



Aniket Property & Investments Limited v Mwakibibo & 10 others (As Trustees of the Ahfat Trust) (Environment and Land Case Civil Suit 134 of 2012) [2023] KEELC 954 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 954 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 134 OF 2012
LL NAIKUNI, J
FEBRUARY 16, 2023

BETWEEN

ANIKET PROPERTY & INVESTMENTS LIMITED PLAINTIFF

AND

HAMADI JUMA MWAKIBIBO 1ST DEFENDANT
VENTURE HOLDINGS LIMITED 2ND DEFENDANT
DAVID K KANDIE 3RD DEFENDANT
DRIEDRICK ALFONS JOSEY BRINKMAN 4TH DEFENDANT
AMANA ABDALLA NG'ANG'A 5TH DEFENDANT
KHALFAN MLAI 6TH DEFENDANT
LAND REGISTRAR KWALE 7TH DEFENDANT
ATTORNEY GENERAL 8TH DEFENDANT
FARDOSA AHMED ABDULLE 9TH DEFENDANT
MOHAMED AHMED ABDULLE 10TH DEFENDANT
. MOHAMED SALIM BALALA 11TH DEFENDANT
AS TRUSTEES OF THE AHFAT TRUST



RULING

I. Preliminaries

1. The Plaintiff/Applicant herein, Aniket Property & Investments Limited” moved this Court through a Notice of Motion application dated 18th March, 2022 and filed under Certificate of Urgency on the same date for its determination.

II. The Plaintiff/applicant’s Case

2. The Plaintiff/Applicant brought the said application under the provision of Articles 25(c), 47, 48, 50(1) of *the Constitution* of Kenya, 2010 seeking for the following orders:
 - a. That the Honourable Mr. Justice L.L Naikuni do recuse himself from further hearing this suit.
 - b. That costs of this application be in the Cause.
3. The application is premised on the grounds in verbatim that:
 - i. His Lordship Honorable Mr. Justice L. Naikuni had in his Site Visit report purported to make certain findings of fact relating to matters directly in issue before the Court relating to ownership of the properties which clearly shows a pre-disposed mind set;
 - ii. The said Honourable Judge was very reluctant to release the Site Visit conducted on 12th November, 2021 and a Site Report despite several requests by the Plaintiff to do so which he eventually did on 20th January 2022 and thereafter insisted that parties agree to its contents so that the trial could proceed which the Plaintiff, ‘inter - alia, declined to do as it had not had the opportunity to peruse and consider the same;
 - iii. The said Honorable Judge had descended into the arena of litigation despite his adversarial role and had, and continued to, deliberately ignore decisions of this Honourable Court and particularly that of the 20th January 2021 that has neither been set aside nor appealed from;
 - iv. On 20th January 2022, despite allowing the Plaintiff’s Application for joinder of certain parties, he proceeded to insist on proceeding with the case based on his eagerness to proceed with the matter and regardless of the fact that the newly joined parties were yet to be served with process;
 - v. In his ruling delivered on 19th January 2022 on the contempt application as against the First Defendant, the said Honourable Judge not only purported to suggest that the restraining orders issued had not been extended but he also ventured into making observations/findings on an interlocutory matter that are prejudicial to the final trial of the matters in issue.
 - vi. In the circumstances, it is apparent when all the proceedings and matters are considered, the said Honourable Mr. Justice L.L Naikuni was not being or, at the very least, appeared not to be impartial and, the Plaintiff’s constitutional right to a fair trial was being infringed;
 - vii. Contrary to the Honourable Judge’s assertion’s, the Plaintiff had and was ready to proceed with the hearing of the suit before an impartial Court and had no choice of Judge;
 - viii. The Honorable Justice L.L. Naikuni had of his own motion stated on 20th January 2022 that he would consider whether he ought to recuse himself but had now stated he would not do so.;
 - ix. It was just and equitable to grant the relief sought.



4. The application by the Applicant is premised on the grounds, facts and testimony contained in the 56 Paragraphed Supporting affidavit of Irene Njagi, employed by the Plaintiff/Applicant as its Legal officer. The Plaintiff/Applicant herein averred that:
- a. Save where otherwise stated the contents of this Affidavit were derived from her own knowledge, belief and information and/or documents which she had had sight of in her aforementioned position. To the extent that any of the statements herein were based on information or belief, the sources of such information and grounds of such belief were are stated hereunder and I verily believe the said statements to be true. She was personally aware of this matter having attended all Court Proceedings herein and swore this Affidavit in support of the Plaintiff's application seeking the recusal of Honourable Mr. Justice L.L Naikuni from further hearing this matter.
 - b. This matter was previously heard by Mr. Justice Yano and was a "part – heard" matter then taken over by Justice LL Naikuni. The last time the matter was before Mr. Justice Yano, on 21st May 2021, it was adjourned at the instance of the First Defendant. Prior to that, on 20th January 2021, the matter was adjourned at the instance of the Defendants, and particularly the 1st Defendant, who was not in Court. On that day (20th January 2021), an argument had ensued before the Court as to the order of giving evidence by the Defendants and the Honourable Mr. Justice Yano, in his ruling, ordered that parties call their respective witnesses to testify in the order the parties were sued. It was premised on this decision that the 1st Defendant began his testimony on 24th February 2021 when he was also cross - examined by the other Defendants but was stood down for cross - examination by the Plaintiff's Advocates.
 - c. When the matter came up for hearing on the 21st May 2021, the matter was adjourned at the instance of the 1st and 2nd Defendants. The matter was thereafter set down for hearing on the 14th October 2021 when Mr. Sanjeev Khagram Advocate of Messrs. A. B. Patel & Patel Advocates appeared for the Plaintiff and informed the Court that he was ready to proceed but flagged the issue of constructions ongoing. As was apparent from the record, the 1st Defendant's Advocates, Mr. Kounah sought an adjournment as his client was not in Court as he had advised his client not to attend that day and sought the Court's indulgence in the matter. Mr. Ndambiri for the 2nd Defendant stated he had not travelled to Mombasa for the scheduled hearing as he had been advised by Mr. Kounah, Advocate for the 1st Defendant, that the matter would not proceed to hearing and he had acted on that advice.
 - d. Mr. Justice Naikuni thus adjourned the matter for hearing to the 19th and 20th January 2022 and directed the Plaintiff's application for contempt dated 19th August 2018 be disposed of by written submissions. The Court further ordered that no further construction should be undertaken on the property and directed, suo moto, a site visit to inspect the suit property 'with a view of gathering further evidence to assist the Court. She is advised by Mr. Sanjeev Khagram and verily believe that he was not aware of this until he perused the Court's handwritten proceedings recently and that the law only permitted an inspection of the property and not that it can suo moto order a site visit'...to gather further evidence...' as otherwise the Court ventures into the arena of litigation. Had the Plaintiff been aware that this was the intent of the Court, it would have objected to such cause being adopted by the Court of its own accord.
 - e. From the record, it would be apparent that the Plaintiff's case was closed on the 20th January 2021 and since then not on a single occasion had the matter been adjourned at the Plaintiff's instance. For the site visit, the Court invoked its powers under the provisions of Order 18 Rule 11 of Civil Procedure Rules, 2010 which empowers the Court to inspect the property or thing



concerning which any question may arise. The site visit was fixed for 12th November 2021 but directed the matter to be mentioned virtually at 9.00a.m.that morning. The Court, on the contempt applications, after hearing parties, directed the 1st Defendant to file its response to the application by 18th November 2021. Thereafter, parties proceeded to the Site Visit (Locus in quo”) whereby the parties’ representatives, including the Deponent were also present. During the site visit inspection, she suddenly found the Honourable Mr. Justice Naikuni’s demeanor changed and he refused to acknowledge the existence of Diani/Beach Block/203 and seemed only interested in the purported sub-divisions which he kept specifically referring to and also to the owners/representatives in persons. I pointed this out to the Plaintiff’s director, Mr. Dilpun Shah on site.

- f. At the end of the inspection, the Court directed the matter be mentioned virtually on 25th November 2021 for purposes of ascertaining compliance by the 1st Defendant on the contempt application. At the closing, she recollected that the Honourable Judge stating that a Mr. Kihara, a Surveyor from Kwale was picked for convenience and attended the site visit even though Mr. Makuto had pointed out that he had not been unable to procure the attendance of the Land Registrar or the Surveyor. In any event, prior to the commencement of the site visit application, the Honourable Mr. Justice Naikuni specifically pointed out that ‘this was only going to be an ‘inspection’ exercise and was not intended to amount to ‘hearing proceedings’ in the matter and no parties would be entitled to ask any questions during the Inspection Visit.
- g. The site visit ended at 3.45 p.m. and the Honorable Judge expressed to Mr. Makuto from the Attorney General’s Chambers, that he would like the Land Registrar and Surveyor to testify in the matter. He also informed parties that his Site Visit Report would be available for the parties’ consideration by Tuesday following on 16th November 2021-for consideration. Parties appeared before the Court on the 25th November 2021 when Mr. Ondego of Messrs. A. B. Patel & Patel, Advocates appeared for the Plaintiff. This date, in her understanding, was only for mention to ascertain compliance on the contempt application and take directions as to the hearing of this application.
- h. The Court gave directions on Written Submissions of the application and set down the matter for mention on 15th December 2021 for purposes of ascertaining compliance. Mr. Ondego Advocate enquired as to the status of the Site Report which the Court stated would be released to the parties shortly. Thereafter, the Court ventured into, of its own motion, the question of the trial and mode of giving evidence and suggested that the Land Registrar and Surveyor be called to give evidence immediately after the 1st Defendant had concluded his testimony. She was informed by the said Mr. Ondego Advocate and verily believe that the Judge intimated that arising from his observations at the Site Visit contained in his Report, it was imperative that the Land Registrar and Surveyor testify first before any of the other Defendants. She was informed by the said Mr. Ondego that Mr. Makuto’s plea that all the other Defendants’ ought to testify before the Land Registrar was called to testify so that his client’s rights were not compromised especially that he would not be able to then challenge any evidence produced by the other Defendants should the need arise was disregarded by the Court on the basis that the witnesses could be re - called should the need arose; his and Mr. Siminyu’s protests as regards the order of giving evidence premised on Judge Yano’s ruling given on the subject on 20th January 2021 in the matter were also disregarded;it was pointed out to the Honourable Mr. Justice L.L Naikuni by both Mr. Ondego Advocate and Mr. Siminyu Advocate that the matter was only for mention for compliance and no substantive orders could be made - and further that the Court could alter the manner of giving evidence of its own motion given they were in an



adversarial system; and he pointed out to the Court; in any event, we required the Site Visit Report to consider given that he (Mr Ondego) was not present and could not comment on the same.

- i. The Court thereupon went ahead to issue directions and ordered:
 - i. Hearing date of 19th and 20th January 2022 be adhered to whereupon Mr. Mwakibibo who was testifying proceeded to be followed by the Land Registrar, Kwale and Land Surveyor notwithstanding any other order because of the observations made by the Court during the site visit on locus in quo; and
 - ii. There be liberty to recall the said Land Registrar and Land Surveyor to testify.
- j. The Plaintiff, being dissatisfied with this decision, thereafter filed a Notice of Appeal in the matter given that there was no plausible reason for the Honourable Judge to purport to reverse an earlier decision of the Court made after hearing parties which the Deponent annexed hereto marked 'IN-1'. The Deponent deposed that she was informed by the said Mr. Ondego that his firm's efforts to obtain a copy of the Site Visit Report thereafter was not successful as the Court file as said to be the Judge's Chambers.
- k. When the parties appeared before the Honourable Mr. Justice L.L. Naikuni on the 15th December 2021, the Honourable Judge's attention was drawn to an attempt by the 2nd Defendant, the Venture Holdings Limited, to register a charge over the property despite there being subsisting Orders of the Court prohibiting any dealings over Kwale/Diani Beach Block/1543 and it was confirmed that the Plaintiff had filed their Written Submissions on the contempt application being mention that day. The Court thereupon proceeded to make the following Orders:
 - i. the Plaintiff to ensure that filed copy of its Written Submissions were placed on the Court file by close of business that day;
 - ii. the 1st Defendant was granted 14 days to file and serve skeleton Submissions responding strictly to the new issues raised in the Plaintiff's Submissions;
 - iii. parties were advised to abide by Orders of this Honourable Court previously granted to the effect that no activity takes place on the suit land pending the hearing and determination of the suit and Mr. Makuto to facilitate an official search against the property.
 - iv. hearing dates of 19th and 20th January 2022 be adhered to; and
 - v. ruling on the contempt application was reserved to 19th January 2022 prior to the hearing.
- l. She deposed that she was further advised by the said Mr. Ondego and verily believe that his firm's attempts to obtain the Site Visit Report were yet again unsuccessful in the interim as the file was said to be with the Honourable Judge and he had not released the Report. This Honourable Court's ruling on the contempt application was delivered on the 19th January 2022 in which the Honourable Mr. Justice L. Naikuni stated:
 - i. he needed to briefly state the facts of the case in the course of which he made observations relating to the alleged compulsory acquisition of the 1st Defendant's property Kwale/Diani Beach Block/25 which was then sub-divided into Kwale/Diani



Beach Block/203 and 204 respectively and that on 18th October 2007, he was issued with a 99-year lease upon extension of the lease.

- ii. that some of the matters in this case emerge but still to be fully appreciated and determined. It is alleged the parcel No. 203 was sold off to the Plaintiff. For the reason of safeguarding the rule of sub judice and not wanting to prejudice the case by the parties hereof, taking that the hearing is still work in progress, this Honourable Court shall not wish to devolve further and instead defer on this aspect for the time being until this case is fully heard and determined;
 - iii. that from the pleadings, there appeared to be sub-divisions of Parcel No. 203 into eight (8) parcels namely Land Reference Number Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 & 1543 all issued on 3rd October 2011;
 - iv. there was no evidence of service of pleadings in this suit on record to demonstrate service was duly effected by substituted service and that the Court was not therefore satisfied that service was effected;
 - v. the facts deponed to by Mr. Vijay Lakhani were not factual and bordered on willful mis-representation of facts or misleading the Court and in saying so, the Court on a without prejudice basis, confidently and strongly held the assertion of three aspects:
 - vi. Firstly the Court conducted a site visit for inspection in the presence of all parties from which it ‘...was able to pragmatically and practically take judicial notice and on first hand basis deduced that there has been not only numerous resultant sub-divisions of the suit land from the original Land Reference Number Kwale/Diani Beach/203 to other parcels Nos. 1542 to 1547.’ He then went on to list the names of the occupants of these parcels; at paragraph 30 of the said ruling, he then makes a finding that ‘...the abovementioned new and beneficial owners and who included some of the Defendants in this case were not the 1st Defendant. To proceed to cite the 1st Defendant alone as urged would be not only discriminatory but also taking a premature decision prior to conducting a full trial..’; and the Court wondered loudly and has been extremely anxious to know the reason the Plaintiff has to date never taken any tangible and legal steps to have ‘...these beneficial land occupants or in possession enjoined in this suit...’.
 - vii. Secondly, that the Plaintiff had to demonstrate that apart from applying from approvals for the Plot No. 1542, the 1st Defendant was indeed the person behind the alleged construction of the perimeter wall;
 - viii. Thirdly, injunctions cannot subsist interminably and in the instant case, the injunction Orders were made on 11th July 2012 and 5th October 2012 and issued on 6th August 2018 and that there was no indication on extension of these Orders on the Court file. The application was thus dismissed.
- m. In this regard, she annexed hereto and mark as Exhibit ‘IN-2’, true Photostat copies of the file note made by Mr. Sanjeev Khagram upon delivery of the ruling. The ruling was already typed at the time it was delivered and despite numerous attempts to obtain a copy of the Site Visit Report as well as the typed ruling, this was not availed which compelled the Plaintiff to write to the Executive Officer of the Environment and Land Court to register the protest which its advocates did the following day on 20th January 2022. She annexed hereto and marked as Exhibit ‘IN-3’, a true Photostat copy of the said letter. All along and during the proceedings,



the said Mr. Justice L.L. Naikuni purported to allege that the Plaintiff was frustrating the progress of the suit yet it was not as is apparent from the record.

- n. The Plaintiff in light of the ruling on the contempt application, also instructed its advocates to file the joinder application which it did on 20th January 2022. All parties appeared before the Court on 20th January 2022 as directed at 12.00 noon and the first thing that the said Mr. Sanjeev Khagram Advocate addressed extensively was the fact that the Orders said not to have been extended were actually subsisting and he was concerned by the Court's observations on this especially that there was an attempt by the 2nd Defendant to register a charge in December 2021 and the suggestion in the ruling that there was no indication of extension of these orders on the Court file.
- o. Like the previous day, protest was raised that neither the typed ruling nor the site visit report had been availed to the Plaintiff and it was impossible to proceed without considering the contents thereof given the remarks and observations being made in these two documents. The Deponent could not understand the Court's reluctance to release these two documents. Eventually, after much argument and submissions by Mr. Siminyu and Mr. Makuto, the Honorable Mr. Justice Naikuni released the Site Visit Report to the parties and stated he wanted this agreed before proceeding further. At this point, Mr. Khagram, Mr. Siminyu and Mr. Makuto protested this was not possible and that they needed to consider the contents before proceeding further in the matter at which juncture the Honourable Judge retorted that he could not understand the reluctance of the Plaintiff to proceed with the matter yet he had been informed that his observations/findings in these two documents were pertinent to consider before proceeding with the matter.
- p. The Honourable Judge Mr. Justice Naikuni was getting visibly agitated and kept on repeating that the Court was eager and anxious to proceed with the matter and that the Plaintiff was impeding this process by refusing to agree to the Site Visit Report and proceed with the hearing when even the Land Registrar, a Ms. Widad was in Court. Just before the hearing, Mr. Sanjeev Khagram had in her presence, inquired of Mr. Makuto and whether he was ready and he stated that although the Kwale Land Registrar had appeared in Court, he was not in a position to proceed given he had not filed her Witness Statement. The Learned Judge's attention was also drawn to the joinder application before him which he simply proceeded to allow on the basis it was unopposed and ordered the Affected Parties to be served with process by substituted service in a local daily Newspaper of National circulation and also physically on the individual premises. Despite this he then ordered that the matter proceed as scheduled.
- q. Immediately thereafter, Mr. Siminyu raised protest at the lack of being supplied with the ruling and asked for an adjournment on the basis that despite the matter having been adjourned the previous day for lack of release of the ruling, the same was yet to be released to him and he needed to consider this before proceeding further in the matter. The Plaintiff's advocate, Mr. Khagram, also raised protest and informed Court it was difficult to proceed in the absence of being availed a copy of the ruling and that a protest letter had been sent to the Court on this. He also alluded to the fact he could not understand how the Court could proceed in the absence of these parties thereby infringing on their rights to natural justice. Mr. Makuto even raised the question of service of process on the fresh parties enjoined and stated there was a risk of the parties' witnesses' evidence being questioned by the enjoined parties.
- r. She annexed hereto and marked as Exhibit 'IN-4', true Photostat copies of the notes taken by Mr. Sanjeev Khagram and Mr. Ondego through the proceedings which speak for themselves. The Deponent averred being informed by the said Mr. Ondego and verily believe that the typed



ruling on the contempt application was not released to the Plaintiffs Advocates until after about one week thereafter. Throughout the proceedings of the 19th and 20th January 2022, the Court mentioned that it was enthusiastic and very eager to hear the matter and proceed with the trial and appeared to cast aspersions on the Plaintiff as being an impediment to proceed which she found extremely surprising given that the Honourable Mr. Justice L. Naikuni was even prepared to sacrifice the Affected Parties right to be heard and proceed with the trial of the case. At one stage, he even stated he would consider recusing himself from the matter, a matter the Deponent also found strange as nobody had raised this with him at that stage. She could not understand his zeal to proceed with the matter and yet he also wanted to consider recusing himself given that he felt very frustrated that the trial was not proceeding to hearing.

- s. After receipt of and considering the typed ruling as well as the contents of the Site Report, it became visibly evident that the Honourable Judge had a pre-fixed mindset and had even proceeded to find that the sub-divisions were proper and belonged to the respective Defendants and that matters that the Honourable Judge had verbally stated when delivery his ruling on the contempt application were now obliterated therefrom. The reasons for the Court's reluctance to release the Site Visit Report and the typed ruling began to become apparent to her particularly as she was present in Mr. Ondego office when the ruling was delivered and was also present on 12th November 2021 at the Site Visit. It was discordant for the Honourable Judge not to release the Site Visit Report to the parties and particularly the Plaintiff until the 20th January 2022, and even then only when parties protested the reluctance to release the report and typed ruling, yet the Court used this extensively as findings '...of beneficial ownership...' in interlocutory proceedings despite being fully aware that it would be wrong and prejudicial to do so and in the process compromise integrity of the proceedings before it.
- t. Based on her director's instructions she immediately sought that the Plaintiff's advocates obtaining Photostat copies of the Court proceedings as well as a transcript of the recorded virtual proceedings. She was made to understand by the said Mr. Ondego and verily believe that the Photostat copies of the Court's handwritten proceedings were availed to his firm after a fairly long while as the file was said to not to have been released to the Registry by the Honourable the Judge.
- u. She has carefully perused through these handwritten proceedings and from these as well as the Site Visit Report and ruling, it is clear that:
 - i. the Honourable Mr. Justice L. Naikuni definitely had a pre - disposed mindset in the matter. Whilst in his ruling delivered on 19th January 2022 he stated he appreciated, in so far as Kwale/Diani Beach Block/203 was concerned, that in order to avoid any prejudice and to safeguard the sub-judice rule given that the hearing was still in progress, he would not make any findings on the question of the Plaintiff's proprietary rights until the case was fully disposed of showing that the Learned Judge clearly appreciated that he could not make any definitive findings on the issues for determination before him at trial;
 - ii. yet, in his Site Visit Report, he made no reference to the Plaintiff's ownership of Kwale/Diani Beach Block/203 and instead persistently referred to the purported sub-divisions Kwale/Diani Beach Block/1536,1537, 1538, 1539,1540,1541,1542 & 1543 as having been properly done out of Kwale/Diani Beach Block/203 and that the owners of these sub-divisions were, inter-alia, some of the Defendants in this suit;



- iii. the above was tantamount to making purported findings on issues that were pending determination before the Honourable Judge Mr. Justice L Naikuni and clearly indicated a pre-disposition in the matter particularly in light of the persistent adverse comments made by the said Honourable Judge as to the Plaintiff's perceived reluctance to proceed with the case when since January 2021, it was the Defendants who had sought to defer the matter as was evident from the record;
- iv. the Court's reluctance to release its ruling and the Site Visit Report was intentional and aimed at prejudicing and compromising the Plaintiff's position as was its deliberate conduct in only releasing the report on 20th January 2022 (despite it having been ready since 12th November 2021) and insisting that it be agreed upon so that proceedings could progress further;
- v. the Court's ruling on the contempt application released had been altered and no longer contained the contentious findings that there was no indication of the extension of the Orders of Court earlier made which led the Plaintiff's Advocates to raise this matter with the Honourable Judge extensively on the morning of the 20th January 2022;
- vi. the site Visit ended at 3.45 pm. on 12th November 2021 as the record of proceedings showed after which there was an assertion of an alleged agreement as to the order of giving of evidence between parties when none was agreed upon. In fact, it was the Honourable Judge who kept insisting that he wanted to hear the Land Registrar and Surveyor first despite protest from the Plaintiff, the Attorney General and Mr. Siminyu for the 6th Defendant on the basis that it was an adversarial system showing that the Learned Judge was not dispassionate or impartial in the matter. This was further manifest from the fact that at the mention of 25th November 2021, protest was again raised at the Honourable Judge's attempt to have the Order of testifying changed and the Plaintiff, in fact, filed a Notice of Appeal against the said Order which the Learned Judge made notwithstanding the earlier Orders of the Court (Mr. Justice Yano) made after hearing parties extensively in the matter;
- vii. to the Deponent's utter consternation, the proceedings for the 25th November 2021 had been changed to reflect Mr. Ondego stating there was an agreement for the change of the order of proceedings at the Site Visit. The Deponent was informed by Mr. Ondego and verily believe that he never stated as he is alleged to have done as he was not at the Site Visit and had not had sight of the site report which was to be released by the Court. In any event, he informed her and she verily believe that he vehemently opposed the attempt by the Honourable Mr. Justice Naikuni to impose the changed order together with Mr. Siminyu and Mr. Makuto yet the Honorable Judge proceeded to impose this notwithstanding earlier orders of the Court and on the premise that the Land Registrar and Surveyor could nevertheless be re-called after testifying should any further matters arise from the other Defendants' testimony;
- viii. even after joinder of the Affected Party on 20th January 2022 and ordering substituted service and personal service upon them, the said Honorable Judge insisted that the matter should proceed to hearing on that day and did not relent in his quest to proceed (having expressed severally how eager he and enthusiastic he was to proceed with the matter) until the parties agreed by consent that the matter could not proceed in the circumstances and taking into account the Affected Parties' right to be heard in the matter;



- ix. despite stating at the outset that the Site Visit was simply an inspection exercise and no proceedings would be conducted on Site, the Honourable Judge purported in his site visit report to give directions as to the order of testifying of witnesses when there was no such agreement between the parties;(it is apparent from the said Honourable Judge's remarks in his conclusion in the Site Visit Report that he had already a partial disposition against the Plaintiff. He would not have reached these concluding remarks - predominantly questioning the Plaintiff's title and seemingly accepting the validity of the alleged Sub-divisions had he considered the fact that the Plaintiffs had already testified on record and even produced all original documents in its possession for inspection before the Court;
- x. in the proceedings before him on 4th March 2022, the Honourable Judge purported in his ruling on the adjournment to wonder how it was that Mr. Karega was in Court when there was no evidence of service before the Court immediately prompting a protest from the Plaintiff's advocates that the Affidavit of service was filed on 17th February 2022. Strangely, this has now been obliterated from the Court's record of proceedings;given the foregoing and the fact that the Plaintiff had already concluded their case and closed it and yet the Plaintiff was the one who was consistently being termed as an impediment to proceedings with the matter (despite the record showing otherwise) considered in light of the above creates, at the very least, an impression of a real likelihood of bias when all the circumstances were viewed objectively. Of course, so far as she was concerned, having recognized that it was imprudent for the Court to make any definitive findings on the issues that were before him for determination to avoid prejudicing any of the parties, by making observations and findings in the Site Visit Report (which the Court reluctantly released to the parties) purporting to lend credence to the purported sub-divisions and ownership of these parcels, the Honorable Judge clearly appeared not to be impartial as he ought to apply the same standard to all parties to avert any prejudice;
- xi. without hearing any evidence of the circumstances in which the Defendants allegedly sub-divided the parcel Kwale/Diani Beach Block/203 and how the Defendants purportedly acquired these, the Honourable Judge appears to have formed an opinion as to the ownership of the land and that there '...have been resultant sub-divisions of the suit land from the original land reference number Kwale/Diani Beach Block/203 to other parcels Nos. 1542-1547....' as stated in his ruling delivered on 19th January 2022 yet no such evidence had been produced before the Court to enable it make such a finding. In addition to this, the Honourable Judge in his decision consistently referred to the persons found in possession of the purported sub-divisions as the '...new and beneficial owners and who include some of the Defendants in this case...' Indeed, the Court expressed its eagerness in the matter in writing in the ruling;
- xii. given the aforesaid, and the circumstances of the matter, there was little doubt that the Plaintiffs apprehension of bias was not unfounded but was reasonable when objectively considered by any reasonable and fair-minded person. Indeed, the question of recusal crossed the said Honourable Judge's own mind on the 20th January 2022 when he himself expressed his desire to do so in light of what he termed as 'him being frustrated from proceeding with the trial despite his eagerness and enthusiasm to do so';



- xiii. the Honourable Judge’s conduct infringed on the Plaintiff’s constitutional right to a fair trial; and
- xiv. it was imperative, for the preservation of the administration of justice in an impartial and dispassionate manner without any bias or pre-disposition that the Plaintiff sought, with tremendous respect to the said Honourable Judge, his recusal and disqualification from hearing this matter further.
- v. At the time the site visit was suggested by the Honorable Judge “Suo Moto”, she was in the company of the Plaintiff’s directors and Advocates and they were all of the view that this was simply for purposes of inspection as provided in law but it now transpired that the Honorable Judge was using the inspection as evidence of ‘... beneficial ownership..’ and making conclusive findings based on his Site Visit Report adversely to the Plaintiff assertion of proprietorship over Kwale/Diani Beach Block/203.
- w. The Plaintiff given the said Honourable Judge’s persistent remarks that the Plaintiff appeared not to be keen to proceed in the matter and appeared to impede the progress of the suit, was apprehensive that it would not receive a fair hearing as the Judge had clearly expressed his mindset about the Plaintiff appearing to frustrate the process and as to its doubtful ownership of the property Kwale/Diani Beach Block/203 when the evidence on record showed otherwise- yet he made definitive finding at an interlocutory stage and in an application unrelated to the issue as the ‘.new and beneficial..’ ownership relating to the purported sub-divisions which he suggested were properly done from Kwale/Diani Beach Block/203. In this regard, the Plaintiff was apprehensive that the view expressed by His Lordship gave rise to a reasonable apprehension that it would not receive a fair hearing from His Lordship who would punish the Respondent for its insolence in raising pertinent questions raising the proceedings.
- x. It was in the interest of justice that his Lordship did recuse himself from further hearing this matter. The Plaintiff had never had any preference for the matter to be heard before any particular Judge and the matter could be referred to the Presiding Judge of the Environment and Land Court for further directions in the event the application was allowed.
- y. In conclusion, the Deponent stated that this affidavit was made in support of the Plaintiff’s application for recusal of the Honourable Mr. Justice L. Naikuni from further hearing this matter.

III. The 1st Defendant/respondent’s Case.

- 5. On 4th May, 2022, the Counsels for the 1st Defendant/Respondent, the Law firm of Messrs. Kounah & Company Advocates filed four (4) Grounds of Opposition dated 28th April, 2022. They raised the following grounds:-
 - a. That the Application was without merit.
 - b. That the Application was misconceived, bad in law and fatally defective.
 - c. That the Application was an abuse of the process of Court.
 - d. That the Application was meant to cause delay.



IV. The 2nd & 4th Defendant/Respondent's Case

6. On 14th May, 2022 the Counsels for the 2nd and 4th Defendants, the Law firm of Messrs. A.N. Ndamibiri & Company Advocates raised and filed a Seven (7) Grounds of Opposition dated 28th April, 2022 to the said Notice of Motion application dated 18th March, 2022 by the Plaintiff. The objections were the following grounds:
 - a. That the grounds on the face of the Notice of Motion application stated that the Hon. Justice L.L Naikuni purported to make certain facts while in the Site Report which was compiled by the trial Judge he stated that the purpose of the said visit was only to inspect the same and in no way was the purpose to collect any evidence but to confirm only that which had been presented in Court by the parties.
 - b. That the delay on the part of the Judiciary in releasing both the Site Visit report and the typed copy of the Ruling delivered on 19th January, 2022 did not in any way reflect a prejudice by the Learned Judge against the Plaintiff as this was an issue that affected all parties to the suit.
 - c. That the grounds for recusal of a Judge as indicated in the Judicial Code of Conduct showed that they could apply where there was prejudice on the part of the trial Judge. However, from the filed application, the Applicant had failed to present any evidence in the affidavit sworn by Irene Njagi on 18th March, 2018 in support of the above-mentioned Notice of Motion of such prejudices.
 - d. That the averments made in the Supporting Affidavit that the Trial Judge only referred to the suit land in terms of its sub -divisions and not as a block as the Plaintiff would have preferred did not raise an issue of prejudice but rather it brought about judicial notice as indicated in the Site Report that the suit land had already been divided with some parcels of land having perimeter walls, gates and extensive developments that never involved the adjacent parcels of land.
 - e. That the Applicant stated that in the Ruling delivered on 19th January, 2022 the Trial Judge made findings in an interlocutory manner in stating that the persons found on the parcel of land as beneficial owners did not justify a claim of prejudice as the court then asked the Plaintiff why all along he had never enjoined these parties who were not named as Defendants to be parties in the suit.
 - f. That the Applicant stated that the Court seemed to want to have the matter hastened stating that the Learned Judge was eager and enthusiastic to proceed on with the matter could not be construed as a matter of bias but as an attempt by the Judge to have a case that was more than ten (10) years old be expeditiously dispensed with.
 - g. That the application was, to say the least scandalous, frivolous and vexatious and was a clear abuse of the Court process.

V. Submissions

7. On 12th October, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 18th March, 2021 by the Plaintiff/Applicant be disposed of by way of written submissions. Pursuant to that all the parties obliged and a ruling date was reserved on 6th February, 2023 or on Notice by Court accordingly.
8. The Honorable Court wishes to sincerely applaud all the parties herein – Mr. Sajiv Khagram, Mr. Kounah, Mr. A. Ndambiri, Mr. Ondabu, Mr. Siminyu, Mr. Makuton and Mr. Karega Advocates



who despite all odds and ends in the matter the professional manner, diligence, dedication, devotion, dignity, decorum and resilience they have conducted themselves before this Honorable Court. I dare say, it is a typical and unique case which all the young and more experienced practitioners ought to emulate.

A. The Plaintiff/ Applicant's Submissions

9. On 14th July, 2022, the Counsel for the Plaintiff/Applicant, the Law firm of Messrs. of A.B. Patel & Patel Advocates filed their written Submissions dated 13th July, 2022. Mr. Sanjiv Khagram Advocate commended by stating that the Notice of Motion application dated 18th March, 2022 is merited and should be allowed as prayed for the reasons below.
10. The Learned Counsel submitted that the Plaintiff/Applicant herein filed its application dated 18th March 2022 seeking recusal of the Honourable Mr. Justice L. Naikuni from further hearing this suit. The grounds on which the application was made as stated in the said Notice of Motion which was supported by the Affidavit of MS. IRENE NJAGI sworn on the same day. The Counsel noted that none of the parties had filed any Affidavit in opposition to the afore stated application and all the facts deponed to therein remained uncontroverted. In this regard, the Applicant referred this Honorable Court to the decision of "Mustano Rocco – Versus - Aniello Sterell [2019] eKLR in which the Court stated that:

‘Grounds of Opposition only address issues of law and no more...and in no way respond to the issues raised by the application in its Supporting Affidavit. Thus what was deponed to was not controverted nor rebutted by the Respondents. It must be taken to be true..’
11. The Learned Counsel submitted that the Applicant therefore invited this Honorable Court to find, as Mr. Justice Sergon found in the case of "Godfrey Kimani Mwangi – Versus - Kanorero Wendani Co. Limited & 3 Others[2015] eKLR that the facts deponed to ought to be taken as true. He stated therein:

‘.....there is no Replying Affidavit to the application, the facts deponed in the Supporting Affidavit are therefore considered unrebutted and I take them to be true.....’
12. The Learned Counsel submitted that it would be noted that Grounds of Opposition dated 28th April 2022 were filed by 1st Defendant on 4th May 2022 while the 2nd and 4th Defendants filed their Grounds of Opposition dated 28th April, 2022 were filed on 4th May 2022. The Counsel observed that the 1st Defendant/Respondent's Grounds of Opposition did not raise matters of fact. But the 2nd and 4th Defendants/Respondents' Grounds of Opposition purported to raise factual contentions which, as the Court knew, and as the authorities above stated, could not be raised in Grounds of Opposition but rather in a Replying Affidavit. To this extent, the Grounds of Opposition filed by the 1st, 2nd and 4th Defendants/Respondents and the matters of fact raised therein ought to be struck out. They should not be considered. The only ground capable of being construed as being one of law therein is Ground 7 from the Grounds of Opposition by the 1st and 2nd Defendants/Respondents herein.
13. The Learned Counsel further averred in the premises that, the Plaintiff/Applicant humbly submitted that the matters deponed to in the said Supporting Affidavit remained uncontroverted and unrebutted and it was on the basis of these that the present application ought to be considered. The facts were all set out in the said Affidavit and were not repeated herein for sake of expediency.
14. On the issue of the law, the Learned Counsel submitted that the Judicial Code of Conduct and Ethics in Kenya applicable to all judges of the Superior Court requires Judicial Officers to observe and maintain honesty, accurately and honesty represent information to the public and not falsify



record (see the provision of Section 6), to uphold the independence and integrity of the Judiciary and maintain an independence of mind in the performance of Judicial duties and exercise these on a basis of assessment of facts and without being influenced by personal feelings, prejudice or bias (see the provision of Section 7), to exercise powers in a dignified manner to maintain the integrity of Court process (see the provision of Section 8), to observe and carry out duties impartially and without bias(see the provision of Section 9) and to discharge duties in an Honourable manner and with integrity without altering the substance of reasons given or transcript of evidence or summing up thereof. The Counsel averred these principles were un-compromisable in the dispensation of justice. Each case ought to turn on its own individual facts.

15. To buttress his position, the Learned Counsel relied on the decision by the Supreme Court of:- ”Jasbir Singh Rai & 3 Others – Versus - Tarlochan Singh Rai & 4 Others [2013] eKLR where the Court stated that:

‘Perception of fairness, of conviction, of moral authority to hear the matter, is 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 due process of law be realized, and be seen to have had its role; that the profile of the rule of law is the matter in question, be seen to have remained uncompromised.’

16. The Court further recognized that:

‘The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial.’

17. The Learned Counsel submitted that the Supreme Court in this matter recognized that it was of fundamental importance that justice should not only be done but also should manifestly and undoubtedly be seen to be done and that the test of possible apparent bias is ‘a double real possibility’ test - whether there was a real possibility that a fair minded and informed observer might think that there was a real possibility of bias. The Court of Appeal in ”Justice Philip K. Tunoi & Another – Versus - Judicial Service Commission & Another[2016] eKLR reiterated these principles and stated that:

‘.....in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people..’ ‘The question is whether the fair minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased.’

18. The Learned Counsel submitted that these same principles had been applied consistently and had withstood the test of time. Indeed, the Counsel argued that the same appeared in the above two authorities where the 1st Defendant relied on in its submissions filed herein on 27th May 2022. The Plaintiff/Applicant further referred this Honorable Court to its own decision in the case of:- ”Esther Muguru Njeru Njoroge Micheni – Versus - Ian Karani Kamunde & 2 Others [2021] eKLR in which the Honourable Mr. Justice P. M. Njoroge recused himself and stated:

‘I opine that the allegations made by the Plaintiff may raise the perception of possible bias against the Plaintiff. In many cases, perception may override the truth. In my view, the hearing should commence in a Court where no veneer of bias, actual or imagined, is expressed by the parties....’



19. The Learned Counsel submitted that the above authority were very profound statement by the Honourable Judge in which he recognized that Courts were mere arbiters of disputes and had no property incases before them. The Counsel was of the view that the moment a perception of bias arose, the Honorable Judge ought to down his tools in keeping with the age - old adage that: 'Justice must not only be done but also be seen to be done.' This Honourable Court, differently constituted, in "Michael Kungu Kigia – Versus - Agricultural Finance Corporation & 5 Others[2018] eKLR invoked the Bangalore Principles on judicial conduct stating:

'Public confidence in the Judicial system and in the moral authority and integrity on the judiciary is of utmost importance in a modern democratic society'

20. The Learned Counsel submitted that as stated above, the facts deponed to in the said Supporting Affidavit remained uncontroverted and unrebutted. He held that it was not open, with tremendous respect to this Honourable Court, to seek to controvert the facts deponed to, lest to descend into the arena of litigation. Given none of the parties had chosen to controvert the facts/evidence presented by the Plaintiff/Applicant on oath, these ought be taken as true in line with judicial authority as above. The 1st Defendant, in his written submissions, boldly and without any foundation, asserted that the evidence presented in the said Supporting Affidavit was premised on '.....wild allegations.....' and that the Plaintiff/Applicant was '.....hell bent on delaying the hearing of this suit and has now resorted to forum shopping.....'. The Counsel opined, with the greatest of respect, that these statements were incongruous statements completely lacking in candor especially so that no evidence to support these bare allegations had been placed before the Court.

21. The Learned Counsel submitted that from the said affidavit that the principles matters raised by the Plaintiff/Applicant were the Learned Judge had in his Site Visit report purported to make certain findings of fact pertaining to ownership of the property in question when the question of ownership was directly in issue and the matter was part -heard. According to the Counsel this did raise the question of a pre - disposed mind set; the reluctance of the Court to release the Site Visit Report as particularized;previous decision of this Honourable Court made as to the order in which evidence was to be given (made after hearing all parties on the issue] had been ignored and substituted with directions given of the Court's own motion and without any party moving the Court to do so thereby prejudicing the Plaintiff and a fair trial of the case. The Learned Judge after allowing a joinder application on 20th January 2022, insisted on proceeding with the case despite the new party joined not having been served with due process; in the Court's ruling of 19th January 2022, the Learned Judge observed that the interim orders were not extended and purported to venture into making observations/findings of fact as to the ownership of the suit property on an interlocutory application which were prejudicial to the final trial of the matters in issue. The Counsel's contention was that the Court had made prejudicial comments suggesting the Plaintiff/Applicant's purported in delaying the case when, in fact, it was the Defendants who were guilty of this as the record clearly showed; and the Learned Judge having stated on his own motion on 20th January, 2022 that he would consider recusing himself and stating thereafter that he would not do so in the absence of a formal application.

22. The Learned Counsel submitted that when all the foregoing matters were considered objectively and from the stand point of a well - informed thoughtful observer, there would be little doubt that a reasonable, if not serious, apprehension of bias would arise in the mind of a reasonable fair minded and informed member of the public as to the impartiality of Learned Judge. He argued with tremendous respect, that the test was not whether Learned Judge had the conviction that he was not and would not bebiased. But was the test was that of an objective, reasonable, fair minded and informed member of the public. In conclusion, the Learned Counsel thus urged the Court to adopt the preamble on



the Bangalore Principles of Judicial conduct also reiterated in Kenya's Judicial Code of Conduct and Ethics and do the right thing by recusing itself to preserve the integrity of Judicial process.

B. The 1st Defendant's Submissions

23. On 27th May, 2022, the Counsel for the 1st Defendant/Respondent through the Law firm of Messrs. Kounah & Company Advocates filed their Written submissions dated 25th May, 2022. Mr. Kounah Advocate submitted that the submissions were filed in support of the filed Grounds of Opposition dated 28th April, 2022 by the 1st Defendant to the Notice of Motions application dated 18th March, 2022 primarily seeking for the recusal of the Honorable Mr. Justice L.L Naikuni from hearing and adjudicating this suit instituted by the Plaintiff/Applicant. The Counsel recapped the issues that the Plaintiff provided as grounds for recusal of the said Honorable Mr. Justice L.L Naikuni. In a nutshell he summarized them in the following five (5) grounds:-
- a. That the said Honorable Justice L. Naikuni had during the Site Visit and its report purported to make certain findings of fact relating to matters directly in issue before the Court relating to ownership of the properties which clearly showed a pre - disposed mind set;
 - b. That the said Honorable Judge was very reluctant to release the Site Visit Report despite several requests by the Plaintiff to do so which he eventually did on 20th January 2022 and thereafter insisted that parties agree to its contents so that the trial could proceed which the Plaintiff, inter-alia, declined to do so as it had not had the opportunity to peruse and consider the same.
 - c. That the said Honorable Judge had descended into the arena of litigation despite his adversarial role and had, and continued to, deliberately ignored decisions of this Honorable Court and particularly that of the 20th January 2021 that had neither been set aside nor appealed from.
 - d. That the Learned Counsel submitted that on 20th January 2022, despite allowing the Plaintiff's Application for joinder of certain parties, he proceeded to insist on proceeding with the case based on his eagerness to proceed with the matter and regardless of the fact that the newly joined parties were yet to be served with process.
 - e. That in his ruling delivered on 19th January 2022 on the contempt application as against the 1st Defendant, the said Honorable Judge not only purported to suggest that the restraining orders issued had not been extended but he also ventured into making observations/findings on an interlocutory matter that are prejudicial to the final trial of the matters in issue. In the circumstances, it was apparent when all the proceedings and matters are considered, the said Honorable Mr. Justice L. Naikuni was not being or, at the very least, appears not to be impartial and, the Plaintiff/Applicant's Constitutional right to a fair trial is being infringed.
22. The Learned Counsel submitted that contrary to the Honorable Judge's assertions, the Plaintiff/Applicant had and was ready to proceed on with the hearing of the suit before an impartial Court and had no choice of a Judge or Court. The Honorable Justice L.L. Naikuni had of his own motion stated on 20th January 2022 that he would consider whether he ought to rescue himself but had now stated he would not do so.
23. The Counsel posed a few issues for consideration. There were on the issue of whether the Plaintiff/Applicant's complaints met the threshold for recusal of a Judge? Whether the Plaintiff/Applicant's complaints meets the threshold for recusal of a Judge, the Learned Counsel submitted that under Regulation 21 Part II of the Judicial Service (Code of Conduct and Ethics) Regulations 2020, a Judge could recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;



- a. Is a party to the proceedings;
 - b. Was, or is a material witness in the matter in controversy;
 - c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - d. Has actual bias or prejudice concerning a party;
 - e. Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - f. Had previously acted as a counsel for a party in the same matter;
 - g. Is precluded from hearing the matter on account of any other sufficient reason; or
 - h. Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.
24. The Learned Counsel submitted that the grounds given by the Plaintiff/Applicant never met the threshold for recusal of a Judge. They were unwarranted. They were far from the established test. To support his legal position on this point, he relied on the case of:- “Jan Bonde Nielson – Versus - Herman Philipus Steyn & 2 others HC COMM No. 332 of 2010 [2014] eKLR the court observed that:
- ‘The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R Versus David Makali And Others C.A.Criminal Application No Nai 4 And 5 of 1995 (Unreported), and reinforced in subsequent cases.’
25. The Learned Counsel made reference to the case of “R – Versus - Jackson Mwalulu & Others C.A.Civil Application No NAI 310 of 2004 (Unreported) where the Court of Appeal stated that:
- “.....When Courts are faced with such proceedings for Judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a 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.....”
26. The Learned Counsel further submitted that the wild allegations made out by the Plaintiff/Applicant against the Honorable Judge and purported findings of facts were not grounds for recusal. In saying so, he averred that the Site Visit report was merely a reduction into writing what was witnessed on the ground by all the parties present. The Plaintiff/Applicant’s assertion that the Court had a pre-disposed was unfounded. The Counsel cited the case of:- “Philip K. Tunoi & another – Versus - Judicial Service Commission & Another CA Civil Application NAI No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in “Porter – Versus - Magill [2002] 1 All ER 465, where it stated that:-
- “The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.”



27. The Counsel on this point referred Court to case by the Supreme Court (per Ibrahim J.) where the same position was taken in the case of “Jasbir Rai and 3 Others – Versus - Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR where he observed that:-

“The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”

28. The Learned Counsel submitted that the ruling delivered on 19th January 2022 on the contempt application against the 1st Defendant/Respondent never in any way or manner venture into observations/findings that were prejudicial to the final trial. The Counsel contention was that, through this Application, the Plaintiff/Applicant was trying to appeal the decision through the backdoor by re - litigating instead of formally appealing the decision at the Court of Appeal. Further, the Counsel asserted that the Court of Appeal in the case of:- “Kalpana H. Rawal – Versus - Judicial Service Commission and 2 others (2016)EKLR (Nairobi court of appeal and cited in the holding by the East Africa court of justice in the case of “AG of Kenya – Versus - Anyang Nyong’o Appeal No.5, Ref No. 1 of 2006 set out the test for bias as follows:-

“We think the objective test of reasonable apprehension” is good law” the test is stated variously, but amounts to this: do the circumstances give raise to a reasonable apprehension, in the mind of the 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”

29. The Learned Counsel submitted that from the above decision it was clear that there ought to be a reasonable ground for assuming the possibility of bias and whether it was likely to produce in the mind of right thinking, well informed and reasonable member of the public reasonable doubt about the fairness of the administration of justice. Additionally, on the said issue, the Counsel relied in the case of: “Barnaba Kipsongok Tenai – Versus - Republic [2014] eKLR, the court relied on the case of “Jasbir Singh Rai & 3 Others (Supra), the Supreme Court of Kenya Petition No. 4 of 2012 Hon. Justices P.K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had this to say;

“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’s Law Dictionary, 8th Edition (2004) (P. 1303);

‘Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest’.

30. The Learned Counsel submitted that from this definition, it was evident that the circumstances calling for recusal, for a Judge, were by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, was the proper test of whether or not the non - participation of the judicial officer was called for. The object in view, in the recusal of a judicial officer, was 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. He held that it was an insightful perception in the common law tradition, that the justice of a case never always rested on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, was critical to equitable outcomes. His view was that, this was what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a “constructive intuition which operates after learning and analysis are exhausted” [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166].



31. The Learned Counsel submitted that the Supreme Court of Kenya in the case of:- “Gladys Boss Sholei – Versus - the JSC and Another (2018) eKLR cited with Authority the case of “Simonson - Versus - General Motor Corporation USDCP 425 RSupp574,578 (1978) in which the Court stated:-
- “Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.
32. The Learned Counsel submitted that from the above it was clear that the requirements of independence and impartiality of Judge ought to be counterbalanced by the Judge's duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helped to protect the independence of our Courts against maneuvering by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme Court in the holding by the New Zealand court of appeal in “Mnir – Versus - Commissioner of Inland Revenue 2007) 3NZLR 495.
33. The Learned Counsel submitted that in an American case, “Perry – Versus - Schwarzenegger,671 F.3d 1052(9th Circ. February 7, 2012) it was held that the test for establishing a Judge’s impartiality was the perception of a reasonable person, this being a “well - informed, thoughtful observer who understands all the facts”, and who had “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” would not suffice.
34. The Learned Counsel submitted that from the authorities cited above, the Plaintiff/Applicant had failed to demonstrate any ground that supports the application or any impartiality for the following reason:
- a. The Honorable Judge had not ignored the decisions of the Honorable Court but had acted with fairness by giving directions to expedite the hearing of this suit.
35. The Learned Counsel submitted that it was apparent that the Plaintiff/Applicant was bent on delaying the hearing of this suit and had now resorted to forum shopping. Given that this was an old suit, it was only fair and in the interest of justice that the same was heard and determined as soon as possible. In the long run, he urged the Honorable Court to dismiss the Notice of Motion application by the Plaintiff/Applicant dated 18th March, 2022 with costs to the 1st Defendant/Respondent herein.

VI. The Issues for Determination.

36. As indicated above, the Honorable Court has keenly considered all the filed the pleadings being the Notice of Motion application dated 18th March, 2022 by the Plaintiff/Applicant, the Grounds of Opposition by the 1st, 2nd, and 4th Defendants/Respondents both dated 28th April, 2022respectively, written submissions, a myriad of cited filed by all the parties, the elaborate and robust written and oral submissions by the Learned Counsels, the relevant provisions of *the Constitution* of Kenya, 2010, the law and the cited authorities. I have also perused all the files that have been mentioned in this application.
37. I have read through all the pleadings filed herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and other statutory excepts. In order to arrive at a fair, just, equitable, reasonable and informed decision, this Honorable Court has framed four (4) broad salient issues for its determination. These are:-



- a. What are the basic legal grounds and/or parameters required for a Judge and/or a Presiding to disqualify and/or recuse himself/herself from a matter he or she presiding.
- b. Whether the application by the Plaintiff/Applicant has any merit and/or meets the established threshold for a Judge and/or Presiding Officer to recuse himself/herself from adjudicating a proceedings before him in Court.
- c. Whether the parties are entitled to the orders sought.
- d. What are the plausible directions this Court should render in the given circumstances.

VII. Analysis And Determination

38. Having condensed the subject issues for determination herein, this Honorable Court now wishes to proceed on with an elaborate analysis of each one of them with the guidance of the following sub – headings as enumerated here. These are:-

Issue No. 1. What are the basic legal grounds and/or parameters required for a Judge and/or a Presiding to disqualify and/or recuse himself/herself from a matter he or she presiding.

39. The main issue in this application is whether, as a Honorable Judge or the Judicial Presiding Officer over this matter, I should disqualify and/or recuse myself from adjudicating and/or dealing with the present matter. From the very onset, and without mincing words, the answer to that query is the negative. I say so as there is no plausible, reasonable nor justifiable cause spelt out from the application by the Plaintiff/Applicants. The Court has simply opted to have a ten (10) years matter expedited in the spirit of clearing backlogs from the Courts. By and large, the Court means well and to the best of my ability wishes to adjudicate this matter while informed by the core Values of fairness, impartiality, nondiscrimination, bias but sustain transparency, accountability, the Rule of Law, honesty, human dignity, integrity as enshrined under the provision of Article 10 (2) of *the Constitution* of Kenya, 2010, It the more reason, when the matter was handed over to me in September, 2021 from our being appointed as new Judges by the President of the Republic of Kenya, on 3rd June, 2021. Upon being allocated this case, my first strategy was to tackle it from a pragmatic and practical view point and the entry point was Conducting a Site Visit as provided by law to first and foremost establish the fundamental sticky issues in terms of the underlying issues affecting the matter and the cause of the delay of the case. Indeed, as the records would bear me right I tried making the whole process as participatory and engaging with the parties as much as possible. Surprisingly, all the parties appeared utterly pleased and appreciative of my approach. We all walked together in unison from October, 2021 until March, 2022 when things took a dramatic turn!! Indeed, the said Site Visit, held on 12th November, 2021 was very successful and all the parties were overboard on it. We achieved a lot on that day. For ease of reference, I will be re – producing the Site Visit report here verbatim at a later stage of this Ruling.

Nonetheless, my reasoning for taking this position are as enumerated herein below. Firstly, I am informed by the wise principles by the Philosopher Socrates when he held that:- “ there are four (4) things that belong to a Judge. These are a). To hear Courteously; b). To answer wisely c). To consider soberly and d). To decide impartially. These principles inform me all the time of the execution of my work. Further, I wish to extrapolate the fundamental principles governing recusal of a Judge or Presiding Officer. in this jurisdiction are not well settled. In the case of “Jan Bonde Nielson – Versus



- Herman Philipus Steyn & 2 Others HCCOMM No. 332 of 2010 (2014) eKLR the court observed that:-

“The appropriate test to be applied in determining an application for a disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in “R – Versus – David Makali & Others CA Criminal Application No. Nai 4 & 5 of 1995(Unreported) and reinforced in subsequent cases by stating that – when courts are faced with such proceedings for disqualification of a Judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a 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....”

40. Additionally, I want to fully associate myself with the Constitutional Court of South Africa when it stated as follows in case of “The President of the Republic of South Africa – Versus - The South African Rugby Football Union & Others, Case CCT16/1998

“At the very onset we wish to acknowledge that a litigant and her or his Counsel who find it necessary to apply for the recusal of a Judicial Officer has an unenviable task and the propriety of their motives should not be lightly questioned. Where the grounds are reasonable it is the Counsel’s duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his or her recusal as a personal affront” (Emphasis added).

41. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord denning (1899 – 1999) of England who thus spoke of candour and trust associated with Judicial appointment:-

“Every Judge on his (or her) appointment discards all politics and all prejudices. Someone must be trusted. Let us be the Judges.”

42. It is the right of every party to apply for a Judge and/or Presiding Officer to recuse himself/herself from adjudicating on a matter. This proceeds from the fact that justice must not only be done but must be seen to be done and if a basis is established that justice will not be seen to be done, then the judge must give way. On the other hand, Judges have a duty to sit, hear, and determine cases and in the absence of a direct conflict of interest, they will discharge justice in accordance with the oath of office. Further, the court must be alive to the fact that unwarranted, malicious, and frivolous applications for recusal by disgruntled litigants have the effect of undermining justice.

43. In order to make better progress, it will be prudent for this Court to extrapolate on all the fundamental jurisprudential aspects on this subject matter. Under the provision of Article 50(1) of *the Constitution* of Kenya enshrines the right of every person to have a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This right cannot be limited or abridged. Under the provision of Article 25 of *the Constitution* categorically states that the right to a fair hearing is one of the fundamental rights that cannot be limited. Articles 50(1) and 25 (c) stipulate: –

“ 50.

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public



hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

c. the right to a fair trial; and ...”

44. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to the provisions of Section 5(1) of the *Public Officer Ethics Act*, 2003 contains general rules of conduct and ethics to be observed by judicial officers to maintain the integrity and independence of the judicial service. Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of *the Constitution*.
45. Specifically, under the provision of Rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.
46. In the cases where a party seeks recusal of a Judge on the basis of apparent bias, the party must establish a factual basis for seeking recusal. The test is objective and not subjective. In the case of “Tumaini – Versus - Republic [1972] EA LR 441 Mwakasendo Ag. J. stated as that:-

“In the Justices of Queen’s County case, Slade J described ‘bias’ in the following terms:

“By ‘bias’ I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reason-able evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds-was reasonably generated but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision.”

It is not something that raises doubt in somebody’s mind that is enough to cause an order or judgment of justices to be set aside. There must be something in the nature of real bias. The fact that a person has a proprietary or a pecuniary interest in the subject matter before the court which he does not disclose has always been held to be enough to upset the decision of the court, but merely that justices may be thought to have formed some opinion beforehand is not, in my opinion, enough to do so. (Emphasis mine)



47. Mwakasengo Ag. J further gave an excerpt from a decision of Lord Denning where he provided the test for apparent bias. It was stated as follows:-

“...Lord Denning ,M.R., has reiterated the same principle in “Metropolitan Properties - Versus - Lannon, [1969] 1 QB 577”, where at p.599 he paraphrases the authorities on this subject matter in the following words:

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there is real likelihood that he would or did, in impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part , then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favor one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favor one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’ (Emphasis mine)

48. In the same legal reasoning, the Court of Appeal in the case of “Justice Philip K. Tunoi & another (Supra) adopted the test for recusal propounded by the House of Lords in the case of “Porter – Versus - Magill [2002] 1 All ER 465, where it was stated that,

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

49. The same position was taken by the Supreme Court in Jasbir Rai and 3 Others (Supra) where Ibrahim J observed that:-

“The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”

50. The principles in the above cited cases buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;

- a. Is a party to the proceedings;
- b. Was, or is a material witness in the matter in controversy;
- c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;
- d. Has actual bias or prejudice concerning a party;



- e. Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - f. Had previously acted as a Counsel for a party in the same matter;
 - g. Is precluded from hearing the matter on account of any other sufficient reason; or
 - h. Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.
51. Under Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of the impartiality of a Judge. Regulation 9(1) provides:

“A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.”

Issue No. 2. Whether the application by the Plaintiff/Applicant has any merit and/or meets the established threshold for a Judge and/or Presiding Officer to recuse himself/herself from adjudicating a proceedings before him in Court.

Brief facts

52. The Honourable Court has adequately laid down the law and jurisprudence on recusal of a judicial officer. Now to the matter at hand. Before embarking on the issues here for analysis, it is imperative that the Court expounds on the brief facts to this matter. As stated before, this is a case of a prolonged litigation, being in Court for over ten (10) years over the same subject matter. The suit was commenced through a Plaint filed on 11th July 2012 but was subsequently amended and re-amended. From the pleadings filed by the parties and the records herein, it is indicated that in the year 2005, the 1st Defendant was the legal and absolute registered owner to all that parcel of land known as Land Reference Kwale/Diani Beach Block 25. In the course of time – the year 2005, he was informed that there was need to compulsory acquire part of his land for curving it out for public use specifically being the construction of the Diani – Kalu – Kinondo road to Tanga in Tanzania. As a result of this, he surrendered the original Certificate of Lease to the relevant Implementing Entity within the Government of Kenya to hive off the portion desired. The said sub - division of the land into two portions was caused – namely:- (a) Land Reference number Kwale/Diani Beach – 203 and (b) Land reference Number Kwale Diani Beach 204 respectively. The 1st Defendant retained the parcel No. Kwale/Diani Beach Block/203 while Land Reference No. Kwale/Diani Beach Block 204 was utilized by the Government and is what became part of the aforesaid road. Subsequently, upon the expiration of the Certificate of Lease to Parcel No. Kwale/Diani Beach Block/203, the 1st Defendant surrendered his title No. 203 for extension through his appointed Advocates. He was issued with new title deed on 18th October, 2007 with a further 99 years lease. The Plaintiff has testified and closed its case. What is remaining is the Defendant's case. On 12th November, 2021, a very successful Site Visit was conducted in the presence of all parties. A report was shared among the parties. Subsequently, so many other sessions took place between 12th November, 2021 and 18th March, 2022. I now wish to re – produce the Site Visit Report verbatim:-



The Site Visit Report

Republic of Kenya

In The Environment and Land Court

At Mombasa

Elc. Civil Suit No. 134 Of 2012

Aniket Property & Investments Limited..... Plaintiff

Versus

1. Hamadi Juma Mwakibibo
2. Venture Holdings Limited
3. David K. Kandie
4. Driedrick Alfons Josey Brinkman
5. Amana Abdalla Ng'ang'a
6. Khalfan Mlai
7. The Land Registrar Kwale
8. The Attorney General Defendants

A Site Visit Report Onto The Suit Land On 12Th November, 2021

I. Introduction

Upon arrival at the site at 1.30pm, the Honourable court formally called the session to order. It introduced its team and the security operatives. All the parties present were introduced by their Advocates as follows:-

- (a) The Plaintiffs:- Mr. Sanjev Khagram Advocate
 - (i) Mr. Dilpun Shah – Director Aniket Property Investment Limited.
 - (ii) Mr. Nakyen Kivil – Representative Aniket Property Investment Limited.
 - (iii) Mr. Nicholas Ngugi - Representative Aniket Property Investment Limited.
 - (iv) M/s. Irene Njagi – Legal Officer Aniket Property Investment Limited.
 - (v) Solomon Wague – Representative Aniket Property Investment Limited.
 - (vi) Mr. Mohamed – Representative Aniket Property Investment Limited.
- (b) The 1st Defendant :- Mr. Kounah Advocate.
 - (i) Mr. Hamadi Juma Mwakibibo



- (c) The 2nd & 4th Defendants :- Mr. Alfred Ndambiri Advocate.
 - (i) Kwame Kariuki - Director Venture Holdings Limited.
 - (ii) M/s. Esther Kariuki – Representative Venture Holdings Limited.
 - (iii) M/s. Driedrick Alfons Josey Brinkman.
- (e) The 3rd Defendants :- Mr. Ondabu Advocate.
 - (i) M/s. Amama Abdalla – Owner to Plot No. 1539.
 - (ii) Mr. David Kandie – Owner to Plot No. 1540.
 - (iii) Mr. Lumumba Hamisi – brother to the 3rd Defendants
- (f) The 6th Defendant :- Mr. Simiyu Advocate.
 - (i) Mr. Omar Nzani – Representative to the 6th Defendant – Mr. Khaflan Mlai who is abroad at Dubai owner of Plot nos. 1541, 1542 & 1536.
- (g) The 7th & 8th Defendants :- Mr. Kounah Advocate.
 - (i) Mr. Emmanuel Makuto Advocate.
 - (i) Mr. Simon Kihara – Land Surveyor Kwale

II. The Purpose

The purpose of the site visit was explained. It was stated that pursuant to a court directive made on 12th October, 2021 and in view of the numerous activities reported to be taking place on the suit property particularly the ongoing constructions it became imperative to conduct the site visit. The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, to wit:-

40

(10)

- (1) “The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-
 - a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.



Ideally the site visit – the Locus in quo was with a view of gathering further evidence on the above stated arising two (2) issues – of the alleged constructions and the settlements onto the suit land to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

III. The Procedure

It was explained that the team would commence by fully guided by the maps available – and under the guidance of the Land Surveyor. The team would then move from one plot to the other in sequential manner accompanied by the Security operatives. The said maps are attached hereof for ease of reference.

At each plot, the team led by court would primarily be verifying, examining and inspecting the following parameters.

- a. The acreage and size of the plot and the surroundings.
- b. Any existing development in form of structures.
- c. The occupying land owners and their contacts.
- d. The existence of any new constructions and development and when it was commenced and estimated completion period.
- e. Any other observation that may be of value to the evidence and the ongoing constructions.

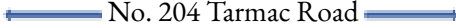

IV. The Process, The Insepection And The Findings

The team conducted an intense physical inspection. They moved from the plot by lot spot check and inspection by all the team present these were the findings:-

- a. The Original Plot was land Ref. No. Kwale/Diani/beach block/203. It was registered in the names of the 1st Defendant - Mr. Hemedi Mwakibibo.
- b. From the amended Registered Index Map (RIM) done on 29.8.2016 bears Reference numbers no. 458/35. It indicates that the above parcel was sub - divided into eight (8) parcels being L.R. No. 1536, 1538, 1538, 1539, 1540, 1541, 1542 & 1543 respectively.

The Diani – Kalu Kinando road leading to Tanga, in Tanzania was constructed onto the land was constructed on the suit land based on the compulsory acquisition bases pursuant to the provision of Article 40 (3) of *the Constitution* of Kenya.. The sketch map is as attached:-



DIANI BEACH /OCEAN		
Diani Leisure Lodge	Plot No. 1543 (5 Acres) venture Ltd.	Akalu Kinando
 No. 204 Tarmac Road 		
	5 meters 1542 - MOSQUE	Wide Access 1541
		Road (1 KM) 1540 Combined
		1539 – 3 Rd Defendant
		1538 David Kandie
		1537 – German – Mr. Driedrick Alfons Josey Brinkman
		1536 - Mr. Frank Peter Anhorn Khalfan Mlai

A. Plot No. 1543

It is a 5 acre plot. It is well partially fenced with the chicken wire and concrete posts – replica of the ones used by the Military Camps but only on the upper side. The lower side has posts but no wire. There are some unkempt shrubs scattered all over. There are four (4) old concrete while pointed structures. We were informed that they were built and left behind by the former proprietor of Mugoya Company – Mr. James Isabinye. There seem to be people mainly guards manning the property who live under these structures as there were a few old beddings and some utensils scattered all over. The plot is adjacent to a very severe beach with tides reaching at. There are a few temporary Makuti Swahili shelters on it where we noticed some tourists visit for causal relaxation including body massage and sand walking along the beach. There were no construction taking place at all. The owners of the plot were present and were very cooperative. They are the 2nd Defendants.

B Plot No.1542.

This is approximately 1.0 acres Plot or thereabout. We found two care takers/assistant artisans namely Mr. Kelvin Otieno and Khalid Rimo. They were very co - operative and shared information freely. There was an already and almost completed construction. From external observation and features, it appears to be an ultra modern story Mosque on the left hand side corner of the land.

It was not clear whether it is for the Shia or Suni religious sect. The newly constructed building can accommodate approximately five (500) worshippers. It has a wide Parking Bay.



There were huge wooden timber and poles used for shutter construction. There was a large perimeter wall all round the land with gates. There are two sites houses and their families. The owner was stated to be one Mr. Amedo Noor. We learned that he died approximately two weeks ago from the time of his demise the construction works stopped to allow the mourning take place. There after it would resume. There was no Mosque within the nearby vicinity. Hence, for this reason, this newly built Mosque would attract many worshippers.

The construction commenced in February, 2021 and was planned in being complete by January 2022. He intended to build more structures on it.

Upon his demise the deceased's children have taken over the management of the site and its development. They were Mr. Mohamed Noor and M/s. Fardos. There is a being the Diani – Kalu Kinando road that was constructed onto the land Consultant called Mr. Amer Ali who was on the cell phone No. 0715 800900.

The caretaker admitted they were served with the July 2021 court order but indicated they thought the process server had mistaken the identity as they were not mentioned anywhere on the order. Mr. Otieno held that he did not know from whom the owner had bought the plot from. He is not party to the suit.

C. Plot No. 1541 & 40

This appears to be a combination of two (2) plots summoned with a well done 5 -6 feet concrete perimeter wall. The compound is cleared and with a few palm and coconut trees planted recently. There were no construction taking place on the plots. They are manned by a Samburu caretaker – One Mr. Milton Lekalesoi – who had been there for a month having been brought there by the owner of the land from Naivasha. He informed us the owners a company operating in the name and style of “Daylun Company Limited”. He was paid through his bank account with cooperative bank. The owner of the land had other 4 story buildings within the area. The caretaker had no much information to offer. He is not party to the suit.

D. Plot No.1539

Alleged to belong to the 3rd Defendant. She was present but held she was not aware who had taken over and even caused massive development on it. On arrival the guard a young lady behaved in a funny manner. She appeared rather apprehensive. She refused to open the gate but the security team assisted in getting smooth access. The caretaker – one young man Mr. Patrick Kihara married with a one year child was at first extremely uncooperative. He attempted to run away using his motor cycle but was apprehended by the security officers. He at first lied being a tenant. Its later on being arrested for a while that he relaxed and became cooperative. He was remorseful and confessed on having been ignorant and feared the large crowd.

We learnt that the 1 acre compound had a 4 story 3 flats. It was a resort called “Horizon Star Beach Resort” and a swimming pool. The owner is called Kabiru Ndiritu on cell Nos. 0721996480 who was never present to the place from the time of Corona/Covid – 19 Pandemic. He was based at Mwambungo and Nairobi. They had to change the name of the place three times. He did not know who sold the plot to the owner.

He is not party to the suit.

E. Plot No.1537 & 1538:-

There is a 5 1/2 meter access road to this plot. Mr. Mwakibibo indicated he sold it to Mr. Brinkman. Coincidentally, we met the wife of Mr. Brinkman. A very kind, humble and co



– operative lady. She took us through to her two plots. There existed a two old residential houses. The compound was well kept with several mango, Tamarind, and other fruit trees. It was well fenced with a perimeter wall. He is the 4th Defendant.

F. Plot No. 1540

Meant to belong to Mr. David Kandie. He was present. It has a perimeter wall and a gate with a large rock inserted at the lock to enable us from accessing it. We managed to enter from the Plot No. 1540. There is nothing on it apart from a cleared environment. Mr. Kandie denied being the one behind the development there we could not get to know the owner. Mr. Mwakibibo got rather emotional as he even denied knowing and having dealt with Mr. Kandie at all.

G. Plot No. 1536

There was a caretaker Mr. Francis Ora Charo. The workers were jovial and very cooperative. They freely mingled with us. There is a large compound on a 1 acre with severe atmosphere. There is a huge “L” shaped bungalow and a swimming pool, we learned it was residential but later on turned into a resort place for tourists. It has a well raised 4 story tower which enables one to see the whole vicinity so clearly. It was later on that the wife to the owner – Mr. Frank Peter Anhorn of the Germany nationality who stated to have seen us through the Closed Circuit Television (the CCTV) camers arrived.

IV. The Conclusion

From the site visit, the following issues emerged. These were:-

- a. Its apparent that the original title deed numbers 203 belonged to the 1st Defendant, Mr. Mwakibibo.
- b. Where is the original Certificate of title deed – Numbers 203?
- c. It was from this parcel that all the sub – divisions were derived from.
- d. The sub – divided parcels have been taken over and development taken place on the said parcels;
- e. There would be need to establish these owners of the sub – divided parcels from the records kept at the Land Registry, Kwale.
- f. Need to establish how these new owners acquired these parcels – the root of the titles – was it through the innocent purchasers for value or fraud, mistake and/or omission.
- g. What is the claim by the Plaintiff to the suit land? Was it before or after the sub – division took place or not?

It was agreed that the matter will proceed on 19th and 20th January, 2022 without failure. The following witnesses will testify – the 1st Defendant, the Land Registrar, the Land Surveyor, the 2nd & 4th, 3rd, 5th and 6th Defendants in that order. The site visit was concluded at 3.45 p.m.

HON. JUSTICE L. NAIKUNI (JUDGE)

ELC, MOMBASA

19. 1.2022

In the presence of:-



- a. M/s. Yumna Hassan – the Court Assistant.
- b. Mr. Sanjiv Khaghram Advocate for the Plaintiff/Applicant.
- c. Mr. Kounah Advocate for the 1st Defendant.
- d. Mr. Ndambiri Advocate for the 2nd and 4th Defendants.
- e. Mr. Ondabu Advocate for the 3rd & 5th Defendants.
- f. Mr. Siminyu Advocate for the 5th Defendant
- g. Mr. Makuto Advocate for the 7th & 8th Defendants.

53. I believe that is adequate on the facts of this case.

ISSUE No. 3. Whether the parties are entitled to the orders sought.

54. Now turning to the other framed issues and aspects of the matter. The main cause forming the basis of this application is summarized into the following five (5) condensed issues inter alia:-

- a. Making of certain findings of facts on the ownership of the suit property during the Site Visit and its report clearly showing a pre - disposed mind set and being reluctant to release the Site Visit Report despite several requests by the Plaintiff though eventually doing so on 20th January 2022.
- b. On 25th November, 2021 the Judge altered or disregarded an earlier Court order on the order or sequence of the witnesses to be summoned by the Defendants hence likely to prejudice the Plaintiffs case. By so doing he descending into the arena of litigation despite of its adversarial nature.
- c. On 20th January 2022, despite allowing the Plaintiff's Application for joinder of certain parties, he proceeded to insist on proceeding with the case based on his eagerness to proceed with the matter and regardless of the fact that the newly joined parties were yet to be served with process.
- d. From the ruling delivered on 19th January 2022 on the contempt application as against the 1st Defendant, the Judge not only suggested that the restraining orders issued had not been extended but he also ventured into making observations/findings on an interlocutory matter that are prejudicial to the final trial of the matters in issue.
- e. On 20th January, 2022, the Judge in his own motion stated he would consider whether he ought to rescue himself but again changed his mind.

55. Without being defensive, and taking the risk of being accused of descending into the arena of litigation in an adversarial nature, I wish to respond to the above issues separately as follows.

Firstly, as seen from the Site Visit Report, the information on the ground was so visible. It is a fact that the suit land has undergone massive sub – division into numerous portions. There are massive development permanent structures and perimeter walls. We found people either claiming to be the owners or caretakers of these portions standing or occupying their portions. The team gathered all these information including details on their Land references and so far was supplied to the team so freely by the said owners or caretakers of the said Plots. All the team members, including the Plaintiff/Applicant herein was taking down meticulous records in writing and even electronic recording. No single party raised any objections at all on the ground. It is no wonder that the Plaintiff/Applicant eventually moved Court seeking to join these new parties to the suit. In any case, the veracity of



these information is still subject of verification and proof by Court during the trial as provided for by provisions of the *Evidence Act*, Cap. 80 of the Laws of Kenya.

Secondly, in as much as there is no obligation for the Court to share the report, It will be noted that from November, 2021 the court proceed for the High Court Summer recess from 19th December, 2021 to 18th January, 2022 and not having any time to share the report. But eventually, the report was shared and no objection on its contents was ever raised whatsoever until the filing of this application.

Thirdly, on 25th November, 2021, this Court having taken over from my predecessor under the provision of Order 18 Rule 8 of the Civil Procedure Rules, and for good order on case management felt it needful that there be a clear sequence of the witnesses testifying during the Defendants case. This was not cast on stone and I never intend to unravel feathers. The order may be altered as the parties wish it being their case. I still fail to appreciate on what aspect did the Judge descend to the arena of litigation here. It is very unfair to Court.

Fourthly, all the other issues are intertwined and closely related. To begin with it is actually the Court that guided the Plaintiff to consider joining the parties we found on the ground. Indeed, the Court granted the Plaintiff/Applicant leave “Suo Moto” to serve them by way of Substituted means by publishing it in the local dailies (an aspect the Plaintiff/Applicant has gone silent on) and which they did and that is how the 9th, 10th and 11th Defendants entered appearance in the matter. Surely, the Court fully appreciates the principles of natural Justice and the parties were accorded adequate time to Comply with the provisions of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010. All the issues emanating from my Rulings, its trite Law should a party feel aggrieved by any findings emanating from it is to prefer an appeal, seek for review, setting aside or varying it in the laid - down procedure. That cannot qualify as a ground for a Judge to recuse himself/herself. As indicated, this is an old litigation having been in Court for over ten (10) years. In my performance contract I am compelled to respond the reason the matter is not progressing. Honestly speaking, I have never understood nor deduced any plausible reason why this matter has taken so long to be finalized and determined on merit. I urge the parties to be co operative and let it be heard and determined in either way as provided for in an adversarial set up. In any case, the Republic of Kenya has a hierarchy of appellate Courts within the Judiciary as provided for under the provision of Articles 163 and 164 of *the Constitution* of Kenya where the parties if so aggrieved by the decision of this Court may prefer an appeal. There should not be any further delay in hearing this matter. I beg.

56. Finally, I hold that during all these sessions, the Plaintiff/Applicant never raised any single complaint nor reservation against me. That situation is rather perplexing, to say the least. Clearly, my conclusion is that this application has been made as an afterthought, from 20th January, 2022 to 18th March, 2022 close to three months and a lot of proceedings had been taking place. , in bad faith and all intended to disparage my name, good standing, reputation and fame as a Judge.
57. Ultimately, the question for consideration is whether a reasonable person having knowledge of the fact as I have presented them would reach the conclusion that as a judicial officer I am biased. I think not. I say so for the following underlying reasons.
58. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.



59. Turning to the facts of the case, there are two grounds for recusal which I shall now consider. The first ground for recusal by the Advocates is that since I ruled on certain issues between the parties, I should recuse myself. As I considered the Advocates' submissions on the rulings I delivered in those references, I could not help but feel that I was being asked to sit on appeal from my own decisions.
60. Consequently, the question for consideration is whether a Judge in the execution of his duties would be prejudged to be biased against one party. I think not.
61. The pending reference in this matter is yet to be determined. In the case of "Republic – Versus - Independent Electoral & Boundaries Commission & Another ex - parte Coalition For Reforms and Democracy (CORD) HC NRB Misc. Appl. No. 648 of 2016 [2017] eKLR, Odunga J., expressed made the following observation on a similar application for recusal:
- (74) To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.
62. I now turn to the second issue that I have been biased towards the Defendants and that I have made utterances suggesting that I wanted to recuse myself and that at some point suggested that the parties should make an application asking me to recuse myself. The Advocates have not provided any evidence to substantiate their claims that I uttered those words. Based on the test of a 'fair minded and informed observer' and the provisions of the Code of Conduct above, can it be said that taking into account all circumstances of this case, I am likely to be biased against the Advocates and deny them a right to a fair trial? I think not. The Advocates have not laid any factual basis for a reasonable observer appraised of the facts to demonstrate a possibility of real bias.
63. Every Judge has a duty to sit in a matter which he duly should sit. Recusal should not be used to cripple a Judge from hearing and determining a matter. This duty is buttressed by the fact that every Judge takes an oath of office, to serve impartially and to protect, administer, and defend *the Constitution*. Having taken the oath of office, I am capable of rising above any prejudices and deliver justice. For all these reasons, I find the application by the Plaintiff/Applicant without any merit nor firm grounds at all ostensibly for me to disqualify myself from handling this matter.

Issue No. 4. Who will bear the costs of the application

64. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".



The proviso under the provisions of Section 27(1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of “Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

65. Additionally, the Supreme Court fortified this position in the case of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

66. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The outcome in the instant case is that the Plaintiff/Applicant herein has not succeeded in establishing its case. For that very fundamental reason, therefore, the costs of this suit will be borne by the Plaintiff/Applicant herein.

VIII. Conclusion & Disposition

67. The upshot of all this, and having caused an indepth and elaborate analysis of the framed issues herein, the Honorable Court finds that the Plaintiff/Applicant has failed to make out a plausible case for the recusal of the Judge presiding over this matter. Thus, for avoidance of doubt, I therefore proceed to make the following findings:

- a. That I categorically refuse to recuse myself from the matter particularly on the reasoning raised and advanced by the Plaintiff/Applicant.
- b. That the Notice of Motion Application dated 18th March, 2022 by the Plaintiff be and is hereby dismissed for being unmeritorious with Costs to the Respondents in the instant application.
- c. That for expediency sake, and unless other stated, the part heard matter to proceed on for hearing of the Defendant’s case irrespective of whichever sequence of the Witnesses, as scheduled on 7th and 8th March, 2023 and other days thereafter to be concluded within the next one hundred and eighty (180) days from this date without fail accordingly.
- d. That the costs of this application is awarded to the 1st, 2nd and 4th Defendants/Respondents as against the Plaintiff/Applicant.

It is so ordered accordingly.

RULING DELIVERED, SIGNED & DATED AT MOMBASA THIS 16TH DAY OF FEBRUARY 2023.

HON. JUSTICE MR. L.L. NAIKUNI, (JUDGE)



**ENVIRONMENT & LAND COURT AT,
MOMBASA**

In the presence of:

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Sanjiv Khagram Advocate for the Plaintiff/Applicant.
- c. Mrs. Kounah holding brief for Mr. Kounah Advocate for the 1st Defendant/Respondent.
- d. Mr. A. Ndambiri Advocate for the 2nd & 4th Defendants/Respondents.
- e. Mr. Ondabu Advocate for the 3rd & 5th Defendants/Respondents.
- f. No appearance for the 6th, 7th, 8th, 9th, 10 and 11th Defendants/Respondents.

