



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 90 OF 2008

BERNARD WACHIRA KIBUI.....PLAINTIFF/RESPONDENT

VERSUS

DAVID MACHARIA MWANGI.....1ST DEFENDANT/APPLICANT

JANE MUGUTHI KAREGI.....2ND DEFENDANT/APPLICANT

KASARANI SETTLEMENT LIMITED.....3RD DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. Vide the Notice of Motion dated 4th November 2021, the Defendant's Advocate (not the Defendant) has sought for following Reliefs:

- i. That the Honourable Judge Mr. Justice Mboya Oguttu Joseph do Recuse himself from hearing and/or handling the case herein any further.
- ii. That costs of the Application be provided for.

2. The subject Application is curiously supported by the Affidavit of One, Charles Mwangi Gachichio, who is the Defendants' Advocate and in respect of which the said advocate has made various averments, averments in support of the Application for recusal or better still, for the disqualification of the Judge.

3. Upon being served with the subject Application the Plaintiff/Respondent herein filed a Replying Affidavit sworn on the 16th November 2021, in respect of which same has traced the chronology of events starting with the virtual mention of the matter up to and including the formal hearing and/or proceedings, which were conducted in open court.

DEPOSITION BY THE PARTIES

4. Vide the Supporting Affidavit sworn by the Defendant's advocates, same has stated as hereunder;

5. The subject matter was scheduled for hearing on the 26th October 2021 and when the matter was called out, I applied for adjournment and sought to have the matter taken out of the hearing list.

6. It is further averred that upon the Application for adjournment, the court declined to grant me the adjournment and directed that the matter must proceed for hearing as scheduled, because the matter was an old one.

7. It is further averred that in ordering and/or directing the matter to proceed for hearing the court was being insensitive to the Defendant, insofar as most of the Defendant's witness had passed on and therefore needed time to reorganized and/or strategize the Defendants case.

8. Nevertheless, it is further averred that when the hearing commenced, the Plaintiff testified, was cross examined and re-examined and that during the Plaintiffs testimony, cross examination and re-examination, the judge allowed the Plaintiff's counsel to ask leading questions.

9. It is further averred that however when the Defendants testified, the judge refused to allow me to ask leading questions and the judge had similarly declined to allow me to produce witness statements of witnesses, who had passed on.

10. On the other hand, it has further been averred that during cross examination the Defendant was not allowed to explain his responses and was informed that he must respond to the question put unto him and not to offer any explanation.

11. Further, it has also been averred that when counsel started re-examination same was reprimanded and barred from asking leading questions and touching on some Documents.

12. Based on the foregoing averments, counsel for the Defendant has therefore sought for the recusal of the judge because according to him the judge has become partial and shall therefore not offer justice to the Defendant.

PLAINTIFF/RESPONDENCE RESPONSE:

13. The Plaintiff/Respondence has averred that after the Defendant's attempt to adjourn this matter was declined, the Defendant's advocate became dissatisfied and/or displeased with the matter proceeding.

14. Nevertheless, it has been further averred that the bone of contention arose during the re-examination, when counsel for the Defendant sought to introduce new issues that were not touched on or addressed during the cross examination.

15. Further, the Plaintiff/Respondent has averred that when the Defendant's advocate insisted on introduction of new issues and asking leading question during re-examination, his advocate raised an objection as to the validity of the new evidence that was being raised in re-examination and the asking of leading question.

16. The Plaintiff / Respondent has further been averred that the objection that was taken by his (Plaintiff's/Respondent's) counsel, was responded to by the Defendants' advocate and same was thereafter ruled upon by the court.

17. It has been averred that when the objection was upheld, the Defendant's advocate instantly sought for the disqualification or Recusal of the judge.

18. In a nutshell, the Plaintiff/Respondent has averred that the Application for recusal is a delaying tactic, which the Defendant's/Applicant's advocate is seeking to employ, so as to defeat and or obstruct the expeditious conclusion of the subject matter.

SUBMISSIONS BY THE PARTIES:

19. Upon the objection by the Plaintiff/Respondent's counsel, which related to the introduction of new issues during the re-examination being upheld, the Defendant's Advocate made an oral Application for disqualification of the judge.

20. Following the making of the said Application, counsel for the Plaintiff opposed same and indicated that the Defendant/Applicant, was keen to delay and/or otherwise defeat the expeditious conclusion of the subject matter.

21. Be that as it may, the court ordered and directed that an Application for disqualification of a judge cannot be made orally or informally and in this regard, an order was made for the filing of the formal Application, which was indeed filed vide the Application dated 4th November 2021.

22. On the 24th November 2021, the Notice of Motion Application came up for directions, whereupon it was ordered and/or directed that the Application be canvassed and/or disposed of by way of written submissions. In this regard, time lines for the filing and exchange of submissions were prescribed and/or circumscribed.

23. Suffice it to note, that the Defendant/Applicant filed his written submissions on the 2nd December 2021, whereas the Plaintiff/respondent filed his written submissions on the 10th December 2021. For clarity, the two sets of written submissions are duly on record and same have been considered.

ISSUES FOR DETERMINATION:

24. Having reviewed the Notice of Motion Application dated the 4th November 2021, the Supporting Affidavit thereto, the Replying Affidavit sworn by the Plaintiff/ Respondent, as well as the written submissions filed by and/or on behalf of the parties, I am of the considered view that only two issues arise for determination as hereunder:

i. Whether an Advocate can swear an Affidavit in support of an Application for recusal of a judge where Bias against a Party is alleged.

ii. Whether the circumstances of the subject matter warrant Recusal by a Judge, either as sought or at all.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether an Advocate can swear an Affidavit in support of an Application for Recusal for a judge where bias against a Party is alleged.

25. The subject Application is premised and/or based on the allegation that the judge has shown favoritism to and in favor of the Plaintiff/Respondent, by allowing the Plaintiff's/Respondent's advocate undue latitude in tendering his evidence and in asking leading questions.

26. On the other hand, it has been contended that the judge showed bias against the Defendant, by restricting the scope of answers that the Defendant was obliged to give in response to questions in cross examination and denying the Defendant the opportunity offer explanation to questions asked in cross examination.

27. It has also been stated that in upholding an objection to a leading question that was being asked in re-examination, the judge again showed bias against the Defendant/Applicant.

28. In short, the person against whom bias is alleged to have been shown is the Defendant and not the Defendants' advocate. For clarity, the case before the court belongs to and is owned by the Party.

29. Consequently, if any bias and/or prejudice were to arise, such bias and/or prejudice will only affect the litigant and not the advocate. In this regard, the bias would be against the Defendant/ Respondent and not otherwise.

30. In the premises, the issues as to whether or not there is a bias is a question of evidence, which is contentious and/or bound to be disputed. In this regard, such evidence can only be tendered and/or adduced by the litigant and not the advocate.

31. Suffice it to say, that where one makes serious allegations including allegation of a judge being compromised, biased and passionate in a matter, the deponent of such an Affidavit is likely to be subjected to cross examination and such a scenario, if the Affidavit is sworn by an advocate, same cannot be an advocate and a witness in the same matter.

32. Be that as it may, the point that I am making is that the Affidavit that has been sworn curiously by the Defendants' advocate and most probably, without the Defendants knowledge and instruction, is bad in law to the extent that the Advocate/ Deponent, delved into Evidentiary issues, which are in any event contentious.

33. In the premises, the Affidavit in support of the Application dated the 4th November 2021, is not only misconceived and Bad in Law, but legally untenable.

34. In support of the foregoing observation, I invoke and adopt the position of the law as captured in the Decision in the case **Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR**, where the Honourable Court observed as hereunder;

“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact.

By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular.

In **Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd**, it was held that .

“.....it is not competent for a party's advocate to depose to Evidentiary fact at any stage of the suit”.

In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.”

35. Based on the foregoing, I find and hold that the Affidavit by one, Charles Mwangi Gachichio, Advocate, is incompetent, Bad in Law and same be and is hereby struck out.

36. Consequently, the Notice of Motion Application beforehand, is left bare and devoid of any Evidential anchorage. In this regard, the subject Application is therefore bereft of any Legal foundation.

ISSUE NUMBER 2

Whether the circumstances of the subject matter warrant Recusal by a Judge, either as sought or at all.

37. Though the Parties in the subject matter have exchanged rivaling Affidavits pertaining to and/or concerning the circumstances leading to the Application to recusal, it is imperative that the Record be put straight.

38. In this regard, it is worthy to note that other than the Application for adjournment, which was made by and/or at the instance of the Defendant and which Application was heard and declined during the call over, it is appropriate to state that both Parties indeed appeared in open court and the subject matter took off for hearing.

39. It is also appropriate to point out that the Plaintiff's case was heard and concluded, without any hitches. For clarity, the Plaintiff adopted his witness statement, produced the Bundle of Documents and was thereafter extensively cross examined by the Defendant's Advocate on record.

40. Suffice it to observe, that the Plaintiff was equal re-examined and during the re-examination, no objection was taken to any question and/or issues, whatsoever.

41. Upon the close of the Plaintiff's case, it was now the turn of the Defendant and in this regard, it is imperative to note that the Defendant similarly took oath and adopted his witness statement and also produced the various Documents contained in his bundle of documents except, the witness Statement of the Witnesses who were indicated to have passed on/ Died.

42. After the Evidence in chief by the Defendant, same was subjected to extensive cross examination by counsel Mr. Wamwayi, acting for the Plaintiff/Respondent. For clarity, I need to point out that up to and including the point of cross examination, no dispute and/or contest had arisen.

43. Be that as it may, when counsel for the Defendant rose to commence re-examination, same started by asking leading question, which attracted various objections from Counsel for the Plaintiff.

44. However, counsel for the Defendant remained adamant and insisted that he had a right to ask whichever question that he pleases and at this juncture, the court called upon the counsel for the Plaintiff to formally ventilate the objection, so that same could be captured and/or reflected in the record.

45. Pursuant to the foregoing, the Plaintiffs' Counsel formally raised the Objection, in opposition to leading questions and to the New evidence that was being raised by the Defendant, during the Re- Examination.

46. Subsequently, the court invited the Defendant's Counsel to respond to the objection and indeed the court was treated to a response and thereafter the court made a ruling, whereupon the objection was upheld.

47. The foregoing position reflects the actual status of the proceedings that transpired before the court, shortly before the Advocate for the Defendant became annoyed, provoked and visibly angry, merely because the court had over ruled him.

48. In the premises, the question that arises, is whether a Decision by the Judge, one way or the other, even if one party is aggrieved, unhappy, annoyed or otherwise, should found a basis for Recusal and or disqualification.

49. To my mind, a Judge has a Duty to sit and discharge his/her constitutional mandate and the Judge is obliged to disqualify and recuse himself/herself from a matter, only where the grounds for recusal meet the objective test of Reasonable apprehension of bias and not otherwise.

50. In support of the foregoing position, I beg to adopt and restate the holding of the East Africa Court of Justice in the decision in the case of Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 when it stated:

“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say,

a. litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the Judge.

b. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable, but also fair minded and informed about all the circumstances of the case.”

51. As pertains to the subject matter, I am afraid that the Application which has been propagated by the Defendants' advocate, does not meet the objective test. Indeed, the Application is a scurrilous attack on the person and Office of the Judge, which is merely aimed to camouflage the inability of counsel to appreciate the scope and legal parameters of what re-examination entails.

52. On the other hand, I must also point out that Judges ought not to readily accede to request for recusal and/or disqualification, merely because a Judge has made a decision that is not palatable to a Party or a Party's counsel. For clarity, if that were the case, then cases would not be concluded and Parties would have extended latitude for forum-shopping.

53. In support of the foregoing observation, I invoke and adopt the holding the Court of Appeal in the case of Galaxy Paints Company Limited v. Falcon Guards Limited [1999] eKLR, had held thus:

“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.”

54. In my humble view, the Defendants’ advocates has not satisfied me that there exists any iota of Evidence of bias and/ or any sound basis, to warrant my disqualification and recusal from hearing the subject matter.

55. Perhaps, I also need to mention that the subject matter was filed in the year 2008 and therefore same is more than 14 years and hence the need, to expedite the hearing and eventual determination thereof, without engaging in sideshows.

FINAL DISPOSITION:

56. Having dealt with the two issues for determination, I come to the conclusion that the subject Application was a deliberate ploy by counsel for the Defendant, to avert and or defeat the scheduled hearing and therefore obtain further latitude to continue delaying the subject matter.

57. Be that as it may, the subject Application has not met and/or satisfied the requisite threshold to warrant the recusal and/or disqualification, either as sought or at all.

58. In the premises, the Notice of Motion Application dated the 4th November 2021, is Devoid of merits. Consequently, same be and is hereby Dismissed.

59. As pertains to costs, I wish to observe that the subject Application, appears to have been propagated by the Defendant’s advocate, albeit without the authority of the Defendant, to the extent that the Defendant has not sworn any Affidavit. In this regard, it would be unfair to condemn the Defendant to bear the costs of the Application.

60. Contrarily, it would have been appropriate to condemn the Defendant’s advocates, to bear the costs. But, the court must rise above certain emotional feelings and remain objective, in the discharge of its constitutional mandate.

61. Consequently, the order that commends itself to me, is that costs of the Application shall abide the determination of the suit.

62. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Wamwayi for the Plaintiff/Respondent

Mr. Gachichio for the Defendant/Applicant