REPUBLIC OF KENYA

IN THE HIGH COURTAT KISUMU

CIVIL CASE NO 336 OF 2001

TRUST BANK LTD ……APPLICANT

VERSUS

MIDCO INTERNATIONAL (K) LTD

CIEM INVESTMENTS LTD

PIYUSH MANUBHAI PATEL

PANKAJ VANKAJ SOMAIA

AJAY SHAH ……RESPONDENTS

RULING

This is an application by the 5th defendant by way of summons in chambers dated 11th June, 2002 under the provisions of order XLIV, rule 4 (6) and order XXI rule 22 and 24 of the Civil Procedure Rules and seeks an order for the Court's ruling delivered on 18th December, 2004 to be reviewed and set aside.

In the said ruling, Justice N R O Ombija finding in favour of the respondent/ plaintiff entered judgment on admission against the applicant for a sum of Kshs 165,398,567/= interest thereon at the rates of 25% per annum from 1st February, 2001 until payment in full and costs of the suit.

The plaintiff/decree holder was in the process of executing the decree when the applicant filed this application on the following grounds:-

(i) That the applicant in the month of April 2004, discovered that the honourable Mr Justice NRO Ombija had personally acted for the plaintiff (Trust Bank Limited in liquidation) when he was in private practice.

(ii) That neither the judge nor the plaintiff's advocates on record or the plaintiff disclosed the above facts to the fifth defendant during and after the hearing of the plaintiff's application for the judgment on admission.

(iii) That because of the conflict of interest or likelihood of mischief there was miscarriage of justice.

(iv) That the fifth defendant's rights under the Constitution of Kenya were breached because of conflict of interest and bias.

(v) That this application has been brought without delay and as soon as the new and important facts were discovered.

The applicant filed an affidavit sworn by himself on 11th June, 2004 setting out the facts underpinning the application. The application annexed copies of correspondence between the respondent Bank and the firm of Messrs. Ombija & Co Advocates in respect of a court case, Kisumu HCCC No 97 of 2001 – *John Njathi Muiruri – Vs – Standard Chartered Bank (K) Limited.*

In view of the nature of and the allegations made in the application, when this matter came before me on 18th June, 2004, I disclosed to the applicant's counsel, Mr Billing and the respondent's counsel, Mr Oyatsi, that while in private practice and before my appointment to the Bench, I did act for the plaintiff Bank while it was under Central Bank Statutory Management and that in the course of such instructions, I did meet and deal with the 5th defendant who was a former director of the Bank. Both counsel requested that I hear the application and waived any objections they may have had.

I have carefully read the correspondence herein between the applicant and the Bank and it is clear that the firm of M/S Ombija & Co Advocates was retained and did act for the Bank in Kisumu HCCC No 97 of 2001 in which the respondent Bank had an interest in the suit property which appears to have been charged jointly to the Standard Chartered Bank and the respondent.

A letter dated 19.4.2002 from the auctioneers to the respondent is headed:-

"Re: LR Nos Bukhayo/Mundika/4143 & 4144 John

Njathi Muiruri Charged to Standard Chartered and

Yourselves."

And in a letter dated 5th April 2002, the liquidation agent of the respondent

Bank wrote directly to the firms of M/S Ombija & Company and stated

in paragraph 3 as follows:-

"....

We have in the past clearly stated that the auctioneers should first market the property and identify interested buyer before staging the sale otherwise the liquidator may not be in a position to settle the fee note

Yours faithfully,

Kasaine S Oloi Tipitip

Liquidation Agent."

The letter was copied to the Manager, Standard Chartered Bank, Kisumu.

From the foregoing, it is certain that the said law firm did act for and was retained by the respondent Bank as advocates. The application was opposed by the Bank which filed a replying affidavit sworn by the Deputy Liquidation Agent of the Bank, Mr Henry Kirimi Mukindia.

The respondent did not challenge or dispute these facts relating to the relationship between the Bank, the firm of Ombija & Company and justice N R O Ombija. The Bank did not deny that the honourable judge did act for the Bank while he was in practice and opposed the application on the validity and legitimacy of the ruling. On this court's part, I did notice that the letters annexed and from the said law firm did contain the name of the honourable Justice Ombija upto the year 2001 in the list of advocates, and/or partners shown on the letter-head. However, in the letters annexed and dated 2002, his name was no longer there.

In response to the application, the respondent submitted that in order for the application to succeed, the applicant is required by law to demonstrate that there was a miscarriage of justice occasioned by the conflict of interest which is alleged to have existed or deemed to have existed due to the judge's past relationship with the plaintiff. That in this case there was no miscarriage of justice or likelihood of prejudice or bias. The respondent states the contents of its affidavit in support of its application for summary judgment was not challenged and must therefore be held to be true. In the application before Justice Ombija, the applicant did not file a replying affidavit but only grounds of opposition. That it does not matter which presiding judge was hearing the matter as the outcome would have been the same. That the applicant had admitted the debt in the suit and the facts were undisputed.

I have considered the application herein, the affidavits and counsels submissions. None of the counsel referred to any precedents in respect of the question of conflict of interest or likelihood of prejudice/bias and I had to carry out my own research, which is part of the reasons for the delay in the delivery of the ruling besides the intervening court vacation, my annual leave and transfer to the Central High Court from the Commercial Division at Milimani.

The House of Lords in the case of *R-v- Gough* [1993] 2 All ER 724, held that:-

"Except where a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias ..... was whether, having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or have unfairly regarded with favour or disfavour the case of a party to the same issue under consideration by him."

Lord Goff summarized the matter in the following words:-

"..... for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the Court is thinking in terms of possibility rather than probability of bias."

In our own Court of Appeal case which had cited the above English case, Civil Appeal No 36 of 1996 *Uhuru Highway Development Limited –v- Central Bank of Kenya & 2 Others,* the 3 Justices of Appeal (Akiwumi, Tunoi & Shah JJ A), in declining to disqualify themselves observed:-

".....In these circumstances, we have carefully considered the application to disqualify ourselves and the evidence preferred in support of it .....

We are confident that the application and the circumstances surrounding it, do not in the least show that

there is a real or even probable danger of bias on our part in the hearing of the present appeal. If we felt so, we would have each disqualified ourselves without being asked to do so. We have also borne in mind the following holding in *Raybos Austalian Property Ltd & another –v- Tectran Corporation Property Ltd*, NSW

LR 272 which was referred to with approval by this court (see the judgment of Tunoi, JA) in *Republic –v-*

David Makali Bedan Mbugua, Independent Media Services Ltd and George Benedict M Kariuki, Criminal

Application Nos 4 & 5 of 1994 (unreported):-

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

The principles coming out of the foregoing cases must be considered and taken into account by this court. However, as I proceed to look into more cases, the salient point and common thread in the English, Kenya and Australian cases is that the question of disqualification, prejudice and/or bias was presented and came up for consideration before the hearing of the cases before the Court and considered at the outset as a preliminary issue. In the present application the issue is being raised after a decision has been made and in a review application under order 44 of the Civil Procedure Rules.

I find a lot of direction in the case of *Galaxy Paints Company Limited –v***Trust** *Falcon Guards Limited,* Civil Appeal No 219 of 1998 (unreported) decided by Justices of Appeal Kwach, Tunoi & Lakha in which the Court stated:-

“The question then arises whether this allegation is sufficient to give rise to automatic disqualification of the judges from sitting on appeal" It is a cardinal principal of law that holders of judicial offices are subject to the common law rule of natural justice whether any pecuniary interest or real likelihood or actual bias disqualifies a judge from sitting. The principle also applies to non-pecuniary interest. There is no fine distinction. Also, a judge should not sit or preside over a case where he has a personal bias towards a party owing to a relationship and the like that he may be personally hostile to a party as a result of events happening either before or during trial. Mrs Dias’ complaint is that the four judges struck out two appeals on technicalities. Do these circumstances give rise to a conclusion by a fair minded informed member of the public, and an advocate of 22 years of experience like Mrs Dias that the judges were actually biased and will not be impartial in the appeal" Do these circumstances suggest that the judges favour the respondent unfairly at the expense of the appellant"

Are there sufficient grounds to establish the actuality of bias"” (emphasis mine).

Applying this test the Court of Appeal dismissed the application for the disqualification of Justices of Appeal Kwach and Lakha. In a recent article in an ICJ legal newsletter (Issue 4 – 5, June – August, 2004), I found an article by an advocate Priscilla Nyokabi titled “*Disqualification of Judges and the Right to a Fair Trial*” to be quite useful. Due to the relevance and currency of this question, I reproduce her words in the opening:-

“..... Under section 77 of the Constitution persons are accorded the right to fair trial by an independent and impartial court established by law. In enjoyment of this right parties should be satisfied as to the

independence and impartiality of the judges sitting in determination of the suit. To give credence to this right judges should disqualify themselves if good reasons for such application are shown. However, we hasten to add that this does not give the litigants and their advocates an avenue to shop for judges they think may be more sympathetic to their cases. Suffice to note that though section 77 relates to criminal trials the arguments raised here below for disqualification of judges apply similarly to civil proceedings. Reasons for seeking disqualification of judges should be cogent and sufficient. There should be evidence of resultant miscarriage of justice as in the case where a judge's position on an issue is known say from earlier comments or conduct. Conflict of interest is an obvious reason for disqualification of a judge even where parties do not raise the issue. Parties can apply for the disqualification of certain judges on the basis of apprehension of bias. The rule is that bias does not have to be real or proved the test is merely possibility of bias ie perceived bias whether it influences the judge or not. It is our submission that to accord persons fair trial by an impartial tribunal, judges should willingly disqualify themselves if the parties express themselves the fear that they may not be as impartial as required by section 77."

This article captured many principles relating to the question of disqualification of judges. I found the reference and comparative analysis of various case law to be of great assistance when considering this application. Going back to the guiding court decisions of our Court of Appeal, I would be failing if I do not mention 2 landmark cases on the subject. In the case of *Kamlesh Masukhlal Pattni and Goldenberg International Ltd –v- The Republic*, Civil Application No 301 of 1999, the judges stated while laying down principles similar to the *Galaxy* case (above) expressed the opinion that public confidence in the administration of justice requires that the judge must withdraw from the case if there is a real danger of bias. They said:

"It is no answer for the judge to say that he is in fact impartial and that he will abide by the judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality.

And finally, Justice of Appeal Cockar in the *Makali* case observed:-

"It is normal practice for a judge to disqualify himself from hearing a case in which he has an interest or in which he thinks the parties may have a justifiable cause to fear prejudice."

The last 2 cases were criminal and contempt proceedings respectively but in all criminal and civil cases that I have read, there is no distinction or different standard or criteria of establishing sufficient cause or the actuality of prejudice/bias that is given. It would appear that the said core principles apply to all cases of whatever nature.

In the present case, there was no application for disqualification of Justice Ombija before he heard the application for summary judgment or judgment on admissions. I have no doubt that had the applicant made the application, then the judge would have considered disqualification or otherwise on merit.

So what is the situation now" In this case the applicant depones that he only discovered that the judge had acted for the respondent in April 2004.

He therefore in effect contends that this is discovery of a new and important matter as envisaged under order 44. In my view this statement on oath was not rebutted in the replying affidavit and the Court believes it to be true. This court presided by me cannot and will never know whether the judge realized or remembered that the respondent was his client while he was in practice as he proceeded to hear the matter. There is all likelihood that this issue did not cross his mind and dealt with the matter without

consideration under the pressure of heavy work-load at the Commercial Court. As to whether in his mind the fact registered or what he could have decided had he noted this in his mind or upon being prompted, is a question of conjecture and speculation that I cannot go into.

The question that I must ask myself while applying the provisions of order 44 and my discretion are:-

1. Is there discovery of new and important matter or evidence which after the exercise of due deligence, was not within the knowledge or could not be produced by him at the time the order was made"

2. If so, what is the effect of this"

3. Was there a real danger of bias on the part of the judge due to his relationship with the respondent and was there a possibility of bias"

4. Were there sufficient grounds to establish the actuality of bias.

5. Was there an existence of a conflict of interest even though neither the judge nor the applicant did raise the matter for consideration"

In answer to the first question, I do hold that the applicant discovered a new and important matter in April 2004 which after exercise of due diligence, was not within his knowledge at the time the Order was made.

A party cannot be expected to know the clients of a judge who has come to the bench from private practice. It is the judge presiding who ought to have known and also in this case, the respondent. It was their duty and obligation to have disclosed or declared the existence of that past relationship. It does not matter now as to who may be to blame because there is a possibility that the judge and the respondent did not remember and that they considered it not to be significant. Judges also could deem such matters would not affect their impartiality due to their oath and their own sense of fairness, justice and conviction. But as seen in the case law, it is not for the judge to decide in his mind without declaring or disclosing the fact to the parties and for them to consider and decide what is good for them or the implications. I do hold that the applicant was denied the opportunity to decide in the said very important application for judgment.

The respondent contended that there was no replying affidavit filed by the applicant in the earlier application and therefore the contents in the supporting affidavit were rightly treated as true. It referred to the case of *Saint Benoist Plantations Limited –v- Jean Emile Adrien Felix*, EACA (1954), Vol XXI, 105

I would like to emphasize that in this review application that I am not sitting as an appellate court or hearing an appeal against the decision of my brother. I cannot decide on the merits of the decision, if short-comings, correctness or otherwise. I will therefore desist from considering this issue. I will also disregard the case referred to me by the applicant, Civil Case No 223 of 2001, *Trust Bank Limited –v- Van Guard Limited* in which the facts were almost similar and involving the respondent and the applicant herein and where Justice Osiemo disallowed an application for judgment on admissions.

I do consequently hold that as a result of the aforesaid non-disclosure of the past relationship between the judge and the respondent, the applicant raise the issue or apply for disqualification on the grounds of prejudice and/or bias and in particular to raise the 3 subsequent questions that I posed above (3, 4 or 5).

Having not been given the opportunity and judgment having been entered against him for the colossal

sum of Kshs 165,398,567/=, I do hold that the applicant has suffered a miscarriage of justice. This is not from a case of actual bias or prejudice but due to the fact that he was denied opportunity to raise the issue of disqualification and test it before the judge.

How the decision would have gone had it been raised is neither here nor there. It could have gone either way. It is now water-under the bridge with the bridge washed away and the decision handed down.

I do hold that a reasonable person looking at the situation now would have the impression that there could have been a real danger of bias on the part of the judge due to his past relationship with the respondent. As started by Goff in *R –v- Gough* :-

“justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking. “The judge was biased!”

In the absence of disclosure by the judge and the respondent, there are sufficient grounds to establish that the lost opportunity to apply for disqualification of the judge has denied the applicant the opportunity to show the actuality of bias. The discovery of the new matter herein discloses that there was a serious breach of the cardinal rules of natural justice.

Consequently, I do hereby allow the application and set aside the ruling given on 18th December, 2002 together with all consequential orders.

Costs of this application shall be in the cause.

Dated and delivered at Kisumu this 1st day of November, 2004

M.K. IBRAHIM

…….

JUDGE