



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 238 OF 2017

HASSAN SAID SALIM MBARAK

AHMED SAID SALIM MBARAK.....PLAINTIFFS

-VS-

AWADH MOHAMED

SALIM MOHAMED.....DEFENDANTS

RULING

1. The Application before this Court is the Notice of Motion dated 10th October. 2017 in which Defendants seek the following orders.

- 1. THAT this Application be certified as urgent and the same be dispensed with in the first instance.**
- 2. THAT the Honourable Justice C. Yano be pleased to disqualify himself from any further conduct of this matter.**
- 3. THAT this matter be placed before any judge in the Environment and Land Court Division for its just and conclusive determination.**
- 4. THAT the costs of this Application be in the cause.**

5. The Application is based on the grounds in the face of the Motion namely: -

- i. THAT the Honourable Justice Yano has demonstrated, since the onset of this suit, through several comments, actions and orders, a likelihood of bias against the Applicant's case.**
- ii. THAT the Honourable Justice Yano's comments have consequently created in Applicant's mind a reasonable apprehension that they will not get a fair and impartial trial and will be prejudiced.**
- iii. THAT the comments by the Honourable Judge demonstrated a bias which the Applicants fear has divested the Honourable Judge of the requisite legal and impartial mind to adjudicate on the matters before this Honourable Court.**

iv. THAT accordingly, if the Honourable Judge continues to preside over this matter, it is highly unlikely that justice will not be done nor seen to be done to the prejudice of the Applicants.

v. THAT the Honourable Judge seemingly implied by conduct and statements made in open court that he has already formed an opinion and an inference against the Applicants herein.

vi. THAT the Honourable Judge ex-parte set aside temporary injunction orders issued on 26th of July 2017 on 2nd of August 2017, only 6 days after issuing the said temporary orders.

vii. THAT in accordance to the Applicants the Honourable Judge has already formed his opinion concerning the Applicants Application dated 11th July 2017 and 7th August 2017 and by extension the whole suit and counter claim, hence the Applicants are not confident of getting a fair opportunity to be heard.

viii. THAT from the time of institution of the Suit and from all the appearances in court, the Applicants have a real apprehension as to the fairness of the conduct of this matter under the presiding Judge.

ix. THAT justice must be done and the same ought to be seen to be done and the applicants have failed to see justice being done.

x. THAT it is in the interest of justice that this Application be allowed as prayed.

3. The Application is also supported by the Affidavit of Salim Mohamed sworn on 10th October, 2017 in which he reiterated the grounds set out above. In addition, the Applicants aver that they have no personal issue with the Honourable Justice Yano per se, save that the conduct, comments and reservations made by the Judge have made them extremely apprehensive that he had already determined this matter from the onset and consequently there is a real likelihood that they will not get justice from the Court.

4. The Application was canvassed before me on 24th January 2018. Mr. Hassan Advocate represented the Applicants while Mr. Ratemo Advocate appeared for the Respondents. The Respondents had not filed any response to the Application as required by Order 51 Rule 14 of the Civil Procedure Rules hence the Application was not opposed.

5. Mr. Hassan reiterated the contents of the Supporting Affidavit. He submitted that test to be applied is reasonable apprehension of bias in the mind of a reasonable person and not the mind of the Judge. It was his submission that the Court ought to consider perception of bias and that the Applicant ought not to prove real bias. Mr. Hassan submitted that the Applicants are aggrieved because on 2nd August 2017 the Court set aside ex-parte orders it had issued in favour of the Applicants on 26th July 2017 without giving the Applicants an opportunity to be heard. He added that when the Application dated 26th July 2017 was due for hearing on 27th September 2017, the Applicants' Counsel was ready to proceed but the Respondents' Counsel was not ready and instead suggested that the Application be canvassed by way of Written Submissions. That the Applicants Counsel responded by stating that if the Court was inclined to direct that parties file Written Submissions as suggested by the Respondents, the Court ought to make an order for the status quo to be maintained. That the Court declined to grant the status quo and instead made comments by asking which status quo was to be maintained when the construction was complete. It is the Applicants contention that as a result of that refusal by the Court to grant the orders for maintenance of the *status quo*, the Respondents continued with the construction and the Applicants are therefore apprehensive that the Applications on record and the Suit and counter-claim will not undergo a fair and impartial hearing as the Judge has already formed a pre-conceived notion of the dispute. Mr. Hassan further submitted that in those circumstances, the Applicants have formed a perception that they will not get a fair hearing as envisaged in Article 50 (1) of the Constitution if the Judge continues to preside over this matter because, according to the learned Counsel, there is an apparent bias which would then lead to substantial prejudice. He referred the Court to Rule 13 of the Judicial Service Code of Conduct and

Ethics.

6. The test to be applied in determining whether a judicial officer should recuse/disqualify himself or herself over allegation of bias has been set by Courts. In the case of **Attorney General of Kenya –vs- Peter Anyang Nyong’o & Others**, East African Court of Justice stated at paragraph 34 and 35 as follows:

“There are two categories of scenarios. In the first, where it is established that the Judge is a party to the case or has relevant interest in its subject matter and outcome, the Judge is automatically disqualified from hearing the cause...

In the second category, where the Judge is not a party and does not have a relevant interest in the subject matter or outcome of the Suit, a Judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances or relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The Applicant must establish that bias is not a mere figment of his imagination.”

In the case of **Philip K. Tunoi & Another –vs- Judicial Service Commission & Another (2016) eKLR**, the Court of Appeal stated as follows:

“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.”

7. In this case, the main ground relied upon by the Applicants in support of the Application for recusal is that this Court has demonstrated, since the onset of this Suit through several comments, actions and orders a likelihood of bias against the Applicants. However, the Applicants have not given specific instances when the Court made the alleged several comments, actions and orders. Indeed in paragraph II of the Supporting Affidavit, the Applicants aver that they have no personal issues with the Judge *per se*, save for the alleged conduct, comments and reservations made. As I have stated, the Applicants have not specified those alleged comments and reservations. The Applicants complaints against the Court, in my view are too general. In his submissions, learned Counsel for the Applicants faulted the Court regarding its decisions in setting aside ex-parte orders and refusal to grant orders of status quo as requested to by the Applicants. The Court made those decisions based on the material and evidence on record and in accordance with the Constitution and the law. In my view, where the Court has pronounced itself such as granting or refusing to grant orders based on its discretion, a party is entitled to choose between appealing against such a decision or seek an order for the vacation/setting aside or variation thereof. The success or failure of a litigant to obtain favorable orders should not be a basis to attack or criticize a Court. A court cannot be disqualified merely on the basis of a previous decision which a party perceives to have been against it. In my view, the Applicants can only succeed in asking for the Court to recuse itself if has reasonably demonstrated that the previous decision of this Court was not good in law and was not justifiable to the reasons given for it. There must be credibility to the allegations made concerning why this court would be deemed to portray bias towards the Applicants. Do the circumstances in this case give rise to a reasonable apprehension in the mind of a reasonable, fair-minded and informed member of the public that the Judge did not or will not apply his mind to the case impartially? There is no doubt that the Constitution guarantees a litigant trial by an independent and impartial Court, but there must be a substantive basis in making claims about likelihood of bias, not just general allegations or blanket statements.

Applying the principles outlined above, I do not think the circumstances of this case give rise to a reasonable apprehension in the mind of a reasonable, fair-minded and informed member of the public that this Court will not apply its mind to the case impartially. In the end, it is my view that the Applicants have not laid sufficient basis upon which this Court should recuse itself.

The Application dated 10th October 2017 is therefore dismissed with no order as to costs.

Delivered, signed and dated at Mombasa this 28th February, 2018.

C. YANO

JUDGE