

TANZANIA / JUDGMENT

# khalid mwisongo vs ms unitrans t ltd 2018 tzhcld 3 2 february 2018

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2 February 2018

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS  
APPLICATION NO. 298 OF 2016 KHALID MWISONGO..... APPLICANT  
VERSUS M/S UNITRANS (T) LTD..... RESPONDENT

## RULING

Date of Last Order: 12/02/2018 Date of Ruling: 16/02/2018 L.L.MashakaJ When this application for extension of time came for hearing on the material date the 12th February 2018, the applicant insisted and prayed to this Court for the Hon. Judge presiding over the application to recuse herself from determining his application hence this Ruling thereto. The reasons advanced for recusal of Trial Judge by the applicant are as follows. Firstly, that the Trial Judge has been with this matter for a long time, commencing as an application for Revision registered as No. 249 of 2016 which is not moving forward but backward to being a Misc. Appl. No. 298 of 2016; secondly, he submitted that Learned Counsel for the respondent Mr. Philip Lincoln Irungu has not filed a notice of representation to represent the respondent and has kept on filing documents on behalf of the respondent. Thirdly, the applicant had written a rejoinder to counter affidavit but the Court decided to strike it out because he had used strong words. That the Court allowed the respondent to file counter affidavit, after striking out a defective one, being the 4th time to do so for the respondent to file a proper counter affidavit. From the above, the respondent prays to the Hon. Court that the Hon. Judge recuses herself from hearing his application. In rejoinder Learned Counsel for the respondent before responding to the submission by the applicant, prayed to serve the applicant with the counter affidavit which they had filed in Court on the 4th December 2017 on the reason that they could not get hold of the applicant and the place where they used to serve his relative one Hamisi Mwisongo at his work place known as Foreman Pepsi Co. was no longer there as he had retired. He therefore prayed to serve the applicant. On the application for recusal of Hon. Judge assigned this matter, Learned Counsel argued that on their part they found no substantial reason for the said basis. The matter being in Court for some time now is caused by the applicant himself as he has always been filing defective applications before the Court and was always given another opportunity to file proper and competent applications before the Court. That, for all that time till this matter which is before the Court, it is the applicant himself who has caused the delay for this matter to reach it is finality. 2 That in most humility, the respondent was

expected to complain against this applicant being favoured by the Court to bring new applications every now and then. That the respondent has been coming to Court every now and then. Learned Counsel insisted and submitted that the prayer by the applicant be dismissed and the matter be heard on merit, which will provide an end to the application by the applicant. On the prayer to serve counter affidavit to the applicant, the Court ordered Learned Counsel for the respondent to serve the applicant in Court forthwith. The applicant was served and ordered to file rejoinder if any within 7 days from the date of order. Having heard the parties' submissions and going through the Court records, on the reasons advanced by the applicant for recusal, this Court finds as follows. First, the application by the applicant has not taken a long time in this Court on the fault of the Court rather the applicant himself as the records can speak by themselves. Secondly, it is not true that Learned Counsel for the respondent did not file Notice of Representation per the law, the records vividly and clearly show that on 11/05/2017 Notice of Representation was filed by the respondent showing that the respondent will be represented by Advocates Danstan Kaijage, Philip Lincoln Irungu and Abdon Rwegasira of Law Care Chambers. That the allegation was once cleared by this Court in its Ruling between the parties delivered by this Court on the 30/11/2017 at page 11 on the very same issue, where the applicant had alleged so in his Written 3 submission. It is with that reason, the submission by the applicant on the issue is found with no merit and hereby dismissed. The Court records also are empty and silent that the respondent has filed defective Counter affidavits for four times and given leave to refile. Perhaps, at this juncture this Court feels compelled to make a legal literature on what grounds can amount to recusal or disqualification of a judge or magistrate from conduct of the case. In the case of Issack Mwamasika and 2 Others Vs. CRDB Bank Ltd, Civil Revision No. 6 of 2016 CAT at Dar Es Salaam (unreported), per Mbarouk, JA, where the Hon. Trial Judge had disqualified himself suo motu from the conduct of the case before composing of the judgement, after receiving a text message from unknown person that he recuses himself from the conduct of the case, the Court of Appeal of Tanzania established principles for recusal at page 7 quoting the case of Laurean G. Rugaimukamu Vs. 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 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. A judge or a magistrate should not be asked to disqualify himself or herself for flimsy or imaginary fears." The Court of Appeal of Tanzania went further to employ another reason which can be a ground for recusal, and therefore emphasized at page 10 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." Furthermore, the Court of Appeal of Tanzania elaborated further that Chadwick L.J giving the judgment of the Court 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 tempting 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 is mine] In emphasizing the point for judges and magistrates not to disqualify themselves easily, the Court of Appeal of Kenya in the celebrated case of Nyamodi Ochieng Nyamogo and Another Vs. Kenya Posts and Telecommunications Corporation, Civil Application No. 264 of 1993 (unreported) cited the case of Uhuru Highway Development Ltd Central Vs. Central Bank of Kenya and 2 others, Court of Appeal (K), Civil Appeal No. 36 of 1996, Kenya Appeal Reports Vol. 3, p.211-219 observed that, "for our part; we dare say that most litigants would much prefer that they be allowed to shop around for the judges that would hear their cases. That however, is a luxury which is not yet available under our law to litigants and those applicants cannot have it " The Court of Appeal of Tanzania (supra) at page 15 concluded that "Before penning off, we note that recusal 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 motion seeking disqualification should be made only after careful consideration..." 6 It is clear that all the purported reasons for recusal advanced by the applicant do not in whichever manner fall in the ambit of the above decision of the Court of Appeal of Tanzania, a binding decision upon this Court in which grounds for recusal were well articulated. I therefore dismiss the applicant's prayer to recuse myself from the conduct of this application. The hearing of the application is ordered to proceed on merit. So ordered L.L.Mashaka' \* JUDGE 16/ 02/2018

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