



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO.E028 OF 2018

SYNGENTA EAST AFRICA LIMITEDPLAINTIFF

VERSUS

SOY-KABATIK AGRI CENTRE LIMITED.....DEFENDANT

RULING

BACKGROUND

1. This matter first came up for directions before me on 16th May 2019 when Mr. Kiprono, learned counsel for the defendant informed the court that the directions sought were three-fold in respect to the following matters:

- a. Notice of motion dated 25th January 2018 in which the defendant seeks orders to strike out the plaintiff's suit.**
- b. Notice of Motion dated 3rd December 2018 in which the plaintiff seeks orders for summary judgment.**
- c. Defendant's Preliminary Objection dated 18th February 2019.**

2. The defendant's counsel informed the court that the preliminary objection is highly conclusive in nature and urged the court to hear the preliminary objection first.

3. Mr. Ondieki, learned counsel for the plaintiff submitted that he was ready to canvass both two applications and preliminary objection by way of oral submissions but was also agreeable to taking directions on written submissions.

4. The court then directed the parties to file and exchange written submissions to the preliminary objection dated 18th February 2019. The court further gave directions that parties were also at liberty to file and exchange written submissions to the applications dated 25th January 2018 and 3rd December 2018. The matters were then listed for hearing on 8th July 2019 for purposes of highlighting the submissions.

5. The plaintiff then filed written submissions on 3rd July 2019. On its part, instead of filing written submissions, the defendant filed an application dated 16th May 2019 under certificate of urgency in which it sought the following orders:

- 1. That the application be placed before the duty judge, certified urgent and heard ex-parte in the first instance.**
- 2. That pending the hearing and determination of this application, these proceedings be stood over generally.**
- 3. That the trial judge, Hon. Lady Justice Wilfrida Okwany be pleased to disqualify herself from hearing/presiding over the matter.**
- 4. That the directions/orders issued by Hon. Lady Justice Wilfrida Okwany on 16th May, 2019 be reviewed and/or vacated.**
- 5. That the applicant's/defendant's notice of preliminary objection dated 18th February 2019 be heard first.**

6. That the costs of this application be in the cause.

6. The application is supported by the affidavit of one Japheth Mibei and premised on the grounds that:

a. On 16th May, 2019 the learned judge issued directions/orders that were completely divorced from the goals of justice and that negated expeditious, proportionate and affordable process of disposal of matter before her.

b. That applicant is apprehensive that if the said judge continues to hear this matter, further, the case will not be handled in a proportionate and fair manner to all the parties, hence equitable justice may never be served to the applicant contrary to Article 48 and 50 of the Constitution of Kenya, 2010.

c. The applicant is concerned that the conduct of trial judge raises eyebrows and there exists real and apparent bias on the part of the said judge to the detriment of these proceedings at hand, hence the likelihood of bias or miscarriage of justice.

d. The logical conclusion of events is that the trial judge Honourable Wilfrida Okwany is not independent, objective and fair contrary to the dictates of Constitution of Kenya, 2010 and all attendant laws and judicial service code of conduct.

7. The plaintiff/respondent opposed the application through the replying affidavit of one EZRA MAKORI and grounds of opposition dated 3rd July 2018 in which it set out the following grounds:

1. The application is vexatious, frivolous, scandalous and an abuse of the court's process.

2. The defendant has not offered reasonable grounds to warrant the grant of the orders sought.

3. The defendant has not satisfied the test that warrant to recusal of a judge as set out by the Court of Appeal in Philip K. Tunoi & Another v Judicial Service Commission & Another [2016]eKLR.

4. Judges have a duty to not recuse themselves on flimsy and baseless allegations as this will encourage parties to forum shop and delay the prompt determination of disputes. This was emphasized by the Court of Appeal in the case of Kaplan & Stratton v L. Z. Engineering Construction Ltd & 2 Others [2001] eKLR.

5. The defendant has not established the facts upon which inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. The applicant bears the duty of establishing such facts as was stated by the Court of Appeal in Kalpana H. Hawal v Judicial Service Commission & 2 Others [2016] eKLR; and

6. Courts have the discretion to consider preliminary objections and applications concurrently if this will ensure the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings. The Supreme Court in Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others [2015] eKLR considered both a notice of motion application for extension of time together with a notice of preliminary objection. The High Court in Godfrey Otieno Onyango (Suing on behalf of Ronald Onyango) & 2 Others v Crispin Oduor Obudo & 8 Others [2014] eKLR considered two notice of motion applications alongside a notice of preliminary objection.

8. At the hearing of the application Mr. Kiprono, learned counsel for the defendant/applicant relied on the provisions of Articles 10 and 73 of the Constitution and submitted that the reason for seeking recusal was founded on the conduct of the judge, which is his view, gave rise to suspicion that she is not objective or impartial.

9. Counsel urged the court to consider the jurisprudence for recusal set out in the case of **Republic v Independent Electoral & Boundaries Commission & Another [2017] eKLR** and in **Re- Estate of Gitere Kahura (Deceased) [2019] eKLR**.

10. Miss Kirimi, the plaintiff's counsel, on the other hand submitted that the application does not satisfy any of the grounds that have been established for recusal. Counsel further submitted that the application is defective as it is supported by defective affidavit that is sworn by a party who is a stranger to the suit and whose interest in the matter is not disclosed.

11. It was plaintiff's position that the applicant has not disclosed the manner in which any fair minded person would come to the conclusion that the judge was biased in issuing the impugned directions of 16th May 2019 regarding the disposal of the pending applications and preliminary objection. Counsel argued that there was no basis for the alleged bias or fear of miscarriage of justice that would warrant the orders for recusal sought.

Determination

12. I have carefully considered the application for recusal and the plaintiffs response together with the submission by counsel and the authorities that they cited.

13. The circumstances under which a judge may recuse himself/herself from a case were set out in the case of **Re- Estate of Gitere Kahura (Deceased) [2019]eKLR** as follows:

1. In the matters of conflict of interest.

2. **If a Judge is biased or seen to favor one party.**
3. **If a Judge handled the matter previously as a lawyer in private practice.**
4. **If there is ex parte communication between the Judge and one of the parties.**
5. **When a Judge predicts that he or she may be impartial in a matter.**

14. In the instant case, the record shows that 16th May 2019 was the very first time that this court handled the matter during the mention for directions in respect to the hearing of the two pending application and a preliminary objection.

15. As I have already stated in this ruling, the defendant's desired to have its preliminary objection canvassed first before the two applications while the plaintiff was agreeable to canvassing both the applications and the preliminary objection by either oral or written submissions. The court directed parties to file written submissions on the pending applications and the preliminary objection. It would then appear that the defendant was not happy with the court's said directions thereby leading to the filing of the application for recusal.

16. My finding is that the instant application does not meet the threshold of the conditions under which a judge may recuse himself or herself from hearing a matter as were stated in *Re- Estate of Gitere Kahura (Deceased)* (supra). I further find that the allegation of bias or impartiality on the part of the court is far-fetched and has not been proved by any hard facts or at all. I find and hold that this court did not, in giving directions on the matter, make any orders that can be construed to be adverse, prejudicial or against any party to the suit so as to justify the claim that the judge's conduct did not accord with the Judicial code of conduct, the rule of law and the Bangalore Principles as alleged by the defendant.

17. I find that there is no justification or merit in the defendants application dated 16th May 2019 and I hereby dismiss it with costs to the plaintiff.

Dated, signed and delivered in open court at Nairobi this 31st day of October 2019.

W. A. OKWANY

JUDGE

In the presence of

Mr Langat for defendant

Mr Ondieki for the plaintiff

Court Assistant – Sylvia