



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E 469 OF 2019

DARI LIMITED.....1ST APPLICANT

RAPHAEL TUJU.....2ND APPLICANT

MANO TUJU.....3RD APPLICANT

ALMA TUJU.....4TH APPLICANT

YMA TUJU.....5TH APPLICANT

S.A.M COMPANY LIMITED.....6TH APPLICANT

VERSUS

EAST AFRICAN DEVELOPMENT BANK.....1ST RESPONDENT

MUNIU THOITHI.....2ND RESPONDENT

GEORGE WERU.....3RD RESPONDENT

RULING

1. The plaintiffs have moved this court by an application dated 16th September 2020. It is a notice of motion brought under the provisions of Article 25 and 50 of the Constitution of Kenya 2010. The application has two main prayers. They are:

- *The Hon. Lady Justice Mary Kasango do recuse herself from presiding over this matter.*
- *This matter be remitted to the principal Judge of the High Court for assignment to a judge other than Hon Lady Justice Mary Kasango.*

2. The application is based on the following grounds:

i. The plaintiffs have, through the 2nd plaintiff, filed a petition to the Judicial Service Commission for the removal of Hon Lady Justice Mary Kasango as a Judge of the High Court of Kenya pursuant to Article 168 of the Constitution of Kenya on the grounds that the manner in which the Hon Lady Justice Mary Kasango has handled this matter offends Rules 5, 3(5) and 3(8) of the Judicial Code and Conduct of Ethics in accordance with Article 168 (1) (b) of the Constitution and the same amounts to gross misconduct in accordance with Article 168 (1) (e) of the Constitution.

ii. The petition is premised on the biased manner in which the Hon Lady Justice Mary Kasango has handled this matter, and particularly the Plaintiffs' Notice of Motion Application dated 21st July 2020. This goes against the principle of equality of arms as enshrined in Article 50(1) of the Constitution as read together with Article 25 of the Constitution.

iii. The plaintiffs right to access to justice as enshrined in Article 48 of the Constitution of Kenya, 2010 will be tremendously compromised if the orders sought in this application are not granted.

iv. It is therefore untenable for the Hon Lady Justice Mary Kasango to continue to preside over this matter.

3. The application is supported by the affidavit of Raphael Tuju, the 2nd plaintiff. In his short affidavit Tuju simply repeated the above stated grounds. Annexed to that affidavit is the petition for my removal as a high court judge, which petition is addressed to the Judicial Service Commission (JSC). It bears a JSC stamp of receipt dated 15th September 2020.

4. The application is opposed by the defendants through the affidavit of Loise Muigai the 1st defendant's acting Head of Business Country Office, Kenya. The deponent stated the application was another attempt of the plaintiffs to delay the hearing of this matter, that the plaintiffs have delayed the hearing of this matter by applying for recusal of other judges and further the petition before JSC was an attempt to intimidate the court and delay the hearing of this matter.

ANALYSIS AND DETERMINATION

5. Since my appointment as a judge, 17 years ago, I have always done my utmost to ensure that I handle all matters before me with utmost fairness and transparency. I have been true to my oath of office which I took on my appointment and which oath I renewed when the 2010 Constitution was promulgated. Just to remind the parties before me and all sundry, I will reproduce the oath I took:

I,, a judge of the High Court do swear in the name of the Almighty God to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. (So help me God.)

6. I have not handled this matter any differently to other cases that have been before me. Our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice. See *Wewaykum Indian band v Canada* (2003) SCC 45.

7. The plaintiffs have alleged that I have been biased against them. They base that allegation on the fact that their application dated 21st July 2020 was not heard on 22nd July 2020. That allegation is now before the JSC for determination. However since that allegation was central to the arguments placed before me let me state categorically that the plaintiffs have failed to provide cogent evidence to support their allegation of bias. I would go further and state that anyone who is reasonably informed and familiar with this matter would not conclude that I am biased either for or against any of the parties before me. In this regard the statements made by our supreme court Justices in the case *Gladys Boss Shollei v Judicial Service Commission & another* (2018) eKLR will be useful to consider. The Justices stated:

“The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord Denning (1899-1999) of England who thus spoke of the candour and trust associated with the judicial appointment:

“[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges” [see Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How they made the Common Law* (Cambridge: University Press, 2012), p.156.”

The court further stated:

“Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: “to serve impartially; and to protect, administer and defend the Constitution.” It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties’ right to have their cases heard and determined before a court of law.”

8. I find it would be disservice to the oath of office that I took to yield to the plaintiffs' unreasonable and unsubstantiated call for recusal. The petition for my removal as a judge, presented to the JSC is nothing short of stage managed manoeuvre to get me to recuse myself from hearing this matter. I decline to give in to fear and intimidation directed toward me. I decline to recuse myself from hearing this matter.

9. However it must by now be in the public domain that the Honourable Chief Justice has transferred me from the Milimani Commercial Court Division. In view of that I direct this matter be mentioned on a date to be given at the reading of this Ruling for mention before the incoming Judge of the Division.

10. On the whole I find no merit in the plaintiffs' application of 16th September 2020 and I order the same to be dismissed with costs to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of OCTOBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

ORDER

This decision is hereby virtually delivered this 21st day of October, 2020.

MARY KASANGO

JUDGE