IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 121 OF 2020

ZEDEM INVESTMENTS LIMITED..... 1ST PLAINTIFF
FIRDOS APARTMENT LIMITED.....2ND PLAINTIFF
MOHAMED IKBAL HAJI.....3RD PLAINTIFF

VERSUS

EQUITY BANK (TANZANIA) LIMITED..... 1ST DEFENDANT

BILO STARS DEBT COLLECTORS CO. LIMITED.....2ND DEFENDANT

OLIVER MARK.....3RD DEFENDANT

MR. DISCOUNT HYPER AND SUPERMARKET LTD.....4TH DEFENDANT

RULING

Date of last order: 19th October, 2022
Date of Ruling: 25th November, 2022

E.E. KAKOLAKI, J.

> *"In considering whether there was a real likelihood of bias the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expenses of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded*

person would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."

The above quoted excerpt is not mine but the legal position of the Court of Appeal in the case of **Registered Trustees of Social Action Trust Fund and Another Vs. Happy Sausages Ltd and Others,** Civil Appeal No. 70 of 2002 [2004] TLR 264, at page 273, when quoted the wisdom of Lord Denning MR in **Metropolitan Properties Co. (FGC) Ltd Vs. Lannon** (1966) 1 QB at page 599, on the application of reasonable suspicion/apprehension of bias test, in the situation when the judicial officer is called to recuse him/herself from the conduct of the matter, the situation which reflects the prayer by the 3rd defendant in the present matter, in which this Court is called upon to consider and determine. Briefly, the plaintiffs mentioned above filed a civil case against the above-mentioned defendants. The case had reached at the hearing stage, after the plaintiff were ordered and complied with the Court's order to file the witness statements within 14 days. When the matter came for hearing on 16/08/2022, the date which was fixed for cross examination of plaintiff's witnesses, the Court noted existence of a letter from the 3rd Plaintiff dated 09/08/2022, requesting my recusal from the conduct of this matter on account of suspicious biasness. The 3rd

plaintiff who is the principal officer of the 1st and 2nd plaintiffs contended in her letter that, I was the classmate and close friend to one Anthony Mark who is the managing director of Mark and Associates Attorneys in which the 3rd defendant in this matter one Oliver Mark is her sister and partner, hence his fear that, I am likely to be biased and decide the matter in his disfavor or favour of the alleged friend and classmate. For appreciation of the nature of his fear/apprehension, I find it imperative to quote part of the contents of the said letter of 09/08/2022.

RE: LACK OF CONFIDENCE IN YOUR ROLE AS A TRIAL JUDGE.

Reference is made to the matter captioned above.

Kindly be informed that, I am the Managing Director of the 1st and 2nd Plaintiffs and I am the 3rd Plaintiff in the case captioned above.

I am humbly writing this letter to your Honourable Judge to explain my fear that justice may not seen to be dome of you continue to be the Trial Judge in the proceedings of the case.

My fear and apprehension of worry is based on the facts that your Lordship and ***Mr. Mark Anthony*** *(Advocate) were classmates and friends while at the University of Dar es salaam, faculty of law (school of law) in 1997 to 2000 intake.*

The law firm of ***Mark and Associates*** *in which* ***Advocate Mark Anthony*** *is the Managing Partner "is one of the*

Defendant" in this case as one of the partners or employee in the said firm, ***Oliver Mark*** *is the 3rd Defendant. The said law firm through Advocate* ***Oliver Mark*** *is said to have witnessed my signature and those of other Directors of the 1st and 2nd plaintiff's in various documents the subject of this case. The signing and witnessing of the said documents is one of the contentious issue before the Court.*

Given the relationship between your Lordship and Advocate ***Mark Anthony****, it is my greatest fear that the said relationship may prejudice you in determining the right of the parties to the case especially the Plaintiffs.*

The essence of this letter therefore is to humbly request you to consider my fear that justice may not seen to be done and recuse yourself from the conduct of the trial of the case.

I humbly request.

Yours faithfully,

Sgd:

Mohamed Ikbal Haji

Following that letter this Court fixed the hearing date to address the 3rd plaintiffs' prayer which was done orally, as the plaintiffs were represented by Mr. Deogratious Lyimo Kirita and Mr. Godwin Mussa Mwapongo, learned advocates, while 3rd plaintiff appeared in person, and Mr. Godwin Nyaisa represented 1st to 3rd defendants, whereas Mr. Michael Kabekenga serviced the 4th defendant.

It was 3rd plaintiff who took the floor first to explain his apprehension/fear. He said, as the letter suggests, since the managing partner of **Mark and Associates Attorney** is my classmate at University of Dar es salaam and since he believes that, the said person Antony, is my friend, it is his fear that I won't do justice to him should I continue to preside over this matter. He therefore prayed for my recusal from the conduct of this case.

Having heard from the 3rd plaintiff, plaintiffs' advocate Mr. Kirita joined his efforts and expressed that, he had nothing to add to the 3rd plaintiff feelings as he was not questioning my integrity nor the oath of office taken by me. He said, according to what he perceived from the 3rd Plaintiff's submission, the friendship between Anthony Mark and me which extends to Oliver Mark who is Anthony's relative, might lead this court to be sentimental regarding the documents likely to be used in this case against the 3rd plaintiff, hence decide the case is plaintiff's disfavour. In his view, he does not think that he is in the position to say whether the reasons advanced are justifiable or not. He convincingly argued, even if I find the reasons advanced not justifiable or irrational, the best approach is to be guided by the decision of the court in the case of **Zabron Pangamaleza Vs. Joachim Kiwaraka** (1987) TLR 140 at pages 145 -147, where it was stated that, however irrational the

allegations by the party to the suit against the Judge can be, the easiest option to the Judicial officer is to give him the benefit of doubt and retire from the conduct of the case, so as remove fear of the complaining party. He therefore urged me to consider the 3rd plaintiff's prayer and act upon it.

In response, Mr. Nyaisa for the 1st – 3rd defendants submitted that, the 3rd plaintiff's fear can be grouped into three grounds/reasons. **One**, that the trial Judge was with Anthony Mark at the University from 1997-2000 and that were friends. On this ground he argued that, the 3rd plaintiff has not disclosed the source of that information, apart from telling the Court that he was told by unknown person. He contended, the assertion is a pure hearsay and unsubstantiated fact. According to him, reasonable apprehension and suspicion must arise from existing facts which is not the case in this matter.

Second, that the law firm in which advocate Anthony Mark is the Managing director is one of the defendants in this case, in which he submitted that, before this Court there is no defendant called Anthony Mark and Associates hence a blatant lie which cannot form the basis of judge's recusal as the defendant in this case is Oliver Mark, who works in a law firm, in which the managing partner is alleged to be the trial judges' friend. In his view, he does not see how the trial Judge being the classmate of Anthony Mark can

affect the conduct of this case. Mr. Nyaisa was of the submission that, the trial judge is working under oath of his office which he took to render justice without fear and/or favour, thus the allegations in other words are doubting the judge's oath. In further view of Mr. Nyaisa, if this reason is considered positively its consequences will be far reaching as every party who raises fear to the Judge who schooled together with other party or one related to might seek for the recusal, which has the effect of meaning that, the law firm owners who went to law school together the judge or any other judicial officer cannot have their case be handled by the said judicial officers. Mr. Nyaisa submitted further that, this being the Court of record, entertaining and granting 3rd plaintiff's prayer basing the raised reasons will open a pandora box to the lower courts for opening a shopping forum to the parties for judicial officer to handle their cases in accordance with their wishes, as in this case there is no even evidence that the alleged Oliver Mark is Mr. Anthony Mark's relative, thus an afterthought.

The **third** ground of complaint as mentioned by Mr. Nyaisa is from the third paragraph of the letter, on the relationship between the Judge and the one Anthony Mark which is unsubstantiated to as the complainant has not told the court on how the relationship is so close to the extent of influencing the

court's decision in this matter. According to Mr. Nyaisa, in our jurisdiction the principles for recusal of judicial officers are well enunciated in the case of **Laurean Rugaimukamu Vs. Inspector General of Police**, Civil Appeal No. 13 of 1999 (CAT-unreported) as quoted in Civil Revision No 6 of 2016 (CAT-unreported) between **Issack Mwamasika and Two Others Vs. CRDB Bank Ltd,** Civil Revision No. 06 of 2016 (CAT-unreported) at page 7. According to him, the second reason in the cited case relates to the allegation set forth by the complainant in this case, which is where the Judge is alleged to have close relationship with the adversary party or one of them. He contended that, in this case Anthony Mark is not a party, hence it is overstretching to extend to the third party.

He submitted that, at page 10 of the ruling in the above cited case the court held that, it is not enough to state a fear or apprehension but there must be events in question raising reasonable apprehension or suspicion on the part of a fair minded and/or informed member of the public that, the Judge was not impartial.

Concerning the case of **Zabron Pangamaleza** (supra) cited by Mr. Kirita, Mr. Nyaisa countered that, the same is no longer a good law as there is developed jurisprudence in the recent decision of the Court of Appeal cited

above that, the Judge should resist the temptation to recuse himself simply it would be comfortable to do so unless the allegations are founded. He referred the Court to page 13 of the cited decision of **Issac Mwamasika and 2 Others** (supra). In his further submission he argued that, to show that the jurisprudence has change he also cited the case in **The Registered Trustees of Social Action Trust Fund and Another** (supra), where the Court held that, it did not see anything to show bias in the manner the trial court conducted proceedings in the matter complained of. Mr. Nyaisa was of the firm view that, where there is no reasonable apprehension then the judicial officer should refrain from recusing himself and to support such stance he cited the case of **Dhirajlal Manji Ladwa and 2 others Vs. Jitesh Jayantilal Ladwa & 2 Others**, Commercial Case No. 2 of 2020, where this Court stated that, suspicion alone is not enough and Court will not act on unsubstantiated ground of flimsy pretexts of bias. It was his further submission that, should the trial Judge choose to recuse himself in this matter that, will amount to abdication of judicial function and encouragement of spurious applications for judicial officers to adopt that approach. He placed reliance in the case of **Registered Trustees of Social Action Trust Fund and Another** (supra) at page 273 and **Isaac**

Mwamasika's Case at page 13 last paragraph. He added that, in the case of **Dhirajlal Walji Ladwa** (supra), the Court cited with approval the case of **Attorney General Vs. Anyang' Nyong'o and Others**, where the Court insisted on the need for Judicial officers to resist from the pressure for recusal based on flimsy grounds.

In winding up he submitted that, considering the fact that this case has been pending since 2020 and the fact that, the trial judge entertained the application for temporary injunction and now the suit is at the hearing stage, the complained of fear be refused and the matter be allowed to continue with its hearing.

On his side, Mr. Kabekenga for the 4th defendant informed the Court that, he is adopting the submissions made by Mr. Nyaisa.

In a short rejoinder Mr. Kirita submitted that, the submission by Mr. Nyaisa is misplaced as the prayer by the 3rd Plaintiff are based on reasonable apprehension that justice might not be done should the trial judge continue presiding over this matter. He contended that, 3rd plaintiff's reasonable apprehension is substantiated save for the relationship between the trial judge and Anthony Mark before and after University studies which he

acknowledged that, the same was not substantiated. With regard to the case of **Zabron Pangalameza** (supra) he said, the same is still a good law, giving guidance to this Court on the principles for recusal by the judicial officers as it set out the foundation on the principle that, justice must not only be done but seen to be done. He contended that, in all the cases cited by Mr. Nyaisa, none of them mentioned the case of **Zabron Pangalameza** (supra) to have been a ceased precedent.

He elaborated further that, in all cited cases there is no single case which states that judicial officer should not recuse rather they all insist that, the Court should be firm to resist the temptation upon the application for recusal, and the only ground to be considered is existence reasonable apprehension or fear. In his view, in this case the 3rd plaintiff has fear that the trial judge can be overwhelmed with senses of sympathy in adjudicating against Anthony Mark's friends or relatives.

In addition, Mr. Mwapongo for plaintiff added that, the oaths taken by judges insists on impartiality and rule against bias. He insisted that, it is a common ground where the assertion for biasness are made against the judicial officer, then such officer has to examine himself and take action whether to recuse himself from the conduct of the matter or proceed to deal with it, for the

purpose of preserving the integrity of the judiciary and his as the judge and uphold public confidence in the justice system. He therefore insisted the judge in this matter should consider the reasons set out by the 3rd plaintiff to support his prayer for recusal of the judge.

I have dispassionately considered the rival submission by the parties herein and accorded it with the weight it deserves. The calling issue which requires this courts determination is *whether the 3rd plaintiff has advanced sufficient grounds justifying my recusal.*

Rule 9 (1) and (2) 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 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 officers personal interest or that of a judicial officers 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.

In this case the reasons advanced by the 3rd plaintiff for my recusal are based on the ground of reasonable apprehension or fear that being a trial judge, classmate and friend of Anthony Mark the managing director of law firm in which the 3rd defendant works for, justice will not be not only done but seen to be done. As the above excerpt of Rule 9(1) of GN. No. 1001 of 2020

suggest, there is no clear interpretation of reasonable test for bias, however an apparent test in determining an issue of apprehension of bias by judicial officer is whether a fair-minded person and informed observer, having considered the relevant facts, would conclude that there is a real possibility that Court or tribunal will be or was biased. See the case of **Registered Trustees of Social Action Trust Fund and Another** (supra). Similar stance was taken by the Court of Appeal in the case of **Isaac Mwamasika and 2 Others** (supra) when borrowed the wisdom of the House of Lords in its judgment of 15/01/1999 which is date 17/12/1998 in the case of **Reg. Vs. Gough**, where it was held that:

> *"…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."*

From the above position of the law, it is evident to me that, for the trial Judge or magistrate or any member of the tribunal or body deciding parties rights or fate to disqualify himself/herself there must be sufficient and convincing reasons/grounds advanced by the party to the suit or matter, which if considered by a fair minded and informed person or member of the

public would read to a conclusion that the judicial officer or officer rendering the decision would be or was not impartial.

Another factor which would be considered is where it is advanced by the party that real danger of bias is likely to happen basing on personal friend ship or animosity between the judge and any member of the public involved in the case. This position was also adumbrated by the Court of Appeal in the case of **Isaac Mwamasika and 2 Others** (supra) when cited with approval the case of **Locabail (UK) Ltd Vs. Bayfield** [2000] QB 451 where the Court said:-

> *"… **real danger of bias might well be thought to a arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved the case, particularly if the credibility of that individual could be significant in the decision of the case**; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion… **we repeat: every application must be***

decided on the facts and circumstances of the individual case*." (Emphasis supplied)*

Looking at the 3rd plaintiff's letter and submission of his prayer for recusal two grounds are raised, in which I am proposing to consider and determine one after another. Firstly, that I studied with one advocate **Anthony Mark** at the University of Dar es salaam between 1997 to 2000, who is the relative to the 3rd defendant, hence likely to be biased after being overwhelmed with the relationship with the said Anthony Mark as classmate, hence a decision in his disfavour. It is true that Mr. Antony Mark was my classmate during the period specified by the 3rd defendant. However, subjecting this ground to the test of a fair minded and informed observer, the pertinent question would be can that observer in the public conclude that, under the said classmate relationship there is a possibility of this Court being biased? Certainly the answer to any reasonable man in the street would be no. The reasons I am so holding is not far-fetched as it is unavoidable circumstances for the judicial officer in his/her carrier journey to undergo studies with other law practitioners from the primary school level, secondary school up to the university level as well as law school. So working with school or college mates is unavoidable situation otherwise discharge the judicial function by the

judicial officer will be at stake. Further to that, under rule 9(1) of the Code of Conduct and Ethics for Judicial officers, 2020 cited above, there is nothing preventing the judicial officers who passed in the same University colleges with other law practitioners from presiding over cases or matters conducted by his classmates or any party(ies) who have relationship with judge's classmates, or classmate relatives, where he believes will be able to adjudicate the same with impartiality. In my opinion, as rightly suggested by Mr. Nyaisa, to recuse from the conduct of this case on flimsy ground that, the said Anthony Mark is my classmate and allegedly the relative to 3rd defendant, will open a pandora box and allow forum shopping of judicial officers by the parties the practice and luxury which is not yet available in our country, leave alone the fact that the relationship between Anthony Mark and 3rd defendant as relatives is not established at all. The issue of the risk of opening a pandora box if parties are allowed to seek recusal of judicial officers relying on flimsy grounds was discussed in the case of **Isaac Mwamasika & 2 Others** (supra) when cited with approval the case of **Uhuru Highway Development Ltd Central Bank of Kenya & 2others**, CA (K) Civil Appeal No. 36 of 1996, Kenyan Appeal Reports Vol 3p. 211-219, where it was held that:

> *"For our part, we dare say that most litigants would much prefer that they be allowed to shop around for the Judge that would hear their cases. That however, is luxury which is not yet available under our law to litigants and these applicants cannot have it."*

For the stated reasons and guided by the above authority, it is my findings that, the first ground has no basis and I discount it.

The second ground for recusal is on the reason that, I have a close relationship or friendship with one Anthony Mark whose sister Oliver Mark is the 3rd defendant to this matter thus, his fear or apprehension that I will act with bias particularly in determination of the allegation of fraudulence mind of the 3rd defendant over the documents signed by the plaintiffs. I do not find merit in this ground too as the same was also unsubstantiated. I so find as the plaintiffs' counsel Mr. Kirita conceded to the fact that, my relationship with the said Anthony Mark during and after University studies was not substantiated. Further to that, in my firm view this allegation came as a hearsay as it is not known from which source is it arising as it could have been sufficient to raise the ground of bias had there been strict proof of the alleged friendship or close relationship apart from being a classmate which is uncontroverted fact. The information having being sourced from the third

party it was expected its source would have been disclosed and bring forth evidence to substantiate the same as being classmates does not necessarily read to close relationship or personal friendship. It is from those grounds which I find the reasons to be flimsy and trivial, hence distance myself from the submission by Mr. Kirita when referring the Court to the case of **Zabron Pangameleza** (supra) that, this Court should give the 3rd plaintiff a benefit of doubt on his fear or apprehension and retire from the conduct of this matter regardless of the irrational of the grounds advanced by him so as to preserve the integrity of the judiciary and myself. I so do as to succumb to the 3rd plaintiff's pressure in absence of evidence to substantiate the assertion of personal friendship or close relationship to Mr. Anthony Mark, in my humble opinion would be an abdication of judicial function and an encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on grounds of possible appearance of bias which I am not prepared to venture into, as it was held in the case of **The Registered Trustees of Social Action Trust Fund and Another** (supra). The law is very clear and Judicial officer are advised to recuse themselves where three grounds exist, in which non exist in the present matter as rightly described by the Court of

Appeal in the case of **Laurean G. Rugaimukamu Vs. Inspector General of Police & Another,** Civil Appeal No.13 of 1999 (CAT-unreported) where the Court held that:

> *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 or herself for flimsy or imaginary fears."***

As alluded to earlier on for a judicial officer to recuse himself/herself from the conduct of the matter, sufficient and convincing reasons must be established, as the law requires that he/she should always resist the temptation of so doing on flimsy pretexts of bias or trivial grounds or for the purpose of pleasing the party or on mere belief that it would be more comfortable to so do as it was held in the Court of Appeal in the case of **Isaac Mwamasika & 2 Others** (supra) at page 12 cited with approval the case of **Tridoros Bank N. V vs. Dobbs** [2001] EWCA Civ. 468 cited in the case of **Otkritie International Investment Management Ltd & 4**

Others (supra) where the court had this to say on the point that judge should resist to recuse himself/herself for simple or flimsy reasons:

> *It is always temping 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.*

It was also viewed by the Court of Appeal in the case of **Isaac Mwamasika and 2 Others** (supra) that:

> *Before penning off, we note that recusal and disqualification of judges is a sensitive subject, since it draws into question the fitness of a judge to carry out the fundamental role of his or her position the fair and impartial resolution of judicial proceedings. So, the decision to file motion seeking disqualification should be made only after careful consideration.*

Much as recusal of the judge or any other judicial officer from the conduct of the case is a sensitive issue which should be done with great circumspection as it touches preservation of the integrity of the judiciary and as well as that of judicial officer. Applying the principles as cited in above authorities to the facts of this case, it is my findings that the 3rd plaintiff's prayer is unmaintainable as the reasons advanced by him are very trivial based on unsubstantial grounds of flimsy pretexts of bias and as such do not meet the test set forth in the case of **Isaac Mwamasika** (supra) cited above on whether the fair minded and informed observer or member of the public would conclude that under the said grounds the judicial officer would be biased, which is binding upon this court. I do not think that my recusal just on the unjustifiable flimsy pretexts and imaginary fear or apprehension of bias by the 3rd plaintiff would be interest of justice as already alluded to above to so act would tantamount to abdication of judicial function which is my calling, the pressure which I resist to fall into, as it was also rightly advised by the Court of Appeal in the case of **Registered Trustees of Social Action Trust Fund & Another** (supra).

In the premises and for the fore stated reasons, I do not find merit in the 3rd plaintiff's prayer for my recusal from the conduct of this suit, hence reject the same. The hearing of the suit is to proceed on merit.

Costs to follow the event.

It so ordered.

Dated at Dar es Salaam this 25th day of November, 2022.

E. E. KAKOLAKI

JUDGE

25/11/2022.

The Ruling has been delivered at Dar es Salaam today 25th day of November, 2022 in the presence of Mr. Deogratias Kirita, advocate for the Plantiffs, Mr. Novatus Method, advocate for the 1st, 2nd and 3rd defendants, Ms. Lulu Mbinga holding brief for advocate Odhiambo Kobas, for the 4th defendants and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

25/11/2022