



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC NO. 1 OF 2017**

**ABDIKADIR MOHAMMED ALI.....1<sup>ST</sup> PLAINTIFF**

**SHEIKH HASSAN SHEIKH ALIGELI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ALI DIGALE & 9 OTHERS.....DEFENDANTS**

**RULING**

1. The Defendants through their Counsel Mr. Onono on 24/2/2020 made an oral application before this court seeking this court to recuse itself from hearing this matter. The applicant is basically seeking my recusal from this matter.
2. The genesis of the applicant application as per his grounds in support of the application is a letters dated 23<sup>rd</sup> April, 2019, in which the 2<sup>nd</sup> Plaintiff protested against Ibrahim Abdi Ali a Chief Bour Algy Location and Ahmed Hussein Affey an assistant chief of Bour Algy sub location , both who have been lined up by the applicants as their defence witnesses. Vide the said letter, the 2<sup>nd</sup> Plaintiff complained to the two witness's employer, the Ministry of Interior, alleging that they were acting in a biased manner against him contrary to their oath of office in taking sides and testifying on behalf of the defendants. He alleges that their intended testimony is in contradiction of their earlier position as evidenced by the letters they had earlier wrote supporting THE 2<sup>ND</sup> Plaintiff case.
3. Additionally, the applicant alleges that the 2<sup>nd</sup> Plaintiff action is a threat to the foundation of the rule of law and justice as it threatens the witnesses and their jobs, and instead they argue that the 2<sup>nd</sup> Plaintiff ought to have raised his issues during cross-examination and not undertake such actions which prejudices their employment.
4. They contend that despite bringing the issue to the attention of the court, they have been surprised by the court view of the issue as the court failed to admonish the 2<sup>nd</sup> Plaintiff. It is on this basis that the applicant is alleging that this court has exhibited acts of biasness towards the defendants and therefore they do not feel that justice will be served in the circumstances. Although they recognize that this is an old matter needing to be dispensed with expeditiously, he urges the court to recuse itself and transfer the matter to another court.
5. Their main concern is that the court failed to reprimand the 2<sup>nd</sup> Plaintiff for their action which they consider amounts to threatening of witnesses, which action they argue amounts to a contempt of the court.
6. Furthermore, the applicant's Counsel further submitted that this court had disclosed to him that the 2<sup>nd</sup> Plaintiff had come to see me in chambers, and therefore they feel that since the court did not disclose what was discussed and that since no action has so far been taken by the court in respect to the 2<sup>nd</sup> Plaintiff action, they therefore feel that this court is biased and thus they don't see the need to file their intended application and instead are seeking for my recusal as they feel justice will not be served in the circumstances.
7. The 2<sup>nd</sup> Plaintiff through his Counsel Mr. Kimakya opposed the applicant application. He submitted that they see nothing wrong with their impugned letters and that the applicant having been given an opportunity to raise any issue regarding the same by filing a formal application, he instead failed to do so. Additionally, he alleges that the said individuals affected by the said letters are public officers and nothing stops any individuals from writing a complaint letter to their employer. And that the alleged letters only raised a critical issue, in that the witness statements by the said witnesses contradicted their earlier written letters, and if indeed the same were useless, their employer which Is the Ministry of Interior would have ignored the same.
8. Further, they alleged that the applicant has perfected the art of delaying the matter, and such an application as the one herein forms part of his wider scheme to further delay the conclusion of this matter. He also denied the allegation that the 2<sup>nd</sup> Plaintiff came to see me in chambers, arguing that the applicant intention is to delay the matter and scuttle the court process. Furthermore, they submitted that this

matter is an old matter filed in the year 2010 and that justice delayed is justice denied and urged the court to hear the matter to its conclusion in the interest of justice.

9. I have carefully considered the Applicant's application as well as the opposition to the same by the 2<sup>nd</sup> Plaintiff/Respondent. I am being asked to recuse myself on grounds of biasness. An application for recusal is a serious issue which ought to be made on serious grounds. This is because as a Judge one has to discharge his duties in a manner that promotes public confidence in the integrity of his or her office.

10. In the case of Kaplana H. Rawal Vs Judicial Service Commission & 2 Others [2016] eKLR, the Court of Appeal Judges quoted the South Africa Constitutional decision in the case of President of the Republic of South Africa Vs The South Africa Rugby Football Union & Others, Case CCT 16/98 where it was stated as follows; -

***“At the very outset we wish to acknowledge that a litigant and her or his Counsel who find it necessary to apply for recusal of a Judicial Officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront.”***

11. Additionally, the East Africa Court of Justice in Attorney General of Kenya Vs Prof. Anyang' Nyong'o & 10 Others EACJ Application No.5 of 2007 held as follows: -

***“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 mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially.”*** Needless to say,

***a Litigant who seeks disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.”***

12. Further, the Supreme Court of Canada expounded the test in the following terms in R Vs S (R.D) [1977]3 SCR 484.

***“The apprehension of bias must be a 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. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the Judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”***

13. From the foregoing, it is apparent to me that a party or his Advocate is entitled to ask for recusal of a Judge and when this happens, a Judge should not take it that the application is a personal affront. In this case the Applicant is apprehensive that I will be biased in view of this court alleged failure to reprimand the 2<sup>nd</sup> Plaintiff for his actions against their witnesses, this is an addition to their claim that this court disclosed to them that the 2<sup>nd</sup> Plaintiff met me in chambers and that what was discussed was not disclosed.

14. In deciding whether to recuse myself from these proceedings, I will apply the test which is acceptable as enunciated in the Constitutional Court of South Africa and the Supreme Court of Canada in the cases quoted hereinabove. Recusal of a Judge cannot be based on mere allegation which is baseless. In the instant case, the Applicant has made serious allegations of bias starting with the alleged meeting in chambers with the 2<sup>nd</sup> Plaintiff, which in my understanding they are trying to tie it with the alleged failure of the court to reprimand the 2<sup>nd</sup> Plaintiff.

15. A person cannot make casual allegations and not substantiate the same and expect the same to form a basis of recusal of a Judge. The Applicant had the onus of proving the allegations made. The Applicant did not discharge this onus which was on his part. The question which will then be required to be answered is whether a reasonable person who has a background of the issue in contention would believe that I am likely to be biased.

16. This matter was commenced in the year 2010 and has gone through several Judges, and finally it ended in this court and at this juncture the Plaintiff had closed his case and the defendant was due to present his case when the above developments emerged. The contest herein is that the applicant seems to contend that this court should have suo moto reprimanded the 2<sup>nd</sup> Plaintiff for the alleged letters against their witnesses, failure of which, they allege points to some biasness towards their clients.

17. This in my view is not the true state of affairs as parties ought to move the court in view of the alleged developments, and from the record it is apparent that the applicant had indicated to this court that they intended to file a formal application by 27<sup>th</sup> January, 2020, which instead failed to do so and when the matter came for directions over their intended application, they turned around and alleged that they did not file the said application as they felt that this court was biased for failing to reprimand the 2<sup>nd</sup> Plaintiff and therefore they had no

confidence in filing the said application.

18. On the issue of the 2<sup>nd</sup> Plaintiff meeting me in chambers, this is an information I disclosed to the applicants prior to the later developments which led to the instant application. I had informed the applicant that the 2<sup>nd</sup> Plaintiff had made an attempt to see me in chambers, however, I chased them out of my office and therefore there was no discussion between me and the 2<sup>nd</sup> Plaintiff and therefore the issue of bias in my view has no basis.

19. In view of the above, I find that the allegations of bias based on alleged failure to reprimand the 2<sup>nd</sup> Plaintiff and the alleged meeting is just but a figment of the Applicant's imagination meant to trigger a recusal with a view of delaying this matter further. There is absolutely no merit in this application which is dismissed with costs to the Respondents. However, as the Applicant seems determined to have this matter heard by a different Judge, I direct that the same be placed before the ELC Presiding Judge at Milimani on 15/7/2020 to allocate it to another Judge.

It is so ordered.

**Read, delivered and signed in the Open Court this 26<sup>th</sup> day of June, 2020.**

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**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Mr. Kimakya: For 2<sup>nd</sup> Plaintiff
2. Mr. Onono: Absent
3. Fardowsa (Court Assistant): Present