IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION No. 59 OF 2013

LUXURY APPARTMENTS LIMITED.....APPLICANT

Versus;

1. EDWARD WILSON NGWALE.....1ST RESPONDENT
2. WILIUM JOSEPH HELLELA
   (Administrator of Estate of Joseph
   William Hellela).....2ND RESPONDENT
3. THE REGISTRAR OF TITLES.....3RD RESPONDENT
4. THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

03/07/2014 & 08/07/2014

Utamwa, J.

This is a ruling on whether or not I should disqualify myself from presiding over this matter in respect of a preliminary objection lodged against an application for a temporary injunction now pending before this court for ruling and for the actual application. The background of

this matter goes thus; the applicant in the application, Luxury Apartments Limited filed the application seeking for the following orders;

1. That the Honourable Court may be pleased to issue an order for temporary injunction restraining the 3rd respondent from rectifying the Land Register in respect of Plot No. 125, Kitonga Street, Upanga area, Dar es Salaam with CT No. 118135 registered in the name of the applicant, and or in any way dispose it to the 1st and 2nd (respondents) pending referral of the dispute between the applicant and the 1st and 2nd respondent to arbitration.
2. Costs of this application be provided for.
3. Any other reliefs as the court may deem fit to grant.

The application was preferred under s. 2 (3) of the Judicature and Application of Laws Act, Cap. 358, R. E. 2002 and s. 95 of the Civil Procedure Code, Cap. 33, R. E. 2002, and any other enabling law. It was supported by an affidavit sworn by one Alaudin G. Hirji. The respondents, Edward Wilson Ngwale, Wilium Joseph Hellela (Administrator of estate of Joseph William Hellela), the Registrar of Titles and the Attorney General (first, second, third and fourth respondent respectively) objected the application through their respective counter affidavits. The first and second respondents also lodged the PO based on the following two points of law;

i. That the Hon. Court has not been properly moved.

ii. That there is no any pending proceedings to justify the present application.

Following the agreement by the parties, the court directed the PO to be argued by way of written submissions and the parties accordingly filed their respective submission. On 23/10/2013 the court made an interim order, for grounds contained therein, directing that the *status quo* of the parties be maintained pending the final determination of the application. On the 28/11/2013 the court fixed a date for ruling for the PO to be on 13/12/2013, but the same had been adjourned for six times before the respondents made complaints before me on 03/07/2014, which said complaints are the subject matter of this ruling. On that date the following learned counsel represented the parties; M/S. Hawa Rweno (for the applicant), Mr. Wanyancha (for the first and second respondents) and Mr. Ponsian Lukosi, Principal State Attorney (PSA) for the third and fourth respondent).

On that date (03/07/2014), when I informed the parties that I was aware of the belatedness of the ruling, but I had to adjourn it to the following week (i. e. the 8th or 9th of July, 2014) as the ruling had been fixed to that date (03/07/2014) by the Registrar in my absence, the first and second respondents personally, and not through their learned counsel vigorously reacted against that plan. The first respondent forcefully argued that he had lost confidence with me since I had

delayed the ruling, he thus asked me to recuse myself from the case though it is at the stage of a ruling. The second respondent concurred with the first respondent. He added that, his further reason for the reaction was that the applicants were enjoying the interim order.

When I sought the views of the learned counsel appearing for the parties, Mr. Wanyancha for the first and second respondents submitted that, his clients had not disclosed their grievances to him before, but because they had lost confidence with me, he could not compel them to believe otherwise. He then left it to the court to decide. The learned counsel for the applicant joined hands with the counsel for the first and second respondents and left it to the court to decide. On his part, Mr. Lukosi learned PSA took a different view. He submitted that though he could not compel the first and second respondents to believe otherwise, they had a duty to consult their counsel before they could react the way they had done. They had no reason to react that way because I had already informed the parties that I was outside Dar es salaam and I had indicated that the matter had to come for ruling just the following week. He added that, the plan would speed up the ruling. He further argued that, in case I grant the prayer made by the two respondents and recuse myself, the case will be heard by another Judge and will thus be further delayed. He showed suspicion that the interests by the two respondents was in fact to speed up the case. He thus objected their prayer for been irrelevant.

In their rejoinder submissions, the first respondent remained adamant and stuck to his position. The second respondent changed mind and argued that, if that was the case, he would be ready to wait for the ruling on the suggested date of the following week.

As hinted at the opening of this ruling, the main issue here is whether or not I should recuse myself from making the pending ruling on the PO and from presiding over the main application in case the PO is overruled. I admit that the Issue has greatly exercised by mind, but I determine it as hereunder; in the first place, since the second respondent changed mind apparently after the educative submissions by Mr. Lukosi learned PSA, I take it that the application for my recusal is solely instigated by the first respondent. The main ground for his application is that, I have delayed the ruling in respect of the PO and I was about to adjourn it to the following week, hence the lack of confidence with me.

In my view, it is imperative that I highlight the pertinent law and practice on assignment of cases to Judges of this Court, albeit briefly, before I proceed to examine the main issue. Cases/matters are assigned to Judges of this Court by the Principle Judge or the Judges in-charge of the respective High Court zones depending on the High Court Registry before which the matter is filed. It is also the law and practice that, once a matter is assigned to a Judge it becomes his duty to finally determined it. If he does not accomplish that mission without any good reason, he will be abrogating from his judicial duty, and thus violating not only the

Code of Conduct for Judicial Officers of Tanzania, but also the law of the land. It is for the above reasons that there is in place the principle of Judicial Disqualification which guides on when a judicial officer of this country should disqualify himself from presiding over a matter duly assigned to him. There is no dispute that the application at hand was appropriately assigned to me. The law and practice just demonstrated herein above thus apply to the matter under discussion.

The doctrine of Judicial Disqualification is intended to promote the fundamental principle of Judicial Impartiality in the administration of justice. It has been underscored that Judicial Impartiality is the bedrock of every civilized and democratic judicial system, it requires a Judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute, see the case of **Attorney-General v. Anyang' Nyong'o and others [2007] 1 EA 12** decided by the East African Court of Justice at Arusha. On the other side, the principle of Judicial Disqualification or recusal refers to the act of abstaining from participation in an official action such as a legal proceeding due to a conflict of interests of the presiding court official,see at http://en.wikipedia.org/wiki/Judicial_disqualification (retrieved on 6/7/2014).

As I observed elsewhere (my ruling dated 02/05/2014 in the case of **VIP Engineering and Marketing Ltdv. Standard Chartered Bank PLC and Five Others, Civil Case No. 229 of 2013, at Dar es salaam,**

unreported), there are two schools of thoughts on the law related to Judicial Disqualification in the United Republic of Tanzania. The first school is to the effect that, once there is an accusation against a judicial officer on grounds of bias in deciding a case, the court (the accused Judicial Officer) will examine the grounds for the accusation and make a finding on whether or not the grounds are strong enough to point out that there is a real possibility of bias. In case the issue is positively answered, the judicial officer must disqualify himself from adjudicating the matter. But, if the issue is negatively determined the judicial officer has no any other option other than to proceed in adjudicating the matter. The second school of thought is almost similar to the first school, save for the fact that it (the second school) is in favour of the idea that, in some circumstances, even where the accusation against the presiding judicial officer is not strong enough to point out that there is a real possibility of bias on his part, the judicial officer may still disqualify himself from the adjudication for the interests of justice as long as justice is rooted in confidence.

Both schools of thought are supported by the Court of Appeal of Tanzania (CAT) precedents. It must be born in mind here that, the CAT is the highest court in our court system/hierarchy and its decisions are laws of the land binding to all other courts (including this court) and tribunals subordinate to it, regardless of their correctness, see **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa**

[1988] TLR 146 (CAT). This position is by virtue of the common law doctrine of *stare decisis* which is applicable in our jurisdiction.

Precedents supporting the first school of thought include **Laurian G. Lugarabamu v. Inspector General of Police and the Attorney General, CAT Civil Appeal No. 13 of 1999, at Dar es salaam** (unreported). In that case the CAT held that, a judge or magistrate should not be asked to disqualify himself or herself for flimsy or imaginary fears, unless some conditions are met, I quote it for a readymade reference;

> "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 adverse party or one of them. Three, if the judge or a member of his close family has an interest in the outcome of the litigation other than the administration of justice" (at page 6 of the typed version of the Judgement).

This position of the law was also sustained in the case of **Attorney-General v. Anyang' Nyong'o and others** (supra) where it was held that Judges must be in the forefront in ensuring the maintenance of public confidence in court, however they must not lightly accede to veiled intimidation in form of unsubstantiated allegations that they or any of them has undermined public confidence in court. The Court of Appeal of Kenya sitting at Mombasa, also upheld this stance in **Gharib v. Naaman [1999] 2 EA 88** when it rejected a motion for disqualification

of one of its Judges and remarked thus, I quote the relevant passage for a swift perusal;

> "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".

On the other hand, the second school of thought is backed up by the CAT decision in the case of the **Registered Trustees of Social Action Trust Fund and others v. Messrs Happy Sausages Ltd and Eleven other [2004] TLR. 264**. In that case, the appellant appealed to the CAT against a ruling of a Judge of this Court praying *inter alia*, for the Judge to disqualify himself from presiding over other two matters for grounds of suspected bias in making a ruling. In that case, though the CAT underlined the stance made in the **Laurian Lugarabamu Case**, it found that in that particular case (the Registered Trustees Case) the accusation against the Judge was unfounded and it dismissed the appeal. However, the CAT did not totally neglect the said ungrounded fear by the

appellant and proceeded to order thus, I leave it to speak by its own tongue;

> "In the event and for the foregoing reasons, we find no merit in the appeal which is dismissed with costs. However, in the interests of justice, even though we have found no bias established against the learned trial judge conducting the proceedings, it is ordered that hearing of the main suit and other pending applications be proceeded with before another judge" (at page 21 of the typed judgement).

Hardly a year later in **Tanzania Telecommunication Co. Ltd v. MIC Tanzania Limited, CAT Civil Appeal No. 99 of 2003, at Dar es salaam** (unreported), the CAT cemented the second school of thought. In that case, the appellant's counsel applied for a recusal of one of the members of the panel of the CAT on the ground that she had presided over an application for stay of execution and had made her mind on an issue which had also to be tried in the appeal. The CAT considered that ground various precedents (the above cited **Laurian Lugarabamu** Case inclusive). It then concluded that, the application for the disqualification was unfounded and the fact that a judge had made a previous decision on one aspect of the matter does not necessarily mean that he or she cannot come to another decision on a different issue. The CAT again, did not absolutely ignore the said unfounded fear for bias. It decided to give way so that justice could be seen to be done upon re-constitution of another panel. It held, and I quote it for ease of reference;

> "...However, it is often said that justice is rooted in confidence. Under the circumstances, we order that the Registrar place this matter before the Honourable the Chief Justice, with request to re-constitute the panel to hear and determine the appeal" (see page 8 of the typed version of the Ruling).

It is apparent that the two precedents cited herein above (the Registered Trustees Case and the Tanzania Telecommunication Co. Ltd Case) echoed the stance set previously by the same CAT in the case of **Zabron Pangamaleza v. Joachim Kiwaraka & Another [1987] TLR 140** (Judgement). In that case, the appellant **Zabron Pangamaleza** lost the case before a Senior Resident Magistrate in Iringa following his complaint against him for bias. He filed a revisional application before the High Court with some complaints on bias against the Magistrate. The High Court found *inter alia*, that the fear for bias was not founded and he lost the case again. He appealed to the CAT which held to the effect that, thought the magistrate would have ensured that justice was done had he tried the case, the appellant before him would not have seen that justice was actually done. The CAT then held as quoted hereunder;

> "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. This can easily be done at a court like Iringa where there are several Magistrates" (see at page 146).

It is thus prominent that, the **Zabron Pangamaleza** Case supported the second school of thought save only where the court is of the view that the accusation against the presiding judicial officer are aimed at delaying the case, under which said single circumstance, the judicial officer will not disqualify himself.

Other courts outside Tanzania do also bear the second stance of the law. In the case of **Eastern and Southern African Trade and Development Bank (PTA) and another v. Ogang (2) [2002] 1 EA 54 (COMESA)** for instance, the COMESA Court of Justice sitting at Lusaka, Zambia considered the application for recusal of one of the Judges of the Court, it was of the view that, though there was no reason to doubt his integrity and to think that he would allow his prior acquaintance with the Respondent to cloud his judgment, it was a fundamental rule of the law that justice should not only be done, but should manifestly and undoubtedly be seen to be done. It was, accordingly, incumbent upon the Judge to have either recused himself or, at the least, to have disclosed his acquaintance with the Respondent to the Court.

It must be noted that, all the cases discussed above, related to the stage of trial of the respective cases. The sub-issue here is thus, whether or not the principles demonstrated above apply also in matters like the

one at hand, which is pending for a ruling on the PO. In my view, the principles apply *mutatis mutandis* in such matters where the accuser party alleges that the reasons for applying for the recusal came to his or her knowledge when the matter was already pending for the verdict. The principles thus apply at any stage of the proceedings before the impugned judicial officer becomes *functus officio* in the matter. The sub-issue is thus answered positively.

As to when a judicial officer becomes *functus officio* in a case, a heap of precedents have answered that, a judicial officer or a court becomes *fuctus officio* upon finally determining the matter, see **Scolastica Benedict v. Martin Benedict [1993] TLR 1** (CAT), **Zee Hotel Management Group and others v. Minister of Finance and others [1997] TLR 265** (CAT) and **Bibi Kisoko Medard v. Minister for Lands, Housing and Urban Development and another [1983] TLR 250** (HC). See also **Tanzania Telecommunications Company Limited and others v. Tri Telecommunications Tanzania Limited [2006] 1 EA 393** (CAT) following **John Mgaya and others v Edmundi Mjengwa and others criminal appeal number 8 (a) of 1997** and **Kamundi v. R [1973] EA 540.** The same applies in other jurisdictions like Kenya, see **Mediratta v. Kenya Commercial Bank and others [2006] 2 EA 194** (CCK).

The rationale of my holding that the above highlighted principles apply in matters pending for verdict is that, where an application for recusal is made basing on reasons which the accuser party alleges came to his knowledge when the matter is at the stage of a verdict, it will not matter that the case is pending for the verdict, otherwise the accuser party will walk out of the court complaining that justice was not done to him or was not seen to have been done. The law says, justice must not only be done, but must also manifestly and undoubtedly be seen to have been done. It must be underscored also that, minimum standard elements of fair trial include the right to be tried by an impartial and independent court. This right is enshrined by the Constitution of the United Republic of Tanzania, 1977, Cap. 2, R. E. 2002, see articles 13 (6) (a) read with 107A (2) (a). The law also emphasises that the right to fair trial must be maintained in all stages of the matter until the same is finally determined.

It may be argued on the other side that applying the principles to a matter which is pending for a verdict may encourage delays of cases. While this argument may be genuine on the grounds that the right to speedy trial is also one of the minimum standard elements of fair trial (article 107A (2) (b) of Cap. 2), in some circumstances such speed of trial by a judicial officer accused for bias will never ensure that justice has manifestly and undoubtedly been seen to have been done. I am also convinced that where speed of a trial and justice collide, the latter must

prevail over the former. This is the spirit of the legal belief of "justice hurried is justice buried" which essentially means that speed of a case will not be allowed to sacrifice justice for, justice is better than speed, see decisions of this Court in **Rahel Kifyogo v. Kanjinga Mwashilindi (PC) High Court Civil Appeal No. 56 of 1997, at Mbeya** (unreported, by Moshi, J as he then was) following **Alimasi Kalumbeta v. Republic [1982] TLR. 329** (Samatta J, as he then was). It is more so in the case under discussion where the first respondent made the accusation against me even without consulting his counsel and he remained adamant even after the tutorial submissions by Mr. Lukosi, learned PSA. The first respondent might have thus, meant what he said, and might have been prepared for the result of his prayer, and his views must be considered. Whether such views are correct or not, is a subject to be discussed soon herein below.

Having demonstrated the applicable law, I now revert back to the case at issue for testing merits of the single reason supporting the application for my recusal. In fact, I admit, as I did on that 3/7/2014 when I addressed the parties that the ruling has been delayed. However, the belatedness is not without reasons. As I informed the parties the matter had been fixed by the Deputy Registrar (in my absence) to come for ruling on 3/7/2014, but I had already compacted my official schedule for that date (3/7/2014). Again, the matter had been delayed for pressure of official duties on my part in and outside Dar es salaam. It is a

common knowledge that Judges of this Court are overwhelmed by the backlog of cases. The matter was also interrupted by my annual leave that had been adjourned several times for the same ground of pressure of official work. Moreover, the matter itself involves lengthy submissions by the parties citing various precedents with some annextures. It was thus a matter capable of holding up a court for some times in view of considering it judiciously. Moreover, the suggested adjournment on the said 3/7/2014 was only for a period of one or two working days since the same was interrupted by a long weekend involving a public holiday of *Sabasaba* (peasants' day) that falls on the 7th of July, each year. The delay and the suggested adjournment were thus not for ill motives.

For the above reasons I hold that the ground supporting the application for my recusal is short of merits and does not fit the test set by the CAT in the first school of thought. For this sole finding, I would have refused to disqualify myself as prayed by the first respondent. But, for the prevailing circumstances in this matter at hand, I am compelled to resort to the second school of thought. The grounds for taking this course are the following; as underscored earlier justice must not only be done, but must also be manifestly and undoubtedly seen to be done. Moreover, justice is footed on confidence which the first respondent has lost.

Again, there is a good number of other Judges in Dar es salaam who can determine the matter in my lieu without any ordeal of importing

a Judge from other High Court Registries outside Dar es salaam. After all, the matter was argued by way of written submissions as differentiated from oral submissions or evidence. Another Judge can thus just read the submissions and record his ruling. It would have been a different case had it been that the matter was heard by oral submissions or evidence in which said case, the successor Judge could not have had the opportunity of hearing the parties unless the proceedings were re-opened. This course would cause a more delay. Moreover, the nature of the arguments pending for ruling is of a mere PO, while the main application has not been heard yet, the successor Judge will thus have a better opportunity to hear the main application after deciding on the PO. This follows my vision that, as a general rule justice requires a Judge who determines a PO to also determine the main objected matter in case the PO is overruled. This view is footed on the belief that in case a Judge entertains a PO and overrules it, and the objected matter is assigned to a successor Judge, that successor Judge may have a different view on the decided PO, and the decision of the predecessor Judge may not bind him, hence a complication in the matter if not a delay.

Other reasons for resorting to the second school of thought are that, the learned counsel for the adverse side in this matter (the applicant) took a very passive approach to the first respondent's prayer. This conduct, is conspicuously indicative that the applicant supports the move by the first respondent. The third and fourth respondents who were

represented by Mr. Lukosi learned PSA and who openly objected the prayer for recusal are not parties to the arguments related to the PO now pending for the ruling. The parties to the PO did thus put me in a position that I cannot resort to the first school of thought, otherwise there will be some negative feelings in case I decide the PO either way. If for example, I overrule it, it will be regarded as I did so in vengeance for the first respondent's accusation against me. On the other side, in case I uphold the same, it will be considered that I did so for appeasing the first respondent following the said accusation against me.

As to the positions taken by the first respondent, his counsel and the applicant's counsel, I would remark that, though a judicial officer has a duty to accomplish his assigned adjudicating duties impartially, the parties to the matter too, have a duty not to put judicial officers under circumstances that may compel them to resort to the second school of thought, especially where the parties are legally represented as in the matter at hand. The learned counsel for the first respondent cannot thus exonerate himself from this move in a pretext that he could not advise his client otherwise for; the law would expect him to properly advise his client and give his own views on the concern of his client, see the envisaging in the **Tanzania Telecommunication Co. Ltd case** (supra).

I am also justified to take the second school of thought for; the law on precedents is to the effect that where a judicial officer faces two contradictory positions of the law, and each of them is supported by

authorities with equal binding forces, he is at liberty to follow any of the stances that he deems will do justice according to the circumstances of the case, of course not without giving reasons.

Having observed as above, the main issue is answered positively that under the circumstances of this matter, I have to disqualify myself as prayed by the first respondent though his accusation was unfounded. I accordingly disqualify myself from making the pending ruling on PO and from presiding over the pending main application for the reasons I have adduced above. The case file should thus be placed before the assigning authority for it to see if it can exercise its powers to re-assign it to another judge.

JHK. UTAMWA

JUDGE

.8/7/2014.