



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 106 OF 2017 (FORMERLY HCCC NO. 345 OF 2007)

MOHAMED GODANA JASRO T/A DAL INTERNATIONAL HOTEL.....PLAINTIFF

VERSUS

MAXWELL OTIENO ODONGO.....DEFENDANT

RULING

Mohamed Godana Jasro, T/A Dal International Hotel has come to this court against Maxwell Otieno Odongo by way of Complaint seeking various orders. The suit herein was filed in the year 2007 in the High Court of Kenya and later transferred to the ELC as ELC No. 106 of 2017. The Plaintiff now comes to this court praying that the Honourable Mr. Justice Antony O. Ombwayo be pleased to recuse or disqualify himself from hearing and determining this matter and all matters arising therein and that this matter be mentioned before any other Court for further directions and/or hearing and determination. The costs of this application be provided for.

The application is based on grounds that the Applicant is reasonably apprehensive that Hon. Mr. Justice Antony O. Ombwayo is biased in the manner in which he has thus far presided over the suit and the matters arising herein. Resultantly, the Applicant is apprehensive that justice shall not be fairly dispensed in this suit and in the matters arising herein, should Hon. Mr. Justice Antony O. Ombwayo continue to preside over the same.

The Applicant's confidence in the judicial process is therefore irreparably eroded, and the applicant does not have any more trust in this court. It is therefore only meet and just that Hon. Justice Antony O. Ombwayo recuses himself from further presiding over the suit and all matters arising therein.

In the supporting affidavit, the plaintiff states that he filed his suit against the Defendant way back in 2007 at the High Court at Nairobi, and it was later transferred to the ELC at Kisumu, for hearing and determination. The suit was fixed for hearing on 6th November 2019, and on the said day, he arrived in Kisumu from Nairobi at 7:40 am, and he was seated in court a few minutes to nine o'clock which is the official time the court starts business. The Court Assistant arrived in court at 8:45 o'clock, and there being no appearance for either party the suit was dismissed for non-attendance. Upon making further inquiries from the Court Assistant, he was informed that the Judge- the Honourable Mr. Justice Antony O. Ombwayo – handles his Hearing at 8.30 o'clock, and not at 9:00 o'clock, as he was expecting, as is the case in other courts in the country. He was shocked at the manner in which the Court dealt with the matter, owing to the fact that on 4th July 2019, when the matter came up for a hearing, which was adjourned, to the best of his knowledge, no express orders were issued indicating that the next hearing slated for the November 2019, would commence at 8:30, and not during normal court starting time at 9.00 o'clock. That neither himself, nor his Advocates on record, were aware that the Environment and Land Court at Kisumu commences its sittings at 8:30 o'clock and not at 9 o'clock as other courts in the country, and there was no prior notice of this fact to his Advocates on record, and he was informed that neither was the same communicated on the Court's cause list posted on the Kenya Law Reports webpage. He immediately instructed his Advocates on record, to prepare an application to set aside the orders issued dismissing the suit for non-attendance and reinstate the same for hearing on its merit, which application was later settled by consent between the parties. He was completely taken back by the proceedings that took place on the morning of 9th November 2020, and considering how the Honourable Mr. Justice Antony O. Ombwayo, dealt with the matter, while He the plaintiff had been in court seeking justice for over 12 years, it was evident to him that he will not get a fair hearing in this matter before him. In the circumstances of this case, he was perturbed by the manner in which his Lordship has conducted the proceedings and apprehensive that his conduct has been and shall be biased against his interest. He therefore repose no confidence in the judicial process under His Lordships' superintendence since his Lordship has exhibited and displayed an inconsiderate and hostile disposition in dismissing his case in the absence of either counsel, while the case has been in court for well over a decade. That it is his considered view that his apprehension of bias is not without reason, as he has a reasonable apprehension that a fair trial is not plausible, and he verily believe in the circumstances of this case, it is in the interest of justice that Hon. Mr. Justice Antony O. Ombwayo do recuse himself from presiding over this suit and the matters arising herein. He therefore prays on behalf of the Defendant that the Hon. Judge recuse himself from this matter and enable another judge to exercise a free and fair judicial mind. He made the affidavit in support of the application herein.

Mr. Geoffrey .O. Yogo filed a replying affidavit whose import is that on 6th November 2019 the court started its session at 8.30 a.m. and two cases where there was no appearance, the same were dismissed for want of prosecution.

When Justice A. Ombwayo was posted to Kisumu from Eldoret Law Courts, he held a meeting with the local Chapter and communicated his starting time and mode of conducting his hearings. Even in Eldoret Law Courts, Justice A. Ombwayo started his hearings at 8.30 a.m. before proceeding with applications and mentions from 12.00 noon. There was no way that this matter would be handled differently from the other cases as that would have shown bias. The issue here involved a tenancy agreement which has now expired and the plaintiff is hell bent on prolonging his stay on the defendant premises by bringing in such frivolous applications. This application has not been made in good faith but only meant to delay this matter for no apparent reason.

The lack of knowledge of starting time of this court persuaded the defendant's advocates to enter into a consent re-instating the suit hoping that the hearing would be fast tracked only for delaying tactics to be deployed by the Plaintiff.

The plaintiff claims that this court is biased and therefore should recuse itself. The principle of bias is enshrined in the maxim *Nemo iudex in causa sua*, also known as the rule against bias means that nobody should be a judge in his cause. This principle has been established to ensure that the judiciary is impartial and free from bias. ... A person can apply his mind effectively when he follows the path of impartiality. Bias means an act which leads to unfair activity whether in a conscious or unconscious stage in relation to the party or a particular case. Therefore, the necessity of this rule is to make the judge impartial and given judgement on the basis of evidence recorded as per the case. In this case, the practice of starting hearings at 830 am is not act of bias as it applies to all court users in Kisumu.

The principles governing recusal in this jurisdiction are not well settled. In **Jan Bonde Nielson v Herman Philipus Steyn & 2 others HC COMM No. 332 of 2010 [2014] eKLR** the court observed that:

*The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in **R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED)**, and reinforced in subsequent cases. See **R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)** where the Court of Appeal stated that:*

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a 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 **Philip K. Tunoi & another v Judicial Service Commission & Another CA Civil Application NAI No. 6 of 2016 [2016] eKLR** the Court of Appeal adopted the test for recusal propounded by the House of Lords in **Porter v Magill [2002] 1 All ER 465**, where it stated that, “The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.” The same position was taken by the Supreme Court (per Ibrahim J.) in **Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR** where he observed that, “The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”

The principles in the cases above cited cases have the import that the standards of conduct enacted in the **Judicial Service (Code of Conduct and Ethics) Regulations 2020** dated 26th May 2020. Under **Regulation 21 Part II** of the said **Code of Conduct**, a Judge can recuse himself or herself in any of the 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.

Regulation 9 of the Judiciary **Code of Conduct** emphasizes the importance of impartiality of a Judge. **Regulation 9(1)** provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the Constitution and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

I have considered the application and the replying affidavit and do find the application has no basis as there is no evidence of bias. This court starts hearing matters at 8.30 a.m. and it applies to all matters, advocates, parties acting in person and the Plaintiff has not been treated differently from the other parties. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF OCTOBER, 2021.

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE