Gachagua & 11 others v Speaker, National Assembly of Kenya & 7 others; Ruto & 4 others (Interested Parties) (Constitutional Petition E522 of 2024 & Petition E506, E509, E525, E528, E537 & E541 of 2024 (Consolidated)) [2024] KEHC 13655 (KLR) (Constitutional and Human Rights) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E522 OF 2024 & PETITION E506, E509, E525, E528, E537 & E541 OF 2024 (CONSOLIDATED)

EKO OGOLA, AC MRIMA & FG MUGAMBI, JJ

OCTOBER 25, 2024

BETWEEN

RIGATHI GACHAGUA ..... 1ST PETITIONER

OBULI NAMEYA ..... 2ND PETITIONER

KENNEDY KAMITHI GACHEGE ..... 3RD PETITIONER

DENIS OKUMU ..... 4TH PETITIONER

SIMON MUCHANGI ..... 5TH PETITIONER

PETER MAINA ..... 6TH PETITIONER

GEMA WATHO ASSOCIATION ..... 7TH PETITIONER

JOHN MUGO KIRAGU ..... 8TH PETITIONER

NJOMO JOHN ..... 9TH PETITIONER

CAROLINE WAMBUI MWANGI ..... 10TH PETITIONER

DR CLARENCE EBOSO MWERESA ..... 11TH PETITIONER

WANJIRU MWANGI ..... 12TH PETITIONER

AND

THE SPEAKER, NATIONAL ASSEMBLY OF KENYA ..... 1ST RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA ..... 2ND RESPONDENT

THE SPEAKER, SENATE OF KENYA ..... 3RD RESPONDENT

THE SENATE OF KENYA ..... 4TH RESPONDENT

THE DEPUTY SPEAKER, NATIONAL ASSEMBLY ..... 5TH RESPONDENT

HON MOSES MASIKA WETANGULA ..... 6TH RESPONDENT

HON AMASON KINGI JEFFA ..... 7TH RESPONDENT

HON ATTORNEY GENERAL ..... 8TH RESPONDENT

AND

WILLIAM SAMOEI RUTO ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

MT KENYA JURISTS ..... INTERESTED PARTY

KITUO CHA SHERIA ..... INTERESTED PARTY

DR JOHN KHAMINWA ..... INTERESTED PARTY

Judicial impartiality could not be undermined by mere social or professional interactions

The significance of the case lies in its origin from the unprecedented impeachment of the Deputy President, raising critical constitutional questions on due process, judicial impartiality, and separation of powers. It tests the thresholds for recusal, bias, and admissibility of evidence in politically charged litigation, setting an important precedent for future impeachment proceedings and the integrity of the judiciary in Kenya.

Reported by John Ribia

Judicial Officers *– recusal – recusal of judicial officers – grounds of recusal – bias – what was the threshold on recusal application on the ground of bias and impartiality.*

Judicial Officers *– recusal – grounds of recusal – bias – actual bias vis-à-vis perceived bias - what was the distinction between actual bias and perceived bias - what were the conditions upon which it may be implied that a judicial officer was biased - Constitution of Kenya articles 47(1), 50, 159(1), and 159(2); Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (cap 8A) regulation 21; Bangalore Principles of Judicial Conduct, 2002 principle 2.5.*

Judicial Officers *– recusal – grounds of recusal – bias – allegation that a court ruled on recusal without submissions by the parties on the same – allegation that court prioritized applications from other parties - whether the decision of a court's decision to rule on the recusal without further submissions from the parties did not in itself demonstrate bias - whether administrative decisions and case management directions, such as the issuance of directions on urgent applications, constituted grounds for recusal - whether a court that prioritized applications of conservatory orders and applications by one party over the others demonstrated bias from the bench deserving of recusal by the bench - Constitution of Kenya articles 47(1), 50, 159(1), and 159(2); Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (cap 8A) regulation 21; Bangalore Principles of Judicial Conduct, 2002 principle 2.5.*

Judicial Officers *– recusal – grounds of recusal – bias – bias arising out of a Judge's personal and professional relationships - allegation that a Judge had a relationship with a litigant that was not disclosed – allegation that a Judge had professional associations with a litigant – allegations that a Judge's spouse was appointed to a Board by one of the litigant - whether the absence of a formal disclosure by a Judge about the relationships that they had with the parties would give rise to an insinuation of bias deserving of recusal by the Judge - whether speculation or suspicion based on professional or social ties between a judge and a litigant sufficed to meet the threshold for recusal on account of bias - whether association of a Judge and a litigant as professional colleagues, that they may have naturally encountered one another in professional settings, sufficed to meet the threshold for recusal on account of*

bias - whether the professional pursuits of a Judge's spouse could be used to impugn the Judge's ability to remain impartial - Constitution of Kenya articles 47(1), 50, 159(1), and 159(2); Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (cap 8A) regulation 21; Bangalore Principles of Judicial Conduct, 2002 principle 2.5.

Law of Evidence *– internet commentary – evidential worth of a tweet – tweet alleging impartiality of judicial officers – weight - whether a single tweet could be considered representative of public opinion of the impartiality of judicial officers.*

Words and Phrases *– recusal – definition - removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest - Black's Law Dictionary.*

Words and Phrases *– bias; actual bias; perceived bias - definitions – (bias) an inclination; prejudice or predilection – (actual bias) genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject – (perceived/implied bias) prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person - Black's Law Dictionary.*

Words and Phrases *– impartiality – definition – lack of bias – Black's Law Dictionary.*

Brief facts

Following the impeachment of H.E. Rigathi Gachagua by the National Assembly on October 8, 2024, multiple petitions were filed, leading to their consolidation under Petition No. E522 of 2024 as the lead file. The court referred to these as Cohort 1 petitions. On October 18, 2024, the Senate voted to confirm the National Assembly's resolution, which triggered additional petitions that were subsequently consolidated under Petition No. E565 of 2024, labeled as Cohort 2 petitions.

A three-judge bench was constituted to determine all the petitions, as they revolved around the impeachment process. It was noted that two applications had been filed in both cohorts, both seeking the recusal of the bench. The applicant reportedly argued that the bench had improperly convened on a Saturday and issued orders, which he believed compromised his right to a fair hearing. The second application, dated 22nd October 2024, was filed by the 2nd petitioner in Petition No. E522 of 2024, raising similar concerns. Additional claims were made regarding the judges' alleged relationships with key political figures, including the Deputy President nominee and the Speaker of the Senate, which the applicants claimed could compromise impartiality.

The respondents opposed the applications, asserting that the claims were speculative and lacked credible evidence. They contended that the issue of the Saturday proceedings had already been addressed in a prior ruling, making the matter *res judicata*. Furthermore, they argued that the alleged relationships were either misrepresented or too remote to constitute a reasonable apprehension of bias. It was also submitted that Judges had a duty to sit and could not recuse themselves based on unsubstantiated perceptions. Additionally, the respondents challenged the reliability of electronic evidence submitted by the applicants, arguing it failed to meet evidentiary standards.

Issues

i. What were the conditions under which a judicial officer may recuse themselves?
ii. What was the distinction between actual bias and perceived bias?
iii. What was the threshold on recusal application on the ground of bias and impartiality?
iv. Whether the decision of a court's decision to rule on the recusal without further submissions from the parties did not in itself demonstrate bias.
v. Whether administrative decisions and case management directions, such as the issuance of directions on urgent applications, constituted grounds for recusal.
vi. Whether a court that prioritized applications of conservatory orders and applications by one party over the others demonstrated bias from the bench deserving of recusal by the bench.
vii. Whether the absence of a formal disclosure by a Judge about the relationships that they had with the parties would give rise to an insinuation of bias deserving of recusal by the Judge.
viii. Whether speculation or suspicion based on professional or social ties between a judge and a litigant sufficed to meet the threshold for recusal on account of bias.

ix. Whether the professional pursuits of a Judge's spouse, eg appointment to a public board by the President in a case where the President was an interested party, could be used to impugn the Judge's ability to remain impartial.

x. Whether a single tweet could be considered representative of public opinion of the impartiality of judicial officers.

Held

1. Recusal was the removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest. The concept of recusal of judges and judicial officers from matters before them had its foundations on the fundamental principle of impartiality in the administration of justice. It was rooted in both common law and constitutional provisions, reinforcing the notion that justice must not only be done but must also be seen to be done. Article 159(1) of the 2010 Constitution was instructional that judicial authority was derived from the people of Kenya and was to be exercised in accordance with the principles set out in article 159(2) of the Constitution.
2. Recusal was vital to safeguarding public confidence in the judiciary, maintaining fairness in the judicial process, and upholding the integrity of the courts as commanded by article 159(2) of the Constitution. Recusal should not be taken as a personal affront but a furtherance of the cornerstone of any fair and just legal system.
3. The circumstances under which a judge or judicial officer should recuse themselves from a case required a high threshold. Those instances must be approached objectively, with careful consideration, rather than in a simplistic or routine manner. Recusal directly impacted the administration of justice and a judge should not withdraw from a case simply for convenience sake. That high threshold served to protect the judiciary from being manipulated by parties who may otherwise sought to undermine the judicial process by frivolously raising recusal applications in an attempt to secure a more favorable forum.
4. Since all judicial officers took an oath to serve and administer justice, it was implied that there was a duty to sit imposed on judges by the value and principle of the rule of law. Judges should therefore only recuse themselves from a matter in clear cases where a case for recusal has been made out. To do otherwise would amount to an abdication of duty.
5. Bias was an inclination, prejudice, or predilection. It may manifest in two forms; actual or perceived. Actual bias was genuine prejudice that a judge, juror, witness, or other person had against some person or relevant subject. Perceived (or implied) bias was prejudice that was inferred from the experiences or relationships of a judge, juror, witness, or other person. Perceived bias arose where there was no actual prejudice but a reasonable apprehension that existed that the judge's impartiality might be compromised. That often arose from associations, relationships, or conduct that, though not overtly improper, may give an impression of partiality.
6. Perceived bias dealt with the integrity of the judicial process in the eyes of the public. It was not enough that justice was done; it must also be seen to be done. Therefore, a judge must consider whether, even in the absence of actual bias, their participation in a matter might reasonably cause parties or the public to question their impartiality, thereby undermining confidence in the judiciary.
7. In judicial proceedings, bias represented a predisposition to decide an issue or cause in a certain way which did not leave the judicial mind perfectly open to conviction. It was a condition or state of mind, an attitude or point of view, which swayed or coloured judgment and rendered a Judge unable to exercise their functions impartially in a particular case. Bias and partiality were sometimes used interchangeably. Impartiality was lack of bias.
8. Impartiality was the second value espoused in the Bangalore Principles of Judicial Conduct, 2002. The Principles had become a cornerstone in the global discourse on judicial ethics, and their influence had risen to the level of *jus cogens* norms in international law. The principles, which emphasized the values of independence, impartiality, integrity, propriety, equality, competence, and diligence, had been widely

accepted and incorporated into the judicial frameworks of numerous countries. Principle 2.5 provided that a judge shall disqualify himself or herself from participating in any proceedings in which the judge was unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge was unable to decide the matter impartially. The particular circumstances under which a judicial officer may recuse themselves on grounds of bias or lack of impartiality were provided in regulation 21 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 and were largely replicated from the Bangalore Principles.

9. Owing to the training, selection, and appointment of judges, there was a strong presumption of impartiality on judicial officers. That presumption arose from the rigorous processes involved in their appointment, which were designed to ensure that only individuals of high moral character, legal acumen, and independence are appointed to the bench. The judiciary, as a pillar of democracy, was structured to operate on principles of fairness and neutrality, and it was assumed that judges were capable of setting aside personal interests and emotions when adjudicating matters.

10. The test for bias was objective and was framed around the question of whether a reasonable and informed observer, knowing all the relevant facts, would have a legitimate apprehension that a judge was not impartial. That principle had been established and refined through jurisprudence to ensure that the perception of fairness was maintained in the judicial process.

11. The following considerations should be taken into account in examining whether the high threshold for proving bias:
    1. whether there was apprehension of bias, real or perceived.
    2. whether a fair minded fully informed observer would reasonably apprehend the Judge might not be impartial.
    3. whether there existed logical and sufficient connection between the circumstances and the apprehension.
    4. whether the recusal application had been instituted in good faith.
    5. Having regard to the totality of the circumstances the case, whether the recusal would militate against the oath of office and duty to sit.

12. The issue that the bench sat on a Saturday and issued directions on hearing of an application by the Attorney General thereby prioritizing the Attorney General over other parties was *res judicata*. The issue was not available for re-litigating by dint of section 7 of the Civil Procedure Act. The only avenue open to the applicants was to file an appeal.

13. The issue of recusal was already squarely before the court for determination and it was incumbent upon the bench to address it. The court's decision to rule on the recusal without further submissions from the parties did not in itself demonstrate bias as the issue had been raised by the applicants and formed part of the then application.

14. The court prioritized hearing petitions with conservatory orders ahead of the instant application. That was purely a matter of case management, which in no way demonstrated bias on the part of the court. Administrative decisions and case management directions, such as the issuance of directions on urgent applications, did not constitute grounds for recusal.

15. The fact that the applicants disagreed with the outcome of the application did not automatically infer bias. Rather, the proper course of action, if they felt aggrieved by the ruling, was to challenge it through the appellate process rather than by continuing to seek recusal on grounds that had already been adjudicated.

16. It was paramount not only that justice was done but that it was seen to be done. Failure to disclose relationships or associations that may bear on a case could reasonably give rise to an apprehension of bias from the perspective of an objective observer. Mere social or professional associations did not automatically disqualify a judge from hearing a case unless there was substantial evidence that such relationships materially impacted the judge's impartiality. There was high threshold to justify recusal,

one that demanded credible proof of a reasonable likelihood of bias. In the absence of such evidence, mere speculation or suspicion based on professional or social ties did not suffice to meet this threshold. The burden lay with the applicants to show a direct link between the associations and the judge's ability to adjudicate fairly.

17. Whether a claim that the Speaker of the Senate attended the Judge's marriage ceremony in 2021, that fact alone did not meet the legal standard for recusal. That was because:
    1. the applicants had not provided evidence of any ongoing or sustained relationship between the judge and the Speaker following the event, which occurred three years before the case was brought to court.
    2. The passage of time further weakened any reasonable apprehension that the social interaction could influence the Judge's impartiality.
    3. At the time, Hon. A. Kingi was not the Speaker of the Senate, and no one could have reasonably foreseen that the instant case would arise in the future.
18. Further, barely a month before the instant ruling, the 1st petitioner presided over the official opening of the Nairobi International Show. As the Chief Guest, he presented an award to Hon. A. Mrima on behalf of the Judiciary. Yet, the petitioners had deliberately chosen not to raise concerns about that interaction, focusing instead on an event that occurred three years ago.
19. To substantiate a claim of bias, there must be proof of a continued or significant relationship that could reasonably affect a judge's neutrality. The applicants had not demonstrated that the judge and the Speaker maintained a close or ongoing relationship. The connection between them was remote and did not rise to the level that would raise valid concerns about bias. Distant social ties, without more, were insufficient to justify recusal.
20. Judges, by the nature of their role in the legal community, would inevitably interact with public officials. However, those professional connections did not inherently undermine their ability to remain impartial. Without further evidence showing that the relationship between the judge and the Speaker had any bearing on the case at hand, that association fell short of the legal standard required for recusal.
21. The court disapproved of counsel's casual manner in handling an application to expunge averments made in accusation against a Judge. The averments contained in the affidavit were serious and potentially damaging to the reputation of the judges presiding over the bench. Allegations of bias, particularly those involving senior judicial officers, were far from trivial and demanded to be treated with the utmost seriousness.
22. The acknowledgement that the allegations were untrue called into question the applicants' honesty and whether the application was made in good faith in the first instance. Nothing would have been easier but to establish the truth of the averments before being deposed to.
23. Officers of the court bore a critical responsibility when raising issues of bias or conflict of interest. The manner in which the allegations were presented raised serious questions about the true intent behind the application -whether it was a genuine effort to ensure impartiality or simply an attempt to unjustly undermine the integrity of the bench. Counsel must recognize that unfounded allegations could erode public trust in the judiciary and unjustly damage the reputations of judicial officers without any legitimate basis.
24. No further evidence was presented to confirm that the appointee to the Kenya Water Towers Board was the Judge's spouse. Even if such proof had been furnished, the allegation still fell short of meeting the threshold for recusal, for several reasons:
    1. the appointment in question was made by Hon. Soipan Tuya, the then Cabinet Secretary for Environment, not by the Head of State, who was a party to the proceedings. That distinction was critical, as it demonstrated a distant and indirect link between the Head of State and the learned Judge, thereby undermining any suggestion of influence or bias. There was no evidence

of direct involvement by the Head of State in that specific appointment, and thus no reasonable basis to infer that it could affect the Judge's impartiality.

2. The timing of the appointment further weakened the applicants' claim. The appointment occurred more than three years before the filing of the current case, making it highly improbable that such a distant event could have any bearing on the matters presently before the court. In the absence of additional evidence showing a direct connection between the spouse's appointment and the issues in the case, the mere fact of the appointment did not meet the high standard required for recusal.
3. Judges' family members were entitled to pursue their own careers without automatically raising concerns about the judge's impartiality. To imply otherwise would place an unreasonable and unfair burden on judicial officers. The professional pursuits of a judge's spouse, particularly in unrelated fields, could not and should not be used to impugn the judge's ability to remain impartial. Without more, that argument amounted to mere speculation and fell far short of providing a valid basis for recusal.

25. A decision on recusal was not a matter of simply pack and leave. The decision to recuse carried serious implications, not only for the individual judge, who could nto and should not abdicate the solemn duty entrusted to them by their oath of office. Such a decision had profound consequences for public confidence in the judiciary as a whole. When allegations of bias were unsubstantiated and failed to meet the established legal threshold, a judge's unwarranted recusal risked undermining the very integrity of the judicial institution, setting a dangerous precedent for future cases.
26. A single tweet unsupported by any evidence could not be considered representative of public opinion. Isolated statements on social media, particularly those lacking factual basis, did not meet the standard required to demonstrate bias or impartiality in a judicial context. Public confidence in the judiciary must be grounded in substantive facts, not unverified commentary from online platforms.
27. The court was confident in its aptitude to adjudicate the instant matter with unwavering commitment to justice and free from fear, favor, ill will, or any form of bias on the merits of the case and in strict accordance with the law.

Application disallowed.

Orders

i. *Costs of the application were in the cause.*
ii. *The petitioners were granted leave to file and serve amended petitions, if need be, within 5 days of the instant order.*
iii. *The respondents were likewise granted leave to file and serve amended responses, if need be, within 5 days of service in (ii) above.*
iv. *The applications seeking to discharge, review and set-aside the conservatory orders were deemed as responses to the applications for conservatory orders.*
v. *Parties were at liberty to file and serve any responses and/or further responses to either of the applications together with skeleton submissions within 2 days of the instant order.*
vi. *The applications in (iii) above are hereby fixed for hearing on October 29, 2024 at 10 A.M.*
vii. *Leave to appeal was granted. Typed proceedings and certified copies of the instant ruling were to be availed to parties at cost or as the case may be.*
viii. *The directions were to be uploaded in the Court Tracking System (CTS).*

Citations

Cases

1. Dari Limited & 5 others v East African Development Bank (Petition (Application) E012 of 2023; [2024] KESC 58 (KLR)) — Mentioned
2. National Oil Corporation of Kenya v Real Energy Limited (Environment and Land Appeal 54 of 2016; [2017] KEELC 2403 (KLR)) — Explained

3. Navin Premji Kerai v. Virunga Limited & 2 others ([2023] eKLR) — Mentioned
4. Rai & 3 others v Rai & 4 others (Petition 4 of 2012; [2013] KESC 20 (KLR)) — Explained
5. Shollei & another v Judicial Service Commission & another (Petition 34 of 2014; [2018] KESC 42 (KLR))
6. Standard Chartered Financial Services Limited & A.D. Gregory v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited, Galot Industries Limited & C. D. Cahill (Civil Application 224 of 2006; [2016] KECA 671 (KLR)) — Mentioned
7. President of the Republic of South Africa v. The South African Rugby Football Union & Others Case ((CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)) — Explained
8. R. v S. (R.D.) ([1997] 3 SCR 484) — Explained
9. Saxmere Company Ltd v Wool Board Disestablishment Company Ltd ([2009] NZSC 72; [2010] 1 NZLR 35; [2009] NZSC 122 SC 64/2007) — Explained
10. Dobbs v Tridios Bank NV ([2005] EWCA 468) — Explained
11. Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz ([2016] EWCA Civ 556) — Explained
12. The King v Sussex Justices ex parte M'carthey ([1924] 1 KB 256) — Mentioned

Statutes

1. Civil Procedure Act (cap 21) — section 7 — Cited
2. Constitution of Kenya — article 47(1); 50; 159(1); 159(2) — Interpreted
3. Evidence Act (cap 80) — section 106 — Cited
4. Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (cap 8A) — regulation 21 — Interpreted

Texts

1. Garner, BA., Black, HC., (Ed) (2014), Black's Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)

International Instruments

1. Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)
2. International Bar Association Guidelines on Conflicts of Interest in International Arbitration

Advocates

None mentioned

RULING

Introduction and Background

1. Following the impeachment of HE Rigathi Gachagua by the National Assembly on 8 October 2024, a number of petitions were filed, culminating in a consolidation of these petitions with Petition No E522 of 2024 being the lead file. These petitions are referred to as Cohort 1 petitions. On 18 October 2024, the Senate voted to confirm the resolution by the National Assembly and following this, a host of other petitions were filed. These petitions are referred to as Cohort 2 petitions. They were equally consolidated and petition E565 of 2024 was named as the lead file.

2. A bench of three judges was empaneled to consider all the petitions since they centered around the impeachment process. This ruling determines two applications, filed in both cohorts of petitions. Both

applications seek the recusal of this bench from hearing the petitions and following directions issued by this court, the applications were considered simultaneously.

3. There are two applications before this court. The first application is dated 21 October 2024. It was filed by David Munyi Mathenge in the consolidated petitions under Pet No E565 of 2024. He prays for the recusal of the bench on grounds that have been set out in the supporting affidavit therein. Briefly, the applicant takes issue with the bench having sat on a Saturday and issued orders in one of the applications in the petitions before the court. The applicant deposed that this incident indicates that there have been procedural infractions that may jeopardize their right to a fair hearing, warranting the recusal of the bench.

4. The second application is dated 22 October 2024 and was filed by the 2nd petitioner. It equally seeks to have the bench recuse itself from adjudicating over the consolidated files in the lead file Pet No E522 of 2024. Like the petition before it, the applicant takes issue with the bench sitting on Saturday, without notifying the applicant of such sitting. They take issue with what they contend was an expeditious and gracious move in favor of the Attorney General, despite having failed to mention the petitions in E522 of 2024 on 18 October 2024 and slated them for mention on 29 October 2024. The applicant deposed that by so doing, this court had clearly demonstrated that the case for the 8th respondent is more important than their petition.

5. The other grounds on which the allegation is based is the relationships of the bench to parties in the petitions, which the learned judges had failed to disclose. More particularly, that Hon Justice A Mrima is a close associate of Prof Kithure Kindiki, the proposed Deputy President and that this association might have caused this court to convene and sit on Saturday with a view of assisting one party in these proceedings. Further, the applicant avers that the Judge was also a long-time friend of the Speaker of the Senate, Hon A Kingi.

6. The applicant further contends that the Hon. Justice E. Ogola is also conflicted as his spouse Florence Oluoch is a member of the Kenya Water Towers Board, having been appointed by the President of the Republic of Kenya, who in haste nominated Prof Kithure Kindiki as the Deputy President. By way of a further affidavit it was alternatively deposed that the Judge's wife had actually been appointed to the Board by Hon Soipany Tuya. Finally, that Lady Justice F Mugambi, is also conflicted as she was Prof Kithure Kindiki's LLM Student at Moi University.

7. The applicant annexed in addition to the gazette notice, photographs of Justice A Mrima and the Speaker, as well as a a copy of a tweet (from X social media platform) of Senior Counsel Ahmednasir Abdullahi. According to the applicant, the Senior Counsel is a fair-minded observer. The tweet in short stated that the bench has been constituted to execute a particular mission other than that of dispensing with substantial justice.

8. The 2nd respondent opposed the applications through Grounds of Opposition. It was contended that the allegations made were speculative and based on unsubstantiated claims without credible evidence and do not meet the threshold for recusal under the *Judicial Service (Code of Conduct and Ethics) Regulations*, 2020.

9. It was the respondents' case that this court had already addressed the concerns surrounding the Saturday directions in its ruling dated October 23, 2024, providing a satisfactory explanation. As such, the matter is *res judicata* and cannot form a basis for renewed allegations of procedural impropriety or bias.

10. By way of submissions, very briefly, Mr Kibe Muigai confirmed that the 1st petitioner had made a complaint to the Judicial Service Commission regarding the conduct of the bench, as it had no

confidence in the said bench. Learned counsel Mr Macharia submitted on the concept that "no man can be a judge on his own cause". To buttress his claim, he cited the case of *R v Sussex ex parte M'carthey* and the Court of Appeal decision in *Standard Chartered Financial Services Limited and another v Manchester Outfitters and others* (2016) eKLR.

11. Senior counsel Mr Khaminwa submitted on voluntary recusal by the bench, urging that the judges recuse themselves on their own volition. Senior counsel Mr Muite, Mr Kiragu Wanduta, and Mr Wambui all submitted that the matter before the bench raises weighty constitutional issues that require confidence in the constituted bench. Counsels raised their concerns that the bench is likely to be biased and is unlikely to reach a fair determination in the case. These submissions were also supported by Mr Kala.

12. Counsel cited the Supreme Court decision in *Dari Limited and others v East Africa Development Bank* Petition E012 of 2023 and relied also on the *IBA Guidelines on Conflict of Interest in International Arbitration* on the requirement for recusal in case of bias.

13. Learned counsel Ms. Kimotho Teresia cited articles 47(1) and 50 of the *Constitution* and asked the bench to recuse itself so as to uphold the right to a fair hearing. Dr Eboso, appearing in person, emphasized the need for individual reflection by individual judges in reaching the right decision on recusal. Learned counsel Mr. Omari expressed concern with the remark by the bench in their ruling dated October 23, 2024 where the court used the phrase that counsel was addressing the gallery instead of the judges. He argued that this kind of remark showed bias against the petitioners.

14. In response, learned counsel Prof Githui Muigai observed that the petitioners were approaching the matter with a double standard; praising the bench when favorable orders were granted, but criticizing it as biased when the outcome did not align with their expectations. This inconsistency highlights the flawed nature of their argument, as the impartiality of the bench cannot be judged based on whether the rulings benefit one party or the other. He added that some of the matters raised were *res judicata* as a result of the ruling of October 23, 2023. It was his submission that all the grounds raised for recusal did not meet the required threshold.

15. Learned counsel Mr Gumbo submitted that judges as judicial officers have a duty to sit and determine matters and must guard the court against forum shopping. He noted that in the application that led to the ruling of October 23, 2023, the applicants had prayed for a recusal of the bench and as such, the matter was *res judicata*. Learned counsel Mr Nyamodi and Mr Murugara in support submitted that the issue of recusal was dealt with in prayer no. 5 of the applicants' notice of motion dated October 22, 2024 and the ruling was delivered on October 23, 2024.

16. Mr Nyamodi further asked the court to distinguish the case of *Dari Limited and others v East African Development Bank* (*supra*) and *Navin Premji Kerai v Virunga Limited & 2 others* [2023] eKLR from the present case. It was his case that the electronic evidence submitted by the applicants was in breach of section 106 of the *Evidence Act* and ought to be disregarded.

17. Learned counsel Mr Ojienda submitted that a recusal application must be made in good faith. Counsel submitted that these applications were tied to an intention to extend the conservatory orders issued by Mwongo, J in Kerugoya High Court. With respect to the Speaker of the Senate, he noted that the said Speaker was a peripheral party in these proceedings. His role was to facilitate discussions in the Senate but he did not vote and decide the outcome of the impeachment motion. His association with Justice A Mrima was therefore not critical in the circumstances.

18. Learned counsel Mr Michael Macharia confirmed that he had not been able to file a replying affidavit to the applications but noted that there was an inconsistency with the signatures appearing on the application by the 2nd petitioner as well as some of the affidavits.

19. Mr Mahat Somae learned counsel for the Independence Electoral and Boundaries Commission submitted that in determining the question of recusal this court ought to be guided by an enquiry as to whether there is reasonable apprehension for bias and that the presumption of impartiality of judges must be rebutted with cogent evidence.

20. Submitting on behalf of the Law Society of Kenya, both Mr Havi and Mr Michuki argued that on the whole, the applicants had not made a case for actual or apparent bias and asked the court to so find.

Analysis and Determination

21. We have carefully considered the applications, responses submissions and evidence presented by respective parties. In our view, the following issues arise for determination: -

    i. The concept of recusal

    ii. Bias/impartiality as a ground for recusal

    iii. The threshold on recusal application on the ground of bias and impartiality

    iv. Whether the applications are merited

i. The Concept of Recusal

22. The *Black's Law Dictionary* defines 'recusal' as the

> " Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest."

The concept of recusal of judges and judicial officers from matters before them has its foundations on the fundamental principle of impartiality in the administration of justice, which is a cornerstone of any fair and just legal system.

23. The doctrine is also rooted in both common law and constitutional provisions, reinforcing the notion that justice must not only be done but must also be seen to be done. Article 159(1) of the 2010 *Constitution* is instructional that judicial authority is derived from the people of Kenya and is to be exercised in accordance with the principles set out in article 159(2) of the *Constitution*.

24. This principle is, therefore, vital to safeguarding public confidence in the judiciary, maintaining fairness in the judicial process, and upholding the integrity of the courts as commanded by article 159(2) of the *Constitution*. On this basis, recusal should not be taken as a personal affront but a furtherance of the cornerstone of any fair and just legal system.

25. The Supreme Court espoused the foundational principles of recusal in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012 [2013] eKLR as follows:

> " The term is thus defined in *Black's Law Dictionary*, 8th ed (2004) [p 1303] as:
>
> > " Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."

From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

26. The Constitutional Court of South Africa further pronounced itself on these principles relating to recusal in the *President of the Republic of South Africa v The South African Rugby Football Union & Others Case* CCT 16/98. The Court had this to say:-

> " At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront...A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals".

27. It is also established through judicial pronouncements that the circumstances under which a judge or judicial officer should recuse themselves from a case require a high threshold. These instances must be approached objectively, with careful consideration, rather than in a simplistic or routine manner. Recusal directly impacts the administration of justice and a judge should not withdraw from a case simply for convenience sake. This high threshold serves to protect the judiciary from being manipulated by parties who may otherwise seek to undermine the judicial process by frivolously raising recusal applications in an attempt to secure a more favorable forum.

28. This point was ably articulated in *Dobbs v Tridios Bank NV* [2005] EWCA 468, where the court stated as follows:

> " ... But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant - whether it be a represented litigant or a litigant in person - criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticizing all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticized -- whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticizing the system generally. Mr Dobbs' appeal could never be heard."

29. Since all judicial officers take an oath to serve and administer justice, it is implied that there is a duty to sit imposed on judges by the value and principle of the rule of law. Judges should therefore only recuse themselves from a matter in clear cases where a case for recusal has been made out. To do otherwise would amount to an abdication of duty.

30. The Supreme Court in *Gladys Boss Shollei v Judicial Service Commission & another*, Petition No 34 of 2014; [2018] eKLR (Justice Ibrahim, SCJ) made this point in his concurring opinion at paragraph 25:

> " Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the *Constitution*." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law."

31. In the matter at hand, the grounds for recusal have been elaborated earlier. They are centered around allegations of bias arising from a perception that the bench had prioritized hearing and issuing directions on an application made by the Attorney General over other parties. The other grounds for the real or perceived bias arise from the alleged associations between the members of the bench with parties in the matter.

32. Before we can delve into the specific grounds adduced, it serves a good purpose to highlight some relevant principles on bias as a ground for recusal.

ii. Bias/lack of impartiality as a ground for recusal

33. Bias is defined in the *Black's Law Dictionary* as an inclination; prejudice or predilection. It may manifest in two forms; actual or perceived. Actual bias is defined as genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject. Perceived (or implied) bias is defined as prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person.

34. In other words, perceived bias arises where there is no actual prejudice but a reasonable apprehension that exists that the judge's impartiality might be compromised. This often arises from associations, relationships, or conduct that, though not overtly improper, may give an impression of partiality.

35. The distinction between actual and perceived bias is crucial in recusal matters because the latter often deals with the integrity of the judicial process in the eyes of the public. It is not enough that justice is done; it must also be seen to be done. Therefore, a judge must consider whether, even in the absence of actual bias, their participation in a matter might reasonably cause parties or the public to question their impartiality, thereby undermining confidence in the judiciary.

36. In its application to judicial proceedings, bias represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. It is finally, a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case. Bias and partiality are sometimes used interchangeably. Impartiality is defined in the *Black's Law Dictionary* as lack of bias.

37. Impartiality is also the second value espoused in the *Bangalore Principles of Judicial Conduct*, 2002. These *Principles* have become a cornerstone in the global discourse on judicial ethics, and their influence has risen to the level of jus cogens norms in international law. The principles, which emphasize the values of independence, impartiality, integrity, propriety, equality, competence, and diligence, have been widely accepted and incorporated into the judicial frameworks of numerous countries.

38. Principle 2.5 provides that a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

39. The particular circumstances under which a judicial officer may recuse themselves on grounds of bias or lack of impartiality are stated in regulation 21 of the *Judicial Service (Code of Conduct and Ethics) Regulations* 2020 and are largely replicated from the Bangalore Principles. It provides as follows:

> "21.
>
> (1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge-
>
> a. is a party to the proceedings;
>
> b. was, or is a material witness in the matter in controversy;
>
> c. has personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> d. has actual bias or prejudice concerning a party;
>
> e. has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
>
> f. had previously acted as a counsel for a party in the same matter;
>
> g. is precluded from hearing the matter on account of any other sufficient reason; or
>
> h. a member of the judge's family has economic or other interest in the outcome of the matter in question."

40. Owing to the training, selection, and appointment of judges, there is a strong presumption of impartiality on judicial officers. This presumption arises from the rigorous processes involved in their appointment, which are designed to ensure that only individuals of high moral character, legal acumen, and independence are appointed to the bench. The judiciary, as a pillar of democracy, is structured to operate on principles of fairness and neutrality, and it is assumed that judges are capable of setting aside personal interests and emotions when adjudicating matters.

41. In the *Shollei case* [*supra*], the Supreme Court (Justice Njoki Ndung'u, SCJ), affirmed this presumption of impartiality. At paragraphs 53 and 54, the court held as follows:

> "It must always be remembered that there is a presumption of impartiality of a Judge. In *The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others*, (CCT16/98) [1999] the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when

hearing and determining matters. The role of a Judge is to ensure that cases are determined in accordance with the *Constitution* and the law. "

42. This point was equally emphasized by the court in *President of the Republic of South Africa v The South African Rugby Football Union* [*supra*] in the following words: -

> " In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often-difficult task of fairly determining where the truth may lie in a welter of contradictory evidence..."

43. Having addressed the concept of recusal and bias/lack of impartiality as a ground for recusal, suffice to now deal with the threshold on recusal application on the ground of bias and impartiality. That leads us to third issue.

iii. The threshold on recusal application on the ground of bias and impartiality:

44. The test for bias is objective and is typically framed around the question of whether a reasonable and informed observer, knowing all the relevant facts, would have a legitimate apprehension that a judge is not impartial. This principle has been established and refined through jurisprudence to ensure that the perception of fairness is maintained in the judicial process.

45. It must equally be emphasized that the threshold for proving bias is high and for good reason. In the *President of the Republic of South Africa v The South African Rugby Football Union & Others Case* CCT 16/98 the Constitutional Court of South Africa quoted with approval the following sentiments of Cory J in *R v S (RD)* [1977] 3 SCR 484:

> " Courts have rightly recognized that there is a presumption that judges will carry out their oath of office.....This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias." (Emphasis added)

46. Borrowing from the New Zealand Supreme Court decision in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 the court noted thus;

> " The standard for recusal [on grounds of bias] is one of "real and not remote possibility", rather than probability. The test is a two-stage one. The judge must consider:
>
> i. First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and
>
> ii. Second, whether there is a "logical and sufficient connection" between those circumstances and that apprehension.

47. So far as concerns the 'informed and fair-minded observer' in whose eyes the potential for bias must be determined, the court in *Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz* [2016] EWCA Civ 556, the Court of Appeal (England and Wales) expressed itself thus:-

> " ... We would however, emphasise two important points. First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant.

> The 'real possibility' test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias....
>
> The litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded. Secondly, the informed and fair-minded observer is to be treated as knowing all the relevant circumstances, and it is for the court to make an assessment of these. It was held in *Virdi v Law Society* [2010) EWCA Civ 100 that the hypothetical fair-minded observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available ..."
>
> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold.
>
> The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. "

48. On the whole and drawing from these authorities, it is our view that the following considerations stand out as the pointers on which an examination such as this may be made; -

    i. Whether there is apprehension of bias, real or perceived.

    ii. Whether a fair minded fully informed observer would reasonably apprehend the Judge might not be impartial.

    iii. Whether there exists logical and sufficient connection between the circumstances and the apprehension.

    iv. Whether the Recusal application has been instituted in good faith.

    v. Having regard to the totality of the circumstances the case, whether the recusal will militate against the oath of office and duty to sit

49. The above discussion lays a sound basis for consideration of the merits or otherwise of the claims put forward by the applicants.

iv. Whether the applications are merited

50. In response to the submission by the applicants that the bench sat on a Saturday and issued directions on hearing of an application by the Attorney General thereby prioritizing the Attorney General over other parties, the respondents argued that the issue was *res judicata*. We concur that this issue is not available for relitigating by dint of section 7 of the *Civil Procedure Act*. For the avoidance of doubt, we pronounced ourselves thus in the ruling dated October 22, 2014 that: -

> " [86] In this case, the issue has been raised that this court allegedly sat and considered an application by the respondent on a Saturday, outside official court hours. The ordinary definition of a 'sitting,' as provided in the *Black's Law Dictionary*, is a formal occasion when the court convenes to conduct its business. In this instance, no such formal sitting occurred. No evidence or proceedings have been presented before the Court to support the claim that a formal sitting took place.
>
> [87] Rather, the bench merely conferred and issued directions electronically, in line with established practice and the procedural rules as expressly permitted under *Practice Direction* 19(b). This is markedly different from a court session in which the bench is convened to hear and determine a matter. Accordingly, it is only fair and reasonable for the parties to dispel any notion that this bench convened to hear arguments from any party *ex parte* before issuing directions.
>
> [89] Moreover, and for the avoidance of doubt, out of all the prayers sought, by the applicants, including a prayer to be heard outside of the ordinary office hours of the court, only prayer (i), which sought to have the matter certified as urgent, was granted. No other reliefs were granted at that time.
>
> [90] It is therefore evident that the court was fully cognizant of both the urgency of the matter and the potential repercussions that granting any further *ex parte* orders could have had on the prevailing status quo. With this understanding, and in an effort to balance the scales of justice, the bench issued the directions that are now being challenged, so as to give an opportunity for both parties to be heard on the applications. We therefore find and hold that there is nothing unconventional in the manner in which this bench dealt with the two applications filed under certificate of urgency".

51. Having therefore already dealt with the issue, the only avenue open to the applicants is to file an appeal against the above findings. Indeed, during the hearing related to this ruling, the applicants' counsel confirmed that a notice of appeal against the entire ruling of October 22, 2024, had already been filed. Consequently, this issue cannot be relitigated before this court.

52. The applicants have submitted that, in reaching its findings on this issue, the bench determined the question of recusal in the ruling dated October 22, 2024 without affording the parties an opportunity to be heard. The applicants argue that this conduct demonstrates bias by the bench, as it allegedly pre-emptied the outcome of the case without first considering the respective applications, thereby infringing on their right to a fair hearing.

53. However, a cursory examination of the applications to which the ruling of October 22, 2024 relates shows that one of the prayers made by the applicants, even at that time, was for the recusal of the bench. The 4th petitioner (E565/24) in his supporting affidavit sworn on even date deposed that the bench

should recuse itself due to the perceived bias against the petitioners. This indicates that the issue of recusal was already squarely before the court for determination, and it was incumbent upon the bench to address it. As such, it is our position that the court's decision to rule on the recusal without further submissions from the parties does not in itself demonstrate bias, as the issue had been raised by the applicants and formed part of the then application.

54. We may equally note that the applicants correctly acknowledge the court's initial scheduling of mentions for the 1st Cohort of petitions on October 29, 2024. They further concede, and rightly so, that the court prioritized hearing petitions with conservatory orders ahead of their own. In our view, this is purely a matter of case management, which in no way demonstrates bias on the part of the court.

55. As the applicants themselves recognize, the court deemed it necessary to address the interlocutory applications in Cohort 2 since the petitions in Cohort 1 were ready for hearing having determined the applications for interim reliefs. Such procedural decisions are within the court's discretion and are driven by considerations of efficiency, not partiality.

56. The respondents cited the case of *National Oil Corporation of Kenya v Real Energy Kenya Ltd* (2017) eKLR, where it was equally held that administrative decisions and case management directions, such as the issuance of directions on urgent applications, do not constitute grounds for recusal.

57. In any case, as already stated, the fact that the applicants disagree with the outcome of the application does not automatically infer bias. Rather, the proper course of action, if they feel aggrieved by the ruling, is to challenge it through the appellate process rather than by continuing to seek recusal on grounds that have already been adjudicated.

58. Turning to the allegations of bias leveled against Hon Justice A Mrima, the applicants contend that the judge is a close associate of the Deputy President nominee, Prof Kithure Kindiki. Additionally, it is alleged that the judge shares a long-standing friendship with the Speaker of the Senate, Hon A Kingi, who is also a party to these proceedings. The applicants argue that while such associations in themselves may not be inherently condemnable, the absence of a formal disclosure by the judge about these relationships gives rise to an insinuation of bias and partiality in the consideration of the matters before the court.

59. The applicants' view is that the lack of transparency regarding these associations creates a perception that the judge's impartiality may already be compromised. In the judicial process, it is paramount not only that justice is done but that it is seen to be done. Failure to disclose relationships or associations that may bear on a case could reasonably give rise to an apprehension of bias from the perspective of an objective observer.

60. That said, it is important to recognize that mere social or professional associations do not automatically disqualify a judge from hearing a case unless there is substantial evidence that such relationships materially impact the judge's impartiality. Legal precedent requires a high threshold to justify recusal, one that demands credible proof of a reasonable likelihood of bias. In the absence of such evidence, mere speculation or suspicion based on professional or social ties does not suffice to meet this threshold. The burden lies with the applicants to show a direct link between the associations and the judge's ability to adjudicate fairly.

61. Regarding the specific claim that the Speaker of the Senate attended the judge's marriage ceremony in 2021, this fact alone does not meet the legal standard for recusal. Several factors support this conclusion.

62. First, the applicants have not provided evidence of any ongoing or sustained relationship between the judge and the Speaker following the event, which occurred three years before this case was brought to

court. The passage of time further weakens any reasonable apprehension that this social interaction could currently influence the judge's impartiality. Moreover, at the time, Hon A Kingi was not the Speaker of the Senate, and no one could have reasonably foreseen that this litigation would arise in the future.

63. To further illustrate the lack of good faith and selective use of evidence, this court takes judicial notice of the fact that, on September 25, 2024, barely a month ago, the 1st petitioner presided over the official opening of the Nairobi International Show. As the Chief Guest, he presented an award to Hon A Mrima on behalf of the Judiciary. Yet, the petitioners have deliberately chosen not to raise concerns about this recent interaction, focusing instead on an event that occurred three years ago.

64. Legal precedents clearly establish that to substantiate a claim of bias, there must be proof of a continued or significant relationship that could reasonably affect a judge's neutrality. In this case, the applicants have not demonstrated that the judge and the Speaker maintain a close or ongoing relationship. The connection between them is remote and does not rise to the level that would raise valid concerns about bias. Courts have consistently found that distant social ties, without more, are insufficient to justify recusal.

65. Additionally, it was submitted during the hearing that both the Hon. Speaker and the learned judge, as professional colleagues, may have naturally encountered one another in professional settings. Such interactions, or even the presence of a public figure or other professional colleagues at a personal event like a wedding, as was the case, do not by themselves create a reasonable apprehension of bias.

66. Judges, by the nature of their role in the legal community, will inevitably interact with public officials. However, these professional connections do not inherently undermine their ability to remain impartial. Without further evidence showing that the relationship between the judge and the Speaker has any bearing on the case at hand, we conclude that this association falls well short of the legal standard required for recusal.

67. On the former association between Hon A Mrima and the Deputy President nominee, counsel Mr Njiru made an application to expunge this averment, which was contained in paragraph 10 of the affidavit sworn by the Mr Obuli Nameya. A similar application was made to expunge paragraph 16 of the same affidavit, which contained allegations regarding a potential conflict of interest involving Lady Justice (Dr) F Mugambi and her association with the Deputy President nominee.

68. We must express our strong disapproval of the casual approach taken by counsel for the applicant in handling this matter. The averments contained in the affidavit were serious and potentially damaging to the reputation of the judges presiding over the bench. Allegations of bias, particularly those involving senior judicial officers, are far from trivial and demand to be treated with the utmost seriousness.

69. In this instance, the acknowledgement by Mr Njiru that he had learnt that the allegations in paragraph 10 and 16 were not true and that is why he wished to expunge the paragraphs calls into question the applicants' honesty and whether the application was made in good faith in the first instance. Nothing would have been easier but to establish the truth of the averments before being deposed to.

70. It is undeniable that officers of the court bear a critical responsibility when raising issues of bias or conflict of interest. In the incident before the court, the manner in which these allegations were presented raises serious questions about the true intent behind the application -whether it was a genuine effort to ensure impartiality or simply an attempt to unjustly undermine the integrity of the bench. Counsel must recognize that unfounded allegations can erode public trust in the judiciary and unjustly damage the reputations of judicial officers without any legitimate basis.

71. Another allegation raised was that the spouse of Hon. Justice E Ogolla is a member of the Kenya Water Towers Board, having been appointed to the position by the President. The applicants based their claim on Gazette Notice number 7515 of June 7, 2023, which purportedly documented her appointment to the board. However, no further evidence was presented to confirm that the appointee is indeed the judge's spouse. Even if such proof had been furnished, we are of the opinion that this allegation still falls short of meeting the threshold for recusal, for several reasons.

72. Firstly, a closer examination of the Gazette Notice reveals that the appointment in question was made by Hon Soipan Tuya, the then Cabinet Secretary for Environment, not by the Head of State, who is a party to these proceedings. This distinction is critical, as it demonstrates a distant and indirect link between the Head of State and the learned judge, thereby undermining any suggestion of influence or bias. There is no evidence of direct involvement by the Head of State in this specific appointment, and thus no reasonable basis to infer that it could affect the judge's impartiality.

73. Secondly, the timing of the appointment further weakens the applicants' claim. The appointment occurred more than three years before the filing of the current case, making it highly improbable that such a distant event could have any bearing on the matters presently before the court. In the absence of additional evidence showing a direct connection between the spouse's appointment and the issues in this case, the mere fact of the appointment does not meet the high standard required for recusal.

74. Finally, it is important to emphasize that judges' family members are entitled to pursue their own careers without automatically raising concerns about the judge's impartiality. To imply otherwise would place an unreasonable and unfair burden on judicial officers. The professional pursuits of a judge's spouse, particularly in unrelated fields, cannot and should not be used to impugn the judge's ability to remain impartial. Without more, this argument amounts to mere speculation and falls far short of providing a valid basis for recusal.

75. In our analysis of the issues at hand, we trust it has become clear that a decision on recusal is not a matter of simply "pack and leave," as one of the counsel supporting the application has suggested. The decision to recuse carries serious implications, not only for the individual judge, who cannot and should not abdicate the solemn duty entrusted to them by their oath of office. More importantly, such a decision has profound consequences for public confidence in the judiciary as a whole. When allegations of bias are unsubstantiated and fail to meet the established legal threshold, a judge's unwarranted recusal risks undermining the very integrity of the judicial institution, setting a dangerous precedent for future cases.

76. Regarding the submission that relied on a tweet to reflect the perspective of a fair-minded observer towards the bench, we firmly hold that a single tweet unsupported by any evidence cannot be considered representative of public opinion. Isolated statements on social media, particularly those lacking factual basis, do not meet the standard required to demonstrate bias or impartiality in a judicial context. Public confidence in the judiciary must be grounded in substantive facts, not unverified commentary from online platforms.

77. In conclusion, we echo the sentiments of the Supreme Court in the *Shollei case* [*supra*], where it was stated:

> " We conscientiously take the stand that the instant matter is not one calling for the recusal of any Judge ... Committed to our oaths of office, we would pronounce ourselves unbiased, and ready and willing to own up to our constitutional mandate of dispensing justice in matters falling within our jurisdiction".

78. We equally are confident in our aptitude to adjudicate the matter before us with unwavering commitment to justice and free from fear, favor, ill will, or any form of bias on the merits of the case and in strict accordance with the law.

Disposition:

a. Application dated October 22, 2024 is hereby disallowed.

b. Costs of the application be in the cause.

c. The Petitioners are hereby granted leave to file and serve amended Petitions, if need be, within 5 days of this order.

d. The Respondents are likewise granted leave to file and serve amended responses, if need be, within 5 days of service in (b) above.

e. In view of the nature of the pending applications for conservatory orders and those seeking to discharge, review and set-aside the conservatory orders in Cohort 2 Petitions, we hereby direct as follows: -

   i. The applications seeking to discharge, review and set-aside the conservatory orders shall be deemed as responses to the applications for conservatory orders.

   ii. Parties are at liberty to file and serve any responses and/or further responses to either of the applications together with skeleton submissions within 2 days of this order.

   iii. The applications in (i) above are hereby fixed for hearing on October 29, 2024 at 10am.

f. Leave to appeal is hereby granted. Typed proceedings and certified copies of this ruling to be availed to parties at cost or as the case may be.

g. The directions herein shall be forthwith uploaded in the Court Tracking System (CTS).

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25TH DAY OF OCTOBER 2024

.....

E.O. OGOLA

JUDGE

.....

A. MRIMA

JUDGE

.....

DR. F. MUGAMBI

JUDGE