



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 856 OF 2017

FOREMELY NAIROBI ELC NO.1363 OF 2013

AMOS KIBATIA GITHEKO.....PLAINTIFF/APPLICANT

VERSUS

LOISE GACHIKU KINUTHIA.....1ST DEFENDANT/RESPONDENT

AMOS KIBATA GITHEKO.....2ND DEFENDANT/RESPONDENT

HON.ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR KIAMBU.....4TH DEFENDANT/RESPONDENT

JOSPHAT GACHERU RUGIRI.....5TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **10th June 2019** by the Plaintiff / Applicant filed under Section **3A,1A** and **63e** of the Civil Procedure Act seeking for orders that;

- 1. THAT trial Judge, Gacheru be pleased to recuse herself from continuing with the determination and adjudication of this matter.**
- 2. THAT the Honourable Court be pleased to transfer this matter to Nairobi Environment Lands Court for hearing and determination.**
- 3. THAT costs of this Application be provided for.**

The Application is premised on the grounds that in **ELC Appeal No. 6 of 2017**, the Court made a ruling restoring and reinstating the Defendant into the suit land and that therefore the opinion of the Court determined the appeal and prayers sought in **856 of 2017**, which are similar to the ones in **Appeal No. 6 of 2017**. That there is a likelihood that this Court might not make any different ruling in this matter having determined **Appeal No. 6 of 2017**, with similar facts. Further that the facts in **Appeal No. 6 of 2017** are the same as Case No. **856 of 2017**, and parties are the same and the subject matter is the same and it is therefore fair and just that this Honourable Court orders that cause **856 of 2017** be transferred to Nairobi for hearing and determination.

In his **Supporting Affidavit**, the Plaintiff/ Applicant reiterated the contents on the grounds of the Application and further averred that the orders he is currently seeking were issued in **Appeal No. 6 of 2017** and that he is apprehensive that the Court might not change its previous position hence the reason why he is asking the Court to recuse itself. He further averred that in the circumstances, there may be perceived impartially, real or otherwise if the matter is heard and determined by **Hon. Lady Justice Gacheru**, and it is therefore in the interest of Justice if the said **Justice Gacheru** recuses herself as no prejudice shall be suffered by the Defendant.

The Application is opposed and the 1st Defendant **Loise Gachiku Kinuthia** swore a Replying Affidavit on **14th June 2019** and averred that the Application is aimed at delaying the main suit which was scheduled for hearing on **17th June 2019**, the reason why it was filed some few days to the hearing date. She averred that the matter is in the right jurisdiction at Environment and Land Court Thika since the suit premises is in Kiambu County and therefore it ought not to be transferred to Nairobi. She further averred that the Ruling made in the **ELC appeal No.6 of 2017**, was on interlocutory matters pending the hearing and determination of ELC appeal and that after the same was delivered, the Applicant appealed to the Court of Appeal and his Application was again dismissed. It was her contention that any claim of bias was unfounded because the **Appeal no. 6 of 2017** is yet to be heard and determined and that it is for the Applicant to set his appeal down for

hearing. Further that the appeal is an appeal from a determination made by the lower Court on illegal demolitions/ evictions and does not dwell on issues of ownership, fraudulent transfers of titles and cancellation of the said titles which are the issues of determination in the instant suit. She averred that she has been advised by her Advocates, advise which she believes to be true that the issues of facts and law in ELC cause and those in **ELC appeal 6 of 2017** are completely different as one is a trial issue and the other one an appeal issue and it is therefore fair and Just that the Application be dismissed.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered.

The issue of recusal of a Court in a matter by the Judicial Officer concerned, is whereby the Judicial Officer recused him/herself from hearing a matter where he/she feels he/she may not appear to be fair or where he/she feels his/her impartiality would be called into question.

The Court in the case of **Philip K. Tunoi & Another...Vs... Judicial Service Commission & Another [2016] eKLR**, 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 would therefore mean that the Court in considering whether or not to recuse itself, the Judicial Officer would then be answering the question first whether on its own evaluation of itself, it would likely be biased and second whether on the opinion of an informed mind, the Court would appear to be biased.

The **Black's Law Dictionary, 10th (2014)**. Defines **Bias** as;

“ A mental inclination or tendency; prejudice; predilection. Actual Bias Genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject.”

In this instant, the Applicant is seeking the recusal of this Court based on the fact that the Court had in a separate suit issued orders that were not favourable to him and in his opinion granted the Defendant possession of the suit property. It is therefore the Applicant's contention that being that the instant suit is similar in terms of issues, facts and parties and therefore since this Court had already made a ruling against it in the **ELC Appeal**, then he is apprehensive that there is no way that the Court will find any other way.

Every sitting Judge, this Court included took an oath to serve with **impartiality** and to protect the Constitution. As a Judicial officer, I took an oath of office and I have a duty to protect it. See the case of **Gladys Boss Shollei...Vs...Judicial Service Commission & Another [2018] eKLR**, where the Court held that:-

“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.”

Further the test that has to be established is whether a reasonable and balanced observer will conclude that there was bias. 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. In the case of **Kaplana H. Rawal...Vs...Judicial Service Commission & 2 Others [2016] eKLR**, the Court held that:-

“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 has 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.....”

It cannot be gainsaid that the applicant bears the duty of establishing 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.

The law is also very clear on what should happen should a party be dissatisfied with the orders of the court. The party has a right to seek for review or appeal against the said order. The Applicant filed an Appeal which was dismissed and still it chose to apply for the Court's recusal just because he feels that this Court might rule against him. It is the Court's considered view that it would seem as if the Applicant is forum shopping

The Applicant has alleged that there is reasonable apprehension that this Court might not apply my mind clearly to this matter and that is because in a different matter I had had ruled in favour of the Respondent.

Even though the Applicant has a right to call for recusal of a Judicial Officer, myself included, on apprehension of bias, that apprehension must be a reasonable one. See the case of **President of Republic of South Africa...Vs...The South African Rugby Football Union & Others case CCT16/98**, where the Court relied on the case of **Committee for Justice and Liberty et al...Vs...National Energy Board** and held that:-

"...the apprehension of bias must be reasonable one, held by reasonable and right minded persons applying themselves to the question and obtaining thereon the required information.... The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through – conclude".

It was further held that:-

"An unfounded or unreasonable apprehension concerning a Judicial Office is not a justifiable basis for such application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application".

The Applicant alleged that this Court has already made decision over the matter and it is still likely to rule the same. However the Court's decision was done after consideration of the circumstances of the matter and if the Applicant was dissatisfied with the said exercise of judicial discretion, it ought to have appealed which according to the Respondent it did. Even so if this instant suit was similar to **ELC Appeal 6 of 2017**, then it would only mean that the two matters should be consolidated. The reason as to why two similar matters in terms of issues and parties are consolidated would be to avoid getting conflicting decisions by the same Courts. In this instant, it would seem that the Applicant is trying to choose a Court in which he feels will be favourable to him and is more likely to rule in his favour. The Court finds the Applicant's apprehensive of bias not reasonable and there is no evidence of such bias.

As was held in the case of **Miller...Vs...Miller (1988) KLR 555**, by the Court of Appeal:-

"No party should be placed in a position where he can choose his court It would be disastrous if the practice was that once there are allegations made against a Judge and the Judges honour is in question, that Judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification by Judges with ease and the consequence would be a choice of trial Judge by a party".

The Applicant has not demonstrated any evidence of partiality or biasness by this court in this matter in any way. In the case of **Anyang' Nyong'o & Others (2007) 1EA 12**, the Court held that:-

"The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge."

Having now carefully considered the instant application and the written submissions and the relevant provisions of law, the Court finds the necessary order herein for the end of justice to be met is to find that the Applicant has not presented anything to prove any bias against it or partiality on the part of this court to warrant this Court's recusal from this matter. The application fails to meet the test warranting recusal and for the above reasons, the **Notice of Motion** application dated **10th June 2019**, is dismissed entirely with costs to the 1st Defendant/ Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 7th day of May 2020

L. GACHERU

JUDGE

7/5/2020

Jackline - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

No appearance for the Plaintiff/Applicant

Mr. Njanja for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/ Respondent

No appearance for the 3rd Defendant/ Respondent

No appearance for the 4th Defendant/ Respondent

L. GACHERU

JUDGE

7/5/2020