IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A, MWARIJA, J.A. And LILA, J.A.)

CIVIL APPLICATION NO. 195/01 OF 2017

GOLDEN GLOBE INTERNATIONAL SERVICES..... 1ST APPLLICANT
QUALITY GROUP LIMITED ..... 2ND APPLICANT

VERSUS

MILLICOM (TANZANIA) N.V ..... 1ST RESPONDENT
JAMES ALAN RUSSEL BELL ..... 2ND RESPONDENT

(Application for Review from the Ruling of the Court of Appeal of Tanzania at Dar es Salaam)

(Mbarouk, J.A., Mwarija, J.A. and Lila, J.A.)

dated the 23rd day of February, 2017 delivered on 27th February, 2017 in Civil Revision No. 03 of 2017

RULING OF THE COURT

9th & 23rd June, 2017

MBAROUK, J.A:

To preface this ruling, we have found it pertinent to make reference to the quotation from the judgment of this Court in the case of **Ahmed Mohamed Al Laamar v. Fatuma Bakari and Asha Bakari,** Civil Appeal No. 71 of 2012 (unreported), where this Court had intelligibly observed thus:-

"We have found it necessary to give a chronological background to this case since the outcome of the appeal is to say the least, ***a startling demonstration of the truth that this Court like all courts can do justice only in accordance with the law and not otherwise..."***

The conventional wisdom inherent in this 1993 observation, was in 2000, given Constitutional recognition in ***Article 107B of our 1977 Constitution****. We shall, therefore, endeavour to render the justice to the parties herein are seeking,* ***"in accordance with the law of the land and not otherwise****."* [Emphasis added]

As cited above, it is clear that our duty to render justice to the parties is required to be in accordance with the laws of the land and not otherwise. In doing so, we are required to take into account our core values which include professionalism, **Impartiality,** respectfulness, integrity and **punctuality/ timelines** among others. We are of the

view that as a Highest Court of the land, we have up to now demonstrated so to the public and abided by the requirements of our core values.

We have purposely started with this introduction as one of the claims, is that, we have conducted this matter according to the claims leveled against the Court, at an unusual speed (super sonic speed) and thus an unfortunate allegation of bias.

Before us is a Civil Review which was filed on 05th May, 2017 by GOLDEN GLOBE INTERNATION SERVICES AND QUALITY GROUP (the first and second applicants respectively) to challenge our decision on the preliminary objections raised in **pending Civil application for Revision No. 3 of 2017 dated 27th February, 2017**.

It would not have been necessary to go into the details of the controversy for the purpose of the task immediately infront of the Court, but in order to capture well the gist of this Ruling, we have found it pertinent to state even if briefly the background of this matter. The above stated application for revision was called by the Court *suo motu* as directed by the Hon. Acting Chief Justice on 27/1/2017 after receiving a complaint letter from the 1st Respondent dated 10/1/2017.

Thereafter, the Acting Chief Justice on 27/1/2017 gave the following directives:-

> ***"Let Revision Proceedings be opened suo motu to determine the appropriateness and propriety of the order/proceedings over which the complainant contends denial of the Right to be heard. The hearing be fixed in February, 2017 session and all parties concerned be notified of the date of hearing***
>
> ***I.H. Juma***
> ***Ag CJ***
> ***27/1/2017"***
> [Emphasis added]

Before the application was called on for hearing, the applicants filed a notice of preliminary objection where on 15/2/2017 we heard all parties and reserved our ruling. On **27th February, 2017** the ruling was delivered and we overruled the preliminary objections and ordered the Revision proceedings to be set for hearing on a date to be fixed.

Thereafter, the application for revision was cause-listed for hearing on **05th May, 2017.** However before hearing started, counsel

for the first Applicant Mr. Rweyongeza asked for an adjournment of hearing for a single reason that there was a pending Civil Application for Review which was filed in Court two days prior to the hearing date (i.e. on **03/05/2017**) intending to review our earlier ruling of overruling their preliminary point of objections in Civil Application No. 195/01 of 2017. We granted the prayer for adjournment as prayed.

On 09th May, 2017, Mr. Fayaz Bhojani, Counsel for the first Respondent filed a certificate of urgency seeking the Court to accelerate the hearing of the Review filed by the applicants. Two days before the hearing of that Review Application i.e. on **7th June, 2017,** Mr. Rweyongeza, learned advocate on behalf of the 1st Applicant wrote a letter to the Registrar of the Court of Appeal seeking the panel in this matter to either "*recuse, reinforce or widen it or to take any other necessary steps as may be deemed necessary to ensure proper administration of justice*." Thereafter, the first respondent's counsel Mr. Fayaz Bhojan and Mr. Erick Sikujua Ng'maryo responded to the letter wrote by Mr. Rweyongeza and replied it by writing a letter dated 8th June, 2017 asking us not to disqualify ourselves from the conduct of the application for review.

When the matter came up for hearing on 9th June, 2017, we invited the parties to address us and elaborate on the gist contained in the said letter wrote by Mr. Rweyongeza. At the hearing, Mr. Richard Rweyongeza, assisted by Mr. Mpaya Kamara and Mr. Joseph Ndazi, learned advocates represented the 1st Applicant, whereas, Mr. Semi Malimi and Mr. Alex Mgongolwa, learned Advocates were appearing for the second Applicant. For the first respondent were Mr. Erick Ng'maryo, Mr. Gaudiociosus Ishengoma and Fayaz Bhojan, learned Advocates. The Second Respondent was absent though he was dully served by substituted service.

In addressing the Court, Mr. Rweyongeza prayed to adopt the contents of his letter and submitted that, Rule 66(5) of the Court of Appeal Rules, 2009, (the Rules) gives room for other justices other than those who previously determined the matter to entertain the application for review arising therefrom. The learned counsel eloquently added that, they have appeared before us on several occassions in several matters, and argued their cases successfully and in some instances lost. He added that, they have thus a highest respect to us. He said, however that they have a duty to the Court on one side and their client on the

other. He was of the view that if they complain outside the Court that justice is not seen to be done, they will be defeating their duty, and that is why they have opted to address their complaint before the Court itself.

Mr. Rweyongeza proceeded to state that in their letter they were constrained to raise a complaint that the current proceedings in the application for Review and Revision are tainted with apparent discomforting situation; that there is a familiarity between the bench and Millicom Tanzania N.V. (1st Respondent) to the extent that justice in these proceedings will not be conducted fairly in the manner required by the Highest Court of the Land. To attesting his claim, he referred us to paragraphs 2, 3 and 4 of his letter which partly recapulates, the directive of the Hon. Acting Chief Justice dated 27th January, 2017 of opening *suo motu,* the application for revision and that the effect that revision be all parties concerned should be notified of the date of hearing. It is the learned counsel's complaint that the directive that all parties should be notified was not complied with. He claimed that, the selection of the parties to the Revision *suo motu* is striking surprise because, it is against directive of the Hon. Acting Chief Justice. Mr.

Rweyongeza contended that the Court record did not join parties who were involved in the proceedings at the High Court. He therefore was of the view that there is a sign of forcing and hurry the matter at a super sonic speed. He was further of the view that, justice hurried is justice buried because in such a circumstance, justice might not be seen to be done.

He also added that the application for review was hurridly fixed for hearing before an affidavit for reply was filed and according to him that shows that, it is the respondent who sets the tune in the conduct of these proceedings. Since justice is based on confidence, he submitted, where confidence erodes it become a bad task for administration of justice. Mr Rweyongeza concluded by expressing his surprise why is this case being cause listed before this same panel in various occasions?

On their part, Mr. Malimi and Mr. Mgongolwa, learned counsel for second respondent associated themselves with Mr. Rweyongeza and fully agreed with him.

On his part Mr. Ng'maryo in his reply started with the saying that "desperate situation leads to desperate measures". He submitted that the move by Mr. Rweyongeza is a result of a desperate situation. He

added that the desperate measure taken by the learned advocates for the applicants is to obtain an adjournment in the application for review just on the shrink of time, and that this move is not taken for the first time. This is because, he said, when the Revision *suo motu* was set for hearing, on 15th February, 2017 just 24 hours before that hearing a preliminary objection was filed and the hearing of *suo motu* Revision was adjourned. Again on 7th June, 2017 just two days before the hearing of this Review Application, the learned advocate for the applicant has asked the panel in this application to recuse itself. On the gravamen of the letter and the submission by Mr. Rweyongeza, Mr. Ng'maryo asked whether those allegations constitute sufficient grounds for recusal by the panel.

Mr. Ng'maryo refuted the blame imposed on the Court that the proceedings in this matter are conducted at a supersonic speed. On his part, he gave a credit to the Court that it conducted the proceeding in an expected prompt manner. Mr. Ng'maryo then asked the Court to ignore the contents of the letter as it lacks prove. Finally he concluded that there is no justification to say that the 1st Respondent sets a tune of these proceedings. He urged us to follow the principle of recusal held in

the case of **Issack Mwamasika and 2 Others v. CRDB Bank Ltd,** Civil Revision No. 6 of 2016 (unreported).

Mr. Fayaz assisting his fellow counsel, Mr. Ng'maryo, adopted the contents of their reply letter and submitted that, arguments by the applicants' advocates and their points cannot be cured if the panel in these proceedings recuses itself. He considered the letter an embarrassing one which if entertained, is going to set a bad precedent in our jurisdiction. Further, Mr. Bhojani asked how could the learned advocates for the applicants accuse the panel that they are conducting these proceedings at a supersonic speed? His answer is that they are just intending to delay the hearing of the application for Review. Mr. Bhojani asked also as to how can the recusal assist to change the parties?. He submitted that the apparent intention is to park the case. He insisted that the same bench should hear the application for Review pursuant to Rule 66(5) of the Rules. He said, as they have already been served with the applicants' written submission and as they have filed a reply, the matter should proceed to hearing.

In his rejoinder, Mr. Rweyongeza responded by submitting that the case of **Issack Mwamasika** (supra) is distinguishable. Being on of

the counsel who was involved in that case, he said, that case is versed with the facts thereto. In that case the Judge of the High Court disqualified himself because of threat made via massage in his mobile phone by anonymous person. This is not the case here, he said.

With regard to the preliminary objection filed at the early stage before hearing the *suo motu* Revision and filing of an application for review at a late hours, he submitted that, it was their right because they were within time.

After hearing vigorous rival submissions, we are of the view that, the central and crucial issue in this matter is, whether or not we should disqualify ourselves from reviewing our earlier decision given on 27th February, 2017 on preliminary objections and subsequent to the hearing of Civil Revision No. 03 of 2017 pending before the Court.

Recusal or disqualification is a tenet of the law intending to promote the fundamental principle of Judicial impartiality and confidence in the administration of justice. Disqualification of a judicial officer for apparent bias therefore is not a discretionary matter. If we may borrow from an English case of **AWG Group Ltd and Another vs. Morrison and Another** [2006] EWCA Civ 6 the Court of Appeal considered the

apparent bias and interests which may give rise to the appearance of bias and quoting *Halsbury's Laws* (4th Edn) (2001 reissue) para 99,100 held as follows:-

> ***".....Disqualification of a judge for apparent bias was not a discretionary matter. There was either a real possibility of bias,*** *in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him.* ***Inconvenience, costs and delay did not count in a case where the principle of judicial impartiality was properly invoked because it was the fundamental principle of justice.*** *..."*
>
> [Emphasis added]

This decision quoted other cases in **R v. Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan** [2000] 1 All ER

65, **Taylor v. Lawrence** [2002] 2 All ER 353 and **Lawal v. Northern Spirit Ltd** [2004] 1 All ER 187.

The concept/issue of a possible bias to a Judge had as well been connected with the principle of natural justice in the case of **Smith v. Kavaerner Cementation Foundations Ltd (Bar Council intervening)** [2006] EWCA civ 242.

Under Rule 2C (1) of the Code of Conduct for Judicial Officers in Tanzania states that a Judicial Officer should disqualify himself in proceedings in which impartiality **might reasonably be questioned.** The Code has not given interpretation of reasonability test. However, appropriate test in determining an issue of apparent bias is *whether a fair -minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.* (See the cases of **Porter v. Magill** [2001] UKHL 67 at page 359; **Janan George Harb v. HRH Prince Abdul Aziz Bin Fad Bin Abdul Aziz,** [2016] EWCA Civ. 556 at page 18; **Government of Seychelles And Attorney General Versus Seychelles National Party and 2 Others,** Constitutional Appeal Sca 03 &4/2014 and **S. Versus Shackell,** 2001(4) SA 1 (SLA) **Standard Chartered Bank**

(Hong Cong) LTD v. VIP Engineering and Marketing Ltd, Civil Application No. 158 & 159 of 2011 (Unreported).

In **Issack Mwamasika and 2 Others v. CRDB Bank Ltd,** Civil Revision No. 6 of 2016 (unreported) at pages 12 to 13, we subscribed to the holding taken in **Tridoros Bank N.V. v. Dobbs** [2001] EWCA Civ. 468 cited in the case of **Otkritie International Investment Management Ltd and 4 others v. Mr. George Urumov** [2014] EWCA Civ. 1315 to the effect that:-

> *"**it is always tempting for a judge against whom criticism 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 sense of grievance if the decision is going against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hear the case will feel that, if he loses, he is in some why been discriminated against. **But is important for the judge to resist the***

temptation to recuse himself simply because it would be more comfortable to do so."

[Emphasis added].

In the case of **Standard Chartered Bank (Hong Cong) LTD v. VIP Engineering and Marketing Ltd**, (supra) we said that in order for the judge to disqualify, himself/herself there must be sufficient convincing reasons before he/she disqualifies himself from a suit, otherwise a court will find itself in a position stated in the case of **The Registered Trustees of Social Action Trust Fund and Colman Mark Ngalo & Michael J.T. Ngalo (Receiver Manager) v. Messrs Happy Sausages Limited and 11 Others** [2004] TLR 264, which is as follows:-

"it is our considered view that it would be an ***abduction of judicial function and encouragement of spurious application for judicial officer to adopt the approach that he/she should disqualify himself or herself whenever requested to do so on application of one of the parties."***

In the instant case, to us, the ingenuity displayed by Mr. Rweyongeza and supported by Mr. Malimi is in our view, a delaying tactic and/or a forum shopping expedition. If they genuinely doubted the impartiality of any or all of the panel members, they should not have to taste water in the first place, instead they should have requested for this panel to recuse itself at the earliest stage before preliminary objection was heard. In fact, at page 1 in the last paragraph, the applicant's letter indicates that the manner in which the revision and review proceedings are conducted is prejudicing Golden Globe (the applicant) and entire court jurisprudence which will ultimately cause failure of justice since *there is discomfort familiarity between the Bench and first Respondent (Millicom Tanzania N.V.) because directives of Acting Chief Justice dated on 27th January, 2017; speed of preparing record of revision; request for opening revision suo motu was initiated by the first respondent and selection of the parties to the revision suo motu.*

Under paragraph four of the letter, Mr. Rweyongeza, amplified his above assertion of first respondent familiarity with a Bench, because *we allow respondent excess time to address the Court* and that *two among*

us have previously dealt with the matter in these proceedings claim in the past. In that respect Mr. Rweyongeza connects one of us that on 5th May of 2017, directed the first respondent to file a certificate of urgency in this application for review and the advocates for the 1st Respondent complied with that direction, before the respondent had filed her affidavit in reply. In fact, what transpired was that an advocate for the 1st Respondent sought before the Court for an urgent hearing date and the Court rightly observed that there was a procedure to make such a request and an oral request from the Bar could not be accepted. In our considered view, that claim cannot be taken to amount to bias on the part of the panel in this matter.

If we may pose a question here a bit, would the facts posed by the advocates for the applicants make a fair minded and informed observer conclude that they exhibit real possibility of bias?, We are certainly of a different view. The allegations are flimsy and imaginary. The bench has neither directed the Registry to open the revision nor assigned itself to preside over the matter. We have no such powers. With due respect to Mr. Rweyongeza, those are administrative powers which are not within the sphere of the panel.

Although we agree with the learned advocates for the applicants that at times "justice hurried is justice buried"; on the other hand one cannot turn a blind eye to the fact that "justice delayed is justice denied". It is therefore, the duty of the Court to strike a delicate balance between these two conflicting interests, which are irreconcilable in the administration of justice, as both are inherent to the fundamental human rights and freedom guaranteed by the supreme law of the land. Society is hurt when justice is delayed because of a legal and procedural technicalies, and in the instance case, with due respect, we do not subscribe to Mr. Rweyongeza that we over hurried the conduct of the proceedings.

We as judges carry out our oath of office (see **Article 121 of the Constitution of United Republic of Tanzania**). If we may borrow a passage from the holding by The Court of Appeal of Kenya sitting at Mombasa, in **Gharib v. Naaman** [1999] 2 EA 88 when it rejected a motion for disqualification of one of its Judges: The relevant passage states as follows:-

> *"The only place we as Judges can speak with authority and conviction is in our*

judgments....Indeed, we think some of these applications amount to no more than a subtle way of bringing pressure to bear on us so that we decided the matter in favour of those who make the applications....We know ourselves when it would be proper for us not to sit on a matter. ***None of us would ever dream of sitting on a matter in which we know our impartiality would be suspect****. This is not to say that applications for our disqualification ought not to be made. It is clearly the duty of a party or his advocate to make the application when the interest of justice requires it. But to make an application when it is known that ". . . it is legally not tenable" can only be interpreted to mean the person making same is seeking*

something other than the interest of justice." [Emphasis added]

Whereas in **Zabron Pangamaleza v. Joachim Kiwaraka & Another** [1987] TLR 140, we held as follows:-

"The safest thing to do for a judicial officer who finds his integrity questioned by litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case ***unless it is quite clear from the surrounding circumstances and the history of the case that the accuser is employing delaying tactics.*** *Apart from ensuring that justice is seen to be done, he saves himself from unnecessary embarrassment.* [Emphasis added].

We have taken into consideration the foregoing and the position of the law that, Review under Rule 66(5) of the Rules shall be heard before the same panel as far as practicable. ***"..(5) An application for***

review shall as far as practicable be heard by the same Justice or Bench of Justices that delivered the judgment or order sought to be reviewed....". Having also beared in mind the demand of public policy on the **finality of litigation**, we are declining to disqualify ourselves in hearing this application for Review. We therefore order the hearing of review application to be set in the next convenient sessions.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th day of June, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.A.LILA
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL