REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, TUNOI & LAKHA, JJ.A.)
CIVIL APPEAL NUMBER 219 OF 1998
BETWEEN

GALAXY PAINTS COMPANY LIMITED ..... APPELLANT
AND
FALCON GUARDS LIMITED ..... RESPONDENT

Appeal from the judgment of the High Court of Kenya at Nairobi (Akiwumi, J) dated the 6th June, 1989 in H.C.C.C. NO. 4477 OF 1986)
****

RULING OF THE COURT

By this application dated 26th May, 1999, Mrs P. L. Dias, advocate for the appellant, Galaxy Paints Company Limited, moves the court for the following orders that:

> ***The Honourable Judges of Appeal, Mr Justice Kwach and Mr Justice Lakha who are on this present Bench, do disqualify themselves from hearing this appeal on grounds that:***
>
> > ***(i) This is the Highest Court in Kenya and there is no further Appeal and the said 2 Honourable Judges having been part of a Bench, which previously exercised its discretion against the Appellant on two previous occasions could be influenced by their previous "striking out" orders.***
> >
> > ***(ii) That "striking o ut" is a discretionary order and it has been exercised on two occasions against the Appellant.***

The appellant sued the respondent, Falcon Guards Limited, in the superior court claiming Shs.219,575.00 being a loss allegedly suffered by the appellant due to the respondent's employees' negligence in failing to prevent burglary and theft at the appellant's factory premises situate along Kitui Road, Industrial Area, Nairobi, in or about 1984. At the conclusion of a seemingly protracted trial the learned Judge (Akiwumi, J as he then was) dismissed the suit on 6th June, 1989. The appellant being dissatisfied with the decision promptly instructed Mrs Dias to file a Notice of Appeal. This she did on the same day of the pronouncement of the judgment. She then applied for copies of the proceedings and the judgment which were supplied to her on 28th August, 1992. About a month later, on 25th September, 1992, she lodged ***Civil Appeal No. 140 of 1992*** which was fixed for hearing on 28th October, 1996. We reproduce in full the order which was made on the even date:

> ***"ORDER OF THE COURT***
>
> ***The record of appeal does not include a certified copy of the decree. This is in breach of the mandatory provisions of Rule 85(1) (h) of the Rules of this Court. The omission renders the appeal incurably defective and incompetent. Accordingly, it is struck out with***

no order as to costs.

Made at Nairobi this 28th day of October, 1996.

R. O. KWACH

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JUDGE OF APPEAL

A. A. LAKHA

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JU DGE OF APPEAL

S. E. O. BOSIRE

.....

AG. JUDGE OF APPEAL"

Following this order, Mrs Dias sought and obtained from the learned single Judge of this Court (Shah, J.A.) leave to lodge appeal out of time. Consequently, she filed ***Civil Appeal No. 263 of 1996*** . When the appeal was called to hearing Mrs Dias, readily conceded that several exhibits which were produced in evidence in the superior court had been excluded from the record. However, she retorted by saying that she excluded them because they were, in her view, not relevant to the appeal. The court made the following order, which we also reproduce fully:

"ORDER OF THE COURT

Several exhibits which were produced in evidence in the superior court have been exclud ed from the record. Mrs Dias says that they were excluded because they were not directly relevant to the matters in issue. The documents which are not relevant can be excluded from the proviso to rule 85(1) of our Rules but under rule 85(3) Judge or the registrar of the superior court shall determine on application to him which documents or parts of the documents shall be excluded. No such order was ever obtained.

The result is that these documents which have been excluded should not have been excluded. They cannot now be brought on record by way of a supplementary record.

Rule 85 (2A) does not permit it. The appeal is therefore incompetent and it is hereby struck out with no order as to costs.

Made at Nairobi this 26th day of May, 1998.

R. S. C. O MOLO

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL"

On the same day on which the appeal was struck out, Mrs Dias again sought extension of time to lodge a notice of appeal and record of appeal out of time. Leave was subsequently granted and ***Civil Appeal No. 219 of 1998*** was duly filed on 21st October, 1998.

It would appear that on 1st April, 1999, Mrs Dias received the following letter from the appellant:-

"1st April,

1999

P. L. Dias Advocate,

P. O. Box 44016,

NAIROBI .

Dear Madam,

RE: CLAIM NO. CL/B/125

C. A. NO. 219/1998

This matter is coming up for hearing on 24th May, 1999. I write to point out that acco rding to the 2 rulings struck out Civil Appeals Nos. 263/96 and 140/92, there is a connection namely one Judge is common in each of these cases.

We should have expected that if a Judge is appointed the 2nd time to hear the same appeal, he should disqualif y himself. We have looked at the 2 rulings, they have rendered our Appeals incurably defective but could the Appeals not have been rejected at inception? in 1992?

We have no quarrel with the 2 rulings but we are concerned as to why one bench is not inde pendent of the other. We think each bench should have been comprised of different judges, so that one is independent of the other.

We have once again looked at our record of appeal in C.A. 219/98 and we think it is in order, having cured the 2 defects bu t we are concerned and would prefer that a fresh bench of new Judges hear this Appeal.

We look forward to hearing from you with finalisation of this Appeal.

Yours faithfully,

M. J. Okumu

CLAIMS/U -WRITING MANAGER "

On 16th April, 1999, Mrs Dias wrote a letter to the Honourable the Chief Justice in which she notified

him that the appellant had lodged two appeals both of which were struck out on "a minor" point. On both these occasions, she stated in her letter, the Judges happened to be Kwach and Lakha, JJ.A. She added:

"I do suspect there is some connection."

She petitioned the Honourable Chief Justice for any 3 Judges

"except the above two"

for the appeal which was scheduled for hearing on 24th May, 1999.

By a letter dated 7th May, 1999, again addressed to the Honourable the Chief Justice Mrs Dias lamented that she had filed the appeal for the third occasion and was apprehensive that Kwach and Lakha, JJ.A. were likely to be biased and therefore he should hasten to re-constitute the bench. Three days later on 10th May, 1999, after receiving no reply from the Honourable the Chief Justice, Mrs Dias wrote to the Deputy Registrar of this Court as follows:-

". . . As the four Judges, Kwach, Omolo, Lakha and Pall, JJ.A. have decided against the appellant it is likely that they will be prejudiced in this appeal".

In her affidavit and submissions before us in support of the application Mrs Dias stated that on receipt of the letter from the appellant she approached the Deputy Registrar of this Court to find out which judges would hear the appeal. She did this in order that she could take steps to see that the four Judges should not be part of the bench scheduled to hear the appeal. She engaged the Honourable the Chief Justice in correspondence when she was informed by the Deputy Registrar that the Honourable the Chief Justice is the only authority who does the allocation of appeals.

She told us in no uncertain terms that she firmly believed that any bench consisting of the said named four Judges would not be independent since they had studied the appeal on previous occasions and had struck out two appeals on minor technical grounds. She expected no justice from them but bias and prejudice. She would therefore seek their disqualification.

As we understand it, Mrs Dias alleges that the four Judges of this Court were in fact actually biased against the appellant. In other words, she is saying that the four Judges are incapable, in the light of what they had already done, of conducting an impartial hearing.

In the recent case of ***R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No.2***) [1999] 1 All E R 577 at page 586 the House of Lords observed that the fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

It is manifestly clear to us that this case falls within the second category of case, viz where the judges are alleged to have failed to act impartially, or had an interest in the outcome of the appeal - its dismissal. This alleged interest is not financial but something akin to malice.

The question then arises whether this allegation is sufficient to give rise to automatic disqualification of the judges from sitting on appeal? It is a cardinal principle of law that holders of judicial offices are

subject to the common law rule of natural justice whereby any pecuniary interest or a real likelihood or actual bias disqualifies a judge from sitting. The principle also applies to non-pecuniary interest.

There is no fine distinction. Also, a Judge should not sit or preside over a case where he has a personal bias towards a party owing to a relationship and the like or may be personally hostile to a party as a result of events happening either before or during trial. Mrs Dias' complaint is that the four Judges struck out two appeals on technicalities. Do these circumstances give rise to a conclusion by a fair-minded and informed member of the public, and; an advocate of 22 years experience like Mrs Dias that the Judges were actually biased and will not be impartial in the appeal? Do these circumstances suggest that the judges would favour the respondent unfairly at the expense of the appellant?

Are there sufficient grounds to establish the actuality of bias?

The two appeals which were struck out were incompetent. Their records omitted primary documents which were necessary for the proper determination of the appeal. We need not reiterate that rule 85 of the Rules specifies the contents of the record of appeal. Mrs Dias did not observe and nor did she want to observe the mandatory provisions of the rule. She blatantly and knowingly breached this fundamental rule. We observe from the record that she readily admitted her mistakes when they were brought to her before the appeals were struck out.

However, a couple of months later and to save face from her client, she is unable or unwilling to see the correctness of the verdicts and is apt to attribute those verdicts to a bias in the minds of the learned Judges. She has not established any facts constituting bias or likelihood of bias on the part of the learned Judges. Her allegations together with those of the appellant are unjustified and are made without a reasonable cause.

The Rules are designed to facilitate justice and further its ends. They are not a thing designed to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee. But, due to rampant inefficiency, negligence, dishonesty, lack of diligence and general disregard for professional ethics on the part of the majority of the advocates in this country, the Rules are abhorred. The result is that the standards of advocacy have in the recent past considerably fallen.

When this Court acts to uphold the Rules it meets with resistance from counsel. The Law Society of Kenya then lends support. The last session of this Court at Nyeri saw fake decrees. Important documents and exhibits were withheld and not incorporated in the records of appeal. The struck out appeals the subject matter of this application are a classic example of faulty appeals. Unless the Rules, the hand maid of justice are observed, the administration of justice will be eroded. This Court will uphold the Rules.

As a result of the failure on the part of counsel to observe the Rules, many like Mrs Dias, have turned to scurrilous abuse and unfounded allegations against the learned Judges and applications to disqualify them, which were formerly very rare, are now a common feature. As we have said elsewhere this practice is nothing but an attempt to shop around for Judges favourable to their cause. It is strongly deprecated.

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. See ***Raybos Australia Pr operty Limited & another v. Tectram Cooperation Property Ltd. & Others 6 NSWLR 272.***

As for the facts of this application, Mrs Dias and the appellant have failed to establish specific acts constituting actual bias by the learned Judges of this Court. The correspondence and the affidavit together with the submissions of Mrs Dias are deficient in substance. It is worthy of note that when we pointed out this to Mrs Dias she feebly attempted to withdraw the application.

Mr Ojiambo, counsel for the respondent, vehemently opposed this application. He submitted that the application was undesirable, misplaced and uncalled for. He termed the complaint pernicious and

condemned the highly inflammatory letter from a non-lawyer. He thought that if the letter was not instigated by Mrs Dias then it was incumbent upon her to write to the appellant to clear the misconception. Mr Ojiambo found the letter rude and malicious. He was of the view that it was only meant to tarnish the image of the Judiciary. The allegations, he observed, were without concrete evidence. He submitted that if the Rules are disregarded the whole judicial fabric would crumble.

In our view these observations are perfectly valid. By following the Rules this Court cannot be said to be acting oppressively.

The two learned Judges of this bench have no good reasons for disqualifying themselves from hearing this appeal since the appellant and Mrs Dias have not advanced any valid reasons for their disqualification.

For these reasons, this application is rejected and is hereby dismissed with costs. The Deputy Registrar shall proceed to fix the hearing of the appeal before us on a priority basis.

Made at Nairobi this 4th day of June, 1999.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR