



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 311 OF 2018**

**ALVIN KAMANDE NJENGA.....1 ST PLAINTIFF**

**DERRICK KARIUKI NJENGA.....2 ND PLAINTIFF**

**VERSUS**

**ESTHER NJERI NJENGA.....1 ST DEFENDANT**

**JUDITH NYORO.....2 ND DEFENDANT**

**LUCY WANJIKU MUCHEKEHU.....3 RD DEFENDANT**

**JOSEPHINE NDUTA KARIITHI.....4 TH DEFENDANT**

**BANCY GATHONI MUSA.....5 TH DEFENDANT**

**SOPHIE KABURA MACHARIA.....6 TH DEFENDANT**

**RULING**

1. By a chamber summons dated 16/4/2019 and expressed to be brought under Sections 3 and 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules. The Law Reform Act, and all other enabling provisions of the law, the applicant, Alvin Kamande Njenga (1st plaintiff) seeks my recusal on the following verbatim grounds:

- (i) The Judge has appended his signature on false proceedings indicting that the applicants were not in court on 7/2/2017;***
- (ii) The Judge proceeded to hear and issued directions in the matter without giving the applicants an opportunity to be heard;***
- (iii) In circumstances, the Judge outrightly biased against the applicants;***
- (iv) The applicants are apprehensive that he will not access justice in the suit due to the way the Judge has conducted himself in the suit***
- (v) It is in the interest of justice that the Judge disqualify himself.***

2. The application is supported by the applicant's affidavit sworn on 16/4/2019 in which he deposes inter alia, that: (i) he has read the court file, records and proceedings relating to this suit and he has noted a sequence of unlawful, fraudulent and criminal activities that occurred in court on 2/6/2015 before Justice Gacheru and on 7/2/2017 before me. He did not appear in court on 2/6/2015 before Justice Gacheru and it is possible that someone impersonated him; (ii) the proceedings of 2/6/2015 were fraudulently manufactured and were most likely written after 15/2/2015; (iii) Justice Gacheru disqualified herself after it was brought to her attention that she appended her signature on manufactured proceedings; (iv) he had perused the court file and confirmed there was no return of service on the court record demonstrating that he was notified on the need to attend court on 7/2/2017 for mention before me; (v) Mr Mark Ronald who appeared for the defendants on 7/2/2017 was not on record for the defendants and had no right of audience before the court; (vi) there was no court attendance by any party on 7/2/2017 hence the proceedings of 7/2/2017 were manufactured to enable the judge to unlawfully and clandestinely allow the respondent's application dated 4/9/2015 without the applicant's participation; (vii) the directions issued on 7/2/2017 were irregular and an intentional error by myself (ix) it was an error for me to ignore the applicant's preliminary objection and direct parties to file submissions relating to the application dated 4/9/2015; (x) it was wrong and unreasonable for me to expect him to reply to the respondents' submissions written 4 days; (xi) I intentionally failed or ignored to notice that there was no replying affidavit by him; (xii) I was wrong in directing the applicant to file submissions relating to an application which had not been opposed; (xiii) the material application had been sneaked into the proceedings and was intended to enable me to illegally allow the application dated 4/9/2015 without his participation; (xiv) my directions created confusion;

(xv) I denied him the opportunity to be heard on 21/2/2017; and (xvii) the proceedings of 21/2/2017 were irregular and I had no basis to transfer this matter to Thika.

3. The respondents opposed the application through a replying affidavit sworn on 8/5/2019 by Sophie Kabura Njenga. She deposed that the Presiding Judge has never denied the plaintiffs a chance to be heard. This case was mentioned in February 2017 and the Judge properly ordered its transfer to Thika because the suit property is situated in Kiambu County. The Judge has never mistreated the plaintiffs in any way. The Judge recorded all the proceedings properly. It is wrong for the applicant to make spurious and unsubstantiated allegations against all the Judges. The present application is an attempt to delay the disposal of the suit and to benefit the plaintiffs who are illegally occupying and commercially exploiting the defendants' portion of land. They urged the court to dismiss the application.

4. The application was canvassed through written submissions. The applicant argued that he had demonstrated bias on part of the Presiding Judge by deposing to events that had occurred in court. He added that the court had denied him the right to a fair hearing.

5. The respondents submitted that the plaintiffs were vexatious because they filed a similar application which resulted in the recusal of Gacheru J who noted that the applicant had failed to meet the required standard of proof in an application for recusal. They added that there was no truth in the allegations made against the Presiding Judge and that all that the Presiding Judge did was to order transfer of the suit to Thika in accordance with the existing directions in the Environment & Land Court. The respondents further submitted that the Presiding Judge had acted honourably at all times. They urged the court not to allow the applicant to intimidate the judges into withdrawing from this case. They contended that no reason had been presented by the plaintiffs to warrant recusal of the Presiding Judge. Lastly, they submitted that the plaintiffs had taken over all ancestral land, locked out all the defendants who are their sisters, and they wanted the status quo to continue the presiding judge.

6. I have considered the application together with the rival affidavits and submissions. The single question falling for determination in this application is whether the applicant has satisfied the criteria for recusal of a judge.

7. The jurisprudential criteria to be applied in determining an application for recusal of a judge on the ground of likely bias was succinctly spelt out by Kenya's Court of Appeal in **Kalpna Rawal Vs Judicial Service Commission & 2 Others (2016) eKLR** as follows:-

*An application for recusal of a judge in a case in which actual bias is established on the part of the judge hardly poses any difficulties; the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however arises where, like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a judge....."*

8. The Court of Appeal in the Rawal case proceeded to adopt the test articulated by the House of Lords in **R v Gough (1993) AC 646** and adopted by the East African Court of Justice in **Attorney General Vs Prof. Anyang Nyong'o & 10 Others (EACJ), Application No. 5 of 2007** as follows:

*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, a 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.*

9. The Court of Appeal similarly adopted this same test as articulated by the Supreme Court of Canada in **R Vs S (RD) (1977)3 SCR 484** in the following words:

*The apprehension of bias must be a reasonable one held by reasonable and right minded person, 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 forms a part of the background and appraised also of the fact that impartiality is one of the duties the judge swears to uphold. 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*

10. The application under consideration is premised on two substantive grounds. The first ground is that the Presiding Judge appended his signature on false proceedings indicating that the applicant was not in court on 7/2/2017. I have looked at the proceedings of 7/2/2017. They indeed confirm that the applicants were not in court on that day. In paragraphs 15 and 16 of the supporting affidavit, the applicant confirms that he was not in court on that day. I handled this matter for the first time on the said day. The matter was one of the cases which were listed before the newly posted judges for directions. This was not a date fixed by a party to the suit. The matter was listed by the Court Registry. There is nothing false about the proceedings of 7/2/2017. The court record relating to 7/2/2017 is a true reflection of the coram and the proceedings of the day. I therefore find this ground of recusal completely baseless.

11. The second ground is that the judge proceeded to hear and issue directions in the matter without giving the applicants the opportunity to be heard. On 6/5/2019 the applicant informed the court that he had an application seeking the recusal of the Presiding Judge. Prior to that I had interacted with this matter only on three occasions. The first occasion was on 7/2/2017 when I gave hearing directions relating to the

application dated 4/9/2015, listed it for hearing was on 21/2/2017 and directed the defendants to serve the plaintiffs. The second occasion was on 21/2/2017 when, upon being informed that the suit property is situated in Kiambu, I ordered transfer of the suit to the newly established Environment and Land Court Station at Thika, in accordance with the administrative resolutions which had been reached to transfer suits relating to land in Kiambu County to Thika Environment and Land Court Station which had been established to adjudicate land disputes in Kiambu County. The applicant was fully heard and he confirmed that the suit property is situated in Kiambu County. The third encounter was on 29/1/2019 when this matter came to me after it had been transferred back to Nairobi ELC. All I did on that day was to fix the matter for mention for directions on 6/5/2019 the day when the applicant sought my recusal. The transfer back to Nairobi followed an application dated 5/4/2017 in which the applicant herein sought the recusal of Gacheru J on the ground that she had on several occasions denied him the opportunity to be heard. Although Gacheru J found the application to be completely unmerited, she let go the file. The Learned Judge observed thus:

***“ Though this court finds that the applicants herein are the kind of litigants who all too often blame their losses in court cases to bias on the part of the judge and who only want the proceedings and outcome of the court proceedings to go their way, it is prudent and fair to allow the application herein for the interest of justice for the sake of the other parties herein who have been delayed by the numerous applicants and allegations made by the applicants against myself as the judge handling the matter and also against other judges who have handled the matter at any given time.”***

12. From the record relating to the three occasions preceding the applicant’s plea for my recusal, there is nothing contested which came up for hearing before me and on which I denied the applicant a hearing. I have not heard any application in this matter, not even an uncontested one. I therefore find this ground completely baseless. I therefore find no merit in the application for my recusal.

13. I note from the record that the applicant made similar allegations against Mwilu J, Mutungi J and Gacheru J. It is therefore probable that this application is deliberately tailored to delay the disposal of this suit as contended by the defendants.

14. In light of the above findings, the 1st plaintiff’s chamber summons application dated 16/4/2019 is dismissed for failure to satisfy the criteria for recusal of a judge. The applicant will bear costs of the application.

15. Having come to the above findings, and having made the above disposal orders, for the sake of the defendants who through the theatrics of the 1st plaintiff stand exposed to delayed justice, I will step aside and allow the Presiding Judge of the Environment and Land Court to assign this File to another judge.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JANUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Katee holding brief for Mr Makori for the plaintiff

June Nafula - Court Clerk