REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 551-575 of 2012

THE STATUTORY MANAGER
UNITED INSURANCE CO. LIMITED……..... PLAINTIFF

VERSUS

KENNETH NGANGA MUNGAI P/A
MUNGAI AND GAKURU ADVOCATES……DEFENDANT

RULING

1. These are suits by the Statutory Manager of United Insurance Company Limited against the Defendants, who are Advocates of this Court for Accounts under Order 52 of the Civil Procedure Rules. The Statutory Manager was appointed by the Commissioner of Insurance on 15th July 2005 under the Provisions of Section 67 C(2)(i) of the Insurance Act, Cap 487. In its mandate under that Section , on 30th August 2012, the Manager filed these suits being HCCC No.'s 551 to 574 of 2012 wherein Kenneth Ng'ang'a Mungai T/A Mungai and Gakuru Advocates was the Defendant(herein after "the 1st Defendant") and HCCC No. 575 of 2012 wherein Mr. Livingstone Simerly Sare practicing as Sare & Co. Advocates is the Defendant (hereinafter "the 2nd Defendant). By an Order of this Court made on 17th September 2012, these matters were consolidated. Subsequently directions were given on 17th September, 2012 that the suits be heard by way of Affidavits. It was also directed that the Parties do file their respective written submissions.

2. When the matters came up for hearing on 25th February, 2013, Mr. Ombete learned Counsel for the 1st Defendant indicated to the court that he had instructions of his client I should disqualify myself from hearing these suits. According to the 1st Defendant, there was no impute of any improper motive or bias on my part per se in the hearing and determining these cases. Counsel had therefore filed a "document" entitled **"APPLICATON FOR THE HONOURABLE MR. JUSTICE MABEYA TO DISQUALIFY HIMSELF FROM HEARING THESE CASES"**dated and filed on 20th February 2013. The same was not expressed by way of the known mode of commencing an application i.e Motion or otherwise, but by way of written reasons and submissions.

3. In it the 1st Defendant contended that in the Case of **Sammy M. Makove Commissioner of Insurance vs. Kenya Reinsurance Corporation (Statutory Manager) and United Insurance Company Limited HCCC No. 545 of 2012** (hereinafter "HCCC. No. 545 of 2012) I made a ruling that was delivered on 28th March 2012 that consequently invited the Plaintiff to file the present suits before this court. In the foregoing, the 1st Defendant contended that he will not receive a fair hearing in these suits. He contended that he would like the suits to be heard before another judge who had not expressed any opinion on the merits or otherwise of the subject matter of the issues raised in these suits, that he was afraid that it will be nearly impossible to persuade me to rescile from the opinions I had expressed in the aforementioned

case.

4. Mr. Ombete for the 1st Defendant also submitted that under the circumstances it would be in the interest of justice if the 1st Defendant's defence could be heard by another Court which has not handled cases pertaining to the Plaintiff Company under Statutory management. He submitted that applications for recusal of a court could be made orally as no procedure on how the same should be made has been provided by law and that a Party has a right to request for the recusal of a Judge where he feels that his case has no chance of a fair hearing .Counsel relied on the Case of **Frome United Breweries Co Ltd v Bath Justices [1926] A.C. 586** in support of this contention. Counsel for the 1st Defendant submitted that I had expressed opinion in this matter when I held that the Statutory Manager had been impeded from carrying out his functions in the said HCCC No. 545 of 2012, that I had also suggested that Parliament should amend the Insurance Act to provide for penal provisions against Advocates who had acted for United Insurance Company Limited. Mr Ombete submitted that in light of those pronouncements, the 1st Defendant fears that his case will not be adjudicated upon in accordance with the Law. In the Opinion of the 1st Defendant I have already been influenced with the problems that have bedevilled United Insurance Company Limited and I have therefore made a determination of what the Statutory Manager should do and hence justice will not be served in these suits in light of that Ruling dated 28th March 2012. Counsel therefore urged that the application should be allowed.

5. On the application of Mr. Sare, the 2nd Defendant, the Court allowed him to address the Court, since his Advocates had failed to attend to attend Court. Mr. Sare identified himself with Mr. Ombete's submissions.

6. In opposition to the application, Mr. Millimo learned Counsel for the Plaintiff contended that the application is baseless, mischievous and an afterthought calculated to protract the expeditious disposal of the issues raised in the Suits. He submitted that the suits filed herein involve the Professional Conduct of Senior Officers of this court who owe a duty to both their clients and the Court. Counsel contended that the 1st Defendant had failed to file a formal application and had only filed submissions in breach of Order 51 of the Civil Procedure Rules which require that all applications must be through a Motion except as otherwise provided or directed by the Court. Counsel pointed out the 1st Defendant had not cited any law allowing him to invoke the jurisdiction of this court orally and the Application was therefore baseless in law. The 1st Defendant had on his own admission stated that there was no bias or improper motive on the part of the court and that therefore the issue before this court is whether a judge can recuse himself without apprehension of bias. It was contended that the rule on recusal requires that there should be a demonstration of bias, which has not been alleged or demonstrated in the present application. Counsel urged that the Application should be dismissed.

7. On the Ruling of HCCC No. 545 of 2012, the Plaintiff's counsel submitted that the same was decided on the facts before the court and in the foregoing had nothing to do with these suits. Mr. Millimo indicated that he was involved in the said HCCC No. 545 of 2012 and that the Ruling made on 28th March 2012 did not inform the institution of these suits. In his opinion, these suits having been commenced on 30th August 2012 under a certificate of urgency and the 1st Defendant had not raised the issue of recusal at any stage until the day of the hearing, it was an afterthought meant to serve as a diversionary tactic. It was submitted for the Plaintiff that parties should not be allowed to engage in forum shopping. That in the case of , **Frome United Breweries Co Ltd v Bath Justices[1926] A.C. 586** relied on by the 1st Defendant was inapplicable as Justices in that case were disqualified on the basis of bias. Mr. Milliomo observed that the 1st Defendant fears I will not rescile from the pronouncements made in the ruling dated 28thMarch 2012 was baseless and that for a judge to recuse himself from a matter, it requires that a party making such an Application should advance proper and valid reasons for such recusal. The Plaintiff therefore urged this court to dismiss the Defendant's Application.

8. I have carefully considered the Counsel's submissions on the matter. I have also considered the authority relied on by the Defendant. There are two issues arise for determination. First the issue on the form in which the application for recusal was made and secondly whether or not I should recuse myself

from hearing these suits. I propose to start with the first issue.

9. It is the contention of the Plaintiff, that the 1st Defendant breached the provisions of Order 51 Civil Procedure Rules 2010 as the present Application was not expressed to have been brought under any provision of the law nor was it made under a Notice of Motion or a manner that was prescribed by the Court. Order 51 Rule 1 of the Civil procedure rules provides thus -;

"All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."

It is not in dispute that no formal application was filed. Only reasons by way of submissions. This is so notwithstanding the clear provisions of Order 51 of the Civil Procedure Rules that I have cited. In my view, this issue brings into sharp focus the battle between adherence to procedural technicalities and formalism on the one hand, and dispensation of substantive justice, on the other hand. Article 159 (2) (d) of the Constitution of Kenya 2010, requires that justice shall be administered without undue regard to procedural technicalities. In the case of **Masefield Trading (K) Ltd v Kibui [2001] 2EA 431** ,HEWETT J, stated:

"This case highlights the conflict between strict compliance with procedural requirements, which can sometimes work so as to deprive one party, and the Court, of the opportunity to delve into and decide the real issues in controversy……The Applicant is merely standing on bare technicalities. Nobody has a vested right in procedure and a Court must, at least at the present day, strive to do substantive justice to the parties, undeterred by technical procedure rules. As is often said, rules of procedure are good servants, but bad masters... Lord Denning, the celebrated English Judge has said, ad nauseum, that technicalities are a blot in the administration of justice. English courts have on numerous occasions refused to set aside process for technical irregularities — see Macfoy v United Africa Company Ltd [1962] AC 152."

While I agree with the notion that rules are handmaidens of justice and are formulated for a purpose and not in vain and that the same should not be flouted with impunity, I hold the view that Courts should always endeavour to do Justice, unless the failure to follow procedure would lead to injustice itself.

Given the nature of the application and weighty issues it raises, I hold that the matter should be considered as raised by the 1st Defendant notwithstanding the fact that the Application was not brought by way of a formal application Motion.

10. I now turn to the main issue of recusal. The Defendant's contention is that having made a ruling on 28th March 2012 in the said case of **Sammy M. Makove Commissioner of Insurance vs. Kenya Reinsurance Corporation (Statutory Manager) and United Insurance Company Limited HCCC No. 545 of 2012** there is a likelihood that I cannot, in the present suits, act in an impartial manner and that I shall be heavily influenced by the pronouncements made in that case . The offending portion of the ruling read as follows;

"Firstly, there is the issue of missing documentation. The manager may have known those who had possession of or who could have assisted in tracing the same but it could do nothing in terms of compelling production of the same or compliance with its directives. Since Section 67C of the Insurance Act is meant for the public good, rather than appointing a manager who becomes ineffective in his carrying out his duties under Section 67C, and who continues to expend the little that there may be in the subject company, the applicant should urge Parliament to amend the law and include therein penal provisions in the event there is interference or attempted frustration of the manager's mandate under the law"

The Defendants contend that it is following these observations that the current suits were instituted by the Plaintiff.

11. The question raised herein is one on the administration of justice. Indeed, it is a well established

principle that justice must not only be done, but should always be seen to be done. The Constitution requires that all courts and tribunals should be independent and impartial in determination of disputes.This is the rationale behind the Oath of Office taken by each judicial officer. From the foregoing, I agree with the Defendant's submission that the question of disqualification is a weighty matter which should not be trivialized and should be treated with the seriousness it deserves.

12. It is not in dispute that the Defendant's do not impute any improper motive or bias on the part of this Court. Their worry is founded on that Ruling delivered in the Said HCCC No. 545 of 2012. The part they are aggrieved with concern my observations regarding the complaint of the Statutory Manager and on his efforts to carry out his functions under the Insurance Act. I agree with the Plaintiff's submissions that the particular ruling was informed by the particular facts before Court. In that matter, the Statutory Manager had sworn that its delays was informed by the fact that it prevented it from undertaking its mandate and functions. I called for legal reform in relation to section 67C of the Insurance Cat to aide in dealing with errant parties during statutory Management. I believe it was this Courts view in the circumstances of that case. It should be noted that in that case none of the Defendants was named as one of the errant parties. In any event in that Ruling, I never directed the Plaintiff herein to pursue any such errant Parties. In those circumstances, was this court not enjoined to examine those reasons before arriving at the decision whether to allow or decline the application? I think the Court was entitled to do so. As regards these cases, it is very clear in my mind that I have conducted the same in a way that would suggest that my sentiments in the Ruling in HCCC No. 554 of 2012 in these matters. I believe that no reasonable man having all the facts can come to that conclusion.

13. What is then the test of determining impartiality in a matter? . In an American case, ***Perry v. Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012)*** it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "**well-informed, thoughtful observer who understands all the facts**", and who has "**examined the record and the law**"; and thus, "**unsubstantiated suspicion of personal bias or prejudice**" will not suffice. In view thereof, do the contents in the ruling in HCCC No. 545 of 2012 make a reasonable man doubt of my impartiality in these cases? Firstly, in that ruling I had been called upon to extend the period of statutory management. In considering whether or not to extend that management, I considered the reasons advanced by the Commissioner for the delayed in concluding the management. As at the time, the Management had subsisted for Seven (7) years. Whether the current suits were set in motion by the Ruling, it is not clear. Mr. Millimo has denied that fact. In any event, the Plaintiff had every right to institute any cases that it reasoned would aid in the performance of its statutory functions as mandated. Had the ruling triggered the filing of these cases, I would have expected the same to have been filed soon after delivery of the ruling. But these suits were filed way after 5 months in August 2012 even after 9th July 2012 the date which that ruling had fixed the matter for mention to consider progress made in the management.

14. In the Supreme Court Case of **JASBIR SINGH RAI & 3 others v TARLOCHAN SINGH RAI & 4 others [2013]**eKLR, the Honourable Justices of the Kenya Supreme Court observed that;

"Even as this Court takes cognizance of the merits of the individual Judge's personal convictions, and of matters of ethics, in such a situation, it is inclined in favour of a choice which begins with the Judge's commitment to the protection of the Constitution, as the basis of the oath of office. The shifting scenarios of personal inclination should, in principle, be harmonized with the incomparable public interest of upholding the Constitution, and the immense public interest which it bears for the people, whose sovereignty is declared in Article 1(1)."

As set out in the ruling in HCCC No. 545 of 2012, I made observations complained of based on Public interest. I noted that the troubles of United Insurance Company had greatly affected members of the public. I believe that calling for Law reform as a way to address the public interest aspect of the Insurance Act for expedited management of failed insurance companies, did not and does not in my view suggest that I had made conclusions on the allegations of the statutory manager. Once a proper complaint is laid by the statutory manger, as it has now done by way of these suits, the same have to be dealt with inaccordance with the law.

15. As stated earlier, cases are decided on the facts before the Court. These suits and the said HCCC No. 545 of 2012 are substantially different. They entail different facts though they relate to United Insurance Company Ltd. In HCCC No. 545 of 2012 the Commissioner sought the extention of the statutory management whilst in the present suits, the statutory manager seeks that the defendant's account for their professional services. I believe that I should decide disputes before me on the evidence and the law applicable. I should not consider any extraneous matters and that in arriving at my decisions, I do so without fear or favour, affection or ill-will. There is no evidence that has been presented to show that there are real grounds for doubting my ability to ignore extraneous considerations and arrive at an objective judgment on the issues before me. I find that the Defendant's application is simply made to delay the conclusion of these cases. I say so because, the record would show that on 11th December, 2012, I granted the 1st Defendant leave to file a further affidavit notwithstanding that he had been served with the suit papers on 30th August, 2012. I also granted an adjournment at his instance on that day. On 5th February, 2012, the 1st defendant applied for an adjournment which I granted. The ruling of 28th March, 2012 was referred to in the Originating Summons and the order made therein was contained in the suit papers served upon the Defendants in August, 2012. On all the several times the suits came up for hearing, the issue of my recusal was never raised until the matters finally came up for trial. Why the delay in making the application if not an afterthought to scatter the hearing? I say no more, The Plaintiff has accused the Defendants of forum shopping. To that accusation, I will only refer to the case of ***Re JRL exparte CJL 91986) 161 CLR 342*** at page 352 where Mason J stated that:-

"***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 by someone thought to be more likely to decide the case in their favour." (Emphasis supplied)***

16. In the foregoing, I find the Defendant's application to be unmerited and it is hereby dismissed with costs.

Dated and delivered at Nairobi this 1st day of March 2013

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A MABEYA

JUDGE