REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 31 OF 2010

IN THE MATTER OF: ADOPT-A- LIGHT LTD.

AND

IN THE MATTER OF: THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

R U L I N G

1. Before the Court is an application dated 19th September, 2013 brought under the provisions of **Section 77(9)** of the *Constitution*, **Section 3A** of the *Civil Procedure Act* and **Order L** of the *Civil Procedure Rules*. The applicants seeks for the following prayers *inter alia:*

> **"1. THAT the Honourable Justice Havelock be pleased to disqualify himself from further conduct of this matter and this matter proceed before any other Judge of the High Court;**
>
> **2. THAT the costs of this application be in the cause".**

The application is predicated upon the grounds that the applicant is apprehensive that there will be improper interfering with the cause of justice if the Honourable Judge continues to hear the matter. The applicant contends that there is danger of bias and that his constitutional right as provided under *Article 77(9)* is likely to be infringed and that it is unlikely that justice would be done or be seen to be done to the prejudice of the applicant. Further, the applicant contends that the disqualification is to preserve the administration of justice from suspicion of impartiality.

2. The application is further supported by the affidavit of **Bryan Yongo** sworn on 18th September, 2013. The deponent contends and reiterates the grounds as adduced in the application. He further deposes that the disqualification is predicated upon the judicial officer's conduct in the circumstances, and that in the instance, it would be difficult to avoid or overcome the feeling and fear of biased predisposition by the Judge in determining the matter in favour of the respondent. In support of its deposition, the applicant relied on amongst other cases **Shilenje v R (1980) KLR 134,Webb v The Queen [1994] 181 ELR 41**, **Trust Bank Ltd v Midco International (K) Ltd & 4 Others [2004] KLR 485**, **President of the Republic of South Africa v South African Rugby Football Union (1998) 4 SA 147, Kamlesh Mansukhlal Damji Pattni & Another v R**

and **Galaxy Paints Co. Ltd v Falcon Guards Ltd Civil Appeal No. 219 of 1998 (UR)**.

3. The application is opposed. In the Replying affidavit of **Kyalo Mbobu** sworn on 26th September, 2013, the respondent contends that the application is an abuse of the Court, calculated to stifle the hearing and determination of the application. It is averred that the applicant has not established any facts that constitute the alleged apprehension of bias, real or perceived, in order to lay a basis for the Court to disqualify itself. Further, it is contended that the application is baseless, and that the mere fact that the Honourable Judge has decided one or more of the applicant's cases contrary to its expectations, does not in itself constitute an appearance of bias and that the Court has the ability to discharge its duty with the requisite impartiality. The Respondent relied on **R v Gough (1993) All E.R 724**, **Metropolitant Properties v Lannon & Others (1969) 1 QB 577**, **RPM v PKM [2011] eKLR** and **R v Mwalulu [2005]eKLR** in support of its objection to the application.
4. It would be of importance at this juncture, to put the applicant on notice, as has been espoused succinctly be the Respondent in his submissions, that **Section 77(9)** of the *Constitution* and **Order L** of the *Civil Procedure Rules* are none-existent provisions of the law. The Court, however, shall not be encumbered with the inconsistencies of such oversight on the part of the applicant, but shall instead stand guided by the provisions of *Articles 159(2)(d)* and *165(3)(d)* of the Constitution, as read together with **Section 1A(2) and 1B(1)(a)** of the *Civil Procedure Act*. The Court will, in exercise of its powers under the aforementioned provisions of the law, determine that the sections of the law referred to in the application are Article 77(9) of the Constitution and **Order 51** of the *Civil Procedure Act*. The Court shall not be inundated and beleaguered by the vagaries of technicalities but shall determine the substantive issues in the application.
5. The applicant contends that his rights as espoused under *Article 77(9)* of the *Constitution* will be infringed if the Judge does not disqualify himself from the hearing and determination of the instant application. The reasoning by the applicant is that there is a reasonable apprehension of bias as against it should the Judge proceed with hearing and determining this matter. The applicant submitted that the Judge should disqualify himself, after being aware that it had issued a letter to the Judicial Service Commission, complaining of the manner in which he had handled the applicant's two previous matters, namely **H.C.C.C No. 560 of 2010** and **Winding Up Cause No. 2 of 2012** involving the parties herein. The applicant contends that the Judge departed from his decisions in the latter matter and that the dismissal of their application was actuated by malice, biased and whimsical. They also cited the Judge's decision in **Winding Up Cause No. 11 of 2011** in which their application was also dismissed and stated that the Judge had exhibited serious contempt and malice in his decision. They relied on **Locabil (UK) Ltd v Bayfield Properties Ltd & Others (2000) 1 All E.R 65** which judgment enunciates the guidelines and principles for the disqualification of a Judge on the grounds of bias and other aforementioned authorities (supra).
6. In **Locabil (U.K) Ltd v Bayfield Properties Ltd & Others** (supra), the Court of Appeal in dismissing the application for disqualification on grounds of bias, succinctly set out the guidelines that the Court would adopt in such an application. It was held *inter alia* thus;

"The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case."

In his submissions, the applicant stated that persons are accorded the right to a fair trial. It was further submitted that bias has to be established in order for there to be a reasonable apprehension or real danger of bias, and thus a breach of natural justice. However, in **Webb v The Queen** (supra), Mason CJ held *inter alia*;

> **"In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done."**

7. In determining the establishment of bias in a disqualification application, the Court in **R v Teskey (2007) 2 SCR 267** held that:

> **"As reiterated in S. (R.D.), fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced. The onus is therefore on the appellant 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."**

In dismissing an application in which the applicant had failed to adduce any reasonable and cogent evidence that the Judge may, or would have been impartial in the hearing and determination of his matter, Waweru, J in **Andrew Alexander Wanyande v Attorney General & Another [2011] eKLR** held inter alia;

> **"Nothing at all has been placed before the court demonstrating bias on my part, or reasonable apprehension of bias. Looking at the material now before the court (both in the application and in the entire court record) would a fair-minded and informed observer conclude that there was a real possibility or danger, that I might be biased in this matter against the Plaintiff or for the Defendants? I think not. There is nothing like a litigant's veto of the court or judge hearing his matter. Litigants cannot choose their judges. Applications for disqualification of judges should not be lightly allowed. That would tend to erode public confidence in the courts and the administration of justice."**

Similarly in **Ismail Gulamali & 2 Others v Stephen Kipkatam Kenduiyua [2010] eKLR** the Court adopted the ruling in **Attorney General v. Anyang' Nyong'o & Others [2007]1E.A. 12** in which it was held;

> **"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially [?] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case."**

Ojwang', J in determining the application therein in the aforementioned matter, held thus;

> **"Judicial authority on the question of recusal by a Judge, to avoid perceptions of bias, is unambiguous: the mere fact that a Judge had previously given a decision bearing a relationship to a current matter or cause, or touching on parties who are in a current matter or cause, is by itself not a reason for recusal. Only tangible facts and circumstances that naturally spawn favouritism, or lack of impartiality, will justify calls upon a Judge to recuse himself or herself."**

8. From the foregoing, it is of note that in an application for recusal or disqualification, the applicant has to establish bias by presenting evidence and cogent reasons of the real or perceived bias, and that the test applicable in establishing the bias is predicated upon the determination of the particular circumstances of the matter and that a reasonable person, having cognizance of the issues at hand, would be able to discern and ascertain that the reasons constitute a reasonable apprehension of bias on the part of the Judge. The applicant made reference to three matters; **Winding Up Cause No. 11 of 2011**, **Winding Up Cause No. 2 of 2012** and **H.C.C.C No. 560 of 2010**. All these issues were determined against the applicant, who then had the notion and preconception that the Court was biased, and that it is therefore apprehensive that the present

matter would not be fairly determined. The mere fact that the Judge has heard and determined these issues previously did not constitute cogent reasons for recusal and disqualification, predominantly on the fact that they were determined as against the applicant. In **Drury v B.B.C [2007] All E.R (D) 205**, it was held that:

> **"The mere fact that a judge had made a finding against a party on a previous occasion, even if he had been critical to that party, did not found a later objection to the judge sitting in another matter. It was, however, also plain that where there was any room for doubt as to which course to adopt, that doubt should be resolved in favour of recusal. In the instant case, it was plain from the guidance that it would have been entirely appropriate to reject the application. The issues did not depend upon any view taken as to the claimant's credibility, nor did they depend upon any view as to the issues underlying the litigation. It could not really be thought by an independent observer that the judge could or would not apply an objective mind to the issues in the case."**

The position was also adopted in the case of **MacPhail v MacKinnon 2001 PESCAD 20** in which it was determined *inter alia*;

> **"The Supreme Court of Canada in R.D.S., supra , has held that the presumption of judicial impartiality creates a high threshold for the establishment of a reasonable apprehension of bias. The grounds for the apprehension must be substantial and the evidence in support must be cogent. Judges are appointed, at least partially, on the basis of their perceived ability to be impartial and they are sworn to be so. There is a presumption that judges are impartial and will abide by their oath…Judges are not disqualified from sitting on a case merely because during the course of the proceedings they have heard inadmissible or irrelevant evidence."**

9. The applicant has failed to establish any cogent reason or adduce any evidence of the fact that this Court would be biased in its determination. Portending that:

"it is no answer for the Judge to say that he is in fact impartial and that he will abide by the judicial oath",

the Court would refer to the provisions of *Article 159(2)(a)* and *165(3)(b)* as read together with the **Sections 1A, 1B, 3A and 63** of the *Civil Procedure Act*. As reiterated in **Locabil (U.K) Ltd v Bayfield Properties Ltd & Others** (supra) every application shall be determined on the circumstances and facts of each individual case. In the instant application, no cogent reasons have been advanced by the applicant to establish any reasonable apprehension or real danger of bias by the Judge to allow his application for disqualification. The mere fact that the Judge has determined against him in previous matters, as reiterated in **MacPhail v Mackinnon** (supra), does not necessitate the recusal of the Judge from hearing the present application. Consistent with this Court's observation in this application is Fatiaki, J in the case of **Citizens' Constitutional Forum v President [2001] 2 FLR 127**, referred to in the case of **State v Citizens' Constitutional Forum Ltd andAnother, ex p Attorney General [2013] FJHC 220** where the learned Judge reiterated;

> **"… the applicant's fear is more a reflection of its own subjective perception rather than an objective assessment by an informed observer based on relevant and admissible evidence asking himself the question "is there a real danger that the judge is biased" … It may not be commonly understood, that, besides being human, judges are, by training and experience, quite capable of exercising a high degree of personal and emotional detachment from the cases that they are called upon to determine."**

10. The upshot is, and in consideration of the foregoing, that the application dated 19th September 2013 is without merit and is dismissed with costs to the Respondents.

DATED and delivered at Nairobi this 24th day of April, 2014.

J. B. HAVELOCK

JUDGE