

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL REVISION APPLICATION NO. 4 OF 2023**

(C/F MATRIMONIAL CAUSE NO. 1 OF 2023)

**LINA ELINAMI MALEKO..... APPLICANT**

**VERSUS**

**EVANS ROBERT MAINA.....RESPONDENT**

**RULING**

27/7/2023 & 31/07/2023

**MWASEBA, J.**

Under certificate of urgency, the applicant herein has filed an application asking this honourable court to call and inspect the records of proceedings in matrimonial cause No. 1 of 2023 and examine as to the correctness, legality, propriety and regularity. Further to that, the applicant is requesting this court to examine and find that the refusal of the trial magistrate to withdraw herself from the proceedings was unlawful.

The application has been preferred under Section 79 (1) (a), (b) and (c), Order XLIII Rule 2 and Section 95 of the Civil Procedure Code, Cap 33



R.E 2019, Section 30 (1) (a) of the Magistrates' Courts Act, Cap 11 R.E 2019. And has been supported by an affidavit of the applicant herself.

Briefly, on 10/05/2023 Mr. Mohamed Mhinda under the instruction of the applicant wrote a letter to the trial magistrate requesting her to withdraw herself from the conduct of the case on the reason that when they appeared for the first time in court, they notified the court that they intended to file their reply to the petition. It is alleged that the trial magistrate started to complain as if it was a backlog case and gave them seven days to make a reply to the petition contrary to **Rule 23 of the Law of Marriage (Matrimonial proceedings) Rules**. Thereafter, she set the matter for hearing as if pleadings were complete. This action raised a red flag to the applicant due to the fact that "a hurried justice is a buried justice".

Further to that, the applicant complained that they have no confidence with the trial magistrate Hon. Ndossy RM as she is blood related to Stella Ndossy who is a concubine of the petitioner and on diverse occasions Stella called and threatened the applicant on the pending suit that she will never succeed as they have a master plan. The applicant was worried that justice would not be done as there is an indicator of



injustice and there is a likelihood of biasness and conflict of interest of the trial magistrate as she is blood related to Stella Ndossy.

On the same date on 10/5/2023 the parties addressed the court regarding the applicant's complaints. After hearing both parties, the trial magistrate ruled out that the allegations were not legally based and proved. So, she denied to recuse herself from the conduct of the case. Aggrieved, the applicant has filed this application for this court's divine intervention.

Before this court, Mr. Mohamed Mhinda learned counsel appeared for the applicant while Mr. Lugakingira Nelius learned counsel represented the respondent. The application was disposed of orally.

When the parties appeared before me for the first time on 17/7/2023, Mr. Lugakingira learned counsel informed this court forthright that they concede with the application, so they do not intend to file counter affidavit.

During the hearing of the application, Mr. Mhinda reiterated what was written in their complaint letter and in the applicant's affidavit and added that on 6/5/2023 the applicant saw the trial magistrate with her naked eyes at Mateves area walking with the respondent's concubine one Stella Ndossy whom they are blood related. Further to that, on 10/05/2023 on

recusal proceedings Mr. Mhinda submitted that the trial magistrate sent them out of the open court and remained with his client and started to tell her that she should not ask her to disqualify herself from the conduct of the case as the respondent has a plan to dispose of all of his properties and intend to give the applicant Tshs. 50,000,000/=. He averred that they were astonished to hear that as how the trial magistrate knew all this information at the beginning of the case. He insisted that they have no faith with the trial magistrate and they pray that she disqualifies herself from the conduct of the case due to the potential biasness and conflict of interest. To support his arguments, he referred this court to a number of cases including the case of **Isack Mwamasika and 4 others vs CRDB Bank**, (Civil Revision No. 6 of 2016) [2016] TZCA 546 (19 September 2016) in which the principles for recusal of a judge or magistrate were set.

Responding to the submission in chief, Mr. Lugakingira learned counsel repeated notifying the court that they concede with the application. So, he prayed that the court considers the application as to its correctness, legality as prayed and the court decides as it deems fit.

After hearing the submissions and going through the record, the issue for determination is whether the applicant had advanced genuine



reasons worthy for a judge or magistrate to disqualify herself from the conduct of the case.

In the case of **Laurean G. Rugaimukamu vs Inspector General of Police & Another**, Civil Appeal No.13 of 1999 (Unreported) cited with approval in the case of **Issack Mwamasika & Others vs CRDB Bank Limited** (Supra) the court of appeal laid down the circumstances in which a trial judge or magistrate can recuse himself /herself from the hearing of the case as follows:

*"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."*

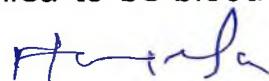
See also the case of **Khalid Mwisongo vs M/S Unitrans (T) Ltd**, Miscellaneous Application No. 298 of 2016 (HC- unreported).

Guided by the cited authority, the reasons advanced by the applicant for the recusal of the trial magistrate were an indicator of being biased and

that there is a conflict of interest due to the fact that she is blood related with Stella Ndossy who is the concubine of the respondent herein. They clarified the point of biasness that the trial magistrate seems to be not impartial as when they appeared for the first time in court with an interest to file a reply to the petition the trial magistrate started to complain as if it is a backlog case. Thereafter, she gave them 7 days to file their reply and proceeded to fix a hearing date as if pleadings were complete. This complain is well depicted in the proceedings. On 17/4/2023 the parties appeared in court for the first time. Mr. Gwemelo learned counsel for the petitioner notified the court that they served the respondent. However, he did not state when they served her. Thereafter the respondent needed time to file the reply of which the trial magistrate ordered the reply to be filed on 25/04/2023 that means within 7 days. As stated by the counsel for the applicant, **Rule 23 of the Law of Marriage (Matrimonial proceedings) Rules** which stipulates that reply should be filed within 14 days was violated. I am aware that in managing cases the court can shorten or extend any duration for compliance of the order. However, parties must be given right to give their opinion. The record is silence if the applicant opted to use seven days to file his reply among the 14 maximum days provided by the law. However, this alone cannot stand as a ground for disqualification on the

basis of biasness as the record shows on 28/04/2023 the applicant was granted her prayer to file amended reply and she was to file on 4/05/2023. Unfortunately, she filed out of time that is on 5/04/2023. The court sustained her prayer that her reply be accepted as they misquote the court's date. Thus, I hesitate to state that there was biasness but an error in regard to an order for filing a reply. However, it is pleaded in the applicant's affidavit that before the trial magistrate giving them 7 days she complained as if it was a backlog case while it was a newly filed case. This was also stated in their complaint letter asking the trial magistrate to disqualify herself from the conduct of the case. In my considered view, this allegation even if not revealed in the record but there was an error of giving the applicant 7 days to make a reply without according them with a right to state if they are comfortable with those days or not. So, although the trial magistrate might not be biased, it was safe for her to disqualify herself from the conduct of the case for the sake of justice.

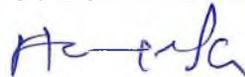
Coming to the fact that there is conflict of interest, the learned counsel for the applicant complained that they had no confidence with the trial magistrate as she is blood related with the concubine of the respondent namely Stella Ndossy. The trial magistrate denied to be blood related to



the said Stella due to the fact that they have different religion. The learned counsel for the applicant stated that people may change the religion. I agree with Mr. Mhinda learned counsel for the applicant that having different religion is not a genuine reason for not being blood related to someone. People might be blood related with different religion as one chooses.

Furthermore, I am aware that people might share the surnames but are not relatives just as the name Ndossy which is the surname of the trial magistrate and the said petitioner's concubine. However, looking at the applicant's complaint, she alleged that the said Stella Ndossy has been calling her and threatening about the case at hand. The record shows that the court listened to the voice note between the applicant and the said Stella Ndossy. What transpired therein is not disclosed in the record but it was termed to be a mere argument. In my view, the applicant and other informed observers might be in worry if the court will not be biased even if there is no blood relationship between the trial magistrate and Stella Ndossy.

In the case of **Standard Chartered Bank (Hong Kong) Ltd vs VIP Engineering and Marketing Ltd**, Civil Applications No. 158 & 159 Of 2011 (unreported) the Court of Appeal sitting at Dar es Salaam adopted



the principle for recusal from the English Case of **Porter and Another vs Magill** [2002] I All ER 465, states: -

*"The test for apparent bias is whether the alleged circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Court was biased."*

Being guided by the above principle, whenever there are circumstances that would lead a fair-minded person or informed observer to conclude that there is a possibility that the court was biased it is safe for a judge or a magistrate to disqualify from the conduct of the case. It should be noted that justice should not only be done but be seen to be done.

For those reasons the application is hereby granted for being meritorious. The matter is to be remitted to the trial court to be re assigned and determined by another Magistrate. Taking the nature of the application each party will bear its own costs.

It is so ordered.

**DATED** at **ARUSHA** this 31<sup>st</sup> day of July 2023.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

**N.R. MWASEBA**

**JUDGE**