



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 133 of 2009

CATHERINE NYAGUTHII MBAUNI.....PLAINTIFF

VERSUS

GREGORY MAINA MBAUNI *sued as the Legal representative of*

PETER MBAUNI MAINA.....RESPONDENTS

RULING

The substantive matter in this suit is the originating summons dated 21st August 2009 in which Catherine Nyaguthii Mbauni, the plaintiff herein is seeking for interalia:

1. ***A declaration that at the time of his death on 14th January, 1997, the late Peter Mbauni Maina held title Number Nyeri/Gatarakwa Scheme/866, upon trust for the plaintiff and himself in equal shares.***
2. ***A declaration that the administrators of the estate of the said Peter Mbauni Maina hold the said title number Nyeri/Gatarakwa Scheme/866 upon trust for the Plaintiff and the estate in equal shares.***
3. ***An order that the said administrators of the estate of the late Peter Mbauni Maina (deceased) do transfer a half of the said title number Nyeri/Gatarakwa Scheme/866 to the plaintiff and the other half to the estate of Peter Mbauni Maina.***
4. ***A declaration that the plaintiff and members of her house own 13/16 of title Gatarakwa Scheme/866.***
5. ***A declaration that the plaintiff's house is entitled to 39.12 acres of Nyeri/Gatarakwa Scheme/866 whilst the defendant's house is entitles to only 9.08 acres.***
6. ***A permanent injunction to restrain the defendant's house from occupying/farming on more than 3/16 of title No. Nyeri/Gatarakwa Scheme/866.***
7. ***A declaration that the Defendant holds the Nyeri/Gatarakwa Scheme/915 upon trust for himself and for the plaintiff and the estate of the late Peter Mbauni Maina in equal shares.***
8. ***A declaration that the plaintiff owns a half of Nyeri/Gatarakwa Scheme/915 in respect of which the late***

Peter Mbauni Maina was a beneficial owner of at the time of his death.

9. *A declaration that the plaintiff's house is entitled to 18.69 acres of Nyeri/Gatarakwa Scheme/915 whilst the defendant's house is entitled to 4.31 acres and the Defendant is entitled to 23 acres.*

10. *An order that the defendant transfers a quarter of the said Nyeri/Gatarakwa Scheme/915 to the plaintiff and other quarter to the estate of the said late Peter Mbauni Maina.*

The originating summons is supported by the affidavit of the plaintiff sworn on 21st August 2009. When served with the originating summons, Gregory Maina Mbauni, the Defendant herein, filed a notice of preliminary objection dated 22nd December 2009 to oppose the same. The main issue raised in the preliminary objection is that the suit is resjudicata.

On 18th January 2010, this court gave directions to the effect that the originating summons be determined the reception of oral evidence. Parties appeared before the registry on the same date and had the matter fixed for hearing on 18th May 2010.

When the originating summons came up for hearing on 18th May 2010, the plaintiff, through her advocate applied for this court i.e. Serгон J to disqualify himself from hearing the matter. M/S Wamucii, learned advocate for the plaintiff pointed out that this court formed an opinion in its ruling of 17th March 2010 vide Nyeri H.C. Succession cause No. 6 of 1999 that the originating summons herein is resjudicata. It is also Miss Wamucii's argument that this court erred when it rejected the distinction given by Lady Justice Rawal in **Nairobi H.C.C.C. No. 18 of 2003 Dorcas Wangari Macharia =vs= Kenya Commercial Bank and 2 others.** On the basis of the above reasons, the plaintiff argued that she has a reasonable apprehension that she may not get a fair trial.

Mr. Kebuka Wachira on his part was of the view that the application lacks merit because the court has not heard the case. Mr. Wachira pointed out that this was merely asked to make a finding as to whether or not the originating summons had had chances of success. The defendant's learned counsel further argued that this court has exhibited any form of bias or prejudice against either side.

I have considered the submissions of both learned counsels. The principles are well settled in dealing with applications which seek for a judge or any judicial to disqualify himself from hearing a matter placed before him. I will refer to old English case of **Regina =vs= Cambome Justices and Another Exparte Pearce (1955) 1 QB 41** in which it was held at page 42 as follows:

“That, to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceedings, a real likelihood of bias must be shown not only from the materials in facts as ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the cause of his inquiries.”

I will apply the aforesaid principles to the application before this court. The question which must be determined is whether or not the facts espoused by the applicant disclosed a real likelihood of bias on the part of this court? What provoked the plaintiff to apply for the disqualification of this court from hearing this suit is the ruling given ON 17th March 2010 vide Nyeri High Court Succession Cause No. 6 of 1999. The aforesaid ruling is the consequence of the summons dated 11th November 2009 in which the plaintiff herein had sought for an order to stay further proceedings in Nyeri High Court Succession Cause No. 6 of 1999 pending the hearing and the determination of this suit. In the process of arguing the application dated 11th November 2009, learned counsels urged this court to make a finding to whether or not this originating has high chances of success. In the end the court took up the challenge and form a preliminary view that the originating summons herein may turn out to be resjudicata as far as it related to the distribution of the estate of Peter Mbauni Maina, deceased. This

court formed the aforesaid opinion on the basis of the material placed before me. This court did not import any material outside what was presented to it. Furthermore this was very careful not to make conclusive opinions because it was aware that the dispute is yet to be heard and determined. Parties must appreciate that a judge administers the law and learned counsels guides the judge in doing it. I must confess that I find it extremely difficult for anybody to make an inference the ruling exhibited any real likelihood of bias on my part. **In Rex =vs= Sussex Justices exparte Mc Carthy [1924] 1 K.B. 256** it was restated interalia that

“Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

In appreciating the principle enunciated hereinabove, the court cautioned its general citation in the case of **Regina =vs=Camborne Justices (supra)** at page 52 as follows:

”Whilst endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.”

In my view it is not just enough for a party to point out areas where a judge has formed an opinion that manifests bias but one must establish substantial grounds to prove bias. If the threshold needed to disqualify a judge is not raised then a litigant may use any flimsy grounds to cause judges to disqualify themselves even where it does not warrant to do so. In the end I have come to the conclusion that no substantial grounds have been laid to establish bias or any likelihood of it. The application for disqualification is dismissed with costs abiding the outcome of the originating summons.

Dated and delivered this 11th day of June 2010.

**J.K. SERGON
JUDGE**

In open court in the presence of
Mr. Wachira for Respondent and
Miss Wamucii for the Applicant.

**J.K. SERGON
JUDGE**