IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 30 OF 2012

BETWEEN

JAMES MWARIRI GATOME.....1ST APPELLANT

PATRICK R. KIBUCHI.....2NDAPPELLANT

S. P. NJAGI.....3RD APPELLANT

PATRICK M. LYNUS.....4TH APPELLANT

L. M. M'MBWI.....5TH APPELLANT

J.M. NDERITU.....6TH APPELLANT

JASON KABURO.....7TH APPELLANT

IBRAHIM ISAACK JARI.....8TH APPELLANT

(ALL T/A GATOME & ASSOCIATES)

AND

REPUBLIC.....1ST RESPONDENT

LAND SURVEYORS BOARD.....2ND RESPONDENT

(Appeal from the decision of the High Court of Kenya at Nairobi

(Wendoh, J.) dated 18th December, 2006

in

H. C. Misc. Application No. 1337 of 2005)

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JUDGMENT OF THE COURT

The 1st appellant, ***James Mwariri Gatome***, is and was at the material time a licenced registered surveyor as is evidenced by the Certificate issued to him by Kenya Land Surveyors Board on 7th July, 1979 which was produced before the High Court.

The 2nd – 8th appellants, ***Patrick R. Kibuchi, S. P. Njagi, Patrick M. Lynus, L. M. M'Mbwi, J. M. Nderitu***, ***Jason Kaburo*** and ***Ibrahim Isaack Jari,*** were Approved Assistants who practiced under the 1st appellant's licence as was allowed by ***The Survey Act Cap 299 Laws of Kenya***. All the 8 (eight) appellants practiced in the survey profession under a trade name M/s Gatome & Associates.

The 1st respondent is the Republic while the 2nd respondent is the Land Surveyors Board constituted under the said ***The Survey Act***.

The facts of the case that were before the High Court were straightforward but unfortunate. We shall review those facts in detail as we are required to do under ***Rule 29*** of the rules of this Court in a first appeal like this one from a judgment or decision of the High Court of Kenya acting in its original jurisdiction. This court has interpreted the power and mandate of the Court in a first appeal in many judicial pronouncements such as the case of ***Ephantus Mwangi v Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278*** where we are to reappraise the evidence and reach our own conclusions of fact reminding ourselves of the advantage the High Court Judge has of observing the demeanour of witnesses, an advantage we don't have, although, again, in this appeal, the High Court's findings were based on the affidavit evidence that was placed before the court as no *viva voce* evidence was called, which is the usual case in judicial review proceedings as were before the court.

One J. K. Mathenge wrote a letter dated 29th October, 2002 to the Secretary of the 2nd respondent regarding a complaint he had against the said firm of M/s Gatome & Associates. The substance of the complaint was that one Peter Munyiri Njogu, who it was alleged practiced under the said M/s Gatome & Associates, had received money from the said J. K. Mathenge to conduct some survey work but that the work had not been undertaken. The said Mathenge stated in the letter that he had himself established that the said Peter Munyiri Njogu was not licenced or authorized to carry out that or any other survey work. He asked the 2nd respondent to ask M/s Gatome and Associates to refund him a sum of Kshs.15,000/= because he had paid a sum of Ksh. 9,600/- to the said Peter Munyiri Njogu.

The 2nd respondent by a letter dated 20th May, 2003 informed the 1st appellant of its receipt of the said complaint. It was stated *inter alia* in the letter:

> ***"It has been established from our records that Mr. Peter Munyiri Njogu is not an Approved Assistant. The Board, in its meeting of 27th February decided that you be asked to explain the allegations of employing an unapproved assistant who not only illegally surveyed land in your name but allegedly even conned an unsuspecting mwananchi.***
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> ***Your response should reach the undersigned as soon as possible".***

The letter was signed by the Secretary of the 2nd respondent.

The 1st appellant responded to the said letter on 18th June, 2003 where he said amongst other things that he had no office at Karatina and he was not aware of the allegation and had not received any complaint from the said Joseph Kinyua Mathenge. He was not able to make any further comments on the complaint as he stated that he had no information.

There is on record a letter dated 18th November, 2003 by the Secretary of the 2nd respondent to an organization called "*Operation Firimbi*". The Secretary stated in the letter that the 2nd respondent had investigated issues regarding the complaint by J. K. Mathenge and had established that Peter Munyiri Njogu was not a surveyor authorized to carry out any title survey work in Kenya; that the said person could have been operating an office in Karatina under the guise of working for M/s Gatome & Associates; that the 2nd respondent found that M/s Gatome & Associates had no office in Karatina town; that Mr. Munyiri Njogu was an impostor who was fleecing unsuspecting public of their money and carrying out bogus title surveys and would eventually end up causing land disputes. The said letter which was copied to Joseph Kinyua Mathenge advised the said Mathenge to take up his complaint with the police.

For completion of the record, by a letter dated 27th November, 2002 addressed to the 2nd respondent one S. N. Murimi writing on behalf of Nguchu's family raised a complaint about the way a parcel of land had been subdivided by one Munyiri who was acting for Mujo Land Consultant Agency of Karatina. It talked of some mutation forms having been certified by M/s Gatome & Associates. The 2nd respondent wrote to the 1st appellant by a letter dated 20th May, 2003 asking him to explain the circumstances that led to the use of the said mutation forms. The 1st appellant replied through a letter of 18th June, 2003 explaining that the Nguchu's family were his neighbours at his rural home and were well known to him and any issues between the families could be amicably resolved. Further that mutation forms were issued to the 1st appellant's assistant, one Patrick Muraya and there was nothing wrong with the way that had been done.

In respect of the first complaint, Peter Munyiri Njogu was charged in Criminal Case No. 744 of 2004 in a court which is not stated (probably at Karatina) with three (3) counts, first, ***Obtaining by False Pretences*** contrary to ***Section 313*** of the ***Penal Code*** particulars being that he had received Kshs. 9,600/= from the said Joseph K. Mathenge pretending that he (*the accused*) was a land surveyor. The second was a charge of ***False Assumption of Authority*** contrary to ***Section 104 (b)*** of the ***Penal Code*** particulars being that without authority he assumed to act as a person having authority to survey and subdivide land an act of public nature which can only be done

by a person duly authorized by law to do so. The third count was also on ***False Assumption of Authority*** contrary to the said ***Act*** particulars being that without lawful authority he was found having opened a survey office acting as a surveyor which he had no authority to do. The record shows that the said person pleaded not guilty to the three counts but on 22nd July, 2004 it is recorded that the complainant in the said charges had been paid cash Ksh. 15,000/= by the accused person and the case was withdrawn under ***Section 87 (a)*** of the ***Criminal Procedure Code*** and the accused was discharged.

Events should have ended there but they did not and this is where the drama begins.

On 27th March, 2003 a letter had emanated from people calling themselves *"Embu Approved Survey Assistants"* addressed to the Secretary of 2nd respondent. It is important to note that the letter was written through the Survey Assistants two of who were I. N. Mwathane and one Muriithi Mugo, and the significance of their participation in the proceedings that followed will become clear in the course of this judgment. The complaint in that letter was said to be '*Abuse of Survey Profession in Embu*'. It was stated by the 5 (five) persons who authored the letter that there were quacks who were operating in Embu area who posed as surveyors and undertook survey services both in the office and in the field. These people were swindling and cheating the unsuspecting public and were creating disputes and confusion on the ground. It was further alleged that Jason Kaburo (the 7th appellant) of M/s Gatome & Associates was signing documents for the said quacks. The 2nd respondent was requested to urgently address issues raised in the letter and give a response to the authors of the same. That letter elicited the action of the 2nd respondent whose Secretary by a letter of 9th June, 2003 addressed to the 1st appellant summarized the complaints raised in that letter and required of the 1st appellant:

> ***"…the group of Approved Assistants in Embu have accused your Mr. Jason Kaburo and one other for lack of support of their cause and, worse, collaborating with the quacks. If indeed these allegations are true, you stand severe disciplinary measures from the Board including cancellation of your licence.***
>
> ***You are therefore, required to investigate these allegations and respond to the Board in writing immediately".***

The 1st appellant responded to that letter by his letter of 8th July, 2005 where he regretted delay in responding and enclosed a letter by the 7th appellant who stated that he had noted that Approved Assistants had ganged up to accuse him of malpractices which he knew nothing about and which he denied.

The record however shows that before these actions on 14th January, 2005 the 2nd respondent had issued summons to the 1st appellant in regard to the earlier complaints by the said Peter Munyiri Njogu on the issues we have discussed in this judgment. That summons stated that although the 1st appellant had already responded to the 2nd respondent's queries, members of the Board of the 2nd respondent still required the 1st appellant to personally appear before the Board to attend to certain questions of ethics on the matter. The 1st appellant was therefore required to attend a Board meeting on 24th February, 2005 but it would appear that that meeting was adjourned and took place on 14th July, 2005. Present in that meeting was the Chairman and Vice Chairman and 6 members who included Mr. I. N. Mwathane and Mr. Muriithi Mugo, who it will be recalled were some of the people through who the "*Embu Approved Survey Assistants*" had written the letter from Embu to the Secretary of the 2nd respondent on 27th March, 2003. The proceedings show that at the hearing on 14th July, 2015 by the 2nd respondent Mr. I. N. Mwathane was appointed "prosecutor" in a case against the 1st appellant. The 1st appellant was interviewed by the Board Members present on several issues including the complaint against Peter Munyiri Njogu (*he had since been charged before a Magistrate for criminal offences and later discharged after paying money to the complainant*); complaint by S. N. Murimi and complaint against the 7th appellant by "*Embu Approved Survey Assistants*" and a complaint which was withdrawn. Mr. I. N. Mwathane conducted the prosecution and J. G. Halake, the Secretary of the 2nd respondent, was Secretary of the meeting. The Board after examining the 1st appellant for a considerable length of time released him and, after deliberations, decided:

> ***"(a) James Mwarari Gatome His practicing license should be suspended for six (6) months for gross professional misconduct".***

What followed was a letter dated 18th July, 2005 by the 2nd respondent to the Director of Surveys informing him that the Board of the 2nd respondent after the said meeting had found the 1st respondent and another guilty of professional misconduct and suspended his licence number 115 for six (6) months with effect from 14th July, 2005. During the period of suspension the 1st appellant was forbidden from practicing survey relating to registration of transaction in or of title to land. It was also stated that the suspension order applied to all Approved Assistants and field officers who were registered under the 1st appellant's licence. The Director of Surveys was therefore advised to immediately suspend accepting or processing cadastral survey work submitted by the 1st appellant and his authorized assistants (2nd – 8th appellants) until the expiry of the suspension period.

By a letter of the same date 18th July, 2005 the 2nd respondent formally informed the 1st appellant of the suspension of his licence and the suspension was published in a special Gazette Notice being Gazette Notice Number 5727 published on 18th July, 2005.

The Director of Surveys under the Ministry of Lands and Housing by his letter of 18th July, 2005 informed all Survey Offices in Kenya of the suspension of the licence of the 1st appellant and his Approved Assistants the 2nd – 8th appellants.

We have set out in detail the background of the dispute that ended up before the Judicial Review Division of the High Court which court was approached in High Court Miscellaneous Application No. 1337 of 2005, when a Notice to the Registrar was served as required by Civil Procedure Act and other laws and, by Certificate of Urgency in a Chambers Summons presented before that court on 13th September, 2005. The High Court was asked to grant leave to the appellants to commence judicial review proceedings by way of certiorari to remove to the High Court and to quash the decision of the 2nd respondent made on 14th July, 2005 where the Board had suspended all the appellants' licences for six (6) months. It was further prayed that leave granted do operate as a stay of the said decision; that the appellants be granted leave to commence judicial review proceedings by way of prohibition, prohibiting the 2nd respondent from acting on its said decision and that the appellants be allowed to publish in Kenya Gazette Notice orders granted by the High Court.

In the grounds set out and in the Statement of Facts filed and also in the affidavit of the 1st appellant the history we have given was set out. Leave to commence judicial review proceedings was duly granted and, as required, the appellant filed a Notice of Motion on 27th September, 2005 where it was prayed that the High Court do issue an order of certiorari to remove to that Court for purposes of being quashed the decision of the 2nd respondent of 14th July, 2005; that prohibition be granted to prohibit the 2nd respondent from acting on or relying on the said decision and that the appellants be allowed to publish in the Kenya Gazette prayers to be issued by the court and the 2nd respondent be condemned to costs.

Submissions were made before ***R. Wendoh, J.*** and in a judgment delivered on 18th December, 2006 the learned Judge found no merit in the motion and dismissed it.

Those are the orders that have provoked this appeal which is premised on the Memorandum of Appeal drawn by M/s Karanja Mbugua & Company Advocates for the appellants where 5 grounds of appeal are set out. It is stated in the grounds that the learned Judge made an error in law in making a finding to the effect that had the respondent's members of the Board excluded some of the complainants who also comprised the panel of judges who were also judges of their own cause, the Board would have reached the same decision. It is further stated that the learned Judge erred in law in dismissing the appellants' application even after finding that two members of the Board of the respondent who heard the matter sat as judges in their own cause and in fact one of them who was a "*prosecutor*" was also a complainant in the cause. The learned Judge is also faulted for finding that rules of natural justice were not breached although she had found that some members of the Board should not have sat in the proceedings. In the penultimate ground of the Memorandum of Appeal the complaint is that the Judge erred in law in finding that after hearing the 1st appellant alone all the other appellants could be condemned without the need for a hearing. In the last ground the learned Judge is faulted for finding that the 2nd respondent acted within its jurisdiction despite all materials presented before the court where a different finding should have been reached.

When the appeal came up for hearing before us on 2nd October, 2018 Mr. Karanja Mbugua Advocate appeared for the appellants while Miss Ndirangu Advocate appeared for the 2nd respondent. The appeal against the 1st respondent was withdrawn by the appellants as the 1st respondent had not participated in the proceedings before the High Court.

In urging the appeal Mr. Mbugua faulted the learned Judge for making a finding that members of the 2nd respondent's Board who sat and tried the appellants were also complainants but finding that this did not prejudice the appellants. Learned counsel pointed out that one of the complainants was a board member and was appointed to lead the prosecution against the 1st appellant. Further that the "*prosecutor*" and another member who was a complainant voted in the decision reached by the 2nd respondent's board. According to Mr. Mbugua it was wrong for the learned Judge to hold that the decision of the whole board was unaffected by the two votes submitting that a right thinking member of the public would think the two complainants were biased. Counsel cited the case of ***Republic v Hendon Rural District Council, exparte Chorley [1933] ALL E. R. 20***, where the decision of the Council though a decision of a quasi judicial body was vitiated for breach of rules of natural justice. According to counsel the Court looks at the likelihood of bias but does not look at the mind of the chairman; it looks at the impression given to other people. In further submissions it was Mr. Mbugua's case that the 1st appellant could not be tried on behalf of the other appellants who were not accorded a right of hearing. According to counsel the 2nd - 8th appellants had no notice of any hearing and could not be condemned when they had not been heard. On the complaint raised by the "*Embu Approved Survey Assistants*", it was counsel's submission that the 1st appellant could not be punished if the 7th appellant had committed a wrong which the 1st appellant did not know about. Counsel concluded his submissions by wondering why the learned Judge had made substantive findings in favour of the appellants but declined to grant orders of certiorari.

Miss Ndirangu opposed the appeal by submitting that the meeting of the 2nd appellant had the requisite quorum which according to ***The Survey Act*** should be half of the gazetted members. There were 8 out of 12 members present. According to her the 2nd respondent's Board was properly constituted and the Board could under ***The Survey Act*** regulate its own procedure and was not a judicial body so it could conduct proceedings the way it saw fit. According to counsel the appellants were given a fair hearing as the 1st appellant had been served with a notice and had been given sufficient time to

prepare. According to counsel since the 2nd - 8th appellants worked under the licence of the 1st appellant there was no necessity to grant them a hearing. Counsel concluded her submissions by reminding us that the learned Judge exercised her discretion in refusing the orders of certiorari and that we should not interfere with that refusal, an act of discretion by the Judge.

In a brief reply Mr. Mbugua submitted that the learned Judge had made a good finding that there was a likelihood of bias but had erred when she did not grant the orders prayed in the final orders she made.

We have considered the record of appeal, all materials presented before the learned Judge and the relevant law and this is what we think of this appeal.

The learned Judge examined the material presented before her and after considering her jurisdiction under ***Order 53*** of the ***Civil Procedure Rules*** she decided that the only prayer that she could consider in the judgment was the prayer seeking to quash the 2nd respondent's board decision which was contained in the motion and statement before her. The Judge considered various provisions of the ***Survey Act*** and found that the board of the 2nd respondent was mandated in law to do various things including taking proceedings against surveyors in Kenya and their Approved Assistants and to mete appropriate sanctions provided in the ***Act***. On the proceedings of the board of the 2nd respondent that took place on 14th July, 2005 the Judge found that there were eight (8) members present with two (2) apologies and found therefore that the board was properly constituted as was required by the ***Act***. She found that the 1st appellant was authorized by the said ***Act*** to employ the 2nd – 8th appellants as Approved Assistants. She further found that under the ***Act*** and regulations made thereunder the work of approved assistants was under the direct personal control of the licenced surveyor (*in the case before her the 1st appellant*) and it was the licenced surveyor who was required to carry out sufficient checks to ensure work done by Approved Assistants met the requirements of the said ***Act***.

On whether or not the 2nd – 8th appellants were given a hearing the Judge found that they could voice their concerns or complaints through their licenced surveyor; they had no voice of their own since the 1st appellant was heard he represented his own interests and those of the 2nd – 8th appellants who the Judge found could not be heard.

On the inclusion of I. N. Mwathane and Muriithi Mugo as board members in the disciplinary proceedings that took place on 14th July, 2005 this is what the learned Judge said:

> ***"As observed above, Approved Assistants have no standing of their own. They can only voice their grievances through the licensed surveyor. They are directly under the control of the licenced surveyor. My understanding of this is the complaints of the Approved Assistants contained in the letter of 27th March, 2003 automatically became complaints emanating from the licensed surveyors under whom the Approved Assistants practiced. The complaints raised were to do with impostors or surveyor quacks which directly touched one of the allegations against the applicant. I do hold that Muriithi Mugo and Mwathane were directly interested in the proceedings against the applicants and should not have taken part in the disciplinary proceedings against the applicant".***

The issues raised for our determination in this appeal relate to whether the 1st appellant and all the other appellants were accorded a fair hearing before the decision of the board of the 2nd respondent was reached and whether it was right for the said two individuals who were members of the board and who were complainants to constitute the disciplinary tribunal that heard complaints against the appellants.

Judicial review proceedings are concerned with the decision making process of a quasi judicial body and are not concerned with the decision reached by that body or tribunal. The mandate of the High Court considering judicial review proceedings was well discussed in the case of ***Municipal Council of Mombasa vs Umoja Consultants Limited & Another [2002] eKLR*** where this court considered the holding in ***Kenya National Examinations Council vs Republic [exparte] Geoffrey Gathinji Njoroge & 9 Others Civil Appeal No. 266 of 1996 (ur)*** where it was held that judicial review is concerned with the decision making process not with the merits of the decision itself. In that case it was found that the Court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, that is, the jurisdiction to make? Were the persons affected by the decision heard before it was made? In making the decision did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a Court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision. That is not the province of judicial review.

First as we have shown the complaint against M/s Gatome & Associates by J. K. Mathenge alleging that one, Peter Muchiri Njogu had received money from Mathenge to undertake work which had not been undertaken. Investigations by the 2nd respondent and even by Mathenge himself had confirmed that Peter Muchiri Njogu was not a surveyor but an impostor who masqueraded as a surveyor acting on behalf of M/s Gatome & Associates. M/s Gatome & Associates had denied knowledge of all the activities of the said Peter Muchiri Njogu and the 2nd respondent had by November, 2003 established that the said Njogu was an impostor and advised that he should be arrested and prosecuted. That indeed led to the criminal prosecution of Peter Muchiri Njogu in a criminal court as we have shown in this judgment.

Was it in the circumstances open to the board of the 2nd respondent to continue an investigation against the 1st appellant regarding the complaint by Mathenge?

Then there is the issue of the participation of the two (2) individuals I. N. Mwathane and Muriithi Mugo in the disciplinary proceedings that took place on 14th July, 2005. It is shown that the board of the 2nd respondent convened and met on 14th July, 2005 at the Office of Director of Surveys in Nairobi. The quoram was:

> ***" PRESENT***
>
> ***1. Mr. K. Mwero Chairman***
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> ***2. Mr. Kennedy Kubasu Vice Chairman***
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> ***3. Mr. J. E. R. Oduol Member***
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> ***4. Mr. I. N. Mwathane Member***
>
> ***5. Mr. Muriithi Mugo Member***
>
> ***6. Mr. E. M. Ohanda Member***
>
> ***7. Mr. Benson Okumu Member***
>
> ***8. Mr. J. G. Halake Secretary".***

There is an apology by two (2) board members and on disciplinary matters, four (4) licenced surveyors including the 1st appellant are shown as present. It is stated that the convener of the legal committee of the board ran members through briefs relating to each of the summoned licenced surveyors. In respect of the 1st appellant the board was briefed of the complaint by Joseph Kinyua Mathenge against Peter Munyiri Njogu and a complaint by one S. N. Murimi against one, Peter Munyiri Njogu. There was a complaint against the 7th appellant and a complaint which was withdrawn.

The 1st appellant was then summoned into the board meeting and it is shown that Mr. Mwathane was asked to lead the prosecution. Proceedings were taken after which the decision which we have adverted to was reached where the 1st appellant's licence was suspended and the 2nd – 8th appellants' licences were equally suspended.

The learned Judge recognized that no man should be a judge in his own cause. That is indeed the position in law and that has been the position upheld for many years in common - wealth jurisprudence.

The two (2) board members I. N. Mwathane and Muriithi Mugo sat in as the board members in the disciplinary proceedings and Mwathane was requested to and was prosecutor in the proceedings. He and Mugo voted after the hearing even though they were both complainants in the letter by Embu Approved Assistants which we have discussed in this judgment.

This Court in the case of ***Galaxy Paints Company Limited vs Falcon Guards Limited [1999] eKLR*** while dealing with an appeal where some Judges were asked to disqualify themselves from hearing the appeal the court cited with approval the case of ***R v Bow Street Metropolitan Stipendiary Magistrate and Others ex-parte Pinochet Ugarte (No. 2) [1999] 1 All E R 577*** where at page 586 the House of Lords observed that the fundamental principle is that a man may not be a Judge in his own cause. It was observed that the principle as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a Judge is in fact a party to the litigation or has a financial proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of

the principle that a man must not be a judge in his own cause, since the judge will be not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In a recent case by this Court ***Stephen Mring'a Masamo & 4 Others v County Assembly – Taita Taveta & 2 Others [2017] eKLR*** it was held that a decision that is reached in violation of the rules of natural justice cannot be allowed to stand and it matters not that the Assembly as in that case or a quasi judicial tribunal could still have recommended the action that it took.

The case of ***General Medical Council v Spackman [1943] 2 All E. R***. the effect of violation of the rules of natural justice was explained as follows:

> ***"If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision".***

The principle against bias will also be found in ***Halsbury's Law of England, Vol. 1. 4th Edition*** paragraph 97 where it is stated:

> ***"It is a fundamental principle that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be a Judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted".***

In the case before the Judge the complaint by one Mathenge against one, Peter Muchiri Njogu, could no longer lie or be alive when the 2nd respondent had on its own investigations established that the said Njogu was a quack and an impostor and not a surveyor. He was a fraudster who masqueraded as operating under M/s Gatome & Associates and was charged in a criminal court for that conduct. There was nothing for the 1st appellant to answer and it was wrong to call the 1st appellant later and require him to answer other questions in the same regard when the 2nd respondent had established that the said Njogu was a fraudster who had no connection with the firm of Gatome & Associates at all.

The board of the 2nd respondent had received a complaint against the 7th appellant and by necessary implication the 1st appellant from persons who operated in the Embu region inclusive of board members I. N. Mwathane and Muriithi Mugo. When the board constituted itself as a displinary tribunal on 14th July, 2005, the two sat as members of the tribunal and worse still for the proceedings that took place. Mr. Mwathane was appointed and was the prosecutor of the matters that were before the board against the 1st appellant. Both Mwathane and Mugo had a direct interest in the matter before the disciplinary tribunal and it was wrong for them to sit as members of the same and participate in the voting and decision that took place. Learned counsel for the 2nd respondent is with respect wrong in her submissions that their votes did not affect the final decision of the disciplinary tribunal. That is not the position in law at all. The whole decision was vitiated by their presence and participation and theirs was not a decision as known in law. There was complete and total breach of process and worse still the decision reached which had serious implications against the 2nd - 8th appellants was made without according them any hearing at all. The decision had the effect of suspending the licence of the 1st appellant and also the 2nd - 8th appellants operations as the they practiced as surveyors under the 1st appellant. They were being robbed of the opportunity to earn their living through the trade under which their profession lay and this was done without following procedure and without according them a right to be heard. The tribunal acted against every known tenet or principle on the right to a hearing and although it is submitted by the 2nd respondent that we should not interfere with the decision of the Judge who exercised her discretion against the appellants' circumstances of this case show that the Judge failed to consider necessary principles in exercise of discretion and we are entitled to interfere with the exercise of that discretion which we hereby do. The effect is that this appeal succeeds and we allow it. We exercise the mandate donated to us by ***Rule 31*** of the rules of this court and issue an order of certiorari to remove to the High Court for purposes of quashing and to quash the decision of the 2nd respondent made on 14th July, 2005.

The surveyors licence issued to the 1st appellant by the 2nd respondent is hereby restored and Kenya Gazette Notice No. 5727 of 22nd July, 2007 is cancelled. The respondents are prohibited from relying on the said decision made on 14th July, 2005 and the appellants will have the costs of this appeal here and below to be paid by the 2nd respondent.

Those, then, are our orders.

Dated and Delivered at Nairobi this 23rd day of November, 2018.

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR