



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL APPLICATION 30 OF 2009**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 65 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE SUPERVISORY JURISDICTION OF THE HIGH COURT UNDER SECTION 65(2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF CHIEF MAGISTRATE'S COURT THIKA IN C.M.C.C. NO. 792 OF 2006 – SAMURU GITUTO FARMERS CO-OPERATIVE SOCIETY LIMITED –VERSUS- JOHN MBAU, MONICA WAMBUI, JOSEPH KARUMBA, HANNAH MARUGU, SIMON NGUGI KAMAU, PAUL WANYOIKE, JOAN NJERI, BONIFACE MWANA AND COMMISSIONER OF CO-OPERATIVE DEVELOPMENT**

**B E T W E E N**

**SAMURU GITUTO FARMERS COOPERATIVE SOCIETY LIMITED.....  
APPLICANT**

**AND**

**TERESIA MUIRURI- CHIEF LAND REGISTRAR..... 1<sup>ST</sup>  
RESPONDENT**

**ZABLON MABEA- COMMISSIONER OF LANDS..... 2<sup>ND</sup>  
RESPONDENT**

E.M. MURAGE – DIRECTOR OF SURVEY..... 3<sup>RD</sup>  
RESPONDENT

DOROTHY ANGOTE, PERMANENT SECRETARY, MINISTRY OF LANDS...4<sup>TH</sup>  
RESPONDENT

FRANCIS NDUNG’U MWAURA..... 5<sup>TH</sup>  
RESPONDENT

PETER NDUATI MBAU..... 6<sup>TH</sup>  
RESPONDENT

SIMON NGURE KUNG’U ..... 7<sup>TH</sup>  
RESPONDENT

### R U L I N G

When this matter (**Originating Notice of Motion**) came up for hearing on 11/6/2009, Dr. Kamau for the applicants asked me to disqualify myself from hearing this matter. Counsel submitted that this court has made two previous decisions that, in the minds of his clients, the impression created is that they will not have a fair hearing. Counsel contended that his clients were reasonably oppressive that they will not have a fair hearing.

The first was a decision I made in the afternoon of 29/4/2009 when I declined to certify the application for leave to file contempt proceedings as urgent. The second was my decision of 2<sup>nd</sup> June, 2009 striking out the application for leave to file contempt proceedings. Counsel relied on the case of **SHILENJE - VS- REPUBLIC (1980) KLR 132.**

Mr. Njuguna and Mr. Aguta and Mr. Karanja who appeared for the other parties, left the matter to the court. Indeed, in the case of **SHILENJE** (supra) Trevelyan J. cited with approval what was stated by Sir H P Prinsep and Sir John woodroffe – in Commentary and Notes 14<sup>th</sup> edition (1906), and Criminal Procedure in British India (1926) thus-

***“What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have happened which, though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. It is not every apprehension of this sort which would be taken into consideration, but when it is of reasonable character, and notwithstanding that there was to be a real bias on the matter, the fact that incidents have taken place calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer.”***

When I asked Dr. Kamau to state which particular parts of my rulings created the reasonable apprehension that there would be no fair hearing, counsel elected not to specify any but to state that those determinations are on the record.

As was stated in the case of **SHILENJE** (above) it is not every complaint or apprehension that should result in a judge disqualifying himself. Indeed, whether before me or another Judge, a decision has to be made on any application or request. That decision can either be positive or negative. The fact that I decided that the application was not urgent, and gave the reasons thereat does not show bias. The fact that I struck out the application for leave to file contempt proceedings, and gave reasons does not also show bias. That is what any court would have to do. If my decision is wrong the avenues for challenging same are there and available.

Since the applicant’s counsel has not given me the particulars of what his clients consider as raising

reasonable apprehension that they will not have a fair trial, I find no basis for disqualifying myself. I decline to disqualify myself.

Dated and delivered at Nairobi this 1<sup>st</sup> day of July, 2009.

**George Dulu**

**Judge.**