



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NUMBER NAI. 207 OF 1998 (83/98 UR)

CENTRAL BANK OF KENYAAPPLICANT

VERSUS

UHURU HIGHWAY DEVELOPMENT LIMITED.....1ST

EXCHANGE BANK LTD (IN LIQUIDATION.....2ND

KAMLESH MANSUKHLAL PATTNI.....3RD

PANSAL INVESTMENTS LIMITED.....4TH RESPONDENTS

**(Application for leave to appeal against the order of the
High Court of Kenya at Nairobi, Honourable Mr.
Justice Kuloba dated 7th August 1998**

**in
H.C.C.S. NO. 29 OF 1995)**

RULING OF THE COURT

The applicant, Central Bank of Kenya, has moved this Court, pursuant to the provisions in rules 1(2), 39, 42 and 43 of the Rules of this Court, for orders that this Court do grant leave to the applicant to appeal against the ruling and orders of the superior court (Kuloba, J) whereby the learned judge declined to disqualify himself from hearing the suit in the High Court, being Civil Suit No. 29 of 1995.

The learned judge was asked to disqualify himself by the advocate for the applicant from hearing the said suit on the grounds that (1) the learned judge had permitted the third respondent to file two suits in the Commercial Division of the High Court when the matters raised in the suits were not of commercial nature and, (2) that the learned judge had improperly intervened in the correction of a draft of a formal order in respect of suit No. 418 of 1998 and that therefore there was reasonable apprehension in the mind of the applicant that the learned judge may not give it a fair trial.

It is necessary to set out how the suit went for hearing before Kuloba, J. In the case of Uhuru Highway Development Limited and others v. Central Bank of Kenya, (Civil Application No. NAI. 83 of 1998), (unreported), this court on 26th May, 1998 said:

"We would expect that the appeal will be heard without any more undue delay and thereafter the trial should go to Commercial Division of the High Court for hearing."

When the appeal referred in the quote above, was heard, that is, Civil Appeal No.75 of 1998 this Court said per Kwach J

"A.sA . my brothers Tunoi & Bosire JJA also agree, this appeal is allowed; the ruling of O'kubasu J dated 22nd January, 1998 is set aside and substituted by an order dismissing, with costs, the plaintiff's application dated 7th December 1997, and filed in court on 8th December, 1997. We also order that all pending applications in the superior court be and are hereby stayed, and that the Honourable the Chief Justice do designate a judge who has not previously dealt with this matter to hear and determine this case expeditiously." (emphasis supplied.)

As a result of that order of the Court the suit went for mention before the Honourable the Chief Justice, who, on 30th July, 1998 transferred the suit to the Commercial Division of the High Court at Milimani and directed that Kuloba, J hears the case until it is finalized, on a day to day, priority basis.

On 5th August, 1998 the suit was mentioned before Kuloba J, pursuant to the order of the learned Chief Justice made on 30th July, 1998 when Mr. Oraro informed the learned judge that he had applied for review of the orders of the Honourable the Chief Justice and asked for time to be heard on the review application. After hearing arguments from counsel Kuloba J held that unless he received orders otherwise (taking away the suit from his hands) he was obliged to hear the case. Thereupon Mr. Oraro asked the learned judge to disqualify himself which the learned judge declined to do in a lengthy ruling. It was not necessary for the learned judge to deliver such a lengthy ruling as he was indeed bound to carry out the directive of the Honourable the Chief Justice as regards hearing of the case unless otherwise directed. He did exactly that.

The allegations and insinuations made against the learned judge are of a serious nature and we are not able to say that the allegations and insinuations per se are sufficient in this particular instance to call for disqualification of the judge.

In this particular instance we are only concerned to see whether the appointment of Kuloba J by the Honourable the Chief Justice to try the action complied with the direction of this court given on 10.7.98. We are satisfied it did. We are accordingly not satisfied that the judge exercised his discretion in a manner that would call for his disqualification by this Court, and, that being the case we think it would be futile to grant the leave to appeal as sought. This application is accordingly dismissed with costs.

Dated and delivered at Nairobi this 30th day of September, 1998.

R. O. KWACH

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.