



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2452 of 1982**

**BENSON OWENGA ANJERE.....PLAINTIFF**

**VERSUS**

**SIMON KITAVI NDUTO.....1<sup>ST</sup> DEFENDANT**

**JUBILEE INSURANCE COMPNAY LTD.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. This file was referred to me by the Hon. The Chief Justice on 8<sup>th</sup> March, 2010 for hearing. The suit was fixed for hearing for 3 days beginning from 9<sup>th</sup> March, to 11<sup>th</sup> March, 2010. When the parties appeared before me on 9<sup>th</sup> March, 2010, the plaintiff who is in person objected to my hearing his case and asked me to disqualify myself.
2. The reason given by the plaintiff is that sometime in 1983-84, while I was a magistrate, in the Civil Courts in Sheria House, I heard a case involving the plaintiff and Kenya Commercial Bank in which I gave judgment against the plaintiff. The plaintiff maintains that I was harsh to him and refused to grant him an order for stay of execution. The plaintiff claims that he later successfully appealed against the judgment in the High Court.
3. However, the plaintiff claims that his memory is still fresh with the harsh treatment which he received from me. He is therefore not comfortable having his case heard before me and has therefore requested me to disqualify myself from hearing the suit.
4. Ms Jan Mohamed who appeared for the defendant, objected to the application contending that it was nothing more than an attempt by the plaintiff to shop for a Judge of his choice. Ms Jan Mohamed pointed out that the plaintiff's suit was an old case which has been handled by several Judges, some of whom had to disqualify themselves because of the plaintiff. Ms Jan Mohamed found nothing unusual about a Judge being firm, conceding that sometimes Judges have to tell off parties that appear before them, and that this happens even before the Court of Appeal.
5. Ms Jan Mohamed noted that the complaint of the plaintiff relates to a completely different matter, and that it is usual for parties to feel aggrieved when they lose. Ms Jan Mohamed maintained that there was no foundation or basis for me to disqualify myself from hearing this matter. She noted that the Chief Justice had given 3 days for hearing the suit, as it is an old matter which should be finalized. She urged me to stop the plaintiff's attempt at Judge shopping and proceed with the hearing of the suit.
6. Having considered the plaintiff's application, and Ms Jan Mohamed's response, I am at a loss for words. This is because I do not recollect having any altercation with the plaintiff. Indeed, in the year 1983-84, although I was a magistrate, I was not working in Sheria House. However, given that the plaintiff is talking about events that took place more than 20 years ago, I will give him the benefit of doubt as I cannot rule out my having dealt with a matter involving the plaintiff at some other time. As a judicial officer, I have dealt with many cases over the years and I obviously cannot recall each party who has appeared before me.
7. Be that as it may, the plaintiff claims that I was harsh to him as I gave judgment against him and refused to give him an order for stay of execution. I find nothing harsh about giving orders against a party. In our adversarial system it is normal for litigation to result in one party losing, and orders being given against the losing party. The fact that judgment is given against a party does not necessarily mean that the judicial officer is against the party, or has a personal interest in the matter, or an attitude towards the losing litigant. Each case has to be considered in its own peculiar circumstances.
8. In my considered view, the plaintiff is simply besieged with an unfounded fear that he may lose his case. The plaintiff's complaint has absolutely no basis but is only intended to embarrass me. I am tempted to overrule him and proceed with the case. Nevertheless, given the correspondences that I have seen in the file, and the previous proceedings, it is evident that the plaintiff is a cantankerous man who may make proceeding with the hearing of this suit impossible if he does not wish me to hear the suit. I appreciate the confidence that Ms Jan Mohamed has exuded in me. However, justice should not only be done but seen to be done.

9. With the kind of position that the plaintiff has already taken, if I do hear this case, unless the plaintiff wins the case, it may be difficult to convince him that it has been done justly or fairly. For the above reasons, I disqualify myself from hearing this case, and refer back the file to the Hon. The Chief Justice.

**Dated and delivered this 11<sup>th</sup> day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Plaintiff present in person

Ms Jan Mohamed for the defendants

Eric - Court clerk