



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 115 OF 2019

MARRIOT AFRICA INTERNATIONAL LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MARGARET NYAKINYUA MURIGU.....1ST DEFENDANT

MARY WANJIKU KANYOTU.....2ND DEFENDANT

WILLY KIHARA.....3RD DEFENDANT/APPLICANT

KANGAITA COFFEE ESTATE LIMITED.....4TH DEFENDANT

AND

UKOMBOZI HOLDINGS LTD.....INTERESTED PARTY

RULING

By a **Notice of Motion Application** dated **16th October 2020**, brought under various provisions of law among them **Articles 50(1) and 25(c)** of the **Constitution of Kenya**, the **3rd** Defendant herein **Willy Kihara Njoki Kanyotu** sought for the following Orders:-

- 1. THAT the Hon. Presiding Judge be pleased to recuse herself from hearing this matter forthwith.**
- 2. THAT the Hon. Presiding Judge be pleased to refer this matter to the head of Environment & Land Court, Nairobi for allocation to another Judge.**
- 3. Costs of the Application be provided for.**

The Application is supported by various grounds stated on the face of the application together with the **Supporting Affidavit** of the Applicant. Among these ground are:-

- 1. That the Applicant has recently learnt that the Hon Presiding Judge has dealt and handled disputes relating to this suit property on three other occasions in addition to the current suit.**
- 2. That in some of the cases handled, the dispute involved some parties that are also in the current matter before this**
- 3. That the Hon. Presiding Judge did not inform and/or forewarn the parties herein when the matter was filed before this Court that she had handled other disputes involving the suit property.**
- 4. That the Hon. Presiding Judge already had personal knowledge of the facts concerning the dispute.**
- 5. That on 24th September 2020, the Hon. Presiding Judge issued a Ruling in favour of the Plaintiff with costs while she had recognized and noted that there were grave allegations of fraud and illegality levelled against the Plaintiff and its affiliate Companies and agents.**

Therefore, the Applicant is apprehensive on reasonable grounds that the Hon Presiding Judge will not be impartial on this matter and will not give the applicant and the other Defendants herein a fair hearing. Further that Justice must not only be done, but must also be seen to be done and the applicant herein and the Defendants do not see it here.

In his **Supporting Affidavit** the Applicant, **Willy Kihara Njoki Kanyotu** reiterated the contents of the grounds in support of the Application and explained why he felt the Presiding Judge herein would not be fair and impartial in dealing with this matter. He contended that it would be fair and just if this Court allows the Application as sought by him.

The Application was further supported by two **Further Affidavits** sworn by the 3rd Defendant/Applicant on **13th November 2020** and **18th November 2020** and annexures thereto.

Further the Application is supported by the 1st, 2nd and 4th Defendants who filed an affidavit in support sworn by **Margaret Nyakinyua Murigu**, the 1st Defendant herein. She alleged that she is the Administrator of the Estate of **James Kanyotu**, the Principal shareholder of **Kangaita Coffee Estate Ltd**, the 4th Defendant herein. She further averred that the 4th Defendant was the registered proprietor of **LR No.11261/76**, which is the subject of this litigation. Further that the Presiding Judge herein handled another matter being **ELC No.1528 of 2014**, and therefore became aware of the issues in dispute in all the proceedings relating to the alleged sale of **LR No. 11261/76**. That it is impossible to clear any prejudice she may have in these proceedings now and in future against the defendants who are associated with **James Kanyotu**. That it is only fair and just that the Presiding Judge in this matter recuse herself from these proceedings and allow a different Court and/or Judge to hear the present suit to allow fairness and impartiality. That Justice should not only be done, but must be seen to have been done.

The Application is opposed by the Plaintiff herein and the Interested Party. **Abdul Dawood Hassan**, a Director of the Plaintiff swore a **Replying Affidavit** on **9th November 2020**, and averred that the Application by the 3rd Defendant/Applicant is totally misconceived, bad in law and a gross misrepresentation of pertinent facts attendant to this matter. That it is devoid of any facts and does not proffer any evidence to show or prove any allegations made therein.

Further that prior to the Ruling delivered by the Court based on the material presented to it, the 3rd Defendant had not raised the issues that he has now raised. That by raising the issue of recusal of the Presiding Judge after a Ruling has been delivered against the Applicant, then he is attempting to forum shop.

Further, that the Applicant has failed to establish any reasonable apprehension of bias on the part of the Presiding Judge as well as establish the material facts that demonstrate the said bias and/or prejudice. Further that where a party is aggrieved by a Ruling and/or decision of a Court, the law provides for adequate mechanism where the same can be challenged. Further, that in the said Ruling, the Hon. Presiding Judge did not hold and find that the Plaintiff obtained the suit property fraudulently since the said Ruling did not go into the merits of the case. That the 3rd Defendant knew all along that the Hon. Presiding Judge had dealt with the other matters involving the suit property, but failed to raise the same at the very beginning of the suit. The Applicant only raised the issue of recusal after a ruling was issued against the Defendants. He urged the Court to dismiss the instant Application.

The deponent swore a further affidavit on **10th December 2020** and denied all the allegations made by the Applicant in his further affidavit. That the Application is bad in law, devoid of merit and an overt waste of precious Judicial time.

Bishop Jimmy Kimani, a Director of the Interested Party swore a Replying Affidavit on **13th November 2020**, in opposition to the instant Application. He averred that the Applicant has not met the threshold required to have a Judicial Officer recuse herself from a matter. That though the Defendants were aware of the other matters, they participated in this proceedings from **2019** and did not bother to raise the issue and only raised it after a substantive Ruling was issued against them. That when this Court issued Interim orders in favour of the Defendants, the 3rd Defendant was comfortable with the Judge and it is insincere on the part of the 3rd Defendant/Applicant to belatedly make this Application for recusal simply because orders were made against him and yet when the previous orders were in his favour, he was comfortable. He contended that the contents of the 3rd Defendant Application concern dissatisfaction with the Ruling of this Court issued on **24th September 2020**, and the 3rd Defendant remedy of dissatisfaction should have been to file an Appeal against the said Ruling but not to besmirch the Court.

Further that the 3rd Defendant is abusing the process of the Court through the present Application. That instead of progressing the matter and preparing it for full hearing, the 3rd Defendant is busy re-litigating issues and pulling this Court and all parties to litigate in installments or piecemeal. He urged the Court to dismiss the instant Application.

The Application was canvassed by way of written submissions which this court has carefully heard and considered. It renders itself as follows:-

The issue that falls for determination is whether the 3rd Defendant/Applicant has satisfied the criteria for recusal of a Judge.

It is not in doubt that the suit herein was filed in **July 2019**. At the first instant, the Plaintiff also filed a **Notice of Motion Application** seeking for **injunctive orders**. The Court did not grant any interim orders at the first instance, but directed the Plaintiff to serve the Defendant/Respondent for inter partes hearing on **16th July 2019**.

Subsequent thereto, the Defendants also filed their **Notice of Motion Application** dated **15th July 2019**, and also filed a **counter claim** to the suit. The Defendants also sought for injunctive orders against the Plaintiff. Thereafter **Ukombozi Holding Ltd**, the Interested Party was enjoined in the suit.

On **15th August 2019**, the Court issued **status quo orders** wherein the parties were restrained from any further dealing with the suit property until the two applications were heard and determined. However, it had been averred by the Interested Party that some plots had already been transferred to 3rd Parties who were not parties to this suit. The Court directed that the said transferred plots to remain as so transferred, but directed the Interested Party to halt any further **transfers, sub-divisions** and/or **dispositions**.

In further directions issued by the Court on **30th January 2020**, the Court noted that this matter was convoluted and after filing and exchange of pleadings and written submissions by the parties, this Court did deliver a ruling on **24th September 2020**, wherein it first acknowledged that it could not determine the merit or demerit of the case at that interlocutory stage. Though there were allegations and counter-allegations, the Court stated that those conflicting issues could only be determined after calling of evidence at the main trial. However, the Court did grant interim orders in favour of the Plaintiff and dismissed the Defendants' **Notice of Motion Application** for permanent injunction which could not have been issued at the interlocutory stage as per this Court's considered view.

Further, the Court gave timelines on preparation of the suit for main hearing and acknowledged that it needed to be determined on priority basis so that all the contested issues could be addressed once and for all after calling of evidence.

However, before the pre-trial date, the 3rd Defendant filed the instant application seeking for my recusal. It is instructive to note that all the material time from **July 2019**, to **September 2020**, the 3rd Defendant did not raise any issue on the allegations that the presiding Judge herein had previously handled other disputes involving the parcel of land. This Court did issue status quo orders on **15th August 2019**, and even though there were allegations of non-adherence to the same, and after the Court gave directions that it could not interrogate the said non-adherence so much as that could have meant engaging in a mini-trial, the 3rd Defendant/Applicant did not ask for the Court or Presiding Judge to recuse herself.

However, the Applicant filed this Application after being dissatisfied with the substantive Ruling of this Court that was issue don **24th September 2020**.

An Application for recusal of a Judge or a Judicial Officer handling a matter is not novel. This was acknowledged by the Supreme Court in the case of **Jasbir Singh Rai & 3 Others....Vs...Tarlochan Singh Rai & 4 Others, Petition No.4 of 2012 (2013) eKLR**, where the Court held:-

“Recusal, as a general principle, has been much practiced in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account.

The term is thus defined in Black Law Dictionary, 8th Ed.(2004) [P.1303] to mean;- “Removal of oneself as Judge or policy maker in a particular matter.”

There are plethora of authorities from our Courts and other jurisdictions in respect of the issues a Court should take into account while determining such an Application for recusal.

In the case of **Gladys Boss Shollei...Vs...Judicial Service Commission & Another [2018] eKLR**, the Court held that:-

“Tied to the constitutional argument above, is the doctrine of the duty of a Judge to sit. Though not profound in our jurisdiction, every Judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a Judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every Judge takes an oath of office: “to serve impartially; and to protect, administer and defend the Constitution.” It 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 of law.”

The 3rd Defendant/Applicant has alleged that there is perceived bias and/or impartially on the part of the Presiding Judge who has handled other previous matters relating to the suit property and that she failed to disclose the same to the parties.

The criterial to be applied in determine whether a Judge should recuse herself/himself was succinctly captured in the case of **Kalpan Rawal vs Judicial Service Commission & 2 other (2016) eKLR**, where the test had also been adopted in the **Attorney General vs Prof. Anyang Nyong'o & 10 Others (EACJ) Application No. 5 of 2007** and held as follows:-

“We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously but amount to this; do the circumstance give rise to a reasonable fair minded and uninformed member of the public that the Judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks 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 uninformed about all the circumstances of the case.”

Further, the test for recusal of a judge was also laid down by the Court of Appeal in the case of **R Vs David Makali and others C.A. Application No. 4 and 5 of 1995 Nairobi (unreported)** and later emphasized in **R vs Jackson Mwalulu & Others C.A Civil Application No. 310 of 2004, Nairobi** where the Court of Appeal held:-

“The test is objective and the fact constituting bias must be specifically alleged and established.”

In the instant application, the applicant has alleged that the Presiding Judge herein has handled other disputes relating to this parcel of land and ruled in favour of the Plaintiff and affiliate companies and he is therefore apprehensive that in this matter, the presiding Judge will too be biased in favour of the Plaintiff.

As the Court pointed out earlier, the Applicant herein did not raise any objection to the Judge handling this matter until after the Ruling of **24th September, 2020**. Though, the Presiding Judge did handle the stated disputes at the preliminary stage, the said matters were not heard to their full conclusion before herself. For sure, Judges or Judicial Officers are not expected to remember all the land parcels numbers after handling a matters or cases relating to the said land parcels.

It was incumbent upon the Applicant to demonstrate the actual or perceived bias on the part of the Presiding Judge. The Applicant did not ask this Court to recuse itself at the first instance and it failed to do so. After issuance of the status quo orders on **15th August 2019**, the applicant did not complain, but proceeded and complied with the Court's directives on filing of pleadings.

The issue of recusal of a Judge is a serious matter and the Applicant bears a duty to establish facts instead of raising allegations. Further recusal is a matter of discretion by the Judge concerned, but the said discretion must be exercised judiciously.

The Applicant herein seems to be dissatisfied with the ruling that was delivered by this Court on **24th September 2020**. Instead of filing an Appeal as provided by the law, he chose to attack the Judge handling the matter. It is not in doubt that in our legal system which is adversarial in nature, when a matter is filed in Court and taken before a Judicial Officer and/or a Judge in this matter, there would definitely be a winner and a loser. However, it is not proper to attribute loss in a case to the person of the Judge or Judicial Officer handling the matter. In the case of **Attorney General vs Prof. Anyang Nyongo & 2 others (2007) IEA** the Court held:-

“The Court must guard against litigants who too often blame their losses in Court cases to bias on the part of the Judge.”

From the allegations levelled against this Court and/or the Presiding Judge by the Applicant, it is clear that the said allegations stem from the outcome of a Ruling delivered in an interlocutory application. It is not in doubt that the Applicant herein was not satisfied with the said Ruling or was aggrieved by the findings of the Court. But did he adopt the available mechanism to challenge the said decision?

Further the Applicant alleged that he had been tipped by one Shollei about the outcome of the said Ruling. This is a very serious allegation that was not raised before the said Ruling was delivered or even on the date of the ruling.

However, it is not in doubt that the Applicant and the other Defendants have made very disparaging allegations against the Presiding Judge herein. Though no evidence of bias has been demonstrated, the Court is very aware of the fact that Justice must not only be done but must also be seen to be done. In the case of **RPM VS PKM (2011) eKLR** the Court held:-

“I am aware of the maxim that Justice must not only be done, but must also be seen to be done.”

From the averments and allegations made by the Applicant and the other Defendants, it is clear that these are litigants who are keen to blame their losses in Court cases to bias on the part of the Judge. Maybe, if the outcome of the said Ruling was in their favour, the applicant would not have filed the instant application. But that is just a may be!

Even though as the Presiding Judge herein finds no evidence of perceived or actual bias has been advanced by the applicant, I however find it prudent, fair and in the interest of justice to disqualify myself from handling this matter further. For the above reasons, this Court and as the Presiding Judge, I proceed to disqualify myself and allow the 3rd Defendant's application dated **16th October 2020** in totality.

The upshot of the foregoing is that the Court allows the 3rd Defendant/Applicant's **Notice of Motion Application** dated **16th October, 2020** in terms of prayers **No. 2** and **3** with costs being the cause.

Further, the Court directs the **Deputy Registrar** of this Court to cause this file to be placed before the **Presiding Judge** of Environment & Land Court, for purposes of allocation to another Court and/or another Judge.

It is so ordered.

Dated, signed and Delivered at Thika this 4th day of March, 2021

L. GACHERU

JUDGE

4/3/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by

His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Nyiha for the Plaintiff/Respondent

Mr. Ruiru for the 3rd Defendant/Applicant and holding brief for

M/s Akedi for the 1st, 2nd and 4th Defendants

Mr.Thuita for the Interested Party

L. GACHERU

JUDGE

4/3/2021