



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI HIGH COURT**

**CIVIL SUIT NO 131 OF 2015**

**ANITA CHELAGAT O'DONOVAN.....1<sup>ST</sup> PLAINTIFF**

**ESTATE OF TERENCE PETER O'DONDOVAN.....2<sup>ND</sup> PLAINTIFF**

**ESTATE OF JOYCE JEROTICH O'DONDOVAN.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**FREDRICK KWAME KUMAH.....1<sup>ST</sup> DEFENDANT**

**ZIPPORAH WAIRIMU WANJOHI .....2<sup>ND</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 11.1.2016, the Court attention was drawn to a letter dated 8.1.2016 authored by Plaintiffs/Applicants' advocate with the sole objective of having the trial judge recuse himself from the matter, citing the case of **THUGI RIVER ESTATE LTD & ANOTHER VS. NBK LTD & 2 OTHERS**. It sought the matter to be mentioned in chambers to enable the Plaintiffs' advocate make an application as per their instructions to have judge recuse himself from the matter.
2. After hearing parties advocates, Court directed the matter to be mentioned in Chambers to enable the Plaintiffs' advocate to make the application.
3. In Chambers, the Court and the Defendants/Respondents No. 1 and 2 were supplied with a complaint made to the Chief Justice over the proceedings of 16.12.2015 in the instant matter.
4. The Principle complaint is that the Court '**created**' an eviction order while the matter was not listed and in absence of the Plaintiffs and their representative. It was on that basis the Plaintiffs notified the Chief Justice that they would not expect fair hearing before the trial judge and thus seek his intervention by way of allocating the matter to another judge to adjudicate.
5. The email to the Chief Justice is dated 5.1.2016. By the time the complaint was made the Plaintiffs had by an application dated 22.12.2015 procured an Order of stay of the eviction Orders and fixed the application to set aside Orders for interparte hearing on the 11.1.2016 before the trial Judge. The Orders were made by Ochieng J. during the vacation on 23.12.2015.
6. On 11.1.2016, the Plaintiffs' advocate sought the Court to recuse itself on the basis of the content of the letter of 8.1.2016 or court to direct a formal application to be filed for recusal as set out in the cited case of **THUGI RIVER ESTATE LTD**; where the Court held;

***“The procedure in application for recusal is well settled now. The usual procedure in application for recusal is that the counsel for the Applicant seeks a meeting in Chambers with Judge(s) in the presence of his/her opponent. The grounds for recusal are put to the judge who is given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge, the Applicant would, if so advised move the application in open Court”***

7. The advocate relying on the above authority stated that since his clients have filed complaint against the judge over the proceedings of 16.12.2015, the instructions were that the Plaintiffs are apprehensive that they will not get a fair hearing. They sought thus the judge to recuse himself or move application to court for hearing. The Advocate intimated that since the client is in U.K, he would need 3 days to file and serve a formal application.
8. Mr. Ogeto who appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents and held brief for Mr. Okachi for the 3<sup>rd</sup> Defendant opposed the application. Mr. Ogeto set out the background of the matter particularly from 2.12.2015 when the application heard on 16.12.2015 was fixed by consent for hearing. The bulk of Mr. Ogeto’s submissions and address to the Court is contained in his replying affidavit sworn on 6.1.2016 responding to the application by the Plaintiffs for setting aside the Orders of 16.12.2015.
9. The emphasis is on the events of 2.12.2015 and 16.12.2015. The matter was scheduled for hearing for application for eviction on 2.12.2015. The Plaintiffs advocate requested for adjournment and sought 14 days to file and serve replying affidavit to oppose the same application. The parties agreed the hearing of the same application to be heard on 16.12.2015 and the court granted the Plaintiffs’ advocate 14 days to file and serve a replying affidavit.
10. On 16.12.2016, the matter was not listed for hearing. At 10am Mr. Ogeto and Mr. Okachi appeared in court and raised the issue of the failure to list the matter in the daily cause list.
11. The Court enquired the whereabouts of the Plaintiffs or their representative but non was present. The Court was informed that the court file could not be traced and thus the incharge of the registry was called to explain in open court.
12. After hearing his explanation and on application by Mr. Ogeto, the court directed a skeleton file to be reconstructed and the matter to proceed. The court was informed by then that, the Plaintiffs had neither filed or served a replying affidavit and thus the matter proceeded ex parte.
13. It is in light of the above circumstances the trial judge is asked to recuse himself. At this stage, I can only give directions as to whether I will recuse myself at this juncture or allow the matter to go to open court to be canvassed on recusal at a second stage in terms of the practice set out in **THUGI RIVER ESTATE LTD and J.R CASE NO.124/2014** cited therein.
14. It is trite law that a party has a right to make an application for a judge to recuse himself. In such an event, the court is obliged to consider it; the test for determining such an application is now set out by our courts in several case of which Mr. Ogeto has availed to the court during his submissions.
15. In **REPUBLIC vs. JACKSON MWALULU & others C.A** in Civil Appeal No.310/2004 (unreported), the Court held that, the test is **“whether a reasonable person seized of the facts will conclude that the judge hearing the matter will be biased”**. In **REPUBLIC VS. DAVID MAKALI & OTHERS C.A CR. APPLIC 301/2004** (unreported) Tunoi J.A stated that;

***“the test is objective and the fact constituting bias must be specifically alleged and established,,,where such allegations are made, the court must carefully scrutinize the affidavit on either side,,,”*** .

16. In both cases, the court emphasized the need to disallow frivolous applications which would tend to undermine the public confidence in the Judiciary. The complaint to the Chief Justice confirms that neither the advocate nor the Plaintiffs appeared in court but only alleges a lawyer’s clerk one **JEPTANUI KATWA** was in court up to 10.30am. She never got any advocate to enquire about the matter neither from the court nor from the court clerk.
17. The apprehension that the Plaintiffs will not get a fair hearing in this court is not based on any cogent ground but what court would call a figment of Plaintiffs’ imagination. Although the Plaintiffs’ advocate pointed out that the recusal request is not based on the Judge’s integrity, what

- court can see between the lines is the fact that since the Plaintiffs had lost application in a previous ruling in this court, the court is likely to be biased.
- 18.The court cannot recuse itself on the basis of a previous decision which party perceives to have been against it. See **THE PRESIDENT OF THE REPUBLIC & OTHERS Vs. SOUTH AFRICAN RUGBY FOOTBALL UNION & OTHERS(CCT 16/98)**.
- 19.In conclusion the court holds that a case for recusal has not been established. However to unlock the matter from being bogged down in disqualification applications, I direct the matter be mentioned on 14.1.2016 before the Presiding Judge for allocation of the same matter to another Judge for expeditious disposal of application dated 22.12.2015.
- 20.Costs in the cause.

**Dated, Signed and Delivered in Court at Nairobi this 12<sup>th</sup> day of January, 2016.**

.....

**C. KARIUKI**

**JUDGE**