REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 29 OF 2014

IN THE MATTER OF ARTICLES 10, 22, 23, 73, 165, 210 (1) AND 258(1) OF THE CONSTITUTION

STEP UP HOLDINGS (K) LIMITED……...…….....1ST PETITIONER

BERNARD GIKUNDI MWARANIA…….....2ND PETITIONER

MARGARET KARWIRWA MWONGERA…….....3RD PETITIONER

AND

SIMON NYUTU GICHARU & 16 OTHERS……...……....RESPONDENT

RULING

1. The application dated 24th April 2015 has been brought under the provisions of **Article 22** and **50(1)** of the **Constitution** and **Rules 3** and **19** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. The Applicant sought the following orders:

> (a) **That the honourable Lady Justice Abigail Mshila does disqualify herself from hearing this petition and that the Petition and all applications herein be heard and determined in a different and/or other court.**
>
> (b) **That the honourable court be pleased to issue such orders as may be fair and just to secure the Applicant's rights to a fair and just trial; and**
>
> (c) **That the costs of this application be provided for.**

2. The application is supported by the affidavit of Margaret Karwira Mwongera, the 3rd Petitioner, sworn on 24th April 2015 and her further affidavit sworn on 17th May 2015.

3. The applicants have sought the recusal of the court from hearing this matter because they are believe that the court will be biased against them. They allege that this court is not an impartial and independent court as envisaged by **Article 50(1)** of the **Constitution**. They arrived at this conclusion from the way the court handled these proceedings.

4. The first complaint is that this court has completely disregarded court directions with regard to

the manner of hearing of the preliminary objections that were filed by the Respondents and proceeded to issue conflicting orders that have resulted in confusion. These orders were issued by Hon. Wendoh, J on 28th May 2014 and again on 30th May 2014 that the preliminary objections should be argued by way of written submissions and that on the various dates given for hearing, the parties would only simply highlight the submissions.

5. When the matter was placed before this court on 14th July 2014 and on 29th October 2014 however, the court proceeded to direct that the preliminary objections would be argued orally and not by way of written submissions.

6. The court maintained this stand despite being notified by Counsel for the Petitioner of the earlier directions that the parties file their written submissions first. Counsel alleges that his insistent on the compliance with the earlier directions resulted to an exchange with the court.

7. The second complaint is that the court, without considering the urgency of this petition and without any reason, kept the file in chambers between 14th and 23rd July 2014. During this time, the petitioner's counsel was unable to trace the file and could not take hearing or mention dates. This action contributed to the delay in concluding this matter.

8. The third complaint is that this court coerced the Petitioner's Counsel into giving an undertaking that he would not pursue an application for recusal of the judge from hearing the case. Following these procedural improprieties by the court, the Petitioner's counsel lodged a complaint with the Judicial Service Commission by the letter dated 5th January 2015. The Petitioner's Counsel notified the court of this fact on 18th January 2015 in chambers in the presence of Counsel for the Respondents.

9. When the matter came to open court, Counsel for the petitioner sought an adjournment in order to make a formal application for disqualification of the judge. However, the court and all Counsel for the Respondents implored the Petitioner's Counsel not to make the application. They then proceeded to extract an oral undertaking from the Counsel that he would not make this application if the adjournment he sought is granted.

10. The Petitioner believes that the conduct of the court has demonstrated a likelihood of real bias or an apprehension of real bias against her. It is therefore in the interest of justice that the court recuses itself and the matter is heard by another judge. In addition, no prejudice will be suffered by the Respondents if the orders sought are granted.

11. The application was opposed. The 1st, 2nd and 3rd Respondents filed a Replying Affidavit sworn by Professor Stanley Waudo on the 7thJuly 2015. They argued that a trial court has discretion to determine how the matter will be heard. In any event when the matter came for hearing on 14th July 2014, all the parties except the Petitioner were ready to proceed. He was however granted an adjournment and allowed to take a date before another court. On 19th November 2014, the court's directions that the matter be argued orally were made with the consensus of all the parties. In any event if the Petitioners were dissatisfied with these directions, they ought to have appealed or sought review.

12. The allegation that the file was missing from the registry is unsubstantiated because firstly there is no written complaint to this effect and according to the court's movement record, the file was taken back to the registry on 14th July 2014 and not 23rd July 2014 as alleged. That all the directions given by the court were with the consensus of the parties.

13. With regard to the allegation that the court extracted an undertaking from the Petitioner's Counsel, it was deposed that when the matter was mentioned in chambers on 18th January 2015, Counsel for the Petitioners notified the court of the complaint but indicated that neither he nor

his client had an objection to the court handling the matter.

14. However when the matter was called out in open court, counsel sought an adjournment in order to apply for the disqualification of the judge. The other parties objected to this application for adjournment. It was disallowed and they proceeded to argue their preliminary objections. When the Petitioner's Counsel was called upon to respond to the applications, he applied for an adjournment so that he could prepare for a flight to Mombasa.

15. This application was opposed by the Respondents who were concerned that his true intention was to apply for recusal of the judge. The Petitioner's Counsel gave the undertaking, on his own motion, that he would not revive his earlier application. The 2nd Petitioner who was also in court also told the court that she would not pursue that application.

16. The Respondents perceive this application as one which is solely intended to vex or annoy the court and that the Petitioners are simply forum shopping. They submitted that it should not be allowed.

SUBMISSIONS

17. Counsel for the Petitioners relied on the Supporting and Further Affidavits and the annexures attached thereto. He urged the court to apply the standards of a reasonable man and ensure that justice is seen to be done in this case by allowing the application.

18. Counsel for the 1st, 2nd and 3rd Respondents submitted that the Petitioners were seeking preferential treatment and have not been intimidated by the court. The allegation regarding filing of written submissions, Counsel submitted that all applications should be argued orally in court. The requirement of filing written submissions is a recent development. In addition, the parties may highlight the submissions or leave it to court and the Petitioners could also have relied on their written submissions and also made oral arguments. What is material is that the petitioners have not alleged that they were denied a chance to present their case. They have not shown any prejudice that they suffered.

19. He submitted that the allegations that the court extracted an undertaking from the Petitioners' Counsel or that it kept the file in chambers were unfounded and only intended to intimidate the court.

20. Counsel argued that there must be cogent evidence to support the allegations of bias. The test is not that of a reasonable man in the street but rather, ***'a keen observer'*** or ***'a well informed and thoughtful observer who has all the facts and has examined the record of law'***. This person must appreciate that the judge has taken an oath to uphold the law and sworn to dispense justice without fear or favour. He is also aware of the mechanisms of court room procedure and understands that judges will make comments at the outset of the trial but will change their mind after hearing oral arguments.

21. Counsel submitted that the facts disclose a claim for judicial bias which is attributed to the manner in which the court does its work.

22. Counsel for the 4th to 16th Respondents adopted the submissions and arguments of Counsel for the 1st, 2nd and 3rd Respondents.

DETERMINATION

23. The sole issue for determination is whether this court should recuse itself from handling this matter.

24. The right to fair hearing is the cornerstone of our legal system. It is guaranteed by **Article 50 (1)** of the **Constitution** which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

25. Impartiality, which applies not only to the decision but to the decision making process as well, is recognized as essential to the proper discharge of office in the Bangalore Principles of Judicial Conduct, 2002. It is a value precedent to the true realization of the right to fair hearing. **Rule 3(1)** if the Judicial Service Code of Conduct and Ethics made under **Section 5** of the **Public Officer Ethics Act, Cap 18**3 (hereinafter referred to as the Code) refers to impartiality as ***"a mind which is free from external influence from any quarter."*** The judges therefore take oath to dispense justice to all without prejudice or bias. Justice is perceived as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the case. (See **Locabail (UK) Ltd** V. **Bayfield Properties Limited & Another,** [2000] 1 ALL ER 68 at page 69).

26. For purposes of preserving the confidence of the public in the judicial system, it is pertinent that impartiality not only be present but be seen to be present by the litigants. Therefore, notwithstanding that the court believes it will be impartial, if there are circumstances that will lead a fair minded person to conclude that there was a likelihood of bias then the court must disqualify itself.

27. The test is that the circumstances lead to apprehension of bias rather than proof of actual bias. This was stated in **Attorney General of Kenya** V. **Prof' Anyang' Nyongo' & 10 Others**, EACJ Application No. 5 of 2007 [U/R] cited in **Gitobu Imanyara & 3 Others** V. **Attorney General,** [2012] eKLR as follows:

> **"The test of whether there is bias of real danger or real apprehension of bias. We think that the objective test of reasonable apprehension of bias is good law. The law is stated variously; but amounts 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."**

28. The perception of bias is judged not from the mind of the litigant but from that of a reasonable fair minded observer. In **Attorney General of Kenya** V. **Prof' Anyang' Nyongo' & 10 Others** *(supra),* the court held:

> **"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."**

29. In **President of the Republic of South Africa** V. **South African Rugby Association 199 (4) SA 147** the court held a similar view and defined that person in the following words:

> **"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was or will not be**

impartial."

30. In the English case of **Lawal** V. **Northern Spirit,** [2003] UKHL 35, the reasonable fair-minded observer was defined as:

> **"A fair-minded observer who is a reasonable member of the public and is neither complacent or unduly sensitive or suspicious. He will know that public authorities operating a statutory scheme should be deemed to be professional and able to put out of their mind irrelevant considerations of personal conflict."**

31. **Rule 5** of the **Judicial Service Code of Conduct and Ethics** provides for the instances where the impartiality of the judicial officer may be reasonably questioned to include:

> a) **If the officer has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him;**
>
> b) **he has served as a lawyer in the matter in controversy;**
>
> c) **he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or**
>
> d) **he or his spouse, or a person related to either of them or the person or such person or a friend is a party to the proceedings.**

32. The integrity of court is presumed, and the onus lies on the person alleging bias to prove that such circumstances exist. I now turn to determine whether the circumstances disclosed in this case, are likely to create an impression of bias against the petitioners to a fairly minded observer.

33. The Petitioner's case is that the way the court has conducted these proceedings has led her to believe that it will not be impartial. Its conduct towards the Petitioner has hostile and biased so that ultimately she is convinced that the court goal will not be to serve justice.

34. The first complaint was with regard to the contradicting directions issued by this court. The parties are presumed to know that the court seized of a matter has the discretion, with the consensus of the parties, to direct how that matter will proceed. These directions are not determinations of the rights or duties of the parties and are therefore synonymous to an order or judgment. Therefore, directions issued by one court are not binding on another and a court therefore is free to determine how best to dispose of a matter regardless of earlier directions by another court.

35. In this regard I rely on the holding in In **Adbiwahabdullahi Ali** V. **Governor, County Government of Garissa & Others,** [2013] eKLR, the court held in this regard:

> **"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, is 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 the court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical."**

36. Further the Petitioner must know that in an adversarial system like ours, the parties will almost always have conflicting arguments and different views on the issues before the court. Therefore, the court as the impartial arbiter will be required to make a determination in the interests of justice.

37. A reasonable person does not expect the court to rule in his favour in order to feel that it is impartial. He only expects that the court's decision is based solely on the evidence and submissions of the parties and no other outside factors.

38. Therefore, on 18th February 2015, when the Petitioner's Counsel applied for adjournment in order to file an application for recusal, the court had a duty to consider the objections of the Respondents. They alleged that the Petitioner had ample time to file the application between the time when the complaint was lodged to when the matter was coming up for hearing. Counsel informed the court that the Petitioners' Counsel had intimated to them that he would proceed with the hearing even on the previous day and it was therefore not just for him to seek an adjournment at that point.

39. The Petitioner's counsel sought an adjournment on the same day for the reason that he wished to prepare for his flight. This application was made after the Respondents had argued the preliminary objections and before he could respond to them. They were apprehensive that the sole purpose of seeking the adjournment was to file the application for recusal and in order to alleviate their fears, the Petitioners' Counsel gave the undertaking that he would not pursue this claim, this he did voluntarily and on his own motion.

40. A party has the right to waive his right to seek recusal of a judge. Therefore, the Petitioner's claim that the court should not have allowed Counsel to obtain the undertaking that he would not object to this court hearing the case has no merit.

41. The claim that the file was in the court's chambers are completely unsubstantiated. It is common knowledge that only files which are pending for ruling or judgment are kept in chambers, all other files are forwarded to the registry. There was no evidence that this was not the case with this file.

42. In the end, I find that the application for recusal has no merit. This court has the constitutional duty to determine all cases that are placed before it and cannot choose which case to hear. Similarly parties are not at liberty to pick the judges that will hear their cases. Therefore an application for disqualification of a judge should not be allowed lightly as doing so would lead to erosion of public confidence in the courts. (See **Andrew Alex Wanyandeh** V. **The Attorney General & Kenya Railway Corporation Nairobi**, H.C.C.C No. 844 of 2005 [u/r])

43. In this case, the reasons proffered by the Petitioner are not likely to lead a reasonable observer who knows that the court is under duty to uphold justice to presume that it will be biased solely for the reason that it did not adopt the petitioners' arguments.

44. For the above reasons, I find that the application dated 24th April 2015 has no merit and it is dismissed with costs to the Respondents.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2015.

A. MSHILA

JUDGE