



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 779 of 2009**

**KENYA FARMERS CO-OPERATIVE UNION LTD..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED..... DEFENDANT**

**R U L I N G**

This ruling relates to a notice of motion application brought under Order L Rule 1 of the Civil Procedure Rules, Rule 5 of the Judicial Service Code of Conduct and Ethics and the inherent powers of the Court. The said application seeks the following orders:

- a) THAT this Honourable Court be pleased to certify this matter as urgent and to direct that the same be heard forthwith and in priority over all the pending applications.
- b) THAT this Honourable Court be pleased to stay further proceedings in this matter pending the hearing and determination of this application.
- c) THAT the Honourable Mr. Justice Muga Apondi do hereby recuse and disqualify himself from further hearing the matter.
- d) THAT this Honourable Court be pleased to direct that the pending applications in the matter do proceed for hearing before any other Judge other than the Honourable Justice Muga Apondi.
- e) THAT the costs of this application be provided for.

During the hearing of the application, the applicant's counsel Mr. Macharia submitted that they are relying on the affidavit of one Jacob Unda. Specifically, they are applying for prayers (c and (d). The grounds on which the applicant is depending on are:

- (a) The Respondent has questioned the conduct of the Hon. Justice Muga Apondi in this matter in HCCC No. 700 of 2009.
- (b) In his ruling delivered on 18<sup>th</sup> January, 2010, the learned Judge alluded to the allegations made by the Respondent and attempted to justify his conduct of the mater.

- (c) It is inevitable that in Petition No. 700 of 2009, the Attorney General will have to file an affidavit to defend the conduct of the Honourable Mr. Justice Muga Apondi.
- (d) Having called the Judge's conduct into question, it is not prudent for the said Judge to continue hearing the matter.
- (e) If the Honourable Mr. Justice Muga Apondi is to continue hearing the matter, he will be sitting as a judge in his own case.
- (f) The Judge's conduct having been called into question, the test is whether a common man would perceive that justice is done.
- (g) In view of the nature of the application filed herein, justice demands that further proceedings in this matter be stayed pending the hearing and determination of this application.
- (h) This application has been brought timeously.
- (i) No prejudice will be occasioned to the Respondent if this application is allowed.
- (j) It is in the interest of justice that this application be allowed.

In support of his submissions, the learned counsel quoted the case of **Home Park Caterers Ltd. vs. the Attorney General**. He also submitted that justice must not only be done but also seen to be done. Apart from the above, he also quoted the case, In the matter of the **Estate of Mbiu Kionange Succession Cause No. 597** of 1991. In addition to the above, he also quoted the case No. HCCC 11 of 2009. While replying to the submission of Mr. King'ara the applicant's counsel submitted that in this particular case, they have not alleged that the trial judge has any relationship with any of the parties. He was also of the opinion that by raising complaints in the Constitutional and Judicial Review Division the plaintiff is bringing pressure on this court to be biased in his favour. To support his submissions he quoted the case of **Trust bank Ltd vs. Midco International Limited & 4 Others [2004] 2 KLR pg. 485**. In the said case the trial judge stated as follows:

***“The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality.”***

Apart from the above, Mr. Macharia also denied strenuously that they have developed a penchant of asking judges to disqualify themselves whenever they make decisions against them. Further to the above, he also submitted that Kenya Commercial Bank has not lost anything to justify the assertion that every time they loose they would apply for a judge to disqualify himself.

On the other hand, Mr. Kinga'ra, the respondent's counsel has opposed the application while relying on the affidavit of Watson Kimathi. In his affidavit, Mr. Kimathi stated *inter alia*;

3. THAT the Plaintiff/Respondent has never at any time complained about the Honourable Lord Justice Muga Apondi in any of our pleadings on the Constitutional Court.
4. THAT all we have said is that we are yet to be heard on our application but the court has now fixed the matter for hearing on 11<sup>th</sup> February 2010.
5. THAT it is therefore wrong for the Defendant to state that we have "complained" about the Honourable Judge and I verily believe that the contorted interpretation of the Application in the Constitutional Court is aimed at serving their selfish interest which has been to ensure we are not heard on our application for removal of Receivers.
6. THAT the Kenya Commercial Bank Limited seems to have a penchant for asking Judges to disqualify themselves whenever they rule against them. I am aware that in HCCC No. 505 of 2008, MUIRI COFFEE ESTATE LTD & OTHERS a similar application was made against the Honourable Lady Justice Khaminwa last month. A copy of the order has been kindly furnished to me by my Advocates (without Bulky exhibits) and I annex the same and mark "WELK 1".
7. THAT the complaint in the Constitutional Court is against the Minister for Finance and Coffee Board of Kenya and the impact of their decisions to the purposed indebtedness of the Plaintiff herein to the Defendant.
8. THAT the Honourable Lady Justice Gacheche did not comment on lack of access to justice which was in any event a general complaint about court proceedings and not an attack on any Judge.
9. THAT the Applicant has tried all manner of tricks to avoid this matter being heard as shown hereunder.
  - (a) On at least 3 occasions, hearing was adjourned due to the Applicant having filed affidavits late or without leave.
  - (b) The November hearing was adjourned because Mr. Kamau Karori came to Court armed with an air ticket that he was going to South Africa on some undisclosed missions.
  - (c) During his absence, the same applicant filed an *ex parte* application for orders for assistance to remove the Board of Directors.
  - (d) The Applicants have now used the Administration Police to forcefully evict us from our offices.
  - (e) On the hearing of the Application for removal of receivers, the Applicants' counsel came with another excuse on why our application should not be heard and made an oral application for stay of application.
  - (f) Last week, the same applicant moved the Court for stay of proceedings and leave to file an Appeal.
  - (g) When the application came for hearing yesterday, the same applicant made another oral Application for the Judge to recuse herself.
  - (h) Yesterday (3/2/2010) the applicant filed an application that the Judge disqualifies himself,
10. THAT it is apparent that the Applicants do not want this matter to proceed and hence the various excuses any time the application comes up.
11. THAT there are no proper grounds for the Honourable Judge to recuse himself as the complaint on the Court was about Court procedures, diaries and Calendar not against any Judge.

12. THAT I am advised that the application for stay is res-judicata.
13. THAT I now urge this Honourable Court to issue interim orders as prayed in the main application as this is the only way to ensure the court's process is no longer inundated with mischievous applications like we have seen in this suit.

In his opening submissions, Mr. King'ara emphasized that they have not made any complaint against the trial judge. That is despite making the disclosure to the Constitutional and Judicial Review division that they had not yet been heard. Besides the above, he also submitted that the plaintiff will be prejudiced if the trial Judge disqualifies himself. He also pointed out that the Defendant has stated that the petition in the above court is an abuse of the court process while when they came to this court they have argued that these proceedings should be stayed. He described the above as *intellectual dishonesty*. Apart from the above, Mr. King'ara also submitted that this court has declined to grant *ex parte* orders in their favour because the court wanted to hear all the parties. In addition to the above, he also submitted that in their petition before the Constitutional and Judicial Review Division they have sought 16 prayers against the AG of the Republic of Kenya. However, he emphasized that they have not sought any declaration against this court. He was of the opinion that the applicant's counsel has made this application for other reasons other than justice. To support his submissions Mr. King'ara quoted the case of ***Republic vs. Mwalulu [2005] 1 KLR***. He further submitted that the test to be applied must be objective. According to him there has not been any single allegation of bias in this case and hence he cannot understand why the application was filed in the first place. Apart from the above, he also quoted the case of ***Trust Bank vs. Midco International (K) Limited, Musiara Limited vs. Ntimama [2004] Vo. II KLR*** at pg. 174. In addition to the above, Mr. King'ara also distinguished this case from that of Mbiu Koinange since in that case, there was a lot of animosity and hence the trial judge found that the proceedings were unhealthy and disrespectful. However that situation does not obtain in this case.

In the case of ***Republic vs. Dickson Munene & Another, Criminal Case No. 11 of 2009 (unreported)*** it was alleged that the judge was likely to favour one party and hence the trial judge disqualified herself on the grounds that one of the counsels had been disrespectful. However, he pointed that in this particular case we have not reached there and hence that case should not have been quoted in these proceedings.

After carefully considering the submission by the learned counsels, it is apparent that none of them has accused the undersigned of any bias in favour of any particular party. What the applicant seems to be worried about are "*perceptions*". This is derived from the fact that since the plaintiff has made complaints in the Constitutional and Judicial Review Division, the same will bring pressure to bear on me to be biased in their favour. The applicant's counsel also admitted that they have not alleged any relationship between the parties and the court. It is not in doubt at this stage that the applicant has already appointed Receiver Managers who have taken over the suit premises. It is said that the same was done in exercise of their statutory powers. From the records, it is apparent that this court has persistently declined to grant the plaintiff any *ex parte* orders to prevent the receiver managers from taking over the suit

premises. Ideally, one would be tempted to interpret those facts as being prejudicial to the plaintiff. It is a settled principle of law that when a litigant makes a complaint against any public officer in the Constitutional and Judicial Review division, then one must apply for specific orders against that particular officer. In the petition No. 700 of 2009 the plaintiffs have not requested for any orders against the trial judge in this case. *In the African society, when one attends a funeral, it is generally accepted that they can cry to show their feelings and emotions towards the deceased. However, it is rather unusual for ordinary mourners to try and outdo the bereaved family in mourning. Obviously, the only exceptions are professional mourners who are on duty. These mourners are usually handsomely paid for their duties.* In this particular case, the applicant's conduct is akin to a situation where he feels more aggrieved than the plaintiff himself. Whereas there are several judges assigned to the Commercial & Tax Division, it is not the duty of litigants to choose where their cases will be decided. That is tantamount to *forum shopping*. It is also an *onslaught* on the powers and discretion of this court to assign and allocate cases to the judges who are assigned to this division. I do not see any credible nor genuine reason why I should disqualify myself from hearing this matter. I have noted the several applications which have been brought by the applicant since I started handling this matter. It is my opinion that Kenya Commercial Bank is a solid and reputable institution. On the other hand, the KPCU has a track record of marketing coffee on behalf of farmers. From the record, it is apparent that KCB had lent KPCU a colossal amount of money. That must have been based on the fact that they were aware of the cash flow that the farmers' body had over a period of time. Among the issues that most banks consider before granting loans, is the credit worthiness of its customers. *Having had a fruitful relationship previously, both parties may want to consider how to secure their long term interests. This court appreciates the role that both institutions play in the economy of this country.* However, in the event that they cannot agree, then this court will proceed to hear the pending applications on 18<sup>th</sup> March, 2010. In the event that any party feels aggrieved by my decision then they are at liberty to proceed to the Court of Appeal for any necessary orders. The upshot is that I hereby dismiss the application since the same has no merits. The applicant will have to bear the costs of this application.

Those are the orders of this court.

**MUGA APONDI**  
**JUDGE**

Ruling read signed and delivered in open court in the presence of:

Macharia -Applicant's/Defendant's Counsel

N/A for - Respondent's Counsel

**MUGA APONDI**  
**JUDGE**  
**18<sup>TH</sup> FEBRUARY, 2010**