REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

COMMERCIAL SUIT NO. 31 OF 2009

1. ISMAIL GULAMALI
2. DAVID BETT LANGAT …. PLAINTIFFS/RESPONDENTS
3. KAPCHEBET TEA FACTORY LIMITED

-VERSUS-

1. STEPHEN KIPKATAM KENDUIYUA
2. JOEL KIMUTAI SANG
3. JOSEPH KIPKURUI NGETICH
4. RODERICK MITEI KENDUIYUA
5. JONAH KIPKEMOI KETER …DEFENDANTS/APPLICANTS
6. G. MUGO MUNGAI
7. ASSOCIATED REGISTRAR LIMITED
8. REGISTRAR OF COMPANIES

RULING

The applicants came before the Court by Notice of Motion dated ***21st May, 2010*** brought under ss.1A (1) and (2), 1B(1)(a),(b),(c) and (d) and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order **L** rule 1 of the Civil Procedure Rules.
The purpose of the application is simple: the applicants are dissatisfied the Judge who has given an earlier ruling should continue to handle this matter; they want to have a different Judge hear their matters, more particularly their pending application of 5th April, 2010.
Since it is not for parties to determine who, in the Judicial Service, will hear them, it is important to set out the grounds stated by the applicants; these grounds are as follows:
(a) there is real likelihood or apprehension of bias arising from *Justice J.B. Ojwang* ***hearing the application dated 5th April, 2010.*** *Justice Ojwang* ***has, by virtue of his ruling of 26th February, 2010, "formed preconceived views and opinions on the subject-matter in dispute";***
(b) ***there is reasonable apprehension of bias, in the view of a reasonable, fair-minded and informed member of the public, that the Judge will not apply his mind to the case impartially by virtue of his ruling of*** *26th February, 2010;*
(c) the Judge ought to recuse himself, as a perception has been created in the minds of the applicants, that the Judge who heard the respondents' application –
(i) has formed an opinion on the issue as to the ownership of the disputed 28,750 shares;
(ii) has given mandatory orders at an interlocutory stage without making any findings of fact or law and has already formed an opinion on the entire case;
(d) in the ruling of 26th February, 2010 *Justice Ojwang* ***stated as follows:***

"However, ***prima facie*** status attends a number of the prayers made by the applicants, and I will,

therefore, make orders in favour of the applicants as follows:

i. The 6th defendant is hereby restrained from acting or purporting to act as 3rd plaintiff's Secretary until hearing and determination of this suit.

ii. ***The 8th defendant's letter dated 16th January, 2009 emanating from the 3rd plaintiff is hereby declared to be null and void*** *ab initio.*

iii. The defendants shall bear the costs of the application."

(e) the said decision of *26th February, 2010* ***has been interpreted by 1st and 2nd respondents to mean that the Court has declared them to be the majority shareholders in the 3rd plaintiff company, and they have, in reliance on the said ruling, purported to remove 1st to 5th applicants from the board of directors of 3rd plaintiff company – hence provoking the application dated*** *5th April, 2010****;***

(f) the Judge having made a finding on the respondents' application "that there was 'a *prima facie* ***status' and having proceeded to make orders he made, it will be embarrassing for the same Judge to make contradictory findings in favour of any parties";***

(g) the application dated *5th April, 2010* ***by the defendants was made in a separate suit by way of counterclaim, and the ruling of*** *26th February, 2010* ***was made in the plaintiff's suit by way of plaint;***

(h) if the same Judge heard the applicants' application and made findings, or rules one way or the other, whether in favour of the applicants or the respondents, it will be difficult to tell whether he will be making an objective interpretation of the ruling or saying , "this is what I meant in my ruling of *26th February, 2010****";***

(i) the second of the two orders is final and mandatory in nature, and has essentially disposed of a substantive issue that ought to be for determination in the main suit, on a full hearing;

(j) a reasonable person looking at the situation would have the impression that there could have been a real danger of bias on the part of the Judge, due to his past ruling where he had made a final finding on matters before the full trial and disposed of a substantial issue concerning the share structure of the company which is the main dispute, without the benefit of evidence;

(k) if the Judge hears the applicant's application it will be tantamount to him sitting on appeal over his decision of 26th February, 2010;

(l) if the Judge hears this application, it may embarrass the Court;

(m) the applicants have lodged an appeal in the Court of Appeal against the said decision, in Civil Appeal No. 77 of 2010.

The application is supported by the 31-paragraph affidavit of the 5th defendant/applicant sworn on ***21st May, 2010***. The content of the lengthy affidavit can be thus summarized:

(i) the deponent was dissatisfied with this Court's ruling of ***26th February, 2010****, and lodged Civil Appeal No. 77 of 2010;*

(ii) *the applicants, on 5th March, 2010 lodged in the Court of Appeal Civil Application No. 39 of 2010 seeking stay of execution of the orders of* ***26th February, 2010;***

(iii) the said Ruling of ***26th February, 2010*** *was followed by 1st respondent convening "a management meeting on 12th March, 2010 at which they made sweeping and drastic decisions";*

(iv) the defendants have an application now pending, intended to restrain the said activities of 1st respondent; and same had already, on ***19th April, 2010*** *and* ***19th May, 2010*** *come up before* ***Ojwang, J****, and this is a cause for apprehension on the part of the defendants: "we with all due respect honestly and humbly believe the Judge has formed an opinion that the respondents have established a* ***prima facie*** *case….."*

(v) "the ***Hon. Justice J. B. Ojwang*** *has by virtue of his ruling of 26th February, 2010 made in the plaintiff's suit formed preconceived views and opinions on the subject-matter in dispute".*

The 1st respondent swore a replying affidavit dated ***26th May, 2010***, deponing that: his advocate has not been served with any record of appeal, in respect of the ruling of ***26th February, 2010***; the application made to the Court of Appeal by the applicants herein was incompetent, and this fact led to its withdrawal; the applicants' claim of risk of partiality in the ruling of ***26th February, 2010*** is their recourse only after

they failed to go through with their application in the Court of Appeal; if the applicants were not willing to await the Court of Appeal's decision on their appeal, they would have sought a review of the orders in question.

The 2nd respondent too, swore a replying affidavit on ***26th May, 2010*** deponing that the Companies Register of Members is still showing that the 1st plaintiff is the holder of 50,312 shares fully paid for; the Share Certificate has not been cancelled; the Register of Members has not been rectified under s.118 of the Companies Act; the 8th defendant had made the admissions in its statement of defence dated ***10th September, 2009***; and the said statement of defence has not been amended.

The ruling of ***26th February, 2010*** was on an interlocutory application by the plaintiffs, dated ***23rd September, 2009*** and its orders were necessarily founded on ***prima facie*** perceptions. What was, in the circumstances, expected was that the parties would be seeking an early opportunity for ***inter partes*** hearing of the main cause, if there was a genuine dispute emenable to the judicial process of resolution; that, however, has not been sought and, instead, the applicants herein have twice moved the Court of Appeal – by ***appeal*** against the ruling of ***26th February, 2010*** and by ***application*** to stay that ruling. As a third strategy, the applicants now, by the Notice of Motion of ***21st May, 2010***, come before the Judge who rendered that ruling to disqualify himself from the hearing of a new application which they have lodged in the High Court.

Although, clearly, such a scheme of endeavours to keep moving the judicial process is apt to cause concern, with regard to the due process of law, it is my task to consider the much-canvassed application for recusal (the Notice of Motion of ***21st May, 2010***).

Learned counsel, ***Mr. Wasuna*** contested the ruling of ***26th February, 2010***, on the basis of his own assessment that there were no ***prima facie*** grounds for making certain orders – even though the ruling itself indicated that there was a ***prima facie*** basis for the orders.

Mr. Wasuna's essential point relates to an issue of merit in the dispute between the parties: that the ruling of ***26th February, 2010*** touched on the question whether or not 1st plaintiff was the majority shareholder; and since the Court's order was in favour of the plaintiffs, the plaintiffs had, as it turned out, moved to extract the order and to serve upon the Registrar of Companies, to the prejudice of the defendants; and consequently, "the plaintiffs and the 8th defendant have treated the ruling of ***26th February, 2010*** as a finding of fact". Counsel stated the defendant's grievance at this stage as being that, the plaintiffs/respondents have now acted on the basis of an alleged share-holding which favours them, to purport to exclude 1st , 2nd , 3rd and 5th defendants from the Board of the Company – whereas those four defendants maintain that the ruling of ***26th February, 2010*** had not determined the ***ownership*** of some 28,000 shares.

From my observation, such submissions by counsel are by no means a pointer to a compromise to the quality of the Court's decision-making, but only a reconstruction of law and evidence as perceived by learned counsel; but counsel has urged that such a scenario ought to lead to recusal by the Judge, because "the issue of interpretation of the orders of ***26th February, 2010*** has arisen". Counsel went on to urge: "once a decision is entered, it is not open to any party to ask the Judge who made it to explain". Although learned counsel had indicated that his clients had moved the ***Court of Appeal*** on two separate occasions, in relation to their grievances arising from the orders of ***26th February, 2010***, and, of course, they also seek by the instant ***High Court*** application the recusal of the Judge who made the orders of ***26th February, 2010***, these applicants had yet another application, a Chamber Summons of ***5th April, 2010*** in the ***High Court***, which the Judge who made the ruling of ***26th February, 2010*** ought to recuse himself from hearing. Learned counsel did not make it clear whether, apart from the pending Chamber Summons of ***5th April, 2010*** it would be proper for the same Judge to hear any other matter at all, whether an application or the main cause, on the same file, or a related file.

Mr. Wasuna linked the purpose of the Judge's recusal to the fact that the applicants' Chamber Summons of ***5th April, 2010*** was coming up – and that the proper determination of that application will "turn on how the Court determines what ***Ojwang, J.*** meant in the ruling of ***26th February, 2010***".

The foregoing is an intriguing contention, given the fact that the said ruling of ***26th February, 2010*** is already being questioned in the ***Court of Appeal***, at the instance of the same applicants; so, ought they not to wait for the Court of Appeal to determine the question? If the ruling of ***26th February, 2010*** is, as ***Mr. Wasuna*** urges, questioned before a different High Court Judge, in the pending application of ***5th April,***

2010, won't this create a ***jurisdictional puzzle***? And if it did, how will that help the applicants? And how will it help in achieving the proper object of judicial dispute settlement?

Learned counsel submitted that the Judge who made the orders of ***26th February, 2010*** ought to recuse himself, because "if the defendants were to lose the application [of ***5th April, 2010***] it may be said it's because ***Ojwang, J*** had already made up his mind about [share] ownership."

Learned counsel sought case-authorities which he urged to be in support of his argument. It is necessary to scrutinize these authorities to appreciate their essence and their specific linkage to the case being made.

Counsel began by citing an extempore ruling by the High Court (***Aluoch, J***, as she then was), ***Judith Wambui Gatei & Another v. Ngugi Muiruri***, Nairobi HCCC No. 1301 of 2004, where the following passage occurs:

"However, on perusal of the application plus the supporting affidavit and annexures as well the grounds of opposition filed, I discovered that the dispute herein revolves around a piece of land namely GITHUNGURI/IKINU/76 which was the subject of dispute in H.C. Succ. Cause No. 1775 of 1883 which was decided by my order of 8th October, 2002. In the circumstances I find that the justice of the case requires that the present application be heard and determined by ANOTHER JUDGE.

"In the circumstances therefore, I hereby DISQUALIFY myself from handling this matter and direct that the same be placed before any other Judge who did not handle the succession cause which has given rise to this case".

Learned counsel next cited the Court of Appeal decision in ***Attorney-General v. Anyang' Nyong'o & Others*** [2007]1E.A. 12, from which he underlined two passages from the editor's summary (on pp.13 and 14):

(i) [pp. 13-14] –

"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially [?] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case……."

(ii) [p. 14] –

"While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law'. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers."

From highlighting the foregoing passages in case law, ***Mr. Wasuna*** went on to urge that: "the matter touches on the interpretation of orders; it is like the same Judge sitting on appeal over his earlier orders. That will be embarrassing to the Court".

The difficulty with that contention, as already noted, is that the applicants do now have an appeal before the Court of Appeal, in relation to the orders they complain about; and unavoidably, to subject those very orders to the scrutiny of another High Court Judge, is to raise puzzles of jurisdiction – and this tends to weaken the argument itself.

Even as I perceived the several analytical points in regard to the case made by ***Mr. Wasuna***, I was keen to see the scenario from learned counsel, ***Mr. Kinyua's*** perspective, for the plaintiffs/respondents.

Mr. Kinyua's submissions reinforced the impression I was gaining already, that this application targets the merits ***of the case***, and carries only limited grievance about the ***manner of decision-making***, in respect of this Court's ruling of ***26th February, 2010***. Counsel submitted that although the applicants claim there is an issue as to the interpretation of the ruling of ***26th February, 2010*** which justifies recusal

by the Judge, no application had been made for an interpretation of the said ruling: and were there to be such an application, it would most appropriately be done by the Judge who wrote the ruling. Counsel urged:

"The applicants want another Judge to interpret the ruling; but the ruling is in plain English; and a Judge of concurrent jurisdiction should not be the one doing the interpretation".

Learned counsel referred to a ruling made by ***Mr. Justice Ibrahim*** at an ***ex parte*** stage, on the defendant's application of ***5th April, 2010***. The learned Judge thus recorded:

"I do not think in any event that the interim orders made by *Justice Ojwang* ***on*** *26th February, 2010* ***determined the dispute herein in respect of the shareholding of the parties".***

But the defendants have thought contrariwise, and it is this thinking that leads them to demand the recusal of the Judge who made the ruling of ***26th February, 2010***.

Mr. Kinyua urged that since the defendants have already lodged an appeal against the said ruling of ***26th February, 2010***, the proper thing for them to do, in moving this Court as they have done, was to seek stay of proceedings pending the pronouncement of the outcome of that appeal.

Learned counsel submitted that it is trite law and procedure that injunctions are dealt with by the High Court on the basis of ***prima facie*** evidence: and hence it would not be proper to attack the orders of ***26th February, 2010*** for having been made on ***prima facie*** grounds. Learned counsel urged that once the ruling was made, there were only two regular openings for redness: seeking a ***review***, or proceeding on ***appeal*** – and the applicants had elected to file an appeal. In the circumstances, counsel urged, the right course for the defendants was to await the delivery of the appeal judgment.

As regards the orders of ***26th February, 2010***, learned counsel submitted that the 1st order restrained 6th defendant, and was unrelated to ***share-holding***; and the other substantive order made had nullified the ***8th defendant's*** letter, and the 8th defendant is raising no complaint about it: it is 1st -7th defendants who have taken upon themself the task of raising complaint on behalf of the 8th defendant.

Counsel urged that, by the Court of Appeal's decision in ***Attorney-General v. Anyang' Nyong'o & Others*** [2007]1E.A. 12, there had to be a "reasonable apprehension of bias", as the basis for recusal by a Judge, and that the same had not in this instance been demonstrated.

Learned counsel was not in agreement with the High Court decision in ***Judith Wambui Gatei & Another v. Ngugi Muiruri***, Nairobi HCCC No. 1301 of 2004, as a precedent; that decision, in his opinion, was "a most unfortunate ruling", for having been made ***suo motu*** and insofar as it "bars other Judges….." Counsel urged the point further by citing the Court of Appeal decision in ***Republic v. Mwalulu & 8 Others*** [2005]1KLR1, in which it was thus held(p.2):

"The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself."

Learned counsel considered the position on recusal by a Judge, further afield, and invoked the English Court of Appeal decision in ***Locabail (U.K.) Ltd v. Bayfield Properties Ltd***. [2000]Q.B. 451; from that decision, the following passage (at p.480) may be set out:

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of a judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history…..; or previous judicial decisions……"

On the basis of the foregoing authority, ***Mr. Kinyua*** urged that the ruling of ***26th February, 2010*** which the applicants were using as their basis for asking for recusal of the Judge, carried nothing outspoken which suggested bias, and thus the application lacked a cogent basis.

This has been an opportunity for me to consider closely the subject of recusal by a Judge, on grounds that there are apprehensions of bias. This ruling is detailed, and carries a record of the entire argument and the evidence on both sides. At a general level, I have to state that nothing compelling has been shown which indicates that the applicants are facing a real danger of a hearing that is not impartial. But more specifically, the deportment of the applicants shows them to be somewhat too restive to wait upon and to accommodate the judicial decisions and the judicial process. The moment the applicants felt dissatisfied

with this Court's ruling of ***26th February, 2010*** they moved the Court of Appeal at two levels; at one level, to reverse the High Court's ruling on the merits; and at another level, to stay the said ruling pending the determination of the appeal. Although the applicants must have known that, by the two appellate motions, they could, at least temporarily, be relieved of the aspects of the High Court ruling being questioned, they would not accord the Court of Appeal a chance to give them results. They, by parallel motion, asked this Court to disqualify itself, and that a different Judge be brought into these proceedings. Why was this necessary, as the Court of Appeal had already been moved to give its decisions? The most probable answer is that the applicants were in quest of strategic solutions and not just ***judicial solutions***: they had filed yet another application in the High Court (dated ***5th April, 2010***) which was also targeted at the ruling of ***26th February, 2010***against which they had already appealed. Without due regard to the structures of the law of jurisdiction, the applicants, in all probability, assumed a different High Court Judge was going to re-interpret the ruling of ***26th February, 2010***.

In such a strategy by parties and their advocates, it is clear that the mere object of emerging a winner, trumps the Court's regular procedures for arriving at just results. For this reason, the approach of the applicants in this matter should be viewed as an abuse of the process of the Court.

Judicial authority on the question of recusal by a Judge, to avoid perceptions of bias, is unambiguous: the mere fact that a Judge had previously given a decision bearing a relationship to a current matter or cause, or touching on parties who are in a current matter or cause, is ***by itself*** not a reason for recusal. Only tangible facts and circumstances that naturally spawn favouritism, or lack of impartiality, will justify calls upon a Judge to recuse himself or herself.

In the instant case, the applicants have brought no case of merit, to support their prayer for the recusal of a Judge; and their application is hereby dismissed, with costs to the respondents.

DATED and **DELIVERED** at **MOMBASA** this 24th day of September, 2010.

……
J. B. OJWANG
JUDGE