



Aura v Cabinet Secretary, Ministry of Education Science and Technology & 9 others; Wainaina & another (Interested Parties) (Environment & Land Petition E030 of 2022) [2023] KEELC 21087 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E030 OF 2022
OA ANGOTE, J
OCTOBER 26, 2023**

BETWEEN

JOSEPH ENOCK AURA PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING 2ND RESPONDENT

JOSEPH K KINYUA, THE HEAD OF PUBLIC SERVICE 3RD RESPONDENT

PRINCIPAL SECRETARY, UNIVERSITY EDUCATION & RESEARCH, MINISTRY OF EDUCATION 4TH RESPONDENT

MINISTRY OF LAND & PHYSICAL PLANNING, PRINCIPAL SECRETARY, PHYSICAL PLANNING 5TH RESPONDENT

MINISTRY OF LANDS & PHYSICAL PLANNING 6TH RESPONDENT

THE NATIONAL LAND COMMISSION 7TH RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF KENYA SUED THROUGH THE HON ATTORNEY GENERAL 8TH RESPONDENT

THE HON ATTORNEY GENERAL 9TH RESPONDENT

KENYATTA UNIVERSITY 10TH RESPONDENT

AND

PROFESSOR PAUL WAINAINA INTERESTED PARTY

LAW SOCIETY OF KENYA INTERESTED PARTY



RULING

1. In the Notice of Motion dated 18th August, 2022, brought pursuant to the provisions of Article 25(c) and 51 (1) of *the Constitution* of Kenya, Section 5(1) of The *Public Officers Ethics Act* and Rule 3 Sub Rule 8(a) and Rule 5 of the Judicial Code of Conduct and Ethics in the Public Officers' Ethics Act, the Petitioner/Applicant seeks the following reliefs:
 - i. The Honourable Mr. Justice O. A. Angote do recuse himself from hearing, or deciding any further any aspect of these proceedings.
 - ii. Upon the issuance of Order Number 2 above, the matter be forthwith, and expeditiously mentioned before any other ELC Judge at Nairobi for further orders on the hearing of the matter.
 - iii. The costs of this Application be in the cause.
2. The Motion is supported by the Affidavit of Joseph Enock Aura of an even date who deponed that he believes that absent an impartial, fair Court, his right to a fair hearing will be impeded and that this Court has demonstrated a stark lack of impartiality and/or independence in handling his Petition.
3. It was deponed that in a related matter being Nairobi HC ELC E029 of 2022, the Court conducted the proceedings on 27th July 2022, 8th August 2022 and 12th August 2022 in a manner that is not consistent with the principles of fairness or transparency and has already pronounced itself in a manner demonstrating inclination to irrationally and unfairly refuse his prayers in the application dated 14th July 2022.
4. It was deposed that on 18th July, 2022, Justice Komingoi ordered that this matter be heard before this Court as it had dealt with Nairobi ELC E029 of 2022 raising similar issues; that when the matter came up before the Court on 27th July, 2022, the Court declined to consolidate the two matters yet so far as he is aware, they relate to the same subject matter seeking similar reliefs and that the Court instead indicated that the matters would be heard together on 8th August, 2022.
5. The Petitioner deposed that on 8th August 2022, his Counsel sought to have the Motion dated 14th July 2022 heard, since the same was unopposed as at the said date, having been served on the Respondents in readiness for the 27th July 2022 mention as per the Court's directions; that this was verified by an Affidavit of Service in that regard and that nonetheless, the Court proceeded to hear and entertain allegations of non-service on some of the Respondents.
6. It is the Petitioner's case that the 7th Respondent and the 2nd Interested Party admitted having been served with the Motion; that the Court declined to allow his counsel demonstrate the necessary affidavit of service, even in hard copy, in proof that the Respondents had all been effectually served with process in the suit and that on the basis of the said spurious and wholly misleading allegations, the court proceeded to accommodate an adjournment application by the Respondents and directed that a Ruling on whether or not they had been served would be made on 12th August, 2022.
7. It was deposed by the Petitioner that in so doing, the court denied him a chance to be heard; that he was further shocked by the court's statement that the filed Affidavit of Service by his counsel could not be traced yet it was, and remains on the Judiciary Portal and that the Court fully heard the arguments from all the parties in Nairobi ELC Petition No. E029 of 2022 in spite of the matters raised therein being on all fours as in the present suit herein, and gave a Ruling thereto.



8. He deponed that in his opinion, the aforesaid are a clear indication of the premeditated and already-conceived outcome of these proceedings, yet his complaint regards the unconstitutional and illegal takeover of Kenyatta University land, a matter of grave public concern and that the imminent miscarriage of justice against him entitles him to be granted the plea sought.
9. According to the Petitioner, he has no faith that the Court will objectively adjudicate the matter as it has formed and adopted a state of mind and attitude antithetical to the objective application of the principle of fairness which is espoused under Article 10(2)(a), (b) and (c) of *the Constitution* of Kenya and that a fair minded and informed observer, having considered the facts of the matter as herein would readily conclude that there exists, and there is a real possibility that the Court would be biased against him.
10. According to Mr Aura, there was no basis for the Court to decline to grant his Motion dated 14th July 2022 as no opposition was lodged thereto as at 8th August 2022 and having been served on the Respondents in readiness for the 27th July 2022 mention; that as advised by Counsel, the Respondents, apart from the 10th Respondent, are yet to file their notices of appointment in these proceedings and that equity aids the expeditious and not the indolent which principle the court failed to apply.
11. According to the Petitioner, he is aware that in the related matter Nairobi ELC Petition No. E029 of 2022, the court in its Ruling of 12th August, 2022 sunk into the arena of litigation, even gathering internet" evidence" on the status of some of the parties, in what amounted to a final decision akin to a Judgement instead of issuing a Ruling on the established principles of conservatory orders and/or interlocutory injunctive relief on a prima facie case.
12. It was deposed that the Court effectively articulated the Respondents' case and defended a naked and clear grabbing of public land; that such conduct on the part of the court plainly informs his Motion herein will find no justice before the court and further runs contra to Rule 3, Sub-Rule 8(c) of the Judicial Service Code of Conduct Rules & Ethics within The Public Officers Ethics Act and that it further shows a disconcerting lack of impartiality in breach of Rule 3 Sub-Rule 1 of the Judicial Service Code of Conduct and which calls for the Court to recuse itself from these proceedings.
13. Mr Aura deponed that he is aware that by dint of the provisions of the applicable law, the Court is obligated to exhibit respect for the rule of law, comply with the law, avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judicial service.
14. It was deposed that Rule 3 Sub Rule 8 of the Judicial Service Code of Conduct Rules & Ethics in the Public Officers Ethics Act, dictates that whenever a party expresses concern that they may not get a fair trial before a court, the court is obliged to recuse itself.
15. According to the Petitioner, a fair minded person, who is informed of the requirements of service of process on the Respondents to a suit and of such parties being admitted to a virtual hearing for purposes of being given a hearing by the Presiding Officer, and such a fair minded person learning that the Respondents somehow accessed the Court in the absence of filing their notices of appointment as demanded in law, irregularly appeared before the Court and brazenly denied receipt of service of process while others admitted to the same and secured orders, would discern the real possibility of bias with the stated Judge dealing with the matter.
16. In response to the application, the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th and 9th Respondents, through the Attorney General, filed Grounds of Opposition on the on the following grounds:



- i. The application is frivolous, an abuse of Court process and made mala fides and is meant for nothing else than to derail the hearing of the Petition.
 - ii. That the questioning of the impartiality of Hon Justice Oscar Angote is unreasonable, out of context, irrelevant and not applicable under rule 5 of the Judicial Service Code of Conduct and Ethics.
 - iii. That a judge is a public good and is not intended to serve individual's personal interests.
 - iv. That the application filed by the Petitioner is an assault on the judge's duty to sit and their presumed impartiality under oath of service.
 - v. That the mischief revealed in this application is just but styles, tactics and designs to forum shop for a judge of the Petitioners choice.
 - vi. That any party that will be dissatisfied by the decision of this Honourable Court have and reserve the right to Appeal at the end.
 - vii. That the application dated 18th August, 2022 is therefore marred with mischief, spiteful, mala fides and should be dismissed with no orders as to costs.
17. The 10th Respondent filed Grounds of Opposition dated 12th July, 2022 and averred as follows:
- i. The application is incompetent, misconceived, an abuse of the Court process, lacks merit and ought to be dismissed with costs as the Application does not demonstrate any ground under the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, (Legal Notice No 102 of 2020) that would warrant the recusal of Hon Mr Justice O. A Angote.
 - ii. No justifiable basis has been laid by in the application as to why Hon Mr Justice O.A Angote ought to recuse himself from these proceedings and this suit.

Submissions

18. The Petitioner filed submissions on 26th June, 2023. Counsel submitted that the Petitioner has, vide his Affidavit in support of the Motion laid a clear foundation for the recusal sought; that the Petitioner cites specific acts on specific dates and as such there is no element of speculation and that the Petitioner is entitled to conclude that the Court is biased.
19. Reliance in this respect was placed on the Supreme Court case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2014]eKLR and the Court of Appeal decision of *Kalpana H. Rawal vs Judicial Service Commission & 2 Others* [2016] eKLR which lay out the principles governing the application for recusal affirming that the same must be based on reasonable grounds.
20. Counsel for the Petitioner also relied on the case of *National Water Conservation & Pipeline Corporation vs Runji & Partners Consulting Engineers and Planners Limited* [2021]eKLR, in which the court cited the Supreme Court decision in *Litekey vs United State* 510 U.S. 540. 550-551 [1994].
21. It was submitted that vide its Ruling on 12th August, 2022, the Court in making its determination considered extraneous matters; that in so doing, the Court failed in its duty to conduct the proceedings in a fair manner by giving each party a reasonable opportunity to present its case and that the Applicant has amply demonstrated and stated under oath that he is reasonably apprehensive that he will find no justice in the result, absent the recusal sought.
22. According to the Petitioner's counsel, the expressions of bias cited above has withered the Petitioner's confidence in the Court's ability to determine the matter objectively, and within the expectation of



- the principles of fairness, objectiveness and equality as set out under article 10(2)(b), and (c) of [the Constitution](#) and in breach of rule 3 sub-rule 5 of The Judicial Service Code of Conduct Rules & Ethics within The Public Officers Ethics Act.
23. The Attorney General filed submissions on 24th July, 2023. Counsel submitted that under rule 21(1) of the Code, a judge is required to disqualify himself or herself in proceedings where their impartiality might be reasonably questioned and that a judge cannot be asked to recuse himself on account of having issued orders unfavorable to a party.
 24. It was submitted that in *Republic vs Honourable Jackson Mwalulu & Others*, Civil Application No 310/2004 (unreported), the Court of Appeal stated that when faced with proceedings for the 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.
 25. It was submitted that the Court in the *Accredo AG & 3 Others vs Steffano Ucceli & Another*[2018]eKLR, cited the *South African case of President of the Republic of South Africa and Others vs South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1, in which the Court quoted with approval the sentiments of the Court in *R vs S(R.D)*[1997]3 SCR which stated that Courts have rightly recognized that there is a presumption that judges carry out their oath of office and this is one of the many reasons why the threshold for a successful allegation of perceived judicial bias is high.
 26. It was submitted that despite this high threshold, the presumption can be displaced with cogent evidence; that the test in this respect is a two-fold objective test: the person considering the alleged bias must be reasonable and the apprehension of the bias itself must also be reasonable in the circumstances of the case and that in the case of *Gladys Boss Sholei vs Judicial Service Commission & Another*[2018]eKLR, the Supreme Court affirmed that a judge has a constitutional right to sit and a recusal should not be used to cripple a judge from hearing a matter.
 27. It was submitted that if parties were to move the Court every time they had an unfavorable ruling, the business of the Court would be reduced to hearing applications for recusal and that the present application does not meet the test for establishing bias.
 28. The 10th Respondent’s counsel submitted that the Petitioner has not set out the threshold for recusal; that in the case of *JGK vs FWK*[2019]eKLR, the Court stated that recusal should not be undertaken lightly but, upon a conscientious decision based on plausible reasons backed by evidence, say, bias, prejudice, conflict of interest or personal interest on the part of a judge.
 29. Counsel submitted that the stringent test is in accord with the constitutional desire to attain the independence of the judge in the administration of justice free from intimidation or blackmail.

Analysis and Determination

30. According to the *Black’s Law Dictionary*, 8th ed. (2004) [p.1303], recusal refers to;

“Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.”
31. The basis for judicial recusal is rooted in constitutional, statutory, and common law principles. It is founded on the fundamental concept of impartiality, ensuring that justice is not only carried out but is also seen to be fair. Article 160 of [the Constitution](#) mandates the courts to uphold independence, free from influence by any party, and to ensure that justice is dispensed to all individuals, regardless of their social status.



32. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides as follows:

“A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2)(b) and 232 of *the Constitution* and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.”

33. The said Rule mandates that in so doing, the Judge shall: uphold and apply the law; observe fairness and impartiality; cooperate with other judges in the discharge of judicial duties by ensuring unity of purpose and collegiality; and perform all duties of the judicial office, including administrative duties impartially, competently, diligently, and without bias.

34. As regards recusal, Rule 21 of the Judicial Code Service (Code of Conduct) 2020 is instructive. It sets out the grounds upon which a judge ought to recuse themselves thus;

- “(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) or a member of the judge’s family has economic or other interest in the outcome of the matter in question.”

35. In the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* Petition No. 4 of 2012 [2013] eKLR, the Supreme Court laid out the rationale and objective of the rule of recusal as follows;

“Recusal, as a general principle, has been much practiced 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.”

36. The Court in *Jasbir Singh*(supra) laid out the test to be applied when a party requests a judicial officer to recuse themselves in the following terms:

“[T]he test for establishing a Judge’s impartiality is the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts,” and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.”

37. This was affirmed by the Court of Appeal in *Kalpana H. Rawal vs Judicial Service Commission and 2 Others* [2016]eKLR which, citing the holding by the East Africa Court of Justice in *AG of Kenya vs Anyang Nyong’o ApealNo.5 , Ref No. 1 of 2006* set out the test for bias as follows:

“We think the objective test of reasonable apprehension is good law. The test is stated variously, but amounts to this: do the circumstances give raise to a reasonable apprehension, in the mind of the reasonable fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially “needless to say.”

38. The Court of Appeal in *Kalpana Rawal*(supra) emphasized that there must be credibility to the allegations made concerning why an officer sitting in a court or tribunal would be deemed to be biased so as to disqualify himself. The Court stated as follows:

“An application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties: the Judge must, without more, recuse himself. Such is the situation where a Judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of a Judge... It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn... We agree with the respondents that where a party wishes to rely on statements of information, which they cannot prove, the least that is expected is to disclose the source of the information so that its credibility may be gauged and assessed.”

39. It has also been affirmed that the Court has a duty to sit and should not be relieved of this duty on account of unsubstantiated claims of bias. This position was well enunciated by Ibrahim SCJ in his concurring opinion in *Gladys Boss Shollei vs Judicial Service Commission & Another* [2018] eKLR thus;

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“(25) Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: “to serve impartially; and to protect, administer and defend *the Constitution*.” It is a doctrine that recognizes that



having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.

- (26) In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine)

- (27) In the case of *Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978)*, the United States District Court, Eastern District of Pennsylvania, had this to say:-

"Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit."

40. The Court will be guided by the foregoing principles.
41. Whereas a litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the judge, the court has to envisage the perception of a member of the public who is not only reasonable but also fair minded about the circumstances of the case.
42. As to what constitutes bias, the Bangalore Principles of Judicial Conduct are instructive and provide thus:
- "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. 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."
43. In the present circumstances, the Petitioner is aggrieved by the manner in which the court conducted the proceedings of 27th July 2022, 8th August 2022 and 12th August 2022. He alleges bias on account of the court's refusal to hear the Motion dated 14th July, 2022 on 8th August, 2022.
44. He asserts that the application was unopposed; that in view of the foregoing, the Court ought not have entertained the Respondents' allegations of non-service, nor adjourned a matter and set a date for Ruling on the issue of service.



45. The Petitioner's second grievance concerns the court's determination in ELC EO29 of 2022. He asserts that the court in its Ruling of 12th August, 2022 sunk into the arena of litigation, even gathering internet evidence on the status of some of the parties, in what amounted to a final decision akin to a Judgement instead of a Ruling contra to the established principles of conservatory orders and/or interlocutory injunctive reliefs and that the court effectively articulated the Respondents' case, and defended a naked and clear grabbing of public land.
46. The Court has considered the record in respect of the impugned proceedings of 27th July, 2022, 8th August, 2022 and 12th August, 2022. On 27th July, 2022, this matter came up for the hearing of the Motion dated 14th July, 2022. The Court directed that the same would be heard contemporaneously with Petition No E029 of 2022 on the 8th August, 2022.
47. On the aforesaid date, counsel for the Respondents in this Petition indicated that they had not been served with the Motion. This was strenuously denied by the Petitioner. Considering the contention regarding the issue of service, the Court directed that it would make a determination on the question of service on 12th August, 2022.
48. The Court did indeed make this determination and found that evidence of service had not been established. Critically, the Court noted that even as at 8:30 am on the morning of 12th August, 2022, the Affidavit of Service had not been uploaded on the portal.
49. The recapitulation of the events herein on whether or not the motion was served does not in the court's opinion depict any bias whatsoever. The court further made a determination on the plea to consolidate this matter with ELC Petition number 029 of 2022 which it declined, opting to instead hear the Petitions contemporaneously upon determination on the contentious issue of service alluded to above.
50. The Petitioner disagrees with the court's decisions on the issue of service and refusal to consolidate the two suits. Rather than take the ordinary course in circumstances where a party is aggrieved by the decision of the Court, that is filing of a review application or an appeal, the Petitioner has decided to file an application for recusal. An application for recusal is not a forum for the court to reconsider its decision.
51. The extrapolation by Gacheru J in *Engen Kenya Limited vs Rukan Limited* (2020) eKLR speaks aptly to this issue.
- “In this determination, I am not in any way called to defend the judicial decision that I may have exercised in discharge of my judicial authority or discretion as provided in law...The law is very clear on what should happen should a party be dissatisfied with the Orders of the Court. The party has a right to seek for review or appeal against the said order. The Applicant did none of the above. Instead, it chose to apply for my recusal just because I extended the ex-parte interim orders.”
52. On the issue of decision in Petition E029 of 2022, the Petitioner is similarly aggrieved by the decision of this court. The Petitioner, who was not a party to that case, points out elements of the decision which he considers erroneous and alludes this to bias by the court.



53. The question of whether a Judge can recuse himself/herself on the basis of a previous decision was considered in the case of *Saad Yusuf Saad vs Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2017] eKLR where the Court stated;

“Should a Judge recuse herself on the basis of a previous decision? This issue was considered in the case of *Locabail (UK) Ltd v Bayfield Properties Ltd & Another*; 2000 1 All ER 65 where the Court of Appeal in England listed inter alia previous judicial decisions as some of the factors upon which an objection to a judge hearing a case may not be raised.

“32. Closer home, in the case of *Republic v Independent Electoral & Boundaries Commission & another Ex parte Coalition For Reforms and Democracy (CORD)* [2017] eKLR, the facts of which are on all fours with the case at hand, the applicant therein sought to have the matter heard by another Judge because of a previous decision made by the Judge in a similar matter. Odunga, J. Court set out the submissions of the applicant’s counsel thus:

“Learned counsel was however quick to point out that in his view the judgement was well-reasoned but stated that whether his clients agree with the same is another matter altogether. It was however submitted that the issues in the instant application are in pari materia to the issues in the said earlier proceedings and in learned counsel’s view, it is improbable that this Court may arrive at a different decision. It was therefore learned counsel’s view that having expressed itself as it did, this Court should let another Judge have another look at the matters with afresh mind.”

In the present case, the Applicant has made the exact assertion that it is unlikely that the Hon. Judge will arrive at a different decision than that in Petition No. 9. As such the Applicant sought to have another Judge with a fresh mind hear the Petition. In his finding, Odunga, J expressed himself thus:

“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.”

54. The mere fact that this court has made a decision in respect of Petition number 029 of 2022, whose facts are similar to the present Petition, cannot be a basis for recusal of the court from hearing the current Petition.



55. In the end, the Court is not convinced that the Petitioner has presented anything to prove bias against him by the court. Indeed, the Petitioner has not presented any facts upon which a reasonable member of the public who is fair minded would find that the facts give rise to a reasonable apprehension that the court will not apply its mind to the case impartially.
56. In conclusion, I would like to say that decisions by the court inevitably result in winners and losers. If judicial officers were to frequently recuse themselves on the basis of unverified and implausible allegations by a party who has lost, the court system will be paralyzed.
57. This Court is disinclined to support what appears to be forum-shopping tactics, where a party requests a judge's recusal simply because they did not receive a favorable Ruling, with the intention of getting a different judicial officer who might rule in their favor.
58. The upshot of the foregoing is that the court declines the invitation to recuse itself. The application dated 18th August, 2022 lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Allan Kamau for Attorney General

Mr. Kinyanjui for Petitioner

Mr. Wakhisi holding brief Emmanuel Wafula for 1st Respondents

Court Assistant - Tracy

