REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A CASE NO. 35 OF 2018

(FORMERLY MERU ELCA NO. 22 OF 2016)

MICHAEL KUNGU KIGIA.....APPELLANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

RULING

1. By a notice of motion dated 12th July 2019 brought under the provisions of **Order 51 Rule 3 of Civil Procedure Rules 2010, Sections 3, 3A and 63(e) of Civil Procedure Act (Cap 21) Laws of Kenya** the Appellant sought the following orders:

> *a) That this application be certified as urgent and be heard ex-parte in the first instance.*
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> *b) That this honourable court do issue an order to re-transfer this case back to High Court at Meru as the Appellant has no faith with this court, has written to presiding Judge of ELC Court Nairobi Hon. Samson O. Okongo on 10th July 2019 for this matter to be heard by ADR Judge or mediator in Meru.*
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> *c) That costs be in the cause.*

2. The said application was based upon the grounds set out on the face of the motion and supported by the Appellant's own supporting affidavit sworn on 12th July 2019. Although the application was not meticulously drawn it is discernible that the main reason why the Appellant is seeking to have the judge to recuse himself and the appeal to be transferred to Meru Law Courts for alternative dispute resolution is that he has no faith in this court. The reason why he has no faith in the court is that the court had dismissed his petition in Embu *ELC Petition No. 3 of 2018 – Michael Kungu Kigia V AFC & 4 Others*.

3. The court has perused the material on record in this appeal as well as *Embu Petition No. 3 of 2018.* It is apparent that the two files were initially filed at Meru Law Courts since they were challenging the judgment and decree of the Hon. Chief Magistrate in *Meru CMCC No. 257 of 1996* delivered on 25th April 2016. The record shows that the then ELC Judge at Meru Hon. P.M. Njoroge disqualified himself from hearing the Appellant's matters on 23rd May 2016 and referred his matters to the ELC at Nyeri. The record reveals that soon thereafter Hon. Justice Lucy Waithaka who was sitting at Nyeri also disqualified herself in 2017 and referred the two files back to Meru.

4. The Appellant's said files were briefly handled by the current ELC Judge Hon. Lucy Mbugua in 2018 before she disqualified herself on 18th July 2018. The two files were then referred to the Presiding Judge of the ELC at Nairobi for directions on where the matters should be heard. By his directions made on 17th September 2018 the Presiding Judge of the court Hon. Justice Samson Okongo directed that the two files be heard and disposed of by the ELC at Embu.

5. The record shows that upon receipt of the two files this court gave directions on the hearing of the aforesaid Petition No. 3 of 2018. It was directed that the said petition be canvassed through written submissions. The Appellant, who was the Petitioner in the said petition, did not raise any objection to the court handling his matter. He did not contend that he had no faith in this court. He fully participated in the said proceedings and prosecuted his petition through written submissions. The said petition was disposed of vide a judgement dated 28th March 2019 which dismissed the petition.

6. When the appeal was listed for directions on 16th May 2019, the Appellant attended court and sought transfer of the Appeal to either *Meru* or *Nyeri* for hearing and disposal. He informed the court that the matter (dispute) has been pending in court for 23 years. The court could not entertain the oral application for transfer since there was no evidence of service of a mention notice upon the Respondent. The court thereupon stood over the appeal to 18th July 2019 for directions and directed the Appellant to serve the Respondent's advocates.

7. The court has considered the Appellant's application for disqualification of the judge and for transfer of the appeal to the ELC at *Meru*. The court shall first consider the prayer for recusal. The court appreciates that it is within the Appellant's right to file an application for recusal of a judge. The court seized of such application should deal with it on merit on the basis of the applicable legal principles just like any other application. As was observed by Hon. Justice S.N. Mutuku in **R V Raphael Muoki Kalungu [2015] eKLR:**

> **"An application for recusal of a Judge is the occupational hazard every Judge must face in the course of his/her judicial career …"**

8. The court has carefully perused the affidavit in support of the said application. It has not been alleged that the court is biased in any way hence unable to dispense justice with impartiality. It has not been alleged that the court has had any inappropriate contact or communication with the Respondent, its agents or advocates. It has not been alleged that the court is conflicted in any manner so as to create an impression of apparent bias. The only allegation is that the Appellant has no faith in the court because it ruled against him in *Embu ELC Petition No. 3 of 2018.*

9. There are numerous authorities both local and international on the subject of recusal of a judge. The subject usually concerns reconciling two competing interests in the administration of justice. The first is the duty of a judge to sit and determine matters because that is the principal duty of a judge. The second is to need to ensure that justice must not only be done, but also seen to have been plainly done.

10. In the **Petition No. 34 of 2014 Gladys Boss Shollei Vs Judicial Service Commission & 2 Others [2018] eKLR**, Hon. Justice Ibrahim SCJ held as follows in dealing with an application for recusal of some judges of the Supreme Court:

> **"25: 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 has a duty to 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."**

11. The Hon. Justice Ibrahim, SCJ in the said case also made the following relevant pronouncement at paragraph 28:

> **"28:** It is useful to refer to the case from the New Zealand Court of Appeal **Muir -v- Commissioner of Inland Revenue** [2007] 3 NZLR 495 in which the Court stated as follows:-
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> ***"the requirement of independence and impartiality of a judge is counter balanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 "it is equally important the judicial officers discharge their duty 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 a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."***

12. So, what is the test to be applied in determining the appropriate balance between the two competing interests? In the case of the **Attorney General of Kenya V Prof. Anyang Nyong'o & 10 Others EACJ Application No. 5 of 2007,** the East African Court of Justice held 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,**
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> > **a) The 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."**

13. In the South African case of **President of the Republic of South Africa V South Africa Rugby Football Union [1999] 4 SA 147** at 177 the test for recusal was rendered as follows:

> **"… the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the Applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."**

14. The court is aware that applications for recusal of a judge are sometimes fraught with certain challenges and dangers. The Court of Appeal of Kenya in the case of **Galaxy Paints Co. Ltd V Falcon Guards Ltd [1999] eKLR** gave the following caution:

> **"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 …"

15. It is also well settled that it is not every allegation of bias which would result in the recusal of a judge. The allegation must not only be well founded but must also be proved. In the case of **Hon. Kalpana H. Rawal V Judicial Service Commission & 2 Others Civil Appeal (Application) No. 1 of 2016 [2016]** the Court of Appeal of Kenya made the following relevant observations:

> **"… 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**
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> **"would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance."**

16. The court has fully considered the material on record against the test for recusal as explained in the preceding paragraphs. The only ground upon which the Appellant seeks disqualification of the judge is that he has no faith in the judge. That is his personal, subjective belief. The only reason why he holds that belief is that the judge had dismissed his petition in *Embu ELC Petition No. 3 of 2018* upon a hearing on the merits.

17. The court finds and holds that the Appellant has failed to demonstrate any legitimate grounds for the recusal of the judge on the basis of the objective test set out in the authorities cited herein. The mere fact of losing a case before a court, without more, is not a good ground for recusal of the concerned judge in other pending matters before the same court.

18. The second matter for consideration is the prayer for transfer of the appeal to Meru Law Courts for alternative dispute resolution (ADR). The court has already given the history of this appeal. It was initially filed before the ELC at Meru. It was handled by three different judges in different stations who all disqualified themselves from handling the matter. The last judge to disqualify herself was the ELC Judge currently sitting at Meru.

19. It is due to the foregoing series of disqualifications that the Presiding Judge of the ELC at Nairobi directed that the Appeal be heard before this court sitting at Embu. In those circumstances, on what basis can this court abdicate its responsibility by transferring the appeal to the ELC at Meru? Why should the clear and specific directions of the Presiding Judge be disregarded at the convenience of the Appellant? This court finds that no legal basis has been demonstrated for seeking the transfer of this appeal to the ELC at Meru. Even if the Respondent were to agree to have the pending appeal resolved through mediation, such process would require the supervision of a judge. If the mediation were to be successful, the final product would have to be recorded before a judge and adopted as the judgement of the court.

20. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 12th July 2019 and the same is hereby dismissed.

21. It is so ordered.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **25TH DAY** of **JULY 2019.**

In the presence of the Appellant present in person and in the absence of the Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

25.07.19