Editorial Note

The appeal against this decision is reported in [1988] KLR 555.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2855 OF 1987

MILLER....................................PLAINTIFF

VERSUS

MILLER..................................DEFENDANT

RULING

June 28, 1988, **Rauf J** delivered the following Ruling.

The defendant, by notice of motion filed today i.e. 27-6-1988, is seeking to disqualify me from hearing. This application, under section 3A of the Civil Procedure Act which confirms the court’s inherent power “to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” This application is supported by the defendant’s affidavit – also dated 27-6-1988.

In paragraph 3 and 4 she has deponed that I am a close friend of the plaintiff since my days as the Chief Magistrate i.e. exactly from 16.6.1982 and that as the plaintiff’s wife she entertained me in their house on Dennis Pritt Road. At the outset I must solemnly declare that I am not the plaintiff’s or the defendant’s enemy. I am familiar with the plaintiff only to the extent that he was a senior judge of the High Court, then a senior judge of the Court of Appeal and now is the Chief Justice of Kenya, which is no more than the familiarity enjoyed by any other judge in Kenya. I have never been closely or at all associated with the plaintiff, during the period before his appointment as the Chief Justice towards the end of 1986. Since the commencement of his tenure as the head of the judiciary my association with him is restricted to my official duty which is a situation affecting every judge of the High Court and the Court of Appeal, however senior or junior.

The defendant’s assertion on oath that she entertained me at the matrimonial house or anywhere else is a blatant untruth. I never met or saw the defendant any time anywhere before today. I was never entertained by the plaintiff or the defendant in their house on Dennis Pritt Road or anywhere jointly or severally. This also is a despicable fabrication. I may further state that the plaintiff never entertained me or I did him individually.

I have, however, had the occasions of being present in the judges’ meetings in his chambers for official formal and informal functions where light refreshments were served.

I regret that I have to say these trite things but since the application is of a serious nature supported by untruths and half-truths I have to expose the utter mendacity and contemption which the allegations against me and the plaintiff are based. The reference to my previous rulings, conduct of the case, the imputation of collusion between me and the plaintiff in arranging the proceedings and advancing the hearing date are absurd and unworthy of any consideration. My first ruling was appealed against and was confirmed by the Court of Appeal. My second ruling was only of administrative or quasi judicial nature. Such interlocutory rulings abound in any serious litigation and there is nothing unique about that happening herein.

It is a matter of some consolation to me that I am being blamed for expiditing the proceedings, rather than delaying them. The dates were advanced solely for the plaintiff's undisputed state imperatives. Mr Kuria never challenged the plaintiff's assertions in this regard and never demanded the details of his (the plaintiff's) state commitments. The dates were suitable to him and his client.

My action was determined by the dictates of the nature of the suit and the circumstances of the parties involved in unfortunate domestic differences.

A perusal of the pleadings of both parties amply reveal that the marriage between them has irritrievably foundered. They only differ in the remedies they seek. In these circumstances where is the room for bias?

All the proceedings before me so far were by way of chamber applications.

I never excluded any interested person from appearing in chambers, indeed none applied to me to appear. It is evident from the fact that a local magazine called "*Law*" reproduced my important ruling verbatim, revealing even the names of the parties in full. Where is the room for complaint on this score? The learned counsel for the defendant knew about this position and yet chose to question the court's rectitude.

The record speaks for itself which is awash with vindication of my personal position on every aspect of the procedure. I was and am prepared to swear an affidavit reiterating on oath the aforesaid facts concerning my dispassionate attitude in these proceedings.

Mr Lakha also offered to obtain an affidavit of his client refuting the defendant's allegations in her affidavit. Mr Kuria prudently did not pursue the matter forcing the issue of the defendant's veracity on patent distortions to which she resorted on oath.

On the question of in camera' proceedings of hearing this suit in the open court, Mr Kuria relied on law as enunciated in Shimon Shetreet, *Judges on Trial* pp 303 to 307; *John Brown Shilenji v R*, H C C Application No 180 of 1980. *Sest v Sest* 1913 AC 417, and *Herman v Hane Office* 1982, 2 weakh, L R p 338. He also referred to section 77(10) and (11) of the Constitution of Kenya.

The English authorities are not binding on this court but they are useful as a guide on the subject. But it should be borne in mind that the authorities are not related to any constitutional enactment and therefore they are not beneficial even as persuasive statements of law. In Kenya we have a written constitution and therefore except *Shilenji's* case (supra) all other cases are only of academic interest.

Section 77(11) (a) created exceptions to the general provision of a trial in an open court. The exceptions concern, *inter alia*, public morality, the welfare of persons and children under 18 years of age, and the protection of the private lives of persons involved in the proceedings, all of which are relevant to these proceedings.

Shilenji's case involved a criminal offence and although the principle expounded in it is of general application, it relates to the protection of an accused's interest. Yet even in this case, as indeed, in the English authorities, selective passages may be quoted in support of divergent propositions.

The upshot of all the cases is that in Kenya the court has wide powers to impose secrecy in the matters relating to the exceptions in section 77 (11) (a) of the Constitution. Even in English domestic jurisdiction

the protection of secrecy is extended to guard the interest of the parties as well as the issues of the marriage. Besides the public morality and over-riding consideration of innocent persons dictate that embarrassing details of domestic disputes ought not be aired in public. This time-honoured and deep-rooted practice based on sound public policy carries the force of law. It is as it should be an essential safeguard against social abuse of the unfortunate persons facing the odium of their personal life. Any perverse and morbid interest in the exposition of unpleasant details of other people's lives is and must be against public morality.

The latest unreported High Court cases provide a good guidance on the issue of disqualification. They are:

1. *Waira Kamau v Thakwa Bookshop and others,* High Court Misc C Application No 185/88, and

2. *Old v Republic* App No 417 of 1987.

Disqualification of a judge is a serious matter. There is not a slightest reason for the defendant to warrant a suspicion that justice will not be done and seen to be done. If any of the grounds on which the present application is based, is accepted it would equally apply to all the judges in Kenya and by the process of elimination there will remain no judge to hear this matter. Much emphasis is put on the plaintiff's status. It is no fault of his that he is the Chief Justice of Kenya. Is he to be denied an access to the judicial process for that reason? Where will he obtain redress to his domestic problems?

Having carefully considered many allegations levelled against me and having given careful thought to the submissions of Mr Kuria I find no merit in this application whose main purpose is to discredit the judiciary and embarrass the plaintiff. There is no ground to apprehend that justice will not be done or seen to be done. It is in the interest of justice that both prayers in the application ought to be denied, which I hereby do. I reserve the question of costs to a future date.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of June, 1988

A. RAUF

JUDGE