IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:LAKHA J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 115 OF 2000

BETWEEN

KAPLAN & STRATTON…….....……APPLICANT

AND

L.Z. ENGINEERING CONSTRUCTION LIMITED.....1ST RESPONDENT

YAYA TOWERS LIMITED.....2ND RESPONDENT

RAMESH MANEK.....3RD RESPONDENT

(Application for extension of time for lodging a Notice of Appeal and Memorandum and Record of Appeal in the matter of an intended appeal from the judgment & decree of the High Court of Kenya at Nairobi (Pall, J) delivered on the 9th day of January, 1998

in

HCCC No 3791 of 1993)

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R U L I N G

This is the latest round in the long-running and well publicized vendetta between Trade Bank Limited (in liquidation), on one hand and Yaya Towers Ltd and L Z Engineering Construction Ltd on the other. It will certainly not be the last. It is an application by Kaplan & Stratton, Advocates, for extension of time for lodging a Notice of Appeal and Memorandum and Record of Appeal.

The background to the application is familiar and can be shortly summarized. In the suit in the superior court the first respondent sought a declaration that it was at all material times and still is the beneficial owner of the share capital of Yaya Towers Ltd, the second respondent, and the charge and guarantee given by it to the Deposit Protection Fund Board are illegal or void. By its judgment and final decree of the superior court (Pall, J) given on 9th January 1998 the learned judge held, *inter alia*, that Kaplan & Stratton Advocates do pay:-

(a) “the plaintiff (ie the first respondent) the costs of and occasioned by and thrown away by the appearance and defence filed by Kaplan & Stratton on behalf of the second defendant including the costs of three applications dated 1st February, 1996, 31st January 1996 and 27th February 1996 and of the

hearing of the suit on the issue of representation ....."

(b) "Ramesh Manek, Esq Advocate for the second defendant (ie Trade Bank Ltd) his costs occasioned by and thrown away by the appearance and defence filed by Kaplan and Stratton, Advocates on behalf of the second defendant including the costs of the said three applications. ....."

(c) "the plaintiff, (ie the first respondent) its costs in respect of cross-examination and re-examination of Mr James Fredrick Norbury ....."

On 19th January, 1998 the applicant filed a Notice of Appeal consist only that portion of the said decision which ordered costs to be borne by them. No appeal followed. The present application by way of a Notice of Motion was filed by the applicant on 25th April, 2000 seeking extension of time for lodging a fresh Notice of Appeal and Memorandum and Record of Appeal (substantive application).

Before doing so, however, I must state that at the commencement of hearing the substantive application, Mr Deverell, advocate for the applicant, applied that I should disqualify myself from hearing the same. There was no formal application supported by an affidavit as is required but at his request I agreed to hear the application for my disqualification. For this purpose a copy of the Notice of Motion made in Civil Application No NAI 282 of 1998 filed on 31st January 2000 and a copy of Mr Deverell's affidavit therein made were produced by consent.

In making his application for my disqualification, Mr Deverell, for the applicant, did not suggest that I had any proprietary or pecuniary interest in this litigation or any actual bias against his client. His own affidavit speaks of it having been unwise to have had two luncheons with Mr Esmail, advocate, who now appears before me on behalf of the first respondent however innocent it may have been. He expressly relied on the oft-quoted *dictum* in *R v Sussex Justices* that "Justice should not only be done, but should be seen to be done". I will return to this later. As I have said, Mr Deverell does not allege that I was infact biased.

In *R v Gough* [1993] 2 All ER 724 at 732, Lord Goff stated:

"I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Woolf, and it follows from what I have said that I am in agreement with his conclusions both about the effect of the *Sussex Justices* and *Camborne Justices* and that the only special category of case, in which it is unnecessary to inquire whether there was any real likelihood of bias relates to circumstances where a person acting in a judicial capacity has a direct pecuniary interest in the outcome of the proceedings."

In my judgment, this is perhaps one of the most important single statement on the issue of real likelihood of bias.

At this stage, however, I must return to *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256. There the applicant came before magistrates charged with the offence of dangerous driving, which had involved collision between his vehicle and another vehicle. The solicitor acting as magistrates' clerk on this occasion was also acting as solicitor for the other driver in civil proceeding against the applicant arising out of the collision. At the conclusion of the evidence before the magistrates, the acting clerk retired with them in case help should be needed on a point of law; but infact the magistrates did not consult him, and he himself abstained from referring to the case. The magistrate convicted the applicant, but his conviction was quashed by a Divisional Court. This is of course the case in which Lord Hewart, CJ, let fall his much-quoted *dictum* to which I have already referred.

That case was therefore concerned with the possibility that the acting magistrates' clerk, who plainly had such an interest in the outcome of the civil proceedings that he might well be biased against the applicant in the proceedings before the magistrates, might influence the decision of the magistrates adversely to the applicant. Lord Hewart CJ clearly thought that the acting magistrates' clerk's involvement in the civil proceedings was such that he should never have participated in the hearing before the magistrates and went so far as to indicate that even a suspicion that there has been an improper interference with the

course of justice' is enough to vitiate the proceedings, an observation which has been invoked as the original of reasonable suspicion test. Indeed, following the *Sussex Justices* case, there developed a tendency for Courts to invoke a test requiring no more than a suspicion of bias.

However, in a later case, also concerned with alleged bias on the part of a magistrates' clerk, *R v Camborne Justices, ex p Pearce* [1954] 2 All ER 850, a Divisional Court, having received the assistance of the Solicitor- General as *amicus curiae*, approached the question on the basis that a real likelihood of bias must be established. In that case, the applicant was convicted of the offence under the Food and Drugs Act 1938. The information alleging the offence had been laid by a sampling officer for the Cornwall County Council. The magistrates' clerk, who in the course of the hearing was invited into the magistrates' private room in order to advise them, was a member of the County Council (though not of the relevant committee of the Council, the public health and housing committee). For this reason, the applicant alleged a reasonable suspicion of bias might arise, and that his conviction should be quashed. The Court dismissed the application, holding that in the circumstances there was no real likelihood of bias on the part of the magistrates' clerk. Moreover, the Court was at pains to reject any suggestion that mere suspicion of bias was sufficient; and, while endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart CJ in the *Sussex Justices* cases, nevertheless deplored the principle 'being urged as a covenant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases, upon the flimsiest pretext of bias' (see [1954] 2 All ER 850 at 855 *per curiam*).

In the *Sussex Justices* case it must have been plain that there was a real likelihood of bias on the part of the acting magistrates' clerk; and the Court went on to the hold that, despite the fact that there had been no discussion about the case between the magistrates and the clerk, nevertheless the decision of the magistrates must be quashed, because nothing may be done which creates even a suspicion that there has been a wrongful interference with the course of justice. It appears that this decision was later used to suggest that a mere suspicion of bias on the part of a person involved in the process of adjudication is enough to require that the decision should be quashed. That approach was rejected in the *Camborne Justices* case, in which it was held that, since there was no real likelihood of bias on the part of the magistrates' clerk, there was no ground for quashing the magistrates' decision. The cases can therefore be distinguished on the facts. But the question remains whether, in a case involving a magistrates' clerk, it is enough to show that there was a real likelihood of bias on the part of the clerk, or whether it must also be shown that, by reason of his participation in the decision-making process, there was a real likelihood that he would impose his influence on the justices or give them wrong legal advice' (see [1955] 1 QB 41 at 46 per the Solicitor General, Sir Reginald Manningham-Buller QC, *arguendo* as *amicus curiae*). In my opinion, the latter view is to be preferred. Of course, nowadays a magistrates' clerk will not withdraw with the justices, but will only join them if invited to advise them on a question of law. If the clerk is not so invited, any bias on his part will ordinarily have no influence on the outcome of the proceedings; though if he has any interest in the outcome it is obviously undesirable that he should be acting at all in the capacity of clerk in relation to those proceedings, in case his advice is called for. If however he is invited to give the magistrates advice, it is open to the Court to infer that, having regard to the insidious nature of bias, there is a real likelihood of the clerk's bias infecting the views of the magistrates adversely to the applicant.

To sum up, the present state of the law in relation to apparent bias, as it applied to judges, is that there is an automatic disqualification for any judge who has a direct pecuniary or proprietary interesting in any of the parties or is otherwise so closely connected with a party that he can truly be said to be judge in his own cause: Apart from that, if an allegation of apparent bias is made, it is for the Court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issue. It is for the Court, to which application is made, to decide, on all the evidence then before it, whether such real danger existed at the time when the impugned decision was taken. Also see to like effect *R v Bow Street Metropolitan Stipendiary Magistrates, Ex parte Pinochet Ugarte* (No 2) (2000) IAC 119 and *Locabil Ltd v Bayfield Properties Ltd & another* [2000] 1 All ER 65 and *Galaxy Paints Ltd v Falcon Guards Ltd* Civil Appeal No 219 of 1998 (unreported).

I am satisfied that there was no such danger in the instant case for the following reasons.

(1) I have no pecuniary or financial interest in the outcome of the litigation.

(2) I have no proprietary interest in the outcome of the litigation.

(3) I am not involved in the day-to-day commercial decisions of the parties to the litigation.

(4) I hold no shares in any of the companies parties to litigation.

(5) I was trained from my earliest days at the Bar and on the Bench to decide cases on the evidence before me and submissions made to me and put aside all extraneous matters. It is axiomatic to me that I will decide cases without fear or favour, affection or ill-will. I have taken oath to that effect but no one supposes I would act differently if no such oath was sworn.

(6) The actual evidence of apparent bias in this case is no more than that I had about two years ago the two luncheons with Mr Esmail, advocate at a public restaurant under the gaze of public eye. There is no evidence or even suggestion that he discussed any of the cases then pending before me, which he certainly did not.

(7) There is no actual evidence that there are real grounds for doubting my ability to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before me.

The correct test for apparent bias was that the Court, in possession of the full facts, should determine whether there was a real danger of bias; on that test there was no such danger in the instant case. It would not be right in the absence of any real danger of bias to disqualify myself. Surmise, conjecture or suspicion is not enough. In "*Judges on Trial*", 1976 Edn, the author Shimon Shetreet states as follows:-

"Personal knowledge of counsel does not disqualify. Otherwise, there would be few judges who would not be disqualified ....."

And in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 at 77, the Court of Appeal in England significantly states:-

"By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case....."

Upon a careful consideration of the above two extracts it appears to me that apparent bias may readily be inferred, if sufficient evidence exists, it is different in cases of friendship between a judge and counsel. After all when a member of the Bar is appointed to sit judicially, as I was, he may ordinarily be expected to know of any past or continuing professional of personal association which might impair or be thought to impair his judicial impartiality. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.

I find force in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 177, even though these observations were directed to the reasonable suspicion test:-

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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 of

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 the fact 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 no be impartial."

I also find great persuasive force in three extracts from Australian authority. In *Re JRL, ex p CJL* (1986) 161 CLR 342 at 352 Mason J, sitting in the High Court of Australia, said:-

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

In *Re Ebner, Ebner v Official Trustee in Bankruptcy* (1999) 161 ALR 556 at 568 (para 37) the Federal Court asked:

"Why is it to be assumed that the confidence of fairminded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?"

In the *Clenae* case [1999] VSCA 35 Callaway JA observed (para 89 (e)):

"As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."

In the light of the above and applying the above principle, I reject the application for my disqualification in the instant case as I did at the conclusion of the arguments. The onus clearly is on the applicant and it has not been discharged. To say in an affidavit merely that it was unwise to have a lunch is a far cry from saying there was danger of bias. The applicant has simply not laid a foundation in law even for an apparent bias. Accordingly, I made an order to proceed with the hearing of the substantive application which was done.

Before I leave this part of the application, I must deal with one matter. It was said that on two earlier occasions, I declined to sit because of the objection now taken. It is true that on 11th May, 1999, I declined to sit in Civil Application NAI 304 of 1998 for the sake of transparency. Obviously, the transparency referred to related to the application to extend time in relation to costs which I had earlier ordered as the matter then before the Court might well be an indirect appeal from which I then reclused. It could have nothing to do with the lunch because the affidavit alleging it was not even filed. The second occasion when I refused to participate was on 1st February 2000 in Civil Application NAI 282 of 1999. The order therein made was based on the earlier order of 11th May which as I have already explained had nothing to do with any luncheon. I do not then find that the luncheons on these two earlier occasions in any way add anything to the objection or were reasons for my not sitting. On this occasion, I have invited counsel to address me. It does not appear to me to be correct that a lunch I had two years ago with a member of the Bar should become a permanent bar to my sitting in the matter before me in the absence of any evidence of any real danger of any bias. I also think it was time that all insinuations arising from an innocent lunch should be put to an end. All the authorities above set out lead me to a clear conclusion that my disqualification was not alluded for.

To the substantive application I now turn. As I have said, it is an application for extension of time to file a Notice of Appeal, a Memorandum of Appeal and a Record of Appeal out of time made under rule 4 of the Rules of this Court. In *Major Joseph Mweteri Igweta v Mukira M'Ethare* Civil Application No NAI 8 of

2000 (unreported) I stated as follows:-

"The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criterion of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they are to be observed and the resources of the parties which might, in particular, bear relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an importance feature in deciding what justice requires was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."

One of the principal grounds on which the substantive application is founded is mistake. It is said that the applicant genuinely believed until 7th April, 2000 that authority from the superior court to defend the High Court suit and to use the applicant as its advocates extended to the filing of a Notice of Appeal in the High Court against a judgment of the High Court suit. This proposition is not correct as was held by the Court in Civil Appeal (Application) No 14 of 1998 in the ruling delivered on 18 September 1998 and again by this Court in Civil Appeal No 39 of 1998 in the ruling delivered on 7th April 2000. I have not been told how such a belief arose, whether it was as a result of non-reading of any rules and, if so, which or any misunderstanding or in the belief that the Court was mistaken. I am willing to extend to the applicant the benefit of doubt and hold that the applicant's belief initially was genuine and perhaps also a mistaken view. But when this Court delivered its ruling that belief was laid to rest as is acknowledged by Mr Gachuhi, advocate and partner for the applicant in his affidavit sworn on 4th November, 1998. After all, this Court is the final court of the land and its decision cannot be not binding on the grounds that it did not know the law. The Court is bound by its own previous decisions although it may depart from it for good reasons. Indeed, Mr Deverell himself in Civil Application No NAI 282 of 1998 *Trade Bank Ltd (in liquidation) v L Z Engineering Construction Ltd and Yaya Towers Ltd*, ruling wherein was delivered on 3rd June 1999 while not agreeing with the ruling in Civil Appeal No 14 of 1998 "was quick to point out that there was no provision under the law to challenge it". One cannot speculate or live in the hope that a decision might be declared *"per incuriam"*. Once a judgment is delivered it states the law and becomes binding at once. No judge can refuse to follow it as being incorrect. That being the position it follows that the alleged belief and/or mistake on the part of the applicant ceased to exist or be valid after the ruling of this Court in Civil Appeal (Application) No 14 of 1998 delivered on 18th September 1998. Yet the present application was not filed until 25th April 2000 ie 19 months. Such a delay is, in my judgment, inordinate. Nor is there any account or explanation for such a long delay. I always understood the rule to be that the party who seeks an indulgence must explain why a discretion should be exercised in his favour notwithstanding "inaction" or "delay" on his party. *Prima facie*, if no excuse or explanation is offered, no indulgence should be granted. In this case that onus has unfortunately not been discharged by the applicant. Substantial delay has occurred and simply no explanation has been proferred.

Finally, Mr Deverell raised the question whether Mr Esmail's representations on behalf of the first respondent was, in the circumstances, valid and proper. The first respondent is a corporation and it may be represented by an advocate within the meaning of rule 22 of the Rules of this Court. Mr Esmail is one and has filed an appropriate notice of appointment to that effect. Nothing, in my judgment, turns in that regard.

It remains for me to express my gratitude to counsel for their helpful submissions lucidly made.

It is unnecessary for me to deal with the other issues raised before me as the ones on which I have expressed myself are sufficient to dispose of this application. Anything else I say may be *obiter* unnecessary or superfluous.

It is for all these reasons I have above set out that the application fails. I am unable to exercise my discretion in favour of the applicant. I do not consider this to be a fit or proper case for the exercise of my discretion.

Accordingly, the application is dismissed with costs.

Dated and delivered at Nairobi this 14th day of August, 2000.

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR