REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1170 OF 1981

MWANGI STEPHEN MURIITHI ……...……PLAINTIFF

VERSUS

THE ATTORNEY GENERAL …… DEFENDANT

JUDGMENT

On April 29 this year the plaintiff filed this action claiming that the purported retirement from the post of Deputy Director of Intelligence was null and void, that he was never validly appointed as Chairman of the Uplands Bacon Factory as set out in the attached letter dated April 13, and appropriate declarations. On the same day Mr Khaminwa, who has acted throughout for the plaintiff, as he has said in his submissions on the present objection, personally approached Cotran J in the court building, and, as the record shows, said he had an urgent application which had to be heard that day. That urgent application was a prayer for what was in effect a temporary declaratory in lieu of an injunction order that the decision retiring here was void and, in effect, preserving his rejects as a pensionable officer in the Special Branch of the police, whom he has served for over one quarter of his life. This application was heard by me and dismissed after full argument on Mr Shield's preliminary objection on behalf of the Attorney-General, and it is this which now gives rise to Mr Khaminwa's present preliminary objection. The objection is that I should not hear the case; that it was fixed before Cotran J and the file wrongly transferred from him as a result of a telephone conversation said to have taken place with the Chief Justice from the Judge's chambers. Cotran J's accord does indeed show that he was directed that the case should not come before him but before me, but it is equally clear from it that the file itself was not before him on what was erroneously stated to be in April 30. In fact all the proceedings took place on April 29, both before Cotran J and myself, and the Ruling on the application delivered on the 30th.

In the course of his argument before me at that time Mr Khaminwa did take the point that once Cotran J was properly seized of the case the Chief Justice did not have power to take away his jurisdiction and give the case to another Judge. Mr Khaminwa did not, however, at that stage, pursue the matter to the point of objecting to my hearing the interlocutory application, but he did, as he says lodge an appeal upon this ground. That appeal has been abandoned.

Mr Khaminwa's grounds for the present application for transfer are that due to the circumstances of the transfer, and, I take it, generally, the plaintiff has in his mind grave suspicion that he will not get a fair trial if that I am incapable of assessing the facts objectively and that the hearing should be transferred to a Judge who is so capable; and that if the trial proceeds before me his client will have no confidence that he will get justice. Mr Khaminwa referred to the recent contempt case in which, in the face of an objection, I said I would not take part, and also to passages in *Jowitt's Dictionary of English Law* and *Stroud's Judicial Dictionary* on the meaning of the word "bias", it will suffice to quote one of the passages from the former:

> "Moreover, no one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind."

No one would seriously contend that if there is a risk of bias, or that justice will not be seen to have been done, a judge ought not to hear the particular application or case in which it arises. But I must say that beyond the bare suggestion and the extract containing vague and non-specific allegations in last Sunday's Nairobi Times, no concrete ground of objection, or evidence or likelihood of bias has been shown. In *Karanja v Republic*, Misc. Cr Application No 199 of 1976, Sachdeva J in dealing with an application for

the transfer of a Criminal case from one magistrate to another (and I am perfectly satisfied his remarks are equally applicable to a litigant in a Civil Case) said

> "Before a transfer of any trial is granted on the application of an accused person a clear case must be made out that the accused person has a reasonable apprehension in his mind that he will not have a fair and impartial trail before the magistrate from whom he wants the trial transferred (see *Republic v Hashimu* [1968] E A 636). I am well aware of the maxim that justice must not only be done but seen to be done. However, this court will not make such an order of flimsy grounds at the whim or fancy of an accused person. Justice is administered by persons who have their ample share of human weaknesses and frailities. Some magistrates have acquired the reputation, perhaps unjustly, of being harsh; while others, again perhaps, unjustly, are considered soft. In my capacity as a Senior Resident Magistrate and a Chief Magistrate in charge of allocating criminal cases in Nairobi for about 6 years to between a dozen and two dozen magistrates, I am well-aware of the desire of an accused person to have his case listed before a magistrate of his liking."

In my view "reasonable apprehension" clearly means "apprehension on reasonable grounds" and I am fortified in my view by the remarks of Trevelyan J, in recent case of *Shilenje v Republic* Cr Application 180 of 1980 where, after also citing Hashimu's case he went further and said the apprehension must be

> "a real apprehension, honestly held and reasonably based".

There have been no grounds, reasonable or otherwise, advanced here for the plaintiff's stated apprehension and recollect that Mr Khaminwa took an almost identical objection in *Majisu v Majisu* Divorce Cause No 8 of 1977 on the ground that I had ten years earlier, held an inquest into the death of the husband's father in circumstances which were said to have suggested medical negligence. The decision as to whether it was culpable to have left a sponge-holding forces in the deceased's abdomen was said by Mr Khaminwa to have some bearing on the credibility of the husband in cruelty allegations. In rejecting the objection I said:

> "I cannot see that because a particular judge has, fortuitously, been concerned with another case about a relative, even a close relative, of one of the parties to the case in front of him, it can possibly affect his fitness to sit in judgment thereon. To hold otherwise would mean, in theory at any rate, that a party could go on objecting to judges hearing his case until he obtained the particular judge that he wanted. Thus, in a somewhat circuitous way, he would be able eventually to select the judge who should try his case. The common law, and indeed the law of Kenya as it is engrafted thereon, has always set its fact against such a procedure which could set a precedent, which would strike at the roots of the administration of justice. It is of course possible that a litigant may have a valid objection to a particular judge trying his case in the sense that the judge had been in some way personally concerned with the facts or the parties, and thus that his continuing to hear the particular case in question might infringe the principle that justice must not only be done but must manifestly be seen to have been done. This is not the position here. The issues are totally different from those which were ventilated at the inquest, and, indeed, I was not even aware of the connexion, or even mindful of the previous case until Mr Khaminwa raised it."

Whereupon Mr Khaminwa withdrew from the case and left his client unrepresented.

The first paragraph of the citation is in effect adopted by Mr Shields now: that it is possible, if the criterion to be adopted is the litigant's own state of mind, in which he is said to harbour suspicions, to raise objections to every Judge in turn until he gets the one he wants. Indeed the way in which this case has been presented and argued so far give the uneasy impression that the plaintiff or his lawyers did want a particular judge to try the case, and that these objections have flowed from the fact that they did not get what they wanted. For it is not correct to say that Cotran J was seized of the case, neither was it ever fixed before him. Moreover, as is manifest from the record, the file was not before him. All that happened was

that the advocate made a direct approach to the Judge who agreed to hear his application, though he could not do so straightaway. One is tempted to ask, if the matter was so urgent, why other judges were not approached in the interval before 4.15 pm. I accept there may be cases of such manifest urgency, as where someone is about to leave the jurisdiction by aircraft, or the detention or release of a ship, where it is possible to conceive of the circumstances admitting of no other course than a direct approach. But it should not be done other than in very exceptional circumstances. Ordinarily the matter should be dealt with through the Civil Registry in a regular fashion which avoids any suggestion of this nature. In the instant case I am bound to say that I consider this is a spurious objection. No valid reason has been advanced for the suggestion of bias, partiality or lack of objectively on my part. I agree with Mr Shields that to allow such an application could give rise to dangerous results. In the circumstances and for the foregoing reasons I dismiss the preliminary objection and direct that the case, which has been listed for the past two days and today, proceed before me.

A.R.W.HANCOX

JUDGE