



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 164 OF 2014**

**EUNICE WAIRIMU MUTURI.....1<sup>ST</sup> PLAINTIFF**

**WASHINGTON MUCHIRI MUTURI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUCHANGI NDUATI NGINGO T/A**

**MUCHANGI NDUATI & CO. ADVOCATES..... DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 21<sup>st</sup> January 2015 in which the Defendant/Applicant seeks for the Honourable Lady Justice Mary M. Gitumbi to recuse herself from hearing this matter, for the matter to be heard and determined by any other judge and for the costs of this Application be costs in the cause.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Defendant, Muchangi Nduati Ngingo, sworn on 21<sup>st</sup> January 2015 in which he averred that this suit should not be handled by Lady Justice Gitumbi because the same judge was involved in another matter **ELC No. 309 of 2013** in which the Defendant/Applicant was representing clients who were unhappy with the way their matter was being handled by her and lodged a complaint with the Honourable Chief Justice. He added that this matter against the Defendant/Applicant following immediately after the aforesaid events and being allocated to the said judge for hearing poses a fantastic possibility that justice will not be served as the said judge may take it upon herself to seize the opportunity to hit back at the Defendant/Applicant mistakenly thinking that he was the one behind the complaint against her. He further averred that previously the said judge has also made orders in this matter which were adverse to the Defendant/Applicant as it became apparent that she wanted to hear the matter herself despite the matter being a civil matter and not a land matter. He concluded by stating that justice would best be served if the said judge recuses herself from this matter altogether in the circumstances.

The Application is contested. The Plaintiffs/Respondents filed the Replying Affidavit of the 2<sup>nd</sup> Plaintiff, Washington Muchiri Muturi, sworn on 10<sup>th</sup> February 2015 in which he averred that he strongly believes that the Defendant/Applicant brought this Application to prolong the proceedings herein and to avoid to

account for monies received as stakeholders amounting to Kshs. 2,300,000/-. He added that he is not aware of any order made herein which is adverse to the Defendant/Applicant. He further stated that the suit that the Defendant/Applicant is referring to being **ELC No. 309 of 2013** has nothing to do with the proceedings herein and in any case the Defendant/Applicant is not a party other than being an advocate representing a party in the referred suit. He further averred that in the present proceedings, the court has not made any adverse comments and /or conducted proceedings in a manner to show that the court will be prejudicial to the Defendant/Applicant at all. He further averred that there are no sufficient grounds which have been placed before the court to enable it make any inference of bias and/or prejudice against the Defendant/Applicant. He further stated that the Defendant/Applicant has only made an allegation which has nothing to do with this Application and further has failed to demonstrate as to how the previous proceedings have a bearing to this Application. He also stated that he does not understand the basis of this Application more so as the Defendant/Applicant has deponed that there is a “fantastic possibility” that justice will not be served and this shows that the Defendant/Applicant is basing his fears on impossibilities. He added that cases are decided on merit and not on past encounters with counsel or parties in any suit. He also averred that the court gave only directions like in other matters up and if at all the Defendant/Applicant was dissatisfied he ought to have appealed but not to make wild allegations against the Learned Judge. He sought for this Application to be dismissed with costs.

The Defendant filed his written submissions.

The issue for determination is whether or not I should recuse myself from hearing and determining this suit. The first reason cited by the Defendant/Applicant as to why I should recuse myself from this suit is that I am also handling **ELC No. 309 of 2013** in which a complaint against me was supposedly made to the Chief Justice and I am likely to hit back at the Defendant/Applicant in this present suit. I have perused the court file for **ELC No. 309 of 2013**. I must say that there is nothing on record in that file that would reveal that a complaint was made against me to the Chief Justice. That matter has progressed well and is at an advanced stage of being settled out of court. The Defendant/Applicant’s assertion that a complaint was made in that matter against me to the Chief Justice is news to me. I was not aware of any such complaint. No one communicated to me of any such complaint having been done, either by the parties to that suit or even from the Chief Justice or the Judiciary Ombudsman. I have come to learn of this from the Defendant/Applicant when he filed this Application. Consequently, I was not going to “revenge” against the Defendant/Applicant in this suit as he alleges or at all.

The Defendant/Applicant has also alleged that I have made previous orders in this suit which are adverse to him. He failed to highlight even one such order. I have studied the court proceedings herein and have confirmed that I have not issued any substantive orders in this matter that would be considered adverse to the Defendant/Applicant.

In light of the foregoing, I consider that the Defendant/Applicant has failed to make a good case as to why I should recuse myself from hearing and determining this suit. Be that as it may, it is a well-established principle that justice must not only be done but should always be seen to be done. In the case of **Alliance Media Kenya Limited –vs- Monier 2000 Limited & Njoroge Regeru HCCC No. 370 of 2007 (eKLR)**, Warsame J did state as follows;

***“In my understanding, the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice.....justice is deeply rooted in the public having confidence and trust in the determination of disputes before the court. It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made.”***

On my part, I see nothing to prevent me from hearing and determining this suit but for the sake of ensuring that the Defendant/Applicant is satisfied that he will get justice in this case, I choose to recuse myself from hearing this matter. It is on that basis that I hereby allow this Application. Costs shall be in the cause. I therefore direct that this file be placed before Okongo, J. on 14<sup>th</sup> March 2016 for reallocation to another judge.

It is so ordered.

**SIGNED AND DELIVERED AT NAIROBI THE 4<sup>TH</sup> DAY OF MARCH 2016.**

**MARY M. GITUMBI**

**JUDGE**