



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 131 OF 2013**

**ELISHA KARE BUSIENI.....1<sup>ST</sup> PLAINTIFF**  
**AGNES ROP.....2<sup>ND</sup> PLAINTIFF**  
**STEPHEN KEMBOI.....3<sup>RD</sup> PLAINTIFF**  
**JACKSON KIBOR.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JAPHET KIPYEGO CHEPKWONY**

*(Suing as the administrator of the estate of*

**ELIZABETH J. SIRMA.....1<sup>ST</sup> DEFENDANT**  
**REBECCA SOY.....2<sup>ND</sup> DEFENDANT**  
**GIRO COMMERCIAL BANK LTD.....3<sup>RD</sup> DEFENDANT**

**AND**

**NICHOLAS GITUHU KARIRA.....1<sup>ST</sup> INTERESTED PARTY**  
**ALLAN GEORGE NJOGU KAMAU...2<sup>ND</sup> INTERESTED PARTY**  
**FESTUS MITEI KIPTOO.....3<sup>RD</sup> INTERESTED PARTY**  
**JEPKORIR KIPLAGAT.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. This is a ruling on an Application made orally by the Plaintiffs' counsel for adjournment of their case on **1/12/2021**. It was made when the matter came up for the plaintiffs' case which had been fixed for two consecutive dates, that is to say, the **1/12/2021** and **2/12/2021**. This followed an adjournment made on **28/10/2021** when this matter could not proceed for hearing at the instance of the Plaintiff for the reason that counsel by name Mr. Akenga who was said to have been in the conduct of the matter had since left the firm of Ms. Nyaundi Tuiyott and Company Advocates to join the Judiciary as a Legal Researcher and had not briefed other counsel the position of the matter. This was one among the many reasons advanced then for the adjournment. I have singled it out for the reason of it being mind-boggling in regard to the instant application for adjournment, as will be seen hereunder. The Application was strongly objected. The Court having considered it reluctantly granted the adjournment, marking it as the last one. It then fixed the matter for the two dates in issue.

2. When the matter came up as scheduled, counsel Mr. Songok made a spirited application for adjournment. This he did, knowing well that the matter was given a last adjournment. His oral Application was based on a number of reasons. One, was that his clients were not comfortable with him handling the matter before my Court. The reason behind that was that counsel had previously, between **March 2009** and **July** of that year, worked as an Associate in my former Law Firm, before moving to another law firm. Counsel submitted that by the said employer-employee relationship he became close to me. When the Court raised a question as to how that would cause a conflict of interest, he stated that in that service, at one time I gave him accommodation in his then Nakuru home when he had travelled from Eldoret to Nakuru to handle the firm matters there. It is noteworthy that since counsel had neither worked under my direct supervision nor in the same firm

branch that I managed then, it was virtually impossible to recollect such good gesture that I rendered since it happened only one day and that was the last that I heard of him whilst as an employee. Be that as it may, therefore, to his clients there was a likelihood of there being a conflict of interest if the matter proceeded before me through the said counsel who was seized of full instructions in it. Second, one of his clients, Mr. Jackson Kibor was ill and absent from Court hence the need to adjourn the matter. He submitted that the said client being of very advanced age and sickly he could not attend, in his condition attend Court. Third, counsel submitted that the subject matter is situate in Eldoret and all the parties hail from Eldoret hence even though the Court had jurisdiction to handle the matter, for good order it was in the interest of justice that the same be transferred back to Eldoret for hearing and determination. He stated that the matter was transferred from Eldoret in **2013** on the order of the Judge who was then sitting in Eldoret, for the reason that he had discovered that one of his parcels of land was adjacent to that of one of the parties hence making him immediate neighbour. It was the Judge's view that that would have created the impression of a likely bias if the matter proceeded before him. Thus, counsel was of the view that since the judge is no longer in the station, it was appropriate for the matter to be transferred back to Eldoret. Fourth and last, he submitted that there was an Appeal pending before the Eldoret Court of Appeal over an order that had been made earlier by the Court and that his clients had the in the previous Friday applied to that Court for a stay of proceedings of this Court. He was of the view that proceeding with the hearing would be an exercise in futility just in case the Court of Appeal allowed the appeal in the end. He stated however that the court had neither issued orders of stay of the proceedings of this Court nor had he served the said Application on all the parties. He thus, implored on the Court to give directions regarding the issue before it court proceed. He said that any inconvenience caused by the adjournment would be compensated by costs.

3. The Application was strenuously opposed by both counsel for the defendants and the Interested Parties. They urged this Court to refuse the adjournment and if the Plaintiffs were not ready, it dismisses the Plaintiffs' claim. First, they submitted that this is an old matter which was commenced in **1998**, a period of **24 years** now, and the Plaintiffs seem to have lost interest in it. The Defendants' counsel stated that the Court orders of **28/10/2021** for payment of costs before the hearing date had not complied with. To this, the Plaintiffs responded at the time by apologizing and paying the costs together with adjournment fees there and then. They opposed the application further arguing that there was no conflict of interest created by virtue of counsel having previously worked in the law firm wherein the judge was a partner prior to appointment to the bench. They argued that such engagement is not a bar to justice being done since it did not entail any association by the Judicial Officer with any of the parties in the matter. Counsel for the defendants argued that had it been that the judge had handled issues touching on the matter herein it would have been different. He noted that this matter the previous law firm where counsel revealed to have worked in has never handled issues touching this matter. Both opposing counsel submitted that such an application should have been filed and served much earlier so that they would respond to it hence by making it at the hearing it amounted to an ambush.

4. On the issue of transfer of the matter to Eldoret, they argued that this amounted to forum shopping. They indicated that since the matter had been transferred to Kitale and was ready for hearing it should proceed as scheduled. They concurred that this was a mere ploy to delay the matter. In regard to the Court adjourning the matter on account of there being an appeal pending in the Court of Appeal, they both argued that that would not be a bar to proceeding because there was no order of stay of proceedings issued by the Court. On indisposition of one of the Plaintiffs it was submitted that the Plaintiff had not provided medical evidence to that effect hence it the reason should be rejected.

5. One of the most mind-boggling aspect of the adjournment was that counsel, Mr. Songok when appearing and making the application for adjournment indicated that he was appearing alongside Mr. Akenga. This was the counsel who had, on the previous hearing which was adjourned, had been said to have crossed over to the Judiciary. During that last time he was absent but this time he was in court. However, he stated that he did not wish to address the Court. The Court did not believe that fact to the extent of asking him to confirm that indeed it was he. If this Court was not taken for a ride on **28/10/2021** when it was lied that counsel had crossed over to the Judiciary, what else can be called a white lie in this world?

## **DETERMINATION**

6. I have considered the Application before me. I have given due regard to the submissions by counsel, the circumstances of this case and the law. I am of the view that there are three issues for determination here. These are:

- (1) Whether the Application for adjournment has merits;***
- (2) Whether or not this Court should recuse itself;***
- (3) Whether or not the matter should be transferred back to Eldoret;***
- (4) Who should bear the costs of both the Application and adjournment, if any.***

7. I will start by considering the first issue. Does the Application for adjournment have merits? The law regarding adjournment of cases in this court is to be found in **Order 12(3) (Twelve Rule 3)** of the **Civil Procedure Rules [2010]** as amended in **2020**. It provides that where on the date fixed for hearing only the defendant attends, and the matter is called outside court, and defendant does not admit any part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

8. Counsel for the Plaintiff advanced four reasons for the Court to adjourn this matter. This application comes in the backdrop that the Court had marked this as the last adjournment to the Plaintiffs. Thus, to them it is either an adjournment or none. That must have informed them of the reasons they raise herein. I say so because I find no good merits in the reasons advanced. I make that finding based on the analysis of the facts presented before me. First, it was urged before me that one of the Plaintiffs, Mr. Jackson Kibor, is old and sickly and cannot be able to attend Court. I find that reason lacking substance because this Court has not been given any medical evidence to the effect that the said party is unwell. That should have been the first document that counsel should have presented before the Court. Many a time, courts have been misled on account of parties illness only for it to turn out that the said parties are enjoying holidays somewhere. It would be advisable that in my Court, once a party alleges sickness that has to be supported by medical justification. Additionally, counsel wants this Court to assume that old age is a barrier for a party to attend Court. I do not believe so. I recall that last week but one there was an 89 year old female witness in my Court who travelled all the way from Turkana Court to testify. I have not been given the age of the said Plaintiff who is said to be unwell. Counsel wants this Court to assume that I know who Jackson Kibor is and therefore his age. I do not. Even then, there are other ways

of handling evidence of witnesses who cannot attend court physically. In this era of technology, the witness can even testify virtually. I find that reason absolutely unfounded.

9. On the issue of the plaintiffs being uncomfortable (sic) about this Court handling the matter, I find a party's discomfort about a Judicial Officer handling a matter not a good reason for that officer proceeding with the matter. If that were to be taken literally, all of us as human beings often find one reason or other to be uncomfortable with others once a while. That does not of itself make us not to relate to those other persons. But what I understood counsel to mean is that this Court should recuse itself from this matter.

10. Recusal of a Court from hearing a matter it is seized of jurisdiction is a serious issue. It goes to the root of impartiality, lack of bias and integrity. Such allegations cannot be wished away lightly. It should not be lost sight of the fact that when a judicial officer is handling a matter, there are many things that go through his mind. But topmost is and should be the duty to fulfil the function of his office in the most honest and just manner possible as humans because he owes a duty to God first, as the one who is just and demands justice in the universe, and to the people who have delegated their authority and trust in him.

11. Therefore, when a party makes a move to paint a picture that would mar the position of the Judge, a good Judge should carry out introspection, especially when the party does not disclose the reasons, such as in the present case. That I have done.

12. I have taken that step in order to understand why the Plaintiffs would not trust me in handling this course. It is puzzling because, if counsel worked in the former law firm 13 years ago and left in good terms, as he did, why would his clients be uncomfortable? If anything I thought they are the ones who should have been happy, but mistakenly so, that the judge knows their counsel! I say mistakenly so because even when a Judge knows people, unless the association is so close as to interfere with the integrity and impartiality of the Judge that is neither here nor there. Casual knowledge is not enough. Trust is key in discharging judicial functions. On this, I quote *Lord Denning* (1899-1999), "[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges" [see Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How they made the Common Law* (Cambridge: University Press, 2012), p.156.

13. In essence I have a duty to sit in the seat of justice and I have an unmistakable obligation to do justice. Regarding the duty to sit, 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; 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."***

14. I cannot say more on the reason advanced for my inability to sit than quote the case of *Simonson -vs- General Motors Corporation* U.S.D.C. p.425 R. Supp, 574, 578 [1978]. The judge stated:-

***"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" . . ."***

15. Counsel did not give this Court the real reason for it not being able to impartially conduct this matter. In my view the reasons counsel gave that his clients are uncomfortable with this court are a mere smokescreen designed to paint a wrong picture of the Court in order to play into the mind of the other parties that they are not likely to get justice in this Court. When counsel submitted that he only raised the issue so that it would be known that way he was playing the saint. What I mean by that is, the Plaintiffs want to play the holiness such as that of St. Peter or St. Paul to the effect that "for us, we think you will not be partial since you associated with our Advocate those ages ago." That should never be the picture painted to the world!

16. Adjournment of cases is not a matter of course in this era or backlogs which must be reduced. If parties are not willing to proceed with matters in court, they would rather take them out of the tray by withdrawing, compromising or in any way getting them out of the way in order to given deserving matters a chance to be heard. Having a matter in Court for 24 years is indeed unjustifiable.

17. Lastly, to demonstrate that the Plaintiffs have been intent on adjourning this matter at whatever cost, I refer to how the previous adjournment, on 28/10/2021 was caused. That is what I will repeat many times over that it was mind-boggling. This Court was convinced then that counsel handling the matter had been employed in the Judiciary as a Researcher while the said counsel was busy somewhere waiting to learn whether or not the Court had accepted the reason. He then shows up in Court when the instant application was made.

18. It is absurd and utterly unprofessional for Counsel to deliberately lie to the Court about any issue. I wonder where many a counsel took their morals and put their oath of office to not only uphold and defend justice but to the true to the profession and duty. This Court longs for a day when the legal profession will be taken by all Counsel back to the times when an Advocate's word was pure and would be taken all the way to the bank for whatever it was.

19. For the reasons given above and for the reason that no one should think that this Court has special interest in handling this matter which was initially filed in Eldoret but transferred for good reason to this Court, I exercise my discretion to transfer it back to Eldoret. There should not be any iota of doubt in the mind of the parties herein that this Court is not likely to deliver justice impartially. But since justice must not only be done but be seen to be done, I have to make that order lest the Plaintiffs think that this Court has something to achieve other than the ends of justice. It is possible they may have been misled by counsel that his stint or association in my former law firm was marred with issues or it created special grounds that warrant recusal. That in fact from the truth. This Court wonders whether counsel will be asking this Court to handle any matters he will be appearing in before me in case opportunity ever arises again as long as God gives us life and opportunity to serve in the positions were are in.

20. As I transfer this matter back to Eldoret, I request my brother and sister Judges there to be extremely alert and conscious of the fact that it has appeared that there is clear intent for it to be delayed at all costs, including lies being put forth to the Court without a wink or shame. I could have wished to proceed with the matter but for the reason that there is an indirect insinuation that there is a likelihood of conflict, or put differently as I understand it, a possibility of appearance of unfairness or bias! I have stated that when this Court pressed Counsel to explain the real reasons why he thought his clients would apprehend that there would be conflict, he stated that he would not have wished to disclose the manner in which he left the firm or so to say why he did. I wish he did. Since he did not, it left this Court to wonder whether by so putting it he meant the Court would proceed with the matter in a prejudiced manner. This will remain forever a mystery. That could not have been the basis for recusal because for a Judicial Officer to recuse himself the reasons must be clear and real. However, since the subject herein is within the jurisdiction of the Eldoret Court and the parties and witnesses hail from there, I do no more than return the file to where it came from. I hope it does not reach there and find its way to another station.

21. As I adjourn the matter and order its transfer, I note and agree by both Counsel for Defendants and Interested Parties that all the issues that were present before me as basis for the application should have been raised during the time the matter was in court on **28/10/2021**. Had that happened the Court could not have wasted its precious time fixing the suit for hearing, and for two days for that matter. Additionally, the Defendants and Interested Parties could not have wasted their resources and time to come to court. Again, there could have been no need for counsel for the Plaintiffs to lie to Court about Counsel having joined the Judiciary only for him to embarrassingly appear in court. For these reasons, the Plaintiffs will pay the day's costs for the Defendants and Interested Parties' witnesses and both Counsel before the date the matter will be mentioned or heard before in the Eldoret Court, whichever precedes the other. The costs to be assessed immediately after the delivery of this ruling. The Plaintiffs will also pay Court Adjournment Fees before then.

22. It is hereby ordered that the file be transferred back to Eldoret ELC Registry and it be minuted for mention before the Judge on **16/12/2021** directions. The Deputy Registrar to forward it within the next **five (5) days**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 2ND DAY OF DECEMBER, 2021.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**