IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 53 OF 2021

MWESIGWA ZAIDI SIRAJI..... PLAINTIFF

VERSUS

MARA TEXTILES LIMITED..... DEFENDANT

RULING

Date of last order: 1st March, 2023

Date of Ruling: 17th March, 2023

E.E. KAKOLAKI, J.

On the 08/12/2022, the plaintiff herein filed with this Court a letter requesting for my recusal as a presiding judge from the conduct of this matter. The move came after the defendant had submitted on no case to answer following closure of plaintiff's case on 27/10/2022 and parties ordered to file their respective submissions to that effect. As the letter was not served to the respondent on 12/12/2022 an order was issued for the plaintiff to serve the respondent with a copy of the said letter so that both could be heard on the matters raised therein, the order which was cordially complied with. In the said letter the plaintiff alleged that, he has reasons to

believe that, justice will not prevail under trial judge's watch. The matter was therefore fixed for hearing on 01/03/2023, after two adjournments.

Hearing proceeded viva voce, whereby the plaintiff appeared in person while the defendant had representation of Mr. Elisa Msuya assisted by Neema Mahunga, both learned advocates.

Kicking off the ball Mr. Mwesigwa argued that, the proceedings are founded on a lot of bias and favour, lack of impartiality and lack of diligence which to him will prejudice justice if the trial judge continues to handle this matter.

With regard to bias of the trial judge, it was plaintiff's contention that, prior to my coming into the proceedings of this matter there had been raised a preliminary objection on lack of plaintiff's cause of action against the 1st, 3rd and 4th defendants in which on 14/06/2021, the Court (through Mlacha, J), issued an order for conduction of forensic investigation to ascertain whether the officers of the defendants had signed the document in dispute namely annexure A2 to the plaint. He argued, forensic examination order of the said document was meant to ascertain whether the plaintiff had a cause of action against the 1st, 3rd, and 4th defendants. It was his further contention that, surprisingly when the forensic report came out and the preliminary objection heard by current trial judge, the ruling of the Court of 8/10/2021 answered

the issue which was not raised and consequently ordered for removal of 1st, 3rd and 4th defendants from the plaint for want of cause of action. According to him, paragraphs 6, 7, 16, and 17 of the plaint disclosed cause of action against those defendants. He took the view that, the trial judge was biased in deciding that the plaintiff had no cause of action against the 1st, 3rd and 4th defendants after disregarding the report which was in the court file.

Concerning lack of impartiality, it was his argument that, the principle is imposed in the Constitution of the URT, 1977 under Article 107 A (2) (a). He was of the view that, the trial judge acted in contravention of the Constitution as the principle of impartiality applies not only to the decision reached but also the whole process in which the decision is made.

Thirdly he contended, the trial judge acted in favour of the defendant as on 08/12/2022, advocate Irene for the defendant applied for extension of time to file rejoinder submission against the plaintiff's reply submission, and admitted openly that she had no good cause for failure to file rejoinder in time, but surprisingly the trial judge in his ruling found there was good cause for the delay. To him, this was a favour to the defendant.

It was also his contention that, on 31/08/2022 plaintiff prayed for the Court to issue summons to Mohamed Dewji and the Forensic expert but the trial

judge issued only one summons for Mohamed Dewji on the ground that, Forensic expert is a courts witness. He added that, on 26/10/2022 when the matter was heard in chambers, the trial judge denied him to refer to the contents of forensic report despite of admission of exhibits P1 and P2 basing on same report. It was his submission that, all those conducts amount to bias of the trial judge.

On another accusation to the trial judge, he cited to the Court Article 107 A (2) (e) of the Constitution and submitted that, on 26/10/2022 the trial judge rejected admission of annexure A2 to the plaint on the grounds that it did not bear advocate's stamp while at the same time admitting exhibits P1 and P2 which had similar features. He lamented, the trial judge did not consider whether Annexure A2 was a real document which was submitted to forensic department or not.

In winding up the plaintiff submitted that, the trial Judge acted without diligence and was biased, which if all is taken into account occasioned injustice on his part. He took the view that, it is for the interest of justice that I recuse himself from handling this matter while raising a disclaimer that, his act should not be taken as shopping forum of judges of his own

choice rather enhancement of his confidence to the justice system, in particular the judiciary.

In rebuttal submission, Mr. Msuya attacked the accussations raised by his adversary. He argued that, the plaintiff as a complainant is not an ordinary man but also a practising advocate with Registration number 6239. In that regard, he is an officer of the court by virtue of his profession and secondly, that he is presumed to know the law, and the fact that courts are guided by statutory laws and case laws.

Mr. Msuya explained in details on what case laws provide regarding recusal of judicial officer by citing the case of **Isaac Mwamasika and 2 Other Vs. CRDB Bank Limited,** Civil Revision No.6 of 2016(CAT-unreported). He then contended that, request for recusal of the judge is a very serious allegations which this Court and the Court of Appeal have maintained that, the same should not be entertained unless the complainant submits tangible materials supporting recusal of the judge or any other judicial officer. He cement his argument by citing the cases of **Isaac Mwamasika and 2 Other** (supra) at pages 13-14, and **Senso Maswi @ Mwita & Wambura s/o Marwa @ Wambura Vs. R,** Criminal Appeal No. 518 of 2019, (CAT- Unreported) at pages 11-12, where the Court acknowledged the significance of Art. 107 A

(1) and (2) of the Constitution but held that, much as justice is rooted in confidence, that does not include a litigant demanding change of a forum for unknown reasons as it is in this case, or simply because he disliked the magistrate who had conduct of the proceedings. To succumb to such demand would be abdication of the adjudication duty by the judicial officer, Mr. Msuya stressed and cited a plethora of authorities in support of that stance. He reminded the Court of the grounds for recusal as articulated in the case of **Hobokela Fred Mwangota and Another Vs Augustino Mwangota,** Misc. civil case No.271 of 2021 (HC-Unreported) and invited me to consider them in determination of this matter.

Replying plaintiff's complaints, it was his contention that, as per paragraph 7 of the amended plaint, the plaintiff pleads that the original report is in court, which to him means that, the report is court's document. Mr. Msuya took the view that, it is unethical and unprofessional for the plaintiff to state that, the order was made for the purpose of resolving the issue of cause of action against the 1st, 3rd and 4th defendants as that issue was raised by the then defendants in their joint Written Statement of Defence, and both parties were heard on it before determination by the court in which the plaintiff was ordered to amend the plaint, the order which he complied with without

complaints. According to him, if the plaintiff was dissatisfied with the ruling, he ought to have followed the proper course as recusal of the presiding judge is not a proper remedy for challenging the said decision, instead it is an invitation for him to sit as the Court of Appeal on his own decision.

Concerning rejection of annexure A2 it was his submission that, the same does not form part of forensic report, and whether the decision to reject the same was right or not, it is for another forum to decide and not this Court. Hence, the same does not form the basis for recusal of the judge.

Regarding his denial by the trial judge to make reference to the forensic report it was his response that, the report belongs to the court and that the plaintiff is not an expert in hand writing expected to tender the same, thus could not have made any reference therein without having it tendered first and admitted in Court.

On the complaint of this Court's denial to call forensic expert it was his submission that, the record of 31/08/2022 shows that there was no such prayer made to summon the alleged forensic expert. Concerning the contention that the court did not make any reference to forensic report in plaintiffs favour he argued that, the Court could not have referred to the exhibit which was not brought into its attention or tendered by the parties.

Regarding the allegation that the defendant was favoured when extended time to file rejoinder submission on no case to answer without justifiable reasons for delay, he countered that, Ms. Irene, as advocate addressed the Court in terms of section 93 of CPC and explained the reasons for delay in which the plaintiff failed to counter. Thus, to him, there is no any favour that was given to her.

In winding up Mr. Msuya implored this Court to deter unethical behaviour of parties who are doing forum shopping at the expense of justice. According to him, interest of justice demands the plaintiff to be warned not to act unethically and unprofessional like that, he being advocate on the other part. He then prayed the Court to reject this application and proceed with the matter as scheduled as it is strange that the application was raised just before the date is set for ruling on no case to answer.

In a short rejoinder, the plaintiff criticised the decisions referred by Mr. Msuya and submitted that, they are distinguishable to the facts of this matter. According to him, he has managed to raise factual issues which go to the root of procedural and ethical issues with relevant dates found in courts records as in the cited authorities, no party was able to so do.

Concerning the submission that, he ought to have taken appropriate legal steps if not satisfied with the complained of ruling of this Court, he submitted, even his act of applying for recusal of the presiding judge is a correct step taken towards challenging the said decision or showing his dissatisfaction. On other points he reiterated his submission in chief and maintained that, in the event this court follows the precedents cited by Mr. Msuya, which according to him are distinguishable from the facts of his case and the trial judge refuses to recuse himself, then that will be a new precedent, meaning there will be no meaning of having in place recusal procedure for the judicial officer.

I have keenly considered the rivalry arguments by the parties herein, the nagging issue calling for determination by this Court is whether the plaintiff's prayer for recusal of the trial judge is justified or not. Notably recusal and disqualification of a judge or any judicial officer from the conduct of any matter is a sensitive subject, since it draws into question the competency of a judge or magistrate to carry out the fundamental and Constitutional role of his or her position, to fair and impartial resolution of judicial proceedings. So, the decision to file a motion seeking his/her disqualification should be made only after careful consideration of all the circumstances pertaining to

such subject matter as it was held in the case of **Isaac Mwamasika and 2 Others** (Supra).

Rule 9 (1) and (2) of the Code of Conduct and Ethics for Judicial officers, 2020, GN. No. 1001 published on 20/11/2020 provides for the circumstances under which a judicial officer may disqualify or refuse to disqualify himself from the conduct of the matter. The same reads thus:

> *9(1) A judicial officer shall disqualify himself in any case in which that judicial officer:*
> *(a) believes he will be unable to adjudicate impartially.*
> *(b) believes that a reasonable, fair minded and informed person, would have a reasonable suspicion of conflict between a judicial officer's personal interest or that of a judicial officer's immediate family and his judicial functions;*
> *(c) has a personal bias or prejudice concerning a party or personal knowledge or facts;*
> *(d) served as a lawyer in a matter in controversy or a lawyer with whom he previously practised law served during such association as a lawyer concerning the matter or the judicial officer or such lawyer has been a material witness in the matter;*
> *(2) Disqualification is not appropriate if:*

(a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or

(b) no other judicial officer can deal with the case or because of urgent circumstances, failure to act could lead to a miscarriage of justice;

(c) upon disclosure of the ground(s) of intended recusal by the judicial officer, parties agree that the judicial officer may participate in the proceedings. The consent by the parties or their representatives shall be recorded and shall form part of the record of proceedings.

The grounds for recusal were restated by the Court of Appeal in the case of **Isaac Mwamasika** (supra) in which the apex court in its earlier on decision in **Laurean G. Rugaimukamu Vs. Inspector General of Police & Another**, CAT-Civil Appeal No. 13 of 1999 (unreported), were quoted with approval. In the latter, principles for recusal were enumerated as quoted hereunder:

*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 litigation other than the administration of justice. **A judge or a***

magistrate should not be asked to disqualify himself for flimsy or imaginary fears.

Further the law is well settled that, recusal on trivial grounds is tantamount to abduction of judicial function. This principle of law was adumbrated in the case of **Registered Trustees of Social Action Trust Fund & Another Vs. Happy Sausages Ltd & Others** (2004) TLR 264 where it was held inter alia that:

> *It is our considered view that it would be an abduction of judicial function and an 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 on the grounds of possible appearance of bias.*

Having in mind all those grounds and principles of law guiding recusal of judicial officer, I now proceed to consider plaintiff's complaints one after another as raised in his submission. Starting with the issue of bias, plaintiff's major lamentation hinges on the ruling of this Court dated 08/10/2021 answering the preliminary objection which according to him was not raised, by holding that, the plaint did not disclose the cause of action against the 1st, 3rd and 4th defendants. He is accusing me for not considering the forensic report which according to Mr. Msuya was not tendered and admitted. Further

accusations are on my refusal to admit annexure A2 which document is original and referred in the said forensic report, which complaints if all wrapped up together constitute bias on my over the matter. In short the basis of my biasness according to him lies on my decision for not admitting annexure A2 and the finding that, the plaintiff had no cause of action against the 1st, 3rd and 4th defendants.

It is worth noting that, for a ground of bias stand before recusal any judicial officer strong reasons must be advanced supporting the contention that, with all his/her conducts the judicial officer is not expected to discharge his duties fairly. This principle was stressed in the case of **R Vs. Australian Stevedoring Industry Board, Ex parte Melbourne Stevedoring Co Pty Ltd** [1953] 88 CLR 100, the case which was quoted with approval by this Court in **Dhirajlal Walji Ladwa & 2 Others v. Jitesh Jayantlal Ladwa & Another**, HC-Comm. Cause No. 2 of 2020 (HC-unreported), where the Court said:

> *"…to demonstrate disqualification for bias "it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties*."

Similarly the Court of Appeal in **Isaac Mwamasika** (supra) when deliberating on *'bias'* as one of the reasons for which recusal of the judicial officer can be grounded, borrowed the wisdom of the House of Lords in the case of **Reg. Vs. Gough**, it was observed thus:

> *"…the relevant test to be used to determine the issue of bias is to examine: whether the events in question rise to reasonable apprehension or suspension on the part of a fair minded and informed member of the public that the judge was not impartial."*

With those principles in mind, I find the reasons advanced by the plaintiff herein in support of the ground of bias are flimsy and therefore do not hold water as they go against the grounds stated in **Laurean G. Rugaimukamu** (supra), supporting recusal of the judicial officer. I so find as, **one**, there is no evidence adduced by the plaintiff that, I am in bad blood with him or that, the defendant(s) were known to the judge before, the fact which would invite an apprehension or suspicion on the part of fair minded person or informed member of the public that, under the circumstances the trial judge would be biased in making decision or act without impartiality. **Second**, it is in the plaintiff's knowledge and admission as also rightly put by Mr. Msuya that, both parties were given right to be heard before the complained of

decisions were reached. Now whether the complained of rulings on whether the plaintiff had cause of action against the 1st,3rd and 4th defendants or not and whether it was proper for me as trial judge to refuse annexure A2, are not issues for this Court to answer but rather the apex court. The mere fact that the plaintiff was displeased with my decision on the two rulings, I hold does not amount to bias or impartiality as the Plaintiff would want it to be so known since he knows the right course to take in challenging them. This ground is therefore devoid of substance hence bound to fail.

Next for determination is the contention that I favoured the defendant counsel, one Ms. Irene by granting her extension of time to file rejoinder submission to the plaintiff's reply to the submission of no case to answer, without justifiable reasons. This point in my view need not detain me much. The reasons I am so holding are not far-fetched, as the record speak loudly that the defendant's counsel advanced reasons for seeking extension of time and the plaintiff was given time to counter them before the ruling was delivered on the matter. Whether the same was correctly arrived at or not, it is within the sphere of another forum to judge but not this Court.

Another complaint on favouritism is that, when asked to issue summons to one Mohamed Dewji and the forensic expert, I refused to do so instead I

issued only one summons to Mohamed Dewji. With due respect to the plaintiff whom I respect much given the uncontroverted fact that, he is an advocate with roll No. 6239, hence full aware of the importance of raising argument supported by record, the record of 31/08/2022 betrays him as it paints out that, he never made such request of calling the forensic expert and got denied by the Court as rightly submitted on by Mr. Msuya. It is from those reasons I make a finding that, such contentions of favour are just fiction and inflammatory allegations deserving no entertainment by this Court as a ground for my recusal. I thus reject it for want of merit.

Next is the allegation that, I acted with lack of diligence in conducting the matter. This point apart from being mentioned by rushing was not submitted and expounded on by the complainant. However, he was of the view that lack of diligent combined with bias results into prejudice of justice. In my humble view it is insufficient for the plaintiff to merely assert that I acted without diligence, without demonstrating how. In short, all the grounds for recusal raised by the plaintiff have not graduated a higher level of reasonable suspicion that would make a fair-minded person and informed member of public to hold that I acted with bias, impartiality or favour in handling this matter. In fact, the same does not meet the tests stated in the case of

Laurean G. Rugaimukamu (supra) and Rule 9 (1) and (2) of the Code of Conduct and Ethics for Judicial officers, 2020, GN. No. 1001 published on 20/11/2020, for the judicial officer's recusal from the conduct of the matter. As rightly submitted by Mr. Msuya the reasons advanced by the plaintiff are mere flimsy and pretext of bias which do not meet the objective test. I do not think that my recusal just on the reasons advanced by the plaintiff would meet interest of justice considering plaintiff's submission that recusal is sought as a remedy for challenging the decisions made, the point which I will discuss at length soon. It is well settled that, recusal on trivial grounds is tantamount to abduction of judicial function. See the case of **Registered Trustees of Social Action Trust Fund & Another Vs. Happy Sausages Ltd & Others** (2004) TLR 264. I am also alive to the fact that, my refusal from recusal might lead the plaintiff to the feelings that, he has in some way been discriminated against. But again it is important for the judge to be bold and refuse to recuse from the case simply because the complainant would be more comfortable as it was firmly observed by the Court of Appeal in the case of **Isaac Mwamasika** (supra) when cited with approval the case of **Tridoros Bank N.V Vs. Dobbs** [2001] EWCA Civ. 468 as cited in the case of **Oktritie International Investment Management Ltd & 4 Others**

Vs. Mr. George Urumov [2014] EWCA Civ. 1315, where the Court had this to say on the point of the judge or magistrate to resist to recuse himself/herself for simple or flimsy reasons:

> *"7. 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 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 supplied)*

Similarly in the said case of **Isaac Mwamasika** (supra) emphasizing on the point of the judges and magistrates to resist disqualification easily from the proceedings, the Court of Appeal borrowed a wisdom of the Court of Appeal of Kenya in the case of **Nyamondi Ochieng-Nyamongo and Another Vs. Kenya Posts and Telecommunications Corporation**, Civil Application No. 264 of 1993 as cited in the case of **Uhuru Highway Development Ltd Vs. Central Bank of Kenya and 2 Others**, C.A. (K) Civil Appeal No. 36 of

1996, Kenya Appeal Reports Vol. 3 p. 211-219, where the Court observed thus:

> ***"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 supplied)

In this matter as demonstrated above the reasons advanced by the plaintiff seeking for my recusal are not only flimsy but also unsubstantiated. As alluded to above when rejoining the submission by Mr. Msuya that, if not pleased with the complained of rulings or order as a matter of law plaintiff ought to have followed the right course to challenge them, the plaintiff had in response that this request of my recusal as adjudicator is one of the right way of challenging the said decision. In my humble view, the applicant's act of seeking for my recusal as a recourse for challenging the decision of this Court, suggests nothing than forum shopping of judges whom he believes would heed to his pressure, me not being one of them. Indeed that is a luxury which the plaintiff cannot be afforded with under the circumstances as it was also held in the case of **Uhuru Highway Development Ltd** (supra). I so view as I took oath of office to render justice to any party

without fear or favour, the oath which I still stand for, thus I resist the plaintiff's temptation of pushing me to recuse myself from the conduct of this matter on the pretext of being biased, impartial and acting in favour of the defendant, while in fact he is seeking to challenge the decisions made in which I am not the proper forum to address them.

All said and done, I find the prayer by the plaintiff for my recusal from conduct of these proceedings is devoid of merit. Consequently, his application for my recusal is dismissed. Hearing of the suit is to proceed on merit from the stage reached.

Costs in the course.

It so ordered.

Dated at Dar es Salaam this 17th day of March, 2023.

E. E. KAKOLAKI

JUDGE

17/03/2023.

The Ruling has been delivered at Dar es Salaam today 17th day of March, 2023 in the presence of Hon. Joseph Luambano, Deputy Registrar of the High Court, in the presence of Ms. Happy Joyce Kisanga, advocate for the applicant, Mr. Ndehorio Ndesamburo, advocate for the respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
17/03/2023.