



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 51 OF 2010**

**PETER MUTUA NDETO**

**GEOFFREY KAMAU WANYOIKE**

**JASON MASIMBA**

**PETER NJUGUNA(Suing on behalf of Ngarariga**

**Seventh Day Adventist Church).....PLAINTIFFS**

**=VERSUS=**

**ANTHONY KANGETHE KARIUKI.....DEFENDANT**

**RULING**

This matter was concluded through a final judgment delivered on 20<sup>th</sup> December, 2018. What is now before me is an application brought by the defendant in which he has sought a number of prayers among them, an order that I recuse myself from any further dealing with the matter. This ruling relates only to the limb of the application seeking my recusal. The application as it relates to my recusal has been brought on the grounds that my impartiality in the matter is reasonably questionable and that the defendant is reasonably apprehensive that I am biased or prejudiced against him.

The defendant has contended that my conduct during the hearing of the matter has created a reasonable perception of partiality. The defendant has contended that I have demonstrated bias against him by issuing orders against him which were unjust and contrary to laid down practice. The defendant has contended that the bias of the court was demonstrated recently when the court refused to issue an order to preserve the subject matter of the suit even after it was brought to the attention of the court the fact that the plaintiffs were ill bent on defeating the cause of justice by forcefully evicting the defendant from the suit property. The defendant has contended that he is apprehensive that his right to a fair hearing enshrined in the Constitution would be violated if I continue to handle the matter.

The application is opposed by the plaintiffs through a replying affidavit sworn by Simon Muchina Njuguna on 10<sup>th</sup> June, 2019. The plaintiffs have contended that the defendant's application is unfortunate and is an uncalled for attack on a judicial officer who is carrying out his constitutional mandate. The plaintiffs have contended that the defendant has not established a case for recusal of a judge. The plaintiffs have contended that the application is not properly before the court the same having been filed by a law firm which is not properly on record. The plaintiffs have contended further that the fact that the court refused to grant to the defendant an order of stay of execution is not a good ground to ask for the recusal of a judge.

I have considered the defendant's application seeking my recusal from continuing to handle this suit. As I have stated at the beginning of this ruling, this suit has been concluded and there is no further hearing to be conducted. What is pending are post judgment applications. I believe that it is these applications which the defendant does not want me to hear. From the grounds put forward by the defendant, it is clear that the defendant's alleged apprehension of bias arises from the orders that have been made by the court which have not been favourable to the defendant. I am of the view that the business of a court is to decide matters before it one way or the other. Any party aggrieved with a decision of a court has recourse to a higher court. It cannot be a ground for recusal of a judge that he has made an order against a party. All the orders that I have made in this matter have been made judiciously after due consideration of the law and circumstances of the case. I can find no basis for the defendant's alleged apprehension of bias. As has been rightly pointed out by the plaintiffs, I wonder why I would only exhibit bias against the defendant after hearing and determining the case.

For the foregoing reasons, I find no merit in the defendant's application for my recusal from continuing to handle this matter. In any event, I am in agreement with the plaintiff's advocates that the application is incompetent the same having been filed by a law firm which is not properly on record.

I am not in agreement with the defendant's advocate that the provisions of Order 9 Rule 9 of the Civil Procedure Rules can be waived. The rule in my view was intended to protect and secure the fees of the advocate previously acting for a party who has engaged a new advocate after judgment. It has nothing to do with the other parties to the suit or their advocates. The argument that the plaintiff's advocates herein had waived the failure by the defendant to seek leave of the court to change advocates after judgment does not hold water. The firm of Mongeri Kinyanjui and Kirathe Advocates having come on record in this suit for the defendant after judgment had to seek leave of the court under Order 9 Rule 9 of the Civil Procedure Rules. In the absence of such leave, the firm is improperly on record and cannot competently bring an application on behalf of the defendant.

In conclusion, the defendant's application dated 15<sup>th</sup> May, 2019 seeking my recusal from continuing to handle this suit has no merit, is incompetent and a candidate for dismissal. However, I am aware that subsequent to the filing of the present application, I have recused myself from handling another matter involving the defendant herein namely, ELC No. 168 of 2017. For that reason, I will recuse myself from continuing to handle this matter. It is so ordered.

**Delivered and Dated at Nairobi this 26<sup>th</sup> day of September 2019**

**S. OKONG'O**

**JUDGE**

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

Ms. Muyai h/b for Mr. Getange for the Plaintiffs/Respondent

Defendant/Applicant present in person

C. Nyokabi-Court Assistant