IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 464 OF 2016

BETWEEN

SAHKAR LIMITED.....1ST PLAINTIFF

DAVID LIVINGSTONE LIMITED.....2ND PLAINTIFF

AND

AFRICAN HOTELS & ADVENTURES (EAST AFRICA) LIMITED.....DEFENDANT

RULING

1. The Plaintiffs have moved the court by the Notice of Motion dated 7th August 2020 and they seek the following orders:

[1] Spent

[2] THAT Hon. Mr. Justice David Majanja be pleased to recuse himself from this matter.

[3] THAT this matter be placed before the presiding Judge of the Commercial and Admiralty Division-Milimani High Court for issuance of further directions on the matter;

[4] THAT the costs of this application be provided for.

2. The grounds of the application are set out on the face of the application and supported by the affidavit of Gopal Dhanji Patel, the Managing Director of the 1st and 2nd Plaintiffs, sworn on 7th August 2020. The application is opposed by the affidavit of Moses Masinde, the director of the Defendant, sworn on 31st August 2020. Both parties filed written submissions which their counsel briefly highlighted.

3. The principles applicable to a case of recusal are common ground and the parties cited several cases. These principles are uncontroversial and have been settled by our Superior Courts. There is a presumption that every Judge presiding over a matter acts in accordance with the oath of office as was stated by the Supreme Court in ***Gladys Boss Shollei v Judicial Service Commission & Another*** **SCK Pet. No. 34 of 2014 [2018] eKLR** that, *"[T]here is a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and*

determining matters." Unless an actual interest is demonstrated in which case a Judge must recuse himself, a party who seeks recusal on the basis of apparent or perceived bias must demonstrate to the court that reasonable and fair minded people having knowledge of the facts of the case would conclude that the judge was biased.

4. Judges must not recuse themselves on flimsy or bare allegations made by a party as this would undermine the administration of justice hence the authorities are clear that there must be a factual basis for the Judge to recuse himself. In ***Jan Bonde Nielson v Herman Philipus Steyn & 2 others*** **HC COMM No. 332 of 2010 [2014] eKLR** the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in ***R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED),*** *and reinforced in subsequent cases. See* ***R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)*** *where the Court of Appeal stated that*:

"…When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established…''

5. In ***Philip K. Tunoi & another v Judicial Service Commission & Another*** **CA Civil Application NAI No. 6 of 2016 [2016] eKLR** the Court of Appeal adopted the test for recusal propounded by the House of Lords in ***Porter v Magill*** **[2002] 1 All ER 465**, where it stated that, *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased."* The Court of Appeal concluded that the facts alleged in an application for recusal of a judge must be specifically alleged and established by the applicant and that those facts must lead to a conclusion by the public at large of reasonable doubt of fair administration of justice. In short, the test is objective and not subjective.

6. What are the facts that the Plaintiffs have put forth in support of the application" The material part of the deposition of Gopal Dhanji Patel states as follows:

[2] THAT the Plaintiffs/Applicants have reasonable apprehension that the Honourable Judge has not handled this matter dispassionately.

[3] THAT the Honourable Judge's conduct of this matter has demonstrated both open bias as against the Plaintiffs/Applicants and that he has a personal interest in this matter.

[4] THAT the Honourable Judge proceeded with the full Hearing of the Defence case on 11th August, 2020, on which date this matter was listed for Mention contrary to his own notice appearing in the Kenya Law Website to the effect that all matters listed before him for full Hearing in the month of August, 2020 had been taken out (Annexed hereto and marked "GDP-1" is a true copy of the Public Notice appearing on Kenya Law Website on 11th August, 2020).

[5] THAT the judge proceeded to reserve his judgement for 18th September, 2020 after hearing the Defence case.

[6] THAT the judge's act of proceeding with full Hearing of the Defence case on 11th August, 2020 when this suit was listed for mention contrary to his own notice appearing on Kenya Law Website evidently demonstrates that the judge is clearly prejudiced against the Plaintiffs/Applicants.

[7] THAT the judge's act of proceeding with full Hearing of the Defence case on 11th August, 2020 in the absence of the Plaintiffs/Applicants when there is a Public Notice by the Honourable judge posted on Kenya Law Website on 11th August, 2020 indicating that " DUE TO ACTIVITIES SCHEDULED FOR THE JUDICIAL SERVICE COMMISSION(JSC), ALL THE MATTERS THAT WERE FIXED FOR FULL HEARING IN THE MONTH OF AUGUST, 2020 BEFORE THE HONOURABLE JUDGE ARE TAKEN OUT FOR HEARING AND WILL BE MENTIONED ON THE RESPECTIVE DATES TO CONSIDER WHETHER THEY WILL BE HEARD DURING THE SERVICE WEEK OR ON OTHER DATES," fails to inspire confidence in the Plaintiffs/Applicants that the Judge is a neutral Arbiter but instead portrays him as being openly biased against them.

[8] THAT the Judge's aforesaid act of failing to issue directions on the Plaintiffs'/Applicants' Notice of Motion Application dated 21st July, 2020 and filed on 23rd August, 2020 and his consequent act of proceeding to hear the Defence case on 11th August, 2020 while there is a pending application filed by the Plaintiffs/Applicants further lends credence to the Applicants' apprehension that the Judge is openly biased as against them.

[9] THAT this matter was initially allocated to Hon. Mr. Justice Francis Tuiyott and in fact, the learned Judge had fixed the matter before him for hearing for 4th February, 2020(Annexed hereto and marked "GDP-2" is a true copy of the Cause list for matters scheduled for hearing before Hon. Mr. Justice Francis Tuiyott for 4th February, 2020).

[10] THAT further to the foregoing, it is unclear how the matter was then presented before Hon. Justice Majanja for hearing on 4th February,2020 having been allocated and listed before Hon. Francis Tuiyott as no directions were ever issued by the Presiding Judge of the Division on its reallocation.

[11] THAT the Plaintiffs/Applicants herein thus have reasonable apprehension that they are unlikely to get a fair determination before the said Judge, who from the foregoing cannot be said to have conducted himself beyond reproach in the hearing of this matter.

[12] THAT it is trite law that justice must not only be done but must manifestly be seen to be done.

[13] THAT it is in the interest of Justice that the Honourable Judge recuses himself from presiding over this matter and that the same be placed before the Presiding Judge of the Division for issuance of directions on Hearing de-novo.

[14] THAT I swear this Affidavit in support of the Application for the recusal of Hon. Mr. Justice David Majanja and to have this matter referred to the presiding judge for directions on the hearing and determination of this matter on merits.

7. Upon the basis of the facts set out above, Counsel for the Plaintiffs submitted that the act of proceeding with the full hearing of the defence case on 11th August 2020 in the absence of the Plaintiffs when there was a public notice on *Kenya Law Website* on 11th August 2020 to the effect that the Judge would not be proceeding with hearings in August denied the Plaintiffs the opportunity to test the Defendant's evidence on record through cross-examination hence prejudicing the Plaintiffs' case. The Plaintiffs contended that this was in violation of their right to a fair trial and a fair hearing enshrined under **Article 25(c)** and **Article 50(1)** of the Constitution respectively. The Plaintiffs maintained that the Judge violated the rules of natural justice and that his actions aforesaid impeded the delivery of justice in this case.

8. The Plaintiffs contended that they have a reasonable apprehension that they are unlikely to get a fair determination before the Judge, who cannot be said to have conducted himself beyond reproach in the hearing of this matter. In addition, the Plaintiffs submitted that the Judge, through his conduct as set out above on the facts relied on, has demonstrated open bias as against the Plaintiffs and for that reason he has a personal interest in this matter.

9. The Defendant gave a detailed chronology of the events that led to the hearing of the defence case. On that basis, it submitted that no reasonable observer with knowledge of the facts would conclude that the judge was biased. The suit initially proceeded for hearing on 4th February 2020 before the Judge when the Plaintiffs' witness testified. The matter was adjourned to 2nd March 2020 to enable the Plaintiffs call an expert witness. As the Judge was not sitting on that date, the matter was fixed for mention on 10th March 2020. On 10th March 2020, the parties appeared before the Judge and the Plaintiffs' advocate closed the Plaintiff's case. When the Defence case came up for hearing on 5th June 2020, the Plaintiffs' advocates applied for and were granted an adjournment. On 7th July 2020, the defence hearing did not proceed as the Plaintiffs' advocates had filed an application dated 24th June 2020 seeking to re-open the Plaintiffs' case. It was fixed for hearing on 14th July 2020 by consent of the parties. On 14th July 2020, the Plaintiffs' advocates did not attend the court session hence the Judge dismissed the application for non-attendance. The Judge directed that the defence hearing would proceed on 31st July 2020. Since 31st July 2020 was declared a public holiday, the matter was fixed for mention on 3rd August 2020 when the Judge directed that the defence hearing would proceed on 11th August 2020 and that the Plaintiffs' advocates be served with the notice.

10. The Defendant submitted that the Plaintiffs' objection to the Judge dealing with the suit is made in bad faith and is intended to further delay conclusion of this old suit as no objection was raised when the Judge heard the Plaintiffs' case. It contended that based

on the facts of the case, the Judge has not displayed any bias against the Plaintiffs and has in fact given the Plaintiffs more than ample reasonable opportunity to be heard. It accused the Plaintiffs of having failed to utilise the opportunity to be heard by repeatedly failing to attend court to prosecute their case despite being served and that from the totality of circumstances, the Plaintiffs' conduct and history of delay, it is clear that the Plaintiffs have lost interest in prosecuting their suit and their intent is to delay the matter. Counsel for the Defendant submitted that the right to be heard under **Article 50** must be balanced against the principle in **Article 159 (2) (b)** that justice should not be delayed. It submitted that the Plaintiffs have not produced any evidence of bias on the part of the Judge.

11. I am now called upon to consider whether the Plaintiffs have satisfied the grounds for my recusal based on the principles I have set out. The Plaintiffs' complaint is based on three grounds. First, the matter was supposed to be heard by Tuiyott J., and it is not clear how I came to deal with the matter thus implying a personal interest in the matter. Second, the case was heard when the court had indicated that it would not be hearing matters during the August recess. Third, the hearing proceeded with the court giving directions on the Notice of Motion Application dated 21st July 2020 and filed on 23rd August, 2020.

12. On the first ground, I agree with counsel for the Defendant that the Plaintiffs never objected to my hearing the matter when I presided over the hearing of the Plaintiffs' case. The objection is an afterthought at this stage. I would hasten to add that the reason the matter was allocated to me by the Presiding Judge of the Division was that Tuiyott J., having been nominated by the Judicial Service Commission to be a Judge of Appeal in 2019, it was resolved that he should not hear any new matters and since I had joined the Commercial and Tax Division, it was also resolved that I would take over his docket. In these circumstances, any suggestions that I have a personal interest in the matter is not supported by the facts.

13. As regards the hearing of the matter during the High Court recess, counsel for the Defendant rightly points out that at each stage the Plaintiff's advocates were served with the hearing notice. The Plaintiffs were given the opportunity to attend court and when I was satisfied that they had been served, I proceeded for hearing. The Plaintiff's case is that because I proceeded for the Defence hearing after having issued a public notice, implies that I am biased. Merely because a judge has proceeded on what a party considers wrong footing or made a misstep in procedure does not imply bias. That is why the law is replete with many provisions that allow a party aggrieved by any action or proceedings taken ex-parte or where a Judge proceeds on a wrong procedural basis to apply to set aside or review those proceedings before the same judge.

14. The application before me is not an application to set aside proceedings but one to recuse myself on account of the fact that I heard a matter during the recess having issued a notice to the effect that I would not be hearing matters. Based on the full facts before the court that the Plaintiff was served at various stages of the proceedings and that the party was given an opportunity to appear before court at every stage when the court was in fact sitting and that the party had an opportunity to set aside any proceedings, I do not think a reasonable observer would conclude that I was biased in those circumstances.

15. As regards the Notice of Motion Application dated 21st July, 2020 and filed on 23rd August, 2020 which the Plaintiffs state has neither been heard nor determined. The record shows that the Defence hearing took place on 11th August 2020 and the matter reserved for judgment on 18th September 2020. It is on that date for judgment that the Plaintiffs applied for recusal. During the whole period and because of failure to attend court, the Plaintiffs did not bring to the court's attention that its application was pending for directions.

16. On the basis of the facts of the case, I have come to the conclusion that the Plaintiffs have not established a case for my recusal. I dismiss the Notice of Motion dated 7th August 2020 with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Ms Ndinda instructed by T. K. Rutto and Company Advocates for the Plaintiff.

Ms Wataka instructed by Anjarwalla and Khanna LLP Advocates LLP for the Defendant.