



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**PETITION NO 37 OF 2019**

TATU CITY LTD.....1<sup>ST</sup> PETITIONER

KOFINAF COMPANY LTD.....2<sup>ND</sup> PETITIONER

VERSUS

ETHICS AND ANTI CORRUPTION

COMMISSION.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

SIMON GICHARU.....1<sup>ST</sup> INTERESTED PARTY

CB RICHARD ELIS LTD.....2<sup>ND</sup> INTERESTED PARTY

NCBA BANK KENYA PLC.....3<sup>RD</sup> INTERESTED PARTY

AXIS REAL ESTATE LTD.....4<sup>TH</sup> INTERESTED PARTY

**RULING**

1. By their application brought by way of a Notice of Motion filed under certificate of urgency on 28<sup>th</sup> July 2020, the petitioners seek orders that I recuse myself from hearing their petition. They further ask that the matter be referred to the Presiding Judge to assign another judge to hear the matter.

2. The application is supported by an affidavit sworn by Christopher Barron on 28<sup>th</sup> July 2020 and is based on the following grounds:

*a. The Honourable Lady Justice Mumbi Ngugi presided over Constitutional Reference No. 165 of 2011 Rosemary Mwangiru & 2 Others vs. Attorney General & 3 others [2011] eKLR (“the 2013 Petition”), where the Petitioners in the matter challenged the charges and criminal proceedings brought against them in Chief Magistrate’s Criminal Case No. 2077 of 2010 Republic v Rosemary Wanja, Stephen Mbugua Mwangiru and Robert Githui at the behest of Tatu City Limited and Kofinaf Company Limited (the Petitioners/Applicants herein). The court in its Judgment dated 12<sup>th</sup> November 2013 allowed the Petition.*

*b. The Honourable Lady Justice Mumbi Ngugi in the said Judgment described the Petitioners/Applicants herein as “Galloping litigants” which term was a picturesque description of a vexation litigant.*

*c. The court’s decision was overturned by the Court of Appeal in Civil Appeal No. 349 of 2013, Tatu City Limited and another v Rosemary Mwangiru & 4 others [2019] eKLR*

*d. The Honourable Lady Justice Mumbi Ngugi has prejudged the matter, which concerns the powers of the 1<sup>st</sup> Respondent under sections 26, 27 and 28 of the Anti-corruption and Economic Crimes Act with respect to requirement of notice and obtaining search warrants when carrying out investigations with respect to corruption offences; that the court will be slow to find that the warrants are illegal or irregular.*

3. In his submissions at the hearing of the application, Mr. Ahmednasir Abdullahi, Learned Counsel for the petitioners, condensed and argued the petitioners' grounds for their application under two heads. The first was that this court had personal bias against the petitioners while the second was that a review of previous decisions of this court showed that the 1<sup>st</sup> respondent had 100% chances of winning corruption cases.

4. Before considering the application and the respective arguments of the parties with regard thereto, and in order to properly appreciate and assess the factual basis of the application, it will be useful to set out a brief history of the proceedings in the matter.

### **Procedural History**

5. In the petition filed under Certificate of Urgency on 6<sup>th</sup> December 2019, the petitioners sought various orders against the respondents. The first was an order of certiorari to quash the decision of the 1<sup>st</sup> respondent contained in its letters dated 11<sup>th</sup> November 2019, 19<sup>th</sup> November 2019, 26<sup>th</sup> November 2019, 27<sup>th</sup> November 2019 and 2<sup>nd</sup> December 2019 addressed to the petitioners and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties.

6. The petitioners further sought conservatory orders suspending investigations by the 1<sup>st</sup> respondent concerning tax evasion, money laundering or corruption and prohibiting the 1<sup>st</sup> respondent from instituting legal proceedings and/or making recommendations as a result of its investigations pending the hearing and determination of **ACEC Misc. Application No. 1 of 2019 Republic v Ethics and Anti-Corruption Commission and another ex parte Tatu City Limited and another**. The petitioners also sought general and exemplary damages and interest thereon against the respondents.

7. Contemporaneously with the petition, the petitioners filed an application by way of Notice of Motion dated 6<sup>th</sup> December 2019 seeking conservatory orders suspending any investigations by the 1<sup>st</sup> respondent concerning alleged tax evasion, money laundering or corruption touching on properties belonging to the petitioners pending the hearing and determination of ACEC Misc. Application No. 1 of 2019.

8. The petition and the application for conservatory orders were placed before Onyiego J. The Learned Judge certified the matter urgent and directed that it be served on the respondents within 4 days and thereafter be placed for *inter partes* hearing before me on 13<sup>th</sup> December 2019.

9. On that day, the matter was duly placed before me. The petitioners were represented by their Learned Counsel, Mr. Abdullahi and Ms. Ngugi. Ms. Kibogy appeared for the 1<sup>st</sup> respondent, Mr. Allan Kamau for the 2<sup>nd</sup> respondent and Mr. Kenyatta held brief for Mr. Bahati for the 1<sup>st</sup> Interested Party. The 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties were represented by Mr. Omwanza while Mr. Monari represented the 3<sup>rd</sup> Interested Party. Essentially, the representation of the parties has remained the same throughout the proceedings leading to the application the subject of this ruling.

10. At that first appearance, Mr. Abdullahi indicated that he was ready to argue prayers 2, 3 and 4 of the petitioners' application for conservatory orders. Ms. Kibogy stated that she was not ready to proceed as the 1<sup>st</sup> respondent had just filed its grounds of opposition that morning and was seeking leave to file a comprehensive response to both the application and the petition. She further sought the directions of the court in light of the subsistence of ACEC Misc. Application No. 1 of 2019 which involved the same parties and raised the same issues relating, *inter alia*, to the 1<sup>st</sup> respondent's investigation of the petitioners' properties. The 2<sup>nd</sup> respondent was also not ready to proceed as his office had not been served in time.

11. The 1<sup>st</sup> Interested Party indicated that he had been wrongly joined to the proceedings, while the 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties indicated that they were joined at the hip with the petitioners and were supporting their application for conservatory orders. They would be ready to proceed with the petition whenever the court was ready, and would be taking the same position as the petitioners. The 3<sup>rd</sup> Interested Party's position was that it was ready to proceed with the interlocutory application and the petition.

12. Mr. Abdullahi opposed the application for adjournment by the respondents. He stated that he had served the respondents on 9<sup>th</sup> of December 2019 and they had had four days to respond. He was insistent that he should be allocated time that morning to argue his application for conservatory orders.

13. In my ruling on the application for adjournment, I directed, first, that the present petition would be heard together with ACEC Misc. Application No. 1 of 2019. I further issued orders restraining the 1<sup>st</sup> respondent from taking any action in respect of the letters it had issued to the petitioners under section 27(3) of ACEA pending hearing and determination of the petition. In addition, I directed the parties to proceed with the substantive petition and dispensed with the application for conservatory orders. I also issued directions with respect to the filing of responses and submissions and fixed the petition and the judicial review application for hearing on 5<sup>th</sup> February 2020.

14. When the matter came up on 5<sup>th</sup> February 2020 in the presence of the parties, Mr. Abdullahi indicated that the petitioners were not ready to proceed as the 1<sup>st</sup> respondent had not filed its response within the timelines given by the court. Ms. Kibogy conceded that there had indeed been a delay, caused by the fact that the 1<sup>st</sup> respondent's affidavit required input from other agencies as its investigation was multi-faceted involving several offices. Similar reasons were given by the 2<sup>nd</sup> respondent for its failure to file a response in time. Accordingly, the court granted the petitioners and the Interested Parties time to file their responses and submissions in accordance with the directions issued on 13<sup>th</sup> December 2019. The hearing of the petition and the judicial review application was then rescheduled to the 9<sup>th</sup> of March 2020.

15. On that day, Mr. Abdullahi informed the court that he had not yet filed the petitioners' affidavit in response to the respondents' replying affidavits and was not ready to proceed. That he had, on Friday, 6<sup>th</sup> March 2020, written to Counsel for the 1<sup>st</sup> respondent with a copy to the

Deputy Registrar of the Court informing them of his intention to make an informal application to bring to the attention of the court the decision of the Supreme Court in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae) Supreme Court Civil Application No. 21 of 2019** (The **Tom Ojienda** decision). He had stated in his letter that he would, on the date scheduled for the hearing of the matter, try to persuade the court that the decision was a decision *in rem*, applicable to all matters touching on the issue that underpinned the application. Further, that the investigations that triggered this petition were stayed by the decision of the Supreme Court in the **Tom Ojienda** decision at paragraph 15 of its ruling. In his view, until the Supreme Court gave its judgment, this petition could not proceed and should be stayed.

16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application. Ms. Kibogy noted that the **Tom Ojienda** decision arose from specific investigations against Tom Ojienda T/A Prof Tom Ojienda & Associates. That the decisions therefrom in the High Court and Court of Appeal had had a ripple effect affecting other cases and ongoing investigations. The position of the 1<sup>st</sup> respondent was that the decision of the Supreme Court that no party should apply or use the **Tom Ojienda** High Court and Court of Appeal decisions was to address the ripple effect that had arisen as a result of these decisions. The ruling of the Supreme Court was that the matters in court would not be affected by the decision, not that they would be stayed by the Supreme Court ruling.

17. The 2<sup>nd</sup> respondent agreed with the position taken by the 1<sup>st</sup> respondent, while the 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties supported the position taken by the petitioners. They submitted that this court should stay this petition pending the decision of the Supreme Court in the **Tom Ojienda** matter. The court reserved a ruling on the matter but directed the petitioners to, in the interim, file their affidavit in reply to the respondents' affidavits.

18. In its considered ruling dated 22<sup>nd</sup> April 2020, the court declined to stay the petition as prayed by the petitioners. It observed that at paragraph 15 of its ruling, the Supreme Court had stayed 'the effect' of the **Tom Ojienda** decisions as issued by the High Court and the Court of Appeal. The 'effect' of the two decisions that had been stayed by the Supreme Court was to require the EACC to issue prior notice to parties against whom it wished to carry out searches.

19. The petition and the judicial review application were then fixed for mention for directions on 18<sup>th</sup> June 2020. On that date, Ms. Ngugi who was holding brief for Mr. Abdullahi informed the court that the petitioners had filed a notice of appeal against the ruling of the court on the application made by the petitioners for stay of the petition. She also indicated that the petitioners would be requesting for leave to file an application for stay of the petition within a period of 3 weeks. She informed the court that the petitioners were yet to file a replying affidavit or submissions on the petition. They however, wanted to make an application to stay the current proceedings.

20. In submissions in reply, Counsel for the 2<sup>nd</sup> respondent observed that the court's ruling was a dismissal of the petitioners' application, so there was no positive order capable of being stayed. He noted that the petitioners had been given sufficient time to file their response and submissions, and he urged the court to give a date for the hearing of the matters. These submissions were supported by Counsel for the 1<sup>st</sup> respondent. She observed that the ruling that the petitioners stated they wished to stay pending appeal had been delivered some 60 days before on 22<sup>nd</sup> April 2020. Other than filing a notice of appeal, the petitioners had taken no other step in the matter. The petitioners had had sufficient time to file their response and submissions, which they had not done.

21. In its ruling on the matter, the court noted that the ruling that the petitioners indicated that they intended to apply to stay had been a dismissal of their oral application to stay the proceedings in this petition. Contrary to the petitioners' Counsel's contention, there was nothing to stay as the ruling in question was a dismissal of their oral application. The court indicated that the petitioners were at liberty to file an application for stay of the present proceedings in the Court of Appeal. Until such application was made and granted, however, they were required to comply with the directions of the court with respect to the hearing of this petition which the court noted was holding up the hearing of Misc. Application No 1 of 2019. The court then fixed the two matters for hearing on 29<sup>th</sup> July 2020.

22. It was on the date scheduled for the hearing of the petition and the judicial review application, the 29<sup>th</sup> of July 2020 that the petitioners informed the court that they had filed the preset application asking this court to recuse itself on the grounds set out earlier in this ruling. The court was then constrained to adjourn the hearing to address itself to the application for its recusal. A perusal of the court record indicates that the petitioners never did get round to filing their response to the replying affidavits on the petition by the respondents, or their submissions on their petition.

### **The Submissions**

23. In highlighting the petitioners' submissions, Mr. Abdullahi condensed the basis of their application into two broad grounds. The first was that this court has personal bias against the petitioners, while the second was that a review of previous decisions of the court showed that the 1<sup>st</sup> respondent had 100% chances of winning corruption cases. The basis of these contentions were, first, the manner in which this court had handled Constitutional Petition No 265 of 2011 and, secondly, a Press Release by the 1<sup>st</sup> respondent published on 8<sup>th</sup> June 2020.

24. Mr. Abdullahi submitted that the decision in Petition No. 165 of 2011, in which the petitioners were respondents, was rendered on 13<sup>th</sup> November 2013. He compared the manner in which Ochieng J had dealt with the matter at the interlocutory stage and had dismissed the prayer for interim orders. He submitted that when the matter came before this court, it went on a tangent that shows the court's mindset regarding the case. He contended that the Court of Appeal was stinging in its criticism of the decision and alleged that this court had engaged in a 'self-righteous' and sanctimonious justification of its decision in the 2011 petition.

25. The petitioners' position was that they were affronted that the court had improperly described them as 'galloping litigants' which in their view should have described the petitioner in that matter, Stephen Mwangi. Mr. Abdullahi submitted that the judgment of this court was overturned by the Court of Appeal, confirming that this court erred in exercise of discretion by stopping the criminal prosecution of the petitioners in the matter. Mr. Abdullahi cited the case of **Kenya Hotel Properties Limited v Attorney General & 4 others [2016] eKLR** in which the court allowed the petitioner's informal application for recusal based on the judge's earlier expression of doubts as to the court's

remits to entertain the application. He submitted that even though the judge was of the opinion that even if he did not recall making a statement to that effect, he would recuse himself as the petitioner's advocate's version, if true, would lead a reasonable fair-minded man to conclude bias on the judge's part.

26. Mr. Abdullahi submitted, finally, that the decisions and statements made by the court in Petition No. 165 of 2011 ought to be considered as a basis for recusal as they were so biased, potent and prejudicial to the petitioners. That in the said petition, this court was of the opinion that the "petitioners have captured certain organs of the State" which decision shows that the judge exhibits a judicial animus that is "so glaring, scope-sweeping in its condemnation and determinative in its conclusion".

27. Regarding the petitioners' second ground for seeking recusal, Mr. Abdullahi submitted that the Chief Executive Officer (CEO) of the 1<sup>st</sup> respondent had stated that it had a 'partnership with the judiciary'. He submitted that a look at the Press Release indicates that this court has a 'soft spot' for the 1<sup>st</sup> respondent. According to Mr. Abdullahi, an empirical study of the cases before this court shows that the 1<sup>st</sup> respondent has a 100% success rate. He therefore asked the court to grant the orders for recusal.

28. The position of the petitioners was supported by the 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties, whose submissions echoed in material respects those of the petitioners.

29. The 1<sup>st</sup> respondent opposed the application. Ms. Kibogy relied on the Grounds of Opposition dated 29<sup>th</sup> July 2020 and a Replying Affidavit sworn on 14<sup>th</sup> September 2020 by Phillip G. Kagucia, its Assistant Director for Communication.

30. Ms. Kibogy submitted that recusal is a matter of discretion and that the applicable test is that of a reasonable right-minded person, applying themselves to the question and facts obtaining thereon. She relied in support on **JR. No. 124 of 2014- R v Cabinet Secretary for Transport & Infrastructure & 5 others Ex-Parte Kenya Country Bus Owners Association & 8 others** in which the court set out the test for determining what a reasonable apprehension of bias would be.

31. It was her submission further that it was crucial to consider the chronology of events from the date of filing of the petition on 6<sup>th</sup> December 2019. She noted that on that date, the court had already made the decision in Petition No. 165 of 2011, yet Counsel for the petitioners did not make the application for recusal then. She further observed that on that date, the court had granted interim orders in favour of the petitioners. Ms. Kibogy noted that it was only when the Supreme Court issued a ruling in the Tom Ojienda decision and this court declined to issue orders of stay of this petition on the basis of the Supreme Court ruling that the petitioners alleged bias.

32. It was the 1<sup>st</sup> respondent's submission further that the present application was choreographed with the aim of delaying the hearing of the main petition yet the petitioners would continue enjoying the conservatory orders issued by the court on 13<sup>th</sup> December 2019. Ms. Kibogy noted that in any event, the petitioners in Petition No. 165 of 2011 were not parties to this matter and the petitioners' apprehension of bias is therefore unfounded and unreasonable. She relied in support on the decision in **Republic v Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti [2017] eKLR**.

33. Regarding the press statement from the CEO of the 1<sup>st</sup> respondent, Ms. Kibogy asked the court to consider the affidavit sworn by Phillip Kaguchia to which the Press Release is annexed and to note that there is no mention of a partnership with the judiciary. The 1<sup>st</sup> respondent submitted that the court renders decisions on the law, and several of its decisions have been affirmed by the Court of Appeal. In its view, the petitioners had failed to meet the threshold test for bias, and their application should be dismissed with costs.

34. Mr. Kamau, Learned Counsel for the 2<sup>nd</sup> respondent, associated himself with the position of the 1<sup>st</sup> respondent. He relied on the decision in Attorney **General vs. Anyang' Nyong'o and Others [2007] 1 EA 12**, cited in the **Wavinya Ndeti** decision cited above and **Supreme Court Petition No. 34 of 2014 Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR** regarding the duty of a judge to sit in a matter in which he duly should sit, and applications for recusal should not be used to cripple a judge from sitting to hear a matter. He observed that it was only when the court declined to issue a stay of the petition on the basis of the ruling of the Supreme Court in the **Tom Ojienda** decision did the petitioners allege bias.

35. It was his submission further that the application for recusal is suspect as it was only filed on 28<sup>th</sup> July 2020 when the petition and the judicial review application were scheduled for hearing on 29<sup>th</sup> July 2020. The 2<sup>nd</sup> respondent also agreed with the 1<sup>st</sup> respondent that the application is choreographed to enable the petitioners to continue to enjoy the interim orders issued in their favour.

36. Mr. Kamau submitted that the principles for recusal are clear, and an apprehension of bias must be reasonable. He observed that the basis of the application for recusal is that the court rendered a decision in Petition No. 165 of 2011, yet the decision was rendered in 2013. It is the 2<sup>nd</sup> respondent's submission that the mere fact that the Court of Appeal rendered a different decision is no basis for recusal.

37. In his submissions in reply, Mr. Abdullahi contended that while Counsel for the 1<sup>st</sup> respondent was concerned with the timing of the petitioners' application, the petitioners had a right to make the application before the hearing of the substantive application. He contended that the decision made by this court in 2013 was so prejudicial that there was no way the petitioners could expect the court to be unbiased.

### **Analysis and Determination**

38. I have considered the application for recusal and the reasons advanced in support thereof. I have also considered the responses of the respondents as well as the respective submissions and authorities relied on by the parties. The sole issue that arises for consideration, I believe, is whether the petitioners have met the threshold for an order for recusal to issue in their favour.

39. The term 'recusal' is defined in **Black's Law Dictionary** as meaning **"Removal of oneself as judge or policy-maker in a particular matter because of a conflict of interest."** The term has been considered by the Supreme Court of Kenya in **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others (2013)eKLR** in which the court stated as follows:

***"Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303]: "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."***

40. It is axiomatic that a judge sitting on a matter is required to be impartial and harbour no bias, either positive or negative, towards any party. The **Judicial Service (Code of Conduct and Ethics) Regulations, 2020** encapsulate the requirement for judges of the superior courts, as public officers, to carry out their duties in accordance with the law. Under Rule 21(1) of the Code, a judge is required to disqualify herself or himself in proceedings where their impartiality might reasonably be questioned. The Rule 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.**

41. The petitioners in this matter have not asked the court to recuse itself on the basis of the grounds set out in the Judicial Code of Conduct, nor do they allege bias as recognized in judicial precedents. Their application is premised on a decision made by this court in 2013, and a press statement alleged to have been made by the CEO of the 1<sup>st</sup> respondent.

42. With regard to the first argument, the petitioners had a right of appeal against the decision, which they exercised. The fact that a court reached a particular decision and that such decision was reversed on appeal does not constitute ground for recusal, and indeed, the petitioners have not presented before the court any judicial precedent that would support their argument.

43. It is also instructive that the 2013 decision was raised as a basis for the application for recusal on 29<sup>th</sup> July 2020. The timing of an application for recusal is critical. As the court observed in **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12**:

***"A litigant seeking disqualification of a Judge from sitting on the ground of appearance of bias must raise the objection at the earliest opportunity...The right to object to a disqualified adjudicator may be waived, and this may be so, even where the disqualification is statutory. The Court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts, which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings to continue without protest, they are held to have waived their objection and the determination cannot be challenged...A litigant who has knowledge of the facts that give rise to apprehension of possibility of bias ought not to be permitted to keep his objection up the sleeve until he finds that he has not succeeded. The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process..."*** (Emphasis added)

44. In the present case, the decision of this court in Petition No. 165 of 2011 that the petitioners now seek to use as a basis for their application for recusal was made on 12<sup>th</sup> November 2013. The decision of the Court of Appeal reversing the decision of this court was made on 10<sup>th</sup> May 2019. Thus, as the record of proceedings in the matter set out above illustrates, in December 2019, when the petitioners first appeared before this court, they were fully aware of the decision. It is to be noted that they did not allege bias when their Counsel insisted on

proceeding with the application for conservatory orders on 13<sup>th</sup> December 2019. Nor did they allege bias when the court gave directions on the hearing of the petition alongside ACEC Misc. Application Number 1 of 2019. Nor was there an allegation of bias when the petitioners sought orders of stay on 9<sup>th</sup> March 2020 on the grounds that the Supreme Court had issued certain orders in its ruling in the **Tom Ojienda** matter regarding the issuance of notices under sections 26, 27 and 28 of ACECA.

45. As observed by the 1<sup>st</sup> respondent, the issue of bias arose only after the court declined to stay the petition in its ruling dated 22<sup>nd</sup> April 2020 and directed the parties to proceed with the petition. In my view, an application alleging that the court is biased because it had made a decision in 2013, made 7 months into proceedings in this petition and only after the petitioners failed to get their way in an application seeking stay of the petition, is really an untenable argument. It certainly does not meet the threshold for a judge to recuse herself from hearing a matter.

46. It is also instructive that the petitioners, who are the applicants in ACEC Misc. Application No. 1 of 2019, have not sought the recusal of this court in the hearing of that matter. A perusal of the record in the matter will show that the petitioners in this matter, who are the applicants in the judicial review application, have been ready all along to be heard by this court, and have complied with all directions of the court on the filing of pleadings and submissions. Which begs the question: how do the petitioners allege bias on the part of the court arising from an eight-year-old judgment in one matter, but are comfortable proceeding before the same court in another matter raising essentially the same issues as the petition? The answer, clearly, must lie in another dynamic.

47. The second argument advanced by the petitioners for this court's recusal is that the CEO of the 1<sup>st</sup> respondent issued a statement in which, according to the petitioners, it stated that it has a 'partnership with the judiciary'. In their submissions, the petitioners insinuated, without offering any proof, that the 'partnership' must be with this court, as the 1<sup>st</sup> respondent has a '100% success rate' before this court.

48. I have read the Press Release by the CEO of the 1<sup>st</sup> respondent dated 8<sup>th</sup> June 2020. Titled '**Press Release on Emerging Jurisprudence on Unexplained Wealth**', the Press Release contained comments by the 1<sup>st</sup> respondent on emerging jurisprudence in the area of unexplained wealth. The 1<sup>st</sup> respondent commented in particular on the decision of this court in the case of **Dr. Evans Kidero & 9 others v EACC & 6 others ACEC Petition No. 25 of 2018**. The 1<sup>st</sup> respondent also took note of other decisions that have bolstered the fight against corruption. Among such decisions was the Supreme Court decision in **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2020] eKLR**; the decision of the Supreme Court in the **Tom Ojienda** case; and the decision of this court in **Moses Kasaine Lenolkulal v Republic [2019] eKLR**. The Press Statement concludes with the sentiment of the EACC that it "*looks forward to enhanced synergy from all stakeholders*".

49. It appears that the petitioners did not read the actual Press Release by the 1<sup>st</sup> respondent. Rather, they based their application for recusal on a media article dated 9<sup>th</sup> June 2020 annexed to the affidavit of Christopher Barron in support of the application as annexure 'CB2'. The article is headed "*EACC boss lauds partnership with Judiciary in war against graft*". Not surprisingly, the heading of the article is completely at variance with its body, which reflects a little more accurately the contents of the Press Release by the 1<sup>st</sup> respondent.

50. Two concerns arise with respect to this ground. First, nowhere in the Judicial Code of Conduct or jurisprudence on the question of bias as a basis for recusal is there a principle that requires that a judge recuses herself from hearing and determining a totally unrelated matter because a party makes a comment in the media about a matter that has already been determined. Judges and judicial officers generally have no control over what statements or comments are made by third parties on their decisions. To ask a judge to recuse herself because a party makes a statement in the media is to cast an unreasonable and onerous burden on the court. Indeed, the argument by the petitioners relating to the 1<sup>st</sup> respondent's Press Release but based on a clearly inaccurate media article has the intention of casting aspersions on and embarrassing the court, with a view to avoiding the hearing of the matter before this court.

51. At paragraph 11 and 12 of the Supporting Affidavit of Christopher Barron, the petitioners argue that this court has already pre-judged this matter which concerns the powers of the 1<sup>st</sup> respondent under section 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act. Indeed, this court had made a ruling touching on these sections following an application by Counsel for the petitioners on 9<sup>th</sup> March 2020 for stay of this petition on the basis that the decision of the Supreme Court in the **Tom Ojienda** case had stayed all pending matters having a bearing on those sections. I have already alluded to the ruling of this court dated 22<sup>nd</sup> April 2020 in which the court held that what the Supreme Court had stayed was '*the effect*' of the Tom Ojienda decision.

52. In his decision in **Republic v Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti (supra)** Odunga J, in determining an application for recusal on the basis that the court had already pronounced itself on a similar matter, observed as follows:

***"34...According to The Bangalore Principles of Judicial Conduct:***

***"Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side 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. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law." ...***

***35. What I understand by that position (is) that if a Court of law has pronounced itself on a matter and the parties view that as the correct legal position, there ought to be no valid objection to the same Court entertaining a subsequent matter even if similar issues are involved. Where the parties are of the view that the matter in controversy has been decided, save for the option of an appeal where one is provided, parties are expected to order their lives in accordance with the said decision since courts of law are***

**meant to set the law straight so that litigants may predict the outcome of their actions and either avoid taking a particular course or order their lives in accordance therewith. Therefore where the Court has pronounced itself on a matter, parties to the subsequent proceedings where the legal issues are similar ought not to seek that the same be heard by different judges in the hope of obtaining a different outcome.** (Emphasis added)

53. 47. In dismissing the application for recusal, Odunga J concluded as follows:

**“38. To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.”** (Emphasis added)

54. In his decision in **Kenya Hotel Properties Limited v Attorney General & 4 others** (supra) cited by the petitioners, Onguto J expressed similar views when he observed as follows:

**“3. In the persuasive Australian High Court case of Re JRL ex parte CJL [1986] 161 CLR 342, 352, Mason J (later Mason CJ) stated thus:**

**“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour”.**

**4. In my view, the value of the guidance by Mason J, was and still is, that there has to be a proper and appropriate factual foundation for any recusal as a judge is expected to discharge his duties unless disqualified by the law. An appropriate reason must be advanced for any recusal otherwise litigants may effectively succeed in influencing the choice of judges in their own cause.”**

55. Given the facts and circumstances of this case, there is absolutely no basis for this court to recuse itself. The application before me appears to be precipitated by a desire on the part of the petitioners or their Counsel to avoid proceeding to hearing at all costs. This view is bolstered by the fact that right up to the point at which the petitioners filed their application on 28<sup>th</sup> July 2020, they had consistently failed to comply with the court’s directions to file their affidavits in reply to the affidavits by the respondents, or their submissions in support of their petition.

56. Throughout the proceedings before this court from 13<sup>th</sup> December 2019, the petitioners have been represented by Learned Senior Counsel, Mr. Ahmednasir Abdullahi. The basis of this application is primarily a decision that this court delivered in 2013. That decision has been in the public domain since then. Senior Counsel, learned in the law as I have no reason to doubt, has known about it all along. It is not lost to this court that the petitioners filed this application only after they failed to obtain the orders of stay of the petition. Applications such as the present one, with no basis in law or fact, but replete with regrettable and baseless *ad hominem* attacks directed at the court, are usually intended to delay the hearing and disposition of a matter.

57. In my view, there is no basis whatsoever in this matter for this court to recuse itself. Having said that, however, I take the same position in this matter as I did in **Hardi Enterprises Limited & 3 others v Ethics & Anti-Corruption Commission & 2 others [2020] eKLR**, a matter that bears many similarities with this matter. In my ruling on an application for recusal, I observed as follows:

**“51. In his ruling dated 21<sup>st</sup> July 2020 recusing himself from hearing Petition No. 38 of 2019, Onyiego J stated as follows:**

**“45. To demand my recusal and that of Judge Mumbi Ngugi being the only judges mandated to hear Ant-Corruption related matters in the High Court is to say the least an act of forum shopping. The applicant has not met the key ingredients for my recusal as stipulated above in the Judicial Code of Conduct and the test set out in various judicial precedents.**

**46. A reasonable man faced with a set of facts presented before this court cannot find an iota of evidence or reasons to warrant my recusal. Instead, such reasonable ordinary person will read malice, a litigant hell bent to arm twist courts, and an abuse of the court process.**

**47. The above notwithstanding, a court confronted with unsubstantiated and unproven grounds for its recusal just as in this case, has the discretion for the sake of personal conscience to recuse itself and for the sole reason that, a party who might lose a suit at the end of the trial should not hold the excuse that he had foreseen bias coming hence justify to the public that our courts cannot be relied on to make impartial decisions.”...**

52. *I share fully the sentiments expressed by my brother above. There is no basis in law for me to recuse myself in this matter. The interpretation that I placed on the ruling of the Supreme Court granting stay orders regarding section 27 and 28 of ACECA are matters of law, subject to appeal. So also is the interpretation of section 62(6) of ACECA that the petitioner in ACECA Petition No. 38 of 2019 alleged as the basis for seeking recusal of Ngenye-Macharia J and I. In my view, parties who seek recusal on baseless grounds have no real interest in justice but are out to subvert the course of justice.*

53. As Onyiego J observed, however, one is loath to give parties the opportunity to falsely claim, as unsuccessful litigants are often wont to do, that they knew from the outset that they would not get justice from this court, which will only contribute to further undermining the rule of law and the administration of justice. This is particularly so in a matter such as this where the petitioners have spent the better part of a year trying to avoid the hearing of the petition by this court.

54. *Accordingly, even though I find no basis to recuse myself, I believe that the administration of justice is better served if I do not deal with this matter. I therefore direct that it should be placed before the Principal Judge for directions with respect to hearing and determination.*” (Emphasis added)

58. In the result, and for the reasons set out above, there being no merit in the application for recusal, it is hereby dismissed with costs to the respondents.

59. Nonetheless, and for the reasons also set out above, I direct that this petition, alongside ACEC Misc. Application No. 1 of 2019 which involves the same parties, raises the same matters and with which it was scheduled to be heard before the filing of this application, is placed before Wakiaga J for hearing and determination.

60. Orders accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 17TH DAY OF MARCH 2021.**

**MUMBI NGUGI**

**JUDGE**