

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 01 OF 2023

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF
TANZANIA OF 1977, AS AMENDED**

AND

**IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT
(PRACTICE AND PROCEDURE) RULES, 2014**

AND

IN THE MATTER OF THE LAW SCHOOL OF TANZANIA ACT, CAP. 245

AND

**IN THE MATTER OF THE LAW SCHOOL OF TANZANIA (STUDENTS'
PERFORMANCE ASSESSMENT AND AWARDS) BY LAWS 2011**

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT, 2016

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE ACTS AND
OMISSIONS OF THE 1ST AND 2ND RESPONDENTS AS BEING
UNCONSTITUTIONAL**

BETWEEN

ALEXANDER J. BARUNGUZA PETITIONER

VERSUS

LAW SCHOOL OF TANZANIA 1ST RESPONDENT

HON. JUDGE DR. BENHAJJ SHAABAN MASOUD 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

22nd November & 01st December, 2023

BWEGOGGE, J.:

This is a pronouncement emanating from an application for recusal made by the petitioner in this matter based on the apprehension of bias. The petitioner herein has commenced constitutional proceedings against the respondents herein alleging unfair marking of his answer scripts in the 1st sitting of his final and supplementary examination, among others. On the 11th August, 2023, the petitioner raised his concern before the panel in that he has apprehended bias on my part over the conduct of this case in respect of the opinions I made when he raised a notice of preliminary objections against the pleadings filed by the respondents herein and in the manner I presided the hearing and determination of the preliminary objections he had advanced. Hence, the petitioner made an oral application before the panel for my recusal from the panel presiding his petition. Consequently, I was obliged to hear and decide the application herein preferred against me. Hence this ruling.

On the date scheduled for hearing of this application, the petitioner fended for himself whereas the respondents were represented by Mr. Stanley Kalokola, the State Attorney. The application was argued orally.

In substantiating the application herein, the petitioner advanced five grounds to bolster his prayer as follows: **First**, allegedly, I previously preempted his petition. That he made a prayer, off record, in that his life was in danger and prayed for an order for protection whereas I opined that he should report the threat to the police station as this court could not issue protection order.

Secondly, I appear to be biased towards the petitioner herein, especially during the deliberations of the preliminary objections advanced by the same. That during the deliberation, prior to the hearing of the preferred preliminary objections, I preempted his objection in that the counter affidavit was not signed by the proper authorised person, opining that the document had been signed by the proper person.

Thirdly, during the hearing of his preliminary objections, I adjourned the case, which was scheduled to start in the morning, to be heard in the afternoon. Thus, the petitioner alleges that the adjournment made by this court was calculated to create an opportunity to Mr. Kalokola, the State Attorney, so that the same would be able to appear and argue the case for the respondents. That, when the particular stated attorney appeared, he joined the case for the respondents without praying for leave of the court. Further, the petitioner argued that the respective state attorney,

from the outset, raised a point intended to preempt the petitioner's preliminary objections advanced by contending that the objection was the weapon available for the respondents, not the petitioner. That the petitioner had objected the impugned point belatedly raised to be argued, but this court allowed the attorney to argue the point.

Fourthly, the ruling rendered by this court in determination of the preliminary objections reflected my previous predispositions, to the petitioner's disadvantage. On above grounds, the petitioner prayed for my recusal from the panel presiding his petition.

On the other hand, Mr. Kalokola, learned state attorney representing the respondents had a brief submission in reply. From the outset, the attorney asserted that the application herein has been triggered by emotions. He opined that, emotions or suspicions alone, cannot be ground for recusal. Likewise, the attorney argued that, regardless of the opinion made during the deliberations made on the horde of preliminary objections advanced by the petitioner, yet the same was afforded opportunity to argue his preliminary objections. And, this court had made ruling based on reasons furnished. The attorney directed my mind to the decision of the Apex Court in the case of **Golden Globe International Services and**

Another vs. Millicom (Tanzania) N.V. and Another (Civil Application 195) [2017] TZCA 193 at pages 14 and 15.

The attorney concluded his submission by opining that it is upon this court to decide whether it is convenient and, or in the interest of justice that recusal prayed for is necessary in the circumstances of this case. The petitioner had nothing to rejoin.

The issue for determination is whether the reasons furnished by the petitioner herein constitutes sufficient grounds for my recusal from the panel presiding the petition herein.

Ab-initio, I find it pertinent to affirm my subscription to the tenets of judicial ethics in that impartiality, in both the decision and the decision-making process, is essential to the proper discharge of the judicial duty. This cherished principle manifests under the provision of rule 9 (1) (a) of the Code of Conduct and Ethics for Judicial Officers (G.N. 1001 of 2020) whereas it is aptly echoed:

"A judicial officer shall disqualify himself in any case in which that judicial officer; -

(a) believes he will be unable to adjudicate impartially."

Reverting to the pressing matter at hand, I likewise, find it pertinent to highlight the guiding principles which guides me in determining the application herein as follows:

1. Recusal or disqualification is a tenet of the law intending to promote the fundament principle of judicial impartiality and confidence in the administration of justice. Disqualification of a judicial officer for apparent bias therefore is not a discretionary matter [**Golden Globe International Services & Another vs. Millicom (Tanzania) N.V. and Another** (supra)].
2. In order for the judge to disqualify himself, there must be sufficient convincing reasons before he/she disqualify himself from a suit [**Standard Chartered Bank (Hong Cong) LTD vs. VIP Engineering and Marketing Ltd** (Civil Application 158 of 2011) (2012) TZCA 239].
3. Appropriate test in determining an issue of apparent bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased [**Standard Chatered Bank (Hong Cong)**

**LTD vs. VIP Engineering and Marketing Ltd (supra) & Golden
Globe International Services & Another case (supra)].**

Having revisited the guiding principles above, I now proceed to evaluate the grounds furnished by the applicant herein for my recusal and find whether they pass the legal tests mentioned above. In respect of the 1st complaint, the petitioner alleged that I previously preempted his petition. That he made a prayer, off record, in that his life was in danger. And, he prayed for an order for protection whereas I opined that he should report the threat to the police station as this court could not issue protection order.

Admittedly, the petitioner herein, at the first day scheduled for mention of the case herein lodged in this court, off record, he asserted that having been in dispute with the 1st respondent and commenced constitutional proceedings against the respondents herein, he felt his personal safety in jeopardy. He requested this court to enter protection order to that effect. Apprehending that the public safety and protection is the core responsibility of the police force, I opined that the petitioner, at the first instance, was obliged to lodge report about his concern of the threat to his personal safety to the nearby police station. My opinion was premised on the reason that it would not be prudent for this court to enter

protection order in absence of the evidence that the police force has deliberately failed to discharge its legal mandate and, or refrained to attend the petitioner's concern of threat to his personal safety. The rest member of the panel found substance in my opinion and subscribed to it. The petitioner has never enlightened this court whether he acted on the instruction given and, or the outcome thereof. Therefore, we apprehended that the petitioner's perceived threat to his personal life has subsided. Honestly speaking, I fail to see the connection between my opinion explained above and the alleged bias on my part against the petitioner.

In the 2nd ground, the petitioner alleged that during the deliberation, prior to the hearing of the advanced preliminary objections, I preempted his objection in that the counter affidavit was not signed by the proper authorised person. From what I can recall, based on the charge made by the petitioner herein, upon the respondents' lodging counter affidavit, the petitioner lodged a notice of preliminary objections containing eight grounds. We found it pertinent to scrutinize the aptness of the preliminary objections before we embarked on hearing session. It is a well-known principle of law that, a preliminary objection is expected to raise a pure point of law based on ascertained facts from the pleadings which, if

argued, should be capable of disposing of the case. Likewise, it is a law that a preliminary objection cannot also be raised if what is sought is the exercise of judicial discretion. See the cases; **Attorney General vs. The Board of Trustees of the Cashewnut Industry Development Trust Fund**, (Civil Appeal 72 of 2015) [2015] TZCA and **Mukisa Biscuits vs. West End Distributors Ltd** [1969] EA 696, among others. It was upon the above reiterated principles that we found it pertinent to scrutinize the aptness of the preferred preliminary objections before we proceeded with hearing. The deliberations aimed to enable the petitioner see whether it was convenient for him to proceed with all his objections as pleaded or otherwise opt to refine the same were made in presence of both parties. It was not our enterprise to refrain the petitioner to proceed with arguing the preferred objection, if at all he found the same justiciable. At the end of the deliberations, the petitioner found it convenient to pursue four preliminary objections out of eight previously advanced. And, I was appointed to preside the hearing of the relevant objections. And, the petitioner did not raise any objection on my appointment to determine the objections on merit. It was after I determined the objections raised that the petitioner expressed his reservations. I, likewise, find no substance in this ground.

With respect to the 3rd ground, it was charged by the petitioner that during the hearing of his preliminary objections, I adjourned the case, which was scheduled for hearing in the morning, to the later hour of the day. And, it is his allegation that the adjournment made by this court was calculated to create room to Mr. Kalokola, the State Attorney, to appear and argue the case for the respondents. Likewise, it is alleged that the said state attorney having appeared, didn't seek leave of the court to proceed with the case. Moreso, it is charged that the particular state attorney, raised a point intended to preempt the preliminary objections advanced by the petitioner and I permitted him to do so regardless of the petitioner's objection.

Admittedly, the hearing of the preliminary objections was scheduled for hearing on 27th March, 2023 by the chairperson. The hearing was to commence in the morning. However, I could not proceed with the case for circumstances beyond my control during the morning sessions; and upon deliberations with parties herein, the case was scheduled in the afternoon whereas the case was duly heard as scheduled. It is uncontroverted fact that earlier, one Steven Noel, the state attorney, appeared for the respondents. And, later on, during scheduled hour for hearing, Mr. Stanley Kalokola, state attorney, likewise, appeared in

company of his colleague Noel. It seems the petitioner was at ease with non-appearance of the later. Nowhere, on record, the state attorney who appeared before me earlier bothered to explain the whereabouts of his colleague, Mr. Kalokola. It sufficed to me that the respondent was represented regardless of the number. I am unable to comprehend the ground upon which the petitioner perceives that the case was adjourned to pave way for appearance of the abhorred state attorney. Likewise, I am at loss of the procedure requiring the state attorney to pray for leave to appear in court proceedings with his office colleague, taking into consideration the fact that the case was not heard during the scheduled morning session. In fact, both state attorneys appeared for respondents before this court the previous date scheduled for mention. Therefore, I didn't find it strange that both attorneys appeared in court at the hearing of the case that fateful afternoon.

Unarguably, during his submission, Mr. Kalokola opened up his submission by asserted that the objection was the weapon available for the respondents, not the petitioner; whereas the respondent, feeling he was taken by surprise, and apprehending that his cherished objections were being preempted, he protested against the unexpected counter argument from his opponent. The petitioner alleged that this court allowed Mr.

Kalokola to submit on his novel point of law despite his protest. With due respect, rules of fair trial would not allow me to prevent the attorney to make argument he founds convenient in the circumstances of the case. Be that as it may, fortunately, I had found the impugned counter-argument made by Mr. Kalokola bereft of substance and proceeded to determine the objections raised on merit. Therefore, I find the complaint herein unwarranted.

Lastly, it has been charged by petitioner that the ruling I rendered in determination of the preliminary objections reflected my previous predisposition. I fail to apprehend the gist of this complaint as well. The petitioner has not disclosed the purported prior predilection when I was appointed to determine the preliminary objections, neither the record of this court doesn't reflect his opinion in this respect.

Having evaluated the grounds furnished by the petitioner, I find the matters raised herein buttressing the prayer for recusal trifling. I feel constrained to borrow a leaf from the wisdom of the Apex Court in the case of **Isack Mwamsika & 2 Others vs. CRDB**, Civil Revision No. 06 of 2016 [2016] TZCA 456 whereas the Court subscribing in the foreign decision in the case of **Otkritie International Investment**

Management Ltd and 4 others vs. Mr. George Urumov [2014]

EWCA Civ. 1315 aptly held:

*"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 sense of grievance if the decision is going against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hear the case will feel that, if he loses, he is somehow been discriminated against. **But it is important for the judge to resist the temptation to recuse himself simply because it would be more comfortable to do so.**"*

In the same vein, in the case of **The Registered Trustees of Social Action Trust Fund and Colman Mark Ngalo & Michael J.T. Ngalo (Receiver Manager) v. Messrs Happy Sausages Limited and 11 Others** [2004] TLR 264, the Apex Court opined: -

"It is our considered view that it would be an abduction of judicial function and 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."

Guided by the aforementioned apposite restatements, I am of the considered view that the alleged bias is premised on the non-existent

factual grounds. I find the allegations charged herein to have been based on the misapprehension of facts. I, therefore, finds no sufficient convincing reasons constraining me to disqualify myself from the panel presiding the matter herein. Likewise, I find no material facts constraining me to believe that I would be unable to adjudicate the matter with impartiality. I find it needless to point out that petition herein is presided by the panel of three judges in which my opinion alone doesn't constitute the decision of the court.

In view of the foregoing, I find the petitioner's application for recusal bereft of merit. The application is hereby dismissed.

I so rule.

DATED at **DAR ES SALAAM** this 01st December, 2023.



A handwritten signature in blue ink, appearing to read "O. F. Bwego", is written over the printed name.

O. F. BWEGOGUE

JUDGE