REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

THE ELECTIONS ACT 2011

ELECTION PETITION NUMBER 8 OF 2017

SAAD YUSUF SAAD.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC)……...……....1st RESPONDENT

NANCY WANJIKU KARIUKI…….....….2nd RESPONDENT

MOHAMED ASHA HUSSEIN…….....…3rd RESPONDENT

RULING

1. By a Notice of Motion dated 16.10.17 ("the Application"), the Saad Yusuf Saad the Petitioner herein seeks the following orders:

> ***"1. THAT the Honourable Justice Thande be pleased to disqualify herself from any further conduct of this matter.***
>
> ***2. THAT the matter be placed before the Chief Justice to gazette another judge of the high court for its just and conclusive determination.***
>
> ***3. THAT costs of his (sic) application be provided for."***

2. The proceedings herein relate to an election petition (the Petition") dated 6.9.17 challenging the election of Mohamed Asha Hussein the 3rd Respondent herein, as the Mombasa County Woman Member of the National Assembly. When the matter first came up before me for pre-trial directions on 5.10.17, Mr. Mwaniki, learned Counsel for the Petitioner informed the Court that M. Buti, learned Counsel for the 3rd Respondent had filed an application for striking out of the Petition. He further informed the Court that he would file and serve his response to that application that day whereupon Mr. Buti would file his submissions and thereafter he would file his submissions. Mr. Buti on his part sought leave to a file supplementary affidavit. Directions were given that Mr. Buti would file his supplementary affidavit and submissions by 10.10.17 while Mr. Mwaniki would file his submissions by 12.11.17. Highlighting of submissions was fixed for 16.10.17.

3. On the same day, Mr. Wafula, learned Counsel for the IEBC and Nancy Wanjiku Kariuki, the 1st and 2nd Respondents respectively sought that their Response which was filed out of time be deemed to have

been filed within time. Mr. Mwaniki stated that he had no objection as a result of which I granted the order that the said response is deemed to have been filed on time.

4. On 16.10.17 the date scheduled for hearing the application for striking out of the Petition however, Mr. Ambwere appearing with Mr. Mwaniki for the Petitioner sought leave to file an application for the Court's recusal due to a decision the Hon. Judge made on 13.10.17 in Petition No. 9 of 2017 ("Petition No. 9"). After hearing all parties, the Court did grant leave to the Petitioner to file the application for recusal on terms that the said application would be filed by close of business that day. The 3rd Respondent was to file her response by the following day 17.10.17 for hearing on 19.10.17. The above is a chronology of the proceedings herein to date. It is the Application that is now before me for consideration.

5. The grounds of the Application are contained in the face of it as well as in the affidavit of the Petitioner sworn on 16.10.17. The Petitioner alleges that the Hon. Judge has shown open hostility and bias toward the Petitioner and his Counsel. Further that the Hon. Judge has shown apparent bias and impartiality as she did in handling Petition No. 9 which she struck out. The Petitioner was informed by Jimmy Mkala, the Petitioner in Petition No. 9 that the Hon. Judge demonstrated open bias when she lied in the said Ruling that the Petition did not state the date of the election when in fact it did. The said Jimmy Mkala has petitioned the Judicial Service Commission for the removal of the Hon. Judge for breach of oath of office and gross misconduct.

6. The Petitioner further avers that he was informed by a Mr. Mohamed that the 2nd Respondent called him (Mr. Mohamed) and informed him that she had met the Hon. Judge in private after she was gazetted to deal with this Petition and the Judge assured her that she will strike out the Petition within 2 days since she had already prepared a ruling in advance.

7. The Petitioner states that he has been advised by his Counsel that the Honourable Judge casually struck out Petition No. 9 ignoring the Constitution and the Judiciary Bench Book on electoral disputes resolution. The Petitioner further states that the format in Election Petition No. 9 is similar to the Petition herein and the application before the Court for striking out the Petition herein is similar to the one in Petition No. 9. The Hon. Judge's mind is fixed and prejudiced and the outcome thereof is openly known. The Petitioner is, in light of the above apprehensive that that if the Hon. Judge presides over this matter the Petition will be struck out on technicalities as she did Petition No. 9. For justice to be seen to be done it is prudent that a fresh Judge looks at the issues before the Court objectively.

8. The Petitioner further says that open bias is shown by the record 2½ hours given to the Petitioner to file his application and submissions which was meant to ensure that his Counsel experienced difficulties in complying so that the Hon. Judge continues to cling on to the file and strike out the Petition. The Petitioner went on to aver that it is deeply clear that the Hon. Judge is interested in the outcome of the Petition. The Hon. Judge is under instructions from some unforeseen forces to strike out the Petition as quickly as possible.

9. In submissions on behalf of the Applicant Mr. Ambwere reiterated the contents in the Petitioner's affidavit. He submitted that confidence of the public in administration of justice is critical. He argued that Petition No. 9 was struck out on technicalities yet the Supreme Court in the Raila case did away with technicalities. The advocate in both Petitions is the same as is the format of the Petition. He argued that it will be very difficult for Court to depart from its ruling in Petition No. 9. The Petitioner is apprehensive that he will not get a fair hearing as envisaged in Article 50 of the Constitution and that the apprehension is reasonable. Learned Counsel urged the Court to consider allowing another Court hear the matter. He further urged the Court to consider in light of the Petition filed for the removal of the Hon. Judge from office for misconduct, whether it is fair for the Hon. Judge to hear the Petition. To buttress his submissions, learned Counsel cited several authorities which the Court has considered. He further submitted that as an officer of the Court the application was most difficult for him but he was just acting on instructions of his client.

10. The Application is opposed. The 1st and 2nd Respondents filed Grounds of Objection dated 18.10.17. According to them, the Application is bad in law and an abuse of the Court process and filed in violation

of the orders and directions given by the Court on 16.10.17. The Application lacks foundation and is made in bad faith designed to taint the image of the Court and interfere with the independence of the Court. Mr. Wafula, learned Counsel for the 1st and 2nd Respondents in his submissions reiterated the grounds of objection. He submitted that the Application is a well-orchestrated scheme to intimidate the Court, to interfere with judicial independence and to forum shop. Judges are human beings with feelings and with a reputation and career to safeguard. Thus unwarranted and baseless attack on a judicial officer should be resisted. In an application for recusal a basis must be laid. It was submitted that the allegation that the Court has demonstrated hostility to Petitioner and his Counsel has no basis as this matter has never been heard therefore the issue of hostility does not arise. Counsel further submitted that there is no nexus between the Petition herein and Petition No. 9 of 2017 which is any case has not been annexed. This is neither a review nor an appeal of the decision in the said Petition and the said decision cannot be a basis for an application for recusal. On the Petition for the removal of the Judge for misconduct, counsel submitted that it is not the Petitioner herein who has lodged the complaint with the Judicial Service Commission and therefore the same has no relevance.

11. On the allegation that the Petitioner was called by an unspecified Mr. Mohamed who informed him of the Hon. Judge's impropriety, Counsel submitted that when such a serious allegation is made, then the Petitioner must be specific. A claim of violation of Chapter Six of the Constitution cannot be based on unsubstantiated rumours. Counsel further submitted that in considering this issue, the Court must look at the mind of a reasonable person who appears before it and not a just any person who peddles rumours.

12. Mr. Buti learned Counsel for the 3rd Respondent submitted that the Application is anchored on the ground that the Court made a decision in Petition No. 9. The issues in that Petition and the present Petition are similar. The 2 Petitioners instructed the same advocate who drafted similar Petitions. On the allegations that there were mistakes, those mistakes were made by the advocate and not the Court. Counsel contended that the said mistakes are replicated everywhere where Mr. Mwaniki has filed a petition.

13. Citing several authorities, Counsel submitted that a Judge should not disqualify herself because of a previous judicial decision so that the case can go to another judge who will rule in favour of a litigant. He argued that it the duty of this Court to hear all the cases for which it has been gazetted. On the submission that the Judge should disqualify herself so that the matter is heard by a fresh mind, Counsel submitted that what the Petitioner seeks is to have a judge of his choice who will hear him favourably because of his errors. Counsel insists that the mistakes are of the Petitioner's advocate in drafting the Petition and not of the court. These mistakes should not be deflected on the Court. If the Petitioner in Petition No. 9 is aggrieved, he should appeal. The fact that he has moved the Judicial Service Commission to remove the Judge should not be brought here. Finally counsel submitted that the Application is meant to derail the timelines in this matter and the same should be dismissed.

14. I have given due consideration to the Application, the depositions on which it is predicated as well as the rival submissions by Counsel and the authorities cited. The Petitioner's complaint as set out in the Application is that he is apprehensive that he will not get a fair hearing in the Petition. The issue for my consideration and determination therefore is whether the Petitioner has placed before the Court such material as may justify his apprehension that the Hon. Judge shall be biased or which may give rise to want of impartiality and impede fair hearing of the Petition herein. The Petitioner has raised a number of grounds that give rise to that apprehension.

15. The Petitioner has alleged that the Hon. Judge has shown open hostility and/or bias towards the Petitioner and his counsel. Black's Law Dictionary, 7th Edition defines bias as:

> ***"Inclination, prejudice; Judge's bias usually must be personal or based on some extrajudicial reasons."***

16. In Mumias Sugar Co. Ltd v Director Of Public Prosecutions & 2 Others [2012]eKLR, Gikonyo observed and I agree with :

"I take the view that the Petitioner should establish such material facts that attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons. Real likelihood of bias would therefore occur when the matters complained of create a reasonable doubt in the minds of the public about the fairness in the administration of justice in the particular case in question. The operating phraseology is a reasonable doubt-an elusive expression-but ordinarily refers to an impression of doubt that goes beyond mere apprehension or belief of the parties to a more concrete and cogent grounds based on the judge's personal interest, pecuniary or otherwise in the case. The applicant must therefore specifically set out the facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of a judge."

17. The Petitioner has not indicated when or how the Hon. Judge showed open hostility or bias as alleged. It is inconceivable that hostility or bias could be displayed by the Hon. Judge in a matter that is yet to be heard. The petitioner must specifically set out the facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of the Hon. Judge. Failure to specifically set out and prove facts constituting bias has rendered this ground a mere allegation devoid of any basis.

18. With regard to the allegation that the Hon. Judge has shown apparent bias and impartiality as she did in Petition No. 9 where she stated in the Ruling that the results of the election were not stated in the Petition whereas they were in fact stated therein. Again, no evidence has been placed before the Court to support this allegation. The Petitioner did not annex a copy of the said Petition nor indeed of the said Ruling in the said Petition. The Petitioner has stated that the format used in Petition No. 9 is similar to the one used in the Petition herein and the application before the Court for striking out the Petition is similar to the application in Petition No. 9. The fact that Petition No. 9 was struck out makes the Petitioner apprehensive that his own Petition will suffer the same fate. The Court notes that the two Petitions were both drawn by the firm of Mwaniki Gitahi & Partners, Advocates in the same format hence the apprehension by the Petitioner. If there are any mistakes in the 2 Petitions, then the same are of the Petitioner's advocate and should not be visited upon the Court. If however the Petitioner is confident that his Petition has complied with the law then he has nothing to be apprehensive about.

19. The Petitioner has imputed impropriety on the part of the Hon. Judge by alleging that upon her gazettement to deal with this Petition, she met with the 2nd Respondent in private. The Petitioner bases this assertion on information he allegedly received from a Mr. Mohamed who informed the Petitioner that the 2nd Respondent called him and told him that she had met with the Hon. Judge in private and the Hon. Judge had assured her that she would strike out the Petition within 2 days since she had already prepared a ruling in advance. The Petitioner is not relaying information that he knows of a fact. He is conveying information given to him by someone who got information from yet another person. The Court has not been told when and where the alleged meeting took place. The Court has also not been told who this Mr. Mohamed is. Mohamed is a very common name in a Mombasa setting yet no second name has been provided for the alleged informant. Notably the Petitioner has not seen it fit to have the said Mr. Mohamed swear an affidavit to substantiate the very serious allegations he has made against the Hon. Judge. The only conclusion that can be drawn is that this is a malicious and baseless allegation that is intended to embarrass the Court and the Hon. Judge.

20. The Petitioner has also averred that the Petitioner in Petition No. 9 has filed a petition with the Judicial Service Commission for the removal of the Hon. Judge from office for misconduct. I have perused the annexed copy of the said petition for removal. I note that the subject matter in the said petition is the Ruling in Petition No. 9 and the complainant is the Petitioner therein. There is no nexus between the petition for removal and the Petition herein. Counsel for the Petitioner did however urge the Hon. Judge to consider, in light of the said petition for her removal, whether it is fair for her to hear the Petition. It would appear therefore that the motive for introducing the removal petition in these proceedings is to maliciously attack the integrity of the Hon. Judge with a view to intimidating her and interfering with her judicial and decisional independence.

21. The Petitioner further alleges that open bias was shown by the Hon. Judge when she gave him 2½

hours to file the Application which is against the principle of fair hearing intended to ensure that Counsel fails to file the application. Election petitions are time bound. This Court was gazetted to hear 3 election petitions. Sufficient time must be allocated to each one of them. The timelines set by the Court must therefore be honoured by all. Any breach of the timelines no matter how minor may derail the hearing of the petitions. The Court also takes judicial notice of the fact that most of the counsel are engaged in several petitions. Indeed Mr. Mwaniki did inform this Court that he was involved in 10 petitions. It was therefore in the interest of all concerned that this Application be filed, served, responded to and heard as quickly as possible. Further in the ruling on the application to file this Application, this Court did state that the ruling in Petition No. 9 which gave rise to the apprehension of bias was delivered on 13.10.17 at 9 am. The Petitioner had the entire day on 13.10.17 and the weekend to prepare the Application. I do therefore find no bias was demonstrated by the period given to the Petitioner to file this Application.

22. When a Court is faced with an application for recusal such as the present application, it is necessary to consider whether there is a reasonable ground for possibility of 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. In the case of Philip K. Tunoi & Another v Judicial Service Commision & another [2016] eKLR, the Court of Appeal observed regarding bias:

> ***"The House of Lords held in R v. Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely 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.***
>
> ***The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v. Magill [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –***
>
> > ***"[T]he question 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."***
>
> ***In determining the existence or otherwise of bias, the test to be applied 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.***

23. The question this Court has to ask itself is not whether the Petitioner who is a party herein perceives bias on the part of the Court but whether the fair minded and informed observer having the facts as set out above would adopting a balanced approach, conclude that there was a real possibility that this Court will be biased. The test to be applied is that of a reasonable and independent fair-minded and informed observer of the Court's conduct and proceedings. It follows that the Petitioner who is a party herein and who has a stake in the outcome would not be the best person to use as the 'reasonable person'.

24. Relying on the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR the Petitioner submitted that a reasonable person seized of the facts in question herein would conclude that the Hon. Judge is biased and hence the justification for recusal. In that case, Ibrahim, SCJ. in a separate opinion observed:

> ***"Lord Justice Edmund Davis in* Metropolitan Properties Co (FGC) Ltd. Vs Lannon (1969) 1 QB 577 *stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in* R vs Liverpool City Justices ex parte Topping (1983) 1 WLR 119 *elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification would be***

inevitable."

25. In the instant case, the relevant facts that a reasonable fair-minded man sitting in Court would know are that the apprehension of bias is based on a ruling made striking out another petition with no demonstration of nexus with the Petition herein; that as a result of the ruling, the Petitioner in that Petition has moved the Judicial Service Commission for the removal of the Hon. Judge from ofice for alleged misconduct; that the hearing of the Petition or the application for striking out of the Petition herein has not even commenced; that there is the unsubstantiated allegation that there was inappropriate contact between the Hon. Judge and the 2nd Respondent; that an incredulous allegation has been made that the Hon. Judge has assured the 2nd Respondent that the ruling striking out the Petition herein has already been written in advance. Given the above facts, it is inconceivable that a reasonable fair-minded person would have reasonable suspicion that a fair trial as envisaged in Article 50 of the Constitution was not possible in the Petition herein.

26. Ibrahim, SCJ, went on to state:

> ***"In an American case, Perry v. Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the 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."***

As indicated in the above cited American case, it is clear that the unsubstantiated suspicion of personal bias or prejudice by the Petitioner herein will not suffice as a ground for the Hon. Judge's recusal.

27. In the case of Attorney General of Kenya vs Prof. Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 another quality was added to the reasonable fair-minded person as follows :-

> ***"We think that the objective test of reasonable apprehension of bias is good law. The law is stated variously, but amount to this: do the circumstances give rise 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, 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 however has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case."(emphasis added).***

28. Every litigant such as the Petitioner herein who seeks recusal of a Judge does so because of his own perception of appearance of bias on the part of the Judge. But as stated in the Anyang Nyong'o case (supra) this Court has to address its mind on whether the circumstances herein give rise to a reasonable apprehension, in the mind of not just a reasonable and fair-minded but also informed member of the public that the Hon Judge will not apply her mind to the case impartially and without prejudice.

29. On whether the alleged bias is actual or perceived, it was submitted for the Petitioner that the appearance and reasonable inference from the facts of the case and from the manner in which the Hon. Judge has conducted the matter would form a justifiable ground for her recusal. The cases of Barnaba Kipsongok Tenai v Republic [2014] eKLR and R V Gough (1993) 2 All ER 724 were cited to buttress the submission. In Barnaba Kipsongok (supra) the Court observed:

> ***"the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair- minded person would do, that the judge is biased or is likely to be biased."***

As earlier indicted, this matter is yet to commence. The only substantive hearing that has taken place is of the present Application. Consequently no inference of probability of bias can be drawn by any reasonable

and fair-minded person. Further, the Petitioner has not specifically set out and proved the facts constituting bias**.** As such, all that is deponedto by the Petitioner are substantiated allegations which cannot form the basis of an inference of bias.

30. The Petitioner cited the case of Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR in which Odunga, J. forwarded the matter to the presiding Judge for directions with respect to the hearing and disposal of the same. The Court was urged to do the same in the interest of justice as the issues before this Court are the same as those in Petition No. 9 which was struck out. To begin with, the matter herein is an election petition and not any ordinary litigation. This Court is a duly gazetted Election Court which has a duty to hear and determine the electoral petitions allocated to it by the Hon. Chief Justice. Having this matter heard by another Judge is not as simple as forwarding the file to the presiding Judge as Odunga, J. did. It would entail a fresh gazettement of another Judge by the Hon. Chief Justice. In the circumstances the cited case is not relevant.

31. The ruling in which Petition No. 9 was struck out constitutes the basis or the bedrock of the allegations of bias on the part of the Hon. Judge. 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 Exparte 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."***

33. 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.***

34. The Petitioner is apprehensive that his Petition will suffer the same fate as Petition No. 9. This is because as he stated, both Petitions were drawn by the same advocate and in the same format. I fully concur with Odunga, J in his finding above. To seek a judge of concurrent jurisdiction with a "fresh mind" to hear the Petition herein is an implication that there is a likelihood that another Judge will arrive at a different decision. Rather than Counsel seeking on behalf of the Petitioner herein the recusal of the Hon. Judge he ought to advise the Petitioner in Petition No. 9 to appeal the decision. After all he acts for both Petitioners. A party must not be allowed to shop for a Judge who will be sympathetic to his case. No party should be placed in a position where he can choose his court (Miller vs. Miller [1988] KLR 555) otherwise the whole judicial process will be brought into disrepute and embarrassment.

35. Similarly in Republic v Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017] eKLR Odunga, J. again observed:

> ***"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."***

The issue addressed by Odunga, J is the very issue that the Petitioner now seeks in this Application namely that the matter would be heard by another Judge of concurrent jurisdiction with a fresh mind in the hope that that other judge would arrive at a different decision. This is indeed a manifestation of bad faith. Two conflicting decisions by Courts of concurrent jurisdiction would create the perception that the Petitioner chose a Judge sympathetic to his case. This would compromise the integrity of the judicial process and must be resisted at all costs.

36. In his submissions, Mr. Ambwere stated severally that the prosecution of the application was very difficult for him but that he was only carrying out his client's instructions. That may very well be the case. It however behoves all counsel to advise their clients to avoid baseless and unwarranted attacks on Judges which do nothing but taint the image of the Court in the eyes of the public. Unsubstantiated allegations made by parties through their counsel against a Judge who is dutifully discharging her judicial functions compromise the dignity of the Court and the relationship between the bar and the bench. It was Mutuku J who stated in Abdiwahab Abdullahi Ali v Governor, County Government Of Garissa& 2 others [2013] eKLR Mutuku J

> ***"One last word of unsolicited advice to my brothers, legal counsels involved in this case; the same way this court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, the same way the court and the presiding officer demands respect from the parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practicing before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party who is not satisfied with a ruling of this court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era when it used to be a "jungle out there"."***

37. My commitment to deliver justice to all in accordance with my oath of office without any fear or favour, bias, affection, ill will, prejudice or any political, religious or other influence is and has always been and will continue to be unwavering. I do not know any of the parties in this Petition or indeed in Petition No. 9 and have no interest whatsoever, personal or otherwise in the outcome of either Petition. The application to strike out of Petition No. 9 was determined on the basis of known legal principles.

38. In conclusion this Court finds that no reasonable fair-minded and informed person observing these proceedings and being in possession of the facts herein would conclude that there is a possibility that the

Hon. Judge will be biased and will not be fair or impartial. The apprehension by the Petitioner is both unfounded and unreasonable and cannot form a justifiable basis for recusal. As stated in the Locabail case (supra), this Court shall not accede to an unfounded application for recusal. In the circumstances the Application dated 16.10.17 is hereby dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of October 2017

_____

M. THANDE

JUDGE

In the presence of: -

……..... for the Petitioner

……..... for the 1st & 2nd Respondents

……...for the 3rd Respondent

……...Court Assistant