IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Gachuhi & Masime JJA)

CIVIL APPEAL No. 83 OF 1988

BETWEEN

MILLER.....APPELLANT

AND

MILLER.....RESPONDENT

JUDGMENT

(Appeal from a Ruling and Order of the High Court at Nairobi, Rauf J)

September 22, 1988, **Nyarangi, Gachuhi & Masime JJA** delivered the following Judgment.

This is an appeal from a Ruling and Order of the High Court (Rauf, J) given and made on June 28, 1988 whereby he dismissed the respondent's application by Notice of Motion under Section 3A of the Civil Procedure Act and Order 50 rule 1 of the Civil Procedure Rules for orders that the trial Judge do disqualify himself from hearing the case and that the case be heard in open court.

In the memorandum of appeal, the appellant attacks the decision of the High Court by asserting, *inter alia*, that the trial Judge erred in failure to apply the law governing the disqualification of a Judge, in refusing to order that the suit be heard in open court, descending into the arena of the parties' dispute and in acting on his own evidence thereby contravening the rules of natural justice. For the appellant it was submitted as the first and major proposition, that the trial judge should have disqualified himself because there are facts in the case from which it can be inferred that there is real likelihood of bias. The second leg of the contention is that the proceedings of the court for the determination of the suit should be held in public in pursuance of sub-section 10 of section 77 of the Constitution of Kenya (the Constitution). It was urged that there was no evidence which would bring the case within the exception to be found in sub-section 77 of the Constitution.

The appellant's further contention was that the affidavit evidence put forward by the appellant was not controverted and established a clear case for disqualification. The other claim was that in his Ruling the trial Judge descended into the conflict of the parties by giving evidence.

Counsel for the respondent took two main points. On the point which was argued first by Mr. Kuria, namely, whether the trial Judge should have disqualified himself, Mr. Lakha submitted that there was no material before the Judge that there was any real apprehension that there was any bias at all. As to the argument that there is no reason why the suit should be heard *in camera*, Mr. Lakha said whatever might be the position in England, we have a written Constitution and the words of the relevant provision ought

to be read in their ordinary and popular sense.

The live issues in this appeal are firstly, whether the trial judge misdirected himself on the law governing the disqualification of a judge and in not disqualifying himself and secondly, if it was an error for the judge to disallow the plea that the suit be heard in open court.

The evidence in the application consisted of an affidavit sworn by the appellant and of parts of proceedings of the record of appeal. Upon the first two paragraphs of the appellant's affidavit, it was submitted that the respondent and the trial judge have been close friends for a long time. The appellant deponed that she has entertained the Judge in their house on Dennis Prit Road. However, there is singularly little information about the alleged friendship. The period and duration of the claimed friendship is not given.

The appellant does not support her evidence that she entertained the Judge. How often? Was the judge alone? If not, was he in the company of other persons or Judges? It is not for this Court to enumerate the kind of factors which would have fortified her case. Suffice it to say that the allegation of friendship between the respondent and the Judge is so bare that no reasonable court could be expected to act on it. There are no circumstances explained to us pointing to a real likelihood of bias or an appearance of bias. The fact that the judge knows the respondent would not justify disqualification. The respondent knows, and is known by, all the judges. If that personal knowledge is to disqualify, there would be no judge who would not be held disqualified - See *Shimon Shetreet' Judges on Trial*, page 304 & 306.

On the vital questions concerning the matter contained in the first two paragraphs of the appellant's affidavit, the finding of fact to be gathered is that reliance was placed entirely on a mere assertion which does not enhance the appellant's case. We also find it extraordinary that there was no suggestion, not even a hint by the appellant for the trial judge to disqualify himself before he heard the Notice of Motion which was filed in court by the appellant on December 24, 1987. That in our Judgment is additional support for the view we have formed, to wit that it is perfectly apparent that the matter of disqualification is an afterthought.

A matter which in our judgment must always be carefully watched is that no party to a suit should be placed in a position where he can choose his court. We are far from saying that in no circumstances is it possible for a judge to disqualify himself or be reasonably expected to disqualify himself from hearing a case.

Before proceeding further we would say that there is nothing prejudicial in one Judge making several or more orders in a court record. In practical terms it is advantageous to the parties and therefore in the interest of justice for a judge to familiarize himself with the substance of a court file. In the absence of evidence that the appellant's case was prejudiced by some order of the nine orders the trial judge made, we must hold that Mr. Kuria's submission on this aspect was without substance. It may be as well at this juncture to remark that no objection was taken to the trial judge making any of the nine orders.

In the course of his judgment in this case, the trial judge answered an allegation made against him. That did not alter the role of the Judge. Surely a judge is entitled to deal with an allegation if it is hurled at him. If he does so, he does not descend into the conflict between the parties. It is a different matter if a judge gives evidence in a case he is hearing. Two cases were referred to. One is *Jones v National Coal Board*, [1957] 2 QB 55 in which at the trial of the action, the trial judge intervened frequently during the evidence for the defendant, sometimes conducting the examination of a witness himself, at times interrupting cross-examination to protect a witness against questions which he considered misleading. The nature and sequence of the Judge's intervention was such as to break the sequence of question and answer. The judge gave judgment for the defendant. The plaintiff appealed. It was held that the Judge's interventions taken together were excessive.

That situation is however a far cry from a decision by a Judge to answer allegations made against him which is what Rauf J did.

Now, it is said by Mr. Kuria that once there are allegations made against a judge and the judge's honour is in question, that the judge should disqualify himself. In our view, it would be disastrous if that were to become practice. The administration of justice through court would be adversely affected. Mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be choice of trial judge by a party. The cases which the industry of the appellant's counsel found do not provide authority for that proposition.

On the evidence before the trial judge and before us, the judge did not interfere with the proceedings and did not cloud his mind in any way. The trial judge had no interest of any nature in the case and so he was right in dealing with the allegation and in refusing to disqualify himself.

Next is the question: was the judge right in refusing the prayer that the case be heard in open Court?

In this connection we refer to sub-section 11 of Section 77 of the Constitution. The sub-section provides.

> "(11) Nothing in subsection (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority-
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> > (a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings."

Subsection 11 is an exception to sub-section (10) which provides that except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of ... any civil right or obligation before any other adjudicating authority ....shall be in public.

Sub-section 11 properly construed, has several limbs, each limb independent of the other. Interlocutory proceedings are included in the sub-section as an exception to hearing in public. The proceedings in the instant case were interlocutory. The question in issue is whether the trial judge had jurisdiction to order for the holding of *in camera* proceedings.

Mr. Kuria argues that a party has to identify the law upon which to found the case for *in camera* proceedings before an order for such proceedings can be made by a court. The court was referred to the decision in *Scott v Scott* [1913] A.C 417, a decision of the House of Lords. Kenya, unlike England, has a written constitution with a provision for hearing *in camera* in specified circumstances. That is the law which the trial judge cited and relied on. English law, too, lays down that the High Court in England may hear cases in private where a public trial would defeat the whole subject of the action, and in cases affecting lunatics and wards of court – *Nagle Gillman v Christopher,* (1878) 4 Ch. D 173. So although the broad principle in England is that English Courts must administer justice in public, the principle is subject to exceptions. Those exceptions and the exceptions in sub-section 11 of Section 77 of the Constitution, take account at all times, of the fundamental principle that the purpose of courts of justice is to ensure that justice is done. The paramount consideration in applying the material exception must be that without in camera proceedings justice would not be attained, that nothing short of excluding the public and publicity would secure justice . An example is where evidence to be given is of such character that a witness would not give it in public.

In the present case, the respective claims as stated in the pleadings and all the other relevant circumstances have caused us to doubt if justice can be done by a public hearing.

Before the trial judge, the question became one of discretion. We are unable to say that the judge was so wrong that we should interfere.

It follows that in our opinion the appeal fails.

No order as to costs. That is the order of this court.

Dated and delivered at Nairobi this 22nd day of September , 1988.

J.O NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR