



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE 118 OF 2009

ECCREDO AG.....PLAINTIFF

-VERSUS-

SALAMA BEACH HOTEL LTD.....DEFENDANT

RULING

This is an application made by Mr. Munyithya (advocate) on behalf of ISAAC RODROT who is one of the directors of SALAMA BEACH HOTEL (the defendant) asking that this court disqualifies itself from hearing this matter any further following a ruling I made on 22nd February 2011 with regard to the hearing on an application whose issue is representation of SALAMA BEACH.

His request stems from the fact that:

(1) When the parties appeared before this court on 12th November 2010, 30th November 2010 and 14th December 2010 and 16th December, 2010, the subject of those appearances were all surrounding

(a) Compliance of the orders issued by Hon. Justice J. B. Ojwang on 8th September 2010

(b) Whether Mr. Kenyariri could be heard by the court before full compliance of those orders. This court had given directions on three occasions i.e

(a) on 12th November 2010

(b) 30th November 2010

(c) 16th December 2010, consistently directing that before any other application could be heard, the orders by Hon. Justice Ojwang had to be complied with. It was Mr. Munyithya's submissions that the court would retreat and consider the rival arguments by the counsel representing parties here, then either give directions or deliver its rulings –which one the court had notice of the content of submission by counsel and the substance of the pending application. It is against that background that Mr. Munyithya states, viewed in that context, then the ruling made by this court on 22nd February 2011 means that the court has shifted from the earlier contention by his client.

(2) As at 22nd February 2010, unlike when this matter started before myself, several litigations have been prosecuted before me and which are drawn by the directors of 1st defendant (i.e) SALAMA BEACH), one of them being HCCC no. 106 of 2010 which was before me a day earlier.

The counsel informed me of yet another matter in which yet another counsel for the defendant (SALAMA BEACH), MR. MWANGI NJENGA, has been sued on matters emanating from this litigation. As a matter of fact, there is also a Winding Up Cause No. 2 of 2011 which was transferred from Nairobi to Malindi court – which cause has been filed by HANS JUEGERN LANGER (2nd defendant), one of the directors of SALAMA BEACH HOTEL LTD.

In view of those suits pending before this court, in which ISAAC RODROT is a party, then ISAAC RODROT is apprehensive that the objectivity of the court may be lost. It is explained that this is natural and human.

Thirdly, as a result of the ruling, ISAAC RODROT is not very sure about proceeding with the contempt application and has asked his advocate to consider the possibility of prosecuting the substantive prayers of the application dated 6th September 2010 where in prayer No. 3, they urge the court to set aside a consent judgment dated 21st January 2010 which was presented and adopted by Hon. Justice Ibrahim sitting in Mombasa.

Ibrahim sitting in Mombasa – they would now be more comfortable if the Honourable Judge handled that application in that regard. Mr. Muniyithya also made it clear that his client ISAAC RODROT has no issues with regard to my integrity, he just doesn't have the faith in my objectivity.

The application is opposed by Mr. Mbuvi who says;

1) Such an application should be made formally so as to enable him respond appropriately.

He pointed out that on 16th December 2010, the court ruled against them, and they submitted to the court's directions, and confirmed; yet now because the court has made a finding which is not favourable to the adverse party, it is now a ground for the court to disqualify itself.

Further that Justice Ibrahim is based in Mombasa and all the orders made whenever this matter went to Mombasa, was that it be heard in Malindi. Mr. Mbuvi's view is that the ruling given on 22nd February 2011 paved the way and opened the deadlock, (which it seems Mr. Muniyithya's client had found some satisfaction in its existence) and that this court should view the application as being made purely on emotions.

Likewise, Mr. Kenyariri opposed the application terming it as being maliciously made against a judicial officer and he is skeptical about the request that the matter be heard in Mombasa, saying the orders given by the court in Mombasa were irregular. He wonders what is so irksome about his pursuit to come on record for the defendants or what makes Mr. Muniyithya jittery about that.

Miss Ngige who held brief for Mr. Njenga for 1st defendant agreed with Mr. Muniyithya's sentiments, saying it is not made in bad faith.

I confirm that this is a matter registered in Malindi and ought to be heard by the Malindi High Court. The only reason why it was handled by my two brothers in Mombasa i.e Hon. Justice Ojwangi and Hon. Justice Ibrahim, is that on those dates, I was not sitting and this being a single judge station, the next nearest High Court which could handle matters in my absence is Mombasa High Court. Infact the consent orders issued by Hon. Justice Ibrahim were made on 21st January 2010, when this court was on vacation and the administrative arrangements made, with the approval of the Chief Justice, is that whenever the Malindi High Court is not in session then urgent matters are handled by the Mombasa High Court. Judge Ibrahim was the vacation duty judge.

That was also the scenario when the parties appeared before Hon. Justice Ojwang on 17th August 2010 leading to his orders of 8th September 2010 – again this court was on August Summer Vacation, Hon. Justice Ojwang was the vacation duty judge.

I need to put that record straight, so as to disabuse parties of the impression that there were other unclear reasons why this matter found its way in Mombasa High Court.

As regards the request for me to disqualify myself, I can understand where the said ISAAC RODROT'S concern emanates from, that all along, this court had been fiercely opposed to any attempts by his defendant's other directors to have a different counsel come on record, insisting that the issue of contempt had to first be addressed before anything else. His view is that I ought to have maintained that rigid stand throughout, and there is no objective reason for the sudden shift. I will not repeat the contents of my ruling, but I think if that ruling lacks objectivity, then the best avenue open to ISAAC RODROT to redress it is by way of contesting the same before the COURT OF APPEAL and I grant him leave to do so. My initial stand had been based on a misapprehension as regards;

(a) Who was alleged to be in contempt visa vis which party Mr. Kenyariri wished to represent. Once that became clear, then, I gave the direction contained in the ruling dated 22nd February 2011.

I am flattered that ISAAC RODROT at least gives credit to my incredibility, it would have hurt deeply, were he to insinuate impropriety on my part, because I do not even know any of the parties in this matter, and there is no denying that currently the judiciary is living in the eye of a hurricane and any hint of impropriety is like a call to end one's career on the bench. So yes I laud him for recognizing that, but then if he is not saying there is impropriety on the court's part, and he is not outrightly alleging bias, then why does he object to me hearing the matter? And if the contempt proceedings are being pursued in good faith then whether Mr. Kenyariri is allowed to argue his application as to why he should come on record or not, should not affect the pursuit of those prayers. Surely ISAAC RODROT is not by any means suggesting that this court ought to have maintained a one sided winning streak in his favour, and that the moment the ground shifted, then the court lost its objectivity. I have given this matter a lot of thought - is this a veiled intimidation, maliciously intended to ensure this court keeps its hands off the matters touching on SALAMA BEACH, ACCREDO LTD AND ISAAC RODROT, or is this a genuine fear, borne out of concern for justice to not only be done but be seen to be done.

I wonder is this lack of objectivity based on a fear that the court will be biased? If that is the case, then ISAAC RODROT would have to go further than simply claim that because the decision was not to his expectation then this court should not handle the matter – it would have to meet the thresholds so well examined by Lord Denning on the decision of Metropolitan Properties Co. (F.G.C) Ltd v Lannon (1968)3 All ER 304 - That there must be circumstances from which a reasonable man would think it likely or probable that a Judge would favour one side unfairly at the expense of the other – so that if there was even a hint of or a reasonable suspicion of bias I would gladly step aside, but as for now, there isn't anything to persuade me that I should decline from handling this matter which I undertake to do with a clear and independent mind, observing my oath of office to serve without fear or favour. I decline to disqualify myself.

Delivered and dated this 29th day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE

Mr. Kenyariri present and holding brief for Mr. Mbuvi
Mr. Muniyithya for applicant
Miss Ngige holding brief for Mwangi Njenga

