IN THE HIGH COURT OF TANZANIA

[MTWARA DISTRICT REGISTRY]

AT MTWARA

MISC. CIVIL APPLICATION NO. 38 OF 2012

AMADEI S. MKOBA & 104 OTHERS ..... DEFENDANTS

VERSUS

ROSE COSTA MWANACHE ..... PLAINTIFF

Date of submissions: 07/06/2016
Date of Ruling: 08/06/2016

R U L I N G

Twaib, J:

On 11th December 2015, I delivered judgment in Land Case No. 9 of 2012 between the parties herein. That judgment has aggrieved the applicants (original defendants), who have filed the present application for leave to appeal to the Court of Appeal of Tanzania.

On 5th April 2016, I set this matter for hearing on 7th June 2016. However, on 3rd June, 2016, the applicants filed a document titled "Loss of Confidence Notice", ostensibly saying that they have no confidence in having me as the Judge presiding over the application because I am the same Judge who decided against them in the main case. They believe that rules of natural justice "may be violated and that justice may not be seen to be done", if I preside over the application for leave to appeal against my own decision.

In view of the said "Notice", when the case was called on for hearing, the 1st applicant, Mr. Amadei S. Mkoba, on behalf of his co-applicants, moved to submit

on the Notice, saying that they had expected another Judge to be assigned to hear the application. In response, Mr. Kazungu, learned counsel for the respondents, resisted the prayer but also raised some issues of technical significance, which I will determine first.

Mr. Kazungu's argument on technical grounds challenges the validity of the Notice, saying that the same does not indicate who drew it, contrary to section 44 (2) of the Advocates Act, Cap 341. The provision states that no document shall be admitted unless it indicates who drew it. The law actually goes further to make it an offence punishable by imprisonment, fine or both, submitted Mr. Kazungu, adding that since this is not a representative suit, the document had to be signed by all the 105 applicants. It has instead been signed by about 30-plus applicants. He intimated that the Court should consider punishing whoever filed the document for violating section 44 (1) of the Advocates Act.

Mr. Mkoba rejoined with a submission to the effect that the document contains 34 signatures of persons who are the actual applicants herein, and that all others whose signature do not appear in the Notice are not applicants. Hence, the actual applicants are indicated by name and signatures contained in the Notice. With due respect to Mr. Kazungu, I accept Mr. Mkoba's argument as sufficient endorsement for the purposes of the Notice. The names are clearly stated, and the signatures of those who have expressed their views requiring my recusal are appended to each signature. There is thus no need for dealing with the issue of consequences of non-endorsement in terms of section 43 of the Advocates Act.

However, I think it is of moment here, albeit by way of *obiter dicta*, to mention that even if there was no such endorsement, the document and its filing in court would not have attracted the criminal action envisaged by section 44 (2) of the

Advocates Act, for two reasons: first, the document at issue, being a document filed for purposes of a court proceeding, is not among those listed in section 43 of the Act; and secondly, the document has not been registered by a "registering officer" covered by section 43 of the Act. The ordinary civil (or land) registry of this Court is not one of the registries the section refers to.

Mr. Kazungu's argument on the merits of the prayer for recusal begins with the argument that an application for leave is not filed before a particular judge. It is up to the court to assign the application. To require the judge who is assigned the case to withdraw from presiding over it is to interfere with the court's powers to assign cases among judges. Otherwise, the applicants would be choosing a forum for their case, something they have no right to do. He submitted: "This is not a supermarket, where one has the right to choose what to buy and what not to buy". In any case, counsel argued, the applicants will have an opportunity to make another application to the Court of Appeal if the present application is not granted. He further said that there is a preliminary objection that his client has raised, and that the same has to be determined according to law. He prayed that the Notice be struck out.

In rejoinder, Mr. Mkoba used an analogy to respond to the argument that they would still have the right to make a second application to the Court of Appeal if they are not successful before the High Court. He said:

> *The fact that we can re-apply to the Court of Appeal holds no water. One cannot drink poison simply because there is milk available to treat one. All we want is a neutral judge to determine our application.*

Despite its somewhat distasteful character, the analogy used by Mr. Mkoba makes some sense. It is true that the mere existence of an avenue for filing a second

application for leave to appeal (or an appeal from a decision, where applicable) is not in itself a reason for disallowing a prayer for recusal if good reasons exist for recusal.

The applicants' only reason for wanting my recusal is that, having decided the main case against them, justice will likely not be done if I sit to determine the application for leave against that same decision. The applicants seem to think that in deciding whether or not leave should be granted, I will be deciding whether or not my decision was correct, making me a judge in my own cause. This is clear from their Notice. In paragraph 4 thereof, they state:

> *"…the rules of natural justice may be violated and that justice may not be seen to be done if the same Honourable Justice proceed in hearing the application seeking to defeat his judgment in which he believe he was hundred percent correct."* (sic!)

Fortunately, the track in which I am now treading has been well-treaded by others before me. The reasons that may compel a judicial officer in Tanzania to recuse himself from the conduct of a case were set down in the case of ***Laurian G. Lugarabamu v. Inspector General of Police & Anor***, CAT Civil Appeal No. 13 of 1999, at Dar es Salaam (unreported). The Court of Appeal held that flimsy or imaginary fears cannot be ground for recusal. Instead, three conditions must be met, namely:

1. Where there is evidence of bad blood between the litigant and the judge concerned;

2. Where the judge has close relationship with the adverse party or one of them; and

3. Where the judge or a member of his close family has an interest in the outcome of the litigation other than the administration of justice.

In a decision that I made less than two weeks ago, I was called upon to recuse myself from presiding over the trial in the case of ***Independent Power Tanzania Ltd. & Another v. Standard Chartered Bank (Hong Kong) Ltd. and 2 Ors***., Civil Case No. 60 of 2014. I considered the decisions of the Court of Appeal in ***Laurian G. Lugarabamu v. Inspector General of Police & Anor***, CAT Civil Appeal No. 13 of 1999, at Dar es Salaam (unreported) and the case of ***Zabron Pangamaleza v. Joachim Kiwaraka & Another*** [1987] TLR 140.

Given the above two decisions, Utamwa J. in ***VIP Engineering and Marketing Ltd. v Standard Chartered Bank PLC & 5 Ors***, Civil Case No. 229 of 2013, and ***Luxury Apartments Ltd. v Edward Wilson Ngwale***, Misc. Civil Application No. 59 of 2013 (both HCT DSM) identified two schools of thought. The first one wass that the court has a duty to sit and decide the case, despite a prayer for his recusal if, upon due consideration of the reasons given, they do not show that the Judical Officer will be prejudiced in his continued handling of the matter. The second school holds that even where such allegations are not proved to the judicial officer's satisfaction, the judicial officer should still recuse himself if his continued handling of the matter may cause an apprehension in one or more of the parties that justice would not likely be done.

The issue here is whether the principles in ***Laurian Lugarabamu's Case*** have been met to support the prayer for my recusal. It was held in English case of ***Paul Jonathan Howell & Others v. Marcus Lee Millais*** [2007] EWCA Civ 720 (per Buxton, LJ) quoted ***Dryry v the BBC***, that:

> *"The mere fact that the judge had made a finding against a party on a previous occasion even if he had been critical to that party did not found a later objection to the judge sitting in another matter. It was however also plain that where there was any room for doubt as to which course to adopt that doubt should be resolved in favour of recusal".*

As earlier stated, the only reason why the applicants want me to recuse myself herein, is that I cannot be fair if I sat to decide on their application for leave to appeal because I was the one who made the decision they are now seeking to challenge on appeal. Obviously, this is no good ground for my recusal. Hence, I could only recuse myself if I subscribed to the second school of thought, such that the mere expression of lack of confidence is sufficient to secure a Judge's recusal, since justice has to be rooted in confidence.

In IPTL, I was not required to choose between the two schools, as the matter fell under an exception to the second school of thought, where the accuser appears to be interested in delaying the determination of the matter. In the case at hand, I see none of that, despite Mr. Kazungu's submission to that effect.

In my respectful opinion, the applicants are simply suffering from a misapprehension of the true import of an application for leave to appeal. In fact, in an application for review, the same Judge who made the decision is required to hold that his decision was erroneously made. Not so in an application for leave to appeal. The applicants need to understand that the application before me is not an appeal against my decision, neither will I be required to determine whether or not my decision was correct. All I would need to decide is whether the decision raises issues of legal significance fit to be brought to the attention of the Court of Appeal. There is no violation of rules of natural justice. The reasons the applicants have advanced, therefore, are far too inadequate as grounds for my recusal.

Considering all the factors that usually surround such instances, I think that the first school described above provides the better approach. I would, with respect, align myself to this school. I think the duty of a judicial officer to sit and decide a matter assigned to him should not be taken away on the ground merely that the accuser feels that there will be no fairness if that particular judicial officer determines the case because he or she had earlier made a decision against the accusing party. Accepting such an excuse would be to succumb, for no good reason, to pressure from litigants or some of them, who may simply be ignorant of the true nature of the impartial disposition that the Judge or Magistrate is bound to uphold in any particular case.

Before winding up this ruling, I find it pertinent to cite the following apt remark by the Court of Appeal of Kenya when rejecting a motion for recusal of one of its Judges in ***Gharib v. Naaman*** [1999] 2 EA 88 comes readily to mind:

> *"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 the same is seeking something other than the interest of justice".*

In the final analysis, and for the reasons advanced in this ruling, I hold that the ground advanced by the applicants herein is insufficient to permit me to relinquish

my duty to sit and decide the matter. The applicants will be better advised to appreciate the fact that, by the very nature of their training and orientation, and above all, their oath of office, Judges do have not only the duty, but also the capacity, to be impartial and detached from the cases that come before them, to handle them dispassionately and to decide them strictly in accordance with the law and justice.

That is a noble calling. It is a calling to which we as Judges are always enjoined to respond. Only when we are satisfied, on cogent grounds, that our ability to deliver decisions according to law and justice has been or is likely to be compromised, that we can be relieved of the duty to preside over any particular case.

As earlier stated, the applicants have not proved anything that passes the test laid down in the law governing recusal as I understand it. Consequently, I dismiss the applicants' prayer for my recusal for want of merit. There shall be no order as to costs.

DATED and DELIVERED at Mtwara this 8th day of June 2016.

F. Twaib

JUDGE