



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1202 OF 2014**

**KAMAHUHA LIMITED.....PLAINTIFF**

**VERSUS**

**WINNIE NJERI KARIUKI.....1<sup>ST</sup> DEFENDANT**

**SAMUEL MUREITHI MURIOKI.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before me is a Notice of Motion application dated 13<sup>th</sup> February, 2018 by the 1<sup>st</sup> defendant seeking an order that I recuse myself from hearing this case. The application is supported by an affidavit sworn by the 1<sup>st</sup> defendant's advocate, Charles Mwangi Gachichio on 14<sup>th</sup> February, 2018. The application has been brought on the ground that I have exhibited glaring bias against the 1<sup>st</sup> defendant to the extent that I would be unable to do justice to her in this case. In his affidavit, the 1<sup>st</sup> defendant's advocate has averred that I had unfairly denied the 1<sup>st</sup> defendant an adjournment on 11<sup>th</sup> October, 2017 thereby forcing her to withdraw an application in which she had sought joinder of some parties to the suit. The 1<sup>st</sup> defendant has averred further that after the withdrawal of the said application, I also made it clear to the 1<sup>st</sup> defendant's advocate that he would have an uphill task convincing me on the 1<sup>st</sup> defendant's application dated 23<sup>rd</sup> June, 2017 for the transfer of the suit from Milimani Law Court to Thika Environment and Land Court which was pending.

The 1<sup>st</sup> defendant's advocate averred that when the 1<sup>st</sup> defendant's application seeking the transfer of the suit to Thika came up for hearing on 15<sup>th</sup> January, 2018, I insisted that the matter could not be transferred to the Environment and Land Court at Thika on the ground that the court had made a policy decision not to transfer cases to Thika and that this position was taken by me even though the application for the transfer of the suit was not opposed. The 1<sup>st</sup> defendant's advocate has contended that I was very hesitant to hear the said application to transfer the suit to Thika and reluctantly fixed it for hearing on 30<sup>th</sup> July, 2018 after he protested. The 1<sup>st</sup> defendant's advocate averred that in his view I would not be able to impartially arbitrate on this case.

The application is opposed by the plaintiff through grounds of opposition dated 10<sup>th</sup> September, 2018. The plaintiff has contended that the application has fallen short of the test of "reasonable apprehension of bias" set by the Court of Appeal in the case of Kalpana H. Rawal v. Judicial Service Commission & 2 others [2016] eKLR. The plaintiff has averred that on 11<sup>th</sup> October, 2017, it opposed the 1<sup>st</sup> defendant's application for adjournment which was ultimately refused by the court in exercise of its discretion. The plaintiff has averred that an application for adjournment is not granted as of right and that the court had a discretion to refuse such application. The plaintiff averred that after the application for adjournment was refused, the 1<sup>st</sup> defendant's advocate applied to withdraw the 1<sup>st</sup> defendant's application dated 22<sup>nd</sup> April, 2016 which request was not opposed. The plaintiff has averred that it is incorrect for the 1<sup>st</sup> defendant to claim that it is the court which forced her to withdraw the said application.

The plaintiff has stated that on 15<sup>th</sup> January, 2018, the 1<sup>st</sup> defendant's advocate informed the court that the 1<sup>st</sup> defendant wished to proceed with the hearing of her application to transfer this suit to Thika even after being informed of an administrative decision that had been made against transfer of land cases from Nairobi to Environment and Land Court at Thika aimed at easing congestion at the latter court. The plaintiff has averred that the 1<sup>st</sup> defendant has devised ways of abusing the court process by filing multiple applications aimed at causing unnecessary delays. The plaintiff has averred that the court has not made any ruling or done anything in this suit sufficient to raise any reasonable suspicion of bias.

At the hearing of the application on 12<sup>th</sup> June, 2019, the advocate for the 1<sup>st</sup> defendant relied entirely on the grounds set out on the face of the application and on his affidavit in support of the application and urged the court to allow the application. The advocate for the 2<sup>nd</sup> defendant left the matter to the court while the advocate for the plaintiff did not attend court.

Determination:

I have considered the 1<sup>st</sup> defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff in opposition to the application. What I need to determine is whether the 1<sup>st</sup> defendant has established that there exists a real likelihood of bias that would justify my recusal from hearing this suit.

The test for establishing whether there exists a real likelihood of bias was set out in the case of Accredo AG & 3 others v Steffano Ucceli & another [2018] eKLR as follows:

“The test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias. This current position was succinctly set out by the House of Lords in Porter vs. Magill [2002] 1 All ER 465 as follows:

“[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

Expounding on that test the Supreme Court of Canada in R. vs. S. (R.D.) (supra) had this to say:

“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.”[Emphasis added]

I am of the view that my refusal to allow the 1<sup>st</sup> defendant's application for adjournment on 11<sup>th</sup> October, 2017 cannot give rise to an apprehension of bias on my part. As rightly pointed out by the plaintiff, the power to allow or refuse an application for adjournment is discretionary. In my order refusing the adjournment, I gave reasons for my decision. There is no evidence that considering all the circumstances of the case, I did not exercise my discretion judiciously. Even if that was to be the case, that would be a proper ground for appeal and not my recusal.

The allegation that I forced the 1<sup>st</sup> defendant to withdraw her application dated 22<sup>nd</sup> April, 2016 is unfounded. It is clear from the court record that after the application for adjournment of that application was refused, the 1<sup>st</sup> defendant's advocate applied to withdraw the application which was allowed by the court. The court did not ask the 1<sup>st</sup> defendant's advocate to withdraw the application. The claim that I expressed contrary views on a pending application seeking to transfer this suit to the Environment and Land Court at Thika similarly has no basis. What I did was to bring to the attention of parties the fact that there was an administrative directive against transfer of cases from Milimani Environment and Land Court to the Environment and Land Court at Thika aimed at easing congestion in the said court. I did not at all comment on the merit of the 1<sup>st</sup> defendant's application. When the 1<sup>st</sup> defendant's advocate told me that he wished to have the transfer application heard on merit, I gave the application a hearing date. I am unable to see how informing the parties of a policy decision that had been made regarding the Environment and Land Court at Thika to address some of its challenges could be construed as expressing an opinion on the 1<sup>st</sup> defendant's application.

For the foregoing reasons, I find no basis for the 1<sup>st</sup> defendant's apprehension that I am biased against her and that she cannot get justice before me. The application dated 13<sup>th</sup> February, 2018 is not for granting. The same is dismissed with costs.

**Delivered and Dated at Nairobi this 25<sup>th</sup> day of July, 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Ms. Njuguna for the Plaintiff

Mr. Gachichio for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

C.Nyokabi-Court Assistant