



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC NO. 576 OF 2016**

**SOPHINAH KALONDU MBITI.....PLAINTIFF**

**=VERSUS=**

**ARUN MAHENDRA ADALJA & 3 OTHERS.....DEFENDANTS**

**RULING**

1. This Plaintiff/Applicant filed a Notice of Motion dated 27<sup>th</sup> March, 2018 in which she seeks my recusal from this matter. The Applicant contends that on 10<sup>th</sup> February, 2018 while she was at Java Restaurant, Sarit Centre, she overheard some two gentlemen who were conversing saying that a relative of mine who deals in real estate had been assured that he was going to be appointed a Manager to manage properties of a deceased Asian at Rosslyn Gardens. The Applicant therefore argues that I have interest in this matter and that she cannot expect justice from me.

2. The Applicant further argues that the ruling delivered by this Court on 1<sup>st</sup> February, 2018 did not reflect what happened in Court more particularly that her Advocate did not abandon any prayers in the application which was before Court.

3. The 1<sup>st</sup> Defendant/Respondent opposed the Applicant's application based on a Replying Affidavit sworn on 17<sup>th</sup> May, 2018. The 1<sup>st</sup> Respondent denies the allegations by the Applicant that he called her tenants and informed them that he was going to tell them where they could be paying rent as from April, 2018. The 1<sup>st</sup> Defendant states that he resides in Austrarain and has no time to engage the Applicant's tenants as alleged.

4. The 1<sup>st</sup> Respondent further argues that the allegations made against me are made in bad faith and are only meant to delay the appointment of a receiver manager to collect rent from the disputed properties.

5. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposed the Applicant's application based on grounds of opposition dated 4<sup>th</sup> June, 2018 and filed in Court on 7<sup>th</sup> June, 2018. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents contend that the Applicant's application is an abuse of the process of the Court; that the same is scandalous and that to their knowledge, this Court has never exhibited any bias towards any of the parties herein.

6. I have carefully considered the Applicant's application as well as the opposition to the same by the Defendants/Respondents. I am being asked to recuse myself on grounds of conflict of interest. An application for recusal is a serious issue which ought to be made on serious grounds. This is because as a Judge one has to discharge his duties in a manner that promotes public confidence in the integrity of his or her office.

7. A party or his Advocate is entitled to ask for recusal of a Judge and when this happens, a Judge should not take it that the application is a personal affront. In the case of *Kaplana H. Rawal Vs Judicial Service Commission & 2 Others [2016]eKLR*, the Court of Appeal Judges quoted from a decision of the Constitutional Court of South Africa in the *President of the Republic of South Africa Vs The South Africa Rugby Football Union & Others, Case CCT 16/98* where it was stated as follows:-

***“At the very outset we wish to acknowledge that a litigant and her or his Counsel who find it necessary to apply for recusal of a Judicial Officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront.”***

8. The Applicant is apprehensive that I will be biased in view of alleged conflict of interest. In the *Kaplana H. Rawal* case (Supra), the Court of Appeal Judges adopted the objective test as held by the *East Africa Court of Justice in Attorney General of Kenya Vs Prof. Anyang' Nyong'o & 10 Others EACJ Application No.5 of 2007* where it was stated as follows:-

***“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially.” Needless to say,***

***a Litigant who seeks disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.”***

9. The Supreme Court of Canada expounded the test in the following terms in **R Vs S (R.D) [1977]3 SCR 484.**

***“The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the Judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”***

10. In deciding whether to recuse myself from these proceedings, I will apply the test which is acceptable as enunciated in the Constitutional Court of South Africa and the Supreme Court of Canada in the cases quoted hereinabove. Recusal of a Judge cannot be based on mere allegation which is baseless. In the instant case, the Applicant has made serious allegations of conflict of interest. The Applicant alleges that she overheard some unnamed gentlemen saying that I had assured my relative who is a real estate dealer that I was to give him the task of managing the properties of an Asian who had died. These are serious allegations which touch on the integrity of a Judge. A person cannot make casual allegations and not substantiate the same and expect the same to form a basis of recusal of a Judge. The Applicant had the onus of proving the allegations made. The Applicant did not discharge this onus which was on her part.

11. The question which will then be required to be answered is whether a reasonable person who has a background of the issue in contention would believe that I am likely to be biased. The Plaintiff/Applicant and the 1<sup>st</sup> Respondent are disputing over a number of properties left behind by a deceased person. An application was made for appointment of a manager to manage the disputed properties. In a ruling delivered on 1<sup>st</sup> February, 2018 the Court granted the prayer for appointment of a manager who was to be agreed between the Applicant and the 1<sup>st</sup> Respondent. This seems to have been the basis for the application for my recusal. This is so because apart from the allegations levelled against me, the Applicant alleges that the 1<sup>st</sup> Respondent had telephoned her tenants and told them that in April of 2018, he was going to tell them where they were going to pay rent.

12. The Court had no role in appointment of a manager. The role of appointment of a manager was left to the Applicant and the 1<sup>st</sup> Respondent. Given this background, would a reasonable person have had a perception of bias on the part of the Court? The answer to this question is simply in the negative. There is no way I would have assured a non-existent relative of management of a property or properties when the Court orders were very clear that appointment of the manager was left to the Applicant and the 1<sup>st</sup> Respondent. I therefore find that the allegations of bias based on alleged conflict of interest is just but a figment of the Applicant’s imagination meant to trigger a recusal as a result of the ruling made on 1<sup>st</sup> February, 2018. There is absolutely no merit in this application which is dismissed with costs to the Respondents. However as the Applicant seems determined to have this matter heard by a different Judge, I direct that the same be placed before the Presiding Judge to allocate it to another Judge.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 25<sup>th</sup> day of April, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of Mr. Mutua for Plaintiff/Applicant and Mr. Rebelo for 1<sup>st</sup> Defendant/Respondent and for Mr. Saende for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant’s Respondents.

Court Assistant - Hilda

**E.O.OBAGA**

**JUDGE**

**25.4.2019**