Rules dictate how an order ought to be extracted. In this matter, I have not been moved appropriately with a complaint that Order 21 Rule 8 was sidestepped or not complied with. The complaint is that the orders were issued irregularly and erroneously in capturing the terms of the partial settlement agreement.

37. All I see in the two orders is that, the order extracted on 30/11/2018 did not go to the express terms of the partial settlement agreement while that of 2/11/2018 captured the terms thereof extensively and verbatim. To this court, I see nothing prejudicial in the way the orders are worded. I see no prejudice and none has been demonstrated how the two versions of the order affect the plaintiff. All I get is that having been served with the orders of 2/11/2018, which it says it received under protest, the plaintiff chose to extract its own version of the order and opted for brevity rather than precision. That to me is not the way to conduct court processes.

38. I think this scenario could have been avoided wholly had the plaintiff observed the dictates of Order 21 Rule 8 by showing what was omitted or added in the Order of 2/11/2018 and presenting its own draft for approval by the defendants. That is what an honest and candid litigant ought to have done but was conveniently not done. I have said that to me both versions of the order communicate the same things in different styles; one choosing brevity as opposed to precision and I have no doubt that the terms of the partial settlement agreement was well captured thus the contract of the parties.

39. That however may be beside the point in the current applications. The assertion and position taken in the application and the Affidavit in its support; ground 9 of the application and paragraph 8 of the Affidavit in is that the court issued those orders irregularly and erroneously. In asserting so the applicant has appreciated the duty of the Deputy Registrar and that of the court. It comes out from the application that the applicant appreciates that it is the Deputy Registrar to issue the extracted orders. With that application, it is difficult to understand how the ministerial actions by the Deputy Registrars would be the evidence of bias on the part of the court.

40. I see this as a red herring or just a Trojan horse flushed at the court to blur its vision and obstruct it from seeking the applicant's genuine and ultimate goal; "set aside all proceedings including those before the mediator and the parties agreement, for the case to start afresh before another judge"[1]. That is the goal and clear intention of the entire application if prayer 4 of the motion is understood sufficiently well. I understand the plaintiff's design to be towards running away from its bargain and consequent agreed terms at the mediation and the ensuing adoption as a court order. Such manouvres must be discouraged and resisted at all times if the court system is to remain an independent arbiter of legal disputes.

41. As a Kenyan judge, the Kenyan people expect me to determine their legal disputes bereft of personal bias, prejudice, irrelevant personal beliefs and predispositions. A judge is bound to determined disputes based on the facts as applied to the law and not otherwise. In doing so, I must resist all manner of pressure from wherever source so that I do not reward any litigant who for own crafted reasons chose to hold the view that if one judge cannot give to it its way then the preposterous allegation of bias would entitle them to a choice of an alternative Judge.

42. In the words of the Supreme Court of South Africa in **President of the Republic of South Africa vs South Africa Rugby Football Union & Others case CCT 16/98,** the nature of a judge's work involve the performance of difficult and at times unpleasant task. It is many times difficult and unpleasant that one may ask himself whether it is possible to disabuse one's mind and soul from personal beliefs including cultural and faith ones; inculcated throughout one's life. At such times one remembers the oath office by which a judge swears in the name of Almighty God to 'diligently serve the people of the Republic of Kenya and to impartially do justice in accordance with the constitution as by law established, and the laws and customs of the Republic without fear, favour, bias, affection, ill- will, prejudice and to at all times protect, administer and defend the constitution so as to uphold the dignity and respect of the judiciary and judicial system of Kenya.

43. I see a scheme, design and desire to stall and erase all the progress made so far in resolving the matter for an all blown out dispute. The intention is to ignore and push to the oblivion the isolated issues together with the partial solution settled by agreement of the parties. That should never be encouraged or countenanced by the court. In ***Joseph Cheptais vs AG and others Eldoret ELC No. 15 of 2013, Ombwonyo J,*** when faced with a similar application rendered himself in dismissing the application, in the following words:-

> "I do believe that the application is meant to delay the hearing of the petition because the petitioners have never been interested in pursuing the petition despite being given a hearing date and directions to file submission".

44. In this matter the plaintiff having come to court, agreed to go to mediation, participated at mediation, asked the court to adopt the mediation agreement which incorporated the appointment of an auditor to audit the accounts between the parties and in fact proposed the name of the auditor ultimately appointed by consent, now wants to resile from the entire process and journey and rewind the clock. That is not only recalcitrance but evidently a design to not only delay the matter, contrary to the constitutional dictates and thereby abuse the due process, but also engage in the now fashionable practice of throwing mud of ignominy at judicial officers.

45. Having reviewed the entire record and the orders thereby made, and while reminding myself of the oath office and expectations of the office of a judge, I do hold and find that the plaintiff/ applicant has failed in its Onus and obligation to demonstrate prospects and likelihood of bias and prejudice for reason the application cannot succeed but must fail. I am clear in my mind, conscience and soul that I have nothing against the parties and the plaintiff in particular. I am also of the very honest belief that the consensual progress made so far must be retained if the matter is to see a fair, just and timely disposal.

46. On the last issue of a pending complaint against this judge by the 2nd defendant before the judicial service commission, that complaint has been pending before the commission for now close to a year and the same has been regularly reported on the mainstream press. All this time and prior to my directions the plaintiff had not deemed it likely to impact on my impartiality. I consider it an afterthought and part of the design to run away from the partial settlement at all costs.

47. However, that to me should be a concern and worry of the 2nd defendant. It is that defendant who would be believable to hold that since it has complained about the court, I may be engulfed by prejudice, bias or even vengeance against it. Had this party been the person who raised the issue, I would not hesitate to recuse myself. In fact I leave it open to the said party to exercise its liberties as deemed in its best of interests. Before then I am able to delineate between my duty to the judiciary and the Kenya Public and personal interests including the complaint before the commission.

48. In any event, the entire proceedings are over with the complaint giving evidence and what remains is the commission to render its determination and I do not fathom how one can seek to impress the commission by seeking to rewrite parties' agreement in this matter.

49. In all, the application was utterly misconceived bereft of any reasonable grounds and I order it dismissed with costs.

Dated, signed and delivered at Mombasa this **30th** day of **April 2020.**

P J O OTIENO

JUDGE