



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MILIMANI
ELC CIVIL SUIT NO. 1474 OF 2014

CHRIS NYAKUNDI

(Suing through his attorney JEREMIAH MATAGARO.....PLAINTIFF

=VERSUS=

MIMOSA PLANTATIONS & 7 OTHERS.....DEFENDANTS

RULING

1. The 7th Defendant/Applicant filed a Notice of Motion dated 12th July 2019 in which she sought for my recusal from hearing this case and for leave to file an appeal against the ruling delivered on 19th June 2019. The Plaintiff/Respondent had filed an application seeking injunction Orders against among others the Applicant restraining them from dealing with the suit property herein.
2. The Applicant made an application seeking to discharge or vary the orders as to allow her proceed with construction on the disputed property. This Court heard the application for discharge /variation of the injunction and dismissed the same with costs vide ruling of 19th June 2019. The Applicant expressed her intention to appeal against the ruling by filing a notice of appeal.
3. The Applicant has now filed an application for my recusal on the ground that I failed to consider the materials placed before me during the hearing of the application for discharge of injunction, that I granted injunction against the Applicant who had not been enjoined in the suit ; that I extended the interim injunction granted without considering the prejudice the Applicant was suffering and that above all, I come from the same ethnic community with the Respondent and therefore she is apprehensive that she will not get justice before me. The Applicant further argues that after I delivered the Ruling of 19th June 2019, her advocate applied for leave to appeal against the Ruling but I did not grant leave or even comment on the same.
4. The Applicant's application was opposed by the Respondent based on a replying affidavit sworn on 7th October 2019. The Respondent contends that the Applicant's application does not meet the threshold for recusal of a Judge and the application is merely brought for purposes of trying to forum shop. The Respondent argues that since this Court was seized of this matter, he has been coming to court even during mention and that the court has never exhibited any bias towards any party. The Respondent further argues that the recusal on grounds of ethnicity is not only bizarre but also far-fetched and that the application should be dismissed as the Applicant has already manifested her intention to file an appeal against the Ruling of 19th June 2019.

5. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the Respondent and those of the Attorney General. The Applicant had been granted leave to file her submissions by close of business on 22nd October 2019 but as at the time of writing this ruling, the submissions had not been filed or if any were filed they were not put in the file. The only issue for determination is whether the Applicant has disclosed grounds for recusal.

6. In the case of Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others. (2013)eKLR the Supreme Court had this to say:-

“Recusal as a general principle has been much practiced 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 the Black Law Dictionary 8th Edition (2004) (P(303) “Removal of oneself as a Judge or policy maker in a particular matter especially because of conflict of interest” 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 be uncompromised; that the due process of law be realized and be seen to have its rules; That the profile of the rule of law in the matter in question be seen to have remained “uncompromised”.

7. From the case of Jasbir Singh Rai (Supra), it is clear that a Judge may recuse himself or herself if there is a likelihood of bias or conflict of interest. In the instant case, the Applicant appears to have been irked by the dismissal of her application vide ruling of 19th June 2019. I do not see how coming from one community with a litigant can be a ground for a Judge's recusal without any evidence of bias. The Applicant has argued that her counsel applied for leave to appeal against the Ruling of 19th June 2019 but that I did not grant or comment on the same. The Applicant's application for discharge or variation of the injunctive orders was brought under Order 40 Rule (7) of the Civil Procedure Rules. A party appealing from an order given under the said rules has an automatic right of appeal. See Order 43 of the Civil Procedure Rules. I was therefore under no obligation to grant leave where the statute has given an automatic leave as of right.

8. In Attorney General of Kenya Vs Anyang' Ngong'o Application No. 5 Ref No 1 of 2006, Ruling EACJ , February 6, 2007, the East African Court of Justice had this to say:-

“In conclusion, we would like to borrow the words of the Constitutional Court of South Africa in the S.A Rugby Football Union case (supra) para.104.

While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour ...The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself."

9. I have considered the many decisions which have been cited in the submissions on the grounds which can call for recusal. In the instant case, I do not see any basis for my recusal. I do not think that the mere fact that the Respondent comes from the same ethnic community as I do will lead a reasonable and fair minded person to think that I will be biased. To allow recusal on this ground will be stretching the grounds for recusal too far. I therefore find that the Applicant's application lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 7th day of November 2019.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Olalo for Plaintiff,

Mr Nyamu for 7th and 8th Intended 7th and 8th Defendants

Mr Mulandi for 6th Defendant and M/s Njagi for Mr Kamau

for 4th Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE