REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MALINDI

SUCCESSION CASE NO. 47 OF 2008

IN THE MATTER OF THE ESTATE OF: DANIEL BERNARD HEFTI (DECEASED)

JOYCE JEPLATING REINHARD.....APPLICANT

VERSUS

ELIZABETH REINHARD HEFTI.....1ST RESPONDENT

DANIEL BERNARD REINHARD.....2ND RESPONDENT

AND

DAMARIS NTHENYA.....INTERESTED PARTY

MAURIZIO MARINO.....INTENDED INTERESTED PARTY

ALFRED ANDREAS KELLER.....INTENDED INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Mr. Songok for Applicant

Mr. Kinyua for the Interested Party

Mr. Kithi for the Administrators

RULING

THIS MATTER was brought before me by way of a Notice of Motion dated and filed on 24th of December 2019 in terms of Articles 23(1), 50(1) and 159(1) (d) of the Constitution of Kenya, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all Enabling Provision of Law. The Applicant is seeking among other orders to recuse this Court from hearing and determining this matter and stops any other proceedings touching on this matter.

The Applicant referred to biasness on the part of this court in favor of certain parties for unknown reasons. In addition to the motion for recusal, the Applicant seeks further orders that the matter be considered res-judicata and that the court is bereft of jurisdiction to entertain a matter pertaining to title to land.

The instant application is anchored on several grounds couched on the face of the notice of motion. The applicant's contention is that this Court has been compromised, has **exhibited** bias, heartlessness and in that regard the appellant has written a complainant letter against this Court. The applicant **predicts** that this court will be impartial in this matter basing on the orders it has given to date and in that regard this court is unfit to preside over the matter.

The Applicant therefore prays that the matter be allocated to another Judge within the area of jurisdiction in this matter for further orders pertaining this matter; the applicant feels that there has been ex-parte communication between the judge and the Intended Interested Party which led to him granting the said controversial orders. Further, the Applicant is of the view that, unless the orders sought herein are granted, the Applicant stands to suffer losses and damage.

In support of the motion to recuse, the Applicant swore an affidavit dated 24th December, 2019. She states that the orders made by this court to enjoin Maurizio Marino and Amici Mei Limited as parties in the Succession Cause (hereinafter the main suit) when they were neither dependents nor beneficiaries was improper. She described the said interested parties to be total strangers to the Estate of the Deceased and that they were only tenants to one **GIOVANNI OZZI** and sub-tenants to one **DAMARIS NTHENYA** who are Judgement Debtors, who have been evicted from the suit property. In her view, it is prudent that the court takes Judicial notice and stop the abuse of Court process since the matters arising from the estate of the deceased were settled.

The Applicant also questioned the orders of this court made on the 11th December, 2019 saying that the direction made to the effect an Intended interested party was granted a hearing date for 20/2/2020 for his Application dated 9th December, 2019 yet his claim indicates that he purports to have purchased part of the suit property from third parties who are not part to the Estate of the Deceased herein. The Applicant's position is that granting such orders and or entertaining the same will prejudice her interests and that a similar claim was dismissed in **ELC No.108 of 2012** yet he has been given directions in his application.

Further, the applicant stated that she has already reported the issues herein to the Judicial Service Commission and has also written a letter to this court asking it to recuse itself from hearing and determining the matter if the interest of justice is being served.

The parties herein filed Submissions and grounds of opposition in support of their respective cases with the respondents seeking for the applicant's case to be struck out on the basis of frivolity, vexation and incompetence. I have considered the said Submissions from both parties and I shall marry them with the facts and the Law in the discussion to follow.

Findings, Analysis and Determination

The question which must be grappled with is one that deals with whether the applicant has established the grounds for recusal that demonstrates she has suffered prejudice, mistrial, injustice or loss of confidence with the court.

I consider it a cardinal principle in the administration of justice that the virtue of judicial impartiality is one of the key value to aid a judge to dispense justice without fear, ill-will or favor. The reason is as stated in the case of **R v s (RD) (1997)118 CCC (3D) (SCC)** where the court held:

> **"A cornerstone of any fair and just legal systems the impartial adjudication of disputes which come before courts and other tribunals, ... Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes"**

Judges are entrusted with such an important role to ensure that disputes are determined in accordance to the Constitution and the law. The right to a fair hearing encapsulated in terms of article 50 of the Constitution of Kenya envisages among other things, that an adjudicator compromised by interest or favour must withdraw from hearing and determining the case. It goes without saying that parties are entitled to object to their case being heard by a biased or otherwise relevantly compromised judge, they have no right to choose their own judges.

Regarding the question of recusal, the principles of governance and national values under Article 10 of the Constitution requires that Judges in discharging their roles of judging be accountable and transparent, envisage equity, human dignity, integrity and good governance in the administration of justice.

Ultimately the obligation for a Judge to act in good faith and in the petitioner interest requires that importance must be given to his or her oath of office in exercise of powers and functions to the office of a Judge under Article 159 as read with Article 162 of the Constitution.

This contentious issue of recusal must meet the test of validity as broadly and purposively stated in the case of **Sarfu II {1999}2ACC (G).**

> **"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to rescue themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to rescue herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."**

Except where it is impracticable for an aggrieved party to seek remedy through a system of Courts established by the Constitution, the question of recusal of a Judge or a Magistrate should only be entertained in the rarest circumstances where there is prima facie evidence that the applicant will suffer prejudice or a failure of justice due to bias, conflict of interest or any other recognizable test. I do not think for a moment that if a judicial officer compromises his oath of office by engaging on a frolic outside the Constitutional Controls and Scheme of Statutory Framework is an act of good faith protected by the Constitution. The plain deduction from this case is that the circumstances do not warrant recusal.

The Applicant herein seeks recusal of this Court from hearing and determining the main suit to which this application is subsidiary to, on the basis that it has exhibited bias through the orders it has granted to certain parties in the matter.

The Black's Law Dictionary, 8th Edition at page 1303 defines recusal as follows:

> **"Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest."**

The same dictionary at page 171 defines the word bias as:

> **"Inclination; prejudice … judicial bias. A Judge's bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extra judicial reason."**

In the case of **Jasbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & 4 Others (2013) eKLR,** Supreme Court of Kenya Petition No. 4 of 2012 Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had the following to say;

> **"(6) Recusal as a general principle, has been much practised in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account. The term, is thus defined in Black's Law Dictionary, 8th Edition (2004) (P. 1303);**
>
> **'Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest'."**
>
> **[7] From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.**
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> **[8] It is an insightful perception in the common law tradition, which the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.**
>
> **[9] Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.**

I'm also inclined to cite an American case of ***Perry v. Schwarzenegger,* 671 F. 3d 1052 (9th Circ. February 7, 2012)** it was held that the test for establishing a Judge's impartiality is the perception of a *reasonable person*, this being a **"well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice"** will not suffice.

In determining the question of recusal on the basis of bias, the court has to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or likely to be biased. Once more, as TUNOI J.A pointed out, sight must not be lost of the fact that losing litigants might be more inclined to explain their loss on the alleged wickedness of other people rather than on the weakness of their own case. See **Miscellaneous Criminal Application 82 of 2013 eKLR.**

The Applicant herein made serious allegations that the this court was compromised, heartless and acted with bias hence it ought to recuse itself on that basis. She went on to make a complainant against this court to the Judicial Service Commission. I note that all the orders this court has made thus far were case management directions which were made in the presence of all the parties. They were adopted under consensus by the parties that we preserve the subject matter of the suit until the matter is completely heard and determined on merits. Hence, the orders this court has made so far were procedural in nature rather than substantive and no rights have been affected and or determined definitively.

I also note that the matter was still at a very infant stage for one to be deduce and make serious allegations like the Applicant did. For instance issues relating to the enjoined Interested Parties, whether this court has the jurisdiction to entertain them or not, or whether they fall within with realms of res judicata or not ought to be discerned from the facts of the case, and that may only happen the case is allowed to proceed, heard and the said issued determined according to the available evidence. In as much as it maybe argued that the matter is resjudicata or the court lacks subject matter jurisdiction the circumstances of this case are that no such application had been brought to the attention of the court. There would be no reasonable apprehension of bias on the part of the applicant in the absence of clear facts which will negate the presumption of impartiality in the person of a judge.

It is trite law that Judges should decline to hear a case only for proper and sufficient reason to do so. On one hand, justice must be seen to be done and on the other, litigants must not be allowed to pick their own judges or disrupt proceedings unfairly. That may directly impact on public confidence in the administration of justice and in my view, its effects on the whole justice system may be too ghastly to contemplate. Thus, wrongful recusals damage the justice system as this may encourage abuse and manipulation of court processes, parties might succeed

in judge-shopping, and the proper functioning of the justice system might be at risk of being undermined.

In my view, the Applicant bears both the legal and evidential burden of proving that the court is indeed compromised. Judges enjoy a rebuttable presumption of impartiality in the performance of their judicial functions. It must be noted that for one to displace such a presumption, she requires cogent evidence since it carries considerable weight. The allegations leveled against this court are criminal in nature, the standard of proof in criminal matters has long been settled to be proof beyond any reasonable doubt. I have not seen any proof, documentary or otherwise which shows that indeed this court was either involved in secret communication or received any kind of bride or compromised as alleged by the Applicant. I find the allegations of recusal on grounds of bias to be without foundation. In **Ansar v Lloyds TSB Bank P/c (2006) EWCA Civ 1462,** the Court emphasized that a mere complaint cannot give rise to automatic decision to recuse.

If the Applicant was dissatisfied with the orders of this court, or further rulings and decisions to be made by this court in the matter in question, there are other avenues readily available for her to either overturn or impugn the orders of this court. This may include appeal, application for error on the face of the record among others but does not include recusal of this court on the basis of mere unsubstantiated allegations that the court has been compromised and tainted with bias without providing any evidence to support such allegations.

It is equally important that judicial officers discharge their duty to sit and do not, by acceding 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 this case in their favor. Such an inappropriate recusal may encourage fishing expeditions that harass judges to the detriment of judicial independence and the administration of justice.

The mere fact that the Applicant claims to have no confidence in the impartiality or fairness of the court is insufficient. The court process does not work on the basis of feelings, predictions and mere allegations. Furthermore, strongly worded personal attack against a judicial officer do not constitute sufficient and appropriate basis for recusal. Neither do threats of taking up the alleged bias allegations to the Judicial Service Commission, designed to force recusal and manipulate the judicial system, shall suffice.

Allowing such, would encourage the litigants to manipulate the justice system, threatening every decision maker assigned to their cases whenever they feel that their case would not take the course they expected, until they get a judge they preferred. This could also be used to force undue delays, which in some way make the matter difficult to try or may put witnesses at a much greater risk. In my view such a blatant manipulation if allowed, would subvert our process, undermined our notions of fair play and justice and damage the public perception of the judiciary.

In light of the foregoing refer to the remarks of Chadwick L.J. in **Triodos Bank NV v Dobbs [2005] EWCA Civ 468, explained:**

> **"The reason is this. If judges were to recuse themselves whenever a litigant … criticised them … we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases.**
>
> **"7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.**

These words are applicable in this case of a brother judge in the common law jurisdiction which prima facie explains the situation the applicant finds herself in her litigation before this court. It should be remembered that the applicant is yet to be heard insofar as the pending proceedings are concerned. She cannot therefore be aggrieved insitu the trial unless the judge has displayed prima facie evidence outside his oath of office or the tenets of a right to a fair trial under Article 50 of the Constitution are at risk of being violated or infringed to occasion a failure of justice.

I'm inclined to quote the useful guidance of the **Supreme Court of Papua New Guinea** which confirmed in **Yama v Bank South Pacific (2008) PGSC41, at [27]** that

> **"it is the law that a judge should not disqualify himself because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous."**

In the premises, the points relied upon by the Applicant were entirely groundless, and to recuse myself in the face of such spurious allegations would be arguably be similar to granting an indulgence to a litigant clearly determined to interfere with the administration of justice. In any event, this Court notes that the matters canvassed in the application before have also been handed over to independent agents which I believe to have the competence to get to the bottom of the allegations made by the applicant. I also reserve my constitutional right to take up the matter subject to the stipulations embraced in the Constitution and enabling statutes.

So far as this court has found occasion to advert the effect of the application the motion for recusal dated 24th of December, 2019 is denied.

The matter shall proceed as per the court's previous directions. Each party has leave of this court to apply in any event.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE

In the presence of: -

Mr. Obaga for the Objectors