



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 248 OF 2006**

**CHEVRON KENYA LIMITED.....APPLICANT**

**(Formerly CALTEX OIL KENYA LIMITED)**

**VERSUS**

**MUVIR HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**(by original action)**

**AND**

**MUVIR HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**CHEVRON KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**(Formerly CALTEX OIL KENYA LIMITED)**

**TOTAL MARKETING KENYA LIMITED .....2<sup>ND</sup> DEFENDANT**

**TOTAL KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1) The subject matter of this ruling is the motion dated 20<sup>th</sup> December 2018 allegedly taken out by Muvir Holdings Ltd, the 1<sup>st</sup> defendant herein through one **Bethwel Maina Muhuhi** and represented by the firm of **Kimandu & Ndegwa Co. Advocates**. In the aforesaid motion, the applicant sought for the following orders *inter alia*:

***a) THAT this application be certified as extremely urgent to be heard instantly its service notwithstanding.***

***b) THAT pending the hearing and determination of this application and the application dated 19/11/2018 this honourable court be pleased to arrest and stay its ruling scheduled for the 27<sup>th</sup> February 2019.***

***c) THAT the learned honourable Justice Sergon do recuse and withdraw himself from hearing and determining the applicant's application dated 19/10/2018.***

***d) Costs of this application be provided for.***

2) The aforesaid motion is supported by the affidavit of Bethwel Maina Muhuhi. When served with the motion, Muvir Holdings Ltd, the 1<sup>st</sup> defendant/respondent through the firm of C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau Advocates filed two grounds of opposition while the firm of Waruhiu K'Owande & Ng'ang'a advocates too filed grounds of opposition to resist the motion.

- 3) When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit plus the grounds of opposition and the rival written submissions. It is the submission of the applicant that this court has shown open bias and partiality against the applicant and its counsel since the filing of the motion dated 19.10.2018.
- 4) It is argued that the court has given directions to other advocates including the ones the applicant wants to fire and disregard the presence of the applicant's counsel. It was pointed out that this court gave a mention date for purposes of fixing a ruling date for the issue touching on the consent and or statement agreement between the law firms of C. N. Kihara & Co. advocates, Kinyanjui & Njau advocates and that of Waruhiu K'Owande & Ng'ang'a Advocates despite the pendency of the applicant's application dated 19.10.2018 in which the applicant seeks to replace the law firms of C. N. Kihara & Co. Advocates and that of Kinaynjui & Njau Advocates from representing the applicant.
- 5) The applicant pointed out that this court ought to have first determined the application touching on representation instead of allowing the aforesaid firms to file affidavits for purposes of compromising the settlement agreement.
- 6) According to the applicant, this was evidence of bias on the part of this court. This court was also accused of being biased by failing to direct that the applicant be served with the affidavits and submissions. It is also stated that this court failed to record that the applicant's application dated 19.10.2018 is based on very serious grounds of fraud, forgery and corruption.
- 7) This court was also accused of showing open bias by failing to disclose to the applicant's counsel of what the ruling which was set for 27.2.2019 entails and by refusing to grant a request that any affidavit and submission filed towards that end be served upon the applicant's counsel.
- 8) The respondents strenuously opposed the application for recusal. It is the submission of C. N. Kihara learned advocate for Muvir Holdings Ltd, the 1<sup>st</sup> defendant herein argued that the law firm of Kimandu & Ndegwa Advocates cannot purport to file and act for Msrs Maina Mahuhi whose claim and averments are in conflict with the affidavit of Joseph Wachira Mugweru therefore the later application is clear abuse of the court process and was therefore intended to procrastinate these proceedings now pending on party and party costs and put to unwanted waste of time of other parties and judicial time by a litigant who is not yet a party to this suit and whose issues and contested claims do not belong to this case.
- 9) The 1<sup>st</sup> defendant further pointed out that the application is fatally defective since the jurisdiction of the court has not been properly involved. It is argued that the entire application is malafides and an abuse of the court process. It was pointed out that there is no reasonable grounds or otherwise that the applicant has put forward as to why the ruling concerning party and party costs of the services delivered and out of pocket expenses incurred by the firm of C. N. Kihara & Co. Advocates should be stayed and hence the application is an abuse of the court process.
- 10) The 1<sup>st</sup> defendant further argued that no discernible ground was shown upon which this court can be deemed to have exhibited bias in these proceedings. It was also pointed out that the facts of court attendance as outlined by the applicant that this court instead proceeded to hear Msrs. Kihara, Kinyanjui and Kimaru on their issue are false and false. It was submitted that the accusations against the court were unprofessional and that counsel abused his privileged position and engaged in conduct that is dishonorable to the legal profession. Mr. Kinyanjui who jointly co-appear with Mr. C. N. Kihara for 1<sup>st</sup> defendant made near similar submissions to those of Mr. C. N. Kihara and urged this court to dismiss the application.
- 11) It is the submission of Thangei, learned advocate for Total Kenya Ltd, the 3<sup>rd</sup> defendant in the counter claim that the application for recusal is incompetent in that the law firm of Kimandu & Ndegwa Advocates is not formally on record for Muvir Holdings Ltd, the 1<sup>st</sup> defendant hence it lacks the requisite locus standi.
- 12) Mr. Thangei further argued that even if the motion was to be considered on its merits, the same falls short of the threshold in applications for recusal. It was pointed out that where the application for recusal is based on alleged bias and impartiality such facts constituting bias must be specifically pleaded and established and mere suspicion is not sufficient.
- 13) Before determining the application, I think it is important to set out the brief background of this dispute. On 17<sup>th</sup> December 2015, this court delivered its judgement in which it *inter alia* awarded the 1<sup>st</sup> defendant in the main claim and the plaintiff in the counter claim as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the counter-claim as follows:
- |                           |                    |
|---------------------------|--------------------|
| a) <i>Special damages</i> | ksh.40,483,438/=   |
| b) <i>General damages</i> | ksh.114,09,735/=   |
| <i>Total</i>              | ksh.154,503,223/=. |
- 14) On 13<sup>th</sup> May 2016, the 3<sup>rd</sup> defendant in the counter-claim successfully obtained an order for stay of execution of the judgment/decreed pending appeal on condition that the 3<sup>rd</sup> defendant provides a bank guarantee for the aforesaid amount. Mr. Thangei, later informed this court that his client and 1<sup>st</sup> defendant in the main claim had without involving their advocates, negotiated to settle the claim by adjusting the decretal sum downwards to a sum of ksh.120,000,000/=. Mr. Thangei urged this court to mark the claim as settled in terms of the aforesaid agreement. Mr. C. N. Kihara urged this court not to mark the matter settled until the question touching on party and party costs is factored in the settlement agreement. This court directed the learned advocate to file and exchange affidavits together with written submissions.
- 15) While learned advocates were busy arguing over the question as to whether or not the settlement agreement should be adopted, the firm

of Kimandu & Ndegwa Advocates filed the motion dated 19<sup>th</sup> October 2018 in which the aforesaid law firm sought for *inter alia* leave to immediately come on record for Muvir Holdings Ltd (the 1<sup>st</sup> defendant herein) in place of the law firms of C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau Associates.

16) Prior to filing the aforementioned motion, the applicant had filed the motion dated 2/10/2018 whereof it sought for *inter alia*:

**a) THAT this application be certified as extremely urgent its service notwithstanding.**

**b) THAT this honourable court be pleased to find that the only genuine and legitimate director and shareholders of the plaintiff are Josphat Wachira Mugweru (50%) and Francis Mburu Kimani (50% - now deceased) and proceed to review and set aside the settlement agreement dated 14/8/2018**

**c) THAT the Directorate of Criminal Investigation (DCI) do give a report and findings within sixty (60) days on the directorship and shareholding of Muvil Holdings Limited viz a viz the interested party, James Irura Kaguamba, Francis Mburu Kimani (deceased) and Reuben Gachau Mwhiki.**

**d) THAT pending the hearing and determination of this application there be granted by this court a stay of execution of the settlement agreement purportedly signed on 14/08/2018 between the plaintiff and the 3<sup>rd</sup> defendant in the counter-claim.**

**e) THAT pending the hearing and determination of this application be granted preventing any payment and or distribution of money by the law firm of M/s. Kinyanjui & Njau Advocates pursuant to the settlement agreement purportedly signed on 14/8/2018 by James Irura Kaguamba and Reuben Gachau Mwhiki on behalf of the plaintiff to the counter claim.**

**f) Costs of this application be provided for.**

17) The motion was placed before Lady Justice Kamau, the Duty Judge for certification. The honourable judge declined to certify the motion as urgent and instead directed the motion to be placed before this court on 15.10.2018, a date which had been reserved for mention to confirm the filing of submissions over the application for stay of execution.

18) On the aforesaid date, Mr. Gichohi, learned advocate for the applicant sought for the application dated 2/10/2018 to be heard. The aforesaid motion having been placed before this court as a mention for further orders and directions, this court fixed the aforesaid motion for further directions on 22/10/2018. On 18/10/2018 the applicant filed a notice of withdrawal and discontinuance of the motion dated 2/10/2018.

19) On 19.10.2018 the applicant filed the motion dated 19.10.2018 in which it sought for the following orders *inter alia*:

**a) THAT this application be certified as extremely urgent to be heard instantly its service notwithstanding.**

**b) THAT the law firm of Kimandu & Ndegwa Co. Advocates be granted leave to immediately come on record for Muvil Holding Limited (the 1<sup>st</sup> defendant herein) in place of the law firm of C. N. Kihara & Co. Advocates.**

**c) THAT the law firm of Kimandu & Ndegwa Advocates be granted leave to immediately come on record for Muvil Holdings Limited (the 1<sup>st</sup> defendant herein) in place of the law firm of Kinyanjui & Njau Associates.**

**d) That upon grant of prayers 2 and 3 above, the draft notice of change of advocates annexed as 'BMM1 and 2' in the supporting affidavit hereof be deemed as duly filed upon payment of the requisite filing fees.**

**e) That the law firm of Kinyanjui & Njau Advocates be ordered to immediately deposit in court any sum of money it is holding pursuant to the judgment and decree in this matter purportedly being held on behalf of Muvir Holdings Limited (the 1<sup>st</sup> defendant herein) to prevent the ends of justice from being defeated.**

**f) THAT the 1<sup>st</sup> defendant be at liberty to pursue any unpaid balance of the decretal sum from the judgment debtor.**

**g) THAT the law firms of C. N. Kihara & Co. Advocates and Kinyanjui & Njau Advocates be at liberty to apply for costs if need be.**

**h) That costs of this application be provided for.**

20) The aforesaid motion was fixed for interpartes hearing on 12.11.2018. This matter came up for the hearing of an application dated 9/11/2018 filed by some beneficiaries of the estate of deceased shareholder of the 1<sup>st</sup> defendant company. On the aforesaid date, Mr. Gichohi urged this court to hear his application dated 19.10.2018 despite the fact that the same had on 19.10.2018 been fixed for interpartes hearing on 12.11.2018.

21) On the aforesaid date also, Mr. Gichohi successfully sought for leave to have a further supporting affidavit he had filed without leave of court to be admitted as though prior leave had been sought. In view of the new development the motion dated 19.10.2018 could not be heard on 12.11.2018 but the same was stood over to 15.11.2018 for mention for further orders and directions.

22) On 15.11.2018, M/s Khisia who held brief for Mr. Gichohi, successfully applied to this court to grant Mr. Gichohi leave of 7 days to file a further affidavit. The matter was then stood over to 23.11.2018 for further orders and directions. On 23.11.2018, Mr. Kinyanjui sought for time to file a response to the motion dated 19.10.2018. Mr. Gichohi stated that the question of representation between him and Mssts C. N. Kihara and Kinyanjui be resolved by having the motion dated 19.10.2018 fixed for hearing. This court listed the matter for mention on 10.12.2018 to confirm filing of further affidavits.

23) On 10.12.2018 this court having confirmed filing of the responses listed the motion dated 19.10.2018 for interpartes hearing on 19.12.2018. Come 19.12.2018, Mr. Gichohi instead of prosecuting the motion dated 19.10.2018, orally applied to this court to recuse itself from hearing the matter. This court then directed Mr. Gichohi to file a formal application for recusal. Mr. Gichohi eventually filed the motion dated 20<sup>th</sup> December 2018, the subject matter of this ruling.

24) Having given a detailed background of this matter, I now turn my attention to the motion dated 20/12/2018. I have already considered the material placed before this court and the rival written submissions and the authorities cited. The principles to be considered in determining an application for recusal of a judge have been developed through case law over a long period of time in various jurisdictions. Those principles have also been imbedded in various Judicial Codes of Conduct and borrowing heavily from the Bangalore Principles.

25) In **Republic vs= Bow Street Metropolitan Stendiary Magistrate & Others Exparte Pinochet Ugarte (1999) ALL ER 577** it was held inter alia:

**“..... where a judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge can only disqualified if there is a likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification (where it has been established that a judge is a party to the case or has a relevant interest in its subject matter and outcome). The applicant must establish that bias is not a mere figment of his imagination. In the S. A. Rugby Football Union case (supra) the court said in paragraph 45-**

**“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for (a recusal application).”**

**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 view of a reasonable fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially.”**

26) In the matter before this court, the applicant is basically arguing that this court is biased because it did not certify its application dated 19.10.2018 to be urgent. It is also alleged that this court failed to record material submissions made by the applicant’s advocate and preferred to record the submissions of Messrs Kihara, Kinyanjui and Thangei. I have hereinabove given in detail what transpired before me between 2<sup>nd</sup> October 2018 to 19<sup>th</sup> December 2018. It is apparent from the record that this court did not receive substantive oral submissions on any of the applications.

27) It is clear that this court spent most of the time in giving directions before eventually inviting the parties and their counsels to file written submissions. The record is clear that the motion dated 19.10.2018 took time to be fixed for hearing because the parties had to be given time to file their responses and further responses. The aforesaid application was finally fixed for interpartes hearing on 19.12.2018. On the aforesaid date, instead of the applicant prosecuting the motion, it decided to orally apply for this court to recuse itself from further hearing the matter.

28) This court has not determined the issue touching on the settlement agreement between the three law firms namely: **C. N.Kihara & Co, Kinyanjui & Njau Advocates** and **Waruhiu K’Owade & Ng’ang’a advocates**. Therefore there is no basis for the applicant to allege that this court is openly biased. I therefore find no reasonable ground to recuse myself from handling this matter.

29) The respondents have raised a preliminary issue which merits consideration by this court. It has been submitted that the firm of **Kimandu & Ndegwa Co. Advocates** has not been granted leave to come on record in place of the firms of **C. N. Kihara & Co. Advocates** and **Kinyanjui & Njau Advocates** to appear for Muvir Holdings Ltd the 1<sup>st</sup> defendant herein. This assertion is not controverted and in any case it is one of the orders sought in the motion dated 19.10.2018.

30) With respect, I agree with the submissions of the respondents that the firm of Kimandu & Ndegwa Advocates has no locus to prosecute the application for recusal without obtaining prior leave to come on record to replace the firms of advocates appearing for the 1<sup>st</sup> defendant pursuant to the provisions of Order 9 rule 9 of the Civil Procedure Rules. Consequently, the motion dated 20<sup>th</sup> December 2018 is found to incompetently before this court having been filed by a firm of advocate which has not obtained prior leave to come on record in place of the firms of advocates currently appearing for the 1<sup>st</sup> defendant.

31) In the end, the motion dated 20<sup>th</sup> December 2018 is struck out and dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of July, 2019.

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant