



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 502 OF 2017

(Formerly Machakos ELC No. 178 of 2016)

FRANCIS NGANGA MUNDIA.....PLAINTIFF

VERSUS

ISAAC GATHUNGU WANJOHI.....1ST DEFENDANT

JACKSON SIMEI NKARU PARTERU.....2ND DEFENDANT

SIMON MOLOMA NKARU.....3RD DEFENDANT

COUNTY LAND REGISTRAR, KAJIADO.....4TH DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's oral application made on 28th May, 2019 seeking for the Judge to recuse herself from hearing this suit. The 1st Defendant contends that there are incidences that have occurred during the pendency of this suit which demonstrate biasness from the Court. He explained that the incidences include the Court's dismissal of the 1st Defendant's application dated the 19th March 2018 to strike out this suit as well as a second application dated the 15th March, 2019 to stay the proceedings herein, pending the outcome of an Appeal he had lodged in respect of Justice Nyakundi's ruling in Kajiado High Court Family Division Misc Application No. 49 of 2018. He contends that Justice Nyakundi in the said ruling held that the Plaintiff herein validly purchased the suit land which decision he has Appealed against. He insists since the Court declined to stay the proceedings herein pending the intended Appeal against Justice Nyakundi's decision, it demonstrates an endorsement of his findings. He insists the 1st Defendant has to have an assurance from the Court that it will not be bias and be influenced by the said decision by Justice Nyakundi. He further argued that since the High Court had usurped the jurisdiction of the Environment & Land Court by making a determination on the title, a reasonable person will not believe the Court will be impartial. He has relied on the cases of **Attorney General Vs Anyang Nyongo & Others and Shilenje Vs the Republic** to support his argument.

The Plaintiff opposed the application and insisted that the test for recusal of a judicial officer had been set in the case of **Porter V Magill and relied on in the Civil Appeal NAI 6 of 2016 Hon Philip K. Tunoi & Another V JSC & Anor (2016) eKLR** where the Court held that the acts of the judicial officer has to convince a common man of impartiality. Further, that a litigant should not pick and choose which court to litigate before just because, they are unhappy or apprehensive of the decisions that have been made or will be made. He submitted that the Plaintiff was not a party to the proceedings in the family division. He reiterated that a party aggrieved with a judicial decision has a recourse to Appeal. Further, that it is an affront to justice that a party be allowed to apply for recusal whenever an order or ruling did not favour them. He further relied on the case of **Andrew Alex Wanyande V AG & Anor (HCC No. 844 of 2005)** to support this argument. He averred that the Court was capable of rendering judgement based on the evidence adduced before it.

The 2nd and 3rd Defendants opposed the application and relied on the case of **Petition No. 34 of 2014 Gladys Boss Shollei Vs JSC & Another (2018) eKLR** and insists no good reason has been made for the Court to recuse itself. They claimed the 1st Defendant had taken selective excerpts from Justice Nyakundi's decision and decided that the Court will not be impartial. Further, that this Court in a previous decision referred the issue for revocation of grant to the family court which made its decision. They reiterated that this application for recusal is an attempt to derail the hearing of this matter.

The only issue for determination is whether this Court should recuse itself from hearing and determining this case.

From the Court records, I note this matter had proceeded for hearing where the Plaintiff had testified after which the 1st Defendant filed an

application dated the 19th March, 2018 seeking to strike out this suit on the ground that the Certificate for Confirmation of Grant that enabled the 2nd and 3rd Defendants transfer suit land to the Plaintiff was null and void as it was issued by the Magistrate's Court, which did not have jurisdiction to do so. This Court made a Ruling and noted that it did not have jurisdiction to handle a matter in respect of the law of succession by virtue of the provisions of Section 13 of the Environment and Land Court Act and hence disallowed the application. The 1st Defendant proceeded to the High Court to challenge the said Grant where Justice Nyakundi made orders in respect of the same after which he filed an application in this Court seeking to stay the proceedings herein pending the outcome of the Appeal which he had lodged against Justice Nyakundi's Ruling. The Court declined to stay the proceedings which ruling culminated in this instant application for recusal.

In the case of **Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR**, the Court of Appeal held that: **'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 be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias. In Taylor v. Lawrence [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:**

"... we believe the modest adjustment in R V. Gough is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.".....The facts of this case would not in our view, on the authority of Porter v. Magill (supra) lead a fair-minded and informed observer to conclude that there is real possibility that the Presiding Judge will be biased. It was not shown that circumstances exist that are likely to show that a real possibility exists that the Presiding Judge's integrity or impartiality might reasonably be questioned.

In The People case, this Court expressed itself as follows in relation to the application for disqualification of the members of the bench.

"How should Judges treat the subject of disqualification when raised before them?"

...when the courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.'

In applying the test set out in this decision to the current scenario, I note the Applicant is apprehensive that the Court would not be impartial based on the decision of the High Court Judge in respect of suit land which decision he has appealed from. Except for the two Rulings, which he feels, were not in his favour, the Applicant has not highlighted the real grounds of bias. It is my considered view that this is unfortunate as the issues in this suit, which are for the determination of ownership of the suit land lie squarely within the jurisdiction of this Court, which is competent to make its own determination after reviewing the pleadings and evidence before it.

In the circumstances and in relying on the above cite Court of Appeal decision, I find that the Applicant has failed to meet the threshold set down for recusal of a judicial officer and will proceed to disallow this application.

I direct the parties to set down this suit for hearing.

Dated signed and delivered in open court at Kajado this 2nd day of October, 2019.

CHRISTINE OCHIENG

JUDGE