



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 100 OF 2016**

**YUSUF ABDI ADAN.....1<sup>ST</sup> PLAINTIFF**  
**BLUE BIRD AVIATION LIMITED.....2<sup>ND</sup> PLAINTIFF**  
  
**VERSUS**  
  
**HUSSEIN AHMED FARAH.....1<sup>ST</sup> DEFENDANT**  
**HUSSEIN UNSUHUR MOHAMMED.....2<sup>ND</sup> DEFENDANT**  
**MOHAMMED ABDIKADIR ADAN.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This matter was last before this Court on Friday 8<sup>th</sup> April 2016. Just before the Court rose at 4pm, Mr. Sagana on behalf of the Second Defendant made an oral application for the Judge to recuse herself. Mr. Sagana was directed to file a written application partly because of the lack of Court time and also because that is a practice that conforms to the need for transparency in these matters.
2. This matter was first came before the Court on an Application made under certificate of Urgency. The parties and their Advocates attended and there is an issue as to representation. Due to various subsequent applications made on or before the return date there was insufficient Court time on 7<sup>th</sup> April 2016 to deal with all the applications and arguments and a full list. The matter was adjourned to 13<sup>th</sup> April 2016 at noon.
3. Later that day Counsel for the Defendants (all three) demonstrated an intention to attempt to barge into the Judge's Chambers demanding to be heard on various new applications and for hospitality to be provided for them. It was about 3.30p.m. That is time allocated to writing and considering rulings and judgments. Interruptions have an impact on other matters before the Court.
4. Court proceedings are heard in Court. If the particular circumstances of a case require a closed hearing the appropriate arrangements can be made but they will still be in Court, that is the physical Court. The Parties were told to return the next day. That is when the application for recusal was made.
5. The decision for a Judge to recuse him or herself has to be taken by the Judge. The authorities on recusal range from the view that a Judge should accede to the "request" as soon as it is made. That is not a popular view because it may lead to and does encourage "*forum shopping*". In some jurisdictions "*forum shopping*" is frowned upon. It also leads to unnecessary delay in the Hearing and disposal of

Court proceedings. The other extreme of the range of authorities is that recusal should only be acceded to in exceptional circumstances and for good reason. In this case the Judge takes the view that like all exercise of discretion the Court should take into account the circumstances of the case before it and its characteristics both impinging on the issue and peripheral to it. That is in keeping with the principle of the independence of the Judiciary as set out in **Article 160 of the Constitution**.

6. The Constitution of Kenya 2010 enshrines the principal of access to justice. There is anecdotal evidence that some people believe that means access to a Justice. That is not correct. Access to justice means access to all citizens to a fair and just system that is properly and efficiently administered taking into account the available resources. In this case the Parties have been provided with ample Court time and without a doubt that will continue. **Article 159(2) of the Constitution provides:**

*"In exercising judicial authority, the courts and tribunals shall be guided by the following principles-*

*(a) Justice shall be done to all, irrespective of status;*

*(b) Justice shall not be delayed;*

*(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

*(d) Justice shall be administered without undue regard to procedural technicalities; and*

*(e) The purpose and principles of this Constitution shall be protected and promoted.*

**Article 50 of the Constitution provides;**

*(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.*

*2. Every accused person has the right to a fair trial, which includes the right:-*

*(a) To be presumed innocent until the contrary is proved;*

*(b) To be informed of the charge, with sufficient detail to answer it;*

*(c) To have adequate time and facilities to prepare a defence;*

*(d) To a public trial before a court established under this Constitution;*

*(e) To have the trial begin and conclude without unreasonable delay;*

*(f) To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

*(g) To choose, and be represented by, an advocate, and to be informed of this right promptly."*

7. As a starting point, the Court must consider the question of bias. Has there been actual or perceived bias? In this case, the striking theme is that all the Parties and the Advocates both current and potential have in both word and deed demonstrated a dislike for their Tribunals. To my mind you cannot get a more level playing field than one where everyone "hates" the Judge more or less equally.

8. Although that deals with the present position. However, the question must be asked whether that is a

position that will endure throughout the proceedings.

9. To ask any Judge to answer that question is require them to be both a fortune teller and an arbiter of their own emotions. It is a basic tenant of a fair trial that a person should not be a judge in his/her own cause. Whether the events of Thursday afternoon and what followed will affect the Court's decision making, I know not and it matters not. Whether those events and actions were deliberately orchestrated to precipitate a recusal, I know not and it matters not. The record speaks for itself and that decision is for another tribunal.

10. In addition, there are the Applications filed in Court and correspondence raising side issues. The impact of those side issues on the administration of justice generally can be seen in the number of Court sitting hours used up without any significant progress. That in addition to the interruptions during time allocated for writing and considering rulings. The overriding objective and enunciated by Section **1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya** places a professional obligation on all of us to further that objective. The delays in this matter although caused by an intention to progress this matter has had a direct and negative impact on other Court users and the length of sitting time necessitated to accommodate them is testament both to their patience and also inconvenience.

11. Ultimately, the first consideration is fair and transparent administration of justice. That includes eliminating not only actual bias, but the perception of bias as well. Therefore for the higher ideal of a fair and just system under the 2010 Constitution, I accede to Mr. Sagana's request and allow the Application.

Orders accordingly.

**FARAH S. M. AMIN**

**JUDGE**

**SIGNED AND DELIVERED AT NAIROBI this 13th day of April 2016.**

**In the Presence of:**

Otieno - Clerk

Mr Paul Muite and Mr Ahmed Nasir for the Plaintiff/Applicants

Ms Janmohamed for the First Defendant

Mr Sagana for the Second Defendant

Mr Aden Daud for Third Defendant

Mr Oraro and Mr Kemboi for the Company as well \* (issue to be resolved)