REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO 231 OF 2012

FLORENCE CHELANGAT LANGAT.....PLAITNIFF

VERSUS

TIMOI FARMS AND ESTATES LIMITED.....1ST DEFENDANT

ISAYA K KIMEYWO.....2ND DEFENDANT

RULING

(Application for recusal of a judge; principles applicable; plaintiff being wife to a defendant in a matter where judge had acted for the plaintiff while in private practice; such matter being unrelated to the suit in issue; whether in the circumstances the judge should recuse himself; application disallowed)

1. The application before me is that dated 23 February 2015. Through the said application, the plaintiff has asked me to recuse myself from hearing this matter and to transfer this suit to any other judge of the Environment and Land Court for determination. The grounds upon which the application is based are :-

> *(i) That the applicant is apprehensive that she will not be accorded a fair trial if the same is to proceed before the learned Justice.*
>
> *(ii) That if the Honourable Justice continues to hear the case the applicant is exposed to actual bias.*
>
> *(iii) That the principle "justice must not only be done but must be seen to be done" is at risk of being trashed.*
>
> *(iv) That in the interest of justice and fairness the orders sought herein be granted.*

2. The application is supported by the affidavit of the plaintiff which expounds on the reasons why she wants my recusal from this suit. The plaintiff has explained that she is wife to one Paul Kipterer arap Langat. The said Mr. Langat is the 1st defendant in Kericho Civil Suit No. 101 of 2009 (the Kericho case) . Before my appointment as judge in the month of October 2012, I used to practice in the law firm of M/s Sila Munyao & Company Advocates where I was proprietor. While in practice I acted for the plaintiff in the Kericho case, one David Kipkoech Biegon. It is the view of the applicant, that since I represented Mr. Biegon in a suit where her husband was defendant, then she is apprehensive that she will not be accorded a fair trial if I am to hear this suit. It is her view that she is exposed to actual bias.

3. The application is opposed by the defendants who have filed a replying affidavit sworn by Isaya Kiptonui Kimeiywo, the 2nd defendant and Managing Director of the 1st defendant company. It is his view that the application is not only misconceived but without merit. He has deposed that the applicant has not demonstrated any bias as neither he nor the applicant were parties in the Kericho case. He has deposed that the application does not meet the threshold provided in law to cause a judge to disqualify himself.

4. I need to mention that prior to the application, Ms. Kimani for the applicant had written to me asking me to disqualify myself, but I directed that a formal application be filed, as I was not too convinced that this is a straight forward case for recusal.

5. Before I go to the arguments of counsel, I think it is prudent that I set out the nature of the dispute herein. The dispute is over the properties registered as Olenguruone/Amalo/314, 315 and 316. The properties in issue were at some point owned by one Kipngeno arap Ngeny who appears to have entered into separate agreements of sale with both the plaintiff and the defendant. There is indeed another related matter being Nakuru HCCC No. 32 of 2010, *Timoi Farms Ltd vs Kipngeno arap Ngeny*, where the 1st defendant herein has sued Mr. Ngeny for transfer of the suit properties to itself. The core issue in this suit, and in the related matter, is who between the plaintiff and defendants is entitled to ownership of the suit properties. The hearing of the two matters has not yet commenced although there have been several interlocutory applications which have been heard and determined by my predecessors in this court station.

6. At the hearing of this application, Ms. Kimani for the applicant argued that the plaintiff as husband to Mr. Langat has an interest in the Kericho case pursuant to the provisions of Sections 7 and 9 of the Matrimonial Property Act, 2013. She also submitted that Mr. Langat has made contribution to the property in issue in this case. She relied on the case of ***Kipkoech Kangogo & 62 Others v Board of Governors Sacho High School & 5 Others (2015) eKLR***; ***Lawrence Mukiri Mungai v Attorney General & 5 Others (2014) eKLR***; and ***Homepark Caterers Limited v The Attorney General & 3 Others (2007) eKLR*** and the principles set out therein in respect of an application for recusal. She also relied on the Judicial Service Code of Conduct and Ethics contained in The Public Officer Ethics Act, CAP 183. She stated that though there may not be actual bias, any decision will not appear to be impartial. She stated that her client feels that in view of the litigious nature in the Kericho suit, there will be an appearance of bias which will erode public confidence in the judicial system.

7. Mr. Kimatta for the defendants was of a contrary view. Inter alia, he submitted that the application is only meant to attack the judge for no reason or all. He submitted that an advocate does not go beyond representing facts of the client and that representation alone does not create bias as an advocate is merely a mouthpiece of his client. He submitted that the Matrimonial Property Act has no application to this suit and that from what has been presented, there is even no proof that the applicant is wife to Mr. Langat, or that I had represented any party in the Kericho case. He submitted that to allege that a case involving other parties would invite bias, will be extending the principle too far and that courts must guard against being held at ransom. He submitted that there needs to be proper evidence of bias or else every advocate who gets appointed to be judge will need to disqualify himself in almost all cases.

8. I have considered the application. Before I go to the gist of it, I understand the predicament faced by Mr. Kimatta, and the basis of his argument that the application as presented, has not demonstrated that I acted for any party in the Kericho matter. This is because the applicant only annexed the Statement of Defence in the Kericho matter and no pleadings were annexed indicating that I actually acted for any party in the matter. Neither was any proof tendered that the applicant is actually the wife of Mr. Langat, the defendant in the Kericho case. It goes without saying that it is important for parties to table all relevant facts so that the other party may have a fair opportunity to respond. In the circumstances of this case, the applicant did not table all relevant facts, placing the defendants at a clear disadvantage and I may have missed some important contributions if all facts had been tabled.

9. Be as it may, it is within my knowledge that I acted for the plaintiff in the Kericho matter. I will also give benefit of doubt to the applicant and assume that she is the wife to Mr. Langat. For the record, I do not know Mr. Langat personally save that he was defendant in the Kericho suit. I also do not know the

applicant. I have never met her and would not pick her out. Neither was she a party in the Kericho matter. In fact, if it were not that it was mentioned that she is wife to Mr. Langat, I would never have known that connection. She is a complete stranger to me. To my recollection, the Kericho suit has absolutely no relationship with the matter herein. The dispute therein revolved around the ownership of land situated in Kericho, where the plaintiff in that case Mr. Biegon, and Mr. Langat the defendant, both held titles to the same land. The bone of contention in that case was/is which of the two titles needs to be upheld. When I joined the bench, that matter was still at its interlocutory stage, the parties having agreed to maintain the status quo. Since joining the bench, I have never followed up on what transpired in that matter and as we speak, I do not know the position of that case. I have not deemed it necessary to do so. Neither do I have any control of what transpires in my former firm which now has another proprietor.

10. Applications for recusal are not new in our jurisprudence nor in other jurisdictions. The main basis for such applications is that a party is entitled to be given a fair hearing , and a hearing will not be fair, if the judge is biased. Rule 5 of the Judicial Service Code of Conduct and Ethics, provides that a judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which :-

> *(a) he has a personal bias or prejudice concerning a party or his lawyer, or personal knowledge of facts in the proceedings before him;*
>
> *(b) he has served as a lawyer in the matter in controversy;*
>
> *(c) he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or*
>
> *(d) he, or his spouse, or a person related to either of them or the spouse of such a person or a friend is a party to the proceedings.*

11. Going through the above provisions, I have already mentioned that I never knew of the prior existence of the applicant. Neither do I know the defendants in this case. I have nothing for or against both Mr. Kimatta and Ms. Kimani, the two counsels acting in this matter. I also do not have any personal knowledge of the facts of this case. I have never while in private practice acted as lawyer in the matter in controversy. Neither I, my family or a close relation, has any financial or any other interest that can affect in any way the outcome of these proceeding. Neither my spouse, nor myself, is related to either of the parties or their spouses, nor can I say that I am a friend to any party in these proceedings. In brief, the parties are total strangers to me. The provisions set out in the Judicial Code of Conduct therefore do not apply to the circumstances herein.

12. But the provisions in the Judicial Code of Ethics are not the only provisions under which a judge may recuse himself. It is now established through case law that the correct test to apply is whether there is the appearance of bias rather than whether there is actual bias (See ***Kimani v Kimani 1995-1998 1 EA 134***.) The test is not the subjective notion of the applicant but rather the objective test of the reasonable man. It follows therefore that a judge does not have to disqualify himself merely because one party has stated that he is of the opinion that he will not get a fair hearing, or that such party feels that the judge will be impartial or prejudiced.

13. The issue was canvassed in the case of ***Miller v Miller (1988) KLR 1*** where counsel for the applicant (Mr. Kuria) on an application for recusal, argued that once an allegation is made against the judge, the judge needs to disqualify himself. The Court of Appeal had this to say on that argument at page 5 of the decision:-

> *"Now it said by Mr. Kuria that once there are allegations made against a judge and the judge's honour is in question, that the judge should disqualify himself. In our view, it would be disastrous if that were to become practice. The administration of justice through court would be adversely affected. Mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be choice of trial judge by a party. The cases which the industry of the*

appellant's counsel found do not provide authority for that proposition."

14. Ibrahim JSC, in his separate opinion in the case ***of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2013) eKLR*** affirmed that the test is the objective test of the reasonable man. The learned judge quoting decisions of other jurisdictions stated as follows :-

> *"Lord Justice Edmund Davis in* Metropolitan Properties Co (FGC) Ltd. Vs Lannon (1969) 1 QB 577 *stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in* R vs Liverpool City Justices ex parte Topping (1983) 1 WLR 119 *elaborated on the test applicable. 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 would be inevitable."*

15. The point was also finely put in the case of ***Attorney General of Kenya vs Prof. Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007*** where it was stated as follows :-

> *"We think that the objective test of reasonable apprehension of bias is good law. The law is stated variously, but amount to this : do the circumstances give rise 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, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case."*

16. The Constitutional Court of South Africa in the case of ***President of the Republic of South Africa vs South African Rugby Football Union (1999) (4) S.A 147, 177*** also observed that :-

> *"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions."*

17. It is clear from the foregoing that it is settled law that the test is that of the reasonable man, not the subjective views of the applicant, who invariably thinks that the judge will not give him a fair trial. The subjective view of the applicant in this case is therefore not the applicable standard, but the standard applicable, is that of the reasonable man. In other words, the fact that the applicant feels that she will not get a fair trial, is not itself sufficient for me to recuse myself , for the test applicable is not her subjective feeling. Her feelings may be relevant, but not critical to the determination of this application.

18. I have already mentioned that the test applicable is that of the reasonable man, and it is therefore necessary to assess the reasons given for the request for recusal, and assess them in light of that applicable standard.

19. The sole reason for asking me to recuse myself from this matter is the ground that the applicant's husband was defendant in the Kericho case in which I acted for the plaintiff while in private practice. The question that arises is whether given that connection, a reasonable man would be of the view that the judge would be biased.

20. I think not. The mere fact that a judge acted for a party while in private practice is not by itself ground

enough to have such judge recuse himself in a matter involving such party, *a fortiori* , where the situation is that the person before the court is not the party himself that the judge acted for or against, but a person who alleges to be connected to such party. The attempts by Ms. Kimani to allege that the applicant has/had an interest in the Kericho case and that Mr. Langat has an interest in this case, through the utility of the Matrimonial Property Act, 2013, which argument, for the record, I find tenous, far-fetched and wholly unconvincing, is therefore irrelevant.

21. It is common knowledge that many judges are drawn from advocates in private practice. The position of an advocate needs to be understood. He is never a party to the proceedings. His role is merely to articulate the position of his client. That does not make an advocate a party to the proceedings nor does it make him biased towards the advocates or persons on the other side of the litigation. It is therefore not ground enough, without more, to merely allege that because a judge acted for a party while in private practice, or acted for a person who sued the party before the judge in the matter at hand, then such judge is biased or prejudiced in favour of or against such person. This was indeed the holding in the case of ***Gitobu Imanyara & 3 Others vs Attorney General (2012) eKLR.*** In the matter, an application was made by the petitioners to have Honourable Justice Majanja disqualify himself. The basis for the application was that Justice Majanja, while in private practice, had acted for a company which had been sued by the petitioner in a completely unrelated matter. Majanja J, in rejecting the application stated as follows at paragraph 19 of the decision :-

> *" A judge appointed from private practice is expected to have dealt with various matters, parties and advocates and to insist that a judge recuse himself or herself from every matter he had contact with would not only be unreasonable but also undermine justice as a whole. Rule 5 of the Judicial Service Code of Conduct and Ethics specifically refers to the judge disqualifying himself where he acted if it is the matter in controversy."*

The learned judge continued to address himself as follows on the matter before him at paragraph 20 :-

> *" I do not think that the fact that I dealt with a matter concerning the Hon. Imanyara should disqualify me from dealing with the matter particularly where the matter is a separate and different cause of action. In the ordinary cause of business, an advocate's duty is to advance and protect the interests of his client. It would follow that as an advocate in the firm, I was not under any obligation to promote or advance Hon. Imanyara's cause. The fact that my obligation was adverse to the plaintiff should not be construed as a matter of ill-will or spite against Hon. Imanyara as it is the ordinary duty of an advocate to represent his or her client including the filing of an application for dismissal of a suit where rules permit."*

22. I think the above dictum puts in focus the issues in this application. The mere fact that I acted for Mr. Biegon against Mr. Langat in the Kericho case, ought not to be construed that I have any ill-will or spite against Mr. Langat or against any member of his family. The mere fact that I acted for a person who had sued him does not in any way prejudice my mind for or against Mr. Langat or any member of his family. Indeed to me that can be the only reasonable conclusion of any reasonable man. Advocates are professionals and are divorced from the proceedings in which they act. They hold no grudges, ill will or malice, towards the persons whom they have been instructed to act against. I do not think that any advocate can contest that position.

23. It was said by Ms. Kimani that the Kericho matter was extremely acrimonious. I do not know what acrimony she was referring to, as there was no deposition of any, and personally, I have no recollection of any. As far as I can remember, most of the preliminary matters were in fact agreed by consent.

24. The upshot of the foregoing is that I find no merit in this application. I dismiss the same with costs.

Dated, signed and delivered in open court at Nakuru this 21st day of April 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU

In the presence of : -

Ms Wambui Kimani for the plaintiff/applicant

Ms D Alwala holding brief for Mr Kimatta for the defendants.

Emmanuel Maelo : Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU