REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 8 OF 2013

COMMUNITY UPLIFT MINISTRIES.....PLAINTIFF

VERSUS

NATHAN CHESANG MOSON & OTHERS.....DEFENDANTS

RULING

1. This matter had been set for hearing and infact proceeded to hearing with the first witness when at the hearing of the 2nd witness, issues arose from the defence counsel, leading to the filing of this notice of motion dated 8th March 2019.

The applicant seeks:

(I) Stay of proceedings and/or any further action or writing of the judgment in this matter,

(II) That I (H. A. OMONDI) do disqualify myself from handling, hearing and determine this matter, and the file be sent to the Principle Judge for re-allocation.

The basis for this application is that this matter was originally filed at the **Kitale High Court as HCCC No. 3 of 2011,** before being transferred to Eldoret, it commenced hearing on 5.3.2019, and was to go on further hearing on 6.3.2019, when the plaintiff flashed a bundle of documents dated 28.1.2011 which were neither in the court record nor with the applicant/defendants.

2. According to the applicants, this was the first time they and their counsel were hearing of the existence of those documents which were over 1400 pages – this was at the point which the Respondent/Plaintiff's witness **JAMES LANDON KARIN** had begun his testimony.

Counsel **(MISS ODWA)** brought to the court's attention that she did not have copies of the said documents and required to be availed the same before proceeding. The court perused the file and confirmed that the said bundles were not on record.

3. Miss **ODWA** expressed inhibitions about proceeding without the said documents which are described as voluminous, and the witness instead of giving evidence, read the plaint word for word without examination in chief, and despite the applicant's counsel presenting them was **RUBBISHED** by myself.

4. When the witness sought to have the voluminous bundle of documents produced in evidence, the applicant's counsel objected to the production saying the same should be supplied to her so as to go through them and assess whether or not the witness was competent to produce, but again the judge (i.e myself) without paying due regard to the **WEIGHT** of the issues raised I allowed the witness to produce the bundle, "some of which he had not even talked about and in fact the judge had no knowledge of what they were…"

5. Subsequent to this court allowing the admission of those documents, **MISS ODWA** sought leave to appeal and stay of proceedings pending filing of a formal application considering that the hearing was to continue on 06.03.2019.

The court – granted leave to appeal but declined to stay the proceedings and confirmed the hearing for 06.03.2019. At this point the applicant's counsel insisted on being supplied with the copies of those documents, and directions to that effect were given.

6. The hearing proceeded until 6.30pm when the applicant's counsel made copies of the documents until about 9.00pm, and thereafter begun binding and perusing them, an exercise which went on upto 12.00am on 6.3.2019. She then met the Respondent's counsel at 6.00 am at the advocate's office to prepare for the trial but it became apparent to her that she would require more time.

7. So on 6.3.2019 when the matter came up for hearing, she explained her predicament to the court and sought an adjournment so as to get instructions to enable her cross examine the witness. This request was refused, but the court granted her leave to appeal suo moto, and rejected any application for stay of proceedings even before the application was made. That this court made comments regarding the merits of the case which was not the issue at hand for determination. Miss Odwa then sought to leave the court room, and this was granted.

8. The applicants who were left in court, indicated they would not proceed without representation by counsel, but the judge insisted on proceeding.

The matter thus proceeded without the participation of the applicants

It is stated that:

> "In light of the above series of events and the unfair manner the court handled the matter, the defendant/applicant has lost faith in the judge to fairly determine the case as they strongly feel that the judge is impartial and biased against them, having openly displayed her impartiality in handling proceedings on 5th and 6th March 2016."

The defendants/applicants are therefore apprehensive that the judge is unlikely to give them a fair hearing and fairly determine the matter regardless of the evidence that will be tendered hence the application for recusal of Justice H. A. Omondi from handling the matter.

9. The Respondent in a replying affidavit sworn by **JAMES LANDON KARINS** confirms that indeed the applicant complained about not having received the documents, but **MR LILAN** presented to court duly filed affidavit of service which indicated that the bundle had been served together with the summons, plaint, witness statement, list of documents and list of witnesses.

10. That the court upon perusing the affidavit of service was satisfied that service had been duly effected and allowed the witness to continue with his evidence in chief. He also confirms that on two occasions the defence counsel rose up to object to him reading contents of the plaint and his witness statement. He explained that such reference was necessary as the issues he was referring to happened more than 10 – 15 years ago, and involved many transactions, and since he had retired from service, and given his advanced age, he needed to refresh his memory. He was infact warned not to refer to the documents except where accurate facts such as numbers and dates were required. He maintains that the documents were properly served and duly admitted in evidence, and swears he has never met nor is he acquainted with her. That the issue was never raised at pre-trial.

11. The Respondent terms this application as a mere ploy to derail the process because the matter is pending for judgment. That the applicant had at some point filed a complaint about the previous presiding judge in this very matter, before the Judges and Magistrates Vetting Board when it was at the Kitale High Court alleging bias and unfairness – that complaint was dismissed on grounds of the same being false and misconceived.

12. Let me place matters in perspective – indeed the narrative as given by the applicant is correct as regards not having the bundle of documents. However I did peruse the affidavit of service and confirmed that the documents had been served. Although the documents were not in the court file, it was pointed out by my then Court Assistant, the late David Ouma, that the file was in volumes, and what was before court were two volumes and there was a likelihood of the documents being in another volume which was not before court.

13. Further, that because the file had been transferred from Kitale, it was possible that one volume had been left in Kitale. The same was to be confirmed by the Court Assistant when the court would take a break. Unfortunately the hearing was lengthy, and short break was taken was not enough and the matter proceeded.

14. The reason for not wanting to "wait and see" as it were was informed by 2(two) reasons:

> a) The matter was an old one which had its roots earlier than 2013, and the court was aware to the clarion call to get out of the justice system, matters that were 5 years or more.
>
> b) It is on record that the plaintiffs witnesses were coming from distant lands, and thus far off date had been given and account of that fact [see record of 05.03.19]

15. Indeed when the hearing was adjourned on 5th March 2019 at 6.30pm, it was scheduled for the next day to commence at 9.00 am but Miss Odwa had sent word that she would be late, and I commenced mention of other matters, and the matter was scheduled to 10.45am. Miss Odwa eventually arrived at 11.20 am and indicated that she needed at least a month's adjournment so as to comprehensively go through the documents and conduct cross examination.

This was opposed by the Respondent's counsel. The court in declining the request pointed out that the issue concerning the documents had already been addressed and leave granted to appeal against the court's directions. The court observed the numerous times that the matter had been adjourned, the life history of the case including having found its way to the Court of Appeal and back, and the age of the file. That reference to the life history of the case was critical so as to give a justification for whatever decision the court would give in relation to the prayer for adjournment.

16. Of course I observed that the witnesses had travelled from the US – that was information given in open court, and it would have been totally myopic of me to ignore that fact. And yes without prompting – because it was apparent the intention was to delay the matter – what would a reasonable person infer. Where witnesses have travelled from the US to testify and instead of even seeking a day or two – counsel asks for one month. The reasonable inference to draw was that those were delaying tactics intended to frustrate the plaintiffs if an adjournment was achieved by subjecting them to extra costs of travel and time – so yes indeed those remarks. Art 50 (1) of the court

provides:

> **Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

I took an oath of office to administer justice without fear or favour, affection on ill will, where a litigant expresses reservations about the impartiality of a court then it is important that the affected individual who is the object of such claims considers the matters raised objectively.

17. Indeed ***Rolstm F. Nelson*** in his treatise ***"Judicial Continuing Education Workshop:*** Recusal, Contempt of Court and Judicial Ethics, observed:

> "A judge who has to decide on an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the approved impartiality and instilling public confidence in the administration of justice. On the other hand a judge has a duty to sit in the cases assigned to him or her, and may only refuse to hear a case for extremely good reason."

The principal underlying recusal was restated by the Supreme Court in ***JASBIR SINGH RAI & 3 OTHERS V TARLOCHAN SINGH RAI & 4 OTHERS Pet. No. 4 of 2012 [2013] eKLR,*** **that:**

> "**…**Perception of fairness, of conviction, of moral authority to hear a matter, is the proper test whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer is that justice as between the parties be uncompromised…"

The House of Lords held in **R V Gough [1993] AC 646**, that the test to be applied in all cases of apparent bias was whether in all the circumstances of the case there appears to be real danger of bias. This test was subsequently adjusted by the House of Lords in ***PORTER V MAGILL [2002] 1 All E R 465*** 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."

This test pre-supposes that the observer of the circumstances is a fair minded and informed individual who will not be unduly sensitive or suspicious. This requires that the first thing to be done is ascertain the circumstances which gave rise to the suggestion that the judge is biased.

I therefore examine whether there is a reasonable basis for asking me to recuse myself from this matter. Since I am the subject of the allegation, I must caution myself to be as objectively as I possibly can. The easiest option is to immediately put down my pen, announce that I have no lien over this matter, I have enough work to last me till the year ends, and one file less – the better for me. But that would not be paying fidelity to my oath of office. That would be giving a chance to make whimsical claims and get away with it without ascertaining prevailing and tangible basis. This is why it is critical to objectively look at the circumstances under which the allegations of bias are raised.

18. Indeed the ***AMERICAN BAR ASSOCIATION JOURNAL VOL. 68 PG 1179 – 1329***, the position is amplified that subjective feeling, whim and reaction of a litigant or his uttering does not automatically disqualify a judge; and must not be permitted to conduct the integrity of the justice system.

19. Once the request for stay had been declined, Miss Odwa then sought to leave the court room, which request was granted.

Since the 1st and 2nd defendants were present in court, they were called upon to cross examine the witness but they declined, and left the court in a fashion similar to their counsel. What their actions and that of their counsel conveyed to me is that this was a well choreographed act intended to derail and delay the matter, which I was not ready to be party to. I therefore directed that the matter proceeds to conclusion albeit ex parte.

20. For the applicant to now claim that I was impartial and obviously inclined towards the plaintiff, only communicates one theory – wherever a court does not oblige the applicant's wishes, they are willing to impale and intimidate by alleging all manner of things, including improper motive such as unspecified comments on merits of the case. The claims are obviously calculated to cause apprehension – a pattern already earlier exhibited by reporting the judge who handled the matter in Kitale and who became a victim of the applicant's ire by having his conduct reported to the Judges and Magistrates Vetting Board. A body which visited such fear and terror on judicial officers, and whose decisions saw the end of the career of many judicial officers.

21. I do not say this lightly or to curry sympathy or empathy from any quarter, but true to their reputation that when a judicial officers does not make a decision in their favour, then it must be due to some misconduct, the applicants lodged a complaint against me to the **Judicial Service Commission [JSC].**

22. Indeed it is on account of such complaint that there was delay in delivering the ruling as the Judicial Service Commission **[JSC]** had called for this file. The thankless position for a judicial officer is that no matter which way their decision goes, there will always be one aggrieved party, and woe unto that officer if the loser designs beyond using due process of appeal to challenge the decision. That, I regret to say is what applicants herein are doing. The Constitutional right to a fair hearing, cuts across the board and applies both to the goose and gander.

23. Miss Odwa had cited the decision in ***Philiph K. Tunoi*** to buttress her argument, it is not what this court perceives, but what the ordinary person sitting in court on both days and being alive to the facts at play would have concluded. She is right but it depends on which lenses such a person sitting in court would be wearing. For her to claim that the court was bulldozing the applicants is far from the truth, infact it is the applicants who are out to blackmail the court by spinning a technicoloured sob story about unfair treatment.

24. Miss Odwa has used a lot of choice adjectives some which are not worth recording or repeating but which leaves no doubt in my mind that the applicant wants this matter conducted in his own terms. I certainly have no personal interest in the matter, the Plaintiff/Respondent and the director or officials are as strange to me as Adam would be if I were to meet the first member of human race on this earth. Indeed in *Re Estate* of *Gatere Kahiu Nakuru Succ. 265 of 2009* the court pointed out that allegations of bias are some of the tricks litigants try to use to scuttle a matter.

25. Certainly the applicant is within his rights to contest the decision by this court, but surely not to the extent of making unfounded claims hinged on mere suspicion on account of not having had a decision made in his favour or because holds a different view of the law from what the litigant holds.

26. It is correct that I made it clear that the applicant had leave to appeal but without prompting I ordered for good measure that no stay would be granted – that was not without prompting, it arose from the pattern of events which clearly communicated an intention to derail the hearing of a matter which is celebrating 8 years in the court without being concluded. I honestly believe this application for recusal is intended to cripple the court so as not to complete the matter which is pending judgment.

27. The circumstances and the content under which the allegations are made persuade me that the applicant has only applied the subjective test, having failed to achieve an adjournment, and hopes to rattle the court into shying off this matter. Should I accede to this then I will have made a mockery of what my duty to uphold justice and administer a fair hearing to all actually means.

I therefore decline the call to recuse myself and the application is dismissed with costs to Respondent.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of Sept. 2019.

H. A. OMONDI

JUDGE