



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 117 OF 2013

KIVUWATT LIMITED 1ST PLAINTIFF

SMART CARGO LIMITED 2ND PLAINTIFF

V E R S U S

THE COMMISSIONER,

KENYA REVENUE AUTHORITY,

CUSTOMS SERVICES DEPARTMENT.....DEFENDANT

RULING

1. Civicon Limited (Civicon) by its Notice of Motion dated 6th October 2014 seeks the following prayers-

- **The Hon. Lady Justice Mary Kasango be and is hereby pleased to recuse, step aside, and/or disqualify herself from the conduct of any further proceedings in this suit and/or from further hearing and determination of the Suit.**
- **The Court be and is hereby pleased to direct that the file be placed for administrative directions in respect of the conduct of all pending further proceedings in the Suit before the Hon. Resident Judge, Mombasa.**

2. I will begin by citing from the Ruling of Majanja J in the case **OKIYA OMTATAH OKOITI & ANOTHER –Vs- ATTORNEY GENERAL & 3 OTHERS [2014]eKLR**, which I wholly adopt as follows-

“It is the right of every litigant to make an application for the Judge to recuse himself or herself. The Court is obliged to consider it and the test for determining such an application now propounded by our Courts in several cases including R v Jackson Mwalulu and Others CA Civil Appl. No. NAI 310 of 2004 (Unreported) is whether a reasonable person seized of the facts will conclude that the Judge hearing the matter will be biased. In Republic v David Makali and Others, CA Criminal Application Nos NAI 4 and 5 of 1995 (Unreported) Tunoi JA stated that, “the test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where such allegation is made, the Court must carefully

scrutinize the affidavit on either side ...” In both cases the Court emphasized the need to disallow frivolous application which would tend to undermine the public confidence in the Judiciary.”

3. Civicon has based its prayers on the following grounds-

“4. It is clear, from the Court Record, that as at 24.09.2014 when the Court issued the orders against the Applicant, that the Judge was aware of the following facts:-

a. That the Applicant is not and has never been a party to this Suit.

b. That the Applicant was also not a party to the out of Court settlement recorded in the suit and adopted by the Court.

c. That the Applicant had however, previously applied to be enjoined as a Defendant into the suit.

d. That the said Judge had by her Ruling delivered on 18.12.2013 refused the said application.

e. By refusing to enjoin the Applicant into the Suit as a Defendant, the Court ensured that it could not legally grant any orders against the Applicant in favour of the Plaintiffs [or any of them].

f. It was therefore not open for the said Judge to issue any orders against the Applicant in this Suit notwithstanding the fact that [i] the Applicant was not a party to the Suit and [ii] was not a party to the Settlement recorded in the Suit.

g. There was no or no legally valid formal Court decree or Court order issued against the Applicant by the Court, and duly served on the Applicant by the Court Bailiff or by an Auctioneer, and in either case duly instructed by the Court.

h. There was no service of a Formal Proclamation Notice in execution of a formal court decree or order issued by the Court against the Applicant, by the Court Bailiff or an Auctioneer duly instructed by the Court in accordance with the provisions of the Auctioneers Act and the Rules prescribed thereunder.

i. There was in fact, no formal application for execution of a formal decree or order against the Applicant on the Court record filed by the Plaintiffs.

6. Considering the above premises, the orders in question can only have been issued deliberately by a Judge who was improperly aiding a party to a Commercial dispute, which party is facing insurmountable jurisdictional hurdles.

7. The Hon. Judge therefore exercised Judicial authority in violation of the Constitution of Kenya and in the circumstances, appears to [i] have become partisan in the dispute between the Kivuwatt Limited and the Applicant or [ii] to have totally ceased to be objective and is therefore unable, in either case, to dispense true justice to the parties.

8. Based on the above facts, the Applicant has made a formal complaint against the Hon. Judge to the Judicial Service Commission and the Hon. Judge will probably be called to defend her conduct in this Suit.

9. In the premises, there is a real likely hood of justice not being done or not being seen to be done in this Suit unless the Hon. Judge recuses herself from handling any other or all further pending proceedings in this Suit.

4. I have considered the parties submissions and their authorities. It is not my place, in this Ruling to defend my previous Judicial pronouncements. I will therefore not go that road other than to say that Civicon did not present either fact or Law to substantiate their prayer for my recusal. My conscience is clear on my previous decisions. The only answer I have for Civicon is best encapsulated by statement in the case **THE PRESIDENT OF THE REPUBLIC & 2 OTHERS –Vs- SOUTH AFRICAN RUGBY FOOTBALL UNION & 3 OTHERS (Case CCT 16/98)** viz-

“Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment... dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers

“While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.”

5. In conclusion I make the following orders-

- a. Civicon Limited have failed to make a case for my recusal but I do order that this matter henceforth be heard by another Judge.
- b. The Order granted on 25th September 2014 staying the Order of 24th September 2014 is hereby vacated.
- c. Each party to bear their own costs of Notice of Motion dated 6th October 2014.

DATED and DELIVERED at MOMBASA this 22ND day of OCTOBER, 2014.

MARY KASANGO

JUDGE