REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 8 OF 2014 (OS)

IN THE MATTER OF: MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF: ENFORCEMENT OF RIGHTS TO MATRIMONIAL HOME AND MATRIMONIAL PROPERTY

R B……PLAINTIFF

VERSUS

1. H B

2. A B.……..……..DEFENDANTS

RULING

By a Notice of Motion filed under certificate of urgency the plaintiff/applicant **R B** sought the following orders:

"(a) This application be certified urgent.

(b) This suit, Mombasa Succession Cause No. 301 of 2014: In the Matter of the Estate of S P B (deceased) and Mombasa Succession Cause No. 395 of 2014: In the Matter of the Estate of SPB (deceased) be consolidated for purposes of this application.

(c) The Honourable Lady Justice M. A. Odero be pleased to recuse herself from this suit, Mombasa Succession Cause No. 301 of 2014: In the Matter of the Estate of SPB (deceased) and Mombasa Succession Cause No. 395 of 2014: In the Matter of the Estate of SPB (deceased).

(d) All proceedings undertaken and orders issued by the Honourable Lady Justice M. A. Odero in this suit, Mombasa Succession Cause No. 301 of 2014: In the Matter of the Estate of SPb (deceased) and Mombasa Succession Cause No. 395 of 2014: In the Matter of the Estate of SPB (deceased) be set aside.

(e) The court files in respect of this suit, Mombasa Succession Cause No. 301 of 2014: In the Matter of the Estate of SPB (deceased) and Mombasa Succession Cause No. 395 of 2014: In the Matter of the Estate of SPB (deceased) be placed before the Honourable Chief Justice for urgent directions as to further proceedings.

(f) Any other or further directions as the Honourable Court shall deem fit to issue in the circumstances.

(g) Costs."

Contemporaneously with this application the applicant filed another Notice of Motion under Certificate of Urgency seeking *inter alia* that:

> **"Professor Albert Mumma & Company Advocates and all Advocates serving in the said firm be disqualified from acting or representing the defendants in this suit and in all suits concerning the estate of SPB (deceased)."**

The court gave directions that the application seeking the recusal of Hon. Justice M. A. Odero be heard and determined first.

It is necessary to give a brief history of these proceedings to date. The Estate in issue is that of the late **SPB** (hereinafter referred to as *'the deceased'*) who met an untimely and unfortunate death as the result of shooting by unknown persons on the evening of 11th July, 2014. The applicant **RB** is a widow to the deceased. The 1st defendant/respondent **HB** is a son to the deceased and the 2nd defendant/respondent **AB** is also a widow to the deceased (these facts were conceded to by all the parties). The applicant has two minor children (daughters) borne of her union with the deceased.

On 8th September, 2014 the applicant filed a Chamber Summons under certificate of urgency in which she claimed that she had been unlawfully tricked and evicted from the property known as Mombasa *[particulars withheld]* (hereinafter referred to as the *'suit property'*) in Mombasa together with her two minor children. The applicant sought from the court a determination that the said property including the household goods and effects therein was the matrimonial home of the deceased and herself. The applicant therefore sought from the court orders in the following terms:

"(b) An order of injunction restraining the defendants themselves, their servants, employees, agents, assigns or otherwise howsoever from dealing in, entering, occupying, remaining upon, removing household goods and personal effects of the plaintiff and the plaintiff's children therefrom, evicting or in any way interfering with or undermining the plaintiff's rights and interests in all that property known as house No. 1 situate on MOMBASA *[PARTICULARS WITHHELD]*, MOMBASA pending inter partes hearing of this application."

This application was duly admitted for hearing and was certified as urgent. The court however declined to grant the temporary interim orders sought above and directed that the application be served upon the respondents for *inter partes* hearing. The application of 8th September, 2014 was set down for *inter partes* hearing on 16th September, 2014. On that date the respondents through their advocate **MR. AGWARA** raised and argued a preliminary objection on the question of the jurisdiction of the court to hear the matter. The applicant through her advocate **MR. MIYARE** responded to the preliminary objection and also challenged the defendants representation by the firm of **PROFESSOR ALBERT MUMMA & COMPANY ADVOCATES** on the grounds that Professor Albert Mumma had previously represented the late SB against the 2nd defendant. The court reserved its ruling on the twin applications for 10th October, 2014. In the meantime before the ruling could be delivered the following intervening events took place.

1. The Plaintiff/Applicant jointly with her mother **RGO** filed Mombasa High Court Succession Cause No. 395 of 2014 on 16th September, 2014 petitioning for letters of Administration ad Colligenda bona to enable them collect, preserve and receive assets of the deceased and to make limited provision for the upkeep, maintenance, education, transport and daily necessities of the wife and children of the deceased. The plaintiff/applicant alleged that the 1st and 2nd defendants had connived with the local chief not to issue her with the letter procedurally required by the courts identifying the next of kin of the deceased person. When the application was placed before

me I did direct as follows:

"I have considered this petition for letters ad colligenda bona. A chief's letter is required to indicate the heirs/beneficiaries of the estate as known to him." [the chief]

2. The plaintiff penned a letter to the Hon. Chief Justice on 22nd September, 2014 seeking his intervention in what she termed as frustration and injustice from the area chief, the lands office in Mombasa and the trial Judge. She went on to accuse the Hon. Judge of failing to disclose the fact that she was a classmate to Professor Albert Mumma at the University of Nairobi. In this respect the applicant wrote:

"While dragging and blocking my cases Judge Odero did not inform us that she was the classmate of Professor Albert Mumma. Advocate Mumma was advocate for my husband against A (the 2nd defendant) in Mombasa Kadhi's Court Case No. 63 of 2005……..….and Mombasa High Court Case No. 93 of 2006……..…He has now turned to be A Advocate on the same property and is acting against me and my husband's interest, and the Judge sees nothing wrong. I believe Albert Mumma has personal interest in my husband's estate."

The plaintiff went on to request the Honourable Chief Justice to call for the file and direct that her matter be heard by a Judge in Nairobi. In this regard the plaintiff wrote:

"I do not have money to pay for travel and accommodation for my Advocates who are based in Nairobi…… the conduct of the Provincial Administration in denying the chief's letter needed for the Succession Cause for the estate of my husband, and the conduct of Judge Odero on insisting that I must get a letter from the chief and in refusing to protect my rights and the rights of my children to our family home and allowing A and her son H to take it over and in dragging my cases all deny me access to justice."

The plaintiff concluded her letter as follows

"Please order all my above files to be taken to Nairobi to be heard by any Judge in Nairobi. I need to be in my home. I also need my children's share and my share of inheritance after death of my husband."

3. While all this was happening and before the 10th October, 2014, which is the date which I had scheduled to deliver my ruling on the applications which were pending before me the applicant on 27th September, 2014 filed this application asking that I recuse myself from the matter. I took the view that the application for recusal took priority thus I stayed my ruling due for 10th October, 2014 and directed that this application be heard and determined first. The application for recusal was argued before me on 28th October, 2014.

Mr. Miyare for the applicant submitted that there had been manifest bias by this court against the applicant. He relied on the following instances as examples of said bias. Firstly when the applicant approached the court on 8th September, 2014 seeking to be reinstated into her matrimonial home in Mkomani Mombasa the court declined to issue interim/temporary orders to that effect. The applicant submitted that the court failed to take into account the provisions of Article 53 of the Constitution of Kenya which lays emphasis on the protection of children's right. Secondly it was submitted that the court has shown bias against the applicant by declining to grant her petition for letters of administration ad colligenda bona due to the absence of a letter from the chief. Thirdly it was submitted that the court failed to disclose the fact that there exists a close relationship between the Judge and Professor Albert Mumma whose law firm is acting for the defendants in this matter. Finally the applicant submits that having been in court and having observed the proceedings so far she is apprehensive that justice will not be accorded to her and her two young children.

The defendants opposed the application to have me recuse myself in this matter. Through an affidavit

sworn by the 2nd defendant on 25th September, 2014, she submitted that the present application was frivolous and accused the applicant of forum-shopping. She submitted that the mere fact that the court failed to grant to the applicant the mandatory injunction prayed for is not indicative of bias. Mr. Agwara submitted that there has been no evidence of bias by the court as against the applicant. The 2nd defendant finally submitted that justice goes both ways and is due to each party in a suit.

THE LAW

Blacks Law Dictionary 8th Edition (2004) defines recusal as follows:

> **"Removal of oneself as Judge or policy maker in a particular matter because of a conflict of interest."**

Rule 5 of the **Judicial Service Code of Conduct and Ethics** as established under section 5(1) of the **Public Officers Ethics Act, 2003** provides that:

> **"DISQUALIFICATION**
>
> **A Judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which**
>
> a. **He has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him.**
> b. **He has served as a lawyer in the matter in controversy.**
> c. **He or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or**
> d. **He or his spouse or a person related to either of them or the spouse of such person or a friend is a party to the proceedings."**

In the case of **ATTORNEY GENERAL VS. PROFESSOR PETER ANYANG' NYONG'O & OTHERS EACJ** Application No. 5 of 2007 the court held as follows:

> **"Judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a Judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute."**

In this case the applicant has alleged the existence of bias against her by this court. As such the facts relied upon must show the existence of a *'reasonable apprehension of bias'* based on the manner in which the court has conducted the proceedings. In **REPUBLIC VS. BOW STREET METROPOLITAN STEPENDIARY MAGISTRATE & OTHERS EX PARTE PINOCHET UGARTE 1999 ALL ER 577 [*'the Pinochet case'*]** the court held that:

> **"…..where a Judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a Judge is only disqualified if there is a likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification [where it has been established that a Judge is a party to the case or has a relevant interest in its subject matter and outcome]. The applicant must establish that bias is not a mere figment of his imagination. In the S.A Rugby Football Union case (supra) the court said in paragraph 45 –**

"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal application]."

> **We think that 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 the Judge did not (will not) apply his mind to the case impartially."

The Supreme Court of Kenya adopted this test of a *'reasonable person'* in the case of **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS SC Petition No. 4 of 200 eKLR** wherein their Lordships cited the case of **PERRY VS. SCHWARZENEGGAR 671 F 3d 1052 (9th Circ February 7, 2012)** in which it was held that the test to use in establishing a Judges impartiality is the perception of a *'reasonable person'* this being a *"well-informed, thoughtful observer who understands all the facts and who has examined the record and the law."* Therefore the *"unsubstantiated suspicion of personal bias or prejudice"* will not be sufficient ground for recusal.

DETERMINATION

Having established that the test to be applied is that of a reasonable and independent observer of the courts conduct and proceedings it follows that the applicant who is a party to the case and who has a stake in the outcome would not be the best person to use as the *'reasonable person'*. In an adversarial system like we have in Kenya it is impossible to please both parties. A court invariably has to make a decision in favour of one party or the other. More often than not the party against whom the court makes orders will be aggrieved and may be tempted to conclude that the court was biased. I will proceed to consider individually each of the allegations of bias relied upon by the applicant in this application seeking my recusal.

i. **Failure of the court to grant the Interim Orders sought in the application dated 8th September, 2014**

This constituted the basis or the bedrock of the allegations of bias by myself against the applicant. The applicant appears to have interpreted the fact that I declined to issue interim orders in her favour as evidence of my bias against her. Any court has ultimate discretion in deciding whether or not to grant interim orders applied for by any party to a suit. Although the orders sought by the applicant were couched in terms of preventing her removal from the suit property a close look at the supporting affidavit reveal that the applicant and her two children were already out of the said home. By the time she came to court the applicant was not in occupation of the suit property. The same was occupied by the 2nd defendant and her son. The question of whether the defendants' occupation of the home was lawful was one which could only be determined upon hearing both parties. As it was the orders which the applicant was seeking on interim basis in real terms amounted to seeking a mandatory injunction to compel the 2nd defendant and the 1st defendant who is her son to leave the suit property. The applicant and the 2nd defendant are both wives of the deceased and as such each could arguably have had a legal right to occupation of the suit property. To determine who out of the two parties had a right to such occupation in priority over the other would again demand that the court hear from each party. As a general rule courts are slow to grant interim orders where the position is as **unclear** as in this case. The prudent course would be to hear the matter inter partes before coming to a determination as to whether the 1st and 2nd defendants ought to be removed from the suit property. The court was very alive to the fact that this was a family/succession matter and I did encourage both parties and their advocates to negotiate a suitable temporary compromise. This was not achievable. The question of my *"allowing"* A (2nd defendant) and her son H (the 1st defendant) to *'take over'* the applicant's house does not arise. At no time did this court give orders to enable the defendants to enter and occupy the suit property neither did this court at any time order and/or sanction the removal of the applicant and her two children from the said house. The court could only deal with the facts as presented before it. The fact that the court declined to issue the interim orders sought was not due to any bias. Indeed this court does not know either of the parties to the suit and has no interest at all in the outcome. Rather the court exercised its discretion on the basis of known legal principles.

(ii) **Failure to disclose the existence of a relationship with Professor Albert Mumma Advocate**

It is not denied that counsel **Mr. AGWARA** who is acting for the defendants in this matter practices law

with the firm of Professor Albert Mumma & Company Advocates. Neither do I deny that Professor Albert Mumma was indeed my classmate in year 1 at the University of Nairobi in 1982 or thereabouts. Beyond having been classmates for a brief period (I later moved to the University of Essex in the United Kingdom where I undertook my law degree) no special relationship exists between myself and Professor Albert Mumma neither is one alleged. The mere fact of having been classmates is not indicative of any bias neither would this fact raise suspicion of any bias in the mind of reasonable person. For the record in my 28 odd years on the bench several of my classmates have appeared before me and I have no doubt that this will continue to be the case. This position is not unique to this court but is repeated before different judicial officers the length and breadth of this republic. I am not aware of requirement that a judicial officer disclose who all their classmates were to litigants. To disqualify a Judge or a magistrate on this basis would mean that very few cases would ever be heard. The fact of the matter is that it is not Professor Albert Mumma who is prosecuting this matter before this court. The matter is being handled by Mr. Agwara with whom this court has no relationship at all, neither is one alleged to exist.

The applicant has also alleged that this court has **"allowed"** the firm of Professor Albert Mumma & Company Advocates to represent the defendants despite the firm's previous representation of the deceased in matters involving his 2nd defendant who is his first wife. Firstly every litigant has the right to counsel and is at liberty to choose counsel of their choice. The court cannot and will not dictate to any litigant whom to engage to act on their behalf. Secondly the objection to the firm of Professor Albert Mumma & Company advocates appearing for the defendants was the subject of an oral application to disqualify said firm from acting in this matter. That application was heard by this court on 16th September, 2014 and the ruling was reserved for 10th October, 2014. The applicant by this present application has pre-empted that ruling and has relied as a ground of bias on the very subject of the application yet to be determined. How can this court be said to have **"allowed"** the firm of Professor Albert Mumma & Company Advocates to act when a ruling on that very point was yet to be delivered. It is quite obvious that no reasonable person would read bias into this set of circumstances.

(iii) **Requirement for Chief's Letter**

Though not stipulated by law it is a procedural requirement in all succession matters filed in the High court (including Mombasa) that a petition for letters of Administration be accompanied a letter from the local chief confirming the names of the beneficiaries to the estate. This would include any spouses, children, parents and siblings to the deceased. The applicant herein filed in the High Court at Mombasa Succession Cause No. 301 of 2014 in which she and her mother petitioned for a limited Grant to manage the estate of the deceased. When the file was placed before me I did indicate that a letter from the chief was required. The applicant cited this as another example of bias against her as she claims that the local chief had declined to issue her with a letter and claims further that the Deputy Registrar had waived the requirement for a chief's letter. Firstly a decision by the Deputy Registrar does not bind a Judge of the High Court. Secondly these facts were not brought to the attention of the Judge. Neither the applicant nor her lawyer sought to explain to the court the challenges they were facing in obtaining the chief's letter. It would have been as simple as having the file placed for mention before the court in order to find a remedy to this problem. Instead of doing that the applicant applies to have the court recuse itself merely for upholding the procedural requirement that a chief's letter be availed. Here again no reasonable person would conclude that bias existed.

The prayer that the file be forwarded to the Hon. Chief Justice to be assigned to a Judge in Nairobi also in my view has no basis. The deceased was a resident of Mombasa. He met his death in Mombasa. The wives and children of the deceased live in Mombasa and his estate is largely based in Mombasa. As such the succession cause is properly before the High Court at Mombasa. Even if for some reason I would be unable or unwilling to hear the matter, Mombasa High Court has several other competent Judges who would be in a position to hear and determine this case. The applicant claims that she is put to great expense meeting the costs of her advocate whenever he has to travel to Mombasa for this matter. The applicant chose to engage counsel who has an office in Nairobi with the full knowledge and understanding that the matter was proceeding in Mombasa. She remains at liberty to select any counsel from the highly qualified and competent pool of advocates who practice in Mombasa to mitigate her expenses if she so desires. I decline to grant this prayer for transfer of the file.

On the whole I find no merit at all in this application for recusal. The applicant having decided to litigate her case in court must be prepared to let the legal process take its course. The court is under an obligation to deliver justice to all parties who appear before it and this includes the defendants in this case. The rules of National Justice require that all parties be accorded a hearing before a decision is reached. That is exactly what this court has been committed to ensuring. Where a party feels aggrieved by orders made by a court the proper procedure is to seek a review of those orders and/or appeal. To engage in tantrums and threats does not in any way advance the course of justice. This application is nothing short of forum-shopping. There is no bias by myself either for or against any party in this case. I am and have always been committed to delivery of justice to **all** parties who appear before me in accordance with my oath of office – that is **"without fear or favour, affection or ill-will."** I am convinced that any reasonable person observing these proceedings and in possession of the facts would find that no bias has been proved against the applicant. I therefore dismiss this application in its entirety and I direct that the applicant pay the costs for this application.

Dated and Delivered in Mombasa this 20th day of November, 2014.

M. ODERO

JUDGE