



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISCELLANEOUS NO. 22 OF 2019

P.J DAVE FLOWERS.....1ST APPLICANT/RESPONDENT

HITESH PRAVIN DAVE.....2ND APPLICANT/RESPONDENT

VERSUS

LIMURU HILLS LIMITED.....1ST RESPONDENT/APPLICANT

HIGHGROVE HOLDINGS LIMITED.....2ND RESPONDENT/APPLICANT

KIRITKUMAR BHAGWANDAS KANABAR.....3RD RESPONDENT/APPLICANT

HARISHKUMAR KANABAR.....4TH RESPONDENT/APPLICANT

AND

EQUITY BANK LIMITED.....INTERESTED PARTY

RULING

The matter for determination is the **Notice of Motion** Application dated **16th May 2019** by the Defendant/Applicants seeking for orders that:-

1) This Honourable Court do recuse itself from the hearing and determination of this Application.

The Application is premised on the grounds that the Counsel for the Applicants has previously been involved in Litigation before this Court being **Maisha Investment Ltd...Vs...Mohamed Hassanli & Farhana Hassanali** and the Plaintiff in that case sought for orders of specific performance of a non-existent **Sale Agreement** and an injunction against the Defendant. However this Court recognized the existence of a non-existent sale agreement. That the Counsel for the Defendants/Applicants has reported the trial Court to the Judicial Service Commission vide a letter dated **21st October 2016**, accusing the trial Judge of incompetence and corruption but the complaint is yet to be determined. That it is reasonable likely that the Hon. Judge will not exercise her mind in a fair and impartial manner to the Defendants/Applicants in these proceedings.

In his **Supporting Affidavit** sworn on **16th May 2019**, **Kirit Bhangwanda Kanabar**, reiterated the grounds on the face of the Application and averred that in the previous suit filed by his Advocate, the trial Judge delayed the Ruling of the application for a whole year without reason since the issue before the Court was a simple point of fact. It was his contention that while his intention was not to accuse the trial Judge of incompetence in this suit, he is advised by his Advocate that the provisions of **Section 3(3)** of the **Law of Contract Act** and **Section 44** of the **Land Registration Act** require in express terms that any agreement for transfer of an interest in land be in writing and duly signed by all parties and for a Court to give a Ruling that is blatantly in contravention, is evident manifestation of either incompetence or corruption. He further averred that in light of the history between their Advocate on record and the trial Judge, there is every likelihood she will not be fair and balanced in case the Court hears and determines the Application.

He averred that he has been advised by his Advocate that when an application for recusal of a Judicial Officer is being considered, the test to apply is that of reasonableness and in this circumstances, it is within reason to conclude that the Hon. Judge is unlikely to exercise her mind with impartiality as against the Defendants.

The application is opposed and the Plaintiffs/Respondents filed **Grounds of Objection** and averred that no bias, discernible or at all has been

disclosed in the entire application as against any of the Respondents. That the Defendants have relied solely on another suit between different parties and not touching on the subject matter of the present Application. Further that the biased alleged against Court is against the Counsel for the Respondents and as such the Defendants are free to instruct alternative Counsel but not an alternative Court. That if the Application is allowed, it would subvert the Constitution and the enabling laws. It was their contention that an allegation against a Court or a pending complaint to the Judicial Service Commission cannot bequeath guilty verdict and or affirmation of the said allegations and any allusion of the same could subvert the doctrine of equity and the age old presumption of innocence before a fair hearing. That Court cannot recuse itself at the whims of an Advocate representing a party who is disgruntled with a past decision.

The Plaintiffs/Respondents also filed a **Replying Affidavit** sworn on the **26th of June 2019**, and averred that the said Application is frivolous and an abuse of the Court process in that the Counsel for the Applicant is in the habit of writing lamentations to the Judicial Service Commission. Further the Counsel on whose bias is alleged, is on record in various authorities holding the position that the mere reason that a Court has held a position contrary to the expectations of the litigant is not sufficient reason for the Court to recuse itself. Further that a suit belongs to the party and not his Counsel.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered.

The issue of recusal of a Court in a matter by the Judicial Officer concerned, is whereby the Judicial Officer recused him/herself from hearing a matter where he/she feels he/she may not appear to be fair or where he/she feels his/her impartiality would be called into question.

The Court in the case of **Philip K. Tunoi & Another v Judicial Service Commission & Another [2016] eKLR**, in considering an application for recusal stated:

In **Tumaini v. R. (supra)** Mwakasendo J held, rightly in our view, that

“in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable people.....”

The House of Lords held in R v. Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v Magill [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly held that –

“The 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.”

It would therefore mean that the Court in considering whether or not to recuse itself, the Judicial Officer would then be answering the question first whether on its own evaluation of itself, it would likely to be biased and second whether on the opinion of an informed mind, the Court would appear to be biased.

The **Black's Law Dictionary, 10th (2014)**. Defines **Bias** as;

“ A mental inclination or tendency; prejudice; predilection. Actual Bias Genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject.”

In this instant, the Applicants are seeking the recusal of this Court based on the fact that the Advocate acting for them in a matter that it is not in any way connected to this instant suit has filed a claim against this Court with the Judicial Service Commission and therefore the Applicants are apprehensive that the Court will not be impartial. Therefore, the said Advocate of the Applicants is under the impression that the Court is vindictive and displeased with him and his action and therefore will met out its frustration with the Applicants who are his clients.

Every sitting Judge, this Court included took an oath to serve with **impartiality** and to protect the Constitution. As already stated, the issue of whether or not to recuse itself is an evaluation of the Judicial Officer him/herself. If any Judicial Officer is to have prejudice over any Counsel appearing before it based on the fact that the said Counsel was dissatisfied with its Ruling and further go ahead and exercise such prejudice over the Counsel's client and or any party associated with the said Counsel, then it is this Court's holding that such a Judicial Officer has no business serving on the bench. This Court took an oath of office and it has a duty to protect it. See the case of **Gladys Boss Shollei...Vs...Judicial Service Commission & Another [2018] eKLR**, where the Court held that:-

“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 duly should 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.”

Further the test that has to be established is whether a reasonable and balanced observer will conclude that there was bias. The fear by the

Applicants that the Court will be vindictive has no basis as no evidence has been produced before this Court to show the same. This Court is not even aware of the said complaint before the Judicial Service Commission by the Applicants' advocate and would have no reason to be biased. See the case of **Philip K. Tunoi & Another v Judicial Service Commission & another [2016] eKLR**, where the Court stated:-

“It appears from perusal of the Judgment in The People case that the fear of the 1st Applicant seems to be that the Presiding Judge might be vindictive or take it out on him on account of the conviction and fine meted out to him by the bench that included the 1st Applicant 22 years ago. Is there evidence to this effect?”

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. In the case of **Kaplana H. Rawal...Vs...Judicial Service Commission & 2 Others [2016] eKLR**, the Court held that:-

“An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a judge.....”

It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn.”

Having considered the entire pleadings and the written submissions, the court finds and holds that no reasonable cause has been advanced as to why this Court should recuse itself from hearing this matter. If the Court is to recuse itself, it would therefore mean that it would never be in a position to hear any matters filed by the Counsel for the Applicants in any suit as the Counsel will always cite that one instant case. Therefore the Court finds that no reasonable ground has been presented to warrant its recusal in this instant suit and consequently, the Court finds the instant Application is not merited and proceeds to disallow the same.

The Upshot of the foregoing is that the Notice of Motion Application dated 16th May 2019, is found not merited and the same is dismissed entirely with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

19/12/2019

In the presence of

No appearance for Applicants/Respondents

No appearance for 1st Respondent/Applicant

No appearance for 2nd Respondent/Applicant

No appearance for 3rd Respondent/Applicant

No appearance for 4th Respondent/Applicant

No appearance for Interested Party

No appearance - Court Assistant.

L. GACHERU

JUDGE

19/12/2019