THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

YEBOAH, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL MOTION
NO. J5/36/2019

3RD JULY, 2019

THE REPUBLIC

VRS

HIGH COURT

GENERAL JURISDICTION "2", ACCRA ……. RESPONDENT

EX-PARTE ALHAJI HALIDOU ABOUBAKAR ……. APPLICANT

KING GEORGE ENTERPRISE ……. INTERESTED PARTY

RULING

MARFUL- SAU, JSC:-

The applicant before us has invoked the supervisory jurisdiction of this court under article 132 of the Constitution praying that we do prohibit His Lordship Justice Daniel Mensah, sitting at the High Court, General Jurisdiction Division, Accra from continuing to hear the suit titled Alhaji Halidou Aboubakar v. King George Enterprise, suit no. AL/120/2010. The basis of applicant's case is that the said Judge has shown open bias against him and his lawyer during the trial.

We observed that even though applicant failed to clearly set out the grounds of the application as required by rule 61 (2) of the Rules of this Court, the main grounds may be deduced from the affidavits in support of the application as follows: -

(a) That when the trial court went to the locus on the 21st January 2019, the driver of the Interested Party herein approached the Judge and introduced himself as an indigene of the town, where the Judge is the Paramount Chief. The said driver further informed the Judge that the Managing Director of the Interested Party was his boss.

(b) That following above incident the Judge became prejudiced against the applicant for which reason an application was filed praying the Judge to recuse himself.

(c) That during the hearing of the application the Judge refused to adjourn the case for an affidavit in opposition filed by the Interested Party to be served on applicant. That the Judge having failed to record the non-service of the affidavit in opposition, heard the application and dismissed same, ruling that he has not shown any bias against the applicant.

(d) The Lawyer for applicant then petitioned the Honourable Chief Justice against the conduct of the Judge and requested that the suit be transferred from the court. That this petition was brought to the attention of the Judge, but he insisted on continuing with the trial, till a decision is taken by the Honourable Chief Justice.

(e) That when applicant's instant application for prohibition was brought to the attention of the Judge, he became angry and refused to record that the application for prohibition had been brought to his knowledge.

The applicant contends that as a result of the events narrated above, the Judge has been hostile to him and his Lawyer and shown open bias to the extent that the Judge cannot be fair in the proceedings before him.

The facts of the case briefly are that in 2010, the applicant herein brought an action against the Interested Party for (i) declaration that applicant is the lawful lessee and

occupant of the premises in House No. D 942/3, Derby Avenue, Accra; (ii) an order of perpetual injunction restraining the interested party from interfering with applicant's quiet enjoyment and (iii) General Damages. In the course of the trial the court had to visit the locus on 17th October 2017.

It later turned out that the court could not trace the records of the said visit so a second visit to the locus was conducted on 21st January 2019.

It was on the second visit that the driver of the interested party approached the Judge and introduced himself as an indigene of the town, where the Judge happens to be the Paramount Chief. The driver also informed the Judge that the Managing Director of the interested party was his boss. According to the applicant, though the Judge indicated that he had been embarrassed by the conduct of the driver, he showed open hostility toward him and his Lawyer during court sessions, after the visit to locus. The applicant alleged that he became a victim of the events narrated above.

The interested party in an affidavit in opposition admitted the incident involving the driver and the Judge, but categorically denied that the Judge had shown open bias against the applicant and his Lawyer as alleged. The interested party contends that the Judge on the second visit to the locus observed that the applicant was developing part of the land in dispute and so decided to hear the case expeditiously. According to the interested party, after the visit, the Judge had to reprimand the applicant and his Lawyer for resorting to unnecessary adjournments which was delaying the trial. The interested party deposed that the instant application was one of several attempts by the applicant to frustrate the early disposal of the case, which had been pending since 2010 and all that was left to conclude the case, was the locus in quo proceedings. The interested party therefore posited that the allegations against the Judge were unfounded and urged that the application be dismissed.

From the record before us, no affidavit appears to have been filed on behalf of the Judge, by any of the appropriate officials of the Judiciary. There is no official certificate from the Registry of this court or the court below that the application had been served on the Registrar of the respondent court.

The applicant however in a supplementary affidavit in support of the application deposed that the Registrar of the respondent Court brought, the pendency of this application to the attention of the Judge, who allegedly indicated that he will continue with the case.

From the facts deposed in the supplementary affidavit, we are convinced that the Registrar of the Court below and the Judge, became aware of the application, but no response has been filed on behalf of the Judge, by any appropriate officer of the Court, as procedurally required. We will however reiterate, that in applications such as the instant one, the Registrar of the Judge whose conduct was under attack ought to be served formally with the processes filed to enable such Registrar or an appropriate official file a response to same, if any. We think that in such cases appropriate certificates of service ought to be filed, to indicate whether service of the process has been effected on the Registrar of the Court. We consider the above procedure necessary to avoid a situation where a Judge would allege that he had no notice of such proceedings brought against his conduct and that he has been denied a hearing.

Moving forward we like to recommend to the Judicial Secretary to remind all Registrars to ensure compliance of the above practice or procedure, whenever an application such as the instant one is filed against a sitting Judge or Magistrate.

We shall now consider the grounds upon which the application has been brought against the Judge. Before then, it is important to address the allegation of non-recording of proceedings made against the Judge which applicant has cited as one of the grounds of open bias against the Judge. Firstly, applicant alleged that at the hearing of his application for the Judge to recuse himself, on the 26th of March 2019, the Judge failed to record that the affidavit in opposition filed by the interested party had not been served on him and yet the Judge heard and dismissed the application.

Secondly, the applicant alleged that when the instant application of prohibition was brought to the attention of the Judge, by the Registrar of the court, on 28th March 2019, the Judge refused to record the fact that the application has been brought to his attention, and decided to continue with the hearing.

We note that these allegations are capable of proof by applying for the courts notes for the respective days or the proceedings of the said dates, but the applicant failed to adduce the required evidence to establish the allegations so made against the Judge. We note that counsel for applicant did apply for the proceedings of 28th March 2019, per a letter exhibited to the supplementary affidavit as 'Exhibit 1", but the said proceedings were not supplied, as the Judge is alleged to have refused to release same. We think that an affidavit from the Registrar of the Court would have been enough evidence to settle the issue. With regard to the proceedings of 26th March 2019, there is however, no evidence that applicant tried to secure a copy of the proceedings, when it was alleged that the Judge refused to record that an affidavit in opposition had not been served on the applicant.

As things stand now in this proceeding, there is no evidence before us that clearly demonstrates that the Judge failed to make the alleged recordings. We consider these allegations very serious and when made against a sitting Judge of the Superior Court, it must be subjected to the standard of proof required under the law. The record before us does not provide us the required evidence and for that matter we can only dismiss the said allegations as not proven.

Now, in this application, the applicant has alleged open bias against the Judge in question. It is important to state that applicant is not alleging real likelihood of bias.

From the discussion so far the major grounds for the allegation of bias are that (a) during a visit to the locus in the trial the driver of the interested party approached the Judge and introduced himself as an indigene of the town where the Judge is the Paramount Chief and (b) that after the visit to the locus the Judge exhibited some hostility against the applicant and his lawyer, during the hearing of the case. What then is the law on judicial bias in Ghana?

This court in the case of **Republic v. High Court, Denu; Exparte Agbesi Awusu II (No.1) (Nyonyo Agboada (Sri III) Interested Party) (2003-2004) 2 SCGLR 864,** after reviewing a long list of cases on the subject of judicial bias, stated the law as follows: -

> **"a charge of bias or real likelihood of bias must be satisfactorily proved on the balance of probabilities by the person alleging same. Where there existed a real likelihood of bias or apparent bias was an issue of fact determinable on a case to case basis."**

This Court in Exparte Awusu II(No.1), supra at page 872 considered and approved the decision in **Adzaku v Galenku {1974} 1 GLR 198,** (as stated in holding (1) of the headnote that: -

> **"to disqualify the trial magistrate and invalidate his decision, the allegation of bias must be supported by evidence. A mere or reasonable suspicion of bias was not enough: the law recognised not only actual bias but that interest, other than interest of a direct pecuniary or proprietary nature, which gave rise to real likelihood of bias. Without more, the conduct of the trial magistrate could not support the charge of bias and since there was no foundation in the allegation of bias, the trial magistrate was right in dismissing the application."**

From the above, the burden in this case was on the applicant who made the allegations to adduce credible evidence to prove same. The standard of proof is one of balance of probabilities which **section 12(2) of the Evidence Act, NRCD 323 defines as follows: -**

> **"Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence."**

The critical question we need to answer is this: would a Judge be biased simply because a driver of a party introduces himself at a locus that he is a native of the town in which the Judge is a Paramount Chief? We think that in the circumstances of this case, the mere self-unsolicited introduction of the driver to the Judge will not amount to open bias, especially so when the applicant himself deposed to the fact that after the introduction, the Judge stated that he had been embarrassed by the

conduct of the driver, who was then admonished by his boss, the interested party. The applicant has alleged that events that took place in court after the visit to the locus showed that the Judge was bias against him and his lawyer.

One of such events cited by the applicant, was when as alleged, the Judge proceeded to hear an application brought by the applicant, even though, he had not been served with the affidavit in opposition filed by the interested party.

It is a fact on the record that such event took place, however, the interested party in his affidavit in opposition provided an answer why the Judge proceeded to hear the application without the service of his affidavit in opposition, on applicant. The evidence on record was that the applicant brought an application for the Judge to recuse himself on the ground of bias, because of the incident at the locus in quo.

On the date of hearing applicant's motion, an affidavit in opposition filed by the interested party had not been served on the applicant. Applicant's counsel prayed for an adjournment so that he could be served with the said affidavit in opposition. According to the interested party, the Judge refused the request for adjournment and asked applicant's lawyer to move his application since the prayer sought was against the Judge and had nothing to do with the interested party. The Judge accordingly heard the application and dismissed it in a ruling that he was not biased.

From the circumstances of this case, we do not think that the mere fact that the Judge heard the application, when the affidavit in opposition had not been served on applicant's counsel is enough proof of such a serious allegation of open bias. The view taken by the Judge was that by the nature of the application brought by the applicant to recuse himself, the affidavit in opposition filed by the interested party was irrelevant, since the matter did not concern the interested party, but rather it was a matter between the applicant and the Judge.

The case of applicant is not that the Judge did not hear him before determining the application, his case was that, he had not been served with the affidavit in opposition filed by the interested party. From the record, the Judge was seised with jurisdiction and if applicant was aggrieved by the procedure adopted by the Judge in

the hearing of the application, his remedy lied in an appeal. We do not think that procedural errors committed by a Judge in the course of hearing an application, without more, can amount to open bias against the Judge.

We think that from what took place at the locus in quo and the events that subsequently took place in court, for example, when applicant's application for the Judge to recuse himself was dismissed, the applicant became suspicious that the Judge was bias towards him.

The record before us however, proves otherwise and the evidence is at paragraph 59 of the affidavit in opposition filed by the interested party in this application on the 6th May 2019, as follows:

> "59. That at about 12 noon, the motion was ruled upon and the trial Court asked the Plaintiff's lawyer to proceed to conclude his cross-examination however, the Lawyer for the Plaintiff pleaded for an adjournment because he had to be in another Court upon which plea the matter was adjourned to the 28th day of March 2019".

The fact narrated by the interested party above in his affidavit in opposition stands uncontroverted. We hold that a Judge who was biased as painted by the applicant in this proceeding would not have granted Plaintiff Lawyer that adjournment as stated. A biased Judge would have insisted that applicant's Lawyer continued with the cross-examination thus refusing the adjournment as prayed. We accordingly conclude on this point that no credible evidence has been adduced on the balance of probabilities that the Judge was biased against the applicant as a result of the incident at the locus in quo.

The next important allegation that we need to address is that the Judge was hostile to Plaintiff's Lawyer. The applicant has alleged that the Judge has been hostile against his Lawyer as a result of the open bias against him and for that matter the Judge should be prohibited from continuing to hear the case.

In Exparte Awusu II (No.1) supra, this Court dealing with an allegation of bias based on hostility of a Judge to a party's Lawyer considered and approved the decision in the case of **Republic v. Owusu-Addo; Exparte Agyemang, High Court,**

Kumasi, 24th October 1969; digested in 1970 CC 10, unreported, where Mensa-Boison J held as follows :

> **"The evidence must be compelling to say that personal hostility between counsel and the judicial officer should disqualify the judicial officer on grounds of legal bias. A suspicion of bias is not enough nor do I think it right that any flimsiest pretext should suffice."**

From the record before us no evidence has been adduced by the applicant to prove the allegation that the Judge had been hostile to his Lawyer in the proceedings. The affidavit filed by the applicant in support of the application does not allege that the Lawyer was insulted by the Judge neither is it alleged that the Judge even attempted to humiliate the Lawyer. The applicant seems to base this allegation of hostility on the fact that the Judge heard the application to recuse himself, when the affidavit in opposition had not been served on applicant, and also the alleged failure of the Judge, to record the fact that the instant application for prohibition had been brought to his attention. We are of the opinion that these alleged incidents that occurred in the proceedings, even if proved, are not compelling enough to ground a charge of open bias against the Judge. In other words, applicant's apprehension against the Judge is not justified in law.

We find it difficult to appreciate how a Judge's failure to enter a record could constitute hostility towards a Lawyer and for that matter a ground for open bias. The applicant in effect has failed to prove the allegation of open bias against the Judge. In conclusion we hold that on the facts of this case the applicant is not entitled to the order of prohibition. The application for prohibition is accordingly dismissed.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

COUNSEL

FELIX QUARTEY FOR THE APPLICANT.

JOHN F. APPIAH FOR THE INTERESTED PARTY/RESPONDENT.