REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.289 OF 2017

(FORMERLY NAIROBI ELC NO.512 OF 2008)

ALVIN KAMANDE NJENGA...1ST PLAINTIFF/APPLICANT

DERRICK KARIUKI NJENGA..2ND PLAINTIFF/APPLICANT

-VERSUS-

ESTHER NJERI NJENGA..1ST DEFENDANT/RESPONDENT

JUDITH NYORO...2ND DEFENDANT/RESPONDENT

LUCY WANJIKU MUCHEKEHU.................................3RD DEFENDANT/RESPONDENT

JOSEPHINE NDUTA KARIITHI.................................4TH DEFENDANT/RESPONDENT

BANCY GATHONI MUSA...5TH DEFENDANT/RESPONDENT

SOPHIE KABURA MACHARIA...................................6TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs/Applicants ***Chamber Summons*** application premised to be brought under Section 3 & 3A of the Civil Procedure Act and all other enabling provisions of law and has sought for the orders that:-

a) Lady Justice Gacheru do disqualify herself from these proceedings.

The application is premised on the grounds that Hon. Justice Eboso had on ***21st February 2017***. erroneously transferred this suit to Thika Environment and Land Court on a false assumption that it was part heard before Lady Justice Gacheru. However the matter was not partheard before Lady Justice Gacheru and that the said Judge should disqualify herself from the matter as she has on several occasions denied the

Applicant or opportunity to be heard. He further averred that several documents went missing from the Court file and when the Applicant sought the attention of the Lady Justice Gacheru to replace them with his documents which were stamped, the Judge declined to grant the said request. It was his further

averment that Lady Justice Gacheru erred in the first instance when she directed that parties to proceed only through written submissions. He also alleged that Hon. Justice Mutungi had invoked false evidence in his Ruling dated ***19th June 2014*** and the Hon. Lady Justice Gacheru failed to verify that. He further alleged that the directions by the Judge to have the matter proceed only through written submissions denied the Applicant the right to cross-examine the deponent of the Replying Affidavit and this denied the Applicant an opportunity to be heard.

This application is opposed and ***Sophie Kabura Njenga***, the 6th Defendant/Respondent filed a ***Replying Affidavit*** and averred that she is a daughter of ***Esther Njeri Njenga*** the 1st Defendant and ***late Laban Njenga Mundia*** and a sister to the Applicant herein. She opposed the instant application by alleging that the same is baseless and fatally defective and should therefore be dismissed. She averred that the Hon. Lady Justice Gacheru has never denied the Plaintiff a chance to be heard and if documents went missing from the court file, that cannot be blamed on the Judge.

Further, that the Applicant never attached any letter showing that he had complained about the missing documents and there was no letter from the Deputy Registrar of the court to confirm that indeed the said documents were missing. Further that there are mechanism for reconstruction of lost or misplaced files. It was her contention that the Applicant has not shown that he made such an application for reconstruction of the missing court file and it was denied. She further contended that her advocate has informed her that the rules of the court do allow conduct of proceedings through written submissions and the Hon. Judge cannot be faulted on that.

Again, that if the Applicant was dissatisfied with the ruling of Justice Mutungi, he should have appealed the same instead of asking Lady Justice Gacheru to verify the same. Further that this suit property is situated in Kiambu County and J. Eboso was right in transferring the matter to Thika Environment and Land Court which is the only Environment and Land Court for Kiambu County. It was her believe that the Applicants applications is an attempt to delay the final disposition of this case as allegations made against the Environment and Land Court Judges are spurious and unsubstantiated. She urged the Court to dismiss the application with costs.

The Applicant filed a Supplementary Affidavit and made very serious allegations against the Lady Justice Gacheru such as that the Judge fabricated the proceedings of ***2nd June 2015,*** as the Applicant did not appear in court and that the matter was never in court on the material date. He also alleged that he did not inform Justice Eboso on ***21st February 2017,*** that the matter was partheard before Lady Justice Gacheru for him to transfer this matter to Thika Environment Court to be placed before Lady Justice Gacheru. He urged the Judge to recuse herself and further added that directing this matter to be heard by way of written submissions, Lady Justice Gacheru continued to deny him an opportunity to be heard.

Indeed the Court had directed the parties to file written submissions in support of their respective positions. The Applicant filed his written submissions on ***5th February 2018***, and retaliated most of the allegations that he had made in the Application and Supplementary Affidavit. He further submitted that the Judge issued orders and directions on her own volition without any application before her which orders and/or directions have continued to prejudice the Applicant. The Applicant submitted that he was apprehensive that should the Judge proceed with the hearing of this suit, he was not guaranteed of a fair trial and he feared suffering great prejudice.

Applicant relied on various decided cases and specifically the case of ***Jasbir Singh Rai & 3 Others….Vs…Tarlochan Singh Rai & 4 Others, Petition No.4 of 2012 (2013) eKLR***, where the Court held:-

> ***"Recusal, as a general principle, has been much practiced in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account.***
>
> ***The term is thus defined in Black Law Dictionary, 8th Ed.(2004) [P.1303];- "Removal of oneself as Judge or policy maker in a particular matter, [especially] because of a conflict of interest".***

> ***From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, in the proper test of whether or not the non-participation of the Judicial Officer is called for. The object in view, in the recusal of a Judicial Officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised".***

The Respondents did not file any written submissions but oral submissions were made by ***Mr. Makori Advocate*** for the Respondents. The submissions were highlighted in Court on ***8th February 2018***, wherein the Applicant reiterated that he did not attend court on ***2nd June 2015***, and the said proceedings were fabricated. He also submitted that there was no need to transfer the matter from Milimani Environment and Land Court to Thika Environment and Land Court as this matter was not part-heard before Lady Justice Gacheru. ***Mr. Makori*** for the Respondent submitted that this matter was filed in court in the ***year 2008*** and the Applicant has been enjoying injunctive orders. That since the suit property is situated in ***Limuru, Kiambu County,*** the matter was rightfully transferred to this Court. Further that if the suit will be returned to Nairobi, the Respondents are likely to suffer prejudice as the Plaintiffs have occupied the whole suit property and have denied the Respondents use of the same. That the 21st Applicant has made allegations against several Environment and Land Court Judges who have handled this matter and he should not be allowed to intimidate the court. He urged the Court to put down its foot and decline to allow the instant application. The Respondent relied on the case of ***Civicon Ltd….Vs… The Commissioner of Customs & Another (2014) eKLR***, where the court quoted with approval of several decided cases among them the case of ***Attorney General of Kenya…Vs….Peter Anyang Nyong'o & Others, East African Court of Justice Appl. No.5 of 2007***, where it was stated as follows:-

> ***"There are two categories of scenarios. In the first, where it is established that the Judge is a party to the cause 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".***

The Court has now carefully considered the instant ***Notice of Motion*** and the annextures thereto. The court has also considered the pleadings in general and the submissions by the rival parties. Further the Court has considered the cited authorities and it renders itself as follows;-

The Applicant has anchored his application under ***Section 3*** of the ***Civil Procedure Act*** which states:-

> ***"In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force".***

Further, he has also premised the application under ***Section 3A*** of the same Act which provides as follows:-

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".***

Therefore the relevant provisions of law herein is ***Section 3A*** above which gives the Court the inherent power to make such orders as may be necessary for the ends of justice to be met and/or prevent abuse of the court process.

The Applicant has sought for recusal of myself from handling this matter on several grounds. He has raised allegations of biasness, conflict of interest and that the Court did fabricate the proceedings of ***2nd June 2015,*** with the aim of achieving a predetermined decision. The 1st Applicant has alleged that he was not in court on ***2nd June 2015,*** and could not have participated in the said proceedings.

However, this Court has considered the court record and noted that on ***2nd December 2014*** one ***Rose*** for ***Alvin Kamande*** who is the Applicant herein fixed the matter for mention on ***2nd June 2015***. Indeed on ***2nd June 2015***, the matter came before me for the first time and from the court record of ***2nd June 2015***, one ***Mr. Gatheru*** appeared for Defendants and both Plaintiffs were present. However it was ***Alvin Kamande***, the 1st Plaintiff/Applicant who addressed the court and alleged that the orders issued by ***Hon. Lady Justice Mwilu*** on ***19th June 2012***, were directed to non-existent office and he urged the Court to correct the same and be directed to the right office. Further, Mr. Gatheru alleged that the said application was a substantive one and it was unprocedural to argue it without a formal application. He also intimated to the fact that he intended to amend the defence.

Therefore the Court directed that the Plaintiffs should file a formal application for amendment of the alleged order and further directed that the matter be mentioned on ***13th July 2015.*** The parties appeared before me and it was confirmed that the Plaintiffs had filed an application dated ***15th June 2015,*** for review of the orders issued by ***Hon. Lady Justice Mwilu*** on ***19th June 2012***.

This application dated ***15th June 2015*** was further slotted for hearing on ***28th September 2015,*** wherein the court directed the same to be heard by way of written submissions. The Ruling for this application was given on ***23rd February 2016,*** and it is this Ruling that the Applicant has based his accusations against myself and other Judges. The Applicant did not appeal against the said Ruling. The Court was very clear in the said Ruling that it cannot review the Orders of another Judge of concurrent jurisdiction since that would amount to sitting as an appeal court for orders emanating from a Judge of equal jurisdiction.

It is also very instructive to note that this suit was filed in ***2008*** which is about ten years ago. The Applicants have been enjoying injunctive orders and he has brought one application after another thus delaying the expeditious disposal of this matter.

From the pleadings filed herein, it is clear that the Applicants have accused each and every Judge who has handled this matter. The Applicants seem to have perfected the art of sideshows to delay the final hearing and disposal of this case. It is also instructive to note that the Respondents are all related to the Applicants as from the proceedings it is indicated that they are mother and sisters to the Applicants. Further that the Applicants are in possession and use of the whole suit property and any delay in the final determination of this matter is to their advantage.

However, since the Applicants have sought for recusal of myself from hearing this case, the Court will embark in determination of whether the said application is merited or not.

The principles relating to recusal were discussed in details in the case of the ***President of the Republic of South Africa…Vs…The South Africa Rugby Football Union & 3 Other, Case CCT 16/98***, where the Court held that:-

> ***"At the very outset we wish to acknowledge that a litigant and he or his Counsel who found it necessary to apply for recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable, it is Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full application of the admission that she or he should not be unduly sensitive and ought not to regard an application for his/her recusal as a personal effort… A cornerstone of any fair and just legal system is the impartial adjudication of disputes which comes before the courts and tribunals…… Nothing is merely likely to impair confidence in such***

proceedings whether on the part of litigants or the general public that actual bias on the appearance of bias in the official or officers who have the power to adjudicate on disputes ….. in applying the test for recusal. Courts have recognized a presumption that Judicial Officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradicting evidence….This consideration was put as follows by Corying in R…Vs..(R.D) 37;-

> ***"Courts have rightly recognized that there is a presumption that judges will carry out their oath of office…..This is one of the reasons why the threshold for successful allegation of recurred judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidences that demonstrates that something the Judge has done gives rise to a reasonable apprehension of bias".***

Taking into account the above guiding principles and the allegations made by the Applicants, the Court finds that this is a case where the Applicants herein want the proceedings and outcome of the court processes to go their way. That is why on ***1st February 2016***, the 1st Applicant stated that;

> ***'I am asking the court to give what I want. I want what Justice Mutungi invoked to be set aside….The matter should go by what I want and set aside what Justice Mutungi invoked. That is all".***

Of course, the court is guided by rules of procedure and evidence and not what a litigant wants. As was held in the case of ***Attorney General…Vs…Anyang Nyong'o & Others (2007) 1EA 12*** that;

> ***'the court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge…'***

The Applicant herein was dissatisfied with the Ruling of Justice Mutungi. Instead of appealing, he filed an application for review and levelled all manner of allegations against the said Judge.

He further applied for review of Hon. Lady Justice Mwilu (as she then was) Orders of ***19th June 2012***. When I gave my ***Ruling*** on ***23rd February 2016***, the 1st Applicant again levelled all sorts of allegations against me. He even disputes his attendance in court on ***2nd June 2015*** and it is very clear from the court record that 1st Applicant was preset in court and submitted at length. Therefore the Applicants have not availed any evidence to demonstrate any bias or conflict of interest on my part.

However, it is important that justice must be seen to be done. Further for the sake of the other litigants in this matter, this Court finds it prudent to remove the matter from this court and have it heard by another Judge. I say so because it is very likely that even after this determination, the Applicants might file another interlocutory application and thus delay this matter further. This Court finds that for the interest of justice and for expeditious disposal of this matter, the necessary orders herein is to allow the Applicant's ***Notice of Motion*** application dated ***5th April 2017***, and proceeds to disqualify myself from hearing this matter. As was held in ***RPM…Vs..PKM (2011) eKLR***;-

> ***"I am aware of the maxim that justice must not only be done but it must also be seen to be done…."***

Though this Court finds that the Applicants herein are the kind of litigants who all too often blame their losses in court cases to bias on the part of the Judge and who only want the proceedings and outcome of the court proceedings to go their way, it is prudent and fair to allow the application herein for the interest of justice for the sake of the other parties herein who have been delayed by the numerous applications and allegations made by the Applicants against myself as the Judge handling the matter and also against other Judges who have handled the matter at any given time.

For the above reasons, the Court allows the ***Notice of Motion*** dated ***5th April 2017,*** entirely with costs to be borne by the Applicants herein.

Further, the Court directs the matter to be mentioned before the Presiding Judge at Milimani Environment and Land Court on ***4th July 2018*** for further orders.

It is so ordered.

Dated, Signed and **Delivered** at **Thika** this **19th** day of **June 2018**.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Applicants

No appearance for Defendants/Respondents

Lucy - Court clerk.

Court – Ruling read in open court in the absence of the parties**.**

L. GACHERU

JUDGE

19/6/2018