CIVIL COURT

(FAMILY SECTION)

MADAM JUSTICE

JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)

Hearing of Wednesday 17th June 2020

App. No. : 15/2019/7 JPG

Case. No.: 25

EML

Vs

AM

The Court,

Having seen the urgent application filed by AM, dated 23rd December 2019, at page 2 et seqq., wherein it held:

> *That by means of an application dated 29th October, 2019, applicant AM requested this Honourable Court the granting of leave to appeal before the definitive judgment, from the decree dated 28th October, 2019; and to immediately suspend the effects of the decree dated 28th October, 2019, in the minor's supreme interest and this until this matter is finally determined.*
>
> *That by means of a decree issued on the 10th December, 2019, this Court denied the requests made by applicant AM and after having heard the recordings of the child E and of applicant AM and in the light of Article 149 of the Civil Code, the Court appointed Child Psychologist Dr. Moira Borg in order to investigate the matter, and in particular to examine the effect that the parties' behaviour is having*

on the child, and to report to the Court accordingly.

That, from the offset, applicant AM declares that he does not in any way object to the appointment of the Child's Psychologist, since it was he himself who by means of a note filed on the 25th June, 2019, suggested that "in order to determine the existing problem between E and his mother and to suggest a possible solution for same, applicant humbly suggests that a psychiatrist is appointed to relate about same. Applicant is also willing to submit himself to the same psychiatrist so that parental alienation be completely excluded as a cause of the troublesome relationship between his son and his mother".

That, however, applicant is extremely concerned by the reasoning openly declared by the Court that led to the above decree. Particular reference is made to the following declarations contained in the decree dated 10th December, 2019:

i. *"The Court has heard the recordings of the child filed by Defendant, from which is [sic] seems to appear that not only was Defendant too busy recording the child crying hysterically to effectively try to comfort him during a substantial part of these recordings which lasted a total of approximately twenty minutes …"*

The Court was quick to rebuke applicant AM for recording his son, claiming that he did so allegedly in lieu of trying to comfort him, and this when:

a. *The recorder was simply placed on a table, whilst applicant can be heard lulling his son whilst he was sitting on his lap and continuously patting his back. The Court should note that applicant couldn't even speak to his son for the best part of the recording, because even he was emotional and felt helpless, seeing his son in such a state. Applicant does not stay crying in the courtroom to impress the Judge, as his wife does, but ultimately the current situation has taken its toll on him as well, because he cannot accept the fact that his son's life is being ruined due to his wife's decision to have a relationship with a drug dealer.*

b. *Despite the fact, that applicant filed countless recordings of his wife blatantly*

flashing her mobile in E's face for almost a whole year rather than exercise access and trying to interact with her son, this Court never ever chided her for doing so. Not only, but this Court even rewarded his wife, at the child's expense, by authorising her to pick up E directly from school, even though, through her own doing, defendant EML, had alienated herself from her son.

c. *The Court did not even mention the fact that in one of the recordings filed by EML on the 22nd November, 2019, defendant was so intent in recording her son, that she did not even notice her 2 year old daughter right in front of her, putting a deflated balloon in her mouth!*

d. *Hadn't applicant filed the recordings, no one would have believed what his son is going through, and applicant would have been accused of lying with an intention to alienate his son from the mother. Even so, the Court is implying such alienation, let alone without the said recordings. The recordings have been filed for the Court to understand the full implications of the decree dated 28th October, 2019 on his son and for the Court to act accordingly to protect the child's interests, rather than the interests of any one of the parents involved.*

ii. *"... that when Defendant did in fact try to comfort the child, he agreed with him that Plaintiff is "the worst mother"*

Applicant flatly denies that he has ever said such a thing to his son and he confirms that he would never dream of telling his son such a thing. When E was hysterically crying, screaming and repeating that defendant was "the worst mother", applicant was soothingly hushing his son and quietly telling him "ieqaf E" and this to calm him down. At the end, applicant told him "I can understand", implying that applicant can understand his son's frustration at being forced into something (the picking up by the mother from school) that he has objected to from the offset of the separation and not just for the past year. The Court, however, chose to misinterpret the above and somehow inexplicably claimed that applicant agreed with his son that plaintiff is the worst mother!

iii. *suggested to the child that "it's time you tell this to your mother" [with reference to the child expressing a wish to not see his mother again].*

With all due respect, this Court has not understood that when applicant told his son that "it's time you tell this to your mother", E was not objecting to seeing his mother again, but was objecting to her picking him up from school and to her taking him to her apartment. Applicant can be clearly heard explaining to his son that "she's gonna come to pick you up on Monday, Wednesday and Friday and Sunday I need to take you to her place". E vehemently objected to this. Applicant is feeling as helpless as his son, in this situation, and that is why he told his son that he has to speak up and tell his mother his feelings and his wishes. It is evidently useless for applicant to relate to the Court, as he has done on numerous occasions, about his son's feelings and strained relationship with the mother, so much so that it is being implied that he is alienating his son from the mother. Applicant is now at a complete loss, since it seems that the Court wants him to instruct his son to suppress his feelings and acquiesce to all that is being imposed on him, rather than speak up, face the existing problems and try to discuss them with his mother!

iv. *and telling the child that he (AM) tried to persuade the Court to stop access but that the Court does not understand the needs of children"*

Applicant is once again flabbergasted at how the Court claimed that he told his son that he tried to persuade the Court to stop access, when applicant can be clearly heard saying "I tried to explain to her about coming to school to pick you up, but unfortunately she told Valletta [i.e. the Court] and Valletta they want it like that". Applicant confirms that he told his son "unfortunately Valletta they cannot understand because it is not their children" ... applicant has already claimed on numerous occasions, that no one would allow their children to be remotely in the vicinity of persons with a shady character, let alone with a criminal past and awaiting a trial on drug trafficking – thus, applicant simply cannot understand how his son is being forced by Court decree to spend hours in Kevin Sammut's residence, whilst ignoring all the risk factors involved and despite the strained relationship that his son has with his mother.

To add insult to injury, applicant feels that the Court is somehow blaming him for this situation! All this feels surreal.

That what is troublesome, is the fact that the above misrepresentations imply a clear bias against applicant. Unfortunately this bias is evident even from the below:

i. *that this Honourable Court has rightly not hesitated to impose in open Court and on the spot, supervised access when a verbal claim of marijuana smoking was made in Court by a party during an application in the acts of a mediation during the sitting held on the 28th October, 2019 . By contrast, the hesitation by this Court in this case, which is by far more serious than pot smoking, is inexplicable.*

ii. *When applicant filed a simple application on the 28th November, 2019, requesting that defendant EML be notified at specific times, since she has in the past always avoided notification; this Court did not automatically accede to his request, as is normally done, but has instead ordered that defendant be notified with this application!*

That apart from the bias against applicant, the Court has, by means of the decrees dated 28th October, 2019 and 10th December, 2019, already expressed its opinion with regard to the merits of the case. Even though the Court stated that the "decision given in a pendente lite decree does not necessarily have to be followed in the Court's final judgement", the merits of this case are limited to the care and custody and access relative to the minor E, which issues have been dealt with in the mentioned decrees.

In terms of Article 734 (1) (d) (i) of Chapter 12 of the Laws of Malta "A judge may be challenged or abstain from sitting in a cause, if he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependant thereon". The First Hall, Civil Court had accepted this plea of recusal in the decree delivered on the 22nd May, 2002 in the case: Frankie Refalo noe vs Jason Azzopardi et [Writ of Summons No. 1365/92 AJM], following a preliminary judgement which had been given by the Court since "fis-sentenza preliminari

taghha tal-24 ta' Mejju, 1995, kienet ghamlet certa osservazzjonijiet li jimpingu fuq il-mertu tal-kaz".

Applicant is also aware that this Honourable Court as presided over, has in the recent past recused itself from hearing cases where one of defendant's lawyers, Dr. Stephen Thake, was assisting one of the parties, and this for personal reasons. That case was assigned to another Judge, without a decree of abstention and without a request for recusal. A request was forwarded for the case not to be assigned to the new Judge since a number of witnesses had already testified viva voce, however, at that stage it became known that this Honourable Judge herself requested the transfer of this case, in view of Dr. Thake's presence in the said case. Everyone had accepted this Judge's decision. However, in this case, it is Dr. Stephen Thake himself, who is assisting EML, together with Dr. Maria Cardona, and as a consequence, if there existed a valid reason at law for this Honourable Judge to stop hearing the case: Donna Salerno et vs Guido Bonello Ghio, there likewise exists a valid reason at law for the presiding Judge to stop hearing this current case and to abstain due to an evident conflict of interest. Tertium non datur.

That as a consequence of the above, applicant feels that his right to a fair trial as sanctioned by Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Liberties, is being breached and will continue to be breached throughout these proceedings, and this to detriment of his son. In this regard, the Constitutional Court has confirmed that:

"Din il-Qorti taqbel u taghraf li tabilhaqq ir-raġunijiet li ghalihom ġudikant jista` jiġi rikużat milli jkompli jisma` kawża m`humiex biss dawk li l-liġi nnifisha ssemmi u, f`każijiet eċċezzjonali, jista` ikun hemm raġunijiet ohrajn serji li jwasslu bhala xierqa ghal tali astensjoni jew rikuża. L-istitut tar-rikuża jew tal-astensjoni huwa mahsub biex ihares l-ahjar interessi tal-ġustizzja, b`mod partikolari f`dak li jirrigwarda l-jedd ta` smigh xieraq b`mod imparzjali u kif ukoll it-tishih tal-fiduċja pubblika fl-amministrazzjoni tal-ġustizzja."

Ultimately, it is vital that justice must not only be done but must be seen to done.

Applicant confirms that he was not aware of the above facts when he filed his statement of defence.

Thus, for the above mentioned reasons, applicant humbly requests this Honourable Court to abstain from hearing this case any further and to request the Director of Courts to assign this case to another Judge.

Having seen that the application and documents, the decree and notice of hearing have been duly notified in accordance with law;

Having seen the reply filed by EML, dated 16th January 2020, at page 8 et 8, wherein it held:

1) *That defendant has filed yet another application requesting that the presiding Judge abstains. Defendant cites two (2) unconnected but equally flimsy grounds for doing so, being that the Court has shown bias against him and, the nebulous ground that in a prior suit, in which both parties' lawyers were involved, the presiding Judge had abstained. Both grounds are objected to and opposed by respondent not only because the grounds themselves are inexistent, but also because even where the facts actually alleged were to exist, such facts would not give rise to cause for abstention.*

2) *It is now becoming clear that defendant is engaging in nothing short of an attempt at judicial intimidation. Defendant is aware that this application should not be upheld as he was aware that his previous applications demanding the Judge's abstention would have been rejected before he withdrew them. Defendant is also aware that this Court however presided, will not countenance the behaviour he has engaged in, but is doing his upmost to attempt moral pressure on the presiding Judge. This of itself constitutes contempt of Court which is a topic which will be revised by respondent in due course.*

Having heard all the evidence on oath;

Having seen the exhibited documents and all the case acts;

Having heard oral submissions;

Considers;

AM testified and exhibited Documents AMX1 to AMX12 that is a series of photos from video recordings taken during access. AM informs the Court that all these photos show EML mobile in hand taking photos and video of the child independently of apparent danger of to her child as well as danger to the other child of the plaintiff ML.

Deliberates;

This is a decision following a request by Defendant for the presiding judge to recuse herself from this case for the reasons mentioned in his application, including the fact that the Presiding judge was assisted by Plaintiff's counsel in a personal legal matter unconnected with the case at hand. Plaintiff objects to this request, arguing that Defendant's request amounts to nothing other than judicial intimidation and is motivated only by Defendant's failure to obtain the suspension of her access with their child.

The Court *obiter* recognizes that it is particularly odious that the question of a judge's recusal is left to the judgement of the same judge whose recusal is being sought. Such a determination ought to be made by a different judge, however the current legal system in Malta does not permit this. The Court notes furthermore that the law does not even permit an appeal from a decision regarding recusal, albeit there are other remedies at the disposal of the parties.

The Court recognizes furthermore that with regards to complaints relating to impartiality, the Court has to protect not only the parties' interests, but also that of the public in general. This is because the impartiality of the members of the judiciary is fundamental not only to guarantee the right to a fair trial but also for democracy and the rule of law. It is oft said that justice must not simply be done, but it must also be seen to be done. It is for this reasons that a complaint of lack of impartiality can be based either on a lack of subjective impartiality on the part of the presiding judge or on a lack of objective impartiality, where the fear stems from the objective circumstances of the case which, independently of the actual convictions or personal interests of the judge, do not sufficiently guarantee the impartiality that the Court ought to have, and ought to appear to have. In a democratic country, it is crucial that the public has faith in the judicial

and the impartiality of the judges, both actual and perceived, is a *sine qua non* requisite for such faith to exist.[1]

The Court also begins by noting that a recusal on the basis of the fact that the presiding Judge was assisted by the counsel to one of the parties' in a personal legal matter unconnected with the case at hand, is not contemplated in Article 734 of Code of Organization and Civil Procedure. However, the Court understands that the jurisprudence of the Maltese Courts on this matter is that decisions relating to the recusal of a judge are to be decided not simply on the basis of ordinary law but also in the light of the fundamental rights and liberties according to European Convention as well as the Constitution.[2]

The Court recalls that in determining the Court's impartiality the test is two-fold because the impartiality required of the Court must be both subjective as well as objective. This was confirmed in the European Court of Human Rights 's judgement in the names of **Micallef v. Malta** decided on the 15th of October 2009:

> "*Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the*

[1] See for example, **Castillo Agar v Spain,** ECHR decided on 28 October 1998: "…*even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public*."

[2] **Avukat Dottor Irene Bonello vs Onor. Prim Ministru et,** Constitutional Court, decided on 28 April 2000: "[d]*in il-Qorti tara pero` li* ***l-kwestjoni rimessa lilha trid tigi deciza fuq livell oghla minn dak tas-semplici dritt ordinarju***. *Fi kliem iehor anke jekk skond id-disposizzjonijiet relattivi tal-Kapitolu 12 ma hemmx lok ta' rikuza - anzi jista' jkun hemm addirittura divjet ta' astensjoni - tista' tinholoq sitwazzjoni li tikkuntrasta mad-drittijiet fondamentali u kostituzzjonali ta' l-individwu*." See also **Carmelo sive Charlie Galea vs Rosina Cardona,** Court of Appeal, decided on 5 July 2006: "…***anke jekk il-motivi huma tassattivi, "l-interpretazzjoni taghhom ma ghandhiex tkun tali li thalli dubju fil-fiducja (ta' l-akkuzat f' dan il-kaz) dwar id-dritt tieghu li jkollu 'a fair trial' u li ghalhekk, fid-dubju, l-Imhallef ghandu jakkolji l-eccezzjoni ta' rikuzazzjoni****" (Kollez. Vol. XXXII P IV p 601)*"; **S.N. Properties Limited vs Bank of Valletta et,** First Hall of the Civil Court, decided on 18 October 2017: "…*huwa car illi l-interpetazzjoni li l-Qorti trid taghmel tal-Artikolu trid tkun wahda li tiehu kont tal-fatt illi talba ghar-rikuza ta' gudikant, ghalkemm maghmula a bazi tal-ligi ordinarja, ghandha fundament kostituzzjonali u ghalhekk id-decizjoni tal-Qorti trid tiehu in konsiderazzjoni d-dritt fondamentali ghas-smiegh xieraq tal-partijiet fil-kawza. Huwa wkoll fatt accertat illi l-Qorti trid tassigura wkoll illi l-gustizzja mhux biss isehh, izda tkun tidher li tkun qed isehh, u ghalhekk huwa wkoll konsiderazzjoni mportanti illi l-Qorti tkun tista' tinspira l-fiducja tal-partijiet u tal-pubbliku fl-imparzjalita taghha*."

> *Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a* ***subjective test*** *where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an* ***objective test****, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, inter alia, Fey v. Austria, 24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, and Wettstein v. Switzerland, no. 33958/96, § 42, ECHR 2000-XII).*"

In this same judgement it was also stated that:

> "**[a]*ppearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see De Cubber, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public.*** *Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see Castillo Algar v. Spain, 28 October 1998, § 45, Reports 1998-VIII).*"

It has been held with regards to the subjective test that the personal impartiality of a judge must be presumed until there is proof to the contrary. In the absence of proof that the presiding judge acted on the basis of personal bias, a court can only presume that judge's personal impartiality.[3]

With regards to objective impartiality, it has been stated by the ECHR in **Castillo Agar v Spain** decided on the 28th of October 1998 that:

> "*In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is*

[3] See for instance: **Le Compte, Van Leuven and De Meyere v Belgium,** ECHR decided on 23 June 1981; **Hauschildt v. Denmark,** ECHR decided on 24 May 1989; **Castillo Agar v. Spain,** ECHR decided on 28 October 1998; **Rustavi 2 Broadcasting Company Ltd and Others v Georgia,** ECHR decided on 18 July 2019.

important but not decisive. What is decisive is whether this fear can be held to be objectively justified."

Deliberates;

The Court notes that according to law, the request for the recusal or challenge of the presiding Judge, is to be made *ad limine lites*[4].

Indeed, according to Article 733 and Article 734, of Chapter 12 of the laws of Malta:

733. The judges may not be challenged, nor may they abstain from sitting in any cause brought before the court in which they are appointed to sit, except for any of the reasons hereinafter mentioned.

734. (1) A judge may be challenged or abstain from sitting in a cause -

(a) if he is related by consanguinity or affinity in a direct line to any of the parties;

(b) if he is related by consanguinity in the degree of brother, uncle or nephew, grand-uncle or grandnephew or cousin, to any of the parties, or if he is related by affinity in the degree of brother, uncle, or nephew, to any of the parties;

(c) if he is the tutor, curator, or presumptive heir of any of the parties; if he is or has been the agent of any of the parties to the suit; if he is the administrator of any establishment or partnership involved in the suit, or if any of the parties is his presumptive heir;

(d) (i) if he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependant thereon;

[4] Vide Article 739, Chapter 12, Laws of Malta and collected cases Vol XXX.I.724;

(ii) if he had previously taken cognizance of the cause as a judge or as an arbitrator:

Provided that this shall not apply to any decision delivered by the judge which did not definitely dispose of the merits in issue or to any judgment of non-suit of the plaintiff;

(iii) if he has made any disbursement in respect of the cause;
(iv) if he has given evidence or if any of the parties proposes to call him as a witness;

(e) if he, or his spouse, is directly or indirectly interested in the event of the suit;

(f) if the advocate or legal procurator pleading before a judge is the son or daughter, spouse or ascendant of the said judge;

(g) if the advocate or legal procurator pleading before a judge is the brother or sister of the said judge;

(h) if the judge or his spouse has a case pending against any of the parties to the suit of happens to be his creditor or debtor in such manner as may reasonably give rise to suspicion of a direct or indirect interest that may influence the outcome of the case.

(2) A judge may be challenged or abstain from sitting in a cause when he has previously taken cognizance of and expressed himself on the same merits of that cause when sitting as a judge in the Court of voluntary jurisdiction.

In the case under review, the Court notes that no request for the recusal of the presiding Judge was made *ad limine lites*.

A request for the recusal of this Court, had, however already been raised by both counsels to AM by means of an application dated 31st October 2019 (vide Application number 15/2019/6 at page 2). The Court, notes furthermore that this request for the recusal of the presiding Judge was **withdrawn** by the same counsel in the hearing of the 15th November 2019 (vide page 41 of the Application in the same names, 15/2019/6). Indeed, the Court during that same hearing, pronounced as **ceded the application requesting the recusal of the court**. It is pertinent also to note that the second counsel to AM had already appeared before this Court in the proceedings App. No.15/2019 **on the 28th of October 2019**. (Vide note in the record of proceedings 15/2019 at page 97). It is therefore incorrect to state that counsel to AM was **'unaware'** of such ground in terms of Article 739, Chapter 12 of the Laws of Malta.

Following the unconditional withdrawal of the request for the recusal for this Court dated 15th of November 2019, no further requests on the same matters may legitimately be raised.

Moreover, this Court's decree dated the 28th of October 2019 (Vide Application number 15/2019/2 in the same names of the parties) which seems to be the source of the recusal proceedings, was a decree regulating the mother's access to the minor child of the parties. This decree upheld in toto a previous decree pronounced by a different judge of the Family Court, except for the pick-up arrangements of the child in question.

It is perplexing, to say the least, how a change in the pick-up arrangements of an access decree may be deemed to constitute or show bias according to either the objective or the subjective test expounded in the European Court of Human Rights' jurisprudence. Furthermore, the audio recordings exhibited by AM are self-explanatory. Nor do the photos AMX1 to AMX12 exhibited by AM indicate evidence of bias.

For these reasons, the Court denies the request for the recusal of the presiding Judge as proffered by AM in his application dated 23rd December 2019.

Costs are reserved for final judgment.

Read.

Mdm. Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar