REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 69 OF 2019

PROF. RICHARD ONYINO SIMWA.....PLAINTIFF

VERSUS

JOSHUA ANG'ELEI.....1ST DEFENDANT

ROBERT LOBUR ANG'EI.....2ND DEFENDANT

GEDION LOITALIM ANG'ELEI.....3RD DEFENDANT

ALLAN EGILAE ANG'ELEI.....4TH DEFENDANT

LAND REGISTRAR TRANS-NZOIA COUNTY.....5TH DEFENDANT

RULING

1. The application dated **25/2/2020** and filed in court on the same date, brought under **Article 50(1)** and **25(c)** of the **Constitution, Rule 5** of the **Judicial Code of Conduct and Ethics, 2012**, has been brought by the plaintiff. It seeks the following orders:-

> **(1) That Honourable Justice Mwangi Njoroge be pleased to recuse himself from hearing and adjudicating this matter for being biased.**
>
> **(2) That the costs of this application be in cause.**

2. The application is supported by an affidavit of the plaintiff sworn on **25/2/2020.**

3. The 3rd defendant filed grounds of opposition dated **7/7/2020** and opposed to the plaintiff's application dated **25/2/2020** and pray that the same be dismissed with costs on the following grounds:

> **1. The plaintiff has not placed before this honourable court any material which may lead a fair-minded and informed observer to conclude that the Honourable Justice Mwangi Njoroge, who is enjoined under the Judicial Code of Conduct and Ethics to make decisions based on objective criteria, will not be impartial in determining this suit.**
>
> **2. The application lacks merit as there is no evidence of circumstances which would give rise to prejudice or a jaundiced view on the part of the Honourable Justice Mwangi Njoroge.**

4. There was no order to file submissions on the instant application since the plaintiff's counsel preferred to rely on the documents on the record only. I have considered the application and the response.

5. The main issue arising from the instant application is whether there are good grounds for recusing myself from the hearing of this suit.

6. The grounds upon which the application is made are that in the plaintiff's perception this court may not be impartial in this matter; that this court has held an extremely partisan position regarding this matter that will not permit a fair hearing before this court; the applicant also argues that it is in the spirit and letter of the Constitution for every party before a court of law to be accorded fair trial and that it is in the interest of fairness and justice that this court recuse myself from adjudicating this matter.

7. An examination of some previous decisions on self-recusal reveal that it is not proposal that should be readily acceded to by judges, partially for the reason that sound grounds must be first proved, and secondly judges have a duty to sit that should not be incommoded by frivolous applications for self-recusal. That duty is based on the oath of office they took. Finally forum-shopping by crafty litigants should be discouraged.

8. In **Hon. Kalpana H. Rawal V Judicial Service Commission & 2 Others Civil Appeal (Application) No. 1 of 2016 [2016]** the Court of Appeal of Kenya stated as follows:

> **"… Before we consider the merits of the application, however, there are a few issues raised by the parties which we must dispose of. First, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically disqualify himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary, decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in Locabail UK Ltd Vs Bayfield Properties Ltd [2000] Q.B. 451 a judge "would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance."**

9. In **Galaxy Paints Co. Ltd V Falcon Guards Ltd [1999] eKLR** the Court of Appeal observed as follows:

> **"Although it is important that justice must be seen to be done, it is equally important that judicial officers should discharge their duty to sit, and do not, by acceding too readily to suggestions of bias, encourage parties to believe that by seeking disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour …"**

10. In the case of **J G K v F W K [2019] eKLR** Gikonyo J decried the inclination of litigants to apply for self-recusal, stating as follows:

> **"My position has always been that recusal should not be undertaken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, say, bias or prejudice or conflict of interest or personal interest on the part of a judge. The stringent test is more in accord with the constitutional desire to attain the independence of the judge in the administration of justice free from intimidation or blackmail. The trait not to fear or show favouritism in a case is instilled by the Constitution and oath of office of a judge. These principles guarantee and are indispensable facets of fair hearing and access to justice. The presumption therefore is that parties submit themselves to a court manned by independent, thoroughly fearless and impartial judicial officers. What must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favourable to their causes. I lament that forum-shopping returns us to the darkest days in the administration of justice; it erodes all the gains made and distorts the values, objects and purposes of the Constitution. See Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010. Such vice will kill the entire justice system in any civilized society. My earnest view is that law serves legitimate interests of a litigant as opposed to individual desires that a particular judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases for all."**

11. In the case of **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR** the Supreme Court of Kenya observed as follows: .

> **"It cannot therefore be stated in general terms that any Supreme Court Judge who sits/sat in the JSC will, as a matter of cause, not adjudicate in a matter where the JSC is a party. Such a pronouncement will be a total mockery of the Sovereign will of the People of Kenya who established the two institutions in the Constitution and willed that they carry out their various functions simultaneously.**
>
> **Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law"**

12. In **Andrew Alex Wanyandeh -vs- The Attorney General & Kenya Railway Corporation; Nairobi Milimani HCCC No. 844 Of 2005,** Justice Hatari Waweru upon allegations of being biased due noted as follows:

> **"There is nothing like a litigant veto of the court or judge hearing his matter; litigants cannot choose their judges. Applications for disqualification of judges should not be lightly allowed. That would tend to erode public confidence in the courts and the determination of justice."**

13. In the case of **Republic V Mwalulu & 8 Others: [2005] 1 KLR** the court of appeal while ruling on the principles on which a judge would disqualify himself from a matter held as follows:

> **"1. When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. <u>The test is objective and the facts constituting bias must be specifically alleged and established.</u>**

2. In such cases the Court must carefully scrutinize the affidavits on either side,, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.

3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself."(emphasis mine)

14. The applicant's main claim being that this court may not deal with the matter impartially, there is need to assess the instant application on its merits against the principles set out in the foregoing decisions and for this a narrative of its background is necessary.

15. The background was only partially given by the applicant in in his supporting affidavit. It is that another suit, **Kitale ELC 118 of 2015, Sheila Kabole Mabwa Vs Joshua Angelei & Others,** involving the suit land and in which the applicant was not a party, was heard and determined on **3/12/2018.** In that judgment the subdivision of the suit land was found to have been irregular and all the titles to the sub plots of which the applicant apparently has an interest in one, were nullified and the title reverted back to its former whole and vested in the names of the defendants in that suit. The applicant filed this suit on **21/11/2019**, almost one year after the judgment and sought a permanent injunction against the respondents herein, and the 1st - 4th amongst them were defendants in the previous suit. That suit had been made the lead file after its consolidation with another suit that is **Kitale ELC No 87 of 2015 - Robert Lobur Angelei & 3 Others Vs Sheila Kabole Mabwa.**

16. In **ELC No. 118 of 2015** the plaintiff, Sheila, claimed that she was the owner of plot **No. 247** and that the defendants had cultivated the said land and planted on it without the consent or knowledge of the plaintiff. Sheila sought to be declared the sole owner of the said land and an injunction. The defendant's defence is that the Sheila's documents were obtained fraudulently without disclosure that the suit land had been purchased by their parents from the Sheila's parents, and that the defendants had been on the suit land since **1988** with the knowledge of the plaintiff. In paragraph **28** of the court's judgment this court found that the Sheila's evidence, rather than aid her case, lent credence to the defendants' claim that they were in possession of the land from **1988** to **2016**. The court granted the defendants the ownership of the land.

17. Notwithstanding the judgment, the applicant herein now seeks in the present suit an injunction restraining the defendants from interfering with the suit land which is the same land in the concluded cases mentioned above, and a declaration that his acquisition of the title deed in respect plot **No. 248,** one of the subdivisions nullified in the previous cases, was legal.

18. The applicant exhibits in his application a copy of a title in his name issued first to Sheila on **21/11/2014** and later to him on **22/1/2015.**

19. Alongside the plaint was filed an application for an injunction against the defendants. The scanty record of activity in the matter is that on **21/11/2019** this court received the injunction application and for expedition ordered its service for hearing *inter partes* on **28/11/2019**. On the latter date the plaintiff's counsel stated that he served the application only three days earlier and the application was not heard. The application only came up later on **29/1/2020** when the court gave a time frame for filing submission and gave a ruling date, that is **5/3/2020.** Notably at that juncture the applicant had not raised the issue of recusal. No submissions were filed by the applicant or the respondent, and no ruling was made in the matter because the preparation of a ruling was intercepted by the instant application which was filed on **25/2/2020** and so the court put aside its tools to focus its attention on the applicant's claims. It is noteworthy that at no time during the proceedings did the applicant's counsel orally apply for consideration of any interim order. On **5/3/2020** this court gave a time-frame for the filing of responses to the instant application and set the matter down for a mention on **19/3/2020**. The services of all courts were affected by the current pandemic and the court never sat on the latter date. However when the court services resumed to a greater degree the matter was among those affected by the shutdown which were revived by fixing them for a mention and it was at the instance of the court given the mention date of **17/11/2020** on which date the instant ruling date was issued. That is just but a brief history of this suit.

20. A section of the applicant's affidavit states that when his injunction application came up before court the court *"intimated in open court that the matter was res judicata"*. He further alleges that the court stated that his case "lacks basis ab initio as he had dealt with land case number 118 of 2015." He therefore felt aggrieved by the court's comment. The applicant also stated that the court made comments "*questioning my absence when the case number 118 of 2015 was on*." The applicant finally alleged that the defendant's grounds of opposition filed after these alleged comments had the same wording as that used by the court. finally he states verbatim as follows in his affidavit:

"That since the Honourable Judge Njoroge Mwangi has handled ELC No 118 of 2015 as consolidated with ELC No. 87 of 2015 and believes that the court has heard and determined on merit the issue in the present case, he is not fit to hear and determine my case since he has already shown in open court that he will not render a fair hearing."

21. The background to the application having been set out hereinabove it is clear to see that even the most intrepid of litigants, fully knowing the facts of the case, would approach the court with some trepidation and readiness to offer explanations since there is a final judgment relating to the main parcel that has been rendered by the court he is approaching. Add to this the raised expectation at the advice of his counsel that he may promptly obtain an injunction in the face of that judgment, not in the suit that gave birth to the judgment, but in another suit, and a litigant not versed with Civil Procedure Rules and the appellate process may be forgiven for perceiving that the court would be biased against him in the latter suit. However, the apprehensions of the applicant remind all that no man should be judge in his own case as they are likely to have terrible and wrong misconceptions *ab initio.* The objective assessment method recommended in the cases cited herein above must override the applicant's subjective apprehensions of lack of partiality and partisanship

22. Would the reasonable man in the street conclude that the court would not be impartial in the instant matter if it heard and determined it? I think not. First, there is a judgment of the court that still stands and the applicant himself, in a commendable exercise of candour, brought it to the attention of the court by his suit and application.

23. The applicant cites lack of an order of injunction at the *ex parte* stage as a pointer to lack of impartiality on the court's part. However scanty the proceedings in this case, the court is inclined to think that the injunction application and indeed the entire suit would have to be weighed against the previous suits and judgment and that is not a light issue to be glossed over at the interlocutory stage for certain rights may have accrued to some parties through the previous court decision; further, it is a matter of public policy that a court of law should avoid giving two conflicting pronouncements on the same subject matter. Of course failure to obtain interim orders at the *ex parte* stage may have rattled the applicant, but the court is not given to robotic operations which automatically churn out *ex parte* orders without considering the effects on the parties with accrued rights under a previous, disclosed, published judgment on the same subject matter without a hearing, hence the order to serve application and attend a hearing 7 days down the line in the instant case.

24. It is clear that a court's enquiries focusing on the existence of a judgment over the same subject matter is likely to be taken censoriously by an anxious litigant but the inquiry on facts is by no means a proper yardstick by which the impartiality of the court can be objectively gauged.

25. As is seen in the cases cited above, the mere fact that a Judge has sat over a previous matter related to the same subject matter is also a frail ground for an application for self-recusal. The situation is worse where a station has one judge and self-recusal would inconvenience other parties by having the matter liable to be transferred to other stations.

26. In this court's view, the inescapable conclusion is that the grounds that the applicant relies on are not capable of sustaining an application for self-recusal. The application dated **25/2/2020** is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Kitale via electronic mail on this 8th day of December, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.