REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO.2 OF 2019

IN THE MATTER OF: ARTICLES 22 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 10, 27, 47, 73 & 232 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF PROVISIONS OF THE PHARMACY AND POISONS ACT AND THE PUBLIC SERVICE COMMISSION ACT

BETWEEN

WAMBUA MAITHYA.....PETITIONER

=VERSUS=

PHARMACY AND POISONS BOARD.....RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA.....1ST INTERESTED PARTY

DR. PIUS WANJALA.....2ND INTERESTED PARTY

DR. KAMAMIA WA MURICHU.....3RD INTERESTED PARTY

RULING

1. By an application dated 2nd July, 2019, the 3rd interested party/applicant herein, **Dr. Kamamia Wa Murichu**, seeks that this court recuses itself from this matter and transfers the matter to a different judge in a station other than Machakos Court. The basis of the said application was that the 2nd interested party has been involved in various litigation proceedings against the Respondent herein, the 3rd interested party either personally or through other pharmaceutical associations to which the applicant belongs in which this court has consistently given adverse judgements exhibiting bias against the respondent in favour of the 2nd interested party as a result of which the applicant has lodged a complaint to the Judicial Service Commission. It was further contended that the 2nd interested party had exhibited a document meant to highlight his assertion that the 3rd interested party is maligning the trial judge and that the same was meant to plant in the mind of the trial judge a notion that the applicant has personal vendetta against the trial judge and to cloud the judgement of the court.

2. The said application was opposed by an affidavit sworn by the 2nd interested party. According to him, he is aware of only one case: Miscellaneous Civil Application No. 159 0f 2016 **(Republic vs. Ministry of Health & 5 others Ex-Parte Pius Wanjala & 2 Others [2017] eKLR)** that he filed before this court and even then the main Respondent was the Ministry of Health and Hon. Attorney General. The Respondent herein was merely the 4th Respondent and even his work station, National Quality Control Laboratory, was the 5th Respondent while the Applicant was an interested party upon application.

3. According to him, the main Respondent Hon. Attorney General who should have genuinely been aggrieved had there been any iota of bias in that matter, has personally rendered his legal opinion dated 21st March, 2019 to the Ministry of Health by stating in reference to that matter, *inter alia,* thus:

"Having considered your request, in light of the applicable law, we advise as follows: That the legality and impact of Rule 10 of the Pharmacy and Poisons (Registration of Drugs) Rules has been the subject of litigation in Misc. Civil Application No. 159 0f 2016. Vide a judgment delivered on 16th March, 2017, Justice Odunga at page 29 thereof made the following findings ……

In light of the above, we advise that the decision of the court is sound and has the full force of law thus binding between the two regulatory bodies unless an appeal or review has been filed thereof to overturn the said decision."

4. The 2nd interested party disclosed that because of the general impunity in terms of violation of employment Rights and attendant corruption related issues at the Ministry of Health which is in public domain, he has filed a number of matters against the Ministry of Health and in some cases the Respondent before other judges/court's and has succeeded in all of them either at full hearing or favourable interim orders on the basis of the strength of each case as thus:

i. **Justice D. Musinga J as was then:** Miscellaneous Civil Cause No. 131 0f 2011-Republic V Permanent Secretary, Ministry of Medical Services Exparte Pius Wanjala [2011] eKLR – The Judgment was in his favour:

ii. **Justice Mwilu J** as was then: Petition No. 124A of 2012: Issued interim orders in his favour

iii. **Justice Abuodha**: ELRC: Judicial Review No. 19 of 2017 and 20 of 2017: Issued interim orders in both of the two cases in his favour

iv. **Justice Mativo**: Is currently handling contempt case against the Respondent in the above Msc. Civil Application No. 159 of 2016, the Attorney General's advice to the Respondent notwithstanding.

5. It was therefore contended that it is **Justice Abuodha** who has presided over the most of the 2nd interested party's cases (Only two Matters) and the Applicant in his instant Application has not adduced or alleged the slightest of the high legal threshold required for grant of his prayers and his application is merely calculated at delaying and disrupting these proceedings.

6. The 2nd interested party averred that in early 2000, the 3rd interested Party was elected as the National Chairperson/President of the Pharmaceutical Society of Kenya but was removed by members within the first two months for being extremely unreasonable and unable to work function in that office.

7. The 2nd interested part therefore urged the court to dismiss the 3rd interested party's application with costs.

Determination

8. I have considered the application herein, the affidavits filed both in support of and in opposition to the application and the submissions made by the parties herein. In my view, for the purposes of better understanding of the instant application, it is important to set out the chronology of events leading to this ruling.

9. These proceedings were commenced by way of a petition dated 6th February, 2019 which was filed on 7th February, 2019. Together with the said petition, the petitioner filed a Notice of Motion in which he sought conservatory orders which inter alia prayed that the court stays the respondent's decision to exclude all potential applicants to the position of Registrar/CEO of the Pharmacies and Poisons Board. The Court however decided to proceed and hear the petition itself expeditiously rather than the said application. The Respondent however took issue with the jurisdiction of this court and in a ruling dated the said objection was disallowed on 27th March, 2019 after which the court granted leave to the petitioner to amend its petition and directed that the amended petition be filed and served before the end of that day and the Respondent was given 21 days to respond to the same. The Petitioner and the 2nd interested party were then directed to file and serve their submissions within 7 days of service of the Respondent's response and the Respondent was directed to file and serve its submissions within 14 days of service of the Respondent's submissions. The matter was then fixed for further orders on 27th May, 2019

10. Pursuant thereto the Petitioner's submissions were duly filed on 27th May, 2019. However, on the day of the mention on 27th May, 2019 the 2nd interested party informed the court that he was relying of the petitioner's submissions. Respondent on the other hand had not filed its submissions and sought seven days to do so an application which was granted and the matter stood over to 12th June, 2019 for further orders.

11. However, by an application dated 7th June, 2019, the 3rd interested party herein applied to be joined to these proceedings and application which the court directed to be served for directions on 12th June, 2019. On 12th June, 2019 the Petitioner, the Respondent and the 2nd interested party informed the court that all their submissions were on record and were ready to either take the judgement date or highlight the submissions. However, in light of the 3rd Respondent's fresh application and in order to accommodate him while also not unduly delaying the proceedings, the court directed that responses to the said application be made within 3 days and the parties be at liberty to exchange their submissions thereon within 7 days and fixed the matter for mention on 24th June, 2019. On 24th June, 2019 the parties, including the 3rd interested party herein informed the court that after discussing the matter they had agreed that the 3rd interested party comes on record and files his papers within 10 days and the matter was fixed for reservation of judgement date on 4th July, 2019.

12. Pursuant to his joinder, on 4th July, 2019, clearly outside the 10 days prescribed by consent of the parties, the 3rd interested party filed grounds of opposition to the amended petition. In addition, the 3rd interested party on the very day of mention filed an application seeking that this court recuses itself from this trial and transfers this matter to a different judge in a court station other than Machakos Law Courts for

the purposes of hearing of the case. The 2nd interested party on the other hand had filed his replying affidavit on 12th June, 2019 together with his submissions. Once again in order to accommodate the 3rd interested party and despite opposition by the petitioner and the 2nd interested, this court directed the other parties to respond to the fresh application by the end of the day on 5th July, 2019 and fixed the matter for reservation of the date for the delivery of the ruling therefor on 8th July, 20191

13. With a view to expeditiously determining this matter and since by the time the 3rd party was being joined to these proceedings the parties herein had filed all their pleadings and what was pending was the reserving of a date for delivery of the judgement, on 8th July, 2019 I directed that the ruling on the application for recusal would be delivered on 26th September, 2019 and depending on its outcome, the judgement on the main petition would also be delivered the same day.

14. This ruling is therefore in respect of the application for recusal.

15. The principles guiding a decision by a court when faced with an application for recusal were restated in **Republic vs. Independent Electoral and Boundaries Commission & 3 Others Exparte Wavinya Ndeti [2017] eKLR**. Before dealing with the merits of the application, it is important for this Court to deal with the principles relating to recusal of judges in matters before them.

16. The foundation for the principle underlying recusal of judicial officers was restated by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** 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."**

17. The principles relating to recusal were discussed in details in the **President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98**, in which the Constitutional Court of South Africa pronounced itself as follows:

> **"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront…A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes…In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence…This consideration was put as follows by Cory J in R. v. S. (R.D.):37**
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> **'Courts have rightly recognized that there is a presumption that judges will carry out their oath of office…This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.'**
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> **In their separate concurrence, L'Heureux-Dube and McLachlin JJ say:38**
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> **'Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances=: *United States v Morgan, 313 U.S. 409 (1941) at p. 421*. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England III . . .[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd. (1994), 133 N.S.R. (2d) 50 (C.A). at pp. 60-61*.'**
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> **The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased."**

18. The Court then proceeded to pronounce itself as follows:

"Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J:41

'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs… In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own…Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge.

It is appropriate for judges to bring their own life experience to the adjudication process. As it was put by Cory J in R. v. S. (R.D):42

"It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.'

Similar considerations were expressed in their concurring judgment by L'Heureux-Dube and MacLachlin JJ:43

'[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging…It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.'"

19. Relying on **Committee for Justice and Liberty et al vs. National Energy Board** the Court agreed that:

"…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."

20. It was further held that:

"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. *The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application*.

It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test…We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia [In *Re J.R.L.:Ex parte C.J.L.* (1986) 161 CLR 342 at 352.]:

> **"*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*…It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."** [Emphasis mine].

21. On the views held by judges the Court held:

"It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires."

22. In conclusion, the Court decreed:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The

reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training…and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial…Under our new constitutional order, judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself."

23. It was similarly held in **South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000**, where the same Court expressed itself as follows:

"The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after Sarfu, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

> **'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'**

The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigants apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law…The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance…We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping."

24. While dealing with the independence of judges, **Lord Denning** in ***What Next in the Law***, at page 310 had this to say:

"If I be right thus far – that recourse must be had to law – it follows as a necessary corollary that the judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused…[The judges] will not be diverted from their duty by any extraneous influences; not by hope of reward nor by the fear of penalties; not by flattering praise nor by indignant reproach. It is the sure knowledge of this that gives the people their confidence in the judges."

25. In our own jurisdiction the issue has been the subject of legal pronouncements. The Court of Appeal in **Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996** held:

"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be

seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour...Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

See also **Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998 [1999] 2 EA 83**.

26. On the same note, the Supreme Court of Uganda in **Uganda Polybags Ltd vs. Development Finance Co. Ltd and Others [1999] 2 EA 337** was of the view that litigants have no right to choose which judicial officers should hear and determine their cases since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will and the oath must be respected.

27. It must be appreciated that in matters of perception the applicant must show that there exists ***reasonable perception***. Such reasonable perception in my view must be based on facts. According to ***The Bangalore Principles of Judicial Conduct***:

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

28. What I understand by that position 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. In **Miller vs. Miller [1988] KLR 555**, the Court of Appeal expressed itself as follows:

"No party should be placed in a position where he can choose his court. But this is not to say that no circumstances is it possible for a judge to disqualify himself from hearing a case...There is nothing prejudicial in one Judge making several or more orders in a court record. In practical terms it is advantageous to the parties and therefore in the interest of justice for a judge to familiarise himself with the substance of a court file. In the absence of the evidence that the appellant's case was prejudiced by some order of the nine orders the trial judge made, it must be held that the submission on this aspect was without substance. No objection was taken to the trial judge making any of the nine orders...It would be disastrous if the practice was that once there are allegations made against a judge and the judge's honour is in question, that the judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be a choice of trial judge by a party."

29. In this case, although it was contended that this Court has dealt with previous proceedings, it was not expounded the nature of the said proceedings and their outcome. In fact, according to the 2nd interested party, this court only dealt with one matter amongst a myriad others filed by the 2nd interested party in which the 2nd interested party was successful. In that matter dealt with by this court, the 2nd interested party averred, which averment was not controverted that the Attorney General, the principal legal adviser to the Government, in fact agreed with this court's decision. One wonders on what basis the 3rd interested party herein, a non-party to the said earlier proceedings, would be making the allegations made herein when the Attorney General, the legal counsel of the Respondent expressed his satisfaction with the said decision. One can only speculate as to the reasons behind the instant application.

30. In **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12** it was held:

"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...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind...While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour."

31. To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts, even if true,

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.

32. That now brings me to the grounds relied upon by the 3rd interested party in this application. In this case, the first ground is that there is a complaint lodged by the 3rd interested party against the trial judge before the Judicial Service Commission. Suffice it to say that I have not been notified of any such complaint. Even if such a complaint was to exist, the mere fact that a complaint has been made does not necessarily amount to a ground for recusal. If that were the position, parties would simply lodge complaints against judges and judicial officers and based on their own machinations contend that there is likelihood that they may not get justice from the court. In my view a party cannot be permitted to create an awkward situation and then use the same as a ground for seeking recusal of a judicial officer. It is akin to a party applying for a transfer of a case and based on the said grounds applying that the matter be transferred from the trial court on the ground that now that he has sought the transfer of the case, he is unlikely to get a fair trial.

33. With due respect, the applicant herein, who is not even a substantive party to these proceedings and was not even a party to the matters which he relies upon to seek the court's recusal, seems to believe that by conducting its case in an intimidating and unnecessarily abrasive and menacing manner and by employing delaying tactics this court will be bullied into giving in to his demands that this court not only recuses itself from the matter but transfers this matter to a station other than Machakos. Why the applicant seeks that the matter ought not to be heard within Machakos without offering any reason for that prayer, can only be understood in the sense of forum-shopping. By granting the prayers as sought I would, in effect, also be disqualifying the other judge in the station from hearing the matter when no allegations are made against him. On that basis alone, this application must fail. A court of law must stand firm in the face of intimidations whether real or thinly veiled. To paraphrase the expression in **Masalu and Others vs. Attorney General [2005] 2 EA 165** it is to the last degree important that justice should be rendered perfectly and completely independent with nothing to influence or control the judge but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was a timid or a dependent Judiciary. I associate myself with the position taken by **Mutungi, J** in **Trust Bank Limited vs. Shanzu Villas Limited & 3 Others Nairobi HCCC No. 875 of 2001 [2004] 2 KLR 299** that:

> **"When the application is intended to delay the finalisation of the proceedings, and it has no merit, it would be abdication of the Court's duties to grant such prayers. In the day to day running and management of the Court system, the judge/presiding officer is totally independent and free from any influence or interference from any quarters. To put it differently, the Court will not be intimidated or bow to any threats in the discharge of its judicial duties."**

34. In the same vein, the East African Court of Justice in **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12** stated that:

> **"As members of the Court, the Judges, individually and collectively, must be in the forefront in ensuring the maintenance of public confidence in the Court. They however, must not lightly accede to veiled intimidation in form of unsubstantiated allegation that they or any of them has undermined public confidence in the Court."**

35. No court should, and particularly this court will not, succumb to attempts by parties appearing before it to browbeat it into submitting to rehearsed stratagems for reasons best known to them. Parties who set out to unjustifiably malign and tarnish the judiciary and judicial officers by making allegations which are completely baseless for their selfish aggrandisement ought to be told in no uncertain terms the institution of the judiciary is not a punching bag for every Tom, Dick and Harry and ought not to be turned into a rubbish dump for spewing all manner of expletives. If the 3rd interested party/applicant herein thought that by employing such chicanery, he would hopefully get another bench outside Machakos that would make an order favourable to him, then he is barking up the wrong tree. In this case he has simply caught the wrong end of the stick.

36. As this court held in **Republic vs. Pauline Maisy Chesang & 4 Others [2019] eKLR**:

> **"It is pathetic that learned counsel would rush to the Court with an application which has serious impact on administration of justice based on insufficient or clearly misleading instructions from a client…To make such wild allegations against the court in the hope that the court will recuse itself from the matter is in my view one of the greatest sins against the administration of justice and no court ought to entertain such frivolous grounds as a basis for giving in to the demands of litigants…With due respect to counsel for the interested party, this is one of the most frivolous applications seeking recusal of a judge that I have ever had the misfortune to listen to. It ought not to have been made at all. Legal Counsel ought to remember that it is not for no reason that they bear the title "counsel". They are supposed to and are obliged to advice and counsel their clients on matters of the law. They are not just their clients' mouthpiece but are also officers of the court. They must be at the forefront in upholding the dignity of the courts and the rule of law and ought not to simply allow themselves to be instruments through which otherwise frivolous and scandalous applications are made before the Courts particularly where such applications are made on baseless grounds. It is really a sad day for this country when advocates are used by their clients as the instruments through which…profiling of judicial officers is engineered."**

37. Even if it was true that this Court has in the past rendered decisions favourable to the 2nd interested party herein, that, per se, is not a ground for seeking the recusal of a judge. First, the 2nd interested party is not the petitioner in this petition and is not seeking any orders in this petition apart from supporting the petition. Secondly, there is no evidence that any of the previous decisions of this court have been

successfully challenged or at all on appeal. Thirdly, court decisions are based on the law and where a person is hell-bent breaking the law, the court is duty bound to drum the fact of his disregard for the law no matter how many times and the court will not stop from doing so until such a time that he complies with the law. Court decisions are not an auction sale where the decision goes to the highest bidder. Nor is it a lottery where the decision is made on the basis of casting lots. Where a person continuously makes wrong decisions, his decisions will similarly be subject to being overturned in as many number of times as his decisions and the court will not tire from doing so. That action cannot be construed to amount to bias particularly where the decision making has not successfully challenged the same in a higher court. It is for the decision maker to mend his ways in order to win favour with the law.

38. As was stated by **O'kubasu, JA** in **Kenya Ports Authority vs. Obengele [2009] KLR 364**:

> **"I was reminded of David Patrick, a Barrister and fellow of All Souls College Oxford who in his humorous book wherein he says about judges as follows: - 'They repeatedly do what the rest of us always seek to avoid: to make decisions. And they carry out this tricky and delicate function in public'."**

39. The second ground was that the 2nd interested party has exhibited certain communications attributed to the 3rd interested party in which the 3rd interested is portrayed as having disparaged the trial judge. Again, if that conduct was true, the 3rd interested cannot rely on a situation created by himself to seek recusal of a judge. However, this court is not aware of such allegations and their authenticity and as was held in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No. Nai. 195 of 1997:**

> **"A judge is not concerned with what litigants may brag or boast as he is only concerned with dispensing justice according to law, and any boasts made by litigants ought not to perturb or even bother a Judge."**

40. Having considered the grounds upon which the application dated 2nd July, 2019 was based, I find that the said application does not meet the threshold required for a judicial officer to recuse himself. I have said enough to show that the application dated 2nd July, 2019 is completely devoid of merits. It is therefore dismissed with costs to the Petitioner, the Respondent and the 2nd interested party. The said costs to be borne by the 3rd interested party.

41. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 26th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mwangi for Mr Kinyanjui for the Petitioner

Mr Kipkogey for the Respondent

Dr Wanjala the 2nd interested party

Miss Mbilo for Mr Omiti for the 3rd interested party

CA Geoffrey