



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 349 OF 2016

PRISCA YATORPLAINTIFF/RESPONDENT

VERSUS

SAMUEL ROTICH.....1ST DEFENDANT

UASIN GISHU COUNTY SURVEYOR.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

UASIN GISHU COUNTY.....4TH DEFENDANT

RULING

This ruling is in respect of an application dated 28th February 2020 seeking for orders that the suit herein be placed before the Resident Judge Hon. Hellen Omondi for placement before another Judge of the Environment and Land Court than Justice Odeny for hearing and. That in the alternative Justice Odeny do disqualify /recuse herself from handling this suit for manifestly exhibiting open bias against the applicant.

The Applicant filed an affidavit in support of the application on the ground that the judge is biased against her. She alleged that the relationship between her and the judge is not friendly and that the judge has shown open hostility on the applicant who has lost faith in the court hearing the matter.

ANALYSIS AND DETERMINATION

It should be noted that recusal is a matter of discretion by the Judge concerned and the practice in our courts has seen judges recusing themselves from hearing matters where they feel they may not appear to be fair or where they feel their impartiality would be called into question. This does not mean that applicants can use application for recusal of a judge as a gateway to forum shopping for a court to hear their cases. If applicants were to be allowed to use the slightest excuse for recusal, then this would amount to abuse of court process.

Philip K. Tunoi & another v Judicial Service Commission & another [2016]eKLR the Court of Appeal in considering an application for recusal stated:

In Tumaini v. R. (supra) Mwakasendo J held, rightly in our view, 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.....

The House of Lords held in R v. Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v Magill [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly 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.”

It follows that the applicant bears the duty to establish the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. The applicant cannot succeed by just making mere allegations that the judge is biased without giving reasonable grounds to support her claim. It is not enough to just make a bare allegation. Judges do not have property in cases, they deal with cases on merit and on the material placed before them. The applicant’s allegations are mere sentiments which must remain as such as she has not proved any bias.

On the application that this matter be placed before the Resident Judge Justice Hellen Omondi for allocation to a different Environment and Land Court Judge, this is not tenable as the Resident Judge being a High Court Judge does not have jurisdiction on matters pertaining to Environment and Land Court.

In conclusion and applying the test in **Porter v. Magill [2002]**, no fair-minded and informed observer, having considered the facts, would conclude that there is a possibility that this Court will be biased against the Applicant. I therefore dismiss the application dated 28th February, 2020 with costs to the Respondents but direct that the matter be mentioned before Justice Kibunja for further directions on the hearing and determination.

DATED and DELIVERED at ELDORET this 26th DAY OF MAY, 2020

M. A. ODENY

JUDGE