IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

MISCELLANEOUS CASE NO. 73 OF 2019

BETWEEN

C. G. WAITHIMA & COMPANY ADVOCATES .....APPLICANT

AND

PETER MWANGI KARIUKI..... RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 7th September 2020 seeks the following orders:

> *[i] The Honourable trial Judge be pleased to recuse himself from the conduct of the matter.*
>
> *[ii] That the Honourable trial Judge be pleased to order that the matter be heard and determined by a different and/or another court.*

2. The application is supported by the affidavit of Charles Githitu, the advocate practicing in the name and style of C. G. Waithima and Company Advocates, sworn on 7th September 2020. For the sake of completeness, I propose to set out the material contents of the deposition as follows:

> *[2] THAT on 13th March 2020 the trial Judge did issue an order converting the certificate of taxation dated 1st November 2019 to a decree and judgment.*
>
> *[3] THAT subsequent thereto, the trial Judge did order the respondent herein to pay monthly instalments of Kshs. 15,000 every month beginning 5th April 2020 while in the same breath staying execution of the said decree.*
>
> *[4] THAT the respondent herein has willfully failed, neglected and or refused to strictly comply with the orders of this Honourable court.*
>
> *[5] THAT further, erroneously and in bad taste, the trial Judge has in a funny way continued to issue stay of execution of the said decree as a consequence thereof continues to step on the applicant's toes.*
>
> *[6] THAT in view of the foregoing, it is manifest that the trial judge is stalling the process of execution of the execution of the said decree.*
>
> *[7] THAT accordingly, for the ends of justice to be met, it is only fair that the Honourable Judge does cease in conducting the matter.*

3. That brief deposition was supported by oral submissions by Mr Nakhone, counsel for the Applicant, along the same lines. Ms Busima, counsel for the Respondent, was content to leave the matter of recusal to the court.

4. It is the right of every party to apply for a judge to recuse himself. This proceeds from the fact that justice must not only be done but must be seen to be done and if a basis is established that justice will not be seen to be done, then the judge must give way. On the other hand, Judges have a duty to sit, hear and determine cases and it is assumed that absent a direct conflict of interest, they will discharge justice in accordance with the oath office. Further, the court must be alive to the fact that unwarranted, malicious and frivolous applications for recusal by disgruntled litigants have the effect of undermining justice.

5. In cases where a party seeks recusal of a judge on the basis of apparent bias, the party must establish a factual basis for seeking recusal. The test is objective and not subjective. In ***Justice Philip K. Tunoi and Another v Judicial Service Commission and Another*** **NRB CA Civil Appeal No. 6 of 2016 [2016] eKLR**, Court of Appeal adopted the decision in ***Porter v Magill*** **[2002] 1 All ER 465** where the court held that the test for apparent bias is, *"[W]hether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court (per Ibrahim J.) in* ***Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR*** *where he observed that, "The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."*

6. As I understand the accusation against me is that I am stalling the case and staying execution to the detriment of the Applicant. What is apparent from the affidavit though, is the paucity of facts. First, the Applicant does not acknowledge the fact that the Respondent has filed an application which is pending hearing and determination. The Applicant also states that I have, *"in a funny way"* continued to issue stay orders but does not point to specific aspect of the record or proceedings to support the "*funny way*" in which I have acted.

7. What then are the facts? The first time I dealt with this matter was on 13th March 2020 when the application to convert the certificate of costs to a judgment came up for hearing. On that day, the Respondent appeared in person. He did not oppose the application but instead pleaded with the court for an opportunity to pay the decretal sum by instalments. After hearing the parties and considering the circumstances, I entered judgment in favour of the Applicant but allowed the Respondent to pay instalments of Kshs. 15,000.00 per month commencing April 2020. I thereafter issued an order of stay of execution on condition that the payments would be made as scheduled.

8. Two days later, the COVID-19 pandemic was declared and as part of directions issued by the Chief Justice executions were generally stayed. In due course, the Respondent instructed *Njogu Mungai and Company Advocates* who filed an application for stay and for review of instalments on 18th June 2020. The application was fixed for directions on 19th June 2020. On that date I gave parties, through their advocates, Mr Nakhone for the Applicant and Ms Busima for the Respondent, an opportunity to negotiate and record settlement on 2nd July 2020. I also issued an order of stay of execution based on the Respondent's application.

9. On 2nd July 2020, Ms Busima, counsel for the Respondent, attended court and in the absence of Mr Nakhone, I directed that the matter be mentioned on 21st July 2020 and that the Applicant be served. I extended the order of stay to that date. On 21st July 2020, Mr Nakhone appeared before the court and raised the issue that I was being unfair to the Applicant by staying execution. He applied for me to recuse myself. I directed counsel to file and serve a formal application for recusal before 17th August 2020 on which day I fixed the matter for mention for further directions.

10. On 17th August 2020, Mr Nakhone did not attend court. Since he had not filed and served the application for recusal by that date, I fixed the Respondent's application dated 18th June 2020 for hearing on 11th September 2020. I directed Ms Busima to serve notice thereof on the Applicant.

11. The application for recusal was filed on 10th September 2020, a day before the Respondent's application dated 8th June 2020 was scheduled for hearing. Even before the matter could be heard, Mr Nakhone informed the court that the Applicant had not been served with the Respondent's application dated 8th June 2020 despite the matter having been in court since 19th June 2020. At no time did counsel raise the issue of lack of service of the application. I however heard the application for recusal and reserved the ruling.

12. On the basis of these proceedings, can a reasonable person with knowledge of the facts I have set out above come to the conclusion that the Judge was deliberately delaying the matter to the detriment of the Applicant or acting in a "*funny way*"? I do not think so. If there is any delay it can only be attributed to the Applicant and his Advocate. Mr Nakhone has failed to attend court twice despite being in court when the dates were taken. On each of the dates, the Respondent's application dated 8th June 2020, on which the stay is predicated, would have been fixed for hearing or indeed heard. Further, it took over one and a half months for the Applicant to file the application for recusal.

13. As a matter of record, I issued an order of stay pending the hearing and determination of the Respondent's application dated 18th June 2020. The court has discretion to issue an order of stay and in this case it is intended to maintain the status quo so that the application is not rendered nugatory if it is successful. The Respondent also has a right to be given a fair opportunity to prosecute its application. At this stage and before hearing him and the Applicant's response, it cannot be said that the Respondent's failure to settle the decretal sum is deliberate.

14. I have said enough to show that I shall not recuse myself from this matter. The Notice of Motion dated 7th September 2020 is devoid of merit and is dismissed with costs to the Respondent.

DATED and DELIVERED at NAIROBI this 14th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Nakhone instructed by C. G. Waithima and Company Advocates for the Advocates/Applicant

Ms. Busima instructed by Njogu Mungai and Company Advocates for Respondent.