REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC NO. 189 OF 2019

(FORMERLY NAIROBI HCCC NO. 990 OF 1999)

KUTIMA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MUTHONI KIHARA.....1ST DEFENDANT

COMMISSIONER OF MINES & GEOLOGY.....2ND DEFENDANT

RULING

(Application for recusal of the presiding Judge filed by 1st defendant; plaintiff having filed suit claiming that the 1st defendant has trespassed into its land and is illegally undertaking mining activities; suit resisted by the 1st defendant; plaintiff subsequently filing an application to withdraw suit; 1st defendant filing an application for amendment of defence to include a counterclaim; directions issued that the application to withdraw be heard first; 1st defendant seeking leave to appeal which was granted and an appeal filed; 1st defendant now seeking recusal of the judge mainly for reason that the judge ordered that the application for withdrawal of suit be heard first; 1st defendant basing her application on apprehension of bias; test on an apprehension of bias; whether an objective man would consider the judge to be biased based on the fact that the judge directed the plaintiff's application to withdraw to be heard first; court not convinced that an objective person would consider the judge to be biased because of giving one application priority over the other;application dismissed)

1. The application before me is that dated 25 September 2020 filed by the 1st defendant. The substantive order is to have me recuse myself from this case and to have the matter transferred to the Environment and Land Court at Nairobi for disposal. There are various grounds listed in support of the application, and the application is supported by the affidavits of Godfrey Kihara Kamau and Charles Kanjama, the latter being counsel on record for the 1st defendant/applicant. The plaintiff and 2nd defendant are not persuaded as to the merits of this application and have thus opposed it. Before I delve into it, I find it necessary to provide a bit of a background to this suit and the far that it has reached.

2. This is an old case that was initially filed at the High Court in Nairobi, in the year 1999, which is now more than 20 years ago. In the plaint, the plaintiff pleaded inter alia that it is the legal owner of the land parcel LR No. 12199/4 situated in Taita Taveta District having purchased it in the year 1994. It is averred in the plaint that prior to the purchase of the land, the previous owners, had entered into an agreement with the husband of the 1st defendant/applicant one Kihara Kibugi (deceased), whereby the deceased would prospect for minerals on the land and in consideration, a partnership was to be formed between him and the land owners. The plaintiff averred that Mr. Kibugi died in the year 1986. It complained that the applicant has entered the land and has been illegally mining since the year 1993. It further pleaded that the applicant had filed an application with the 2nd defendant for the issuing of a mining licence without the permission of the plaintiff. The plaintiff thus contended that the applicant is a trespasser on the suit land. In the suit, the plaintiff sought orders of an injunction to restrain the applicant from the suit land, account of proceeds earned since 1993, general damages for illegal and unauthorised mining on the plaintiff's land, general damages for degrading and polluting the plaintiff's land and costs of restoring it, and a declaration that the 2nd defendant has no right to issue any prospecting or mining licence to the applicant over the plaintiff's land unless with consent of the plaintiff. The plaintiff also sought costs of the suit. The suit was resisted by the applicant and 2nd defendant who filed defences.

3. In the course of the proceedings, both the applicant and 2nd defendant filed applications to have the plaintiff's suit struck out as being incompetent. The applications were heard by Kihara Kariuki J (as he then was) who allowed them and proceeded to dismiss the case of the plaintiff through a ruling dated 26 April 2005. The plaintiff, being aggrieved, filed an appeal to the Court of Appeal. The appeal was heard and judgment delivered on 24 April 2015 with the appeal being allowed. The order dismissing the suit was set aside and the suit restored to proceed to full hearing in the normal manner expeditiously, given its age. At this time the Environment and Land Court had been created following the 2010 Constitution, and the matter was transferred to the Environment and Land Court at Nairobi for disposal. The matter went before the Presiding Judge of the Environment and Land Court, Hon. Justice Samson Okong'o, who directed that since the suit land is situated in Taita Taveta, the matter ought to be heard at the Mombasa Environment and Land Court, and he proceeded to transfer the case file

to this court. The matter came before me (as the Presiding Judge, Mombasa ELC) on 22 October 2019 when I directed that this matter be placed before Yano J, principally because there had been a related matter that had been handled by him. The applicant however had a problem with Yano J, handling the case, as he had handled the previous matter, and thought it appropriate that the case be handled by me. Yano J, pursuant to these submissions, referred the case back to me.

4. In the meantime, the plaintiff had on 29 July 2019, filed a notice of withdrawal of suit under Order 25 Rule 1 of the Civil Procedure Rules, 2010. That notice was drawn as follows :-

> *TAKE NOTICE that the plaintiff has wholly withdrawn the plaint dated 10th May 1999 for reason that it has in all respects been overtaken by the final and binding judgments of this Court in Milimani High Court Judicial Review Miscellaneous Civil Application No. ELC 84 of 2011 (Judgment of Hon. Justice G.V Odunga delivered on 1st November 2013) and by the Court of Appeal in Nairobi Civil Appeal No. 10 of 2014 (Judgment of Hon. E.M Githinji, R.N. Nambuye and W. Karanja J.J.A delivered on 9th June 2017) involving similar parties, copies of which are hereto annexed.*

5. The withdrawal was minuted by the Deputy Registrar but this was later reversed as she thought that it was unprocedural. Subsequently two applications were filed, one by the applicant dated 15 October 2019, and the other by the plaintiff, dated 23 January 2020. The application by the applicant inter alia sought orders to have that application heard in priority to the plaintiff's notice to withdraw suit, leave to amend defence to introduce a counterclaim, and joinder of Muthoni Kihara Mining Company Limited as co-defendant. On the other hand, the application by the plaintiff sought orders for leave to be granted to the plaintiff to withdraw the suit.

6. The matter came before me on 27 January 2020. There arose the issue of which application should be heard first or whether the applications should be heard together. Mr. Raiji, learned counsel for the plaintiff thought that his application should be heard first though he had no problem if the two applications were heard together. Mr. Kanjama, learned counsel for the applicant, in principle had no problem with the two applications being heard together. Having considered the submissions of counsel, I made the following directions, which I copy in full for they form the genesis of this application. This is what I recorded :-

> There are two applications before court, being the applications dated 14/10/2019 filed by the 1st defendant and the application dated 23/1/2020 filed by the plaintiff. The 1st defendant's application is for leave to amend defence to include a counterclaim, joinder of several parties and injunction. The plaintiff's application is for withdrawal of the suit. I have taken note of the submissions of counsel on what directions and orders they would wish from the court. My own view of the matter is that the application to withdraw suit should take precedence for if it is allowed, then there would be nothing before this court upon which the application to amend can be founded. If it is dismissed, then the suit would remain live and we can then determine whether to hear the application to amend. I thus direct as follows :-
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> 1. That the application dated 23/1/2020 be heard in priority to the application dated 14/10/2019.
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> 2. That pending determination of the application dated 23/1/2020, the application dated 14/10/2019 be stayed.
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> 3. That at the moment, I am not persuaded to issue any interim orders of injunction as prayed by the 1st defendant.
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> 4. That the 1st and 2nd defendants are at liberty to oppose the motion dated 23/1/2020 by filing a Replying Affidavit and/or Grounds of Opposition within 7 days of today.
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> 5. The application be heard inter partes on a date that I will give when issuing these directions.

7. After I made the above directions, Mr. Kanjama referred me to a prayer in his application of 14 October 2019, which had sought that the said application be heard in priority. My view was that the fact that there was such a prayer, did not take aware the court's power to give procedural directions on what should be heard first, and I was of opinion that we proceed as directed above. Mr. Kanjama sought leave to appeal my directions which leave I granted. A notice of appeal was duly filed followed by an application dated 7 March 2020 for stay of proceedings pending appeal. That application was argued substantively and I delivered a ruling on 30 July 2020. I was not persuaded that this was a fit case for stay of proceedings and I dismissed the application. That paved way for the hearing of the application dated 23 January 2020 pursuant to my directions that it be heard first. I listed that application for formal hearing on 28 September 2020. It was three days prior to that application that this application, seeking my recusal, was filed.

8. The grounds upon which the application is based are inter alia that :-

> i. On 27th January 2020 the Court made an Order to the effect that the 1st Respondent's Application for leave to withdraw the suit be heard in priority to the Applicant's, which seeks amendment of pleadings. The Order thus stayed the application for amendment of pleadings to introduce a counterclaim. Notably, the parties had submitted that they were ready to have the applications heard and determined simultaneously.
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> ii. The Court failed to consider that the effect of staying the application seeking amendment of pleadings was to deny the 1st Defendant/Applicant procedural fairness as the Court already predetermined the said Application.
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> iii. The Court also unequivocally stated that "my own view of the matter is that the application to withdraw suit should take precedence for if it is allowed, then there would be nothing before this court upon which the application to amend could be founded". This is clear evidence that the Judge already predetermined the matter.

iv. Thereafter and being aggrieved by the said directions, the 1st Defendant/Applicant herein filed an application dated 7th March 2020 seeking inter alia stay of further proceedings pending the hearing and determination of an intended appeal. The said application was dismissed with costs for the reasons inter alia the Notice of Appeal was filed out of time and the affidavit in support of the application was sworn by a stranger to the proceedings. Notably, none of the parties raised the former issue and thus it was not part of the issues for determination before the Court. As for the latter issue, the 1st Defendant's counsel, in his oral submissions, submitted that the description of the deponent was an inadvertent error and that the matter had been raised late and the 1st Defendant was ready if required to correct the mis-description but the Court still found that the affidavit was incompetent.

v. After the Ruling denying stay was delivered, the Court then proceeded to fix the Plaintiff's application to withdraw the suit against both Defendants dated 23rd January 2020 for inter partes hearing on 28th September 2020.

9. The applicant has additional grounds, inter alia, that because of the above, I have a set position that the withdrawal should precede the amendment of the 1st Defendant/Applicant's pleadings and therefore my continued hearing and determination of the present case will prejudice the applicant; and that her counsel on record (Mr. Kanjama) was involved in a similar case, *Nakuru Constitutional Petition No. 7 of 2011*, where I appeared to be predisposed against the advocate's client and an application for recusal was filed. The applicant avers that she is apprehensive of a similar situation where I could be predisposed against her advocate on record. She believes that a fair minded and informed observer might think that there is a real possibility of bias. She wishes for the case to be moved back to Nairobi because Judge Yano had already excused himself from these proceedings.

10. In opposing the application, the plaintiff filed a replying affidavit sworn by Saul Joel Mwangola its Managing Director. He believes that the application is a flagrant abuse of the court process beyond tolerance. It is his view that the real objective of the applicant is to avoid adjudication of the actual issue in controversy, and to delay and obstruct the final determination of the one outstanding issue, that is, whether the suit is still relevant. He believes that I expressed myself with integrity, skill and impartiality. On the Nakuru proceedings, he is of opinion that it is an irrelevancy to sow confusion in an attempt to annoy and irritate the judge. He is further of the view that the application is an attempt at forum shopping and prolonging the conclusion of the matter.

11. A supplementary affidavit was filed by Godfrey Kihara Kamau to respond to this affidavit of the plaintiff. I have considered this affidavit which, in my view, mainly gives a background on the dispute between the parties and tries to demonstrate that the applicant has a good case.

12. The 2nd defendant filed grounds of opposition. It is the opinion of the 2nd defendant that this court duly exercised its discretion in giving priority to the application to withdraw suit and that the applicant has been accorded a fair hearing. It is his view that the application is a delaying tactic to avert the determination of the application to withdraw suit.

13. I invited counsel to file written submissions on the application. I have taken note of these submissions, and the authorities tendered, alongside the oral submissions made. In his submissions, Mr. Kanjama, learned counsel for the applicant, inter alia submitted that my recusal is sought on the ground that the applicant is reasonably apprehensive that I am biased and that justice will not be done if the case is heard and concluded by myself. He has submitted that the applicant is reasonably apprehensive that I have already predetermined the case by prioritising the plaintiff's application for withdrawal of suit over her application for amendment of pleadings.

14. On his part, Mr. Raiji for the plaintiff, inter alia submitted that this court cannot be faulted for the exercise of its discretion. He submitted that the applicants have turned a blind eye to Sections 1A and 1B of the Civil Procedure Act to support the overriding objectives of the court, that is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. He has questioned the conduct of the applicant, and it is his view that the applicant has been filing unnecessary and unmerited multiple applications, and that she is not interested in the logical conclusion of the prioritized application, nor her pending application for amendment. He submitted that if the applicant is genuinely aggrieved with the outcome of the rulings made by this court her legal avenue is to appeal. He further submitted that the affidavit of Godfrey Kihara Kamau should be expunged as he is a stranger to the proceedings.

15. Mr. Mwandeje, learned State Counsel, for the 2nd defendant, relied on his Grounds of Opposition.

16. I have considered all the above and now take the following view of the matter.

17. It is trite that every litigant is entitled to be given a fair hearing by an impartial court. Article 25 (c) of our Constitution indeed provides that one has the right to a fair trial. It is also not in controversy that where a judge is biased, then the probability of having a fair trial is called into doubt, and it is only prudent that the judge recuses himself/herself from the suit.

18. The question of recusal of a judge is not novel and has ample authority in our jurisdiction. In the case of *Kalpana H. Rawal & 2 Others vs Judicial Service Commission & 2 Others (2016)eKLR*, Ndungu SCJ, stated as follows :-

[68] There is a presumption of impartiality of a Judge which must be disproved by a party alleging bias on the part of the Judge. Similarly, it is expected that a judge will disqualify him or herself if he or she is biased. According to Professor Groves M, in "The Rule Against Bias" [2009] U Monash LRS 10, bias may be actual or apprehended. He observes that:

Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind.

19. It will be seen from the above that firstly, the presumption is that a court is impartial, and the burden of proving that a court is biased is

on the party so alleging. Secondly, bias may take two main forms, that of actual bias, and apprehended bias. I am not, in the circumstances of this case dealing with any claim of actual bias. Neither is it claimed that I have any interest in the outcome of this litigation, and for the record, I do not have any. In the above case of *Rawal vs JSC*, Ndungu SCJ at paragraph 71 of her decision further referred to the decision in the South African case of *Re President of the Republic of South Africa & 2 Others vs South African Rugby Football Union & 3 Others*, where the South African Court pronounced itself as follows in dismissing an application for recusal :-

It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.

It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

20. The test for proving an apprehension of bias is thus objective, and the question to pose and to be answered, is whether, a reasonable, objective and informed person, would on the correct facts, reasonably apprehend that the judge has not, or will not, bring an impartial mind to bear on the adjudication of the case.

21. It is apparent to me that this application has been filed because the applicant is aggrieved by my directions that the plaintiff's application to withdraw suit be heard in priority to her application to amend the pleadings. I thus ask myself, whether, an objective well informed person, would hold the view that I am biased, because I have opted to give priority to one application over the other. I am not persuaded that an objective, reasonable person, would come to such conclusion. This is because in the daily life of a judge, a judge has to make, and is indeed expected to make, such directions. If we were to invite the recusal of judges because they make procedural directions over which application should be heard before another, then all that judges will be hearing is applications for recusal, because a party thought that his/her application should be given priority over the other litigant's application. If a party is seriously aggrieved by such directions, in my view, the avenue is to appeal and not to seek the recusal of the judge.

22. In the context of this case, I was faced with two applications, and I needed to make a decision over which application should be heard before the other, or whether the two applications should be heard together. I held the opinion that the plaintiff's application to withdraw suit should be heard first and I did give my reasons why. I still stand by those reasons. To me the applications could not be heard together, because they sought orders that were at great variance and not capable of consolidation, thus one application had to be given priority over the other. I have mentioned that it is the work of judges to make such decisions. I reiterate that the avenue for a party who is aggrieved by a decision made in exercise of the judge's judicial authority ought to pursue an appeal against that decision. Indeed, I granted leave to the applicant to file an appeal to the Court of Appeal and I have seen that the applicant exercised her right to appeal to the Court of Appeal by duly filing an appeal. I cannot, through this application, revisit the issue of which application should be given priority, and I do not see how it can be argued, that because I gave priority to the application by the plaintiff, then it means that I am biased.

23. In fact, I wish to categorically state for the record, and for the avoidance of doubt, that I am not biased in any way against the applicant. I take the applicant as a litigant who is before this court to seek justice. But in the same vein, the plaintiff is also here to seek justice. I have to exercise my judicial discretion one way or the other. At the end of the day, I have to make a decision, and such decision, may or may not be in favour of the applicant. The applicant cannot claim that I am biased because I have made a decision that is not what she wanted. If I have made a decision that she feels is not favourable to her, I assure her that such decision was made objectively on the basis of the facts and my understanding of what is best for the case before me. The applicant should not consider a judge to be fair only when the judge makes decisions that favour her. The applicant has contended that I have acted as if I have already decided on the application to withdraw. Nothing could be further from the truth. That application has yet to be heard and to be decided, and when I make a decision, it will be purely on the merits of it. I cannot say more on that application because it is yet to be considered. What I can say is that I will hear it impartially. I have nothing against the applicant.

24. The applicant's counsel in his submissions submitted that I have already taken a position on the applicant's application to amend, for reason that, when I gave directions, I did state that if the application to withdraw succeeds, then there would be nothing upon which the application to amend will be founded. I do not see how the applicant can hinge on that. It is a natural consequence, in my opinion, that if the application to withdraw is allowed, then there would be no suit, and there being no suit, there will be nothing further to do in the proceedings. I do not see how a party can allege bias because a judge has pointed out the natural course that a matter will take. Let us take an example. Let us assume that a party has filed suit and the defendant has raised a preliminary objection to the suit, claiming that it is incompetent, and the judge has to give directions on whether to hear the suit or the preliminary objection first. If the judge states that he will hear the preliminary objection first, because if it is allowed, then the whole suit will collapse, will we say that the judge has now predetermined the suit and is biased against the plaintiff ? Certainly not. What the judge would be stating is the obvious, that if the preliminary objection succeeds, then the suit would fall by the way side. It is the natural course of events and a judge cannot be said to be biased for pointing this out. Indeed, that reason could be the very basis of the decision. Of course, a party is at liberty not to agree with the judge, for he may feel that there is still substance in the suit. If so (and I am aware that I am repeating myself but I need to insist on this) the path is to file an appeal, not to seek a recusal. In any event, in the case before me, I have not seen any prejudice that the applicant stands to suffer. Assuming that this suit falls by the wayside, both herself and the plaintiff, will still be vested with any ground of defence or attack that may have arisen in the counterclaim, via a fresh suit. If the suit does not fall by the wayside, then the applicant can proceed to argue her application to amend in order to introduce the counterclaim. Either way, I see no prejudice to the applicant.

25. There was an attempt to introduce a case that I heard in Nakuru being *Nakuru High Court, Constitutional Petition No. 7 of 2011*. That to me is a red herring as it has completely no bearing over this matter. There is no common thread between that case and this suit, save only that

Mr. Kanjama appeared in that case, and is also appearing in this case. The fact that the same counsel appeared in a different matter and also filed an application for recusal in that matter, cannot be transported into a subsequent suit over completely different parties. I thus need not say anything more on that, save to clearly state for the record, that I have nothing against counsel for the applicant. If I had, I would readily recuse myself, even without any application for recusal being made. There is also the issue of the competency of the affidavit sworn by Mr. Godfrey Kihara. It is really not necessary for me to address that because either way I am not persuaded on the substance of the application.

26. The result is that I find no merit in this application. It is hereby dismissed with costs.

27. Orders accordingly.

DATED AND DELIVERED THIS 25 DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA