IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., KAIJAGE, J. A. And MUSSA, J.A.)

CIVIL REVISION NO. 6 OF 2016

ISSACK MWAMASIKA....................................1ST APPLICANT
REGISTERED TRUSTEES OF
DAR ES SALAAM..2ND APPLICANT
EDBP & GD CONSTRUCTION
COMPANY LTD...3RD APPLICANT

VERSUS

CRDB BANK LIMITED ....RESPONDENT

(Revision from the Proceedings of the High Court of Tanzania at Dar es Salaam)

(Mkasimongwa, J.)

Dated 21st day of September, 2015
in
Civil Case No. 79 of 2012

RULING OF THE COURT

9th & 28th September, 2016

MBAROUK, J.A.:

Before us is a revision proceedings prompted by the Court *suo motu* from the directions of the Honourable Chief Justice dated 10th June, 2016. The same reads as follows:

"RCA:

Isaack Mwamasika & others

Civil Appeal No. 79 of 2012

Let revision, suo motu, by the Court be opened to examine the propriety or any irregularly in the proceedings in the High Court, and in particular the ruling of the High Court (Mkasimongwa, J.) on 16/05/2016.

Sgd. M.C. Othman

Chief Justice

10/06/2016".

In essence, the Court has invoked the powers conferred upon it under section 4(3) of the Appellate Jurisdiction Act in initiating *suo motu* these revisional proceedings. The genesis of these proceedings arose when the Judge in charge Dar es Salaam Zone asked the Principal Judge for guidance as to a correct legal procedure the court should take when a judge disqualifies himself at the judgment stage. Thereafter, the Principal Judge wrote to the

Chief Justice who then ordered for these revisional proceedings to be opened.

At this early stage, we have found it prudent to reproduce part of the order of Mkasimongwa, J. dated 16-5-2016 sought to be revised so as to appreciate what led to these revisional proceedings, which reads as follows:

> "***ORDER:*** *This suit which I have partly heard was set for Judgment on 13/03/2016. A week before, the date of Judgment that is on 07/05/2016, I received a text Message through my mobile No. +255 755 248 749 which reads as follows:*
>
> > *"Mh. Jaji Mkasimongwa, Mzelendo mwenzetu kuna pesa zinakuja kwako au zilishafika zinazohusu kesi ya kitapeli ya Isack Mwamasika @ Mzee wa Jet. Pesa hizo chukua ila hakikisha benki yetu inabaki salama vinginevyo utakuwa katika hali mbaya utatumbuliwa jipu, mchezo wa tapeli Mwamasika siyo siri toka uliyempokea kesi hiyo na mchezo mchafu anaotaka*

kukushilikisha wewe tunakujua Mzelendo mwenzetu. Fungu kula linda bank yetu. Usiwe jipu...

The message originated from Mobile No. +255 692 559 764...

The message above bears threats and accusation against me..

Court Judgments should not be seen to have been made influenced by either bribe or threats. I am not fearing of what is said "KUTUMBULIWA JIPU" for I will be so happy if that is done to me for I always believe that everything I do in my capacity as a judge I do it with a clear conscious and in accordance to the law.

From the above I find it necessary that I recuse myself form this matter at this stage so that the same can be dealt with by my brother or sister judge who no party or any person will have to doubt. I therefore disqualify myself from composing judgment in this matter. Let the

record be placed before the Honorable Judge in-charge for his necessary action.

Sgd E.J. Mkasimongwa

JUDGE

16/05/2016".

At the hearing, Prof. Mgongo Fimbo, learned advocate assisted by a team of three other learned advocates namely Mr. Mpaya Kamara, Mr. Martin Matunda and Burton Mwakisu appeared for the applicants. Whereas Mr. Richard Rweyongeza and Mr. Wilbroad Mwakipesile, learned advocates appeared for the respondent.

As pointed herein above, the purpose of these revisional proceedings is to explore guidance on the correct legal procedure for a court to take when a judge disqualifies himself at the time of composing a judgment. To begin with, Prof. Fimbo started the ball rolling by praying to adopt his written submissions filed earlier on 7th September, 2016 in terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009. He submitted that, the trial judge erred when he failed to invite counsel from both parties to address him before

he arrived at his decision to recuse himself at that late stage of composing a judgment. Prof. Fimbo was of the view that, that action of the trial Judge to recuse himself at that stage amounts to a delay and may pervert the ends of justice. After all, he said, no party claimed for allegations of bias or criticized him on the way he conducted the proceedings. He added that, a complaint or application for recusal must come from a party or party's agent or an advocate for a party in the proceedings. In support of his argument, Prof. Fimbo cited to us the following decisions of this Court, namely:-

1. **Kishore Vallabhdas & Another v. S.M.Z.** [2001] TLR 167 at page 169.
2. **Zablon Pangalameza v. Joachim Kiwaraka** [1987] TLR 140.
3. **Laurean G. Rugaimukamu v. Inspector General of Police & Another,** Civil Appeal No. 13 of 1999 (unreported)

Putting more emphasis to his argument, he cited the decision of **Laurean Rugaimukamu** (supra) where principles for a Judge or magistrate to recuse himself/herself were given, namely:-

*"An objection against a judge or magistrate can legitimately be raised in the following circumstances: **One,** if there is evidence of bad blood between the litigant and the judge concerned. **Two,** if the judge has close relationship with the adversary party or one of them. **Three,** if the judge or a member of his close family has an interest in the outcome of the ligation other than the administration of justice. **A judge or a magistrate should not be asked to disqualify himself or herself for flimsy or imaginary fears."***

[Emphasis added.]

Prof. Fimbo added that, it was improper for the trial judge to act on the text message. He further cited the following cases to support his argument. **Okritie International Investment Management Ltd. & 4 others v. Mr. George Urumov [2014] EWCA** Civ. 1315, **Galaxy Paints Co. Ltd. v. Falcon Guards Ltd** [1999] 2 E.A. 83 CA (K), **Uhuru Highway Development Ltd Central Bank of Kenya & 2 Others,** C.A. (K) Civil Appeal No. 36 of 1996, Kenyan Appeal Reports Vol. 3 p. 211 -219.

In addition to what was submitted by Prof. Fimbo, then Mr. Kamara added that according to their oath of office Judges and Magistrates are supposed to perform their duties without fear or favour. He then questioned as to what precedent will be created in our courts if a judge decides to act upon and recuse himself/herself where an anonymous author who is not a party has sent a text message to that judge or magistrate. By acting that way, he said, litigation will not come to an end as it will allow litigants to shop around for a judge who will hear their case. He therefore urged the Court to issue prohibitory directions so as to avoid fear, threats, intimidations or blackmail to Judges or Magistrates.

All in all, Prof. Fimbo then urged the Court to set aside the order of the trial judge dated 16-5-2016 and order him to continue to compose and deliver the judgment in that case.

On his part, Mr. Rweyongeza agreed to what was submitted by his learned friends. However, he added that, the test in considering whether there was a real likehood of bias, the court should look at the impression which would be given to other people, rather than a real likelihood that he would, or did in favour of one side at the expense of the other. Mr. Rweyongeza took that stand

from the case of **Metropolitan Properties Co. (F.G.C.) Ltd. V. Lannon and Others** [1969] I.Q.B. 577 at page 599.

Mr. Rweyongeza then prayed for the Court to order the matter to be remitted back to the same Judge so as to compose and deliver the judgment.

Having examined the contributions from both sides in these revisional proceedings, we are of the view that to some extent this case is peculiar for two reasons, **One**, is that, unlike in various cases, the likelihood of bias was raised by an anonymous person by way of a text message to the trial judge and not by the parties. **Two**, that the issue which led the trial judge to recuse himself arose not at the hearing stage but when the judge adjourned the case so as to allow him to compose a judgment. All in all, we are of the view that the principles for a Judge or magistrate to recuse himself/herself do not take into account whether the case is at the hearing stage or at the stage of composing a judgment. What matters is that, the objection against a judge or magistrate should be raised by the parties and not from an anonymous person as it appears in this case.

In most jurisdictions, if the matter is brought to a judge's attention through a party's motion seeking disqualification, the procedure is that the judge will initially decide the motion by hearing the parties. This underscores the importance of the motion to be raised by the parties in a case.

One among the reasons for a judge to recuse himself/herself is bias. In the case of **Reg.v. Gough**, the House of Lords in its judgment dated 17th December, 1998 on 15th January, 1999 it was stated that the relevant test to be used to determine the issue of bias is to examine: "*....whether the events in question rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the judge was not impartial."*

Examining more closely on the issue of the bias, in the case of **Locabail (UK) Ltd v. Bayfield** [2000] QB 451 Lord Bingham of Cronhill giving judgment of the Court which comprised himself, Lord Woolf MR. and Sir Richard Scott V.C. said:-

> "*... real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public*

involved in the case; or if the judge were closely acquainted with any member of the public involved the case, particularly if the credibility of that individual could be significant in the decision of case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if any question at issue in the proceedings before him the judge had expressed view, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see ***Vakauta v. Kelly*** *(1989) 167 C.L.R. 569); or if, for any reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same*

case or in previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will obvious. But if in any case there is real ground for doubt should be resolved in favour of recusal. ***We repeat: every application must be decided on the facts and circumstances of the individual case."*** [Emphasis added]

Furthermore, Chadwick L.J giving the judgment of the Court in the case of **Tridoros Bank N.V. v. Dobbs** [2001] EWCA Civ. 468 cited in the case of **Otkritie International Investment Management Ltd & 4 others** (supra) had this to say on the point that a judge should resist to recuse himself/herself for simple or flimsy reasons:-

" *7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of*

grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. ***But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so.*** *"* [Emphasis added].

Also, in emphasizing the point for judges and magistrates not to disqualify themselves easily, the Court of Appeal of Kenya in the celebrated case of **Nyamodi Ochieng-Nyamogo & Another v. Kenya Posts & Telecommunications Corporation,** Civil Application No. 264 of 1993 (unreported) cited in the case of **Uhuru Highway Development Ltd** (supra) observed as follows:

"For our part, we dare say that most litigants would much prefer that they be allowed to shop around for the judges that would hear their cases. That however, is a luxury which is not yet available under our law to litigants and these applicants cannot have it". [Emphasis added].

What we have gathered from the authorities cited herein above seems to direct that judges are required to resist the temptation to disqualify themselves for flimsy or imaginary fears. See, **Laurean Rugaimukamu** (supra). What is more important is that the objection for a judge to disqualify himself/herself must come from a party/litigant in that particular case.

We strongly advise that, Judges and Magistrates should refrain themselves from acting on mere text messages from anonymous authors who are not parties in a case conducted by them.

As we have already established herein above, for a judge or magistrate to disqualify himself/herself it does not depend upon the stage where a case has reached, but that, the objection must come from a party in that particular case. The principles laid down in the case of **Lauren Rugaimukamu** (supra) applies all along since a case is set for hearing until when it is adjourned for composing a judgment. In addition to those principles, we also find that if a judge has personal knowledge of disputed facts it may also take as one of the circumstances where a judge can recuse himself/herself. We are of the considered opinion that, in the instant

case, the trial judge recused him at that late stage of composing a judgment for flimsy and imaginary fears from a text message from an anonymous author who was not a litigant in that case. We therefore fully agree with the advocates for the applicants and respondent that, the trial judge erred when he relied upon a mere text message from a person who was not a party in that case.

Before penning off, we note that recusal and disqualification of judges is a sensitive subject, since it draws into question the fitness of a judge to carry out the fundamental role of his or her position-- the fair and impartial resolution of judicial proceedings. So, the decision to file a motion seeking disqualification should be made only after careful consideration.

In the circumstances and for the reasons stated herein above, we invoke our revisional powers conferred upon us under section 4(3) of the Appellate Jurisdiction Act and set aside the recusal order of Mkasimongwa, J. dated 16-5-2016 in Civil Appeal

No. 79 Of 2012 and remit the file back to him to continue to compose and deliver the judgment in that case. Order accordingly.

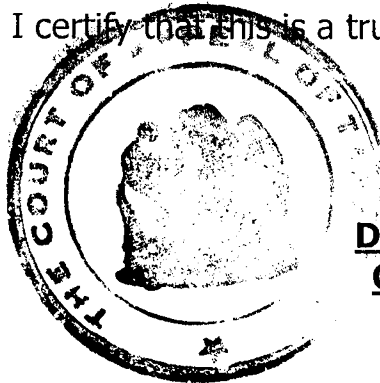
DATED at **DAR ES SALAAM** this 19th day of September, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSITCE OF APPEAL

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



B.R. NYAKI
DEPUTY REGISTRAR
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