



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 525 OF 2013

THUGI RIVER ESTATE LIMITED.....1ST PLAINTIFF/APPLICANT

PAUL K. MUTE.....2ND PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT/RESPONDENT

WA-GATHAGU LIMITED.....2ND DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES.....3RD DEFENDANT/RESPONDENT

[COURT'S DIRECTIONS]

On 6th May, 2013, the Plaintiffs herein filed this suit vide a Plaint even dated and sought for various prayers. Simultaneously, the Plaintiffs filed a Notice of Motion under Certificate of Urgency and prayed for various orders. Among the orders sought was prayer No.7 ;-***that there be no further dealings in the suit property pending the hearing and determination of this suit.***

The parties filed their pleadings and thereafter their written submissions. The matter was set down for Ruling on 10th December, 2013 but the court could not deliver the Ruling on this material day as the Judge was still writing Judgments for Criminal Appeals that had been reserved after the service week. The court indicated that the Ruling would be delivered on Notice. The said Ruling was eventually delivered on 16th July, 2014. Among the Orders issued is an Order for Status Quo to the effect that there shall be no dealing with the suit property for a period of 12 months upon which time, the Plaintiffs were ordered to set the matter down for hearing. Parties were also ordered to comply with Order 11 within a period of 30 days from the date of the Ruling. This was meant to set down the process of preparing the matter for hearing of main suit.

However, on 17th July, 2014, the 4th Defendants filed a Notice of Motion seeking to be enjoined as a Defendant in this suit. The 4th Defendant also prayed that the Order issued on 16th July, 2014, be set aside, varied and/or be discharged unconditionally forthwith.

The above Notice of Motion came for hearing on 23rd July, 2014 when the 4th Defendant was enjoined as a party to the suit by consent. However, the counsel for the 4th Defendant also applied that the matter be placed before the Presiding Judge of Environment and Land Court, so that he could argue prayer No.2 of the Notice of Motion.

Though the said application was opposed by Mr. Mureithi for the Plaintiffs/Respondents, the Court obliged and referred the matter to Justice Nyamweya, Presiding Judge, ELC.

From the Courts records, the matter came before Nyamweya J. on 31st July, 2014 and 5th August 2014, when the Judge directed that this matter be placed before me on 2nd September, 2014 for hearing of the Notice of Motion dated 17th July, 2014.

I have also noted that on 4th August, 2014, the 4th Defendant/Applicant filed another Notice of Motion and prayed that; I be disqualified and /or in the alternative I do disqualify myself from further dealing with this case.

The 4th Defendant raised various grounds seeking my recusal from the matter. Among the grounds for the application are;

- i. ***That 4th Defendant has reasonable apprehension that the Judge is not able to handle this matter on a dispassionate manner.***
- ii. ***That because the Judge issued orders in this matter which adversely and prejudicially affected the applicant, without the applicant being heard.***
- iii. ***Justice must not only be done but must also be seen to be done.***
- iv. ***That there is a reasonable probability that the Judge is biased in favour of the Plaintiffs herein.***
- v. ***That the applicant stands to suffer irreparable loss and damage unless the Orders are granted.***

The application was also supported by the Affidavit of **Maara Gichuhi**, one of the Directors of the applicant's company.

The application was also supported by the 1st Defendant who filed an Affidavit in support of the application sworn by Samuel Mundia Wanjohi , the Legal Manager in the 1st Defendant Bank.

The 2nd Defendant did not file any Affidavit but the Counsel present in Court indicated that he was in support of the instant application. The application is opposed by the Plaintiffs herein who filed a Repling Affidavit sworn by the 2nd Plaintiff.

When the matter came for hearing on 2nd September, 2014, Mr Gatheru , Counsel for the applicant sought to have the matter mentioned in Chamber so that they could state the grounds for the application. The counsel submitted that the procedure for such an application is to have it first mentioned in the Judge's Chambers for directions. The applicant's Counsel had also attached some authorities in support of his application. He cited **Judicial Review case No.124 of 2014** where the Judge set out the procedure for an application for recusal in paragraph 38.

“The procedure in application for recusal is now well settled. The usual procedures in application for recusal is that the Counsel for the applicant seeks a meeting in Chambers with the Judge or Judges in the presence of her or his opponent. The grounds for recusal are put to the Judge who is given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge, the applicant would, if so advised move the application in open Court”.

The said meeting was done in chambers on 3rd September, 2014 in the presence of the Counsels for the all the parties herein. Mr Gatheru informed the court that after the Ruling delivered by this Court on 16th July, 2014, his client instructed him to file an application for joinder as a Defendant and for review of the said Ruling. The 4th applicant further filed an application seeking recusal of this court on the ground that the parties were apprehensive that there was bias and the 2nd applicant lodged a complaint against the Judge. Mr. Gatheru further submitted that he is not forum shopping but only safe guarding the court from the said accusations of apparent or perceived element of bias. Mr Gatheru therefore urged the court to recuse itself.

Mr Onyango for 1st Defendant also submitted that his client feels that justice may not be done if the court continues to handle the matter. He further submitted that he is acting on the instructions of his client had no personal vendetta against the Judge.

The Plaintiffs in their opposition to the application submitted that the applicant's application is an attempt to shop around for a forum which will hear their case and determine in their favor and that the applicant has shown no facts constituting bias as alleged.

At this stage, I will only give directions as to whether I will recuse myself at this juncture or allow the applicant to proceed with its Notice of Motion dated 4th August, 2014.

The applicants counsel appeared in chamber with the other counsels and stated the grounds for recusal. The applicant has expressed apprehension of bias by the Court due to the fact that the Judge delivered a Ruling which was in its disfavor. The **Bangalore Principles of Judicial Conduct** defines bias as:-

“Bias or prejudice has been defined as leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude, or point of view which sways or colors judgments and renders Judge unable to exercise his or her function impartially in a particular case. However, this cannot be stated without taking into account the exact nature of bias”.

Further the Law on the recusal of a Judge is well settled. The Supreme Court of Kenya in the case of **Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others. Petition No.4 pf 2012 (2013)eKLR** held that .

“Recusal as a general principle has been much practiced in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account .The term is thus defined in the Black Law Dictionary 8th Edition (2004) (P (303) “Removal of oneself as a Judge or policy make in a particular matter especially because of conflict of interest” From this definition, it is evident that the circumstances calling for recusal for a Judge are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that Justice be uncompromised; that the due process of law be realized and be seen to have its rules; That the profile of the rule of law in the matter in question be seen to have remained “uncompromised”.

Again on the issue of recusal of a Judge on the ground of bias, the Court of Appeal in the **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others Civil Appeal No.36 of 1996**, held that:-

“ Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of - the Tribunal in question;

in the sense that he might unfairly regard or unfairly regarded with favor or disfavor the case of a party to issue under consideration by him; the real test in term of real danger rather than real likelihood to ensure that the court is thinking in terms of possibility rather than probability of bias . Although it is important that justice must be seen to be done, it is equally important that Judicial Officers discharge their duties to sit and do not, by acceding too readily to suggestion of appearance of bias, encourage parties to believe that by seeking the disqualification of Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favor”.

The applicant’s counsel informed the court that their clients felt apprehensive that there was bias on the part of the Judge as she delivered a Ruling and gave orders of **Status Quo** which were not sought for by the Plaintiffs in their Notice of Motion.

In my Ruling, I gave orders of **Status Quo** to the effect that there shall be no dealing with the suit property. The **Status Quo** was to last for 12 months within which time the Plaintiffs were ordered to set the matter down for hearing. As I stated earlier, the plaintiffs had prayed for an order of no further dealing with the suit property until the suit is determined. Section 3A of the Civil Procedure Act gives the Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.

The applicant has alluded that it is apprehensive that it may not obtain justice if this court continues to handle the matter as there is some element of perceived bias. However, the court notes that it issued a Ruling which could have been in disfavor of the applicant herein. The applicant is aggrieved by that decision and to my mind, the best recourse would be to apply for a review or appeal against that Ruling.

I have noted that the applicant filed an application to set aside or vary this court’s Ruling. However, the applicant has sought for recusal of this court before that application is heard.

It is settled principle that *Justice must not only be done but must also be seen to have been done*. The applicant herein feels that justice may not be done if I continue to handle this matter. Much as I find that apprehension far-fetched, I would not hesitate to recuse myself, if only my recusal would give the applicant the confidence to approach the Court for arbitration of this matter and also to remain assured that justice would indeed be done. The parties do approach the Court seeking for justice and it is my believe that all parties in this matter are in court seeking for Justice. I would therefore not wish to stand as an obstacle on the way of any litigant who is in pursuit of justice.

For the above reasons I will therefore proceed to recuse myself from further handling of this matter. Consequently, I will refer this matter to the Presiding Judge, of Environment and Land Court for further directions.

Dated this 16th day of September, 2014.

L. N. GACHERU

JUDGE

16/9/2014

Coram Before Hon.Gacheru Judge

Court Clerk Kamau

Mr Gatheru for 4th Defendant/Applicant.

Mr.Onyango for the 1st Defendnt.

Mr Kihunyu for the Plaintiffs.

Mr Onyango holding brief for Mr Mburu for 2nd Defendant.

L. GACHERU

JUDGE

16/9/2014

Court:

These directions to be typed and the file to be placed before the presiding Judge of Environment and land Court on **1st October, 2014**, for further directions.

L. GACHERU

JUDGE

16/9/2014