

SUPREME COURT OF NIGERIA

30TH APRIL, 2010, SC. 211/2002

**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, J. A. FABIYI, O. O. ADEKEYE, JJSC**

1. RAFIU WOMILOJU
2. SOLOMON LAMITE
3. BURAIMOH AKINLOTAN
4. ALHAJI FASASI ADENLE APPELLANTS
5. JOSHUA IDIOLE
6. SALAMI FATOLU
7. NUSIRU OLORI (for and on
behalf of all Ijo-Agbe Agbodo
of Ikoriko Ajangboju Koniwo
AgbogboFamily of
Ado-Odo, Ogun State)
AND

1. MR. FATAI OGISANYIN ANIBIRE
2. MR. AJAYI OGA ILU
3. LASISI OGISANYIN RESPONDENTS
4. MRS. DORCAS TAIWO ANIBERE
5. MRS. SARAH OJO
(For themselves and on behalf
of the Ikoriko Ajangboju Koniwo
Agbogbo family of
Ado Odo Ogun State)

COURTS - Judicial bias - Allegation - Proof - Such allegation must be proved on some extra judicial factors - Else it is insufficient to disqualify a judge - From adjudicating a case properly before him (H1)

COURTS - Judicial bias - Proof - Judge as former counsel of a party - Effect - It is not enough to disqualify him - Unless it is shown that his former role as counsel - Could pervert the course of justice (H2)

FACTS

The plaintiffs/respondents sued defendants/appellants in the High Court of the Ogun State. Respondents' claims were for declaration of title to the land in dispute, order of forfeiture under native

law and custom, as well as perpetual injunction restraining appellants from further entry on the land. After the hearing, the learned trial judge dismissed respondents' claims as unproved. Aggrieved, respondents appealed to Court of Appeal.

After a review of the whole proceedings at trial court, Court of Appeal found merit in the appeal and allowed same. Dissatisfied, appellants have brought this appeal against the judgement of Court of Appeal. Their central complaint is that the court was improperly constituted when it heard the appeal in that one of the justices that sat on panel, Kolawole JCA, was counsel to appellants in suit NO. AD/ 57/ 70 which purportedly related to the same land now in dispute.

ISSUE FOR DETERMINATION

“Whether the Honourable Justice Owolabi Kolawole was qualified to be a member of the panel which heard the appeal and delivered judgment at the lower court on the 13th day of April 1993 in view of his connection with the Appellants as their counsel in SUIT NO. AD/57/70 which relates to the same parcel of land being the subject matter of the appeal.”

HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**)

Judicial bias - Allegation - Proof

1. For an allegation of Judicial bias against the person of a Judge to succeed, the accuser must establish his allegation on some extra judicial factors/reasons as such. Where such factors or reasons are absent such ‘perceived’ judicial bias is insufficient to justify disqualifying a judge from participating in a case which is properly brought before him for adjudication. The allegation cannot be founded on mere conjecture or hearsay. (p. 1612 B)

Judicial bias - Judge as former counsel of a party - Effect

2. On the ‘role’ played by Mr. Kolawole as counsel, even if Kolawole JCA was indeed the same person who participated as a solicitor to the plaintiffs and they lost and the suit proceeded to appeal court wherein one of the judges was alleged to have played a role when he was a lawyer, such allegation can hardly disqualify him from participating as a judge except where it can be established that his participation is capable of perverting the cause of justice against the adverse

party. In this case, if the appellant had won at the Court of appeal, they would not have, perhaps, contemplated of raising the issue of bias against Kolawole JCA. (p. 1615 E)

REPRESENTATION

Olatunde Adejuyigbe Esq., with him, J. I. Chindo for the Appellants.
E. Ohwovoriole Esq., for the Respondents.

CASES REFERRED TO

Adegoke v. Adibi (1992) 5 NWLR (Pt.242) 410
Deduwa v. Okorodudu (1976) 1 NWLR pg. 236
Anosike v. Igbeke (1999) 8 NWLR pt. 616 pg. 686
Whyte v. Jack (1996) 2 NWLR (Pt.431) 407 at 443
Adefulu v. Okulaja (1998) 5 NWLR (Pt. 550) 435 at 447
Umanah v. Anah (2006) 17 NWLR (Pt. 1009) 503 at 536
Kenon v. Tekam (2001) 14 NWLR (Pt. 732) 12 at 41 - 42
Abalaka v. Minister of Health (2006) 2 NWLR pt. 963 pg. 105
Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Pt. 405) 1
Madukolu v. Nkemdilim (1962) All NLR (Pt. 2) 581 at 589 - 590
Bamigboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg. 270
Omega Bank (Nig.) Plc v. OBC Ltd (2002) 16 NWLR pt. 794 pg. 483
Omoniyi v. General Schools Board Akure & Ors (1988) 4 NWLR (Pt. 89) 449 at page 463

LEAD JUDGMENT BY MUHAMMAD JSC

The plaintiffs at the High Court of Justice of Ogun State (trial court), took out a writ of summons against the defendants. In both the writ of summons and paragraph 20 of the amended statement of claim, the plaintiffs indorsed their claims as follows:

“1. The plaintiffs claim against the Defendants jointly and severally is for:-

1) Declaration that the plaintiffs are entitled to a Statutory/ Customary Right of Occupancy to that piece or parcel of land situate, lying and being at Orile-Agbogbo, Olorunleke, Ado-Odo, Local Government Area of Ogun State.

2) Declaration that the Defendants have incurred forfeiture under Native Law and custom of the land described above which they occupy as plaintiffs’ tenants, which land is shown on survey plan

to be filed later.

3) *An Order that the said Defendants, their servants or Agents do deliver up possession of the said land to the plaintiffs.*

4) *Perpetual injunction restraining the Defendants their servants and/or agents from any further entry on the said land. Annual Rental value is N10.00.”*

After the settlement of pleadings by the parties and taking evidence by the trial court, the claims of the plaintiffs were dismissed by that court. Dissatisfied with that decision, the plaintiffs appealed to the court below.

The court below, after a review of the whole proceedings at the trial court, found merit in the appeal and allowed same. Dissatisfied, the defendants now appealed to this court on eight grounds of appeal. The complaint in the first ground of appeal is that the court below erred in law by hearing the appeal and delivering judgment on 13/04/93 when it was not properly constituted as required by law in that one of the justices that participated and read the leading judgment, Kolawole, JCA was counsel in suit No. AD/57/70 which purported to relate to the same land subject matter of this appeal, which ran contrary to the fundamental concept of the administration of justice as the court below did not secure a fair hearing for the appellants.

Briefs of argument were filed and exchanged by the parties as required by the Supreme Court Rules.

The appeal was heard by this court on the 1st day of February, 2010. The learned counsel for the appellants adopted and relied on his brief of argument. The learned counsel for the respondents, as well, adopted and relied on his brief of argument.

In his brief of argument, learned counsel for the appellants formulated the following sole issue for our consideration; viz:

“*Whether the Honourable Justice Owolabi Kolawole was qualified to be a member of the panel which heard the appeal and delivered judgment at the lower court on the 13th day of April 1993 in view of his connection with the Appellants as their counsel in SUIT NO. AD/57/70 which relates to the same parcel of land being the subject matter of the appeal.*”

Learned counsel for the respondents couched his issue for determination as follows:

“*Whether the Court of Appeal was not properly constituted by virtue of the inclusion of Honourable Justice Owolabi Kolawole, JCA*

as a member of the panel which heard the appeal and delivered judgment at the lower court on the 13th day of April, 1993. (Ground One)."

It is the submission of learned counsel for the appellants that for a court of law to be competent to decide matters brought before it, it must comply with the requirements of the law as spelt out in the case of *Madukolu v. Nkemdilim* (1962) All NLR (Pt. 2) 581 at 589 - 590. Learned counsel set out the 3 requirements stated in the *Madukolu's* case (supra). He argued that it was improper for KOLAWOLE, JCA having acted as appellants' counsel in suit No. AD/57/70 which relates to a parcel of land which formed the subject matter of the appeal to be a member of the panel of justices which heard the appeal at the lower court. He in fact presided at the hearing of the appeal and delivered the leading judgment of the lower court on the 13th day of April, 1993. Learned counsel cited the case of *Adefulu v. Okulaja* (1998) 5 NWLR (Pt. 550) 435 at 447. Learned counsel submitted further that the obvious connection of Kolawole, JCA with the appellants as counsel who acted for them in suit No. AD/57/70 which relates to the same parcel of land as the subject matter of the appeal, ipso facto, disqualified him from participating in the hearing of the appeal. It was not conscionable for Kolawole, JCA to adjudicate on a matter in respect of which he had acted as counsel to the appellants as he had foreknowledge of facts relating to the parcel of land which is the subject matter of the appeal. His participation, it was further submitted, rendered the panel which heard the appeal at the lower court incompetent as the court below acted without jurisdiction in its hearing and determination of the appeal constituted in Appeal No. CA/I/70/89, having regard to the participation of Kolawole, JCA. Hence, the entire proceedings of the court below are a nullity. Learned counsel cited in support, the case of *Kenon v. Tekam* (2001) 14 NWLR (Pt. 732) 12 at 41 - 42. He urged us to allow the appeal and remit same for a re-hearing by the court below.

In his submission, learned counsel for the respondents stated that suit No. AD/57/70 was admitted by the trial court as Exh. B. And, in order to establish the allegation of bias against Kolawole, JCA, it had to be shown that the appellants were parties to Exh. B. It was submitted that the appellants were not parties in Exh. B. The appellants refused to name the parties to the suit in Exh. B wherein they claimed to have

been represented by Kolawole, JCA. Learned counsel for the respondents submitted further that Exh. B was tendered by the respondents during the trial to show that the appellants had previously testified in the said Exhibit B that they were customary tenants of the respondents on the land in dispute. The learned trial judge made a finding that the appellants were mere witnesses who did not have personal interest in the proceedings in Exh. B.

Further argument by learned counsel for the respondents is that the appellants must prove that the “Kolawole” in Exh. B is the same person as Kolawole JCA. The appellants failed to do so. There is absolutely nothing on record to show that “Kolawole” referred to in Exh. B is the same person as Kolawole JCA.

On the information that Kolawole JCA was purportedly the appellants’ counsel in Exh. B and that he fell out with the 3rd appellant Buraimoh Akinlotan, that did not emanate from any of the appellants but from their counsel and that constitutes hearsay and liable to be discountenanced. He referred to *Kala v. Potiskum* (1998) 3 NWLR (Pt. 540) 1 SC, in support. In respect of the portion wherein it was stated that there was a re-examination by Mr. Kolawole, learned counsel submitted that since the appellants were not parties to Exh. B, they could not have been and indeed were not represented by Kolawole JCA. He urged this court to find that Kolawole JCA did not have any connection, either latent or obvious with the appellants which could have disqualified him from discharging his adjudicative function when the appeal came before him in the court below. Learned counsel emphasized the point that the question of Kolawole, JCA having foreknowledge of the facts material and relevant to the main question that was tackled in the court below does not arise as it was not shown that in course of the proceedings in Exh. B, Kolawole, JCA acquired facts relevant and material to the main questions that were tackled in the court below. Learned counsel urged us to dismiss the appeal as the allegation against Kolawole JCA is unfounded.

Now, this is one of the rare situations where this court will sit on an appeal upon which the court below did not have the opportunity of making a pronouncement on the subject matter of the appeal. The allegation of bias was against the Hon. Justice Kolawole, JCA, of the court below who in fact presided and delivered the leading judgment. That allegation was never brought before the panel

that sat to decide the appeal on its merit. This is clear from the statement of facts contained in the brief of argument filed by the learned counsel for the appellants where he observed as follows:

“on the 13th day of April 1993 the Court of Appeal delivered its judgment and allowed the appeal. The leading judgment of the court was delivered by KOLAWOLE, JCA with MUKHTAR, JCA^B (as she then was) and R. D. MUHAMMAD, JCA concurring.

Shortly after the judgment was delivered the appellants intimated their counsel, Chief Tunde Elemide that KOLAWOLE, JCA who delivered the leading judgment was their counsel in respect of another action constituted as Suit No. AD/57/70 which relates to the same land as the subject matter of the appeal and that he fell out with Buraimoh Akinlotan; (the 3rd appellant).”

The learned counsel for the appellants stated further that on the 24th day of January, 1994, this court granted leave to the appellants to file and argue new grounds of appeal not previously canvassed before the lower court. Sequel to the leave granted by this court the appellants’ notice of appeal dated 8th day of February, 1994, was filed in this court on the 23rd day of February, 1994. It is in that Notice of Appeal where Ground One thereof raised the issue of the propriety of Kolawole, JCA being a member of the panel of Justices which heard the appeal against the judgment of the trial court.

I had to conduct a small research into the court’s main file and I confirm that the above assertion by learned counsel for the appellants is correct, where I found the panel that sat on the 24th of January, 1994, headed by Belgore, JSC (as he then was); Wali, Ogwuegbu, Onu and Iguh, JJSC; granted the leave sought by the appellants to file and argue new grounds of appeal not previously canvassed before the court below. This, perhaps, is what saves this appeal.

‘Bias’, generally, is that instinct which causes the mind to incline toward a particular object or course. When a judge appears to give more favour on consideration to one of the parties before him, either in his utterances, attention or actions, which is capable of perverting the cause of justice, or where fair hearing cannot be said to take place, all in favour of the party he supports covertly or overtly, then an allegation of bias against him can be grounded. That of course is a Judicial bias. But where a trial has been conducted in which the authority of the court has fairly been exercised in consistence with the fundamen-

tal principles of justice embraced within the conception of the process of law, then there is said to be a fair hearing. This contemplates of allowing the parties equal opportunity to present evidence; to cross-examine witnesses and for the trial court to make findings which are supported by evidence. See: *Omoniyi v. General Schools Board Akure* B & Ors (1988) 4 NWLR (Pt. 89) 449 at page 463; *Elike v. Nwakwoale & Ors* (1984) 12 SC 301 at 341; *Ariori v. Elemo* (1983) 1 SC 13 at 81; *Whyte v. Jack* (1996) 2 NWLR (Pt. 431) 407 at 443.

For an allegation of Judicial bias against the person of a Judge to succeed, the accuser must establish his allegation on some extra judicial factors/reasons as such where such factors or reasons are absent such 'perceived' judicial bias is insufficient to justify disqualifying a judge from participating in a case which is properly brought before him for adjudication. The allegation cannot be founded on mere conjecture or hearsay.

In the appeal on hand, the learned counsel for the appellants submitted that there was a defect in the competence of the court below because:

- E a) Kolawole JCA, was a counsel to the appellants in respect of same parcel of land in dispute, in suit No. AD/57/70,
- b) The proceedings in suit No. AD/57/70 in which Kolawole JCA acted as counsel to appellants was admitted in evidence as Exh. B and
- F c) That Kolawole JCA, in course of the proceedings in suit No. AD/57/70, he acquired facts relevant and material to the main questions that were tackled in the court below.

He who asserts must prove. The language of section 135 (1) of the Evidence Act, Chapter E14 LFN, 2004 is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See; *Adegoke v. Adibi* (1992) 5 NWLR (Pt. 242) 410; *Amodu v. Amode* (1990) 5 NWLR (Pt. 150) 356. It therefore dawned on the H appellants to prove the facts alleged as shown in paragraphs (a) - (c) above. The learned counsel for the appellants in his brief of argument marshaled the following arguments which I hereunder synopsized:

- i. That suit No. AD/57/70 related to a parcel of land which

formed the subject matter of the appeal

ii. That it is certain that Kolawole JCA having acted as counsel to the appellants in suit No. AD/57/70 had foreknowledge of the facts relating to the parcel of land which is the subject matter of the appeal.

iii. That it was improper and unconscionable for Kolawole JCA B having acted as their counsel (at the court of trial) in suit No. AD/57/70 to now sit as an appeal judge over the same subject matter.

Now the suit that was before the trial court and upon which judgment was delivered by that court is referred to in the record as “HCL/3/85. It was in this suit that the proceedings contained in a previ- C
ous suit No. AD/57/70 was tendered in evidence and admitted as Exh. B. Exh. B was a proceeding conducted by the customary court of western state of Nigeria in the Egbado Divisional Grade B court holden at Ado-Odo town, between 1970- 1974. D

The parties mentioned therein were:

Buraimo Ajayi Lasisi Oshoko (for themselves
and on Behalf of Ikoriko family)

Plaintiffs

AND

Remi Ogisanyin

E

Saula Ogisanyin

Defendants

In that suit (contained in Exh. B), one Owolabi Kolawole was shown to have written and signed his name at the end of Plaintiffs’ claim as plaintiffs’ solicitor. The trial customary court itself reflected the name of one “Mr. Kolawole” who appeared for the plaintiffs and his name kept on recurring throughout the proceedings including the conduct of examination in chief, cross-examination and re- examination of the witnesses called by the respective parties. F

In the suit before the High Court of Justice Ogun State, Ilaro G Judicial Division suit No. HCL/3/85 which admitted and marked the proceedings of the Customary Court mentioned above as Exh. B, the parties were named as follows:

1. Chief Fatal Ogisanyi - Anibire

2. Ajayi Oga-Ilu

H

3. Lasisi Ogisanyi-Anibire

Plaintiffs

4. Docas Taiwo Anibire

5. Mrs. Sarah Ojo (for themselves and
on behalf of the Ikoriko Ajangboju

Koniwo Agbogbu Family of Ado-Odo, Ogun State)

AND

1. Rafiu Fomiloju

2. Solomon Lanite

3. Buraimoh Akinlotan

B 4. Alh. Fasasi Adenle Defendants

5. Joshua Idirole

6. Salami Fatolu

7. Nasiri Olori (for and on behalf of

C All IJO AGBE tenants of the Ikoriko

Ajangboju Koniwo Agbogbo Family of Ado-Odo Ogun State)

The plaintiffs claim against the defendants in the Customary Court as contained in Exh. B reads as follows:

D “(1) Declaration of title according to native law and custom to all that piece and parcel of land situate, lying and being at Agbogbo under Ado-Odo, Egbado Division, Abeokuta Province, the boundaries of which are:-

Bottom - Ore River; Top-Idosaba Land, Left-Igbessa Land, Right-Matori Land.

E (2) Injunction to restrain the Defendants their servants and/or agents and assigns from any further entry on the said land.

(3) The value of the said land is about £500. Dated at Abeokuta this 24th day of August, 1970.

F (sgd) Owolabi Kolawole

Plaintiffs’ solicitor.”

The claim before the trial court in the suit which culminated into this appeal reads as follows:-

G “1. The plaintiffs claim against the Defendants jointly and severally is for: -

1) Declaration that the plaintiffs are entitled to a Statutory/Customary Right of Occupancy to that piece or parcel of land situate, lying and being at Orile-Agbogbo, Olorunleke, Ado-Odo, Local Government Area of Ogun State.

H 2) Declaration that the Defendants have incurred forfeiture under Native Law and custom of the land described above which they occupy as plaintiffs’ tenants, which land is shown on survey plan to be filed later.

3) An Order that the said Defendants, their servants or Agents

do deliver up possession of the said land to the plaintiffs.

4) Perpetual injunction restraining the Defendants their servants and/or agents from any further entry on the said land. Annual Rental value is N10.00."

It is very clear from the two suits compared as above that:

- a) The parties were not the same
- b) The subject matters of the claims were not the same
- c) The courts were not the same

Thus, no relationship whatsoever was established by the appellants between the two suits. The principles of estoppel by record can have no operation or effect on the appeal on hand. So, even if the Kolawole referred to by the Customary Court, and perhaps who signed as solicitor to the plaintiffs in Exh. B, (which is not conceded by the respondents), it is beyond any peradventure that the two suits were not the same neither in terms of the parties therein, nor the subject matter in dispute. Thus, the appearance of Mr. Kolawole in Exh. B, will have no legal consequence whatsoever on suit No. HCL/3/85 which gave rise to this appeal, there is no relationship between the two whatsoever. If there is, it is not shown to exist through evidence.

On the 'role' played by Mr. Kolawole as counsel, even if Kolawole JCA was indeed the same person who participated as a solicitor to the plaintiffs and they lost and the suit proceeded to appeal court wherein one of the judges was alleged to have played a role when he was a lawyer, such allegation can hardly disqualify him from participating as a judge except where it can be established that his participation is capable of perverting the cause of justice against the adverse party. In this case, if the appellant had won at the court of appeal, they would not have, perhaps, contemplated of raising the issue of bias against Kolawole JCA.

I think I need to draw attention of litigants generally and legal practitioners in particular that the allegation of bias is a very serious attack on the person and integrity of a judge. A counsel who decides to launch such attack on a judge must be prepared to show by concrete evidence in support of his allegation. If it can be reasonably inferred by a reasonable person sitting in court, from the circumstances that there is a real likelihood of bias against one of the parties on the part of the court, it must follow irresistibly that party's right to a fair hearing had been contravened and the decision on the issue between the parties

by the court in such circumstances should not be allowed to stand.

The test of determining a real likelihood of bias is that the court does not look at the mind of whoever sits in judicial capacity. It does not look to see if there was real likelihood that the judge would, or did, in fact, favour one side at the expense of the other. It rather, looks at the impression which would be given to the other people. The likelihood of bias, nevertheless, must be real, not a surprise, caricature or a game of chance.

Where the conduct of a judge or tribunal is impugned, the court or tribunal is not concerned with whether the judge/adjudicator was in fact biased. Where even the evidence adduced has pointed strongly to the inference that a judge or adjudicator was in fact biased, the court confines itself to the determination of whether a likelihood of bias has been established. The question is always answered by inference drawn from the circumstances of the case. The reason for this attitude of the court is that it would be unseemly for the court to purport to pry into the state of mind of any judicial officer. See: *Abiola v. Federal Republic of Nigeria* (1995) 7 NWLR (Pt. 405) 1.

It is my view that there was a fair trial at the court below which remained uninfluenced by anyone including the perceived Kolawole, JCA, who was accused of bias on the matter. That allegation, as far as I am concerned, cannot hold any water. It is baseless, unfounded and malicious against the person of Hon. Justice Kolawole, JCA (Rtd). Accordingly, this appeal lacks any merit. I dismiss it with N50,000.00 costs in favour of the respondents from the appellants.

MUSDAPHER JSC

I have read before now the judgment of my Lord Muhammad, JSC with which I entirely agree. For the same reasons so eloquently set out, which I respectfully adopt as mine, I too, dismiss this appeal and abide by the order for costs proposed therein.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother MUHAMMAD, JSC just delivered. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

It is very irresponsible of counsel to accuse a judicial officer of

bias or likelihood of bias on very false premise. It is utterly false to say that appellants were parties in suit NO AD/57/70 in which KOLAWOLE JCA was alleged to have acted as counsel prior to his elevation to the bench. The learned trial judge in Exhibit B found as a fact that the appellants herein were customary tenants of the respondents who testified therein as witnesses who had no personal interest in the subject matter. B

That apart, the appellants have not established the fact that the MR. KOLAWOLE who appeared and conducted the re examination in Exhibit B is the same as KOLAWOLE JCA. There is no nexus between the two persons on record. In short the act of the appellants in raising the issue in this appeal is clearly the act of a drowning man who is ready to cling to a straw in order to stay afloat. Since a straw cannot sustain his weight so as to keep him afloat, his act becomes an exercise in futility as he must surely drown. This is clearly the most useless appeal I have ever come across. C D

It is for the above reasons and the more detailed reasons in the lead judgment that I too dismiss the appeal for lack of merit and abide by the consequential orders made therein including the order as to costs. E
Appeal dismissed.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, I. T. Muhammad, JSC. I agree with the reasons ably advanced therein to arrive at the conclusion that the appeal is devoid of merit and should be dismissed. F

I wish to chip in just a few words of my own. The appellant's real complaint in this appeal relates to the sole issue of bias raised by them against Kolawole, JCA who presided at the Court of Appeal and wrote the lead judgment on 13th April, 1993. The issue couched on their behalf reads as follows:- G

“Whether the Honourable Justice Owolabi Kolawole was qualified to be a member of the panel which heard the appeal and delivered judgment at the lower court on the 13th day of April, 1993 in view of his connection with the appellants as their counsel in suit No. AD/57/70 which relates to the same parcel of land being the subject matter of the appeal.” H

Learned counsel for the respondents, at the onset, cleverly cited the case of *Adefulu v. Okulaja* (1998) 5 NWLR (Pt. 550) 435 at 447 where this court held that a Judge is precluded from hearing a case in any of the following circumstances:-

- B (a) When he has personal interest when he would seem to be a judge in his own matter; or
- (b) When having dealt with same issue and it comes or resurfaces when he is in a superior court and is being called upon to decide on appeal against his own decision; or;
- C (c) where because of some latent connection of his with either of the parties or all of them, it would be unconscionable of him to participate in hearing the case; or;
- (d) where generally his being a member of the tribunal would not appear to be in the interest of justice as he will not be seen to do D justice.

The appellants, with glee, thought they had a 'joker' anchored on circumstance (c) above. They allege that Kolawole, JCA had some latent connection with them which would be unconscionable of him to participate in hearing the case. Accordingly to the appellants, Kolawole, JCA E was their counsel in suit No. AD/57/70 which relates to the same parcel of land being the subject matter of the appeal. Undoubtedly, they had the burden to prove their allegation.

A certified True copy of the record of proceedings in suit No. AD/57/70 was admitted as Exhibit B at the trial court. In short, Ex- F hibit B is the bed-rock upon which their complaint will stand or fall. From a careful perusal of Exhibit 'B' it is clear that the appellants embarked upon falsehood when they asserted that they were parties in the said suit. They were not. The learned trial judge found as a fact G that the appellants were mere witnesses who did not have personal interest in the proceedings in Exhibit 'B'. The appellants did not appeal against the salient finding that they were mere witnesses in Exhibit B and that they did not have personal interest in the proceedings therein. The appellants are deemed to have accepted the finding H of the trial court. See: *Umanah v. Anah* (2006) 17 NWLR (Pt. 1009) 503 at 536.

Since the appellants were not parties to Exhibit B, how can they, under the sun, be taken seriously in their stance that Kolawole, JCA was their counsel in a case in which they were mere witnesses

who had no personal interest? Their allegation which rested on quick sand naturally collapsed.

So, the appellants have not been able to establish that Kolawole, JCA had some latent connection with them which made it unconscionable of him when he participated in the hearing of the appeal at the Court of Appeal. The ‘joker’ of the appellants missed their desired target. They cried wolf to no avail. Such was to their own consternation; in the main. In attempting to cast aspersion on the person of Kolawole, JCA, they got enmeshed in their malicious and evil design.

With the above and of course the detailed reasons adumbrated in the lead judgment, I have no doubt that the appeal lacks merit. It is accordingly dismissed by me. I endorse the order relating to costs as made by learned brother.

ADEKEYE JSC

I had read in draft the judgment just delivered by my learned brother, I. T. Muhammad, JSC. The background facts of this appeal are as stated by my Lord in the leading judgment. The respondents in this appeal were plaintiffs before the High Court of Ogun State, Ilaro Judicial Division where they claimed to be entitled to a statutory right of occupancy to that parcel of land situate, lying and being at Orile-Agbogbo, Olorunleke, Ado-Odo Local Government Area of Ogun State. The trial court dismissed the claim of the plaintiffs. The respondent appealed to the Court of Appeal, Ibadan. In the leading judgment of the court delivered by Kolawole JCA (now deceased), the Court of Appeal allowed the appeal. After the judgment, the respondents in the appeal, who are now appellants before this court, informed their counsel that my lord who delivered the leading judgment, Kolawole JCA was their counsel in another action, Suit No. AD/57/70 which relates to the same land. The certified True Copy of proceedings in Suit No. AD/57/70 was admitted in evidence as Exhibit B at the trial court. Reference was made to the portion in Exhibit B - which states “RE EXAMINATION BY MR. KOLAWOLE” (Vide page 123 of the Record).

The appellants filed an appeal against the judgment of the lower court to this court. He filed an application for leave to file and argue new grounds of appeal not previously canvassed before the lower court. The lower court granted the leave on the 24th of January 1994.

In the Notice of Appeal filed on 23/2/94, the appellants raised the issue of propriety of Justice Kolawole, JCA being a member of the panel which heard and determined the appeal against the judgment of the trial court when he had earlier represented the appellants as counsel in respect of the same land which forms the subject-matter of this appeal.

The inevitable sole issue for determination reads -

“Whether the Honourable Justice Owolabi Kolawole was qualified to be a member of the panel which heard the appeal and delivered judgment at the lower court on the 13th day of April 1993 in view of his connection with the appellants as their counsel in Suit No. AD/57/70 which relates to the same parcel of land being the subject-matter of the appeal.”

The argument and submission of the appellants was that there was a defect in the competence of the Court of Appeal, Ibadan Judicial Division when it heard and determined Appeal No. CA/1/70/89 as Kolawole JCA who presided at the hearing of the appeal was disqualified from adjudicating on the appeal in view of his prior role as counsel to the appellants in respect of the same parcel of land. The appellants concluded that it is certain that Kolawole JCA, having acted as counsel to the appellants in Suit No. AD/57/70 had foreknowledge of facts relating to the parcel of land which is the subject-matter of the appeal. Foreknowledge of fact in such circumstance is an aspect of bias, as he did not come to the dispute with an openness of mind that would enable him to hold an even scale and he should therefore have been disqualified from hearing the appeal.

One of the twin pillars of the Rules of Natural Justice is the rule against bias, which is expressed in the maxim *Nemo Judex in causa sua*. It means that no one should be a judge in his own cause. Fairness of proceedings require that a person who is tainted by likelihood of or actual bias should not take part in the decision making process where the adjudicator is under a duty to act fairly. For instance, an adjudicator must not have any direct financial or proprietary interest in the outcome of the proceedings. In the process of adjudication, there must not be reasonable suspicion of bias or likelihood of bias. Other factors which could show a real likelihood of bias are: -

- (1) Hostility or strong personal animosity towards a party.
- (2) Personal friendship, family or professional relationship.

A bias must demonstrate a real likelihood of an operative prejudice whether conscious or unconscious. There must be cogent evidence as opposed to mere vague suspicion to support a contention of real likelihood of bias.

Bamigboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg. 270.

Yabugbe v. C. O. P. (1992) 4 NWLR pt. 234 pg. 152. B

Cooper v. Wilson (1937) 2 ALL E. R. pg. 726.

R. v. Hendon R. D. C. Exp. Cholley (1933) 2 K. B. pg. 696.

Ononuju v. Ononuju (1991) 5 NWLR pt. 192 pg. 479.

Adio v. A-G Oyo State (2000) 5 SC pg. 87.

Black's Law Dictionary Eight Edition defines judicial Bias as – C

“A judge’s bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or refusal the judge’s bias usually must be personal or based on some extrajudicial reason. In the case Kenon v. Tekam (2001) 14 NWLR (pt. 732) pg. 12, Bias is defined as -

‘An opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the court so influenced will be unable to hold an even scale.’ E

On the test for determining real likelihood of bias, the court does not look at the mind of the Justice himself or at whoever it may be who sits in a judicial capacity. It does not look to see if there was real likelihood that he would, or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to the other people. Even if he was as impartial or could be, nevertheless if right minded persons think that in the circumstances there was a real likelihood of bias on his part, and then he should not sit. And if he does sit, his decision cannot stand. The reason is plain enough. Justice is rooted in confidence and confidence is destroyed when right-minded people go away thinking that the judge was biased.” F

Deduwa v. Okorodudu (1976) 1 NWLR pg. 236.

Anosike v. Igbeke (1999) 8 NWLR pt. 616 pg. 686. H

Metropolitan Properties Co. v. Lannon (1968) 3 ALL E. R. pg. 304.

Onigbede v. Balogun (2002) 6 NWLR pt. 762 pg. 1.

Abalaka v. Minister of Health (2006) 2 NWLR pt. 963 pg. 105.

I will summarize the foregoing to mean that the test for likelihood of bias is that there must be circumstances from which a reasonable man would think it likely or probable that the decision maker would or did in fact favour one side unfairly.

In the instant appeal, the complaint of the appellants was that Justice Kolawole JCA, who presided at the hearing of the appeal and wrote the lead judgment was disqualified from adjudicating on the appeal due to his foreknowledge of the primary facts relating to the parcel of land which was the subject-matter of the appeal. He was counsel to the appellants in another suit No. AD/57/70 which relates to the same parcel of land as the subject-matter in the appeal.

Where an allegation of bias is established by evidence or acknowledgment, it disqualifies a judge from participating in the matter placed before him. An allegation of bias or likelihood of bias against a judge is usually a very serious matter not to be taken with nonchalance. It must be supported by clear, direct, positive, unequivocal and cogent evidence from which real likelihood of bias could be inferred and not mere suspicion. In the instant appeal, the appellants failed to adduce direct and positive evidence to relate the Mr. Kolawole mentioned on page 123 of the Record with Kolawole JCA, who presided over the panel which heard the appeal.

The parties in suit No. AD/57/70 tendered as Exhibit B and in the suit now CA/1/70/89 before the appeal court are not the same. The appellants were not parties but witnesses in suit No. AD/57/70-Exhibit B. The evidence of likelihood of bias available before this court being at best mere suspicion or mere conjecture is too remote and therefore unacceptable to disqualify Kolawole JCA from adjudicating in appeal CA/1/70/89 on the allegation of bias or real likelihood of bias.

Anyebe v. Adesiyun (1997) 5 NWLR pt. 505 pg. 403.

Onigbede v. Balogun (2002) 6 NWLR pt. 762 pg. 1.

Omega Bank (Nig.) Plc v. OBC Ltd (2002) 16 NWLR pt. 794 pg. 483.

With the fuller reasons given by my learned brother I. T. Muhammad, JSC in the leading judgment, I also dismiss the appeal. I adopt the consequential orders made as mine.