

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DODOMA

MISC. LABOUR APPLICATION NO. 2 OF 2023

(Originating from Labour applications No. 17 and 18 of 2022)

DEUS GRACEWELL SEIF1st APPLICANT

ABUBAKAR SALUM ALAWI2nd APPLICANT

VERSUS

CHAMA CHA WALIMU TANZANIA (CWT)..... RESPONDENT

RULING

Date of Ruling: 14/03/2023

Mambi, J.:

This ruling originates from an oral application made by Pasian Sian on behalf of the respondent **CHAMA CHA WALIMU TANZANIA (CWT)**. Pasian Sian moved this court before I proceeded to determine the labour cases (Miscellaneous Labour Application No.2 of 2023, application No.17 of



2022 and Miscellaneous Labour Application No.18 of 2022) filed by the applicants. Earlier the matter (Miscellaneous Labour Application No.17 of 2022) was scheduled for inter-party hearing. However, before I proceeded, one person (Pasian Sian) who identified himself as the representative of the respondent asked me to disqualify (recuses myself from determining Miscellaneous Labour Application No.17 of 2022 and other two similar cases I have mentioned above.

Before I made any decision as required by the law I availed both parties to address the court as part of principles of right to be heard. Mr Pasian Siay briefly submitted that I should recuse myself from determining all the matters (Miscellaneous Labour Application No.2 of 2023, application No.17 of 2022 and Miscellaneous Labour Application No. 18 of 2022) involving the respondent that are before me. His reasons were based on the following;

- (1) That, I was the presiding judge in case No. 4 of 2021, **Ndebeze Kesebo Vs. CWT** which took a long time that is one year before the applicant withdrew his case.

"Shauri la Ndebeze Kasebo lilichukua Zaidi ya mwaka mmoja na mlalamikaji (Ndebeze Kasebo) akaondoa kesi.

- (2) That, there are two cases No. 17 and 18 of 2022 that came up with an order (amri) while we were in the meeting between 15 & 17 December, 2022. "Kesi hizi zilileta taharuki kwa vile Chama hatukuwa na nyaraka muhimu ambazo zinahusiana na kesi hizo".
- (3) Basing on those concerns we, pray to this court for you to recuse from dealing with these cases and the matter be placed to another Judge.

In response, the applicants Counsel Mr. Mtobesya contended that the application or objection for recusal has no merit since the respondent did not show any reason as to why he wants the judge to disqualify himself from determining Misc. Labour Case No. 2 of 2023 and other two similar cases.

The learned Counsel Mr Mtobesya submitted that they don't agree with prayers by the Respondent's representative since there are no reasons advanced to enable the judge to recuse. He argued that there is no any reason advanced by the respondent in his objection. He contended that the respondent is saying that the judge was involved in the case No. 4 of 2021 and the matter took a long time before the applicant withdrew the case. He further submitted that, the respondent is also saying that the judge made an order while they were in the meeting. He argued that all these claims are not the reasons for the judge to recuse.

Mr. Mtobesya averred that, the issue of recusal is the legal issue that needs one to explain the reasons as explained by various cases of the Court of Appeal and the High Court. He argued that the so called reasons have no merit. He was of the view that since there is no any likelihood of biasness on this case the judge cannot recuse himself from determining this matter. The learned Counsel referred the decision of the court in **Registered Trustees of Social Action Trust Fund and Another vs Happy Sausages Ltd & another, Civil Appeal No.70 of 2002 TLR 2004 at page 264**. He argued that in the case of Registered Trustees, the case cited show that the applicant claimed biasness on the part of the judge, but the applicant failed to show any biasness and the objection was dismissed. He also referred the decision of the court in **R V. S safari son of Antony Alliance and another. Crim Session No. 6 of 2020 cited in Ally**

Suleman Musa and another Vs. Rafaat sharia Champs, Civil Appeal No. 97 of 2021. The applicants thus prayed the prayers for recusal be dismissed for lack of reasons.

In his rejoinder, the learned Counsel for the respondent Mr Mnyele submitted that, the concern of the CWT is on the three cases that I already decided and the two pending cases before me. He argued that the respondents reasons are based on the fact that the two cases were withdrawn by one Ndebeze who was the applicant before the matters were decided on merit. The learned counsel added that the concern was also on the decision of Misc. Labour Application No. 17 of 2022. The learned Counsel further submitted that the respondents were dissatisfied by on ex-parte order made by this court. He was of the view that under those circumstances, the respondent lost confidence on this court and justice needs to be seen done. He referred the decisions of the Court in **Ernest N Vs. R. 1980 TLR at page 363 and DPP Vs. Jilu and another 3 others.** He thus prayed application for recusal be considered.

Before I consider the objection or application made by one Pasian Sian on behalf of the respondent, I wish to highlight that, the issue of recusal is the legal issue that originated from the Middle French word "recuser but later developed into Common Law and our legal jurisprudence. Generally, recusal is a situation in which a judge or magistrate steps down from hearing a case, on the basis that it is not appropriate for them to deal with it, because they have a conflict of interest and there might be actual or presumed bias against a party or, because there is a real possibility that a fair-minded observer would conclude that the judge should not try the case because they cannot be impartial (apparent bias).

Indeed, English speakers began using recuse with the meaning "to refuse or reject" very early in the 14th century. Consequently, in the 15th century, the term had acquired the meaning "to challenge or object to (a judge)". In this regard, the current legal use of recuse as a term specifically meaning "to disqualify (oneself) as a judge" didn't come into frequent use until the 19th century.

Having summarized submissions of both parties including the concept behind recusal, let me now revert to our main issue at hand. I have keenly gone through and considered the submissions by both parties. In my considered view, the issue to be determined is whether the court has been properly moved by that representative of the respondent. The main issue to be determined is whether the objection has merit. In other words, the first legal issue to be considered and determined is whether the respondent's representative has advanced sufficient reasons for my recusal as he claimed. Generally, any party to the case has the right to inform the court that he preferred the magistrate or judge to recuse from the case before such party advances sufficient reasons for his claim.

As I alluded earlier that Mr Pasian Sian on behalf of the respondent has prayed that I should recuse from determining the matters that involve the respondent. His claim was based on the following reasons that:

- (1) I was the presiding judge in case No. 4 of 2021, Ndebeze Kesebo Vs. CWT which took a long time that is one year before the applicant withdrew his case.*

He said and I quote: "Shauri la zamani lililofunguliwa na mlalamikaji (Ndebezi Kasebo) lilichukua Zaidi ya mwaka mmoja na akaondoa kesi kabla halijasikilizwa 2021.

(2) There are two cases No. 17 and 18 of 2022 that came up with an order (amri) while we were in the meeting between 15 & 17 December, 2023. "Kesi hizi zilileta taharuki kwa kwa chama chetu kwa vile hatukuwa na nyaraka muhimu".

From the above quoted purported reasons, the main Legal issue is whether these are the reasons for a Judge to disqualify or recuse from the matters referred. In other words, whether these reasons are in line with the tests or legal Principles developed by the Court of Appeal as indicated under the cases that I will refer.

Looking at the submissions made by the respondent's representative, I have not seen any reasons advanced to make me disqualify myself from dealing with the matters before me. In his first reason Mr Pasian is saying that in 2021 there were two matters filed by one person against them which took a long time to the extent that the person who filed the case against them decided to withdraw the cases. Indeed, it is not true that those matters claimed to have taken a long time rather it was the applicant (Ndebeze) who decided to withdraw his cases within a short time before the matters went on merit and there was no any complain of delay. It is on the records that the two matters were before another judge for a short time and when they were re-assigned before me it hardly took one month before the applicant withdrew his cases. However, in my view this cannot be said the reason for me to disqualify myself as those matters had nothing to do with the matters at this court. On top of that, it was the respondent who was sued by the

applicant (Ndebeze) at that time and it should be the applicant who could have claimed at that time and not the respondent at this moment in a different matter.

On the other hand, the applicants' Counsel contended that the application for my recusal has no merit since the applicants did not show any reason and his claim has not met the tests for the judge to disqualify himself underscored by the court of Appeal in various cases.

I am well aware that every party to the case has the right to refuse the judge/Magistrate or apply for the presiding judge or magistrate to recuse or disqualify himself/herself. However, that right is not automatic on the ground that the party who prays for judge to recuse must advance sufficient reason for his claim otherwise that right can be misused by the parties or used to misuse the court on the wishes of one party at the detriment of the other party. Indeed, if such application, objection or claim cannot be properly handled it can in my view cause unnecessary delay of justice. In my considered view as also observed by the court in various decision that doing so (recusing), would be an abduction of judicial function and encouragement of serious applications for a judicial officer to adopt the approach that he should disqualify himself whenever requested to do so on an application of one of the parties on the ground of insufficient reasons or mere possible appearance of bias.

Indeed, this is why the Court of Appeal have developed guiding principles and guidelines or conditions on how the judge or magistrate can deal with issues related to disqualification or recusal. The Court of Appeal has thus highlighted and underscored three tests to be met by the applicant

before the presiding judge or magistrate decides to recuse himself from entertaining any matter.

At this juncture I wish to refer the relevant authorities that addressed the conditions for judge or magistrate to recuse or disqualify himself in dealing with the matter at hand. I wish to refer the decision of the court of Appeal in ***ISSACK MWAMASIKA and four others vs CRDB Bank Ltd Civil Revision No.6 of*** where the court in this case referred guiding principles laid down in ***Lauren G. Rugaimukamu vs Inspector General of Police & Another, Civil Appeal No.13 of 1999***. The Court in that case advanced three tests to be proved before the judge recuses himself. The court in ISSACK (Supra) at page 7 observed that;

"An objection against a judge or magistrate can legitimately be raised in 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 administration of justice". [Emphasis supplied with]*

The court in the above cited cases went on by emphasizing that ***"a judge or magistrate should not be asked to disqualify himself or herself for flimsy or imaginary fears."*** [emphasis supplied with] The question is; did the respondent in his objection met the above three tests or conditions advanced by the court in ***Lauren (supra) case?***. The answer in my view is **no**, since the respondent did not say anything or show proof of any likelihood

of biasness or my relationship with the applicants or if I or any member of my close family has an interest in the outcome of the matters before me. The Respondent has also failed to show if there is any indication of biasness on my side to the other party.

Mr. Pasian Siasi on behalf of the Respondent has prayed that I should recuse from determining the matters that involve the respondent. Mr Pasian has claimed that I was the presiding judge in case No. 4 of 2021, **Ndebeze Kesebo Vs. CWT** which took a long time that is one year before the applicant withdrew his case. He has also claimed that there was an order that I made against them. In his words, he said;

"Ile mari ilileta taharuki kubwa kwa chama chetu kwa vile hatukuwa na nyaraka muhimu".

As I said earlier that the claim that I once attended the matter that took a long time that is one year has no merit since there has never been any claim and that matter which has even not taken a long time as claimed by the respondent has nothing to do with the matter in hand. Indeed, as I said the matters being claimed were withdrawn by the applicant and he prayed to withdraw without costs. One can wonder as to how comes the CWT which was sued by another person (Ndebeze) is now complaining on behalf of the person who sued it?. This in my view shows that the respondent's lawyers failed to properly guide their client.

With regard to an order (an interim order) made by this court, I am of the settled position that, the very order or ruling was made in accordance to the law and the respondent was duly served with that order before they conducted the meeting and the matter was scheduled for interparte hearing. Again, that order cannot be the reason for one to recuse or disqualify himself

as the respondent was given right to defend during interparte hearing. Looking at the reasons advanced, in my view no judge can disqualify himself for those claims otherwise doing so, every party will be rushing to court to pray for the judge or magistrate to recuse/disqualify for unmerited reasons that at the end will result into delay of justice.

It should be re-emphasized that there are legal principles and tests that were developed by the court with regard to the reasons for recusal and I cannot depart from those tests and guidelines developed by the Court of Appeal as the decisions of the Court of Appeal are binding to the lower courts.

Worth also at this juncture referring the decision of the court in ***Registered Trustees of Social Action Trust Fund and Another vs Happy Sausages Ltd & another, Civil Appeal No.70 of 2002 TLR 2004 at page 264*** The court equally in this case held that:

*"It would be an **abduction of judicial function** and encouragement of serious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on application of one of the parties **on the ground of possible appearance of bias**;" [Emphasis supplied with]*

In one of the persuasive decision the House of Lord (English Court) in **Reg v Gough** cited by our Court of Appeal in **Issack Mwamasika Case (Supra at page 10)**. The English Court observed that

*"the relevant test to be used to determine the issue of bias is to examine "...whether the events in question rise to a **reasonable apprehension or suspicion** on the part of a*

*fair minded and informed member of the public that the judge was not **impartial**".*

I also wish to refer the decision of the court in **KHALID MWISONGO VERSUS M/S UNIHTRANS (T) LTD MISCELLANEOUS APPLICATION NO. 298 OF 2016**. In this case my lady sister Hon. Mashaka J as she then was referred similar decision of the Court I have referred. The Judge in this case had this to say:

*"The Court of Appeal of Tanzania went further to employ another reason which can be a ground for recusal, and therefore emphasized at page 10 that" amongst the reasons for a judge to recuse himself/herself is **bias**. In the case of **Reg. Vs. Gough, the House** of Lords in its judgement stated 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**".*

Indeed, the tests and reasons for recusal or disqualification are found all over the world in various decisions of the court. For instance, in a persuasive decision from England Lord Bingham of **Ceronhill in Locabail (UK) Ltd vs Bayfield [2000] QB 451**, the court among other things observed that;

"The mere fact that a judge, earlier in the same case, had commented adversely on a party or witness, or found the evidence of a party or witness

to be unreliable, would not without more found a sustainable objection". [Emphasis supplied with]

Similarly, the court in **Ceronhill in Locabail (UK) Ltd vs Bayfield** (supra) highlighted a long list of principles or tests to be met by an objector or the party who applies for the judge or magistrate to recuse. Some of those principles and conditions include:

*"**Firstly**; the real danger of **bias** might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case;*

***Secondly**, 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 case;*

***Thirdly**, 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;*

***Fourthly**, if any question at issue in the proceedings before him the judge had expressed view, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.*

***Fifthly**, if, for any reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.*

Elaborating the guiding principles for the judge recusal the court in *ceronhil* (supra) cited by court of Appeal of Tanzania in *Issack* case (supra) went further by re-emphasizing the mere fact that a judge, earlier in the same case or in previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.

Additionally, the court further underscored as follows:

In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt should be resolved in favour of recusal.

We repeat: Every application must be decided on the facts and circumstances of the individual case. "[Emphasis added]

I am of the considered view which is also the position of law and practice that the judge or magistrate should not recuse himself/herself for simple or flimsy reason based by unproved facts alleged by the party on his own wishes. If the party addressed the court the clear reasons based on the tests established by the Court of Appeal in various decisions, the judge or magistrate will have no reason to proceed with the case but if there are no reason one cannot just recuse himself. In my view as also emphasized by the Court of Appeal, most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, and thus the court

should take a considerable objection or prayer for recusal by determining whether there are sufficient reasons for the judge to recuse.

In addressing the point of judge to resist to recuse himself/herself for simple or flimsy reason, the court in ***Tridoros Bank N.V v Dobbs [2001] EWCA Civ.468*** (persuasive decision) cited by the Court of Appeal in ***ISSACK*** case (supra) at page 12 observed that:

"It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved.But it is an important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so."

For further reference, I also find pertinent to refer the decision of the Court of Appeal in ***Nyamodi Ochieng-Nyamodi & Another v Kenmya Posts & Telecommunication Corporation Civil Application No.264 of 1993*** cited in the case of **Uhuru Highway Development Ltd** as cited by our Court of Appeal in ***SSACK*** case (supra) at page 13 where the Court observed that:

"For our part, we dare to say that most litigants would much prefer that they be allowed to shop around for 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".

All in all, and basing on what I have reasoned, I echo the observation made by the Court of Appeal in ***SSACK*** case (supra) at page 13 that the principles laid down in **Lauren Rugaimukamu** (supra) applies along in our case since a case is set for hearing until when the decision is made. I should

also re-emphasize the very crucial observation and recommendation made by the court of appeal in **ISSACK MWAMASIKA (supra)** at page 15 that:

*"That recusal and disqualification of judge is 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 a motion seeking disqualification should be made only after careful consideration**".*


Indeed, my thorough consideration of the respondent objection supported by the submission made by the learned counsel has revealed that the objection on my part as presiding judge in cases (Miscellaneous Labour Application No.2 of 2023, application No.17 of 2022 and Miscellaneous Labour Application No.18 of 2022) has no merit. My reasons are based on the fact that the respondent has failed to advance reasons as to why I should recuse myself.

Basing on the reasoning and observations above that the respondent has failed to advance reasons in his objection, I find the objection raised with regard to my recusal devoid of merit. It is clear that all the purported reasons for recusal advanced by the respondent do not at any rate fall in the ambit of the tests and principles developed by the Court of Appeal of Tanzania on the decisions I have referred which articulated clear grounds of recusal.

It is trite law that in situation where the application or objection proceeds to a hearing on merit and in such hearing the application or objection is found to be lacking in merit, it must be dismissed. The rationale is simple that experience shows that the litigations if not controlled by the

court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court". See also ***Joseph Ntongwisangu another Vs. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005.***

Before I make the final decision as to whether or not to dismiss this application, I will find the better way to deal with this matter but that should not be regarded as the legal reasons for recusal/disqualification. It follows that, irrespective of lack of the reasons advanced for my recusal, but for the interest of Justice I find it prudent the matter to be re-assigned to another judge who will proceed.



A. J. MAMBI
JUDGE
14/03/2023

Ruling delivered in Chambers this 14th of March, 2023 in presence of both parties.



A. J. MAMBI
JUDGE
14/03/2023

Right of appeal explained.




A. J. MAMBI

JUDGE

14/03/2023