JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 15 OF 2014
(Being Civil Cause No. 311 of 2013 in the First Grade Magistrate's Court Sitting at Blantyre)

BETWEEN

ELTON MAGALASI ..... APPELLANT

-AND-

DAPP IN MALAWI ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
The Appellant, present and unrepresented
Ms. Amasi, of counsel, for the Respondent
Mr. O. Chitatu, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is this Court's ruling on an application by the Appellant to have the presiding judge recuse himself.

A brief restatement of the background facts might not be out of order. On 6th August 2013, the Appellant filed a summons in the First Grade Magistrate Court claiming against DAPP in Malawi, the Respondent, the sum of K195,000 being rental arrears for the months of March, April and May 2013 and rentals in lieu of notice in the sum of K150,000 and K5000 as costs.

The Respondent was duly served with the summons and the Statement of Claim and it filed its Affidavit of Defence on 14th August 2013. The Affidavit of Defence is to the effect that (a) the Respondent intends to defend the action and has a good

defence to the claim and (b) a statement of defence is necessary and the Respondent intends to file such defence within 7 days from the date of filing the Affidavit of Defence. It would appear the Respondent did not file a defence because the Appellant entered a default judgment on 27th August 2013 against the Respondent.

On 29th August 2013, the Respondent obtained an order staying the default judgment, subject to the Respondent filing an application to set aside the default judgment within 14 days of 29th August 2013. Meanwhile, on 17th September 2013, the Resident Magistrate seised of the case, Her Worship D. Mangwana, recused herself *"because of reasons beyond my control"*.

On 14th October 2013, the Appellant obtained a Warrant of Execution which was enforced on the Respondent. Through this execution, the Respondent paid the sum of K265, 536.72 which sum included sheriff fees and costs. The Appellant was fully paid the sum of his claim.

On 19th October 2013, the Appellant filed with the lower court a preliminary issue and the same primarily attacks the affidavit that was used by the Respondent in obtaining the stay order:

> *"1. The purported affidavit came into court without informing the plaintiff.*
>
> *2. As if it is not enough the purported affidavit has not been paid for i.e.. it has No Chief Residence magistrate Cash office stamp.*
>
> *3. The purported affidavit has not been sworn*
>
> *4. The purported statement of defence is filed outside the 7 days period contrary to item 2 of the summons served on 7th August 2013*
>
> *5. Yet the court was deceitfully moved to issue a stay order of execution and application to set aside default judgement*
>
> *6. The defendant all along had the intention of defrauding the plaintiff hence engaging the lawyer to deceive the court through delaying tactics."*

The preliminary issue ends with the following prayer:

> *"1. It is my humblest prayer to struck out the Ex-parte stay order and its application to set aside the default judgement.*

2. *Through this court let the responsible authorities take this matter for their action. (the secretary of Malawi Law Society and the High Court)*

3. *Let the officers of the defendant who are involved in making these unlawful acts face the law."*

On 8th November 2013, the Respondent filed with the lower court summons to set aside the default judgement and the hearing of the same was set for 18th December 2013. Meanwhile, on 6th December 2013, the Appellant filed with the lower court a notice to raise another preliminary issue regarding the presiding magistrate. He asked for her recusal on the ground that *"it is perceived she has an interest on this matter"*.

On 7th January 2014, the Appellant filed with the lower court a Certificate of Non-Compliance: the default being that the Respondent had failed to file an application to set aside the default judgement within the prescribed period of 14 days from 20th September 2013.

On 3rd February 2014, the lower court issued a notice scheduling the hearing of the matter to take place on 6th March 2014. On 6th March, 2014, the lower court directed the vacation of the stay of the execution and ordered the Respondent to pay costs to the Appellant amounting to K258,885.64.

On 25th March 2014, the lower court issued a notice scheduling the hearing of the matter to take place on 7th April 2014. Come 3rd April 2014, the Respondent filed a summons for stay of execution. The summons was accompanied by an affidavit sworn by Charles Mlozeni Chayekha and paragraphs 5 to 9 thereof are relevant:

"5. *When the matter was called for hearing on 17th September 2013 the court recused itself and adjourned the matters so that it would be assigned to another court*

6. *Since then nothing happened but only to be surprised that sheriffs had gone to levy execution on the defendant based on a warrant signed after the stay of execution. I attach and exhibit the warrant marked "CMC3".*

7. *Further despite the matter not being assigned to another court and the earlier court having recused itself the plaintiff has been obtaining various orders and notices allegedly issued by the court which had recused itself. I attach and exhibit the warrant orders marked "CMC4" and "CMC5".*

8. *Surprising to the defendant since the plaintiff executed the first warrant he was paid everything but without any amendment or application duly served on the defendant the plaintiff is again claiming a sum of K258,885.64 whose basis is not known to the defendant and there is also a notice of hearing which has included counsel for the defendant as party to the action which is now set before a different*

court suggesting that the matter has now been assigned to another court pursuant to the recusal of the earlier court which is what ought to have been done before all these other orders.

9. *From the foregoing it is doubtful if the orders and notices were issued by the purported court and if they were then the same was wrongful."*

On 3rd April 2014, the lower court granted an order of stay of execution and directed the Respondent to file an inter partes summons within seven days of the order. By a Notice of Hearing dated 17th April 2014, taxation was set down for 2nd May 2014. The grand total of the Appellant's Costs was put at K1,511,130.00. The lower court assessed costs at K377,782.00. The Respondent did not attend court as it thought that the matter had already been settled. Upon receiving an order to pay the Appellant costs of the action, the Respondent made an application for rehearing. The court later gave an order for rehearing of the assessment of costs. However, the parties agreed to settle and the Appellant was paid the sum of K200, 000.00 as costs of the action in the lower court. The 1st respondent fully paid the Appellant the said sum of money.

On 24th April 2014, the Appellant filed with the lower court a Notice of Appeal to the effect that he was "dissatisfied with the judgement of the preliminary issue raised on 17th September 2013 delivered on 7th April 2014". The Notice of Appeal is headed a follows:

"CIVIL APPEAL CAUSE NO. 15 OF 2014

BETWEEN

ELTON MAGALASI ..... APPELLANT

AND

CHARLES MLOZENI CHAYEKHA ..... DEFENDANT

AND OTHERS ..... DEFENDANT"

On 28th February 2017, the Appellant gave notice that he would raise a preliminary objection and the objection was argued on 1st March 2017.

The Appellant drew the Court's attention to the fact that the Respondents were served with the Notice of Appeal in November 2016 and that it was only the Respondent that acknowledged receipt thereof but without expressing its intention to contest the appeal. It was thus contended that the Respondent can only be allowed to attend hearing of the appeal but not to take part in the hearing. For this

proposition, the Appellant placed reliance on rules 8.4 of the Civil Procedure Rules (CPR 1998).

By its ruling dated 27th March 2017, this court held that the preliminary objection was premised on Rules, namely, CPR 1998, which were no longer applicable in the High Court. The preliminary objection was, accordingly, dismissed.

The Appellant seeks to ground his application for the Judge's recusal on the following passage that obtains at page 5 of the Court's Ruling dated 27th March 2017:

> *"The matter for consideration in this Ruling is not the appeal but I only stay to observe that there is a mismatch between the number of parties to the action in the lower court and, according to the Notice of Appeal, the number of parties to the appeal. The parties to the case in the lower court were the Appellant (Elton Magalasi as the Plaintiff) and the Respondent (DAPP in Malawi as the Defendant). This was the position regarding the parties to the case at all material times, including at the stage of assessment of costs. At no time, was an application made to the lower court to add other parties. I would venture to state that even if an application for leave to add defendants had been made after the Appellant had obtained a default judgement, I have grave doubts that leave would have been granted considering the stage at which the proceedings had reached. In the circumstances, the purported attempt by the Appellant to add other persons to the appeal is clearly an exercise in futility. The only parties to this matter are the Appellant and the Respondent"*

The Appellant advanced three grounds in support of his application and it is necessary that I quote them in full:

> *"**GROUND 1: SUBSTANTIAL MATTER DECIDED BEFORE HEARING.** During the hearing of the preliminary issue, My Lord you directed that we (Appellant and Defendants) should zero in on the question that the defendants should not take part in the deliberations according to RSC 0.12/8 and CPR8.3, 8.4(1a+b) and (2) .this means that the substantial matter was not touched however at the pretext of your outlining the background of this matter in your judgment, you deliberately chose to misguide yourself with distorted facts which you have based your observe that there is a mismatch between the number of parties to the action in the appeal. Yet the lower court on 17th September 2013 applied Laws of Malawi, courts, subordinates court rules, order xxxi sect 5 'Any person doing any act or taking any proceeding in the name or on taking any proceeding in the same name or on behalf of another person, not being, and knowing himself not to be lawfully authorized thereunto, he shall be guilty of contempt of court. Section I " If a contempt is committed in face of the court, it shall not be necessary to serve notice to show cause but the court shall ensure that the person alleged against him and has opportunity to be heard in his own defence ,and shall made a proper record of the proceeding". Thus the pronouncement of*

the presiding magistrate to recuse herself after counsel for the respondent admitted the wrong in the face of the court. When this matter was brought before His Worship Viva Nyimba, he tried to play it down by asking that we should zero in on costs only hence this appeal. It is now contended that grave injustice would be done if refused to entertain the appeal on the appellant's allegation. As this involves hearing all the facts of the appeal, it makes any rule which has to be enforced by an objection in limine, quite useless, for the merits will always have to be fully heard on the appellant's allegation that, when they are heard, the error in law will appear. The fact that your decision is violating the existing law I see this to fall in section 5 of our constitution and pray that you should honourably recuse yourself from this matter.

***GROUND 2: CHANGED RESPONDENTS WITHOUT COURT MOVER**. In my presentation on 1st March, 2017, I cited Radstock Cooperative and Industrial Society V Norton- Radstock Urban District Council (1968) 2 All ER 59. "At 65, paragraph E. Horman L.J protested against the method of procedure where a preliminary point was taken. It was his view that what was taken as a preliminary dealt with the whole subject matter of the action and without any evidence, the court was left in a most unsatisfactory position and had to guess at many things which on the hearing would properly be proved on evidence". With the fear of what has happened you deliberately chose this method to come up with wrong conclusion. Changing of respondents contravenes the existing law of the lower Court and the fact that it has been done by the court without a mover it raises eyebrows and falls in the armpit of section 5 of our constitution.*

***GROUND 3. PERCEIVED BIASNESS**. In my presentation I quoted Rules of Supreme Court 1999 edition 0.12/8 and CPR8.3,8.4(1a+b) +(2). Why dwell only CPR which is just a supplementary of RSC. This is intellectual dishonesty. According to section 12 (ii) of our constitution you are wanting. I pray that you recuse yourself from this matter because my trust on you has gone zero."*

In seeking to buttress his viewpoint, the Appellant cited the following legal provisions:

"Rules of Supreme Court 1999 Edition 0.2/1 page 10 par 5 "The power given to the court by 0.2/1 is a power to cure irregularities consisting of failures to comply with the rules. ***THERE IS NO POWER TO REMEDY FAILURES OF MORE FUNDAMENTAL KIND"***

TWENTY – THIRD SCHEDULE FOR JUDICIAL CODE OF ETHICS RULE 3A (5)

"A Judicial officer shall perform the duties of a judicial officer impartially and diligently.

(5) Judicial officer shall accord to every person who is legally interested in proceeding or his or her legal representative full right to be heard according to law.

RULE 1 & 2

1. A Judicial officer shall uphold the integrity and independence of the Judiciary.

2. A Judicial officer shall avoid impropriety in all activities.

LIMASSOL RESOLUTION

"When one speaks or hears of corruption one invariable thinks of abuse of a position of authority for financial reward. This of course is the obvious definition, but there can also be corruption of one's mind reflected in the delivery of perverse Judgments based on distortion of facts. The motivation may be to assist a friend or relative. Both are equally reprehensible forms of misconduct the later perhaps even more condemnatory as it is based on intellectual dishonestly".

CONSTITUTION

Section 103 "All Courts and all persons presiding over those courts shall exercise their functions. Powers and duties independent of the influence and direction of any other person or authority"

RULE AGAINST BIAS – NICOL V ELECTRICITY CORPORATION OF NIGERIA 1968 (3) ALR COMM 434 PER IKPEAZU J.

"The rule against bias is very clear in that where a decision is made…… that there is likelihood of bias, the decision so made will be invalid. The mere risk of prejudice being enough."

The law governing application for recusal by a judge is well settled. The all important question is whether or not a reasonable and fair minded person would come to the conclusion proffered by the Appellant. If at all any authority were to be needed, the decisions by the Supreme Court of Appeal in the cases of **Sumuka Enterprises Ltd v. The Registered Trustees of African Businessmen Association (MW) 10 MLR 264** [hereinafter referred to as the **"Sumuka's Case"**] and **The State v. Council of the University of Malawi and Others [2011] MLR 381** would suffice. **Sumuka's Case** is well known for the oft-cited dicta by Skinner, C.J at page 270:

"We are satisfied that the test which should be applied in matters of this nature is whether or not a reasonable man, in all the circumstances of the case, would think that his case was not being fairly tried. It would be very rare indeed that a judge would recuse himself in the course of the trial on the basis that his conduct of it has been such as to give rise to a reasonable suspicion that the hearing was not unbiased. The test which we have enunciated, which in our view is all-embracing in the sense that it covers conduct at the trial and matters extraneous, such as where the judge might have a financial interest in the affairs of one of the parties or where he has dealt with criminal proceedings founded on the same facts as the civil proceedings. He would then recuse himself at the outset of the trial. But it would be very rare indeed where circumstances arose in the judge's conduct of the trial which would justify his recusing himself. Faults in the

conduct of the trial should be left for a decision by the Supreme Court of Appeal on an appeal against the verdict of the trial court."

The best test of who a reasonable person is can be found in the case of **Water Valente v Her Majesty the Queen (1985) 25 CR 673**:

"The apprehension of bias must be a reasonable one held by a reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – have concluded'"

The Appellant alleges bias on the part of the Judge. What is "bias"? Skinner CJ in **Sumuka's Case** quoted with approval the definition of "bias" as set out in the opinion of Lord O'brian CJ in **R v. County Cook JJ [1910] 1 IR 275**:

"By "bias" I understand a real likelihood of an operative prejudice, whether conscious or unconscious, there must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicion of whimsical, capricious and unreasonable people should be made a standard to regulate our actions here. It might be a different matter if suspicion rested on reasonable grounds – was reasonably generated – but certainly mere flimsy, elusive morbid suspicion should not be permitted to form a ground of decision" – Emphasis by underlining supplied.

In the present case, what generated the perception of bias was the fact the Appellant sought to add parties to the case through the back door using unorthodox means. I think this falls far short of reasonable evidence required to satisfy that there was a real likelihood of bias. The mere fact that the Court decided the matter against the Appellant does not mean that the Judge is biased. Allegations of bias or prejudice against a Judge are serious matters. They should only be made when there are reasonable grounds that the Judge may not be impartial: see **The State v. Council of the University of Malawi and Others**, supra.

Understandably, the Appellant is not happy that the Court put a stop to his scheme to add parties to the case willy-nilly. In such a situation, the answer does not lie in seeking to have the Judge recuse himself but, as was rightly pointed out by Skinner

C.J. in **Sumuka's Case**, in resorting to the appeal mechanism. Courts have an in-built self-correcting mechanism by way of appeal process.

All in all, I am satisfied that a well-informed, fair minded and reasonable observer would not come to the conclusion the Appellant arrives at. In the premises, it is my

conclusion that the Appellant has not made out a case for my recusal and I, accordingly, dismiss his application.

I would have been content to stop at this juncture. However, I feel that it is necessary to briefly comment on the fact that the Appellant also made similar applications for recusal before the lower court. For example, hardly had the Resident Magistrate (Her Worship Mangwana) recused herself on 17th September 2013 when the Appellant on 6th December 2013 also applied for recusal of the presiding magistrate *"on grounds that it is Perceived she has an interest on this matter"*.

Whilst the proper application of recusal guards the impartiality of the justice system, any abuse or misapplication of the recusal rules would only serve to undermine the administration and delivery of justice. In this regard, the observations by the Supreme Court of Appeal in **The State v. Council of the University of Malawi and Others**, supra, at page 390, are instructive:

> *"It is vitally important that judicial officers should not be unjustifiably taken off a case, as it is that they should not take or continue a case where it would be inappropriate to do so. These are two sides of the same coin. One should not be emphasised at the expense of the other".*

The hearing the appeal is scheduled for 23rd June 2017 at 9 o'clock in the forenoon. For avoidance of doubt, the only parties to the appeal are the Appellant (Elton Magalasi) and the Respondent (DAPP in Malawi) respectively.

Pronounced in Court this 8th day of June 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE