



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 6 OF 2019

(FORMERLY KISUMU CIVIL CASE NO. 38 OF 2009)

DAVID OSCAR OWAKO.....PLAINTIFF/APPLICANT

VERSUS

CHEMELILI SUGAR COMPANY LIMITED.....1ST RESPONDENT

KIBOS SUGAR COMPANY LIMITED..... 2ND RESPONDENT

MUHORONI SUGAR COMPANY LIMITED (UNDER RECEIVERSHIP) ...3RD RESPONDENT

JOHN KENY, DANIEL LELEI, SIMON SERONEY (SUED IN THEIR CAPACITY AS

ELECTED OFFICIALS KAMALAMBEI SOCIETY)4TH RESPONDENT

JOSEPH CHEPSIROR, DAVID KIMELI, STEVEN YEGO (SUED IN THEIR CAPACITY

AS ELECTED OFFICIALS OF TUWAPSUL SOCIETY)5TH RESPONDENT

WILLIAM LANG'AT, DAVID BOEN MUSA(SUED IN THEIR CAPACITY AS ELECTED

OFFICIALS OF BARMARENG SOCIETY.....6TH RESPONDENT

KAMALAMBU FARMERS COMPANY.....7TH RESPONDENT

KARATILI FARMERS COMPANY LIMITED8TH RESPONDENT

RULING

1. The plaintiff/applicant has filed an application dated 13th February, 2020 seeking that this court recuses itself from this case on the grounds that:-

(1) The applicant shall not be accorded a fair hearing if the Honourable Judge presides over the case.

(2) The Honourable Judge is prejudiced against the applicant.

2. The basis of the complaint by the applicant is that this court on the 12/2/2020 made an order that an application made by the applicant dated 10/2/2020 be expunged from the record on the grounds that the same was filed without leave of the court. This was in pursuance of the court's ruling delivered on 11th December, 2019 whereby the applicant was barred from filing any application without leave of the court. The application dated 10/2/2020 was filed without leave of the court.

3. The applicant now complains that the ruling of 11/12/2019 was biased against him and that it was meant to gag him from prosecuting his case. He contends that the court has no powers to expunge documents from the record. That it seems that the court has a pre-determined

decision to stop him from succeeding in his case.

4. The application was opposed by the advocates for the 1st and 3rd defendants/respondents, **Owiti, Otieno & Ragot Advocates** and the advocates for the 2nd defendant/respondent, **Wasuna & Company Advocates**. The application was urged in court by Mr. Kobibo on behalf of the two firm of advocates. He submitted that the application is not based on facts that show bias or prejudice. That if the applicant was aggrieved by the orders of the court made on 11/12/2019 he should have filed an appeal which he has not. That the application is otherwise an abuse of the process of the court.

5. The test on bias by a judicial officer was stated by the Court of Appeal in **Philip K. Tunoi & Another –Vs- Judicial Service Commission & Another (2016) eKLR** where the court cited the English case of **Porter –Vs- Magill (2002) 1ALL ER 465** where the House of Lords held that:-

“The 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”.

The court also cited with approval the decision in **Tumaini –Vs- Republic 1972 EALR 441** where it was held that in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable people.

6. This court made categorical orders that the applicant should not file any application without leave of the court. The applicant admits that he did not seek leave of the court before filing the application dated 10/2/2020. He is now questioning the propriety of the orders of this court made on 11/12/2019. This is not the right court to determine the appropriateness of the said orders. If the applicant was aggrieved by the said orders he should have pursued an appeal against the orders. If not then he should comply with the orders. It is my considered view that I have powers to expunge from the record any document filed in defiance of the orders of the court. In so acting I do not think that that can be construed as an expression of bias or prejudice.

8. The upshot is that there is no basis for this court to recuse itself from the matter. The application dated 13/2/2020 is unmerited and is accordingly dismissed with costs to the 1st – 3rd respondents/defendants.

Delivered, dated and signed in open court at Kakamega this 12th day of March, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for 1st & 3rd Respondents

No appearance for 2nd Respondent

Applicant - present

1st – 3rd Respondents - absent

Court Assistant - Polycap

30 days right of appeal.