



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC. CAUSE NO. 24 OF 2008**

**DUSAN CONSTRUCTION LIMITED.....PLAINTIFF**

**VERSUS**

**S.M. MUNIKAH T/A**

**MUNIKAH & CO. ADVOCATES.....DEFENDANT**

**RULING**

1. The Defendant filed the application dated 15/8/2017 seeking orders that the Hon. Lady Justice Kossy Bor J. be disqualified or in the alternative do disqualify herself from further dealing with the case. The application also sought to have the matter placed before the Presiding Judge of the High Court of Kenya Nairobi ELC Division for further directions in respect of its hearing.
2. The application was made on the grounds that the Judge was scheduled to deliver judgement in the case on 19/9/2017 and a determination had to be made before that date otherwise the Defendant stood to suffer irreparable loss and harm. It was also urged that the dispute is not in the nature of an environmental or land matter and the Judge has no jurisdiction to determine the case. The Defendant stated that he was apprehensive that the Judge is not able to handle the matter in a dispassionate manner since she had issued orders which adversely and prejudicially affected him. The other ground for bias proffered against the Judge was that she proceeded with the hearing of the case in a manner that was biased yet the Plaintiff's Advocates failed to comply with the time given for filing of documents.
3. The Defendant contends that the orders made by the court go against his constitutional right to file and produce his bundle of documents to prove that the funds he held were properly utilised to defray debts of the Plaintiff company; disbursements towards facilitating completion of subdivision and procurement of titles; and the balance applied towards the Defendant's outstanding legal fees. The Defendant argued that the stand taken by the court was completely unfair to the Defendant who ought to have been given more time as he was in the process of gathering and putting together the files after retrieving copies from his previous advocates.
4. The other ground urged is that the Judge ignored the fact that the Defendant had detected numerous errors and actions of fraud and had commenced the process of authenticating the contents of some of the documents relied on by the Plaintiff and it was therefore necessary to give time to enable the Directorate of Criminal Investigations (DCI) and other relevant expert authorities to conclude their investigations.
5. The application is supported by the Defendant's affidavit, sworn on 15/8/2017. The Defendant depones to the numerous attempts that his advocate made for adjournment which the court declined. He alleges

that he was forced into the witness dock without the benefit of his witness statements or documents. The Defendant also takes issue with the titling of the suit as a miscellaneous cause and not an Originating Summons in which the parties are to be designated as Plaintiff and Defendant in accordance with Order 37 of the Civil Procedure Rules. The Defendant also argued that the Plaintiff failed to exhibit any minutes and resolutions of the company and that the transfer of shares called "Quitclaim Bill of Sale" was never registered. He contended that there could not have been any resolutions of the directors and or shareholders who are presumed to have died in the year 2005.

6. Most of the other issues raised in the affidavit do not relate to the issue of recusal of the Judge and have been addressed in the judgment.

7. The Plaintiff opposed the application. It filed Grounds of Opposition on 28/8/2017. The Plaintiff argues that the application is incompetent the Defendant having preferred and appealed against this court's decision of 2/8/2017 which declined to set aside the proceedings and transfer the suit to the Civil Division of the High Court. The Plaintiff argues that the Defendant has not satisfied the criteria for recusal of a judicial officer as set out in the Judicial Code of Conduct and Ethics and that there is nothing in the application to indicate a situation giving rise to a reasonable apprehension of bias in the mind of a reasonable, fair minded and informed person.

8. The Plaintiff also argued that the application is an afterthought intended to introduce purported new evidence which the Defendant failed to submit during the trial or disclose during the pre-trial stage. It contends that the application is a ploy to belatedly challenge the Plaintiff's evidence which the Defendant failed to do during the trial. The Plaintiff urged the court to dismiss the application with costs to the Plaintiff since it is without merit.

9. Both parties filed their submissions and attended court to highlight the submissions. The Defendant argues that there is a reasonable probability that the Judge is biased in favour of the Plaintiff since the court proceeded with the hearing of the case after the Plaintiff failed to file the bundle of documents within the time lines given by the court. He argues that he was not given an opportunity to study the documents and file an appropriate response in time.

10. The Defendant also argues that he was in a position to account for the sale proceeds for the sale and that the documents required to do this were locked out and remained locked out. It is also stated that the Judge was unfair to the Defendant who ought to have been given more time to gather and put together his files after retrieving copies from the advocates who previously represented him.

11. It is urged that the Judge ignored the fact that the Defendant had detected numerous errors and actions of fraud which needed to be investigated by the Directorate of Criminal Investigations.

12. It was also submitted that there is no provision in law for binding of documents yet the court made directions for the Plaintiff to file a bound bundle of documents. Mr. Gatheru Gathemia submitted but when the Defendant realised that the Plaintiff's Advocates had omitted to include the Defendant's documents in the bound bundle prepared by the Plaintiff's advocates, they sought an adjournment which the court declined to grant. Counsel urged that there was no urgency in the matter proceeding as it did. He claimed to have attempted to cross examine the Plaintiff's witness but the court interjected and declined any cross examination.

13. Counsel urged that the court had no jurisdiction to hear the matter it being a matter involving a lawyer accounting for sale proceeds of land which is not an ELC matter. He also submitted that the court had declined to grant the Defendant leave to file a supplementary affidavit to introduce the report prepared by the Documents Examiner on the alleged forgeries of the documents produced by the Plaintiff's witnesses during the hearing.

14. The Plaintiff's advocate submitted that there was nothing in the Defendant's application that would give rise to reasonable apprehension of bias in the proceedings since the court record shows that the Defendant's applications for adjournment during the trial were vague and devoid of substance and the

court rightly exercised its discretion in not allowing the adjournments.

15. He urged that the application for recusal was brought too late in the day after the hearing had been completed, parties had filed their written submissions and a date fixed for the delivery of judgement. Counsel urged that the application was only filed to stop the court from delivering its judgement in the case.

16. He stressed that the common bundle of documents filed by the Plaintiff's advocate contained the documents the Defendant filed in court and that the Defendant was attempting to introduce new documents which it had not previously filed in court. He also urged that the Defendant had not pointed out any specific document which the Plaintiff omitted when it put together the consolidated bundle of documents that was used at the hearing.

17. He stated that the case was initially filed in the High Court where the court registry clustered it as an Environment and Land Court matter. He maintained that the matter related to the sale proceeds of land.

18. It is helpful to set out the background of the case and the facts giving rise to this application for recusal of the judge.

19. The Plaintiff filed this claim on 24/11/2008 by way of an Originating Summons seeking to have the court exercise its supervisory jurisdiction over the Defendant who is an Advocate and an officer of the court. The Plaintiff sought orders to have the Defendant remit the sum of Kshs. 10 million together with accrued interest to the Plaintiff's new lawyers, Messrs Mohammed & Samnakay Advocates to hold as stakeholders pending completion of the transaction of the sale pertaining to LR No. 209/14475 and 14476 (original number 209/10820). This will be referred to as "the Suit Property".

20. The Plaintiff sought an alternative prayer to have the Defendant disclose the amount of sale proceeds he received for the sale of the Suit Property and that he remits the sale proceeds to the Plaintiff's new advocates with interest at the rate of 18% from the date of receipt of the sum until payment in full. The Plaintiff also sought to have the Defendant forward the entire file of papers and all documents pertaining to the sale transaction in his possession to the Plaintiff's new advocate.

21. The Originating Summons is supported by the affidavit of Verica Cupurdija, a director of the Plaintiff Company. She deposes that the Plaintiff appointed the Defendant to act for it in the sale transaction in respect of the Plaintiff's Suit Property. The purchase price for the Suit Property was Kshs. 10 million out of which the Defendant received Kshs. 8 million, which he was to hold as stakeholder until completion of the sale transaction. The agreement for sale is dated 13/1/2000.

22. Under the agreement between the Plaintiff and the Defendant, the Defendant was expected to deposit the purchase price in an interest earning account pending completion of the sale.

23. The Plaintiff avers that the Defendant failed to disclose the status of the remaining Kshs. 2 Million which he should have demanded and received from the purchaser before releasing the material documents to the purchaser's advocates. She believed that the Defendant had in his possession the full purchase price of Kshs. 10 million since the Defendant had released the transfer documents and the documents of title to the purchaser's advocate. The Plaintiff was apprehensive since the Defendant had failed to give it any substantial feedback on the progress of the said transaction for a very long time.

24. The court has looked at the ruling delivered by Judge J. L. Onguto on 22/1/2015 on the Plaintiff's preliminary objection. The court noted that the Plaintiff's suit was brought under the provisions of the then Order LII of the Civil Procedure Rules. He observed at paragraph 4 that the court file went missing in 2009 and it was thereafter reconstructed and the parties prepared the case for trial by filing lists of documents and undertaking discovery. The court, while dismissing the preliminary objection, hastened to add that the matter was relatively old and that civil disputes should be determined expeditiously and fairly where resources allow. The Judge directed that the Originating Summons was to be listed for hearing on a priority basis within 60 days of the date of the ruling.

25. There is a letter dated 23/3/2016 in the file, from the Ministry of Foreign Affairs to the Registrar of High Court. The letter states that the Ministry had received communication from the Embassy of the Republic of Serbia in Nairobi, seeking to be updated on the status of the matter and raising concerns about the postponement of court hearings and the possibility of accelerating the hearing of the case.
26. When this matter came up for hearing on 13/3/2017, the Defendant was not represented at 9 o'clock when it was called out. The court confirmed the matter for hearing at 10.30 a.m. Mr. Gatheru Gathemia appeared for the Defendant at 10.40 a.m. and informed the court that he had been instructed to act in the matter the previous week. He sought 14 days to come on record. The court allowed the adjournment and adjourned the matter to 6/4/2017.
27. On 6/4/2017, both parties informed the court that they were ready to proceed with Mr. Gatheru indicating that he had two witnesses in court. It is only when the court discovered that the documents and witness statements filed by the parties were not in the court file that it directed the Plaintiff to file a consolidated bundle of the pleadings, witness statements, documents and issues to be used at the trial.
28. The court granted the Defendant leave to file and serve a supplementary witness statement within 14 days while the Plaintiff was also given leave to file and serve further statements. The court directed the parties to file and serve their comprehensive witness statements within 30 days and adjourned the matter to 14/6/2017.
29. On 14/6/2017 Mr. Gatheru informed the court that he was not ready to proceed since the Defendant wished to reply. The court considered the application for adjournment and directed that the hearing would proceed at 11.30 a.m. At 11.30, Mr. Gatheru renewed his application for adjournment stating that he wished to file a supplementary list of documents and that he had written to the Plaintiff's advocate stating that he would seek an adjournment while expressing concern that the Plaintiff did not file the bundle of documents as directed by the court.
30. Counsel later conceded that he had looked at the file and established that the Defendant had filed his documents on 9/8/2019. The application for adjournment was opposed with Mr. Mohammed stating that the Defendant had had ample time from 2010 when he filed his documents to file further documents that he wished to rely on at the trial. The Defendant did not give any plausible reason for failing to file his additional documents as directed by the court on 6/4/2017.
31. The court considered the application for adjournment and declined to grant the adjournment. The court noted that this was an old matter filed in 2008 and that no good reasons had been given for the court to exercise its discretion to grant the adjournment.
32. The Defendant's advocate made more applications for adjournment as the hearing progressed which the court considered and declined. The hearing proceeded and was concluded.
33. The Plaintiff called two witnesses who produced various documents. Mr Gatheru cross-examined both witnesses. He spent considerable time cross-examining PW1 on the issue of the documentation that transferred the ownership of the Plaintiff Company to Verica Cupurdija.
34. The Quitclaim Bill of Sale which the Defendant now seeks to challenge is dated 1/3/2007 and was filed in court in 2010. It is the document which deals with the transfer of the Plaintiff Company to Verica Cupurdija which the Defendant alleges is forged and that the Directorate of Criminal Investigations carried out investigations and established that it was a forgery. The investigations were done after the case had been heard.
36. The court notes that Quitclaim Bill of Sale was drawn in the State of California and attested before an Attorney at Law in the United States of America. No explanation was given by the Defendant as to why this document was not authenticated from 2010 when the Plaintiff filed and served his list of documents on the Defendant. No justification was established for investigating this document after the case had been heard and was now pending judgement yet the Defendant had had knowledge of this document since

2010.

36. The Defendant alleges in the application that he was forced into the witness dock without the benefit of his witness statement or documents. The Defendant gave evidence on 14/6/2017 where he confirmed that he had been instructed by the Plaintiff to act for it in respect of the sale of the Plaintiff's Suit Property. The Defendant produced the documents at pages 151 to 192 of the consolidated bundle prepared by the Plaintiff's advocate. He also stated that he was relying on his Replying Affidavit which was at pages 34 to 37 of the consolidated bundle. The consolidation of the witness statements and documents relied on in evidence and binding of these documents is for the orderly conduct of the trial and for effective case management.

37. The Defendant was admitted to the bar as an Advocate of the High Court of Kenya in 1977 and is a senior lawyer.

38. The court has looked at the authorities relied on by the Defendant in support of his application. In **Barnaba Kipsonok Tenai V. Republic** [2014] eKLR the court referred to the case of **Jasbir Singh Rai & 3 others V. Tarolchan Singh Rai and 4 others** [2013] eKLR the court stated that the "*Perception of fairness of conviction, of moral authority to hear the matter, is a proper test of whether or not the participation of the judicial officer is called for*". It was stated that the court is required to carefully examine the facts which are alleged to show bias and from those facts draw an inference as any reasonable and fair minded person would do that the judge is biased or is likely to be biased.

39. The Defendant also relied on the decision of Canadian Supreme Court in **R. V S. [R.D]** [1977] 3 S.C. R 484 where the court expounded on the test to be applied where bias is alleged as follows:-

*"The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, 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 two-fold 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 form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that 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."*

40. The Defendant contends that the court should have called for an investigation or allowed the Defendant an opportunity to investigate the alleged forgeries when it was brought to the court's attention that the signatures of the directors in the Memorandum and Articles of Association of the Plaintiff's Company appeared to have been forged in the Quitclaim Bill of Sale. The Defendant alleged that the investigations had been concluded and the court refused to adopt the report prepared by the DCI.

41. Another issue arose that is worth mentioning. During the hearing of the application for recusal, the Plaintiff's advocate brought to the attention of the court the fact that he was apprehensive that he would be arrested at the instigation of the Defendant on the allegation that he had uttered a false document in court when he filed the Plaintiff's documents in court.

42. The Plaintiff's advocate sought the court's protection as a court officer from the impending arrest. The court agreed with the Plaintiff's advocate that the threat to arrest Mr. Mohammed and charge him for representing the Plaintiff amounted to intimidation. The court granted the advocate protection from arrest in respect of the document complained of for a period of 7 days and directed the advocate to file a formal

application before the High Court so that the issues relating to the role of an advocate in representing his client could be dealt with under its inherent jurisdiction.

43. For the avoidance of doubt, the court stated that its order did not in any way stop the Directorate of Criminal Investigation from discharging its mandate of investigating the alleged forgery. The Defendant submits that this is uncalled for and that the court appeared to exonerate the said advocate from aiding and abetting the commission of a forgery, perjury or subornation of perjury without regard to the seriousness of the deception committed by the advocate. Advocates represent clients and can only file the documents clients present to them. Arresting an advocate for filing his client's documents in court is not proper and amounts to intimidation of the advocate.

44. The court has considered the application for recusal, the grounds of opposition and the submissions of counsels.

45. The apprehension of bias must be a reasonable one held by reasonable and right-minded persons. The test is what would an informed person conclude, viewing the matter realistically and practically, and having thought the matter through. Both the person considering the alleged bias and the apprehension of bias must be reasonable in the circumstances of the case.

46. Applying this test, the court is of the view that the apprehension of bias by the Applicant is not a reasonable one that would be held by reasonable and right-minded persons in light of the facts of this case set out above; the conduct of the Defendant who is an officer of this court of forty years standing; and the timing of the application for recusal. It ought to have been made earlier, not after the hearing when the matter was pending for judgement.

47. An informed person viewing the matter realistically and practically and having thought the matter through would not conclude that the Applicant's apprehension of bias is reasonable.

48. The court declines to allow the application for recusal.

Dated and delivered at Nairobi this 11<sup>th</sup> day of October 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Momanyi for the Plaintiff

Mr. Gatheru Gathemia for the Defendant

Mr. V. Owuor- Court Assistant