

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Case 47 of 2006

SEA STAR MALINDI LTD.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MALINDI1ST DEFENDANT

TOWN CLERK MALINDI MUNICIPAL COUNCIL.....2ND DEFENDANT

PATRICK LUMUMBA OUYA3RD DEFENDANT

ALFRED MRAMBA KASHARI4TH DEFENDANT

R U L I N G

At all material times the firm of Khaminwa and Khaminwa was seised of this matter on behalf of the defendants.

Application for striking out the defence was handled by Mr. Mwadilo of Khaminwa & Khaminwa. A ruling in respect thereof was delivered on 17th July 2008.

When the matter came up for formal proof on 21st February 2008, Mr. John Khaminwa raised the issue of Mr. Wasuna's appearance along side Mr. Ritho. He complained thus:

“Mr. Wasuna appearing with Mr. Ritho was the Judge’s partner for a long time. I feel that a wrong signal would be perceived by some third parties if the judge handles this matter.”

Mr. Wasuna response was as follows:

“.....the position is that I practiced law with his Lordship from 1983 – 1993 when the firm of Ombija, Wasuna & Co. Advocates was dissolved by mutual consent. From September 1993 we practiced separately. Your Lordship as Ombija & Co. Advocates and myself as Wasuna & Co. Advocates for 8 good years. What may be insinuated in me joining Mr. Ritho is that I was co-opted after the case had been filed so as to influence your Lordship’s decision. Nothing would be further from the truth. Between me and Mr. Ritho we have jointly appeared in seventy (70) other cases. Some of those cases are between Khaminwa & Khaminwa advocates and Mr. Ritho. For example in Nairobi HCCC No. 3106/1997 we appeared jointly with Mr. Ritho before Hon. Lady Justice Angawa. In that case Mr. Khaminwa is one of the advocates for one of the parties. It is significant that the decision in the aforesaid case will affect 69 other cases whose subject matter are land issues along the coast. It is therefore not by coincidence that I am leading Mr. Ritho in this matter. I plead innocent”

I have considered the issue raised herein. I wish to note in passing that the so called radical surgery in 2003 has given rise to instances where advocates attack, judges and other judicial officers on spurious grounds. I have not been spared in that wave of madness. Be that as it may, I take cognizance of the fact that the purpose of disqualification is to preserve the administration of justice from any suspicion of impartiality.

By reason of the foregoing, I hereby disqualify myself from hearing any application in this matter and the

suit itself.

In passing, I wish to observe that by this oral application the defendants/applicants counsel scuttled the formal proof. In the circumstances I am constrained to order that the applicant/defendants do meet the costs of today, which for avoidance of doubt, shall include any expenses that may have been incurred by the plaintiff in anticipation of the formal proof. The said costs may be agreed upon, if not to be taxed before the Deputy Registrar Malindi before the file is transferred to Mombasa High Court for hearing and disposal.

DATED and delivered at Malindi this 25th day of February 2008.

N. R. O. Ombija

JUDGE

Mr. Ritho for plaintiff/respondent

Mr. Thiongo for Khaminwa for defendant/applicant