REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL, ADMIRALTY & TAX DIVISION

CIVIL CASE NO 291 OF 2013

HERMANUS PHILLIPUS STEYN……..……PLAINTIFF

VERSUS

GIOVANNI GNECCHI-RUSCONE……..DEFENDANT

RULING

Recusal

[1] The Defendant has applied for my recusal from these proceedings. The application is dated 15th January 2015 and expressed to be brought pursuant to the provisions of Section 3 & 3A of the Civil Procedure Act and Order 51(1) and (4) of the Civil Procedure Rules. The applicant sought the following prayers inter alia;

1. **THAT the Honourable Judge should disqualify himself from continuing to hear this suit.**

2. **THAT each party to bear its own costs for this application.**

The Applicant explained why he was not able to file the application within 7 days as had been ordered. He stated that he had traveled out of the country. Nonetheless, he filed this application and I accept the explanation. I will determine the application on merit.

[2] The major reasons for asking me to recuse myself are:-

a) That the Applicant was apprehensive that there was likelihood that he would not get justice before the learned Judge, who had previously recused and disqualified himself from hearing HCCC No 332 of 2010 and had not given or advanced any reasons for his recusal. It was contended that there was the likelihood of bias or real bias from the learned Judge, given that he had recused himself from hearing HCCC No 332 of 2010, in which the Respondent herein had been awarded favourable rulings. It was averred that the learned Judge recused himself in that matterdespite dismissing the application for recusal.

b) Further, that the learned Judge had been keen to give orders for the hearing of the suit himself despite intimation by the Applicant that he will apply for his recusal. The learned counsel for the Applicant argued that the judge ordered the hearing of their application immediately counsel for the Respondent withdrew his affidavit that he wanted time to respond to.

[3] In the Supporting affidavit sworn on 15th January 2015, it was deposed to that justice would not be seen to be done by the same Judge who had recused himself in HCCC No 332 of 2010 in which the Respondent herein was the Plaintiff. Further, it was deposed to that the said learned Judge would not be partial if he continued to hear the present case, and that there was real danger that the trial before the Court may not be conducted free from bias. It was deposed to that if the Judge failed to recuse himself, the Applicant would be inclined to hold the view that they will not get justice before the learned Judge, who had purportedly delivered a ruling in HCCC No 332 of 2010 in favour of the Respondent herein, which ruling was supposedly issued as a result of special bias towards the Respondent.

[4] The Replying Affidavit sworn on 24th March 2015 was withdrawn during the hearing of the application on 25th March 2015. I will not consider the depositions therein. However,strong objections to the application were raisedby counsel for the Respondent in his oral submissionsat the hearing of the application. He urged that the application was a personal and unprovoked attack to the Court. It was further stated that the application was based on falsehoods and mere aspersions cast by the Applicant. According to counsel for the Respondent, the application did not meet the applicable test for recusal; whichis an objective one and of which a reasonable minded person would deduce that there was likelihood of bias. Reliance was placed upon the cases of **Trust Bank Ltd v Midco International (K) Ltd & 4 Others (2004) 2 KLR 485**, **Miller v Miller (1988) KLR 555**, **Attorney General v Anyang' Nyong'o & Others (2007) 1 EA 12** and **R v Mwalulu& 8 Others (2005) 1 KLR 1.** Seethe Plaintiff's List of Authorities dated 24th March 2015.

[5] During the hearing of the application on 25th March 2015, Mr. Chege Kirundi, counsel for the Applicant assured the court that he was not questioning the integrity of the judge. He, however,forcefully reinforced the above grounds of the application. He emphasized that, since the learned Judge had recused himself from the hearing of HCCC No 332 of 2010 in which the Respondent was a party, it would only be reasonable for the Judge to recuse himself from the present suit, because any reasonable person looking at the circumstances of this case would read a likelihood of bias if the Judge were to proceed with the matter. Further, since the learned Judge had recused himself from hearing HCCC No 332 of 2010 without any reason, he should do the same in this case. Further, it was recounted that the basis of recusal was not to be based on facts, but on the impression being created. For this contention they relied on the case of **Court of Appeal No 102 of 1994 King Woolen Mills Ltd formerly known as Manchester Outfitters Suiting Division Ltd & Another v Standard Chartered Financial Services Ltd & Another**.

DETERMINATION

[6] In **Nbi Hccc No 332 of 2010,** the Court drawing from the decision in **BGMHC Constitutional Petition No 3 of*2012* [2013] eKLR**stated as follows:

> **It bears restating that the stringent test is more in accord with the constitutional desire to attain the independence of the judiciary as an indispensable facet of the right to fair hearing and access to justice. As parties submit themselves to the court, they do so to [an] independent, thoroughly fearless and impartial judicial officers. What must be avoided therefore is a practice that may encourage parties to 'shop' for the judges who will hear their cases in the belief that those judges will be favourable to their causes. If 'shopping' for judges was to be allowed ... such will be the darkest day in the administration of justice. The values, objects and purposes of the Constitution and specifically as enshrined in Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010 will be lost, and that shall surely be the death knell of the entire justice system in any civilized society.**

And further:

> **''That law subserves legitimate interests of a litigant as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases''.**

[7] Impartiality of and being free from bias or prejudice in the conduct of judicial work by a judge is the hallmark of the right to fair trial and hearing enshrined in Article 50(1) of the Constitution. Therefore, the court must conduct its affairs in such a manner as not portray, or to create a perception to the public that the court was not or will not be impartial in the case. This is also after the long time adage that ‘’justice must not only be done, but must also be seen to be done’’. The test here is one of reasonable looking at what the judge has done will conclude that there has been likelihood of bias**.**Consider the following arguments and facts of this application.

[8] On 20th November 2014 Mr. Chege Kirundi had orally requested the court to recuse itself. As recusal is a serious matter which requires a party applying to make a conscientious decision to so apply, and to have sufficient reasons which will meet the high standard required, the court directed Mr. Chege Kirundi to file a formal application for recusal for consideration of the court. The course directed by the court was to give the other side an opportunity to be informed exactly on the reasons for applying for recusal. Similarly, the court needed reasons to be provided for the request of recusal and make an informed decision. It would not have been proper for the court to have pretended that it is considering an oral application to which no reason had been assigned. I think it will be dangerous proposition of the law for a party to think a simple request or intimation that the court should recuse itself from a case without reason would be a service to the covenant the judge made with the Constitution and the people of Kenya to dispense justice without fear or favour. Mr. Chege Kirundi’s approach was stealth and covert intimidation. He used very strong terms in the application without any basis. In fact given the reasons he adduced, those terms in the application were preponderantly out of proportion and were not necessary. At some point in his submissions, the court sought to know whether counsel had anything personal against the judge. He said that he does not know the judge at personal level- which is true- and that there was none; that is why the court has serious reservation about the bona fides of the application for recusal.

[9] On 25th March 2015 when the application was heard, Mr. Chege Kirundi applied for time to reply to the Replying affidavit by the Respondent. Mr. Ahmed Nassir objected and stated that he was ready to withdraw the affidavit and proceed with the application for recusal which he believed lacked merit and was unfair attack on the court aimed at forum shopping. It should be noted that Mr. Kirundi had filed his application outside the time allowed by the Court. Nonetheless, Mr. Nassir withdrew the Replying affidavit and the court directed the application to be heard as scheduled. Mr. Chege Kirundi in his submissions read too much out of these events yet he had said that he needed this matter to be dealt with quickly. He accused the court in his submissions that it was too readily to grant requests by Mr. Nassir. Needless, to state that a party cannot be stopped from withdrawing his pleadings unless the withdrawal is shown to be a way of defeating justice. Nothing of that kind existed here and only Mr. Chege Kirundi would know why he staged such scathing attacks on the court without any reason or justification.

[10] The court heard both parties on the application in order to decide the issue before court substantively. I do not think in the new Constitution the Court can justifiably block a substantive party in the suit to reply to such request for recusal. The Respondent was represented by and counsel was in court; he must he heard on such matters. Therefore, the withdrawal of the affidavit did not mean the application is granted or he cannot speak to it. Even the nature of the application would need thoughtful input of all parties and it is the court to decide on the arguments presented. Such an application is never allowed simply because no affidavit was filed in opposition thereof. I gather that, the meaning in the case of **Peter Murithi Mwarania v Family Bank Limited & Another [2014] eKLR**is that where a party who has filed pleadings has attended court during the hearing of, must be heard on such application for recusal.

[11] Turning to the main issue of the application for recusal, the major reasons being advanced are that the judge recused himself from HCC NO 332 OF 2010 without assigning any reason. The Applicant stated thatthe Respondent was a party in the said suit and so the recusal raised apprehension that the Judge might be biased. But I am glad, and I will repeat it, that Mr. Chege Kirundi assured that he was not impeaching or casting any doubt on the integrity of the Court. I have considered the application and all the submissions of the parties on the matter. I have also considered the applicable test for recusal. Much was submitted on the applicable test. But the true position Is that the test for recusal of a judge is as 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), andreinforced in subsequent cases which have been submitted to the court by the parties. Specifically see **R v JACKSON MWALULU& OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)** wherethe 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’’.

[12] That position of the law in Kenya was accordingly guided by the principle set out in **METROPOLITAN PROPERTIES CO., LTD v LANNON (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694** that:-

> **‘’Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias’’.**

[13] There is no dearth of judicial decisions on this subject and I need not multiply all of them. But for further elucidation, see the cases of **King Woolen Mills Ltd formerly known as Manchester Outfitters Suiting Division Ltd & Another v Standard Chartered Financial Services Ltd & Another** (supra), the Court of Appeal reiterated the case of **Metropolitan Properties Co. (FGC) Ltd v Lannon (1969) 1 QB 577** at 599 in which Lord Denning MR stated the principles for a Judge disqualifying himself from hearing a matter. No matter what one alleges, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances for which a reasonable man would think it likely or probable that the justice or the chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.*The onus is therefore on the applicant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it.’*

[14] All the reasons being advanced are not based on any real or cogent ground except suspicions, fanciful apprehension and allegations. The judge did not substantively deal with the other matter, i.e. 332 of 2010. Even if the Applicant was a party in that suit, there is absolutely nothing that the judge did which would translate into or be a basis for any reasonable likelihood of bias. The other ground that I did not give any reason for my recusal is baseless as I clearly stated that I exercised my discretion to ask the presiding judge of the division to re-allocate the file to another judge. In fact, in that case, it is the other party who applied for my recusal. The connection Mr. Chege Kirundi is trying to draw between the two cases is obscure. No cogent material which have been placed before the court which would constitute real or reasonable likelihood of bias on the party of the judge. Everything said by Mr. Chege Kirundi is hot air calculated at puncturing the dignified mood of the court. Everything was based on quick sand, sinking sand. It does not meet the threshold of the law. I must state, however, that the court has other investigative and intrusive training and eye and can see through this motion; it is one purely aimed at forum shopping. Mr. Chege Kirundi and his clients ought to have laid sufficient material that meets the threshold. And as I said earlier on the law on recusal, I will repeat:

> **‘’That law subserves legitimate interests of a litigant as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases’’.**

[15] I must say that: ‘’**Only tangible facts and circumstances that naturally spawn favouritism, or lack of impartiality, will justify calls upon a Judge to recuse himself or herself.”** See the decision by Ojwang, J (as he then was) in the case of **Ismail Gulamali& 2 Others v Stephen KipkatamKenduiyua [2010] eKLR** in which the Court cited with approval the case of **Attorney General v Anyang’ Nyong’o & Others** (supra). The application for my recusal is not based on anything tangible. However, I will once

again exercise my discretion for the comfort of the Applicant and recuse myself from this matter. The entire judiciary is now filled with men and women of integrity who have undergone intense scrutiny before appointment or vetting for those who were serving before the effective date of the new Constitution. Thus, any judge will dispense justice in this matter. The court is not dying to preside over this matter as it has been alleged. Accordingly, I direct that the file be placed before the presiding judge for re-allocation or further directions. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 30th day of June 2015.

F. GIKONYO

JUDGE