



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**MISC APP CAUSE NO. 2 OF 2015**

**MUTIA MUINDU t/a MUTIBRA AUCTIONEERS .....**  
**.....APPLICANT**

**VS**

**1. CFC STANBIC BANK LTD**

**GARNISHEE.....1<sup>ST</sup> RESPONDENT**

**2. MAURICE MUNYAO & 148 OTHERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The application before the court is the appellant's Notice of Motion dated 6.10.2015. It is brought under Article 50 of the Constitution of Kenya, Section 10 (2) of the Public Officer's and Ethics Act, Judicial Service Code of Conduct and Ethics, the inherent Powers of the Court, Section 1A and 1B of the Civil Procedure Act and all other enabling provisions of the Law. It basically seeks the following orders:-
  - a. That I recuse myself from dealing with the proceedings in the present suit.
  - b. That I do order a transfer of this suit to Nairobi before the Principal Judge, Honourable Justice Nduma Nderi for purposes of consolidation with Industrial Cause No. 116 of 2013 (now Nairobi 1262 of 2015) and/or for further directions.
2. The motion is supported by the affidavit sworn by Mr. Eric Otonglo on 6.10.2015. The main ground for the application is that since I recused myself from the proceeding in the **ELRCC 116 of 2013 (now 1262 of 2015)**, I should also recuse myself from this suit. That the issues involved in this suit are related to the ones in the former suit. The respondent's never filed any reply to the motion but they were allowed to respond on points of law when the motion came up for hearing on 19.10.2015.

**Applicant's submissions**

3. Mr. Allen Waiyaki learned counsel for the applicant relied on the grounds on the body of the

Notice of Motion and the supporting affidavit filed therewith. he submitted that although he had faith that I can handle this dispute, it is only fair that I recuse myself from it just as I recused myself in the **ELRCC 116 of 2013 (now Nairobi ELRCC 1262 of 2015)**. That the auctioneer's bill of costs arose from a premature execution of the decree in the **ELRCC 116 of 2013** on 13.11.2014. That on 26.11.2014 the applicant filed a Motion to challenge the said premature proclamation and that when the motion came for hearing before me on 5.12.2014, I disqualified myself from the proceedings and forwarded the file to Rika J who also disqualified himself and referred the file to the Principal Judge of this Court at Nairobi, and whom it is still pending determination. That while transferring the file to Nairobi Rika J also made an order staying all proceedings related and incidental to the said case pending the transfer of the file to Nairobi.

4. That in contempt of the said stay order, the first respondent (Auctioneer) filed his bill of costs in this suit on 16.1.2015 and had the same taxed by the Deputy Registrar of this court. That the bill related to the execution of the decree in the said **ELRCC 116 of 2013** and as such that the appellant herein has since filed contempt proceedings in the **ELRCC 116 of 2013 (now 1262 of 2015)** and the same is pending before the Nduma J. Consequently the best thing to do according to the applicant's counsel is to recuse myself from this suit and transfer it to the Principal Judge to consolidate it with **ELRCC 116 of 2013 (now 1262 of 2015)** or for other directions. He relied on Court of Appeal decision in **C.A No. 314 of 2009, Serah Njeri Mwobi vs Joel Kimani Njoroge (2013) e KLR** where the Court of Appeal held that once a Judge disqualifies himself from a case he should not here it again.

#### **Respondent's submissions**

5. Mr. Makau learned counsel for the first respondent (Auctioneer) opposed the Motion and invited me to consider the conduct of the applicant in this suit. That the applicant appealed against the taxed costs before this court and prosecuted her appeal before me and even after she lost the appeal she brought further proceedings without any complaint against me. That the motion for recusal should be dismissed for the reason that it only an afterthought.
6. He submitted further that I only recused myself from the primary suit after judgment. That no ethical complaint have been made against me by the applicant in her submissions and as such I should reject the application and refuse to be bullied by the parties. That transferring the suit to Nairobi will hinder his client from accessing justice due to increased costs.
7. Miss Nthinga, learned counsel for the 2<sup>nd</sup> respondent associated herself with the submissions by Mr. Makau Advocate. She however added that the facts of this case are distinguishable from those in **Serah Njoki Mwobi case** cited by the applicant. That in the said case, Khaminwa J disqualified herself from the suit but later heard it and rendered a judgment. Just like the applicant's counsel she submitted that she had no doubt on my credibility and had confidence in me.

#### **Applicant's rejoinder**

8. In a brief rejoinder, Mr. Waiyaki submitted that, what is pending before this court is an application for extension of time to file appeal but the same cannot proceed because there is pending contempt of court proceedings pending. That the respondents have not distinguished this case from the **Serah Njoki Mwobi case**. That if the proclamation is nullified, the bill of costs herein will be rendered void. That the auctioneer cannot disrespect court order of stay and proceed to tax his bill herein.

#### **Analysis and determination**

9. There is no dispute that I disqualified myself from presiding over further proceedings in **ELRCC 116 of 2013** after execution and /or settlement of the decree. That by the time I disqualified myself the applicant herein was not challenging the decree but only the validity of the execution. That the applicant has not accuse me of any ethical or professional misconduct as the reason for asking me to recuse myself from the suit.

10. It is further not disputed that after the taxation of the Auctioneer's bill, the applicant appealed to this court and deliberately listed and prosecuted the appeal before me. That after rendering my ruling in which I struck out the appeal for being time barred, she filed application for extension of time to file another appeal. That when the respondent's objected to the motion for extension of time, the applicant requested me to recuse myself from the suit. The issue for determination is whether the applicant has shown any good cause to warrant my recusal from this suit.

### **Recusal**

11. After careful consideration of the motion, supporting affidavit and the submissions by the counsel for both sides, I have found no good reason shown as to why I should recuse myself from this suit. I have not been accused of any bias against or in favour any of the parties to this suit. It has also not been shown that there exists any conflict of interest if I continue to hear this matter. The mere fact that I disqualified myself from the primary suit (**ELRCC 116 of 2013**) does not **per se** mean that I should not preside over any secondary proceedings arising therefrom.

12. I agree with the Miss Nthiga's submissions that this suit is distinguishable from the **Serah Njoki Mwobi case** because in the said case Khaninwa J disqualified herself from the suit and later heard the same and rendered a judgment. That the facts in that case remained constant. In this case however I heard the suit (**ELRCC 116 of 2013**) and rendered judgment. Thereafter execution was done through garnishee proceedings and the judgment debt was paid. Later a dispute arose between the Garnishee (now applicant) and the Decree-holder (now respondent's) herein about the validity of the proclamation and which is still pending in that file. I never disqualified myself from the suit because of either the Garnishee or the Auctioneer but other parties who were strangers to the suit and who were seeking to set aside the judgment even after the decree had been settled. In my view the court had become functus officio in respect of the primary dispute in that file. Consequently the request for my recusal is dismissed for being vexatious, frivolous and bereft of merits.

### **Transfer of the suit**

13. The applicant has requested for transfer of this suit to the Principal Judge in Nairobi for consolidation with **ELRCC No. 116 of 2013 (1262 of 2015)** or for any other direction. The respondents have opposed the transfer on ground that their access to justice will be compromised because the cost of the suit will increase. I have considered the arguments advanced by the two sides and finds that, no good cause has been shown by the applicant as to why this suit should be transferred to Nairobi. In this court view, the dispute pending in this suit is leave to file appeal out of time against the taxed costs of execution by the auctioneer while the dispute pending in **ELRCC 116 of 2013 (1262 of 2015)** involves the validity of the said execution and contempt of court order. I will not comment on the merits of the proceedings pending in the **ELRCC 116 of 2013 (1262 of 2015)**. However I believe that the issue pending before **ELRCC 116 of 2013 (1262 OF 2015)** can be determined independently without consolidation with this file.

14. Transferring this file to Nairobi will not only delay the determination of the dispute but it is also very expensive for the respondents. The decentralization of this court was meant to encourage faster disposal of cases and access to justice by bringing service close to people and in order to mitigate on costs of litigation. Transferring the case to Nairobi will militate against the said constitutional obligation to faster disposal of cases and access to justice. However, for purposes of any convenience being served by having all the files related to the dispute in **ELRCC 116 of 2013 (1262 of 2015)** being handled from one court station, I will order transfer of this file to Nairobi. In so doing I have considered the fact that parties herein are already involved in the contempt motion in the **ELRCC 116 of 2013 (1262 of 2015)** in Nairobi. If the Principal Judge finds that the file ought to proceed from here, he will make direction accordingly.

### **Stay of proceedings**

15. According to the applicant's counsel, if proclamation is nullified by the Nairobi court in ELRCC

116 of 2013 (1262 of 2015), the bill of costs taxed in this case will become void. He therefore prays for stay pending the determination of motion on the validity of the proclamation. The applicant has however not given any security in case she loses in her motion in **ELRCC 116 of 2013 (1262 of 2015)**. The purpose of the court is to do justice to all. I will therefore grant stay of proceedings herein pending transfer of this suit to Nairobi on condition that the applicant deposits kshs. 21,763,126 (the sum of the taxed costs) in this court within 15 days of this order. If the applicant defaults to deposit the said sum as ordered herein above, the stay order shall lapse automatically.

**Disposition**

16. The Notice of Motion dated 6.10.2015 is allowed only to the extent and upon the conditions stated above. Each party to bear his or her own costs.

**Signed, dated and delivered at Mombasa this 19<sup>th</sup> day of February 2016.**

**ONESMUS MAKAU**

**JUDGE**