REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 201 OF 2008

PAN AFRICAN CREDIT & FINANCE LTD.....PLAINTIFF/RESPONDENT

(In Liquidation)

- VERSUS -

NICHU INVEVSTMETNS LTD.....1ST DEFENDANT/APPLICANT

RAJNIKANT KHETSHI SHAH.....2ND DEFENDANT/APPLICANT

HASMUKH SUMARIA.....3RD DEFENDANT/APPLICANT

R U L I N G

1. On **11th July 2012** the application dated **19th June 2012** was due for hearing, when the counsel for the Applicant Mr. Isindu abruptly without any prior notice made an application urging me to recuse or disqualify myself from presiding over this matter. In his oral application Mr. Isindu provided the following reasons for the application: -

i. That his clients, the Defendants **NICHU INVESTMENTS LTD., RAJNIKANT KHETSHI SHAH and HASMUKH SUMARIA** were uncomfortable with me, proceeding with this matter.

ii. That his clients above named were unhappy with my Judgment delivered on **20th April 2012** and they believe that they will not get a fair chance if I hear the pending application for stay of execution of that judgement.

iii. That arising from the above judgement there is likelihood of bias, and now they want another court altogether to hear the application.

iv. That under the Constitution his clients are entitled to an independent and an impartial tribunal.

2. In response to the application Mr. Mwangi counsel for the Plaintiff, **PAN AFRICAN CREDIT & FINANCE LIMITED (*in liquidation*)** objected to the application on the following grounds:-

i. The application was meant to intimidate the court and to frustrate the Plaintiff from realizing the fruits of the Judgement.

ii. That the court cannot be accused of bias when the court has all along handled the matter and rendered a Judgement. The application for stay has not been heard and there is no expressed existence of

any bias or likelihood of bias.

iii. That there are no allegations that the court has had any contact with any of the parties, and there is no evidence that the court is vindictive.

iv. That the application is opportunistic, and that the Defendants, having lost a case are now looking for scapegoats.

v. That the application is carelessly made ant that the counsel for the Applicant, Mr. Isindu owes the court an apology.

In his reply Mr. Isindu submitted that the application was made in good faith and was not meant to intimidate the court.

3. I have carefully considered the application and the submissions of counsel. The brief history of this matter is that I presided over the hearing of the suit on two sessions the first on **1st December 2011** and the second on **6th February 2012** when the hearing was concluded. I directed the parties to file written submission which was done by both parties. In the presence of both advocates on **22nd February 2012** I informed the parties that I would deliver the Judgment on the matter on **20th April 2012**. Indeed, on **20th April 2012** I delivered the Judgement in the presence of Mr. Mwangi for the Plaintiff, Mr. Isindu for the Defendant did not attend. Upto this point no party had expressed any likelihood of bias. For me this was the end of the matter until the **21st June 2012** when the file came back to me with a certificate of urgency by the Defendants dated **19th June 2012** seeking the stay of execution of the said Judgement. I attended to the matter in the open court together with other certificates of urgency matters. Mr. Isindu for the Applicant did not come to court in time so I had no option but to dismiss the application soon after 2.30 p.m. and I retired to my chambers as I had nothing else to do in the court. While in my chamber Mr. Isindu enquired to see me on the application which I had dismissed. I allowed him and after giving a reason why he was late, I reinstated the application and heard Mr. Isindu on the same. In fact, I went ahead and granted Mr. Isindu the interim orders he was seeking. I ruled:-

"I have considered the application. I certify it urgent and grant prayer 2 in the interim pending inter-parte hearing of the application on 3rd of July 2012".

Upto this stage, the Applicant had not expressed any fear of bias, and did not give the court any indication that they were unhappy with the court.

4. On **3rd July 2012** when the application was due for *inter-partes* hearing, Mr. Isindu successfully sought for an adjournment on the grounds that he needed to file a further affidavit. He also prayed for the extension of the interim orders. Mr. Mwangi opposed the extension of the interim orders but I nonetheless allowed both the adjournment and extension of the interim orders and directed the application to be head on **11th July 2012**. Upto this stage, still there was no indication that the Applicants had any fear that the Judge would be bias. I was therefore, shocked and taken aback by the abrupt and sudden application by the counsel for the Applicant Mr. Isindu that I should recuse myself on ground of bias or appearance of the same.

5. In my view, the application is not only uncurtius to the Judge but is meant and calculated to intimidate the Judge in carrying out the Judge's constitutional mandate. It is meant to strike fear into the Judge, and to cause the Judge to down the judicial tool and to ground the wheel of justice in respect of the matter at hand. In my understanding there would occasionally be situations where, for good grounds, a Judge may be required to recuse himself in a matter. Such a request would not mean that the judge is culpable for any real or imagined offence. But it would be abdication of constitutional office for a Judge to down tools in respect of a particular matter simply because a litigant has lost a case before a Judge. The Applicant has not alleged that the Judge has had any contact, whether bad or good with the public liquidator or with any other officials of the Plaintiff, or indeed with the Defendant. What the Applicant appears to be saying is that I fear that because we lost the case, we are also likely to lose the application before you. If that is

correct then this application is opportunistic and is simply meant to frustrate the plaintiff in realizing the fruits of the judgement.

6. "**Bias**" is defined in Black's Law Dictionary as

"Inclination, prejudice, predilection, actual bias is a genuine prejudice that a judge Juror etc has against some other person. Implied bias is a prejudice that is inferred from the experiences or relationship of a Judge Juror or other person – it is also termed presumed bias"

I have analyzed the above definition of bias in relation to the matter at hand. The records show that I have not expressed any bias towards the applicant whatsoever expect that I have delivered a judgement against them. The Applicant has not convinced me that I have been bias whatsoever in this matter.

But if for some reason unknown to myself, I have been biased as alleged by the Applicant in the cause of this matter, such bias would amount to what is called in law "***Judicial bias***" Judicial bias is defined in Black's Law Dictionary as

"A Judge's bias towards one or more of the parties to a case over which the Judge presides"

It is also worth to note that

"Judicial bias is usually not enough to disqualify a Judge from presiding over a case unless the Judge's bias is personal or based on some extrajudicial reason"

7. I have carefully considered the concept of bias. Whether actual implied or judicial, I believe I have not in any way whatsoever expressed the same or given the Applicant any reason to be apprehensive of the same. In any event as I have already stated, evidence of a judicial bias would not entitle me to disqualify myself from the current matter.

In dismissing the application I am saddened that the Defendants would make such kind of allegations when the court record clearly show that their wishes have always carried the day from the date of the Judgment. It is unfortunate that the Defendants would shout bias only on the basis that they lost a case. If Judges were to recuse themselves only because a litigant has lost a case or an application before a Judge no judicial work would proceed before the courts since in every suit or application there is a winner and a looser.

8. I however wish to re-assure the Applicants that I am committed to preside over a fair trial and determination of the issues which will come before me in this matter and that in this court they have an independent, fair and impartial tribunal to which they are entitled under the constitution.

The costs of this application are to the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 17TH DAY OF JULY 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Mwangi for the Plaintiff

Isindu for the Defendant

Teresia – Court Clerk