



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 844 OF 2005

ANDREW ALEX WANYANDEH.....PLAINTIFF

V E R S U S

1. THE ATTORNEY-GENERAL
2. KENYA RAILWAYS CORPORATION.....DEFENDANTS

R U L I N G

This suit first came before me on 12th of May 2008 when it was due for hearing for that day and the following day. As it happened, hearing did not proceed but the learned counsels agreed on a bundle of documents which was by consent admitted in evidence on 13th of May 2008 and marked as **Exhibit A**. The case was then fixed for hearing on 10th of July 2008. The counsels then appearing before me were Mr. Sagana for Plaintiff, Ms Muli for 1st Defendant and Mr. Amoko for 2nd Defendant. Mr. Sagana and Mr. Amoko have been in the matter throughout up to the present.

Hearing eventually commenced before me on 24th of November 2008. The Plaintiff testified as PW1 at length on that date and also on 26th January 2009 when he completed his testimony.

On 11th March 2009 when the case came up for further hearing, the court was informed that all three parties were in negotiations with a view to settling the suit. The case was therefore taken out of that day's hearing list and stood over for mention on 4th May 2009 for further hearing if there would be no settlement.

On 4th May 2009 the court was informed that negotiations were still going on, and the matter was then fixed for mention on 10th of June 2009 with a view of recording a settlement. On that date the court was informed that there was no settlement reached, and the case was then fixed for further hearing on 5th of October 2009.

For various reasons, the case was not further heard and in February 2010, I was transferred to Machakos.

There were subsequent orders for the proceedings to be typed with a view to the matter being taken over by another judge. Eventually, the matter was placed before Sitati, J. On 12th of November 2010 Sitati, J recorded the following consent order: -

“Order:

By Consent

- (1) The defence shall not be calling any witnesses and that the defence case be and is hereby marked as closed.**
- (2) The Plaintiff do file and serve written submissions together with relevant authorities within 14 days from today.**
- (3) The Defendants do file and serve their written submissions together with relevant authorities within 14 days of service.**
- (4) The Plaintiff do file and serve its reply within 7 days of service by Defendants.**
- (5) Mention on 17.12.2010 to confirm compliance and take directions on judgment.”**

The Plaintiff’s written submissions were filed on 17th December 2010. The 2nd Defendant’s submissions were filed on 15th February 2011 while those of the 1st Defendant were filed on 4th March 2011. The Plaintiff’s reply to the Defendants’ written submissions was filed on 14th March 2011.

In the meantime Sitati, J had been transferred from Nairobi to Kisii. In February 2011 I was transferred from Machakos back to Nairobi.

On 14th March 2011 the matter was placed before the Duty Judge, Mwera, J. In attendance were Mr. Sagana for Plaintiff and Mr. Amoko for 2nd Defendant. There was no appearance for 1st Defendant. Mr. Amoko is recorded to have stated as follows –

“May matter go to Waweru, J who heard the Plaintiff’s (case). Defence called no witnesses. I want to respond to Mr. Sagana’s submissions in 7 days”.

Mr. Sagana was not recorded as having responded to what Mr. Amoko said. The court then ordered

“...further mention on 22nd March 2011 for Mr. Amoko to respond to the Plaintiff’s replying submissions. Thereafter file will be placed before Waweru, J.”

And so, that is how this matter finally came back to me. It was mentioned before me on 22nd March 2011. In attendance were Mr. Muganda holding brief for Mr. Sagana for the Plaintiff, Mr. Amoko for the 2nd Defendant and no appearance for the 1st Defendant.

Mr. Amoko referred to previous orders and stated that he did not wish to put in any further submissions. Mr. Muganda then requested that the matter be mentioned before any other judge for preparation of judgment. He stated further that the Plaintiff feared that he may not get justice before me.

Mr. Amoko responded that I was the trial Judge; that I took the evidence; that I was best suited to write the judgment; and that in any event there was no proper application for me to recuse myself from the case. Mr. Muganda then sought time to file a formal application.

Such application was eventually filed by **notice of motion dated 4th of April 2011**. It is the subject of this ruling.

The application seeks the main order that I be pleased to disqualify myself from any further conduct of this matter, and that the matter be placed before any other judge in the Civil Division for its “just and conclusive determination”. The application is expressed to be brought under **sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Cap 21** and **Order 51, rule 1** of the **Civil Procedure Rules** (the **Rules**).

The grounds for the application as they appear on face thereof are as follows –

- (1) That Justice Waweru has demonstrated, since the onset of this suit, through his several comments, a likelihood of bias against the Plaintiff’s case.
- (2) That Justice Waweru’s comments have consequently created in the mind of the Plaintiff, a

reasonable apprehension he may not get a fair and impartial trial.

(3) That the comments by the judge demonstrated a bias which the Plaintiff fears has divested him of the requisite mind to adjudicate on the matters before the court.

(4) That accordingly, if the judge continues to preside over this matter, it is highly unlikely that justice will be done or be seen to be done to the prejudice of the Plaintiff.

(5) That it is apparent to the judge that the Plaintiff should never have come to this court seeking justice as the court is not mandated to rewrite contracts for parties.

There is a supporting affidavit sworn by the Plaintiff. It is deponed as follows in the material parts: -

1. That prior to commencement of the hearing, Judge Waweru expressed reservations in the Plaintiff's case to the effect that the cause of action was tantamount to asking the court to re-write contracts for parties.
2. That after taking evidence Judge Waweru has stated that the Plaintiff had worked well but regretted that there was no contract evidencing the Plaintiff's employment, and that the judge therefore advised the parties to enter without prejudice negotiations.
3. That during negotiations, the judge advised the Plaintiff to accept any offer that the 2nd Defendant might lay on the table, and thus settle the dispute amicably.
4. That following the judge's comments the 2nd Defendant, who had sought to call a witness all along, elected not to call any witness.
5. That the Plaintiff had "wanted" the judge to disqualify himself as he seemed biased and had already made up his mind, thus rendering the trial a mere formality, but that this was not to be as the judge was transferred to Machakos.
6. That subsequently, the matter was placed before Sitati, J and that after that judge's transfer to Kisii, all parties agreed that the matter be forwarded to her there for preparation of judgment.
7. That the 2nd Defendant has now reneged and insists that the file be forwarded to Judge Waweru at Machakos to prepare judgment.

The 2nd Defendant has opposed the application by grounds of opposition dated 22nd July 2011 and replying affidavit filed on the same day. The grounds of objection are: -

1. That there is no sufficient material or evidence before the court to warrant Judge Waweru's disqualification from determining this suit.
2. That none of the established principles for disqualification of a judge from hearing a suit on the basis of bias have been satisfied by the Plaintiff.
3. That the application is frivolous, vexatious or otherwise an abuse of the process of the court.

In the replying affidavit sworn by one STANLEY GITARI, Senior Legal Officer and Acting Corporation Secretary of the 2nd Defendant, it is deponed as follows, *inter alia*: -

1. That a suggestion by the judge that the parties should try to settle the case amicably cannot be construed as cause for bias.
2. That the judge merely encouraged the parties to move away from their antagonistic positions to facilitate amicable solution of the case and never told the parties that he had made up his mind on the merits of their respective positions.
3. That after Judge Waweru was transferred to Machakos, to save time and avoid inconvenience the 2nd Defendant agreed for the case to be heard and determined by any other judge stationed at Nairobi.
4. That Sitati, J only recorded a consent order for filing and exchange of written submissions.
5. That after Sitati, J was transferred to Kisii the Plaintiff's learned counsel sought to have the file transferred to the judge at Kisii upon the ground that the matter was part-heard by the judge.
6. That the 2nd Defendant's learned counsel protested that the matter has never been heard by Sitati, J and stated that whereas he had no objection to the matter being concluded before any judge stationed in Nairobi, if it was to be transferred, it should only be to Waweru, J before whom the matter was part-heard.
7. That Mwera, J confirmed that the matter was not part-heard before Sitati, J and expressed his clear

view that the matter ought to be concluded by Waweru, J.

8. That in reaction the Plaintiff's counsel "implored Mwera, J not to take the matter to Waweru, J and proceeded to make all kinds of accusations of impropriety against Waweru, J including an allegation that the Judge had called him to persuade him to settle the matter".

9. That Mwera, J was unimpressed by all this and directed that the matter be placed before Waweru, J.

10. That the Plaintiff is thus engaging in forum-shopping by purporting to exercise a litigant's veto as to who should determined his suit.

No papers were filed by the 1st Defendant in response to the application, but his counsel participated at the hearing of the application.

I have considered the submissions of the learned counsels appearing, including the cases cited.

I must state at the outset that I have no personal interest of any kind at all in this matter. The case is between a citizen (Plaintiff) and the Attorney-General (representing a Government department) and a public corporation (Kenya Railways Corporation) (as Defendants).

Secondly, there is nothing inherently wrong in the presiding judge encouraging parties, in appropriate cases, to seek an amicable settlement of the dispute before the court. In doing so, there cannot be anything wrong with the judge pointing out certain aspects of the relative cases of the parties.

But the allegation that I expressed before trial commenced and subsequently, reservations regarding the Plaintiff's case, or that I unduly persisted in trying to persuade the parties to seek an amicable settlement, is patently false. If I demonstrated arrant bias against the Plaintiff even before I took evidence, as alleged, why was the application for me to disqualify myself not made sooner? Why was it not made before I started taking the Plaintiff's evidence on 24th November 2008? Why was the application not made before 26th January 2009 when the Plaintiff further testified? Why was the application not made before February 2010 when I was transferred to Machakos?

Nothing at all has been placed before the court demonstrating bias on my part, or reasonable apprehension of bias. Looking at the material now before the court (both in the application and in the entire court record) would a fair-minded and informed observer conclude that there was a real possibility, or danger, that I might be biased in this matter against the Plaintiff or for the Defendants? I think not.

There is nothing like a litigant's veto of the court or judge hearing his matter. Litigants cannot choose their judges. Applications for disqualification of judges should not be lightly allowed. That would tend to erode public confidence in the courts and the administration of justice.

I find no merit at all in the application. It is dismissed with costs to the 2nd Defendant. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF OCTOBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2011