



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 114 OF 2020

SWING LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL (Sued on behalf of the

Kenya Meteorological Department).....1ST DEFENDANT

NATIONAL HOUSING CORPORATION.....2ND DEFENDANT

ATTORNEY GENERAL (Sued on behalf of the

Ministry of Transport, Infrastructure & Public Works).....3RD DEFENDANT

RULING

The plaintiff brought this suit against the defendants on 23rd June, 2020. Together with the plaint, the plaintiff sought a temporary injunction restraining the defendants from trespassing on, selling, transferring, alienating and/or interfering with all that parcel of land known as L.R No. 209/20791 (“the suit property”) pending the hearing and determination of the suit. In its affidavit in support of the application, the plaintiff stated that it had purchased the suit property from a company known as United Care Ltd. on 22nd July, 2015. The plaintiff averred that the property was transferred to it on 9th December, 2015.

The plaintiff annexed to the said affidavit among others, a copy of Grant No. I.R 153069 dated 31st December, 2013 and an agreement for sale dated 22nd July, 2015 between the plaintiff and United Care Ltd. According to the said Grant No. I. R 153069, the suit property was transferred to the plaintiff at a consideration of Kshs. 60,000,000/= on 9th December, 2015 while according to the agreement for sale dated 22nd July, 2015, the plaintiff purchased the suit property from United Care Ltd. at Kshs.110,000,000/=. That means that there was a difference of Kshs. 50,000,000/= between the price at which the plaintiff purchased the suit property and the value that was declared/assessed for the purposes of Stamp Duty on the transfer.

When the plaintiff’s application for injunction came up ex parte on 25th June, 2020 the court ordered that the same be served for hearing inter-partes on 27th July, 2020. The court did not grant any interim order. When the parties appeared before me on 27th July, 2010 for the hearing of the application, the advocate who appeared for the Attorney General asked for time to file a replying affidavit. On his part, the advocate for the plaintiff applied for leave to amend the plaint and for an interim order of injunction pending the hearing of the application inter partes. The advocates for the Attorney General, and the 2nd defendant did not object to the plaintiff’s application for leave to amend the plaint. The advocate for the Attorney General however opposed the application for grant of an interim order.

While considering whether or not to grant the interim order, the court drew the attention of the plaintiff’s advocate to the inconsistency in the purchase price for the suit property as indicated in the Grant and the agreement for sale aforesaid and sought to know from the advocate the actual purchase price that was paid by the plaintiff for the suit property on the basis of which the plaintiff paid Stamp Duty. The plaintiff’s advocate instead of responding to the court’s inquiry took offence and claimed that the court had raised an issue that had not been raised by the advocates for the defendants and as such the court had taken sides in the dispute. The court only wanted to understand the plaintiff’s claim better so as to apply its mind properly to the application that had been made by the plaintiff’s advocate for an interim order.

What is now before me is the plaintiff’s application brought by way of Notice of Motion dated 25th September, 2020 seeking an order that I recuse myself from hearing this suit and that the suit be allocated to another judge for hearing. The application was brought on the grounds that the plaintiff was not likely to get a fair hearing before me because I had made prejudicial remarks against it. The application was opposed by the Attorney General (A.G) through grounds of opposition dated 5th October, 2020. The A. G. contended that the application did

not raise any reasonable basis for the alleged bias by the court against the plaintiff. The 2nd defendant opposed the application through grounds of opposition dated 9th October, 2020. The 2nd defendant contended that the plaintiff had not established with cogent evidence the allegations of bias leveled against the court. The 2nd defendant averred that the plaintiff was out to shop for a forum which the plaintiff believes may determine the case in its favour.

The plaintiff's application was argued by way of written submissions. The plaintiff filed its submissions on 23rd October, 2020 while the A. G. filed his submissions and supplementary submissions on 5th October, 2020 and 28th October, 2020 respectively. The 2nd defendant filed its submissions on 6th November, 2020. I have considered the plaintiff's application together with the supporting affidavit. I have also considered the grounds of opposition filed by the defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. What I need to determine is whether the 1st defendant has established that there exists a real likelihood of bias that would justify my recusal from hearing this suit. In Accredo AG & 3 others v Steffano Ucceli & another [2018] eKLR the court cited the President of the Republic of South Africa v The South African Rugby Football Union & Others Case CCT 16/98 where the Constitutional Court of South Africa quoted with approval the following sentiments of Cory J in R. v S. (R.D.) [1977] 3 SCR 484:

“Courts have rightly recognized that there is a presumption that judges will carry out their oath of office.....This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence’ that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.”

In the same case (Accredo AG & 3 others v Steffano Ucceli & another) the court laid the test for establishing whether there exists a real likelihood of bias as follows:

“The test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias. This current position was succinctly set out by the House of Lords in Porter vs. Magill [2002] 1 All ER 465 as follows:

“[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

Expounding on that test the Supreme Court of Canada in R. vs. S. (R.D.) (supra) had this to say:

“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.” [Emphasis added]

The burden was upon the plaintiff to establish that this court is biased against it and that it will not get a fair hearing before the court. I am in agreement with the defendants that the plaintiff's application has not met the threshold for recusal of a judge on the ground of bias. The court has a duty to peruse all the documents placed before it by the parties and to ask any question in relation thereto. The court cannot be said to be biased merely because it has asked questions in respect of which a party feels uncomfortable. The court cannot be silenced in the manner sought by the plaintiff. The court must have free hand to robustly scrutinize the material placed before it and to engage the parties and their advocates in respect thereof. I do not think that any reasonable person looking at the question that this court had put to the plaintiff's advocate would conclude that the court was biased against the plaintiff.

I have said enough to show that the plaintiff's application dated 25th September, 2020 has no merit. However, since the plaintiff feels strongly that it will not get justice before this court, I will recuse myself nevertheless from the matter so that the plaintiff can be heard by another court.

In conclusion, I hereby recuse myself from hearing this matter. The same is allocated to Eboso J. for further action.

Delivered and Dated at Nairobi this 24th day of June 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Thuo for the Plaintiff

Mr. Abobo for the 2nd Defendant

Mr. Kamau for the 1st and 3rd Defendants

Ms. C. Nyokabi- Court Assistant