REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 328 of 1999, 342 of 1999, 61 of 2000 & 65 of 2000 (Consolidated)

A-Z SHAH T/A FASHION SPOT……..1ST TENANT/APPELLANT

VS

JAN MOHAMMED INVESTMENTS LTD……..……..LANDLORD/RESPONDENT

CIVIL APPEAL NO.342 OF 1999

JAN MOHAMMED INVESTMENTS LTD…….....…..…LANDLORD/APPELLANT

VS

A-Z SHAH T/A FASHION SPOT…..……..1ST TENANT/RESPONDENT

CIVIL APPEAL NO. 61 OF 2000

INTERPOSE ELECTRONICS……TENANT/APPELLANT

VS

JAN MOHAMMED INVESTMENTS LTD……...…LANDLORD/RESPONDENT

CIVIL APPEAL NO.65 OF 2000

JAN MOHAMMED INVESTMENTS LTD…….....…..…...LANDLORD/APPELLANT

VS

INTERPOSE ELECTRONICS…….……TENANT/RESPONDENT

(CONSOLIDATED)

R U L I N G

1. Jan Mohamed Investments Ltd (hereinafter referred to as the Landlord/applicant) is a party in Civil Appeals

Nos.HCA.328 of 1999, HCA.342 of 1999, HCA.61 of 2000 and HCA 65 of 2000 which were appeals from judgments in Business Premises Tribunal in Tribunal Cases No.12 of 1999 and 44 of 1997 dated 22nd July, 1999 and 17th January, 2000 respectively. The appeals were consolidated and argued before us on 19th June, 2008. Judgment was reserved and subsequently delivered on 14th October, 2008.

2. By a notice of motion filed on 17th November 2008 brought under certificate of urgency the applicant sought inter alia an order of stay of execution of the judgment and decree of this court made on 14th October, 2008. The applicant also sought to have the judgment and the entire decree of the honourable court made on 14th October, 2008 reviewed in its entirety. The application was anchored on two main grounds. First, the fact that there are errors on the face of the record that are material and consequential, and secondly, that there are other serious and substantive matters constituting a sufficient cause for review. The application was also supported by an affidavit sworn by the applicant on the 14th November, 2008, and another affidavit sworn by Joan Murithi on the same date. The application was certified urgent on 17th November, 2008 by Hon. Visram J. It was subsequently listed for hearing before us on the 27th November, 2008.

3. When the application came up for hearing on the 27th November, 2008, Mr. Kiage who appeared for the applicant explained that in arguing the application under the limb of sufficient cause the applicant intended to question our conduct in the delivery of the judgment. He therefore indicated to the court that he was under express instructions to apply that we do recluse ourselves and disqualify ourselves from the application for review. Mr. Kiage argued that since his clients have made a complaint questioning the propriety of what amounts to an *ex-parte* communication between the counsel for the respondents and ourselves, it would be difficult for us to make an unbiased and dispassionate judgment in the matter. He maintained that we would be sitting in judgment in our own cause by determining whether what is being alleged is true and whether the apprehensions of the applicant are reasonable. Relying on the principle that no man can be a judge in his own cause, counsel urged that we disqualify ourselves from the matter.

4. Mr. Kiage further submitted that the affidavit sworn by Joan Murithi on 14th November, 2008 in support of the application, depones to the allegations of the alleged impropriety. Counsel contended that the allegations have remained uncontroverted as there was no replying affidavit sworn by the counsel alleged to be involved in the impropriety. Relying on the case of ***Trust Bank Ltd vs Midco International (K) Ltd & 4 Others (2004) 2 KLR 485***, Mr. Kiage maintained that the test as to whether there was a danger of bias was an objective test and that in view of all the allegations that had been made against us, the possibility of bias was real.

5. In response to Mr. Kiage's application, Mr. Rayani who appeared for A-Z Shah t/a Fashion spot (hereinafter referred to as the 1st respondent), who is the appellant in HCCA.328 of 1999 and the respondent in HCCA.342 of 1999, submitted that the applicant was merely using the allegations of impropriety as a red herring to get a 2nd bite of the cherry by getting a ground for review and also ensuring that the matter is not heard by ourselves. Mr. Rayani maintained that allowing such an application would set a dangerous precedent as all a party has to do is to make allegations of impropriety in order to have his matter heard. Mr. Rayani submitted that under Order XLIV Rule 4(2)(b) of the Civil Procedure Rules, an application for review upon some ground other than discovery of new matter or evidence or mistake, can only be made to the judge who passed the decree or made the order sought to be reviewed. Mr. Rayani maintained that the application for review should be heard by us. Mr. Rayani contended that the allegations of impropriety were simply an attempt by the applicant to ensure that we do not hear the application by asking us to disqualify ourselves. He urged us to preserve the honour and dignity of the court by refusing such an application. He urged the court not to be guided by the authority of ***Trust Bank Ltd vs Midco International (K) Ltd & 4 others*** (supra) as that case was not dealing with an application for review. He maintained that the court had authority to hear the application for review by virtue of powers under the Civil Procedure Rules.

6. Mr. Imanyara, counsel appearing for Interpose Electronics (hereinafter referred to as the 2nd respondent), the appellant in HCCA.61 of 2000 and the respondent in HCCA.65 of 2000, submitted that the application by Mr. Kiage, was brought in bad faith. Mr. Imanyara noted that the allegations of impropriety were alleged to be within the applicant's knowledge before the judgment was delivered yet no attempt was made to have us disqualify ourselves before the judgment was delivered. Mr. Imanyara maintained that the application was brought simply for the purposes of avoiding the consequences of the judgment after notice of the intention to execute the judgment was served. He submitted that the dignity and impartiality of the court must be protected and urged us to dismiss the application to disqualify ourselves.

7. In reply to the submissions made by Mr. Rayani and Mr. Imanyara, Mr. Kiage maintained that the applicant did not make his application before the judgment because it was human to hope. He urged the court to be guided by the ***Trust Bank Ltd vs Midco Internaitonal (K) Ltd & 4 others*** as it actually concerned review and setting aside orders. Mr. Kiage contended that Order XLIV Rule 4 of the Civil Procedure Rules which requires an application for review to be heard by the judge who made the orders sought to be reviewed was not a rule cast in stone.

8. What is before us is simply an informal application urging us to disqualify ourselves from hearing the application dated 17th November, 2008. The application being one for review under Order XLIV Rule 1 of the Civil Procedure Rules, Rule 1(2) requires such an application to be heard by the same judge who made the orders sought to be reviewed. The only exception is where the judge who passed the decree or made the order sought to be reviewed is no longer attached to the court or where such a judge though still attached to the court is precluded by absence or other cause for a period of 3 months from hearing the application for review. Both of us are still attached to this court and are able to hear the application for review. Order XLIV Rule 4(2) of the Civil Procedure Rules does not therefore apply.

9. The question is whether we should disqualify ourselves from hearing the application for review in view of the allegations of impropriety that the applicant has made against us. In determining such a question the test is whether the circumstances surrounding the application for review show that there is a real or even probable danger of bias on our part in the hearing of the application for review. Indeed, that was the approach adopted by the Court of Appeal in ***Civil Appeal No.36 of 1996, Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 others***.

10. In the more recent case of ***Republic vs Mwalulu & 8 others (2005) 1 KLR 1***, the Court of Appeal considering the principles on which a judge can disqualify himself or herself from a matter held *inter alia* as follows:

"***(i). When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the fact constituting bias must be specifically alleged and established.***

(ii) In such cases the court must carefully scrutinize the affidavits on either side remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal.

(iii) The court dealing with the issue of disqualification is not, indeed it cannot go into the question of whether the officer is or will be actually biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would do that the judge is biased or is likely to be biased."

11. With the above in mind we note that as per the applicant's affidavit sworn on 14th November, 2008 and the affidavit of his partner Joan Murithi also sworn on the same date, it is alleged that on the 9th October, 2008, when the consolidated judgment in these appeals were scheduled to be delivered Mr. Rayani, counsel for the 1st respondent in the absence of the appellant's counsel and the court clerk went first into the chambers of Hon. Okwengu J where he is alleged to have remained alone with the judge for over 10 minutes before proceeding to the chambers of Hon. Sitati J where he is also alleged to have remained alone with the judge for about 10 minutes. It is further alleged that Hon. Sitati J exhibited partiality to Mr. Rayani when she profusely apologized to him for the delay in the delivery of the judgment. These facts are the basis of the applicant's apprehension that we have exercised bias or are likely to exercise bias. It is upon us to examine these facts objectively with a view to determining whether any reasonable and fair minded person can draw an inference from these facts that we are biased or are likely to be biased in hearing the application for review.

12. The possibility of Mr. Rayani having entered each of the Hon. Judges' chambers cannot be disputed as it is normal for an advocate to go to judges' chambers for delivery of judgment or inquiry as to whether the judgments are ready. The normal procedure is for both counsels to enter the chamber together with the court clerk. However where one counsel is absent there would be nothing to prevent the counsel present from entering the judges' chambers even in the absence of a court clerk. Indeed it is common knowledge that in the law court at Nairobi, judges do not have the protection of a secretary or even an usher and advocates and parties therefore have unrestricted access to the judges' chambers. The fact that Mr. Rayani may have entered the judges' chambers alone does not establish or give reason to believe that there was impropriety on the part of the honourable judges or an attempt to compromise the judges. Mr. Rayani's alleged encounter with the judges was not a furtive or clandestine meeting, but a brief encounter in a chamber, open and accessible to the public. Indeed, the applicant's partner Joan Murithi also apparently managed to have access alone into the judge's chambers. Moreover, the apology made to Mr. Rayani for the delay in the delivery of the judgment was made in the presence of both parties and was therefore nothing more than courtesy. It is obvious that in their anxiety concerning their suits, litigants are bound to be suspicious and this may result in very fertile and unjustified imagination particularly when things do not appear to go their way. The applicant herein is no different. Being dissatisfied with the outcome of the appeal, he appears to be reading too much into the alleged incidents to the extent that even an apology for the delay in the delivery of the judgment is considered to be "*overly solicitous and friendly*" as to be evidence of impartiality. The test however, is not what the applicant thinks or imagines, but what a reasonable and fair minded person would infer from the circumstances.

13. We find it unlikely that Mr. Rayani may have spent 10 minutes or more alone with the judge in any of the judge's

chambers. Indeed, if the applicant or his partner or his advocate was outside the judge's chamber waiting for the delivery of the judgment, and Mr. Rayani walked into the judge's chambers and was taking that long in the judge's chambers, the applicant or his partner or advocate could have easily walked into the judge's chambers to find out if the judgment was actually being delivered. Moreover, the fact that Mr. Rayani may have gone alone into the chambers of the Hon. Judges, and the fact that Hon. Sitati J. apologized to him for the delay in delivering the judgment, do not provide any reasonable grounds upon which any fair minded person can draw any inference of impropriety, bias or likelihood of bias. We therefore find no basis for the application to disqualify ourselves from hearing the application for review of our judgment.

14. Further, it was submitted that because of the allegations of impropriety made against us, it would be difficult for us to make an unbiased and dispassionate judgment, in determining the application for review of our judgment. In other words, we would be likely to be prejudiced against the applicant. That fear is indeed unfounded. Each of us took a judicial oath of office to uphold the rule of law and to dispense justice without fear or favour. This case will not be an exception as we shall go by that oath of which we are bound. We shall therefore hear the application for review of our judgment and determine the same on merit without being influenced by any side shows. For the above reasons the applicant's informal application is rejected. A date may be fixed for the hearing of the notice of motion dated 17th November, 2008.

Those shall be our orders.

Dated and delivered this 15th day of January, 2009

H. M. OKWENGU

JUDGE

R.N. SITATI

JUDGE

In the presence of: -

……..…for the appellant

……..…….for the respondent