



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.53 OF 2019**

**ENGEN KENYA LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RUKAN LIMITED.....DEFENDANT/APPLICANT**

**RULING**

Coming up for determination is the **Notice of Motion** application dated **9<sup>th</sup> July 2019**, brought under **Order 1 Rule 1 of the Civil Procedure Rules, Sections 1A(i) and 2, 1B(i)(a) and 3A of the Civil Procedure Act** wherein the Applicant has sought for the following orders:-

- 1) That the Honourable Justice Gacheru do recuse herself from hearing this case.**
- 2) That this case be assigned to another Judge.**
- 3) That the costs of this application be provided for.**

This application is anchored on the following grounds:-

- 1. The Applicant is reasonably apprehensive that the learned Judge will not apply her mind to the case impartially having shown bias on 2<sup>nd</sup> April 2019, 29<sup>th</sup> April 2019 and 29<sup>th</sup> May 2019, by extending an *ex parte* order despite objection by the Applicant without giving reasons.**
- 2. A justifiable perception has been created in the mind of the Defendant that the Judge has already formed an opinion concerning the dispute between the parties.**
- 3. Justice will not be seen to have been done if the Honourable Justice Gacheru continues hearing this matter.**

The application is further supported by the affidavit of **Edward Rurii Kanjabi**, the Director of the Defendant herein.

He averred that he was in court on **3<sup>rd</sup> April 2019**, when the Learned Judge extended the *ex parte* orders despite protest from his advocate on record that the Defendant was objecting to the extension of the said injunctive orders. That he also sought for his **Preliminary Objection** to be heard first but the court requested the parties to attempt an out of court settlement and therefore the application was slotted for hearing on **29<sup>th</sup> April 2019**.

Further, that the court extended the *ex parte* injunction on **29<sup>th</sup> April 2019**, without giving any reasons despite the protest from the Defendant's advocate. Further there was no Consent to the extension of the said injunctive orders and the matter was stood over to **29<sup>th</sup> May 2019**. He also averred that the **Preliminary Objection** was heard on **29<sup>th</sup> May 2019**, and without reasons and despite protest from the Defendant's advocate, the injunctive orders were further extended to **19<sup>th</sup> June 2019**.

It was his further contention that on **19<sup>th</sup> June 2019**, the Court dismissed the Defendant's **Preliminary Objection** and once again extended the injunctive orders despite protest to the extension of the same.

The deponent contended that the Defendant is suffering great monetary loss as a result of the *ex parte* orders made on **20<sup>th</sup> March 2019**, which were made with total disregard to the Defendant's position and they are completely oppressive towards the Defendant and are heavily

biased in favour of the Plaintiff. Therefore the Defendant is apprehensive that the Learned Judge will not apply her mind to the case impartially as she has already made decisions which have been oppressive to the Defendant and has caused them great monetary loss. He contended that a justifiable perception has been created in the Defendant's mind that the Learned Judge has already formed an opinion concerning the dispute between the parties. He disputed that the application is designed for bench-shopping as the Judge has in the past made findings that was not in their favour and this is the first time the Defendant has made such an application for recusal.

It was his further contention that Justice will only be seen to be done if the Hon. Justice Gacheru disqualifies herself from hearing this matter further. He urged the court to allow the application.

The application is opposed by the Plaintiff herein who filed **Grounds of Opposition** and averred that:

- 1) *The Defendant has not disclosed any grounds to warrant the granting of the Orders sought herein.*
- 2) *The application is a disguised appeal of the Orders issued herein.*
- 3) *The application is an attack on the Judicial Authority of this Honourable Court which is one of the guiding principles under which the court exercises its jurisdiction under the Environment and Land Court Act No.19 of 2011.*
- 4) *The application is an abuse of the process of this Honourable Court and obstructive of the exercise of the jurisdiction of this Honourable Court.*
- 5) *The application and the proceedings are otherwise incompetent in law or otherwise.*
- 6) *The Defendant is keen on insulating itself from acts of contempt that it continues to commit during the pendency of these proceedings; and*
- 7) *Such other grounds as shall be adduced at the hearing hereof.*

The application was canvassed by way of written submissions wherein the Defendant/Applicant filed its written submissions on **27<sup>th</sup> August 2019**, and urged the court to allow the instant application. The Applicant relied on the case of **Mobile Kitale Services Station...Vs...Mobil Oil Kenya Ltd(2014)1JLR**.

The Plaintiff filed its written submissions on **17<sup>th</sup> September 2019**, and urged the court to dismiss the application. It relied on the **Bangalore Principles of Judicial Conduct** and on various decided cases among them the case of **Attorney General...Vs...Anyang' Nyong'o & Others [2007] 1EA 12**, where the Court held:-

*“The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them...”*

The Court has carefully considered the instant **Notice of Motion** application and the **Supporting Affidavit**. The Court too has considered the **Grounds of Opposition** to the application and the rival written submissions and it makes the following rendition:-

The Applicant has sought for recusal of myself from hearing this matter and that this case be assigned to another Judge.

The application is anchored under **Sections 1A(i) & 2** of the **Civil Procedure Act**, which Section deals with the Overriding Objective of the said Act which is to facilitate the **just, expeditious, proportionate** and **affordable** resolution of civil disputes governed by the Act.

Further **Section 1B(i)(a)** enjoins the court to handle all matters before it for purposed of attaining the just determination of the proceedings. Further the application is anchored under **Section 3A** of the **Civil Procedure Act** which grants the court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

As the court embarks on the determination of the instant application, it will take into account the above provisions of law upon which this application is anchored.

Courts in the country have had occasions to deal with various applications for recusal, and therefore this is not a new area. There are plethora of decisions on the issue of recusal of a Judicial Officer from hearing a matter.

**Black's Law Dictionary, 8<sup>th</sup> Edition (2004)(P1303)** defines '**Recusal**' as:-

*“Removal of oneself as a Judge or policy maker a particular matter (especially) because of conflict of interest”.*

From the above definition, it is evident that various factors needs to be considered in a matter calling for recusal of a Judge or Judicial Officer. Such factors would be perception of fairness, of conviction, of moral authority to hear the matter and impartiality.

The Applicant herein has alleged that it is reasonably apprehensive that **“I might not apply my mind to this case impartially having shown bias on 2<sup>nd</sup> April 2019, 29<sup>th</sup> April 2019 and 29<sup>th</sup> May 2019 by extending exparte injunctive orders. Further that there is a justifiable perception that I have already formed an opinion concerning the dispute herein.”**

The guiding principles of Judicial conduct are found in the **Bangalore Principles of Judicial Conduct**. Value No.2:1 requires a Judge to perform his or her Judicial duties without favour, bias or prejudice.

Further Value 2:5 requires a Judge to disqualify himself or herself from participating in any proceedings in which the Judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially. In the instant case, the Applicant has alleged that the Judge has shown bias or prejudice in favour of the Plaintiff by extending the exparte interim orders.

**Black’s Law Dictionary 10<sup>th</sup> Edition (2014)** defines ‘Bias’ as:-

***“A mental inclination or tenancy, prejudice predilection, actual bias, genuine prejudice that a Judge, junior witness or other person has against some person or relevant subjects”.***

The Applicant is seeking recusal of myself from hearing the matter based on the fact that I did extend interim orders that the court had issued on the first instance on **20<sup>th</sup> March 2019**.

In this determination, I am not in any way called to defend the judicial decision that I may have exercised in discharge of my judicial authority or discretion as provided by law. The application that brought about the issuance of exparte interim orders was anchored under **Order 40** and **Order 40 Rule 1(a)** is very clear on extension of interim orders. The law is also very clear on what should happen should a party be dissatisfied with the orders of the court. The party has a right to seek for review or appeal against the said order. The Applicant did none of the above. Instead, it chose to apply for my recusal just because I extended the exparte interim orders.

The Applicant has alleged that there is reasonable apprehension that I might not apply my mind clearly to this matter and that is because I extended the interim orders and which extension is provided for by the law.

Even though the Applicant has a right to call for recusal of a Judicial Officer, myself included, on apprehension of bias, that apprehension must be a reasonable one. See the case of **President of Republic of South Africa...Vs...The South African Rugby Football Union & Others case CCT16/98**, where the Court relied on the case of **Committee for Justice and Liberty et al...Vs...National Energy Board** and held that:-

***“...the apprehension of bias must be reasonable one, held by reasonable and right minded persons 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”.***

It was further held that:-

***“An unfounded or unreasonable apprehension concerning a Judicial Office is not a justifiable basis for such application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application”.***

The Applicant alleged that I have already made up my mind over this dispute because I extended the interim orders. However extension of the said interim orders was done after consideration of the circumstances of the matter and if the Applicant was dissatisfied with the said exercise of Judicial discretion, it ought to have appealed the said decision but not to seek for recusal of the Judge handling the matter. The Court finds the Applicant’s apprehensive of bias not reasonable and there is no evidence of such bias.

As was held in the case of **Miller...Vs...Miller (1988) KLR 555**, by the Court of Appeal;-

***“No party should be placed in a position where he can choose his court ..... It would be disastrous if the practice was that once there are allegations made against a Judge and the Judges honour is in question, that Judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification by Judges with ease and the consequence would be a choice of trial Judge by a party”.***

The Applicant has not demonstrated any evidence of partiality or biasness by this court in the extension of existing interim orders. If dissatisfied with the said orders, the Applicant ought to have sought for review or appeal of the same.

In the case of **Anyang’ Nyong’o & Others (2007) 1EA 12**, the Court held that:-

***“The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge.”***

In any event, the Applicant herein has not lost the case because this dispute is still at the interlocutory stage.

Having now carefully considered the instant application and the written submissions and the relevant provisions of law, the Court finds the

necessary order herein for the end of justice to be met is to find that the Applicant has not presented anything to prove any bias against it or partiality on the part of this court to warrant my recusal from this matter. The application fails to meet the test warranting recusal and for the above reasons, the **Notice of Motion** application dated **9<sup>th</sup> July 2019**, is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

***Dated, Signed and Delivered at Thika this 23<sup>rd</sup> day of January 2020.***

**L. GACHERU**

**JUDGE**

**23/01/2020**

In the presence of

Mr. Luseno for Plaintiff/Respondent

Mr. Oigara for Defendant/Applicant

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**23/01/2020**