



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 18 OF 2019

MUKUNYA MUGO A.....1ST PLAINTIFF /RESPONENT

WINNIE WAMBUL..... 2ND PLAINTIFF/RESPONDENT

VS

ELIZABETH MUGURE MUKUNYA.....DEFENDANT/APPLICANT

RULING

1. This Ruling relates to the Notice of Motion dated the 16/3/2020 filed by the Applicant seeking orders inter alia that the judge be pleased to recuse or disqualify herself from hearing and determining this matter and that the matter be placed before any other Court for directions and/or hearing and determination.

2. The application is based on the grounds adduced thereto and supported by the affidavit of the Applicant sworn on the 16/3/2020. The Applicant avers that there is reasonable apprehension that a fair trial is not plausible going by the manifest bias and prejudice demonstrated by the Learned Judge in the ELC 111 of 2017 which is similar to the current suit. She states that in the former case the Court declined her application to reopen the case for hearing ostensibly on the grounds that she may repair the gaps in her evidence. That the same Court abandoned the said yardstick in the current suit when it struck out the suit instead of dismissing the same to allow the Respondents the opportunity to repair the gaps that the judge had identified in the judgement rendered on the 28/3/18. That the Plaintiffs were allowed a window to file the present suit.

3. That she was not accorded a fair hearing in ELC 111 of 2017 despite having filed a statement of defence and demonstrated the interest she had in the property. That the conduct of the learned Judge in handling the previous case gives rise to reasonable apprehension and suspicion that she is not going to be impartial in the hearing and determination of the suit herein.

4. In addition, the deponent stated that there are ongoing investigations in respect of two threatening letters to the Hon Judge in this suit, allegedly written by her for which statements have been recorded. Further that since there are ongoing investigations in respect to alleged threatening which allege to have been authored by herself, she may not be accorded a fair hearing and justice may not prevail at all. That the recusal/disqualification of the Judge is of fundamental importance for justice to be seen to be done.

5. As of the 26/5/2020 when the matter came up for highlighting of the written submissions, the Respondent/Plaintiffs had neither filed any response to the application nor written submissions contrary to the orders of the Court issued on the 6/5/20 requiring the parties to file responses and exchange their written submissions by close of business on the 21/5/2020. Attempts by the Respondents counsel on the 26/5/20 to seek leave to file their Replying affidavit out of time was declined by the Court on grounds that the Respondents were served in good time but failed to comply with the orders of the Court. The highlighting of the written submissions then proceeded.

6. I have read and considered the written submissions filed by the Applicant.

7. Having considered the application, the grounds, the Supporting Affidavit and the Written Submissions, the key issues are; whether there is evidence of bias and who meets the costs of the application.

8. It is on record that the parties in this case are similar to the ELC No 111 of 2017. The subject matter of the suit is the same. The ELC 111 of 2017 was heard and determined on 28/3/19 where the Court struck out the suit on the grounds of non-joinder of one of the joint registered trustees of the suit land. From the annexures placed before the Court by the Applicant, it is clear that the suit proceeded ex parte. At the end the Applicant moved the Court for orders to set aside the proceedings on grounds that her previous counsels did not notify her of the hearing dates. On consideration the Court was not satisfied that the Applicant had met the threshold for grant of the orders in its ruling of 31/7/18. It was dismissed. A second application was made by the Applicant seeking orders of stay of proceedings pending the hearing and determination of an Appeal in respect to the ruling of 31/7/18. The Court determined the application and dismissed it on the grounds that by then there were no proceedings pending as the hearing of the matter had been concluded. The Court proceeded then to render its judgement as aforementioned.

9. The current suit was heard and determined and the Applicant has filed an application seeking orders to set aside the judgement of this Court rendered on the 11/12/19. The application is pending hearing and determination. It is against this background that the Applicant has sought for the recusal of this Court on the grounds that the conduct of the judge in making the decisions that she did in ELC 111 of 2017 is prejudicial and biased against her.

10. There is abundant jurisprudence in our Courts and other jurisdictions in respect to the considerations that a Court must take into account when determining an application for recusal of a judge. These considerations were highlighted by the Supreme Court in the case of **Gladys Boss Shollei Vs Judicial Service Commission & 2 Others [2018] eKLR**;

“25: 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 has a duty to 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.”

11. What is the test to be applied to the considerations? The Court of Appeal in the case of **Kaplana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR** relied on the decision in **Magill v. Porter (2002) 2 AC 357**, where the House of Lords modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. In the case of **The East Africa Court of Justice adopted the same test in Attorney General of Kenya v Prof Anyang’ Nyong’o & 10 Others EACJ Application No. 5 of 2007** when it stated:

“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, 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. v. 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 acknowledgement 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. The test for recusal of a Judge was laid down by the Court of Appeal in the case of **R VS. David Makali and Others C.A.Criminal Application No. 4 and 5 of 1995 Nairobi (unreported)** as reinforced in **R Vs. Jackson Mwalulu & Others C.A Civil Application No. 310 of 2004 Nairobi**, where the Court of Appeal stated that;

“.....The test is objective and the facts constituting bias must be specifically alleged and established”.

14. It is the case of the Applicant that given the decisions of the judge in ELC 111 of 2017, she is apprehensive that she will not be given a fair hearing in this matter. She avers that the Court in dismissing the application to set aside the *ex parte* hearing denied her the right to be heard contrary to the tenets of the Constitution. Further that the Judge in striking out the ELC 111 of 2017 allowed the Respondents the second chance to repair their case and file a fresh suit hence giving them a benefit/advantage. That these decisions have prejudiced her.

15. It has been held that recusal of a judge is a serious matter for which an Applicant bears a duty of establishing the facts upon which the inference of bias is to be drawn by a fair minded and informed observer that the judge is biased. The test of finding bias is an objective one. There must be a reasonable apprehension of bias. The reasonable bias must be held or made by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. see **R V S** above.

16. To begin with the rulings and the judgement of the Court in ELC 111 of 2017 were arrived at based on the facts and circumstances of the case at hand. It rings true that the right of a party to be heard must be protected at all times. However, it is borne of the decisions of the Court that the Applicant’s application was dismissed with reasons. Further the Court exercised its mind and discretion and arrived at the decision to strike out the suit in ELC 111 of 2017.

17. The Applicant has expressed contrary views on what or not ought to have been the judgement of the Court. Such expressions are the applicant’s deductions out of the content and conclusion of the decisions in the rulings and the judgement of the Court in ELC 111 of 2017. Such expressions and deductions do not constitute facts which may be relied objectively by a third party who is fair minded and independent of the rulings and the judgement. Such circumstances do not constitute or disclose any bias or evidence of it on the part of the Court.

18. There is no evidence that the Court was motivated by any bias or the desire to grant a benefit or an advantage to the Respondent. Throughout the application the Applicant has not tabled any evidence to demonstrate any basis to support an inference of bias against the Applicant. The judge exercised her discretion judiciously and if it is the view of the Applicant that the judge misapplied her mind on the law and the facts of the case then the right avenue was to Appeal the said decisions.

19. It is the conclusion of the Court that no fair minded and reasonable observer would conclude based on the decisions of the Court in ELC 111 of 2017 that the Judge was biased towards the Applicant.

20. Notwithstanding my holding in para 19 above, I find that substantive justice would be met by my recusal in view of the ongoing investigations into certain matters alluded to by the Applicant, with the probability of the Court being called as a witness, so that this suit may proceed expeditiously before another Court. The alternative would have been to remand the case until the finalization of the investigations and or any prosecution, if any, that may arise. This cause of action would be undesirable because it will delay the hearing and finalization of this case.

21. For the reasons given in para 20, I therefore grant the application and recuse myself from the case.

22. I direct the Deputy Registrar of the Court to place the file before the Presiding Judge of the Environment & Land Court for purposes of allocation to another Court for further orders and directions.

23. I make no orders as to costs.

24. **It is so ordered.**

DELIVERED DATED AND SIGNED AT MURANGA THIS 18TH DAY OF JUNE 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of

1st and 2nd Plaintiffs/Respondents; Mr Wainaina, Advocate

Defendant/Applicant; Absent but Counsel consented to delivery of Ruling via email.

Njeri, Court Assistant