REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 225 OF 2018

SOLOMON WANYOIKE WAINAINA.....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 and therefore the Defendant/ Applicant will not have a fair and impartial trial and judgment of this case. That 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 for 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 . It was contended that this was done without regard for the rights and interest of the Defendant/ Applicant and without any reference on the merits of the Defendants/ 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 to hearing or is barred by **Section 4 of the Limitations of Actions Act**.

It was further contended that had the Honourable Judge been impartial, the proper thing was to determine the Preliminary Objection on its merit first and proceed with the suit depending on the outcome. Further that the Honourable Judge initially agreed to hear the Preliminary Objection and ordered disposal 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.

It was further contended that the Defendant/ Applicant reads bias and lack of impartiality in the reasons given by the Honourable Judge for putting the Preliminary Objection in abeyance and further notes 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 order that status quo be maintained. 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 the 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 submissions 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,** wherein he reiterated the contents of the grounds in support of the Application. It was his further contention that together with his Co-Director, they have been attending Court and have therefore heard and seen what took place. That he had been advised by his Advocates that it was proper that the Preliminary Objection be determined first on merit before the Court proceeded with hearings of any Applications or hearing of the main suit as it had led to the dismissal of the whole suit.

He also averred 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 granted them 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**. 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.

That the Court without hearing evidence from the Defendant/ 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 as to the fact that there was a valid and subsisting sale agreement and 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, **Solomon Wanyoike Wainaina,** filed a Replying Affidavit sworn **8th July 2020,** and averred that there is no evidence tendered by the Defendant/ Applicant to show that the 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 defense and be canvassed at the hearing of the suit. That the Defendant/ Applicant has not demonstrated that by issuing the said orders, the Honourable Judge was biased in favour of the Plaintiff/ Respondent and to create doubts in the minds 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 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 . Further 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 has filed 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. He averred 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. It was his contention that the Honourable Judge should also have ordered the amount in the Counter claim to be deposited in court. He further contended that the Plaintiff's/Respondent was the ones benefitting from the orders granted and the Defendant/ Applicant or its Counsel has no business casting aspersions. He further contended 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 read and considered the Pleadings by the parties, the affidavits , and provisions of law and the Court finds the 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 not in doubt that there are various issues that needs to be considered in a matter calling for the recusal of a Judge. It is further not in doubt that the Applicant has a right to call for the recusal of a Judicial Officer, this Court or myself included, on apprehension of bias. However, that 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 is whether the apprehension that the Court is partial and thus biased against the Defendant/Applicant is justifiable. From the above, it is not in doubt what it is required is that the mind of a reasonable person be applied to determine whether there is an apprehension of bias.

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

From the above, it is the Court's considered view that even while trying to make a determination on whether or not to recuse myself, I am still forced to explain and defend the Judicial decision. It is evident that the reasons for the said decisions had been indicated in the ruling. In this decision, I should only be called to respond to the question of whether there is evidence of apprehension of bias.

It is quite clear that the Applicant is dissatisfied with the Court's decision and was also not satisfied with the reasons that the Court gave for its decision. If the Defendant/Applicant was dissatisfied with that decision, the best remedy available to the Defendant/Applicant would have been to Appeal the decision. The said Ruling was allegedly delivered on **19th December, 2018** and this application was filed on **17th June, 2020.** Why did the Defendant/applicant take that long to file the instant application?

As already stated above, 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? It is the Court's considered view that nothing should be further from the truth. Further the Court notes that 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. It is the Court's further considered view that if indeed there existed 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.''***

There is no doubt that the Defendant/ Applicant has sought for a review of the Court's decision. The Court finds and hold that seeking for a recusal while at the same time seeking for a review of the said decision, 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 or the Judge to warrant this Court's recuse itself from the matter. Consequently, the Court finds that the **Notice of Motion 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 the Plaintiff/Respondent

Mr. Hamba holding brief for Mr. Ogada for the Defendant/Applicant

L. GACHERU

JUDGE

29/10/2020