Tuff Bitumen Limited v SBM Bank (Kenya) Limited & another (Civil Suit E018 of 2023) [2023] KEHC 3198 (KLR) (Commercial and Tax) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E018 OF 2023

NW SIFUNA, J

APRIL 14, 2023

BETWEEN

TUFF BITUMEN LIMITED ..... PLAINTIFF

AND

SBM BANK (KENYA) LIMITED ..... 1ST DEFENDANT

KEYSIAN AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. This is ruling is on the Plaintiffs application dated 23/3/2023. The applicatio states that it is brought under Article 48 and 50 (1) of the *Constitution* of Kenya 2010, the *Bangalore Principles on Judicial Conduct*, the *Judicial Service (Conduct and Ethics) Regulations 2020*, and Order 51 Rule 1 of the *Civil Procedure Rules 2010*. This application, which has been opposed by the 1 st Defendant's Grounds of Opposition dated 29/3/2023, is grounded on the grounds stated on its face and is supported by the supporting affidavit of Dev Mukund Patel sworn by him on 21/3/2023, and is seeking the following orders:

    a. (Spent).

    b. That I be pleased (o recuse and/or disqualify myself from presiding over this suit;[a]

    c. That the same be placed before the Presiding Judge of the High Court, Commercial and Admiralty Division for further directions and orders, including re-allocation of the matter to another Judge; and

    d. That the costs of this application be provided for.

The Factual Background

2. Before delving into the law and legal principles on recusal, the rival arguments of the parties as well the merits of the application, let me first lay bare the events leading the filing of this application. From the plaint, this suit arises from a loan that the Plaintiff obtained from SBM Bank (K) LTD the 1 st Defendant. The suit was filed to stop the said bank from exercising its statutory power of sale. For purposes of the Plaintiffs request for my recusal from this suit, these brief facts of the suit should suffice, as this is not the time to get into the merits of the case. This preliminary stage, and since I have not yet heard the case, it is proper that I confine my account to the events of 20/3/2023 when this matter came up before me for directions.

3. From the record, this suit herein was filed in January 2023, together with a Notice of Motion dated 20/1/2023. The same was placed before Mabeya J under a certificate of urgency. His Lordship who is the Presiding Judge Commercial and Tax Division where I serve, by his orders of 25/1/2023 directed that the application be mentioned before me on 20/3/2023, and granted an interim injunction to last until then. On Monday 20/3/2023 when the application as cause-listed came up before me virtually, a Mr Olonde Advocate recorded appearance as holding brief for Mr Rene the Plaintiff's Advocate on record, while Ms Odongo Advocate from the law firm of Robson Harris Advocates LLP appeared for the 1 st Defendant. There was no appearance for the 2nd Defendant, who the Plaintiff had not served, and there was no affidavit of service on record.

4. Mr Olonde in his address for Plaintiff/Applicant requested that the hearing of the application be postponed for 90 days to give the Plaintiff time to negotiate with the bank. It should be noted that the application the advocate was seeking to postpone for a whole a whole three months, was that day cause-listed before me for directions on how it should be hearing. Besides, it had been filed under a certificate of urgency and an interim order of injunction obtained stopping the bank from realizing the security the Plaintiff had charged for the loan.

5. I rejected that prolonged and unreasonable postponement of the application and said that a party cannot come to court under certificate of urgency and once it has obtained interim orders and is enjoying them resort to postponing for such a prolonged and unreasonable time, the hearing of the same application it brought to court under certificate of urgency and pleading for interim *ex parte* relief. I informed the advocate that I could not extend those *ex parte* interim orders for such a prolonged period, and that where there are interim orders on an application, I could not allow the hearing of the application to be postponed for that long.

6. In line with the Judiciary's current policy of efficient and expeditious disposalof matters and the problem of case backlog, informed the advocate that I would discharge those orders if the urgency that informed the grant of those *ex parte* orders the Plaintiff was enjoying no longer abided. That was on Monday 20/3/2023. I expected that to make the advocate agree to an expeditious hearing disposal of the application since it had been filed under a certificate of urgency.

7. On noticing that the Advocate was unmoved, and was still for a prolonged postponement of the hearing of the application, I discharged the said *ex parte* interim orders then being enjoyed, and directed that the application having been filed under a certificate of urgency and those orders obtained under that urgency,it be heard orally on Thursday 23/3/2023 at 2.30 PM. Which was only 3 days away, as it was on Monday 20/3/2023. By so doing, instead of letting the Plaintiff to continue enjoying interim orders while clamouring for a prolonged post ponement of a mere application, I as it was within my discretion declined to extend the said interim orders and further, and put the hearing of the said application only 3 days away. Such interim orders could even be after hearing, to last until the ruling.

8. In effect therefore, I offered the parties a fast fast-tracked hearing of the said application instead of postponing it for the proposed prolonged and unreasonable period of three months. Immediately I issued those directions, Mr Rene Advocate whose brief was being held by Mr Olonde popped up on the screen and started protesting as Mr Olonde then holding his brief suddenly without excusing himself or informing the court that Mr. Rene was now present, just vanished!

9. I stood my ground and stated that Thursday was only 3 days away, and I had Ualready issued and signed the directions and that the application was for hearingon Thursday 23/3/2023 as directed.

10. On Thursday 23/3/2023 at 2.25 PM, the Plaintiff through his advocate on record Mr Rene, under a certificate of urgency, filed this application, seeking that I s the court expected both parties to have prepared to argue the application and have a merit determination, and it did in fact scuttle, jolt and put off the hearing scheduled for that time lnterestingly, among the annextures on the supporting affidavit of the said Dev Mukund Patel a director of the Plaintiff Company, is an unnecessarily lengthy and dishonest complaint to the Judicial ServiceCommission dated 23/3/2023. Wherein he has stated that on that day he was personally logged on the virtual platform that day and witnessed me conducting the proceedings with gross misconduct and bias.

11. By filing this recusal application instead of proceeding with his initial application, the Plaintiff has itself squandered the opportunity to have its supposedly meritorious application heard and determined without undue delay instead on insisting on enjoying *ex parte* interim orders that the Defendant has opposed. The Plaintiff itself jolted and put off the hearing that was scheduled on that day at 2.30 PM, by filing this recusal application just five minutes to start of the scheduled hearing. At the session, his advocate Mr Rene insisted that he did not wish to proceed with his scheduled application in which he was seeking the injunctive orders. And his Advocate insisting that to him, my recusal was more important than the initial application.

12. After I acceded to his request of putting off the hearing and giving directions on the recusal application, Mr Rene immediately made an oral application that I grant on the recusal application interim injunctive orders relating to the property the subject matter of the very application whose hearing he had by his recusal application scuttled, and which were the same orders he was seeking in then said application of 20/1/2023. That request was opposed by the defendant's advocate, gave a ruling declining to grant those orders, on the grounds stated therein. Certainly, there was no nexus between the orders he was seeking, and the application for recusal.

13. Curiously, the Plaintiff has since 20/3/2023 when I discharged the *ex parte* interim orders, filed two other applications (dated 21/3/2023 and 30/3/2023, respectively) seeking the same orders as the initial application of 20/1/2023 whose hearing which it scuttled and put off- all in the hope that the computer system would unsuspectingly direct them to a different Judge for issuance of those same interim orders he was enjoying.

Analysis and Determination

14. Upon reading the application, its supporting affidavit and annextures, the Defendant's Grounds of Opposition thereto, as well as the applicable law and legal principles, I have deciphered two issues that call for my determination in this application, namely (a) Whether this application has met the legal threshold for recusal applications, and (b) Whether I should recuse myself from this matter as proffered by the Plaintiff in this application, or what orders I should make.

Has the Application Met the Legal Threshold for Judicial Recusal?

15. From the court proceedings of 20/3/2023, the substance of this application, the Plaintiff's affidavit, the material and evidence on record, as well as the applicable law and legal principles, this application as I have hereinafter demonstrated, not only falls far short of the legal threshold required for recusal, but is wholly meritless.

16. The bedrock of this determination rests on the test that a recusal is necessitated where it is proved beyond peradventure, speculation, conjecture, and sheer paranoia, that a judicial officer will not impartially handle a case before him, as a result of actual bias or a reasonable apprehension thereof; and never on unfounded or unreasonable apprehension. Where an application is based on apprehension rather than actual bias, the apprehension should be that of a reasonable person and must be assessed in the light of the true facts as they emerge at the hearing of the application: and the test to weigh the apprehension should an objective one, and not subjective one based for instance, on paranoia.

17. The Supreme Court of Uganda in *Uganda Polybags Ltd v Development Finance Company Ltd & others* [1999] 2 EA 337 was of the view that litigants have no right to choose which judicial officers should hear and determine their cases since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will and the oath must be respected. Here at home, our Court of Appeal in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others* Civil Appeal No 36 of 1996 stated as follows:

> " Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias.... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour.... Although most litigants would much prefer that they be allowed to shop around for Judges that would hear their cases, that is a luxury which is not yet available under our law to litigants. "

18. I dare say that this application is among its other intentions, a forum shopping scheme that should not find glorification of whatsoever. The Court of Appeal in *Galaxy Paints Company Limited v Falcon Guards Limited* [1999] eKLR. stated as follows:

> " Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried someone thought to be more likely to decide the case in their favour. "

19. Some recusal applications such as this particular one, are made in the hope that they will tarnish the Judge' s reputation as well as cause him or her psychological, mental and emotional pain regardless of whether the application succeeds or not.

This should be resisted by every Judge minded about his judicial oath of office, which is that he will dispense justice without fear, favour or other influence, and with fidelity to the law and the *Constitution*. Judicial office is not for the fainthearted and a Judicial officer's spine ought to be made of steel.

20. Many a litigant still believe, and mistakenly so, that an unfounded apprehension of bias could form a justifiable basis for recusal. For allegations of bias to necessitate a Judicial officer's recusal, the bias must be real or reasonably apprehensible, and not speculative, by conjecture, or merely imagined. There are many other who unconventionally employ recusal not as an avenue for advancing judicial integrity, but as a tool for furthering their case. To them should be said that recusal was never meant to be a litigation tool of litigants and their lawyers. Courts should never allow recusal to be used as a tool for the crucifixion of judicial officers as is attempted in this application.

21. Recusal is not merely the litigants' tool for dislodging judicial officers from proceedings, but tool that judicial officers can themselves harness to advance the rule of law as well as the dictates of natural justice and fair play. A judicial officer presiding in a case will have no difficulty recusing himself where he knows or it is sufficiently demonstrated, that he is biased, likely to be biased, or unlikely to be impartial. Recusal applications by litigants ought to be used by them as a shield for safeguarding the administration of justice as well as the integrity of the judiciary, and not as a sword for attacking Judges. It should never be for merely expressing displeasure of litigants, or satisfying their egos; but to bring honour and dignity to judicial office.

22. An ill-intended application for recusal such as this one, places a judicial officer in a most difficult and discomforting position and unless subjected to the truth, can impair his impartially, objectivity as well as fidelity to law and justice, turn him into a pawn of the litigants. Recusal applications should never be made casually and leisurely. They are the kind of applications that should be made in good faith, and with much circumspection, compassion, honesty and truthfulness. Some applicants believe that the moment they apply for recusal, the Judge would just cave in and recuse without much ado.

23. The extravagantly devious and mischievous dispatch ofjudicial recusal will be the death bed of the authority and dignity ofjudiciaries. Especially where recusal applications and threatened or complaints to the Judicial Service Commission (JSC) are used by litigants and their advocates as the sword of Damocles hanging on the necks of judicial officers. By so doing, recusal then becomes an occupational hazard for judicial officers, which was never its intended purpose. Judges who have in the course of proceedings not perpetrated any impropriety, should gladly appear before the JSC and vindicate themselves of such complaints. This will stem the current state of affairs, where uncanny litigants keep waving to the Judges, the stick of a complaint to the JSC. Unless hard tackled, recusal application can at times be exploited for hidden litigation gains such as stealing the match from the court, unevening the playing field to the disadvantage of their adversaries, upstaging them, or removing them from the seat of justice.

24. Just as a feeble, vulnerable, terrified and intimidated judiciary is unhealthy for law and the administration of justice, nascent democracies such as Kenya's require a strong, vibrant, assertive and independent judiciary. A dignified and venerable judiciary is to be preferred. This is because world over, the judiciary is the vanguard of justice, a temple of law, and the last line of defence for rights and fundamental freedoms guaranteed by Constitutions. Notably, a threat on Judges and their independence, is a threat on the *Constitution*, the rule of law and the administration of Justice.

25. Needless to say, recusal should not be used by litigants for intimidation, insubordination, blackmail, arm-twisting, capture, or the boxing of a Judge into conforming with a litigant' s whims; or for throwing him into panic, subservience or dishonor. Such ulterior motives if allowed have the

undesirable consequence of chipping away on the authority, dignity, integrity and independence of courts. This is because, recusal applications are applications in person am rather than in rent. In that they are made against the person of the judicial officer, rather than the subject matter of the suit. Besides, whenever they are made, all the proceedings and other applications in the suit have to be paused to await the determination on recusal, before they can resume.

26. The Defendant in its replying affidavits to the Plaintiffs pending applications, denied Mr. Olonde's representations of 20/3/2023 that there were on-going negotiations between the parties, and stated that the Plaintiff had not evenapproached them. It is therefore clear in my mind that, that was ploy by the Plaintiffs advocates to mislead the court and dupe it into adjourning the case almost indefinitely for a whole 90 days, with interim orders enjoyed.

27. It is my position that failure by a party enjoying interim orders to comply with directions or order of the court in those proceedings where those orders were obtained, disentitles that party to those orders and is a compelling reason for the discharge and vacation of those orders. Interim orders should be for purposes of advancing the cause of justice, and not for subverting or antagonizing it. Unlike the case with litigants like the Plaintiff, who after obtaining interim orders and are enjoying them, now resort to using delaying tactics to avoid the hearing and determination of those proceedings. On this, any judicial officer worth his judicial oath of office should frown upon.

28. Interim orders should never be an incentive to postponement and adjournment of cases. From the court record of 20/3/2023, it was as clear as pikestaff, that the Plaintiff's advocate having obtained interim orders which his client was happily enjoying, was now intent on his client continuing to enjoy the same indefinitely including the next 90 days, and was no longer keen on prosecuting his urgent or formerly urgent application. Which he had filed for his client under certificate of urgency. What he forgot, was that those orders as worded, were to last until directions on 20/3/2023.

29. This application is overbearing, oppressive and uncalled for. It has failed to prove bias or the likelihood of bias on my part. Besides, there was no suggestion in it, that of any one of the suitors or their advocates is known to me or related to me, or that I have any interest in this suit or its subject matter. And neither was it shown that I made any intemperate or extra-judicial remarks against any of the parties or their respected advocates. My conscience is clear that there was no wrong-doing or impropriety whatsoever on my part in the proceedings herein of 20/3/2023.

30. I conducted myself with integrity, impartiality, competence, independence and diligence; as required of me by the *Bangalore Principles on Judicial Conduct*, the Judicial Code of Conduct, and my oath of office as Judge. It is my commitment to the expeditious disposition of cases, the fair administration of justice and a level playing ground for all litigants, that seems to have spurred the Plaintiff into applying for my recusal. My only sin being that I fast-tracked the hearing of his urgent application instead of adjourning it for 90 days as demanded by his advocate. That is a decision I do not regret, and neither do I regret my disapproval for unnecessary and unbridled adjournment of cases.

31. Time is ripe for the Kenyan judiciary to formally adopt a no-adjournment policy.At that time litigants like the Plaintiff, bent on using recusal applications to put the parent suits in indefinite abeyance, will start enjoying the benefits and fruits of cases being heard expeditiously and concluded without undue delay. Especially in commercial disputes such as the one the subject of this suit. It is surprising that some parties seem to delight in parking their cases in the court registry rather than bringing them to the courtroom for hearing. This should not be allowed in the commercial court such as this, where some cases are time bound by statutory timelines.

32. I need to disclose that today 14/4/2023 before reading this ruling, Mr Rene the Applicant's advocate in his address to court stated that his client was no longer urging my recusal, and that it had instructed him

to withdraw the application. Further that, that is why he did not file any submissions on it. This was a virtual court session, which is recorded. My question is: What about his client's unfounded complaint to the JSC which he annexed on the application, and which having been filed is a permanent record? This is actually sharp practice that can hurt a judicial career, but which I now take as an occupational hazard and excuse it, hence as per my oath of office will not allow it influence me or compromisemy impartiality in this case or cloud my judgment. This being the formative stage of my judicial career, I believe there will be many other litigants that may take the root the Plaintiff took, and I take this in my stride.

33. Before I finally determine whether I should recuse myself or not. This being a court of record, I need to address the issue whether in recusal proceedings the Judge is at the mercy and let of the Applicant. And whether failure to prosecute, or withdrawal of a recusal application automatically terminates the court's consideration of the request or application. My answers to these questions are in the negative (an emphatic No). In my considered opinion, the question whether to recuse or not, is a question of law that is determinable in accordance with the law, established legal principles, and Codes of Judicial Conduct. It is not a purely factual question.

34. A court can determine an application for recusal on the basis only of the application, its supporting affidavit and annextures. There is no law precluding courts from proceeding to determine the recusal without any hearing or subsequent arguments or written submissions by the applicant. Upon reading the application, the Judge can elect to recuse himself without having to list the application for hearing. This can be at the court's election in the exercise of its inherent discretion, or where the applicant fails to prosecute the application or file submissions on it.

35. I am of the view that a Judge can recuse himself even where the application is withdrawn, just the way he can for sufficient cause recuse himself sua moto without any application for his recusal. Further, a Judge can recuse himself even on grounds other than the ones a party has placed before him. The rationale for me taking this position is that judicial recusal is a fundamental and very critical determination meant to further the administration of justice as well as preserve judicial integrity. In this matter, I would have proceeded to determine recusal even if the applicant withdrew the application, or as I did in this application when the applicant did not file submissions.

36. By so-doing, courts will deal with the improper habit of parties or their advocates filing recusal applications and later: (a) Failing or even electing not to prosecute them; (b) Simply abandoning them, or (c) Withdrawing them. They do this after having embarrassed or humiliated the subject judicial officer and caused him mental anguish. Proceeding to determine those applications despite such failure, abandonment or withdrawal, will discourage the habit of parties or their advocates making recusal applications and later failing or electing not to prosecute, abandoning them, or quickly choreographically and dramatically withdrawing them before they are heard, sometimes on the eve of the hearing, at the hearing, while the application is pending ruling, or on the day of the ruling as attempted in this case.

Should I Recuse Myself?

37. No reasonable or sufficient cause having been shown for recusal, I have to politely decline that invite. I consequently decline to recuse myself from this suit.

The Orders

38. The application is hereby dismissed for lacking merit. It having been specific to me rather than the defendants or the subject matter of the suit, there shall be no order as to costs. The parties are hereby

directed to attend court on 17/3/2023 as earlier scheduled, for directions on the hearing of the pending applications.

DATED AND DELIVERED AT NAIROBI VIRTUALLY THIS 14TH DAY OF APRIL 2023.

PROF NIXON SIFUNA

JUDGE

Delivered in the Presence of:

Mr Rene for the Plaintiff/Applicant

Ms Odongo for the 1 Defendant/Respondent

N/A for the 2nd Defendant

Dennis Nyaga- Court Assistant