



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GITHINJI, MAKHANDIA & SICHALE, J.J.A.)**

**CIVIL APPEAL NO. 314 OF 2009**

**BETWEEN**

**SERAH NJERI MWOBI** appealing in her capacity as the

Administrator of the estate of the late John Muigai Mwobi.....**APPELLANT**

**AND**

**JOHN KIMANI NJOROGE**.....**RESPONDENT**

*(Being an Appeal against the decision and orders of the High Court of Kenya at Mombasa (Mrs. Khaminwa J) made on the 8th February, 2007)*

*in*

*HC.C.C. No. 99 of 1999)*

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**JUDGMENT OF THE COURT**

The appellant, **Serah Njeri Mwobi**, was the defendant in a suit commenced by a further amended plaint before the superior court at Mombasa dated 25th May, 2005. In that suit, the Respondent who was the Plaintiff had sought for a declaration that he was entitled to the portion of land measuring 0.1504 Ha and known as **Plot No. MN/VI/2939** (hereinafter the “*suit premises*”) as the rightful/legal owner. He also sought for orders to restrain the appellant by way of a permanent injunction from interfering with his quiet enjoyment of the suit premises, an order directing the appellant to sub-divide, sign and transfer the suit premises to the Respondent. He had also sought for an order to direct the Registrar of land to cancel any title documents issued to a third party and the returning of such documents by the appellant for collection by the Land Registrar. In the alternative, he sought for an order that the appellant do pay him the sum of Ksh. 4 million together with interest at court rate from the date of filing the suit being the value of the developments on the suit premises.

In the said further amended plaint, the Respondent averred *inter alia* that on 3rd September 1973, he had entered into a written sale agreement of unsurveyed parcel of land being a portion of the suit premises with the appellant's deceased husband **John Muigai Mwobi**. It was a term of the agreement that the suit premises the subject of the sale agreement was unsurveyed and undemarcated, and that the deceased was to sell a portion thereof measuring 0.2787Ha at Ksh. 12,000/= to the Respondent. Pursuant to the agreement the Respondent allegedly paid the sale price.

The Respondent alleged that on the basis of the aforesaid agreement, in 1974 he developed the suit premises by constructing a commercial building hosting a bar and restaurant popularly known as Narok Bar. In 1983, he added to the main block a beer garden and has since been carrying on the said business without any interference. However, sometimes in 1991, he discovered that **Plot No. 3462** did not measure upto the 150 feet by 200 feet in accordance with their 1973 agreement but only measured 0.0841 Ha. As a result his building on **Plot No. MN/VI/3462** had encroached on **Plot No. MN/VI/2939** which also belonged to the deceased and which had allegedly been created following the subdivision. He therefore averred that the deceased acted contrary to the terms of the 1973 agreement by transferring to him a plot which was less than the agreed.

Subsequently the deceased demanded from Respondent a sum of Ksh. 80,000.00 for the portion that was never transferred with **Plot No. MV/VI/3462** and which was later registered as the suit premises. In his plaint, the respondent claimed that he fully paid the Ksh. 80,000.00 in installments as was agreed upon but the suit premises were not transferred to him.

In her written further amended statement of defence, the appellant stated that the respondent was a trespasser who had encroached upon **Plot No. 3463 Section VI Mainland North** and the subsequent subdivisions created therefrom and such an encroachment can neither confer a right to occupy and use the land nor defeat the appellant's husband proprietary interest. She also denied there having been any agreement for sale of land between the respondent and her deceased husband. It was also her contention that no payments were ever made by the respondent to her or any other person on account of an agreement for sale of the suit premises alluded to by the respondent.

Indeed, she counter-claimed by alleging that she is and was at all material times the owner and was entitled to the possession of all that piece or parcel of land situate at Magongo and known as **Plot No. 3463 Section VI mainland North** and all the sub-divisions created therefrom including the suit premises. She contended that since 1991, the respondent had wrongfully entered the suit premises and taken possession of the same thus committing acts of trespass thereon. As a result he had been deprived the use and enjoyment of the suit premises. She thus prayed *inter alia* for the dismissal of the suit, possession of the suit premises, damages for trespass and mesne profits at Ksh. 5,500 per month from August 1991 until possession is delivered up.

In his evidence, the respondent testified that he was friends with the deceased and they had lived together for a long time. Sometimes in 1973, the deceased offered to sell to him the suit premises. He tendered in evidence documents that showed that the size of the portion of land sold to him was 150ft x 200ft. He also produced an agreement executed between the respondent and the appellant's deceased husband on 10th March 1991, which provided in the payments clause how the Ksh. 80,000.00 was to be paid by installments. This evidence was confirmed by his PW2 wife. PW3 was a land surveyor. His evidence was that the respondent's developments covered **Plot No. MN/VI/3462** which was registered in the name of the respondent and the whole of the suit premises which was registered in the name of the appellant. He testified that the two plots had not covered the area the appellant's deceased husband had sold to the respondent. PW4 was **Mr. Doshi**, a advocate who witnessed the execution of the sale agreement between the respondent and appellant's deceased husband.

On her part, the appellant stated in her testimony that she was aware that the deceased had sold to the respondent **Plot No. 2447/VI/MN** which was subdivided by one, **R. A Zimmerlin**, a surveyor. She also confirmed that the respondent had developed the land he was sold and had been trading there. She however claimed that she was the owner of the suit premises as she held title to it. She denied the agreement made in March 1991 alleging that the deceased was upcountry at that time. She also denied the deceased's signature in that document. She called her son, **Samson Njoroge Muigai**, DW 2 to support her evidence who testified that the respondent had been their neighbour since 1973 and that the appellant subdivided **Plot No. 3463** to create various plots including the suit premises. He confirmed that his deceased father sold a parcel of land to the respondent. However, the respondent never complained about the size. He infact went ahead to obtain the title. THE dispute only arose after the deceased's death. DW 3, Zimmerline, the surveyor testified he could not remember who had instructed him to carry out the subdivision of **Plot No. 2447/VI/MN** but all the same he did sub-divide the plot into **3462** and **3463**. He

confirmed that it was possible to create a plot measuring 150ft x 200ft from **Plot No. 2447/VI/MN.**

**Khaminwa J.** who presided over the case framed eight issues for determination. The first issue was whether there was a complete memorandum of sale agreement of land as between the respondent and the deceased and the Learned Judge found that the appellant could not challenge the sale agreement as it was signed before an advocate Mr. Doshi who was a witness in court. She also stated that the appellant did not object to the admission of the agreement of sale in evidence.

The second issue required an inquiry into the terms of the sale agreement. The Learned Judge found that the identity of the land being sold, the size, the purchase price and parties were clearly spelt out. It was her view that clause two of the agreement, had specified the requirements of the subdivision of the land sold at a future date and the subsequent transfer to the purchaser and in the event the deceased was not able to transfer, he would refund all monies paid to him as purchase price and the expenses of any developments. The learned judge found that although the land sold was unsurveyed, the parties had anticipated a survey would be undertaken. And further that the respondent was given possession of the whole land even though the land he had bought measured only 150ft v 200ft. She also found that, when the survey was being done, the surveyor was not briefed of the plot already sold to the respondent.

In regard to the issue of performance of the agreement, the learned judge found that there was an error when Zimmerlin sub-divided the plot. And that the evidence of the respondent was to be believed in regard to the payment of Ksh. 80,000 and that Ksh. 40,000 since this monies had been paid into the deceased's bank account. The learned judge was also of the view that the agreement had been made before the demise of the deceased but had been altered by his heirs so as to cater for the payment of the balance.

On the issue of whether the respondent was entitled to the orders sought, the learned judge believed the respondents evidence that he purchased a portion of unsurveyed land which was measured by footsteps by both the respondent and the appellant's deceased husband. And that the land comprised in **Plot No. 3462** was far less than what he had purchased in 1973 and the remaining **Plot No. 3462/VI/MN** was subdivided by the appellant after her husband's death and got herself registered as proprietor of the suit premises. As a result, the learned judge held that the respondent was entitled to a transfer of the plot and its quiet possession.

On the issue of whether the suit was time barred, the learned judge held that the respondent was not seeking an enforcement of a contract as was pleaded under **section 4(1)** of the Law of Contracts Act; but his suit was for recovery of land whose limitation period was 12 years. The cause of action arose in 1991 when the respondent was informed by his bank that the land he occupied was not as stated by him. Accordingly, time for the purposes of limitation pursuant to the provisions of section 26 of the Limitations of Actions Act started to run in 1991.

On the issue as to whether the respondent had entered the suit land lawfully or as a trespasser, the learned judge held that, the respondent had entered the land lawfully with consent of the deceased and in pursuance of a sale agreement. She therefore concluded that he was not a trespasser.

In respect to the issue number 7 relating to whether there was demolition of properties belonging to the deceased by the respondent, the learned judge stated that she could not believe the appellant because she had contradicted herself in her testimony and her evidence was inconsistent with her statement of defence and the evidence of DW2 and DW4. There was no prove that there were any structures on the suit premises. Furthermore, the appellant failed to lead evidence that she had reported any demolition of her property to the relevant authorities. Based on this finding, the learned judge found that the appellant's counterclaim was not sustainable and even if it was, it had become time barred after expiration of 12 months in 1985. The respondent would therefore become entitled to a claim by adverse possession by virtue of **section 37** and **38** of Limitation of Actions Act.

On the basis of the foregoing the learned Judge was satisfied that the respondent had proved his case and she accordingly gave him judgment and dismissed the appellant's defence and counterclaim case with

costs.

The appellant was aggrieved and hence this appeal. There are 11 grounds of appeal in support thereof, as follows;

1. *The learned Judge erred in proceeding to hear and determine this suit being HCCC No.90 of 1990, John Kimani Njoroge vs Serah Njeri Mwobi after the learned Judge had disqualified herself from hearing the suit sometimes in 2003.*
2. *The learned Judge erred in holding that the respondent's cause of action was recovery of the suit Land.*
3. *The Learned Judge erred in failing to consider the evidence adduced by the Appellant and her witnesses.*
4. *The Learned Judge erred in failing to follow and faithfully apply the Law of Limitation of Actions Act.(sic).*
5. *The Learned Judge erred in failing to consider that, the Appellant is the registered proprietor of all the suit Land known as Plot No.2939 which Title was not subject to any lawful challenge, the Respondent did not and could not have any interest in the suit Land which was superior to that of the Appellant.*
6. *The Learned Judge erred in considering that the Respondent's cause of action was to recover the suit property which right of recovery the Respondent did not have since the suit land did not and does not belong to him.*
7. *The Learned Judge erred in considering and thereafter evaluating the Respondent's purported claim tht he wanted to recover his Land as such a "claim" was not available to the respondent.*
8. *The Learned Judge erred in considering and thereafter agreeing with the Plaintiff's evidence when the same evidence was contrary to the pleadings. In particular the learned Judge ought to have found that:*
  - a. *The Respondent was a trespasser as he had pleaded in the plaint, Amended Plaint as well as the Chamber Summons application.*
  - b. *Indeed the Respondent had admitted that he was satisfied with the size of the Plot he was given by the Appellant's late husband at the time of the sale of the land to the respondent by the Appellant's late husband.*
9. *The learned Judge erred in not considering that the Appellant had a good claim by way of counter-claim the Learned Judge ought not to have dismissed.*
10. *The Learned Judge erred in not holding that the cause of action was based on contract between the Appellant's late husband and the Respondent.*
11. *The Learned Judge abused her powers in giving judgment in favour of the Respondent and in dismissing the Appellant's counter-claim.*

**Mr. Odhiambo**, learned counsel, presented the appellant's case. In regard to the first ground of appeal, he submitted that the learned Judge had previously disqualified herself as she was known to one of the parties. He thus submitted that it was not proper for the Judge to later hear the case. He claimed that at the time of the hearing of the case advocates on record were not the same advocates on record at the time of her disqualification. And that, at the time of delivery of the judgment, the Judge informed the parties about her earlier disqualification and invited the parties for comments. **Mr. Odhiambo** contends that the

parties remarks are not contained on record. He thus urged us to allow the appeal and order for a re-trial before another Judge. He further maintained that the respondent's suit was time barred as it was based on contract. Parties are bound by their pleadings. The respondents clearly showed that the cause of action was bound on contract. The latest that the suit should have been filed was in 1979. Further he submitted that the Judge erred in her determination on the question of adverse possession.

**Mr. Mogaka**, learned counsel for the respondent opposed the appeal. With regard to the first ground of appeal, **Mr. Mogaka** submitted that the parties to this appeal are the same. Advocates act on instructions and therefore when an advocate applies for disqualification he acts on instructions. That parties were all present in court and represented by advocates throughout the hearing. He also submitted that none of the parties objected to the learned Judge from proceeding with the hearing on account that she had previously disqualified herself. He thus claimed that, by conduct of the parties, they were all precluded or estopped from disputing the jurisdiction of the Judge hearing the case having participated in the trial. He contends that the Judge raised the issue in her judgment and the appellant did not exercise her right to arrest the judgment. Instead she left it to court and that having participated in the case, the appellant had waived her right.

It was also **Mr. Mogaka's** contention that there was acquiescence. On the doctrine on acquiescence, waiver and estoppel, Counsel relied on the following authorities **Halsbury's laws of England, 4th Edition Vol. 16, Commissioner of Lands v Hussein (1968) E.A 585, Jay Jay Rubber Product Ltd v Development Finance Company of Kenya Ltd & Anor, Oakland Metal Co. Ltd v D. Benjamin & Co. Ltd (1953) 2 ALL LR 610.** He submitted that the decision of the Court should not be disturbed as it was not a question of sins of counsel being visited upon a litigant. And in any event, counsel for appellant had not alleged so. He urged us to dismiss the appeal on that premises.

In response, **Mr. Odhiambo** submitted that the doctrine of estoppel, waiver and acquiescence did not apply in this case as the Judge stated in the judgment that there was an opportunity for any party to appeal and raise the issue of her earlier disqualification.

This being a first appeal, it is our duty to re-evaluate the evidence as a whole and arrive at our independent conclusion on that evidence without overlooking at the conclusions of the trial court with the usual caution that the trial judge unlike ourselves had the opportunity of not only hearing the witnesses, but also seeing them testify as to be able to assess their demeanor and credibility. The principles to guide this court in determining an appeal from the High Court were set in the celebrated case of **Selle & Another v Associated Motor Board Company Ltd and Others (1968) 1 EA 123** as follows;

***“An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhibited with the evidence generally.”***

For convenience and good order, we will deal firstly with the first ground of appeal for obvious reasons. In our view, it is the ground upon which the appeal may stand or fall. However, should we deem it unmeritorious, we will proceed to deal with the other grounds together.

We have carefully, considered the pleadings and the parties submissions. It is uncontested that the learned Judge, then as a Commissioner of Assize had disqualified herself from hearing this matter as she was allegedly known to one of the parties. The proceedings in the superior court shows that on 5th March 2013, the court stated as follows;

***'There is an objection to this court hearing this matter allegedly that it is known to one of the parties. I disqualify myself from conducting this matter, is taken out of today's list for hearing on another date to be fixed at the registry.'***

Thereafter, the matter passed through the hands of several judicial officers before it was placed again before **Khaminwa J.** now as a Judge of the superior Court on 16th June 2005 for hearing. From the

record again, it appears that by this time, all the parties and the court had forgotten about the earlier disqualification of the Judge and the matter proceeded to hearing. Thereafter, the issue of disqualification raised again by the Judge at the time of reading the judgment on 8th February 2007. The learned Judge stated this in her judgment:-

***“The matter has taken a long period to come to a conclusion. When first objection was made, it was in March 2003. The matter passed through the hands of several judicial officers. When it came before me no objection was raised by defendant that I should not hear the suit and for all the period I have conducted this trial I have not heard any party raising any complaints. In the circumstances it cannot be said at this stage that I am not qualified to deliver judgment as the objection is made to delay this matter further. I shall proceed to read the judgment. There is opportunity for any party to appeal and raise such grounds.”***

It was on this basis that the first ground of appeal has been raised. **Mr. Odhiambo** submitted that having disqualified herself from hearing the appeal, it was not proper for the Learned Judge to continue to conduct the trial and enter judgement.

On his part, **Mr. Mogaka** contends that the parties had all along been represented by capable advocates, and none of the advocates had objected to the learned Judge proceeding to conduct the case, based on her earlier disqualification. He also claimed that the appellant failed to stop the learned Judge from proceeding to read the judgment in court and as such he could not be heard to complain now. He contends that by their conduct, the parties are all precluded or estopped from disputing the jurisdiction of the judge hearing the case having waived their right to object to the case proceeding before the learned Judge. He concluded by urging us to find that the parties had acquiesced their right by conduct and could not now be heard to complain.

It is thus clear to our mind that the issue for determination is whether the doctrine of waiver, estoppel and acquiescence apply in this case to the extent that the parties failed to raise objections on the Judge proceeding to hear the case. We will also consider whether the learned Judge having disqualified herself was estopped in future from hearing this case as well.

In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See **Seascapes Limited v Development Finance Company of Kenya Limited, Nai Civil Appeal No. 247 of 2002.**

The words waiver, estoppel and acquiescence have also been defined by the **Halsbury's Laws of England, 4th Edition, Volume 16.** At page 992 waiver has been defined as follows:-

***“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.”***

It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot

afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced. In the instant case, it is uncontroverted that the learned Judge disqualified herself when the matter was placed for the first time before her. Almost four years later, she proceeds to preside over the trial. None of the parties objected to the judge conducting the trial and the Judge only raised the issue at the time of delivering the judgment. In our view, and we agree with the learned Judge on this one, the parties had long forgotten about the issue of her disqualification and they proceeded before her as if nothing had ever happened about the propriety of the judge conducting the case. It therefore follows, as submitted by **Mr. Mogaka** that none of the parties can raise the issue of disqualification now. It can be said rightly that the parties by their conduct had waived their right.

In our understanding, the term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time.

**Halsbury's Laws of England, 4th Edition, Volume 16 at page 994** states the following about the term 'acquiescence':-

***“The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act.”***

In our view, it cannot be said that the appellant did not know of the disqualification of the Judge at the initial stages of this matter. An objection was raised and the learned Judge having considered that objection deemed it proper and in the interests of justice to disqualify herself from further conducting the case. The parties thereafter, though having been duly represented at all times failed to raise the issue of disqualification of the Judge. Granted, the matter was handled by various advocates as it can be seen from the various Notice of Change of Advocates forming part of the record for both parties, but it is the duty of an advocate when he comes on record to study the file and more so the proceedings to acquaint himself with the record. A diligent advocate ought to have realised that the matter was at one time handled by the learned Judge while a Commissioner of Assize and had disqualified herself for the reasons stated on record. Having so noted, it would have been prudent for the advocate to raise the matter with the Judge who ought to have considered the same. Failure to do so, would thus mean that the parties in this appeal acquiesced themselves to the apparent omission and are thus estopped from questioning their earlier conduct.

Still, when the learned Judge raised the issue of her earlier disqualification before the lawyers at the time of reading the judgment, the lawyers had an opportunity in our view to decide what they wanted to do. They could have asked for time to consider the position. They could have asked the learned Judge to withhold delivering the judgment and order the proceedings to commence **de novo** before another Judge. They could have also told the judge that they had no objection to her continuing with the hearing. Counsel for the appellant, **Mr. Odhiambo** merely stated that:-

***“In view of the fact that along ago this court had disqualified itself, we should not have proceeded to hearing the case in this court. However, we leave to court to decide on what to do.”***

On his part, **Mr. Mabeya**, counsel for the respondent stated that:-

***“Court has declined to hear the case when she was Commissioner of Assize. When the matter came to hearing the officer was a Judge. The defendant was always in the case and she never raised the matter until today. I say the court should deliver judgment.”***

It was not open to the appellant to wait and see which way the judgment would go and then thereafter revisit the issue of disqualification. In doing nothing at that point and then leaving the issue to court, the appellant was treating the disqualification as not being so important. Silence acted as a waiver and

perhaps we could add that there was silence which was added by participating in the proceedings. In so holding we find support in the English case of *Leonidas D (1985)1 WLR 925*, in which **Robert Goff LJ** stated that:-

***“We should add that we see the same difficulty in invoking the principle of equitable estoppel in such circumstances. It is well settled that, that principle requires that one party should have made an unequivocal representation that he does not intend to enforce his strict legal rights against the other, yet it is difficult to imagine how silence and inaction can be anything but equivocal.”***

Despite all that we have said above, it is nonetheless our view that disqualification of a Judge is a matter of law and not fact. As such there can be no estoppel, waiver and acquiescence. With due respect to **Mr. Mogaka** this principles accordingly do not apply in our instant case.

Having said so that in our view is however not the end of the matter. We bear in mind that, the parties herein did nothing and acquiesced to the current circumstances they find themselves in. However, we are mindful to the well established principle that advocates ought to assist the court in furthering the overriding objective that justice ought to be administered impartially. This is the cardinal principle established by our **Constitution at Article 50** which grants every person the right to a fair hearing. This Article provides thus:-

***“Very person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

We note that the judgment subject of this appeal was delivered on 8th February 2007, and the applicable constitutional provisions are those under the repealed constitution. Even so, that would not change the position because that constitution under **section 77(9)** also had provisions establishing the right to a fair trial. This section provided as follows:-

***“A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”***

So that the position as regards the right to a fair hearing does not change under both the repealed and the current Constitution 2010.

It is a tenet of a fair trial that all parties to a dispute must have the right to due process of law in order to resolve the dispute, and due process of law requires that the parties be given a hearing before an unbiased and impartial decision maker as part of the resolution process. The reason is clear to us. In a constitutional order like ours, grounded on the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. Accordingly, this in our view, is the basis upon which when a Judge is appointed to the bench, he/she takes an oath to uphold the Constitution and administer justice without fear or favour. Public confidence in the administration of justice is indispensable. It is not enough that judges be impartial, the public must perceive them to be so.

There are quite a number of judicial precedents in our jurisprudence and also from other Commonwealth jurisdiction that have set the rules and ethical standards to determine whether disqualification of a judicial officer from hearing the case is proper in situations where a judge's impartiality may be an issue. However, the precise juridical formulation of the test against bias has not quite been settled by our courts. In *Uhuru Highway v Exchange Bank (1998) Nai Civil Appeal No. 83 of 1996* (Akiwumi, Tunoi & Shah JJ.A), the court adopted the reasoning of Lord Goff, in *R v Gough 1993,[1993] 2 All ER 724* who re-stated the afore-said test:-

***“In terms of real danger rather than real likelihood [of bias] to ++ensure the court is thinking in terms of possibility rather than probability of bias.”***

One year later in *Kimani v Njoroge Nai Civil Appeal No. 79 of 1997* (Gicheru, Omolo & Lakha JJ.A), the majority judgment dumped Lord Goff reasoning in favour of Lord Denning's ratio in the older case of *Metropolitan Properties v Lannon [1968] 3 All ER 304*. Lord Denning had said;

***“In considering whether there was a real likelihood of bias... the court looks at the impression which would be given to other people... what right-minded persons would think.”***

We wholly agree. Generally, when the impartiality of a Judge is in doubt, the appropriate remedy available to that Judge is to disqualify himself from taking further proceedings in the matter. Sadly, unlike in the United States of America, Kenya has no policy guidelines or statutes to govern the disqualification of a Judge from hearing a case. The Kenyan position can therefore be discerned from various judicial precedents.

In our instant case, it is not in doubt that the learned Judge had disqualified herself from conducting the trial, when at that time she was a Commissioner of Assize. Four years later, the matter was placed before her and she continued to conduct the trial and entered judgment. The issue then as we perceive it is whether the judge having disqualified herself could later on preside over the same case?

We must state from the outset that the issue as raised now for determination is novel. We have spent considerable time undertaking research from other Commonwealth jurisdictions; Australia, England, Canada, India and lastly United States of America, and we were unable to find any guidelines or judicial precedent on this issue as it has not perhaps arisen in those jurisdictions. In the circumstances we will work with our own industry and understanding of the issue ad hand.

In *Davidson v Scottish Ministers (2004) UKHL 34*, Lord Bingham addressed the subject on impartiality of a Judge. He emphasised on the importance of the objective judgment and stated that;

***“... Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.”***

In the English case of *Locabali (UK) Ltd v Bayfield Properties Ltd (2000) QB 451*, the Court stated as follows;

***“It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided.”***

In the instant case, the learned Judge as Commissioner of Assize disqualified herself based on the objection raised that she was known to one of the parties. It is not disclosed which party she was known to or the extent of the relationship with that party. She however initially satisfied herself that she was not suitable to hear the case. In our view, having so disqualified herself, we do not think that she could later on conduct the same case and be said to be impartial. It matters not, that none of the parties raised an objection to her continued conduct of the case. She could not proceed with the matter having clearly disqualified herself earlier. We say so because it cannot be said that her being known by one of the parties to the suit suddenly dissipated on her becoming the judge. It must be remembered that justice must not only be done but must also be manifestly seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process, it is necessary that judicial officers should be

independent and impartial and more important they should appear to be so.

We have perused the judgment the subject of this appeal. We note that the Judge in her first two opening paragraphs deals with the issue of her disqualification. She stated in her judgment that;

***“This suit commenced in the year 1999. Several applications have been made, argued and ruling made by various members of the court over the years. I note that on 8th March 2003, when the matter was listed before me (then Commissioner of Assize) there was objection to my hearing the matter on the ground that I was known to one of the parties. I quickly disqualified myself and the matter passed through the hands of several courts. On 26th February 2004, the matter was again listed before me for the purpose of reading a ruling made by Hon. Justice Etyang who was then not in the station. That on 16th June 2005, the file was listed before me.*”**

***Mr. Mabeya, leading Mr. Gekoye appeared for the Plaintiff. Mr. Odhiambo appeared for the defendant. By this time all parties had forgotten the allegations they had made against me that I was known to one of the parties. The trial commenced with an address from Mr. Mabeya. The original plaint was amended on ....”***

At this juncture, we are not certain that the Judge was free of any influence at the time of writing the judgment. Obviously, the issue of her earlier disqualification was uppermost in her mind at the time of crafting the judgment. We would have expected that having come to the realisation that she had earlier on disqualified herself, she would have opted to down her tools immediately and summon the parties for their input on the way forward rather than to continue to craft her judgment. And then present it as *fait accompli*, on the date of delivery. We find it particularly strange that the Judge would proceed to read the judgment and thereafter quickly inform the parties of their right of appeal. That to us would only mean one thing; that the Learned Judge abducted her duty as a Judge and her acts are a nullity.

It must be remembered that it is a cardinal principle of fair trial that a judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the Judge's judgment and must appear to be so. In so holding, we find support from the South African case of ***The Republic of South Africa v South African Rugby Football Union (1999) 4 SA 147 at 177*** where the court stated as follows;

***“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”***

The mere fact that the Learned Judge had found it suitable to disqualify herself from hearing the case, we think that there was a likelihood of bias and conflict of interest. There would be an apprehension that the judge approached the case with a closed mind rather than an open one. Sadly, it cannot be said that irrespective of the waiver by parties to assert the disqualification, a fair minded and independent observer would conclude that there was no real possibility of bias in this matter.

We do not think that a Judge who has disqualified herself from a matter and all factors remaining constant can again in future purport jurisdiction and preside over the matter. It is upon this conviction and the above considerations we are mindful to the precautionary principle and hold that the subsequent proceedings after the Judge's disqualification were a nullity. In the circumstances, much as it pains the

court given that this is an old matter and that the respondent is allegedly very ill, we are alive to the principle that justice should be done and be seen to be done.

This ground is enough to dispose of this appeal. We need not address address the other grounds of appeal because in so doing we will obviously end up deaing with the merits of the appeal and in the process preempt the possible outcome of the proceedings before the superior court following a retrial if at all.

In the premises we shall allow the appeal. The judgement and decree of the High Court is set aside. We substitute therefor with an order remitting the case back to Superior Court for a retial before any other Judge of competent jurisdiction other than *Khaminwa, J.* who presided over the trial. It is unfortunate that the advocates allowed the Learned Judge to waste time and resources in conducting the trial. And failed to alert her of her earlier disqualification. In the premises each party shall bear her/his own costs of this appeal and the court below.

**Dated and delivered at Malindi this 26th day of June, 2013.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**