REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 195 OF 1997

M.A.N.....APPLICANT

AND

J.N.N.....RESPONDENT

(Application for leave to appeal from the ruling of the High Court of Kenya Nairobi (Chief Justice A.M. Cockar) and for stay of further proceedings pending hearing and final determination of the intended appeal dated 16th July, 1997
In
THE JUDICIAL SEPARATION CAUSE NO. 71 OF 1995)

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RULING OF SHAH, J.A.

On the 19th of June, 1997 Mr. Muite who was appearing for the petitioner in H.C. Separation Cause No. 71 of 1995, made an oral application before the learned trial judge (Mbogholi, J.) requesting him to disqualify himself from hearing the cause. That oral application was based on one unsubstantiated ground which I reproduce below:

"She fears that the respondent who has bragged before of being capable of influencing the proceedings shall do so. The respondent is said to have continued to repeat the same threat."

The said Separation Cause is between M.A.N, the

Petitioner wife, and J.N.N, the respondent husband who has filed a cross-petition for divorce.

Mr. Muite's oral application seeking disqualification by the trial judge was made at a stage in the trial when the husband's evidence-in-chief was complete and there had been some cross-examination.

Speaking for myself I would at once point out that the said oral application was based on untenable and unsubstantiated grounds and that the learned judge (Mbogholi, J) ought not to have disqualified himself on such grounds. If judges start disqualifying themselves on unsubstantiated, flimsy and hearsay grounds the administration of justice would suffer. Any disgruntled litigant (I am not saying that such may have been the case in this matter) would make wild allegations hoping that the judge would disqualify himself and thereby delaying the due process of law to the detriment of the other side. Judges ought to be slow and careful in disqualifying themselves from hearing suits or applications.

Judges take an oath to administer justice in terms of section 63 of the Constitution of Kenya. A judge is not concerned with what litigants may brag or boast. He is only concerned with dispensing justice according to law, and any boasts made by litigants ought not to perturb or even bother a judge.

The learned judge, despite some serious objections taken to Mr. Muite's application by Mr. Kilonzo (for the husband), proceeded to disqualify himself saying:

"The allegations made at the instance of the petitioner are grave and of great concern as they go to the root of administration of justice. This court is of the view that whereas it does not approve of parties appearing as looking out for favourable judges it is only fair and just that it pulls out of these proceedings".

I respectfully agree with the learned Chief Justice when he said that "the learned judge, thereupon, more from injured feelings, I feel, than from any other reason, disqualified himself". It would certainly appear that the learned judge may have felt "offended" at the baseless remarks.

But the fact remains that the learned judge's ruling amounted to his disqualification and that the order he made was a justifiable order; the husband could well have appealed against such an order with leave of the judge. But the husband did not do so. He did not even ask for leave to appeal. In my view he had sufficient or at least arguable grounds for such an appeal as I am talking about.

My humble view is that once a judge disqualifies himself and signs such order of disqualification he becomes functus officio. He cannot recall such an order. He can only vary such an order upon application for review or by consent of the parties. The other remedy available to the aggrieved party is, as I have pointed out, an appeal against that order.

What happened in this particular case was that the file of the cause was then placed before the Duty Judge for onward transmission to the learned Chief Justice "for directions as to further hearing". The learned Chief Justice then "directed" as follows: "The file is returned to the Duty Judge for her to send the file back to the Hon. Judge to withdraw his disqualification and proceed with the hearing immediately".

Although headed "Directions" the message of the learned Chief Justice to Mbogholi J is clear to my mind. The learned Chief Justice is telling Mbogholi J to withdraw his disqualification and proceed with the hearing immediately. To my mind the learned Chief Justice is telling Mbogholi J to overturn his order and to proceed to hear the case.

That 'direction' by the Hon. the Chief Justice to Mbogholi J amounts to, in my humble view, a justifiable order and I am fortified in my view thereof, as, on the 23rd day of June, 1997 Mbogholi J made the following order:

"I have read the directions by his lordship the Chief Justice. I hereby withdraw and vacate my disqualification made on 19th June, 1997. Both Counsels may now take the earliest possible hearing date".

Even if headed as "Directions" the directive by the Hon. the Chief Justice to Mbogholi J amounted to, effectively, an order directing him to overrule himself. In my humble view and with all respect to the Hon. the Chief Justice, he cannot direct a judge to overrule himself. It is for this reason that the 'directive' of the Chief Justice amounted to a justifiable Order, appealable with leave. An Order is defined in the Civil Procedure Act (section 2 thereof) as "order" means the formal expression of any decision of a court which is not a decree, and includes a rule nisi".

I lay emphasis on the words "any decision of a court". The directive by the Hon. the Chief Justice amounted to an Order directing Mbogholi J to reverse his order of disqualification which directory order Mbogholi J obeyed, even though it could be said that he was not bound to obey the same.

Rightly or wrongly the applicant's wife had in her favour a formal order of Mbogholi J which gave her the

option of not being heard by Mbogholi J. This order (of disqualification) was a judicial decision. It was a justifiable order. It cannot be ordered set aside by any directive. It is for this reason that, in my humble view, the directive became justifiable. It is therefore appealable albeit with leave.

I would therefore allow this application and grant leave to appeal as prayed and I would also order that further proceedings in the superior court be stayed pending the filing and determination of the appeal against the directive (decision) of the Hon. the Chief Justice ordering or directing Mbogholi J to withdraw and vacate the disqualification. I would also order that costs of this application be costs in the intended appeal.

Dated and delivered at Nairobi this 7th day of October, 1997.

A. B. SHAH

JUDGE OF APPEAL

RULING OF LAKHA, J.A.

I have had the opportunity of reading in draft the Ruling of Omolo, J.A.. For the reasons he gives, I too would dismiss the application with costs and make the same order as he proposes.

Dated and delivered at Nairobi this 7th day of October, 1997.

A.A. LAKHA

RULING OF OMOLO, J.A.

The applicant before us is M.A.N. She and her husband J.N.N, the respondent before us, are locked in a dispute in the High Court on the issue of whether their marriage solemnized at the Office of the Registrar —General on the 9th February 1980 should or should not be dissolved. The hearing of their matter commenced before Msagha-Mbogoli, J. on the 25th May, 1997 and on the 19th June, 1997 after some adjournments, Mr Paul Muite who was appearing for the wife asked the learned judge to disqualify himself on the ground that the husband was bragging that he would be able to influence the proceedings before the judge. That is the only reason which was given to the learned judge, going solely by his record. The learned judge thought that allegation was grave as it went to the root of administration of justice, and the judge thought that it was only fair and just that he should pull out of the case. The learned judge accordingly disqualified himself and ordered that the file be placed before the Duty Judge for onward transmission to the Chief Justice for directions as to further hearing.

Unless the learned Judge was told some other things which do not appear in his record, the only reason upon which his disqualification was sought was so flimsy, in my view, that it did not warrant even a serious consideration. If a litigant chooses to brag about his perceived influence, I do not see how the judge can be held to be responsible for such bragging unless it be shown that the judge was either a party to it or had, in some way, contributed towards it. But that matter is not for our determination in this application. The learned Judge, wrongly in my view, disqualified himself and pursuant to his order that the file be placed before the Chief Justice for directions as to further hearing, the file was placed before the Chief Justice on the 20th June, 1997 and the learned Chief Justice gave written "DIRECTIONS" regarding the further hearing of the case. The learned Chief Justice thought, rightly in my view, that there was no valid reason for the Judge to disqualify himself. That was a perfectly legitimate view for the Chief Justice to take. But the "DIRECTIONS" of the Chief Justice went further and he directed that the Duty Judge should send the file back to Mbogholi, J. who should then withdraw his disqualification and proceed with the hearing immediately. Neither

Mr. Muite, nor Mr. Kilonzo for the respondent, nor their clients were before the Chief Justice when he gave his written directions on the 20th June, 1997. Following the written directions of the Chief Justice, the parties appeared before Mbogholi, J. on the 23rd June, 1997. Without hearing the parties first, that

learned judge made the following order and I quote him:-

"Ct: I have read the directions by his Lordship the Chief Justice. I hereby withdraw and vacate my disqualification made on the 19th June, 1997. Both Counsel may now take the earliest possible hearing date."

The applicant was obviously aggrieved by the directions of the Chief Justice and on the 16th July, 1997, the parties appeared before the Chief Justice where the applicant, through Mr. Muite, applied to the Chief Justice for his leave to appeal to this court against his written directions. The matter was fully argued before the Chief Justice who then reserved his ruling for 12 noon that day. He delivered his ruling, the effect of which was that he held that his written directions were neither a decree nor an order from which one could appeal. He was of the view that the directions were made in his administrative capacity as the Chief Justice and they were accordingly not appealable. In the event, the Chief Justice refused to grant leave.

The applicant now comes to us by way of a notice of motion under Rules 5(2)(b) and 39(b) of the Court's Rules and the order sought from the Court is that

"..... leave be granted to the Petitioner/Applicant to appeal against the Order issued herein by the Honourable the Chief Justice, A.M. Cockar, and dated 20th June, 1997 in Judicial Separation Cause No.71 of 1995 and that there be a stay of further proceedings in the said Judicial Separation Cause No. 71 of 1997 together with any consequential orders made thereunder until the hearing and determination of the intended appeal."

Under Rule 39(b) of the Court's Rules, the Court has power to grant leave to appeal where the superior court has refused to grant leave. For my part, I have no difficulty in holding that in deciding whether or not to disqualify himself, a judge is clearly exercising a judicial discretion and though the order he makes in the exercise of that discretion is interlocutory, nevertheless, such an order is appealable to this Court with leave of the judge himself and failing that, with leave of the court. In the case of KING WOOLLEN MILLS & OTHERS V STANDARD CHARTERED FINANCIAL LTD & OTHERS, Civil Appeal No. 102 of 1994 (unreported), the judge was asked by one of the parties to disqualify himself. He declined the invitation and with leave, there was an appeal to this Court on the refusal by the judge to disqualify himself. The Court unanimously held that the judge ought to have disqualified himself and directed that the case be heard by a different judge. This case illustrates my point that the decision as to whether or not a judge should disqualify himself is an exercise of a judicial discretion and once the discretion is exercised, it can only be set aside through the judicial process.

Judicial process however is a totally different thing from an administrative process. When Chief Justice Cockar gave his written "DIRECTIONS" on the 20th June, 1997 was he engaged in the discharge of his judicial duties as a judge or was he engaged in his administrative duties as the Chief Justice? In his "Ruling" refusing leave to appeal to this Court, the Chief Justice was himself in no doubt that he was exercising his administrative functions. Is that contention borne out by the facts of this dispute? In my view, the answer to this question must be in the affirmative. One great hallmark of a judicial decision is that it can only be validly made after the parties to it have been heard. It is unreasonable to think that Chief Justice Cockar would not be aware of this very elementary principle of the rules of natural justice. Yet before he gave his written "DIRECTIONS", the Chief Justice did not seek to hear any of the parties and that must strengthen the position which he has taken in this matter, namely that he was merely giving administrative directions. Again, the Chief Justice must be taken to know simple terminologies like "judgment", "ruling" and "order". Judicially, there is no place for "directions" unless one is dealing with a summons for directions. The Chief Justice specifically gave "directions", and as I have said, he must be taken to know the difference between "directions" on the one hand and "a ruling or an order" on the other hand. Once again, the Chief Justice's choice of words clearly shows that he never intended to give a judicial order to the learned judge. I agree that one has also to look at the effect of what is done rather than the nomenclature used, but it must not be forgotten that the Chief Justice deals with learned judges who must be taken to know these things. So that in asking Mbogholi, J. to withdraw his disqualification one cannot say the Chief Justice made an order directing that judge to withdraw his disqualification,

Mbogholi, J. could only lawfully withdraw his disqualification in two circumstances, namely:-

(i) if the parties themselves consented that he ought to withdraw it;

or (ii) if there was a valid application for review review under Order 44 of the Civil Procedure (Revised) Rules.

In his "DIRECTIONS" the Chief Justice did not purport to cancel the Judge's order; the Chief Justice clearly knew he could not do that. So that until the 23rd June, 1997 when Mbogholi, J withdrew and vacated his order of disqualification, that order was still valid and existing despite anything contained in the written "DIRECTIONS" of the Chief Justice, and it would have been perfectly within the legitimate exercise of the Judge's judicial authority to decline to act in the manner which had been suggested in the directions. What I am stressing is that only Mbogholi, J. himself could have vacated his order of disqualification and I have already set out the circumstances in which he would have been entitled to do so. As it is, the Judge did withdraw and vacate his order purporting to be acting on the directions of the Chief Justice, but with respect, the directions of the Chief Justice did not oblige him to do what he did, namely to withdraw and vacate his order, and worse still without even hearing the parties before he did so. I have no doubt that the order withdrawing and vacating the earlier one was an order from which an appeal would lie to this Court with leave of the Judge himself or of this Court. But I have not the slightest doubt in my mind, and I so find and hold, that the written "DIRECTIONS" of the Chief Justice did not and still do not constitute an order directed at the Judge. Those directions remained no more than administrative ones, however widely they may have been framed. There cannot be an appeal against an administrative directive and if no appeal lies to this Court, it would be futile and a waste of everybody's time to grant to the applicant leave to appeal or order a stay of proceedings as sought in the motion. I must repeat that it is regrettable the learned Judge found it necessary to disqualify himself for the flimsy reason contained in the file and it is more regrettable that having disqualified himself, he again found it necessary to reverse that order without giving the parties a chance to address him on the issue. Having held that no appeal lies from the written "DIRECTIONS" of the Chief Justice, my logical conclusion must be that this motion must fail in its entirety and must be dismissed, with costs. The High Court file must be remitted back to Mbogholi J. *and* it would be for him to decide whether in the unfortunate circumstances which have arisen, he would wish to proceed with the hearing. As Lakha, J.A. agrees, the final order of the Court shall be that the motion is dismissed with costs.

Dated and delivered at Nairobi this 7th day of October, 1997

R.S.C. OMOLO

JUDGE OF APPEAL