REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPL. NO. 538 OF 2015

GRAIN BULK HANDLERS LIMITED ……APPLICANT

VERSUS

MISTRY JADVA PARBAT & COMPANY LIMITED ……..RESPONDENT

IN THE MATTER OF AN APPLICATION UNDER SECTION 14 OF THE ARBITRATION ACT TO DETERMINE THE MATTER OF A CHALLENGE TO THE ARBITRATOR

AND

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT 1995(AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT NO. 11 OF 2009)

AND

IN THE MATTER OF AN ARBITRATION UNDER THE 2012 RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH)

("THE RULES")

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITED …….CLAIMANT

AND

GRAIN BULK HANDLERS LIMITED …….RESPONDENT

RULING OF THE COURT

The Application

1. The Notice of Motion application before the court is dated 2nd September, 2016 and filed herein on 5th September, 2016 by the Respondent pursuant to **Inherent Powers, Articles 25 (c), 47, 48 and 50(1) of the Constitution.** The application seeks the following orders;

a. That the Honourable Mr. Justice Erick Ogola do recuse himself from further hearing this

matter.

b. That consequential direction be made including for the transfer of this file back to the Commercial & Admiralty Court at Nairobi for its hearing and disposal and for the matter to be mentioned before the Presiding Judge of the Division for further directions.

c. That costs of this application be in the cause.

2. The application is premised on the grounds set out therein, namely that the respondent has been apprehensive about the directions which were given in this matter and the manner its pleas to the court were heard and determined giving rise to the sentiments expressed in its counsel's letter to the Judge of 8th July, 2016 as well as the Deputy Registrar's of the Court at Nairobi of the 11th July, 2016; that the Judge in his letter of 18th July, 2016 expressed that he need not hear this matter nor write any ruling herein so that any intended applications for highlighting of submissions and the final determination of the dispute can be done before the Commercial & Admiralty Court in Nairobi; that the haste with which directions were made for parties to file submissions and with which the ruling date was fixed despite the Judge's impending transfer is a matter of some concern on the part of the Respondent and a cause for apprehension on its part as this matter may not be determined in a fair, objective and impartial manner; that on 19th May, 2016 and 27th May, 2016 the judge only gave directions as to the filing of written submissions and filing of further submissions and had not heard any of the parties on the merits or demerits of the application dated 14th December, 2015; and lastly that the file was inaccessible to the Respondent by reason of being under the Deputy Registrar's custody when required by the Respondent for perusal and filing of its submissions.

3. The application is supported by Affidavit of **Paresh Varsani** sworn on 2nd September, 2016 and a Supplementary Affidavit of the same deponent sworn on 26th September, 2016. Both affidavits expound upon the above grounds.

4. The application is opposed by the Applicant vide the Replying Affidavit sworn by **Jonathan Stokes** on 16th September, 2016.

The Background

5. The Originating Summons herein dated 11th December, 2015 first came up for hearing in court on 21st January, 2016, but was stood over to 17th of March 2016 to enable the Respondent to file their response. On that day parties were represented as follows: **M/S Terry Mwango** together with **M/S Omondi** appeared for the Applicant while **M/S Barasa** held the brief of Senior Counsel **George Orara** and **Sanjeev Khagram** for the Respondent. **Mr. Jele** held brief for Mr. Gachuhi for the Arbitrator.

6. On 17th March, 2016 M/S Mwango for the Applicant and Mr. Gachuhi for the Arbitrator were ready to proceed with the Originating Summons. However Mr. Muchiri for the Respondent sought adjournment on grounds that he needed to file further affidavit. M/S Mwango did not object to the application for adjournment by Mr. Muchiri. Adjournment was granted and the Originating Summons was now to the heard on 19th May, 2016. Among the orders given on the 17th March, 2016 was that the parties were to file submissions which were to be highlighted on 19th May, 2016. It is to be noted that in all the appearances in this matter Mr. Muchiri was holding brief of Mr. Sanjeev Khagram for the Respondent, and it is a sound assumption that he briefed his instructing counsel of every step in this matter.

7. On 19th May, 2016 when the Originating Summons came up for hearing **Mr. O.P. Nagpal** appeared together with M/S Mwango for the Applicant, while Mr. Muchiri appeared for the Respondent and Mr. Gachuhi appeared for the Arbitrator. However, the matter could not proceed because the Respondent still had not filed their reply to the Originating Summons. The parties then agreed by consent that Mr. Muchiri was to file his client's Replying Affidavit on 27th May, 2016 when the matter would be mentioned to give a date for the Ruling.

8. On 27th May, 2016 Mr. Nagpal was ready to highlight submissions. However, Mr. Muchiri holding brief for Mr. Khagram for the Respondent informed the court that Mr. Khagram had filed herein an application seeking extension of time to file submissions, and that given the gravity of the matter Mr. Khagram ought to be given more time to file the said submissions. Mr. Nagpal opposed that application submitting that what was recorded on 19th May, 2016 was a consent and could not be altered except by another consent. M/S Mwango also opposed the application as being filed in bad faith and only a day to the highlighting of submissions. At this stage, the court confirmed that indeed there was an application which was not dated but which was filed on 26th May, 2016 by the Respondent's counsel seeking as the main order a prayer:

> ***"That the time fixed for the filing of the Respondent's written submissions herewith which expires on the 27th May, 2016 be extended by a further 21 days from 27th May, 2016"***

9. It also happened that the Judge was already on transfer to Machakos with effect from 2nd of June, 2016. With that in mind the court made the following ruling in the matter of the requested extension of time to file submissions:

> ***"I have considered the submissions of the parties in this matter. In as much as I believe the extension of time required by Mr. Khagram is not deserved in the light of the history of adjournments herein, the weight and nature of the application is such that it would be unjust to shut out a party from making submissions to the application. In that regard I make the following orders;***
>
> ***a. Mr. Khagram is granted 21 days to file his submissions.***
>
> ***b. The applicant shall have 15 days to reply if need be.***
>
> ***c. On 18th July, 2016 the Deputy Registrar shall send the file herein to me in Machakos.***
>
> ***d. Ruling will be delivered on 26th August, 2016 in Machakos"***

10. It is the events which have since occurred that have necessitated the current application.

11. Before proceeding further I wish to put it straight that all the orders and directions which have been issued in this matter were issued in the presence, and where necessary, with the concurrence of all parties. Mr. Khagram was at all material times represented in this matter, and all the three parties to the suit were at all times represented. It is therefore not true to allege that any directions were given without adequate participation of the parties. From the foregoing history of the application it is also clear that the court did at all times accommodate Mr. Khagram and his client, for it is clear that all the adjournments herein, which were fully granted, were at the behest of Mr. Khagram who was at all material times represented by Mr. Muchiri. It is also to be noted for record that Mr. Khagram has never physically appeared in this matter and cannot therefore fully attest to the allegations contained in the grounds in support of this application.

12. Also for record, I state here that I received the notification about my transfer to Machakos well after the matter was filed and after several proceedings had taken place in this matter. The direction I gave as to the file being brought to me in Machakos was a standard direction which I made in all the files which I was going to continue handling for the purposes of concluding witness testimonies, writing a ruling or writing a judgment. In total I gave such directions on 32 files. This is verifiable from my letter dated 30th May, 2016 addressed to the Presiding Judge of Commercial & Admiralty Division, copied to the Principal Judge and the Deputy Registrar ***(I have availed a copy of that letter to this file to enable any references thereto).*** In that letter I attached a schedule of matters which would be brought to me in Machakos for the purposes which I have stated above. The schedule has 32 files, with this file being the last one in the list. That is so because 27th May was the last day I heard matters in the Commercial & Admiralty Division and that was the day that this matter last came before me in that division. In all the said 32 files I made a

standard order of file being brought to me in Machakos once parties complied with the process of filing submissions. In all those files, I also directed the Deputy Registrar keeps the files and forward them to me as appropriate. Therefore the allegation by the Respondent that the said orders manifested a bias on the part of the court is not correct. Besides, the orders were made in the presence of all the parties, so that if Mr. Khagram was looking for the file and he could not locate it, all he needed was to ask Mr. Muchiri about it, for Mr. Muchiri knew that the file would be with Deputy Registrar pending filing of submissions for onward dispatch to the Judge in Machakos.

13. Indeed, as at now some of the said 32 files are still in Nairobi while some have been brought to me and I am writing rulings or judgments.

14. The direction by the Presiding Judge that all the matters that I was handling would henceforth be heard and determined by Hon. Lady Justice Grace Nzioka is not inconsistent with the direction I made in this matter. Of course I handled hundreds of files in the Commercial & Admiralty Division, all in various stages of completion, and it would be inconceivable that I would move to Machakos with all those files. However, all concluded matters in which only rulings or judgments were pending were clearly matters for me to conclude, and it would be inconceivable that a party may find it irregular for a Judge to write a ruling or judgment in a matter duly concluded before the Judge. The allegation that I proceeded with this matter against the direction given by the Presiding Judge is therefore baseless and is not supported by any facts. For record, the Presiding Judge is still sending certain matters to me in Machakos where parties feel that the matter had gone too far to be taken over by another Judge. Any allegations therefore, that are meant to distort the history of this matter will not be acceptable.

15. While I waited for the file to be brought to me in Machakos to write a ruling, I received a letter dated 8th July, 2016 addressed to me by Mr. Sanjeev Khagram of **A.B. Patel & Patel Advocates** for the Respondent herein. The letter was addressed to me personally as opposed to the Deputy Registrar, as is the norm. A copy of that, and other subsequent letters are now attached to the Supporting Affidavit of **Paresh Varsani** as exhibit "PV1". The letter raised three(3) issues;

i. Why the judge issued direction for the Deputy Registrar to keep the file,

ii. That the Respondent's advocate wished to highlight submissions before the ruling can be made.

iii. That this file was being treated differently from other files in the Commercial & Admiralty Division which should now be handled by the Judge who took over from me in the Division.

16. I responded to that letter through my letter dated 18th July, 2016 *(copy also attached to the aforesaid affidavit of Paresh Varsani).*

17. In my reply to the said letter, firstly, I observed that it was irregular for the Respondent's Counsel to write to a judge directly in person when the usual channel is through the Deputy Registrar. However, I at the same time absolved the counsel because I felt he was in a dilemma about procedure given I am currently in Machakos and the file was in Nairobi. I then addressed the said three (3) issues, explaining that all the orders and directions were given in the open court and in the presence and consent of all the parties and that Mr. Khagram was at all material times represented by Mr. Muchiri who would have raised any objection to an issue Mr. Khagram was not happy with. I also explained that the direction to the Deputy Registrar to forward the file to me in Machakos was a standard direction I made in all the 32 files whose schedule I had given to the Presiding Judge, the Principal Judge and the Deputy Registrar. I also stated that it was the natural and consequential duty for a Judge who has heard the matter to render a ruling or judgment. I rendered myself in that letter in the following terms;

"Now on the first issue. I directed the Deputy Registry to keep the file and to forward it to me as soon as you filed your submissions upon the court acknowledging your plea for more time. There was nothing more to be done on the file save for the submissions, upon which the Deputy Registrar was to forward the file to me. I do not see anything wrong with that kind of direction. This is so because the direction was made in the open court in the presence of all the parties. If

you did not know that the file was with the Deputy Registrar instead of being in the registry, then you should fault the counsel who held your brief. Further, the direction to the Deputy Registrar to keep the file was a standard order or direction I made in all the 32 files which were to be brought to me in Machakos, and especially the ones in which submissions were pending. I do not therefore understand the substance of this issue.

The second issue is that you have definite instructions to highlight the submissions before the ruling is made. I have already made orders and directions in that regard. Those directions were made after submissions by all the parties. No party objected to those directions. You were ably represented. Is a personal letter written to the Judge enough ground for a Judge to vary orders made on a matter after participation by all the parties? I think not. However, if you wish to open up the matter for highlighting submissions you may raise the issue with your colleagues so that they may accommodate you appropriately. I have no role to play on that unless you make application to vary the said orders. Should that be necessary, I suggest you file the application in Nairobi since the file is still in Nairobi, and have it determined there.

The third issue you raised is that I am treating this matter differently from other matters by directing that it be forwarded to me to write a ruling. I wish to respond as follows: You cannot make that allegation when you have never appeared in this matter personally. I am properly seized of the matter, and I do not understand how it would be unprocedural for me to write the ruling in the matter I am handling. Secondly, those are directions I made in the open court in the presence of all the parties and after submissions in which you were represented.

You have alluded to the directions by the Presiding Judge Hon. Mr. Fred Ochieng that all the matters previously handled by myself would henceforth be handled by Hon. Lady Justice Grace Nzioka. That is correct. However, that is a general direction. I have handled hundreds of files in the Commercial & Admiralty Division all in various stages of conclusion, and naturally I could not carry all those files to Machakos. The current file was completed. Further, the direction by the Presiding Judge was only a guiding direction. This is so because I moved to Machakos with 32 matters in various stages of completion. Your mater was the 32nd one in the list I submitted. In this regard see my letter dated 30th May, 2015 and the schedule attached thereto addressed to the Presiding Judge and copied to the Principal Judge and the Deputy Registrar about the matters with which I moved to Machakos. So your suggestion that I am treating this matter differently is simply not correct.

In the same regard, the Presiding Judge has himself sent me at least two (2) matters to proceed with and determine, with a further request from the Presiding that I allow more files to be forwarded to me for determination depending on the exigencies and stages of the files. So if you think that this matter is being treated differently kindly seek more clarification from the Presiding Judge.

Still on this issue I want to state for record that I need not be the one to write the ruling in this matter. This is more so because the file has not been forwarded to me, and secondly because you may make an application to open up the matter for highlighting submissions. On these grounds, I suggest that the file need not come to me in Machakos, so that any intended applications and the final determination of the dispute can proceed before the Commercial & Admiralty Court in Nairobi."

18. I concluded the letter by directing that since the file at that time had not been forwarded to me in Machakos, and since Mr. Khagram had indicated he needed to highlight submissions, the said file needed not be forwarded to me in Machakos, and that any application to be made and the subsequent ruling should be done in the Commercial & Admiralty Division in Nairobi. I thought that would be the end of the matter.

19. My direction to have the matter mentioned in the Commercial & Admiralty Division appears not to have gone down well, with the Applicant writing the letter dated 3rd August, 2016 to the Deputy Registrar

through its counsel M/S Terry Mwango, voicing their displeasure with the way the Respondent's advocate was communicating with the court in a matter pending ruling before Judge. The applicant's advocates stated that;

> *"it is obvious that the Respondent wants to have this matter heard by a Judge of its choice which is against all tenets of justice and fair play and immediately raises suspicious of foul play…"*
>
> *… the court orders of 27th May, 2016 must be respected by all parties and by the court. Consent orders cannot be unilaterally varied or reviewed."*

20. With those remarks the Applicant's advocates protested any mention of this matter before the Commercial & Admiralty Division. I wish to absolve the Deputy Registrar for any irregularity in listing the matter for mention on 18th August, 2016 at the Commercial & Admiralty Division. The Deputy Registrar must have read my letter dated 18th July, 2016 in which I had given a go ahead for this matter to be finalized in Nairobi. The court record shows that on the 18th August, 2016 the matter was mentioned before Hon. Lady Justice Nzioka in the Commercial & Admiralty Division. The Judge referred back this matter to me in Machakos, reiterating the orders I had made on 27th May, 2016 stating that;

> ***"I therefore order that the file be forwarded to the Presiding Judge in compliance with the last orders on this file to deal accordingly and if there are issues that the parties wish to address, the same should be addressed before that court. This court cannot therefore entertain any party on any issue including who should hear the matter and where. I wish to once again stress that the matter should remain and be heard before Hon. Justice E.K. Ogola unless otherwise ordered by him or other court of competent jurisdiction. The file to be sent to Machakos High Court as ordered by the court.***
>
> ***Ordered accordingly"***

21. The file was duly delivered to me in Machakos, and I invited the parties for a mention on 6th September, 2016 for directions on the matter. On that day of the mention, **Mr. Nagpal and M/S Mwango** appeared for the Applicant, **Mr. Nyamodi** held brief for **Mr. Khagram** for the Respondent, while **Mr. Kahore** held brief for **Mr. Gachuhi** for Arbitrator. Before I could give directions my attention was drawn to the current application which had been filed the day before by the Respondent, seeking my recusal from further hearing of this matter based on the grounds already stated. This is the position where we are now.

The Respondent's/Applicant's case

22. The Respondent's/Applicant's case is contained in the grounds set out in the application and in the two Supporting Affidavits and its submissions filed herein on 3rd October, 2016, and, in summary, is that this matter came up for Mention on various occasions before this court over the course of the year 2016, during which time the Respondent's counsel Mr. Sanjeev Khagram had instructed Mr. Muchiri *(of Messrs. Oraro & Co. Advocates)* to hold brief for him in respect of this matter on 17th March 2016 when direct10ns were given concerning the filing of further responses and submissions. Mr. Muchiri on 19th May 2016 appeared before the court to seek leave to respond to Ms. Shazeen's Supplementary Affidavit, which said Affidavit was expunged with the Consent of the parties as, in Mr. Nagpal's words, the said Affidavit dealt with extraneous issues. The Court then directed the Respondent to file its Submissions within 12 days which was reduced further by the Court who directed that the matter would be mentioned on 27th May 2016. On the 26th May 2016 the Respondent filed an application under Certificate of Urgency seeking an extension of time for the filing of the Respondent's submissions on account of its inability to file the submissions within the timeframe imposed by the Court on 19th May 2016. The Respondent's case is that Mr. Muchiri on 27th May, 2016, while submitting on the application of 26th May, 2016, informed the Court why it was necessary for the Respondent to respond to the Applicant's submissions, which was one from which there was no right of Appeal as such a right was expressly barred by **Section 14(6)** of the **Arbitration Act** and recent case law emanating from the Court of Appeal such as

Nyutu Agrovet v Airtel Networks, but that the court informed him that the orders of 19th May 2016 were by Consent and had not been set aside. Nonetheless the Court extended the time to file submissions and directed that the file be forwarded to Machakos on 18th July 2016 for writing of the ruling which was to be delivered on 26th August 2016.

23. The Respondent's case is that in the month of July 2016 they sought to peruse the court file and to take copies of the proceedings relating to the previous appearances. However, the attempts by their representatives to access the file were unsuccessful as the Court file was said to be kept under lock and key of the Hon. Deputy Registrar on the orders of the court and that further attempts by Mr. Sanjeev Khagram to access the court file when he was in Nairobi on 16th June 2016 while filing the Respondent's submissions were unsuccessful as he was informed that the Court file was kept under lock and key by the Deputy Registrar as aforementioned. The Respondent's case is that given the gravity of the Applicant's application from which no Appeal lay, the Rrespondent expressed reservations as to this application being determined without the submissions being highlighted by Mr. Oraro SC *(for the Respondent)* and Mr. Nagpal *(for the Applicant).* The Respondent's further case is that pursuant to the transfer of the Judge to Machakos, directions were given by the Presiding Judge in the Commercial Division, that all matters which were being previously handled by Judge Ogola were to be heard by Hon. Lady Justice Grace Nzioka, and they were duly concerned with Judge Ogola's further involvement in this matter, and so they instructed their counsel Mr. Khagram to write a letter directly to the judge seeking a clarification of the issues which I have set out above.

24. The Respondent's case is that on 29th July 2016 they received a letter from the Hon. Deputy Registrar *(Mrs. Tanui),* in which the Hon. Deputy Registrar apologized for the inconveniences caused to the Respondent in attempting to trace the file; and stated that she had sought and obtained directions from Lady Justice Grace Nzioka who had directed that the file be placed before her Ladyship for further orders. However, this was not well received by the applicant's counsel Ms. Mwango, who wrote a letter of protest, complaining that the action of the Respondent in seeking directions from the court was irregular, and that they had not been copied in the aforementioned correspondence with the Judiciary. The Applicant's counsel suggested that the Respondent was engaged in a forum shopping exercise seeking to have the matter heard by a Judge of their choice thereby raising suspicions of foul play and stated that her client reserved all its rights in relation to the conduct of the Respondent and its advocates, and would take all steps to stop the attempt by the Respondent to have the matter heard by a Judge of its own choice.

25. The Respondent is apprehensive that given the views in my letter of 18th July 2016, the Respondent may not receive a fair and impartial hearing as the Judge has expressed his disappointment at the Respondent's Counsel conduct and by extension the Respondent. The Respondent is also concerned and apprehensive that despite what they called *"repeated requests"* for the highlighting of submissions, this request has been declined. Given the gravity of this matter and the fact that no right of Appeal exists and in order to uphold the virtues of the Constitution, the Respondent's case is that it is imperative that both parties have a fair and equal opportunity to ventilate their cases without harboring any concerns or apprehensions in the matter. In this respect, the Respondent submitted that they were at a complete loss, given that the Judge had agreed to let the matter be finalized in Nairobi, why the Applicant insists or would want to insist that the Judge continues to handle and determine this matter. The Respondent's case is that it is imperative that this matter is addressed without bringing any disrepute to anyone.

26. The Respondent's case is that when this matter is considered in its entirety, including the letter by the Judge stating that he need not be the one to write the ruling in this matter, it is strange the Applicant continues to insist that this matter be heard and determined by him. The Respondent believes that they need not show actual bias on the part of the Judge *(and which is not what is alleged),* but rather that facts giving rise to the apprehension and in considering the possibility of bias are such that a fair minded and informed observer, having considered the facts objectively would consider that there was a real possibility of bias or that the facts are such that they are likely to produce in the minds of the public a reasonable doubt about the fairness of the administration of justice; that it is irrelevant which Judge hears and determines the matter but it would be in the interest of justice and in keeping with the Constitutional principles of integrity, transparency and the right of both parties to a fair trial that the application by the

Respondent be allowed as prayed.

The Response

27. The Applicant's opposition to the application is contained in its grounds of opposition filed herein on 20th September, 2016; in the Replying Affidavit by **Jonathan Stokes** filed herein on 20th September, 2016 and in its submissions filed on 4th October, 2016. The Applicant's response in summary is that the Respondent has not satisfied the test required for the recusal of a judge; that the alleged apprehension by the Respondent that it will not get a fair hearing is misplaced, without basis and has not been demonstrated; that imagined apprehension of bias is not sufficient to require that a judge recuse himself; that the Respondent has failed to demonstrate why the matter cannot be heard and determined by Judge Ogola; that the Respondent has not come to court with clean hands; that the Respondent previously alleged by its letters of 8th July and 11th July 2016, that it merely wanted to highlight its written submissions and used this as a basis for having the matter mentioned before the Honourable Lady Justice Nzioka but has now changed tact; and that the entire Application is otherwise an abuse of the process of the court.

28. The Applicant's case is that in accordance with **Section lA** of the **Civil Procedure Act (Cap 21), Laws of Kenya**, it is entitled to have its claim heard and determined expeditiously. The Respondent has, from the onset of these proceedings, contributed to the delay in having this matter heard and determined. The Applicant highlighted the following alleged delay caused by the Respondent, in filing a supplementary affidavit. The Respondent was given 7 days to do so and Applicant was given corresponding leave of 7 days to file a supplementary affidavit if need be. The court also gave directions on the filing of written submissions, and fixed the matter for 19th May 2016 for the purposes of highlighting of the submissions. On 19th May, 2016, the matter came up for hearing. The Applicant was ready to proceed. Again, the Respondent sought an adjournment to enable it respond to the Applicant's Supplementary Affidavit. It was then agreed by consent of the parties that the affidavit in question be expunged from the court record on condition that the Respondent filed its submissions by 27th May, 2016. The hearing was adjourned to 27th May, 2016 for highlighting of submissions and taking of a ruling date. On 27th May 2016, the matter came up for hearing. The Applicant was ready to proceed. The Respondent however stated that it had filed an application under certificate of urgency, asking for an extension of 21 days to enable it file its submissions. The Court granted the Respondent the said 21 days to file its submissions, and the Applicant 15 days to file a reply if any. The court then also directed that the Deputy Registrar was to send the file to Machakos on 18th July 2016 to enable the judge write his ruling, which was to be delivered on 26th August, 2016.

29. The Applicant's case is that it is clear from the above chronology that this matter has come up for hearing on several occasions during the course of 2016 and that the Respondent has on each instance, occasioned the adjournment of the hearings. After the court attendance of 17th March 2016, Mr. Sanjeev Khagram and Terry Mwango agreed a timetable by which the parties' written submissions would be filed. This fact is confirmed in the email correspondence at pages 1 and 2 of the exhibit "JS 1". Despite Applicant having filed its submissions as agreed, Respondent's advocates failed to file their submissions within the periods agreed. It is for this reason that Terry Mwango wrote the letter dated 17th May 2016 to Mr. Khagram stating that she would be ready to proceed with the hearing on 19th May 2016, and it was taken that Mr. Khagram would not be filing any written submissions. The aforementioned letter of 17th May 2016 also stated that any application for an adjournment would be opposed. No response was received to this letter. During the attendance of 19th May 2016, Mr. O.P. Nagpal, who appears together with Terry Mwango, were both ready to proceed with the hearing. However, Mr. Geoffrey Muchiri who was holding Mr. Sanjeev Khagram's brief in the matter stated that Mr. Khagram was not ready to proceed with the hearing as he required time to respond to certain matters raised in the supplementary affidavit of Shazeen Chatur sworn on 20th April 2016 *("the Supplementary Affidavit").* These matters touched on the directorship of Paresh Varsani. Mr. Geoffrey Muchiri then insisted that if the matter was to proceed, the aforementioned Supplementary Affidavit needed to be expunged from the court record. In order to prevent the continued delay of the hearing and determination of this matter, Mr.

Nagpal agreed to have the Supplementary Affidavit expunged, on the basis that the matters surrounding Mr. Paresh Varsani's directorship were peripheral to the facts in issue in the suit and which formed the subject matter of the Applicant's Originating Motion dated 11th December 2015. It was then agreed on 19th May 2016 by consent of the parties *inter alia*, that the Supplementary Affidavit be expunged from the court record on condition that the Applicant filed and served its written submissions by 27th May 2016. The matter was then fixed for highlighting of submissions on 27th May 2016. The Applicant submitted that the allegation at paragraph 14 of the Supporting Affidavit that the matter was fixed for mention is clearly false. On 27th May 2016, the matter was erroneously listed as a mention in the day's cause list and this error was in fact pointed out to the court by Mr. Nagpal. It is false and misleading for **Paresh Varsani** to state and/or suggest that Respondent was given a short period of time to prepare and file its submissions, yet Applicant's written submissions dated 20th April 2016 were served on its advocates on 22nd April 2016. This means that Respondent's advocates had, by the hearing date of 19th May 2016, the sight and benefit of the Applicant's submissions for just under one month. The orders entered into on 19th May 2016, including as relates to the period of time within which Applicant was to file its submissions, were by consent of the parties. It is not true that the orders of 19th May 2016 were varied by the court's orders of 27th May 2016 as stated at paragraph 16(d) of the Supporting Affidavit. The court made fresh orders by consent of the parties, to allow the Respondent file its written submissions.

30. On the allegations by Respondent that the court file could not be found in July 2016, the Applicant has noted that its advocates were able to file their submissions in reply on 11th July 2016, and further, as confirmed by the letters filed in court by Mr. Sanjeev Khagram, he was able to file letters in court on 8th and 11th July 2016. The Applicant believes that the Respondent's having filed its submissions on 16th June 2016 and Applicant's submissions in reply having been filed on 11th July 2016, there was no reason why the Respondent's advocate needed to peruse the court file particularly in light of the fact that the file was to have been sent to the Judge in Machakos, on 18th July 2016. The Applicant rejected the allegation that the Respondent was apprehensive about the matter being determined without submission being highlighted by Mr. Oraro, SC, and that the same is an afterthought as no time during these proceedings or court appearances has Mr. Oraro's name come up as the person leading the matter or that he required to highlight any submissions. Further Mr. Geoffrey Muchiri who has been holding brief for Mr. Sanjeev Khagram in the matter, is Mr. Oraro's partner and therefore even if Mr. Oraro was involved in the matter, he would have known from his partner, that the submissions were not going to be highlighted or alternatively, directed his partner to ensure that the request to highlight was made to the court. In any event the matter did come up for highlighting of submissions on 27th May 2016 but this did not happen as the Respondent had not filed its submissions. It was then agreed by consent of the parties that no highlighting would be done. The Respondent knew as per the court orders of 27th May 2016, that it would not be highlighting its submissions and it is safe to state that its written submissions took this into account and were as comprehensive as possible. In any event, the Applicant's response is that there is no procedural or legal right for a party to orally highlight written submissions, and that there is no prejudice a party can claim to suffer in not highlighting written submissions particularly where the party knew before filing its written submissions, that the submissions would not be highlighted.

31. The Applicant submitted that there is no basis in fact or law for the allegation that there were circumstances or serious concerns that gave rise to Respondent's *"apprehension that this matter may not be fairly, objectively and/or impartially determined"*. In fact none has been demonstrated or made out. The Applicant believes it to be true that the Respondent's actions including the deliberate delay in filing its court papers and the recent letters to court filed in July 2016 have been specifically calculated to have this matter moved from Ogola J. The intention is obvious. The Applicant submitted that the above fact is confirmed by the statement in paragraph 21 of the Supporting Affidavit that the Respondent instructed its own advocate to write to the Judge a letter. The Applicant submitted that the bad faith behind the Applicant's letter to the Judge was further demonstrated by the fact that the Applicant's advocates did not disclose or furnish the other parties with a copy of the said letter until 8th August 2016 and only after the same was demanded. The sequence of events relating to the Applicant's letters to the Judge and the

Deputy Registrar, is as follows. On 3rd August 2016, M/S Mwango's firm was served with;

a. a letter dated 18th July 2016 from Ogola J to Mr. Sanjeev Khagram, the Respondent's Advocate.

b. a letter dated 18th July 2016 from the Deputy Registrar of the Commercial & Admiralty Division, Milimani Law Courts; and

c. a mention notice indicating that the matter was to be in court on 18th August 2016.

32. The Applicant observed that the aforementioned letters came as a complete surprise to their advocate M/S Terry Mwango who was not aware of any correspondence that had been sent from Mr. Sanjeev Khagram to either Ogola J and/ or the Deputy Registrar. She immediately and on the same day, made attempts to obtain from the court file, copies of the letters referred to in both Ogola J and the Deputy Registrar's letters, all being from Mr. Sanjeev Khagram. The court file did not have any letters from Mr. Khagram. She then on the same day 3rd August 2016, wrote a letter to the Deputy Registrar *inter alia*, protesting the fact that the matter had been irregularly fixed for mention and that the court had condoned or otherwise facilitated the Applicants unprocedural conduct. In the same letter of 3rd August 2016, M/S Terry Mwango asked Mr. Sanjeev Khagram to supply her with the letters that he had written to Ogola J and the Deputy Registrar. As stated above, these letters were only served on her firm on 8th August 2016. Despite the Applicant's protestations, the Deputy Registrar by a letter dated 15th August 2016 confirmed that the mention would take place on 18th August 2016 before Nzioka J. The issue the subject matter of Mr. Sanjeev Khagram's letters of 8th and 11th July 2016 to Ogola J and the Deputy Registrar respectively, was that the Respondent wanted to orally highlight its submissions. This was a complete and utter departure from the consent orders of 27th May 2016 which were entered into by both parties. When the matter was mentioned on 18th August 2016 before Nzioka J, she rightly directed that the file be sent to Ogola J for further directions as he was the one seized with the matter. The Applicant read the judge's letter of reply to Mr. Sanjeev Khagram, and has noted that the letter adequately responded to and dealt with the matters raised in Mr. Khagram's letter of 8th July 2016; and that the letter does not set out any matters that would warrant the Applicant claiming as it has at paragraphs 27, 28 and 30 of the Supporting Affidavit, that it will not receive a fair hearing.

33. The Applicant also observed, and rightly so in my view, going by the Court record, that is not true that the Respondent has made ***"repeated requests for the highlighting of submissions".*** The court record will confirm this. The parties had by consent, agreed to rely on their written submissions. The alleged need to highlight submissions has been raised as an afterthought by the Respondent and its advocate with the clear purpose of wanting to forum shop.

34. The Applicant also dismissed, and rightly so in my view, the claim by the Respondent that it had not been able to access the file yet it was able to file its written submissions as well as 2 letters to the court. The Applicant submitted that the conduct of the Respondent and its advocate in this matter to date confirm that they are not sincere in this application. The Applicant also believes that Mr, Khagram has in fact called or otherwise attempted to reach the Judge as a result of which Ogola J issued a verbal reprimand in open court, on 6th September, 2016. The Applicant believes that it would be unjust and a sad day for the justice system in Kenya if parties were allowed to behave in the manner that the Respondent and its advocate have and more particularly, to try and approach judges or otherwise make direct contact with them and when that fails, make unfounded allegations aimed at having the matter moved to another court. The Applicant's case is that it is curious whilst the Respondent alleged in its letters of July 2016 to the court that its sole aim was to be allowed to highlight its submissions, it has, once the matter has been put before Ogola J for further directions, completely abandoned the alleged need to highlight submissions. It becomes very clear that the Respondent's aim is not to highlight submissions but is working under a move ulterior but apparent reason. From the onset of these proceedings, the Respondent has consistently delayed the conclusion of this matter including by regularly trying to renege on matters agreed upon in court by consent of the parties. The Applicant's case is that the Respondent has not satisfied the test for the recusal of a judge, and that the present Application is not only made in bad faith,

but has no merit in fact or in law. It is fair and just that the Applicant's Notice of Motion dated 2nd September 2016 be dismissed and directions be issued for the expedient determination of this matter.

The Submissions

35. In support of its application the Respondent referred to the case of ***Justice Philip Tonui & Another – Vs- Judicial Service Commission & Anor (2016) eKLR*****,** where the Court observed that if there is a perception of bias, a Judge ought to disqualify himself. The consideration is not the mind of the Judge but rather whether there is real likelihood of bias if viewed objectively. The test for recusal is what reasonable objective minded people think or where a Judge feels his impartiality may be called into question. The question is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal may be biased; and that judicial officers are required to recuse themselves in proceedings where their impartiality might reasonably be questioned.

36. In ***Jasbir Singh Rai & 3 Others –Vs- Tarlochan Singh Rai & 4 Others (2013) eKLR***, the court stated that the object must remain that justice between the parties must remain uncompromised, due process of law must be realised and be seen to have had its role and, the profile of the rule of law in the matter in question ought to be seen to have remained uncompromised. The Respondent submitted that it was observed in that case that recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a Court of law should have a fair trial; that it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done; that the test of possible apparent bias is thus a "double real possibility" test - whether there is a real possibility that a fair minded and informed observer might think that there is a real possibility of bias.

37. The Applicant submitted that if this court allows this Application, it will set a very dangerous precedent and that is, that a party and its advocate can orchestrate a series of events calculated at having matters moved from one court to another court that may be perceived to be more preferable, for whatever reason. In an era where the general public and the legal profession as a whole is calling for a judiciary that consistently upholds integrity and the rule of law, allowing this Application would do damage to the image of the judiciary. In short, the Applicant submitted that this application has no merit. The Respondent has not satisfied the test for the recusal of a judge; the test being whether a fair minded and informed observer having considered the facts would conclude that there is **a real possibility** that the judge will be biased. This test was affirmed and applied in ***Civil Appeal (application) 1 of 2016 Kalpana H. Rawal v Judicial Service Commission & 2 others (2016] eKLR; Civil Application No. 6 of 2016 Philip K. Tunol & another v Judicial Service Commission & another (2016] eKLR; Civil Appeal 25 of 2002 Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR; Mumias Sugar Co. Ltd v Director of Public Prosecutions & 2 Others (2012) eKLR.***

38. The Applicant submitted that it is reasonable for a judge who has been dealing with a complicated matter and in which incredibly voluminous documents, affidavits, exhibits, and written submissions amounting to thousands of pages have been filed, to conclude the matter. The Application by the Respondent is an abuse of the process of the court and merely a delaying tactic to forestall the determination of this matter. The Applicant submitted that in ***EACJ Application No. 5 of 2007 Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others*** the court held that an application will be deemed to be an abuse of the process of the court where the aim is to delay a matter, rather than a desire to ensure that an applicant receives a fair hearing. The Applicant submitted that this application be dismissed and the court move to give its Ruling on the main suit.

The Determination

39. I have carefully considered the application and opposition to it. I have also carefully considered the submissions of the parties and the authorities and Case Law cited. In every application where the recusal of a Judge is on consideration, the Judge is not entirely an outsider, because some of the reasons advanced for recusal may well be within the knowledge of the Judge. This in itself may sometime make the rendering of a decision easier, for the judge would be in a position to know the merit of any grounds

advanced for his or her recusal. For me, this ruling will be made purely on what is on record on the file. I therefore think that the following issues are relevant in determining the application.

a. Whether the court file was under lock and key.

b. The nature and impact of directions of the Presiding Judge in Commercial & Admiralty Division.

c. Whether, given the Judge's earlier indication that the matter should be finalized in the Commercial & Admiralty Division, the Judge is now bound with that indication.

d. Whether there is lack of transparency and a threat to a right to a fair hearing.

e. Whether there is bias or appearance of bias on the part of the Judge.

f. Whether the Judge abrogated and offended the Judicial Code of Conduct.

g. Whether this Court should proceed and write a ruling on the Originating Summons.

40. Now, addressing the issues. The issue number one is whether or not the court file was under lock and key by the Deputy Registrar as suggested by the Respondent. The answer to this issue is clear from the foregoing paragraphs of this ruling. The first thing is that the direction to the Deputy Registrar to bring the file to me in Machakos when the submissions were filed was made on the court file and in the presence of all the parties. The Deputy Registrar had to be noted to facilitate the process of movement of the file. Indeed the office of the Deputy Registrar is the managing office of all the files. Mr. Muchiri was aware that the Deputy Registrar would facilitate the movement of the file. More importantly however, it is noteworthy that despite the said allegations that the file was kept under key and lock, the respondents were still able to file their submissions on 8th and 11th July, 2016. They were also able to file the two letters they wrote to the Judge and to the Deputy Registrar. But, even assuming that they genuinely could not allocate the file, why could they not ask the Deputy Registrar? The Deputy Registrar herself said that the file was with her so that upon completion of filing of submissions it was to be forwarded to the Judge in Machakos. These allegations are baseless and are intended to secure a cause of action for this application, which this court cannot allow.

41. The second issue was that the Presiding Judge had given directions that matters pending before me would be taken over by Hon. Lady Justice Nzioka. I think there is no dispute on that issue. The issue is being raised by the Respondent to insinuate that for some reason the matter was not mine to write a ruling on. This is a very misleading insinuation. I have given the history of the matter. At no time was the matter ever handled by any Judge other than myself. By the time I issued directions on filing of submissions and a date for ruling the matter was concluded, just as the other 32 matters whose details are now on record. Can the Respondent or its counsel tell the parties herein whom they preferred to write a ruling on a matter which I had presided over? The Respondent should not think Judges are fools. If they have a person in mind to write a ruling in this matter they should say that clearly. The Respondent should know that the Presiding Judge in the Commercial & Admiralty Division todate is still sending me matters from that Division – matters which are still being heard despite his directions - on a case to case basis depending on the stage a case had reached. The Respondent cannot now purport to hide behind those directions to imply that I abrogated the same. I did not. This allegation is baseless and I dismiss it accordingly.

42. The third issue is that in my letter to advocate Sanjeev Khagram dated 18th July, 2016 I had agreed to allow the matter to proceed to conclusion in the Commercial & Admiralty Division. That is correct. At that time the Respondent had indicated that it needed to make application for leave to highlight submissions. Since the file had not come to me in Machakos, I felt it was reasonable to have the matter be concluded in Nairobi especially given that the applicant's intended application, if successful, would open up the matter for further proceedings. But more importantly in my mind, since the file was still in Nairobi, it needed not be sent to me in Machakos. That was the spirit with which I made that direction.

However, when this matter was mentioned in Nairobi on 18th August, 2016, the Judge in that Division made an order that the same be sent to me for the purposes of writing a ruling pursuant to the orders I had made on 27th May, 2016. The file was then brought to me in Machakos, and since it is my file, I see no reason to return it to Nairobi. However, I need to add that the dishonesty on the part of the Respondent is visible in that while they purported that they wanted to make application for the leave to highlight the submissions, they have never pursued that line of highlighting submissions. Instead they have filed this application for the Judge to recuse himself. When I directed that the matter be finalized in Nairobi, I suffered the impression that the applicant was acting in good faith. However, that is not the case now. There is an application before the court for my recusal from hearing this matter. That application must be heard, and determined on its merits, and if it lacks merits, it must be dismissed. That is why I am now not bound by my earlier direction aforesaid. I am only bound by the orders pursuant to this ruling, which I will in a short while pronounce.

43. The forth issue is whether there was lack of transparency, lack of integrity and a denial of right to a fair hearing in the process. The Applicant has made generalized allegations of lack of transparency in this matter and haste with which the matter was handled. As for lack of transparency, it is not clear how opaque the process was. What is clear to me is that this is a matter which involved several advocates appearing for various parties at all times. All decisions and orders and directions were either consented to, or given after party submissions. None of the counsel who appeared in this matter has complained of any impropriety. In fact, Mr. Sanjeev Khagram, who is making this application, has never appeared before me in this matter. It is also noteworthy that none of the counsel who appear with him in this matter or who appear for a fellow Respondent in the main application is supporting this application. Mr. Muchiri who held Mr. Khagram's brief has not filed any affidavit herein to allege bias or any impropriety. I understand that he cannot do that because he was at all times holding the brief of Mr. Khagram, and was satisfied with the process. The Respondent's director in supporting affidavit depones that certain information that he deponed to were sourced from Mr. Muchiri. If that is so, why didn't Mr. Muchiri himself file an affidavit and state what he knows, or better still why did he not lead this challenge against the Judge? The only reason for him not doing that is actual fear of embarrassment if he were to be confronted with actual facts which are known to him. It is also noteworthy that since this application was filed Mr. Muchiri has never attended to these proceedings causing Mr. Khagram to look for other counsel to hold his briefs. Up to the time I am writing this ruling Mr. Khagram has never appeared before me in this matter, and his allegations that the process was not transparent or fair or that the Respondent's right to fair hearing was abrogated are imaginary and speculative. As early as 17th May, the Applicant's counsel wrote a letter annexed to the Replying Affidavit and addressed to the Respondent's counsel reminding them of the orders made in court and the need to file submissions according to the agreed timetable ***(See Correspondences in annexture "JS1").*** That the Respondent did not respond or take seriously the directions of the court is clear. Further the allegations by the Respondent that **Mr. George Orara SC.** was to orally submit before the court on behalf of Respondent, and **Mr. O.P. Nagpal** on behalf of the Applicant is not correct. At no time did **Mr. Muchiri** inform the court that **Mr. Orara** was to make any submissions. It is therefore imprudent even to mention the name of the Senior Counsel in these proceedings, when the court has never at any one time been informed that the Senior Counsel would be making any submissions.

44. The Applicant also insinuated that the process from the filing of the Originating Summons and issuing of a date of ruling was hushed up, rushed or otherwise speedily anchored, causing it to infer the alleged lack of transparency. This is a shocking submission by counsel who appears not to know timelines within which application such as the Originating Summons are now required to be concluded. It needs no reminding that under the Judges Performance Contracting rules, all such applications must be finalized in 90 days. Of course in vast majority of cases, that time line is difficult to achieve due to several logistical processes in the life of a file. But still it is the duty of the court to strive to achieve that. Record shows that it is the Respondent to blame for delay in this matter. It is therefore shocking to hear the same respondent to be the one submitting that the process was hurried. Even with that in mind, how could a process started in December, 2015 and given a ruling date on 26th August, 2016 be in all fairness said to be hurried? Does the Respondent understand the need for expeditious disposal of cases? I have no hesitation dismissing such kind of allegations.

45. The fifth issue is whether there is bias or appearance of bias. Bias is a verifiable quantity. If it is alleged, it must be proved. Otherwise any party who does not like a Judge, or who has an ulterior motive, can just alleged the same and thereby move a matter from one court to another. While I agree with the authorities cited by the Respondent, those authorities do not apply to this case. The authorities cited by the Applicant are more to the point. In my view, the Respondent's apprehension of bias is imaginary, has not been demonstrated and is otherwise farfetched. The court in ***EACJ Application No. 5 of 2007 Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others*** held that there must be **a reasonable apprehension of bias** and that an applicant **must establish the material facts that demonstrate prejudice on the part of the judge.** In **President of the Republic of South Africa v South Africa Rugby Football Union and others (1999) (4) SA 147; Kalpana v JSC** & **2 others (**above), **Muchanga Investments** case (above), the courts stated that an application for recusal cannot be founded on mere suspicion as has been done in this case. In the ***Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others*** (above), the court observed that a recusal application can also not be based on the allegation that a judge does not like a particular member of the Bar, as has been alleged by the Respondent. There must be a real danger of bias. The Applicant also referred to the following cases, whose text support the foregoing conclusions, ***Petition 22 of 2011 & HCCC 27 of 2012 David Mwanqi Muirurl v Chief Magistrate's Court, Malindi & Another (2012) eKLR.*** It is the opinion and the finding of this court that no reasonable person, being aware of all the facts of this case, would read bias in the letter by the Judge of 18th July 2016 written in response to the Respondents advocate's letter of 8th July 2016, nor of the nature of orders issued on diverse dates by the Judge in open court. The alleged apprehension by the Respondent that it will not get a fair hearing is misplaced, without basis and has not been demonstrated. Imagined apprehension of bias is not sufficient to require that a judge recuse himself and therefore the Respondent has failed to demonstrate why the matter cannot be heard and determined by this court.

46. The sixth issue is whether the Judge has acted according to Judicial Code of Conduct. On this matter, there is no charge against the Judge. The applicant has simply restated that Judicial Officers must act in accordance with the Judicial Code of Conduct. I agree. But I add that a counsel appearing for a party is also an officer of the court and must also act within acceptable Judicial Conduct. The Applicant herein has alleged at paragraph 56 of the Replying Affidavit that ***"it would be unjust and a sad day for justice system in Kenya if parties were allowed to behave in the manner that the Respondent and its advocate have, and more particularly to try and approach judges or otherwise make direct contact with them and when that fails, make unfounded allegations aimed at having them move to another court"*** .I do not know the truth about that allegation. In fact, the Respondent has denied the truth of the same. However, I know that on 6th September, 2016, when this matter was due for a mention before me for directions Mr. Sanjeev Khagram, counsel for the Respondent, sent me a message on my phone, vide his Airtel line ending with digits 100. I am not here concerned with the content of the said message. I am concerned with a cardinal principle of judicial officers' conduct, and prudence, which demand that a counsel should not be cozy or attempt to be unduly familiar with a Judge before whom he has an active matter. A counsel should never communicate or attempt to communicate with a Judge before whom he is appearing in a matter, because such coziness or familiarity or attempt at communication may be deemed to influence the Judge on that matter. But more importantly, in this matter, I would not know the intention of Mr. Khagram. It could be a device to draw the Judge into a conversation which could be inappropriate in the circumstances. I did not respond to that message. I emphasize again that I am not here concerned with the content of the message. This incident caused me to verbally, in the open court, ask **Mr. Nyamodi** who was holding **Mr. Khagram's** brief on that day, to tell the counsel to desist from any attempt to reach me directly either by letter or by phone. Mr. Nyamodi promised that he would relay my message to Mr. Khagram. Mr. Khagram in the Supplementary Affidavit of **Paresh Varsani** has denied that the court issued such reprimand. In my view, this reprimand was necessary to remind Judicial Officers about the sanctity of our roles and how careless communications can ruin integrity in the judicial process. The reprimand was also necessary because, as I have stated earlier, Mr. Khagram choose to write directly to the Judge when he knew or ought to have known that the normal channel is through the Deputy Registrar. The rule is that an advocate must never attempt to contact a Judge before whom the advocate is handling an active matter, unless all the other parties are represented or are briefed about the contact. This rule remains regardless of the motive of the contact. Mr. Khagram's attempt to contact me was therefore in bad taste, unethical and an abuse of Judicial Code of Conduct for Counsel. I however, have nothing against counsel for that conduct, and neither do I take it against his client.

47. In my view, the current application was planned and executed well before I started hearing the Originating Summons. Mechanisms were put in place by the Respondent to delay the matter by seeking several adjournments and making sure that they still do not comply by the next date. When my transfer was announced the Respondent then found a perfect time to ensure that the matter did not proceed before my court. The grounds now set out in support of this application were meant to provide a systematic record of real or imagined issues or events to sustain alleged cause of action for the recusal of the Judge. Mr. Khagram's letter of 8th July, 2016 was part of this scheme, and was meant to annoy the Judge to sustain allegation that the Judge had formed a particular opinion about the Respondent's counsel. However, the Judge's response addressed the issues head-on without any element of annoyance, bias or prejudice. The intention appears to have been to discredit or annoy the judge to abandon the matter. The application for recusal is a clear forum shopping, except that it would not succeed. It would not matter who renders a ruling in this matter. The outcome will still be the same. It will be based on the merit of the Originating Summons and nothing else. In my mind I am not prejudiced. I am not biased, and the parties have nothing to fear, for I have heard this matter, and will deliver a ruling based purely on the merit of the case.

48. The seventh issue for determination is whether this court should proceed and write and deliver a ruling on the Originating Summons dated 11th December, 2015. To address this issue I refer to the orders this court made on 27th May, 2016. Among those orders and directions was that the Ruling on the Originating Summons would be delivered on 26th August, 2016. Those orders or directions have not been varied, reviewed or set aside except that the date for the said ruling has been delayed due to these proceedings. Initially, the Respondent had stated that its intention was to apply for leave to highlight submissions. That intention has since been abandoned. There is no prayer before the court for leave to highlight submissions. There is also no prayer for the review or setting aside of the orders and directions of 27th May, 2016. Therefore, should this court dismiss this application, the court will proceed pursuant to the orders and directions issued on 27th May, 2016 and write and deliver a ruling.

49. I have carefully considered the application before the court and opposition to it. It is the finding of the court that the application lacks merit and is an abuse of the process of this court. The same is herewith dismissed with costs to the Applicant/Respondent.

50. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

M/S Mwango for Applicant/Respondent

M/S Koki Mbulu holding brief for Mr. Gichuhi for Arbitrator

No appearance for Mr. Khagram for Respondent/Applicant