IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

COMMERCIAL CAUSE NO.2 OF 2020

IN THE MATTER OF INDIAN OCEAN HOTEL LIMITED
AND
IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE UNDER SECTION 233 (1) & (3) OF THE COMPANY ACT, 2002

BY

DHIRAJLAL WALJI LADWA.....1st PETITIONER
CHANDULAL WALJI LADWA .....2nd PETITIONER
NILESH JAYANTILAL LADWA .....3rd PETITIONER

v

JITESH JAYANTILAL LADWA.....1st RESPONDENT
INDIAN OCEAN HOTEL LIMITED .....2nd RESPONDENT

RULING

Date of the Last order: 17/6/2020
Delivery of the Ruling: 28/8/2020

NANGELA, J.,:

In the case of ***Issack Mwamasika and 2 Others v CRDB Bank Ltd, Civil Revision No. 6 of 2016 CAT at Dar Es Salaam (unreported)***, His Lordship Mbarouk, J. A, made an emphatic statement worth commencing the preamble to this ruling. In particular, His Lordship stated as hereunder:

> "...[R]ecusal 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 a motion seeking disqualification should be made only after careful consideration..."

I think of no other case where the wisdom ingrained in the above statements of the Court of Appeal would validly apply other than in this instant

ruling. The ruling arises from a request for recusal made by Mr. **Jitesh Jayantilal Ladwa**, the 1st Respondent herein. The request was made by way of *a letter dated 14th June 2020.* In that letter, the 1st Respondent requested that I recuse myself from the conduct of **Commercial Cause No. 2 of 2020** and **Misc. Commercial Applications (Nos.56 & 62) of 2020,** all of which are pending in this Court.

The main case, *i.e.,* **Commercial Cause No. 2 of 2020,** from which this ruling arises, was filed under a certificate of urgency on 15th January 2020. Perhaps it is appropriate that I set out the background. It all started on 17th June 2020, the date when the matter was fixed for hearing. The hearing was preceded by an earlier ruling on preliminary objections raised by the Respondents. The earlier ruling on the preliminary legal issues was delivered on 24th April 2020.

Subsequent to the disposal of the preliminary legal issues raised by the Respondents, this Court set a hearing date, which was the 14th day of May 2020. Unfortunately, the hearing could not take place as I was indisposed. The Deputy Registrar of this Court rescheduled the matter. By way of a summons issued to the parties, its hearing was fixed to take place on the 17th day of June, 2020. On the material date, the Petitioners were represented by Mr. Robert Rutaihwa, learned counsel, while the Respondents enjoyed the services of Mr. Sisty Bernard and John Chuma, also learned counsels. The 1st Respondent was also present in Court.

It is worth noting, however, that, a few days prior to the hearing, *i.e.,* on 15th June 2020, this Court received a six-page letter from the 1st Respondent which was addressed to the presiding judge, **Hon. Dr. Nangela, J.** The letter, which was copied to 16 recipients, among them being the offices of the Chief Justice, the Chief Court Administrator, the Hon. Principal Judge, and some Ministries of the government, to mention, but a few, was titled as follows:

"RE: RECUSAL FROM COMMERCIAL CAUSE NO.2 OF 2020 AND MISC. COMMERCIAL APPLICATIONS NOS.56 AND 62 OF 2020 INVOLVING DHIRAJLAL WALJI LADWA AND 2 OTHERS Vs JITESH JAYANTILAL LADWA AND INDIAN OCEAN HOTELS LTD."

In the letter, the 1st Respondent raised very serious allegations of criminal nature, not only against the presiding judge, but also against other persons, including very senior advocates who have never appeared in this case. The allegations suggest suspicious secret meetings held in the judge's chamber and labeling of the Petitioners and the Advocates named in the letter as criminals and corrupt persons.

Long as it may be, I think the letter may be summarized in five points which are set out on pages 4 to 5 of the said letter. I will hereunder reproduce that portion of the letter verbatim. It reads as follows:

"In conclusion, your following actions clearly show that I will not get justice in your Court:

1. Your private and unrecorded meeting with Chandulal Walji Lawdwa and Michael Ngalo in your Chambers.
2. Allowing Open Perjury in your Court.
3. Ignoring a letter from the Ministry of Home Affairs confirming the petitioner himself has sought an amicable out of court settlement for his actions. A copy of the letter from the Ministry of Home Affairs is attached herewith, marked as JJL-3.
4. Ignoring the pending revision application Number 154 of 2020 already filed before, you changed the date of hearing, and ordered the parties to appear before you "for orders" and indicating your desire to continue with the case despite the fact that there is already an application for revision in the superior court of land (sic) on your earlier ruling.
5. Changing the date from 15th July 2020 to 17th June 2020, (moving the case 30 days earlier) without consulting my lawyers and while there is a pending application to revise your ruling dated 24 April 2020 already in the Highest Court of Tanzania."

Consequently, having noted the letter from the 1st Respondent, this Court, summoned the parties on 17th June 2020 and caused them to address the Court specifically on the issue of recusal, which was the overall purpose of the 1st Respondent's letter. Having read out the letter to the parties, I invited the learned counsel for the 2nd Respondent to address me.

Mr. Sisty Bernard, the learned advocate who appeared for the 2nd Respondent, took the floor. He requested the court that the letter be made part of his submission to the court and insisted that I should recuse myself from the hearing of the Petition. He contended that, the basis for such recusal request was that, in the earlier ruling which is now a subject of revision proceedings before the Court of Appeal, I declared that the Petitioners were shareholders and directors of the 2nd Respondent. In view of that, Mr. Sisty Bernard submitted that, his clients rights of being heard were violated as neither of the parties were heard on merit or adduced evidence.

According to the learned counsel for the 2nd Respondent, the second reason for seeking that I recuse from the case was that, on the day of the hearing of the preliminary objection, the counsel for the 1st Respondent had informed this Court about the on-going out of court mediation chaired by the Ministry of Home Affairs, and, that, the 2nd Petitioner was the one who initiated the mediation but he denied the existence of the same. He submitted that, the letter was later filed in Court on 27th April 2020. However, he conceded that the letter was filed **after** the hearing of the preliminary objections. The learned counsel for the 1st Respondent contended that, since the Petitioners had denied a fact which was later confirmed by the letter from the Ministry, that was the reason why the 2nd Respondent is seeking for the recusal.

The third ground advanced as establishing the reasons why I should recuse myself from the case is the changing of the dates for which the matter was scheduled for orders of the Court. The learned counsel Mr. Sisty Bernard submitted that, the matter was earlier on 14th May 2020, scheduled for orders

on 15th July 2020 as the parties had been informed that the file was taken to the Court of Appeal following the filing of an application for Revision No. 154 of 2020 before the Court of Appeal. He argued that, despite there being such a revision matter before the Court of Appeal, yet the present petition was re-scheduled for orders on 17th June 2020. He contended that, his client was aggrieved having been duly notified of the rescheduling of the date given that his lawyers were not involved in rescheduling the matter.

Concerning the alleged "*private meeting*" between Mr. Chandulal Walji Lawdwa, Mr. Michael Ngalo (Advocate) and the Presiding Judge in his Chambers, the learned counsel, Mr. Sisty Bernard, sought the leave of the Court that his client should address the Court, arguing that, he was "better placed". In the interest of doing justice to the issues, and given the serious nature of the allegations, raised by the 1st Respondent, I granted the prayer and allowed **Mr. Jitesh Jayantilal Ladwa**, the 1st Respondent to address the Court in person.

In his submission to the Court, Mr. Jitesh told this Court, at the outset, that the statement about Mr. Chandulal being corrupt is a fact. Second, he stated that the information that Mr. Chandulal had met with the presiding judge came from his family members and he believed it to be true. Third, as regard the alleged "*private meeting*" with Advocate Michael Ngalo, Mr. Jitesh claimed to have received information from his family that, also Mr. Ngalo had "*privately*" met with the presiding judge in his chamber prior to the hearing. He contended that Mr. Ngalo was seen in the Court premises prior to the opening of the Court on the day of hearing. That being said, he submitted that, as a presiding judge, I should recuse myself from the case as he will not get a fair hearing.In other words, he is contending that I will be biased.

With such ending, the learned counsel for the 1st Respondent rounded up his submission in chief supporting the 1st Respondent's letter and prayer for recusal from the conduct of *Commercial Cause No.2 of 2020* and *Misc.*

Commercial Applications Nos.56 and 62 of 2020 involving *Dhirajlal Walji Ladwa And 2 Others Vs Jitesh Jayantilal Ladwa and Indian Ocean Hotels Ltd.*

When Mr. Rutaihwa took the floor to address the Court, he submitted, at the outset that, the letter by Mr. Jitesh demonstrates, by itself, what kind of a person the 1st Respondent is. Mr. Rutaihwa noted that, the letter contains several and grave allegations directed to the Court itself, in this case, the Presiding Judge and the Registrar, as well as the officers of the Court, *i.e.,* Advocates appearing before this Court. Mr. Rutaihwa submitted, however, that, all allegations are false and do not qualify that as a presiding judge I should disqualify myself from the hearing of this case or its ancillary applications. He contended that, the 1st Respondent seems to have his own judgement in mind, considering that one of the complaints is what transpired on the 2nd of April 2020 when the hearing of the preliminary objections took place.

Mr. Rutaihwa recalled that, on the material day when the counsel for the 1st Respondent raised the issue of an out of court mediation chaired by the Minister for Home Affairs, it was him (Mr. Rutaihwa) who appeared in person as an advocate of the Petitioners and made it clear that he was unaware of the said Home Affairs Ministry's brokered mediation. He contended further that, even if there was such an out of court settlement, the same had nothing to do with the Court's exercise of its judicial functions. He submitted that, his earlier submission was based on the fact that, under Article 4 (2) of our Constitution, the Ministry and the Court are two separate organs. He further referred this Court to Article 107A of the Constitution, which enjoins this Court as the final authority in the dispensation of justice.

He submitted that, the Petitioners did not come to the Court from a vacuum but had the guidance of the Registrar of Companies either to resolve the dispute or take the matter to the Court for orders. He referred to a letter dated 10th January 2020 which was annexed to the petition pending in this Court. He contended, therefore, that, any out of court settlement had nothing

to do with the ongoing court proceedings in this Court, taking into account that the case was at the stage of the hearing of preliminary objections filed by the Respondents, and which ought to have been disposed first. Mr. Rutaihwa submitted, therefore, that, the first point raised and the submission made thereon is totally irrelevant and cannot be a ground for a presiding judge to recuse himself from the hearing of the case. What the Court did was to discharge its judicial function in exercise of its powers, Mr. Rutaihwa emphasized.

As regards the second ground, which constitutes one of the reasons for the 1st Respondent's demand for recusal, Mr. Rutaihwa submitted that, the same was attacking the preamble of the ruling which stated that the Petitioners are Directors and Shareholders of the 2nd Respondent. He contended that, all adjournments sought by the Respondents were meant to allow the 1st Respondent to change the shareholding structure of the company and that, that forms the basis of the ***Misc. Cause No.62 of 2020*** which is yet to be heard by this Court.

Mr. Rutaihwa submitted further that, a scheme designed to change the shareholding structure was accomplished on 16th April 2020 while this matter was still pending in this Court. He contended, therefore, that, the grievance that the ruling had pronounced the Petitioners as Directors of the 2nd Respondent was based on the letter dated 16th April 2020 from the Registrar of Companies.

As regards the pending **Civil Application for Revision No.154 of 2020** in the Court of Appeal of Tanzania, Mr. Rutaihwa submitted that, on 24th May 2020, the parties were informed by a court clerk of this Court that, the matter pending in this Court had been scheduled for orders on 15th July 2020. He submitted that, on that day, it was the same day the Petitioners received the **Civil Application No.154 of 2020** filed by the 1st Respondent in the Court of Appeal. He argued that, unlike what was submitted by Mr. Sisty, in

revision proceedings there must be the calling of the files. He argued that, the procedure of calling the file was not adhered to and, since that is more of an administrative issue, the Petitioners are not aware of what procedure was used to call for the file to the Court of Appeal, and, the Petitioners reserve their rights to pursue the matter administratively.

Concerning the submission by the learned counsel for the 1st Respondent, that the issuance of a summons to the parties to appear before this Court on 17th June 2020 before first consulting them was a reason behind the call for my recusal, Mr, Rutaihwa contended further that, such a submission was not legally minded. He contended that, summonses are issued by the Registrar of the Court. He argued that, the Registrar was legally minded and aware of **Rule 433 (1) and (2) (a) and (b) of the Insolvency Rules** which gives power to the Court to give directions as it thinks fit. He submitted that, since the summons was issued a month before the hearing date, one cannot raise a complaint that he was not given right to be heard. For such a reason, he argued that such cannot even be a ground for recusal of a judge from the case.

Mr. Rutihwa also submitted on the allegations of corrupt practices and criminal conducts as put forth by Mr. Jitesh, (the 1st Respondent). He submitted that, what is revealed in Mr. Jitesh' submission is personal attacks directed to the **1st and 2nd Petitioners**, **Mr. Richard Rweyongeza (Advocate)** and **Mr. Michael Ngalo (Advocate)** and **the Presiding Judge**. He submitted that, there was no nexus between the case in court and Mr. Richard Rweyongeza or Mr. Michael Ngalo who have never appeared before this Court in regard to the matter at hand. He argued that, these senior members of the bar have been labelled "**common criminals**" although their influence or role in the case at hand is not demonstrated.

Mr Rutaihwa submitted that, although it has been said that there are ongoing civil cases for 20 years now filed by Mr. Chandulal Ladwa and Mr. Richard Rweyongeza, such cases have nothing to do with the present petition

and cannot be the basis for the presiding judge to disqualify himself from the hearing and determination of the case. He contended that, even though there are several threats and allegations initiated by the 1st Respondent to untwist the Petitioners and their Advocates, the allegations remain to be unfounded allegations of a criminal nature and has nothing to do with the instant Petition.

As regards the alleged private meetings between the Presiding Judge and Mr. Michael Ngalo and Mr. Chandulal Ladwa prior to the official opening hours of the Courts, it was Mr. Rutaihwa's submission that, such assertion is an insult to the Court, and in particular, the Presiding Judge and the entire judicial organ. He argued that, the submission clearly demonstrates the nature and character of the 1st Respondent since he has not given any proof of the allegations, not even mentioning the names of those from whom the information was received. Instead, the 1st Respondent relies on assumptions that a family member had informed him, it was contended. Mr. Rutaihwa submitted that the allegations are pure hearsay as he who alleges must prove.

Mr. Rutaihwa stressed that, since the 1st Respondent (Mr. Jitesh Jayantilal Ladwa) was not present in Court when the preliminary objections were disposed, the Court should use its judicial powers and cause Mr. Jitesh to produce the person who heard what transpired in those alleged "*private meetings*" with the presiding judge or else Mr. Jitesh be held liable for contempt of Court. To wind up his submission, Mr. Rutaihwa submitted that, there is nothing grave or tangible which entitles the presiding judge to disqualify himself from hearing the Petition. He argued that, the grounds for a judge or any judicial officer to disqualify himself or herself from the conduct of the proceedings, should be strong enough and not mere flimsy reasons.

To substantiate his point, Mr. Rutaihwa referred to this Court the case of ***Registered Trustees of Social Action Trust Fund and Another v Happy Sausages Ltd and Another*** **[2004] TLR.** He submitted that, what is before this Court is a mere perception by the 1st Respondent, that, there will be

injustice, a fact which does not constitute a strong reason for the presiding judge to recuse himself from the hearing of the Petition. He submitted that, the presiding judge cannot be moved by baseless grounds and recuse himself from the conduct of the matter before him because, doing so, amounts to an abdication of his duties.

In a brief rejoinder, Mr. Sisty, the learned counsel for the 1st Respondent, reiterated his submission in chief. However, he added that, as regard the issue of out of court settlement under the Ministry of Home Affairs, the reason his colleague, Advocate Musyangi informed the Court about it, was for the purpose of informing this Court that the 2nd Petitioner had initiated the said mediation while being aware of the pending case before the Court. And, for that matter, he was of the view that the Petitioner are engaging in forum shopping. Mr. Sisty rejoined further, that, the allegations that his colleague, Advocate Musyangi, who appeared before this Court when the preliminary objections were set for hearing, sought several adjournment to facilitate the changing of the shareholding structure of the 1st Respondent, were unsubstantiated as the shareholding structure was changed as far back as December 2019.

As regards the argument that the continuation of the hearing of this case while there is already an application for revision of this Court's earlier ruling filed in the Court of Appeal, Mr. Sisty Bernard argued that the continued hearing of the Petition will render the application in the Court of Appeal to be meaningless or nugatory as the decision of the Court of Appeal may have an implication on these proceedings. Regarding the prayer that the 1st Respondent be held liable for contempt of court, Mr. Sisty Bernard contended that, no wrong has been committed by Mr. Jitesh which amounts to a contempt of Court. In his view, if the prayer is granted and his client fails to substantiate his allegations, then his client will be in contempt. With that view, he rested his submission.

I have given due considerations to the rival submissions made by the learned counsel for the parties and those made by the 2nd Respondent herein. To start with, let me make it clear that, in this ruling, I will only confine myself to the issue regarding **whether I should recuse myself from the conduct of this case or not.** It is not intended, and will not, in whatsoever manner, accept to be lured by the learned counsels, to stray to substantive issues regarding or touching on the Petition itself or any of its ancillary applications. Indeed, as it might be noted in the submissions made by the learned counsel for the parties, there is an attempt here and there to draw me into discussions touching on the merit of the pending Petition and its ancillary applications. That temptation has no place in this ruling as I will confine myself to the issue of recusal which this Court is now being seized with.

At the beginning of this ruling I stated, while quoting from the wisdom of the Court of Appeal of Tanzania, that, recusal and disqualification of a judge from presiding over the conduct of a matter placed before him, is a sensitive issue. It is regarded so because, it puts the integrity and the fitness of a judge to carry out the fundamental role of his or her position in the spotlight. It questions not just the impartiality of an individual judge but the whole system of adjudicating dispute.

As it was stated in by the East African Court of Justice in the case of **Attorney-General v Anyang' Nyong'o and others [2007] 1 EA 12 (EACJ)** "*Judicial impartiality is the bedrock of every civilised and democratic judicial system. The system requires a Judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute.*" For that reason, he who desires that a judge or magistrate should recuse himself or herself from the case, should take such a move "*after careful consideration*".

In my humble view, the above caution, which was also reiterated by the Court of Appeal in the case of ***Issack Mwamasika and 2 Others v CRDB Bank Ltd, (supra)***, is loaded with the counsel of the wise. I tend to think that

way, because, any carelessness or baseless allegations which are bent on scandalizing or lower the authority of the court may end up being tantamount to contempt of court, which is punishable under the law.

As I stated earlier, this ruling has been preferred following a plea by the 1st Respondent that I should recuse myself from the conduct of this case and all ancillary applications connected to it. The reasons, as I stated earlier, were advanced in his letter dated 14th June 2020, which was filed in this Court on 15th June 2020. Submissions were made on the basis of the letter and its underlying reasons summarized on pages 4 to 5 of the letter, and which I reproduced earlier here above.

As pointed out earlier, the 1st Respondent's letter has raised very serious allegations of criminal nature, not only against the presiding judge, but also against other persons, including very senior advocates who have never appeared in this case. However, let me make it clear that the allegations and reasons or grounds for recusal are not only legally baseless hearsays and merely imaginary fears, but also, that, given their grievous, scandalous and contemptuous nature, they may, admittedly, be said to sufficiently undermine the majesty of law and dignity of court, and, consequently, fall within the borderline of the offense of contempt of court.

The reasons for the above position are not far fetched. In the first place, the allegation that I (as **the Presiding judge**) had a **"private"** and **"unrecorded"** meeting with the 2nd Petitioner, together with Advocate Michael Ngalo, in my judge's chamber, is false, irresponsible and disreputable to the authority and integrity of, not only the presiding judge, but also the court and its officers. It is clear to me, indeed, that, by so alleging, the 2nd Respondent, even without a scintilla of truth, is trying to demonize this Court by suggesting to its higher judicial ranks, the administrative machinery and other law enforcement organs, that, the alleged suspicious secret meetings,

allegedly held in the judge's chambers prior to the hearing of the case on 3rd of April 2020, harbour elements of criminal and corrupt practices.

In his submission, the 1st Respondent contended, in person, that, he was informed by a member of the family whose name was undisclosed, that such events took place. In law, and, as correctly pointed out by the learned counsel for the Petitioners, that allegation is nothing but a mere hearsay. It is a tittle-tattle calculated to ridicule the authority of this court and the integrity of its officers. If such unfounded allegations are to be allowed to flourish, they will amount to a free ticket to debase and demonize the discharge the functions of the office of a judge. Such erroneous and tenuous allegations, therefore, cannot be a basis of seeking for a recusal of a judge.

In his submission, the learned counsel for the 1st Respondent submitted that, the recusal application was based on the ground that, in my earlier ruling delivered on 24th April 2020, his clients' rights of being heard were violated. His second ground was that when the court was hearing the preliminary objections, the prayers by the 2nd Respondent's legal counsel to have the hearing of the objections adjourned to pave way to a mediated dialogue chaired by the Ministry of Home Affairs, were turned down, hence aggrieving the 1st Respondent. His third ground was that, the Court had rescheduled the hearing of the case, while there was a pending revision filed in the **Court of Appeal, Rev. No. 154 of 2020**.

With due respect, the submissions by the counsel for the 1st Respondent and the grounds he has advanced are without merit and misconceived. **First,** while I cannot turn this Court into becoming an Appellate Court, it is a well known rule of practice that, once there is a preliminary objection, that must be determined first. The ruling delivered on 24th April 2020 was based on that approach. Whether it was right or wrong this is not the appropriate forum to evaluate it.

In the US Court of Appeals for the Second Circuit , the Court once stated, in the case of ***In Re JP Linahan*, 138 F.2d 650 (2d Cir. 1943),** that, if a judge fails to *"form judgments of the actors in those court-house dramas called trials, he could never render decisions."* In our instant case, a decision on the preliminary objections was rendered and, whether rightly or wrongly adjudged, that is a separate issue best reserved for an appellate court, since my hands are now tied. Besides, whether right or wrong, the delivery of the ruling cannot be the basis upon which a request for recusal is to be pegged. That is even an incongruous view if it comes from the member of the bar who is expected to be well versed in the law.

Second, the denial of an adjournment of a case, especially on a matter filed under a certificate of urgency, cannot on its own, amount to a denial of the right to be heard. Even if it were, it cannot be a ground for recusal of a judicial officer. So is it for an order issued by the Court to reschedule a case for the purpose of issuing necessary orders. The same cannot constitute a valid ground for recusal even if there is a pending matter filed in a higher court.

The situation is even worse when the orders for which the case necessitated a rescheduling could have been the orders for the staying of the case, pending determination of an appeal or application preferred in the appellate Court. Such orders or rulings cannot form the valid ground for seeking a recusal. This is a settled legal position, once emphasized by the US Supreme Court in **Liteky v. United States, 510 U.S. 540, 554-55 (1994)**, wherein the Court stated that:-

> "...judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . **Almost invariably, they are proper grounds for appeal, not for recusal**. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (**Emphasis added**).

Perhaps it is worth to restate the valid grounds for a proper recusal, as captured in the decision of the Court of Appeal in the case of ***Issack Mwamasika and 2 Others v CRDB Bank Ltd***, (supra). In that case, the Court of Appeal of Tanzania established principles for recusal on page 7, quoting the case of **Laurean G. Rugaimukamu v Inspector General of Police & Another Civil Appeal No.13 of 1999 (unreported)** 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 a 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.."

In the instant case, none of the above ground has been established by the 1st Respondent or his learned counsel to warrant that I recuse myself from the conduct of this case. Their submissions are bereft of any clue to that effect and, to say the least, are based on unfounded and unreasonable trepidation.

On the second point raised in the 1st Respondent's letter and for which a submission in support was personally rendered by the 1st Respondent, it has been contended that, the Court, when it believe the counsel for the Petitioner's submission that there was no out of court mediation under the watch of the Ministry of Home Affairs, while the 2nd Petitioner was aware of it, it had condoned an open perjury.

With respect, I think this as well cannot, even by a stretch of imagination, be a valid ground for recusal. It must be noted, as a matter of general principle, that, the court acts on the basis of the materials and evidence placed or submissions made before it. What was stated before the Court on the 3rd of April 2020, was a mere request for adjournment not backed by any cogent reasoning or evidence of the stated out of court mediation.

Besides, the learned counsel for the Petitioner was unaware of it and the letter from the Ministry of Home Affairs, which was referred to by the

learned counsel for the 1st Respondent was filed in this Court on 27th April 2020, and as rightly conceded, the filing was **after** the hearing of the preliminary objections. The 3rd point raised by the 1st Respondent in his letter, that this Court ignored a letter from the Ministry of Home Affairs, is therefore devoid of merits, false and an issue after the fact. The same cannot form the basis for my recusal from these proceedings.

Finally, the last two points in the 1st Respondent's letter, *i.e.*, the issue regarding a pending **Revision No.154 of 2020** before the Court of Appeal and the **change of dates from 15th July 2020 to 17th June 2020** have been canvassed in my discussions above. It suffices to state that they are as well devoid of merits. All these grounds and those discussed earlier are born out of the fear of the unknown which cannot be a basis for recusal.

Perhaps it is necessary, at this juncture, to re-state what was stated in the case of **Omari Said Mami and Another v Republic, Crim. Appeal No.99/01 of 2004**, (unreported). In that case, the appellants had asked the Court to allow for a reconstitution of a the Panel appointed to hear the appeal because two members of the hearing Panel had taken part in an earlier case in which the Appellants had lost. They had thought that, if the two members of the Judicial Panel would continue to hear the other appeal as well, their appeal would not be successful.

In the course of deliberating the issue regarding whether the Appellants had advanced sufficient grounds justifying reconstitution of the Panel, the Court of Appeal of Tanzania, stated, on page 6 of the judgement, as hereunder:

> "We do not think that reconstituting the Panel on the shear apprehension of fear that the appellants would lose the appeal would be in the interest of justice. If anything, recusal on trivial grounds would be tantamount to abdication of our calling. Our view gets support from the Court's decision in ***Registered Trustees of Social Action Trust Fund and Another v Happy Sausages Ltd and Another*** **[2004] TLR. 264,** where it was held, inter alia, that:-
>
> > ***It 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 the grounds of possible appearance of bias."***

In my view, I find that a similar holding is deserving in the instant case at hand. As I stated earlier, the reasons for recusal which were advanced by the 1st Respondent and supported by his learned counsel, are nothing but shear apprehension following the earlier ruling, which I delivered on the 24th April 2020. Such unfounded fears, therefore, cannot in any way force me to abdicate my duties to exercise the judicial powers or functions vested in me by virtue of the Constitution and other relevant laws.

Moreover, as stated earlier in this ruling, recusal is not something a party or even a judge or magistrate will embark on at will or in utter absence of solid grounds. In the case of **Issack Mwamasika and 2 Others v CRDB Bank Ltd**, (supra), for instance, the Hon. Trial Judge had disqualified himself *suo motu* from the conduct of the case before composing of the judgement, following text messages sent to him from unknown persons demanding that he should recuse himself from the conduct of the case.

When the matter was brought to the attention of the Court of Appeal, the Court, having established the principles it set out in the case of **Laurean G. Rugaimukamu v Inspector General of Police & Another** (supra) went further and stated that, a "*judge or a magistrate should not be asked to disqualify himself or herself for flimsy or imaginary fears.*" This means that, if a demand for recusal is ill-founded it should, right away, be refused.

In that decision of the Court of Appeal, the Court discussed as well another ground for a judge's recusal. At page 10 of the decision, the Court stated that:

> " amongst the reasons for a judge to recuse himself/herself is bias. In the case of ***Reg. v 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."

In ***Bahai v Rashidian* [1985] 3 All ER 385 at 391**, Balcombe LJ noted that, bias is "*the antithesis of the proper exercise of a judicial function.*" When there is an element of partiality in the proceedings there is an outright breach of the cardinal principles of rule of law, in particular the right to a fair hearing. Uncorrected, the situation becomes a threat to a constitutional democratic society such as ours.

In **Re JP Linahan,** (*supra*) the US Court of Appeals for the Second Circuit was of the view that, "[*d]emocracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness.*" For that reasons, a judge or a magistrate should not sit in a case where he might not be able to administer justice impartially or where there is a possibility of bias, either on the ground of hostility or the ground of conflicting interest in the case. In essence, however, while a litigant's right to demand that a judicial officer should recuse himself from the conduct of the case before him is an important and a well founded right, nevertheless, such has to be honestly exercised in appropriate cases upon well-established grounds.

In the instant request, the 1st Respondent somehow raised the issue of bias, when he contended that, as a presiding judge I had a "*private meeting*" with Advocate Michael Ngalo and the 2nd Petitioner prior to the hearing of the case. He claimed to have received information from a family member whom he did not disclose and submitted, therefore, that, as a presiding judge, I should recuse myself from the case as he will not get a fair hearing. This, to me, indicate an argument based on reasonable apprehension of bias.

However, does the 1st Respondent meet the test for such? I do not think so. As I stated in this ruling, the 1st Respondent's allegations contained in his letter seeking that I should recuse myself from the conduct of this case, are unfounded and some of them are merely based on fictitious hearsay invented

to serve ends best known to himself. In ***R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*** **[1953] 88 CLR. 100,** the High Court of Australia held that, to demonstrate disqualification for bias "*it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties.*"

Similarly, in a subsequent decision, in ***Ex parte Blume; Re Osborn*** **(1958) S.R. (NSW) 334 at 338,** the Court observed that, *"suspicion is not enough and courts will not act on unsubstantial grounds of flimsy pretexts of bias".* The reason for that was, that, the test for there being an apprehension of bias is an "*an objective one. Would a reasonable man, knowing the facts, draw the inference that the magistrate would be likely to be biased one way or the other.*" Put differently, what should be objectionable is not that the decision to be made will actually be tainted with bias but rather, whether the circumstances under which it was made was such as to create a reasonable apprehension in the mind of other right minded people, that, there was a likelihood of bias affecting the decision.

In view of the above cited persuasive authorities, and, looking at the 1st Respondent's presumed claim of reasonable apprehension of bias, it is clear to me that, the same cannot be established. This is for a simple reason that, the allegations regarding prior private meetings between myself, as a presiding judge, and Mr. Michael Ngalo (Advocate) and the 2nd Petitioner were utterly unsubstantiated, wrong, and utterly unfounded. In that regard, and, as it was stated in ***R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*** **(supra)** no court will properly constituted and manned with a right minded judicial officer will "*act on unsubstantial grounds of flimsy pretexts of bias*".

Before penning off, I find it important to cite what the Court of Appeal in the case of **Issack Mwamasika and 2 Others v CRDB Bank Ltd,**

(supra) as well as what the East African Court of Justice said in the case of **AG v Anyang' Nyong'o (supra).** In the Issack Mwamasika's case, the Court of Appeal of Tanzania stated as follows:

> " ....Chadwick L.J in 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)* at pages 12 -13 had this to say on the point that judge should resist to recuse himself/herself for simple or flimsy reasons:-
>
> > **" 7. 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." [Emphasis added]**

In the case of **Attorney General v Anyang Nyon'go (supra),** the EACJ was also emphatic that:

> "While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law." To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself."

I think the parties to this case and all other litigants in this country, need to be well informed that, no litigant has a right to choose which judicial officers should hear and determine his or her case. Indeed, as the Supreme

Court of Uganda stated in the case of **Uganda Polybags Ltd v Development Finance Co Ltd and others [1999] 2 EA 337 (SCU)**, '*all judicial officers take the oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will. That oath must be respected.*'

It follows, therefore, that, while it is crucial to see to it that justice in every case is not only done but seen to be done, it is equally imperative to allow judicial officers to carryout their duties to sit and perfom their judicial functions in accordiance with their oath of office. In the case of **Raybos Australia Property Limited and Another v Tectram Cooperation Property Limited and others 6 NSWLR 272**, the Court was of the view that, judicial officers should not accede too readily to suggestions of appearance of bias, lest parties are encouraged to believe that by seeking the disqualifications of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

In light of the authorities cited herein, including the authoritative Court of Appeal decision in the case of **Issack Mwamasika and 2 Others v CRDB Bank Ltd, (supra),** it is clear to me, that, the purported grounds or reasons set forth by the 1st Respondent as the basis for his demand for my recusal from the conduct of **Commercial Cause No. 2 of 2020** and **Misc. Commercial Applications (Nos.56 & 62) of 2020,** do not, in any manner possible, fit within the framework of judicially approved reasons for recusal.

Consequently, I hereby dismiss the 1st Respondent's prayer to recuse myself from the conduct of this petition. In the mean time, since it was brought to the attention of this Court that, there is currently a pending application No. 154 of 2020 before the Court of Appeal for revision of the earlier ruling which I issued on 24th April 2020, this matter is hereby stayed pending the determination of the said revision.

It is so ordered.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
28 / 08 /2020

Ruling delivered on this 28th day of August 2020, in the presence of Mr. Robert Rutaihwa, the Advocate for the Appellant and Mr.Sisty Bernard and John Chuma, Advocates for the Respondent.

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DEO JOHN NANGELA
JUDGE
High Court of the United Republic of Tanzania
(Commercial Division)
28 /08/2020