REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1035 OF 2016

SIMANDI INVESTMENTS LIMITED.....PLAINTIFF

AND

ROSALINE NJERI MACHARIA.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RDDEFENDANT

AND

GERSHOM OTACHI BWOMANWA, CHAIRMAN

NATIONAL LAND COMMISSION.....1ST INTENDED CONTEMNOR

KABALE TACHE ARERO, CHIEF EXECUTIVE OFFICER

NATIONAL LAND COMMISSION.....2ND INTENDED CONTEMNOR

AND

EQUITY BANK LIMITED.....1ST INTENDED INTERESTED PARTY

KENYA COMMERCIAL BANK LIMITED...2ND INTENDED INTERESTED PARTY

THE GUARDIAN BANK LIMITED.....3RD INTENDED INTERESTED PARTY

RULING

Background:

On 16th December, 2020 the plaintiff filed an application dated 11th December, 2020 seeking the following orders;

a. That the National Land Commission be enjoined as interested party in the suit.

b. That Kenya National Highway Authority be enjoined as interested party in the suit.

c. That this Honourable be pleased to grant an injunction barring and/or staying the release of any compensation by the National Land Commission on behalf of Kenya National Highway Authority to the defendant/respondent herein by herself, her servants, gents and/or employees in respect to compulsory acquisition of the land known as L.R No.209/11293/1 pending the inter-parties hearing of this application and/or further orders of the Honourable Court,

d. That this Honourable be pleased to grant an injunction barring and/or staying the release of any compensation by the National Land Commission on behalf of Kenya National Highway Authority to the defendant/respondent herein by herself, her servants,

agents and/or employees in respect to compulsory acquisition of the land known as L.R No.209/11293/1 pending the hearing and determination of the main suit.

e. That the costs of the application be provided for.

In a ruling dated 4th March, 2021, the court made the following orders;

f. National Land Commission and Kenya National Highways Authority are joined in this suit as 2nd and 3rd defendants respectively.

g. The plaintiff shall further amend its plaint within 7 days from the date hereof to effect the joinder.

h. The new parties shall be served with the further amended plaint together with the summons to enter appearance within 14 days from the date hereof

i. The defendant, Rosaline Njeri Macharia shall be at liberty to amend her statement of defence within 14 days from the date of service of the further amended plaint by the plaintiff.

j. Pending the hearing and final determination of this suit or further orders by the court, the National Land Commission and Kenya National Highways Authority shall withhold the payment of one-half (1/2) of the total compensation payable in respect of the compulsory acquisition of all that parcel of land known as L.R No. 209/11293/1 or any part thereof.

k. The costs of the application shall be in the cause.

In the ruling the court stated as follows in part:

"It is clear from the foregoing that both the applicant and the defendant have some form of title over the suit property on which their respective claims to the property are anchored. They have both exhibited the said titles in their affidavits in support of and in opposition to the present application. The applicant has contended that the defendant's title is illegal and that the same was obtained fraudulently, irregularly and unprocedurally. The defendant on her part has made similar allegations with regard to the titles held by the applicant… From the material before the court, I am unable to say which of the titles held by the parties is the genuine one. The determination of that issue must await the full hearing of the suit that is scheduled for 15th April, 2021 at which parties and their witnesses will give evidence and will be examined and cross-examined on the allegations that each has made on the pleadings and affidavits before the court. I am also unable for the same reasons to say that the applicant has established a prima facie case with a probability of success against the defendant and the proposed defendants.…Although the applicant has not established a prima facie case with a probability of success for reasons that I have given and would in normal cases not be entitled to an injunction, I am of the view that this is an appropriate case in which the court should exercise its inherent jurisdiction to preserve the subject matter of the suit pending the hearing and determination of the suit.

In Kenya Power & Lighting Company Limited *v* Benzene Holdings Limited t/a Wyco Paints [2016] eKLR the court stated as follows:

"Section 3A of the Civil Procedure Act appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this power has now been broadened by the introduction in 2009 of overriding objective in sections 1A & 1B and in 2010 by Article 159 of the Constitution.

The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14 as follows;

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." See also Meshallum Waweru Wanguku (supra)

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice."

It is common ground that NLC intends to acquire the suit property compulsorily on behalf of KENHA for the Nairobi Expressway Road Project and that the process of compensation has commenced. It is also common ground that for the

purposes of compensation, NLC has identified the defendant as the owner of the suit property entitled to be compensated in respect thereof. It is common ground and I have demonstrated above that the ownership of the suit property is in dispute between the applicant and the defendant. It is also not disputed that if the suit property is compulsorily acquired and compensation paid to the defendant, the substratum of this suit would be lost and in the event that the applicant succeeds at the trial in proving that it is the legitimate owner of the suit property, both the land and the compensation would be beyond its reach. I am of the view that since NLC cannot be prevented from compulsorily acquiring the suit property for public purposes, justice would demand that the compensation payable in respect thereof be withheld from the parties pending the determination of the issue of ownership of the property.

The defendant has argued strongly that the compensation to be paid is for both the land and business she is undertaking on the suit property and that if the orders sought are granted, she will be forced to close down her hotel business without compensation. The applicant did not contest the fact that the defendant is running hotel business on the suit property and that compensation that is to be made by NLC would be for both the land and the business. Again in the interest of justice, I will not stop the payment of the whole compensation for the suit property to the defendant. I will limit the amount to be withheld to half of the total compensation so as to alleviate possible suffering by the defendant as a result of the closing down of her business on the suit property."

The plaintiff was dissatisfied with the orders of the court made on 4th March 2021 and preferred an appeal against the same to the Court of Appeal.

The present application:

What is now before me is the plaintiff's application brought by way of Notice of Motion dated 29th March, 2021 seeking the following orders;

1. The Honourable trial Judge in the matter Hon. S. Okong'o be obligated to disqualify and/or recuse himself from further handling of the matter.

2. Any other order which the Honourable Court may deem fit and just to grant in the circumstances.

3. Costs of the application be provided for.

The application that was supported by the affidavit of the plaintiff's director, Simion Nyamanya Ondiba sworn on 29th March 2021 was brought on the following grounds;

1. That the plaintiff has a valid apprehension that it will not be accorded a fair trial.

2. That there is apparent bias towards the plaintiff on the part if the Honourable trial Judge.

3. That the plaintiff has a constitutional right to a fair trial devoid of any suspicion of real and/or apparent bias, and/or prejudice towards it.

4. That the plaintiff has no confidence that the current trial court will accord it justice and/or a fair trial.

5. That the manner in which the proceedings are being conducted by the Honourable Court will only be to the advantage of the defendant.

6. That the Common Law tenets and principles give liberty to a litigant to voice and/or raise concern regarding the manner in which court proceedings are conducted. In his affidavit, the plaintiff's said director stated as follows: The suit was scheduled for hearing on 15th April, 2021. On or about 4th March, 2021, the court issued an order giving the 1st defendant liberty to amend her defence within 14 days of service of the further amended plaint by the plaintiff and that pending the hearing and final determination of the suit or further orders by the court, the National Land Commission and Kenya National Highways Authority shall withhold the payment of one-half (1/2) of the total compensation payable in respect of the compulsory acquisition of all that parcel of land known as L.R No. 209/11293/1 or any part thereof. The said orders given on 4th March 2021 were not sought neither was any formal application made for the same and if any such application was made, the same was not served upon the plaintiff. The judge on his own motion made the said orders which are onerous, adverse and prejudicial to the applicant. There is no fairness on the part of the trial court in issuing the said orders. The plaintiff has lost faith in the trial court and has no confidence that the court would handle the matter fairly. The order of 4th March 2021 was meant to defeat justice. The plaintiff's director contended that the plaintiff has a right to raise a complaint over the manner in which this matter has been handled.

Opposition to the application:

The application was opposed by the 1st defendant and the 2nd intended contemnor. The Attorney General who appeared for the 2nd defendant filed submissions in opposition to the application although he did not file a replying affidavit or grounds of opposition in response to the application. The 1st defendant opposed the application through a replying affidavit sworn by Roseline Njeri Macharia on 26th April, 2021. The 1st defendant contended that this is the second application for recusal being made in this matter against the trial judge. The 1st respondent contended that the first application that was dated 9th February, 2018 and filed on 12th February, 2018 was withdrawn by the

plaintiff on 11th October, 2018. The 1st defendant averred that the said application for recusal dated 9th February, 2018 was also made on the ground that the plaintiff had lost faith in the trial judge for his failure to grant it an interim order of injunction against the 1st defendant.

The 1st defendant averred that the present application is intended to intimidate the court to enable the plaintiff to continue to launder a series of frauds and forgeries in relation to the suit property. The 1st defendant averred that no basis has been laid for the order of recusal sought by the plaintiff. The 1st defendant averred that the plaintiff is keen on forum shopping to obtain a favourable decision. The 1st defendant averred that the application is frivolous and amounts to an abuse of the process of the court. The 1st defendant averred that the plaintiff has neither alleged nor established facts constituting the alleged bias against it. The 1st defendant averred that the only remedy available to a party who is dissatisfied with an order made by a court is either to seek review or appeal against the same but not to seek recusal of the trial court. The 1st defendant averred that the plaintiff has already exercised its right of appeal and as such the plaintiff cannot use the order of 4th March 2021 as a basis for the present application.

The 2nd intended contemnor opposed the application through a replying affidavit sworn by Kabale Arero Tache on 21st June, 2021. The 2nd intended contemnor averred that the plaintiff's application is fatally defective, bad in law, misconceived, and amounts to an abuse of the process of the court. The 2nd intended contemnor averred that the application does not raise any basis for recusal. The 2nd intended contemnor averred that the court had power to grant the orders complained of even if the same were not sought. The 2nd interested party submitted that the applicant has not satisfied the threshold for recusal. The 2nd interested party contended that the plaintiff's application is meant to circumvent the cause of justice by intimidating the trial court into submission.

Submissions by the parties:

The plaintiff filed its submissions dated 12th July, 2021. The plaintiff submitted that it has a complaint and an apparent apprehension that the court will not be fair to it. The plaintiff submitted that its apprehension is based on the fact that the orders given by the court on 4th March, 2021 were given without any justifiable cause. The plaintiff submitted that it has an apprehension that the trial court has personal interest in the matter and that this is a matter which should prick the conscience of the court and in which the court should do some soul searching. The plaintiff submitted that the plaintiff has lost confidence in the court.

The 1st defendant filed her submissions on 11th November, 2021. The 1st defendant submitted that the plaintiff has not placed before the court any evidence of bias alleged against the trial court. The 1st defendant submitted that the plaintiff is engaged in forum shopping and that its application amounts to an abuse of the court process.

The 2nd intended contemnor filed his submissions dated 5th November, 2021. The 2nd intended contemnor (hereinafter referred to only as "the alleged contemnor") submitted that the order made on 4th March, 2021 which is the basis of the present application for recusal was justified and that the court laid a proper basis for the same. The alleged contemnor contended that judges are normally required to disqualify themselves where their impartiality might reasonably be called into question. The alleged contemnor submitted that the plaintiff has claimed that there is a likelihood of partiality by the trial court since there is apparent bias against the plaintiff arising out of the unfairness of the order made on 4th March, 2021. The alleged contemnor submitted that the plaintiff has made a mere allegation of bias. The alleged contemnor submitted that the plaintiff has not shown in what manner the court has shown bias against it. The alleged contemnor submitted that the plaintiff has not placed before the court any evidence in support of the alleged bias.

The 2nd defendant through the Attorney General filed its submissions on 8th November 2021. The Attorney General submitted that a judge cannot be called upon to recuse himself merely because he has given unfavourable order against a party. In support of this submission, the 2nd defendant relied on the case of Samuel Kazungu Kambi *v* IEBC & 2 others [2017]eKLR where the court stated that:

> **"If the parties were to move courts for recusal upon delivery of unfavourable decisions on interlocutory applications then the business of the courts would simply be reduced into hearing applications for recusal. Courts have a duty to make decisions and parties who do not agree with such decisions have recourse to appeal where that is available."**

The 2nd defendant submitted that the plaintiff has failed to establish the alleged bias against him. The 2nd defendant submitted that the plaintiff had the burden of proving the bias which is the basis of its application. The 2nd defendant cited Kalpana H. Rawal *v* Judicial Service Commission & 2 others [2016] eKLR, where the court stated that:

> **"Before we consider the merits of the application, however there are a few issues raised by the parties that we must dispose of. Firstly, 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 recuse 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."**

The 2nd defendant also cited Dari Limited & 5 others *v* East African Development Bank & 2 others [2020] eKLR where the court stated as follows:

> **"That, although it is important under the law that, justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not accede too readily to, suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."**

I have considered the plaintiff's application together with the supporting affidavit. I have also considered the replying affidavits filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties who participated in the application. What I need to determine is whether the plaintiff 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 1st and 2nd defendants, and the 2nd intended contemnor that the plaintiff's application has not met the threshold for recusal of a judge on the ground of bias. The plaintiff's application for recusal is based on the order that I made on 4th March, 2021. The order was made on the plaintiff's application. I gave my reasons for the decision. The plaintiff has appealed against the order. The plaintiff has not pointed out anything in that order that shows that I am biased against it. For the plaintiff's advocates to throw in their submissions an allegation that I have personal interest in the matter without any evidence of such interest tendered in the affidavit in support of the application shows bad faith on the part of the plaintiff.

As correctly submitted by the defendants, a judge cannot be called upon to recuse himself or herself merely because he/she has made a decision that is not favourable to a party making such application. I am persuaded that the plaintiff is seeking my recusal for reasons other than my alleged bias against it. I have said enough to show that the plaintiff's Notice of Motion application dated 29th March, 2021 has no merit. As pointed out by the 1st and 2nd defendants, this is not the first time, the Plaintiff is seeking my recusal from this matter on the ground that it will not get justice before me. The plaintiff had filed a similar application on 12th February, 2018. Although the application was withdrawn by the plaintiff, the plaintiff took his complaint against me to the Judicial Service Commission. I have a feeling that if I continue to handle the matter, this may not be the last application for my recusal. I do not wish to delay the hearing of this case that has been pending in court for the last 5 years. Since the plaintiff feels strongly that it will not get justice before this court, I will recuse myself from the matter so that the plaintiff can be heard by another court although his recusal application is baseless.

In conclusion, I hereby recuse myself from continuing to handle this matter. The matter is allocated to Angote J. for further action.

DELIVERED AND DATED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

S. OKONG'O

JUDGE

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

Ms. Tanui h/b for Mr. Arusei and Mr. Maosa, and Mr. Odhiambo for the Plaintiff

Mr. Obuya h/b for Mr. Ochieng Oduol for the 1st Defendant

Mr. Allan Kamau for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 1st Intended Contemnor

Mr.Omamo h/b for Mr. Ogada for the 2nd Intended Contemnor

Mr. Mahinda for the 1st Intended Interested Party

Mr. Opole h/b for Mr. Musyoka for 2nd Intended Interested Party

Mr. Kuloba h/b for Mr. Rimui for the 7th Intended Defendant

Mr. Muiruri for the 3rd Intended Interested Party

Ms. Betsy Chelangat-Court Assistant