



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 332 OF 2010**

**JAN BONDE NIELSON.....PLAINTIFF**

**Versus**

**HERMAN PHILIPUS STEYN.....1<sup>ST</sup> DEFENDANT**

**HEDDA STEYN.....2<sup>ND</sup> DEFENDANT**

**NGURUMAN LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Recusal application**

[1] Mr Amoko, counsel for the Plaintiff, applied orally that I recuse myself from hearing this case. His major gravamen is founded on the following observation of the court:

***“The huge issue is the one of temporary relief. I am saddened that parties in this case have flouted the law with impunity and the plaintiff is no exception, which really constricts the court’s magnanimity to grant any relief of a temporary nature”.***

[2] Mr Amoko has interpreted that observation to mean that I have already pre-determined that the plaintiff has flouted the law, and should not get a temporary order. He further submitted that he is aware that recusal is a serious matter which requires proof, but the circumstances of this case are exceptional, and justify a recusal. It is, therefore, only fair that another judge who has no such pre-dispositions on the fate of the plaintiff’s application should hear this matter. His view is that in the absence of an application for contempt of court against the plaintiff, or real committal for contempt of court, the defendants do not have any basis to make a claim that the plaintiff is in breach of court orders. For those reason he prays for the court to recuse itself from hearing this case. He was categorical; however, that he is not questioning the integrity of the judge.

**Senior Counsel, Ahmed Nassir, and Nowrojee opposed the application**

[2] Senior Counsel, Ahmed Nassir, and Nowrojee opposed the application for recusal on the following grounds;

- a) That Mr Amoko did not have the courtesy to inform them in advance that he will be applying for the judge to recuse himself from the case;

- b) That disqualification is serious matter and it should not be used by parties to shop for judges who will hear their cases, for if that were to be the case, the entire justice system will come to a halt;
- c) That the plaintiff is simply saying that because the judge denied him the order he wanted, then he should disqualify himself from hearing the case;
- d) That the portion of the proceedings of the court being relied upon contains mere observations which were obiter, and did not amount to a decision on the issues in controversy in this case. All the issues in the application by the plaintiff are yet to be determined;
- e) That the observation herein did not cause any bias or prejudice or favour or disfavour to one side. The observation was in respect of all the parties and it drew from what Mabeya J had already observed in his ruling made in December, 2012. The plaintiff did not appeal against that ruling which made references to breaches of the law by parties.
- f) The application for recusal has no basis at all.

### **COURT'S RENDITION**

[4] I am glad for two things; one; that Mr Amoko categorically stated that his application for recusal is not an attack upon the integrity of the judge; he has full confidence in the judge; and two; that all parties are agreed that recusal is a serious matter. The decision to apply for recusal of a judge is not a simple matter which a party should prattle upon or just apply. It is a serious matter which must be guided by a conscientious decision being made by the applicant only where cogent evidence is available to support a claim of bias or prejudice on the part of the judge. There are good constitutional as well as practical reasons why the law has taken such stringent approach on this subject. See what the court stated on why the strict approach in recusal application, in **BGM HC CONST PETITION NO 3 OF 2012 [2013] eKLR** that:

*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".*

### **The stringent test in recusal applications**

[5] Although none of the counsels quoted any judicial decisions-and I do not blame any one of them, for the application was made orally and without notice to the other parties- counsels eminently submitted on the legal dimensions governing recusal of a judge from hearing a case. That notwithstanding, there is nothing wrong for a judge to ascertain the law even if it is from his

own industry. The law on this subject is so well settled that it cannot be called upon to justify itself, and there are copious judicial authorities on the subject which I do not wish to multiply. Except to state that the appropriate test to be applied in determining an application for disqualification 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)**, and reinforced in subsequent cases. See **R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)** where the 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”.***

[6] 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”.***

[7] I now apply the above test to the circumstances of this case.

### **Is There Real Likelihood of Bias or Prejudice?**

[8] According to the *Black’s Law Dictionary*, 7<sup>th</sup> Edition, bias entails:-

***Inclination, prejudice; Judge’s bias usually must be personal or based on some extrajudicial reasons.***

Prejudice entails:-

***A preconceived judgment formed without a factual basis, a strong bias.***

[9] Does the observation the court made on 19.12.2013 meet the test? Note the following: That the observation was a general one based on the submissions of the parties and the findings of Odunga and Mabeya JJ on the breaches of the law by parties in the case; and that is what exactly brought the parties to court for purging. The observation was made on the conduct of all the parties in the proceeding, at least from the record. The observation did not cite any party for contempt or amount to a determination of any of the issues in the pending application. Why does Mr Amoko want the court to believe otherwise? The court was well aware when it made the observation that both situations alluded to by Mr Amoko- about contempt of court and determination of the plaintiff’s application- would need full scale arguments of parties before substantive orders are made. That is why the court used carefully chosen words in the recording of the proceeding in question... ***that parties in this case have flouted the law with impunity.*** Had counsel taken care to consider the proceeding under contestation within the context of the entire proceeding, it would have revealed to him that it was incapable of assuming the meaning he assigned to it, whether by implication or expressly. That desirability is necessary before seeking to found a cause of action for recusal of the judge on premises such as this. I repeat for the sake of clarity that the applicant ought to have established such material facts that attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons or that the observation amounted to a preconceived judgment formed without a factual basis. By establishing those facts, he will have shown that real likelihood of bias would occur as the matters complained of are capable of creating *a reasonable doubt* in the minds of the public about the

fairness in the administration of justice in this particular case-which criterion goes beyond mere apprehension or belief or desire of the party into a more concrete and cogent grounds based on proven judge's interest, pre-disposition or prejudice in the case. The facts being pleaded for recusal are not anywhere near satisfaction of this test, and so nothing that precludes the judge from hearing this case. Accordingly, the application for recusal lacks merit.

[10] However, on my own discretion, I transmit this file to the head of the division for re-allocation to, and hearing by any other judge in the division apart from myself. It is so ordered.

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of January, 2014**

**F. GIKONYO**

**JUDGE**