**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 6 OF 2017**

**SABATIA INVESTIMENT LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**HARI GAKINYA & CO. ADVOCATES.....DEFENDANT/APPLICANT**

**RULING**

1. In ***Nakuru HCCC No. 31 of 2017***, Sabatia Investments Ltd (Sabatia) sued the County Government of Nakuru (County Government). The County Government failed to enter appearance with the result that judgment was entered in favour of Sabatia for Kshs. 36,445,400/- plus costs and interests.

2. Sabatia was initially represented in ***Nakuru HCCC No. 31 of 2017*** by Hari Gakinya & Co. Advocates. The County Government paid the decretal sum plus costs and interests to Hari Gakinya & Co. Advocates – a total of Kshs. 39,872,598/-.

3. It would seem that a conflict arose between Sabatia and the firm of Hari Gakinya & Co. Advocates after the County Government paid the sums of money to the Advocates. Sabatia says that Hari Gakinya & Co. Advocates paid only Kshs. 22,000,000/- and has refused to pay the balance. Hari Gakinya & Co. Advocates does not refute this claim but alleges that there were certain contractual arrangements between it and Sabatia which would explain how the remainder of the sum was discharged.

4. Meanwhile, there was filed in Court an Application dated 31/1/19 seeking to set aside the Consent order of 28/9/2018 (by which Sabatia and the County Government agreed how much should be paid to Sabatia in full satisfaction of the decretal amount). That Application was purportedly filed by the County Government. It is purportedly signed by Mr. Wainaina, a County Attorney. I say

> "purportedly" because Mr. Wainaina later on appeared in Court and stated on record that he never signed nor filed the purported Application. More on that shortly.

5. On 27/02/2019, the Court record indicates that Mr. Gakinya appeared before the Learned Justice Ng'etich and indicated to the Learned Judge that the parties had consented to the Application. Mr. Gakinya contests that the Court record is accurate and thinks that there was an inadvertent error in the recordation of the proceedings.

6. In any event, Sabatia responded to the recorded Consent of 27/02/2019 in three ways. First, it replaced its counsel on record with Gordon Ogola, Kipkoech & Co. Advocates who filed a Notice of Change of Advocates. Second, through its new Advocates, Sabatia filed an Application dated 19/03/2019 seeking, primarily, to set aside the Consent order of 27/02/2019.

7. Third, Sabatia filed the present action. This is an Originating Summons brought under Order 51 and Order 52, Rules 4(1),4(2) and 4(10) of the Civil Procedure Rules seeking for orders directing the firm of Hari Gakinya & Co Advocates to deposit into Court "the balance of the decretal sum amounting to Kshs. 17,872,598/-that [it] received in ***Nakuru HCCC No. 31 of 2017***" on behalf of Sabatia.

8. The Application dated 19/03/2019 in ***Nakuru HCCC No. 31 of 2017*** came up before me under a Certificate of Urgency on 19/03/2019 where I certified it urgent and directed that it be served. Eventually, the matter substantively came up before me for inter partes hearing on 18/06/2019. Mr. Ogola was in Court representing Sabatia. Mr. Wainaina, the County Attorney, was present for the County. Mr. Githui was present holding brief for Mr. Hari Gakinya for Hari Gakinya & Co. Advocates.

9. What happened on 18/06/2019 is clearly recorded in the Court record for the day. Mr. Wainaina addressed the Court and informed the Court that neither he nor the County filed the Application purportedly filed by him and dated 31/01/2019. He also informed the Court that neither he nor the County had given any directions for that application to be compromised by way of consent on 28/02/2019.

10. What this meant was that the consent order which the Application dated 19/03/2019 sought to set aside was, in fact, non-existent since it was based on an application which the County had now disowned. This also meant, remarkably, that someone had forged the signature of Mr. Wainaina, the County Attorney, in addition to fraudulently filing an Application in Court purporting it to be one filed by the County Government. It also meant, even more remarkably, that an attorney had appeared before the Honourable Judge on 28/02/2019 and informed the Judge that the County Government had agreed to enter into a consent in the matter. Mr. Githui, representing Mr. Gakinya for the day, conceded that the County Government had given no instructions to enter into the consent.

11. Given these remarkable events of 18/06/2019, this Court gave the following orders and directions:

> *I have carefully perused the file and noted that contents of the parties counsels' representations. What emerges from the record is the following:*
>
> *1. The County never filed the NoM Application dated 31/1/2019 as its counsel who ostensibly signed that Application says his signature is a forgery.*
>
> *2. As such, that Application is a nullity. It is as if it does not exist. It is hereby expunged from the record.*
>
> *3. The expungement of that Application from the record must also mean that all the proceedings in this file that came after its filing and related to that Application including the ostensible consent order of 27/2/2019 must be similarly expunged from the file.*
>
> *4. The result is that the consent judgment between the parties in the suit herein remains the disposition of the suit. The file remains closed for purposes of the suit.*
>
> *Having made the conclusions above, it also seems clear that there has been some criminality perpetrated by some actors in this matter. In particular, someone appears to have forged the signature of the Nakuru County's Attorney Mr. Kinuthia in filing the Application dated 31/1/2019. Additionally someone caused that forged certificate to be file in court. Consequently, some serious crimes were committed. For the due administration of justice, I direct as follows;*
>
> > *Mr. Kinuthia, the County Attorney to make an official complaint at Nakuru Central Police Station about the forgery so that investigations can be conducted and those responsible to be charged as appropriate.*
> >
> > *1. Mr. Kinuthia and the County to officially make a complaint against Mr. Gakinya regarding his conduct in purporting to enter a consent on its behalf on 27/2/19 when the matter was in Court.*
> >
> > *2. The Deputy Registrar to extract this decree and serve it on the Nakuru County Attorney and the OCS Nakuru Central Police Station.*

12. It is fair and objective to say that it is these orders that have rubbed Mr. Gakinya of Hari Gakinya & Co. Advocates the wrong way. It is what has provoked his current application. In it he seeks this Court's recusal from the matter because he feels that this Court made "adverse order[s] against the Applicant" in ***Nakuru HCCC No. 31 of 2017***. In particular, in Mr. Gakinya's affidavit deponed on 11/07/2019, he states at paragraph 8:

> *That the Honourable Judge Prof. John Ngugi (sic) was treated to malicious instructions by the Plaintiff and ignored the Civil Procedure (sic) by purporting and eventually concluding that I entered into a consent with myself on billing of the County and even ordered investigations while knowing very well it is impossible for a Counsel to sign a consent for two parties. This was expressly done in an order that was to be extracted, annexed hereunto and marked JHG II is a copy of the proceedings in Nakuru HCCC No. 31 of 2017.*

13. It is on the basis of this that Mr. Gakinya wants this Court to recuse itself and have another Judge handle the matter.

14. The Application is opposed by Sabatia. The Application was orally argued before me.

15. I have reproduced at length the proceedings in ***Nakuru HCC No. 31 of 2017*** above because they clearly explain the circumstances under which the Court gave the orders that it did on 18/06/2019. These orders were made in the presence of Mr. Githui, Counsel holding Mr. Gakinya's brief.

16. These proceedings are clear that:

> a. This Court made no reference to any consent between Mr. Gakinya and the County Government about billing as Mr. Gakinya now alleges.
>
> b. The Court record is clear that Mr. Gakinya appeared before Ng'etich J. on 27/02/2019 and informed her that he and the County Attorney had agreed to record a consent to the Application dated 31/01/2019.
>
> c. The County Government expressly disowned the purported Application dated 31/01/2019 and the County Attorney explicitly informed the Court that the purported signature on that Application is a forgery.

17. It is readily obvious that the orders made by the Court on 18/06/2019 are adverse to Mr. Gakinya; and necessarily so. Serious allegations

of fraud and forgery had been made against him in Court and the Court would have failed in its duties in the administration of justice if it did not order further investigations. The County Government had also expressly stated that it did not file the Application dated 31/01/2019. In such a situation, procedure calls for only one course of action: to expunge the purported Application and treat it as if it never existed in the first place. That is how the Court proceeded.

18. Does this evince bias against Mr. Gakinya? It would a very strange definition of bias that includes this as one. Mr. Gakinya insists that he has reasonable apprehension that the Court will not treat him fairly because the Court gave adverse orders against him. To up the ante, Mr. Gakinya has now filed a formal complaint against the Judicial Services Commission (JSC) against me based on the proceedings of 18/06/2019 as reproduced above. He says that the fact that he now has a "dispute" with me should mean that I must disqualify myself from this case.

19. The rules governing recusals lay out a test that is not pegged on the subjective feelings of litigants or their advocates. They are based on three important considerations:

20. First, that there is a presumption in the law against the partiality of Judicial Officers in assigned cases. See, for example, ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*** where the South African Constitutional Court stated that *"this is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence*."

21. Second, that it is the duty of Judicial Officers to hear cases and not to too easily find a reason not to do so through easily acquiescing to recusal motions. As Mohamed Ibrahim, SCJ, put it in ***Gladys Boss Shollei v Judicial Service Commission & Another [2018] eKLR***, *"every judge has a duty to sit in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter….[the doctrine of the duty to sit] recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rate cases…*"

22. Third, it is generally corrosive to the legal system for litigants to be permitted to easily compel Judicial Officers to opt out of hearing their cases based on the litigants' whims or untested claims. A very plastic test on recusals would permit litigants to forum shop for the Judicial Officers they wish to hear their cases.

23. In ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013] eKLR***, the Supreme Court of Kenya gave the policy rationale and objective of the rule of recusal in these words:

> *7……..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*.

24. The Supreme Court, then, after a comparative detour in which it cites with approval, primarily, ***In R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1) [2000] 1 A.C. 6; Perry v. Schwarzenegger, 671 F. 3d 1052; and South African Defence Force and Others v. Monnig and Others (1992) (3) SA 482 (A)*** stated the test to be applied when a party requests a Judicial Officer to recuse themselves in the following terms:

> *[T]he test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice*.

25. In the same case, Ibrahim Mohammed, SCJ succinctly stated the applicable rule when a party pleads apprehension of bias on the part of the Judicial Officer. Ibrahim Mohamed, SCJ stated the rule thus:

> *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 will be inevitable.*
>
> *In an article by a writer, **Holly Stout (11 KBW)** on the subject of "Bias', the author states:*
>
> > *"… The test to be applied by a judge who recognizes a possible apparent bias is thus a "double real possibility" test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias." (referred to **Porter –V- Magill (2002) 2 AC 357**).*

25. As I have stated before, this progressive re-statement of the test for recusal for bias by Mohammed Ibrahim, SCJ is, in my view, the same one comprehended in the ***Commentaries on the Bangalore Principles of Judicial Conduct***, which, at paragraph 81 postulates that:

> *The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulas have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from "a high probability" of bias to "a real likelihood", "a substantial possibility", and "a reasonable suspicion" of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. The test is "what would such a person, viewing the matter realistically and practically – and having thought the matter through –*

*conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly."*

27. It is the same test laid down laid down in practical terms in South Africa in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*** in the following terms:

> *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 the fact 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." (footnotes omitted)*

28. Applying these principles on recusals to the present case, the following becomes eminently clear:

a. First, a mere subjective apprehension by Mr. Gakinya that the Court is not impartial is not enough to warrant a recusal by the Court. It is not enough for a litigant to be subjectively apprehensive; he must have objectively ascertainable reasons for the apprehension.

b. Second, the fact that a Court has made "adverse" findings against a party in an on-going matter is not, without more, sufficient reason to warrant a Court to recuse itself. Indeed, trials are structured in a way that Courts often give several interlocutory rulings and directions on contested issues before finally disposing the matter. It would cripple the functioning of Courts to draw a presumption that each time a Court makes an adverse ruling or order against a party in an on-going litigation, a ground for recusal is established.

c. Third, the making of a complaint against a Judicial Officer before the Judicial Service Commission by a litigant is not, per se, a ground for recusal. It is quite obvious how a different rule would incentivize litigants to game the system and engage in forum shopping by making unfounded complaints against Judicial Officers in the hope of getting a Judicial Officer off their case. It may be true that the nature of certain complaints may necessitate recusals; or complaints that have passed a certain threshold may call for the Judicial Officer to recuse themselves – but not every complaint, however whimsical and unfounded, without more would warrant an automatic recusal.

29. Looking at the Applications and the reasons given for it, I am confident that, objectively, there is no reason for this Court to recuse itself. I would have had no hesitation whatsoever in dismissing the Application. It is the kind of Application which should not only be discouraged but for which a litigant, especially an officer of the Court who brings it, should probably be sanctioned for it because of its capacity to needlessly corrode confidence in the administration of justice.

30. However, there are compounding circumstances in this case which will, unfortunately, necessitate that I have a different judge handle this matter and the accompanying one – ***Nakuru HCC No. 31 of 2017***. These are two compounding factors here.

31. First, this Application was first made at a time when my name had just been forwarded to the President of the Republic as a nominee for appointment to the Court of Appeal. As a result, wrongly anticipating that it would be a matter of a few weeks before the appointment was made, I made directions that the file be placed before Honourable Justice Matheka for directions, hearing and disposal. I did so without determining the question of recusal at the time anticipating that it was a moot question in view of my anticipated gazettement and appointment to the Court of Appeal.

32. As it turned out, the gazettement and appointment has been delayed and is uncertain. I have therefore remained in the Station. Meanwhile, the file had been placed before Justice Matheka as per the Court's earlier directions. This necessitated a reasoned ruling from the Learned Judge referring the matter back to me for a determination of the question first.

33. In the extraordinary circumstances of this case, in order to forestall the insalubrious innuendo keenly cultivated by the Applicant that this Court has developed an unhealthy appetite for this particular litigation given the fact that a second judge has considered the file and is available to hear the matter, I think it prudent to defer the matter to that other judge.

34. The second reason to defer the matter to Justice Matheka is that in the back and forth contest on recusal there is an innocent litigant, namely, Sabatia, whose resolution of the substantive mater involving a colossal amount of money is delayed. It is only fair that Sabatia gets its day in Court soonest.

35. **For these reasons, in the specific circumstances of this case, I will recuse myself and sent the file back to Justice Mumbua Matheka for further directions, hearing and disposal.**

36. **I will make no order as to costs.**

37. Orders accordingly.

**Dated and delivered at Nairobi this 28th day of May, 2020.**

**……**

**JOEL NGUGI**

**JUDGE**

**NOTE:** This ruling was delivered by both Zoom video-conference facility and email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. After publication of notice of delivery, Ms. Njeri appeared by Video-Conference holding brief for Hari Gakinya & Co. Advocates. The Respondent's counsel did not appear. The judgment was read by Zoom video-conference. A copy of it was subsequently transmitted to the respective lawyers by email.