REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC PET NO. 939 OF 2014

IN THE MATTER OF ARTICLES 2, 3,10,22,40,62,AND 258 OF THE CONSITUTION

AND

IN THE MATTER OF : THE ENFORCEMENT OF THE OWNERSHIP RIGHT OF THE KENYA VETERINARY VACCINES PRODUCTION INSTITUTE (KEVAVAPI) OVER ALL THAT PARCEL OF LAND KNOWN AS LR NUMBER 209/11969 MEASURING 77.67 HACTARES

BETWEEN

KENYA VETERINARY VACCINES

PRODUCTION INSTITUTE (KEVAVAPI) ....……PETITIONER

VERSUS

THE HON. THE ATTORNEY GENERAL & 15 OTHERS …..RESPONDENTS

RULING

1. This is a Ruling in respect of a Notice of Motion dated 14th May 2019. The application is brought by the 7th and 14th Respondents/ Applicant who are seeking my recusal from any further conduct of this suit on grounds of bias. The Applicants contend that I made certain findings in a Judgement delivered on 4th April 2019 in a matter related to this suit which findings show that I have already made up my mind and that the Applicants do not expect to get a fair hearing in this suit.

2. To support their application for my recusal, the Applicants have quoted part of paragraph 19 of my Judgement in ELC No. 1015 of 2016 (OS) (**Banque Villa Estate Management Limited Vs Kenya Veterinary Vaccines Production Institute and another**) in which I stated as follows:

> ***"The Defendant's land has been a subject of grabbing before. It will be unfair to let a person who obtained part of the Defendant's land to keep what he/she took illegally in addition to blocking a public access road. This action is the height of impunity which should not be condoned. If the order of access was to be granted, it will be like rubbing salt on the wound of the Defendant which has already had a huge junk of its land go to grabbers. The Defendant should be given a break by denying the access order".***

3. The Petitioner/Respondent opposed the Applicant's Application based on grounds of opposition dated 18th May 2019.

4. The parties were directed to dispose of the application by way of written submissions. The Applicants filed their submissions on 10th June 2019, the 12th and 16th Respondents filed theirs of 20th June 2019, the 8th Respondent filed theirs on 14th June 2019 whereas the Petitioner filed their submissions on 26th June 2019. Most of the other Respondents opted not to file their submissions but associated themselves with the submissions of the Applicants. The 1st Respondent stated that they were not going to file their submissions but were going to associate with the Petitioner's submissions.

5. I have carefully considered the Applicant's application as well as the opposition thereto by the Petitioner /Respondent. The only issue for determination herein is whether the Applicants have established the likelihood of bias on my part to warrant my recusal from this matter. I first took over this matter on 28th September 2017. The parties had already filed their written submissions and the matter was only coming up for highlighting. Prior to my taking over this matter, three ELC Judges had recused themselves from hearing this matter. The first Judge to

recuse herself was Lady Justice Gitumbi who recused herself for personal reasons. The second Judge was Justice Okong'o who recused himself on the ground that he had acted for h 15th Respondent for a long time while he was in private practice. The third Judge was Lady Justice Bor who recused herself on the ground that she had handled the matters touching on this petition when she was working with Kenya Anti-Corruption Commission.

6. The Applicants are contending that from my remarks in the judgement in ELC 1075 of 2016 (OS) (Supra), I have already made up my mind that the Respondents are grabbers and that they do not expect me to give them a fair hearing. I think that the Applicants and those supporting them have taken my remarks in the judgement out of context. I did not make any reference to any of the Respondents in this Petition. My Remarks were made in reference to a person who was not named who was said to have blocked an access road to the residents of Banque Villa Estate.

7. The undisputed facts in that case were that while the estate was being constructed, the estate had an access road. This access road was blocked by the unnamed person. This is why I denied to grant an access order given these circumstances. The impunity was in reference to the person who had blocked the access road. There was no dispute that the land where the estate is was part of the petitioner's land. Whether the residents obtained it legally or not was not the subject of the suit in which I made the remarks. There is therefore no basis upon which bias on my part can be imputed. The issue of grabbing or illegal acquisition had been raised by the petitioner and I was simply rehashing the facts as put out by the parties. I stated also that the residents through the association had attempted to negotiate purchase of the land in a bid to regularize the issue. This did not however materialize and I said as much. I did not say anything more than what parties brought out.

8. There have been numerous decisions which have set the parameters of establishing bias. In the case of **Perry Vs Schwarzenegger,671 F 3D 1052 (9th … February 7,2012) it** was held that:-

> ***" ……the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a well-informed , thoughtful observer who understands all the facts" and who has examined the record and the law; and thus, unsubstantiated suspicion or personal bias or prejudice" will not suffice".***

9. In **Philip K Tunoi & Another Vs Judicial Service Commission & another (2016) eKLR** the Court of appeal held that:-

> ***" …..in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people…."*** The Court further held:-

> ***"….31. in determining the existence or otherwise of bias, the test to be applied is that of a fair –minded and informed observer who will adopt a balanced approach and will neither be complacent nor unduly sensitive or suspicious in determining whether or not there is a real possibility of bias…".***

10. From the two decision quoted above, particularly the Perry case, the test of establishing a Judge's impartiality is the perception of a reasonable person who is well informed and understands the facts and has examined the record and the law. In the instant case, I have no doubt that the other Respondents who support the Applicants had not examined the record to ascertain in what context my remarks were made. It is the Applicant's lawyer who had circulated a letter which gave his interpretation of the judgement as clearly captured in paragraph 4 of the supporting affidavit to the application. In the letter, the advocates for the Applicants concluded that I had branded all the Respondents in this petition as grabbers which was not the case.

11. My remarks were purely made out of the facts presented in the case and what was before me. I was bound by law to ascertain how the estate became landlocked. Once I found that there was an access that had been blocked by a private developer, I said that that action of blocking the access road besides retaining a property which had been illegally acquired (which fact was admitted) in the proceedings was the height of impunity. Any reasonable person who would have perused the record and got facts would agree with my remarks which I made which are not in any way evidence or perception of bias on my part.

12. In **Republic Vs Independent Electoral and Boundaries Commission & 3 Others Ex-Parte Wavinya Ndeti (2017)eKLR Justice Odunga** quoted from **Committee for Justice and Liberty et al – vs. National Energy Board** where the Court states 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."**

"It was further held that:

> **"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application.** ***The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.***

> ***"It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test…. We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia [In Re J.R.L.:Ex parte C.J.L. (1986) 161 CLR 342 at 352.]:***

> ***"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*…It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.".**

13. I have looked at the decisions cited by the 1st to 91st Interested Parties. Two High Court Judges and one ELC Judge were faced with applications for recusal. They all found that the ground for their recusal were far-fetched but they nevertheless opted to recuse themselves. I am not going to follow that route. I am deeply convinced that I harbour no bias against any of the parties herein. I will determine the case before me without any fear, favour or bias. I have already said hereinabove that my remarks in the judgement relied on by the Applicants was taken out of context. I have taken trouble to put the record straight not because I am defending myself but because I want to comply with the law as regards establishment of bias. I therefore find that the Applicants' application lacks merit. The same is hereby dismissed with costs to the Petitioner.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 7TH day of May 2020.

E.O.OBAGA

JUDGE

In the virtual Presence of:-

M/s Mwachiro for 8th Respondent

Court Assistant: Hilda

E.O. OBAGA

JUDGE