



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 181 of 2008

ELIZABETH NYAMBURA NJUGUNA

FRANCIS KAMAU NJUGUNA (suing as the administrator of the Estate of

NJUGUNA MWAURA MBOGO (Deceased)APPLICANTS/PLAINTIFFS

VERSUS

JUMAA FARMERS COMPANY LIMITED.....1ST RESPONDENT/DEFENDANT

JEREMIAH MUTURA KINYANJUI.....2ND RESPONDENT/DEFENDANT

RUTH WANJIRU.....3RDRESPONDENT/DEFENDANT

JONAH KIMARU.....4TH RESPONDENT/DEFENDANT

JOSPHAT MBURU.....5TH RESPONDENT/DEFENDANT

EZEKIEL KIARIE.....6TH RESPONDENT/DEFENDANT

ELIJAH MACHARIA.....7TH RESPONDENT/DEFENDANT

ENDAO COMPANY LIMITED.....8TH RESPONDENT/DEFENDANT

RULING

By a letter addressed to me personally, instead of the Deputy Registrar or the Chief Executive Officer, Dickson Yatich has alleged that:

- i) there was no clear reason or basis for the change of a hearing date from the original 19th November, 2012 to today (6th November, 2012);
- ii) from the previous conduct of these proceedings, the author and other members of the 8th defendant have noticed that the court is biased against their advocates and in favour of advocates for the other parties;
- iii) there appears to be some interest in giving preference to this case by the court, and;

iv) as a result of the above, the author and members of the 8th defendant feel they will not get justice from this court.

I must say from the on set that I had seen this coming from the manner the 8th defendant has treated the proceedings before this court. The record is clear that the trial in this matter started before me on 9th November, 2009 and has proceeded smoothly upto 15th July, 2010 without a single hitch.

On that day (15th July, 2010), after the 8th defendant's witness (Shadrack Cherogony) had been cross-examined, Mr. Machage sought time to re-examine the witness. Since 15th July, 2010, there have been numerous applications for adjournment by the 8th defendant or their counsel. There have been also some applications in between.

For the last two years, this court has accommodated the 8th defendant when all that remained was re-examination of Mr. Shadrack Cherogony, which Mr. Machage had indicated to the court would take only one (1) hour.

In view of the many unsuccessful applications before me, it was expected, naturally that the 8th defendant and counsel would feel uncomfortable before me.

The proverbial straw that broke the camel's back started on 26th July, 2012 when the parties appeared before me for fixing a hearing. The 13th December, 2012 was proposed on behalf of Mrs. Ndeda who along with Mr. Machage appear for the 8th defendant. Counsel for all parties then settled for 15th October, 2012. On that day, Mr. Machage informed the court that Mr. Shadrack Cherogony was unwell and had been given a bed rest.

After protracted arguments, the 19th November, 2012 was taken for re-examination of Mr. Shadrack Cherogony. But the following day, Mr. Waiganjino for the plaintiff moved the court to have the date brought forward for the reasons:

- i) that Mr. Machage had indicated to the court he would avail Mr. Shadrack Cherogony for re-examination in one month's time and that the new date, 19th November, 2012 would be beyond one month and secondly;
- ii) that the trial judge may not be available to hear the case, the judge having applied for the position of judge of the Court of Appeal.

It was ordered that the matter be mentioned on 18th October, 2012 after Mr. Machage and/or Mrs. Ndeda had been given notice. Before me on 18th October, 2012 Mr. Wambeyi, advocate appeared on behalf of Mr. Machage and Mrs. Ndeda and did not oppose the change of date.

It is now claimed that Mr. Wambeyi did not have instructions to hold brief for Mr. Machage or Mrs. Ndeda. I cannot see what interest Mr. Wambeyi, would have in, as it were budging into a matter without being invited.

The submissions of Mr. Machage and those of Mr. Waiganjo and Mr. Githui are on record and I do not wish to revisit them. It is not a light matter to ask a judge or for that matter any judicial officer to disqualify himself/herself in a matter where he/she has jurisdiction.

But it is equally true that such objections are not uncommon. Again there is no greater satisfaction for both the litigant and the judge for there to be expression of confidence by the litigant in the judge. The principles on which a judge would disqualify himself/herself were summarized by Tunoi, JA (as he then was) in **Republic V. David Makali & 3 others**, Cr. Application Nos. NAI. 4 and 5 of 1994 in which he quoted Denning MR in the well-known English case as **Metropolitan Properties Co. (FGC) Limited V.**

Lennon & others (1960) IQB 577, as follows:

“That being the position as I see it when the courts, in this country are faced with such proceedings as these, (i.e. proceedings for the disqualification of a judge) it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is in my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or *quasi-judicial* tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal”

In my considered opinion, the allegations of bias has no basis. And I want to assure the 8th defendant that whatever action I have taken or rulings I have delivered in this matter have been on merit and in accordance with the law and in the interest of justice. My allegiance to my oath office is firm and I once again assure the 8th defendant that justice will be served to all parties in this matter. I do not know any party in this matter and I have no personal interest in it, save to ensure that the principle of speedy dispensation of justice as enshrined in the Constitution is achieved.

If today’s date is not convenient, it was for counsel for the 8th defendant to say so – as Mr. Wambeyi did not oppose the new date. I find no reason to recuse myself for the reasons stated and reinstate the 19th November, 2012 for the further hearing of the matter.

Dated, Signed and Delivered at Nakuru this 7th day of November, 2012.

**W. OUKO
JUDGE**