



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 114 OF 2011

REGISTERED TRUSTEES, GOSPEL OF GOD CHURCH.....PLAINTIFF

VERSUS

ELIAS RIMBERIA MBOROTHI.....1ST DEFENDANT

ZAVERIO NGURU MBOROTHI.....2ND DEFENDANT

MOSES KAMUNDI.....3RD DEFENDANT

GEDEIL KIRIMI.....4TH DEFENDANT

FRANCIS MUCHERU.....5TH DEFENDANT

REGISTERED TRUSTEE, GOSPEL OF GOD CHURCH INTERNATIONAL...6TH DEFENDANT

NORA NTUI MUTAI.....7TH DEFENDANT

THE LAND REGISTRAR, MERU.....8TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....9TH DEFENDANT

RULING

1. **Moses Kamundi**, the Head Pastor of the 6th Defendant has made a Complaint to the Office of the Ombudsman vide a letter dated 19th September, 2019 stating that he has lost faith and confidence with this court. He feels that justice will not be done. Basically, the author of the letter has raised issues with the proceedings running from the time I took over this matter. He added that the case went for hearing in 2011 where plaintiff lost on a technicality, but later in 2017, the plaintiff filed this suit. The author of the letter appears to have written the letter on behalf of the 3rd to 6th defendants.

2. Mr. Mwanzia, counsel for the 3rd to 6th defendants is the one who brought to the attention of the court, the existence of this letter on 25.9.2019. He expressed his dissatisfaction with his clients in the manner they handled the issue. He averred that there are better ways to apply for recusal.

3. In response, Mr. Muriithi for plaintiffs stated that there is nothing in the letter to warrant this court to recuse itself, and that the letter is geared to have an adjournment. It was averred that the issues raised in the letter are in the realm of appeal and that the letter is a ploy to derail the case.

4. Mr. Kiongo counsel for the Attorney General also stated that the manner in which the complaint was brought is not right, though admitting that parties have a right to raise a complaint.

5. This matter was scheduled for hearing on 25.9.2019, of which I did suspend the hearing of the case to enable me peruse the letter and give a determination thereof hence this ruling.

The Back ground

6. The plaintiffs herein instituted this suit on 11/08/2011 contesting the ownership of land parcel no. **NTIMA/IGOKI/4485** which was excised from parcel number **1269**, and they wanted defendants to be restrained from dealing with the suit land in any manner. The 3rd, 4th, 5th and 6th Defendants filed their Defence on 14.9/2011 denying the particulars of the claim in *toto*. The 1st and 2nd Defendant filed their Defence on 20/09/2011 stating that their father sold one acre of land excised out of the suit premises to Gospel of God.

7. On 26/01/2012 Lessit. J. issued a temporary injunction orders restraining transfer and alienation of **NTIMA/IGOKI/4485** the now identifiable excised suit premises. On 29/9/2015 P.M. Njoroge Judge directed parties to comply with pre-trial directions within 45 days apart.

8. The full trial of this matter commenced on 18.12.2017 and by 25.9.2019, when a date was reserved for this ruling, the case was at defence stage though the court had allowed the 3rd -6th defendants to recall some of the plaintiff's witnesses for cross examination. In the course of the trial, the court delivered several rulings.

9. Ruling delivered on 28.2.2018; When the actual trial of this matter commenced on 22/1/2018, **Pw1 Joseph Ntombura** wished to produce copies of the documents as opposed to their originals. This was objected to by the Defendants. In the aforementioned ruling, the court had allowed production of the copies on these three limbs;

a. The dispute has a turbulent history laying a basis as to why the plaintiff do not have the original documents.

b. Some Documents listed are public documents.

c. Some Documents referred to are the same as those for the Defendant.

10. Ruling delivered on 18.4.2018; This ruling was triggered by the proceedings of 28.2.2018, when counsel for the 3rd and 4th Defendants sought leave to file further documents i.e. Letter dated 26/08/1968 by the Registrar of Society addressed to Gospel of God. This he stated would lay the distinction between Gospel of God and Gospel of God Church. The other document was meant to substitute the Certificate of exemption dated 20/8/1968 which was the 1st item in the Defendants list of Documents to which counsel stated that they had annexed the wrong document. The application was opposed by the plaintiff who stated that they had already undertaken pre-trial directions. In my ruling of 18/4/2018, I questioned why the discovery had been made at this time whereas the documents are dated 1968. I held that it would not be fair to present the document at this stage which are 50 years old yet the plaintiff had not seen them. The Court disallowed the application.

11. Ruling delivered on 3.10.2018; This matter was again set down for hearing on 26/7/2018. The plaintiff was ready to proceed. It was however noted that the Defendants (3rd -6th) had filed an application dated 2/7/2018 seeking to amend their defence. The application was argued orally of which I delivered the ruling on 3/10/2018 disallowing the application with costs to the plaintiff. The Court had observed that this case was filed in the year 2011, but the dispute arose more than 38 years ago in 1985, that the plaintiff had commenced its hearing hence the amendment would occasion prejudice to the plaintiff and the court also noted that the Defendants had made multiple applications in this suit.

12. Ruling delivered on 27.11.2018; This matter was again set down for hearing on 27-28th/11/2018. The 3rd - 6th Defendants however made an application seeking stay of proceedings on account that they had filed a notice of appeal to the Court of Appeal. This court however declined to issue a stay of the proceedings and stated that once the court receives an Order from the Court of Appeal, it will certainly halt the proceedings. In the said ruling, the court noted that the matter had been scheduled for hearing and that the court was striving to embrace the Sustaining Judiciary Transformation Agenda (SJT) of which the counsels and the parties were aware of. I therefore gave directions for the case to proceed. However, by the time the case was to proceed at 12.45pm on that day, counsel for the 3rd to 6th defendants was not there. The case still proceeded of which plaintiff's case was closed. The case for the 1st and 2nd defendants too proceeded and was closed. The case was then to proceed the following day as it had been allocated 2 consecutive days.

13. Ruling delivered on 25.2.2019; On 28.11.2018, Mr. Mwanzia applied to cross examine the plaintiff's witnesses who had already testified, which application was objected to by the plaintiffs' side who averred that the date had been taken by consent. Counsel for 1st and 2nd defendants too objected to the application to recall the witnesses. Vide the ruling delivered on 25.2.2019, the court allowed the application to have the plaintiff's witnesses recalled for cross examination by 3rd to 6th defendants.

14. Ruling delivered on 7.5.2019; After the court had allowed the recalling of plaintiffs witnesses for cross examination, and as Mr. Mwanzia, counsel for the 3rd to 6th defendants was in the process of cross examining PW1, Mr. Mugo counsel for the plaintiffs had raised an objection regarding the documents which were being used to cross examine the witness. The response from the defence was that during cross examination, one is allowed to test the veracity of a witnesses' testimony for the court to arrive at a fair determination. In the ruling of 7.5. 2019, the court made reference to the earlier ruling of 18.4.2018 to the effect that it was not open to the defence to attempt to introduce documents through cross examination, hence the objection was sustained.

15. The instances of dissatisfaction contained in the letter by the 3rd -6th defendants are primarily based on the aforementioned rulings.

Analysis and Determination

16. As highlighted above, this case was instituted in the year 2011, but the dispute runs way back from the year 1985, which is more than 30 years ago. Article 159 of the Constitution and the Sustainable Judiciary Transformation Agenda calls for the speedy disposal of disputes and this is what this court has been trying to adhere to.

17. I must point out at this juncture that the manner in which the complaint has been raised is quite in order. After all, the defendants don't seem to have raised the issue through their counsel who perhaps could have advised them that an application for recusal was the better route

to take. Even though no such formal application for recusal has been made, it is quite apparent that the 3rd to 6th defendants are uncomfortable with the prosecution of this matter as conducted by this court.

18. In **Charity Muthoni Gitabi v Joseph Gichangi Gitabi (Substituted By) Michael Wachira Gitabi [2017] eKLR** the Court held that in determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

19. In **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR** the Supreme Court when dealing with an application for recusal and the issue of averting a real danger of miscarriage of justice quoted the late **Lord Denning (1899-1999) of England** who thus spoke of the candour and trust associated with the judicial appointment:

“Every Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges” [see Allan C. Hutchinson, Laughing at the Gods: Great Judges and How they made the Common Law (Cambridge: University Press, 2012), p.156”.

20. The court also referred to a 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:-

“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 manoeuvring 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.”

21. In the case **R VS. David Makali and Others C.A. Criminal Application No. 4 and 5 of 1995 Nairobi (unreported)** as reinforced in **R Vs. Jackson Mwalulu & Others C.A Civil Application No. 310 of 2004 Nairobi**, the Court of Appeal stated that;

“When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is 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. The test is objective and the facts constituting bias must be specifically alleged and established”.

22. As shown from the litigation history running from the time I took over the matter, it is clear that the Court arrived at justifiable rulings after considering the submissions of the parties. This court also took time to accommodate the preliminary objections raised by the parties during the trial. Leave has also been granted to the applicants to file their appeal if any at the Court of Appeal.

23. A judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case **for an extremely good reason**. The letter in question does not in any way raise any reasonable grounds from which an inference of bias may be drawn and there are no grounds warranting this court to disqualify itself from hearing the case.

25. Of particular interest also is the progress of this suit. The plaintiff and the 1st and 2nd Defendants have closed their cases although the court has allowed the plaintiff’s witnesses to be recalled for cross examination by 3rd – 6th defendants. If this court was to recuse itself on the technicality that a miscarriage of justice may be occasioned, a ground that has not been proved, there will be a delay in the determination of this suit which in itself will be a miscarriage of justice.

25. The court has taken stock of the rulings delivered by this court, 6 of them in a span of one year three months (from 28.2.2018 to 7.5.2019). The court also takes cognizance of the fact that this matter is almost coming to a close as the matter is at defence stage. In order to give the 3rd-6th defendants a window of opportunity to have the claims of bias investigated or challenged on account of the various rulings, I will put the matter on hold for a period of 5 months. Thereafter, the court will proceed to hear the matter. The court will therefore give a date for hearing.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 27TH NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mugo for plaintiff

Otieno C. holding brief for Mwanzia for 3rd – 6th defendant

Mutuma J. holding brief for Muriithi for 1st and 2nd defendants

Kiety for the AG

1st and 2nd defendants

HON. LUCY. N. MBUGUA

ELC JUDGE