



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HCOM/E103 OF 2020**

**TECHNOSERVE LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NOKIA CORPORATION.....DEFENDANT/RESPONDENT**

**INTERNATIONAL CHAMBER OF COMMERCE/ INTERNATIONAL**

**COURT OF ARBITRATION.....INTERESTED PARTY**

**RULING**

By application filed on **10<sup>th</sup> December 2020**, the Plaintiff /Applicant through Counsel Mr. Ataka sought the following orders;

- a) That this Court, Margaret Muigai Judge recuses herself from further hearing and/or determining this matter and/or any other matter between the Parties herein.
- b) That pending the hearing and determination of this application, this Court be pleased to stay proceedings and/or suspend the implementation/execution of directions /orders issued by this Court.
- c) The Court to grant any further orders or directions as may seem expedient in the circumstances of the application.
- d) The costs be in the Cause.

The Grounds are as follows;

1. That upon the Plaintiff filing Amended Plaintiff, realized that the Trial Judge in this matter is the spouse of Prof. Githu Muigai who is a member of the Interested Party, the International Chamber of Commerce.
2. The Plaintiff is of the opinion that it will be greatly prejudiced should the Court proceed to hear and determine the matter, since the issues in question regard to the suit herein are heavily founded on indictment of the proceedings that were conducted before the interested party herein ICC Arbitration where Prof G.Muigai is a member.
3. In the event, the Court should decide to refer the matter to *ad hoc* arbitration that the Plaintiff's option in choice of Arbitrator among other candidates would be Prof. G. Muigai, AG emeritus, as he is highly regarded and competent Arbitrator. That this Court presiding over this matter would deny the Plaintiff the opportunity to appoint an Arbitrator of its choice or in the least limit its choice by having to exclude Prof. G. Muigai as intended.
4. The Trial Court will no longer have an objective and/or open mind she ought to have perceived to have and therefore will not have impartiality to fairly and justly hear and determine the dispute herein.
5. The continued handling /hearing of this matter and related matters in which these parties are involved may not foster the cardinal principle that justice between the parties ought not to be compromised and due process realized and the profile of rule of law is not compromised.
6. It is now a settled principle of law that where the non-participation of a judicial officer in a matter is called for, even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias as is the case herein, the Judge should recuse

herself from the mater.

7. In the interest of justice as espoused under Article 50 of COK 2010 the application should be allowed and the matter proceeds for just and expedient determination.

### **REPLYING AFFIDAVIT**

The Application was opposed vide the sworn Affidavit of **Emmanuel Jolivet** (for the Interested Party) dated **22<sup>nd</sup> February 2021** and stated that; -

1. Prof. Githu Muigai is a member of the International Chamber of Commerce through his law firm. He is however not a member of the International Court of Arbitration (the Court).
2. The choice of an Arbitrator is wholly governed by party autonomy. Each party to the dispute will nominate their own co-arbitrator. The Applicant would have hundreds of arbitrators available to it should it seek to appoint one. The Applicant's assertion that its choice of arbitrators would include Prof. Githu Muigai is not correct.
3. An Arbitrator has an ongoing duty to disclose any facts or circumstances that may give rise to reasonable doubts as to their impartiality. Where such circumstances arise, a party has an opportunity to challenge the continued participation of the Arbitrator.
4. The Applicant bears the legal burden of proving its allegations and its not the duty of the court to prove its impartiality and for an application for recusal to succeed the Applicant has the onus of establishing whether a reasonable, objective and informed person would on the facts reasonably apprehend that the judge would not be impartial.
5. Under common law the judge has a duty not to recuse herself on unsupported speculation. There is as much obligation for a judge not to recuse when there is no occasion for the judge to do so as there is for her to do so when there is.
6. The Applicant has not discharged the burden for recusal and should be dismissed with costs.

### **DEFENDANT'S REPLYING AFFIDAVIT**

The Application was opposed vide the sworn Affidavit of **Aapo Saarikivi** dated **11<sup>th</sup> February 2021** and stated that; -

1. Prof. Githu Muigai is not a member of the International Court of Arbitration of the International Chamber of Commerce and the its website only lists Ms. Njeri Kariuki and Ms Ndanga Kamau.
2. The Judge in this suit will not directly or indirectly impact Prof. Githu Muigai in his personal or professional capacity as to formulate a basis for having any apprehension or likelihood of bias by the Judge in the determination of this suit.
3. Blanket claims on the likelihood of bias by a judicial officer do not constitute a reasonable basis for recusal in the manner set out in the Application. The fact that the Plaintiff considered it will not get a fair trial before the Judge is not sufficient for recusal for the test applicable is an objective rather than a subjective one.
4. Further, in order for a recusal application to be allowed, circumstances must exist that would lead a fair-minded and informed observer to conclude that there was a possibility that a tribunal was biased. Such circumstances do not exist in this case.
5. Neither the Plaintiff nor the Defendant have appointed or attempted to appoint Prof. Githu Muigai as an Arbitrator in any real arbitration between them. There exists no relationship between Prof. Muigai and the Plaintiff or the Defendant. The mere notoriety of a judge's spouse as a highly regarded arbitrator is irrelevant in determining whether a judge may preside over a case relating to arbitration. It cannot be a matter that creates any likelihood of bias in the determination of the present proceedings before the Judge to warrant recusal.
6. The Application is an attempt at forum shopping by the Plaintiff and it would be in the interest of justice that the Application is dismissed.

### **SUPPLEMENTARY AFFIDAVIT**

The Applicant filed the sworn Affidavit of **Bulet Gulbahar** dated **19<sup>th</sup> May 2021** in response to the Replying Affidavit dated **22<sup>nd</sup> February 2021** and stated as that; -

1. The Interested Party's Affidavit on the allegation of authorization to the deponent therein Emmanuel Jolivet to swear the said Affidavit is unsubstantiated as no authority has been exhibited by Emmanuel Jolivet or the Interested Party in that regard. For that reason, the Applicant prays that the Affidavit be struck out for want of authorization.
2. The Respondent seems to have misunderstood the Plaintiff's Application and Supporting Affidavit, in the event the matter would be referred to adhoc or institutional arbitration, Prof. Muigai could be among the candidates the Plaintiff could consider or choose as a potential Arbitrator and by the fact that the matter has been handled by this Court the Plaintiff would be deprived of that

opportunity.

3. The Interested Party does not enforce the ongoing duty to disclose on the Arbitrators and has on numerous occasions denied the Applicant's request for production of timetables and availability of the Arbitrators. Hence the allegation that the Applicant will have an impartial hearing is preposterous and a false promise.

4. Article 50 (1) of the Constitution of Kenya guarantees the right of every person to have a fair and public hearing before an impartial body and that right cannot be limited or abridged simply because a party cannot or has not substantiated its position.

5. In response to the Defendant's Replying Affidavit the Applicant stated the Affidavit discloses a misapprehension of the essence of the Applicant's apprehension of the apparent conflict of interest that this court is faced with in this matter. For clarity, the gist of this Application is not that the decision of this Court will favour Prof. Githu Muigai. The judge will be put in a position where she has to pass judgment on the matter in which her husband has a direct interest hence the conflict.

6. The assertion by the Defendant that the Application for recusal amounts to forum shopping is false and misplaced as the Applicant has not selected any particular court it wishes to have the matter assigned to and confirms that the Applicant is obliged to have the matter heard by an unconflicted court within the division.

7. The Applicant has indeed substantiated its grounds for recusal of the judge herein and as such the Plaintiff urges the court to grant its Application as prayed.

### **APPLICANT'S SUBMISSIONS**

The Applicant submitted that **Section 5 (1)** of the Public Officers Ethics Act and **Rule 5** of the Judicial Service Code of Conducts and Ethics provide for the disqualification of a judicial officer from court proceedings where their impartiality is in question for various reasons some of which include where the judicial officer or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings or where the judicial officer or his spouse or a person related to them is a party to the proceedings.

The spouse of the judicial officer in this suit has interest in the outcome of the case as they are members of the interested party which meets one of the conditions set out in law where a judge should be disqualified from proceedings in this suit. This issue leading to a cause in impartiality of a judicial officer was addressed in the case of ***Republic –versus- Mungera Isabwa & 6 Others [2020] eKLR*** where the court referenced the case of ***R v. Bow Street Metropolitan Stpendary Magistrate, ex parte Pinochet Ugarte (No. 1) [2000] 1 A. C*** as follows; -

***“.....the English House of Lords [now the Supreme Court] had just rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member's wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had had an interest in the outcome of the proceedings.”***

The Applicant also relied on the case of ***Ajay Shah -versus- Attorney General & Another & 2 Others [2013] eKLR*** where the court stated that; -

***Independence and impartiality are the hallmarks of a judicial system. Independence is necessary to protect the integrity of the judicial process as independent judges are free to function without outside pressure or influence. Article 160 of the Constitution underpins this independence by providing, inter alia, that, “In the exercise of judicial authority, as constituted under Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”***

***Although independence is guaranteed, each judicial officer takes an oath to be fair and impartial. This responsibility to be fair and impartial is the foundation of confidence in the decision making process. Judges are expected to bring an impartial mind to the case before them hence what disqualifies a judge is the presence of some factor which could prevent the bringing of an objective judgment to bear which could distort judge's decision. There must be also an appearance of being free from any influence as stated in the oft cited aphorism by Lord Hewart CJ in *R v Sussex, ex parte McCarthy [1924] 1 KB 256*, “it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”***

### **DEFENDANT'S SUBMISSIONS**

It was the Defendants submission that the test to be applied when determining whether or not a judge should be recused is whether an objective, 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 will not be possible on the basis that a judge has not or will not bring an impartial mind to bear on the adjudication of the case. In the case of ***Florence Chelanqat Langat –versus- Timoi Farms and Estates Limited & Another [2015] eKLR*** the objective test was explained as follows;

***“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.... 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.”*

The Defendant submitted that the Plaintiff failed to prove how the alleged membership of Prof. Muigai with the ICC presented a factual matrix from which an apprehension of bias may be inferred in respect to the Judge’s conduct in this suit being the mere allegation. No orders that are likely to issue by this Court could directly affect Prof. Muigai in his personal and professional capacity as to formulate a basis for any apprehension or bias. The Defendant relied on the case of Kalpan H. Rawal –versus- Judicial Service Commission & 2 Others [2016] eKLR where the court agreed that the existence of a reasonable apprehension of bias depends entirely on the facts before the court relied on R. v. S. (R.D.) [1977] 3 SCR 484 where the Supreme Court of Canada expounded the test in the following terms in R. v. S. (R.D.) [1977] 3 SCR 484:

*“The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”*

Further, the Defendant submitted that the Application lacks merit and fails the objective test. In the absence of any credible or cogent evidence to support a reasonable apprehension of bias. The Application is an attempt at scuttling the expeditious conclusion of these proceedings.

#### **DETERMINATION**

The Court considered the instant application pleadings and submissions by Counsel for the parties. The issue before this court for determination is whether the Court based on the grounds raised should disqualify/recuse itself from hearing the matter.

1. In this matter, on 2<sup>nd</sup> December 2020, the Court was moved to hear and determine Chamber Summons of 25<sup>th</sup> September 2020 by the Defendant. The application sought that the Court suspends the time for the Defendant to enter appearance and statement of defense in response to the Plaintiff filed. The Court to stay these proceedings and the dispute between the parties be referred to Arbitration.

Clearly at this stage, the suit was not for hearing as pleadings had not closed and the Applicant sought that the matter is referred to Arbitration which if agreed or confirmed the Court’s jurisdiction would be ousted and the matter would proceed to Arbitration.

Therefore, the application for recusal was premature at this stage, nowhere and no one had moved the Court to hear and determine the dispute.

2. Whether, the matter is to be referred to Arbitration or not is governed by **Section 6 of Arbitration Act**, the Arbitration Agreement /Clause and whether there is a dispute to be taken to Arbitration or not. The Court is bound by the Arbitration Agreement executed by parties’ way before the matter was filed in Court and the Court has no mandate to rewrite the terms and would be presented to Court by the parties for determination of the parties choice of forum.

So, is it bias, prejudice, partiality and dependence if the Court refused to stay proceedings and decided to hear the matter when there is an Arbitration Clause or to insist on sending the matter for Arbitration contrary to the Arbitration Clause by the parties due to partiality and dependence because of the Court’s spousal relationship to/with Prof G.Muigai? I am totally at sea and confused how the alleged bias, impartiality and dependence would play out in the Court deciding the only question of forum which would be based on the parties’ contract.

Yet, in the same breath, the Applicant claims, ‘if the Court should decide to refer the matter to *ad hoc* arbitration that the Plaintiff’s option in choice of Arbitrator among other candidates would be Prof. G. Muigai, AG emeritus, as he is highly regarded and competent Arbitrator. That this Court presiding over this matter would deny the Plaintiff the opportunity to appoint an Arbitrator of its choice or in the least limit its choice by having to exclude Prof. G. Muigai as intended.’

The party cannot legally and justly demand recusal of the Judge so as to facilitate convenience on choice of an Arbitrator only on grounds of spousal relationship with the Judge. The Arbitrator even if appointed has to disclose any affiliation to a party or advocate or judicial officer or subject-matter. It is strange that impartiality of the Court is not based on judicial conduct or conflict of interest by virtue of spousal relationship but on enabling the party act in its interest and convenience in future and outside the court system in the choice of an Arbitrator. By any stretch of imagination this cannot be the legal basis for recusal of Judicial Officer. There must be a nexus between the Court by virtue of the spousal relationship with Prof G Muigai; a 3<sup>rd</sup> party not related or connected to the parties’, advocates and/or subject-matter that would cloud the fair hearing of the matter.

3. The Court takes the view that **all persons** are protected under the Constitution, the Judge is entitled to equal protection of the law under **Article 27 of the Constitution** which provides;

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- 5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

The innocent 3<sup>rd</sup> Party, Prof G. Muigai is entitled to privacy vide **Article 31 COK 2010** that provides;

*Every person has the right to privacy, which includes the right not to have—*

- (a) *their person, home or property searched;*
- (b) *their possessions seized;*
- (c) *information relating to their family or private affairs unnecessarily required or revealed;* or
- (d) *the privacy of their communications infringed*

The parties in Court are also entitled to fair hearing under **Article 50 COK 2010** which provides;

(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.**

All parties are therefore variously protected under the same Constitution and each right ought to be protected but not at the expense of another party.

4. Parties enter and execute Arbitration Agreement(s) way before the dispute(s) arise and parties file matters in Court. The Court is not privy to the terms of the Arbitration Agreement in advance until it is presented to Court. The Court cannot possibly interfere with its terms in any way.

5. The execution of the Arbitration Agreement if the Court's jurisdiction is ousted, is by & between parties through their Advocates and as prescribed under **Section 12 of the Arbitration Act 1995**. The Court has no role to play in appointment of Arbitrator(s) where, when and how the Arbitration proceedings will be carried out except as stipulated in the Arbitration Act 1995.

6. In the case **Serah Njeri Mwobi vs John Kimani Njoroge C.A. [2015] eKLR** the court referred to **Davidson vs Scottish Ministers (2004) UKHL 34** where Lord Bingham addressed the subject on impartiality of a Judge. He emphasized on the importance of the objective judgment and stated that;

*“Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorized as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.”*

*The Republic of South Africa vs South Africa Rugby Football Union (1999) 4 SA 147 at Pg 177* the Court stated as follows; -

*“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. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”*

7) The pleadings and the annexed Curriculum Vitae (CV) of Prof Githu Muigai do not confirm that He is a member of the ICC Court.

The details provided by the Applicant do not confirm that He is involved or affiliated to any party and/or Counsel or Subject-matter. The details do not confirm that he is or not a member of ICC as shown by the Replying Affidavits. How then would this Court by virtue only of spousal relationship with a member of ICC Court (although not confirmed) prejudice any of the parties yet it is only the question of the Court's jurisdiction that is at play and not the dispute between parties?

7) Mr. Ataka, Counsel for the Plaintiff TechnoServe Limited seems to be aggrieved and/or disgruntled by a situation, circumstances or for reasons other than what is alleged in the instant application.

The present ground that Prof. Githu Muigai is a member of the interested Party has not been proved on a balance of probabilities. However, since Counsel and/or Plaintiff are apprehensive that this Court will not comply with the mandatory Constitutional Requirement of a fair hearing under **Article 50 COK 2010** and therefore lack confidence in the conduct of the matter, the position is mutual with the Court, whether, there is legal basis for recusal or not. The Court will not proceed with the matter shrouded in suspicion and apprehension on conduct of proceedings.

**DISPOSITION**

**The matter shall be heard in ANY OTHER COURT within the Division.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 30<sup>TH</sup> JULY 2021.**

**M.W.MUIGAI**

**JUDGE**