REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 19 OF 2017 (O.S)

J G K............PLAINTIFF/RESPONDENT

VERSUS

F W K...........DEFENDANT/APPLICANT

RULING

Recusal of this Honourable Court

1. Before me is the Defendant's application dated 11th of June 2018. But in reply to the said application, the plaintiff sought this court to recuse itself from these proceedings. Recusal by its nature should be decided in limine. I will so proceed.

2. The plaintiff deposed that there was an apparent bias by the Honourable Court and in particular in giving an Order for the defendant to occupy the house which they have not cohabited in. On that basis, she sought this honourable Court to recuse itself from handling any further proceedings in the matter.

3. My position has always been that recusal should not be undertaken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, say, bias or prejudice or conflict of interest or personal interest on the part of a judge. The stringent test is more in accord with the constitutional desire to attain the independence of the judge in the administration of justice free from intimidation or blackmail. The trait not to fear or show favouritism in a case is instilled by the Constitution and oath of office of a judge. These principles guarantee and are indispensable facets of fair hearing and access to justice. The presumption therefore is that parties submit themselves to a court manned by independent, thoroughly fearless and impartial judicial officers. What must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favourable to their causes. I lament that forum-shopping returns us to the darkest days in the administration of justice; it erodes all the gains made and distorts the values, objects and purposes of the Constitution. See Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010. Such vice will kill the entire justice system in any civilized society. My earnest view is that law serves legitimate interests of a litigant as opposed to individual desires that a particular judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases for all.

4. The Supreme Court put it aptly in **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR** and Specifically **Ibrahim. SCJ.** in his Concurring opinion stated;

> **"[25] Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.**
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> **[26] In respect of this doctrine of a judge's 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:**
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> > **"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" (emphasis mine)**
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> **[27] In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-**

> **"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" . . ."**

[5] I will apply the tests of law on the facts of this matter. A little history of the matter is relevant. These two parties were once happily married. But, from the record it is eminent that they are not in any hospitable embrace. Initially the Plaintiff had sought contempt of Court Proceedings against the Defendant through Application dated 16th October 2017. This application was closely followed by the Defendants application dated 8th November 2017 seeking to occupy one of the bedrooms in the 3 bed-roomed House (subject matter) with access to the toilets and to share the kitchen and living rooms. The Defendant also prayed that they should co-exist harmoniously with the Plaintiff.

[6] Each party gave own account as to the layout of the house and who lived where. To resolve this, the Court directed the Executive officer to visit the home and file a report on the statues of the property. This was done on 22nd November 2017.

[7] It was after due consideration of the Report by the EO as well as counsels submissions on it that the court delivered its Ruling on 5th Day of December 2017 allowing the Defendant/applicant's prayers.

[8] The Plaintiff applied for stay of execution of the said Ruling pending the filing of an intended appeal. The application was dated 18.12.2017. She however withdrew the said application. She also withdrew the application dated 16/10/2017 for contempt proceedings against the Defendant.

[9] The recapitulation of the events herein is relevant and does not depict any bias whatsoever. The court exercised its duty to preside over this case as commanded by the Constitution. It is worth repeating that the decision made on 5th December 2017 was after due consideration of the opposing information and the two applications by the parties herein. It is therefore untenable for the Plaintiff to argue that I did not consider her application dated 16/12/2017. Both applications gave a different account on the status of the property in question, hence, direction that a report be filed by the E.O on the status of the property. Again, it bears repeating that legal Counsels for both parties were present during the site visit and they also submitted on the basis of the report.

[9] In this case the Plaintiff has not proved and bias or appearance of it on the part of the court. Her call for recusal is only because the decision herein displeased her. She signified intention to appeal, but she has not done so. I find no merit on the request for recusal. I dismiss the Plaintiff's call for recusal of this Honourable Court. Now that recusal is out of the way, I will consider the application for contempt of court.

Application for contempt of court

[10] The defendant herein filed application dated 11th June 2018 seeking for Orders;

> ***a. Spent***
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> ***b. That J G K, the Plaintiff/ Respondent herein be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed Orders of this Court issued on 05/12/2010***
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> ***c. That the Honourable Court do make any other or further Orders geared towards protecting the dignity and authority of the Court.***
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> ***d. That costs of this application be borne by the Plaintiff/Respondent.***

[11] The Plaintiff/Respondent replied to the Application vide replying affidavits dated 30th July 2018 and 2nd October 2018.

[12] This honourable Court directed the application to be canvassed by way of written submissions.

Defendant/Applicants Submissions

[13] In support of the application the applicant annexed a supporting affidavit which raised the following grounds; (1) that the Court delivered its Ruling on 05/12/17 to the effect that the Plaintiff and the defendant do share the main house and co-exist peacefully; (2) that the plaintiff/ Respondent was present when the Ruling was being delivered hence she is well aware of it. But, she has disobeyed the order despite several requests by the Defendant/Applicant that she obeys; (3) that on 01/02/2018 the Court warned the Plaintiff/Respondent against disobedience of the court order; and (4) the disobedience is highly prejudicial to his health as has been forced to live in unhealthy house.

[14] The Applicant also filed a Supplementary Affidavit on 8th October 2018 and denied the so called ***K Commandments*** alleged by the Plaintiff/Respondent. He also denied having personal scores to settle with the Respondent.

[15] He cited authorities of **P.N.K VRS J K,M [2018] EKLR**and **Republic V Raphael Moki Kalungi [2015] eklr.**

Plaintiff/ Respondents Submissions

[16] In her Affidavit dated 30th July 2018 the plaintiff averred that in defiance of the Court Orders issued on 5th October 2017 the defendant

destroyed the windows to the house and threatened to kill her. She averred that the Report by the Executive Officer did not capture that the defendant broke the windows to the house. That the defendant has continued to harass her and she has reported the matter severally at Tigania Police station.

[17] She urged that the house is not matrimonial property since she is the one who constructed the same and has been paying for electricity and water bills. In her further response dated 2nd October 2018 she averred that the application herein is incompetent since a copy of the Order and a penal notice has not been annexed to the application. She also termed the application an after-thought having been brought six (6) months after the Orders were issued.

[18] She stated that she had complied with the Orders by issuing the Defendant with spare keys to the front and back doors. Except, that the Defendant has blatantly disregarded the Orders by laying out what she termed as ***K Commandments*** which allegedly required her to sleep with him on the same bed, cook for him, wash his clothes and open for him the door whenever he came home drunk or sober.

ANALYSIS AND DETERMINATION

Contempt of Court Proceedings

[19] The plaintiff stated that the Defendant did not attached the Order or the penal notice to the application. The Defendant/Applicant responded; that the Plaintiff was present during the Ruling and was well aware of the Ruling.

[20] The requirement of service of the Court Order and the penal Notice was considered by the Court of Appeal in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** and held;

> **"……….this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).**
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> **Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:-**
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> **"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"…………………Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.**
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> **This is the position in other jurisdictions within and outside the commonwealth.**

[21] A higher court has spoken and by the doctrine of precedent that is the law. Knowledge of a court order by a party is sufficient notice for purposes of contempt of court proceedings. The contemnor had personal knowledge of the Order for she was present in court when the order was made. She has also been ably represented by her legal counsel in the proceedings. In the circumstances, there was no need to personal service of the penal notice and the Court Order in question.

[22] Be that as it may, the standard of proof in contempt matters is beyond the balance of probabilities. There is good reason for the high standard; the proceedings are quasi-criminal, penal sanctions are likely to be imposed and the liberty of the contemnor is at risk. See Mativo . J. In **Katsuri Limited v KapurchandDepar Shah [2016] eKLR** where he held;

> **"…….Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order……"**

[23] She stated that she had complied with the Orders by issuing the Defendant with spare keys to the front and back doors of the house. This is an important averments and will be factored in the final decision herein. She however complained of constant harassment by the defendant including threats to her life as well as the so called K commandments. She stated that she made reports of these harassments and threat to life to Tigania police station. The defendant refuted all these claims and stated that she disobeyed the court order and he now lives in pathetic and life-threatening conditions. Amidst all these accusations and counter accusations, verification of the truth becomes necessary.

[24] Therefore given that these two are spouses but now in bitter disagreements, it is prudent that I give the plaintiff an opportunity to present evidence of the reports she made against the defendant. The Defendant should also confirm or deny whether he was given the spare keys. If the latter matter elicits a negative answer, the court will follow through on full compliance with the orders in question by the plaintiff and shall also issue other appropriate orders in light of the peculiar circumstances of the case. Meanwhile, these proceedings should be heard on priority basis so that each party will know his or her rights. The statement by the plaintiff that the property is not matrimonial property shall also be decided in the hearing. Accordingly, I direct that the case shall be assigned a date for hearing on the basis of priority. These orders are most appropriate as compared to pursuing contempt proceedings. I decline the request to commit the contemnor in jail.

Dated, signed and delivered at Meru in open court this

2nd May 2019

F. GIKONYO

JUDGE

<u>In presence of</u>

M/s Nyaga for defendant

Defendant – present

Plaintiff – absent

Muthomi for plaintiff - absent.

F. GIKONYO

JUDGE