Five Eleven Traders and Auctioneers Through Its Owners Crispus Waithaka v Muses & another (Miscellaneous Application E006 of 2022) [2022] KEELC 3304 (KLR) (13 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3304 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

MISCELLANEOUS APPLICATION E006 OF 2022

LL NAIKUNI, J

JUNE 13, 2022

BETWEEN

FIVE ELEVEN TRADERS AND AUCTIONEERS THROUGH ITS OWNERS CRISPUS WAITHAKA .... APPLICANT

AND

ALI KHAN MUSES .... 1ST RESPONDENT

ESTATE SONRISA LIMITED .... 2ND RESPONDENT

RULING

I. Preliminaries

1. The application that is before this Honorable Court for its determination is the one datedApril 1, 2022 filed by the 2nd Respondent on even date. It is brought under the provisions of article 50 of *the Constitution* of Kenya, section 10 (2) of the *Public Officers and Ethics Act*, the Judiciary Service Code of Conduct and Ethics and all other enabling provisions.

II. The 2nd Respondent's case

2. The 2nd Respondent seeks the following orders:-
   a. That his Lordship Honorable Justice Lucas Leperes Naikuni do forthwith recuse himself from dealing with the proceedings in Misc. Application No. E006 of 2022;
   b. Spent;
   c. That this Honorable Court do grant an order that this Misc. Application No E006 of 2022 be referred to the Hon. Presiding Judge of the Division for reallocation and direction.

3. The application is founded on the grounds, facts, testimonies and averments set out in the 28 Paragraphed Supporting Affidavit sworn by Iwona Strezelecka the director of the 2nd Respondent. For the sake of completeness, I propose to set out the material contents of the deposition in details as follows:

a) Thatthe genesis of the matter before this court is High Court case No. 30 of 2014.

b) Thattwo appeals were heard on this matter emanating from High Court case No. 30 of 2014.

c) Thatpursuant to the Court of Appeal decision, their now exists a matter before the Kwale High Court being Case No. E001 of 2022 where interim orders of stay are in force.

d) That at all times the Adverse parties to the 2nd respondent have been aware of the above, notwithstanding what positions and posturing they may have adopted.

e) Thatit, therefore, came as a surprise when we discovered that the Applicant herein (Five Eleven Traders and Auctioneers through its owner Crispus Waithaka) on or about the 24th January 2022 filed an application being CMCC No. 36 of 2022 Five Eleven Traders Auctioneers and another vs. Ali Khan Muses and Estate of Sonrisa Limited in the Magistrate's Court at Mombasa seeking inter alia orders of eviction as against the 1st and 2nd respondent emanating from High Court Case No. 30 of 2014 filed in the Environment and Land Court Division in Mombasa.

f) Thaton discovery of the filing of the matter at the Magistrates Courts Mombasa, the 2nd Respondent instructed its advocates on record, that is, the firm Oluoch Kimori Advocates to immediately file an urgent application to arrest the situation.

g) ThatI am informed and which information I verily believe to be true, the advocates for the 2nd respondent rushed to the High Court in Mombasa in ELC No. 30 of 2014 by invoking the provisions of section 34 of the *Civil Procedure Act* amongst other appropriate provisions of the law and immediately filed an application under the certificate to stay the Magistrate's orders that purported to execute a decree of ELC No. 30 of 2014.

h) Thatthe Hon. Justice Naikuni who was the duty judge and whilst appreciating that ELC No. 30 of 2014 was the only suit that had jurisdiction over the execution of its own decree pursuant to section 34 certified the matter urgent, stayed the orders and referred the matter to Hon. Lady Justice Matheka who was the presiding judge in ELC No. 30 of 2014.

i) That, I am informed by my advocates on record and which information I verily believe to be true, the issue and conduct of Magistrates purporting to exercise supervisory powers of the Environment and Land Court with equal standing as the High Court and issuing ex -parte eviction orders, demolition orders and varying orders of the Environment and Land Court was raised by members of the Mombasa Law Society and discussed at a bar bench held on 4th February 2022 where Justice Naikuni was one of the judicial officers present and participated and assured members of the bar that the bench was aware and was addressing these types of issues.

j) Thaton 17th February 2022 the Applicant filed this Miscellaneous Application No. E006 of 2022 seeking the same orders on the same grounds it sought in the Magistrate's Court Case Mombasa and which Orders had been stayed by Justice Naikuni making the same reference to the existing High Court Case No. 30 of 2014.

k) Thatthis application came before Honorable Justice Naikuni and Justice Naikuni proceeded to issue ex - parte orders of eviction amongst others.

l) Thatthe Hon. Justice Naikuni was aware of the existence of the High Court Case No. 30 of 2014, as he had issued an order of stay in High Court case No. 30 of 2014 touching on a matter that was identical to what was being presented to him in Misc. Application E006 of 2022 on identical grounds and identical orders. As a prudent judge, he should have called for case file No. 30 of 2014 to verify for himself especially considering the fact that he had also handled a similar application with some parties and issued a stay.

m) That as a judge he should have raised red flags and alarm bells more importantly on the face of the Application in Misc. Application No. E.006 of 2022, was why a party would seek orders to execute a decree in a matter that already exists. More importantly, why not make the application in High Court No. 30 of 2014?

n) Thatthe ex - parte of eviction issued by the Hon. Justice Naikuni has led to the demolition of the 2nd Respondent's property causing losses and damages in excess of a sum of Kenya Shillings Six Fifty Million (Kshs. 650,000,000.00)

o) Thatonce the 2nd Respondent filed an application to set aside the orders issued by this court, on 24th February 2022 Hon. Justice Naikuni at the hearing of the application admitted in open court that his own orders dated 17th February 2022 had caused confusion and led to the embarrassment of the court.

p) That the Hon. Justice Naikuni's embarrassing action has led to the 2nd respondent losing a lifelong investment of a sum of Kenya Shillings Six Fifty Million (Kshs. 650,000,000.00).

q) Thatthe 2nd Respondent is apprehensive that no fair trial will be had if this cause proceeds before the same judge who issued an ex - parte eviction order despite the fact that he was aware of the mischief of the applicant's application through the 2nd respondent's application dated 26th January 2022 where the Hon. Justice Naikuni's issued stay orders staying the orders of the Magistrate's Court which were similar as the one he issued herein coupled with the deliberations between the bar and the bench held on 4th February 2022 in respect of ex - parte eviction orders.

r) Thatthe respondent have lost total confidence in the court's independence and ability to conduct a fair hearing in this cause on the ground that they have unjustly suffered in that, fact immediately surrounding the Honorable judges ex - parte orders were within the honorable judges knowledge but the honorable judge chose to improperly cast aside those facts which he was aware of thereby greatly prejudicing and compromising the position of the 2nd Respondent in this cause and to the overall case of the 2nd Respondent.

s) Thatthe 2nd Respondent is further apprehensive that the decision already made by this court will be at play in the subsequent hearing not only in this cause but the matter before the Kwale High Court.

t) That as such, I believe that this court will not discharge its mandate faithfully, independently and justly in accordance with the oath of office which mandates and requires the judge's conduct to be completely beyond reproach, and to enhance confidence of the public and litigants in the administration of justice.

III. The Replying Affidavit by the Applicant

4. The application is opposed vide the 15 Paragraphed Replying Affidavit dated April 4, 2022 of Crispus Waithaka, the Applicant herein. He deposed that he followed all the proceedings in this matter and nowhere did the court state that its own decision has caused confusion and thereby bring embarrassment on its own face as alleged by the Applicant. He deposed that the allegation that the order of stay was identical to this instant case and the judge sat in a bar-bench meeting deliberating on ex - parte eviction are matters of fact that the 2nd Respondent has not tendered proof. According to the Applicant, the 2nd Respondent failed to demonstrate the correlation between the three (3) multiple and pending suits on the same subject matter namely, the Court of Appeal No. 14 of 2016 (Consolidated with "Civil Appeal No. 32 of 2016 – Estate of Sonrisa Limited , Ali Muses, - v – Samwuel Kamau Macharia, CMCC (Mombasa) No. 36 of 2022, ELC (Mombasa) No. 30 of 2014 and this Miscellaneous application. He deposed that these are matters that have been prosecuted by different parties at different Courts altogether.

IV. Submissions

5. On April 4, 2022 when all the parties appeared before this Court, the learned Counsels were directed to have the application canvassed by way of written submissions. Unfortunately, for reasons well known to the Learned Counsels as at the time of writing this ruling, none of them had filed their written submissions despite the ample time accorded to them. Ideally, this matters ought to be heard in "camera" and in Chambers in order to safeguard the certain professional core values associated with the office of a Judge. These include respect, confidence and integrity.

6. Be that as it may, the Honorable Court will still proceed to pen down its ruling in accordance with the set out timelines.

V. Analysis and determination.

7. I have read through all the pleadings filed herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and other statutory excepts. In order to arrive at a fair, just and informed decision, this Honorable Court has framed three (3) broad salient issues for its determination. These are:-

    a) What are the basic legal grounds and/or parameters required for a Judge and/or a Presiding to disqualify and/or recuse himself/herself.

    b) Whether the application by the Applicant meets the established threshold for a Judge and/or Presiding Officer to recuse himself/herself from adjudicating a proceedings before him in Court.

    c) Whether the parties are entitled to the orders sought.

    d) What are the plausible directions this Court should render in the given circumstances.

    e) Who will bear the costs of the application.

ISSUE No. 1. What are the basic legal grounds and/or parameters required for a Judge and/or a Presiding to disqualify and/or recuse himself/herself.

8. The main issue here is whether I should disqualify and/or recuse myself from dealing with the present matter and other references involving the parties herein. The principles governing recusal in this

jurisdiction are not well settled. In the case of "*Jan Bonde Nielson – v – Herman Philipus Steyn & 2 Others* HCCOMM No. 332 of 2010 [2014] eKLR the court observed that:-

> "The appropriate test to be applied in determining an application for a disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in "R – v – David Makali & Others CA Criminal Application No. Nai 4 & 5 of 1995(Unreported) and reinforced in subsequent cases by stating that – when courts are faced with such proceedings for 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...."

9. Further to this, I would, with respect, want to fully associate myself with the Constitutional Court of South Africa when it stated as follows in "The *President of the Republic of South Africa – Versus v The South African Rugby Football Union & Others*, Case CCT16/1998"

> "At the very onset we wish to acknowledge that a litigant and her or his Counsel who find it necessary to apply for the recusal of a Judicial Officer has an unenviable task and the propriety of their motives should not be lightly questioned. Where the grounds are reasonable it is the Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his or her recusal as a personal affront" (Emphasis added).

10. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord denning (1899 – 1999) of England who thus spoke of candour and trust associated with Judicial appointment:-

> "Every Judge on his (or her) appointment discards all politics and all prejudices. Someone must be trusted. Let us be the Judges"

11. It is the right of every party to apply for a Judge and/or Presiding Officer to recuse himself/herself from adjudicating on a matter. This proceeds from the fact that justice must not only be done but must be seen to be done and if a basis is established that justice will not be seen to be done, then the judge must give way. On the other hand, Judges have a duty to sit, hear, and determine cases and in the absence of a direct conflict of interest, they will discharge justice in accordance with the oath of office. Further, the court must be alive to the fact that unwarranted, malicious, and frivolous applications for recusal by disgruntled litigants have the effect of undermining justice.

12. In order to make better progress, it will be prudent for this Court to extrapolate on all the fundamental jurisprudential aspects on this subject matter. Under the provision of article 50(1) of *the Constitution* of Kenya enshrines the right of every person to have a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This right cannot be limited or abridged. Under the provision of article 25 of *the Constitution* categorically states that the right to a fair hearing is one of the fundamental rights that cannot be limited. Articles 50(1) and 25 (c) stipulate –

> "

> "50.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

"25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

c. the right to a fair trial; and ..."

13. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to the provisions of section 5(1) of the *Public Officer Ethics Act*, 2003 contains general rules of conduct and ethics to be observed by judicial officers to maintain the integrity and independence of the judicial service. Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of *the Constitution*.

14. Specifically, under the provision of rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.

15. In cases where a party seeks recusal of a Judge on the basis of apparent bias, the party must establish a factual basis for seeking recusal. The test is objective and not subjective. In the case of "*Tumaini v Republic* [1972] EA LR 441 Mwakasendo Ag. J. stated as that:-

> " In the Justices of Queen's County case, Slade J described 'bias' in the following terms:
>
> "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reason-able evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds-was reasonably generated but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

It is not something that raises doubt in somebody's mind that is enough to cause an order or judgment of justices to be set aside. There must be something in the nature of real bias. The fact that a person has a proprietary or a pecuniary interest in the subject matter before the court which he does not disclose has always been held to be enough to upset the decision of the court, but merely that justices may be thought to have formed some opinion beforehand is not, in my opinion, enough to do so. (Emphasis mine)

16. Mwakasengo Ag. J further gave an excerpt from a decision of Lord Denning where he provided the test for apparent bias. It was stated as follows:-

> " ...Lord Denning ,M.R., has reiterated the same principle in "Metropolitan Properties v Lannon, [1969] 1 QB 577", where at p.599 he paraphrases the authorities on this subject matter in the following words:
>
> "In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it

may be, who sits in a judicial capacity. It does not look to see if there is real likelihood that he would or did, in impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part , then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favor one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favor one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.' (Emphasis mine)

17. In the same legal reasoning, the Court of Appeal in the case of "*Philip K. Tunoi & another v Judicial Service Commission & Another* CA Civil Application NAI No. 6 of 2016 [2016] eKLR adopted the test for recusal propounded by the House of Lords in "*Porter v Magill* [2002] 1 All ER 465, where it was stated that, "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court in "*Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others* SCK Petition No. 4 of 2012 [2013] eKLR where Ibrahim J observed that,

> " The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

18. The principles in the above cited cases buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;

    a) Is a party to the proceedings;

    b) Was, or is a material witness in the matter in controversy;

    c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;

    d) Has actual bias or prejudice concerning a party;

    e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;

    f) Had previously acted as a Counsel for a party in the same matter;

    g) Is precluded from hearing the matter on account of any other sufficient reason; or

    h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.

19. Under Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of the impartiality of a Judge. Regulation 9(1) provides:

> " A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices."

ISSUE No. 2. Whether the application by the Applicant meets the established threshold for a Judge and/or Presiding Officer to recuse himself/herself from adjudicating a proceedings before him in Court.

Brief Facts

20. The Honourable Court has adequately laid down the law and jurisprudence on recusal of a judicial officer. Now to the matter at hand. Before embarking on the issues here for analysis, it is imperative that the Court expounds on the brief facts to this matter. Upon conducting deep research, the Court on its own volition has now come to appreciate that this matter has much more deeper roots than what is being played here at a very peripheral and surface impression. It is a case of a prolonged litigation over the same subject matter.

21. The whole of this conundrum derives its roots from the parent or primary suit being "ELC No. 30 of 2014 *Samuel Kamau Macharia v Ali Khan Ali Muses, Estate of Sonrisa Limited & Land Registrar Kwale*. This suit was filed by the Plaintiff against the Defendants before this court over the issue of ownership, allegations encroachment and trespass of into the suit property ostensibly meted by the Defendants. It was the Plaintiff's case that he is the registered owner of Kwale/Galu/Kinondo/50 and that the 1st and 2nd Defendants who averred to be the registered owners of Kwale/Galu/Kinondo /48 had encroached on his land. After an extremely protracted hearing, this Court (then the late Justice S. Mukunya) delivered its judgement in favour of the Plaintiff on 13th October 2014, which is almost eight (8) years ago and a decree was issued on 6th January 2015. The decree ordered as follows:-

a. That parcel Galu/Kinondo/50 is 1.7 hectares

b. That land parcel Kwale/Galu/Kinondo/48 is 0.9 hectares

c. That the beacons between land parcel Galu/Kinondo/50 and Kwale/Galu/Kinondo/48 be fixed by a surveyor as per the *Land Act* and taking into account the area shown on the respective title deeds.

d. That survey fees shall be paid by the owners of the said properties equally.

e. That any party found to have encroached on the parties land shall sixty (60) days to demolish structures that might have been erected therein and move and vacate therefrom. If the party encroaching fails to move and vacate, the party whose land is encroached shall be at liberty after the said sixty (60) days to demolish such encroaching structures with the help of the court bailiff who will be assisted by the nearest police officer and administration police officer.

f. That the cost of such demolition shall be borne by the party that has so encroached.

g. That any public path between land parcel numbers 50 and 47 accessing the sea shall not be interfered with or blocked.

h. That as far as the 1st Defendant is concerned his title to land parcel number Kwale/Galu/Kinondo/50 is a fraud.

i. That the 1st Defendant shall move and vacate out of the land (title number Kwale/Galu/Kinondo/50 within 60 days

j. That the 1st Defendant shall remove all his structures and remove all debris therefore within that period. In default, the Plaintiff shall after that person move in with the help of the court Bailiff and with the assistance of police and administration police of the nearest police stations and demolish all structures therein. The cost of such demolition shall be borne by the 1st Defendant.

k. That the Plaintiff shall have costs of this suit in as far as it relates to the 1st Defendant. Costs between the Plaintiff and the 2nd Defendant shall abide with the boundary determination by the surveyor as to who has encroached on whose land.

l. That parcel file of Kwale/Galu/Kinondo/50 shall be taken back for safe custody of Kwale Land Registry by the Executive Officer of the Court."

22. Subsequently, and being aggrieved by the afore stated Judgment of this Court, the 1st and 2nd Defendants proffered an appeal to the Court of Appeal sitting at Mombasa. There separate appeals were consolidated and jointly heard and determined. On 24th April 2020, after hearing the appeal, the Court of Appeal delivered its Judgement whereupon it dismissed the 1st Respondent's Appeal (the 2nd appellant therein, Ali Khan Muses). Further to this, the Court of Appeal agreed with the superior court on the discrepancy in the acreage of all that parcel of land known as land reference Numbers Kwale/Galu/Kinondo/48, which the 2nd Respondent herein argued that it measured 1.9 ha while the court found to measure 0.9ha. All said and done, the Court of Appeal, disagreed and made a slight departure with the findings of the Superior Court which had held that "any party found to have encroached on the other parties' land shall have 60 days to demolish all structures that might have been erected therein and move and vacate therefrom". The Court of Appeal instead held that, "The order for demolition was, in the result, premature."

23. Unfortunately, the Court of appeal never provided any guidelines on how this single aspect of the Judgement was to be executed and I believe that is where it complicates on this matter going forward as each party has been attempting to interpret and implement the said orders on their own. As a result, there has been total confusion and almost chaos. On 14th July 2021 the Plaintiff (Samuel Kamau Macharia) moved the court in ELC No. 30 of 2014 by a Notice of Motion application seeking orders for the execution of the decree issued on 13th October 2014 on the ground that the Court of Appeal dismissed the Appeal. The application was heard and dismissed on 9th November 2021 for reasons that the Appeal varied the decree.

24. The 2nd Defendant, (Estate of Sonrisa Limited) at that time had also filed a suit in Kwale ELC Case No. E001 of 2021; Estate of Sonrisa Limited v Land Registrar Kwale, Regional Surveyor Coast Region, the Hon. Attorney General and Samuel Kamau Macharia. In one of the Applications dated 25th September 2021, Estate of Sonrisa Limited sought orders for injunction restraining the 1st and 2nd Defendants therein from making any changes to the register pertaining to Kwale/Galu/Kinondo/48 and an order for injunction restraining the 4th defendant from interfering with Kwale/Galu/Kinondo/48.

25. Out of desperation, the Plaintiff (Samuel Kamau Macharia) and his auctioneers (Five Eleven Traders and Auctioneers) then moved to the Magistrate's Courts in "CMCC Misc. Application No.36 of 2022: Samuel Kamau Macharia and Five Eleven Traders and Auctioneers v Ali Khan Ali Muses and

Estate of Sonrisa Ltd. By a Notice of Motion application dated 24th January 2022 they sought for execution orders. The said Orders sought were granted.

26. Immediately thereafter, and upon being served on 26th January 2022, the 2nd Defendant (Estate of Sonrisa Ltd) moved this court in ELC No. 30 of 2014 by a Notice of Motion application under certificate of urgency seeking inter alia that the application be certified urgent and for a stay of execution of the orders in CMCC Misc. Application No. 36 of 2022. I was the duty judge and after perusal of the court record, I certified the application urgent, stayed the orders issued in CMCC Misc. Application No. 36 of 2022, and lastly, directed that the file be placed before ELC Court No. 2 for inter - parte hearing. I guess this was the genesis to my troubles with the 2nd Defendant herein.

27. Thereafter, on February 16, 2022, Five Eleven Traders and Auctioneers filed this Miscellaneous Application seeking orders to execute the decree dated October 13, 2014. The application was supported by the Affidavit of Crispus Waithaka. In his supporting Affidavit, he annexed his auctioneer license, a letter from his counsel and the decree issued on October 13, 2014. For completeness, the letter read as follows:

> " Ref: Elc No. 30 of 2014 Samuel Kamau Macharia vs.Ali Khan Ali Muses & 2 others.
>
> The above matter refers.
>
> Our attention is drawn to the orders dated 6th January 2015 and more specifically Order No. 5 which authorized the plaintiff herein to procure the services of a court bailiff.
>
> This letter therefore served duly appointed you, as the court bailiff in view of executing the same.
>
> Kindly advise us on your payable fees.
>
> Find attached herein the said Court Order for your perusal and Record."

28. Again and by sheer coincidence I happened to be the duty Judge. In my ex - parte ruling, I ordered as follows, verbatim:-

> " Ex parte in the absence of the parties/counsel
>
> In the Chambers
>
> I have read the certificate of urgency dated February 16, 2022, the Notice of Motion application dated 16 February 2022 by the Applicant and the nine paragraphed supporting affidavit of Crispus Waithaka sworn and dated on 16th February and two annexures marked 'CW-2 (a) and (b) annexed thereto.
>
> The Notice of Motion Application is brought by the Applicant under rule 9 (1) and (2) of the *Auctioneers* Rules, sections 2, 3A of the *Civil Procedure Act*. cap 21 seeking to obtain the execution of a decree issued on October 13, 2014 onto a parcel of land known as Land Reference No. Galu /Kinondo/50.
>
> This is a decree that was apparently issued a while ago on 13th October 2014. It ought to have been executed by now. It has/may have denied the decree holder to enjoy his fundamental right thereof bestowed on him/her in *the Constitution* of Kenya and fruits of the judgment obtained to date.
>
> For the interest of justice, equity, and conscience and in order to clear the backlogs I do:-

a) Thatcertify the notice of motion application dated February 16, 2022 by the applicant as urgent.

b) Thatprayer No. 1 and 2 of the Notice of Motion application are granted but on due process followed strictly.

c) Thatthe matter to be mentioned on 3rd March 2022 before ELC No. 3 for further directions and progress."

29. Paradoxically, upon the execution of the orders by the Applicants, the 2nd Respondent filed a Notice of Motion application dated 22nd March, 2022 under Certificate of Urgency seeking several interim injunction orders restraining the Applicant from further execution of the orders. I directed the same be served and when they appeared before me for "inter parte" hearing on 24th March, 2022, I granted them some of the orders aiming at maintaining status quo and which they are enjoying todate. During all these sessions, the 2nd Respondent never raised any complaint against me. That situation is rather perplexing, to say the least. Clearly, my conclusion is that this application has been made as an afterthought, in bad faith and all intended to disparage my name, reputation and fame as a Judge. I believe that is adequate on the facts of this case.

ISSUE No. 3. Whether the parties are entitled to the orders sought.

30. Now let us turn to the other framed issues and aspects of the matter. It is from this order, that this instant application for recusal is founded. Ultimately, the question for consideration is whether a reasonable person having knowledge of the fact as I have presented them would reach the conclusion that as a judicial officer I am biased. I think not. I say so for the following underlying reasons.

31. First and foremost, it must be noted and appreciated that this Court stayed the orders of the sub – ordinate Court in "CMCC Misc. Application No. 36 of 2022. It is unfortunate that the Applicant never disclosed this fact at the Ex – Parte stage when it filed the miscellaneous application as an entirely fresh case seeking similar orders while withholding material information. Clearly, there was material non - disclosure of facts of the matter before the duty Judge. This issue of non disclosure of material facts was discussed in "Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where the Court of Appeal stated as follows:-

> " It is perfectly well - settled that a person who makes an ex - parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the

applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus pentitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed…" (Emphasis mine)

32. From the above excerpt, supposedly the applicant – the auctioneers never made certain material disclosure. The concealment of the material facts clearly misled the court. While filing this Miscellaneous application the detailed history of the subject property, which the Court has now been able to establish much later on, was not provided at the onset. This was taking that this Court had never dealt with the matter before. I guess it was also a case of someone taking advantage of myself having been newly appointed to the bench. If at all they were not clear on the entire chronology of the case, they were under a duty to inquire before making the application to this court. I strongly believe the applicants were under the duty to know the nature of the suit, the order for which the application was made, the probable effect of the order on the Defendant, and the degree of legitimate urgency.

33. Secondly, it is the case of the 2nd Respondent herein (Estate of Sonrisa Ltd) that having issued interim orders in ELC case No. 30 of 2014, 'alarm bells' should have rung once I opened this Miscellaneous Application. The 2nd Respondent had not taken into consideration that as an Environment and Land Court judge, and a Judge being but human, I go through multiple files in a span of 10 days. I hear, analyze, and determine several cases on multiple parcels of land. It would be impossible for me to see a parcel number and immediately tie it to its file number. I stress that I am only human, a judge, but not a god! Either way, the court can and must only decide a case on the evidence before it. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court.

34. Thirdly, instead of the parties pursing the orders issued by the Court of Appeal to the effect of engaging a Land Registrar and/or Surveyor to properly conduct a surveying of the boundaries of the disputed

area of the two parcels, and a report submitted, they all the parties kept on filing multiple suits over the same subject matter. As we speak there are a record of five (5) cases filed in various courts all over the same subject matter. These are namely:-

i. ELC No. 30 of 2014 Samuel Kamau Macharia – Versus - Ali Khan Ali Muses, Estate of Sonrisa Limited & Land Registrar Kwale;e

ii. Court of Appeal No. 14 of 2016 (Consolidated with Civil Appeal No. 32 of 2016) – Estate of Sonrisa Limited , Ali Muses, v Samwuel Kamau Macharia,

iii. Kwale ELC Case No. E001 of 2021 – the Estate of Sonrisa Limited v Land Registrar Kwale, Regional Surveyor Coast Region, the Hon. Attorney General and Samuel Kamau Macharia;

iv. CMCC Misc. Application No.36 of 2022: Samuel Kamau Macharia and Five Eleven Traders and Auctioneers v Ali Khan Ali Muses and Estate of Sonrisa Limited"; and

v. ELC Misc. Application No. E006 of 2022 – Five Eleven Auctioneers

This is, in itself, what is termed as forum shopping by all the parties herein, which over the years, litigants have been discouraged from. In the case of "*J G K v F W K* [2019] eKLR" Gikonyo J. decried the inclination of litigants to apply for self-recusal, stating as follows:

> " My position has always been that recusal should not be undertaken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, say, bias or prejudice or conflict of interest or personal interest on the part of a judge. The stringent test is more in accord with the constitutional desire to attain the independence of the judge in the administration of justice free from intimidation or blackmail. The trait not to fear or show favoritism in a case is instilled by *the Constitution* and oath of office of a judge. These principles guarantee and are indispensable facets of fair hearing and access to justice. The presumption therefore is that parties submit themselves to a court manned by independent, thoroughly fearless and impartial judicial officers. What must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favorable to their causes. I lament that forum-shopping returns us to the darkest days in the administration of justice; it erodes all the gains made and distorts the values, objects and purposes of *the Constitution*. See Articles 10, 50, 159(2) (a), 160 and 259 of *the Constitution* of Kenya, 2010. Such vice will kill the entire justice system in any civilized society. My earnest view is that law serves legitimate interests of a litigant as opposed to individual desires that a particular judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases for all." (Emphasis mine)

i) It is in the interest of parties and the system of administration of justice that multiplicity of suits between the same parties and over the same subject matter is to be avoided.

j) As result of this multiplicity of suits, three (3) issues come to fore here. A). it is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. B). the multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. C). the multiplicity of actions on the same subject matter between the same parties even where there exists a right to bring the action is regarded as an abuse of the court process. The abuse lies in the multiplicity and the manner of the exercise of the right rather than the exercise of right per se. The abuse consists in the

intention, purpose, and aim of the person exercising the right, to harass, irritate, and annoy the adversary and further mislead the court.

k) Nonetheless, this Court while granting the orders, emphasized on strict adherence to the law and procedure on the eviction. In my order dated 16th February 2022, I stated as follows:-

> " Thatprayer No. 1 and 2 of the Notice of Motion application are granted but on due process followed strictly." (Emphasis is Mine)
>
> The bench on several occasions has advised the bar on the process of eviction provided under Section 152E of the *Land Act* which stipulated as follows:
>
> " 152E. Eviction Notice to unlawful occupiers of private land.

1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

2) The notice under subsection (1) shall –

   a) be in writing and in a national and official language;

   b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

   c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

   d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area."

l) The provision of section 152E of the *Land Act* was introduced by Section 98 of the Land Laws (Amendment) Act No. 28 of 2016 which brought forth radical changes to the eviction regime. One of the novel features of the Amended Act was the introduction of a procedure that governs evictions of persons deemed to be unlawfully occupying public, community, and private land. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the person affected an opportunity to seek relief in court. Under section 152E of the *Land Act*, any person or persons served with such notice may apply to the court for relief against the notice.

m) If this had happened, then the situation could have been different and arrested before any damage had happened. If the application for execution, supporting affidavit, and annextures filed by the auctioneers were placed before a different Judge of concurrent jurisdiction, would the determination be any different? Would a reasonable, objective, and informed person armed with the facts as presented, reasonably conclude that I was biased or will be biased towards the parties in this case? I think a reasonable observer would conclude that I was impartial in these circumstances.

n) Every judge has a duty to sit in a matter which he duly should sit. Recusal should not be used to cripple a judge from hearing and determining a matter. This duty is buttressed by the fact that every judge takes an oath of office, to serve impartially and to protect, administer, and defend

the Constitution. Having taken the oath of office, I am capable of rising above any prejudices and deliver justice. For all these reasons, I find the application by the 2nd Defendant without any firm grounds at all ostensibly for me to disqualify myself from handling this matter.

VI. Conclusion & Disposition

35. The upshot of all this is that the 2nd Respondent has failed to make out a case for recusal. Thus, for avoidance of doubt, I therefore proceed to make the following findings.

a. That I categorically refuse to recuse myself from the matter particularly on the reasoning raised and advanced by the 2nd Respondent.

b. That the notice of motion application dated April 1, 2022 by the 2nd Respondent/Applicant be and is hereby dismissed with Costs to the Respondents in the instant application.

c. That considering the protracted & historical evolvement, the complexities and convoluted nature of this matter which has led to multiple five (5) other cases below stated:-

    i) "ELC No. 30 of 2014 Samuel Kamau Macharia – Versus - Ali Khan Ali Muses, Estate of Sonrisa Limited & Land Registrar Kwale;

    ii) Court of Appeal No. 14 of 2016 (Consolidated with Civil Appeal No. 32 of 2016) – Estate of Sonrisa Limited , Ali Muses, v Samwuel Kamau Macharia,

    iii) Kwale ELC Case No. E001 of 2021 – the Estate of Sonrisa Limited v Land Registrar Kwale, Regional Surveyor Coast Region, the Hon. Attorney General and Samuel Kamau Macharia;

    iv) CMCC Misc. Application No.36 of 2022: Samuel Kamau Macharia and Five Eleven Traders and Auctioneers v Ali Khan Ali Muses and Estate of Sonrisa Limited"; and

    v) ELC Misc. Application No. E006 of 2022 – Five Eleven Auctioneers

It is directed that the aforementioned matters be placed before the Environment & Land Court, Presiding Judge at Mombasa, on 7th July, 2022 for further direction and guidance moving forward based on the orders made by the Court of Appeal on 20th April, 2020 thereof.

IT IS SO ORDERED ACCODINGLY

RULING DELIEVERED, SIGNED & DATED THIS 13TH DAY OF JUNE 2022

HON. JUSTICE L.L NAIKUNI, JUDGE

ENVIRONMENT & LAND COURT,

MOMBASA

In the presence of:-

M/s. Yumna Hassan, Court Assistant.

Non Appearance for the Applicant/Respondent.

Non Appearance for the 1st Respondent.

Mr. Tariq Khan Advocate for the 2nd Respondent/Applicant.

Mrs. Winnie Waswa for the DCIO/Police/Attorney General.

RULING ELC. MISC. E006 OF 2022 Page 11 of 11 L. NAIKUNI (JUDGE)