REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 119 OF 2016

GITERE KAHURA INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KENNETH KIMARI GITERE.....1ST DEFENDANT/RESPONDENT

DAVID WAKANGU GITERE.....2ND DEFENDANT/RESPONDENT

NATIONAL BANK OF KENYA LTD.....3RD DEFENDANT/RESPONDENT

CHABRIN AGENCIES LIMITED.....4TH DEFENDANT/RESPONDENT

CO-OPERATIVE BANK OF KENYA LTD....5TH DEFENDANT/RESPONDENT

LUCAS WAITHAKA GITERE.....6TH DEFENDANT/RESPONDENT

RULING

1. There are various applications and a preliminary objection (PO) pending determination in this matter. When this matter was before ***F. Ochieng, J*** on ***16th June 2016***, the learned judge directed that: "***the PO be dealt with first, as it was filed first in time. Secondly, the PO raises issues of the competence of suit itself."***

2. The learned judge proceeded to order the parties to file their respective written submissions to that PO.

3. The plaintiff through its notice of motion dated ***20th September 2016,*** sought prayers for review of the directions on the hearing of the PO given by ***F. Ochieng, J*** on ***16th June 2016.*** By that application, the plaintiff also sought prayer for ***F. Ochieng, J*** to disqualify himself from hearing pending application in the matter. That application alongside others that are pending in this matter have not been heard to date.

4. The learned ***F. Ochieng, J*** subsequently ordered for the hearing of an application where the plaintiff seeks to bar the advocate for some of the defendants be heard before the hearing of the PO.

5. When this matter was before me on ***2nd July 2018*** and having received the learned advocate's submissions on which matter should proceed for hearing, I directed that the PO be heard together with an application which was yet to be filed by the 5th defendant, which application was stated by the advocate for the 5th defendant to touch on the validity of the suit.

6. The plaintiff filed a notice of motion dated ***17th July 2018*** and seeks, in prayer no. 1, that I recuse myself from further proceeding to hear this matter. That prayer is supported by the depositions of ***Anne Wanjiru Gitere*** in her affidavit sworn on ***17th July 2018***. It is important to reproduce some of those depositions which I do as follows:

> *"16. That however, when the matter came up in court on 2nd July, 2018, before Her Ladyship Justice Kasango, some proceedings took place, which have necessitated this application for the Judge to disqualify herself from hearing both applications and also from trying this suit.*
>
> *17. That I am advised by my advocates, Messrs Gacheru Nganga and company Advocates, and I verily believe the same to be true that:-*

a. what transpired on that day constitutes, within the meaning of the rule in Shilenje v Republic [1980] KLR 132 at page 134, and Attorney General of the Republic of Kenya vs Anyang' Nyong'o and others, East African Court of Justice Application No. 5 of 2006, incidents which have happened, and which though they may be susceptible of explanation and have happened without there being any real bias in the mind of her Ladyship are nevertheless such as are calculated to create in the mind of the Plaintiff/Applicant a reasonable apprehension that it may not have a fair and impartial trial of this suit; there are circumstances that are likely to undermine or that appear to be likely to undermine her Ladyship impartiality in trying and determining the suit. Herein below I enumerate those specific incidents;

b. the court exceeded jurisdiction of the court as an umpire in the manner described in Lambert Houreau v R [1957]EA, 575;

c. Our right, under Article 50 of the Constitution, which guarantees us, the plaintiffs, enjoyment of the right to a fair hearing was contravened by the proceedings of that day;

d. this is a suitable case for her Ladyship to recuse herself.

18. That on that day, when the matter came up for highlighting submissions on the issue of whether AGN Kamau Advocates should continue acting for the 1st, 2nd and 6th defendants , the Honourable Justice declined to hear the issue and directed that the said defendants' preliminary objection dated 25th April 2016, be heard first; the implication of this is that the Judge has already dismissed the objection even before hearing it thus allowing the firm of AGN Kamau to continue acting for the said defendants in prosecuting the preliminary objection.

19. That in directing that the preliminary objection, on being requested by the said AGN Kamau, be heard first, the Honourable Judge disregarded/reviewed the earlier directions of Hon. mr. Justice Ochieng who had directed that the objection of AGN Kamau acting for the defendants be heard first before his preliminary objection dated 25th April, 2016. This she did without the issue/application having been withdrawn.

20. That the Honourable Judge whilst readily entertaining the request by AGN Kamau Advocate who interrupted the counsel for the plaintiff, ignored on oral application by our counsel to amend the plaint and the Notice of Motion dated 18th March, 2016; and allowed the request by AGN Kamau to have the preliminary objection heard first.

21. That again, the Honourable Judge, on an informal application/request by AGN Kamau cancelled the certificate of urgency, which had certified the plaintiff's application dated 11th June, 2018 as urgent for hearing on 5th July, 2018; with the consequence that she took out the application out of the hearing list of 5th July, 2018; without hearing the applicant on the matter.

22. That the Honourable Judge also entertained submissions on an application of security of costs against the plaintiff which was yet to be filed by counsel for the 5th Defendant and proceeded to direct him to file the same, whilst ignoring applications on record filed by the plaintiff and for which directions had been given by the court earlier that they be heard first even before the preliminary objection.

23. That the Honourable judge also declined to give the plaintiff leave to appeal and to stay these proceedings; the effect of this decision is that those far reaching directions given on that day are final; the higher court will not have a chance to review them and this court will now proceed to hear the preliminary objection filed by the firm of AGN Kamau on 18th July, 2018.

24. That I verily believe that the above incidents and decisions of 2nd July, 2018, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of her Ladyship are nevertheless such as are calculated to create in the mind of the Plaintiff/Applicant, a reasonable apprehension in me and my co-plaintiff that we may not have a fair and impartial trial of this suit.

25. That I also verily believe that the above incidents and decisions, which happened are likely to undermine or appear to be likely to undermine her Ladyship's impartiality in trying and determining this suit.

26. That my Advocates on record further advise me and I verily believe the advice to be true and correct that a party to a suit has a right to seek disqualification of a judicial officer in the course of proceedings where such events have occurred as will make a reasonable person conclude that a fair hearing will not take place."

ANALYSIS

7. I have considered the learned advocates oral submission in respect of the application under consideration. What I understand the plaintiff to argue is that in giving the directions that I made on ***2nd July 2018***, that I firstly reviewed the directions of ***F. Ochieng J***, and secondly that I allegedly denied the plaintiff a fair hearing.

8. In the case of Attorney General of Kenya vs Peter Anyang Nyong'o & Others, East African Court of Justice Application No. 5 of 2007 (Ref. No. 1 of 2006), the East African Court of Justice stated at paragraphs 34 and 35 as follows:

"There are two categories of scenarios. In the first, where it is established that the judge is a party to the cause or has relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause..

In the second category, where the Judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances or relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination."

9. It will be seen that the East African Court of Justice was clear that an applicant has an obligation to establish bias exists and it is not merely in his imagination. The applicant needs to appreciate that a Judicial Officer does not report to work with a preconceived idea of showing biasness to one of the parties. No. On the whole, Judicial Officers are driven by genuine intent of dispensing justice bearing in mind the constitutional provision that Justice shall not be delayed. Therefore, a Judicial Officer will in those circumstances be irked by suggestions such as in this case. It cannot be said that by the court giving directions in a matter there is obvious biasness. What the applicant is entertaining, by its application, is apprehension that I may be biased. The test of biasness was set by a South African case **The president of the Republic & 2 Others v. South African Rugby Football Union & 3 Others, (Case CCT 16/98)** where the court stated as follows at paragraph 45:

"The test of bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in the dissenting judgment by de Grandpre J in Committee for Justice and Liberty et al v National Energy Board:

"…the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…[The] test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude."

…the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case….

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application."

10. In considering the plaintiff's application, I will bear in mind the caveat set out in the following cases: **Galaxy Paints Company Limited v. Falcon Guards Limited [1999]eKLR**, the Court of Appeal held as follows at page 6:

"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."

A similar holding was made in **Kaplan & Stratton v. L.Z. Engineering Construction Ltd & 2 Others [2001] eKLR**, where the Court of Appeal stated as follows:

"Shah JA in Kenya Shell Limited v James G.K. Njoroge (Civil Application No. Nai 292 of 1998) (unreported) in which case there was an informal application for his disqualification referred to an English House of Lords decision in Locabail Ltd v Bayfield Properties Ltd [2000] 1 AII. E.R. 65. At page 77 of that report their Lordships referred to a passage in the judgment of Callaway JA in the case of Clenae Pty v Australia & Newzeland Banking Group Limited (1999) VSCA 35, Vic SC wherein Callaway JA observed at para 89 (e):

'As a general rule, it is the duty of the judicial officer to hear and determine the case allocated to him or her by his or her head or jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."

In **RPM v PKM [2011] eKLR** it was rightly held as follows:

"I am aware of the maxim that justice must not only be done, but that it must also be seen to be done. All judges, like Ceasar's wife, should be above suspicion. But it would be chaotic if any allegation of bias, whether buttressed with sufficient grounds or whether baseless, were to be said to be sufficient to disqualify a judge from hearing a matter. If that were the case, all that a mischievous litigant would need to do to stall or stifle hearing of court proceedings would be to make allegations however flippant and without basis against a judicial officer presiding."

11. Having considered the decisions cited above, I find that the plaintiff has failed to show bias by this court in any manner. I wish to state that the directions given on ***2nd July 2018*** were based on my understanding that the issue of jurisdiction such as is the issue raised in the PO herein is a threshold issue and should be entertained in priority. This is what was stated in the case **Owners and Masters of The Motor Vessel 'Joey' vs. Owners and Masters of The Motor Tugs 'Barbara' and 'Steve B' [2008] 1 EA 367** where the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…As soon as that is done, the court should hear and

dispose of that issue without further ado."

12. Having found that the plaintiff has failed to show the bias, and having stated that an issue on jurisdiction should be determined in priority, I direct as follows:

*a. The Preliminary Objection dated **25th April 2016** shall be heard by this court in priority to all other pending applications. To that end, the directions given on **2nd July 2018**, are amended.*

*b. The plaintiff shall bear costs of the application dated **17th July 2018.***

c. At the reading of this ruling, the court will give a date for the hearing of the Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE