REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 102 of 1994

KING WOOLEN MILLS LTD formely Known as MANCHESTER OUTFITTERS

SUITING DIVISION LTD .....1ST APPELLANT

GALOT INDUSTRIES LTD.....2ND APPELLANT

VERSUS

STANDARD CHARTERED FINANCIAL SERVICES LTD……...……...1ST RESPONDENT

A. D. GREGORY AND C.D.CAHILL.....2ND RESPONDENT

(Appeal from the ruling and order of the High Court at Nairobi (Mr. Justice Dugdale) dated 15th June, 1994

IN

H. C. C. C. NO. 5002 OF 1990

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JUDGEMENT OF THE COURT

In our judgement delivered on 3rd February, 1995, we allowed the appeal in this matter without any order as to costs, and ordered inter alia, that High Court Civil Case No. 5002 of 1990, be heard de nova before a judge other than Dugdale, J. We now give our reasons for our judgement.

The two appellants were plaintiffs in a suit instituted by them in September, 1990, against the first respondent wherein, they sought, inter alia, declarations that the appointment of the second respondent by the first respondent as receiver and manager of the business of the first appellant was invalid, null and void, and that the debentures and all securities given by the appellants to secure the loan granted to the first appellant by the first respondent were unenforceable against them, and an injunction to restrain the respondents from interfering with the running of the business of the first appellant.

In due course, the suit came before Dugdale, J. for hearing. According to the undisputed affidavit evidence and pleadings before us, it appears that after the trial had begun, and two of the appellants' witnesses had given evidence, the appellants, on the eve of the resumed

hearing, filed a suit against the well known firm of lawyers, Kaplan and Stratton, in which they sought an injunction restraining them from appearing for the respondents. This was on the grounds that they had acted for both the appellants and the first respondent during the negotiations between them for the loan that the former had sought and obtained from the latter, and that in the course of this, the former had divulged to Kaplan and Stratton information which contrary to their professional duty to their former client, had been used at the hearing before Dugdale, J. by Mr. Deverell, a partner in that firm of lawyers, who appeared for the respondents, and that if the injunction was not granted, the appellants would not receive a fair trial.

The application for the injunction was heard by Shields, J. who in refusing to grant the injunction stated:
"I must confess I can envisage no sort of confidential information disclosed by the borrowers to his solicitor or his advocates that could by being disclosed to the lender, would work any mischief to the borrower's detriment".

On appeal from the decision of Shields J., this court observed in its judgement in Civil Appeal No. 55 of 1993, delivered on 16th December, 1993, that this passage showed that the learned judge had misdirected himself since, what was really in issue was whether the advocate appearing for the respondents had acted in breach of the privileged protection accorded to information disclosed to him by his client. This court went on to allow the appeal and to grant an order restraining Kaplan and Stratton or those with that firm, from appearing for the respondents, because it would be in breach of the fiduciary duty owed by Kaplan and Stratton to the appellants to allow them to appear for the respondents. In doing so, this court emphasised that the appellant's delay in bringing the application could "not defeat or change the duty or obligations of the common advocate" of the appellants and the first respondent namely, Kaplan and Stratton. It will now be convenient to also set out the provisions of section 134 (1) of the Evidence Act which enshrines the principle of priviledged information between an advocate and his client in our laws:

"134. (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment".

There is no evidence that the appellants had expressly consented to the disclosure by its use, of communications made by them to Kaplan and Stratton and which was, as appears from the unchallenged affidavit evidence before us, made use of by Mr. Deverell in his cross examination of the appellants' witnesses. Furthermore, this court found in its judgement in Civil Appeal no. 55 of 1993, that Mr. Deverell had been briefed by Mr. Keith another advocate of Kaplan and Stratton, who had directly acted for the appellants during their negotiations for the loan from the first respondent. The conclusion can therefore be properly drawn that information imparted by the appellants to Kaplan and Stratton had been, within the context of section 134(1) of the Evidence Act, unlawfully made use of before Dugdale J. This act , it was also to be contended, was one that would make an impression on the learned judge which he may not be able to discard. But it is our view, that upon the occurrence of such an unlawful act, justice demands that the suit be heard de novo. Furthermore, good sense and the need to avoid embarrassment to the learned judge before whom the matter was part heard, would justify an order that the matter be heard de novo before another judge of the superior court.

On 31st May, 1994, when the matter came before Dugdale J. for a continuation of the partheard proceedings, an application was made by the appellants to him to disqualify himself on the following significant grounds:

a. representations and submissions of M/s Kaplan and Having substantially heard this case and particularly Stratton advocates for the defendants and who have now been restrained by the Court of Appeal from acting for the defendants the judge will in all human probability be influenced in judgement by impressions formed during the said part-hearing thereby defeating the purpose of the court of Appeal injunction against M/s Kaplan and Stratton advocates.

b. The plaintiff/appellants have been prejudiced by the conduct of the defendants case by M/S Kaplan and Stratton advocates.

c. There is a real likelihood of bias on the part of the said judge given indications that he has prejudged the case in favour of the defendants.

d. Justice can only be served and be seen to be done by starting the case de novo before another judge."

These grounds were supported by uncontroverted affidavit evidence to the effect that Mr. Deverell had, when the matter was first heard Dugdale J. cross examined two of the appellants' witnesses and that this court had ordered that Kaplan and Stratton and any of their advocates be restrained from appearing for the respondents, because they had, as already observed, obtained privileged information from the appellants their erstwhile clients, in such circumstances, as would render it improper for them to appear for the respondents in the suit brought by the appellants. it was further deponed that the learned judge would be biased in favour of the respondents if he continued to hear the matter since, he would be unable to discard, and rather be influenced, by the impressions made on him by Mr. Deverell's cross examination of the appellant's two witnesses, which cross examination was in breach of the fiduciary duty which Kaplan and Stratton owed to the appellants, and which we might add, was also in breach of section 134(1) of the Evidence Act. In contra, it was argued that the application had not been brought as promptly as it should have been, and had only been brought merely to delay matters. Furthermore, a judge should only disqualify himself if, and there was none, a real likelihood of bias existed. Mere suspicious of a whimsical, capricious and unreasonable person was not enough to justify a judge disqualifying himself.
In his ruling, the learned judge relying on the following test for determining whether a judicial officer should disqualify himself as enunciated by Ackner LJ in R v. Liverpool City Justices, ex parte Topping (1983) 1 All ER 490 at 495:

"……would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant would be possible?", refused to disqualify himself as not being warranted in the particular circumstances of the case. However in his ruling, he failed to consider the decision of this court in Civil Appeal No. 55 of 1993, which was brought to his attention and its important implication that he should not have, had all the facts been brought to his notice, allowed Mr. Deverell to appear for the respondents. This aspect of the matter should have made him less inclined to continue to hear the suit. He was also silent on whether or not the evidence that had been improperly adduced before him, might influence him in his continued hearing of the suit.

It is not therefore, altogether surprising that the appellants have now appealed to this court against the ruling of Dugdale J. refusing to disqualify himself. This appeal has been brought not because of any lack of integrity on the part of the learned judge, but on grounds which can be summarized in this way: that a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the appellants would not be possible. In pursuing this general ground, it was urged on behalf of the appellants that even though it cannot be said that the learned judge showed bias, the fact that he must have known from the judgement of this court in Civil Appeal No.55 of 1993, that it had restrained Kaplan and Stratton including Mr. Deverell, for the reasons set out in extenso

therein, from appearing for the respondents, and in circumstance which would warrant the hearing of the matter de novo, but had nevertheless, refused to disqualify himself from further hearing of the matter, would make a reasonable spectator who knew all the relevant facts, have a reasonable suspicion that the appellants would have a fair trial at the hands of the learned judge, who seemed determined to hear the matter. The fact that the learned judge did not consider all the implications of the judgement of this court in Civil Appeal No. 55 of 1993 it was suggested, would justify this view. In such circumstances, it was urged, it is the duty if the learned judge to disqualify himself.

On behalf of the respondents, it was argued that no confidential information as such, had been exploited by Mr. Deverell who if at all, was not the particular advocate in the firm of Kaplan and Stratton with whom the appellants had dealt with when Kaplan and Stratton were acting for both the appellants and the first respondent. It was also urged that it cannot be said that the learned judge would be biased when he had only heard two of the appellants' witnesses. Moreover, the appellants had been guilty all along, of deliberately causing delay in the disposal of the suit, by first, not bringing timeously, the application to restrain Kaplan and Stratton from appearing for the respondents as soon as they became aware that Mr. Deverell was appearing for them and then, by waiting another year after Kaplan and Stratton had been restrained by this court from appearing for the respondents, before applying to the learned judge to disqualify himself from further hearing of the suit. Lastly, no reasonable person knowing all the relevant facts surrounding the suit would conclude that there would be bias or likelihood of bias against the appellants if the learned judge did not disqualify himself.

The law as to the principles to be applied regarding when a judge should disqualify himself from hearing a matter before him is now well settled. In Metropolitan properties Co. (FGC) Ltd. V. Lannon (1969) 1 QB. 577 at 599, Lord Denning MR stated the following principles which were adopted with approval in the well known East African case of Tumaini v. Republic (1972) E.A. 441, which espouses similar principles:

"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will inquire whether he did, in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

The Metropolitan properties case (supra) was subsequently considered in the Liverpool City justices ex parte Topping case (supra) and after considering the dictum of Lord Denning Mr (supra), Ackner LJ stated as follows:

"In our view therefore, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias".

It was after coming to this view, and having considered other authorities, that Ackner LJ. Formulated the now renowned test already quoted above, and which is not in conflict with the dictum of Lord Denning MR (supra).

In re appraising the facts as we are entitled to do, and without casting any aspersions on the

integrity of the learned judge, we have , bearing in mind the authorities that we have referred to and considered, come to the conclusion that a reasonable and right-minded person sitting in court and having knowledge of all the relevant facts, would have a reasonable suspicion that a fair trial for the appellants would not be possible. We have come this conclusion, notwithstanding that the appellants may have been guilty of delaying tactics, because of the following reasons: the fact that the learned judge disregarded the implications of the judgement of this court in Civil Appeal No.55 of 1993, which we have already dealt with and which was drawn to his attention when considering the application to disqualify himself; the fact that judgement and what we have already stated in connection with the provisions of Section 134 (1) of the Evidence Act would, anyway, have justified the hearing of the suit de novo and before another judge of the superior court; the fact that nowhere is it demonstrated in the learned judge's ruling that the impressions made on him when the appellants' two witnesses were cross examined by Mr. Deverell, would not persist if he continued to hear the matter; and all that we have already observed in this judgment. It is our view, that all these within the surrounding circumstances would, without casting any aspersions on the integrity of the learned judge, make a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the appellants would not be possible.

For reason(s) which we shall give on notice, we allow this appeal and order that High Court Civil Case No. 5002 of 1990 be heard de novo before a judge other than Mr. Justice Dugdale. We make no order as to costs of the appeal . We further direct that the High Court file in respect of the suit be placed before the Hon. the Chief justice for his directions.

Dated and delivered at Nairobi this 3rd day of February, 1995.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR