REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 33 OF 2016

ELIZABETH WANJIKU NJOKA (Suing as the legal

representative of ALICE KAHAKI NJOKA (Deceased) ---------- PLAINTIFF

VERSUS

JUMA KIPLENGE (Sued as the Legal Representative of

Philip Njoka Kamau (Deceased)----------1ST DEFENDANT

TERESIA NJERI ---------- 2ND DEFENDANT

MARGARET DAMAT ---------- 3RD DEFENDANT

LUCY WANJIRU ---------- 4TH DEFENDANT

JAMES GICHERU ---------- 5TH DEFENDANT

PETER NJOROGE ---------- 6TH DEFENDANT

GILBERT KABAGE T/A PATA AGENCIES ---------- 7TH DEFENDANT

JOSEPH NJUGUNA NJOKA ---------- 8TH DEFENDANT

SOMOIRE KEEN ---------- 9TH DEFENDANT

FAMILY BANK LIMITED ---------- 10TH DEFENDANT

SAMUEL GITIMU ---------- 11TH DEFENDANT

ERIC KAMAU ---------- 12TH DEFENDANT

PINKAM HOLDINGS LIMITED ---------- 13TH DEFENDANT

RULING

1. Before court is the notice of motion dated 8/7/2018. The prayers sought are;

    1. **THAT the Presiding Judge herein the Honourable A. K. Ndung'u be pleased to recuse himself from these proceedings.**

    2. **THAT this case be transferred to any other Judge or Court of competent jurisdiction.**

2. It is premised on nine (9) grounds which I reproduce here, namely;

i) Ever since his ruling dated and delivered on 15th June, 2016 revoking the Grant of Letter of Administration issued 32 years prior to the Plaintiff's father Philip Njoka Kamau (now deceased) and posthumously labelling the said Philip Njoka Kamau a fraudster, the Presiding Judge has consistently taken a position that seems to unduly favour the Plaintiff such as when he (the Presiding Judge) instantaneously appointed the Plaintiff the sole administratix of her late Mother's estate despite the record showing that the plaintiff had 6 siblings.

ii) The Presiding Judge (Hon. A.K. Ndung'u J) has also shown a tendency or propensity to (overzealously) advance the Plaintiff's case beyond what is borne out by the Plaintiff's pleadings and even further than the representations and submissions of her counsel.

iii) The Presiding Judge having been the one who directed the Plaintiff to commence the current suit has in any event gotten too entangled in this matter to remain objective.

iv) From the conduct of the Presiding Judge herein, the 9th Defendant/Applicant feels that the said Judge is not impartial.

v) Justice should not only be done but it must be seen to be done.

vi) Article 50 of the Constitution of Kenya guarantees the 9th Defendant/Applicant the fundamental right to a fair hearing before an impartial body.

vii) This Court has an obligation to respect, uphold and defend the Constitution (Article 3).

viii) Neither the Plaintiff nor the other parties herein stand to suffer any prejudice if the orders sought are granted.

ix) It is in the interest of the process of administration of justice that the orders sought be granted.

3. The application is further supported by the affidavit of Somoire Keen sworn on the 18/7/2018 and filed in court on 19/7/2018.

4. The plaintiff, 1st and 5th defendants have respondent to the application.

5. On her part the plaintiff states that the 9th defendant has sworn a false affidavit and largely relied on information given to him by the 1st, 2nd, 3rd, 4th, 6th, 8th, 11th and 13th defendants since he the 9th defendant talks about the conduct of proceedings in **NAKURU HIGH COURT SUCCESSION CAUSE NUMBER 16 OF 1984 IN THE MATTER OF THE ESTATE OF ALICE KAHAKI NJOKA (deceased)** yet he has not been in a position to know about this.

6. The 9th defendant is accused of swearing a false affidavit, scandalizing the court and committing the contempt of court known as scandalizing the court and should be punished for this contempt.

7. It is the plaintiff's case that a judge does not, become partial simply because he has delivered a ruling which does not please some parties.

8. The 1st defendant has vehemently denied any collusion with the 9th defendant in the filing of the instant application and he categorically states that at no time did he, or any of the 4th, 6th, 7th, 8th, 11th or 12th defendant sit with or without their advocates to discuss the conduct of the trial judge in the matter.

9. The 1st defendant accused the plaintiff of painting the defendants in negative and prejudicial manner in her replying affidavit as to make them unworthy before the trial court.

10. The 1st defendant seeks the expunging of the offending paragraphs of the replying affidavit unless the plaintiff can offer tangible evidence to make the allegations.

11. In response to the application the 5th defendant states that he personally has no issue with the person of the judge hearing the matter. He recognizes, however, the right and vital importance of all parties having confidence in the court handling the case.

12. He adds that he would not condemn or criminalize the 9th defendant's application for recusal of the judge. A party should not be punished by court of contempt of court merely for expressing their apprehension and exercising their right to apply for recusal of a judge.

13. This matter was canvassed by way of written submissions and I note the 9th defendant's and the plaintiff's submissions are on record.

14. I have had occasion to carefully consider the application, the grounds raised, affidavit evidence for and against and submissions by counsel.

15. The basis of 9th defendant's case is clearly summarized in his grounds number (i), (ii) and (iii) on the face of the application. I reproduce the same here for their full meaning and import.

i) Ever since his ruling dated and delivered on 15th June, 2016 revoking the Grant of Letter of Administration issued 32 years prior to the Plaintiff's father Philip Njoka Kamau (now deceased) and posthumously labelling the said Philip Njoka Kamau a fraudster,

the Presiding Judge has consistently taken a position that seems to unduly favour the Plaintiff such as when he (the Presiding Judge) instantaneously appointed the Plaintiff the sole administratix of her late Mother's estate despite the record showing that the plaintiff had 6 siblings.

ii) The Presiding Judge (Hon. A.K. Ndung'u J) has also shown a tendency or propensity to (overzealously) advance the Plaintiff's case beyond what is borne out by the Plaintiff's pleadings and even further than the representations and submissions of her counsel.

iii) The Presiding Judge having been the one who directed the Plaintiff to commence the current suit has in any event gotten too entangled in this matter to remain objective.

16. The plaintiff's response to the application has been a robust one and in my view a bit overzealous. I note from the record that the initial reaction by the plaintiff was the filing of application dated 23/7/2018 suing the 9th defendant and his advocate for contempt of court.

17. The plaintiff has deponed a lengthy replying affidavit. In that affidavit, she has accused the 9th defendant of being a decoy of the other defendants in the filing of the application or colluding with them so to file. Going through this affidavit, I am in agreement with the 1st defendant that some of the paragraphs are based on conjencture.

18. That said, I would at the onset avoid the route path that would derail the determination of the application before the court and remain focused on the real issue which in essence is the basis of the application as seen in grounds (i), (ii) and (iii) of the application. I will avoid at all costs to delve into the issue of contempt raised by the plaintiff even though alive to the need to protect the dignity of the court in promotion of the rule of law.

19. The issue for determination is whether the 9th defendant has placed before the court such material as may justify his apprehension that the judge shall be partial or biased thus denying the 9th defendant a fair hearing.

20. Let me begin by restating the fundamental right of any citizen of this land, and indeed, in any democratic society governed by the rule of law to a fair hearing.

21. In our context no less that the constitution ring fences this right. **Article 50(1)** of the **Constitution** provides;

> **"Article 50**
>
> **(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

For the purposes of the instant application emphasis should be laid on the word "impartial".

22. If a judge is biased or prejudicial for or against a party or his counsel he cannot be impartial in deciding the case before him and would thus flout the right to a fair hearing enshrined in **Article 50**.

23. A party or counsel who believes such bias or prejudice exists must prove it with tangible evidence and cannot base this belief on mere suspicion or merely on the ground of holding a different view of the law from that of the judge.

24. It is to be appreciated that errors in judicial decisions are expected given the human frailty of the participants in the judicial system who include judges, lawyers and parties.

25. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

26. In **PHILIP K. TUNOI vs. JUDICIAL SERVICE COMMISSION 2016, eKLR,** the ***Court of Appeal*** in considering an application for recusal stated;

> **"An application for recusal for a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all the Constitution does guarantee all litigants the right to a fair hearing by and independent or impartial judge. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating cardinal guarantee of the Constitution, namely, the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial y an independent and impartial court…**
>
> **An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or had a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on**

appearance of bias attributable to behavior or conduct of a judge…"

The Court further stated;

> "**Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a mere allegation by any of the parties. On the contrary decisions abound that judges should not recuse themselves on filmsy and baseless allegations**."

The ***Court of Appeal*** then concluded;

> **"It cannot be gainsaid 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. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn."**

27. The burden of proving that the court might be biased is borne by the applicant.

28. This quote from the **AMERICAN BAR ASSOCIATION JOURNAL VOL. 68 PAGES 1179 -1328** illuminates the position further;

> **"There must be reasonable balance between the integrity of our judicial system and the rights of a litigant to a fair trial by a fair judge.**
>
> **A blanket pre-emptory challenge is not the answer because it is not addressed to the bias or impartiality of a judge but simply permits the expression of the subjective feeling, whim and reaction of a litigant or his attorney. No judge should be disqualified without some factual basis being set forth in an affidavit or otherwise. The subjective feeling of an attorney or litigant should not be permitted to undercut the integrity of our judicial system."**

29. In our instant application, the first ground raised is that in a ruling delivered on 15/6/2016 the court revoked grant of letters of administration issued 32 years before to one Philip Njoka Kamau, posthumously labelled the said Philip a fraudster and instantaneously appointed the plaintiff the sole administratix of her late mother's estate despite the record showing that she had six (6) siblings.

30. The fact that the judge has pronounced himself on finding in a matter that may relate to another before the court is no good ground for recusal.

31. In **REPUBLIC vs. IEBC & ANOTHER EXPARTE COALITION FOR REFORMS AND DEMOCRACY (CORD) 2017 eKLR, *Odunga J*** set out the submissions of the applicant's counsel thus:

> **"Learned counsel was however quick to point out that in his view the judgment was well-reasoned but stated that whether his clients agree with the same is another matter altogether. It was however submitted that the issues in the instant application are in pari materia to the issues in the said earlier proceedings and in learned counsel's view, it is improbable that this Court may arrive at a arrive at a different decision. It was therefore learned counsel's view that having expressed itself as it did, this Court should let another Judge have another look at the matters with a fresh mind."**

32. The Judge went on to state;

> **"To seek the recusal of a judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another judge will arrive at a different decision. In my view, instead of subjecting another judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another judge to hear the matter, based on recusal there would be an expectation that that other judge may arrive at a decision different from the decision arrived at by the court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment."**

33. Any party who was dissatisfied with the earlier findings of the court had ready remedies through the appeal, review or setting aside system and not through an application for recusal.

34. Has the judge shown a tendency or propensity to (overzealously) advance the plaintiff's case beyond what is borne out of the plaintiff's pleadings and even further than the representations by counsel?

35. I have painstakingly gone through the record herein. On the material placed before the court by the 9th defendant, I find no substantiation of this allegation.

36. I agree with ***Gikonyo J*** in **MUMIAS SUGAR COMPANY LIMITED Vs. THE DPP & 2 OTHERS [2012] eKLR** where he stated;

"I take the view that the Petitioner should establish such material facts that attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons. Real likelihood of bias would therefore occur when the matters complained of create a reasonable doubt in the minds of the public about the fairness in the administration of justice in the particular case in question. The operating phraseology is a reasonable doubt-an elusive expression-but ordinarily refers to an impression of doubt that goes beyond mere apprehension or belief of the parties to a more concrete and cogent grounds based on the judge's personal interest, pecuniary or otherwise in the case. The applicant must therefore specifically set out the facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of a judge."

37. The 9th defendant has not indicated when and how the judge showed a tendency or propensity to (overzealously) advance the plaintiff's case beyond the plaintiff's pleadings and even further than the representations by counsel.

38. Did the judge direct the plaintiff to commence the current suit and thus so entangled in this matter to remain objective? I have taken the trouble to find evidence either in the supporting affidavit or submissions to show that the court directed the plaintiff to file the suit. The 9th respondent appears to intimate that the court ordered the plaintiff to file the current suit. That is far from the truth.

39. The only directions of court, and which do not constitute orders to file suit, are found in the sentiments of the court expressed at page 14 of the court's ruling dated 9/6/2016 where the court stated;

"Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietory interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.

Having found as above, I must of necessity down my tools and will therefore not address the 2nd issued for determination."

40. The plaintiff in her wisdom instituted the current proceedings. Whether she is successful or not will depend on the law and evidence availed. The court had no role to play in the decision to file suit. The court's role remains to take in the evidence and the law relied on, evaluate and make determination of the matter one way or the other.

41. This ground, too, is unsubstantiated.

42. With the result that the application dated 8/7/2018 is completely without merit and is dismissed with no order as to costs.

Dated and Signed at **Nakuru** this **13th** day of **December, 2018.**

A. K. NDUNG'U

JUDGE