



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 21 OF 2020**

**SYLVIA WANGECHI NJOKI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JOYCE NJOKI KAMWERU.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VS**

**JOHN CHEGE NJOKI.....DEFENDANT/APPLICANT**

**RULING**

1.Vide a motion dated the 4/11/2020 the Applicant sought orders that the matter be placed before another Court of similar jurisdiction and costs be provided for.

2.The application is based on the grounds annexed to the application and the supporting affidavit sworn on even date. The Applicant states that he gained knowledge on the 3/11/2020 that the 1<sup>st</sup> Respondent is an employee of the Judiciary based at Murang'a Law Courts working as an Accountant. That he visited the Court premises and confirmed that her office is located near the High Court Registry and the Chambers of the Presiding Judge. That the 1<sup>st</sup> Respondent shares a common working environment with the Judge presiding over the matter and that he has a valid apprehension that there is a likelihood of interference with the Court file and overall determination of the suit. That a reasonable fair minded and informed observer would point at a possibility of bias in the circumstances. That it will serve the interest of justice if the judge recluses herself from presiding over the matter and the same be placed before any other judge with similar jurisdiction to handle the matter. That no prejudice shall be visited on the Respondents.

3.The application is opposed. Vide the Replying Affidavit dated the 16/11/2020 and deponed by J Mwangi Ben Advocate for the Respondent, stated that the application is most unfortunate and misconceived. That it is an affront to the judicial authority and power of the Court as an institution. That these allegations of bias are wild and unsubstantiated and pose the risk of putting the Court to disrespect and disrepute in the eyes of the public. That the Counsel of the Applicant is leading sideshows that do not promote justice and respect instead of instilling confidence and respect to the Court, she being an officer of this Court.

4.Further that the Court being a Court of law is independent in its application of the rule of law and dispensation of justice. That there are no reasonable and plausible reasons to support recusal of the Court and under para 10 of his affidavit issued notice to cross examine the Applicant on oath on the gross and wild allegations raised in the affidavit dated the 4/11/2020 with respect to paras 2,3,6 and 9.

5.In his supplementary affidavit filed by the Applicant dated the 20/11/2020, he stated that his application has not been made out of contempt of the honourable Court but in order to avoid any possibility of bias. That the Respondents Counsel has not denied that the 1<sup>st</sup> Respondent does not work for the Muranga Court. He faulted the Respondents Counsel for swearing the Replying Affidavit instead of his client who should have responded to the facts from her knowledge. That this is a guise to evade the admission of the facts raised in the affidavit of 4/11/2020. That the affidavit dated the 16/11/2020 sworn by the 1<sup>st</sup> Respondent's Counsel should be struck out.

6.In conclusion he stated that he is willing to be cross examined on the averments in para 10 of the Respondents Counsel's affidavit and also be accorded the same opportunity to cross examine the 1<sup>st</sup> Respondent and her Counsel.

7.On the 3/12/2020 when the parties appeared before me the Respondent's Counsel informed the Court that he will rely on the Replying Affidavit on record to raise legal issues but neither to oppose or support the application which in his opinion was aimed at the Court disqualifying itself from the case. That the application in his considered view was not in respect to the 1<sup>st</sup> Respondent. The Counsel for the Applicant sought leave to file written submissions which leave was granted. No written submissions were filed despite the directions of the Court of the 3/12//2020 and 15/2/2020. That said I shall proceed to determine the application based on the pleadings before me.

8.The key issue is whether the Court should recluse itself from hearing this matter.

9.It has been held that recusal of a judge is a serious matter for which an Applicant bears a duty of establishing the facts upon which the

inference of bias is to be drawn by a fair minded and informed observer that the judge is biased. The test of finding bias is an objective one. There must be a reasonable apprehension of bias. The reasonable bias must be held or made by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.

10. This was the test applied in the case of in **R. v. S. (R.D.) [1977] 3 SCR 484** where the Court held as follows:

“The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

11. The test is objective and the facts constituting bias must be specifically alleged and established by the person alleging the bias.

12. In this case the Respondents filed suit against the Applicant on the 16/9/2020 seeking inter alia injunctive orders restraining the Applicant from undertaking excavation works on MAKUYU/KIMORORI/BLOCK11/138 which borders the Respondents parcels to wit; MAKUYU/KIMORORI/BLOCK11/1287 and 1288.

13. Simultaneously, the Respondents filed a motion dated the 28/9/2020 seeking orders of injunction restraining the Applicant from carrying out such excavation works on the common boundary of the suit lands. On the 15/10/2020 the parties by consent compromised the said motion and agreed to restrain the Applicant in terms of prayer 2 of the said motion pending the hearing and determination of the suit.

14. The application is premised on the averment that the 1<sup>st</sup> Respondent is an employee of the Judiciary working as an Accountant at Murang'a law Courts. That she shares a common working environment with the judge and that her office is near the High Court registry and the Presiding Judges chambers. It is these set of facts that the Applicant is apprehensive that there is a likelihood of interference with the Court file and the overall determination of the matter in Muranga Law Courts.

15. The allegation underpinning this motion is that bias is likely to occur in two scenarios; the likelihood of interference with the Court file and overall determination of the suit at Muranga Law Courts. The Applicant has not pleaded with any specificity how the file likely to be interfered with and by whom. Interference with a Court file is a serious matter which cannot be whimsically stated.

16. On different note, one would wonder where the staff of the Judiciary should take their disputes if not the Courts in which some of them are employed in. Judiciary staff too are citizens of this country and are entitled to be heard by an impartial and open Court as enshrined by Art 50 of the Constitution. It would be a travesty of their constitutional rights if they are prevented from filing cases in Court because they are employees of the judiciary.

17. Having said that the issue is that by the case being heard at Muranga Law Court, is a reasonable person likely to apprehend bias on the part of the judge or judicial officer who is governed by an oath of office to hear and determine matters fairly and without inter alia fear or favour? I think not. The Court has not found anything that could create bias in the mind of the judge in hearing and deciding the suit. Under the Bangalore Principles of Judicial Conduct, a judge is required to perform his or her judicial duties without favour, bias or prejudice.

18. Rule 10(1) of the Judicial Service Code of Conduct and Ethics requires Judges of the Superior Courts to carry out their duties in accordance with the law. Every Judge takes an oath of office to serve impartially and to protect, administer and defend the Constitution. The doctrine of the right to sit is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a Court.

19. In the case of **South African Defence Force and Others v. Monnig and Others (1992) (3) SA 482 (A), p.491** the Court held that the recusal is derived from one of a number of rules of natural justice designed to ensure that a person accused before a Court of law should have a fair trial. The aim of the Court is to ensure justice is not only said to be done but be seen to be done and uncompromised.

20. The right to a fair trial in whatever forum must be balanced or weighed against a more superior right and obligation of judges to hear and determine cases.

21. In the case of **Gladys Boss Shollei vs Judicial Service Commission & Another 2018 eKLR**, the Supreme Court of Kenya cited with approval the following passage from the treatise **Judicial continuing education workshop; recusal, contempt of Court and Judicial Ethics, May 4, 2012:**

“A Judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartialities and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason”.

22. Having held that there is no proof of bias on the part of the Court and or the 1<sup>st</sup> Applicant, in upholding the right to natural justice this Court weighing the right to be heard and the right of the judge to sit and determine the case, I find that this to be one of the rare cases which can be considered with the goal of fostering the parties right to be heard without any suspicion of bias and or perceived advantage, however speculative it may be. In the main I am inclined to disallow the application on the basis of unproved bias.

23. I have already held that the grounds of recusal are speculative. But for the sake of safeguarding the integrity and due process of the Court, maintaining the appearance of impartialities and instilling public confidence in the administration of justice, and noting that the suit property in question situate at Kenol which borders the two territorial jurisdictions of the two ELC Courts, I order the file to be transferred to Thika ELC for hearing and determination.

**24. It is so ordered.**

**DATED, SIGNED & DELIVERED AT MURANGA THIS 11<sup>TH</sup> DAY OF FEBRUARY 2021.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Kirubi for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs

Makura HB for Ms. Githinji for the Defendant

Court Assistant; Njeri