



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ACEC MISC. APPLICATION NO. E 018 OF 2021

PETER WANGAI MURIITHI.....1ST APPLICANT/RESPONDENT

GOLDENSCAPE TREES AFRICA LIMITED.....2ND APPLICANT/RESPONDENT

GOLDENSCAPE GREENHOUSE LIMITED.....3RD APPLICANT/RESPONDENT

GODLENSCAPE GROUP LIMITED.....4TH APPLICANT/RESPONDENT

VERSUS

ASSETS RECOVERY AGENCY.....RESPONDENT/APPLICANT

RULING

Introduction

1. This ruling relates to the 1st to 5th respondents Notice of Motion dated 29th November, 2021 which seeks orders that:-

i) The application be and is hereby certified urgent and listed for hearing expeditiously.

ii) This Honourable Court (Honourable Lady Justice Esther Maina) be and is hereby pleased to recuse itself from presiding over and/or proceeding in this matter.

iii) This Honourable Court be and is hereby pleased to stay all and related proceedings in Nairobi ACEC Civil Application No. E 027 OF 2021 Assets Recovery Agency versus Peter Wangai Muriithi & 4 Others pending the hearing and determination of the Notice of Motion dated 12th October, 2021 filed by the 1st to the 5th Respondents herein.

iv) This Honourable Court be and is hereby pleased to set aside *ex-debito justitiae* the directions given on 9th August 2021 for the hearing of the 1st to 5th Respondents Notice of Motion dated 12th October, 2021 as well as the application for joinder by the proposed interested parties be heard together by way of written submissions and the parties file their respective responses and the aforementioned submissions within 14 days each.

v) This Honourable Court be and is hereby pleased to order that the 1st to 5th Respondents Notice of Motion dated 12th October, 2021 be heard and determined first as a matter of priority before the Honourable Court takes proceedings on any other application or suit related to, filed in or arising out of this suit.

vi) Costs of this application be borne by the Applicant.

2. The Application is expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, order 51 Rule 1 of the Civil Procedure Rules and Article 159 (2) (a) of the Constitution and is supported by an affidavit sworn by Peter Wangai Muriithi on 29th November, 2021.

3. In opposition the Respondent filed a replying affidavit sworn by CPL. Jeremiah Sautet, a police officer attached to the Agency. Thereafter the 1st to 5th Respondents filed written submissions dated 3rd January, 2022, 4th February 2022 and 17th March 2022. Those of the Applicant/Respondent are undated.

The 1st to 5th Respondents'/Applicant's case

4. The gravamen of the Application is that the 1st to 5th Respondents are aggrieved by the directions given by this Court on 9th November 2021. They aver that they filed a Notice of Motion dated 12th October 2021 seeking inter alia a declaration that the preservation orders issued herein on 15th June 2021 have lapsed by operation of Section 84 of the Proceeds of Crime and Anti-Money Laundering Act, and an order terminating any prevailing and intended proceedings against the 1st to 5th Respondents arising from the said preservation orders. They contend that the Application dated 12th October 2021 by nature and effect bore consequences akin to a Notice of Preliminary Objection questioning the jurisdiction of this Honourable Court to hear the forfeiture suit or any proceedings against the Respondents and ought to be heard on priority basis. They contend that however when the Application came up for directions on 9th November 2021, the Respondent's Advocate made submissions seeking that the forfeiture proceedings be stayed pending the hearing and determination of said application for reasons that it could potentially terminate the other proceedings; that despite the Respondents' submissions, this court took proceedings in the suit and directed parties to file their responses and submissions and fixed the suit for highlighting of submissions on the said Application and the proposed Interested Parties' application dated 22nd October 2021. The Applicants contend that the directions given by this court on 9th November 2021 lack clarity and practicality for the reasons that should the Respondents' Application dated 12th October 2021 succeed, the Applicant's forfeiture application dated 30th September 2021 will be rendered moot; that the proposed interested parties' joinder application would be a mere academic exercise as it would have been overtaken by events and that this court ought to have heard the joinder application before hearing the applications by the Respondent.

5. The Applicant further avers that on the same date, this court, without good reason, declined to grant the Respondents' request for an additional fourteen days to file a response to the proposed interested parties' application in a related suit; (**Nairobi ACEC Civil Application No. E 027 of 2021 Assets Recovery Agency v Peter Wangai Muriithi & 4 others**); That this was despite their explanation that the 1st Respondent had been taken ill; That, the court's reason that "parties shall not take this court in circles" was not a sufficient reason to deny them additional time to file their response and that the court had in fact denied the Respondents an opportunity to be heard in violation of their right to a fair hearing under Article 50 of the Constitution. They aver that they are apprehensive that this Honourable Court will be biased against the Respondents; That it will not in violation of Article 50 of the Constitution decide this matter impartially and that it will inevitably dismiss the Respondents' application dated 12th October 2021. They contend that a reasonable observer faced with the facts of this suit would in light of the directions given on 9th November 2021 conclude that the court has a predisposition of making findings against the Respondents and that it is in the interest of justice, good order, clarity of proceedings and judicious use of judicial time that the orders of recusal be granted.

The Applicant/Respondents' case

6. The Agency/Respondent opposed the application through the affidavit of CPL Jeremiah Sautet dated 12th December 2021. The Respondent avers that it filed an application for preservation of assets in **Nairobi ACEC Misc. E018/2021 Assets Recovery Agency v Peter Wangai Muriithi & 4 others** pursuant to its mandate under the Proceeds of Crimes and Anti- Money Laundering Act. That the orders preserving the suit property were granted on 15th June 2021 and were subsequently gazetted by the Agency on 2nd July 2021. That preservation orders are valid for a period of 90 days from the date of gazettelement except where an application for forfeiture is made within 90 days. The Agency states that it filed the forfeiture application on 1st October 2021 in NRB ACEC E027/2021 and has since served the Respondents and Interested Parties in the suit. It avers that the preservation orders are therefore still valid and have not expired.

7. In respect of the application for recusal, the Respondent avers that the 1st to 5th Respondents/Applicants have not demonstrated a possibility of real bias. That the 1st to 5th Respondents/Applicants ought to plead specific facts constituting bias and they have not

met the threshold required in an application for recusal. The Respondent contends the mere fact that the 1st to 5th Respondents/Applicants are dissatisfied with the court's directions given on 9th November 2021 does not justify recusal and that the Respondents have not demonstrated proof of the alleged bias or the predetermined views by the court or demonstrated how the provisions of the Constitution have been violated. The Respondent urged that the application dated 29th November 2021 be dismissed with costs.

Submissions of the 1st to 5th Respondents/Applicants

8. Learned Counsel for the 1st to 5th Respondents/Applicants submitted that their Application dated 12th October 2021 is akin to a preliminary objection challenging this court's jurisdiction to entertain further proceedings in ACEC Civil Application No. E027 of 2021 on the grounds that the preservation orders upon which the suit is founded have already expired by operation of law. Counsel stated that the Application raises a point of law that need not be raised by a separate preliminary objection but can be raised through the application and that accordingly this court ought to halt its steps and determine the preliminary objection raised in the 1st to 5th Respondents'/Applicants' Motion dated 12th October 2021 before proceeding with the hearing of the forfeiture application. In support of their submission counsel cited the case of **Mukisa Biscuit Manufacturing Co. Limited v West End Distributors 1969 EA 696** and the case of **Owners of Motor Vehicle Lillian S v Caltex Oil (Kenya) Ltd [1989] eKLR**. Counsel for the 1st to 5th Respondent/Applicants urged this court to stay the proceedings in **ACEC No. E027 of 2021 Assets Recovery Agency v Peter Wangai Muriithi & 4 others** and submitted that this court possesses inherent powers under Section 3A to stay proceedings for just cause and that the interest of justice dictate that orders for stay be granted. Counsel further cited the case of **Priscillah Muthoni Njagi (substituted for Mugo Njagi Ndiga) v John Muriithi Kariuki (substituted for John Kariuki Njagi) [2017] eKLR** to support his submission.

9. On the prayer for recusal counsel submitted that this court is biased against the Respondents because on 9th November 2021, this court denied their request for additional time to file responses to the intended interested parties' Notice of Motion Application dated 22nd October 2021 filed in ACEC No E27 of 2021. That the Respondents/Applicants request for extension of time was founded on the ground of the 1st Respondent's illness and therefore his inability to file a response and that denying them an opportunity to participate in the proceedings was a breach of their right to be heard guaranteed in Article 50. Counsel stated that the proceedings of 9th November demonstrate that the court has already formed an opinion against the 1st to 5th Respondents/Applicants and they are apprehensive that this court will be biased against them and that any reasonable observer would conclude as much. Counsel cited the decision in the case of **Rishad Hamid Ahmed & another v Independent Electoral and Boundaries Commission [2016] eKLR** to support this submission.

Submissions of the Applicant/Respondent

10. Learned counsel for the Applicant/Respondent submitted that the Preservation Orders issued on the 15th June, 2021 and Gazetted on the 2nd July, 2021 are still valid and have not expired because by dint of the filing of the forfeiture application dated 30th September, 2021 vide **NRB HCACEC No. E027/2021** as envisaged by section 84 of Proceeds of Crime and Money Laundering Act the preservation orders continue to be in force until the hearing and determination of the application for forfeiture. Counsel submitted that the 90 days period for the validity of the forfeiture orders lapsed on the 1st October, 2021 as time does not run during public Holidays; That the Cabinet Secretary for Interior and Co-ordination of National Government issued a Gazette Notice No. 7147 dated 16th July, 2021 declaring the 20th of July, 2021 a public holiday to mark Idd Ul-Adha 2021 hence the additional one day in computation of time.

11. In respect of the prayer for recusal, Counsel for the Respondent submitted that the principles governing recusal were laid down by the **Court of Appeal in the case of R v David Makali and Others C.A Criminal Application No. Nai 4 and 5 Of 1995 (Unreported)** and were reinforced in subsequent cases including **R v Jackson Mwalulu & Others c.a. Civil Application No. Nai 310 of 2004 (unreported)** and are codified in the **Judicial Service (Code of Conduct and Ethics) Regulations 2020**. Counsel stated that while presiding over this matter on the 9th November, 2021 the judge gave directions on an application filed by the Applicant/Respondent in exercise of its inherent Jurisdiction and attendant discretion necessary for expedient dispensation of Justice. Counsel submitted that the directions given by the court were in the discretion of the court and the fact that the respondents/Applicants felt aggrieved by those directions is not a valid reason to ask this court to recuse itself. Counsel stated that if the Applicants were dissatisfied with the directions given on 9th November, 2021, they ought to have filed an appeal against the directions but not asked this court to recuse itself. Counsel contended that the Applicant has not laid any factual basis to demonstrate a possibility of real bias; Counsel asserted that there is no proof of the alleged bias and or predetermined views by this court and the Applicants have neither demonstrated nor justified how any provision of the Constitution, law and or guiding principles governing a

fair trial will be breached by the court's continued conduct of these proceedings. Counsel further submitted that a judge's duty to sit and hear cases is that there is a concomitant obligation for the judge not to recuse himself without valid reasons; That the applicants counsel for the Applicants has an obligation to conclusively establish and demonstrate the propriety of his motive for seeking recusal and that the Respondents'/Applicants should not be allowed to justify the application for recusal simply because it is displeased with the court's conduct of these proceedings. Counsel submitted that no basis whatsoever has been established to justify recusal. Counsel urged this court to dismiss the application with costs.

Issues for determination

12. I have considered the Application, the grounds thereof, the affidavits in support, the response by the Applicant/Respondent, the rival submissions, the cases cited by the parties and the law. The issues that arise for determination are:-

- i. *Whether the Hon. Lady Justice Esther Maina should recuse herself from presiding over this case.*
- ii. *Whether this court should grant stay of proceedings in ACEC No. E027 of 2021 Assets Recovery Agency v Peter Wangai Muriithi & 4 others.*
- iii. *Whether this court should set aside the directions and orders issued on 9th November 2021.*

Analysis and Determination.

i) Whether the Hon. Lady Justice Esther Maina should recuse herself from presiding over this case.

13. The term 'recusal' is defined in Black's Law Dictionary as meaning "*Removal of oneself as judge or policy-maker in a particular matter because of a conflict of interest.*" This principle was considered by the *Supreme Court of Kenya in Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others (2013) eKLR* where it expressed itself as follows:

"Recusal, as a general principle, has been much practised 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 ed. (2004) [p.1303]: "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest." From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. 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 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."

14. A judge or judicial officer sitting on a matter is required to be impartial and to harbour no bias, either positive or negative, towards any party. The **Judicial Service (Code of Conduct and Ethics) Regulations, 2020** encapsulate the requirement for judges of the superior courts, as public officers, to carry out their duties in accordance with the law. Under Rule 21(1) of the Code, a judge is required to disqualify herself or himself in proceedings where their impartiality might reasonably be questioned. The Rule provides as follows:

"21. (1) A judge may recuse himself or herself in any 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) a member of the judge's family has economic or other interest in the outcome of the matter in question."

15. Similarly, **Regulation 9 of the Judiciary Code of Conduct** emphasizes the importance of impartiality of a Judge. Regulation 9(1) states:

"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."

16. In the case of **Philip K. Tunoi & another v 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 v Magill [2002] 1 All ER 465**, and held as follows:

"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."

In the case of Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR Ibrahim S.C.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."

17. The directions issued by this court on 9th November which give rise to the present application were as follows:

"The Application by the 1st to 5th Respondents and the Application for joinder by the proposed interested parties be heard together by way of written submissions. Parties have a cumulative 14 days to file and exchange their submissions then Asset Recovery shall have 14 days upon service to file its submissions. Mention on 7th December 2021 to confirm compliance and give further directions. For the avoidance of doubt the applicant (Asset Recovery) and the 1st to 5th Respondents shall have 14 days to file and serve their responses to the proposed interested party's application and the responses shall be filed together with submissions. it is so ordered."

18. Prior to the issuance of the above directions, both parties were accorded an opportunity to address the court and this court, while exercising its discretion, independent from the influence of either of the parties arrived at the directions best suited for the expeditious disposal of the applications. Given the facts and circumstances of this case, there is absolutely no basis for this court to recuse itself. There is no iota of bias revealed from the proceedings and the directions issued. The application appears to be precipitated by a desire on the part of the 1st to 5th Respondents/Applicants or their Counsel to avoid proceeding to hearing at all costs. Should a party be dissatisfied with the directions or orders of the court, the appropriate forum to challenge the orders is by way of appeal and not an application for recusal as is the mode adopted in this Application.

19. An application for recusal must be supported by irrefutable evidence of bias as it is a direct attack on a Judge's integrity and ethical conduct. It is a challenge on the impartiality and independence of a Judge and must be handled with the highest level of seriousness and care. It cannot be based on mere allegations of supposed future bias or "apprehension that this court will be biased against the Respondents" as averred by the 1st Respondent in his supporting affidavit. In the case of Kenya **Hotel Properties**

Limited v Attorney General & 4 others [2016] eKLR Onguto J while cautioning Judges against readily acceding to demands for recusal observed as follows:

3. *“In the persuasive Australian High Court case of Re JRL ex parte CJL [1986] 161 CLR 342, 352, Mason J (later Mason CJ) stated thus:*

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

4. *“... In my view, the value of the guidance by Mason J, was and still is, that there has to be a proper and appropriate factual foundation for any recusal as a judge is expected to discharge his duties unless disqualified by the law. An appropriate reason must be advanced for any recusal otherwise litigants may effectively succeed in influencing the choice of judges in their own cause.”*

20. It is my finding that to recuse myself from hearing this matter when there is absolutely no evidence of bias would be a betrayal of my oath of office which requires me to do justice without fear or favour. It would also be tantamount to absconding my duty which entails hearing and determination of disputes. That I will not do.

ii) Whether this court should stay the proceedings in ACEC NO. E 027 OF 2021.

21. The 1st to 5th Respondents seek to stay all and related proceedings in **Nairobi ACEC Civil Application No. E027 of 2021 Assets Recovery Agency vs Peter Wangai Muriithi & 4 others** pending the hearing and determination of their Notice of Motion dated 12th October 2021. The said Application seeks to terminate the pending forfeiture proceedings in H.C ACEC E027 /2021 and any other incidental proceedings on the grounds that the preservation orders issued in this suit had already lapsed at the time of filing of the forfeiture suit by the Agency. The court’s jurisdiction to stay proceedings is exercised under Section 3A of the Civil Procedure Act. In the case of **Priscillah Muthoni Njagi (substituted for Mugo Njagi Ndiga) v John Muriithi Kariuki (substituted for John Kariuki Njagi) [2017] eKLR** the court elaborated this jurisdiction as follows:

“Section 3A of the Civil Procedure Act grants this court wide powers to stay proceedings when the ends of justice so require. It reads:

Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”

22. As admitted by the 1st Respondent/Applicant in his supporting affidavit, Counsel for both parties made extensive submissions at the attendance on 9th November 2021, culminating in the orders and directions of this court reproduced at paragraph 16 above. This court, after considering those submissions and the record gave directions on the hearing of the Notice of Motion dated 12th October 2021 filed by the 1st to 5th Respondents. The application ought to be heard therefore at the appointed time and in the manner directed by the court. There is no law barring the determination of the application of this nature alongside the forfeiture suit as directed by this court; in any event, the court’s directions are issued in furtherance of the overriding objective of the Civil Procedure Rules which is the expeditious disposal of cases in line with Section 1A and 1B of the Civil Procedure Act. Stay of proceedings delays the course of the suit and the discretion to do so is one that must be exercised judicially and only in the interest of justice. The circumstances under which stay of proceedings may be granted were settled in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000**, cited with approval in the case **Gichuhi Macharia & another v Kiai Mbaki & 2 others [2016] eKLR**, where the court held that the court must determine whether the Applicant has established a prima facie case, whether the application was filed expeditiously and whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought. The primary argument of the Respondents/Applicants is that should the court proceed with the hearing of this suit as per the directions of 9th November 2021, their Notice of Motion Application dated 12th October 2021 challenging the jurisdiction of this court and the Interested Parties’ Application for joinder will be rendered moot. In my view, what is being challenged, is essentially the exercise of judicial discretion by this court and it is premature and preemptive as the hearing has not yet commenced and there is no risk of injustice should the matter proceed as directed. The directions given by this court were clear that the issues raised by the Respondents/Applicants were best handled in the application

for forfeiture whose filing had overtaken the preservation orders. That is the position in law as provided in section 84 of POCAMLA. I see no good reason therefore to stay the proceedings. The justice of the case is best served by hearing the application as directed.

iii) Whether this court should set aside the directions given on 9th November 2021.

23. It is also my finding that the wording of prayer No. 5 of the Application is an attempt by the 1st to 5th Respondents/Applicants to arm-twist this court to give directions, timelines and nature of orders favourable to the Respondents/Applicants. This is a dangerous invasion into the autonomy of the court and a contravention to the principles of judicial impartiality that the very Respondents/Applicants crave. The independence of this court is protected under Article 160 of the Constitution and shall not be fettered at the impulse of the Respondents/Applicants. Whereas the Applicant/Respondent did not submit on the prayers for stay and setting aside and this would infer that those two prayers are unopposed, that does not take away from the Respondents/ Applicants' burden to establish a sufficient cause to warrant the grant of the orders. As I have stated no material was placed before me to warrant me to grant stay of proceedings. To do so would be anti-ethical to the interest of justice and the administration of justice.

24. In the upshot I find that the Applicants have not demonstrated that they warrant the orders sought. It is not likely that any injustice would be visited upon the parties should the hearing of their application and the forfeiture proceedings be heard as directed and accordingly the Application is not merited and is dismissed with an order that costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH, 2022.

E.N. MAINA

JUDGE

In the Presence of:-

Miss Ngelechei for ARA

Mr. Oichoe for the Applicant

Potishoi – Court Assistant



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