



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1389 OF 2004

SOUTH DOWNS DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

HAITHAR HAJI ABDI.....1ST DEFENDANT

ABDI HAITHAR HAJI.....2ND DEFENDANT

RULING

1. On 16/5/2018, Mr Kahuthu, counsel for the defendants, made an oral application for recusal of the court. He contended that the court had shown bias to the defendants by requesting him to peruse the court file before further proceedings are taken. Secondly, he contended that the court had shown bias by calling for the record of **Milimani ELC Appeal No 7 of 2017**. It was counsel's contention that the above two actions on part of the court demonstrated that the court had made up its mind and that the court was not impartial. He urged the court to recuse itself on those two grounds.

2. Responding to the application, Mr Ayieko, counsel for the plaintiff, submitted that the application was a misplaced attempt to delay the finalization of this matter. He contended that the application was aimed at preventing the decree holder from realizing the fruits of its judgments. He further contended that the defendants had brought all manner of applications aimed at delaying execution. He urged the court to dismiss the application.

3. The court has considered that oral application. The court has also considered the applicable jurisprudence on the subject of recusal of a judge. The single issue for determination in the oral application is whether the applicant has satisfied the criteria for the recusal of the judge currently seized of this matter on the ground of apprehended bias.

4. There is no gain-saying that the right to a fair hearing before a duly constituted forum is secured and guaranteed within Kenya's constitutional framework and this court is obligated to protect that right. Indeed, where there is a proper basis for seeking the recusal of a judge, and the established jurisprudential criteria is satisfied, the judge ought, in honour of the constitutional dictates and the oath of office, to step aside and allow another judge to handle the dispute.

5. The jurisprudential criteria to be applied in determining an application for recusal of a judge on the ground of likely bias was succinctly spelt out by Kenya's Court of Appeal in **Kalpna Rawal Vs Judicial Service Commission & 2 Others (2016) eKLR** as follows:-

an application for recusal of a judge in a case 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....."

6. The Court of Appeal in the Rawal case proceeded to adopt the test articulated by the House of Lords in **R v Gough (1993) AC 646** and adopted by the East African Court of Justice in **Attorney General Vs Prof. Anyang Nyong'o & 10 Others (EACJ), Application No. 5 of 2007** 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, a 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 the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.

7. The Court of Appeal similarly adopted this same test as articulated by the Supreme Court of Canada in **R Vs S (RD) (1977)3 SCR 484** in

the following words:

The apprehension of bias must be a reasonable one held by reasonable and right minded person, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude.

This test contains a twofold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that forms a part of the background and appraised also of the fact that impartiality is one of the duties the judge swears to uphold. A real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence

8. In the present oral application, the two grounds upon which the application for recusal is premised are that: (i) the court requested counsel to peruse the court record before taking further proceedings; and (ii) the court called for the record in respect of **ELC Civil Appeal No 7 of 2017**. It is to be noted that on 16/5/2018 when the court requested counsel to peruse the court record and confirm the application(s) which was/were coming up for hearing there were two applications that had been slated for hearing on the same day: the defendant's Notice of Motion dated 13/2/2017; and the plaintiff's Notice of Motion dated 16/2/2018. Secondly, prior to the court calling for the original record in **ELC Civil Appeal No 7 of 2017**, counsel for the defendant had submitted that the defendants had filed the said Appeal against an order made by the Deputy Registrar of this court. He contended that the defendants' application scheduled for hearing on that day sought a stay of proceedings pending the hearing and determination of the appeal. It is on this account that the court called for the original record of the Appeal Case to peruse it while hearing the defendants' application.

9. The question that the court is invited to answer at this point is whether the two actions complained of by the defendants constitute a basis for a reasonable apprehension in the mind of a reasonable, fair-minded and informed member of the public that the judge will not apply his mind to the case impartially. In my considered view, the answer to that question is in the negative. I say so because, the defendants view was that only their application dated 13/2/2017 was slated for hearing. A request that counsel peruses the file to satisfy himself as to which application (s) was slated for hearing cannot be reasonably viewed as an act of bias. Similarly, a request that the appeal case file related to the material application be availed in court during the hearing of the application cannot be reasonably viewed as constituting an act of bias.

10. Consequently, the sum total of my finding on the oral application for recusal is that it does not satisfy the established jurisprudential criteria for recusal. The said oral application for recusal is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Ayieko advocate for the Plaintiff

Mr Kahuthia advocate for the Defendant

Ms Halima Abdi - Court clerk