THE DOCTRINE OF ESTOPPEL : A CRITIQUE; AND ITS APPLICATION UNDER THE RULES OF EVIDENCE IN KENYA.

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I N T R O D U C T I O N

In this paper, the writer addresses himself to the doctrine of 'estoppel' and its application under the rules of evidence and 'Procedure' in dispute settlement in Kenya. Any student of law, must have 'heard' of the rule of estoppel, found under section 120 of the Evidence Act; which states:-

> "When one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such other person or his representative to deny the truth of that thing."

Admittedly, one need not over emphasize the importance of estoppel as a rule of evidence, but a critical evaluation and examination of this subjects gives a student of law a very interesting in-sight to, and appreciation of, the principles of justice and fairness, underlying assumptions, and also the 'notorious' concept of public policy. The analysis of these attributes become more straight forward when each of the categories of 'estoppel' are examined separately and in a detailed form.

In the preparation and presentation of this paper, the writer was ceaselessly confronted with multiple problems, some which still remain unsolved. No sooner did the writer settle to confront the subject on estoppel than he realised that there

was limited materials and case law on the notion of estoppel in Kenya. Secondly, most of the text books which purport to deal with the notion of estoppel either inadequately encounter the concept or worse still, throw one into a 'hell' of confusion and uncertainity. Lastly, the writer noticed one interesting but detrimental fact about the judgemants delivered by our courts on the subject of estoppel. Apparently there is a consistent tendency of our judges (and counsels) to deal with this subject without recourse to the relevant and operative provisions, few as they seem, under our laws. It is very unfortunate but unforgivable that our courts of law have since heavily relied on antiquated and current English decisions and principles of law without specifying how much of these principles have relevancy and apply to our contemporary society. This, has in effect retarded the development of law in Kenya.

With all this in mind, the writer views this paper as a positive attempt to re-state the notion of estoppel and above all give it the justice and honour which it inevitably deserves. The writer views the concept of estoppel as one founded upon the principles of justice, fairness and common-sense. A Notion which must at all costs be retained, and shaped up to operate justice and fairdealing among the members of Kenya today.

The opening chapter examines the doctrine of estoppel generally, giving way to a detailed examination and evaluation of the various categories of 'estoppel' in subsequent chapters. It is hoped that this would adequately 'clothe' the reader with a basic understanding of the attributes of the notion and prepare him/her for a sound appreciation of the doctrines

fine and delicate aspects of the doctrine of estoppel - an attempt the subsequent chapters seek to realise.

The writer has split the paper into five chapters and a conclusion giving an over - view of the discussion therein. The conclusion is peculiary short to avoid unnecessary repetition. The reader will notice that each chapter is conclusive of itself.

In chapter two, which examines the doctrine of 'res judicata,' the writer looks at the principles of 'Autrefois Acquit' and 'Autrefois convict' in criminal cases which play a role roughly equivalent to that of 'cause of action estoppel' in civil proceedings. These principles, primarily seek to preclude a second prosecution of the accused person, for a crime which he has previously been either acquited of or convicted by a court of competent jurisdiction.

The doctrine of estoppel by deed covered in chapter three is not specifically provided for under the provisions of the Evidence Act nor in its predecessor the Indian Evidence Act. Currently, the doctrine of estoppel by deed has very limited application partly because of the numerous operative exceptions to the general rule, A note is given on section 97 (1) of the Evidence Act which prohibits the giving of secondary evidence of the 'terms' of a document - except where secondary evidence is admissible. The writer argues that, there is little justification in preserving the doctrine of estoppel by deed as a separate entity of 'estoppel.' The case should be brought within the rubric of estoppel by conduct.

Chapter four explores the subject on estoppel by conduct, giving way to the recent and most

controversial doctrine of equitable estoppel; covered in chapter five. The subject on the ~~equitable~~ doctrine of equitable estoppel is still at its infancy and much of its governing principles has as of now, not yet crystalized down. Hence, it is possible that the writer has over looked or under - rated certain aspects and attributes of this 'un/ruly' subject. It is hoped that his discussion on Cretney's observation on the application of equitable estoppel in East Africa will be of great assistance and guide to students of law.

Lastly, a word on the heading on this paper. The title is deliberate, in view of the fact that the concept of estoppel is not confined exclusively to the Law of evidence. Its adverse 'power' and 'magic' transgresses to other branches of the law, besides the law of evidence. It is worth of note that the Evidence Act is not an exhausitive codification of all the rules of evidence. Infact, for instance, the doctrine of 'res judicata' is to be found outside the Evidence Act - that is, under section 7 of the Civil Procedure Act. The title gives the writer the liberty to venture outside the provisions of the Evidence Act in search of materials necessary for due appreciation of the notion of estoppel and its application in Kenya.

Maosa T.M.

(X VIII)

CHAPTER ONE

THE DOCTRINE OF ESTOPPEL

HISTORICAL BACKGROUND

To effectively understand the subject of estoppel and its place in our law, mention should be made of the historical background of our current legal system and also the law of evidence. It is a historical fact, that our current legal system in Kenya is as a result of the 1897 East Africa Order in Council which replaced the Africa Order in Council promulgated in 1889. The order in Council not only provided for the setting up of Courts but the law and procedure to be applied in dispute settlement and administration of justice in the protectorate. In particular, Article 3 provided 'Inter alia', that certain Indian codifications applied, one of which was the Indian Evidence Act, 1872. MORRIS notes:-

> "In 1897, the East Africa Order in Council.
> .....which replaced the 1889 Order.....
> stated that jurisdiction should be exercised
> by the High Courts in conformity with certain
> Indian enactments, one of which was the Indian
> Evidence Act....."[1]

The Indian Evidence Act, the work of Sir James Fitz-James Stephen, sought to furnish Magistrates with relevant and comprehensible rules of evidence, and remained in force until subsequently replaced by the Current Evidence Act (Cap. 80 of the laws of Kenya). However, it is submitted that the Kenya Evidence Act does not constitute a radical departure from the Indian code which was basically a codification of the English law. In fact in many instances the current 'Act' reiterates verbatim the provisions of the previous 'Act.'[2] Thus, what our legislature has simply done is to apply the law of evidence imported from India which is to a large extent the English law of evidence.

THE DOCTRINE OF ESTOPPEL

The doctrine of estoppel must be viewed as a notion of universal jurisprudence which falls squarely within the realm of the law of evidence properly so called. The emergence of the doctrine of estoppel in English law dates back to the twelveth century, a period when trials were conducted through various modes of proof which were either selected by the parties litigant or ordered by the Courts. It then follows logically, that estoppel was regarded as one of the various modes of proof. Consequently however, the essence and nature of a trial realised crucial changes such that by the end of the nineteenth century a trial came to be regarded as a process of judical reasoning backed by a set of rules of evidence which prescribed for what matters were relevant, admissible and how they could

be proved in a court of law. Equally estoppel had to change with the times and ideas and came to be rightly regarded simply as a rule of evidence. In summing up these historical developments and crucial changes in regard to estoppel Sir William Holdsworth notes:-

> "Thus the doctrine of estoppel ..... accomodated itself to the gradual changes of men's ideas as to the nature of a trial originally in an age when the main interest of the trial centred round as a mode of proof, it was at first regarded simply as a mode of proof. But now that the main interest of the trial centres round the evidence produced to prove the issue, it is, in its most important form, simply a rule of evidence"[3]

Section 120 of the Evidence Act sets forth the general attributes of the doctrine of ~~evidence~~ estoppel as known to our law The section reads:-

> "When one person has by his declaration, act or omission, Intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such other person or his representative, to deny the truth of that thing."

Thus, the section embodies a general statement of the rule of estoppel whose essentials are that; there be a representation or conduct amounting to a representation on the part of the person against whom estoppel is sought to be established, which intentionally ~~caused~~ caused or permitted the person aggrieved to believe that statement to be true and acted upon such belief. Logically it follows that there can be no estoppel where the truth is accessible or in absence of a representation or conduct amounting to such. Further, there can be no estoppel where a party is not misled and induced to do something detrimental to his interest owing to the action of the other party. When the essentials to create an estoppel are shown, an estoppel arises which consists in holding for truth the ~~the~~ representation acted upon by another party, when the person who made it seeks to deny its truth.

Since it is not uncommon for the doctrine of estoppel to be mistaken with other closely similar legal conceptions, an attempt should be made to distinguish it from such other legal conceptions. Such an attempt will also enable one to appreciate and comprehend the various attributes of the rule of estoppel in our law.

ESTOPPEL AND WAIVER

Generally speaking there is usually a confusion of thought upon the subject of estoppel and waiver in our day to day understanding of the law. However, in law, waiver is taken to imply an intentional reliquishment of a known right or such conduct as warrants an intentional act and implies consent to dispense with or forgo something to which one has a right. However, on the other hand, estoppel may arise in the absence of an intention on the part of the person estopped to reliquish or change any existing right.

A clear distinction between the subject of estoppel and one of waiver in law, was set out in the judgement of the privy Council in DAWSON'S BANK Ltd v. JAPAN COTTON TRADING COMPANY LTD.; in which it was stated:-

> "Estoppel .....is a rule of evidence which comes into operation if, (a) a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement and of the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual.....it is an agreement to release or not to assert a right" [4]

In NURDIN BANDALI V. LOMBANK LIMITED, the distinction between waiver and estoppel was appreciated by New bold J.A. in the following terms:-

> "Waiver is based on contract, express or implied, between the parties.....estoppel on the other hand, is primarily a rule of evidence whereby a party to litigation is, in certain circumstances prevented from denying something which he had previously asserted to be true." [5]

ESTOPPEL AND PRESUMPTIONS

In general terms, a presumption may be defined as a probable consequence drawn from facts (either certain or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. On the other hand estoppel is a personal disqualification laid down upon a person peculiary circumstanced from proving certain

facts. Further, whilst estoppel has the effect of not permitting a party from denying the truth of a representation, if such representation has been believed in and acted upon by another party; in case of rebuttable presumptions, a party is at liberty to adduce evidence to prove the contrary. It is equally important to note that, with regard to conclusive presumptions, no evidence to rebut the existence of certain facts is admissible, where as an estoppel may be accordingly waived by not pleading it in court.

ESTOPPEL AND FRAUD

It is submitted that it is impossible to lay down a definition completely comprehending fraud as understood in law. However, the general principles governing the subject of fraud are laid down in DERRY V. PEEK where Lord Herschell after reviewing previous authorities on the subject of fraud proceeded on to say:-

> "I think the authorities establish the following propositions. First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) Knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false..... To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth..... Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made" [6]

Admitedly, the common feature of both estoppel and fraud is that, the law will not come to rescue a person who has not suffered deception. The two, however, are not one and the same thing. The essence of fraud is a deliberate mis-statement or suppression giving rise to a cause of action for deceit against the person playing the fraud. With regard to estoppel, the very fact that the statement might have been made honestly, makes no difference. If another person believes it and acts upon it to his own detriment.

ESTOPPEL AND ADMISSIONS

In BLACK'S LAW DICTIONARY admissions are defined to mean:-

> "Confessions, concessions or voluntary acknowledgements made by one party of the existence of certain facts. More accurately regarded, they are statements by a party, or some one identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary" [7]

Thus, admissions constitute a piece of substantive evidence, when relied upon for proving the truth of facts, they shift the onus of proof on the party against whom they are produced to establish the contrary. Admittedly, in both estoppel and admissions there are statements, but, it is clear that, an admission does not ripen into an estoppel unless and until the person to whom the representation is made believes it and acts upon such belief to his own detriment.

IS ESTOPPEL MERELY A RULE OF EVIDENCE WHICH CANNOT FOUND AN ACTION?

It has been so often said, and by so many that estoppel is merely a rule of evidence whose sole effect in law is to render inadmissible evidence which would otherwise be admissible. Thus, being an exclusionary rule of evidence, one cannot found an action upon estoppel. In LOW V. BOUVERIE, it was categorically stated that:-

> "Estoppel is merely a rule of evidence. You cannot found an action upon estoppel" [8]

Indeed the general statement of estoppel as duly embodied in section 120 of the Evidence Act, strictly speaking, is merely a rule of evidence, whose effect is to prevent proof of a fact previously asserted to be true or existing; thus one cannot found an action upon it.

However, in recent times, especially with the emergence and development of the doctrine of equitable estoppel, estoppel has since ceased to be regarded as merely to mean the representor's in-ability in law to deny that which he had previously asserted to be true or existing. The whole concept of estoppel, though belonging to the realm of the law of evidence, has come to be regarded more correctly as being within the realm of substative rules of law, HALSBURY says:-

"Estoppel is often described as a rule of evidence but the whole concept is more correctly viewed as a substantive rule of law" [9]

Thereof the cites Lord Wright's dicta in CANADA AND DOMINION SUGAR COMPANY LIMITED V. CANADIAN NATIONAL (WEST INDIES) STEAMSHIP LIMITED that:-

"Estoppel is a complex legal notion involving a combination of several essential elements, the statement to be acted on, action on the faith of it, resultant detrimental to the actor, Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. .....Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must be such that the imputed truth of the statement is a necessary step in the constitution of a cause of action" [10]

PHIPSON who apparently adopts the reasoning of Lord Wright in the above case, notes:-

"An estoppel is a rule whereby a party is precluded from denying the existence of some facts which he has formerly asserted. It is usually said only to be a rule of evidence because at common law an action cannot be founded thereon, but in equity an action and in both a defence can be founded on estoppels and as estoppels must be pleaded and evidence not, it may in many cases be regarded as a rule of substantive law" [11]

However, this does not mark the end of the matter as such, Lord Denning, an esteemed protagonist of the equitable doctrine of estoppel, has in many cases even come to term estoppel not a rule of evidence nor a cause of action but a principle of justice and of equity. This reasoning is represented in MOORGATE MERCANTILE V. TWITCHING, where their lordships said:-

"Estoppel is not a rule of evidence. It is not even a cause of action. It is a principle of justice and of equity. It comes to this when a man by his words, or conduct has led another to believe in a particular state of affairs, he will

not be allowed to go back on it when it would be unjust or inequitable for him to do so" [12]

It would appear that Lord Denning was stating the principle upon which the rule of estoppel rests, rather that over- ruling the fact that estoppel is primarily a rule of evidence, which in certain cases may assist the plaintiff found a cause of action. Equally in East Africa, courts have come to duly acknowledge the fact that estoppel may dictate a particular result to a cause of action than merely acting as an exclusionary rule of evidence. In NURDIN BANDALI V. LOMBANK (TANGANYIKA) LTD. Newbold J.A. made the following observations:-

"Estoppel.....is primarily a rule of evidence whereby a party to litigation is in certain circumstances prevented from denying something which he had previously asserted to be true.....Estoppel whether at common law or in equity cannot found a cause of action, though it may enable a cause of action, which would otherwise fail to succeed." [13]

Thus in East Africa, unlike in the case in English law, estoppel whether at common law or in equity cannot found a cause of action by itself, but capable of assisting a cause of action which would otherwise fail to succeed. This is so particularly where it prevents the defendant from asserting the existence of some fact, the existence of which will destroy that cause of action or alternatively assist the plaintiff in enforcing a cause of action by preventing the defendant from denying the existence of a fact, the existence of which will destroy that particular cause of action. However, it must be noted that estoppel, unlike other rules of evidence has to be specifically pleaded or else the party in whose favour it operates would be taken as having waived his existing right. Further, one must conceed that, once an estoppel has been successfully established it in effect, operates as a conclusive admission of the truth of the fact in issue which was previously asserted as true or existing, perhaps, it may be correct to argue in such cases that, estoppel is the sole or partial foundation of a cause of action.

Thus, it suffices to conclude that in Kenya estoppel is regarded as primarily a rule of evidence embodied within section 120 of the evidence Act, but one which is capable of having greater effects on the substantive rights of the parties by assisting the plaintiff to assert or acquire certain rights against the defendant. The nature of

an estoppel has been clearly summarised by Newbold J.A. in RUNDA COFFEE ESTATES V. UJAGAR SINGH , that:-

> "Estoppel is a rule of evidence which can enable a cause of action to succeed but which can never of itself found a cause of action" [14]

THE THEORY UPON WHICH ESTOPPEL RESTS IN MODERN TIMES

It must be remembered that, in medieval England, owing to the use of estoppel in shutting out the truth against justice, reason, logic and sound policy, it was less favoured and was characterized as 'Odius'. In fact it is during this time that Sir Edward Coke defined estoppel to mean:-

> "..... where a man's own act or acceptance stopeth or closeth up his mouth to allege or plead the truth" [15]

In modern times, estoppel has come to be regarded as one of the most important and beneficial rules in the administration of justice and order in our contemporary society. First, the concept of estoppel seeks to end unwarranted litigation, expense and confusion which will definately arise if matters or facts once solemly affirmed were to be again denied whenever the affirmant saw his opportunity. Thus, estoppel intervenes not by shutting out the truth but by holding a man concluded from saying that which, by his representation or his representative has once become accredited for truth is false. Secondly, the concept seeks to defeat fraud and inconsistence, thus promoting justice and fair dealing amongst members of Society. SARKAR puts it that:-

> "The principle is that it would promote fraud and litigation if a man is allowed to speak against his own act or representation on the faith of which another person was induced to alter his position." [16]

Lastly, it is an indisputable fact that, our courts are overburdened with litigation which ceaselessly keep crowding up. Thus, estoppel operates as a means of ensuring that the limited time of the courts is only used for such matters which in reality require settlement by the court.

The concept of estoppel as embodied within section 120 of the Evidence Act must be viewed as a principle of justice and commonsense and should not be whittled down by mere distinctions and unwarranted technicalities. However, in exceptional cases where the

operation of the doctrine will, in the opinion of the court cause injustice, the court should be at liberty to dispense with it. It is important at all times to recall the moving words of justice wilde in CAVE V. MILLS that:-

> "A man shall not be allowed to blow hot and cold - to affirm at one time and deny at another - making his claim on those whom he has deluded to their disadvantage and founding that claim on the very matters of the delusion. Such a principle has its base in common sense and common justice, and whether it is called 'estoppel' or by any other name, it is one which courts of law have in modern times most usefully adopted." [17]

CLASSIFICATION OF ESTOPPEL

Traditionally the doctrine of estoppel is classified into three categories:-

(a) the doctrine of 'Res Judicata'
(b) the doctrine of estoppel by deed
(c) the doctrine of estoppel by conduct

Recent developments, have led to the emergence of yet another category of estoppel, termed as the doctrine of equitable estoppel. Subsequent chapters deal with each one of these categories of 'estoppel' separately. ✓

C H A P T E R T W O

THE DOCTRINE OF 'RES JUDICATA'

GENERAL INTRODUCTION

The doctrine of 'res judicata', populary refered to as estoppel by judgement, is a branch of 'estoppel' and a notion of universal jurisprudence. In BLACK'S LAW DICTIONARY the term 'res judicata' is taken to mean:-

> "A rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." [1]

In English jurisprudence, the doctrine of 'res judicata' was laid down in the DUTCHESS OF KINGSTON'S CASE[2] which has since acquired an authoritative character in England and in any other country which adopted or followed English jurisprudence. In that case De Grey C.J. stated:-

> "The judgement of a court of concurrent (or of exclusive) jurisdiction directly upon the point is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgement of a concurrent or exclusive jurisdiction is evidence of any other matter which came collaterally in question though within their jurisdiction, nor of any matter to be inferred by arguement from the judgement." [3]

The rule as laid down in the above case was cited with due respect and followed accordingly in the subsequent case of BRUNSDEN V. HUMPHREY.[4] The facts of this case are that, the plaintiff brought an action in a lower court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High court against

the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence. The High court dismissed the subsequent claim holding that the decision of the lower court was conclusive on the cause of action upon which the plaintiff was resting his claim; *in other words the matter was 'res judicata'.* The court of Appeal, on its reasoning thought otherwise holding that the action was maintainable and not barred by the previous proceedings in the lower court. In an apparent reference to the doctrine of 'res judicata' Bowen L.J. stated

> "The rule of ancient common law is that where one is barred in any action real or personal by judgement demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever" [5]

Thus the notion of 'res judicata' in English jurisprudence can be said to be that, as between the parties and their privies, a matter once adjudicated by a court of competent jurisdiction is conclusive, such that in no circumstance should the matter be raised for re-litigation.

Sections 43 - 47 A of the Evidence Act, which purport to deal with the evidential effects of judgements, are in no way exhausitive of the rules and principles governing the doctrine of 'res judicata' falls beyond the realm of the rulers of evidence and appertains to procedure, properly so called. Indeed the framers of our procedure Act did realise such juristic classification and dealt with the doctrine under the civil procedure Act.[6] A concise statement of the rule of 'res judicata' is set out under section 7 of the civil procedure Act, which states:-

> "No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same, or between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such issue and has been subsequently raised and has been heard and finally decided by such court"

The section, in essence, enacts nothing distinctly different from the doctrine of 'res judicata' as known in English law. As is the position in English law, facts actually decided in a suit by a court of competent

jurisdiction cannot again be litigated as between the same parties on their privies. The sections, further suggests that in all such cases the test is not whether the judgement was explicit, but whether the issue raised in a subsequent suit was one upon which the judgement of the former suit was based. Thus, 'res judicata' should not be inferred from a judgement; it must be clear from the pleadings and findings, and such findings must be on points directly or substantially in issue.

It is submitted that, occasionally there is confusion of thought about the subject of 'res judicata' and other closely similar legal conceptions. It is important, therefore, that the subject of 'res judicata' be distinguished from such other legal conceptions.

ESTOPPEL AND 'RES JUDICATA'

Admittedly, 'res judicata' is a branch of 'estoppel', whose primary effect is to prevent a party from denying the existence of a former adjudication to which he was party; that effect amounts, to a similar effect which estoppel ensures, that of preventing a party from denying the existence of certain facts previously asserted as true or existing. Beyond this, there is a very clear distinction in law, between the subject of estoppel and that of 'res judicata'.

First, the doctrine of estoppel as formulated under section 120 of the Evidence Act proceeds upon the principle that he who by declaration, act or omission intentionally causes or permits another to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed; in any suit or proceeding to deny the truth of that thing. On the other hand, 'res judicata' is founded upon the principle that no man shall be proceeded against twice for the same cause and that it is in the public interest that there should be an end to litigation.

Secondly, whilst estoppel prohibits a party after the enquiry has already been concluded from proving anything which contradicts his previous assertions to the prejudice of who relying on them altered his position, the doctrine of 'res judicata' prohibits the court from enquiring into a matter already adjudicated upon.

Thirdly, estoppel results from the acts and conduct of parties while 'res judicata' arises from a judgement of a court vested with competent jurisdiction.

Fourthly, the theory of 'res judicata' is to presume by a conclusive presumption that a former adjudication declared the truth. On the other hand estoppel never means anything more than that

a person shall not be allowed to say one thing at one time and the opposite of it at another time.

Lastly, whilst estoppel is, strictly speaking, an exclusionary rule of evidence, 'res judicata' is a rule of procedure, properly so called.

'STARE DECIS' AND 'RES JUDICATA'

It must be noted that, the principle of 'stare decis' and the doctrine of 'res judicata' are both legal conceptions intended to maintain stability in human relations by giving repose to litigation and both operate to prevent the constant reconsideration of settled questions. However, both are not in law one and the same thing.

First, 'stare decis', deals exclusively with matters of law and principle and is applicable to such matters only when the pro facts of a pending case coincide with those of a prior one. On the othe hand, the subject of 'res judicata', though in essence fixes the law of the actual controversy, has to do particularly with the protection from attack of judicially established facts.

Secondly and lastly, the doctrine of 'stare decis' while of high authority is never absolutely binding in a subsequent case since courts are at liberty to reconsider the question previously passed upon and may in appropriate case modify or reverse former pronouncement of law. However, with regard to the concept of 'res judicata' it is in most cases impeachable and binds the court, parties litigant and their privies.

WHAT IN LAW CONSTITUTES A 'RES JUDICATA'?

The onus of proving or establishing a 'res judicata ' lies entirely upon any party who is desirous of relying on it by way of estoppel. Such a party has to establish each and every of the following constituents:-

(a) that a judgement, in fact exists and

(b) that the court prononcing it had competent jurisdiction in that behalf

(c) that the pronounced judgement was final; and

(d) that it was or involved a determination of the same questions as those sought to be controverted in the litigation in which the estoppel is raised and

(e) Lastly, that the parties to the judgement, or

their previes, were the same persons as the parties to the proceeding in which the estoppel is raised or their privies.'

JUDGEMENT

As it has been pointed out above, in order to establish a 'res judicata' on which an estoppel may be founded, it must appear not only that the person or persons pronouncing the judgement constitute a court but also that what was pronounced duly amounted to a judgement. For purposes of 'res judicata' there must have been a decision or determination of some question of law or fact affecting the substantive rights of the parties or their privies. In cases where a record of the judgement is accessible, its production will be treated as conclusive to the fact of such an adjudication and to the decision pronounced. Section 44 of the Evidence Act, gives the party against whom the 'res judicata' is set up the liberty to plead that a judgement relied upon as evidence of the decision was obtained by fraud or collusion or has since been superceeded by another judgement of a court of competent jurisdiction. Where a party successfully establishes these matters stated above the judgement ceases to be treated as conclusive, thus cannot found an 'estoppel per rem judicatam'

Judgements pronounced by courts may be classified into 'judgements in rem' and 'judgements in personam' or 'inter parties'. Since the two classes of judgements do not have a similar effect and conclusiveness in law, it is important that one must attempt to distinguish one from the other. The most classic and often cited defination of these categories of judgements is given by HALSBURY. He clearly defines a 'judgement in rem' as that:-

> ".....Judgement of a court of competent jurisdiction determining the status of a person or thing, or disposing of a thing."[7]

On the other hand, 'judgements inter partes' or 'in personam' are defined as those:-

> ".....which determine the rights of parties 'inter se' to or in the subject matter in dispute..... but do not affect the status of either person or things, or make any disposition of property or declare

or determine any interest in it except as between the parties litigant" [8]

Though the Evidence Act does not give a clear distinction between these categories of judgements, it may safely be stated that a 'judgement inter partes' or 'in personam' is that which purports to determine the rights, liabilities and interests only of the parties litigant. On the other hand, though incidentally affecting the immediate parties, a 'judgement in rem' has for its primary object the final determination of the status of a person or thing, and, which therefore is conclusive against the whole world. One must concede that a 'judgement in personam' or 'Inter partes' operates as con clusive evidence in favour of, and against parties litigant and their privies and not third parties or strangers. A 'judgement in rem' being binding upon all persons, whether parties, their privies or strangers, it estops anyone in the world from disputing it and equally enables anyone in the world to rely on or take advantage of it.

COMPETENT JURISDICTION

Section 44 of the Evidence Act provides that any party to a suit or any other proceeding is at liberty to impeach the validity and effect of any judgement, order or decree which had been pronounced by the adverse party on the grounds that it was delivered by a court not competent to pronounce it or was obtained by fraud or collusion. It follows therefore, that a party seeking to rely on a judgement must be able to show that the court pronouncing the judgement had jurisdiction both, over the subject matter of litigation and over the parties thereto. Instances of lack of jurisdiction are varied; they, however, include where the court exceeds its jurisdiction either by embarking upon an inquiry outside its province or making an order in excess of its powers. It is submitted that a judgement properly pronounced by an inferior court is conclusive even in the very highest court; the only exception is where a party fails in an inferior court on the sole ground of its want of jurisdiction. In that case, he will not be liable to be met by a plea of estoppel in any subsequent proceedings which he may institute in respect of the same cause of action before a higher court invested with jurisdiction which the inferior court lacked.

FINALITY

In order that a judgement may operate as a 'res judicata', it must be/deemed in law to be final. The burden of establishing this finality rests upon the party who relies upon that judgement. In law, a judgement is deemed final, when it leaves nothing to be judically determined or ascertained thereafter to render it effective and capable for execution, and is obsolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the court which pronounced it. This means that, what a party is required of, is to establish, as a fact, that a given judgement is final, and it is wholly immaterial whether such a decision is capable of being rescinded or waived by some other court invested with competent jurisdiction in that behalf. This issue of finality and conclusiveness was adequately dealt with by their lordships in COLT INDUSTRIES, INC. V. SARLIE (No. 2).[9] The plaintiff, in that case, recovered judgement for a sum of money against the defendant in the state of New York in the United States of America, and the defendant's appeal was dismissed. An application by the defendant to the court of Appeal in New York for leave to appeal was pending. The plaintiff brought an action in England on the judgement and obtained summary judgement against the defendant. On the evidence of United States law the judgement obtained in the state of New York was available throughout the states of the United States, though another state might delay judgement in an action on it until the pending appeal was disposed of. The court of Appeal held that, the judgement obtained in the state of New York was a judgement of a court of competent jurisdiction in the territory in which it was produced, which for present purposes was that state and not the whole of the United States, and was a final and conclusive judgement notwithstanding that the possibility that the court of Appeal, would grant leave to appeal. Lord Denning, M.R. quoting an old case of NOUVION V. FREEMAN; said:-

> It is well established that, even though a judgement is subject to appeal, or under appeal, it is still finaly and conclusive as to enable an action to be brought on it" [10]

With regard to a judgement entered by consent of the parties, the law is very clear, such a judgement is as much a final judgement as one resulting from a contested hearing. In COHEN V: JANESCO, Finlay J. observed:-

"I cannot take the view that the matter is any the less finally determined by a judgement because that judgement is the result of an agreement" [11]

Notwithstanding the fact that in English law, a judgement obtained by default, like one obtained by consent, is regarded for the purpose of the doctrine of 'res judicata' as a final judgement, recent cases have sounded a warning against too ready an assumption that the consequences of default judgement will always be regarded as effective as those of judgements resulting from contested litigation. An authority for this proposition is the case of KOK HOONG V. LEONG CHEONG KENG MINES Ltd. [12] which has since casted doubt on the universal application of the principle that a judgement obtained by fraud is to be regarded as final and conclusive in all cases.

The facts of the above case were that, in 1954, the appellant, alleging that under an agreement made in June, 1952, he had let certain machinery on hire to the respondent Company for twelve months at an agreed monthly rent, and that, on the expiry of the twelve months, the respondent had continued the hiring on the same 'terms, brought an action against the respondent claiming arreas of rent for September 20, 1952 and for subsequent months. He obtained judgement by default in November, 1954. Thereafter, in June, 1957, in an action between the same parties, the appellant, after pleading, 'inter alia' that the agreement of June, 1952 and that by arrangement with the respondent company he had retaken possession of two items of the machinery in 1955, and that the hiring of the remainder was to continue on the terms and conditions of the agreement of June, 1952, subject to the variation that the hiring was to commence from April 20, 1955 claimed, 'inter alia' the arreas of rent from April 20, 1955 and for subsequent months.

The respondents pleaded 'inter alia' that the appellant was a money lender within the meaning of section 3 of the monelenders Ordinance, 1951; that the whole transaction was a Moneylending transaction and that, the appellant not having complied with the provisions of the Ordinance, the loans were not recoverable, By way of reply the appellant alleged, 'inter alia', that the respondent was estopped by the judgement by default of November, 1954, from contending that the appellant was a Moneylender or that the moneylending transaction or that he was not entitled to the relief, claimed.

On the question of the validity of estoppel, the court held; that while there was no doubt that by the law of England, which was the law applicable for this purpose, a default judgement was capable

of giving rise to an 'estoppel per rem judicatam', the question was what the judgement prayed in aid should be treated as concluding and for what conclusion it was to stand. The court proceeded on to say that, default judgements though capable of giving rise to 'estoppels' must always be scrutinised with extreme particularly for purposes of ascertaining the bare essence of what they must necessarily have decided and they could estop only for what must "necessarily and with complete precision" have been thereby determined. In strong words and terms Viscount Radcliffe said:-

> "..... there is no doubt that the law of England, which is the law applicable for this purpose, a default judgement is capable of giving rise to an 'estoppel per rem judicatam'..... For, while from one point of view a default judgement can be looked upon as only another form of a judgement by consent and, as such, capable of giving rise to all consequences of a judgemnent obtained in a contested action or with the consent or acquiscence of the parties, from another, a judgement by default speaks for nothing but the fact that a defendant for unascertained reason, negligence, ignorance or indifference, has suffered judgement to go against him in the particular suit in question. There is obvious and, indeed grave danger in permitting such a judgemant to preclude the parties from ever re-opening before the court on another occasion perhaps of very different significance, whatever issues can be discerned as having been involved in the judgement so obtained by default." 13

Courts in England recommend a total disregard to a judgement by default, particularly where that will cause injustice instead of justice as between the parties litigant. Lord Upjohn, in CARL-ZEISS STIFTUNG V. RAYNER and KEEL Ltd (No. 2) [14] said:-

> ".....there may be many reasons why a litigant in the ealier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising the issue in subsequent litigation. All estoppels are not

'odious' but must be applied so as to work justice and not injustice"

This 'dicta' by Lord Upjohn was cited with approval and applied accordingly in a recent case, McIl KENNY V. CHIEF CONSTABLE in which Lord Denning M.R. stated that:-

> "When an issue has been decided by a competent court 'against' a party in an earlier proceeding, it should only be regarded as final if he has had a full and fair opportunity of defending himself therein and the circumstances are such that it would not be fair or just to allow him to re-open it in subsequent proceedings"[15]

Thus, it may safely be argued that, in modern times a judgement obtained by default may not found a 'res judicata' in English law. Apparently, principles of justice and Common-sense have effectively whittled down to nil, the attribute of finality and conclusiveness it has enjoyed until recently,

In East Africa, the effect of a judgement by default was considered in Re ALLEN,[16] in which an application was made, that an advocate be struck off the roll of Advocates, on the ground that since he had been a defendant in which an allegation of breach of trust had been made in the pleading, and, having failed to enter appearance, judgement had been given against him, he had thereby admitted the truth of the allegation. Various English decisions were considered which pointed out that a judgement by default was capable of founding a 'res judicata' in a subsequent litigation. As far as the law in East Africa is concern, Stephen J. said:-

> "It seems to me beyond all doubt that the respondent Allen by allowing judgement to go by default cannot be estopped from denying the allegation of breach of trust in the plaint. He can only be held to admit that the amount sued for was due from him to the plaintiff" [17]

The law applicable in Kenya with regard to judgement by default, was clearly stated by Wyndham C.J. in MUSA BIN KHAMIS JUMA EL NOFLI V. KAPORO BIN KASIBU MNYAMWEZI [18] to be, that an earlier judgement does not constitute a 'res judicata' where such judgement is by default and not on merits.

SUBJECT MATTER

The law, rests the burden of proof on the party who seeks to rely on a judgement as a 'res judicata' to establish the identity of the subject matter of the previous judgemnet he seeks to plead. It is submitted that, there is no difficulty whatsoever in ascertaining the subject matter of a judgement where the subject matter of the judgement is embodied in a court record which contains in its text an express declaration of the judicial opinion of the court. This makes it easy to establish whether or not the question previously decided is identical with that which is the subject of the later litigation. Hardships do, however, arise where the particular question to which it is desired to found a plea of 'res judicata' in the second proceeding is not a subject of express declaration or finding appearing on the face of the formal record of the previous proceedings.

In any ordinary judgement, two separate genus of 'estoppel res judicata' spring; first, the decision as to the existence or non-existence of some cause of action which may give rise to a 'cause of action estoppel' and; secondly, a lesser determination of questions of fact and law which are essential and fundamental step in the establishment of the existence or non-existence of a cause of action in any litigation. The latter determination may give rise to what is commonly termed as 'issue estoppel'.

CAUSE OF ACTION ESTOPPEL

At it has been mentioned above, the term 'cause of action estoppel' signifies the estoppel which arises between parties by reason of judgemnet given in favour of one and against the other with respect to the cause of action set up in the first proceedings. It is said to be the simplest form of 'res judicata' whose primary effect is preventing a party to an action, from asserting or denying as against the other party the existence of a cause of action which has been determined by a court of competent jurisdiction in previous litigation between the same parties or their privies, Lord Diplock in THODAY V. THODAY define 'cause of action estoppel' to be:-

> ".....that which prevents a party to an action from asserting or denying, as against the other party the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the

> same parties. If the cause of action was determined to exist, it is said to be ..... in 'rem judicatam'. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does, he is 'estopped per rem judicatam' " [19]

The 'cause of action estoppel' may have very disastrous effects upon a plaintiff who has split a single cause of action, since, if a judgement is given for or against him in a suit to enforce a cause of action, he cannot, thereafter maintain an action upon any part of that cause of action. In that case the whole action is said to have merged in or barred by the judgement. The case of WOOD V. LUSCOMBE [20] is very illustrative of this principle. In that case, a collusion occured between two motor-cycles driven by Wood and Luscombe, respectively, both of whom were injured, as was the passenger riding on Wood's motor-cycle. In an action in the High court by Luscomber against Wood, claiming damages for the injuries which he had suffered, they were both found equally to blame. The pillion passenger riding on Wood's motor-cycle later brought an action against Luscombe, in respect of the injuries he had suffered. Luscombe brought Wood in as a third party claiming contributory negligence. The passenger's claim was settled and in the Third Party proceedings, Luscombe claimed that by reason of the judgement in the previous proceedings between Luscomber and Wood, Wood was estopped from denying that he and Luscombe were equally to blame for causing the accident. On this facts, it was held that since the issues of fact in the present Third-Party proceedings were the same as those in the previous action by Luscomber against Wood, and the same evidence would support both, the issue of liability between Luscombe and Wood was 'res judicata'. The court ruled that:-

> "The whole facts governing the respective liabilities of the defendant and the third party have been trashed out and determined.....and one wonders, therefore, what issue there is left for this court now to decide all over again, because it is a principle in the law that there must be an end to litigation .....people cannot have two bites at a cherry; as it seems to me, that is exactly what the third party is now seeking to do." [21]

Analogous to the question of spliting causes of action, is the question where a plaintiff seeks the same relief on different grounds. The principle of law on this subject is very clear; if the

plaintiff has brought an action and alleged certain grounds and judgement is given against him, he is precluded from thereafter maintaining an action for the same relief based on other grounds. A typical example of such a situation is to be found in the facts of WORKINGTON HARBOUR and DOCK BOARD V. TRADE INDEMNITY CO. Ltd.(No. 2)[22] a case brought before the House of Lords.

The facts of that case were that, a firm of contractors agreed to construct a new and enlarged dock. The defendant company gave the Dock Board a bond in the sum of £50,000 to guarantee the performance of the contract. The contractors defaulted, and the Dock Board brought an action against the defendant Company upon the bond. They relied upon an Engineer's certificate showing that the contractors owed them £78,000, which they had failed to pay. The action was dismissed. The Dock Board then started a second action claiming for damages caused by delay, owing to the contractors not having proceeded with due deligence and expedition. The defendant Company applied to have proceedings stayed, on the ground that the same matter had already been finally settled in the first action. On these facts GREEN,LJ. observed that:-

> "In the present case, the plaintiff wholly failed to prove damages which resulted from the breach of contract. They were in a position to prove the whole of them, because they would have called upon the Engineer to say how much delay there was, what was payable in respect of delay, and how much damages there was in respect of other matters. It seems to me, quite clearly, that, if we allowed this second action to proceed, we should be allowing the defendant company to be twice vexed for the same cause of action. The second action is brought by reason of the same failure of the contractors to perform their contract; the damages are put in a different way, but in the second action it is still the same damages which are claimed as are sued for in the first action" [23]

Thus, the court held that a plea of 'res judicata' would succeed, and the second action ought therefore, to be dismissed. This case, is illustrative of the principle of law (in regard to the doctrine of 'res judicata') that, if a plaintiff alleges that a defendant was negligent in a certain respect and is unable to prove such negligence and judgement is given for the defendant, the plaintiff cannot thereafter maintain an

action for the same harm although he alleges other negligent acts.

ISSUE ESTOPPEL

Issue estoppel may be regarded as an extension of 'cause of action estoppel' for to quote Lord Denning M.R. in F. DELITAS SHIPPING CO. Ltd. V. V/O EXPORTCHEB

> "within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule is that, once an issue has been raised and distinctly determined between the parties then as a general rule, neither party can be allowed to fight that issue all over again" [24].

Apparently, adopting a similar reasoning as the one advanced in the above case Diplock, L.J. in THODAY V. THODAY said:-

> "There are many causes of action which can only be established by proving that two or more different conditions are fuilfilled, such cause of action involves as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action, and there may be cases where the fulfilment of an identical condition is a required common to two or more cause of action. If in litigation on one such cause of action, any such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfiled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was" [25]

Indeed, the words and observations of Lord Diplock in the above case exhausitively highlight the major attributes of 'issue estoppel' and its effect as a genus of a 'res judicata'. It has been made very clear, that 'issue estoppel' is an extension of 'cause of action estoppel' and concerns issues which are primary and fundamental to the establishment of a cause of action and also the judgement delivered in any court. When considering whether or not, a particular issue was determined by a court of competent jurisdiction, one has to look into not merely the record of

the judgement pronounced and relied upon, but, more so at the various reasons for the judgement, the pleadings, the evidence adduced and all relevant materials to indicate what issues were dealt with.

THE DOCTRINE OR 'RES JUDICATA' IN MATRIMONIAL PROCEEDINGS

The question we are addressing ourselves to, is whether or not the ordinary principles of 'res judicata' as a branch of 'estoppels' apply in matrimonial proceedings between the parties litigant and also the court. It is submitted that, in England and as well as Kenya, the divorce court had a duty to inquire into facts and duly be satisfied that an alleged matrimonial offence has been committed before granting relief sought by the petitioner. In its determination whether a matrimonial offence has been committed, the court may not permit a petitioner to plead that the offence in question in latter proceedings, had previously been pronounced as existent, therefore binds the respondent. It is this unique position of a divorce court which whittles down the full application of all the ordinary principles of 'res judicata' in matrimonial proceedings. In JAMES V. JAMES, LORD MARRIMAN, put the case to be that:-

> " The question of estoppel in matrimonial cases is one difficult. A petitioner in the divorce court, whose claim for relief is based on an alleged matrimonial offence of the respondent, cannot oblige the court to decide the issue in his favour on the grounds that the respondent is estopped from denying the charge by the finding of some other court from exercising its statutory duty to inquire into the truth of the facts upon which the petition is based and this be contrary to public policy" [26]

A similar reasoning was duly a dranced by Lord Denning M.R. in THOMPSON V. THOPSON, in which their lordship made the following observations:-

> "Once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to reopen the issue and litigate all over again if the other party objects..... But the divorce court has the right, and indeed the duty in a proper case to reopen the issue or to allow either party to reopen it, despite the objection of the other party." [27]

Thus, in matrimonial proceedings, a petitioner cannot as of right contend

that a 'res judicata' as existing following a determination in a previous proceeding, with the respondent. The divorce court vested with the duty of inquiry into any alleged matrimonial offence, has an unchallengable right whether or not to permit a party to reopen the issue for re-litigation. When an issue of a matrimonial offence has been litigated between the parties and determined by a compentent court, it in effect binds the parties there to but does not bind the court.

There are very limited East Africa decisions dealing with the application of 'res judicata' in matrimonial proceedings. The only significant case which throws light on the position of the law in East Africa is UCHAI V. ELKANA.[28] The facts of that case were that, in February, 1966 the appellant was ordered by a District court to pay maintenance to his wife, the respondent, despite the fact that the marriage was proved to be a monogamous marriage. In June, 1967, the appellant applied for discharge of the order on the grounds, 'inter alia,' that the marriage was a customary marriage. Thereupon the court refused to entertain the application on the ground that it was 'res judicata'. On appeal, the appellant contended that the doctrine of 'res judicata' did not apply to matters of this nature and that he would challange any order upon bringing of fresh evidence.

On the question whether the doctrine of 'res judicata' applies to matrimonial proceedings, the court held that; 'res judicata' could apply to maintenance proceedings, if there was no fresh evidence, and since, the appellant had proposed to adduce fresh evidence the magistrate should have heard the evidence and rule on it. Notwithstanding the fact that, the court did not highlight all the principles of law applicable with regard to 'res judicata' in matrimonial proceedings, it may correctly be said that the law in East Africa is not very different from the English law on this subject. The rule is, that in matrimonial proceedings a matter is never concluded 'per rem judicatam' and no doctrine of estoppel can operate against a party so as to abrogate the statutory duty of the divorce court to inquire into the truth of a petition which is properly brought before it.

THE PRINCIPLES OF 'AUTREFOIS ACQUIT' AND 'AUTREFOIS CONVICT' IN CRIMINAL CASES

In criminal cases the Principle of 'Autrefois Acquit' and 'Autrefois convict' play a role roughly equivalent to that of 'cause of action estoppel' in civil proceedings. These principles, commonly refered to as, the principle against double jeo-pardy, primarily seek to preclude a second prosecution of the accused person, for a crime of which he has

previously been either acquitted or convicted by a court of competent jurisdiction. These principles, which occupy a very central place in criminal law are beeen in the constitution of Kenya and also the criminal Procedure Act.[29]

Under section 77(5) of the constitution it is provided that

> "No person who shows that he had been tried by a competent court for a criminal offence and either convicted or acquited shall again be tried for that offence or for any other criminal offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquital"

Section 138 of the Criminal Procedure ~~Act~~ Code, which equally embodies the pleas of 'Autrefois Acquit' and 'Autrefois Convict,' provides to the effect that:-

> "A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquited of such offence, shall while such conviction or acquital has not been reversed or set aside, not be liable to be tried on the same facts for the same offence."

Thus, to institute fresh proceedings against one who has previously been either convicted or acquitted of that same offence by a court, property so constituted and rested with competent jurisdiction, is unconstitutional and violates the provisions of the criminal Procedure Act. However, before the pleas of 'Autrefois Acquit' and Autrefois Convict' are said to exist each and every of the following conditions must be satisfied:-

First, the person who seems to rely on either a plea of 'Autrefois Acquit' or 'Autrefois Convict', must establish that alleged previous proceedings were determined by a criminal court vested with competent jurisdiction, and the proceedings in the nature of a criminal proceeding. Where neither of these salient conditions are existent, any fresh proceedings against the defendant would not violate the provisions of the criminal procedure Act nor be regarded as unconstitutional. Thus a plea of 'Autrefois Acquit' or 'Autrefois Convict' will not succeed unless the defendant is able to establish that there was a criminal proceeding before a court of competent jurisdiction

in which he was either convicted or acquitted of the offence now being brought against him. The criminal Procedure ~~Act~~ Code, under section 239 provides that

> "If at the close of the prosecution, or after hearing any evidence in defence, the court considers that the evidence against the accused is not sufficient to put him on his trial, the court shall forthwith order him to be discharged, as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts"

The notion of competent jurisdiction is clearly provided under section 141 of the Criminal Procedure Act, which reads:-

> "A person convicted or acquited of any offence constituted by any acts may, not withstanding such conviction or acquittal be subsequently charged with and tried for any other offence constituted by the same acts which he may have been committed, if the court which he has first tried was not competent to try the offence with which he is subsequently charged."

Secondly, the defendant in subsequent proceedings, must establish that the previous prosecution is still effective, material and subsisting. That is to say, the previous judicial determination has since not been subject of appeal or been set aside by a superior court in course of appeal or review proceedings. Section 77(5) of the constitution and section 139 of the Criminal Procedure Act (quoted above) are very clear on this matter.

Last but not least, the defendant must satisfy that the second prosecution staged against him promarily constitutes an offence adjudicated upon in the first prosecution. Where a subsequent prosecution is a proceeding of a continuing or distinct offence, a plea of 'Autrefois Acquit' or 'Autrefois Convict' will not secceed. Section 140 of the Criminal Procedure Code, which embodies this requisite, reads to the effect that:-

> "A person convicted or acquited of any act causing consequence together with such act constitute a different offence from that which such person was convicted or acquited may be afterwards tried for such last mentioned offence, If the consequence had not happened at the time when he was acquited or convicted."

In their traditional application in law, the principles of 'Autrefois Acquit' and 'Autrefois Convict' constitute a rule of conclusiveness and finality; a single fair trial on a criminal charge bars reprosecution. These principles act as a check-measure against the prosecution who, for one reason or another, may stage multiple prosecutions against an individual. The rationale of these principles in criminal law is spelled out by Black, J in GREEN V. UNITED STATES that:-

> "The underlying idea, that is deeply ingrained is that the state /with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal, compelling him to live a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty" [30]

These principles, FRIEDMAN,[31] says go over and above the mere protection of the defendant in criminal proceedings to:-

> ".....the legal system itself. By preventing harrassement and inconsistent results the rule assists in ensuring that court Proceedings, to use Lord Devlin's phrase "Command the respect and confidence of the public" [32]

Indeed, courts must always strive to promote and institutionalize public confidence in them. Without the confidence of the public, the essence of the judiciary system shall be whittled down to nil; a thing which the principles of 'Autrefois Acquit' and 'Autrefois Convict' seek to realise in our adversary system. Admittedly, bar of a second prosecution, occasionally enables guilty persons to escape punishment; but this is the price we have to pay, because, ours is an adversary system, peged for all purposes to the concept of justice and fairness. Moreover, no one can deduce with certainity whether or not a particular accused person is within the class that will escape punishment.

THE STATUTE LAW (MISCELLENEOUS AMENDMENT) Act No. 10 of 1969

By virtue of the statute Law (Miscelleneous Amendment) Act - No. 10 of 1969 - Section 47A was added to the provisions under the Evidence Act. The Section reads:-

> "A final judgement of a competent court in any criminal proceeding which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is the latest be taken as conclusive evidence that the person so convicted was guilty of the offence as charged."

The legal effect of section 47A was first considered by the court of Appeal of Kenya in ROBINSON V. OLUOCH[33]. In that case, the respondent appeared and filed a defence in a suit arising out of a motor-accident some five months after the summons had been served The appellant, on the other hand applied to strike out the appearance and defence entered by the respondent in this matter. The appellant argued "Inter alia", that the respondent's conviction of careless driving connection with the accident, the subject of the suit, was conclusive evidence of his sole negligence under section 47A of the Evidence Act.

Striking out the appearance and defence, as prayed by the appellant, the court of Appeal observed that:-

> "The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think..... it may not be open to the respondent to deny that his driving in relation to the accident was negligent.....we are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident to plead in subsequent civil proceedings arising out of the same accident, that the plaintiff, or any other person was also guilty

of negligence which caused or contributed to the accident" [34]

Thus, by virtue of the addition of section 47A of the Evidence Act, a criminal conviction, under special circumstances, may be conclusive evidence of a previous conviction in subsequent civil proceeding arising out of the same subject matter.

More light was shone on this section in QUEENS CLEANERS and DYERS Ltd V.E.A.C. and Others[35] In that case, the defendant a driver of a motor-vehicle involved in an accident was charged and convicted of careless driving. In the negligence action arising out of the same accident, he attempted to lead evidence showing his reasons for pleading quilty. The plaintiff objected, contending that the conviction was conclusive evidence, under section 47A of the Evidence Act. Resolving the suit in favour of the defendant Trevelyan J. said:-

> "In my view the expression "Conclusive evidence" in section 47A, means evidence which cannot be the subject matter of dispute, qualification or challenge. The word "Conclusive" has a number of meanings, such as final, that closes the decision, and decisive, and in the context of the section "conclusive evident" is evidence of such a nature" [36]

The court further observed that the conclusive nature of a previous conviction applied to both ~~xxbjxx~~subsequent civil and criminal proceedings. Thus the legal effect of section 47A of the Evidence Act, is that a previous criminal conviction by a competent court is 'res judicata' whenever that issue has to be raised in a subsequent civil proceeding or criminal proceeding.

THE THEORY UPON WHICH THE DOCTRINE OF 'RES JUDICATA' RESTS

Before attempting to lay down the theory upon which the doctrine of 'res judicata' rests, we must first get rid of the antiquated view entertained by the legendary Sir Edward Coke, which apparently is the source of the misleading but surving expression "Estoppel by Record". Sir Edward Coke is quoted to have categorically stated that, it is only a court of record which should be taken to be a judicial tribunal for purposes of the doctrine of 'res judicata'. Termining this view as unsound and misleading, Brett M.R. in Re MAY said:-

> "Counsel for the petitioner has argued, first of all that this is not 'res judicata' because there was no record, and the doctrine of 'res judicata' applies where there is a record. To my mind that arguement cannot be sustained. The doctrine of 'res judicata' is not a technical doctrine applicable only to records" [37]

Thereof, their lordship, proceeded on to state the theory upon which the doctrine of 'res judicata' rests, in the following terms:-

> ("The doctrine of 'res judicata') .....is a very substantial doctrine and it is one of the most fundamental doctrine of all courts, that there must be an end to all litigation, and that the parties have no right of their own accord, having tried a question between them, and obtained a decision of a court to start that litigation over again on precisely the same question." [38]

Primarily the theory upon which the doctrine of 'res judicata' rests is well summed up in two celebrated legal maxims, 'interest reipublicae ut sit finis litium' - that is to say, in the interest of the state there should be an end to litigation - and 'nemo debet bis vexari pro una et aedem causa'- that is to say that, one should not be vexed twice for the same issue. The former has come to be refered to as, public policy, the latter, private justice, respectively.

The doctrine of 'res judicata', must be viewed a legal measure against vexarious litigations which, obviously sause unwarranted expense, undue hardships and anciety on the part of the defendant. No one enjoys going to court unless he is a lunatic. People are usually compelled to do so when there is at stake their life, wealth, reputation, honour or one of those important things which a man must think it worth-while to litigate on. In almost all cases, people are never willing nor have the stamina or resources to litigate on the same issue over and over again. It is only those with unlimited resources who seek to relitigate, as many times as their money will enable time, One can imagine the state in which the poor would find themselves in. Appraenty they would be forced to vaive their rights merely because they are financially unstable to keep fighting a matter over and over again. Thus, the doctrine of 'res judicata' protects the poor and

under privileged from being deprieved of their rights by means of a multiplicity of litigation over a same issue, formerly adjudicate upon. Once a matter has been adjudicate upon, parties thereto, should regard the matter as once and for all settled. After their day in court they are expected to go home and resume their day to day activities. This contributes to harmony and peace in society.

Human beings quite often disagree. The court system plays a very central and significant role in adjudicating upon those disputes brought before it fairly, conclusively and within reasonable time. Law is a system for imposing a modicum of order on the disorder of human experience without disrespecting or suppressing a measure of diversity spontaneity, and disarray. In Kenya, the economy of the court's time has become a very sensitive issue, as work keeps crowding more and more on our courts. The multiplicity of litigations has attained an alarming rate such that in most cases, suits take almost a year before intervene to settle the matter. Justice delayed is justice denied. It is in this respect that the doctrine of 'res judicata' intervenes to direct the limited time of the courts to fresh litigations, which, otherwise, would be wasted on re-litigations. However, the problem can best be solved by an expansion of the judiciary machinery to reach all the corners of the Country. More judges have to be enrolled to dispose of litigations fairly and within a reasonable time. Lawyers in private practice and students of Law should be encouraged to join the bench. The state should move in and offer a handsome salary and other benefits to those willing to join the bench.

'Estoppel' is not 'odius' and should operate to ensure justice instead of causing practical injustice. The doctrine of 'res judicata' must be viewed as a matter of 'Procedure', which if justice requires should be dispensed with accordingly.

C H A P T E R T H R E E

THE DOCTRINE OF ESTOPPEL BY DEED

GENERAL INTRODUCTION:

The doctrine of estoppel by deed is, yet, another category of 'estoppel' which falls squarely within the rubric of the law of evidence. In English jurisprudence, Holdsworth[1] submits the doctrine dates back to medieval times, whereby it operated as a mode of proof in establishing the existence of a right, liability or transaction. In its rapid development, the doctrine made adverse effects on other branches of law besides the law of evidence. Particularly so, in the law of property where it founded the rule that certain incorporate property could be created or conveyed by means of a deed alone. Further, in the law of contract, it accounts for the early appearance of the speciality contracts, and consequently the idea that an agreement between parties may give rise to legal rights and liabilities enforceable by a court of law.

It was not until the end of the sixteenth century, that estoppel by deed came to be correctly regarded as a rule of evidence, based on the principle that, when a person has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted, by a court of law, to deny any of the facts he has so asserted.

THE DOCTRINE OF ESTOPPEL BY DEED

Mr. Justice Black[2] notes:-

> "A deed is the most solemn and authetic act that a man can possibly perform.....and therefore, a man shall always be estopped by his own deed, or not permitted to over or proof anything, in contradiction to what he has once so solemnly and deliberately avowed."

The special treatment, in respect of deeds, is traceable to the very early times when the King's word was considered indisputable and his seal to a document had the effect of furnishing it with autheticating genuiness; thus conclusive to statements embodied therein. Wigmore,[3]

who successfully traces the evolvement of the rule against contravening a deed to the anologous legal value attached to a King's seal to a document during the medieval times, has this to say:-

> "The legal value of the seal was the result of a practise working from above downwards, from the King to the people at large. It is involved in the beginning with the Germanre principle that the King's word is indisputable..... the King's seal to a document makes the truth of the document incontestable. This leads..... to the modern doctrine of the verity of judicial records.....For private man's documents its significance is that the indisputability of a document sealed by the King marked it with an extra-ordinary quality to be sought after. As the habitual use of the seal extends downwards its valuable attributes fo with it..... this extension of the seal (from the King to private persons) begins in the eleventh and completed by the thirteenth century" [4]

It is important to note that the Evidence Act (nor the *Indian Evidence Act) does not specifically* provide for estoppel by deed within the provisions of section 120 or anywhere in the 'Act! ~~Mere~~ worse perhaps, is the glaring fact that, in East Africa, there is very limited case law on the subject of estoppel by deed. Even in those few cases, which are hard to find the tendency of the judges, has always been to quote English decided cases without making it clear how much of the principles of English law of evidence on this subject is applicable to Kenya.

In GREER V. KETTLE[5] it was clearly stated that:-

> "Estoppel by deed is a rule of evidence founded on the principles that solemn and unambiguous statement or engagement in a deed must be taken as binding between the parties and privies, and therefore, as not admitting any contradictory proof."

The operation of estoppel by deed, as a rule of evidence, is illustrated in JENEBAI SACHOS and ANOTHER V. SHAMSA BINTI HAMUD BIN SHAMIS and ANOTHER[6] The deed in question, in this case contained in the preamble the following terms:-

> "And whereas the mortgagee has at the request of the mortgagor and the surety agreed to lend to her the mortgagor the sum of Shs. 16,000/-....."

The plaintiff claim against the second defendant was based on allegations that he had been guity of a breach of warranty as to her identity of the mortgagor, the loan to him having been made at his request and the deceased having relied on the warranty. LAW J held that the second defendant's defence, that he did not request the loan to be made, could not avail him, because the recital in the deed (as quoted above). The court made the following observations:-

> "To quote from Halsbury (3rd ed) volume 15 at P. 215 a person is bound by the recitals in a deed to which he is a party whenever they refer to specific facts and are certain, precise and unambiguous. F. K. Verji set his hand and seal to this deed, and he is not permitted to deny any matter he has specifically asserted therein. He is estopped by the deed from so doing, and the fact of him having made the request refered to in the preamble cannot be denied by him."[7]

Thus, for a person to be held estopped by a deed, it must be clear that he was a party to it, and the statements therein must be certain, precise and unambiguous.

It is important to note that, in English law, a recital in a deed was for a long time not considered to be so direct as an affirmation to amount to an estoppel. This view was not distinctly overruled till the year 1834, in the case of BOWMAN V. TAYLOR [8] in which it was held that this view was unsound. In that case, the principle of estoppel by deed was extended to cover recitals in a deed so that the defendant, a licensee of patent rights was estopped from denying that the plaintiff was the inventor, as he had executed a deed of licence which recited that this was the true nature of the facts. The apparent theory of estoppel by recitals in a deed, however, was formulated in a more satisfactory manner in a latter case of,

STROUGHILL V. BUCK.[9] In his judgement, Patterson J. said:-

> "When a recital is intended to be a statement which all the parties to a deed mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be a statement of one party only, the estoppel is confined to that party and the intention is to be gathered from construing the intrument" [10]

The principle of law is that, a party is only to be regarded bound by a recital in a deed to which he is a party, and such a recital must refer to specific facts, certain, precise and unambiguous; The estoppel does not stretch to cover immaterial parts of the deed or recital in a deed, nor will a party be bound by inferences which may be drawn from statements in a deed or a recital in a deed.

The principle of law was well domonstrated in, the case of EAST AFRICA POWER AND LIGHTING V. DANDORA QUARRIES" [11]

In that case the plaintiff Company sued the defendant on a minimum consumption agreement for the supply of electricity interms of which the defendant undertook to pay the minimum annual charge of Shs. 12,840.00 per annum for a period of forty - six months from January, 1965. The defendant paid Shs. 7,195.60 for electricity consumed during 1965 and the plaintiff claimed the balance of the minimum due under the minimum consumption agreement, that is shs. 5,644.40 The defendant admitted the agreement but claimed that it was void and enforceable because, 'inter alia' It was without consideration and that it was illegal as not in accordance with the charging provisions laid down in Section 25 (i) of the Electric Power Act. The plaintiff argued that the defendant was estopped from denying the consideration which was stated in the agreement, as being a request by the defendant that the plaintiff Company should carry out certain works towards the instalment of an electric energy supply

in return for which the defendant agreed to sign the minumum consumption agreement.

Chanan Singh J. In his judgement observed, that a mere recital of consideration in a deed does not operate as an estoppel that there was no estoppel operating, to prevent the defendant from challenging the consideration stated in the recitals to the agreement. In his own words, he is quoted to have said that:-

> "A recital..... ... especially one reciting merely the history of negotiations or the reason for entering into the agreement.....is not a term of contract, although in cases of ambiguity of the operative part, a recital may be looked at to resolve the ambiguity. I think the defendant was entitled to re-open the matter of consideration. The recital in the agreement was not conclusive on this issue"[12]

In appropriate cases, an estoppel by deed may be set up against a principal, on the strength of a statements in a deed signed by an agent acting within his actual authority. The case of HOLDWORTH v. Lancashire and YORKSHIRE INSURANCE CO [13] made it clear that an estoppel by deed, may be set up against a principal, by which he is concluded from repudiating alterations made by his agent, in a deed subsequntly to the execution by the principal, if in consequence of the alteration the person setting up the estoppel has altered his position.

EXCEPTIONS TO THE RULE OF ESTOPPEL BY DEED

Professor Cross,[14] notes that, whatever may be the true modern basis of the doctrine of estoppel by deed, its scope is considerably limited under the present law by various operative exceptions. First, the doctrine of estoppel, is exclusively confined to deeds, and specifically applied and binds parties to it and those claiming through or under them.

The second exception to the rule is stated by Halsbury that:-

> "Where the truth appears by the instrument there can be no estoppel unless a clear intention is expressed in the deed to disregard it" [15]

Thirdly, where a person knows the truth of the circumstances under which a deed has been executed, whether such

knowledge was acquired peronally or through his agent, he cannot set up an estoppel in his own favour, if the circumstances were such as to make the deed invalid and in operative, as between the parties and their privies.

The ~~fifth~~ fourth exception to the rule, concerns a mere mistake in a deed common to all the parties thereto; where it is shown that such a mistake existed, not through fraud or deception, no party will be allowed to plead an estoppel.

Lastly where the instrument bound to creat^a an estoppel in rectifiable, there can be no estoppel to the extent of the rectification. And of course, in so far as the deed is void, on grounds that it was obtained by fraud, duress or other foul purposes, no estoppel can arise upon it.

It is worth of note, that these exceptions and many others, which are not herein pointed out, have greatly limited the scope and operation of the doctrine of estoppel by deed presently. Anologous to the subject of estoppel by deed, is the rule in respect of documentary evidence embodied in section 97 (1) of the Evidence Act. The section reads as follows:-

> "When the terms of contract or grant, or any other disposition of property, have been reduced to the form of a contract, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given of the terms of such a contract, grant or other dispositon of property, or of such matter, except the document itself, or secondry evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act"

The theory upon which the rule in respect of documentary evidence rests, is that once parties have resolved that a particular document shall be the sole embodiment of their legal acts for certain legal purposes; so far as that effect and those purposes are concerned, they must be found in that instrument and nowhere else. Wigmore [16] who traces the evolvement of this rule of evidence to medieval times says:-

> "In the primitive medieval conception a document directly affecting rights of property or contract (as we should nowadays say) was looked upon as having in

itself an 'extrinsic effect'. Its physical material existence was what counted, and nothing less. produced - and lo! Its very parchment worked its spell. Not produced - and it countered for nothing" [17]

Thus in ABDULLA V. SHARIFA BINTI MOHAMED[18] where, a settler by a written instrument declared a wakf of certain property stating therein that the income was to be divided between her two adopted daughters, extraneous evidence to show that the settlor intended the dispostion to be limited to the maintanance and support of the children was held inadmissible. The terms of the instrument were regarded as explicit, conclusive and binding, and no parol evidence could be adduced to quality the terms therein.

Moreover, where the contract, grant or disposition of of property is a matter, required by law to be reduced to writing, oral evidence in proof of the terms of the contract, grant or disposition is inadmissible, whether or not it has been actually reduced to writing. In DOMODAR JAMNADAS V. NOOR MOHAMED VALJI[19] for instance, it was held that, the Money Lenders Act[20] which states that no contract for repayment of money lent is enforceable without a signed note or memorandum in writing of the contract, placed upon the money lender the onus of proving the existence of such note or memorandum, and that the onus could only be discharged by the production of the note or memorandum itself (except in cases in which secondary evidence was admissible) and that oral evidence of such a note or memorandum was inadmissible.

THE RATIONALE OF THE DOCTRINE OF ESTOPPEL BY DEED IN MODERN TIMES

It is worth of note that the Evidence Act (nor the Indian Evidence Act, 1872) does not provide for the rule of estoppel by deed, within the provisions of section 120 or anywhere in the 'Act' More worse, perhaps is the bitter fact that there is very limited case law on the subject of estoppel by deed in Kenya. Even in the few cases, where the doctrine of estoppel by deed has been said to operate the tendency of the judges has always been to quote English cases without

making it clear how much of the principles of English law on this subject applies in Kenya. Since the subject of estoppel by deed is not specifically prescribed for under the Evidence Act, I think it is very crucial that our courts attempt to streamline its principles and appertaining qualifications in the interest of justice and consistency.

As mentioned above the application of the rule of estoppel by deed in modern times is limited greatly. This is so partly because it primarily deals with deeds and partly because it is subject to numerous exceptions. As a matter of fact, transactions between parties in this country are usually of a simple and informal character which do not require the strict rules and principles of estoppel by deed as known to the English law, Moreover, contracts under seal are very ~~rear~~ rare and people seem not to give them a special privilege or technicality. Thus, the subject of estoppel by deed in this country does not call for any of the strict and technical principles as known to English law on this subject. The best we can do, is have all documents which purport to envisage transactions governed by Sections 97-98 of the Evidence Act and other rules governing simple contacts.

Admittedly, in property law and commercial transaction the rule of estoppel by deed still holds water. Reading and writing still remains a mysterious art known only to the few 'elite', the only ones who can effectively guard themselves against foul practises which are prevalent in transactions reduced to the form of a document. Much of the Kenya population, especially those in the rural area are illiterate and surely, they should be at liberty to adduce evidence to show the truth about a given transaction reduced to the form of a deed under seal or document.

Last but not least, there seems little justification, if any, in preserving the doctrien of estoppel by deed as a separate entity or category of 'estoppel' statements in documents are, as admissions, evidence against the parties thereto. If such statements are acted upon by the other party to his detriment, the case can be correctly be brought within the rubric of the doctrine of estoppel by conduct. Indeed, the rule of estoppel by deed is one of justice but whose strictness must be proportioned to the degree of

which people have in this Country.

CHAPTER FOUR

THE DOCTRINE OF ESTOPPEL BY CONDUCT

The doctrine of estoppel by conduct is regarded as a category of 'estoppel' embodied within the general concept of estoppel embodied under section 120 of the Evidence Act. The section clearly states:-

> "When one person by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing"

Thus, the essential elements which bring a case within the scope of section 120, with regard to estoppel by conduct are that:-

1. There must be a representation by a person or his representatives to another person in any form, that is, either by declaration, act or omission;
2. The representation must have been of the existence of a fact and not of promise 'de futuro' or intention which might or might not be enforceable in contract;
3. The representation must have been meant to be relied upon.
4. There must have been belief on the part of the other party in its truth and
5. There must have been action on the faith of that representation, that is to say, the declaration must have actually caused another to act on the faith of it and alter his former position to his prejudice or detriment. → [wrong.] simply act upon the belief.

It appears Section 120 of the Evidence Act, enacts nothing distinctly different from the English law of 'estoppel in pais' enshrined in the judgement delivered in PICKARD V. SEARS[1] where the principle was stated to be that:-

> "When one by his words or conduct, willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from avering against the latter a different state of things as existing at the same time"

The principle as stated above, was amplified and re-stated in THE CITIZEN BANK OF LOUSIANA V. THE FIRST NATIONAL BANK OF NEW ORLEANS : in the following terms:-

> "..... that if a man dealing with another for value makes statements to him of existing facts, which being stated would

affect the contract, and without reliance upon which, or without the statements of which the party would not enter into the contract and which being otherwise than as they were stated would leave the situation after the contract different from what it would have been if the representation had not been made, the person making those representations shall be treated as if the representation were true and shall be compelled to make them good" [2]

The law places the onus of proof upon any party who seeks to plead estoppel by conduct to prove each and every aspect of the essential elements mentioned above to bring his case within the scope of section 120 of the Evidence Act. In practise, more often than not, great difficult is experienced in determining whether a person by his conduct brought himself within the rubric of section 120 of the Evidence Act. The determination of this question largely depends upon the facts of the case which certainly vary from one case to another. To illustrate how the courts have struggled to resolve the problem, a number of cases should be looked at.

In PRAJAPAT V. ASHOK COTTON CO. Ltd[3], the court held that the plaintif conduct in paying increased rent without protest and having his name registered as the owner of the property, after he had learned the correct rental of the plot in question, estopped him from latter complaining about the increase. Similarly in JETHA ISMAIL V. SOMENI BROS[4] where the appellants had represented to the respondent that they had remitted payment in cheques, and the respondent acted upon that representation to bring the case within section 113 of the Uganda Evidence Ordinance (equivalent to section 120 of the Kenya Evidence Act), It was held that the appellants were estopped by their conduct from denying that they had infact remitted payment by cheques, and their action to force payment was not maintainable.

The problems experienced in determing whether or not a person by his conduct brought himself within the scope of section 120 of the Evidence Act, have had disastrous effects occasionally. It is for that reason that the judgement in MATAYO MUSOKO V. ALIBHAI GARAGE LTD[5] should be looked at as invoking bad law and perpetuating practical injustice. The facts of that case were that, the defendant had hired a motor vehicle under a hire purchase agreement on one S; and gave him possession of the motor vehicle and the registration book. Having had the car registered in his name, S. consequently defaulted in payment of instalments under the higher purchase agreement and sold the car to the plaintiff, who

subsequently registered it in his name. The defendants acting on the express terms of the hire-purchase agreement with S. seized the sakd motor-vehicle, The plaintiff thereon brought this action for the return of the motor-vehicle or its value. The plaintiff contended, 'inter alia' that the defendant having handed over the registration book to S. and allowed him to register the motor-vehicle in his name, was estopped by conduct from denying S's authority to sell the motor-vehicle.

On the subject of estoppel the court observed that the handing over of the registration book was not a conduct sufficient enough to justify an inference of estoppel. The court further held that, a registration book is not a document of title and a registration book contained such a warning in bold letters. I believe this is a case which involves a situation where the true owner of goods, in breach of his duty to third parties, armed another person with some 'indicta' of title to the goods and letting that other person deal with the goods as if they were his own. Under such circumstances the law is very clear that, the true owner is precluded as against the third party (and any subsequent dealer) who deals 'bona fide' with the goods and without the knowledge of the rights of the true owner, from denying the authority of that other person to deal with the goods in the manner in which they were dealt with. Thus, in this case, the defendant was precluded from denying the authority of S. to deal with the mator-vehicle as he did; thus, precluded from saying or asserting that the plaintiff was liable to him in conversion or otherwise.

The true principle of law in such matters was duly applied in VALLABHDAS HIRJI KAPADIA V. THAKERSEY LAXMIDAS.[6] The facts of that case were that, the appellant instructed on J.V. to ship certain goods to Mombasa. J.V. with the appellants knowledge, invoiced the goods to his agent, the respondent, for sale. These invoices implicity warranted the authority of J.V. to sell the goods and the respondent, who was unaware that J.V. was not the true owner sold them. Later, as the result of confusion delinerately created by J.V. with intent to defraud, the respondent met two bills of the sale drawn by J.V., in the believe that he was paying for the goods. When he was later presented with a further bill, this time, in fact for the goods in question he objected to accept them. The appellant, then brought this action against the respondent for conversion.

After a careful analysis of the facts the court held that the appellant was precluded from asserting that the respondent wrongly dealt with the goods or was liable to him in conversion. Newbold J.A. delivering judgement said that the true principle applicable was that:-

> ".....Where the true owner of goods, in breach of his duty to third party, arms his agent, or unowingly permits his agent to arm himself, with some 'indicta' of title to the goods and allows the agent to deal with the goods as if they were his own, then the true owner is precluded as against this third party (any subsequent dealer) who deals 'bona fide' with the goods and without knowledge of the rights of the true owner, from denying the authority of the agent to deal with the goods in the manner in which they were dealt with" [7]

It is not uncommon even to find courts in East Africa attempting to apply the doctrine of estoppel by conduct to situations where it has no relevancy at all. This can clearly be illustrated by the case of CLIFTON V. HAWLEY.[8] The plaintiff in that case had submitted to arrest on the strength of the presentation to him of a warrant of arrest on which his first christian name had worngly been inserted as 'Edward' instead of 'Edgar'. On his trial it turned out that the error had been done and as a consequence of which he was discharged. He then brought this action claiming damages for false imprisonment. The court observed that, by accepting the position without demun after the presentation of the warrant the plaintiff had given the defendant an unmistakable indication that, in the plaintiff's view, the defendant was acting correctly in effecting his arrest and that the plaintiff would place no obstacle in his way; hence the action was not maintainable.

A close reference to section 120 of the Evidence Act, clearly shows that neither of the essential elements which brings a case within the ambit of the section existed in this matter. This was a clear matter concerning the tort of false imprisonment, of which the plaintiff had successfully established and was entitled to damages.

THE REPRESENTATION MUST BE CLEAR AND UNAMBIGUOUS

To found an estoppel by conduct, a representation to be relied upon by the party who seeks to plead estoppel, must be clear, unambiguous and unequivocal. This rule is, just but, an application of

to every intent'. In WOODHOUSE AC ISRAEL COCOA Ltd S.A. and ANOTHER V. NIGERIAN PRODUCE MARKETING CO Ltd[9] Pillimore L.J. said:-

> "We have been refered to a mass of authority on the law of estoppel. We have ploughed through cases from Low v. Bouverie[10] Freeman v. Cooke,[11] and many others to a recent decision of McNaim in Marquess of Bute v. Barclays Bank Ltd.[12] The overwhelming emphasis throughout these cases is that the words if there are to constitute an estoppel must be clear and unambiguous on unequirocal" [13]

However, the rule does not require that the language on conduct must be such that it cannot possibly be open to different constructions. It should only be that, it is capable of being reasonably understood in a particular sense by the person to whom it is addressed.

In an old English case of FREEMAN V. COOKE [14] an assignee of a bankrupt was held not to be estopped from proving by evidence, the bankrupt's ownership of goods seized by a sheriff because, although the bankrupt had denied that the goods were his, he had made a number of contradicting statements concerning the person who was their owner. His statement was not clear and unambiguous or unequivocal to found an estoppel against the assignee.

In HARMAN SINGH V. JAMEL PIRBHAI[15] the statement in a letter sent to a landlord by the tenant's advocate to the effect that upon acceptance of a notice to quit, the tenant was to become a statutory tenant henceforth, were held, on the ordinary construction, to be clear and unambiguous; hence, the tenant was estopped from contending that he was a contractual tenant, but to be taken to be a statutory tenant.

THE REPRESENTATION OR CONDUCT AMOUNTING TO A REPRESENTATION MUST RELATE TO EXISTING FACTS

To create an estoppel by conduct, within the scope of section 120 of the Evidence Act, the representation or conduct amounting to a representation must relate to an existing fact, relating to present or past state of things. In JORDAN V. MONEY[16] it was stated that:-

> "In order to operate an estoppel, a representation must be of some fact ~~the plaintiff had given the defendant, an~~ ~~exist~~ alleged to be at the time actually in existence: not

> of promise 'de futuro' or of intention which might or might not, be enforceable in contract" [17]

Thus, a mere promise to do a certain act in consideration of something else, may form a valid agreement if it can be proved, and if the law allows it, but it can certainly not be termed a statement of an existing fact, for purposes of operating an estoppel by conduct.

THE REPRESENTATION SHOULD BE ONE OF FACT AND NOT LAW

To invoke an estoppel, one must be able to establish that the representation on which he is relying was one of fact and not of law - that is to say, a person cannot be estopped from stating what the law is, merely because previously he made a statement misrepresenting the state of law in a given case. That was clearly brought out in Re. Hooley Hill RUBBER and CHEMICAL CO. and ROYAL INSURANCE CO. Ltd [18] in that case an agent of an insurance company was asked by the manufacturers, whether the Company's ordinary policy covered damage done by explosion following a fire. The agent quoted the terms of the relevant clause and stated that damage caused by an explosion resulting from fire would be covered, except for loss and damage specified in the condition. The manufactures understood the qualification to refer only to an explosion due to hostile action. Consequently, an explosion occured causing fire which damaged the property of the manufacturers, who thereon sued the insurance Company to recover under the insurance policy taken out. It was contended on behalf of the manufacturers that the insurance Company was estopped from denying liability.

The court held that, the representation by the agent was a representation not of fact but of law, namely as to the meaning and effect of the stipulated condition, hence, the insurance Company was not estopped from contending by way of defence, that the loss was caused by explosion. The court observed that:-

> "If the statement was a statement of an existing fact, independent of any question of construction of a written document, which would be a question of law, or partly of law and partyly of fact, ...there would be an estoppel" [19]

Similarly in BEATIE V. LORD EBURY [20] where the question was whether the director's of a railway Company were personally liable for making a representation to the Manager of a bank to the effect that they had power to overdraw the account, that representation being incorrect, it was laid down that a person cannot be liable for making a representation unless

MORRIS [21] notes that:-

"In practice, the distinction between statements as to fact and as to law may not, at first sight be clear, for a representation may invoke elements of both" [22]

This issue arose in JETHA ISMAIL Ltd. V. SOMENI Ltd.[23] which involved a situation where the respondent had drawn two post-dated cheques in favour of a contractor S, but had later told him that on account of the slow progress of the work, they could not be met. S. had in the meantime, handed the cheques on to his creditors, the appellants. Subsequently the appellant agreed to look for S for payment of the money represented by the cheques. It was established that, in fact, the cheques were not returned, but the respondent acting on the appellant's representation, had paid S. the money due to him. It was maintained by the respondents that the appellants were not estopped from claiming from them the value of the cheques. On the other hand, the appellants contended that remission of payment, must under section 62 of the Bill of Exchange Act,[24] be in writing and, since this had not been met, there could be no estoppel, as estoppel could not operate against an imperative provisions of the law. Forbes V.P. relying heavily on the authority of an English case, ALGAR V. MIDD LESEX COUNTY COUNCIL;[25] held that, though the question involved on issue of law, the representation was primarily one of fact, hence operating on estoppel.

THE THEORY UPON WHICH THE DOCTRINE OF ESTOPPEL BY CONDUCT RESTS

The rule of estoppel by conduct, clearly embodied within the scope of section 120 of the Evidence Act, in its operation, amounts to a preclusion in law preventing a party from alleging on denying, a reasonable consequence arising out of his previous representation or conduct amounting to a representation. The doctrine attempts to effect or carry out what the parties as honest and reasonable men intended to be the state of things with respect ot their existing rights and liabilities.

The doctrine rests upon the cardinal principle that, it would be unjust and against principles of justice and fair - delaing to him, if a person by a representation made or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former conduct to the loss and injurry of the person who

acted on it. Thus, the doctrine of estoppel by conduct, seeks, primarily to promote honesty, confidence, fair-dealing and reliance amongst all the members of a Society. A man must be taken to intend what a reasonable person would understand him to intent in any given situation.

Indeed, the notion of estoppel by conduct, is one of justice, which our jurisprudence having adopted it, should not be whittled down to nil by unwarranted technicalities or distinctions. In this regard the observations in CANADA and DOMINON SUGAR CO. V. CANADIAN NATIONAL (WEST INDIES) STEAMSHIP Ltd[26] are of great importance namely that:-

> "A question of estoppel must be decided on ordinary common law principles of construction and what is reasonable, without fine distinctions and technicalities.[27]

Further it must be recalled that the whole rules and attributes of the doctrine of estoppel by conduct are not exhausitively laid down within the scope of section 120 of the Evidence Act, nor have they been enunciated exhaustively by our courts. Thus, in the interest of justice, our courts should not consider themselves debarred from entertaining any question which calls for the operation of this category of 'estoppel'. However, while dealing with questions which do not fall within the four Act, courts should avoid to stretch the matter too wide as to tamper with questions which do not call for the application of estoppel by conduct.

Where appropriate, English and other continental decisions should be cited to give a guideline on the principles appertaining to the rule of evidence of estoppel by conduct. Such decisions should merely serve as, primarily of persuasive authority, since our jurisprudence and concept of justice is distinctly different, from that of England and elsewhere. Being a notion of justice, the rule of estoppel by conduct should be invoked only when it doesn't cause practical injustice and hardships on the part of the party against whom it operates.

CHAPTER FIVE

THE DOCTRINE OF EQUITABLE ESTOPPEL

GENERAL INTRODUCTION

In LYLE - MELLER V. A. LEWIS CO. (Westminister) Ltd.[1] in which the issue was whether on agreement between the plaintiff and the defendants in which the latter recognized that their cigarette lighters embodied the plaintiff's invention, and in which they had agreed to pay 'royalties' for working it, prevented them from subsequently denying this admission, Lord Denning, in his judgement stated that:-

> "I am clearly of the opinion that this assurance is binding, no matter whether it is regarded as a representation of law or fact or a mixture of both, and no matter whether it concerns the present or future. It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representation of existing fact: but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations" [2]

The so called 'new estoppel' their lordship was referring to is the equitable estoppel, which was set forth in HUGHES V. METROPOLITAN RAILWAY CO.[3] In that case, the plaintiff in October gave notice to the defendant to carry out certain repairs to houses held by him within a period of six months. These houses were held on lease by the defendant. The defendant asked if, the plaintiff, intended to purchase these houses by buying out the

defendant's interest in them. Negotiations followed until December but did not result in a sale. Some months later, in particular April, when the notice to do repairs had almost ran out, the defendant opted to initiate the required repairs but could not effectively and adequately do so within the notice period When the time, as stipulated under the notice, expired the plaintiff brought an action for ejectment. The HOUSE OF LORDS, ruled that the defendant was entitled in equity to relief of forfeiture on the ground that the October - December negotiations superceded the operation of the original notice until the negotiations ended. Their lordships observed that time ran from then and not before as the plaintiff strongly contended. Lord Cairns, in his learned judgement (though without citing any authority for his statement) said:-

> "It is the first principle upon which all the courts of equity proceed, that of parties who had entered into definite and distinct terms involving results - certain penalties and legal for feiture - after wards by their own act or with their own consent enter upon a course of negotiations which have the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced these rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have thus taken place between the parties. " [4]

Apparently, the doctrine of equitable estoppel greatly departs in principle and substance from the 'common law estoppel'. A typical case of the common law estoppel is succinctly described by Lord Birkenhead in MACLAIRE V. GATTY [5] as involving a situation:-

> "Where A has by words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice. A is not permitted to affirm against B that a different state of thing existed at the same time " [6]

Lord Denning who is the leading protagonist of equitable estoppel in English law in CENTRAL LONDON PROPERTIES V. HIGH TREES HOUSE[7] for instance, and several other cases[8] has clearly demonstrated that equitable estoppel in its operation is not confined to representations of existing facts but with equal force covers representations of law and, also representations of future intention and even where there is no proved detriment to the representee. Indeed the emergence and development of equitable estoppel has advesely extended the operation of 'estoppel' to all sorts of situations and circumstances in day to day activities and transactions.

THE DOCTRINE OF EQUITABLE ESTOPPEL IN KENYA

It is submitted that in Kenya, the various categories of the doctrines of equity as known to English law are recognized and have been applied by the courts. Their legal justification is based upon section 3 (2) of the Judicature Act, [9] which provides for their application but on condition that they:-

> ".....shall apply only as far as the circumstances of Kenya and its inhabitants permit and subject to such qualification as those circumstances may render necessary." [10]

In RAYA BINTI SALIM BIN KHALJAN EL BUSAIDI V. HAMED BIN SULEIMAN EL BUSAIDI and ANOTHER, [11] for instance, the English law 'presumption of Advancement' was pronounced by Horsfall J. as having no application to a Muslim husband and wife living in Zanzibar whose social and cultural background is very different from that of victorian England, a time when this notion was founded. In his

own words, Horsfall J. said:-

> "It would be wrong to apply principles of equity which were devised to suit Christian Society in England during the last century in order to import a presumption whereby to gauge the intention of a muslim husband and wife living in present - day Zanzibar whose social and cultural background is very different from that of victorian England" [12]

Similarly, in Kenya, in the case of SHALLO V. MARYAM,[13] the court held that, no presuption of advancement in favour of a muslim wife whose husband had purchase land with his own monies but caused it to be transfered into his wife's name existed.

In certain cases, however, the legislature has specifically ousted the application of the doctrines of equity expressly or by implication. This has been illustrated accordingly in THE WAKF COMMISSIONERS V. THE PUBLIC TRUSTEE.[14] In that case muslim law applied to the 'propositus' by virtue of the Mohammedan marriage, Divorce and succession Act. [15] In particular, section four of the 'Act' provided to the effect that muslim law (as defined in the 'Act) should apply "any provision of any Act or rule of law to the contrary notwithstanding." Windham J.A., In his ruling held that this provision expressly excluded the application of the doctrines of equity even if they would have been otherwise.

In East Africa courts have applied the doctrine of estoppel in both of its branches, namely proprietary estoppel and promissory estoppel. Cretney [15] observes that:-

> "Proprietary estoppel arises so as to confer an interest in property on a person who has incurred expenditure on another person's property in the belief (known to the owner of that property) that he already has a sufficient interest in the property, or that the owner would grant him such an interest. The estoppel will only arise where the true owner of the property stands by, knowing

that the expenditure is being incurred " [16]

Thereof he quotes the often cited words of Lord Denning M.R. in INWARDS V. BAKER [17] that:-

> ". ..... If the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity." [18]

Before we proceed to examine cases in which the doctrine of equitable estoppel has been held to apply, we must first of all, consider whether section 120 of the Kenya Evidence Act embodies the doctrine of equitable estoppel within its scope. This section provides that:-

> "When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such other person or his representative to deny the truth of that thing."

Estoppel

Sarkar [19] commentating on section 115 of the Indian Evidence Act, which is largely equivalent to section 120 of the Kenya Evidence Act notes that:-

> ".....In order to operate an estoppel (within Section 115 of the Indian Evidence Act) a representation must be of some facts alleged to be at the time actually in existence not a promise 'de futuro' [20]

Thus, Sarkar in effect holds that the doctrine of equitable estoppel falls beyond the realm of section 115 of the Indian Evidence Act, which as it has been observed above is largely equivalent or similar to section 120 of the Kenya Evidence Act.

In the case of NURDIN BANDALI V. LOMBANK (TANGANYIKA) Ltd.[21] this controversial section, that is, section 115 of the Indian Evidence Act was considered by the court of Appeal. The case in substance involved later payments under a hire purchase agreement for a lorry having been accepted and duly made under the agreement When the lorry was subsequently repossessed by the respondents, the appellant pleaded equitable estoppel. The plea of estoppel was based on two grounds: first, it was said that the respondents had made a representation that they would not enforce their strict rights under a hirer purchase agreement by a course of conduct in which they had granted indulgences to the hirer over a period of time, It was contended that on three previous occasions they had ~~kkkx~~ purported to determine the hiring but had then allowed it to continue. Secondly, the plea of estoppel was based on the ground that by including in their statement of account with the appellant a sum due to them which included 20/- option money (payable, under the terms of the agreement, if the hirer at the conclusion of the hiring wished to purchase the lorry) the respondents had represented that the hiring was still in existence

In his judgement, Newbold J.A. considered whether the scope of section 115 of the Indian Evidence Act embodied within itself the doctrine of equitable estoppel. In particular he considered the final word of the section, that is, "thing" and in conclusion submitted that despite dicta from the Indian courts to the contrary, the section clearly embodied within it the doctrine of equitable estoppel. In his own words, Newbold J.A. stated:-

> " I agree that as the Evidence Act is designed to cover the whole field of the law relating to evidence then, unless the appellant

> can bring the matter within section 115, no 'estoppel in pais' would arise. I also agree that the representation relied on by the appellant was not a representation of an existing fact, which may found a common law estoppel, but the representation of a legal relationship, which may found an equitable estoppel. I am aware that it has been often stated by courts in India that the word "thing" in section 115 means a statement of fact, but I am unaware of any decision binding on this court to the effect that section 115 covers only common law estoppel and does not include the equitable estoppel, a type of estoppel which was part of the law of England before the Evidence Act was enacted. The word "thing" is a word of the widest ambit, capable of embracing either an existing fact or a present or future relationship, and I see nothing in section 115 which leads me to the conclusion that the meaning of the word "thing" in that section should be restricted to an existing fact" [22]

This case has come to be taken as the one which clearly incorporated into East Africa the doctrine of equitable estoppel and brought it within the various Evidence Acts of the three East Africa countries (Kenya, Uganda and Tanzania). Moreover the Nurdin's case [23] effectively overrules the ruling given in MULJI JETHA Ltd V. I.T. COMMUSSIONER,[24] where it was stated that the doctrine is numbered among the doctrines of equity imported into Kenya by virtue of the East Africa Order in Council 1911.

Thus, the doctrine of equitable estoppel falls within the scope of section 120 of the Evidence Act. In CENTURY AUTOMOBILE V. HUTCHINGS,[25] the court clearly accepted that the doctrine applied in Kenya: Spry J.A. said:-

> "There can be no doubt that the doctrine of equitable estoppel applies in Kenya. There is the clearest authority in Nurdin's case. It is true that the judgement in that case dealt with the law in Tanganyika (Tanzania) but the reasoning applies with equal force in Kenya." [26]

Cretney [27] commentating on the judgement delivery by Spry J.A. observes that it in effect demonstrates the tendency of East Africa courts attempts to desist from unnecessarily relying on English authorities in cases where there are comprehensive statement of the law in local decisions. Indeed if such tendencies were realised effectively our law will develop independently of English law whose principles sometimes has little relevance to our own concept of justice.

We now move on to consider few of the cases in which the doctrine of equitable estoppel has been applied in Kenya. The first case to consider is RUNDA COFFEE ESTATES V. UJAGAR SINGH [28] This case deals with what may correctly refered to as proprietary estoppel. In that case the Plaintiff, as a freehold owner of a farm sued for possession of a combined shop and house erected on it in stone some ten years previously by and at the expense of the defendant's father. It was submitted that the defendant's father had been given permission to build the house and a shop on the land forming the plaintiff's farm. But it was a term of the agreement that the licence could be terminated at any time without restriction by the licensor or their successors in title. The land, in fact, passed through several ownerships until ultimately it was acquired (with notice of the agreement) by the plaintiff. By this time the original licensee had died, his son, the defendant, continued in occupation and carrying on business. Then, the plaintiff terminated the licence and brought proceedings for possession. The court of Appeal held (reversing the trial judge who had held that the defendant was entitled to any such compensation) that the agreement was personal to the father; he was not assisted by the Transfer of Property Act [29]

section 40 because the defendant would only have a claim if he would establish a proprietary right; but any proprietary right would be outside section 40 of the Transfer of Property Act. Further more the defendant could not rely on the doctrine of proprietary estoppel because the defendant and his father both knew that their own interest in the land was determinable freely by the licensor; they could not found an estoppel on their hope (not being a hope induced by the licensor) that the right to be determined would not be exercised.

Mention also has to be made of the old case of ABDI NURI V. B.E.A. and RUKIYA[30] which perhaps forms rather an example of the common law estoppel. In that case the plaintiff Abdi and indeed the true owner of a shamba, permitted Rukiya, to hold himself out as the owner. Rukinya "sold" the shamba to the defendants. Delivering judgement Hamilton J. held that since the defendant was a bona fide purchaser for value without notice actual or constructive that R, was other than the true owner, the plaintiff was estopped as against them from setting up his title.

Similarly in a recent case, COMMISSIONER OF LANDS V. HUSSEIN,[31] the court applied an equitable estoppel against the commissioner of Lands, in the nature of proprietary estoppel. To reach his judgement Harris J. adopted Lord Kings-down's dicta in RAMSDEN V. DYSON [32] The principle was stated to be:-

> "..... If a man, under a verbal agreement with a landlord for certain interest in land, or what amounts to the same thing, under an expectation or encouragement by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the land lord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation" [33]

The second category of equitable estoppel, that is, promissory estoppel as first formulated in HUGHES V. METROPOLITAN RAILWAY CO.[34] and applied in the Tanzanian case of NURDIN BANDALI V. LOMBANK (TANGANYIKA) Ltd.[35] was applied in CENTURY AUTOMOBILE V. HUTCHINGS.[36] In this Kenyan case the facts, briefly were that an agreement had been made out between the parties litigant to a leased premises, the lease being terminable within three months. It was also agreed that no alteration were to be made without prior permission of the respondent land lord. Subsequently alterations were proposed and shown to the Managing Director of the respondent Company, who it was submitted, did not raise any objection provided that it was done at the appellants expenses. Relying on the Managing Director's assurance the appelland expended money and had the leased premises altered accordingly. Soon thereafter, the appellant received a notice to quit and deliver vacant possession of the leased premises, of which the appellant declined to do. Finding in favour of the appellant in his judgement Spry J.A. stated:-

> "..... the application of the doctrine (of estoppel) would be whittled down to nil if assurance given in the course of ordinary conversation were required to have the precision that a lawyer would desire - I entertain no doubt that if the conversation was substantially as Mr. V.V. Patel testified, the assurance was intended to be acted upon. This does not of course mean that Mr. Somen (the Managing Director of the respondent Company) necessarily intended or even contemplated all the legal consequences that would follow from the assurance, what it does mean is that Mr. Somen knew, and must be presumed to have intended, that his remedies would lead directly to the expenditure of the appellant company of the cost of the proposed alterations of the suit. " [37]

In two recent and interesting cases, equitable estoppel was pleaded against the commissioner of Income Tax, namely

I.T.C.V.A.K. [38] and MULJI JETHA V.I.T.C. [39] Our concern here shall only be ~~xxxfixxxx~~ confined to the former case: In that case the plea gave a defence in an action for unpaid income tax, penalties and other related matters. The facts showed that the commissioner had duly served notices of assessment on the defendant; the defendant did not comply with the statutory rules whereby he could dispute the assessment within the time provided by the Income Tax (Management) Act 1958 . Subsequently, however, an assessor of the Income Tax Department, agreed with the tax payer's accountant to accept late notice of the objection, and to act upon that notice. The assessors and the accountant then reached agreement on reversed figures which were to form the basis of revised assessments. For reasons which do not appear clear from the judgement, the commissioner repudiated that agreement (under which the taxpayers liability would have been reduced to some Shs. 2,600/-) and sued for Shs. 75,732/-, being the amount of the original assessment, with penalties e.t.c. Whilst the defendant pleaded that the commissioner was estoppel: the commissioner claimed that he could not be estopped from performing his statutory duty.

The case was decided by Madan J. on the basis that the late acceptance of the notice of assessment was not 'ultra vires' that being so, under the provisions of the "Act", there was no assessment upon which action could be brought. It is important to note that a finding that the acceptance of the late notice was 'Intra Vires' could equally not have enabled the defendant's plea of estoppel to succeed since:-

> "no estoppel, whatever its nature, can operate to annual statutory provisions and a statutory person cannot be estopped from performing his statutory duty or from denying that he entered into an agreement which was 'Ultra Vires' of him to make" [40]

In this case the court seems to have failed to note that there are a variety of circumstances in which a businessman taxpayer might alter

his position to his detriment by relying on a representation that assessments would not be enforced. The businessman, for instance, may invest his money his money elsewhere or employ more workers to man his activities. Cretney [41] criticising the judgement delivered in this case, has noted that

> "..... the effect of an estoppel is normally merely to suspend rights not to extinguish them. Thus, presumably, all that the commissioner could have been required to do was to suspend enforcement of the assessment until he had considered the revised figures..... If having considered those figures, he decided to stand by the original assessment the taxpayer, if given reasonable notice would have no defence." [41]

Indeed, this is what Lord Denning M.R. set out in COMBE V. COMBE [42] that:-

> "When one party by his words or conduct made to the other a promise, or assurance which was intended to affect the legal relations between them and to be acted accordingly, then, once the other party has taken him at his word, and acted on it, then one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration" [43]

The various cases which we have looked into above, to show how the doctrine of equitable estoppel has been applied in Kenya clearly indicate that, equitable estoppel has

developed into a notion of paramount importance and applied to an infitite variety of cases, And indeed the doctrine of equitable estoppel is still developing and encompassing all sort of cases - Its precise limits are by no means clear. Our courts should proceed autonomously to found and crystalize the rules and principles of equitable estoppel, which it seems, if not well understood and applicable may cause practical injustice. In I. T. C. V. A. K. [44] for instance, the court should have, if anything required the commissioner to give the defendant a reasonable time to adjust himself before resuming payment of the original assessment figures.

Spry J.A. in CENTURY AUTOMOBILE V. HUTCHINGS [45] BIEMER said:-

> ".....the application of the doctrine would be whittled down to nil if assurance given in the course of ordinary conversation were required to have the precision that a lawyer would desire....." [46]

Admittedly, technicalities and unwarranted distinctions may in effect cause grave injustice, if not properly applied. However, this does not mean that the doctrine of estoppel be stated widely or be applied with ease. The notion of equitable estoppel must be viewed as a rule of justice, common-sense and fair - dealing which seeks to protect those who on the strength of a promise or assurance from another have been led to change their previous positions to their detriment. A man must be taken to mean what he promises or assures.

C O N C L U S I O N

The doctrine of estoppel should be viewed as a notion of justice and common-sense, employed for purpose of enabling men to bind themselves to the good faith and truth of representation on which other persons are to act. As was stated in Re SUGDNENS' TRUSTS![1]

> "The question of estoppel is (one) of evidence, and depends upon a person having made such a representation, or having acted in such a way, as to induce a third person in reliance upon the representation or the conduct to alter his position. He never afterwards can be heard to say that the representation he made was untrue or that the impression he produced by his conduct was a false impression; in other words, he cannot give evidence to the truth, because the truth is inconsistent with the representation or the conduct by which he induced a third party to alter his position"[2]

Where estoppel applies, the person entitled to wield it as a shield has 'ex hypothes', suffered a past detriment or other change of position Thus, he is not at all asserting any positive rights, but is invoking law or equity to afford him procedural protection to avert injustice.

'Interest rei publicae ut sit finis litium' that the state (or community) has an interest in the termination of disputes, and in the finality and conclusiveness of judicial decisions. Admittedly if matters which have been once solemnly decided were to be again drawn into controvercy, if facts once solemnly affirmed were again to be denied whenever the affirmant saw his opportunity there would neve be an end to litigation, hence, confusion, uncertainity and chaos. One way of ending controversies is to preclude the bringing of an action after a period of time has elapsed, and thus, a perfectly valid claim may be barred by a statute of limitation (in Kenya, that is, the Limitation of Actions Act)[3] or laches, The policy against relitigation,

what 'res judicata' is all about, is even stronger, If the validity on invalidity of a claim is established by a valid and final judgement, that claim cannot again be litigated; if an issue is actually litigated and determined by a court of competent jurisdiction, that issue cannot again be litigated between the parties even though it arises in an action based upon a different claim.

'nemo debet vexari pro una et aedem causa; that is, no one should be vexed twice for the same cause. Indeed this is one of the theories on which the doctrine of res judicata is based Spencer - Bower [4] notes:-

> "The right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may, unless curbed by the estoppel, weigh down judicially declared right and innocence " [5]

The maxim 'nemo debet bis vexari pro una et aedem causa' also expresses a great fundamental rule of our criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence. It is the foundation of the pleas of 'autrefois Acquit' and 'autrefois convict'. When a criminal charge has been once adjudicated upon by a court of competent jurisdiction, that adjudication is final, whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a subsequent prosecution for the same offence. Thus, the pleas of 'autrefois acquit' and 'autrefois convict', like estoppel in civil proceedings, form a rule of finality. The pleas seek to protect the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly. This equally saves both the public and the defendant the cost of redudant litigation.

Taking how quick and easy is the nature of business transactions these days, it appear not unreasonable that

one man should be able to put faith in the conduct and representations of his fellow and such conduct and representations be held binding in cases where mischief or injustice would be caused by treating their effect as revocable. However, at the same time protection should be afforded against men who may be entrapped by formal statements and admissions, which perhaps were looked upon as insignificant when made, and by which no one ever was deceived or induced to alter his position.

As it has been observed there are limited materials and case-law on the notion of estoppel in Kenya. Our courts seem to have a very detrimental tendency of relying on English law cases and principles without particularly specifying whether such cases bind our courts and, how much of the English principles have relevance and apply to our law. This, it is conceded has greatly retarded the development of law in Kenya Independently. We must recall the words of Lord Denning in NYALI LTD. V. A-G[6] that:-

> ".....the common law cannot be applied in a foreign land without considerable qualification. Just as with the English Oak so with the English Common law. You cannot transplant it to the African continent and expect it to retain the though character which it has in England. It will flourish indeed, but it will need careful tending. So with common law. It has many principles of manifest justice and good sense which can be applied with advantage to the people of every race or colour the world over, but it also has many refinements, subtleties and technicalities which are not suited to other folks. These offshoots must be cut away.....The task of making these qualifications is entrusted to the judges of those lands. It is a great task which calls for all their wisdom....."

Thus, where appropriate, English and other continental decisions

should be cited to provide a guide on the principles relating to the doctrine of estoppel. Moreover, much of the rules relating to the notion of estoppel in English law are rested with undue technicalities which do not necessarily apply to our case. Whenever such principles are applied by courts, judges or magistrates should be able to state how much of those principles are relevant and do apply in any given case. This should be particularly so, especially in regard to the notion of equitable estoppel whose principles and boundaries have still not been finally drawn.

FOOTNOTES TO CHAPTER ONE

1. MORRIS: Evidence in East Africa (Law in Africa No. 14);

2. Ibid at P. 7, In particular, Morris notes that :-

> "...the Kenya Evidence Act, in general reiterates verbatim the provisions of the Indian Act, although a few new provisions taken from the English law have been introduced."

3. Sir WILLIAM HOLDSWORTH: A History of English Law: volume IX pp. 144 -47

4. DAWSON BANK Ltd. V. JAPAN COTTON TRADING CO. Ltd. [1953] AIR 79, 82

5. NURDIN BANDALI V. LOMBANK (TANGANYIKA) LTD. [1963] E.A. 304, 314

6. DERRAY V. PEEK [1889] 14 APP. Cas. 337, 374

7. BLACK'S LAW DICTIONARY : 5th Ed. P. 44

8. LOW V. BOUVERIE [1891] 3 ch. 82, 105

9. HALSBURY'S LAWS OF ENGLAND, (Lord simonds) 3rd Ed. Vol. 15. p. 168

10. CANADA AND DOMINION SUGAR CO. V. CANADIAN NATIONAL (WEST INDIES) STEAMSHIP Ltd. [1947] A.C. 46, 56

11. PHIPSON ON EVIDENCE 11th Ed. Para. 2031

12. MOORGATE MERCANTILE V. TWITCHING [1975] 3 All E.R. 314, 323.

13. Supra Note 5 P.

14. RUNDA COFFEE ESTATES V. UJAGAR SINGH [1966] E.A. 564, 568

15. Sir EDWARD COKE: CO. Litt. 352 (a)

16. SARKAR ON EVIDENCE 10th Ed. Para. 1029

17. CAVE V. MILLS [1862] 7 H & N 913, 927, 928

FOOTNOTES TO CHAPTER TWO

1. BLACK'S LAW DICTIONARY : 5th Ed. P. 1174
2. DUTCHESS OF KINGSTON'S CASE [1776] 1 EAST 46
3. Ibid. P. 48
4. BRUNSDEN V. HUMPREY [1884] 14 Q. B.D. 141
5. Ibid P. 146
6. CIVIL PROCEDURE ACT (CAP. 5 OF THE LAWS OF KENYA)
7. HALSBURY'S LAWS OF ENGLAND (LORD SIMONDS) 3rd Ed. p. 181
8. Ibid P. 181
9. COLT INDUSTRIES INC. V. SARLE (NO. 2) [1966] 3 All E.R. 85
10. MOUVION V. FREEMAN [1889] 15 APP. CAS. 1

    (b) SUPRA Note 9 P. 86

11. COHEN V. JANESCO [1926] 1 K.B. 119, 125
12. KOK HOONG V. LEONG CHEONG KENG MINES [1964] A.C. 993
13. Ibid P. 1010
14. CARL - ZEISS STIFTUNG V. RAYNER AND KEEL Ltd. (No. 2) [1966] 2 All. E.R. 536, 573.
15. McllKENNY V. CHIEF CONSTABLE [1980] 2 ALL E.R. 227, 238
16. Re. ALLEN [1930] 12 K.L.R. 90
17. Ibid P. 91

18. MUSA BIN KHAMIS JUMA EL NOFLI V. KAPORO BIN KASIBU MNYAMWEZI [1957] E.A. 189

19. THODAY V. THODAY [1964] 1 All. E. R. 341, 352.

20. WOOD V. LUSCOMBE [1964] 3 All E.R. 972

21. Ibid. P. 974

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13. SUPRA NOTE 9 P. 675

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15. HARMAN SINGH V. JAMEL PIRBHAI [1955] 22 E.A.C.A. 1

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2. Ibid P. 35

3. HUGHES V. METROPOLITAN RAILWAY CO. [1877] 2 APP. Cas. 439

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8. For instance, ROBERTSON V. MINISTER OF PENSIONS [1949] 1 K.B. 227; COMBE V. COMBE [1951] 2 K.B. 215 e.t.c.

9. The Judicature Act. (cap 8, of the Laws of Kenya)

10. S. 3(2) of the Judicature Act

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32. RAMSDEN V. DYSON [1866] L.R. H.L. 129, 170-171

33. Supra Note 31 from P. 595

34. Supra note 3

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36. Supra note 25

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39. Supra note 24

40. Supra note 38 P. 625

41. Supra note 16. P. [illegible] (see generally)

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