REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 863 OF 2015

BISHOP JOSEPH M. MOILO.....1ST PLAINTIFF

FRANCIS NDUNGI KAGGIA.....2ND PLAINTIFF

JOSEPHAT GITAU.....3RD PLAINTIFF

(Suing on their own behalf and in their capacity as National Officials of Bethel Church)

VERSUS

BISHOP JOHN NJUKI KARIUKI.....1ST DEFENDANT

JAMES MURIGI WANJIKU.....2ND DEFENDANT

PETER MUIRURI KABIRU.....3RD DEFENDANT

GERALD WAMBUGU.....4TH DEFENDANT

(Sued on their own behalf and on behalf of the members of Bethel Church of God)

RULING

In the case of Kaplan & Statton vs L. Z Engineering Construction Limited & 2 Others [2000]eKLR, the court stated as follows:

> *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions 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."*

In the case of Republic vs. Mwalulu & 8 Others [2005]1 KLR, it was held among others as follows:

> *1."When the court is faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of 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.*
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> *2. In such cases, the court must scrutinize the affidavit on either side, remembering that when some litigants lose their cases they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."*

In the case of Attorney General of the Republic of Kenya vs. Anyang' Nyongo & Others, East African Court of Justice at Arusha, Application No. 5 of 2006, arising from Reference Number 1 of 2006, the court held among others that:

> *"Where a 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 a likelihood or apprehension of bias arising from such circumstances as the relationship with one party or perceived 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."*

What is before me is the defendants' application dated 20th March, 2017 seeking an order that I recuse myself from hearing this suit and to have the same transferred to another judge for hearing and final determination. The application is brought on the grounds set out on the face thereof and on the affidavit of the 1st defendant, Bishop John Njuki Kariuki. The gist of the defendants' application is that I (hereinafter referred to as "the court") have on two occasions dismissed the defendants' applications, one for injunction and the other for the preservation of the suit properties. The defendants have contended that in the ruling that was delivered on 18th December, 2015, the court madeconclusive findings on the issues in dispute between the parties when the court was not allowed to do so by the law. The Defendants have also contended that in that ruling, the court ignored wholly the doctrine of trust that was recognized by the law and also overlooked the entire history of the church formerly known as Bethel Church which the defendants had given in their affidavit and pleadings.

Finally, the defendants have contended that, that ruling by the court was different from the ruling that had been delivered earlier by another judge basically on the same facts. The defendants have contended that in view of the foregoing, the court has already made a determination that the defendants do not have any chance of winning this suit and as such the defendants' right under Article 50 of the Constitution to a fair trial has been compromised. The defendants have contended that the incidents enumerated above have created in the mind of the defendants a reasonable apprehension that they may not have a fair and impartial trial of this suit.

The application is opposed by the plaintiffs through grounds of opposition dated 11th May, 2017. The Plaintiffs have contended that the application is frivolous, vexatious and devoid of any merit. The Plaintiffs have contended that the application is an attempt by the defendants to forumshop for a judge who they think will be favourable to them. The application was argued before me on 11th October, 2017. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition that was filed by the plaintiffs in opposition to the application, the submissions of counsel and the authorities that were cited before me by both parties. This is my view on the matter. On 18th December, 2015, the court disallowed the defendants' application for injunction against the plaintiffs and allowed a similar application that had been filed by the plaintiffs against the defendants. The defendants were dissatisfied with the ruling and filed a Notice of Appeal on 23rd December, 2015 to appeal against the same to the Court of Appeal. On 6th January, 2016, the defendants brought another application seeking an order that the orders that had been granted by the court on 18th December, 2015 in favour of the plaintiffs be suspended pending the filing, hearing and determination of the appeal the defendants intended to file in the Court of Appeal against the ruling of 18th December, 2015 aforesaid. The defendants also sought an injunction restraining the plaintiffs from entering or remaining on the suit properties pending the hearing and determination of the intended appeal. In a considered ruling delivered on 2nd August, 2016, the court dismissed the said application. Following that dismissal, the defendants filed an application in the Court of Appeal on 30th August, 2016 seeking the suspension of the orders that were given herein on 18th December, 2015 pending the hearing and determination of the intended appeal.

I am of the view that the defendants have not established valid grounds that would justify my recusal from hearing this suit. The mere fact that I have made successive decisions against the defendants is not a sufficient ground for my recusal from hearing this matter. The defendants have a right of appeal against my decisions which they have exercised. The defendants' apprehension that I am not likely to be impartial in this matter has no basis. The applications that I dealt with were interlocutory in nature. No conclusive findings could be made on the issues that have been raised for determination in this suit. The defendants' allegation that the court has already made a determination that their claim against the plaintiffs must fail is unfounded.

The upshot of the foregoing is that the Notice of Motion application dated 20th March, 2017 has no merit. The application is dismissed with costs to the plaintiffs.

Delivered and Dated at Nairobi this 11th Day of May 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Kiragu holding brief for Mr. Njenga for the Plaintiffs

Mr. Ndungu holding brief for Dr. Kuria for the Defendants

Catherine Court Assistant