

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

CIVIL REVISION NO. 03 OF 2021

***(Originating from Civil Appeal No. 04/2021, District Court of Songea,
Original from Civil Case No. 144 of 2020 Songea Urban Primary Court)***

FAUSTINE SHIRIMA APPLICANT (ORIGINAL APPELLANT)

VERSUS

IRENE BERNARD RESPONDENT (ORIGINAL RESONDENT)

RULING

Date of Last Order: 26/08/2021

Date of Ruling :14/9/2021

BEFORE: S.C. MOSHI, J

The applicant wrote a letter to the court requesting me to recuse myself from hearing a revision which is pending before me. Before delivering this ruling, the parties were given an opportunity to address the court on the applicant's prayer. The appellant had nothing to add to what he wrote, and likewise the respondent too had nothing to submit.

Recusal is a principle which is intended to offer a fair hearing to a party. Whether a judge should recuse himself from hearing a case, is upon the judge himself or any party in the matter who is of the view that judge's transparency in the course of adjudication will be doubted. However, an

order for recusal must be reached upon following a judicious consideration, it must be upon objective facts, if there is reasonable suspicion of bias or if there is a conflict of interest. The doctrine is not intended to afford judges to choose at the upfront to recuse themselves from the conduct of the case where there is no cogent reason or likelihood of eminent biasness on part of the Judge, the Court of Appeal of Tanzania in the case of **Issack Mwamasika and 2 Others Vs. CRDB Bank Ltd**, Civil Revision No. 6 of 2016, Court of Appeal sitting at Dar Es Salaam (unreported), held *inter alia* that the yard stick should be 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.

A party who wishes a judge to disqualify himself is duty bound to have reasons for lack of confidence on the judge. In our jurisdiction parties do not have the luxury of choosing and picking judges who can preside over their cases, in a similar case **of Nyamodi Ochieng Nyamogo and Another Vs. Kenya Posts and Telecommunications Corporation**, Civil Application No. 264 of 1993 (unreported) where the case of **Uhuru Highway Development Ltd Vs. Central Bank of Kenya and 2 others**, Court of Appeal (K), Civil Appeal No. 36 of 1996, Kenya

Appeal Reports Vol. 3, p.211-219 was cited, the court observed that: -

"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 those applicants cannot have it".

Among the factors to be considered before a judge recuses himself from hearing a case, are not exhaustive, however, in the case of **Issack Mwamasika** (Supra) the court echoed the principles set in **Laurean G. Rugaimukamu Vs. Inspector General of Police & Another**, Civil Appeal No.13 of 1999 (unreported) which enumerated them thus: -

"...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 dose 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 or herself for flimsy or imaginary fears."

Having revisited the law, the question in the case at hand is whether the applicant (original appellant) has shown any of the above? The

applicant's prayer asking me to disqualify myself from this case is in a complaint letter which was written by him on 09/09/2021. Briefly, his complaint can be summarized thus:

"He was a plaintiff in civil case No. 144/2020 which was before the Songea Urban Primary court, that he sued the respondent for division of properties which were accrued through their joint efforts. The court ordered division of 50% each. He was not satisfied, hence he appealed to the district court. The district court ordered that he should get 60% of the property and the respondent to get 40%.

Both parties were satisfied, the respondent did not appeal, she approached the primary court for Execution of the decree.

However, it is doubtful as the judge reopened this case suo mottu on grounds which are not intended to do justice to any of the parties, and that the circumstances of opening this case are questionable. All these raise doubts, therefore the judge should recuse herself from hearing this case."

First and foremost, I would like to state at the outset that, I did not open the revision on unfounded ground or on my own personal will. The starter of the matter is a complaint letter by the original respondent. The letter was written to my office as a Judge in charge on 06/08/2021.

Despite the fact that she did not appeal against the decision, she complained against execution proceedings which were pending before the Urban Primary Court. The High court has supervisory powers and inspection powers over all Resident Magistrates' courts, district courts and primary courts, see section 79 of the Civil Procedure Code, cap. 33 R.E. 2019 and sections 30 (1), 31 (2), 44 of **The Magistrates' Act**, Cap. 11R.E.2002. I therefore undertook to call the relevant files for inspection. In the course of inspection, I noted some irregularities which go to the root of the case. I thus notified the parties to appear and address me before I make orders to rectify the errors. These powers are exercised by court as it considers may be necessary in the interest of justice.

Similarly, the complaint that the parties did not appeal is baseless. Section 44 of the **Magistrates court Act** (supra) do categorically allow the court to do revision in any case where it appears that there has been an error material to the case involving injustice. In the case of **Lyatonga Mrema vs. Republic**, [2003] TLR 6, the Court of Appeal interpreted section 4(3) of the Appellate Jurisdiction Act, 1979 which is similar to section 44 of the Magistrates' Court Act, and it said that, the power of revision under section 4(3) of the Appellate Jurisdiction Act 1979 **is not dependent upon the existence of any appeal** and makes no

distinction between civil and criminal proceedings, or between interlocutory and concluded proceedings; it applies to any proceedings before the High court.

Looking into the applicant's reasons for wanting me to disqualify myself from the conduct of this case are no way close to those narrated by the court of appeal.

In the final analysis, I refuse the prayer to recuse myself.

I order the application to proceed as scheduled.




S.C. MOSHI

JUDGE

14/09/2021