Trust Bank Limited v Shah & 8 others (Civil Suit 73 of 2001)
[2024] KEHC 2676 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2676 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 73 OF 2001

A MABEYA, J

MARCH 15, 2024

BETWEEN

TRUST BANK LIMITED ..... PLAINTIFF

AND

AJAY SHAH ..... 1ST DEFENDANT

VINOD CHAUNDRY ..... 2ND DEFENDANT

ARUN JAIN ..... 3RD DEFENDANT

PRAVIN MALKAN ..... 4TH DEFENDANT

JIGNESH DESAI ..... 5TH DEFENDANT

NAYAN MURTHI SABESAN ..... 6TH DEFENDANT

RENUKA SHAH ..... 7TH DEFENDANT

PRAFUL SHAH ..... 8TH DEFENDANT

NITIN CHANDARIA ..... 9TH DEFENDANT

RULING

1. Before Court is an application dated 31/7/2023 brought under Articles 27,50 and 159 of the *Constitution* of Kenya, section 1A, 1B and 3A of the *Civil Procedure Act* CAP 21 Laws of Kenya and Order 51 rule 1 of the *Civil Procedure Rules*.

2. The application seeks the recusal of this Court from hearing and determining the present case.

3. The application was supported by the affidavit of David Irungu sworn on 31/7/2023. The plaintiff averred that the Court had displayed open bias and had discriminated against it with respect to fair hearing and administration of justice. According to the plaintiff, the liquidator had sought to recover monies from 30,000 depositors as a result of statutory breaches made by the plaintiff.

4. That the plaintiff attempted to produce the banker's books as its evidence but the same was rejected by the Court. That it therefore sought to produce the same through its second witness but the same was once again rejected by the Court. That the plaintiff would be forced to close its case without producing the banker's books which would weaken the its case. It contended that the Court did not state the prejudice that would be occasioned if the plaintiffs were allowed to produce the said documents as they had attempted to.

5. The 2nd defendant opposed the application vide grounds of opposition dated 7/8/2023. It was contended that the application did not give any justifiable reason to warrant recusal of the Court. The application was termed as frivolous, and misplaced and it offended Article 159(2)(b) of the *Constitution* as it sought to delay the matter.

6. The 8th defendant opposed the application through his replying affidavit sworn on 10/8/2023. He averred that the plaintiff had not produced any evidence to demonstrate that the Court was biased or that the plaintiff had not been accorded a fair hearing. That in its ruling complained of, the Court had considered that the matter was old and the service of notice to produce was given over 15 years ago. It's position was that the allegations in the application were unsubstantiated by evidence.

7. The 5th defendant, Jignesh Desai opposed the application vide a replying affidavit sworn on 17/8/2023. He averred the Court had made a finding that the plaintiff had not met the conditions in section 177 of the *evidence Act*. That the plaintiff had sought to bring in an unidentified witness and recall the first witness which attempts were declined by the Court on sound legal principles. That the plaintiff had caused the delay of the matter for over 20 years.

8. The application was canvassed by way of written submissions which I have considered.

9. The plaintiff's submissions were that the Court had openly showed bias against the plaintiff in his application of the law during trial. That the Court's actions impedes its constitutional right to a fair hearing. That the Court demonstrated open bias for failing to apply the mandatory provisions of the law as espoused in section 176 of the *evidence Act* and denied to allow production of documents.

10. The defendants submitted that there was no evidence of bias, impartiality or impropriety on the part of the Court. That the application for recusal was not based on any ground save for the ruling delivered with regard to production of documents.

11. I have considered the rival averments and the submissions. The plaintiffs seek recusal on open bias as against the plaintiffs. During the trial, the plaintiff sought to produce documents as banker's books. It was opposed by the defendants. Vide its ruling of 23/5/2024, the Court dismissed the same. application and held that PW1 had not testified on the documents he sought to produce and that it would be prejudicial to the defendants for those documents to be produced.

12. The Court noted that the case was over 22 years old and that allowing the application would cause further delays. The plaintiff made yet another application to recall PW1 to produce the said documents. The Court declined to allow the recall on the grounds that that was an afterthought as the plaintiff had more than 15years to prepare its case.

13. It is these three rulings that the plaintiff has based its allegations of bias.

14. On recusal, in *Kaplana Rawal vs. Judicial Service Commission and 2 Others* [2016] eKLR, the court held that : -

> " An Application for recusal of a Judge is a necessary evil." On the one hand, It calls into question the fairness of a Judge who has sworn to do justice impartially, in accordance with the *Constitution* without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence, In such application, the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is too human and above all the *Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial Judge.
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> When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating the cordial guarantee of the *Constitution*, namely, the right to fair trial, upon which the entire Judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the Constitutional guarantee of a trial by an independent and impartial Court.
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> We would, with respect, agree with the *Constitutional Court of South Africa Vs. The South African Rugby Football Union and Others case* CCT 16/98:
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> > "At the very outset we wish to acknowledge that a litigant and her or his Counsel who find it necessary to apply for the recusal of a Judicial Officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is Counsel's duty to advance the grounds without fear. On the part of the Judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a Personal affront. "

15. In *Attorney General of Kenya vs. Professor Anyang' Nyong'o & to 10 Others* EACJ Application No. 5 of 2007, it was held: -

> " 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-
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> a. A 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."

16. The same position was upheld in the case of *Philip K. Tunoi & Another Versus Judicial Service Commission & Another* (2016), where the Court of appeal held: -

> " In determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balance approach and will neither be complacent

nor be unduly sensitive or suspicious in determining whether or suspicious in determining whether or not there is real possibility of bias."

17. From the foregoing, for an allegation of bias to succeed, the test to be applied is the perception of a reasonable man on the same. In the present case, the three rulings delivered by the Court were sound and well-reasoned. The Court gave its reasons for declining the plaintiff's applications. It was not enough for the plaintiff to accuse the Court of being bias, it should have adduced evidence to prove the same. The Court is a neutral arbiter and under the presumption that he will be impartial. The Court is not in the business of assisting parties prosecute their cases. It rather makes determination of matters before it on the basis of the material before it.

18. The plaintiff had an option of appealing against the said rulings to the Court of Appeal. The impugned rulings were based on rules of procedure as well as the rights of all the parties to a fair hearing. An allegation of bias cannot succeed mainly because a party has not obtained the orders it has sought for. This is an attempt by the plaintiff to shift the blame to the Court for its own undoing or omission. It failed to prepare its case on the basis of the law of evidence and once the same is strictly applied, it turns to pointing fingers at the Court. There is no evidence of perceived bias or apprehension of bias on the part of the Court.

19. Accordingly, I find that the application frivolous and only meant to delay the trial. It has no merit and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE