REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2008

MANSUKHALAL JESANG MARU.....PLAINTIFF

VERSUS

FRANK WAFULA.....DEFENDANT

RULING

1. The application dated **25/1/2021** and filed in court on **27/1/2021**, brought under **Section 1A, 3A & 63(e)** of the **Civil Procedure Act Chapter 21** of the **Laws of Kenya,** the **Civil Procedure Rules,** has been brought by the defendant seeking the following orders:-

> **a. That pending the hearing of the application *inter partes* the High Court Judge Hon. Mwangi Njoroge be pleased to disqualify himself from hearing this case.**
>
> **b. That the honourable court do issue directions forwarding and transfer of this file to another judge either in ELDORET or before any visiting judge during the service week for allocation and further orders.**

2. The application is supported by an affidavit of the defendant sworn on **25/1/2021.** The grounds upon which the application is made are that the applicant who is the defendant in the suit has formed an opinion that the judge is biased and that the bias has resulted in animosity between him and the court, that he has made complaints regarding the alleged bias. He states that he desires that the case file be transferred to Eldoret for disposal or that it be dealt with by any judge during a service week at Kitale. The further allegations of evidence of bias are that the judge commented on the **Appeal No. 38 of 2019** at **Kisumu** and that he blocked the applicant from participating in the proceedings. He further alleges that the judge is friendly to the counsels for the respondent and that he has no confidence in the judge for failure to determine his application dated **5/12/2019**.

3. The plaintiff filed grounds of opposition dated **8/2/2021** and opposed to the defendant's application dated **25/1/2021** and pray that the same be dismissed with costs on the following grounds:

> **1. The application has no merit.**
>
> **2. There is no justification for the orders sought to be granted.**
>
> **3. That there is no existing complaint against the Judge.**
>
> **4. There is no evidence in support of the orders sought.**
>
> **5. This court has been fair to all the parties in this matter.**
>
> **6. The defendant has not been ready to prosecute his defence and the instant application has only been made to interfere with the hearing of the case as set down for hearing on 9/2/2021.**
>
> **(7) There is no ground raised sufficient for the Judge to recuse himself.**

4. The defendant filed his submissions on **16/2/2021**. The plaintiff filed no submissions. I have considered the application and the response and the filed submissions.

5. The main issue arising from the instant application is whether there are good grounds for recusing myself from the hearing of this suit. The grounds upon which the application is made have been set out herein above.

6. On some occasions litigants have felt that they do not have confidence in a judge and in such instances they are perfectly entitled to apply for his or her self-recusal provided they can establish good grounds for it.

7. It is quite possible that an application for recusal may be misused by mischievous litigants and so a court ought to examine such an application exhaustively so that no prejudice is occasioned to one party out of sheer mischief on the part of another party.

8. This court has earlier on in a different suit stated that self-recusal is not

> **" a proposal that should be readily acceded to by judges, partially for the reason that sound grounds must be first proved, and secondly judges have a duty to sit that should not be incommoded by frivolous applications for self-recusal. That duty is based on the oath of office they took. Finally forum-shopping by crafty litigants should be discouraged."**

See the case of **Richard Onyino Simwa vs Joshua Angelei and Others Kitale ELC Case No 69 of 2019.**

9. This observation followed the court's examination of decisions such as **Hon. Kalpana H. Rawal V Judicial Service Commission & 2 Others Civil Appeal (Application) No. 1 of 2016 [2016]; Galaxy Paints Co. Ltd V Falcon Guards Ltd [1999] eKLR; J G K v F W K [2019] eKLR; Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR; Andrew Alex Wanyandeh -vs- The Attorney General & Kenya Railway Corporation; Nairobi Milimani HCCC No. 844 Of 2005 and Republic V Mwalulu & 8 Others: [2005] 1 KLR.**

10. In the **Hon. Kalpana H. Rawal** the Court of Appeal of Kenya stated as follows:

> **"… Before we consider the merits of the application, however, there are a few issues raised by the parties which we must dispose of. First, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically disqualify himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary, decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in Locabail UK Ltd Vs Bayfield Properties Ltd [2000] Q.B. 451 a judge "would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance."**

11. The **Galaxy Paints Co.** case emphasized that although it is important that justice must be seen to be done, it is equally important that judicial officers should discharge their duty to sit, and do not, by acceding too readily to suggestions of bias, encourage parties to believe that by seeking disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

12. Gikonyo J in the case of **J G K v F W K [2019] eKLR** also emphasized that recusal should not be undertaken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, for example, bias or prejudice or conflict of interest or personal interest on the part of a judge and that the administration of justice ought to be free from blackmail. At the same time he observed that what must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favourable to their causes.

13. Justice Hatari Waweru in **Andrew Alex Wanyandeh -vs- The Attorney General & Kenya Railway Corporation; Nairobi Milimani HCCC No. 844 of 2005** observed that litigants cannot choose their judges and concurred with earlier decisions stating that that applications for disqualification of judges should not be lightly allowed as that would tend to erode public confidence in the courts and the determination of justice.

14. In the case of **Republic V Mwalulu & 8 Others: [2005] 1 KLR** the Court of Appeal stated that the test is objective and the facts constituting bias must be specifically alleged and established and that that would be achieved by scrutinizing the affidavits filed by either side.

15. It may be quite tedious to adequately restate the background of this suit here. It is sufficient to state that this is one of the oldest cases in this station, the much older one being **ELC No. 34 of 1998** which was very recently determined following an application on the part of the defendant similar to the one filed by the current defendant, while only the defendant's evidence was being awaited. As the history of this litigation will demonstrate shortly courts have of late, in their quest to eliminate backlog of suits, been between a rock and a hard place, trying to force some unwilling litigants in ancient cases to proceed with their claims to conclusion while at the same time maintaining the principle of natural justice that requires every person to be heard out to the fullest.

16. To save much effort on providing the history of the matter and to give a better perspective I will only refer to a ruling delivered on **7/11/2019** in respect of an application dated **18/9/2019** filed by the defendant in which this court proceeded to state as follows:

> **"7. The background to the application is that when serious efforts to have this matter heard and determined commenced on 3/2/2016 after a long hiatus of 7 years since the last court appearance on 27/9/2009, the plaintiff explained the delay and the suit was spared dismissal and the plaintiff was ordered to fix a hearing within 30 days from that date failure to which the suit would stand automatically dismissed. Pursuant to that plaintiff's Counsel Mr. Nyamu attended the registry on 26/2/2016 and fixed the hearing for 9/6/2016. On that date the court adjourned the hearing to 27/10/2016. On the same date the defendant filed a motion dated 2/6/2016 and set it down for hearing on 30/6/2016. Come 30/6/2016 the plaintiff had not been served with that motion and it was adjourned to 11/7/2016. On 11/7/2016 the application was adjourned to 25/7/2016 at the plaintiff's instance. On 25/7/2016 the motion was adjourned 30/8/2016. On the latter date it was argued and ruling was set for 28/9/2016 granting the application for leave to amend the defence to include a counterclaim. On 15/9/2017 the Deputy Registrar fixed the matter for mention on 4/10/2017 for directions at the instance of the plaintiff. On 4/10/2017 the matter was fixed for**

mention on 7/11/2017 when it was issued with a hearing date of 4/4/2018. There is no record on what transpired on 4/4/2017 but on 10/4/2018 the plaintiff fixed a hearing date of 20/4/2018. On 20/4/2018 the matter did not proceed. It was next fixed for mention by the plaintiff on 19/6/2018 when he took 4/7/2018 as the mention. On 4/4/2018 the hearing date 8/10/2018 was taken by consent. On 8/10/2018 the defendant sought an adjournment on the basis that Mr. Chepkwony his advocate was indisposed. The matter was adjourned to 23/10/2018 on which date the plaintiff was ready but the defendant applied for an adjournment which application the court overruled and hearing proceeded. PW1 and PW2 testified on that date. The plaintiff's case was closed. At the end of those proceedings the defendant who was in court applied for 2 weeks to set aside the proceedings. The court gave the defendant 7 days to prepare for his defence and barred the filing of further documents in the matter and set 30/10/2018 as the new hearing date. On 29/10/2018 the defendant filed an application seeking that the proceedings of 23/10/2018 be set aside. Ruling was delivered on 31/10/2018. On 31/10/2018 the ruling was read and the defendant allowed to apply orally for a recall of the plaintiff and his witness for cross-examination. The matter later came up for hearing 14/11/2018 when Mr. Chepkwony orally applied to have the proceedings typed and the plaintiff's witnesses recalled which request the court granted and fixed the hearing for 28/11/2018. On 28/11/2018 the defendant appeared in court alone and asked for an adjournment on the basis that his advocate was bereaved and the matter was adjourned to 11/2/2019. On 11/2/2019 the defendant was represented by a Mr. Changorok who expressed to be holding brief for a Mr. Bundi for the defendant who asked for an adjournment on the basis that the latter had just freshly appointed. The court granted the request and gave 21/3/2019 as the hearing date when the plaintiff's witnesses would be cross-examined. On 21/3/2019 Mr. Karani for the defendant cross-examined the PW1 and decline to cross-examine PW2 on the basis that he needed time to examine some documents. The court allowed the adjournment of cross-examination of PW2 and ordered that the defendant do pay the plaintiff Kshs.20,000/= as costs. Hearing was adjourned to 28/3/2019 at 2.00 p.m. on which date defendant appeared for himself and informed court that he had an application for review of certain orders. The court ordered the application to be heard on 9/4/2019 and delivered a ruling on 30/4/2019 which has given rise to the instant application.

8. I do not for one moment doubt that the desire of the defendant to appeal against the ruling dated 30/4/2019 is genuine. However it must be pointed that that intended appeal only relates to the payment of costs. Mr. Kiarie for the plaintiff is on record as having stated on 18/9/2019 that he is not intent on seeking that the costs be paid before the hearing of the defence case that was scheduled for that date. However Mr. Wafula, the defendant insisted that he intend to prosecute the appeal. The court allowed the defendant an adjournment on that date and condemned to Kshs.10,000/= payable before the next hearing date as well as court adjournment fees.

9. I think I have said enough about this application. When the plaintiff who is entitled to costs undertook to allow the defence hearing scheduled for 18/9/2019 to proceed before he could be paid costs that was a clear signal that the costs that had been awarded so far were no longer a hindrance to the prosecution of the defence case. The application at hand is seeking a stay of the entire suit pending the hearing of the intended appeal. The defendant's ground is that he shall suffer irreparable loss and damage which may not be fully compensated in monetary terms if the prayers sought in the application are not granted and that the plaintiff would not suffer any prejudice. He also maintains that the appeal would be rendered nugatory.

10. With respect I do not find any merit in all the three grounds above. First, a stay of proceedings would halt the progress of the entire suit whereas the only borne of contention is whether the defendant should pay costs before hearing of the defence case; this is notwithstanding the fact that the plaintiff has given clear signs that payment of those costs as a pre-condition for the hearing of the defence case had been waived. Second, it is not correct for the defendant to state that the plaintiff would not suffer any prejudice if the proceedings were stayed; the greater number of adjournments in this case have been occasioned by the defendant and for reasons which the court accepted only for the purpose of allowing the defendant to be adequately prepared for the hearing of his case.

11. Having examined the record in this matter afresh and outlined the highlight of the defendant's conduct earlier in this ruling, this court is of the opinion that the defendant is only intent on wilfully obstructing the progress of this case for reasons best known to himself. This would not be said to be not prejudicial to the plaintiff who, having closed his case a year ago is being made to wait for the defence case to proceed at the defendant's pleasure.

12. This court disagrees with the defendant's attempt to have every party and the court operate at his whim and caprice in the matter at the expense of the finalization of a claim filed in 2008. It finds the application dated 18/9/2019 to be without merit and an abuse of the process. The same is hereby dismissed with costs to the plaintiff."

17. Regrettably so, yet another application being the instant one for self-recusal has taken up yet more time that could have been utilized on hearing of precious evidence in the present or other matters, but the applicant's *bona fides* in the application can not be discounted and he must be heard out to the fullest on its merits.

18. What facts does the applicant rely on to conclude that a fair minded and informed observer who would be neither complacent nor unduly sensitive or suspicious perceive the possibility of real bias? They must be in the affidavit in support of the motion.

19. The affidavit in support of the application has **14** substantive paragraphs if the descriptive ones are excluded. Of these substantive ones, **4** of them, being **paragraphs 4, 5, 6** and **7** do not focus on the Judge's conduct of the matter but amount to complaints regarding the Chief Registrar of the Judiciary and a Mr. Kiarie of Kiarie & Co. Advocates and this application is not concerned with those.

20. Paragraph 3 merely states that the Judge is very friendly to counsel for the plaintiffs and hostile to the defendant. No evidence is attached to support these conclusory statements. **Paragraph 8** merely describes the directions the applicant is giving this court: to transfer the matter to Eldoret or to allow a visiting Judge to handle it during the service week and for lack of facts in the affidavit, I am not aware of how the applicant has learnt that a service week is close by.

21. Paragraph 9 does not detail the instances in which the applicant was either interrupted or in which the judge spoke to the plaintiff's counsel in a friendly manner. In any event the court is not supposed to communicate with any litigant or his counsel, whatever the nature of their case, including an application for recusal, as if they were enemies.

22. Paragraph 10 of the affidavit alleges that the court "made a mistake *"to allow Mr. Peter Kiarie advocate to lie in court that the respondent had travelled abroad in December 2019 when indeed there was no copy of travel documents produced or filed in court."* That is such a general statement and it is clear that if any decision of that nature was made by mistake as stated, all the applicant needed do was to lodge an appeal against it.

23. Paragraph 11 states that the judge has demonstrated that he has monetary interest in the case going by the abnormal court adjournment costs he has been slapping on the applicant which the respondent has not applied for. Again, the history of this matter as set out in the ruling quoted before herein matters. When a plaintiff has closed their case and a defendant adopts such a lackadaisical or in the alternative an obstructionist approach to any further progress in the case, the court should react in the same manner it would treat a plaintiff unwilling to prosecute his case. in the plaintiff's case, dismissal for want of prosecution ensues. In the defendant's case, closure of the case without the taking of the defendant's evidence ensues. The court has been reluctant in this case to close the defendant's case yet now the defendant now ironically seeks its recusal.

24. All I need to state here is that this court has taken the easier route of deliberately punishing the applicant by way of stiff pecuniary penalties for further unwarranted delays in prosecuting his defence on one ground or another in lieu of ordering the defence case closed for want of prosecution. In one instance this court stated as follows in a ruling in the instant suit, dated **30/4/2019,** that is, two years ago:

> **8. The suit at hand was filed in the year 2008 now it is 10 years old. This court has been engaged in an exercise to relieve litigants of the burden of litigation older than 5 years in the spirit of implementing the policy of sustaining the Judiciary Transformation.**
>
> **9. In the times that this suit has been adjourned at the instance of the defendant this court has indulged him simply to allow him to wake up to the requirements of an attitude of expeditious disposal of litigation as required in the recent days. He appears not to have learnt his lesson fast enough and from 8/10/2018 to date - a period of about 6 months - he has made at least 6 direct or indirect applications for adjournment leading to the orders that has been made by this court.**
>
> **10. It is noteworthy that Order 17 rule 1(1) of the Civil Procedure Rules requires that once a suit has been set down for hearing it shall not be adjourned unless the party applying for adjournment satisfies the court that it is just to grant the adjournment.**
>
> **11. Order 17 Rule 2 provides that when a court grants an adjournment it shall give a date for further hearing or directions. Order 17 Rule 2 does not fetter the court in terms of the directions it may give after allowing the adjournment and these directions in my view may include orders as to costs.**
>
> **12. In my opinion a litigant who appear reluctant to proceed with the suit has only the recourse of abiding by the orders of the court which indulged him by granting him an adjournment.**
>
> **13. One option available to a court that is not convinced of the bona fides of an application for an adjournment is to grant that adjournment and order punitive costs against the party so applying. This is in order to salve the wounds of delay inflicted unnecessarily on an innocent party.**
>
> **14. The second option is to compel the applying party to proceed notwithstanding his expressed unpreparedness which may be more deleterious than having to pay costs. This option is deleterious because the litigant may have had a good reason for the adjournment which he poorly communicated to court and in an unconvincing manner.**
>
> **15. In the event of poor communication, the latter option insures his right to be ultimately heard. If he were compelled to proceed while unprepared there may occur a substantial miscarriage of justice that may have long lasting effects.**
>
> **16. So where a litigant is condemned to punitive costs to compel him of his own volition to cease unnecessarily delaying the hearing by numerous and vexatious applications for an adjournment, usually strenuously opposed by the adversary, condemnation to costs is the lesser evil."**

25. Two years have passed and the defendant has yet to prosecute his defence!

26. Paragraph 12 is quite general and avails no evidence of the statements therein.

27. Paragraph 13 quotes a ruling dated **7/11/2019** which is said to make the applicant intimidated and of the conviction that he can not have a fair hearing before me. Though he has only cited two paragraphs, that is **paragraph 8** and **paragraph 9**, I will set out all the paragraphs in between them for ease of flow as follows:

> **"8. I do not for one moment doubt that the desire of the defendant to appeal against the ruling dated 30/4/2019 is genuine. However it must be pointed that that intended appeal only relates to the payment of costs. Mr. Kiarie for the plaintiff is on record as having stated on 18/9/2019 that he is not intent on seeking that the costs be paid before the hearing of the defence case that was scheduled for that date. However Mr. Wafula, the defendant insisted that he intend to prosecute the appeal. The court allowed the defendant an adjournment on that date and condemned to Kshs.10,000/= payable before the next**

hearing date as well as court adjournment fees.

9. I think I have said enough about this application. When the plaintiff who is entitled to costs undertook to allow the defence hearing scheduled for 18/9/2019 to proceed before he could be paid costs that was a clear signal that the costs that had been awarded so far were no longer a hindrance to the prosecution of the defence case. The application at hand is seeking a stay of the entire suit pending the hearing of the intended appeal. The defendant's ground is that he shall suffer irreparable loss and damage which may not be fully compensated in monetary terms if the prayers sought in the application are not granted and that the plaintiff would not suffer any prejudice. He also maintains that the appeal would be rendered nugatory.

10. With respect I do not find any merit in all the three grounds above. First, a stay of proceedings would halt the progress of the entire suit whereas the only borne of contention is whether the defendant should pay costs before hearing of the defence case; this is notwithstanding the fact that the plaintiff has given clear signs that payment of those costs as a pre-condition for the hearing of the defence case had been waived. Second, it is not correct for the defendant to state that the plaintiff would not suffer any prejudice if the proceedings were stayed; the greater number of adjournments in this case have been occasioned by the defendant and for reasons which the court accepted only for the purpose of allowing the defendant to be adequately prepared for the hearing of his case.

11. Having examined the record in this matter afresh and outlined the highlight of the defendant's conduct earlier in this ruling, this court is of the opinion that the defendant is only intent on wilfully obstructing the progress of this case for reasons best known to himself. This would not be said to be not prejudicial to the plaintiff who, having closed his case a year ago is being made to wait for the defence case to proceed at the defendant's pleasure.

28. It is clear that the paragraphs said to be occasioning the applicant apprehension speak for themselves and underscore this court's need to finalize this very old piece of litigation on an expeditious basis. However it would appear that while the applicant is averse to being punished by imposition of pecuniary penalties for delaying the hearing of his own case, he would the court meekly kowtowed to his every demand for adjournment without any concern for the plaintiff's anxiety and generally for his having stymied the progression of the instant litigation, which delay would in itself be against public policy, for the latin maxim states it concisely: *interest reipublicae ut sit litium finis.* The court in the same ruling rejected the applicant's approach as follows:

"12.This court disagrees with the defendant's attempt to have every party and the court operate at his whim and caprice in the matter at the expense of the finalization of a claim filed in 2008. It finds the application dated 18/9/2019 to be without merit and an abuse of the process. The same is hereby dismissed with costs to the plaintiff."

29. Paragraph 14 avers that the applicant was blocked from participating in court proceedings on a mention held on **2/12/2020.** However the record of online proceedings held on the said date speaks for itself as follows:

"2/12/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Nyamu for plaintiff (also) holding brief for Mr. Kiarie (present)

Defendant in person (present)

COURT

File placed aside.

(Signed)

MWANGI NJOROGE

JUDGE

LATER AT 2.30 P.M

Mr. Nyamu for plaintiff present

Mr. Kiarie for plaintiff present

Mr. Wafula (online but muted and despite communication by the court to unmute and speak, he does not do so. When he unmuted he does not speak and the background noise form his connection distracts court).

COURT

Further hearing of the main suit 9/2/2021. Hearing notice to issue.

(Signed)

MWANGI NJOROGE

JUDGE

2/12/2020."

30. Glitches in online communications are common. However the hearings and mentions held online are prone to abuse by unscrupulous individuals who may adopt the affectation that their connectivity is "poor" while it is not! In stating this, I do not include the applicant herein, for I am not aware of the circumstances that led to his being inaudible or unable to communicate with the court and other parties on **2/12/2020.** Fortunately, this court has taken to putting it expressly on record in writing whether a person is audible or responsive as is seen in the above proceedings of **2/12/2020** where the court recorded him as *"online and mute"* and the issue of whether he was availed an opportunity to be heard or not is quickly resolved by a perusal of the proceedings.

31. In this court's view, the singular conclusion to be reached is that the grounds that the applicant relies on are not capable of sustaining an application for self-recusal. Consequently, I hereby dismiss the application dated **25/1/2021** with costs. This suit will be mentioned on **28/6/2021** for directions.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9TH DAY OF JUNE, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.