



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 1047 OF 2013

DEBORAH ACHIENG ADUDA.....1ST PLAINTIFF

RENE JOHNY DIERKX.....2ND PLAINTIFF

VERSUS

FLORENCE SEYANOI KIBERA – also known as

DOROTHY SEYANOI MOSCHION.....DEFENDANT

AND

DIRECTOR OF RATES,

NAIROBI COUNTY GOVERNMENT.....1ST INTERESTED PARTY

NAIROBI CITY COUNTY GOVERNMENT.....2ND INTERESTED PARTY

NAIROBI METROPOLITAN SERVICES.....3RD INTERESTED PARTY

RULING

The Defendant filed the application dated 29/4/2021 seeking to have this court recuse itself from hearing this matter and for the file to be placed before the Presiding Judge for the Environment and Land Court (ELC) for directions and further proceedings. The application was made on the ground that I am actually or apparently biased against the Defendant and that she is reasonably apprehensive she will not be accorded a fair hearing by this court.

The Defendant swore the affidavit in support of the application and deponed that this suit was the subject of **Nairobi Court of Appeal Civil Appeal No. 109 of 2019** concerning the *ex parte* judgement that I delivered on 27/9/2017. She deponed that she was aggrieved by the decision I made and believed that I was biased and prejudiced against her. Further, that she was apprehensive that she will not be accorded any fair hearing in these proceedings for the enforcement of my decision.

The Defendant deponed that she had previously filed an application for my recusal in Nairobi **ELC Case No. 350 of 2018** between herself and Charles Kimeria Mwangi and that I disqualified myself following which the files were placed before the Presiding Judge of the ELC for allocation to a different judge. The Defendant set out instances that she believed that I had consistently demonstrated actual bias against her in relation to the judgment issued on 27/9/2017, the enforcement of the sale agreement dated 16/2/2012 and that I had adjudged her a criminal or fraudster without giving her a hearing. Further, that I ordered excision and transfer of her property to the Plaintiffs without any consideration of her rights over the Suit Property. That on 6/12/2018 I ordered execution of my judgement by excision of an acre from her property being land reference number (L.R. No.) 5892/22 and its transfer to the Plaintiffs while her appeal against my judgement was pending. That in ordering execution, I deliberately ignored the fact that the Plaintiffs would demolish her house and create a road through her property which is L.R. No. 5892/27 which was not the subject of this suit. She averred that I was proceeding with the matter despite the pendency of her appeal against my decision entirely at the direction of the Plaintiffs and for the benefit of the Plaintiffs. She also averred that I had entertained and continued to tolerate non-parties to the suit at the behest of the Plaintiffs without any due process to her prejudice and detriment. Lastly, that I had failed to uphold the requisite judicial deference in the matter.

The Defendant further deponed that she believed that I would be influenced by my bias against her and would proceed unfairly against her. She claimed that I had formed a negative perception or opinion of her which had fundamentally impaired my judgment of the matter. Further, that I was insensitive and unmindful of the difficulties and violations that she suffers or risks suffering in consequence of the Plaintiffs' conduct.

The Defendant annexed a copy of the judgement I delivered on 27/9/2017 as well as the ruling delivered by Gitumbi J on 13/2/2015 when

she declined to grant an injunction to the Plaintiffs. She also attached a copy of the plaint together with a copy of the ruling dated 6/12/2018 allowing the Plaintiff's application to have the Deputy Registrar of the Environment and Land Court sign and execute the documents in the enforcement of the judgment of this court.

The 1st Plaintiffs swore the affidavit in opposition to the application. She deponed that the allegations made by the Defendant were scandalous, vexatious and an abuse of the court process and that they were nothing more than an opportunity for the Defendant to cast aspersions on my integrity, character and honour. Further, that although the Defendant had lodged an appeal against my judgement, the Court of Appeal had not granted any injunction, stay of proceedings or stay of execution that would prevent this court from entertaining further proceedings. That the mere fact that a litigant had preferred an appeal against an unfavourable decision of the court does not in itself establish, demonstrate or prove bias or prejudice on the part of the judge nor is it a ground for recusal.

The 1st Plaintiff further averred that just because the Defendant filed other applications for my recusal in other matters that in itself cannot be a ground for recusal because each case and application must be considered and decided in its own facts. The 1st Plaintiff pointed out that the grounds set out in paragraph 7 of the Defendant's affidavit were matters to be argued in the appeal and do not constitute grounds for recusal of a judge. She urged that the Defendant was attempting to challenge the merits of my judgement and if that if this court were to grant the orders sought I would be in essence agreeing that my judgement was erroneous and ought to be set aside on appeal. The 1st Plaintiff added that disagreement with the substantive findings and decision of a court on merit could not form the basis for asking a judge to recuse herself.

The 1st Plaintiff deponed that the allegations of bias, unfairness, prejudice, insensitivity and un-mindfulness contained in the Defendant affidavit were not substantiated and no evidence was provided in support of those allegations. In any event, the 1st Plaintiff contended that the suit was finalised and that the court became *functus officio* upon delivery of the judgment and that what was pending before the court was execution proceedings and the Defendant cannot rely on the grounds of appeal to seek my recusal in execution proceedings. The 1st Plaintiff averred that the Plaintiffs would be greatly prejudiced if the orders sought were granted as it would forestall execution proceedings which have dragged on for more than 4 years since this court delivered judgment.

The court directed parties to file and exchange short written submissions on the issue as to whether a court can be asked to recuse itself after judgement. The Defendant's advocates filed the submissions, which the court considered. The thrust of the Defendant's submissions is to the effect that a party can ask the court to recuse itself at any stage of the proceedings. The Defendant relied on the Judicial Service Code of Conduct of 2020 which she urged provides that a judge may recuse herself in any proceedings in which her impartiality might reasonably be questioned.

The Defendant made reference to **ELC Case No. 350 of 2018** and the other matters in which this court recused itself. The court notes that those cases are yet to be heard unlike the instant suit which was heard and determined and the Plaintiffs are at the stage of executing the decree issued in the suit. The Defendant alleged without providing any evidence to corroborate this, that I had recused myself from dealing with any other matter involving the Defendant and concerning her Karen property. The Defendant urged that her application for my recusal was merited and relied on the judgment I delivered in the matter on 27/9/2017 which she claimed demonstrated actual or apparent bias. The role of the court is to hear and determine disputes. A party aggrieved by the judgement of a court has a right to pursue an appeal against that decision. A judge does not become biased against a party merely because they delivered an unfavourable judgement against that party. The grounds which a party will advance on appeal do not constitute grounds upon which the court which rendered the decision being appealed against should be asked to recuse itself and neither do they demonstrate any bias by the court against the party who lost in the suit. The grounds for recusal of a judge are settled and do not include rendering a judgement which a party is unhappy about. After delivery of judgement, execution ought to proceed unless the party appealing against the judgement obtains orders staying execution of that judgement.

The Defendant has failed to demonstrate any actual or perceived bias by this court against her.

The court declines to grant the orders sought in the application dated 29/4/2021.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Collins Oyomba for the Plaintiffs

Ms. E. Mutuku holding brief for Mr. G. Miyare for the Defendant

Mr. Eric Achoki for the 1st and 2nd Interested Parties

Mr. V. Owuor- Court Assistant