REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI LAW COURT, NAIROBI

CIVIL CASE NO. 144 OF 2017

NATIONAL OIL CORPORATION OF KENYA …….....PLAINTIFF

VERSUS

REAL ENERGY LIMITED….....DEFENDANT

RULING

Introduction

1. I am concerned in this ruling with allegations which go to the heart of questions on the rules of natural justice before and in the course of a trial.

2. The problem is this: The Defendant in the course of an interlocutory application has made an application that I recuse myself on grounds of apparent bias otherwise also known as overt partiality.

Background

3. The general background to the Defendant's application for recusal is relatively clear.

4. The Plaintiff launched the instant suit in April 2017. As the registered proprietor of Land Reference No. 209/6776 Ngong Road, the Plaintiff sought a declaration that a dealership licence agreement which the Plaintiff had granted to the Defendant in 2014 had lapsed in March 2016. Additionally, the Plaintiff sought a mandatory injunction to compel the Defendant to cease associating with the Plaintiff's brand and an additional order to cause the Defendant to vacate the suit property. The Plaintiff also sought Kshs. 42,498,743.46 in damages. Alongside its statement of claim, the Plaintiff filed an intermediary motion and sought orders against the Defendant.

5. With the intermediary motion certified urgent, the Defendant filed its response on 18 April 2017. Then on 21 April 2017, this court directed that the application be heard by way of oral submissions on 11 May 2017. The court also granted the parties permission to file their respective heads of arguments. Additionally, the court issued an interim order of injunction restraining the Defendant, its servants, agents or employees from continuing to disparage, use or otherwise purport to associate itself with the Plaintiff's brand or any aspect thereof until the hearing of the application on 11 May 2017. The Plaintiff was later to file a Further Affidavit with the court's permission on 5 May 2017.

6. On 8 May 2017, the Defendant filed its Statement of Defence and Counterclaim, and soon followed the

same with its Bundle of documents.

7. Two days later, the Plaintiff filed its heads of arguments pursuant to the court's directions of 18 April 2017. The Defendant did not file any heads of arguments. The court was however unable to hear the parties on the scheduled hearing date of 11 May 2017 due to a bogged cause list which involved appeals from the Political Parties Disputes Tribunal and which appeals had strict statutory timelines. Instead, the court directed that the application be heard by way of written submissions. The parties were then directed to file and exchange their respective written submissions within 21 days. A mention date was subsequently fixed to ascertain compliance and fix a date for the ruling.

8. When the matter was mentioned on 6 June 2017, only the Plaintiff had filed its submissions. The Defendant had not. The parties' counsel appeared before me and I directed that the cause be mentioned on 9 June 2017 to enable the Defendant file and serve its submissions. It is to be noted that the Defendant ultimately only filed its submissions on the injunction application on 20 July 2017.

The recusal application

9. The recusal motion was filed on 8 June 2017, a day before the matter was to be mentioned to ascertain whether the Defendant had filed its submissions on the injunction application. The Defendant also then notified the court of the change in legal representation. The recusal application was supported by the affidavit of one Rajab Ahmed Karume.

10. The Plaintiff opposed the recusal motion. A response to the motion was filed by Mr. Kennedy Melly on 21 July 2017.

11. The recusal motion alleged bias in the manner the proceedings have been handled by this court. It stated that the Defendant is apprehensive that justice shall not be done to the Defendant so long as I continue to preside over the cause. The affidavit in support of the recusal motion focuses on what transpired on 6 June 2017. The Defendant then causes to be deponed in the founding affidavit that the court has exhibited undue disrespect to the interest of the Defendant.

12. It may be apposite at this point to shortly detail the proceedings of 6th June 2017 as recorded by myself. They were as follows:

> *6.6.2017*
>
> *Coram before J.L Onguto J*
>
> *Atelu C/Asst*
>
> *In Chambers*
>
> *Mr Melly for Plaintiff*
>
> *Ms Chepkonga h/b Lakicha for Defendant*
>
> ***Court:*** *Matter to be mentioned on 9 June 2017 to enable the defendant file and serve submissions. Interim orders extended.*
>
> ***J.L. ONGUTO***
>
> ***JUDGE***

13. The principle grounds and evidence relied on by the Defendant to demonstrate bias and support the application for recusal comprised the following grounds:

13.1 My alleged refusal to allow the Defendant a period of 21 days to file its written submissions on the application for injunction.

13.2 My alleged intemperate and hostile disposition towards counsel for the Defendant.

13. 3 My alleged predetermined disposition of the dispute.

13.4 My proceeding with the cause despite the Defendant laying sufficient evidence that a similar matter was pending before the Environment & Land Court.

14. The response by the Plaintiff to the application was to detail the litigation history of the cause leading to the proceedings of 6 June 2017. The Plaintiff also denied any use of intemperate or hostile language by the court towards counsel. The Plaintiff finally pointed out that the Defendant was simply taking issue with case management directions and any disagreement or dissatisfaction with case management directions should never lead to a presumption of bias. In the Plaintiff's view, the application for recusal was just an attempt to scuttle and or delay the proceedings and a bid to forum shop. The Plaintiff concluded by stating that the application for recusal did not meet the threshold for recusal.

The hearing of the recusal application

15. The parties, made oral submissions before me on the application for recusal on 30 November 2017.

16. The Defendant's submissions made through Mr. Wanjohi were to the effect that the Defendant's perception was that justice would never come its way so long as I continued to preside and hear the suit. This reasonable apprehension, it was submitted, had arisen from the directions given by the court on the filing of submissions where the Defendant wanted 21 days to file its submissions but the court did not accede to the request. Mr Wanjohi insisted that what matters is a party's perception of bias and no more.

17. Counsel relied on the case of **Jasbir Singh Rai & 3 Others *v* Tarlochan Singh Rai & 3 Others [2013]*e*KLR** to lay out the test of reasonable apprehension seen in the eyes of a reasonable man and concluded by stating that the Defendant had established reasonable apprehension to the required standard.

18. Mr. K. Melly appeared for the Plaintiff.

19. Mr. Melly submitted that in so far as the application was hinged on case management directions the same could not succeed as management of a cause is in the sole discretion of the court. Counsel then insisted that the record was clear and no apprehension of bias could be assumed. Taking the court through the litigation history, Mr. Melly pointed that the parties had on 20 April 2017 been directed to file heads of arguments in preparation for the oral hearing on 11 May 2017, the defendant did not. Counsel also pointed out that the oral hearing did not proceed as scheduled on 11 May 2017 as the court was engaged with various appeals from the Political Parties Disputes Tribunal. Counsel additionally pointed out that on 11 May 2017, the court directed that the application be heard by way of written submissions which were to be filed and exchanged within 21 days. The court then further directed that the cause be mentioned on 6 June 2017 with view to fixing a date for the ruling.

20. The Plaintiff's counsel also relied on the case of **Jasbir Singh Rai & 3 Others *v* Tarlochan Singh Rai & 3 Others (supra)** to lay out the proposition that the test for bias is that of a well informed thoughtful observer who understands all the facts. Mr Melly concluded that the defendant had not met the threshold and thus the application for recusal ought to be declined.

21. In a quick rejoinder, Mr Wanjohi pointed out that the affidavit in support of the application had clearly indicated that the Defendant had a reasonable apprehension that the court was biased against it.

Analysis and determination

22. I have carefully considered the application by the Defendant. I have also taken careful note of the

affidavits filed by the parties and the oral submissions alongside case law referred to by the parties' counsel. I hold the following view.

Observations

23. Before proceeding with the full analysis and determination, I feel constrained to make the observation that a judge faced with an application for recusal is no doubt in a quandary. He cannot simply rebuff any allegations made and expect the party alleging the same to dance away in contentment. For that reason alone when faced with an application for recusal on grounds of bias, actual or apparent, it is obligatory on the Judge to lucidly detail the factors which are questioned in the application. Often however allegations made demand an innate interrogation. The Judge cannot however cross-examine the party seeking recusal. The parties too cannot cross-examine the Judge and at times he may be the only source of the relevant information. It is critical thus that applications for recusal are made in good faith and grounded on clear well founded and specific facts. It is critical as well that the Judge urged to recuse himself or herself objectively considers the application.

Relevant law

24. It is evident that the grounds for recusal put forth by the Defendant are grounds which can be ranked as intended to reveal apparent bias. There is no actual bias alleged. It is only stated that my conduct of the proceedings thus far creates a perception in the Defendant that I am likely to be biased and partial.

25. In the case of **Jasbir Singh Rai & 3 Others *v* Tarlochan Singh Rai & 4 Others [2013]eKLR** the Supreme Court of Kenya stated as follows, of disqualification of judicial officers:

> ***"Recusal, as a general principle, has been much practiced 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 edition (2004) [p. 1303]: "Removal of oneself as judge or policy maker in a particular matter [especially] because of 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 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".***

26. The above passage was quoted with approval by Odunga J in the case of **Republic & 3 Others *v* Cabinet Secretary , Transport and Infrastructure & 5 Others *Ex parte* Kenya Country Bus Owners Association & 8 Others [2014] eKLR.** I would also adopt the same passage as a good starting point. It lays down the general foundation for any recusal challenge whether based on actual bias or apparent bias.

27. In the instant case, it is a matter of apparent bias and I need to quickly point out that there exists considerable local and foreign jurisprudence on apparent bias.

28. Foremost, it is a widely accepted principle in the administration of justice circles that recusal on any basis is augmented on the rules of natural justice which ensure fairness in any judicial process. The basic natural justice rules that no man should be a judge in his own cause, no man should be condemned unheard and justice should not only be done but be seen as done are pertinent to recusal: see **Kanda *v* Government of Malay [1962] AC 322**. If these standards are not met by the judge he will ordinarily, subject only to the rule of necessity, recuse himself. Indeed, in **Galaxy Paint Company Ltd *v* Falioa Guards Ltd [2002] 2 E A 585**, the Court of Appeal recognized the importance of natural justice in recusal challenge when it stated that:

> *"…**it is a cardinal principal of law that holders of judicial offices are subject to the common law rule of natural justice whether any pecuniary interest or real likelihood or actual bias disqualifies a judge from sitting".***

29. For the present purpose, the relevant jurisprudence would also to be found in those authorities which make useful general observations as to the circumstances in which objection to a judge is or is not likely to be justified. In this respects, the case of **Locabail (UK) Ltd *v* Bayfield Properties Ltd [2000] 1 All ER 65** is relevant. At paragraph 25 of the judgment, Lord Bingham of Cornhill stated:

> *"**It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided".***

The court then proceeded as follows

> ***"We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him…. By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the…. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."***

30. With reference specifically to apparent bias, *Locabail* found it apposite to refer to the observations of two foreign courts. First, was the Constitutional Court of South Africa in the case of **President of the Republic of South Africa *v* South African Rugby Football Union [1999] 4 S A 147**. *Locabail* quoted the following observation :

> ***'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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." :*** *see* ***President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 at 177***

31. Next was an Australian authority. Paragraph 22 of *Locabail* quoted the case of **Re JRL, *ex p* CJL [1986] 161 CLR 342, 352** where Mason J sitting in the High Court of Australia had said:

> *"**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".

32. The value of the guidance given in *Locabail*, to me , remains undimmed. Illustratively, *Locabail* has been applied and cited with approval by many courts within our jurisdiction and within the region: see **Attorney General *v* Anyang Nyongo & Others [2007] 1 E A 12 (EACJ)** and **Musiara *v* Ntimama [2005] 1 EA 317.**

33. Locally too, the issue of apparent bias was considered in the case of **Uhuru Highway Development Ltd *v* Central Bank of Kenya & 2 Others Civil Appeal no. 36 of 1996** [unreported]. The court held as follows:

> ***"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."***

34. More recently, in **Jasbir Singh Raj & 3 Others *v* Tarlochan Singh Rai & 4 Others [2013]*e*KLR,** quoting Lord Justice Edmund Davis in **Metropolitan Properties Co (FGC) Ltd *v* Lannon [1969] 1 Q B 577** the Supreme Court stated that disqualification was imperative even in the absence of a real likelihood of bias (actual bias) if a reasonable man would reasonably suspect bias. So said M.K. Ibrahim SCJ, in his judgment:

> "***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".***

35. In so stating the Supreme Court invoked and adopted the fair minded and informed observer test laid out in the case of **Porter *v* Magil [2002] 1 All ER 465** and embraced within our jurisdiction in the case of **Musiara Ltd *v* Ntimama [2005] 1 EA 317 (CAK). Porter *v* Magil (supra)** at para 103 set out the test in the following terms:

> ***" The question is whether the fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased"***.

36. The briefly reviewed case law suggests the following conclusion.

37. The test to be applied was whether a fair minded and informed observer would conclude that there existed a real possibility of bias. It is not, as was submitted by the defendant's counsel, a question of perception as viewed by the party himself even though such submission did not surprise me as in **Thugi River Estate Ltd & Another *v* National Bank of Kenya Ltd & 2 Others [2014]*e*KLR** the court advanced, albeit erroneously, the proposition that the test is all about perception of bias and the perception is that as seen by the litigant for that matter.

38. If a fair-minded and informed observer having considered the facts would not conclude that there was a real possibility that the court would be biased the objection to the Judge has to fail. The court is thus required to first determine the facts which the fair-minded and informed observer would know and take

into account and then proceed to determine whether the fair-minded and informed observer would conclude on those facts that a real possibility of bias had existed.

39. In **Helow *v* Home Secretary [2008] 1 WLR 2416** guidance concerning who was a fair-minded and informed observer, was provided as follows

> ***"The observer who is fair minded is the sort of a person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious…Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be , and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.***
>
> > ***Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social , political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment"***

40. The factual context consequently is always critical. Of concern are the facts the fair-minded and informed observer should know and take into account. I must also point out that in determining whether I should recuse myself or not, I have to close my eyes to the fact that the Defendant may be left dissatisfied and bearing a sense that justice would not or might not be done. It is all about the facts and context.

41. What then of this case?

42. The facts leading to the application for recusal in this case are relatively clear and on record. It is stated that I declined to allow the Defendant an additional twenty one days to file its submissions. The Defendant does not however disclose that the parties had originally agreed and been directed to file their heads of argument in preparation for the oral hearing of the application on 11 May 2017. The Defendant however did not file its heads of arguments by the said date. The record also reveals that the hearing did not proceed on 11 May 2017 and instead for reasons stated the court varied its earlier directions that the Plaintiff's motion be dispensed with through oral submission. The court then directed the parties to file and exchange their written submissions within 21 days and return to court on 6 June 2017 with a view to confirming compliance and to fixing a date for the ruling. This too is on the record. The Defendant once again, come 6 June 2017, had not filed its submissions. Instead of the court allocating a ruling date in the absence of the Defendant's submissions the court opted to grant the Defendant an additional two days and relisted the matter for mention.

43. It is critical to point out that in the commercial division of the High Court at Nairobi, Judges of the division manage their diaries. Cases are not adjourned *sine die*. The discretion is with the Judge to issue appropriate case management directions which are proportionate and tailored to expedite the administration of justice generally. The Judges are also at liberty to mete out appropriate sanctions for any non-compliance with the directions given. This case was not any bit different.

44. Then counsel for the Defendant pointed to intemperate and hostile remarks by the court towards the Defendant's counsel. No specifics were however availed, let alone the context of any such intemperate or hostile remarks. It is however not unusual for litigants seeking a recusal order to make such allegations. While I agree that a Judge should not express himself in vituperative, abusive, immoderate, intemperate

or severe language , I also hold the view that where an allegation to like effect is made, it is important that the specifics or particulars and details are availed. The need for specifics is to put the fair-minded and informed observer in proper perspective. It enables the fair-minded and informed observer to determine whether the outspoken opinions of the Judge, which often are gratuitous, were plainly outside the scope of the proper performance of the Judge's duties and thus an interference with the Judge's ability to perform those duties with an objective judicial mind. In the instant case, neither the specifics nor the context have been availed. I will consequently make no further comments on the same.

45. The final factual issue raised was that the court has insisted on proceeding with the instant cause notwithstanding another matter involving the same parties in Environment and Land Court Case No 54 of 2016. In this regard, it ought to be known that the Defendant alluded to this fact without placing any documentation before the court on the morning of 20 April 2017. Later the same day, when this matter was mentioned for directions the Defendant quietly took directions and did not pursue the issue at all. In all subsequent court attendances, no party mentioned this issue. The Defendant has also not made any application to stay the instant cause.

46. The Defense and Counterclaim filed by the Defendant has however raised this issue and this must thus be determined in this cause pursuant to the provisions of *s*. 6 of the Civil Procedure Act. It is an issue which is yet to be determined on its merits and a suggestion that the court must go along with the Defendant's submission, otherwise there is presumed bias, would be to preempt the court unnecessarily.

Conclusion

47. Judges are enjoined to manage cases. Often than not, the judge's discretion is called to action. Judges also make many interlocutory or mini-trial determinations. In the course of such determinations or trial, comments may be made by the Judge. The Judge must not be mute. The context is however critical. Adverse and uncalled for comments, even if moderate, may prompt a successful application for recusal. It may be a pointer that the objectivity expected of the Judge has ceased to exist. When it is alleged that a Judge has made comments which would suggest bias, then it is important for the party making the allegation to not only be more specific as to content but also as to context.

48. Taking into account all the relevant circumstances and facts, I am not persuaded that a fair-minded and informed observer would conclude that there is a real possibility that I will be biased when deciding the issues in dispute or that the court would not be objective in its judicial functions to warrant a recusal at this stage.

Disposal

49. I am aware of a recent trend where even after a determination is made that there is no reason to recuse oneself, the Judge nonetheless still recuses himself. In **Thugi River Estate Ltd & Anor *v* National Bank of Kenya Ltd & Others [2014]*e*KLR, Hon. Gitobu Imanyara & 3 Others *v* Hon Attorney General [2012]*e*KLR** and **Roland Denz *v* Kewal Krishna Khosla & 2 Others [2014]*e*KLR, t**he judges having returned the verdict that there were no good reasons for their respective recusal nonetheless proceeded to let the litigants have their way by recusing themselves.

50. I would not take the same approach. It would be anomalous to all the principles applicable to recusal of judges. It would encourage forum shopping through flimsy applications for recusal. It is an unnecessary precautionary approach.

51. By way of overall disposal, I do not find the Defendant's application dated 8th June 2017 to be merited. It must fail. I dismiss it with costs to the Plaintiff.

Dated, signed and delivered at Nairobi this 14th day of December, 2017

J. L. ONGUTO

JUDGE