IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 43 OF 2018

BETWEEN

ACCREDO AG ……..……...…… 1ST APPLICANT

SALAMA BEACH HOTEL LIMITED ……...…… 2ND APPLICANT

HANS JUERGEN LANGER …… 3RD APPLICANT

ZAHRA LANGER ……..……..…… 4TH APPLICANT

AND

STEFFANO UCCELI ……..……...……. 1ST RESPONDENT

ISAAC RODROT ……...……...…… 2ND RESPONDENT

(An application for recusal of the Honourable Virsram, Karanja & Koome, JJ.A)

RULING OF THE COURT

1. Before us is an application seeking the recusal of the entire bench of this Court at Malindi as currently constituted from dealing with the appeal herein which emanates from the decision of the High Court (Korir, J.) dated 20th March, 2018 in H.C.C.C No. 118 of 2009, the reason that earlier on, this same bench had determined an appeal being Civil Appeal No. 36 of 2015 (first appeal) which also arose from the aforesaid High Court proceedings.

2. In the applicants view, this Court's judgment dated 15th December, 2017 in the first appeal was not only biased but also made a finding touching on the root of the subject matter of the High Court proceedings thus rendering the suit therein nugatory. In light of the said decision the applicants are apprehensive that we have a preset mindset and thus we are incapable of deviating from the views we held in the first appeal. In a nutshell, they believe that the Court as they put it is bias in *limine.*

3. Setting out the circumstances which they believe gave rise to the aforementioned apprehension the applicants relied on the background facts of this matter. Those facts were that the 1st applicant filed the suit in question with the aim of getting the assistance of the Kenyan courts to enforce a foreign judgment against the 2nd applicant. Towards that end, it sought:

> ***1) An order that the judgment of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest and costs of Euros 2470 be enforced against the defendant*** (the 2nd applicant herein)**.**
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> ***2) A warrant of attachment before judgment do issue against the defendant's plot no. 9890 Grant no. 11576 pending the hearing and determination of suit.***
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> ***3) An injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/ or agents from selling , disposing off, alienating and/ or wasting plot 9890 Grant no. 11576 Watamu or in any other manner howsoever or whatsoever dealing with the said plot and the developments therein standing in a manner prejudicial or likely to defeat the process of execution of the judgment of the court of Milan given on the 14th December, 2001 pending the ... and final determination of the suit.***

4) An order that the plaintiff be allowed to take over the ownership, management, running, operation and control of the defendant and the business carried on plot known as Grant No. 11576 plot no. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgment and decree of the court of Milan dated 14th December, 2001.

5) Costs of the suit and interest thereon at court rates.

4. Apparently, the 2nd applicant filed a statement of admission dated 18th December, 2009 and a consent to that effect was entered between the 1st and 2nd applicants on even date. On the strength of the foregoing, a decree in the terms of the plaint was issued on 22nd January, 2010 and in addition, the following orders were issued:

a) That the registrar of companies be and is hereby mandated to transfer all the shares held by the defendant (the 2nd applicant) ***shareholders to the directors of the plaintiff company*** (the 1st applicant)***, namely HANS-JUERGEN LANGER & ZAHRA LANGER on equal number (50%50%) basis.***

b) That one STEFANO UCCELLI the current resident director of the defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgment and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder.

5. Thereafter, the 1st respondent who happens to be a director of the 2nd applicant filed an application dated 20th November, 2014 seeking review of the decree. His application was premised on a number of grounds. Key amongst them was that in as much as he had executed the consent on behalf of the 2nd applicant the same was procured through coercion and deceit perpetrated by the 3rd and 4th applicants who are the director and shareholder respectively of the 1st applicant. He lacked the requisite authority to execute the said consent since he was not a majority shareholder of the 2nd applicant. What was more, the alleged Milan judgment was non- existent. It did not come as a surprise that the said application was strenuously opposed by the applicants.

6. Upon considering the parties arguments, the learned Judge (Chitembwe, J.) allowed the application for review vide a ruling dated 30th April, 2015. Apart from setting aside the decree the learned Judge also issued the following orders:

i. The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Jürgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009.

ii. The 2nd and 3rd defendants to hand over all the properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants. Counsel for both parties to participate in the transfer process.

iii. The 2nd and 3rd respondents' names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009.

iv. In view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove.

v. Costs of the application to the applicant.

This was the decision that instigated the first appeal which we dismissed by a judgment dated 15th December, 2017. The applicants state that they intend to prefer an appeal against our decision in the Supreme Court and the said appeal was pending certification.

7. It seems that after the determination of the first appeal, the applicants lodged yet another application in the High Court on 8th January, 2018 praying for an interim injunction to restrain the respondents from taking possession, altering, selling or dealing in any way with the 2nd applicant's property pending the determination of the suit. The respondents viewed the application as tantamount to seeking stay of the ruling dated 30th April, 2015 hence they filed a preliminary objection claiming that the same was *res judicata*.

8. The objection was anchored on the fact that following the delivery of the said ruling the applicants were granted an interim stay of 14 days. Thereafter, they obtained stay of execution pending the determination of the first appeal vide Civil Applic. No. 19 of 2015 which orders lapsed upon dismissal of the said appeal. The learned Judge (Korir, J.) agreed as much and by a ruling dated 20thMarch, 2018 he struck out the injunction application giving rise to the current appeal herein.

9. In reply, the respondents deposed affidavits opposing the application calling for our recusal. They both took exception to the manner in which the 3rd applicant held himself as a director of the 2nd applicant in his affidavit in support of the application. To them, the 3rd applicant was no longer a director following the ruling dated 30th April, 2015 which was confirmed by the first appeal. They contended that the apprehension of bias as alluded to by the applicants was not based on any reasonable grounds. Besides, the substratum of the first appeal and current appeal are different. They went on to state that the Court could not entertain any issue relating to the first appeal since the same is *res judicata*. As a whole, the application was a ploy intended in frustrating the enforcement of the aforementioned ruling as well as a means of forum shopping for a bench which the applicants deemed would determine the current appeal in their favour.

10. At the plenary hearing, Mr. Ndegwa appeared for the applicants while Mr. Munyithya appeared for the 1st respondent. Although, there

was no appearance for the 2nd respondent written submissions were filed on his behalf which we shall consider**.**

11. In his address, Mr. Ndegwa, reiterated the grounds in support of the application. He intimated that the applicants were apprehensive that the Court as currently constituted would render a biased judgment in respect of the pending appeal much like the first appeal. According to counsel, the issue before the Court was the recusal of the current members of the bench sitting at Malindi and nothing else hence the issue of *res judicata* does not lie.

12. Rising to oppose the application, Mr. Munyithya argued that it was not enough for the applicants to claim bias; they were required to not only set out the facts constituting the alleged likelihood of bias by the Court but also prove the same. The fact that the Court came to an adverse finding in the first appeal by itself could not establish lack of impartially on the part of the Court to deal with the current appeal. As far as he was concerned, the application was an attempt by the applicants to cover up their non-compliance with the High Court orders which were confirmed by this Court in the first appeal. In his concluding remarks, Mr. Munyithya asked us to dismiss the application.

13. On the 2nd respondent's part, the case of ***Galaxy Paints Company Limited vs. Falcon Guards Limited*** **[1999] eKLR** was cited to buttress that the law on the recusal of a judicial officer is well settled. It was added that for allegations of bias to warrant the recusal of a judicial officer the same must be established to the requisite threshold through cogent evidence. Towards that end, reference was made to the ***President of the Republic of South Africa vs The South African Rugby Football Union & Others*** **Case CCT 16/98** wherein the Constitutional Court of South Africa quoted with approval the following sentiments of Cory J in **R. vs. S. (R.D.) [1977] 3 SCR 484**:

> ***"Courts have rightly recognized that there is a presumption that judges will carry out their oath of office……This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."***

14. Therefore, whenever a court is faced with an application for recusal based on perceived bias, such as in this case, it is required to consider firstly, whether there can be an inference of bias where a court has handled a previous appeal involving the same parties; and secondly, whether there is cogent evidence to support the allegations of bias levelled against the court.

15. The 2nd respondent was convinced that the first issue has already been considered and settled by this Court in the ***Galaxy Paints Co. Ltd case*** where a similar application had been made. In particular, we were asked to pay regard to the following observations made by the Court:

> ***"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 … 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?***
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> ***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.***
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> ***…***
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> ***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."***

16. Similarly, the 2nd respondent's contention was that the first appeal could not be used as the basis of establishing the bias perceived by the applicants against the Court. Moreover, the applicants had failed to prove the facts and/or circumstances giving rise to the alleged bias to the required standard.

17. In the end, it was urged that the Court as currently constituted could not be precluded from undertaking its duty to hear and determine the current appeal based on the frivolous allegations by the applicants. Therefore, the application was devoid of merit and should be dismissed.

18. We have considered the application, the submissions made on behalf of the parties and the law. The right to have a dispute adjudicated before an impartial court is a subset of the right to a fair hearing as enshrined under ***Article 150*** of the ***Constitution***. Together they advance the rule of law in that, on one hand, litigants are afforded an opportunity to present their respective cases and on the other, the court seized of the matter resolves the issues that arise therein as an impartial arbiter and within the confines of the law. It is for this very reason that whenever there is a question of lack of impartiality or biasness on the part of the court, the concerned judicial officer(s) ought to recuse himself/herself from handling the matter either on his/her own motion or by application.

19. Be that as it may, as rightly observed by this Court in ***Kaplana H. Rawal vs. Judicial Service Commission & 2 others*** **[2016] eKLR** an application for recusal of a Judge in which actual bias is established on the part of the judicial officer hardly poses any difficulties. The challenge arises where the application is founded on real likelihood or reasonable apprehension of bias attributable to behaviour or conduct of a judicial officer.

20. The test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias. This current position was succinctly set out by the House of Lords in **Porter vs. Magill [2002] 1 All ER 465** as follows:

> ***"[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."***

Expounding on that test the Supreme Court of Canada in ***R. vs. S. (R.D.) (supra)*** had this to say:

> ***"The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. <u>This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case</u>."*** *[Emphasis added]*

21. It is also instructive to note that the threshold of making a finding to the effect that there is a real likelihood of basis that warrants recusal of a judicial officer is quite high. This is because the oath taken by a judicial officer under the ***Constitution*** to render justice and uphold the law whilst being impartial raises the presumption that such an officer will indeed uphold impartiality in carrying out his/her mandate. See this Court's decision in the ***Kaplana H. Rawal case***. Consequently, judicial officers ought not to accede to each and every application for recusal especially where the same is not based on reasonable grounds. To do so might encourage litigants to believe that by seeking the disqualification of a judicial officer, they will have their case tried by someone who they think will likely decide the dispute in their favour. See ***Kaplan & Stratton vs. Z. Engineering Construction Ltd & 2 Others*** **[2000] KLR 364**.

22. Taking into account the aforementioned principles did the applicants demonstrate that there was a reasonable likelihood of bias on our part which would hinder us from determining the appeal impartially? We think not. We say so because albeit setting out the chronological events of the matter the applicants did not establish the circumstances which gave rise to the said apprehension. The fact that our decision was contrary to what the applicants believed it ought to be and even assuming that it is overturned by the Supreme Court in the intended appeal that by itself does not give rise to the apprehension of bias on our part. Moreover, despite arguing that our decision in the first appeal was biased, there was nothing to support this claim. In our view, there is nothing to suggest that we rendered the said decision outside the confines of the law or the oath we took as Judges of this Court. Accordingly, we find that the circumstances of this case as they stand do not give rise to a reasonable apprehension of bias, in the mind of the reasonable, fair minded and informed member of the public that we will not apply our minds impartially to the appeal.

23. The upshot of the foregoing is that the application for our recusal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 6th day of December, 2018.

ALNASHIR VISRAM

……..……

JUDGE OF APPEAL

W. KARANJA

……..…

JUDGE OF APPEAL

M. K. KOOME

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

<u>DEPUTY REGISTRAR</u>