



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 263 OF 2019

BETWEEN

RACHUONYO & RACHUONYO ADVOCATESADVOCATES/APPLICANT

AND

NATIONAL BANK OF KENYA LIMITEDCLIENT/RESPONDENT

RULING

Introduction and Background

1. In the Notice of Motion dated 12th February 2021, the Applicant (“the Advocates”) seek for the recusal of Hon. (Mr.) Justice D. S. Majanja from any further conduct of the hearing of the Reference dated 3rd February 2021 and that the matter be referred to the Hon. Presiding Judge of the Division for reallocation and directions on the conduct and disposal of the Reference.
2. The application is supported by the affidavits of Clifford Owuor Rachuonyo, advocate and partner in the Advocates’ firm, sworn on 11th February 2021 and 5th March 2021 respectively. It is opposed by the Respondents through the affidavits of Samuel W. Mundia, the Head of Commercial Transactions and Litigation Department at the 1st Respondent Bank, sworn on 26th February 2021 and 24th March 2021 respectively.
3. Similar applications were raised in other matters between the parties namely; **HC Misc. No. E146 OF 2019 (Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Ltd)**, **HC Misc. No. E300 OF 2019 (Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Ltd)**, **HC Misc. No. E301 OF 2019 (Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Ltd)** and **HC Misc. No. E229 OF 2019 (Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Ltd)** which are pending ruling on references filed therein.
4. The parties agreed that the decision in this matter would apply to all the other matters. The parties filed written submissions, which I have considered.
5. It is common ground that the Advocates filed several Advocate Client Bill of Costs against the Respondent (“the Client”). Those applications were taxed by the Deputy Registrar and became the subject of References under **Rule 11 of the Advocates Remuneration Order** before the High Court. I dealt with the following references and rendered decisions as follows:
 - In **E228 of 2019**, the Advocates filed the reference and by a ruling dated 20th November 2020, I allowed it and directed the bill of cost be taxed afresh before a different Deputy Registrar.
 - In **E249 of 2019**, the Advocates filed the reference which I allowed by the ruling dated 4th December 2020 and directed that the bill of costs be taxed afresh before a different Deputy Registrar.
 - In **E053 of 2019**, the Client filed the Reference and by a ruling dated 14th December 2020, I allowed the reference and directed that the matter be taxed afresh before a different Deputy Registrar.
 - In **E143 of 2019**, the Client filed the Reference which I allowed by the ruling dated 13th November 2020 and directed that the instruction fee be certified afresh by the Deputy Registrar.

The Application

6. The Advocates' first ground for recusal is grounded on the matters which the court dealt with in the references. The Advocates contend that in **E143 of 2019**, the court made a ruling outside the provisions of the **Advocates' Remuneration Order** and was based on the decision of the Court of Appeal in **Peter Muthoka & Another -vs- Ochieng & 3 Others [2019] eKLR** without requiring or allowing any of the parties to address it on its relevance and applicability to the Reference under consideration. In the circumstances, the Advocates contend that they were denied a fair trial on that question. They further argue that the court failed to consider several pertinent, relevant and directly applicable authorities submitted to the Court at the hearing and therefore exceeded the scope of the Reference by setting aside the taxing officer's awards on items not forming part of the Reference before the Court.

7. The Advocates assail the ruling in **E228 of 2019** that in a taxation emanating from an appeal, the taxing officer is only bound to exclusively refer to and consider the Memorandum of Appeal as the only document from which the subject matter and value of the appeal is to be determined, to the exclusion of all other documents, primarily pleadings and Record of Appeal. The Advocates complain that the decision of **John Gakuo & Another v County Government of Nairobi & Another [2017] eKLR** which the court relied on has no relevance whatsoever to the taxation of an advocate-client Bill of Costs. In the circumstances, they urge that the court made a mockery of the Advocates' effort in the services rendered to the Client and made it impossible for the taxing officer to award a just and fair remuneration. The Advocates add that the decision itself was not cited or tendered for consideration by any of the parties, and only surfaced in the ruling thus denying the parties an opportunity to comment upon or to distinguish it.

8. The Advocates state that they have lost confidence in the court's independence and ability to conduct a fair hearing in the reference on the ground that they have unjustly suffered recall by the court of all awards made by taxing officers in its favour against the Client. The Advocates further submit that the specific instructions given by the court to the taxing officers to be followed in the conduct of fresh taxation and reassessment of instruction fees earned have relegated the nature of the specifically pleaded monetary claims and values, the nature of instructions implemented and greatly beneficial financial outcomes secured or achieved on behalf of the 1st Respondent, all of which have been improperly cast aside and deliberately diminished to the great benefit of the Client.

9. The Advocates are apprehensive that the findings already made by this court in those cases will be at play in the References pending determination. The Advocates submit that the court will not discharge its mandate faithfully, independently and justly in accordance with the oath of office which mandates and requires the Judge's conduct to be completely beyond reproach, and to enhance confidence of the public and litigants in the administration of justice.

10. The second ground for recusal is that the Advocates have recently become aware of the fact that prior to my appointment as Judge, I had been Principal Partner in the firm of *Majanja Luseno Advocates* which firm is one of the main provider of legal services to the Respondent and is presently handling taxations emanating from the Advocates against the Respondents. The Advocates therefore submit that it is improper for the court to continue handling any other matters involving the Advocates and the Respondents.

11. The Advocates submit that I should recuse myself in the interests of justice and the matter be determined by any other Judge exercising an impartial and independent mind on the issues, free from any bias or predetermined views and having the full confidence and trust of all parties. They maintain that they have given serious consideration and conscientious thought to the implication of this application which is not made lightly and is not motivated by any personal gain or ill will against the judge. They urge that the outcome of the recusal, upon being granted, will enable the independent determination of the Reference, and will not prejudice the Respondent in any way.

The Respondents' Response

12. The Respondents oppose the application. They contend that the court declined the application for recusal on 9th February 2021 when the Advocates, represented by *Riunga Raiji & Co. Advocates* made an oral application for recusal. That the court thereafter proceeded to issue directions on disposal of the reference. In the circumstances the Respondents submit that the doctrine of issue res judicata bars the Advocates from raising the issue of recusal.

13. In response to the substantive application, the Respondents submit that the consequence of 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. They further submit that the Advocates have an obligation to conclusively establish and demonstrate the propriety of its motive for seeking recusal and which must be questioned by the Court. The Respondents add that the Advocates should not be allowed to justify its application for recusal simply because it is displeased with the court's conduct of these proceedings and that no basis whatsoever has been established to justify recusal.

14. The Respondents argue that the proceedings in **E143 of 2019** are separate and distinct from these proceedings in so far as they involve separate and distinct advocate - client Bills of Costs filed by the Advocates. They state that there is no nexus whatsoever regarding the conduct of the court in the proceedings in **E143 of 2019** and these proceedings. The Respondents contend that the fact that the court delivered a ruling in **E143 of 2019** against the Advocates is not a valid and cogent reason so as to justify my recusal in these proceedings.

15. The Respondents maintain that the findings in the ruling delivered in **E143 of 2019** were specific to the facts, circumstances and principles of law applicable to Reference in that case and the reasoning therein cannot and ought not be applied to the Reference herein in so far as to be a justification for recusal in these proceedings. In any case, the Respondents submit that the Advocates, being aggrieved with the said ruling, have indeed exercised their right of appeal under **Rule 11 of the Advocates Remuneration Order**. As such, the issues raised by the Advocates on the ruling can only be adjudicated on and finally determined by the Court of Appeal.

16. Likewise, in respect of **E228 of 2019**, the Respondents state that the mere fact that the court ruled in the Advocates' favour in that case, is not a valid reason to justify recusal in these instant proceedings as the findings in that case were specific to its the facts, circumstances and principles of law applicable. They urge that since the matter was referred back for fresh taxation, it is no longer within the court's purview. The Respondents reiterate the same sentiments in respect of the rulings in **E249 of 2019** and **E053 of 2019**. As regards **E053 of 2019** where the court ruled in favour of the Respondents and ordered re-taxation, the same has already been done, a Certificate of Taxation thereon issued

and a demand for payment made by the Advocates.

17. In sum, the Respondents aver that any and all reference applications between the Advocates and the Respondents have no nexus and will not have any impact or effect on the determination of the Respondents' Reference application pending determination by the court and no evidence to the contrary has been given by the Advocates. They conclude that in as much as the court also ruled against them in **E228 of 2020** and **E249 of 2020**, they have not made any complaint or sought recusal. In their view, the Advocates have not shown any favoritism and or bias at all as the court and the mere dissatisfaction with the court's decision making in other taxation proceedings does not justify recusal.

18. In response to the second ground, the Respondents submit that the current proceedings do not concern and or involve the firm of *Majanja Luseno Advocates*. They submit that the firm is neither the Advocate nor is it on record for any of the parties and that Advocates are vague and ambiguous as to which matters the firm of *Majanja Luseno Advocates* is currently handling on behalf of the Respondents against the Advocates. The Respondents add that the Advocates have not led any evidence to demonstrate how any of the matters allegedly being handled by the firm of *Majanja Luseno Advocates* against the Advocates are related to and or concern these current taxation proceedings hence this ground lacks merit.

19. The Respondents submit that there no proof of the alleged bias and or predetermined views by the court in the taxation proceedings and the Advocates 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. The Respondent urge the court to decline the application for recusal.

Analysis and Determination

20. Before I deal with the substantive issue, I propose to dispose of a technical issue raised by the Respondent. It urged that the firm of *Amuga and Company Advocates* is not properly on record as it did not obtain leave to come on record in place of *Riunga Raiji and Company Advocates* as required by **Order 9 rule 9** of the **Civil Procedure Rules** which provides as follows:

Change to be effected by order of court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

21. I reject the Respondent's contention that the issuance of a Certificate of Taxation amounts to a "judgment" within the meaning of **Order 9 rule 9** aforesaid. Judgment has a specific meaning and in terms of the **Advocates Remuneration Order**, the judgment on the Certificate of Taxation is entered under **section 51(2)** of the **Advocates Act (Chapter 16 of the Law of Kenya)** upon application by the Advocates. In this case judgment has not been passed to bring **Order 9 rule 9** of the **Civil Procedure Rules** into application. It is sufficient for the advocates coming on record to file a Notice of Change.

22. The main issue is whether I should recuse myself from dealing with the present matter and other references involving the parties herein. The principles governing recusal in this jurisdiction are not well settled. In **Jan Bonde Nielson v 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 v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED)**, and reinforced in subsequent cases. See **R v 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 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..."

23. In **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**, 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." The same position was taken by the Supreme Court (per Ibrahim J.) in **Jasbir Rai and 3 Others v 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."

24. The principles in the cases I have cited buttress the standards of conduct enacted in the **Judicial Service (Code of Conduct and Ethics) Regulations 2020** dated 26th May 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.

25. **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.

26. 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 references 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.

27. I agree with the Respondents that although the parties to the references are the same, each case is a separate and distinct and based on its own facts and any party dissatisfied with the decision was entitled to appeal. Further, merely because I made a decision in any of those cases does not automatically form a basis for recusal. It would be improper for me to justify my decisions in those cases.

28. Ultimately, the question for consideration is whether a person having knowledge of the fact that I heard those cases would reach the conclusion that I am biased in these cases. I think not. Each of the decisions complained about was made after arguments and if any party is dissatisfied, it is entitled to lodge an appeal. The pending reference in this matter is yet to be determined. In **Republic v Independent Electoral & Boundaries Commission & Another exparte 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.

29. I now turn to the second ground regarding the assertion that I was a partner in firm of *Majanja and Luseno Advocates*. I wish to state that like many judges who were in private practice, I was partner in the firm until my appointment in 2011 when I ceased to have any business with that firm. Second, the Advocates have not shown that the Respondent were clients at the firm or that I represented or acted for them. 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.

Conclusion and Disposition

30. The Advocates have not made out a case for recusal. I therefore refuse to recuse myself. The Notice of Motion application dated 12th February 2021 is dismissed with costs to the Respondents.

31. As parties agree, the same order shall apply to similar application in **E146 OF 2019, E300 OF 2019; E301 OF 2019 and E229 OF 2019**.

DATED and DELIVERED at NAIROBI this 30th day of **APRIL** 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Applicant.

Mr Juma instructed by Mutua-Waweru and Company Advocates for the Client/Respondent.

Ms Matunda instructed by Moronge and Company Advocates for the Client/Respondent