REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 22 OF 2020

BETWEEN

REPUBLIC...APPLICANT

VERSUS

KENYA MOTORSPORTS FEDERATION LTD...................1ST RESPONDENT

NATIONAL APPEALS BOARD OF THE

KENYA MOTORSPORTS FEDERATION LTD..................2ND RESPONDENT

EX PARTE APPLICANTS:

RORY HUGH THOMAS McKEAN

JOSH BRADLEY HALDANE McKEAN

(Suing through parents and next friend)

NOELLE CHRISTINE McKEAN

RODERICK McKEAN

RULING

1. The *ex parte* Applicants herein initially filed an application by way of a Chamber Summons dated 24th January 2020, seeking leave to apply for various judicial review orders arising from a determination by the 2nd Respondent's dated 23rd January 2020, that dismissed the *ex parte* Applicants' appeal. After being granted leave they filed a substantive Notice of Motion dated 4th February 2020, and upon application and by consent of all parties, the filed an Amended Chamber Summons and an Amended Notice of Motion both dated 13th February 2020, and a Further Affidavit sworn on 24th February 2020.

2. The Respondents thereupon filed a replying affidavit sworn on 26th February 2020, and a Notice of Motion dated 3rd March 2020, that sought to stay and dismiss the present proceedings on the ground that they are *res judicata*. This matter was mentioned before Hon. Justice Mativo on 10th March 2020, and the learned Judge directed that the Respondent's Notice of Motion dated 3rd March 2020 be treated as part of their response to the *ex parte* Applicants' substantive Notice of Motion. This Court subsequently directed the parties to file and serve further pleadings and submissions on the *ex parte* Applicant's Amended Notice of Motion both dated 13th February 2020.

3. Upon compliance, the Respondents thereupon filed yet another application by a Notice of Motion dated 13th July 2020 seeking the orders that the Honourable Lady Justice Nyamweya be pleased to recuse or disqualify herself from hearing and determining this matter, and that the matter be placed before any other Court for directions and/or hearing and determination. The said application is the subject of this ruling, and the arguments in support and opposition thereto are set out in the following sections.

The Case for Recusal

4. The Respondents' instant application is supported by an affidavit sworn on 13th July 2020 by Mwaura Njuguna, the Respondent's General Manager, and submissions dated 13th July 2020 filed by Murangasia Associates, the Respondent's advocates on record. The main ground for

the application is that Her Ladyship Justice Nyamweya who is already heard and determined **JR 10 of 2019 - Rory Hugh Thomas Mckean And Josh Bradley Haldane Mckean (Suing Through Parents And Next Friend Noelle Christine Mckean And Roderick Mckean Versus Kenya Motorsport Federation Limited** between the same parties and same issues as the suit herein, and the Respondent is apprehensive on the neutrality and impartiality of the Court if it proceeds to make a determination in this Suit.

5. Further, that the aforementioned decision and Judgment of the Court in JR 10 of 2019 is the basis and genesis of JR 22 of 2020 (the suit herein), and the Honourable Lady Justice Nyamweya having already pronounced and expressed her stance on these issues in favour of the *ex parte* Applicant, and it is only fair and just that the Honourable Lady Justice Nyamweya recuses herself from the determination of JR 22 of 20.

6. The Respondent cited the decision in **Re Estate of Gitere Kahura (Deceased) [2019] eKLR** the Court set out the circumstances in which a Judge can recuse herself as:

1. In matters of conflict of interest.

2. If a judge is biased or seen to favor one party.

3. If a judge handled the matter previously as a lawyer in private practice.

4. If there is ex parte communication between the judge and one of the parties.

5. When a judge predicts that he or she may be impartial in a matter.

7. The Respondents submitted that having already decided in favour of the *ex parte* Applicant herein in **JR 10 of 2019 - Rory Hugh Thomas Mckean And Josh Bradley Haldane Mckean (Suing Through Parents And Next Friend Noelle Christine Mckean And Roderick Mckean Versus Kenya Motorsport Federation Limited**, it is impossible for the Respondent not to see this Court as favouring the Respondents herein. Further, that these submissions are in line with the term "bias" as defined in The Bangalore Principles of Judicial Conduct:

> "*Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case.*"

The Case Against Recusal

8. The *ex parte* Applicants responded in a replying affidavit sworn on 7th August 2020 by Roderick McKean the 2nd *ex parte* Applicant. The *ex parte* Advocates on record, Anjarwalla and Khanna Advocates, in addition filed submissions dated 10th August 2020. According to the *ex parte* Applicants' the Respondents' application, is founded on a misrepresentation of facts, and only made in an effort to delay the hearing and determination of this matter. Further, that while it is true that the Hon. Justice Nyamweya heard and determined JR No. 10 of 2019, it is completely dishonest and misleading to suggest, that the issues in the two matters are the same.

9. The *ex parte* Applicants averred that the two matters are founded on distinct causes of action, and that the Orders granted in JR No. 10 of 2019 and those sought herein are entirely different. They distinguished the two matters by stating that, on the one hand, JR. No. 10 of 2019 was precipitated by the Respondents' decision to award prizes for the 2018 National Karting Championship despite a pending appeal, and this Court found that the Respondent's decision to award prizes for the 2018 National Karting Championship before our appeal was heard and determined was illegal, null and void.

10. The *ex parte* Applicants averred that the instant proceedings on the other hand challenge the 2nd Respondent's decision dated 24th January 2020 and is based on the internal appeal, the process, procedure and outcome as demonstrated in the pleadings filed by the ex parte Applicants. In any event, that following the decision in JR No. 10 of 2020, the Respondents have never lodged an appeal claiming to be aggrieved by the decision, and in fact proceeded to hold the internal appeal directed by the Court, albeit very late in the day. Therefore, that because of the differences between the instant matter and JR No. 10 of 2019, the decision made by the Court in the latter has no bearing whatsoever on the matters at issue in the present case.

11. The *ex parte* Applicants further stated that the Respondents' counsel made a similar application orally before the Court on 10th March 2020, and following submissions on the issue of whether the matter was res judicata, the Hon. Justice Mativo dispensed of the Respondents' application directing that the matters were distinct and separate. That it is therefore duplicitous for the Respondents to seek the Court's recusal on issues that have already been dealt with by the Court.

12. Lastly, the *ex parte* Applicants contended that the threshold for proving bias, perceived or actual, on the part of a Judge to warrant recusal is extremely high, and it is not enough for the Respondents to merely suggest in as vague a manner as they have done, that they are apprehensive that the Court may be partial. Therefore, that the allegations of bias on the part of the Honourable Judge are extremely vexatious and only meant to besmirch this Court's integrity.

13. The *ex parte* Applicants' legal submissions were that the applicable legal test for recusal of a Judge is whether all the circumstances give rise to a reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public, that the judge will not apply her mind to the case impartially . Reliance was in this regard placed on the Court of Appeal decision in the case of **Kalpana H. Rawal v Judicial Service Commission & 2 others (2016] eKLR,** as cited in the case of **Robert Tom Martins Kibisu v Republic [2018] eKLR**

where the Court affirmed the of holding of the South African Constitutional Court in **President of The Republic of South Africa and others v. South African Rugby Football Union and others, 1999(4) SA 147 (CC).**

14. The *ex parte* Applicants' submitted that the instant application has not met the above legal threshold, as the burden of satisfying the test for recusal lies with the Respondents, who must specifically plead and prove the allegations of bias, apparent or feared, by presenting cogent evidence. The *ex parte* Applicants relied on the decision by the Supreme Court in **Robert Tom Martins Kibisu vs Republic [2018] eKLR (Supra),** and the decisions by the High Court in **Nathan Obwana v. Robert Bisakaya Wanyera & 2 others (2013) e KLR, Elizabeth Wanjiku Njoka (Suing as the Legal Representative of Alice Kahaki Njoka (Deceased) v Juma Kiplenge (sued as the legal representative of Philip Njoka Kamau (Deceased) & 12 others [2018] eKLR e** and **JGK v FWK [2019] eKLR** , for the position that mere suspicion or apprehension of bias is not sufficient, and that the test is objective, and the facts constituting bias must be specifically alleged and established.

15. In this regard, the *ex parte* Applicant's submitted that the allegations by the Respondents that they are apprehensive that Lady Justice Nyamweya will be impartial because the judge heard and determined JR No. 10 of 2019 are not supported by any real evidence of bias or possibility of bias, and that they have demonstrated that the two matters are easily distinguishable. In addition, that this Court has already rendered itself regarding the issue that this matter is *res judicata* when the Honourable Justice Mativo dispensed of the Respondents' Application dated 3 March 2020.

16. Lastly, the *ex parte* Applicants submitted that judicial findings cannot form the basis for a recusal application, and that if the Respondents are unhappy with any decision of the court, then the solution is to either appeal or file an application for review or setting aside. The ex parte Applicant cited various decisions, including the decision by the Supreme Court of the United States in the case of **Galina Ogeone v United States of America Civil No. 13-00166 SOM-RLP** as cited in the holding in the case of **Litek vs United States, 510 U.S. 540 (1994}** and the Kenyan case of **John Karani Mwenda vs Japhet Bundi Chabari (2017) eKLR** . The ex parte Applicants further pointed out that upon delivery of judgment in JR No. 10 of 2019, the Respondent did not appeal, and instead went ahead and complied with the judgment by convening a hearing of the internal appeal. Therefore, that the Respondent's conduct clearly demonstrates that it was not dissatisfied with the court's decision, and it is therefore absurd for the Respondent to claim that the court is now biased.

17. In conclusion, the *ex parte* Applicants submitted that the Honourable Lady Justice Nyamweya has not exhibited any signs of bias in her conduct of all proceedings between the parties, and that the Respondents' claim for recusal should fail. The decision in the English Case of **Otkritie International Investment Management Ltd & Ors v Urumov [2014] EWCA Civ 1315** was cited for the position that the allegation of bias were not based on any verifiable grounds.

The Determination

18. The issue for determination in the instant application is whether the Respondent has established grounds for recusal of this Court from hearing the judicial review proceedings herein. Recusal is defined in **Black's Law Dictionary Ninth Edition** at page 1390 as "removal of oneself as judge or policy maker in a particular matter, especially because of a conflict of interest". Recusal therefore is the situation in which a judge steps down from a case, usually because of a conflict of interest, bias or prejudice.

19. Deane J. in his dissent in the Australian case of **Webb v. The Queen. [1994] 181 CLR 41** identified four areas of conflict of interest, bias or prejudice that may lead to disqualification and recusal of a judge, namely:

> (a) disqualification by interest, where some direct or indirect interest in the proceedings, pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment;
>
> (b) disqualification by conduct which consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias including published statements;
>
> (c) disqualification by association consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and
>
> (d) disqualification by extraneous information which consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.

20. The first category of disqualification identified by Deane J. results in actual bias, while the rest of the disqualifications result in apparent bias. The test for recusal differs between the two types of bias. In the case of actual bias, disqualification and recusal is automatic, without there being any "question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case" as stated by Lord Goff in the English case of **R. v. Gough (1993) 2 All E.R. 724.** In the case of apparent bias, the perception of impartiality is measured by the standard of a reasonable observer, and the English House of Lords in ***Magill v. Porter (2002) 2 AC 357***, stated that the test for recusal is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased".

21. This test has been adopted by the Kenyan Courts. The Supreme Court of Kenya restated the law on recusal of a judge on the ground of bias in **Robert Tom Martins Kibisu vs Republic (supra),** as follows:

> ***"[59] We agree that bias is prima facie a factor that may lead to a judge recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of the Constitution thus:***

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

[60] What is bias? The Oxford English Dictionary defines bias thus: "as an inclination or prejudice for or against one thing or person". The Blacks' Law Dictionary 9th edition defines the word bias as "Inclination; prejudice; predilection". Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.

[61] From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in Tumaini v. Republic [1972] EA LR 441 Mwakasendo J held that "in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people…"

*22. The same test was also applied in **Nathan Obwana vs Robert Bisakaya Wanyera & 2 others** **[2013] e KLR,** wherein Chitembwe J. further held that more apprehension of bias cannot be a ground for recusal, and that the allegations of bias must be factual and proved. The learned Judge held as follows in this regard:*

"I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter."

23. The Respondents in the instant application claim that there is an apprehension of bias arising from this Court having heard and determined a previous case between the same parties and on the same issues, namely **JR 10 of 2019 - Rory Hugh Thomas Mckean and Josh Bradley Haldane Mckean (Suing Through Parents and Next Friend Noelle Christine Mckean and Roderick Mckean vs Kenya Motorsport Federation Limited**. The *ex parte* Applicants have on the other hand gone to great lengths to distinguish the facts of the instant suit from the previous suit between the parties. The issue of bias on the part of a judge arising from having made a determination in previous cases or even the same case between parties has been the specific subject of various decisions and commentaries.

24. In **Otkritie International Investment Management Ltd & Ors v Urumov** **[2014] EWCA Civ 1315** the English Court of Appeal held as follows:

"There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive"

25. After reviewing various decisions on the issue, the said Court found that there is a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences"".

26. In yet another English case, namely **Locabail (UK) Ltd vs Bayfield** **(2000) QB 451**, Lord Bingham of Cornhill stated as follows in delivering the judgment of the court at paragraph 25:

"…. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case."

27. I also note that the Respondents cited and relied on the definition of bias and prejudice in the **Bangalore Principles of Judicial Conduct.** The **Commentary on The Bangalore Principles of Judicial Conduct (September 2007)** prepared by the United Nations Office of Drugs and Crime explains that one of the application of the value and principle of impartiality is that a judge shall perform his or her judicial duties without favour, bias or prejudice. The said commentary specifically provides as follows as regard what may not constitute bias or prejudice on the part of a Judge in paragraph 60:

"60. A judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable. It has been said that "proof that a judge's mind is a tabula rasa (blank slate) would be evidence of a lack of qualification, not lack of bias". Judicial rulings or comments on the evidence made during the course of proceedings do not fall within the prohibition, unless the judge appears to have a closed mind and is no longer considering all the evidence."

28. The said commentary underscores the fact that each case is decided on its own facts and evidence, and the Judge is required and expected

to apply the law to those particular facts and evidence. In the event that a Judge does not apply himself or herself as required, then a party's remedy is that of review or appeal to correct and reverse any perceived errors made by a Judge. Applications to seek recusal of a judge on the basis of previous decisions in the absence of any evidence giving rise to a perception of bias, are a dangerous and unacceptable affront to judicial independence, and results in the abdication of judicial authority, and must therefore be discouraged in the interests of the rule of law and justice.

29. The imperative and value of judicial independence as the basis for the exclusion of a Judge's previous association with a case from the various categories of bias has been explained in various English decisions. In **JSC BTA Bank v Ablyazov** **[2013] 1 WLR 1845** Teare J. had made findings adverse to a party in interlocutory proceedings , and the party at a later stage applied to the judge to recuse himself from continuing with the case and trying the actions. The judge refused to recuse himself, and was upheld by the House of Lords which observed as follows in its judgment:

> **"70. In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in** Ex Parte Lewin; In re Ward [1964] NSWR 446, **approved in** Livesey v New South Wales Bar Association 151 CLR 288). **He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case": see** Secretary of State for the Home Department v AF (No. 2) **[2008] 1 WLR 2528, para 53. I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments."**

30. In **Triodos Bank N.V. v Dobbs** **[2001] EWCA Civ 468** a party invited the court to recuse itself as a result of the conduct of one of the judges in relation to an application for permission to appeal in related proceedings. Chadwick LJ in giving the judgment of the court stated thus:-

> **"7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. 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 the 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 criticising 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 criticised – 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 criticising the system generally, Mr Dobbs' appeal could never be heard.**

31. In the Kenyan context, this position was explained in **John Karani Mwenda vs Japhet Bundi Chabari** **(2017) eKLR** , wherein Njoroge J. ruled as follows:

> **"44.As already pointed out, our system of Justice is adversarial. Everyday litigants win and lose cases. If every loser accuses the concerned Judge of bias, and we embraced the propositions postulated by the petitioner, there would be need to have an infinite number of Judges ready to be called upon to hear matters raised by the losing parties in future disputes. This would be a veritably ridiculous scenario bordering on the phasmagoric. It would promote untrammeled Judge shopping and unbridled forum shopping.**
>
> **45. If the petitioner's propositions are embraced by this court, every Judge in this planet who applies his mind to the facts and the law apposite to the particular case and decides it in favour of one of the parties will be in conflict in as far as the losing party is concerned.**
>
> **46. A judge cannot just recuse himself because he had handled an earlier dispute involving the parties. A litigant cannot through contrivance of oblique traducent allegations, postilutating unsubstantiated generalities thrown around with unabashed alacrity and abandon attain the threshold needed for a Judge to recuse himself.**
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> **47. By embracing the propositions postulated by the petitioner, this court would be asserting that every loser in a dispute is a victim and every winner is a villain. The villainy of the winner would finally be foisted on the Judge who arbitrated over the dispute. This would amount to embracing veritable escapism in the delivery of justice. Such a scenario deserves deprecation".**

32. *Likewise, in* ***Nathan Obwana v. Robert Bisakaya Wanyera & 2 others, [supra]*** *Chitembwe J, also found that the single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.*

33. I am in agreement with, and persuaded by all the different opinions expressed in the foregoing decisions, and need not say more.

34. I therefore find that the Respondent's application by way of the Notice of Motion dated 13th July 2020 is without merit and fails, for the reasons that the Respondents' sole ground and argument that I have previously heard and determined **JR 10 of 2019 - Rory Hugh Thomas**

Mckean and Josh Bradley Haldane Mckean (Suing Through Parents and Next Friend Noelle Christine Mckean and Roderick Mckean vs Kenya Motorsport Federation Limited between the same parties herein does not qualify as evidence of alleged bias. In addition, the Respondents have not demonstrated or proved any identity, interest or association that I have with the parties or issues in the instant case, that would raise an apprehension of bias in the mind of a reasonable and informed observer. I accordingly decline to recuse myself from hearing this suit.

The Disposition

35. Arising from the above findings, I hereby order as follows:

> **I. The Respondents' Notice of Motion dated 13th July 2020 is hereby dismissed with no order as to costs.**
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> **II. This matter shall be mentioned by email on 22nd February 2021 to set a judgment date.**
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> **III. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the ex parte Applicants and Respondents by electronic mail by close of business on Wednesday, 17th February 2021.**
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> **IV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 22nd February 2021.**
>
> **V. Parties shall be at liberty to apply.**

36. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the ex parte Applicants', and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE