



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 83 OF 2010

MARY WANGUI KARANJA.....1ST PLAINTIFF

SALOME NJERI KARANJA.....2ND PLAINTIFF

-VERSUS-

RHODA WAIRIMU KARANJA.....1ST DEFENDANT

JOHN KIOI KARANJA.....2ND DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 3rd May 2017 by the defendant/applicant in this case. The application seeks my recusal from hearing this case. In the alternative, the application also seeks the setting aside of this court's orders of 4th April 2017 and give appropriate orders as the Court may direct.
2. The genesis of this application can be traced to the 26th February 2017 when the trial of the main case started. The Plaintiff gave evidence after which the defendant's advocate applied for adjournment to cross-examine the Plaintiff. The case was adjourned to 4th April 2017. On 4th April 2017. The matter was not listed. The plaintiffs' counsel Dr Kaman Kuria went to the registry and traced the court file. He came back to court and requested that the matter be heard. I allocated it time for hearing later on that day at 11.00 am.
3. At the time allocated for hearing, Dr Kamau Kuria informed the Court through his pupil who swore that, while at Hillside cafe opposite Milimani Law Courts, he heard the defendant's counsel vow that he was not going to proceed with a case which had not been listed and that if the Court dared to proceed, he was going to lodge a complaint against me at the Judicial Service Commission. It is after this that I made an order closing the defence case and directed that written submissions be filed. Shortly thereafter on 26th April 2017, the defendant made a complaint against me to the presiding judge of the Environment and Land Court which complaint is the basis of this application.
4. The applicant now contends that the orders of 4th April 2017 were prejudicial to him and that he is apprehensive that he cannot get justice before me as I am biased against him and that I am favouring the Plaintiffs in this case. The applicant wants the file to be taken before another judge.
5. The applicant's application is opposed by the Plaintiffs through a replying affidavit sworn by the first

plaintiff on 19th May 2017. The Plaintiffs contend that this application is an abuse of the process of the court which should be dismissed with costs. The plaintiffs contend that the defendant/applicant has always been out to delay the finalization of this case and that failure to appear in court on 4th April 2017 even though the case had not been listed was one such move. That the applicant had moved to the Constitutional Court and filed a Petition through a different Law Firm in which he sought conservatory orders touching on the same subject matter as in this case. That the Petition was filed after this case had been partly heard a fact which shows that the applicant does not want to proceed with this case.

6. I have carefully considered the applicant's application as well as the opposition to the same by the Plaintiff/Respondents. The only ground upon which the applicant seeks my recusal is on my perceived bias against him. The grounds for the perception of bias can be seen from paragraph (d) of his letter of complaint annexed to my supporting affidavit. The applicant alleges that the court file was retrieved from the registry and the Plaintiffs' advocate personally carried it to the court. That there were no directions given by either the Deputy Registrar or the Presiding Judge of the court. The applicant concludes that I have as a result developed a close relationship with either the plaintiffs or their advocates and will therefore not give him justice.

7. Recusal of a Judge can either be automatic or through application by a party. Where recusal is sought through application, the applicant must show that there is a likelihood of bias. Recusal cannot be obtained through unsubstantiated allegations or through intimidation. When it comes to recusal on grounds of bias the objective test is that of reasonable apprehension of bias. In the case of **Attorney General of the Republic of Kenya Vs Anyang' Nyong'o & others, the judges of the East Africa** Court of Justice set out the objective test as follows:-

“The test is stated variously , but amounts to this; do the circumstances give rise to a reasonable apprehension, in the view of a 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 a member of the public who's not only reasonable but also fair minded and informed about all the circumstances of the case would be”.

8. Given the test hereinabove, I have to decide whether a fair-minded person given the circumstances of the case would conclude that there is a likelihood of bias. Here is a case of an old matter which is given a date in court in the presence of all parties. The case is not listed but the file is later traced. A request is made that it be brought to court which request is granted. The applicant's advocate is found a few metres from the court and is told that the case will proceed. Instead of coming to court to either proceed or say why he is not ready to proceed, he goes ahead to say that he will not come to court and if the court dares to proceed, he will file a complaint against the judge. True to the threats, the advocate's client files a complaint. This was a clear intimidation of the Court and there can be no recusal based on such intimidation.

9. The case though not listed is an old case filed in 2010. The applicant's counsel was around but did not want to come to court to explain why he did not wish to proceed. If he had advised his client not to come to Court on the basis that the matter was not listed, he should have come to Court to say so. During the hearing of this application, the applicant's counsel stated that he did not wish to comment on the events which occurred at Hillside cafe. Though the applicant was given leave to file a further affidavit, he did not do so and this means that the averments as to what transpired at Hillside cafe remains uncontroverted. In the circumstances I do not think that a fair –minded person would read any bias in the whole matter.

10. The allegations that I am close to either the Plaintiffs or their counsel are unsubstantiated and are a figment of imagination of the applicant. Equally, the applicant's claims that the Plaintiffs' lawyer personally carried the court file from the registry to the court is outrageous and unbelievable. I therefore reject the application for my recusal from this matter.

11. I now come to the applicant's alternative prayer of setting aside the court's orders of 4th April 2017.

During the hearing of this application, the applicant's counsel submitted that mistakes of counsel should not be visited upon his client. I do not quite understand the basis of this submission but given the circumstances of what prompted this application, it is not difficult to see the basis of that submission. The applicant's advocate has not denied that he was at Hillside Cafe and that he vowed not to come to Court. He has also not denied the fact that he vowed to lodge a complaint against me. All this was not by his client. Indeed the client should not suffer for what he did not author. The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. See **Mbaki & Others Vs Macharia & Another(2005) EA 206.**

12. When the Court made its orders on 4th April 2017. It is only the defendant's defence which was deemed as closed. There were no orders made dismissing the counter claim. It will therefore be fair that the Court's orders of 4th April 2017 closing the defendant's case are set aside. The court's orders of 4th April 2017 closing the defendant's case are hereby set aside. Parties are at liberty to take a date for cross – examination of the Plaintiff's witness and for defence hearing. Costs in the cause.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **18th** day of **September, 2017.**

E. O. OBAGA

JUDGE

In the presence of :

M/s Kamau for Plaintiff

Mr Mbabu for defendants

Court Assistant: Hilda

E. O. OBAGA

JUDGE