TRIAL ADVOCACY LECTURES

**ETHICAL DUTIES OF TRIAL LAWYERS**

A trial advocate owes certain duties to the persons they interact with in the course of the trial, i.e. the client, the court etc.

DUTIES OF A TRIAL ADVOCATE TO THE CLIENT

1. **To be zealous advocates on behalf of clients**

The advocate should act as the client's mouthpiece. He should ensure that at least the outcome of the case should be favourable to his client. He should also have a good grasp of the law and an ability to think on his feet. A trial advocate should as far as possible and within the bounds of the law zealously and fearlessly defend the interests of his clients.

The duty of a barrister is to "promote and protect fearlessly and by all proper and lawful means the best interests" of the client[1] without regards to the barrister's self interest or to any personal consequence.[2] The advocate's duties must be within the bounds of the law, as no professional privilege exists if the actions of the advocate were to help the client in the commission of a criminal act.[3]

He ought not to engage in conduct that jeopardizes the client's interests. He should shun mediocrity at all times regardless of the client's status in society- financial or otherwise.

2. **It is a duty for an advocate to defend his client.**

He must do so to the conclusion of the suit even if that client fails to pay his fee. Once a suit is concluded an advocate is permitted to **sue** for his fees. This is the correct procedure of dealing with clients. An advocate should never abandon a case on the grounds that he had not been paid his fee but as stated above **must** conclude the suit to its finality then sue for his fees- ***J.P. Machira v Abok James Odera*** as per Ang'awa, J.[4]

3. **Duties to Disclose and Keep client informed**

The duty of keeping the client informed is an important duty and one that the surveys show is a major reason for criticism of the profession. The duty to disclose the likely success or otherwise of the actions that would be taken by the lawyer and alternatives that might be available could

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[1]Butterworths, Halsbury's Laws of England, vol 3(1) (2005 reissue) 3 Professional Practice and Conduct, 'Duty to the lay client' [510]

[2]***Rondel v Worsley***[1969] 1 AC 191 at 227 as per Lord Reid

[3] Section 134- 137, Evidence Act, Cap 80 of the Laws of Kenya

[4][2006] eKLR

have been given greater emphasis. This is so especially in the context that litigation should be a remedy of last resort.

An advocate who fails to honestly disclose the true chances of success puts his interests before those of his client as he would be seeking to earn higher fees through litigation rather than properly advising a client on the available alternatives that may be cheaper and more expeditious.

**4. Loyalty**

The advocate's loyalty must be undivided. Advocates are committed to acting in the interests of the client to the exclusion of their own interests, or the interests of any third party.

An advocate must not betray the client's trust by misappropriating client's money or assets. This is expressly provided for in section 80 of the Advocates Act. The principle was also upheld in the recent case of ***Kinyanjui v Republic***[5].

**5. Duty to maintain clients' confidences.**

The advocate-client confidentiality is protected under section 34(1) of the evidence Act which states:

*"No advocate shall at any time be permitted unless with the client's express consent, to disclose ant communication made to him in the course and for the purpose of his employment as such advocate..."*

The Evidence Act establishes professional privilege between an advocate and a client.[6] This is to enable the work of an advocate as an agent of the client. In ***Omari v Hassan***[7], the appellant was convicted of murder. During trial, counsel for the accused informed the Court that the accused person had refused to testify under oath, against his counsel's advice. The disclosure by the advocate was held, on appeal, to be a breach of professional privilege, and the trial court should not have allowed it to affect its mind in the deliberations.

However, this privilege is not absolute and it may be overlooked where the disclosure pertains[8]:

i) any communication made in furtherance of any illegal purpose
ii) any fact showing that a crime or fraud has been committed since the commencement of employment of the advocate

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[5] (2010) eKLR
[6] *ibid*
[7] (1956) 23 EACA 580
[8] An advocate is first an officer of the court, then a confidant to their client

The solicitor holds documents in the right of his client, and can assert in respect of its seizure no greater authority than the client holds himself. In ***R v Peterborough Justices, ex parté Hicks***, some solicitors, acting on behalf of an accused person, were given documents by the accused person, one of which was a forged document granting power of attorney to the accused. The solicitors went to court to challenge the seizure of the document by the police, under search warrant, claiming that the document was protected by legal privilege. It was held that as the client possessed no legal authority to hold it, then the claim must fail.

6. **Duty to carry out instructions**

As the legal advisor, it is key that you remain in control. If in your considered opinion, the client's instructions are unlawful and/ or unethical, it is your duty to;

a. Advise the client accordingly, if they insist,
b. Decline to carry out the instructions

7. **Duty to act competently and with due diligence.**
8. **Duty to act with utmost good faith.**
9. **Duty to account to the client.**

This also involves giving the client good notice when opting out of service of the client, and also refunding any moneys paid in excess of service, where necessary.

10. **Duty to account for any moneys received on behalf of the client**
11. **Duty to advice the client of any requisite payments over and above their legal fees.**
12. **the duty to expedite proceedings**

Justice delayed is justice denied. An advocate should at all times endeavor to ensure that client's matters are concluded in a timely fashion. He must avoid unnecessary delays which would be prejudicial to a client's interests.

This duty is also owed to the court.

13. **Self-Dealing**

An advocate is prohibited from what is known as self-dealing with a client. In other words, a lawyer cannot misuse to his benefit the assets of his client.

**14. It is a duty of an advocate acting for both parties in a transaction not to act against one for the other**

If an advocate acts for both parties in the in the same transaction, he may not act for one against the other. This was stated by the Court of Appeal in ***King Woollen v Kaplan & Stratton***[9]. The decision was upheld by the same court in ***Uhuru Highway Development Ltd & 3 others v Central Bank of Kenya & 4 Others***[10], where an advocate who had acted for both parties in the preparation of a charge was barred by the Court of Appeal from appearing as a witness for one party against the other in an ensuing dispute before the High Court, which action was also proscribed by the Advocates (Practice) Rules, Rule 9.

**Duty to charge reasonable fee:** in accordance with advocate's standing at the bar

CASES

- *Norman Wachira v Republic HCCA 224/07*
- *Pauline Kiprop and 3 Ors v Julius KipropSuccession Cause 189/98 NC Nakuru,*
- *Malindi Air Service Ltd and Anor V Halima Abdinoor Hassan CA 103/99*
- *Caltex Oil (Kenya) Ltd v Inland Petroleum Ltd and Anor HCCA 58/04* Mary Kasango J.

**Conflict of Interest**

- *Charles GitongaKariuki v Akuisi Farmers Co. Ltd HCCC 197/07* :Kimaru J Nakuru
- *Simba Hills Farm Ltd v Sultan HashamLalji and 5 Ors HCCC 22/06:*Gacheche J.
- *National Bank of Kenya Ltd. V Peter KipkoechKorat and Anor HCCA 77/97*
- *Francis Mugo and 22 Ors v James BressMutheye and 3 Ors Nakuru HCCC 122/05:* Muthinga J.
- *H. F. Fire Africa Ltd v AmrGharieb Nairobi HCCC 665/03* Emukule J.
- *Jackson K. Kivinda v United Insurance Co. Ltd Nairobi HCCC 1065/02:*Njagi and KasangoJs.
- *Trust Bank Ltd v Midcor Kenya Ltd and 4 Ors, Nairobi HCCC 336/01:* Mohammed Ibrahim
- *Ndeto v Gachiri, HCCA 714/02:* J. B. Ojwang J.
- *Kagunyi v Gathua and Anor HCEP 3/03:*Mwera J.

9Civil Appeal No. 55 of 1999 (Unreported)
10(2003) KLR

1. **Duty to uphold the administration of justice**

As an officer of the court, an advocate should only use proper and lawful means to promote and protect the interests of his clients. Advocates must not knowingly mislead the court. He or she should not fabricate evidence, coach witnesses to deceive the court or support any form of perjury.

In ***Abraham v Justsun***[11], Lord Denning MR explained counsel's duty as follows:

> "[It is an] advocate's duty to take any point which he believes to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court."

2. **Fairness:**

Only a lawyer who is fair can be aptly described as an officer of the Court. The duty of fairness is inherent in the nature of the work performed by lawyers. Lord Reid summed it up in ***Rondel v Worseley***[12]:

> "As an officer of the Court concerned in the administration of justice, the advocate has an overriding duty to the Court, to the standards of his profession and to the public, which may and often does lead to a conflict with his client's wishes...accordingly an advocate has a duty to be fair, fair to the Court and fair to the public. So important is fairness to the Court and the public that the public duty prevails over the duty to the client if there is a conflict. It is by fairness that the public judges the profession."

3. **To obey Court Orders:**

The advocate must maintain utmost respect for court orders as the dignity of the Court cannot be sacrificed at the altar of the client. Advocates need to avoid issues like:

i. Obtaining and executing decrees without sending the draft to the other side for approval- ***MwangiMbothu v GachiraWaitimu***[13];

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[11][1963] 2 All ER 401 at p.404
[12] (1969)A.C. 191
[13]CA Civil Application No. NAI 23 of 1993

ii. Showing the client how to circumvent Court orders and disobey injunctions as was the case in ***Shuck v Gemer***[14]

iii. Obtaining ex parté injunctions without full disclosure as was the case in ***Tiwi Beach Hotel v Staum***[15]

4. **Courtesy**

An advocate should at all times uphold the dignity of the court through respectful conduct and courteous speech. He should never adopt a confrontational view with the Court, even when there is reason to believe that the judicial officer's position is at odds with the law.

5. **Duty to expedite proceeding**

An advocate should make efforts to ensure that he or she does not waste the courts time through unnecessary proceedings and technicalities.

An advocate should also aid in speedy decision-making by not subjecting the judge to excessive material or more documents than strictly necessary which do not facilitate decision-making or speedy resolution. Without detracting from his duty to his client, counsel can and should exercise in the interests of justice as a whole a proper discretion so as not to prolong cases unnecessarily. In ***Ashmore v Corpn. Of Lloyd's***[16] Lord Templeman said

> "The parties and particularly their legal advisers in any litigation are under a duty to cooperate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of the counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination."

6. **A lawyer should not seek to influence a judge, tribunal or other official by means prohibited by law**

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[14] (1846) 2 Ph 113
[15] (1940) 2 KAR 189
[16] [1992] 1 WLR 446, at p.453

**Which takes precedence? The trial advocate's duty to the court, or his/her duty to a client?**

Often times, an advocate's duty to his or her client conflicts with that to the court. This arises in instances such as, when a client confesses to having committed a crime, when a clients' intends to give a false testimony or when an advocate is in possession of facts which may prejudice his clients' case.

This begs the question: which duty is supreme?

1. The jurisprudence with regard to this matter in most commonwealth jurisdictions appears to incline to the fact that the duty owed to the court is higher than that owed to the client.

In***Giannarelli v Wraith***Mason CJ said[17]:

> "The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest...The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. "

The rationale is that the administration of justice in an adversarial system depends in very large measure on the faithful exercise by an advocate's independent judgment in the conduct and management of the case. The court relies on the integrity of the advocates as the finding of facts is entirely based on the opposite views put forward by opposing advocates. In *Arthur Hall v Simons*[18], Lord Hoffmann stated at p.687 and p.693:-

> "Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice ... The substantial morality of the English system of trial and appellate procedure means that the judges rely heavily upon the advocates appearing before them for a fair presentation of the facts and adequate instruction in the law. **They trust the lawyers who appear before them**; the lawyers trust each other to behave according to the rules, and that trust is seldom misplaced... "

In***re Integration of Nebraska State Bar Association***[19] it was stated that a lawyer's primary duty is to assist judges and all court staff in the operation of the court system and administration of justice. It was further stated that **an attorney owes his or her first duty to the court. He or she**

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[17](1988) 165 CLR 543, 556-7

[18][2000] 3 All ER 673

[19]133 Neb. 283, 289, 275 N.W. 265, 268 (1937)

**assumed his or her obligations toward it before he or she ever had a client**. His or her oath requires him or her to be absolutely honest even though his or her clients' interests may seem to require a contrary course. The [lawyer] cannot serve two masters and the one undertaken to serve primarily is the court.

It is also argued that an advocate is not the servant of the client that engages him, **but the true position is that he is that he is the servant of justice itself**. He is thus in a sense a member of the body judicial and hence it follows that he can commit no graver betrayal of his function than to deceive the court by means direct or indirect.[20] This implies that when there is a conflict between the advocate's duty to the client and to the court, the duty to the court, which is the agent of justice, shall reign supreme.

2. Public policy as well seems to lean towards this view. This is well illustrated by a British case where Lord Brougham in the 19th century when defending Britain's Queen Caroline, who faced an attempt by her husband, King George IV, to obtain a divorce by charging her with adultery, thus ruining her name and putting at risk her fortune and position in society. Lord Brougham let it be known that in the queen's defense he would prove that the king himself was guilty of adultery and had secretly married a Catholic, thus putting at risk his title to the throne. His tactics outraged many who felt he went beyond the bounds of ethical advocacy. He justified his conduct as follows:*"[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons. And in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."* Later on at a dinner,[...] the most respected Chief Justice Cockburn looking disapprovingly at Brougham, Cockburn stated that while it was appropriate to be a zealous advocate, a lawyer should not be an "assassin."[21]
   in ***Rondel v Worsley***[22] it was stated that in addition to the duty owed to his client, a barrister owes "...an overriding duty to the court, to the standards of his profession, and to the public."

3. The law equally provides that an advocate is an officer of the court as per S. 55 of the Advocate's Act and therefore duty bound not to mislead the court regardless of the client's

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[20] Lawyer's duty towards his Client :NishigandhaMasurkar

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[22] *ibid*

interests. In acting in the best possible way for the client, the advocate must, while being fearless in the cause of the client, do so within the law.

**The compromise:**

Courts however have not entirely been oblivious of the advocate's duty to the client. Some have attempted at striking a balance between these conflicting duties in a way which will prevent the Court from being misled or the client from being placed unnecessarily in jeopardy.

In ***R v Davis***[23], the appellants appealed against their convictions, on the grounds that certain prosecution witnesses had been kept anonymous from them. The witnesses had attended the trial for cross-examination and were observed by the judge and jury, but had given their evidence from behind a screen and had their voices disguised to prevent the appellants identifying them. This had raised an issue as to whether counsel for the appellants should be permitted to see the witnesses (which would assist them in their task of cross-examining) even though their clients could not see the witnesses. Counsel were concerned about their conflicting duties, namely,

(a) A duty to the court to keep the witnesses anonymous (breach of which duty would be a contempt of court), and

(b) A duty to their client to describe the witnesses to them (on the basis that this was relevant information).

The court did not in this case prefer the barrister's duty to the court to the barrister's duty to his client. The court held that the barrister could perform his duty to both by cross-examining from behind the screen. However, if the client wished to obtain the possible benefits of his barrister being able to see the witness' demeanour when cross-examining, then this could only take place if the client consented to a limitation on the barrister's usual duty to disclose all relevant information to the client.

***Oceanic life Insurance v***

The duty to the Court tends to be framed in such a way as to communicate the Public Interest that confidence in the institution (Court) be maintained, therefore overrides the other.

**Competition between the duty of the advocate to lay before the court all relevant evidence, and the duty to their client not to reveal communication between them**

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[23][2006] EWCA Crim 1155

In ***Arthur Hall v Simons***[24], Lord Hoffmann stated[25] that advocates "also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case." In view of these "divided loyalties" to the Court, in which circumstances does one duty override the other?

In ***Waugh v British Roads Board***[26] the Plaintiff's husband was an employee to the board, and was killed while in the course of his duties in an accident. An internal investigation was done and a report written, headed "For the Board's Solicitor". The Plaintiff asked the Court to order discovery of the report. The Board claimed professional legal privilege over the report. The Board based this on the fact that the report was for two purposes:

i. To establish the cause of the accident; and

ii. To enable the board's solicitor to advise in the litigation to ensue.

The Court ordered discovery. The Board appealed. The Appeal Court overturned that decision. The Plaintiff appealed. The House of Lords held that there were two competing principles involved:

i. All relevant evidence should be made readily available; and

ii. Communication between a client and his lawyer should be allowed to remain confidential.

It held that public interest was best served by **confining the privilege within narrow limits**. A document was therefore only privileged from production on the basis of the legal professional privilege if the dominant purpose for which it was prepared was that of submitting it for advice. Since the purpose for the report was for advice and legal use was merely subsidiary, the House of Lords held that the Board's claim would fail.

## DUTIES OF AN ADVOCATE TO AN OPPOSING COUNSEL

Advocates owe a duty to fellow advocates in the profession, these may be dubbed as the general duties of good faith and courtesy. These duties extend from the pre-trial stage up to the point of sentencing and/or acquittal. They include:

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[24] [2000] 3 All ER 673
[25] at p.687 and p.693
[26] (1979) 2 All E.R. 1169

1. Advocates must specifically agree with the opposing counsel reasonable requests concerning trial dates, adjournments, any waiver of procedural formalities and any similar matters that do not prejudice the right of the client.
2. Advocates must not unnecessarily embarrass opposing counsel by not giving adequate notice of one's legal argument and authorities.
3. Advocates are advised to maintain a professional manner, and would be well advised to remember the objectivity and detachment inherent in professionalism. They therefore must not send correspondence to, or communicate with the opposing counsel in a manner that is abusive, offensive, or otherwise inconsistence with the proper tone of a professional communication.
4. Duty to seek consent from opposing counsel when introducing new evidence after substantial hearing of the case has been completed.
5. An advocate also has a duty to deal promptly with communication from professional colleagues (opposing counsel). Communications that require an answer must be answered promptly. Similarly advocates are not permitted to communicate or to negotiate a matter directly with any person who is represented by another lawyer except with the express consent of the opposing counsel.
6. An advocate should not falsify evidence, meaning that he has to be truthful to the opposing counsel. He/she should honor his/ her word. Fraudulent or deceitful conduct by one advocate towards another will render the offending advocate liable to disciplinary action.
7. Advocates must not unlawfully obstruct another party's access to evidence unlawfully alter or conceal a document or other material having potential evidentiary value nor shall he assist another person to do so
8. They should not knowingly disobey an obligation under the rules of a tribunal except in the case where it is an open refusal based on an assertion or argument that no such legal obligation exists in the circumstances or that its unconstitutional.
9. Advocates must also not make a frivolous discovery request or fail to make diligent effort to comply with a legally founded discovery request by an opposing party.
10. Duty to not communicate with the judicial officer without the presence of opposing counsel, unless in circumstances allowed by the Court.

DUTY TO WITNESSES

An advocate should thoroughly investigate and marshal the facts; therefore an advocate may properly interview any person, because a witness does not 'belong' to any party. His duties to a witness include the following:

1. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. However an advocate may tell the witness that

he or she does not have any duty to submit to an interview or to answer questions propounded by the opposing counsel unless required to do so by judicial or legal process.

2. Advocates should not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce. Advocates should not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness. However, except when legally required, it is not an advocates' duty to disclose any evidence or the identity of any witness.
3. Advocates should not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witnesses' testimony or the outcome of the case. In addition, an advocate may advertise for witnesses to a particular event or transaction but not for the witness to testify to a particular version that advances his case.
4. An advocate has a duty to inform a witness about the date a case is going to be heard promptly
5. An advocate must furnish the witnesses with the full details of the case so that their testimony can be correct.
6. An advocate must not barger witnesses with unreasonable questions. He or she should therefore be tactful and gentle. ***Sallazar v Republic***: the Court deplored an advocate's disrespectfulness towards witnesses and the Court at large.
7. He should not make baseless attacks on a client's character. There must be sufficient reason for attacking a witness' character before launching such an attack- (s) 158, Evidence Act.
8. The Advocate should refrain from asking indecent, scandalous, insulting or annoying questions. The Court has discretion to restrain such questions, despite the fact that they may reveal relevant information to the case- sections 159-160, Evidence Act.
9. Moreover, an advocate should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, they should ask questions intended legitimately to discredit the assertions of the witness, but not to insult or degrade them.

## CONFLICT OF INTERESTS

The general rule when it comes to conflict of interests is that an advocate is not supposed to represent a client in the event that such representation will bring about a conflict of interests.

Conflict of interests can take two forms:

a) Conflict of duty and interest ( between lawyers and clients)

b) Conflict of duties ( duty to different clients, former clients or a new client)

It may arise where;

1. Representation of one client would directly, adversely affect the representation of another client.
2. Representation of one client would materially amount to the representation of another, a former client or a third party.
3. The advocate has a corresponding interest in the subject matter of the suit.
4. There exists a fiduciary relationship between the advocate and the client.

In such circumstances, the advocate should withdraw from acting, good practice entails that upon realization of this eventuality, an advocate should withdraw from any case which may have the effect of compromising his objectivity and impartiality.

An advocate ought not to represent more than one client in the same case when the same case when the clients' interests are in conflict or there is a possibility of the conflict arising. In;

***King Woolen Mills Ltd v Kaplan and Stratton Advocates***

The court held that: *'once a retainer is established the general principle is that an advocate should not accept instructions to act.... Where there is a conflict of interests.*

Another case that was used to guide the court was the case of

***RukesenvsElius, Munday and Clerk***[27]

It was observed that;

> "a solicitor who has been retained by a client is under an absolute duty not to disclose any information of a confidential nature which has come to his knowledge by virtue of a retainer, and to exercise the duty of utmost good faith towards his client not only for so long as the retainer lasts but even after the termination of the retainer.."

The test whether a conflict of interest will arise was laid down by Hardy M.R in the ***Rukusens case***, as being that, **a court must be satisfied that the real mischief and real prejudice will in all human probability result if the solicitor is allowed to act... "**

**JUDICIAL DISQUALIFICATION/RECUSAL OF A JUDGE**

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[27](reported in orderly on Solicitors 7th Ed pg.70)

Judges form the core of any justice system. Their conduct in terms of independence and impartiality therefore directly impacts on the perceptions of the common citizenry with regard to success or failure of such an institution. It is therefore important as correctly observed by Chief Justice Hewartthat,

> "... a long line of cases shows that it is merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

The rule of judicial disqualification therefore gains its basis from the aforementioned fundamental principle. Judicial disqualification or recusal refers to the act of abstaining from participation in an official action such as legal proceedings due to conflict of interest of the presiding court official. The rule on disqualification of a judge originates from Common Law rules where it was a settled rule that if a judge had pecuniary interest in a case he was disqualified from sitting in that case.[28] It is important to note that at that time, the Common Law recognized no other grounds for judicial disqualification.[29]

GROUNDS FOR RECUSAL

- If the judge has a personal interest in the outcome of the case or has a family member or close relative who is a party to the case
- If the judge has more than a minimal/ nominal financial interest in the outcome of the case
- If the judge has a close social relationship with a litigant, lawyer, or witness in the case
- If the judge was previously a lawyer on the same or a related case or was associated with the lawyers on the case or a related case
- If the judge previously acted for one of the parties to the suit
- If the judge has been a material/ potential witness on the case or a related case
- If the judge has prior personal knowledge of disputed facts in the case
- If the judge is directly or indirectly party to the suit
- If the judge has dealt with the matter previously, e.g. at trial and then at appeal level

[28] James Bleil and Carol King, Focus on Judicial Recusal: a Clearing Picture, 1994, 25 Tex.Tech L. Rev. 773, 775.
[29] See *Ibid.*

- If the judge has already expressed opinion relating either to the specific case, or another case relating to the same parties, or another based on the same subject matter.
- In other jurisdictions where the judge is elected such as the United States, a ground of recusal would include when the judge's campaign coordinator or campaign committee member is a party or lawyer in the case
- The Judge or judge's spouse, or someone within the third degree of relationship to either of them, or to the spouse of such a person, is (a) a party or officer, etc., of a party, (b)a lawyer in the case, (c) known by the judge to have an interest that could be substantially affected, or (d) known by the judge to likely be a material witness.[30]
- If the judge was previously a partner to one of the advocates' firms, there is a need to consider whether a conflict of interest may arise. However, this does not automatically give rise to a need for recusal.
- Personal animosity
- Any other reason that may give likelihood of impartiality

The aforementioned instances of judicial recusal are specifically provided for by law in other jurisdictions. Examples include Rule 25 of the Idaho Criminal Rule and Section C of the North Carolina Code of Judicial Conduct which lists specific instances of judicial disqualification, although the same is only illustrative in nature.[31]

**Court of Appeal** states that if grounds exist for any officer to recue himself, be free to make an application. However we must avoid making frivolous or vexatious applications. Applications should be in the pursuit of the course of justice.

**Legislative Prescription**

In the Kenyan scenario, such a provision in the law providing guidance as to the specific instances of recusal is not in existence. This lacuna in the law has therefore been remedied through judicial prescription as it will be discussed later. However, this is not to underscore the fact that there are rules that govern the procedure of making an application for judicial recusal.

Such a petition is made with the support of provisions relating to the contravention of fundamental rights and freedoms, particularly the right to a fair hearing as provided for in the Constitution of Kenya. The requisite rules are provided for under Rules 11, 12 and 13 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and

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[30] Michael Crowell, Recusal, Administration of Justice Bulletin, September 2009, 1.
[31] See *Supra* n. 3, 1.

Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (known as Legal Notice 6 of 2006). Hence reading S. 77(9) of the Constitution read with Rules 11, 12 and 13 of LN 6/06 a Petition alleging or apprehending contravention of fundamental rights may be brought by an individual person (includes a incorporated person[32]) directly to the High Court[33] by way of a Petition,[34] which shall be supported by an affidavit[35] and any other supporting documents.[36]The laid down procedure is provided in Rule 23 of the LN6/06 that such a Petition should be taken to the challenged Judge whereby he/she makes reference of the matter to the CJ.

PROCEDURE FOR MAKING AN APPLICATION FOR RECUSAL

1. Oral application - If a conflict of interest is straightforward, e.g. noticing that the judicial officer was previously an advocate in the matter, an application can be made orally in court.
2. Formal application - This is done by a notice motion in court. It needs to be accompanied by an affidavit and the relevant evidence.
3. If dissatisfied with an officer's refusal to recuse themselves, an appeal is allowed.

**Judicial Prescription**

It is now conventional wisdom that judge-made law begins where legislative prescription has failed and seeks to seal any vacuum created thereof. The case of judicial disqualification is one such example where the Kenyan Courts have stepped into the shoes of the lawmakers to enunciate and/or provide for principles that govern judicial recusal. It is therefore imperative to take a journey through the corridors of justice.

One of the most conclusive authorities in this subject-matter is the case of ***Home Pack Caterers v. The Hon. A.G. and Others***.[37] The issue in the instant case relate to the recusal of **Hon. Justice Ojwang** who was the presiding judge in **HCC 83/03**. In the instant case the facts are that the Plaintiff relied on a draft bill on HIV and AIDS that had been prepared by a Task Force where the Judge in question was one of the consultants. The contention of the Petitioner is that based on the nature of the issues in HCC 83/03 and the reliance on the Task Force Report, the judge may have certain dispositions and inclinations to certain issues that were dealt by the Task Force.

[32] See Home Pack Caterer's v. The Hon. The A.G. and Others, Petition 671 of 2006, 16; See also S. 123 of the Constitution of Kenya
[33] Legal Notice 6 of 2006, Rule 11.
[34] *Ibid.* Rule 12.
[35] *Id.*, Rule 13.
[36] *Id.*, Rule 14.
[37] Petition 671 of 2006

Hence, the Petitioner had an apprehension of not receiving a fair hearing. The case was first brought by way of an originating summons before allowed to be a full hearing.The Petition was brought under S. 77(9) of the Constitution, Rules 11, 12 and 13 of the .Legal Notice 6 of 2006.

After an exhaustive analysis of judicial authorities within and without Kenya, the Court adopted and approved 10 benchmarks as set out in ***Locabail (UK) Ltd v. Bayfield Properties Ltd***[38]:

1. In any case of automatic disqualification on the authority of ***Dimes*** and ***Pinochet***[39] cases a a judge should recuse himself from the case before any objection is raised;
2. The same should be the case, if for solid reasons, a judge feels embarrassed hearing a case;
3. It is highly desirable, if extra cost, delay or inconvenience is avoided by the judge recusing himself at the earliest stage before the eve of the day of hearing.
4. Parties should not be confronted with a last minute choice between adjournment after a valid objection.
5. In any case not giving rise to automatic disqualification or personal embarrassment, where a judge becomes aware of any matter that could arguably give rise to a real danger of bias, it is desirable for disclosure to be made to the parties in advance of hearing. If an objection is made, it is the duty of the judge to consider it and exercise his judgment upon it.
6. A judge would be wrong to yield to tenuous or frivolous objection, same would be the case for ignoring an objection of substance.
7. Where the facts of a case lead to apprehension of reasonable suspicion test, the Court of Appeal adopted the principle set out in the Constitutional Court of South Africa in ***The President of the Republic of South Africa v. South African Rugby Football Union***,[40] - "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".[41]
8. In ***Re JRL exp CJL Re***,[42] the Australian High Court observed that although justice should be seen to be done, the judicial officers discharge their duty to sit and do not, by ceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking disqualification of a judge, they would have someone who would decide their case in their favour.[43]

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[38] [2000] QB 451, Court of Appeal
[39] **R v Bow Street Metropolitan Stipendiary Magistrate, Ex. P Pinochet Ugate (No. 2)** (199) 1 All ER 577
[40] 1998 SA (4) 147
[41] *Ibid.*,177.
[42] (1986) 161 CLR 342
[43] *Ibid.*, 352.

9. In ***Re Ebner v, Official Trustee in Bankruptcy***,[44] where the Australian Federal Court asked the question why it should be assumed that the confidence of fair minded people on the administration of justice is to be shaken by existence of a pecuniary interest of no tangible value but not the wastage of resources and delays caused by setting aside judgment on the ground that the judge is disqualified for having an interest.[45] Hence, the necessity for the court to address such an issue when it is seized of the matter.
10. As observed by Callaway JA, the judge should not accede to unfounded disqualification application.[46]

The Court therefore came to the conclusion that test of whether an objective onlooker might have a reasonable apprehension of bias is clearly a more satisfactory one and thus applied it in this matter. The Court further observed that where a judicial officer is challenged for possible bias, the challenge assumes a higher dimension in that it is a collateral attack on the administration of justice as a whole and ceases to be a personal affair to the judicial officer.

In ***Kaplan & Stratton v. L.Z. Engineering Construction Limited and Others***,[47] an application was made for the disqualification of the presiding judge, Hon. Justice Lakha, claiming it unwise for the judge to have had two luncheons with Mr. Esmail, advocate for the first respondent. The Court analyzed a number of English authorities and came to the conclusion that there is automatic disqualification for any judge who has direct pecuniary or proprietary interest in any of the parties or is otherwise closely connected with a party that he can truly be said to a judge in his own cause.

The Court further observed that if an allegation of 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 disfavor the case of a party under consideration by him or, might be predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issues. Unconsciously setting the tone for ***Home Pack*** **Caterers** the Court held that surmise, conjecture or suspicion is not enough and that personal knowledge of counsel does not disqualify a judge, otherwise there would be few judges who would not be disqualified. Thus the Challenged judge rejected the application for his disqualification.

The same issue has also arisen in the East African Court of Justice (EACJ). On 6th February 2007, the Kenya Government was upbraided very publicly for attempting to force two judges to step down from hearing a case in which it is a very interested party the case related to the nomination of members to the East African Legislative Assembly. In brief, the EACJ disallowed

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[44] (1999) 161 ALR 57
[45] *Ibid.*, 56.
[46] Clenae case, [1999] VSA 35, para.89(e).
[47] Civil Application No.NAI 115 of 2000.

the GOK application for disqualification of the President of the EACJ, Kenyan Justice Moijo ole Keiwua; having the previous week allowed the Counsel for the Kenyan Attorney General to withdraw a similar challenge against the participation of another Kenyan Judge, KasangaMulwa, and to issue an apology to the Judge for falsely pleading that he was suspended from the Kenyan High Court and facing investigation for corruption.

The EACJ also rejected an application by the Government of Kenya to set aside a 27th November 2006 ruling which stopped the swearing of the East African Legislative Assembly members nominated by the Government of Kenya. In a fit of pique, the same Government had, while reserving its legal appeals against the EACJ ruling, attempted to change the Treaty that establishes the EACJ itself.

In the February 2007 ruling, the EACJ expressly accused the Attorney General of Kenya of bringing the recusal applications against the two Kenyan Judges as a time-wasting ruse in order to allow the Kenyan Government to amend the Treaty to its desired ends. The Judges of the EACJ say categorically, we are constrained to say that any reasonable court would conclude as we are inclined to do, that this application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing. In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the application on that finding alone. In other words, the Government of Kenya was attempting to interfere with the administration of justice at the EACJ, by changing its constitutive statute to favour it as a party before the EACJ.

Hence in***Attorney General of the Republic of Kenya v. Prof. Anyang' Nyong'o and 10 Others***an application was filed in the EACJ for disqualification of the President of the EACJ, Kenyan Justice Moijo ole Keiwua and Kenyan Judge, KasangaMulwa based on the fact that they failed to disclose to parties the material fact of their relation to the Republic of Kenya in a manner which rendered them impossible for them to give a hearing to the 1st respondent hearing. The issue in this case was therefore whether the two judges would have recused themselves before hearing the interlocutory application and if that is the case then the consequent order should be set aside.

The Court, agreeing with ***S.A. Rugby Football Union case*** observed that where a recusal application comes before a court constituted by several judges, subject to the judge whose recusal is sought giving his individual decision on the matter, all the judges constituting coram for the case have a collective duty to determine if there is sufficient ground for the judge to recuse himself from further participation from the case.[48]

The Court examined the two tests of automatic disqualification and reasonable suspicion test and came to the conclusion that the objective test of "reasonable apprehension of bias" is good

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[48] See S.A. Rugby Football Union Case, para 31.

law.[49] They further laid down the parameters of the test as: do the circumstances give rise to a reasonable apprehension, in view of a reasonable, fair-minded and informed member of the public, that the judge did not (will not) apply his mind to the case impartially.[50] The Court further held that a litigant who has knowledge of the facts that give rise to the real danger of bias ought not be permitted to keep his objection up his sleeve until he finds out that he has not succeeded. In the instant case the applicant waited until the interim application was decided before raising the aforementioned objection. The applicant while bringing the application to Court, was at the same time seeking an amendment to the EAC Treaty on the subject-matter before the court, resulting in the court coming to the conclusion that the application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing.[51]

## COURT ETIQUETTE

1. Punctuality
2. Dress Code
   Know your judge. Different judges have different views about issues of dress. E.g. Mary Angawa J requires that advocates before her court must always be fully robed.
   Familiarize yourself with the dress code for the Law Society of Kenya.
3. Posture/ poise
   This plays an important role in the overall poise of the advocate in court.
4. Modes of address
   How you address judicial officers and fellow cousel.
   Magistrates – "your honor"
   Judges – "my lord/lady" of "your lordship/ladyship"
   For judges/magistrates among themselves, they refer to their peers as "my brother/ sister judge..." As for counsel, it is ill advised to use this reference.
   Fellow counsel – "my learned friend..."
5. Language
   In court, always use polite language. Avoid asking the court direct questions.
   Make a habit of thanking the court.
   Even when disagreeing with the court, do it with respect. Agree politely.
   Always be respectful and polite.
6. Time management
7. Dressing the court

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[49] Attorney General of the Republic of Kenya v. Prof. Anyang' Nyong'o and 10 Others, Application No. 5 of 2007.
[50] *Ibid.*
[51] *Id.*, 23.

## OBJECTIONS

An objection may be said to be in simple terms, a motion asking the judge to exclude evidence that the other side is seeking to offer.[1]

An objection may be by an interjection when proceedings are going on mainly during examination in chief or cross-examination.

An objection may also be in the form of a motion seeking that the entire suit should not be entertained. This is what is referred to as a preliminary objection (P.O).

An **objection to indictment** refers to objections that may be raised by an accused person in a trial on indictment. The accused may object on legal grounds. An example is where the indictment contravenes or fails to comply with the law. A breach of the fundamental rights of an accused person prior to arraignment in court is a classical example that would warrant such kind of objections. This is raised by an application to quash the indictment or to declare the trial a nullity.

Lastly, an objection may refer to oppositions raised during the process of execution in civil cases. This is governed by the Civil Procedure Rules, and particularly Order 22 Rule 51 thereof.

## CATEGORIES OF OBJECTIONS

Objections may be categorized into. Firstly, content objections and secondly, form objections.[2]

i. **Content objections**: These relate to substantive evidence. They invoke the applicable rules of evidence to exclude either the witness's anticipated answer or the introduction of an exhibit. They may relate to both oral and documentary evidence. Examples include when one objects to hearsay, opinion of persons otherwise not experts and on information that is privileged. They address the evidence itself.

ii. **Form objections:** These deal with non-substantive issues. They relate to the procedure of the trial and are intended to remedy the manner in which the advocate questions the witness. For instance where the advocate adopts leading questions or becomes argumentative during trial. It also involves the manner in which the witness is responding. Objections to the entertainment of a suit, for instance, where the court lacks jurisdiction.

## 1. PURPOSE AND FUNCTION OF OBJECTIONS

[1] Paul Bergman (Professor, UCLA School of Law) www.videojug.com

[2] Steven Lubet& Jill Turnbill – Harris, Mock Trials, Preparing, Presenting and Winning your case 9, 167 (Nat'l Inst for Trial Advocacy)(2001)

Generally, objections are utilized in a trial to ensure that parties prosecute and defend their cases in accordance to the law. This is both on procedure and substance. Some of the specific purposes and functions include the following:

a) Trial objections invoke the applicable rules of evidence to preclude inadmissible evidence from being presented to court.
b) Trial objections may be utilized to enable witnesses give evidence without intimidation or harassment by the opposing advocate.
c) They also help to predicate error on a court's evidentiary ruling.
d) Preliminary objections help to prevent a court from entertaining a matter that it ought not to.
e) Preliminary objections in criminal cases guide and ensure that the court does not entertain a trial that is otherwise a nullity.
f) Preliminary objections are also be used to strike out defective pleadings.

## 2. TIMING, MAKING AND RESPONDING TO OBJECTIONS

In deciding whether or not to object, the qualities of a good trial advocate will come into play and more particularly the following: -

a) **Clarity of thought and language**; an advocate must have clarity of thought and language so as to be able to put forward and respond to objections clearly and logically in court.
b) **Confidence and courage**; an advocate should put up a civilized warfare in defending or raising a trial objection rather than sit back without putting up a fair fight.
c) **Alertness**; an advocate must be alert during trial so as to point out when to raise an objection. He/she should also know when to expect objections against his/her client. This virtue is achieved by keenly following evidence and being alert to the mind of the court.
d) **Preparedness**; to be able to alleviate situations of surprise in the event that a trial objection is raised against your client's case, an advocate needs to be well prepared. Moreover, by researching the law well, you get to raise informed and timely trial objections.
e) **Professionalism**; this demands that an advocate knows the rules of practice and evidence so as to prevent objections against his/her ill advised choice of action. The rules of ethics and conduct also come in handy to enable one raise well founded objections in a respectful and professional manner.

Professionalism ensures that advocates do not raise objections actuated by malice. The advocate should not raise emotions against the other or go personal. The manner

and language to be used in raising the objection is important. An advocate ought to rise up and politely but confidently say such words as,... 'your honour/ your lordship counsel is leading the witness !'

f) **Sound judgment**; sound judgment enables an advocate make appropriate tactical decisions as to when to raise or not to raise objections, or how to respond to objections. You ought to be able to think on your feet. Experienced judgment dictates that you only assert objections when both a valid objection can be asserted and should be asserted. You should make a quick cost benefit analysis, to avoid a situation where you win the battle but end up losing the war.[3]

### 3.1 Issues to consider in deciding whether or not to object

The following are the factors that may be used to guide an advocate on deciding whether or not he/she should raise an objection.

a) **Relevance:** All facts that are relevant should be admissible unless specifically excluded by law. You should show, or indeed look at the opposing party's proposed evidence to determine whether it tends to prove the existence or non-existence of a fact in issue. The Evidence Act and particularly sections 5-16 guide on relevance and admissibility of evidence. In a nut shell, facts which are relevant though not in issue include the following:

   i. facts forming part of the same transaction,
   ii. facts causing or caused by facts in issue,
   iii. facts relating to motive, preparation and conduct for any fact in issue,
   iv. facts necessary to explain or introduce a relevant fact,
   v. fact tending to prove statements and actions referring to common intention,
   vi. facts that are inconsistent with facts in issue or affect the probability of existence or otherwise of facts in issue,
   vii. facts that would determine quantum of damages,
   viii. facts showing the existence of any right or custom,
   ix. facts showing the existence of state of mind or feeling,
   x. facts showing system or a series of similar occurrences, and
   xi. facts showing the existence of a course of business.

*b)* **Reliability:** Second hand information, for example hearsay, would normally be excluded since it is not as reliable as first hand information. Section 63 of the

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[3] Lecture notes Kenya School of Law 2009 by Mr. Kaluma "Trial Advocacy: The Qualities of a Good Trial Advocate"

*Evidence Act* provides that oral evidence must in all cases be direct evidence. Direct evidence has been defined to mean:

i. with reference to a fact which could be seen, the evidence of a witness who says he saw it;
ii. with reference to a fact which could be heard, the evidence of a witness who says he heard it;
iii. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
iv. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds.

Provided that the opinion of an expert and the grounds on which such opinion is held, may be proved by the production of such article in which the opinion and grounds thereof are contained, if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

Moreover, evidence, which has not been authenticated, should not be admissible. For example, it is not proper to admit an analysis of the alcohol content in someone's breath if the testing instrument was unreliable or tampered with. The same applies to opinion evidence given by someone without the credentials or sufficient basis of information to render an expert opinion.

c) **The concept of legality:** All evidence that ought to be proved should have been obtained through legal means. Evidence which is relevant but is obtained illegally may be objected to. The following examples may give guidance in the concept:
   i. An admission will not be admitted if the circumstance under which it was made was that such admission would not be admitted in court. These are admissions made on a without prejudice basis in civil cases. [4]
   ii. Confessions that are illegally obtained in criminal cases will not be admissible as evidence. Pursuant to section 25A of the *Evidence Act*,a confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court. A confession obtained by inducement, threat or promise will also not be admissible, unless to the opinion of the court, such inducement, threat or promise is removed.[5]

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[4] See part II of the *Evidence Act* generally.
[5] Section 26 of the *Evidence Act*.

iii. Another illustration is bad character evidence in criminal cases. By virtue of section 57 of the *Evidence Act*, the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless the following exceptions arise:

- Where such evidence relates to a fact in issue or is directly relevant to a fact in issue;
- or the evidence tends to prove some state of mind or feeling of the accused or a series of similar occurrence of that offence with which he is then charged; or
- the accused has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or
- the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or
- the accused has given evidence against any other person charged with the same offence:

iv. Another illustration that may be used as guidance is the notion of 'the fruit of the poisonous tree', that is, illegally obtained evidence. Evidence, though relevant and reliable, may be objected to if such evidence was obtained pursuant to an improper search or seizure.

**3.2 Preparation and procedure**

Objections ought to be timely and specific. This means that an objection should be raised before the inadmissible evidence is produced and should be specifically attributed to a particular issue, statute or rule of evidence.

In respect to preliminary objections, a party must file and serve a notice of the preliminary objection. In civil cases, a defence may have a paragraph to the effect that the defendant shall raise a preliminary objection at the hearing thereof on some stated grounds. That serves as sufficient notice. Service of the application to strike out a suit or pleading preliminarily also serves as notice of the preliminary objection. The parties are then given an opportunity to argue at the appointed time. The court thereafter gives a ruling thereon, either overruling or sustaining the preliminary objection. Any aggrieved party is at liberty to appeal within the time stipulated and in accordance with the law.

In respect to trial objections on the other hand, the party wishing to raise the objection does so by simply standing and stating, **"Objection, your honour" or "Objection, your Lordship"** whichever is appropriate. You should then succinctly explain why the trial objection is well

founded. The court will either rule on it immediately or require a response from the other party before ruling. This process should take place with utmost respect and with use of polite language.

As a trial lawyer, you do not need to know all the evidentiary rules but only the ones that potentially apply to your case. You need to do a thorough case preparation. Moreover a lawyer needs to have a rapid cognitive recognition and increasing the "moment of recognition"[6]. Rapid cognitive recognition entails the following:

i. firstly, researching on the matter or listening to the question/issue raised,
ii. secondly, recognizing a potential objection,
iii. thirdly, deciding whether to make the objection, and
iv. finally, making the objection.

## 3. DECISIONS ON OBJECTIONS

It has been illustrated above that the court is required to make and give a decision on objections. For preliminary objections, the issues canvassed will usually require more time and research before a decision is arrived at. The court thus gives the parties some date when the court thinks it shall have written the ruling.

For trial objections on the other hand, the court ought to make ruling instantly for purposes of expediency. This does not however preclude the court from deferring the ruling to a given date. What is important is the weight of the objections both on legal issues and factual issues. It will be noted for instance in the case of ***Republic vs Robert Gilbert Cholmondeley*** , at the close of the prosecution's case, the prosecution moved the court under section 60 of the constitution for an order directing the defence to make a full disclosure of their witnesses, their statements and copies of certain forensic reports that the defence intended to produce. The defence objected to the motion on the ground that such a motion intended to infringe the constitutional rights of the accused and that no reciprocity existed to warrant the defence discloses their witnesses and statements as the prosecution was required to do. The Judge adjourned the proceedings as he retired to consider a ruling.

In objections raised during execution in civil cases, the court by practice makes the decision after due consideration of the arguments propounded by the parties and the evidence. This

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[6]Malcolm Gladwell's Blink.*The Power of Thinking without Thinking*

requires more time before ruling. What is important in either case is the weight of the case. Expediency and the need to make sound rulings must be balanced when any issue is to be properly addressed.

## 4. ETHICS AND OBJECTIONS

Professional ethics and conduct should guide advocates when raising and responding to objections. Advocates should not deliberately bring or try to incorporate objectionable material or arguments in court, as this is unethical conduct.

It is improper to assert a trial objection without a valid legal basis. It is arguable that this may be tactical hence justifiable, but the bottom line is that it is improper to make such objections. Objections raised solely for the purpose of slowing down, impeding justice or protecting witnesses is unethical. Basically, if your primary motivation is tactical as opposed to legal, then prudence and ethical standards are implicated.

## 5. COMMON OBJECTIONS

For the purpose of our discourse, we have chosen to classify objections into three categories namely: -

1. Preliminary objections
2. Trial objections
3. Post-trial objections

### 6.1 Preliminary Objections (PO's)

Preliminary objections are objections raised before the substantive matter is heard and determined on merit, only on a point of law. Preliminary objections may be raised where a pleading is defective for want of form, where a pleading breaches a mandatory statutory provision, where a suit is time barred, et cetera.

A preliminary objection may be raised by a party in his/her pleading, pursuant to rule 7 of Order VI of the civil procedure rules. Under order L rule 1 of the Civil Procedure Rules, a party may nevertheless raise a PO by way of a motion. **Section 16** of the Civil Procedure Act requires that one makes an objection as to the place of suing in the court of first instance since failure to do so no such objection shall be allowed on appeal.

**a) Preliminary objections must be on a point of law.**

The courts have held that preliminary objections shall only be based on a pure point of law, which is clear, and beyond doubt. The court of appeal in ***Mukisa Biscuit manufacturing Co. Ltd vs west End Distributors Ltd. (1969) EA 697*** observed as follows;

> **'A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.'**

It should also be noted that preliminary objections are argued on the assumption that all the facts pleaded by the other side are correct. No preliminary objection can be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. This position was illustrated in ***Natin Properties Limited vsJaggit Singh Kalsi& Another Court of Appeal Civil Appeal No. 132 of 1989 (Gicheru, Kwach& Shah JJ.A)*** The court of appeal further emphasized that when a preliminary objection is raised, it should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.

Preliminary objections, which are premised on facts that are disputed, cannot be used to determine the whole matter as the facts must be precise and clear to enable the court say that the facts are not contested or disputed. This was held in ***United Insurance Company Ltd. Vs Scholar A. Odera Kisumu HCCA No. 6 of 2005( Wasame J. on 14th March 2005.)***

Whereas the law gives courts the discretion of allowing parties to a suit to amend their pleadings as would enable the real issues to be determined, a plaint that is hopelessly bad that no life can be breathed into it may be struck. This was illustrated in ***Quick Enterprises Ltd. Vs Kenya Railways Corporation Kisumu HCCC No. 22 of 1999 (Birech J. 2nd November, 2000)***

**b) Particulars of preliminary objections.**

Where a party indicates that she/he intends to raise an objection on a point of law, she/he must state the particulars of the statutory provision upon which she/he relies to raise the objection. This was the holding in ***KashbhaivsSempagawa (1976) EA 16***.

**c) Notice of preliminary objections.**

Anyparty who intends to raise a preliminary objection must give a sufficient and reasonable notice to the other party. This was the holding in ***Hudson LiaseWalibwavs Attorney general NBI HCCC No. 2714 of 1987 (Ringera J. on 9th November, 1994)***

The requirement of notice is not however necessary in matters before the court of appeal. This is because matters before the court of appeal are prosecuted in accordance to the court of appeal rules.

**Purpose of preliminary objection.**

Preliminary objections ensure that parties file their cases and defend the same according to the mandatory requirements of the law. They also prevent abuse of the process of court. This may arise in instances where a party files a defense that is a mere sham and fraught with mere denials. Another instance may be where a suit is time barred and a party proceeds to file the same without first obtaining the leave of court. Under Order **VI Rule 12** of the civil procedure rules, no technical objection may be raised to any pleading for want of form.

**Examples of preliminary objections.**

a) A preliminary objection may be raised on the ground that the court lacks jurisdiction to entertain the matter. An objection as to the place of suing must be raised in the court of first instance.
b) A preliminary objection may also be raised where there is pending before a court of competent jurisdiction another suit relating to the same parties and the same subject matter.[7]
c) A PO may also be raised where the matter has been substantially in issue between the same parties and the same determined by a competent court. This is what is referred to as *res judicata*.[8]
d) A preliminary objection may also be raised where a pleading offends the rules of procedure on form and substance. i.e. where a Notice of Motion is filed instead of a Chamber Summons, or where a suit is commenced by way of a plaint instead of an Originating Summons.

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[7]Section 6 of the *Civil Procedure Act*.
[8]Section 7 of cap.21.

e) Under the Limitation of Actions Act. Where a suit is time barred a party wishing to institute the same must first apply for the leave of the court in the prescribed manner. Once leave is granted, then the party will be at liberty to file the matter.

Preliminary objections in respect to limitation of time on claims for damages arising out of personal injuries, breach of duty or nuisance shall not be properly raised but a party may only be allowed to cross-examine the other party during trial in challenging the leave granted, or the legality of filing suit without the leave of court. This was illustrated in ***OrutavsNyamato (1988) KLR590***

**Preliminary objections in criminal cases.**

Preliminary objections may also be raised in criminal cases. A good illustration is where an accused raises a motion that the trial be declared a nullity on the ground that his/her constitutional rights have been violated. This aspect was illustrated in ***Republic vs William ChesirKipkore(2008)eKLR*** the accused had been held in custody for 107 days before being arraigned in court. His advocate raised the objection. The High court observed as follows:

> **That ...while it is mandatory for applications raising constitutional issues in respect of causes of action outside judicial proceedings or which arise in matters before the subordinate courts, to be by way of petition, in the High Court when any constitutional issue arising the court may deal with the matter within the same proceedings as a preliminary point or question.**

### 6.2 Trial objections

We have categorized trial objections broadly into two. These are objections top form of questions and objections to the evidence offered. Put aptly, these are form and content objections. We will consider the kinds of objections available under these two broad heads.

**Objections to form of questions**

The following are examples of objections that a trial advocate may raise in objectiong to questions raised to the witness.

a. **A question that is ambiguous or unintelligible**: it means that the witness may misunderstand the question. It is objectionable on the ground that it may take on more than one meaning.

An illustration is to be found in the *Evidence Act*, which excludes evidence to explain a patent ambiguity in a document. Section 99 states: -

"When the language used in a document is on the face of it ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects."

On the other hand, section 101 allows evidence to explain a latent ambiguity in a document. It states: -

> "When language used in a document is plain, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense."

b. **A question that is argumentative**: This is a question asked to persuade the judge rather than elicit information. It calls for an argument in answer and merely asks a witness to concede to inferences.

c. **A question that has been asked and answered**: This is raised when a witness has already answered a substantially similar question asked by the same advocate on the subject matter.

d. **A question assumes facts not in evidence**: This is a question, which presumes unproved facts to be true. For example, "When did you stop beating your wife?" This is an assumption that one actually beat his wife; particularly where the actual act of beating has not been proved.

e. **A question that is compound**: This is where an advocate joins two or more questions ordinarily with the use of the words "or" or "and".

f. **A question that is too general**: A question is too broad, general or indefinite if it permits the witness to respond with testimony, which may be irrelevant or otherwise inadmissible.

g. **A question that is leading**: This is a question that suggests the answer the examining party desires. This may however be allowed on cross-examination. Sections 149, 150 and 151of the Evidence Act deal with leading questions. Any question suggesting the answer which the person putting it wishes or expects to receive, or suggesting a disputed fad as to which the witness is to testify, is a leading question.

Under section150. (1), Leading questions must not, if objected to by the adverse party, be asked in an examination-in- chief or in a re-examination, except with the permission of the court.

By virtue of Subsection (2) ,the court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion been already sufficiently proved. Leading questions may be asked in cross-examination.

h. **A question that misstates the evidence or misquotes the witness**: A question may misstate or misquote the testimony of a witness or any other evidence produced at the hearing. Trial advocates have the tendency to confirm the evidence of a witness by repeating what such witness has stated. Where the advocate adds or alters a statement from the witness, then one should be quick to object to the same as misquoting the witness.

i. **A question that calls for a narrative answer**: This is a question that invites the witness to narrate a series of occurrence, which may provide irrelevant or otherwise inadmissible testimony.

j. **A question that calls for speculation**: This is a question, which invites or causes a witness to speculate or answer on the basis of conjecture. It asks a witness to guess the answer rather than to rely on known facts. This is where the witness is asked to give an opinion whereas such a witness is not an expert.

k. **Indecent and scandalous questions.** Under section 159 of the Evidence Act, the court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

**Objections to offered evidence (content objections).**

The following are types of questions which may be objected to as tending to give evidence which ought not to be adduced.

a. **A question that invites hearsay**: As a general rule, hearsay is inadmissible. Oral evidence must in all cases be direct evidence. [9]The *Evidence Act* gives exceptions to the hearsay rule. These include evidence of dying declarations, expert opinions, and

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[9] See section 63 of the Evidence Act.. Direct evidence is defined to mean:-
(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;
(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner.
(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:
Provided that the opinion of an expert expressed in any treatise commonly offered for sale and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

documentary evidence of official records e.t.c. where such an exception does not exist, an advocate should object to questions inviting such evidence.

b. **A question that is irrelevant or immaterial**: This is a question whose intent and purport is to elicit evidence which does not relate to facts in issue or relevant facts.[10] The trial advocate should therefore ensure that he predicts that kind of evidence that may come forth from a witness and consider whether the same is relevant and admissible before raising an objection.

c. **Inadmissible opinion**. As discussed earlier, a witness may be called to give an opinion. Section 48 of the Evidence Act requires that where the court to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by experts.

   Experts are defined as persons specially skilled in foreign law, science or art, or in questions as to identity, or genuineness of handwriting or finger or other impressions.[11]

d. **Improper impeachment**. The Act allows an advocate to ask a question that impeaches on the credibility of a witness. However, an improper impeachment will not be allowed. Section 154 of the Act provides that a witness may be cross-examined to test his accuracy, veracity or credibility; to discover who he is and what is his position in life; or to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

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[10] Section 5 of the evidence act provides thus: "Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant."

[11] Section 48 of *Evidence Act*.

The court is however given the discretion under section 157 and 159 to forbid any questions which may lead to improper impeachment of character or which may be annoying, indecent and scandalous.

e. **Excluding secondary evidence**. Section 67 of the Act provides that documents must be proved by primary evidence unless secondary evidence is admissible under the Act. An advocate may therefore object to secondary evidence where its admission is not provided for.

f. **Inadmissible parole evidence.** The Evidence Act states that no oral evidence may be given to contradict a written agreement. In case a witness is asked to give oral evidence which would in the circumstances contradict a written agreement, then an objection may be sustained. This is provided under section 98 of the *Evidence Act* which states that,when the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms.

g. **Illegally obtained evidence.** A party will not be allowed to give evidence that was procured illegally.

h. **Evidence that may threaten state security.** The *Official Secrets Act*[12] provides for the preservation of state secrets and state security. An advocate may object to evidence which in the circumstances may threaten state security, or would in the circumstances lead to disclosure of state secrets. An illustration is where investigations on *Angloleasing* were barred on the ground that they tended to question the manner in which the departments of defence of Kenya carried on its business.

i. **Re-examination on matters not raised in cross-examination**: this in not fair and just since one is not afforded the opportunity to cross-examine again on such issues. [13]

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[12] Cap. 187 Laws of Kenya.

[13]Section 146. of the *Evidence Act* provides that:

j. **Best Evidence Rule**: This requires the most original source of evidence available. For example, instead of asking what the contents of a document are, you should ask for and look at the actual document itself.

k. **Instances of badgering**: This is where the opposing party is antagonizing a witness to provoke a response. Section 160 of the Evidence Act gives the court the discretion to forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.

l. **Introducing character evidence when it has not been brought in issue**: In simple terms, the fact that the accused committed prior offences does not necessarily mean he or she committed the present offence. Each case should be treated independently on its own merits without prejudice to the accused. However the accused may bring his or her character in issue, for example, by alleging good conduct.[14]

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(1) Witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross- examined, then, if the party calling them so desires, re-examined.

(2) Subject to the following provisions of this Act, the examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief.
(3) The re-examination shall be directed to the explanation of matters referred to in cross- examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

[14]See section 55-57 of the Evidence Act.

s.55. (1) In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is inadmissible except in so far as such character appears from facts otherwise admissible.

(2) In civil cases, the fact that the character of any person is such as to affect the amount of damages, is admissible.
56. In criminal proceedings, the fact that the person accused is of a good character is admissible.

57. (1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless-

(aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or
(a) the proof that he has committed or been convicted of such other offence is admissible under section 14 or section 15 to show that he is guilty of the offence with which he is then charged; or
(b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character, or
(c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or

m. **Non-responsive answer**: This is when a witness is evading a question and is not really answering it.

n. **Nothing pending**: an objection may be raised normally when a witness continues speaking on irrelevant matters to a question posed.[15]

o. **Privileged information**: as a general rule, evidence which is privileged will not be admitted in evidence. Where the law protects a witness from answering questions which relate to some privileged information, then unless that protection ceases to exist, no question may be asked in respect thereof. This limb is broad and we will consider each category of privileged information.

    i. **Advocate-client privilege**. Section 134 of the evidence Act protects such information from being admitted in court.The act provides that no advocate shall at any time be permitted, **unless with his client's express consent**, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Exceptions to such privileges are given where the communication is made in furtherance of any illegal purpose or where the information relates to any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client. It should also be noted that the protection shall continue after the employment of the advocate has ceased.

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of a witness for the prosecution; or
(d) he has given evidence against any other person charged with the same offence:
Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.
(2) Notwithstanding the provisions of subsection(1), evidence of previous conviction for an offence may be given in a criminal trial after conviction of the accused person, for the purpose of affecting the sentence to be awarded by the court.

[15]Sedivy, *Common Trial Objections* Highlands Ranch Colorado, available at sedivy.tripod.com.usgov-9.html

Section 142 of the Act further provides that no person who is entitled to refuse to produce a document shall be compelled to give oral evidence of its contents. As such, an advocate may not be compelled to give evidence of the contents of any agreement or document prepared by himself for a client in that capacity. This issue is illustrated in

***H.F. FIRE AFRICA V A. M. R. GHARIEB (2005)e KLR***

This was an application to have one Saleh El-Din, an Advocate or his firm of Omar K. Amin & Co. Advocates disqualified from representing the plaintiff. The grounds propounded were that the said Advocate and/ or his firm were potential witnesses in the case and that there existed a conflict of interest in such representation.

The advocate opposed the application on grounds inter alia, that he could not be compelled to testify as a witness in the proceedings as to require him to give evidence would be tantamount to forcing him to betray the confidentiality he owes to his clients and thereby his professional and ethical duties owed to his client would be violated.

The court dismissed the application and observed that:

> **Under the Evidence Act, the standard of confidentiality of an Advocate as opposed to any other confidential agent or employee is regarded so high that the relation of client and Advocate is protected. The Advocate being so privileged as provided under section 134 of the Evidence Act, cannot be compelled to give Evidence on any of the three agreements which the Advocate concede were drawn by him or his firm.**

ii. **Doctor-patient privilege.** There exists a fiduciary relationship between a [patient and a doctor. This relationship operates within the helm of confidentiality. A doctor can not therefore disclose information obtained by him from a client in the course of that relationship.

iii. **Privilege not to testify against spouse.** Section 130 of the Evidence Act provide that no person shall be compelled to disclose any communication made to him or her during marriage, by the other spouse; nor shall a person

be permitted to disclose such communication without the consent of the person who made it, or of his or her representative in interest.

The exception is given where,

- the suit is between the parties to the marriage,
- where one of the parties is charged with bigamy ,
- where the suit is in relation to an offence against morality ,
- where the offence relates to the person or property of either spouse or
- where the suit relates to children to the marriage.

iv. **Privilege of official communication.** By virtue of section 132 of the Evidence Act, no public officer shall be compelled to disclose communications made by any person to him in the course of his duty, when he considers that the public interest would suffer by the disclosure.

v. **Privilege for identity of informer.** This privilege is given under section 133 of the Evidence Act. No judge, magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the law relating to the public revenue or to income tax, customs or excise.

vi. **Privilege against self-incrimination.** Under section 127 of the *Evidence Act*, any person charged with a criminal offence shall not be compelled to give evidence as a witness except upon his own application. Such failure of a person charged to give evidence shall not be made the subject of any comment by the prosecution.

The presumption of innocence under section 77 (2) of the constitution is a founding argument that any person charged with a criminal offence has that right of silence. Under section 210 of the criminal procedure code, the court makes a ruling at the closure of the prosecution case on whether or not a prima facie case has been made top warrant the accused to be put on his defence. In the event that there is no such case made, the accused is acquitted. This provision further protects the accused person's privilege of self incrimination.

6.2.1 The tactical approach in making and responding to objections

### 6.2.1.1 Making objections

One needs to move from spotting skills to become a top-tier trial advocate by not just knowing when you 'CAN' object, but also determining whether you 'SHOULD' object and 'WHEN' it is appropriate to do so.

*'CAN' involves issue spotting which require prior vast knowledge in the law and more particularly the Evidence Act since you will definitely not have the time to go through statute in trial.*

'SHOULD' entails knowing that not every issue really matters. Just because it is objectionable does not mean you should object. Why object if it does not hurt your case? If you object and prevent the judge from hearing some information, for example, hearsay, it is only natural to be curious[16]about the 'forbidden fruit'. You had better make sure it stays out of the evidence since if not it will gain more attention and significance than it ought to have had, had you not objected. One also ought to skim through the consequences of the objection either being sustained or overruled. Ultimately, read the mood of the court and the court's response to the objections you raise.

'WHEN' entails the right time to object. It may be before trial by notice or during trial. You may also want to read the mood of the court before doing so. Ultimately, object before the evidence is introduced. This you do in a split second. Once you fail to make a proper objection in time, then it might be too late to fix the damage; just the same way you cannot 'unring' a bell or stuff toothpaste back in a tube[17].

In summary: -

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[16] How to Successfully Make and Meet Objections (www.trialtheater.com)
[17] *Supra* note 17.

1) Know your Evidence Law.
2) Raise the right objection (Be specific).
3) Know how to object (Say 'objection', think as you rise to your feet, stand up and give your ground, wait for the court to give a ruling and if necessary approach and proffer your argument).
4) Practice.

#### 6.2.1.2 Responding to objections

If your opponent objects, just pause, think, respond, wait for the ruling and probably rephrase your question if the matter is absolutely or obviously necessary so as to avoid the objectionable material. It may also be prudent to smoothly transition to another section of the testimony. Think like a burglar, of course not literally, in terms of having the evidence admitted if extremely vital. If your opponent's objection is overruled, repeat the entire question for the witness for clarity purpose.[18]

### 6.3 Post Trial Objections

*Objections during execution proceedings*

A trial may have been conducted in which your client was not a party to but the same affects your client's property in the execution stage. You definitely will have to object.

These are objections that arise during execution proceedings of a civil case. They are brought under order XXI rules 53-59 of the civil procedure rules. The party who objects to the proceedings is called an objector. Rule 53 of Order XXI of the CPR provides that any person claiming to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the decree holder and the court of his objection to the attachment of such property.

Upon receipt of such notice, the court shall order a stay of the execution proceedings and shall call upon the attaching creditor by notice in writing within fifteen days to intimate to

[18] *Ibid.*

court and the objector in writing whether he proposes to proceed with the attachment and execution there under in whole or in part.

The objecting party takes out an application by way of summons in chambers in the same suit in which the application for attachment was made. This must be supported by an affidavit. The application once filed must be served upon the judgment creditor and if the court so directs, upon the judgment debtor. Such summonses operate as a stay of attachment unless otherwise ordered. Once this is done, the parties will argue their case if the judgment creditor still desires to proceed with execution and the court thereafter makes a ruling on the same.

The purpose of these objections is to ensure that attachment and execution of decrees are not done on goods, which are not otherwise the judgment debtor's. It enables parties with equitable interest over a judgment debtor's property to protect those interests.

There are also objection proceedings in succession matters particularly where people entitled to be co-applicants in an application for grant of letters of administration of a deceased person's estate are left out of the same. This is provided for under section 68 and 69 of the Law of Succession Act.

Section 68-5(1) provides for Notice of Objection to an application for grant while subsection (2) provides for notice to objector to file answer. Section 69 provides for the Procedure after notice and objections.