

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHPT2011/0079

IN THE MATTER OF THE POSSESSORY TITLES ACT CAP 328 OF THE REVISED EDITION OF THE
LAWS OF SAINT VINCENT AND THE GRENADINES 2009

AND

IN THE MATTER OF AN APPLICATION BY MILAD SASSINE FOR DECLARATION OF POSSESSORY
TITLE OF LAND

BETWEEN

MILAD SASSINE

APPLICANT/CLAIMANT

AND

LADY ANTROBUS
SUZANNE FORDE RANGER

RESPONDENTS/DEFENDANTS

Appearances:

Ms. Lakita John for Applicant/Claimant

Mr. Joseph Delves for the Respondents/Defendants

Respondents/Defendants' representative, Ms. Suzanne Forde Ranger, present

2021: 7th July
30th July

REASONS FOR DECISION

Byer, J.:

- [1] At the Pre trial review of the above matter on 7 May 2021, this court notified counsel for the parties that my residence had now moved to Cane Garden, Kingstown and that I was now aware of the location of the lot of land. I had indicated to counsel on that date that they should indicate if they had a difficulty with the court continuing the matter. The matter having been stood down counsel for the

respondent indicated that they had no difficulty in the court continuing with the hearing of the matter. Counsel for the applicant asked for an opportunity to confer with the applicant. On 14 May 2021, counsel for the applicant, without any written reasons asked for the matter to be transferred to another judge for hearing.

[2] Upon counsel for the respondent opposing such a course of action, this court ordered that the applicant was to file an application seeking formal recusal and setting out the basis of such request from the information provided by the court at the hearing on 7 May 2021.

[3] By Notice of Application filed on 7 June 2021, the applicant applied that this court be recused from hearing the application for possessory title as between these parties and set out the following grounds:

“1. This application is made pursuant to order of court dated the 14th day of May 2021 and Part 11 of the Civil Procedure Rules 2000.

2. The applicant filed an Application on the 15th day of November 2011 for a declaration of possessory title to land which is the subject matter of the application.

3. On the 7th day of May 2021, when the pre-trial review of the matter was to be held, the court disclosed its familiarity with the parcel of land which forms the subject matter of the application. The extent of the familiarity being that the honorable judge lives in Cane Garden where the parcel of land is situate. The disclosure being made before both parties to the application and it was asked of the parties whether they wish to proceed given the court's disclosure.

4. On the 14th day of May 2021, at an adjournment of the matter, the court heard representations from Counsel for the Applicant that the matter should be transferred to another judge of the High Court. It was then ordered that the applicant file an application with submissions for recusal by 7th June 2021.

5. The Applicant therefore seeks an order that the Honourable Justice Nicola Byer be recused from the hearing and determination of the application for a declaration of possessory title to the parcel of land which forms the subject matter of the application.”

[4] The notice of application was supported by the affidavit of Danielle France filed on even date. The operative part of the affidavit is contained in paragraphs 4 to 7 of the said affidavit and is reproduced here in their entirety:

“4. I am advised and verily believe to be true that on the 7th day of May 2021, when the pretrial review of the matter was to be held, the court disclosed its familiarity with the parcel of land which forms the subject matter of the application. The extent of the familiarity being that the honourable judge lives in Cane Garden where the parcel of land is situate. The disclosure being made before both parties to the application and it was asked of the parties whether they wish to proceed given the court's disclosure.

6. On the 14th day of May 2021, at an adjournment of the matter, the court heard representations from Counsel for the Applicant that the matter should be transferred to another judge of the High Court. On said date it was then ordered that the applicant file an application with submissions for recusal by 7th June 2021.

7. The Applicant therefore seeks an order that the Honourable Justice Nicola Byer be recused from the hearing and determination of the application for a declaration of possessory title to the parcel of land which forms the subject matter of the application.

5. The facts stated herein are true and correct to the best of my knowledge, information and belief.”

[5] It is therefore clear that the nub of the reason for recusal is that this court resides in Cane Garden the same area as the lot of land that forms the subject matter of the substantive claim and that this court knew of the locality of the said lot of land.

[6] The affidavit of the respondent in response to the application was to put a chronology of the matter before the court and to add at paragraph 2 (e) *“that many judges over the years have been housed in premises situate in Cane Garden.”*

[7] The sole issue for the court is therefore whether this court should continue to preside over the hearing of the substantive matter or whether the court should recuse itself from further hearing.

[8] As both sides agreed this matter is not one of actual bias on the part of the court but rather of apparent bias and as such this court will address its mind only to the principles that apply in those circumstances.

Court’s Considerations and Analysis

[9] The contention of the applicant as to the existence of apparent bias seems to be contained in their submissions in which they have stated it thusly, *“the impression the applicant got from the judge’s disclosure on record at the hearing of the pre trial [review] is that the judge must know the veracity of the witness statements/witness summary because she is aware of the parcel of land that forms the subject matter of the application.”*

[10] However when the court asked counsel to explain this to the court, the contention of counsel was that since the court knew the location of the parcel of land, that there would be a “real possibility” that I would “prejudge the case” and that I was therefore unable to approach the case without bias.

[11] There was the gravamen of the argument of the applicant.

[12] The respondent on the other hand, commending the court of appeal decision of **Keston Riley v The Attorney General and another**¹ to this court made it clear that the act of a judicial officer recusing themselves from a matter is one that cannot be done without cogent and substantial reasons.

¹ MNIHCVAP2020/0003

Counsel for the respondent submitted that there was a definitive lack of those reasons before the court in the evidence in support of the application. Rather, it was a bare bones application when in fact the determination of the court to make such an order must be based on the facts as are presented and the facts that have been presented show nothing that could support a contention that the court would approach the exercise of determining the present matter with a closed mind.

- [13] As counsel for the respondent submitted, it must be assessed from the vantage point of the fair minded observer who would look at all the circumstances and only then if they can conclude that there is a real possibility of bias that the court must then recuse itself. However, the respondent, made it clear that there was no evidence before the court to make that assessment and as such the application must be dismissed.
- [14] So as the court in the case of **Gladys Gafoor v The Integrity Commission**² puts it so succinctly *“this tension between the duty to sit and the duty to preserve judicial independence and impartiality sets the stage for a recusal process which is open, transparent and fair: where decisions on recusal are made after careful thought and reflection; where the applications themselves are made bona fide, properly formulated, coherent and well grounded on established principles of law. The fact that it is a challenge going to the fundamental and solemn duty of a judge of the Supreme Court, the occasion should not be scandalized by improper, spurious and baseless requests for recusal which will do nothing to inspire confidence in the administration of justice. Such applications must not in itself be seen as an attempt to excite suspicion and mischief nor an attempt to ferret out information from the judge to make a case for recusal.”* It is in this context that the application must be considered.
- [15] So what is the test that this court requires to apply to itself for the purposes of determining whether it should recuse itself from the instant case? As stated in the **Keston Riley**³ case it must be two staged. As Baptiste JA put it, *“The court has to ascertain all the circumstances bearing on the suggestion that the judge would be biased and ask whether all those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility that the judge was biased. The facts and context are critical, with each case turning on an intense focus its essential facts”*.
- [16] So who is this fair minded observer? As the court in **Helow v Secretary of State for the Home Department**⁴ so eloquently described her, *“The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness*

² TT unrep Claim No. CV2012-00873 at paragraph 7 per Kokaram J

³ Ibid at paragraph 16

⁴ [2008] UKHL 62 at paragraph 2

requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.”

- [17] From even a cursory perusal of the authorities, this fair minded observer which must assess the circumstances must do so on the evidence and that evidence must be sufficient for them to “...reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.”⁵
- [18] Therefore what is the evidence that this court, in the words of counsel for the respondent, graciously disclosed. Having read the witness statements of the witnesses in preparation for pre trial review, I realized that I knew where the parcel of land was located in Cane Garden, having just moved to the area during the period that the file was assigned to me after the decision of the Court of Appeal.
- [19] This was divulged to counsel and the opportunity to tell the court why either party may not wish the court to proceed was given. That is the sum total of the information. This is the information that the fair- minded observer would have to assess.
- [20] The nature of the substantive matter is whether the applicant has established by his evidence, tested at trial, is entitled to the declaration of possessory title. This court would have no reason to consider the location of the said lot of land. This determination will only be a consideration of whether the applicant has satisfied the provisions of the legislation and whether his evidence is sufficiently cogent. In doing so, the determination of the court will by and large rest on the credibility of the witnesses. Again this court would not be assessing that based on knowledge of location.
- [21] It is clear in this court’s mind that the applicant has sought to infer that the knowledge of the court as to location would also impact the court’s knowledge as to possession- a quantum leap in this court’s estimation.
- [22] The court has never intimated that they are familiar with the state of the parcel of land and even if they were, this court is again slow to grapple with what the present state of affairs may be, whatever that is, when the substantive matter which commenced in 2011 must be determined on the facts that existed at the time of filing. A wholly irrelevant period to the present time and residence of this court.
- [23] That being said, whether I recuse myself or not is not a matter of discretion. Indeed in the case of **Morrison and anr v AWG Group Ltd**⁶ Mummery LJ put it this way, “*I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him.*” Thus it is imperative that I must bear in mind that, “*the ability of the judge to deal with the matter uninfluenced by such matters*

⁵ **Locabail (U.K.) Ltd v Bayfield Properties Ltd** [2000] QB 451 at 479 per Lord Bingham of Cornhill

⁶ [2006] EWCA Civ 6 at paragraph 20

is not the issue; it is a question that, to maintain society's trust and confidence, justice must not only be done but be seen to be done. Hence, it is common ground in this case that a judge should recuse himself from hearing an application if there appears to be bias."⁷ Once the determination is made that this court should recuse itself, there are therefore no considerations of inconvenience, costs or delay as raised by the respondent.⁸

- [24] When this court considers this application and the evidence and all the circumstances as divulged and the inference being sought on the disclosure, it would appear that the applicant is seeking to attribute the real possibility of unconscious bias by some "form of osmosis"⁹ by the mere fact of my living in this community.
- [25] In this court's mind the real possibility of bias has not been established on the evidence of the applicant before this court and in these circumstances, this court is constrained to dismiss the application before it.
- [26] On the issue of costs, as all parties are aware the costs are usually awarded to the successful party on the application however this court has had sight of learning that suggests otherwise on the hearing of an application for recusal.
- [27] In the case of **The Attorney General of Trinidad and Tobago v Dr Wayne Kublalsingh and ors**¹⁰ the Court of Appeal of Trinidad and Tobago had to consider an appeal from a decision where the court refused to recuse itself. At paragraph 36 of the judgment of Mendonca JA, the learned judge had this to say "*on the question of costs we are of the view that unless the Court is of the mind that an application for recusal is frivolous or lacking in bona fides, by which we mean that it is motivated by some cause other than the administration of justice, there should be no order as to costs on the hearing before the judge.*"
- [28] In the case at bar, although the claimant was unsuccessful on this application, this application arose because of the disclosure by the court and in fact represents an "*application ... between the requesting party and the court.*"¹¹ Therefore, although this court is not bound by the pronouncements of the Court of Appeal of Trinidad and Tobago, I am satisfied in my own mind that this learning is entirely appropriate in the instant case, and I make no order as to costs.

⁷ **Mengiste and anr v Endowment Fund for Rehabilitation of Tigray and others** [2015] EWCA Civ 1437

⁸ **Keston Riley** supra at paragraph 55

⁹ **Helow** supra at paragraph 56

¹⁰ Civil Appeal No P018 of 2014

¹¹ **Reynold Bahadoor v Sunshine Publishing Company Ltd** (TT unrep) CV2016-01629 at paragraph 33 per Seepersad J

The order of the court is therefore as follows:

1. The Notice of Application filed on 7 June 2021 is dismissed.
2. No order as to costs.
3. The matter will proceed to Pre-Trial Review on 1 October 2021.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar