



**REPUBLIC OF KENYA**

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

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CORAM: MUMBI NGUGI J**

**ACEC PETITION NO 36 OF 2019**

**BETWEEN**

**HARDI ENTERPRISES LIMITED.....1<sup>ST</sup> PETITIONER**

**TODDY CIVIL ENGINEERING COMPANY LIMITED.....2<sup>ND</sup> PETITIONER**

**ANTHONY NG'ANG'A MWAURA.....3<sup>RD</sup> PETITIONER**

**ROSE NJERI NG'ANG'A.....4<sup>TH</sup> PETITIONER**

**-VERSUS-**

**ETHICS & ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT MILIMANI ANTI-CORRUPTION COURT....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This petition was filed under certificate of urgency on 2<sup>nd</sup> December 2019. It was certified urgent and directions were issued for it to be placed before me on 11<sup>th</sup> December 2019. On that date, I gave directions for the hearing of the substantive petition and dispensed with the application for conservatory orders that had been filed with the petition.

2. On 10<sup>th</sup> February 2020 when the matter came up to confirm compliance with the directions issued on 11<sup>th</sup> December 2019, Learned Counsel for the petitioners, Mr. Makokha, indicated that he wished to bring to the court's attention that this petition was related to ACEC Petition No. 38 of 2019- Mike Sonko Mbuvi Gidion Kioko v Director of Public Prosecutions & 5 others (hereafter Petition No. 38 of 2019) in which the court had recused itself on the application of the petitioner. He submitted that for good order, this petition should be placed before the same judge handling the matter as the two petitions relate to the same subject matter.

3. In submissions in reply, Ms. Kihara for the DPP observed that the parties in this petition are different; that the petitioner in Petition No. 38 of 2019 had filed an application seeking the recusal of several judges; that the issues in the two petitions are different from the present petition and there was no basis for the petitioners to seek the court's recusal. The sentiments expressed by Ms. Kihara were supported by Ms. Ochola for the EACC, who observed that there was no formal application for recusal before the court.

4. In submissions in reply, Mr. Makokha argued that the two petitions raise two issues: the constitutionality of the search warrants against the petitioners, and the regularity of a tender issued to them. They had also been charged together with the petitioner in Petition No. 38 of 2019. The petitioners did not have a problem with this court but there was a danger that courts of equal jurisdiction might arrive at different conclusions, that the transfer will save judicial time, and that since the petitions touch on a person the court felt conflicted to deal with, the recusal was necessary to save the court's time and to save the court from embarrassment.

5. In my ruling, I observed that contrary to the submission by Counsel for the petitioners, I did not find myself conflicted in any way in dealing with any party that appears before me. I further noted that the argument made for my recusal in ACEC Petition No. 38 of 2019 related to my decision with respect to section 62(6) of Anti-Corruption and Economic Crimes Act (ACECA), which is not the case in this

matter. I therefore declined to recuse myself and directed parties to comply with the directions for filing replies and submissions.

6. There was a hiatus in court proceedings resulting from the Covid 19 Pandemic and the social distancing guidelines issued by the Ministry of Health. However, the petition was ultimately fixed for hearing on 17<sup>th</sup> June 2020 with directions to the parties to file their respective submissions.

7. Instead of complying with the directions on filing of submissions, however the petitioners filed the present application dated 12<sup>th</sup> June 2020 in which they seek the following orders:

**1. (spent)**

**2. This Honourable Court, Lady Justice Mumbi Ngugi, be pleased and do hereby recuse herself from hearing this petition pending the hearing and determination of this application inter partes.**

**3. This Honourable Court, Lady Justice Mumbi Ngugi, be pleased and do hereby recuse herself from hearing this petition pending the hearing and determination of this petition.**

**4. Any other or further relief which this honourable court deems fit and just to grant.**

**5. The costs of this application be provided for.**

8. The application is expressed to be brought under the provisions of Articles 22, 23 and 50 of the Constitution Order 51 Rules 1 and 4 of the Civil Procedure Rules 2010, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law. It is supported by an affidavit sworn by the 3<sup>rd</sup> petitioner and on grounds set out on the face of the application.

9. The grounds forming the basis of the application reproduce substantially the averments in the affidavit in support of the petition. They are, first, that there is a similar petition pending before Onyiego J, being ACEC Petition No. 38 of 2019 involving the Nairobi City County Governor and the present applicants relating to the same subject matter, namely the award of tender no. NCC/WEFE & NR/DP/276/2017-2018-Hire of Vehicles and Equipment to the 1<sup>st</sup> petitioner.

10. They state that this court had recused itself from hearing the said petition for alleged perceived bias following the complaint by the petitioner that this court had been consistent in interpreting the import of section 62(6) of the ACECA against the holders of the office of Governor. They state that the complainant, the petitioner in ACEC Petition No. 38 of 2019, had therefore expressed a lack of confidence in the impartiality of this court.

11. According to the applicants, the interpretation of and the import of the Supreme Court stay decision in **Supreme Court Civil Application No. 21 of 2019** with regard to sections 27 and 28 of ACECA is key. They note that this court has already rendered a decision on the question in **Evans Odhiambo Kidero & 9 others v Chief Magistrates of Milimani Laws Courts & 4 others [2019] eKLR**, (hereafter the **Kidero case**) and has therefore taken a position on that question.

12. The applicants contend that they are therefore reasonably apprehensive that this court is already conflicted to fairly determine this petition. Similar issues and questions of law have been raised in ACEC Petition No. 38 of 2019 which is pending before another court and concerns the same subject matter. It would therefore, in their view, be prudent use of judicial time for this petition to be placed before another judge. They argue that the determination of the two similar petitions by different judges may subject the judiciary to embarrassment and disrepute if the two judges were to reach different conclusions.

13. The applicants' case was presented by their Learned Counsel, Mr. Makokha. He submitted that one of the key points that they raise in their application is the interpretation and application of section 26-28 of ACECA. That the applicants affirm the position that notice is required prior to issuance of a warrant for investigation of a person, which was not done in their case. They further submit that in the **Kidero** case, this court had already addressed itself to their argument. It is their submission that the perception created in a reasonable person is that this court is likely to lean in a particular way, and fairness will therefore not have been administered. It is their contention that in an application for disqualification, the applicant does not need to tender evidence of unfairness, the threshold being a question of perception.

14. The applicants rely on the case of **Jan Bonde Nielson v Herman Philipus Steyn & 2 others [2014] eKLR** in which the court stated:

**“...the appropriate test to be applied in determining an application for disqualification was laid down by the Court of Appeal in R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED), and reinforced in subsequent cases. See R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported) where the Court of Appeal stated that:- “When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established”.**

15. The applicants further seek support in **Metropolitan Properties Limited vs. Lannon [1968] 3 All E. R** with regard to disqualification of a decision maker. They submit that in the decision rendered on 4<sup>th</sup> June 2020 in the **Kidero** case, this court rendered its position regarding the interpretation and import of the Supreme Court stay decision in **Supreme Court Civil Application Number 21 of 2019** relating to sections 27 and 28 of ACECA. They are therefore apprehensive, as would any other reasonable person, that this court has already taken a position on one of the key grounds in support of the petition. They have therefore lost confidence in the court's objectivity in handling this

matter, and they therefore urge the court to disqualify itself.

16. To the respondents' objection to the application on the basis that they had already made the same application on 10<sup>th</sup> February 2020, the applicants submit that they had made an oral application for fair administrative reasons seeking to have the court place the matter before another judge who was handling a similar matter to avoid the possibility of embarrassing the judiciary in case the two judges arrived at different conclusions on the same subject matter. They submit that the court had declined to allow their application on the ground that there was no formal application before it.

17. It is their submission that the present application is based on a perception of bias or prejudice. This perception had arisen following the judgment of the court delivered on 4<sup>th</sup> June 2020 in the **Kidero** case. They deny that they are engaging in forum shopping. What is common in the decisions they rely on is that the question is whether there is a reasonable perception of bias and whether it will produce fairness. They submit that they have seen the court rule one way and they wish to have the court rule another way; and that they wish to submit themselves to a different arbiter for interpretation of the issue they raise in a different way.

18. The Ethics and Anti-Corruption Commission (EACC), represented by Mr. Mwongela, filed grounds of opposition and submissions both dated 18<sup>th</sup> June 2020. Mr. Mwongela submitted that the present application is unique, seeking disqualification of the court for a singular reason. The question, however, was whether the court should disqualify itself because it has pronounced itself on a question of law.

19. According to EACC, the applicants were seeking to have the matter taken from this court to another court to be heard together with Petition No. 38 of 2019 pending before Onyiego J. They had not, however, told the court that in Petition No. 38 of 2018, the petitioner had made a similar application for Onyiego J to recuse himself, and the ruling on the application was scheduled for 15<sup>th</sup> July 2020. The petitioner in the matter, who is the co-accused of the present petitioners in the lower court, is seeking recusal of all the judges in the Anti-Corruption Court. In the EACC's view, the applicants want to choose an arbiter whom they think will be sympathetic to their cause.

20. EACC takes the view that the consequences of this court disqualifying itself will not just affect the present matter but will create a bad and dangerous precedent for litigants to litigate matters before judges of their choice. Further, such a decision will lead the general public to believe that justice depends on a particular judge rather than the rule of law, which will bring the whole judicial process to embarrassment. The EACC submits that courts have made it very clear that judicial officers cannot disqualify themselves on the basis that they have pronounced themselves on a particular issue of law.

21. EACC notes that the petitioners had made an oral application on 10<sup>th</sup> February 2020 seeking the court's recusal from hearing this petition on the basis of the same grounds relied upon in the present application. The application had been canvassed in open court and dismissed for lacking in merit. It notes the definition of 'recusal' in **Black's Law Dictionary 8<sup>th</sup> Edition (2004)** and further cites Rule 5 of the **Judicial Service Code of Conduct and Ethics** established under section 5(1) of the **Public Officers Ethics Act, 2003** with regard to the circumstances in which a judicial officer is required to disqualify himself or herself. Reference is also made to the **Bangalore Principles of Judicial Conduct** on the definition of bias and prejudice with respect to judicial recusal. In its view, the present application has not met the threshold set in law for the court to recuse itself.

22. EACC relies on the case of **Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR** in which the Court of Appeal reiterated the "bias test" to be applied in all cases of apparent bias as established by the House of Lords in **R v. Gough [1993] AC 646** as being:

*"whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand..."*

.....

*[T]he questions is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

23. Reliance is also placed on **Republic v Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti [2017] eKLR**, in which the court stated::

*"... 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."*

24. It is its submission that the applicants have not adduced evidence to show the existence of a reasonable apprehension of bias based on the manner in which the court has conducted the proceedings so far. They have also not shown that there was a real possibility that the court will be biased in its determination, and their application therefore falls short of the bias test.

25. EACC further submits that the court should not disqualify itself simply on the basis that it has pronounced itself on a question of law. In its view, a court of competent jurisdiction in the context of a judicial system founded on precedent and directed to establishing and maintaining consistency of judicial decisions so that like cases and principles of law are applied uniformly should not shy away from such consistency. EACC again relies on the decision in **Republic v Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti** (supra) for this submission. It is its case that the decision of this court in the **Kidero** case is the correct legal position. There should therefore be no valid objection to the same court entertaining a subsequent matter even if similar issues are involved. Reliance for this submission is also sought in **Republic v Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti** (supra).

26. EACC submits that the views expressed in **Republic v Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti** are exemplified in the Australian High Court case of **Helljay Investments Pty Ltd v Deputy Commissioner of Taxation [1999] HCA 56 7** where the court stated that:

*“The principles concerning what has come to be called shortly, if not wholly accurately, the “appearance of bias” by judicial officers are well established. What must be demonstrated to the requisite degree is the appearance of prejudgment, not simply that a particular outcome of the litigation is likely or unlikely. As Mason J said in Re JRL; Ex parte CJL5”*

*“..... There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way....”*

27. In EACC’s view, the present application falls short of the threshold set for proving an “appearance of bias”. No fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that this court will not be impartial. It asks the court to dismiss the application with costs.

28. For the Director of Public Prosecutions (DPP), Ms. Wangia relied on grounds of opposition dated 17<sup>th</sup> June 2020 and submissions dated 1<sup>st</sup> July 2020. She noted the definition of bias in Black’s Law Dictionary and the Judicial Code of Conduct to submit that what is before the court is not the mind of the judge but facts that would lead the court to pronounce itself in a particular way. The fact that the court has pronounced itself in a particular way does not rise to bias. In the DPP’s view, the court has a duty to sit on a matter on which it ought to sit, and should not recuse itself where there is no bias. Further, that where a party alleges bias, it must state it with such specificity that it is clear to a reasonable man that there was bias.

29. Ms. Wangia further submitted that it was too late in the day for the petitioners to allege bias in the matter, and that it is false for them to claim that the matters in this petition are substantially the same as in Petition No 38 of 2019. She submitted that the petitioner in Petition No 38 of 2019 had also sought the recusal of Onyiego J, the intention, in the DPP’s view, being to cripple the Anti-Corruption Division of the High Court.

30. It was also the case of the DPP that the rules of recusal are not intended to give litigants veto power over judges they do not like or to choose a person they prefer. While there is a duty on the court to recuse itself where there is evident bias, there is also a concomitant duty not to recuse itself in the absence of a valid reason for recusal.

31. The DPP also notes that the petitioners had made a similar application on 10<sup>th</sup> February 2020, based on similar grounds, and upon consideration by the court, the application was dismissed. The DPP submits that the present application is devoid of any legal or factual basis, is based on falsehoods and contrived facts, and no evidence has been advanced in support to warrant grant of the application.

32. The DPP relies on the definition of bias in Blacks’ Law Dictionary as including **‘mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.’** He notes that the test to determine bias is objective rather than subjective. Reference is made to the House of Lords decision in **Porter v Magill [2002] 1 All ER 465** cited in **Charity Muthoni Gitabi v Joseph Gichangi Gitabi (Substituted By) Michael Wachira Gitabi [2017] eKLR** where it was stated that what is to be established is whether **“the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased....”**

33. The DPP further submits that the court had observed that the test to be applied in determining bias: **“is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.”**

34. The DPP further cites Rule 5 of the **Judicial Service Code of Conduct and Ethics** on what is required of a judicial officer with regard to disqualification. It is the DPP’s submission that the recusal of a judge is not a matter to be taken lightly. That circumstances in which a judge ought to recuse herself should be the exception rather than the norm. Reliance is placed on the observation of the Supreme Court in **Petition No. 34 of 2014 - Gladys Boss Shollei vs Judicial Service Commission & another** in which the court stated:

*“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 recognises that having taken the oath of office, a judge is capable of rising above prejudices, save for those rare cases when he has to recuse himself.”*

35. In the DPP’s view, there is nothing in the present matter that would lead an independent observer to conclude that this court has exhibited bias against the petitioners. Further, that a party has no legal right to ask a judge willy-nilly to recuse herself or as a cover to shop for what such party considers a more agreeable forum.

36. The DPP further notes that while the applicants allege that this petition is similar to ACEC Petition 38 of 2019, they have not annexed the said petition or any of the documents filed by the petitioner in the matter. They had, instead, annexed the EACC response to the petition. They had therefore not placed anything before the court that demonstrates that the two petitions raise similar issues. The petitioners have also failed to disclose that the application pending before Onyiego J in ACEC Petition 38 of 2019 is an application for his recusal from hearing the petition.

37. In submissions in reply, Mr. Makokha argued that the applicants do not know the facts in the application for recusal in Petition No 38 of 2019. He asked the court to expunge from the record the respondents' submissions regarding the application for recusal in Petition No. 38 of 2019.

38. Counsel further submitted that a perception has been created that the applicants do not like this court, which he termed unfair. Mr. Makokha argued that the applicants have another matter pending before this court scheduled for hearing on 18<sup>th</sup> July 2020 and they had not made an application for recusal. According to Mr. Makokha, the applicants were not making an argument that the court was wrong in its decision in the **Kidero** case. Their argument was that the petitioners had a perception already that the court has already made a decision. Their question was why they could not go to another judge who can make a different decision on the matter. In the alternative, the court could exercise discretion to stay the petition pending the decision of the Supreme Court on the provisions of sections 26-28 of ACECA.

### **Analysis and Determination**

39. I have considered the application, the responses thereto and the submissions of the parties. The applicants ask that I recuse myself from hearing this petition because of their apprehension that since I made a determination in the **Kidero** case that is contrary to the decision they wish the court to make, a perception is created that I will be biased against them. In other words, my interpretation of a point of law will lead a reasonable person to conclude that I am likely to be biased against the applicants.

40. It is imperative, therefore to consider the law on the meaning of bias and the circumstances in which a judge should disqualify herself from hearing a matter. **Black's Law Dictionary** defines 'recusal' as "**Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest.**"

41. In **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others (2013)eKLR**, the Supreme Court stated as follows with respect to recusal of a judge:

*"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."*

42. The question of bias as a ground for recusal has also been addressed in the **Judicial Service (Code of Conduct and Ethics) Regulations 2020** dated 26<sup>th</sup> May 2020. Regulation 21 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.*

43. The applicants in this case do not allege bias as defined above or demand that the court recuses itself from hearing this matter on any of the grounds that are recognized in the **Judicial Service (Code of Conduct and Ethics) Regulations 2020** or emerge from jurisprudence for recusal. In his response to the submissions by the respondents set out above, Mr. Makokha, Learned Counsel for the applicants, captures the essence of their intention: they wish this court to recuse itself so that they can have an opportunity to present their case to another judge who can make a different decision on the interpretation of the orders of the Supreme Court in **Supreme Court Civil Application No. 21 of 2019-Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae)** with regard to sections 27 and 28 of ACECA.

44. I have not seen anything in the authorities placed before me by the parties or the regulations and principles governing judicial conduct that decree that when a court makes a particular decision on a matter of law, then that court should recuse itself forever from determining a matter raising the same issue. This, I believe, would be the import of what the applicants are asking of the court. Indeed, it is the argument that underpins both the present application and the oral application made by Mr. Makokha on 10<sup>th</sup> February 2020.

45. The applicants are unhappy with the court's interpretation of the Supreme Court's stay orders relating to sections 27 and 28 of ACECA. In their oral application on 10<sup>th</sup> February 2020, the applications were seeking this court's recusal on the basis that it had made a decision touching on section 62(6) of ACECA. It will be noted that the section has no application to the present applicants, touching as it does on elected officials such as the petitioner in ACEC Petition No. 38 of 2019, the Governor of Nairobi County.

46. In his ruling dated 14<sup>th</sup> June, 2017 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 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.*

47. 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.”*

48. I agree fully with the sentiments expressed by Odunga J in the above matter. The applicants seek my recusal, not because there is any bias or conflict of interest as defined by law demonstrated, but because I have pronounced myself on a point of law, and they do not believe that the interpretation that I have pronounced suits their particular interests or circumstances. They have not told the court whether or not there has been an appeal against the said decision. All they want is another decision from another court of concurrent jurisdiction on the same point of law in the hope that they will get a different outcome. This, in my view, is not permissible, and is precisely what Odunga J so eloquently decried in the **Wavinya Ndeti** case above. The applicants in my view, are engaging in mischief that is tantamount to abuse of court process.

49. There is another stronger reason for describing the petitioners' conduct in this matter as mischievous and an abuse of process. Even as they filed the present application seeking my recusal and consolidation of this petition with ACEC Petition No. 38 of 2019, they could not have done so in ignorance of the fact that the petitioner in the latter petition had applied for recusal of Ngenye-Macharia J, Onyiego J and I. They were aware that I had recused myself from hearing that petition, not because of any bias or conflict of interest, but in the interest of saving judicial time which I was of the view would be better expended than on an application for recusal.

50. They were also no doubt aware that at the time that they were canvassing the present application, a ruling on the application in ACEC Petition No. 38 of 2019 for Onyiego J to recuse himself was pending. Yet, they argued, without batting an eyelid, that I should recuse myself and send the matter for hearing before Onyiego J to be consolidated with ACEC Petition No. 38 of 2019. While such conduct, which displays an inexcusable lack of candour, may not be too surprising from litigants eager to get their way by any means, it is not expected from their Learned Counsel, officers of the court, who are bound by professional ethical considerations.

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 Nguji 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.*** (Emphasis added)

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.

55. Orders accordingly.

**Dated Signed and Delivered at Nairobi this 18<sup>th</sup> day of September 2020**

**MUMBI NGUGI**

**JUDGE**