Gulamhusein & another v Kenya Railways Corporation Limited & another (Environment & Land Case 46 of 2018) [2023] KEELC 17357 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17357 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 46 OF 2018

LL NAIKUNI, J

MAY 4, 2023

BETWEEN

GULAMHUSEIN F GULAMHUSEIN ..... PLAINTIFF

AND

GULAMHUSEIN F. GULAMHUSEIN ..... APPLICANT

AND

KENYA RAILWAYS CORPORATION LIMITED ..... DEFENDANT

AND

KENYA RAILWAYS CORPORATION LIMITED ..... RESPONDENT

RULING

I. Introduction

1. For the determination by this Honorable Court is a Notice of Motion application dated 4th July, 2022 filed by Gulamhusein F. Gulamhusein, the Plaintiff/Applicant herein. He brought it under the dint of the provisions of Sections 1A, 1B,3A and 3B of the Civil Procedure Act, Cap 21, Order 51 Rule 1 of the Civil Procedure Rules, of the Laws of Kenya.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant sought the following orders:-

   SUBPARA a.

   Spent.

   b. That the Honorable Justice Naikuni recuses and disqualifies himself from further hearing of the instant matter.

c. That the costs of the application be in the cause.

3. The application is supported by the 17th Paragraphed Supporting Affidavit of Samuel Odingo, an Advocate of the High Court of Kenya, who has conduct of this matter on behalf of the Plaintiff/ Applicant sworn on 4th July, 2022. He averred that:-

a. Parties appeared before Honourable Justice Naikuni on the 14th March 2022 for full hearing of the instant matter where the Plaintiff was put on the dock to give his testimony.

b. The Plaintiff/Applicant while giving his testimony was severally interrupted by the Honourable Judge who posed a series of questions to the Plaintiff/Applicant.

c. The Plaintiff/Applicant was interrupted while testifying and tasked by the Judge to explain why the Defendant put a seal in the place where he (the Defendant) had appended his signature. This question was followed by a threat from the Judge that failure to satisfactorily explain to court, his claim would stand dismissed.

d. The question was not proper for the Plaintiff/Applicant and the Defendant's Counsel intervention saved the day by calling the Defendant to explain the improper question posed to the Plaintiff.

e. The Plaintiff/Applicant was further bewildered by yet another interruption by the Judge and this time asked to explain why he took long to write a letter requesting the Defendant for vacant possession which question was accompanied by a threat of dismissal of the instant suit should the Plaintiff/Applicant fail to answer the Judge's concern felicitously.

f. Further, while testifying, the Plaintiff was unceremoniously interrupted by the Judge and shockingly informed that his Plaint did not describe elements of breach of contract. Yet again the Judge did not shy away to issue a threat of dismissal of the Plaintiff/Applicant's suit.

g. The Plaintiff/Applicant's 80-page list of documents was required by the Judge to be summarized in 5 minutes which action bordered the impossible. The Honorable Court indicated it had other matters to handle. The unceremonious remarks by court coupled generous intimidations caused the Plaintiff/Applicant to develop complications while leaving the dock and being diabetic, he fainted.

h. The Plaintiff/Applicant was apprehensive that in the way the trial had progressed and conducted, the bias arising infringes on the Plaintiff/Applicant's right to a fair hearing as enshrined under the provision of Article 50 (1) of the Constitution of Kenya, 2010. Annexed hereto is a copy of a treatment notes and marked the same as "GF – 1" to the effect.

i. The Plaintiff/Applicant was apprehensive that serious prejudice would be occasioned if the Orders sought herein were not granted. Justice must not only be done; but must be seen to be done.

j. Plausible reasons as contained in the annexed affidavit have been laid, showed that Honorable Justice Naikuni was biased and prejudiced towards the Plaintiff/Applicant. It is thus imperative that the Plaintiff/Applicant be heard by an independent court free of any bias and prejudice. This would enable and guarantee a fair hearing and access to justice.

k. Parties have a right to submit themselves to a court manned by independent and impartial judicial officers.

l. In light of the hearing conducted on 14th March 2022,Justice Naikuni was simply not capable of being fair, just and impartial.

m. The attack and intimidations upon the Plaintiff by Honourable Justice Naikuni was unprovoked and a coded signal to the Plaintiff that he was on their side.

n. Parties had a right to submit themselves to a court manned by independent and impartial judicial officers. What should be discouraged was a situation where parties are at liberty to shop for judges of their choice. This trait must not be entertained. The aspect of forum shopping must be avoided as it eroded all the gains made and distorts the values, purpose of our progressive constitution.

A. The Grounds of Opposition by the Defendant

4. On 1st November, 2022 the Defendant/Respondent while opposing the Notice of Motion dated 4th July, 2022 filed five (5) grounds of opposition dated 31st October, 2022. They held that:-

   a. The apprehension of alleged bias by the Plaintiff was misconceived and was not based on any good material facts.

   b. The alleged bias also did not meet the threshold of reasonable apprehension of bias balance.

      i. It was not real

      ii. It was not apparent either from the record or from the conduct of the judge.

      iii. It did not any way arise from the hearing of 14.3.2022.

   c. The alleged bias unfairness and one sidedness alleged by the Plaintiff did not create circumstances that would in law give rise to a conclusion of bias in the eyes of an important reasonable and fair thinking person.

   d. The alleged bias was far fetched and based on mere suspicious which did not warrant the Honorable Judge to recuse himself.

   e. The Plaintiff had not laid any good basis or otherwise provided admissible evidence of the alleged partiality and bias.

B. The Replying Affidavit by the Respondent

5. On 1st November, 2022, the Defendant/Respondent filed a 12 paragraphed Replying Affidavit Sworn by SIMON KARINA an Advocate of High Court dated even date he averred that:-

   a. He was in conduct of this matter for the Defendant/Respondent herein and duly authorized by the Defendant to swear this Affidavit for and on its behalf.

   b. He was present in court on 14.3.2022 when the matter came up before Honorable Justice L.L. Naikuni for hearing.

   c. The Honorable Judge asked the Plaintiff questions that were not to benefit the Defendant.

   d. All the questions he heard the Honorable court aske the Plaintiff were geared at making the court understand the case better.

   e. The said questions did not in any way damage the Plaintiff's case.

f. The honorable judge never threatened to dismiss the Plaintiff's case as alleged by the Plaintiff's Advocate Mr. Samuel Okumu Odingo.

g. The Plaintiff's Advocate Mr. Samuel Okumu Odingu was not on record and was not present in court on the said date.

h. Mr. A.N. Atancha of A.N Atancha & Company Advocates and M/s. Maiga who were present on the date and conducted the examination in chief had not sworn any affidavit accusing the Honorable Judge of the alleged bias and one sidedness.

i. Mr. Odingu never came on record for the Plaintiff until 4th July, 2022 and did not have the knowledge of the proceedings of 14th March, 2022.

j. The evidence of Mr. Odingo was inadmissible as evidence of events that took place on 14th March, 2022 as he was not present in court on the said day.

k. The Plaintiff has not sworn an affidavit to support the allegation of bias and one sidedness made against the Honorable Judge in the Notice of Motion application dated 4th July, 2022. he urged the court to dismiss the Notice of Motion application with costs.

III. Submissions

6. On 2nd November, 2022 while all the parties were present in Court, they were directed to have the two Notice of Motion application dated 4th July, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

7. On 16th August, 2022 the Learned Counsel for the Plaintiff/Applicant through the Law firm of Messrs. S.O. Odingo & Co. Advocates filed their submissions dated 4th August, 2022 and filed on 16th August, 2022 submitted that he filed a Notice of Motion dated 4th July, 2022 and supported by an Affidavit sworn by Samuel Okumu Odingo under Certificate of Urgency. The Application is premised on Order 51 Rule 1 of the Civil Procedure Rules,2010 and Sections 1A, 3A and 3B of the Civil Procedure Act (Cap. 21) Laws of Kenya and all other enabling provisions of the law.The principal prayer being that the Honorable Justice Naikuni recuses and disqualifies himself from further hearing of the instant matter.

8. The Learned Counsel submitted that before they endeavor to deal with the issues for determination, a brief outline of the Applicant's case would suffice. The Plaintiff/Applicant entered into a six-year lease agreement with Defendant herein for the lease of one of its lands which was to commence on 1st October 2009 and lapse on 30th September 2015 at an annual rate of Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650,000/-). Consequently, the Defendant blatantly and illegally breached the terms of the agreement, evicted the Plaintiff without notice and issued another lease for the same piece of land to a third party to the detriment of the Plaintiff. The above-mentioned clear contravention of the lease agreement made the suit by the Plaintiff inevitable. The Honourable Judge while handling the matter exhibited clear-cut biasness and the message a no brainer; the matter was pre-determined and was for dismissal.

9. The Learned Counsel argued that the Learned Judge posed a series of questions to the Plaintiff and tasked him to explain why the Defendant put a seal in the place where it(the Defendant)had appended its signature. This question was followed by a threat from his Lordship that failure to satisfactorily explain to court, his claim would stand dismissed. The question was not proper for the Plaintiff and

the Defendant's Learned Counsel intervention saved the day by calling the Defendant to explain the improper question posed to the Plaintiff. While the Plaintiff was testifying the Learned Judge severally threatened to dismiss his case and the Learned Judge indicated that you had been in practice as an advocate before you became a judge, and consequently concluded that the evidence about to be tendered by the Plaintiff was false. The Plaintiff was further bewildered by yet another interruption by the Learned Judge and this time the Plaintiff was to explain why he took long to write a letter requesting the Defendant for vacant possession which question was accompanied by a threat of dismissal of his suit should he (Plaintiff) fail to answer the Learned Judge's concern felicitously.

10. The Learned Counsel argued that while the Plaintiff was testifying, the Learned Judge unceremoniously interrupted the Plaintiff and shockingly informed him that his Plaint never described elements of breach of contract. Yet again the Learned Judge did not shy away to issue a threat of dismissal of the Plaintiff's suit. It's noteworthy that the Plaintiff's Further Amended Plaint at paragraph 5 has listed andunderlined the particulars of breach and any casual look at the Plaint wouldunderlined the particulars of breach and any casual look at the Plaint would identify and recognize the same.

11. The Plaintiff's 80-page list of documents was required by His Lordship to be summarized in 5 minutes which action bordered the impossible. The Learned Judge indicated that he had other matters to attend to. The unceremonious remarks by the Learned Judge coupled with generous intimidations caused the Plaintiff to develop complications when the Learned Judge ordered the Plaintiff to come out of the dock since he was wasting the Learned Judge time and being diabetic, he fainted out of shock occasioned by the trial. The Plaintiff was taken to hospital.

12. The Learned Counsel averred that the Learned Judge indicated countless times that the Plaintiff's case is very weak even before hearing it and repeatedly stated that you will dismiss it; that the Learned Judge was going to write a judgement immediately and dismiss the Plaintiff's claim. Further, the Learned Judge posed a question to the Plaintiff, that supposed the Learned Judge were to be in a 3 - Judge bench, what would the Learned Judge explain to the bench? This insinuated that the case is extremely hopeless and did not deserve to go any further; beyond the hearing conducted on 14th March 2022. Your Lordship purported to act as Counsel for the Defendant.It is at this juncture that the Plaintiff/ Applicant filed this Application before court seeking Recusal and disqualification of the Honourable Justice Naikuni from further dealing with the instant suit.

13. It was the Learned Counsel's contention that this Honorable Court ought to address itself to the question on whether the Applicant is deserving of the Orders sought in theinstant Application. To this end, the Honourable Court is called upon to determine:

    a. Whether the Honourable Justice Naikuni ought to recuse and disqualify himself from further hearing of this matter?

14. The Learned Counsel submitted that judicial Independence is a human right. It is recognized by International Treaties as well as the Constitution of Kenya, 2010.

    Article 10 Universal Declaration of Human Rights

    > "All people are entitled to a fair public hearing by an independent tribunal."

    Article 14.1 International Covenant on Civil and Political Rights "Everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established bylaw"

15. The fundamental right to a fair hearing is enshrined under Articles 25(c) and 50(1) of the Constitution 2010 cannot be abrogated, it is sacrosanct. The Black's Law dictionary defines bias as follows:-

> " Inclination; bent; prepossession; a pre-conceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction.
>
> State of mind which prevents the judge from making an objective determination of the issues he has to resolve"

16. The rule is embodied in the Latin phrase "nemo judex in re causa sua" meaning 'no man shall be a judge in his own cause.' The rule was immutable i.e. it cannot be curtailed even by statute. An Act of Parliament made against the rules of natural justices so as to make a man a judge in his own cause was void.

17. The Learned Counsel opined that the Learned Court of Appeal bench in "Serah Njeri Mwobi – Versus - John Kimani Njoroge [2013] eKLR while faced with an application such as before court, cited well decided cases below:-

> " Kimani – Versus - Njoroge Nai Civil Appeal No. 79 of 1997 (Gicheru, Omolo & Lakha JJ.A),the majority judgment dumped Lord Goff reasoning in favour of Lord Denning's ratio in the older case of Metropolitan Properties – Versus - Lannon [1968] 3 All ER 304. Lord Denning had said; "In considering whether there was a real likelihood of bias...the court looks at the impression which would be given to other people... what right – minded person would think." (Emphasis on underline ours).

18. Further the Learned bench while agreeing the above quoted cases postulated thus:-

> " We wholly agree. Generally, when the impartiality of a Judge is in doubt, the appropriate remedy available to that Judge is to disqualify himself from taking further proceedings in the matter.

19. Turning to the matter at hand, the Learned Counsel utterances during the hearing cannot pass the impartiality test. The Learned Court of Appeal bench while handling the issue on impartiality, cited with approval the cases below:-

> " In Davidson – Versus - Scottish Ministers (2004) UKHL 34,Lord Bingham addressed the subject on impartiality of a Judge. He emphasized on the importance of the objective judgment and stated that;"...Thus a Judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorized as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the Judge is the presence of some factor which could distort the Judge's Judgment."

In the English case of Locabali (UK) Limited – Versus - Bayfield Properties Ltd (2000) QB 451 the Court stated as follows;

> "It would be dangerous and futile to attempt to define or list the factors which mayor 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."

20. The Learned Counsel argued that the Plaintiff was extremely apprehensive that in the way the trial has progressed and conducted, the bias arising infringes on his right to a fair hearing as enshrined under Article 50 (1) of the Constitution. Plausible reasons as cited herein leaves no doubt that the was biased and prejudiced towards the Plaintiff. It was thus imperative that the Plaintiff be heard by an independent court free of any bias and prejudice. This will enable and guarantee a fair hearing and access to justice. Parties had a right to submit themselves to a court manned by independent and impartial judicial officers.

21. The Court relied on the Court of Appeal case of "Serah Njeri Mwobi (supra) which made reliance to the below case in making its determination:-

> " It must be remembered that it is a cardinal principle of fair trial that a judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the Judge's Judgment and must appear to be so. (Emphasis ours through underline).

22. The Learned Counsel submitted that they find support from the South African case of:-

> "The Republic of South Africa v South African Rugby Football Union(1999) 4 SA 147 at 177 where the court stated as follows; "The question is whether a reasonable, objective and informed person would on the correct facts 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 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 grounds on the part of a litigant for apprehending that the judicial officer through underline)

23. The Learned Counsel submitted that in light of the hearing conducted on 14th March 2022, the Learned Judge is simply not capable of being fair, just and impartial. The attack and intimidations upon the Plaintiff by the Learned Judge was unprovoked and a coded signal to the Plaintiff that the Learned Judge was on the Defendant's side. Parties have a right to submit themselves to a court manned by independent and impartial judicial officers. They were guided by Articles 25(c)and 50(1)of the Constitution 2010 and they submitted that the spirit and the letter of the Constitution will be trampled upon unless this application is granted as prayed.

24. The Learned Counsel concluded that due to the presence of open biasness and intimidation directed towards the Plaintiff during the hearing by the Learned Judge and of several illegalities committed and exhibited at the trial, they humbly pray that it is in the interest of substantive Justice that the Court do grant the Plaintiff/Applicant orders sought and the Learned Judge do recuse and disqualify

himself from further hearing the suit and this file be placed before the Honourable Chief Justice for re-allocation.

B. The Written Submissions by the Defendant/Respondent

25. On 1st November, 2022, the Learned Counsel for the Defendant/Respondent through the Law firm of Messrs. Ndegwa Muthama Katisya & Associates Advocates filed their submissions dated 31st October, 2022. Mr. Karina Advocate commended his submission by stating that the allegation of bias and one-sidedness in the Notice of Motion dated 4th July, 2022 by the Plaintiff/Applicant was farfetched and based on mere suspicions which did not warrant the Honorable Judge to recuse himself.

26. The Learned Counsel submitted that they would rely on the following documents on record:-

    a. Grounds of Opposition dated 31st October, 2022.

    b. Replying Affidavit sworn by Simon Karina on 31st October, 2022.

    c. Respondent's list and bundle of authorities dated 31st October, 2022.

27. The Learned Counsel submitted that they relied on the Court of Appeal in the case of "Kaplana H. Rawal – Versus - Judicial Service Commission & 2 others (2016) eKLR laid down the principle for recusal as follows:-

> " 1. 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.
>
> 2. 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.
>
> 3. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

28. The Learned Counsel argued that the only issue that arouse for determination in the instant application was whether the Applicant has demonstrated reasonable apprehension of bias by the Honorable Judge?The Applicant had not demonstrated any reasonable apprehension of bias by the Honorable Judge. This was because the apprehension of alleged bias by the Plaintiff was misconceived and was not based on any good material facts. The alleged bias also did not meet the threshold of reasonable apprehension of bias because:-

    a. It was not real.

    b. It was not apparent either from the record or from the conduct of the judge.

    c. It did not in any way arise from the hearing of 14th March, 2022.

29. This was because;

    a. Contrary to the allegations of one-sidedness at Paragraph 13 of the Supporting Affidavit sworn by Samuel Okumu Odingo on 4th July, 2022,when the matter came up for hearing on 14th March, 2022, the Honorable Judge asked the Plaintiff questions to help the court understand

the case better. The questions were not to benefit the Defendant or damage the Plaintiff's case. (See, paragraphs 3-5 of the Replying Affidavit sworn by Simon Karina on 31st October, 2022).

b. The Honorable Judge did not threaten to dismiss the Plaintiff's case as alleged at Paragraphs 4,6 and 7 of the Supporting Affidavit.(See Paragraph 6 of the Replying Affidavit).

30. The Learned Counsel averred that consequently, the alleged bias, unfairness and one-sidedness by the Plaintiff did not create circumstances that would in law give rise to a conclusion of bias in the eyes of an impartial, reasonable and fair-minded person.Additionally, the allegation of bias by the Honorable Judge against the Plaintiff was farfetched and based on mere suspicions which did not warrant the Honorable Judge to recuse himself as the Plaintiff has not laid any good basis or otherwise provided admissible evidence of the alleged partiality and bias. This is because;

a. The Plaintiff's advocate Mr. Samuel Okumu Odingo was not on record and was not present in Court on the said 14th March, 2022.

b. That Mr. A N Atancha of A.N Atancha & Co. Advocates and Ms. Mainga who were present on the said date and conducted the examination in chief have not sworn any affidavit accusing the Honourable Judge of the alleged bias and one-sidedness.

c. Mr. Odingo did not come on record for the Plaintiff until 4th July, 2022 and does not have the knowledge of the proceedings of 14th March, 2022.

d. The evidence of Mr. Odingo was therefore inadmissible as evidence of the events that took place on 14th March, 2022 as he was not present in court on the said day.

e. Further, the Plaintiff has not sworn an Affidavit to support the allegations of bias and one-sidedness made against the Honorable Judge in the Notice of Motion dated 4th July, 2022.

31. The Learned Counsel submitted that based on the foregoing, the averments of the Plaintiff in the Application dated 4th July, 2022 remain mere allegations without proof or substance. The Plaintiff has failed to meet the high threshold for demonstrating bias by the Honorable Judge against the Plaintiff. As by the Court of Appeal in the case of "Kaplana H.Rawal – Versus - Judicial Service Commission & 2 others(supra). It would be as wrong to yield to a tenuous or frivolous objection as it would to ignore an objection of substance.

32. They therefore urged the Court to dismiss the Notice of Motion dated 4th July, 2022 with costs.

IV. Analysis & Determination

33. Having reviewed the Application dated the 4th July, 2022, the Supporting Affidavit thereto and the Replying Affidavit, filed in opposition thereto and having similarly considered the written submissions filed by and/or on behalf of the respective parties, the following issues are germane for determination;

a. Whether the Notice of Motion application dated 4th July, 2022 by the Plaintiff/Applicant for the recusal of the Honorable Judge has met the threshold to warrant such Recusal or at all.

b. Whether an Application for recusal, which is anchored on bias and/or lack of impartiality, which require Evidence can be anchored on an Affidavit of an advocate or otherwise.

c. Who will bear the Costs of the application

Issue a): Whether the Notice of Motion application dated 4th July, 2022 for the recusal of the Honorable Judge has met the threshold to warrant such Recusal.

34. The issues on the recusal of Judicial officers from presiding over matters before them need be taken extremely seriously. It is not a light issue by all means. There is abound jurisprudence in our Courts and other jurisdictions in respect to the considerations that a Court must take into account when determining an application for recusal of a Judge. I reiterate 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. Refer to the legal ratio in "R – Versus - S. (R.D.) [1977] 3 SCR 484.

35. These considerations were highlighted by the Supreme Court in the case of "Gladys Boss Shollei – Versus - Judicial Service Commission & 2 Others [2018] eKLR;

> " 25: 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 has a duty to 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."

36. The bedrock of this determination rests on the test that a recusal is necessitated where it is proved beyond peradventure, speculation, conjecture and sheer paranoia, that a judicial officer will not impartially handle a case before him, as a result of actual bias or a reasonable apprehension thereof; and never on unfounded or unreasonable apprehension. Where an application is based on apprehension rather than actual bias, the apprehension should be that of a reasonable person and must be assessed in the light of the true facts as they emerge at the hearing of the application; and the test to weigh the apprehension should be an objective one, and not a subjective one based for instance, on mere paranoia.

37. The Supreme Court of Uganda in the case of "Uganda Polybags Limited - Versus - Development Finance Company Ltd & Others [1999]2 EA 337 was of the view that litigants have no right to choose which judicial officers should hear and determine their cases, since all judicial officers take oath to administer justice to all manner of people impartially and without fear, favour, affection or ill will and the oath must be respected. The Court of Appeal in the case of "Uhuru Highway Development Limited – Versus - Central Bank of Kenya & 2 Others Civil Appeal No.36 of 1996 stated as follows:

> " Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances there was a real danger of bias on the relevant member of the tribunal in question in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias...Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties

to sit and do not by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour...Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

38. What is the test to be applied to the considerations? The Court of Appeal in the case of "Kaplana H. Rawal – Versus - Judicial Service Commission & 2 others [2016] eKLR relied on the decision in "Magill – Versus - Porter (2002) 2 AC 357, where the House of Lords modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. In the case of The East Africa Court of Justice adopted the same test in "Attorney General of Kenya – Versus - Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 when it stated:

> "We think that 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 mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, 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 informed about all the circumstances of the case."

39. Suffice it to state, that in the course of hearing of Dispute by a Court of law, the Court is obliged to make decisions, which would go one way or the other. Simply put, Litigation unlike football can never result into a Draw or end in a Stalemate. In one way or the other, one party should win or loss the case.

40. Additionally, the test for recusal of a Judge was laid down by the Court of Appeal in the case of "R – Versus -David Makali and Others C.A. Criminal Application No. 4 and 5 of 1995 Nairobi (unreported) as reinforced in "R – Versus - Jackson Mwalulu & Others C.A Civil Application No. 310 of 2004 Nairobi, where the Court of Appeal stated that:-

> ".....The test is objective and the facts constituting bias must be specifically alleged and established".

41. Further the Supreme Court of Canada expounded the test in the following terms in "R – Versus - S. (R.D.) [1977] 3 SCR 484:

> "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."

42. In support of the foregoing observation, I invoke and adopt the holding the court of appeal in the case of "Galaxy Paints Company Limited – Versus - Falcon Guards Limited [1999] eKLR, had held thus:

> " Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

43. The principles in the cases I have cited buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge:-

(a) Is a party to the proceedings;

(b) Was, or is a material witness in the matter in controversy;

(c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;

(d) Has actual bias or prejudice concerning a party;

(e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;

(f) Had previously acted as a counsel for a party in the same matter;

(g) Is precluded from hearing the matter on account of any other sufficient reason; or

(h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.

44. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

> " A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the Constitution and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

45. From the very onset, I dare say that this application is among its other intentions, a forum shopping scheme that should not find glorification of whatever colour. Additionally, in a recent decision from the case of High Court of Kenya, Milimani Commercial & Tax Division Civil Case Number E018 of 2023, - "Tuff Bitumen Limited – Versus Bank (Kenya) Limited & Ano" eKLR, Justice Professor Sifuna had this to state on the subject matter:-

> " Some recusal applications such as this particular one, are made in the hope that they will tarnish the Judge's reputation as well as cause him or her psychological, mental and emotional pain regardless of whether the application succeeds or not. This should be resisted

by every Judge minded about his judicial oath of office. Which is that he will dispense justice without fear, favour or other influence and with fidelity to the law and the Constitution. Judicial office is not for the faint - hearted; and a Judicial officer's spine ought to be made of steel.

Many a litigant still believe and mistakenly so that an unfounded apprehension of bias could form a justifiable basis for recusal. Nothing can be further from the truth. For allegations of bias to necessitate a judicial officer's recusal, the bias must be real or reasonably apprehensible and not speculative by conjecture or merely imagined. There are many others who unconventionally employ recusal not as an avenue for advancing judicial integrity but as a tool for furthering their case. To them should be said that recusal was never meant to be a litigation tool of litigants and their lawyers. Courts should never allow recusal to be used as a tool for the crucifixion of judicial officers as is attempted in this application.

Recusal is not merely the litigants' tool for dislodging judicial officers from proceedings but a tool that judicial officers can themselves harness to advance the rule of law as well as the dictates of natural justice and fair play. A judicial officer presiding in a case will have no difficulty recusing himself where he knows or it is sufficiently demonstrated that he is biased, likely to be biased or unlikely to be impartial. Recusal applications by litigants ought to be used by them as a shield for safeguarding the administration of justice as well as the integrity of the judiciary, and not as a sword for attacking Judges. It should never be for merely expressing the displeasure of a litigant or satisfying the ego but to bring honour and dignity to judicial office.

An ill-intended application for recusal such as this one, places a judicial officer in a most difficult and discomforting position; hence unless subjected to the truth, such an application can impair his impartiality, objectivity as well as fidelity to law and justice. It may even turn him into a pawn of the litigants. Recusal applications should never be made casually and leisurely. They are the kind of applications that should be made in good faith, and with much circumspection, compassion, honesty and truthfulness. Some applicants believe that the moment they apply for recusal, the Judge will just cave in and recuse without much ado or any probing at all.

I conducted myself with integrity, impartiality, competence, independence and diligence; as required of me by the Bangalore Principles on Judicial Conduct, the Judicial Code of Conduct and my oath of office as Judge. It is my commitment to the expeditious disposition of cases the fair administration of justice and a level playing ground for all litigants that seems to have spurred the Plaintiff into applying for my recusal".

46. In respect to the subject matter at hand the Plaintiff contends that the hearing of the main case on 14th March 20022 scheduled for noon on the same day proceeded albeit commenced past the allocated time. There has been allegations made by the Deponent, an Advocate of High Court, that the Honorable Justice Naikuni severally interrupted the Plaintiff while giving testimony and asked improper questions only relevant to the Defendant and consequently numerously threatened to dismiss the Plaintiffs claim should he fail to give a satisfactory response to the Judge. The Plaintiff is apprehensive that in the way the trial has progressed and conducted, the bias arising infringes on the Plaintiffs right to a fair hearing as enshrined under Article 50(1) of the Constitution.

47. In my humble view, the making and rendition of a decision by a court or the court asking a witness questions so as to get clarity,does not "ipso facto" make the court biased and/or lack impartiality. For clarity, if such were the position then no case would proceed for hearing and determination, because

either Party against whom an adverse decision is made, would be asking the court for the recusal. Consequently, the Court business would ground to a halt and the Rule of Law, would be defeated.

48. There is no evidence that the Court has been motivated by any bias or the desire to grant a benefit or an advantage to the Defendant/Respondent. Throughout the application the Applicant has not tabled any evidence to demonstrate any basis to support an inference of bias against the Applicant. The judge exercised his discretion judiciously and if it is the view of the Applicant that the judge misapplied his mind on the law and the facts of the case then the right avenue of Appeal would be available after the final determination of this court.

49. Based on the foregoing and taking into account the background relating to the subject proceedings, which were captured herein before, it is my finding that it would amount to a travesty of justice to recuse myself, merely because I exercised a Constitutional mandate that is bestowed upon me and made a decision that is adverse against one of the Parties in the subject matter.

Issue b): Whether an Application for recusal, which is anchored on bias and/or lack of impartiality, which require Evidence can be anchored on an Affidavit of an Advocate or otherwise.

50. In respect of the subject matter, the crux of the complaint is that the Plaintiff is therefore reasonably apprehensive that same would not get fair treatment before the Judge and in any event, that the Judge had exhibited a clear bias and personal prejudice against the Plaintiff and his witnesses.

51. It is important to note that the person who is said to have developed reasonable apprehension that there exists a clear bias and personal prejudice, is the Plaintiff. However, despite the alleged bias and/or prejudice being attributed to the Plaintiff, the Plaintiff, has not been called upon to make and swear any affidavit to substantiate the said allegations.

52. There are a few observation that the Court has drawn herein, Firstly, the Plaintiff has not sworn any affidavits on all these averments and allegations against the Honorable Judge as required under Order 19 of the Civil Procedure Rules, 2010. Instead, it's the Plaintiff's advocate Mr. Samuel Okumu Odingo who swears the affidavit. One wonders on what basis he is doing that. For instance, can he withstand to be cross examined under oath and in a witness box? This aspect is discussed herein below to details. Secondly, from the records it is clear Mr. Odingo Advocate was not on record and was not present in Court on the said 14th March, 2022. Hence, where are the source of his information which he swears as true to his belief and information? Indeed, its Mr. A N Atancha of A.N Atancha & Co. Advocates and Ms. Mainga who were present on the said date and conducted the examination in chief of the Plaintiff. Thirdly, one wonders why these two Advocates never swore any affidavit accusing the Honorable Judge of the alleged bias and one-sidedness.

53. Fourthly, Mr. Odingo did not come on record for the Plaintiff on 4th July, 2022 and does not have the knowledge of the proceedings of 14th March, 2022. Therefore the evidence of Mr. Odingo was therefore inadmissible as evidence of the events that took place on 14th March, 2022 as he was not present in court on the said day.

54. Finally, is it by sheer coincidence that the Plaintiff seems to be disappointed by not only his Advocates who he replaces , himself for not even attempting the file an Affidavit but also the Court whom he wants it recuses itself from the matter?. Clearly, there is something which is not adding up here at all.

55. Be that as it may, the supporting affidavit, has been sworn by the advocate retained by the Plaintiff, who is separate and distinct from the Plaintiff, in terms of adduction or better still, production of evidence. Simply put, and advocate retained in a matter cannot adduce evidence, in contentious issues and/or evidentiary matters which are in dispute.

56. Given the nature of the allegations that have been made herein, which revolve around bias and personal prejudice, against the Plaintiff and undisclosed witnesses, it is my humble view that the Advocate herein could not depone to and or swear the supporting affidavit. For clarity, the Issues alluded to are Evidentiary in nature and may lead to Cross- Examination of the Maker thereof.

57. In the premises, the supporting affidavit which delves into contentious evidentiary issues, but which is sworn by the Advocate for the Plaintiff, is incompetent and thus incapable of anchoring and/or grounding the subject Application, whatsoever.

58. In support of the foregoing observation, I invoke and adopt the position of the law as captured in the Decision in the case Regina Waithira Mwangi Gitau – Versus - Boniface Nthenge [2015] eKLR, where the Honourable Court of Appeal observed as hereunder:-

> " On issue number one, the established principle of law is that Advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugi – Versus - Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others – Versus - Kenya Finance Corporation Ltd, it was held that .
>
> ".....it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit".
>
> In addition, Rule 9 of the Advocates Practice Rules prohibit Advocates from appearing as an Advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an Advocate's affidavit creates a legal muddle with untold consequences."

59. Owing to the foregoing I find and hold that the affidavit in support of the subject application is incompetent, misconceived and legally untenable. Consequently, same be and is hereby struck out. In this regard, the Subject Application, which has been propagated by Counsel for the Plaintiff, is rendered bereft of any Evidential backing.

60. All that not withstanding though my holding in paragraph 42 and 49 above, I find that since I have been in conduct on this case and we were taking the evidence if the witnesses and the lack of evidence for the allegations of bias by the Plaintiff, keeping in mind that this matter is an old matter.

Issue No. c). Who will bear the costs of the application

61. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of a legal action, or process or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. (See the Supreme case of "Jasbir Rai Singh Rai – Versus – Tarchalon Singh (2014) eKLR, the Court of appeal case of Mary Wambui Munene – Versus – Ihururu Dairy Co – Operative and Cecilia Karuru Ngayu – Versus – Barclays bank of Kenya & Another (2016) eKLR. Where the Courts held that:-

> " The basic rule on attribution of Costs is that Costs follow the event. It is well recognized that the principles on Costs follow the events is not to be used to penalize the losing party rather

it is for compensating the successful party for the trouble taken in presenting or defending the case".

62. By events, it means the results of the legal action, process or proceedings by parties thereof. In this case, the results of the matter is that the Notice of Motion application dated 4th July, 2022 by the Plaintiff/ Applicant herein has not been successful on the laid down legal principles as stated above. It follows therefore that the Defendant is entitled to costs of the application.

V. Conclusion & Disposition

63. In the long analysis, after conducting such an elaborate and comprehensive assessment of the framed issues herein, the Honorable Court is satisfied on preponderance of probability that the Plaintiff/ Applicant has failed to establish a prima facie case from its filed application herein. Thus, I proceed to grant the following orders:-

    a. THAT the Notice of Motion application dated 4th July, 2022 for recusal of the Honorable Judge from this matter be and is hereby found to be unmeritorious hence dismissed.

    b. THAT for the sake of expediency, this part heard matter to be fixed for hearing within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling commencing on 30th October, 2023 without fail. Notice to issue accordingly by the Defendant's Advocates.

    c. THAT the Costs of the application awarded to the Defendant.

It is so ordered accordingly.

RULING DELIVERED BY MICROSOFT TEAMS VIRTUALLY MEANS SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF MAY 2023.

.....

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:-

a. M/s. Gillian – the Court Assistant.

b. No appearance for the Plaintiff/Applicant.

c. Mr. Karina Advocates for the Defendant/Respondent.