



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 1243 OF 2001**

BETWEEN

AJAY SHAH ..... PETITIONER

AND

THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT

TRUST BANK LIMITED

(In liquidation) ..... 2<sup>ND</sup> RESPONDENT

AND

PARAMOUNT UNIVERSAL BANK

LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY

PRAFUL SHAH ..... 2<sup>ND</sup> INTERESTED PARTY

**RULING**

**Introduction and Background**

1. The key issue presented by this petition is whether the judgment in this matter should be set aside on the ground that the learned judge, who heard the matter, failed to disclose that her spouse was an employee of the liquidator which was such as to give an appearance that she might have been biased against the petitioner.
2. The facts leading to this petition are not in dispute and are as follows. Trust Bank Limited (“Trust Bank”) filed a suit being, *Trust Bank Limited v Paramount Universal Bank Limited & Ajay Shah and Praful Shah, Milimani Civil Suit No. 1243 of 2001* against the defendants to recover Kshs 3,627,922.50. Ajay Shah and Praful Shah, the petitioner and interested parties respectively were sued in their capacities as directors of Trust Bank. Trust Bank’s case was that sometime in September 1998, Ajay and Praful Shah, with full knowledge of the imminent closure of the Trust Bank by the Central Bank of Kenya (“Central Bank”) fraudulently and in abuse of their positions

of trust drew seven Bankers cheques in favour of Universal Bank Limited and one drawn in favour of Paramount Bank Limited which cause a run on the bank. Paramount Universal Bank Limited, the 1<sup>st</sup> interested party, was the result of merger between Paramount Bank Limited and Universal Bank Limited.

3. Few days after the last drawing, Trust Bank was placed under statutory management and subsequently placed under liquidation by the Deposit Protection Fund Board (“DPF”), a division of the Central Bank of Kenya (“Central Bank”).
4. In her judgment delivered on 30<sup>th</sup> January 2009, Lesiit J., found that Ajay and Praful Shah, as directors of Trust Bank, had breached their fiduciary duties to bank. She entered judgment for the plaintiff as against the three defendants, jointly and severally, in the sum of Kshs 3,627,922.50, compounded at an interest rate of 25% per annum from September 1998 until payment in full.

### Petitioner’s Case

5. By a petition dated 4<sup>th</sup> April 2012, filed within the suit, Ajay Shah moved the court for the following orders;
  1. *A declaration that the decree in HCCC 1243 of 2001 resulted from a hearing that breached the Petitioners right to a fair hearing and is therefore null and void having been a product of hearing that violated the petitioners’ constitutional rights.*
  2. *A declaration that the Honourable Lady Justice Lessit breached the provisions of the Public Officers and Ethics Act, 2003 by failing to disclose that her husband works for the Central Bank of Kenya Limited.*
  3. *An order that the entire judgment dated 30<sup>th</sup> of January 2009 and the entire proceeding be nullified and the trial do commence de novo before other judge.*
  4. *The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.*
  5. *The costs of the petition be awarded to the petitioner.*
6. Ajay Shah, in his affidavit sworn on 4<sup>th</sup> April 2012 and filed in support of the petition, depones that sometime in February 2012, his advocate, Mr Billing, got wind of the fact that the Lady Justice Lesiit was married to Mr Mark Lesiit who worked for the Central Bank. He thereafter made inquiries at the Central Bank and in the course of his inquiries discovered that Mr Lesiit was the Assistant Financial Director at the DPF. The petitioner avers that Judge never disclosed, during the hearing of the matter, that she was related to a senior officer working within the agency that was managing Trust Bank.
7. Mr Billing submitted that the learned Judge had a constructive interest in the outcome of the case and that her failure to disclose her relationship to an officer of DPF was a breach of **rule 5** of the **Judicial Service Code of Conduct** under the **Public Officer Ethics Act, 2003**. **Rule 5**, which deals with disqualification of a judicial officer, stipulates as follows;

*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 proceeding; 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 proceeding.*
8. Mr Billing further submitted that the petitioner’s constitutional right to a fair hearing protected

under **Article 50** was violated. Counsel denied that the petition was a collateral attack on the judgment or an abuse of court process contending that the conduct of the learned Judge constituted a breach of the petitioner's fundamental right to a fair hearing which the Court has the jurisdiction to remedy. In support of the petitioner's case, Mr Billing cited the following cases; ***R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet* [2000] 1 AC 119** and ***Trust Bank Limited v Midco International Limited*, HCCC 366 of 2001 (Unreported)**, ***Galaxy Paints Co., Limited v Falcon Guards Limited Civil Appeal No. 219 of 1998 (Unreported)*** and ***K. M. Pattni and Goldenberg International Limited v Republic Nairobi CA Civil App. No. NAI 301 of 1997 (Unreported)***.

9. Praful Shah, the 2<sup>nd</sup> interested party, supported the petitioner's case. Mr Gitonga, his learned counsel, concurred with the petitioner that the learned judge ought to have disclosed her relationship at an early stage during proceedings in the civil suit as this was not optional as there was a likelihood of bias in the circumstances. Counsel submitted that the petition was not an attack on the merits of the judgment.

### Respondent's Case

10. The 1<sup>st</sup> respondent opposes the petition on the basis of a replying affidavit sworn by Hon. Justice Lesiit on 12<sup>th</sup> June 2012. In the affidavit she confirms that her spouse was posted to work for DPF as an officer in charge of Finance and Administration. She states that he was not posted to the Liquidation Department nor was he a liquidation manager or even involved in the day to day running or any decision-making processes or issues to with any banks under liquidation nor does he influence operations of the Liquidation Department of the DPF. The learned Judge denies any partiality in the proceedings or even a possibility of being partial or that she breached the provisions of the ***Public Officers Ethics Act*** or the Judicial Code of Conduct.
11. The 1<sup>st</sup> respondent argued that Central Bank was not a private business owned by the learned judge or her spouse and thus the judgment could not have been influenced by their own selfish interest. Further, that although the spouse was employee of Central Bank he did not work in the liquidation department nor was he a liquidation manager and as such he could not influence decisions that did not directly affect his docket.
12. The 1<sup>st</sup> respondent submitted that the petition was filed three years after the judgment and the delay was therefore inordinate. Counsel for the Attorney General maintained that the appropriate forum to bring the present petition was by way of appeal from the judgment and not by a constitutional petition as one High Court Judge cannot sit to review the decision of another Judge. The 1<sup>st</sup> respondent relied on ***Kirinyaga District Farmers Society v Kirinyaga District Co-operative Union Ltd*, NBI HCCC No. 226 of 2002 (Unreported)** where Justice Hewett held that the High Court lacks both original and appellate jurisdiction in the same matter.
13. Mr Ouma, counsel appearing for the 2<sup>nd</sup> respondent, while supporting the position taken by the 1<sup>st</sup> respondent, contended that the present petition is an attempt by the petitioners to challenge the judgment and decree issued by the learned judge. Counsel submitted that this court lacked jurisdiction to proceed in that manner citing **Article 163(6) and (7)** of the Constitution to support their proposition that this court cannot supervise superior courts. Counsel relied on the case of ***Peter Ng'ang'a Muiruri vs. Credit Bank Ltd & 2 others* [2008] eKLR, Nairobi Civil Appeal No. 203 of 2006** and ***Githongo and 2 Others v Harun Mwau and 4 others*, Nairobi Petition No. 44 of 2012 (Unreported)**.
14. Counsel also took issue with the delay in filing the petition adding that it was an abuse of the court process. He submitted that the relationship now disclosed by the petitioner did not fall within the provisions of **rule 5** of the ***Judicial Service Code of Conduct*** and that impartiality could not reasonably be questioned as Mr Lesiit was not involved in the liquidation business and that there was no likelihood of bias.

15. Mr Ouma implored the court to take into account the special circumstances of the case, the fact that a judgment had been rendered and when balancing the interests of all the parties the matter should be dismissed.

### **Analysis and Determination**

16. I have considered the submissions, oral and written, made by the parties and there are essentially two issues for consideration. The first issue, raised by the 2<sup>nd</sup> respondent concerns the procedural propriety of the petition. The second issue, which is the core issue, is whether the judgment should be set aside by reason of failure of the learned judge to disclose the fact that was related to an officer of DPF.

### **Procedural Propriety**

17. This matter was commenced by way of a petition within the civil suit. The argument proffered by Mr Ouma was that the petition is an originating procedure hence a petition cannot be filed within a suit and in so far as it seeks to set aside the judgment of the court, it amounts to supervision of a Superior Court within the meaning of **Article 165(6)** and **(7)**.

18. I agree with the position taken by Mr Ouma regarding the petition being an originating process. A petition ought to be filed separately as it is an independent suit. **Rule 23** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** deals with a situation where a constitutional matter arises in the course of proceedings. It provides that, “*Where a constitutional issue arises before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.*” In the circumstances, the petitioner ought to have filed an application within the suit to agitate the issue rather than filing a petition.

19. Notwithstanding what I have stated, I do not think that the course adopted by the petitioner is fatal to his case. **Article 159(2)(d)** of the Constitution requires the Court to dispense justice without undue regard to technicalities. Recently, the Supreme Court in **Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others Nairobi Petition No. 5 of 2013 [2013] eKLR**, explained what was meant by **Article 159(2)(b)** as follows “[218] *The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.*”

20. In determining whether the procedural infraction can be ameliorated by the application of **Article 159(2)(d)**, the circumstances of the case are a relevant consideration. Though the petitioner, who was a defendant in the civil case, has filed a petition, that petition is filed within the suit. For all intents and purposes it is an application to set aside the judgment on the grounds set out therein. I do not think any of the parties were prejudiced in any manner as they were able to respond to it and the court is able to deal with the grievances raised effectively.

21. Mr Ouma also referred to **Article 165(6)** provides that, “*The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*” According to counsel, allowing the petition would amount to supervision of the High Court. As I have held, the petition filed in this matter is not a separate suit but rather an application filed within the suit to set aside judgment. In this respect, the case differs from the situation in **Githongo and 2 Others v Harun Mwau and 4 others, Nairobi Petition No. 44 of 2012 [2012] eKLR** where the petitioner filed the petition in order to set aside an injunction granted in another case. In that case the court noted that, “[50] *The law governing civil procedure is replete with provisions that entitle a party to set*

aside an order made *ex-parte*, review orders where there is an error of law apparent on the face of the record or for sufficient reason. This jurisdiction is not exercised by commencing parallel proceedings but by making an application in the same case. To insist that the issues raised in this petition be dealt with in the civil suit will not impair the petitioners' rights and the petitioners will be heard by a court competent to enforce their fundamental rights and freedoms." This was the case in **Trust Bank Limited v Midco International Limited (Supra)** where the application to set aside the judgment was made via application for review within the suit.

22. The 1<sup>st</sup> respondent argued that the petitioner ought to have appealed against the judgment in order to raise the issues that have been raised in the petition. In my view, the appellate procedure is one for reviewing the merits of the decision based on the matters which were litigated before the court *a quo*. Although the issues of apparent bias may be raised in the appellate court where the matters form part of an appeal, what the petitioner seeks is for the court to exercise original jurisdiction to hear and determine a matter based on new facts thus the matter is within the province of the High Court.
23. The petition before the court is in the nature of an application for review and I find and hold that it is properly before the court and I am entitled to deal with it in substance.

#### **Whether Judgment should be set aside**

24. Whether the judgment should be set aside depends on whether the Judge ought to have disclosed the existence of a spousal relationship with an employee of the liquidator of the bank seeking to recover a debt from the petitioner.
25. Independence and impartiality are the hallmarks of a judicial system. Independence is necessary to protect the integrity of the judicial process as independent judges are free to function without outside pressure or influence. **Article 160** of the Constitution underpins this independence by providing, *inter alia*, that, "*In the exercise of judicial authority, as constituted under Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.*"
26. Although independence is guaranteed, each judicial officer takes an oath to be fair and impartial. This responsibility to be fair and impartial is the foundation of confidence in the decision making process. Judges are expected to bring an impartial mind to the case before them hence what disqualifies a judge is the presence of some factor which could prevent the bringing of an objective judgment to bear which could distort judge's decision. There must be also an appearance of being free from any influence as stated in the oft cited aphorism by Lord Hewart CJ in **R v Sussex, ex parte McCarthy [1924] 1 KB 256**, "*it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*"
27. The common law rules against bias must be balanced against the need for efficient administration of justice. In **Galaxy Paint Company Ltd v Falcon Guards Limited Nairobi Civil Appeal No. 219 of 1998 (Unreported)**, the Court of Appeal stated that, "*Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour.*"
28. This is not a case where the learned judge is being accused of having a direct or other interest in the matter. It is not a case of actual bias but one of apparent bias where the nature of the interest is the relationship between the Judge and her spouse. It is now established that in assessing whether or not there was apparent bias, regard is to be had to a 'reasonable person.' 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*

scrutinise the affidavit on either side.....” Likewise in **Attorney General of Kenya v Prof Anyang’ Nyong’o and 10 Others EACJ Application No. 5 of 2007** where the East Africa Court of Justice stated that, “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 mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks 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.”

29. The test of a ‘reasonable person’ was adopted by the Supreme Court of Kenya in the case of **Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 others; SC Petition No. 4 of 2012 [2013] eKLR** in which it cited the American case of **Perry v. Schwarzenegger**, 671 F. 3d 1052 (9th Circ. February 7, 2012) where it was held that the test for establishing a Judge’s 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”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.
30. The principle of apparent bias was also enunciated in **R v Bow Street Metropolitan Stipendiary Magistrates ex parte Pinochet (No. 2) (supra)**. It is not a question of whether or not the learned judge was actually biased. She might as well have been as impartial and as fair as one can get but if the circumstances are such that a reasonable person with the full knowledge of the facts would discern an appearance of bias, then evidence of actual bias is a superfluous ingredient. Lord Browne-Wilkinson observed, “As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.”
31. The obligation to be impartial also brings with it the duty to disclose any facts that may call into question a judge’s impartiality. According to **G. Hammond, Judicial Recusal: Principles, Process and Problems (Hart Publishing, 2009)** at page 87, the importance of disclosure cannot be overemphasised, “Common sense and prudence suggests that many recusal cases could be avoided, or the difficulties at least minimised, if there was proper disclosure at the outset by trial or appellate judges.”
32. The duty of the judge to disclose was dealt with in **Trust Bank v Midco (Supra)** where the court considered an application to set aside judgment on the ground that the judge who heard the application for summary judgment and allowed it had acted for the bank while in private practice. This fact was not disclosed at the hearing of the application for summary judgment. In setting aside the judgement, Hon. Justice Ibrahim (as he then was) held that as it is the judge who had knowledge and information about his past relationships in private practice, he was duty bound to disclose this fact. The learned judge observed, “A party cannot be expected to know the clients of a Judge who has come to the bench from private practice. It is the Judge presiding who ought to have known and also in this case, the Respondent. It was their duty and obligation to have disclosed or declared the existence of a past relationship. It does not matter now as to who may be to blame because there is a possibility that the Judge and the Respondent did not remember and that they considered it not to be significant. Judges also deem such matters would not affect their impartiality due to their oath and their own sense of fairness, justice and conviction. But as seen in the case law, it is not for the Judge to decide in his mind without declaring or disclosing the fact to the parties and for them to consider and decide what is good for them or the implications..... [A]s a result of the aforesaid non-disclosure of the past relationship between the Judge and the Respondent, the applicant was denied the opportunity to raise the issue or apply for disqualification on the grounds of prejudice and/or bias...”
33. I do not think that the extent of disclosure can be closed or itemised but in light of the test of

disqualification for apparent bias, I think a proper approach for a judicial officer would be to disclose any facts or interest which may cause a reasonable apprehension of bias.

34. In order to fully appreciate the matter at hand, it is important to set out the nature of the DPF which is covered under **Part VIII** of the **Banking Act (Chapter 488 of the Laws of Kenya)**. **Section 36** thereof establishes the Deposit Protection Fund Board as a body corporate whose purpose is to, “...provide a deposit insurance scheme for customers of member institutions and liquidate and wind up the operations of any institution in respect of which the Board is appointed as a liquidator in accordance with this Act or any other written law.” The purpose of the cover is therefore to safeguard depositors against losses they would otherwise incur if a bank or deposit taking institution closes. The DPF as liquidator has the responsibility of recovering the debts owed to the institutions for the benefit of creditors who include depositors.
35. The spousal relationship between the sitting Judge and an employee of DPF, a division that would necessarily preside over the liquidation of the subject bank is not in dispute. At the time of hearing the matter Trust Bank had been placed under statutory management. The learned Judge’s spouse held a fairly senior position, that of Assistant Finance Director. Given the nature of the work of the DPF, the financial outcome associated with the liquidation is one of importance and the fact that the person is not directly involved in liquidation does not remove him from the fact that the financial outcomes of liquidation are directly connected with his employment. In my view, although there was no direct pecuniary or proprietary interest, a reasonable person appraised of the full knowledge would raise reasonable suspicion of bias or likelihood of bias.
36. Public perception of the possibility of even subconscious bias is a relevant determinant. The judge could actually be as fair as can be but that is only relevant in case of actual bias. Hence it was not even necessary for the learned Judge to swear an affidavit in opposition to the application. What matters is whether a fair minded reasonable person, knowing of the facts would conclude that there was likelihood of bias.
37. The respondent has also raised the issue of lapse of time since the year 2009 when the judgment was delivered. Though an allegation of bias ought to be raised at the earliest opportunity, lack of knowledge of material facts has long been held to be a defence in allegations of bias. In **Edwards v Giudice (1999) 169 ALR 89**, “An allegation of bias must be raised in a timely fashion, provided there is a practical opportunity for a party to object. Importantly, a party cannot await the outcome of a case before raising the objection if the party was aware that the ground was available for otherwise the ground will be waived.”
38. In the circumstances of this case, the facts giving rise to grounds of likelihood of bias by the learned judge came to the knowledge of the petitioner about three years after the judgment had been delivered. It cannot therefore be suggested that the petitioner had in any way waived or acquiesced to it. He cannot be faulted for facts that were not within his knowledge at the time and which had they been brought to his knowledge would have given him an opportunity to either object to the proceedings or otherwise waive his right to object.

### **Disposition and relief**

39. I conclude that the facts upon which the petition is based and in particular the fact that the Judge’s spouse held a senior management position in the DPF was a matter which ought to have been disclosed to the parties during the proceedings. The parties ought to have been given the opportunity to object or elect to proceed with the hearing.
40. The findings I have made do not impact on the merits of the decision made by the learned Judge. The appearance of bias negatives the essence of a fair hearing guaranteed under **Article 50** and the proper remedy in this case is to set aside the decision. In **R v Gough [1993] 2 All E. R 724, [1993] AC 646** Lord Goff of Chieveley observed that, “[T]he nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or,

*if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of the impartiality.”* This court has an inherent duty to ensure that justice is not only done but is seen to be done to all those who come before it.

41. The petitioner seeks a finding against the learned Judge that she was in breach of the provisions of the **Public Officer Ethics Act, 2003** by failing to disclose her interest. I decline to grant this prayer for obvious reasons. The learned judge is not on trial here and it is not the impropriety or otherwise of the judge's conduct that is under examination by this court. I need not say more.
42. The petition is allowed to the extent that the judgment dated 30<sup>th</sup> January 2009 be and is hereby set aside. Taking into consideration the circumstances of this case, I think it is only fair and just that each party shoulders the burden of its own costs.
43. I apologise to the parties for the delay in preparing this decision which was caused by the fact that I was assigned to hear election petitions at the Machakos High Court.

**DATED and DELIVERED at NAIROBI** this 26<sup>th</sup> day July 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Billing instructed by Guram and Company for the petitioner.

Mr Mohammed, instructed by the State Law Office, for the 1<sup>st</sup> respondent.

Mr Ouma, instructed by Ochieng' Onyango, Kibet and Ohaga Advocates for the 2<sup>nd</sup> respondent.

Mr Gitonga, instructed by D. G. Kimani and Company Advocates for the 2<sup>nd</sup> interested party.