



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 579 OF 2009

KENYA ROADS BOARD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

This matter was listed before me for the hearing of a chamber summons application dated 18th May, 2010 filed by the plaintiff seeking orders for the defence to be struck off for inter alia failing to disclose any defence warranting a trial. When the matter was called for hearing, Mr. Onyango holding brief for Mr. Rachuonyo, learned counsel for the defendant informed the court that he had instructions to apply for my disqualification from hearing the matter on the grounds that I was previously an employee of National Bank of Kenya hence in a conflict of interest situation which would impair my ability to impartially adjudicate over the matter.

In reply, Mr. Agwara, learned counsel for the plaintiff strongly opposed the application. In his submissions, Mr. Agwara took the view that the matter before me had no direct link with my previous employment with the National Bank of Kenya as the facts forming the basis of the case occurred long after my employment with the Bank. He contented further that every serving Judge had previous interactions with parties before whom matters were placed for determination and that if every incidence of interaction were to warrant disqualification, no Judge would hear any matter. To Mr. Agwara, the present application by the defendant's counsel was a ploy to yet again delay the hearing of the application. He complained that the application had previously been adjourned on so many occasions at the instance of the defendant's counsel and urged the court to put a stop to the trend.

In reply, Mr. Onyango insisted that conflict of interest was a question of law and that the defence side could not be blamed for the allocation of the matter to me. All what the defence was concerned about was that their client may not get a fair hearing owing to my previous employment with the company. He indicated that they were ready to proceed with the matter at the earliest opportunity before a different Judge.

I have considered the submissions made by both counsel for the plaintiff and counsel for the

defendant. With due respect, I do not consider that the subject matter of this suit and of the application in question has any iota of bearing to my employment stint with the National Bank of Kenya. Conflict of interest in my view, arises in a situation where a person's private or personal interest is sufficient to appear to influence the objective exercise of his or her official duties as a public officer or a professional.

The business dictionary defines conflict of interest in the following terms:

“A situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self interest and professional interest or public interest”,

It further provides a second definition in the following terms:

“A situation in which a party's responsibility to a second party limits its ability to discharge its responsibility to a third party”, (see businessdictionary.com).

In each of the above definitions, I do not find any direct or indirect bearing to my position as a Judge adjudicating over a matter that arose over seven years since my last call of duty with the defendant bank. In particular, a cursory review of the cause of action reveals the subject matter to involve fraudulent payment of a cheque belonging to a customer of the defendant which clearly has no nexus whatsoever with my previous duties in the defendant bank as a legal officer. The factual question before the court is whether the cheque in issue was a genuine cheque paid on behalf of the customer in the ordinary course of business. How my previous position in the defendant bank would influence consideration of this fact baffles me.

In the end, I cannot help but read mischief and *malafides* on the part of the defendant's advocates in making the application that I disqualify myself from hearing the matter. Indeed, I fully concur with counsel for the plaintiff that the application is merely but a ploy to hamper expeditious hearing of the application. I do believe that there has to be a clear relationship between the cause of action and the previous interaction between the judge and the party seeking disqualification for any such disqualification to be merited. There should be a cut off time during which previous employment should be conferred as having any potential to create a conflict of interest.

Although in the interest of meeting the ends of justice a Judicial Officer should not hesitate to step down from hearing a matter on grounds of conflict of interest, and whereas this is indeed a constitutional duty under Articles 73 (2) (c) (ii) and 75(1) (a) of the Constitution, the court should never shy away from curbing possible abuse of the court process through unsubstantiated allegations of conflict of interest.

The tenets of dispensing justice demand as a minimum that a judicial officer should never hesitate to withdraw from hearing a matter where circumstances point to a clear conflict of interest situation. Such withdrawal is indeed a constitutional duty under Chapter 6 of the Constitution of Kenya, 2010. However, it is equally behoving for the judicial officer to never shy away from curbing possible abuse of the court process through frivolous allegations of conflict of interest. The court does owe in equal measure a duty to dispense justice impartially and expediently to both the plaintiff and the defendant. If therefore justice would be unduly delayed on the part of the plaintiff due to unsubstantiated claims of conflict of interest by the defendant, the court should decisively desist from acceding to withdraw from the matter.

Nevertheless, whilst I am fully convinced that the defendant lacks any plausible basis to allege a conflict of interest in my hearing of this matter, I will purely on grounds of personal decency, exceptionally disqualify myself from the matter. I therefore direct that this matter be placed before the Presiding Judge in the Commercial and Admiralty Division for re-allocation to another Judge and for re-listing for hearing on a priority basis.

DATED and DELIVERED in open court at Nairobi this 13th day of October, 2011

J. M. MUTAVA

JUDGE

13th October, 2011