



REPUBLIC OF KENYA



KENYA LAW

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Silver Construction Company Limited v Shady Acres Limited; Westpoint Realty Limited (Objector); Mambo & another (Aggrieved Party) (Miscellaneous Application E116B of 2020) [2023] KEHC 3249 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E116B OF 2020**

DAS MAJANJA, J

APRIL 20, 2023

BETWEEN

SILVER CONSTRUCTION COMPANY LIMITED APPLICANT

AND

SHADY ACRES LIMITED RESPONDENT

AND

WESTPOINT REALTY LIMITED OBJECTOR

AND

DAVID MURIUKI MAMBO AGGRIEVED PARTY

ROSE MAMBO AGGRIEVED PARTY

RULING

1. The aggrieved persons, David Muriuki Mambo and Rose Mambo (“the Aggrieved Persons”), are directors of Shady Acres Limited (“the Respondent”) and Westpoint Realty Limited (“the Objector”). They have moved the court by the Notice of Motion dated 22nd March 2023 seeking an order that, “The Honourable Mr Justice David Majanja recuses himself from hearing the Notice of Motion dated 31st December 2022.” The Notice of Motion dated 31st December 2022 has been filed by the Aggrieved Persons seeking to review, vacate and or set aside its orders made on 25th March 2021 and 24th June 2021.
2. It is not apparent from the record what order was made on 25th March 2021 but on 24th June 2021, I made the following orders;



- a. The Notice of Motion dated 16th February 2022 be and is hereby dismissed with costs to the Applicant with costs assessed to KES. 30,000.00.
 - b. The Notice to Motion dated 2nd March 2022 is allowed only to the extent that the directors of Shady Acres Limited; David Muriuki Mambo and Rose Mambo are to be summoned to court for examination on the means of the company to satisfy the debt and in that regard they shall furnish the Court, the annual reports, books of accounts and other document as may be requested by the Applicant.
 - c. In default of compliance with order (b) above, the applicant may proceed with execution against the said directors personally.
 - d. The Respondent shall bear the Applicant's costs.
3. The application for my recusal is supported by the affidavit of David Muriuki Mambo sworn on 22nd March 2023 and opposed by the Applicant through Grounds of Opposition dated 24th March 2023. Counsel for the parties made brief oral submissions in support of their respective positions.
 4. The thrust of the application is that if I am to hear the Notice of Motion dated 31st December 2022, the Aggrieved Persons reasonably apprehend that they shall be prejudiced and disadvantaged because the court departed from its directions of 7th March 2022 and delivered a composite ruling on 24th June 2022 on both the objection proceedings and the Notice of Motion dated 2nd March 2022 without having heard the latter or inviting submissions thereon or giving directions as per its own orders and therefore failed to adhere to due process and this constitutes an error on the face of the record.
 5. The Aggrieved Persons further contend that the result of the ruling dated 24th June 2022 is to condemn them unheard as the Notice of Motion dated 2nd March 2022 has not been heard resulting in a situation where they may be liable to pay and or settle the Respondent's debt contrary to the principles on *Salomon v Salomon* [1897] AC 22 and the provision of the *Companies Act*, 2015. The Respondent and the Aggrieved Persons are therefore apprehensive that if I hear the matter, they stand prejudiced as they have already been condemned unheard.
 6. In opposing the application, Silver Construction submits that the application is not made in good faith and is intended to delay of the matter and in particular its right to realize the decree. That the application is flimsy, lacks any basis and amounts to forum shopping and that that the Aggrieved Persons have not demonstrated any form of partiality or unfairness. It contends that the Respondent, in which the Aggrieved Persons are directors, was at the material time represented by the firm of P C Onduso and Company Advocates who did not object to the consent resolving the debt owed to the Applicant or examination of its books account which can only be in custody of the directors. Moreover, the Aggrieved Persons' advocates on record, Amollo and Kibanya Advocates, participated in the proceedings on behalf of Objector where they are directors and no objection was raised to the proceedings. Counsel submits that if the parties were indeed aggrieved by the ruling, the ought to have taken steps to appeal against the ruling. It urges the court to dismiss the application.
 7. The application before the court is for recusal. Judges are obliged to sit and hear cases hence they must not recuse themselves on flimsy or bare allegations made by a party as this would undermine the administration of justice hence the authorities are clear that there must be a factual basis for the Judge to recuse himself. In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* HC Comm No. 332 of 2010 [2014] eKLR the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali*



and others CA Criminal Application No Nai 4 and 5 Of 1995 (unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & others* CA Civil Application No Nai 310 of 2004 (Unreported) where the Court of Appeal stated that:

“...When courts are faced with such proceedings for 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 facts constituting bias must be specifically alleged and established...”

8. In Philip K. Tunoi & another v Judicial Service Commission & Another CA Civil Application Nai No 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal explained in *Porter v Magill* [2002] 1 All ER 465 that, “The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.” The Court of Appeal concluded that an applicant must specifically establish the facts alleged in the application for recusal of a judge and that those facts must lead the general public to doubt the fair administration of justice. In short, the test is objective and not subjective.
9. Turning to the facts of this case, can it be concluded that because the court considered an application which the Aggrieved Persons contend was not scheduled and which was nevertheless the subject of a ruling resulting in adverse orders against the Respondent and Aggrieved Persons evidence of bias? I think not. First, the rules of court in the Civil Procedure Rules are replete with provisions that provide for review, varying and or setting aside of orders made by a judge who has proceeded on a misstep or committed an error in the proceedings. Second, the Aggrieved Persons have themselves invoked section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 of the *Civil Procedure Rules* which provide for review of orders by a party aggrieved by an order which it does not intend to appeal or has not appealed from. Under Order 45 rule 2 of the Civil Procedure Rules, an application for review shall be heard by the judge who passed the decree or orders unless the judge is precluded from hearing the matter due to absence or has left the court, division or station. The law thus contemplates that I will hear the matter.
10. Ultimately, the Aggrieved Persons have not laid any basis upon which a reasonable observer with knowledge of the facts may conclude that I am biased. The facts upon which the application for review are based are the bread and butter of such review applications and the Aggrieved Persons have not placed before the court any facts or evidence to demonstrate that I will not give the matter the due consideration it deserves.
11. I refuse to recuse myself from matter with the result that I dismiss the application dated 22nd March 2023 with costs to the Applicant.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mogeni instructed by Mogeni and Company Advocates for the Applicant.

Mr Amolo instructed by Amolo and Kibanya Advocates for the Person Aggrieved/Objector.

