



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 226 OF 2018

MAMA MILLERS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SUNRISE SYNTHETIC LIMITED.....DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **17th June 2020** by the Defendant/ Applicant seeking for orders that;

- 1. That Lady Justice L. Gacheru, the Honourable Judge currently seized of this case do recuse herself from hearing the same and the case be transferred to a different Judge for hearing and determination.**
- 2. THAT cost of this Application be provided for.**
- 3. THAT in the interest of justice, any other orders deemed appropriate and suitable in the circumstances of this matter be made.**

The Application is premised on the grounds that the Defendant/ Applicant is of a considered belief that there is a real possibility that the Honourable Judge is not impartial and has bias in favour of the Plaintiff/ Respondent in the handling of the case so far. Therefore, the Defendant/ Applicant will not have a fair and impartial trial and Judgment of this case and there are several factors which point to lack of impartiality and fairness. It was contended that by a Ruling delivered on **19th December 2018**, the Court made orders granting the Plaintiff's /Respondent's prayers of injunction pending the hearing and determination of the suit, which orders were sought in the Plaintiff's/ Respondent's Notice of Motion Application dated **9th August 2018**, without any inter parties hearing and consideration of the said Application. That this was done without regard for the rights and interest of the Defendant/ Applicant, and without any reference on the merits of the Defendant's/ Applicant's opposition. Further that the Honourable Judge declined to determine the Defendant's/ Respondent's Preliminary Objection on a point of law, which would have had the effect of determining whether the suit should proceed for hearing or is barred by **Section 4 of the Limitations of Actions Act**. That had the Honourable Judge been impartial, the proper thing was to determine the Preliminary Objection on its merit first and then proceed with the suit, depending on the outcome. Further that the Honourable Judge initially agreed to hear the Preliminary Objection and ordered disposal of the same by way of written submissions, which submissions were duly filed by the parties, but suddenly the Judge wrote a Ruling stating that the Preliminary Objection raised by the Defendant/ Respondent should be incorporated in the main suit .

That the Defendant/ Applicant read bias and lack of impartiality on the reasons given by the Honourable Judge for putting the Preliminary Objection in abeyance. Further that had the Preliminary Objection been found to be merited, it would have terminated the Plaintiff's/ Respondent's case .It was further contended that the only reason given in declining to make a determination of the Preliminary Objection was that the Court is not called upon to use its precious judicial time determining interlocutory applications and yet the Court proceeded to make interlocutory orders of injunctions, all in favour of the Plaintiff/ Applicant against the Defendant/ Respondent .

Further that without inter parties hearing, the Honourable Judge still proceeded to issue status quo orders. That the Defendant/ Applicant was condemned unheard by the Honourable Judge as its Preliminary Objection was pushed without determination, injunction orders were issued against it without inter parties hearings and status quo orders were ordered against the whole property even though the Plaintiff/ Respondent was claiming only a small part of property.

Further that the Honourable Judge showed bias when she decided not to entertain, the Defendant's/ Applicant's objection concerning the Plaintiff's/Applicant's Supplementary Affidavit which was filed late without leave of Court after the Defendant/ Applicant had served its written submission of the Preliminary Objection. It was further contended that it was after the Submissions to the Preliminary Objection had been filed and after the Defendant/Respondent had raised the complaint about the Supplementary Affidavit, that the Court decided to forgo

determining the Preliminary Objection and also grant orders in the Plaintiff's/ Respondent's Notice of Motion Application without inter parties hearing.

The Application is supported by the Affidavit of, **Jayantilal Kachra Shah** sworn on **17th June 2020**, in which he reiterated the contents of the grounds in support of the Application. He further contended that together with his Co- Director they have been attending Court and have been able to hear and see what took place. That he had been advised by his Advocates that it was proper for the Preliminary Objection be determined first on merit, before the Court would proceed with hearing of any Applications or the main suit as the upholding of the Preliminary Objection could lead to the dismissal of the whole suit.

That the Plaintiff's/ Respondent's Notice of Motion Application for injunction and other prayers have to date not been heard, even though the Honorable Judge has granted the Plaintiffs key prayers in the Application and stated that the said application was compromised yet the Defendant/ Applicant had filed a Replying Affidavit opposing the said Application dated **9th August 2018**. Further that the Defendant/Applicant also filed a statement of Defence and Counter Claim to the suit and therefore the Honourable Judge ought not to have granted orders to the Plaintiff/ Respondent, as if the suit was undefended and his Application unopposed.

Further that the Court without hearing evidence from the Plaintiff/ Applicant made orders that the Plaintiff/Respondent deposit in Court what he alleged to be the balance of the purchase price for the Defendant to collect which goes to suggest that the Honourable Court had believed the Plaintiff/ Respondent on the fact that there was a valid and subsisting sale agreement that there was a balance and how much it was, even when all pleadings showed that if there was a sale agreement, it had been impugned or rescinded. That the Defendant/ Applicant has reasonable grounds to believe that there would be no fair trial and impartial hearing and determination of the suit if the Honourable Judge does not recuse herself.

The Application is opposed and the Plaintiff/Respondent's Managing Director, **Benard Wainaina** filed a Replying Affidavit sworn **2nd July 2020**, and averred that there is no evidence tendered by the Defendant/ Applicant that showed that the Honourable Judge is biased in favour of the Plaintiff/ Respondent. He averred that on **19th December 2018**, the Honourable Judge issued an order of injunction and ordered that the Preliminary Objection raised by the Defendant/ Applicant be included in the defence and be canvassed at the hearing of the main suit. That the Defendant/ Applicant has not demonstrated that by issuing the said orders, the Court was biased in favour of the Plaintiff/ Respondent to create doubts in the mind of a reasonable man that the Court is not impartial.

Further that on **8th October 2019**, the Plaintiff/ Respondent filed an Application seeking to consolidate the instant suit with **ELC 226 of 2018**, and that the said Application was dismissed with costs, and if indeed the Court was biased in favour of the Plaintiff/ Respondent, the said Application would have been granted. It was his contention that the Defendant/ Applicant is sensing defeat and has chosen to employ all dirty tricks including employing delay tactics to frustrate the disposal of this case. He contended that the Application is intended to paint the Court in bad light, to intimidate the Court from discharging its constitutional duty to do justice to the parties. That the Application for recusal is not made in good faith as the Defendant/ Applicant has not given any explanation why it is filing the application for recusal one and half years after the contested orders were made.

The Defendant/ Respondent filed a Supplementary Affidavit sworn on **4th July 2020**, by **Jayantilal Kachra Shah**, and averred that the Application for recusal is meritorious and the Defendant/ Applicant has clearly shown a Ruling and orders allowing the Plaintiff's prayers without the Application being determined. That the Judge's failure to determine the Preliminary Objection which raised points of law including the fact that the sale agreement was invalid **ab initio** as it was entered into in breach of legal provisions showed bias or partiality. That the Judge should also have ordered that the amount in the Counter claim be deposited in Court too. He further contended that the Plaintiff's/ Applicants were the ones benefitting from the orders granted and the Defendant/ Applicant or its Counsel has no business casting aspersions. That the Plaintiff/ Respondent wants to incite the Court against the Defendant/ Applicant by alleging intimidation but that recusals are normal in legal practice.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The Court has also considered the Pleadings by the parties, the affidavits, and provisions of law and issue for determination is **whether I should recuse myself**.

There are a plethora of decisions on the issue of recusal of a Judicial Officer from hearing a matter. **Blacks Law Dictionary 8th Edition (2004) (p 1303)** defines recusal as;

“Removal of oneself as a judge or policy maker in a particular matter especially because of conflict of interest.”

It is evident that there are various issues that needs to be considered in a matter calling for the recusal of a Judge. It is not in doubt that the Applicant has a right to call for the recusal of a Judicial Officer, myself included, on apprehension of bias, However the said 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 a reasonable and right minded persons applying themselves to the question and obtaining thereon the required on formation ... The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.”

It was further stated;

“ An unfounded and an unreasonable apprehension concerning a Judicial officer 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.’

What this Court should then determine at this juncture, is whether the apprehension that the Court is not impartial and thus biased against the Defendant/applicant is justifiable. From the above decision, it is clear that the standard that is required is that the mind of a reasonable person should be applied to determine whether there is an apprehension of bias.

From the Defendant’s/Applicant’s Application together with the submissions, it is clear that the Applicant’s bone of contention stems from the fact that in their view, the Court granted an injunction order without considering the Application. Further that the Court ordered that the Preliminary Objection be incorporated in the Defence. However, this Court would like to point out that the Court did not and has not refused to determine the Preliminary Objection. It should be noted that the Court in exercise of its discretion noted that it would be in the interest of Justice and in furthering of the principle of expeditious disposal of matters before the Court, found it necessary to incorporate the Preliminary Objection in the Defence so that the same can be determined on merit during the full hearing .

From the above explanation, it is clear that the Court is now trying to explain or defend its decision instead of determining whether there is sufficient evidence of apprehension of bias and thus reasons to recuse myself or not. The reasons for the Court’s Ruling were indicated in the said Ruling and this Court needs not repeat the same.

It is quite clear that the Applicant is dissatisfied with the Court’s decision, and the reasons that the Court gave for its decision and particularly the applicant is concerned with the rationale of the said decision. If that is the case, the Court finds that the best remedy that would have been available to the Applicant would have been to Appeal the said decision.

It is very clear that, the call for recusal ought to be based on the apprehension of a reasonable man. The Court notes that the Application for recusal has been brought over a year from the date that the said decision was made. Further it is not in doubt that the Court has since then made another Ruling in the instant suit. Would it then have taken a reasonable person over one year to notice that there was bias? Nothing should be further from the truth and further the apprehension of bias only stems from the alleged decision of 19th **December 2018** and no alleged bias has been proffered subsequently or before the said decision. If indeed there was existence of bias, a reasonable person ought to have caught it up from the instance and seen a pattern of the same. In the case of **Miller....Vs...Miller (1988) KLR 555** the Court of Appeal held that;

“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 of a Judge by a party.”

Further in the case of **Anyang Nyongo & 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.”

Further, it is evident that the Defendant/ Applicant has sought for a review of the Court’s decision. The Court finds and holds that in seeking for a **recusal**, while at the same time seeking for a review of the said decision, the same is tantamount to forum shopping and giving the Applicant an opportunity to choose its Court at the detriment of the Plaintiff/ Respondent.

Having now carefully considered the instant Application, the written submissions and the relevant provisions of the law, the Court finds and holds that the Defendant/ Respondent has not presented any evidence to prove any bias against it or partiality on the part of this Court to warrant this Court’s (myself) recusal from the matter. Consequently, the Court finds and hold that Notice of Motion the Application dated **17th June 2020**, is **not** merited and the same is dismissed entirely with costs to the Plaintiff/ Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 29th day of October 2020.

L. GACHERU

JUDGE

29/10/2020

Court Assistant – Jackline

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.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. J. K. Mwangi for Plaintiff/Respondent

M/s Hamba Holding brief for Mr. Ogada for Defendant/Applicant

L. GACHERU

JUDGE

29/10/2020