



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 67 of 2018

MUGUMOINI FARMERS CO LIMITED.....PLAINTIFF

VERSUS

INSHWIL BUILDERS & ENGINEERS LTD.....DEFENDANT/APPLICANT

AND

EPHRAIM WAITHAKA RUTHA.....1ST INTERESTED PARTY

CHARLES WANGONDU SAMSON.....2ND INTERESTED PARTY

RULING

1. The Ruling relates to the application instituted by the Applicant on the 10/5/2021 seeking that the Hon Judge be pleased to recuse herself from further hearing and or proceedings in this matter.
2. The application is supported by the grounds thereto and the supporting affidavit of Patrick Gukura Muraya, a co-Director of the Applicant. The grounds are that the Applicant is apprehensive that the Hon Judge is biased against it; The Applicant has lost trust and confidence in the Hon Judge in continuing to hear the matter.
3. Further that the Court has heard and determined several applications to wit; Preliminary application dated 13/9/2019 which was dismissed; application for review dated the 16/1/2020 which was dismissed; application dated 16/8/18 which was upheld.
4. That the crux of the suit by the Plaintiff is that LR NO KAKUZI/KIRIMIRI/BLOCK 7/37 (suit land) and its subdivisions were fraudulently acquired and transferred to the Defendant. It is the view of the Applicant that to the contrary the suit land was acquired by the Defendant vide a consent recorded in Court dated the 17/12/2009 (**HCCC No 3086 of 1994 – Erastus Nduhiu T/A Emac Enterprises Vs Mugumoini Farmers Co Limited**) (Now ELC No 245 of 2017-Thika). That the said consent determined the issue of ownership between the parties in this suit.
5. Further that the said consent order has neither been set aside, appealed and or vacated. That, notwithstanding the Court has ignored the said order and failed to give it meaning and effect. That on that account the Applicant is apprehensive that the Hon Judge is biased against it and if allowed to proceed there is a likelihood that the Court will arrive at a different determination vis a vis the said order of the 17/12/2009.
6. That in order for justice to be seen to be done it is only met and just that the Hon Judge recuses herself from the suit.
7. In a quick rejoinder, the Plaintiff opposed the application and filed a Replying Affidavit deponed by Joseph Kamande Ngone, who introduced himself as a shareholder/director and Chairman of the Plaintiff's Company.
8. The Plaintiff/Respondent delved into the lengthy history of the suit dating back to 1994. That in that case the then Plaintiff obtained Orders of prohibition prohibiting the current Plaintiff from transacting in the suit land and directing that the suit property be sold by way of auction. That an agreement was drafted between the Defendant herein and the then Plaintiff but the same was rescinded. It is the Plaintiffs case that the Defendant colluded to have the prohibitory Orders lifted vide the consent Orders of 17/12/2009 through fraud, misrepresentation and concealment of material facts. In addition, that it was discovered that the then Directors of the Plaintiff had no capacity to lift the prohibitory Orders as they were not authorized directors of the Plaintiff company.
9. That for one, Julius Mbugua Gatuha was not a director and had no capacity and in any event was critically ill at the time and could not have been in a position to swear the affidavits dated 10/8/2004. That another director namely Benjamin Kamande Githuka has disowned the affidavit in support of the lifting of the prohibitory Orders allegedly deponed by him. It charged that the Orders of 17/12/2009 are illegal, unlawful and tainted with fraud, the subject matter of this suit.

10. Lastly that the Applicant has neither established nor proven the facts upon which the apprehension of bias is based and in its opinion the Applicant has not demonstrated the reasons for the recusal of the Court.
11. Counsel for the interested parties informed the Court on 2/06/2021 that they were neither for nor against the application and had filed an Affidavit of neutrality. However at the time of writing this ruling I did not sight it on record. Parties elected to dispense with the application by way of written submissions.
12. The Applicant maintained that the order for 17/12/2009 completely and effectively concluded the issue of ownership. It is its' submission that the order was brought to the attention of the Court but the honorable Court has failed and/ or ignored to take into consideration. That the instant suit is in the nature of appeal against the order which it seeks to overturn. That the action of this Court of setting the matter down for hearing oblivious of the order depicts the Court as being biased. That this will result in unfair determination of the suit.
13. It further submitted that the order has been brought to the attention of the Court in various applications but the Court has not addressed its mind to it. That equally the Respondent is aware of the said Orders and has not taken any action to impugn it by way of appeal, setting aside or vacating the same all together. It contends that the Plaintiffs suit cannot be entertained in the presence of the consent Orders aforesaid. It submits that this Court is aiding the Plaintiff by not dismissing the matter.
14. Further the Applicant submitted that an earlier suit filed in Thika was dismissed by the Court in ELC 245 OF 2017 vide a ruling dated 9/4/2018. That barely 4 months later the Plaintiff then chose to file the suit in Muranga. That the reason the suit was filed in Muranga is because the Plaintiff views the Court as friendly otherwise it could have been filed in Thika. It is its submission that the suit in Thika is active and the Court dismissed an application to set aside the order. In the end, it submitted that it has satisfied the condition for recusal as was laid in **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others {2013} eKLR**.
15. The Respondent submitted on the genesis of the impugned order in submitting on the legality of it. It submitted that the Applicant has the burden of establishing the existence of bias and a reasonable ground for apprehension. That the test for recusal was laid down in **Jasbir Singh (supra)**. It is its submission that the fact that the honorable Court reached a determination different from that expected by the Applicants in the various rulings on record cannot be concluded that it is biased. That the Applicant has not laid any evidence of bias or apprehension of it and the allegations are meant to delay the matter.
16. It is the Respondent's submission that the Applicant has not demonstrated that the judge is not impartial. That it has not met the test in **Philip K Tunoi & Another vs Judicial Service Commission & Another {2013} eKLR**. That It is its submission that the Applicant has not discharged its onus of establishing a case of recusal on the basis of bias. That the test of proving allegations was settled in **Galaxy Paints Company Limited vs Falcon Guards Limited {1999} eKLR**. Relying on the duty sit doctrine as established in **Kaplan & Straton vs L.Z. Engineering Construction Ltd & 2 others {2001} eKLR** the Respondent submitted that judges do not have a duty to recuse themselves on flimsy grounds.
17. It submitted and urged the Court to be guided by the case of **Syngenta East Africa Limited vs Soy Kabatik Agri Center Limited {2019} eKLR** in finding that a Court cannot recuse itself on mere allegation of bias. In submitting that the application is meant to delay the matter, reliance was placed in **JGK vs FWK and Accredo AG & 3 Others vs Stefano Ucceli & Another {2018} eKLR**.
18. The Respondent instituted the suit against the Applicant vide a plaint dated 16/8/2018 seeking Orders for injunctions, revocation and cancellation of title on account of fraud and illegality. Accompanying the plaint was an application for injunction which was opposed by the Defendant by way of Preliminary Objection and Grounds of Objection. This Court pronounced itself on 23/09/2019 dismissing the Preliminary Objection. The Court in its ruling held as "I have read the ruling and am satisfied that no cause of action such as pleaded herein in terms of fraud and misrepresentation was heard and determined..... from the foregoing this Court finds that the current suit is not res judicata"
19. There was no appeal preferred against the ruling; an application for review was instead filed on 16/01/2020. The application was premised on the discovery of pleadings which culminated to the 17/12/2009 consent order. The Court in its ruling dated 01/10/2020 dismissed the application. The Defendant preferred an appeal evident by the Notice of Appeal dated 12/10/2020. On 11/3/2021 parties appeared before Court for pre-trial directions and only the Plaintiff had complied. On the said date, counsel for the Defendant expressed contention that the Court was biased on his client and informed the Court of his intention to file a formal application.
20. The Applicant now seeks to have the trial Court recuse itself on the basis of biasness. That the Court failed to address its mind on the consent order of 17/12/2009 and which failure will result in unfairness. The issue for determination therefore will be whether the learned judge should recuse herself.
21. The considerations that a Court must take into account when determining an application for recusal of a judge are well settled. These considerations were highlighted by the Supreme Court in the case of **Gladys Boss Shollei Vs 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."
22. A judge has a duty to the Constitution (fidelity to the Constitution) and a duty to Court to the extent that he/ she must be a neutral arbiter. The Bangalore Principles as captured in the Judicial Code of Conduct mandates every judge to be independent and impartial in the course of

dispensing justice.

23. The State Counsel in the **Gladys Shollei Case(Supra)** when looking into the issue of recusal quoted the writings of Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – “Judicial Continuing Education Workshop: *Recusal, Contempt of Court and Judicial Ethics*; May 4, 2012; where he observed:

“A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason”

24. Further, the Court observed the reasoning in *Simonson –vs- General Motors Corporation* U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

“*Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a “duty to sit” . . .*”

25. What is the test to be applied to the considerations? The Court of appeal in the case of **Kaplana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR** relied on the decision in *Magill v. 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 v 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.”

26. Further the Supreme Court of Canada expounded the test in the following terms in **R. v. 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.”

27. Further the test for recusal of a Judge was laid down by the Court of Appeal in the case of **R VS. David Makali and Others C.A.Criminal Application No. 4 and 5 of 1995 Nairobi (unreported)** as reinforced in **R Vs. 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”.

28. Drawing from the above, an order for recusal must be critically analyzed before it can just be issued. It should be observed as not to be used to bar judicial officers from sitting. The **Judicial Service (Code of Conduct and Ethics) Regulations 2020** under Regulation 21 provides:

(1) A judge may recuse himself or herself in any 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.

(2) Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings. (3) A

29. The basis for recusal in the present case is on bias. The Bangalore Principles of Judicial Conduct defines "Bias" as Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another of a particular argument. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view that sways or colors judgment and renders a judge unable to exercise his or her functions impartially in a particular case.

30. The case of **Nairobi Court of Appeal Civil App No. 6 of 2016 Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR** sets the test for recusal of a judge on allegations of bias. The Court held that determination of bias is discernable from the material placed before Court. The test applied will be that of a fair minded and informed observer.

31. The order in contention by the Applicant is one given on 17/12/2009 in **HCC No. 3086 of 1994**. In the ruling of this Court dated 23/09/2019, this Court when analyzing various suits concerning the parties in paragraph 12 found that **HCC No. 3086 of 1994** was in respect of recovery of a debt. That there were attempts to revive the foregoing suit vide **Thika ELC No. 245 of 2017** but the Court dismissed the application.

32. A perusal of the ruling by the Court **Thika ELC No. 245 of 2017** at page 12, the learned judge held "having found that the Defendant/Applicant raises serious issues of **fraud and misrepresentation** and which raise a new cause of action which is different from the main suit herein....." the Court further held on page 13 that "if the Defendants are aggrieved they should **file a new cause of action** as litigation must come to an end" The parties in the suit were the Plaintiff herein as the Defendant in that suit and the Defendant herein as the interested party.

33. The order was introduced by the Applicant in its application for review but had been filed before this Court by the Respondent. It was not a new document that could interfere with the ruling of the Court of 23/9/2019. Importantly, this Court noted in paragraph 14 of its ruling delivered on 23/09/2019 that the present cause of action is premised on fraud and illegalities. An aspect that the Court in **Thika ELC No. 245 of 2017** noted in its ruling of 09/04/2018 as espoused above.

34. The Applicant has not tabled before this Court any evidence pointing on possible bias by the Court. The Applicant has a duty to lay ground upon which allegations of bias is drawn as was established in the case of **Philip Tonui (supra)**. All the Applicant is doing is giving the chronology of events and not guiding evidence as to the bias. It has not escaped the attention of the Court that the Applicant has rightly filed an appeal against the decision of this Court.

35. The standard of proof on allegation of bias on recusal is high as was settled **Accredo A.G Case (supra)**. The Applicant in its submission concludes that it has met the threshold of the Jasbir case. In the case, the Supreme Court found that the test applicable would be Perception of *fairness*, of *conviction*, of *moral authority* to hear the matter. As stated above, the Applicant has not discharged its evidential burden of proving the existence of bias or the apprehension of it.

36. Having considered the material placed before this Court, the case law and precedent cited by parties and foregoing principles, I find that the Applicant has not demonstrated any bias that would warrant the recusal of this court.

37. I make no Orders as to costs.

38. In the upshot the application is dismissed.

39. It is so ordered.

DELIVERED DATED AND SIGNED AT MURANGA THIS 30TH DAY OF JULY 2021.

J G KEMEI

JUDGE

Delivered online-

Ms Nzioka Advocate HB for Ms Beacco for Plaintiff

Mr. Ndurumo Advocate for Defendant

Mugo Advocate for 1st & 2nd Interested Parties

