REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 177 OF 2017 (FORMERLY HCCC NO.120 OF 1998

Consolidated with HCCC NO. 141 OF 1988)

LAWRENCE KINYUA MWAI.....PLAINTIFF

VERSUS

NYARIGINU FARMERS CO. LTD.....1ST DEFENDANT

PATRICK MWORIA.....2ND DEFENDANT

RULING

1. On 31.7.2019, this court gave directions to the effect that the ruling on two applications brought by way of notice of motion dated 14/05/2019 and 2/07/2019 respectively would be delivered on 13.11.2019. In the first application, the applicant seeks that Salome Kabiti and Kabaragu Muita be committed to civil jail for contempt of court orders and that the court returns the injunctive orders lifted on 24/08/1989 to Plots numbers 147 and 120 respectively, that none of the defendants should develop, work or cultivate the land until the cases are finalized and determined by the court. In the second application the plaintiff seeks that I (Hon. Justice Lucy Mbugua) disqualifies myself from this case.

2. The orders sought in the application dated 14.5.2019 are not in tandem with the prayers in the application dated 2.7.2019. I note that this matter is very old, certainly one of the oldest pending matters in this court. The file contains very many applications, mostly filed by the plaintiff/applicant. In an effort to bring this matter to an end, this file was presented to a visiting Judge during the service weeks on 22.6.2018, where Hon. Judge Njoroge observed as follows;

> ***"The parties herein have filed submissions in respect of the applications dated 1.12.2011 and 16.12.2015. I have considered that the only applications pending in this matter are those two. However, I find that another application dated 5.6.2018 has been filed by the plaintiff. This application seeks to set aside the arbitral proceedings and award and the appointment of a mediator……".***

3. Thus the prosecution of the earlier applications were scuttled by the emergence of the new application. That was not all, in quick succession, the applicant filed similar applications one on 29.6.2018 while the other was filed on 14.9.2018. In these applications, the applicant was seeking to set aside the arbitration award allegedly filed in court on 23.7.1992 and read in court on 30.5.2011. The applicant then filed another application on 15.5.2019 (dated 14.5.2019) to have the respondent committed to civil jail and finally he filed the application dated 2.7.2019 seeking to have orders of recusal from this court. Somewhere along the way, this court on 4.3.2019 had set the matter down for the ruling to be delivered on 3.4.2019 in respect of the earlier applications. This never came to be in view of the numerous applications that the applicant keeps on filing.

4. The common thread running from these applications is that applicant has taken deliberate steps to create a maze in the prosecution and finalization of this matter. For instance, it is not tenable that the applicant is seeking for this court to recuse itself from handling the matter and at the same time, he desires this court to enforce some alleged orders emanating from this court. In light of the foregoing, this court will as at now only proceed to give a determination on the application dated 2.7.2019, and the court will give further directions thereafter.

Application dated 2.7.2019

5. The grounds in support of the application are set on the face of the application and the supporting affidavit. In summary, the applicant contends that I am corrupt and that I have a special interest in the matter since I am set to gain if the defendants succeeds, where by, I and the defendant's counsel Mr. Mutunga are planning to sell the suit plots after evicting the applicant. Furthermore, I did not consider his application dated 14/05/2019 as a matter of urgency and put the application to be heard on 17/7/2019. What's more, one Zakaria Nkabu who

died about 30years ago made applications on 15/03/1996 and 5/05/2010 and because of favoritism, judges have allowed them despite of him being dead.

6. The application was opposed vide the replying affidavit of Patrick Mworia and Muita Kabaragu sworn on 22/07/2019. They aver that the application lacks merit, is authored with bad intentions and is meant to prolong the instant suit. They contend that the applicant had filed over fifteen (15) applications since 1988 and that his wild accusation of integrity is unmerited and is not true. He has apparently made such accusations before attacking various judicial officers handling this suit. They affirmed that they are from a humble background without financial muscle which is also evidenced by the value of the suit land which is less than Kshs. 500,000/-. As for the various deceased family members they have been properly substituted. The applicant is only preventing the wheels of justice from moving.

7. ***Whether the judge ought to disqualify herself*** is the only issue that I am determining as stated earlier on.

8. It is well within an applicant's right to file such an application which should be dealt with based on applicable legal principles just like any other application. But the application should not be made to subvert the course of justice and to abuse the processes of the court. The odyssey of this suit depicts a picture of the applicant as a litigant who regularly besmirches Judicial officers. That is why I have found it necessary to highlight the history of this case touching on this aspect of recusal.

9. ***The brief history***. This is an old matter where the suits were filed way back in **1988, a period spanning 30+ years!** During the lifespan of the suit, the file was handled by several judges. The applicant had filed similar applications as the one before this court on several occasions, which I now itemize herein:

10. **Application dated 29/06/2009**, the applicant alleged that Hon. Judge S. O. Oguk had shown a special interest in the case. He sought that the court set aside the past proceedings of the judge and start new proceedings. Lady Justice Mary Kasango dismissed the application through her ruling dated 17/3/2011. From the record, on 20/06/2011 it is noted that Justice Kasango disqualified herself from handling the matter.

11. **Application dated 2/07/2012**; the applicant asked Lady Justice Lesiit to disqualify herself from handling the matter. He averred that she used abusive language and he had no confidence in her. He went ahead and complained to the Judges and Magistrates Vetting Board and the Chief Justice vide his letter dated 13/2/2012. On 22/1/2013 Judge Lesiit disqualified herself from hearing the matter.

12. **Application dated 18/09/2014**; the applicant sought that Hon. Justice J. A. Makau do disqualify himself as applicant had no confidence in him based on allegations of corruption. The learned judge through his twelve (12) pages ruling dated 19/11/14 dismissed the application.

13. **Application dated 10/11/2015;** the applicant sought orders for the Hon. Justice Gikonyo to disqualify himself as he had no confidence in him, alleging that the Judge had a special interest in the matter, that the learned judge abused him and assisted the respondents. Through his fourteen (14) pages ruling dated 14/02/2017, he dismissed the application. In point number 7 in that ruling of Judge Gikonyo, the Judge had captured the incidents of previous allegations as follows;

> ***"The record of the three cases by the applicant is replete with incidents where the applicant made unfounded but disparaging attacks on the judges merely to procure recusal from a judge. The allegations are varied and include those of corruption and favoritism. I need not recite all of them. But one interesting thing is that he does this whenever he feels the Judge is insisting on concluding these cases".***

14. This is exactly what has happened this time round. When the applicant realized that this court was determined to conclude this matter, he filed this application for recusal. Despite this history, I will still proceed to consider the merits of the application at hand.

15. An application for recusal is a hurdle that a judge must surely face but either way a judge in conducting his or her duties must ensure to abide by the oath taken of serving impartially. The Court of Appeal of Kenya in the case of **Galaxy Paints Company Limited vs Falcon Guards Limited [1999] eKLR** stated as follows:

> ***"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."***

16. The Supreme Court in the case of **Gladys Boss Shollei Vs Judicial Service Commission & 2 Others [2018] eKLR** elaborated what needs to be taken into consideration when dealing with such an application:

> ***"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."***

17. Further, in the case of **Attorney General of Kenya vs 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."***

18. The test for recusal of a Judge was laid down by the Court of Appeal in the case of **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,** where 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".***

19. It thus follows that allegations made ought to be proved for it is well settled that whoever alleges must prove. In this suit the plaintiff alleges that the judge is corrupt and has special interest in the suit plots as she wants to sell them together with the defendant's counsel. These are quite strong allegations which the plaintiff has failed to prove. The fact that a decision was made to his detriment or that his application was not considered to be urgent does not mean that a judge is biased. There is always a winner and a loser in any case and if a party loses it does not mean that the decision maker is biased or corrupt. These are bare allegations thrown around by the plaintiff.

20. The Court of Appeal in the case of **Kalpana H. Rawal V Judicial Service Commission & 2 Others [2016] eKLR** made the following relevant observations:

> ***"Before we consider the merits of the application, however there are a few issues raised by the parties that we must dispose of. Firstly, 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***
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> ***"a judge would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance."***

21. I must also add that this being one of the oldest matters in the station, it was scheduled to be dealt with during the case back log clearance initiative exercise which was undertaken in the course of the year 2018. I was at the center of organizing and shepherding the exercise which entailed having three visiting Judges at various times to hear matters at Meru ELC. If I had any interest in the matter, I would have ensured that the matter remained allocated to me. However, the records clearly show that the matter was allocated to Judge Njoroge Mwangi who handled the matter on several occasions. A case in point is on 4.4.2018 when I gave specific directions that the matter was to be mentioned before Judge Njoroge. I also note that even Judge Enock Cherono did handle the matter at some point on 2.7.2018. However, none of the two Judges Managed to hear the matter and that is how the file came back to me.

22. Borrowing the words of Judge Makau made in his ruling of 19.11.2014 in this suit, ***"I find that the allegations made against this court are frivolous, vexatious, and an abuse of the court process and I find that there are no merits in the applicant's application to disqualify myself''. In the circumstances the application dated 2/07/2019 is hereby dismissed with costs.***

23. ***This court will not entertain any further applications until the finalization of the applications which were ready for ruling as at 22.6.2018, the day Judge Njoroge confirmed that parties had filed submissions in the applications of 1.12.11 and 16.12.2015. The court will hence give a date for ruling for these two applications.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Plaintiff

Mutunga for 2nd defendants

Julius Nyiru

HON. LUCY. N. MBUGUA

ELC JUDGE