



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC APPLICATION NO. 135 OF 2014

IN THE MATTER OF MACHAKOS HCCC NO. 60 & 66 BOTH OF 2008 (CONSOLIDATED)

AND

IN THE MATTER OF PARTY & PARTY BILL OF COSTS

BETWEEN

NYAMOGO & NYAMOGO ADVOCATES PLAINTIFF/APPLICANT

VERSUS

PAN AFRICAN INSURANCE CO. LTD 1ST DEFENDANT/RESPONDENT

APA INSURANCE CO. LTD 2ND DEFENDANT/RESPONDENT

RULING OF THE COURT

1. Mr. Nyamogo learned counsel for the Applicant has made an oral application seeking this court to disqualify itself from handling this matter on the ground that he has a feeling that he might not get justice in this court as the court appears not ready to record the fact the Applicant's Application dated 1/2/2018 is not opposed. Counsel further stated that this court is biased in this particular case as it has an interest in the matter and that as far as he was concerned he will be appearing before the court not of his liking since he is convinced that justice is not likely to be given in his case.

2. Mr. Mwitii opposed the Application for recusal and submitted that cogent grounds must be given in that judicial officers must not be antagonized in the discharge of their duties. He submitted that the matter had earlier been mentioned before Hon. Nyamweya, J when the Applicant's counsel had indicated that he did not see the need as to why he should be directed to appear before this court. The Respondents Counsel submitted that the Application for recusal is a delaying tactic and should be refused as no single ground has been given for disqualification of this court.

3. I have considered the Applicant's Counsel's submissions as well as those of the Counsel for the Respondent. I must begin by restating that all persons who come to the courts have their rights enshrined in the Constitution namely the right to access justice and to be accorded a fair hearing in their cases and that the courts are expected to be independent and impartial at all times. The courts are also expected to consider Applications for recusal by parties who appear before it. In the present case the Learned counsel for the Applicant has raised the issue of recusal on the grounds that this court appears not ready to record the fact that his Application dated 1/2/2018 is unopposed by the Respondent and hence he has a feeling that he might not get justice in this court. Indeed the said learned counsel for the Applicant is entitled to

his views and to express them before the court. The issue to be determined by this court is whether the Applicant has provided justifiable grounds upon which a reasonable observer sitting in court can conclude that the Judge has demonstrated bias and has impeded the fair hearing of this matter. Indeed if as claimed by the learned Counsel for the Applicant, bias is likely to be an issue, it is upon the said counsel to specifically establish the allegations of such bias. This court upon hearing both counsels gave directions as to the manner in which the two Applications dated 1/2/2018 and 31/1/2018 both filed on the same day (1/2/2018) were to be canvassed and it proceeded to direct that the said Applications be canvassed together by way of written submissions and that the court would deliver a ruling on both. The court was then waiting for the suggested dates for the reception of those written submissions when learned counsel for the Applicant pointed out that his Application dated 1/2/2018 had not been opposed as no replying affidavit had been filed by the Respondent. The Counsel for the Respondent then stated that the Applicant's Applications raised points of law and that the Respondent's Application dated 31/1/2018 was meant to deal with it. Then out of the blues counsel for the Applicant made the present allegation that he found this court was not ready to record the fact that his Applications was not opposed and promptly sought for this court to disqualify itself from hearing the matter. I must point out the fact that directions had already been taken that the two Applications dated 1/2/2018 and 31/1/2018 be canvassed by way of written submissions and that learned counsels were to indicate when those submissions would be ready and filed so that the court could prepare a ruling on both the two Applications. Under those circumstances it was not appropriate to sever one of the Applications from the other since they would be dealt with jointly in the submissions. The issue of whether or not one or both of the Applications had not been responded to by the other side would aptly be captured in the submissions to be received and that the court would deal with it at that juncture. Suffice to say that the Respondent's counsel had already confirmed that indeed they had not responded to the said application dated 1/2/2018 as same raised points of law which would be adequately tackled by their application dated 31/1/2018 in the submissions. Under those circumstances this court is unable to understand the rationale by the Applicant in seeking to have the Application dated 1/2/2018 dealt with before the reception of the submissions since both applications were to be canvassed together. In the Supreme case of **JASBIR SINGH RAI & 3 OTHERS =VS= TARLOCHAN SINGH RAI & 4 OTHERS [2013] eKLR** the court held as follows:-

“The test for establishing a judge’s impartiality is the perception of a reasonable person this being a ”well informed, thoughtful observe who understands all the facts” and who has “examined the record and the law” and thus unsubstantiated suspicions of personal bias or prejudice will not suffice.”

From the above cited authority it was incumbent upon the Applicant to avail reasonable grounds from which an inference of bias could be drawn. It was not possible to embark on canvassing one of the application and leave out the other yet it had been directed that both the two applications be canvassed together by way of written submissions. If indeed the Applicant felt that the Respondent might use the leeway to file a reply to the unopposed Application, this court had already noted that no such reply had been filed as at the 14/3/2018 and that any pleading filed outside the stipulated period would be dealt with appropriately especially where no leave has been sought. Hence the Applicant's fears appear to be unfounded and that the unsubstantiated suspicion of bias or prejudice by the Applicant does not suffice as reasonable grounds for recusal. The Applicant's Counsel's submissions that he will be appearing before this court not out of his liking seems to reinforce the Respondent's Counsel's submissions that the said Applicant's Counsel had earlier indicated before another court that he did not see the need as to why he should be directed to appear before this court. Indeed all learned counsels are deemed to be officers of the courts and expected to abide by the direction made by the courts and that any party aggrieved by a decision could file an appeal if need be.

4. In the result I find the Application by the Applicant's counsel for recusal lacks merit. The same is dismissed. Leaned counsels are now directed to proceed to indicate the timelines they require for the filing of written submissions regarding the Applications dated 1/2/2018 and 31/1/2018.

Costs in the cause.

Dated and delivered at Machakos this 20th day of March, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Makundi for Nyamogo for the Applicant

Ngotho for Mwititi for respondent

Kituva – Court Assistant