FTCC.045/22 2022 G. NO. 10

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION

BETWEEN:

GUARANTY TRUST BANK (SL) LIMITED - PLAINTIFF/1st RESPONDENT
SPARTA BUILDING
12 WILBERFORCE STREET
FREETOWN

AND

INTERNATIONAL PROCUREMENT AND - 1ST DEFENDANT/APPLICANT
CONSTRUCTION SERVICES COMPANY
8 ECOWAS STREET
FREETOWN

MOHAMED HIJAZI - 2ND DEFENDANT/APPLICANT
11 LOWER PIPELINE
OFF WILKINSON ROAD
FREETOWN

FAYAD HIJAZY - 3RD DEFENDANT/2ND RESPONDENT
16 WILBERFORCE STREET
FREETOWN

Counsel:

F. Sorie (Mrs) - for the Plaintiff/1st Respondent
C.F. Margai Esq - for the 1st & 2 Defendants/Applicants
N.D. Alhadi Esq - " " 3rd Defendant/Respondent

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RULING ON RECUSAL OF THE TRIAL JUDGE

This matter commenced by a writ of summons filed on the 4th day of May 2022 praying for the following orders:

(1) An immediate recovery of the sum of Le6,561,432,480.96 (Six Billion Five Hundred and Sixty-One Million Four Hundred and Thirty-Two Thousand Four Hundred and Eighty Leones and Ninety-Six Cents.) (Old Leones) being the amount by which the Defendants' account stood overdrawn as of March 2, 2022.

(2) Interest on the said sum at the default rate od 37% per annum in line with the prevailing money market conditions.

(3) Any other or further reliefs that the court may deem fit and just.

(4) Costs.

It was before a Judge for arbitration in accordance with the Rules of the Commercial Court 2022 and after which it failed.

Proceedings commenced before this court on the 30th of March 2023. However, no progress was made on this day because counsel for the 1st and 2nd Defendants, Mr. Margai, informed the court that he had filed a Notice to Strike Out the action in November of 2022; whilst counsel for the Plaintiff, Mrs. Sorie said that she had filed an affidavit in opposition in December of 2022. Both processes were not in the judge's file and as such no progress was made in March of 2023.

On the 22nd and 29th of May 2023, when the matter was called, it was adjourned at the behest of Mr. Margai who called the court registrar asking for leave of absence as he was indisposed. Counsel for the Plaintiff consented to these adjournments.

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On the 8th of June 2023, Counsel for the 1st and 2nd Defendants, Mr. Margai, moved the court on an application by way of a notice of motion supported by an affidavit in support sworn to on the 29th of November 2022, asking the court to strike out the writ of summons on the grounds that inter alia, it disclosed no reasonable cause of action against the 1st and 2nd defendants. He also argued that the action was an abuse of process. Mrs. Sorie argued against the application relying on her affidavit in opposition which she had filed in December 2022. She showed the nexus between all the defendants and argued that it was better to go to trial to prove all the important points. She argued that it would be prejudicial if the court grants the application, since the plaintiff would not have been given an opportunity to be heard.

On the 9th of October 2023 a Ruling was delivered by this court in which the application to strike out the proceedings was refused, and directions given to fix a date for trial since pleadings had closed and bundles exchanged. Costs of Le 5,000 was also awarded to the plaintiff.

Trial commenced on 6th March 2024 and at this point, N. D. Alhadi Esq appeared in court to represent the 3rd Defendant, Fayad Hijazy, who I understand from a letter written to the court dated 19th July 2024, is now deceased. Counsel for the Plaintiff, Mrs. Sorie led the 1st witness in examination in chief for the Plaintiff bank and after a detailed examination in chief, the matter was adjourned to 14th of March to continue the proceedings.

On the 15th of April 2024, Mr. Margai asked the court Registrar for a meeting with the Judge. He was accompanied by counsel for the plaintiff, Mrs. Sorie. He expressed his clients' reservation about me being the judge in the matter, even though he said that he had no doubt about me, but that he wants me to recuse myself. Mrs Sorie on the other hand expressed her desire for me to conduct the proceedings and that she had no doubt about my integrity. I then asked counsel to make their submissions orally in open court, which they did.

Summary of Submission by Counsel for the 1st and 2nd Defendants/Applicants

Counsel, Mr. Margai, for the 1st and 2nd Defendants/Applicants made an oral application for me, the Judge to recuse myself on Monday 15th April 2024. He submitted that the 2nd Defendant's son, who has been representing the 1st Defendant throughout the trial, informed him that he learnt that I served in the Legal Department of the Plaintiff bank and that Counsel for the 3rd Defendant has a close affinity with me. Counsel provided no further details on the allegations.

He however told the court that he informed his client that he did not have the slightest doubt that I will give a fair trial based on the evidence. He opined inter alia that he had no doubt in my integrity and impartiality.

Summary of Submissions by Counsel for the Plaintiff/Respondent

Counsel for the Plaintiff/1st Respondent, Mrs. Sorie, responded to Mr. Margai's application orally in court. She said inter alia that having heard Learned Counsel, C.F. Margai, it was her view that previous relationship with the Plaintiff, which she is aware of, ended a long time ago and would not affect the integrity of the proceedings and that she has great regard for the integrity of the court, presided over by me. She maintained that she believes that I will hold the balance and that the same applies to counsel representing the 3rd defendant.

Mrs Sorie argued that given the limited number of judges adjudicating matters in court, the question is, whether judges will be required to recuse themselves on all matters relating to erstwhile employers and the effect it will have on the course of justice and the delays that litigants will ordinarily encounter. She asserted that she has no objection to me sitting on the trial.

Summary of Submission by Counsel for the 3rd Defendant/Respondent

Counsel for the 3rd defendant/respondent, Mr. Alhadi submitted that he had the utmost respect and integrity for the court. He expressed that he had no doubt that justice will be served not only in this matter, but in all matters before the court.

Counsel however expressed his desire for the issue of recusal to be addressed for once, so that it does not come up as a ground of appeal and for future hearings where he may have to appear before me.

The Law

I have carefully considered the oral submissions made by counsel in this matter and wish to first state the position of the law on the recusal of a Judge.

Black's Law Dictionary defines recusal as "the process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice." The recusal of a judge in adjudication emanates from the common law principle of natural justice which forbids a person from being a judge in his or her own cause. This is the underlying reason for the principle of judicial impartiality in constitutional law; Okpaluba and Maloka in "The Fundamental Principles of Recusal of a Judge at Common Law: Recent Developments" Published in Obiter vol 43 n 2 Port Elizabeth 2022.

In Zukerman on Civil Procedure (2006), "English law insists not only on the appearance of bias, but also on the absence of bias. In R v Sussex Justices Ex parte Macarthy (1924) 1 KB, Lord Hewart CJ states that, "it is of fundamental importance that justice should not only be done but must manifestly and undoubtedly be seen to be done."

In Beninion on Statutory Interpretation 6th edition (2012) at page 1011, it refers to the principles applicable to cases of bias. The principle applicable to cases of bias was reviewed by the House of Lords in R v Gough (1933) AC 646. The House distinguished the case where a person acting in a judicial capacity has a direct pecuniary interest, where he or she is automatically disqualified from sitting on the case from where the test is whether, having regard to the relevant circumstances there is a real danger of bias. The term 'danger' was considered preferable to 'likelihood' as indicating that the test is one of possibility of bias rather than the probability of bias.

In Locobail v Bayfield Properties (2000) All ER 1at p.66, the Court of Appeal held that "in considering whether there is a real danger of bias on the part of the judge, everything depends on the facts, which may include the nature of the issue to be decided. However, a judge's religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form the basis of an objection. Nor can an objection be soundly based on the judge's social, educational, service or employment background or that of his family, his previous political associations and so on."

From the decided cases, whether a judge should recuse or be asked to recuse himself or herself from adjudicating on a case, is based on the plaintiff's ability to successfully rebut the presumption of impartiality which qualifies a judge to sit on a case assigned to him or her. This prerequisite of impartiality of a judge is not only a common law principle, but also a constitutional requirement. This provision is the first step in the removal of a judge, and it must be backed up with hard facts and not whimsical allegations or just suspicion. There must be cogent evidence indicating something the judge said or has done that gives rise to a reasonable apprehension of bias. All these circumstances in its entirety must be considered, M.C. Okpaluba and T.C. Maloka (supra).

The next step consists of two objective tests: the test of reasonableness that ascertains how a reasonable person not necessarily involved in the case, but whose perspective may differ from that of an affected

litigant, who is fully apprised of the facts, would view the role of the judge in the particular case; and looking from the perspective of this reasonable observer, whether the judge could be seen as one who has a vested interest in the outcome of the case. If so, would that reasonable observer be acting reasonably by viewing the proceeding in that court in that way? M.C. Okpaluba and T.C. Maloka (supra).

These are the questions to ask, whether the complainant is alleging actual bias on the part of the judge, or merely a reasonable apprehension of bias. In either case, the double-reasonableness test applies and the thresholds in both circumstances are high; M. C. Okpaluba and T.C. Maloka (supra).

Analysis of the law, facts and evidence

From the facts of the case, the questions that arise are: whether counsel for the 1st defendant/applicant has adduced evidence to show actual bias or merely a reasonable apprehension of bias, or self-interest, direct pecuniary interest, or any real danger of bias on the side of the judge? Is there a possibility of bias? Would a reasonable person not involved in the case, who is not the litigant, but fully apprised of the facts, view the role of the judge and from his/her own perspective of a reasonable observer, see the judge as one who has a vested interest in the outcome of the case?

In his submission to the court, Mr. Margai said that when his client raised the issue that I worked for the plaintiff bank in the legal department and that counsel appearing for the 3rd Defendant/ Respondent has a close affinity with me, he told his client that "based on his years of experience in dealing with judges, he had not a slightest doubt that her ladyship does a fair trial based on the evidence". He said that "he had no doubt about the integrity of her ladyship".

Given the seriousness of the aspersions cast by counsel for the 1st Defendant /applicant, Mr. Margai, not a single piece of evidence has he adduced to show my actual bias, his reasonable apprehension of bias, evidence of self-interest, direct pecuniary interest, or any real danger of bias. Instead, he has said the opposite. One then begins to wonder why he even brought up the subject, if he could not prove any ground for my recusal from the matter. He espoused that after discussing the issue with Mrs. Sorie, he "decided to bring it to the court's attention for it to be recorded so that his clients will not say that such information had furnished him, and he did not say it". He said that he had "no doubt that justice will be done irrespective of the affirmations". With all of this said, I am still wondering what was the intention of counsel? Was it to threaten or scare me away from sitting on the matter?

It is a fact that before I became a judge, I worked as the manager of the legal department of the Plaintiff bank and the company secretary, and that was about 10 years ago. Did I sign any of the documents of the bank which are before this court? No. Do I receive any pecuniary advantage from the Plaintiff/bank? No. What evidence has Mr. Margai shown to the court? None whatsoever.

Furthermore, Mr. Margai mentioned that I have an affinity with the counsel for the Respondent/2nd Defendant, Mr. Alhadi. Should I recuse myself because I am related to Mr. Alhadi? No. Mr. Margai has advocated that he has no doubt in my integrity and impartiality. So why should I recuse myself? We live in a small society where many people are related to each other in many ways.

We also live in a society where people belong to various masonic and other fraternity societies, including lawyers, judges, senior public officials and so on. We might as well start asking various members to recuse themselves from matters where judges and lawyers belong to the same fraternities. Recusing myself will be the beginning of a slippery and dangerous trend. I will not allow myself to be drawn into a dangerous trap. Counsel has expressed his confidence in me as a

Judge and that he had no doubt in my fairness and integrity and that is it.

Conclusion

In conclusion, counsel for the plaintiff/applicant, has not successfully rebutted the presumption of impartiality. He has not supported his objection with hard facts. His pronouncements have been whimsical allegations and just suspicion. He has not presented any cogent evidence showing something that I have said or done, that gives a reasonable apprehension of my bias. As pointed out in the case of Locobail (supra), an objection based on a judge's social, service or employment background or that of his/her family cannot form the basis of an objection.

In view of the above, the application for my recusal is REFUSED.

Signed_____  18th December 2024_____
Date:_____

Hon. Mrs. Justice Fatmatta Bintu Alhadi.

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