



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 361(N) of 2009

FRANCIS OYATSI.....CLAIMANT

Versus

NZOIA SUGAR CO. LTD.....RESPONDENT

RULING

1. The Application before me is the Respondent/Applicant's Notice of Motion dated 19th February 2013. What is before me is the determination of whether I should recuse myself. The Respondent/Applicant sought under prayer 7 of the Notice of Motion aforesaid the following:-
 - 7) THAT in the interests of justice and fairness, Hon. Justice Nzioki wa Makau do recuse himself from hearing this matter on account of impartiality exhibited on 05/02/2013 by failing to grant the Respondent's advocates a right to be heard and proceeding to grant *ex parte* final orders in favour of the Claimant on an unserved application of the Claimant and equally dismissing the Respondent's application dated 21/01/2013 which was fixed for inter partes hearing without hearing the Respondent's advocates.
2. The counsel for the Respondent Mr. Simiyu urged the Application and submitted that the Court was not impartial when it dismissed the Respondent's application dated 21st January 2013. He submitted that the Court dismissed it without even looking at it. It was submitted that the issue had been brought to the attention of the Chief Justice and the Law Society by Mr. Wekesa and Mr. Simiyu thus submitted that it would be untenable to continue proceeding before the same Court. It was submitted that the Court had allowed itself to be misled by the Claimant's counsel as to what transpired before my brother the Hon. Mr. Justice Isaac Lenaola. Counsel submitted that if the matter were to proceed before me he would be condemned to prosecute his client's interest with a lot of fear and trembling. In support of his submissions, Mr. Simiyu relied on the case of **Pashito Holdings Ltd & Anor v. Paul Nderitu Ndungu Civil Appeal 138 of 1997** and **Mutiso v. Mutiso [1984] KLR 538** on the right to be heard. He also relied on the case of **Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012** on the reasons and basis for recusal which are summarised as a perception of fairness.
3. The Claimant through Mr. Oyatsi opposed the Application. He submitted that the Respondent had through its conduct subsequent to the dismissal acted in a manner that would disentitle it to be heard. He submitted that the Respondent defied the Court order and made its own interpretation of the Order and the validity of the decree. Mr. Oyatsi submitted that the Respondent had annexed an exhibit marked **RNM 7** which contained correspondence with KRA seeking views from KRA on the decree. This according to Mr. Oyatsi was deliberately defying the Court order in a callous and contemptuous manner. He relied on the Court of Appeal case **Commercial Bank of Africa Limited v. Titus Kamau Ndirangu Civil Appeal No. 157 of 1991**. He submitted that Court orders should be obeyed as to do otherwise would lower the dignity of the Court. As to the allegations that Mr. Wekesa was not heard, Mr. Oyatsi termed

them outright lies. He submitted that there were 2 applications to set aside the *ex-parte* order and the *inter partes* hearing of the Respondent's application. He submitted that the Court made a finding that it had been misled into issuing the *ex parte* order. Mr. Oyatsi submitted that it was absurd to allege that the Court had not looked at the Application. He submitted that it was the application that had brought parties to Court. He submitted that the Court heard the Application *ex parte* and granted orders. As to the complaint lodged with the Chief Justice and the LSK, Mr. Oyatsi submitted that it was meant to intimidate the Court. He called it activism by an officer of the Court. He submitted that when the Respondent's counsel came before me on 21st January 2013, he did not mention that he had been before the Constitutional Court (Lenaola J.) to challenge the same decree. He submitted that on the finding that Mr. Wekesa had deceived the Court, if a party was aggrieved by the finding the appropriate course would be to go to the Court of Appeal. As to conducting the case with fear, he submitted that if a party disobeys a Court Order then it would be bound to be fearful since it is in breach of Court orders. He submitted that if fear is what they have, they have another forum. He submitted that if the Respondent's counsel has a misunderstanding with Court the Respondent can get another counsel who has a fresh mind. Mr. Oyatsi submitted that the moment the Court disqualifies itself because there is a complaint against it before the Chief Justice and the Law Society, the administration of justice will suffer. He submitted that if the Court succumbed to the threats and recused itself, the Claimant would wonder whether a party can come to Court and threaten a judge and start a case afresh. He submitted that if they are not blaming the Court why did they complain to the Chief Justice?

4. There was objection taken to Mr. Oyatsi delving further into the substantive merits of the application. The Court upheld the objection by Mr. Simiyu. In his reprise, Mr. Simiyu submitted that the Court had acted on the basis of misleading information provided by the Claimant's advocates. He submitted that whether the Respondent is in contempt or not is an issue yet to be determined. Mr. Simiyu submitted that all the submissions by the Claimant's counsel are predicated on the presumption that the Respondent is guilty. He submitted that the Respondent had not disobeyed any Order of the Court. He submitted that since the Respondent had no stay, it made payment less statutory deductions which were made to KRA. In closing he submitted that the Respondent wishes to be heard on the issue as to whether it has paid or not and the Court should decide whether it is comfortable to hear the matter or not.

5. After the Court had reserved its Ruling to 24th April 2013, the Counsels for the parties entered a consent in respect of vehicles of the Respondent which had been attached. The Consent was to the effect that the Respondent was to provide a bank guarantee from a reputable bank within 10 days so as to secure the release of the vehicles held by the auctioneers.

6. That in essence captures the issues before Court for determination in this Ruling. What I am required to do is determine whether sufficient cause has been shown for my recusal. As to when a Court should recuse itself, the facts and circumstances of each case differ but the principles are on the broad lines established in judicial precedent. In the case before me, an allegation has been made that there is apprehension that I might not be seen to have been fair even if I am, for the reason that the Respondent's counsel was the beneficiary of diatribes from the Court for misleading the Court when he appeared before me *ex parte* on 21st January 2013.

7. It is clear, the only issue for determination is whether I should recuse myself or not. On matters recusal, it has been held that the decision is a personal one. Black's Law Dictionary Ninth Edition at page 1390 defines **recusal** as follows:- ***“removal of oneself as a judge or policy-maker in a particular matter especially because of a conflict of interest”***

8. Case law cited includes the case of ***Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 others [2013] eKLR*** a decision of the Supreme Court. In the case, the learned Judges of the Supreme Court held that recusal may be on grounds which are stated in statute. The Court held that ***“Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.”***

9. The judges also considered the English case of *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)* [2000] 1 A.C. 6 HL. The House of Lords had rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member's wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the former Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had an interest in the outcome of the proceedings.

Later on in the same judgment the Court held as follows regarding the test of reasonableness to be applied when determining whether there is impartiality or not:

“In an American case, *Perry v. Schwarzenegger*, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts”, and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.”

The case of *Pashito Holdings Ltd & Anor v. Paul Nderitu Ndungu & 2 others Civil Appeal 138 of 1997* now reported as *Pashito Holdings & another v Ndungu & 2 others* 1 KLR (E&L) 295 was on the principle of the cardinal rule of *audi alteram partem*, while the case of *Mutiso v. Mutiso* [1984] KLR 358 is on the same.

10. It can be surmised that circumstances which can lead to the judge recusing himself vary from case to case. Why would a judge recuse himself? More often than not, it is geared to ensuring that justice is not compromised. There is no limit to the number of times a party may win or lose in a case at interlocutory stage. The Claimant has won and failed in equal measure before me. The Respondent has also failed and won in equal measure in my Court. Matters canvassed by parties are determined on the merits and not on the basis of the personalities before me. I have no personal interest or any other interest in the dispute before me. I am an arbiter, the referee as it were. If a party commits a foul, I may award a penalty, give a yellow or red card and declare goals when one scores. I am not a player. I cannot be involved in the match in any other way other than a referee. Can decisions I make be the basis of complaint? Yes, indeed. The decisions of my Court are subject to the orders of review and also are amenable to appeal in the Court of Appeal and as I have recently found out, they can be the basis of a complaint before the Chief Justice and the LSK.

11. As the forum of final determination of disputes emanating from this Court is the Court of Appeal, the logic of it is that if a party is aggrieved by my finding, the party may move the Court of Appeal and seek redress from the appellate Court. In some cases, parties may seek review and also setting aside is available before me. On good cause being shown, a Court of competent jurisdiction can review or set aside its decision. It must be noted that if the forum is incompetent, the review and consequential orders would be a nullity and of no consequence. The Supreme Court decision related to a judge in a matter where the judge as a Judge of Appeal recused himself and the issue came before the Supreme Court. That is different from what is before me.

1. I was appointed judge alongside 11 other Judges on 12th July 2012 and subsequently sworn in as such by the 3rd President of the Republic of Kenya at a ceremony held at State House Nairobi on 13th July 2012. Present at the swearing *inter alia* were the Chief Justice and President of the Supreme Court, the Hon. Attorney General, the Chief Registrar of the Judiciary who administered the Oath, the Deputy Chief Registrar of the Judiciary who assisted her, 4 representatives of the Judicial Service Commission as well as the Head of the Public Service and distinguished invited guests. The Oath we took as Judges was exactly the same. I swore as follows:

I, Nzioki wa Makau, do swear in the name of the Almighty God to diligently serve the people and the Republic of Kenya and to impartially do justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer, and defend this Constitution with a view to upholding the dignity and the respect for the Judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. So help me God.

13. That is a sacred Oath which binds me till I leave the office of Judge. I took an oath to do justice to parties without any fear, favour, bias, affection, ill will, prejudice or any political, religious or other influence. In coming to decisions on cases before me, I am only guided by the law, the facts and the evidence before me.

14. Prior to recusal, a judge should be satisfied that there is sufficient basis to warrant the recusal. I have reviewed the matter before me, the proceedings taken and the Rulings delivered so far including the determination by my Learned brother the Hon. Mr. Justice Lenaola. From an analysis of the material before me, I see no basis for my recusal. I have not had any reason, and neither do I foresee myself having any reason, to determine the case on the basis of other considerations such as personalities of counsel before me or any other extraneous matter.

15. There is no basis for imagining or finding that a reasonable person acquainted with the facts of this case would conclude that I would be biased. I will not allow a party to intimidate me to vacate this high calling to render justice. I therefore decline the invitation to recuse myself from hearing this dispute.

16. As there is a balance of the Application still pending before me, cost will abide the outcome of the entire Notice of Motion.

It is so ordered.

Dated and delivered at Nairobi this 24th day of April 2013

Hon. Mr. Justice Nzioki wa Makau
Judge