REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 138 OF 2013

(Appeal arising from the Judgment of [RACHEL NGETICH, AG. CM] dated 10.9.2013 in the Chief Magistrate's Court Bungoma in Election Petition No.1 of 2013)

NATHAN OBWANA …… APPELLANT

V E R S U S

ROBERT BISAKAYA WANYERA …….. 1ST RESPONDENT

CALEB GEKONDE ..…… 2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION …… 3RD RESPONDENT

R U L LI N G

The application dated 13.11.2013 seeks three prayers as follows:-

1. **That the Honourable Justice Said Chitembwe do disqualify himself from hearing this Appeal.**
2. **That this appeal be heard before any other Judge within this region.**
3. **That costs of this application be in the cause.**

The application is supported by the grounds on its face and four affidavits. There are three affidavits of counsel for the applicant sworn on 13.11.2013, 21.11.2013 and 27.11.2013. There is the affidavit of the applicant sworn on the 13.11.2013. The appellant filed a replying affidavit sworn on the 22.11.2013 while Mr. Akenga Collins, counsel for the 2nd and 3rd respondents swore an affidavit on the 25.11.2013.

Mrs. Mumalasi, counsel for the applicant submitted that she attended court on 12.11.2013 and the court was biased against her and her client. Counsel only intended to inform the court that there were important documents that were not part of the record but the court ignored that. Counsel was told to sit down three times. Counsel had filed an application seeking to strike out the appeal as the appeal had not been signed by the appellant but the court made up its mind and dismissed it without giving counsel a hearing. After the current application was filed a supplementary record of appeal was filed and this shows that the appeal was not ready for directions. Counsel further submitted that the record of appeal did not have supplementary submissions of the petitioner. The court has to be given all the relevant materials despite the fact that the appeal has to be disposed of within a period of six months. Counsel submitted that on the 12.11.2013 an application for stay of execution was allowed and this was improper

as it had not been listed for hearing. The proceedings show that the 2nd and 3rd respondents do support the appeal. The 1st respondent did not respond to the application for stay of execution on 12.11.2013.

Mrs. Mumalasi went on to submit that after what transpired in court she informed her client who was not in court on that date what had happened and the 1st respondent became apprehensive that he would not get justice before this court. The respondents have dragged Mrs. Mumalasi's marriage into this matter and that is improper. Counsel is only doing her work and has no interest in the matter. It is not every day when a litigant can make an application asking the court to recuse itself but there must be good grounds. If a reasonable man was in court on 12.11.2013 and saw what happened he would conclude that the 1st respondent would not get a fair trial before the court. Counsel relied on the case of **ABDIWAHAB ABDULLAHI ALI VS GOVERNOR, COUNTY GOVERNMENT OF GARISSA & OTHERS [2013] eKLR** It is counsel's further submission that the applicant is not shopping for a judge to hear the appeal. The applicant is not angry or the application is made out of any vendetta. It is further contended that the court allocated time for the hearing of the appeal but the 1st respondent was given only 40 minutes while the appellant was given one hour and the 2nd and 3rd respondents were jointly given one hour. This shows that the court was biased against the 1st respondent as he was given only 40 minutes. Further, there was another appeal relating to the same issue that was withdrawn but the court only awarded a paltry sum of KShs.25,000/= as costs. That amount is tantamount to undercutting and the 1st respondent believes that the court was biased in awarding those costs.

The applicant further contends that he is apprehensive that he will not get justice before this court. Counsel for the applicant sought the court's permission to leave and she was allowed as she did not want a situation where there was going to be confrontation. The court showed animosity and hostility to counsel for the 1st respondent. The applicant is only seeking the right to be heard but this was denied. The pattern of events including counsel for the applicant to be told to sit down shows bias on the part of the court and justice will not be seen to be done.

Mr. Mokua, counsel for the appellant opposed the application and relied on the two affidavits. Counsel submitted that the application has been presented by a party who is dissatisfied by the decision relating to an earlier application. The application dated 12.11.2013 was determined by the court and it is improper to argue the merits of the application. The applicant is complaining about costs that were awarded in another appeal and the extension of court orders. These are not sufficient grounds for a judge to disqualify himself. A supplementary record has been filed and the missing documents were not intentionally left out. The missing documents are contained in the lower court file. On the 12.11.2013 counsel for the applicant walked out in protest while the court was in session. Counsel could have appealed against the ruling of the court. When the other appeal was withdrawn, the application for striking out that appeal was settled. Counsel decided to walk out instead of waiting to see if the application for stay was going to be heard. If counsel for the applicant is of the view that the time allocated to her is not sufficient she can seek more time instead of complaining of the court being biased. The complaints are not based on facts or substantive grounds but on apprehension or fear. Mr. Mokua further submitted that counsel for the applicant alleges that the court got into contempt with the counsel for the appellant and the 2nd and 3rd respondents when the matter was listed for directions on the 12.11.2013 which allegations are serious and ought not to be raised by a counsel. The allegations that counsel for the appellant was shouted at are not based on facts. It is only the belief of counsel for the applicant.

Mr. Akenga, counsel for the 2nd and 3rdrespondents relied on the affidavit sworn on the 25.11.2013 and opposed the application. Counsel submitted that the application is made in bad faith. The mere mention of bias and the scanty evidence by the applicant's affidavit is too remote to warrant any reasonable person to suggest any bias whatsoever. There is a consent on record marking Bungoma Misc. Application No. 196 of 2013 as withdrawn as between the applicant's counsel and the firm of NyaundiTuiyot. The consent was not initiated by the court. The interim orders were extended on 10.10.2013 by a different Judge. The matter was to be mentioned before Justice Gikonyo on 30.10.2013 and the allegations that the court has kept on extending the interim orders is not true. Appeal No. 50 of

2013 was withdrawn in court by the appellant in that appeal and this was not made through the urging of the court. The cost of KShs.25,000/= awarded to the applicant herein was on the higher side as nothing had been done on the appeal. The applicant did not appeal on the costs awarded. Counsel relies on the case of **L.H. LIMITED & 2 OTHERS VS R.J.W. & 4 OTHERS [2012]eKLR** and that of **ABDIWAHABABDULLAHI ALI VS GOVERNOR, COUNTY GOVERNMENT OF GARISSA & OTHERS [2013] Eklr** Counsel further submit that the court should look at the interest of both parties and consider whether justice will be served if it disqualifies itself. No act of bias has been proved and if counsel for the applicant is dissatisfied with the court orders she can appeal against the orders.

There are four affidavits in support of the application. The supporting affidavit by Mrs. Mumalasi sworn on the 13.11.2013 contends that counsel was in court at 2.30 p.m. when the matter was set for directions. The court dealt with all the cases up to around 3.15 p.m. when the judge informed her that the other counsels in this matter were not in court and she should wait. Paragraphs 13 and 14 of the affidavit states as follows:-

> **13. That since my colleagues in the matter had not even called me to indicate whether they were coming, what time they would arrive and why they were late, I wondered why the court would allow counsel on one side to hold both the court and counsel on the other side at ransom. I wondered whether he had talked to them and knew where they were, otherwise why would he tell me to wait indefinitely? Courtesy demands that in such circumstances at least counsel who is late should call and explain that he would be late and the reason for the lateness. I would have informed court accordingly and waited for them.**
>
> **14. On 12/11/2013, when I appeared before him and informed him of the 1st respondent's application dated 11/11/2013, he indicated that he had not seen the application, started saying that if that application was the same as the other application, he will not hear me. I was surprised because besides this application, I had not made any other application in this Appeal. He asked what I was seeking for in this application but before I could explain, he raised his voice against me and told me to sit down and he went ahead and dismissed the application summarily on grounds that the application raised a matter of technicality**.

Counsel further contends that she asked the court on the material day before the other counsels attended court that she wanted to be given time allocation but the court refused and informed her that the court was ready to work up to 7.00 p.m. and she should sit around and wait. Her colleagues had not even called her to indicate that they were coming. When the court resumed at around 4.00 p.m. counsel informed the court that she had filed an application dated 11.11.2013 but the judge did not consider whether lack of a signature on a pleading or a memorandum of appeal in respect of an Election Petition is a matter that goes to the core of the appeal and has nothing to do with technicality. Counsel tried to apply for certified copies of the proceedings and ruling but the judge shouted at her telling her to sit down. The application was summarily dismissed. The affidavit further explains that the record of appeal had left out many other documents as itemized in paragraph 23 thereof.

The second affidavit is that of the petitioner also sworn on the 13.11.2013. The petitioner avers that he has lost confidence in the impartiality of this court and he is apprehensive that he shall not get justice before the court. He knows that even the devil has the right to be heard. On the 12.11.2013 his counsel attended court and later informed him that the counsel was unable to represent him properly as expected as the judge had been very hostile to her and denied her audience. He concurs with the averments contained in his counsel's affidavit. The third affidavit was sworn by Mrs. Mumalasi on the 21.11.2013. The contentions in that affidavit are that an application by the 1st respondent dated 11.9.2013 was allowed yet it had not been listed for hearing on that date. Further when the court allocated time, the appellant was given one hour, the 2nd and 3rd respondents were given one hour while the 1st respondent was only given 40 minutes. Those directions show that the court is biased and the court's hostility towards the appellant's counsel was done in the open in the presence of members of public, counsels for the appellant and 2nd and 3rd respondents as well as Mr. Elung'ata advocate.

There is the 4th affidavit sworn on the 27.11.2013. The purpose of that affidavit was to respond to issues raised by the 1st respondent in his replying affidavit sworn on the 22.11.2013. Paragraph 7 of counsel's affidavit states as follows:

> **7. That I am neither emotional, bitter nor angry against the Judge and if this matter is decided in a biased manner I have nothing to lose because the suit herein concerns my client not me as I do not have personal interest in this matter**.

Most of the issues raised in that affidavit are similar to those ones in the other affidavits. Counsel maintains that it is as a result of the current application that a supplementary record of appeal has been filed. Her application to have the appeal struck out was based on Article 159 of the Constitution as where an appeal is not signed the court should not waste its precious time by hearing it as it is already fatally defective.

The appellant filed a replying affidavit sworn on the 22.11.2013. It is indicated in that affidavit that the application is intended to unfairly intimidate the court by attacking the personality of the judge and that counsel for the applicant has expressed a lot of bitterness against the judge. The appellant further avers that the interim orders were at one time extended by Justice Dulu.

Mr. Akenga, counsel for the 2nd and 3rd respondents filed an affidavit sworn on the 25.11.2013 and disputes the contentions raised by the appellant and his counsel. Counsel maintains that on the 5.11.2013 the issue of supplementary record of appeal was verbally raised and the court directed the applicant's advocate to file a supplementary record of appeal to introduce those things she thought were missing. Counsel avers that Bungoma High Court Civil Appeal No. 50 of 2013 was withdrawn on 5.11.2013 and costs were assessed at KShs.25,000/= for each of the two respondents. Counsel contends that most of the issues raised by the application relies and drawn in a quarrelsome manner.

For purposes of understanding the current application it would be fair to give a background of this matter. The 1st respondent herein contested for Ward representative of Lwandanyi Ward in Bungoma County. The appellant was declared the winner while the 1st respondent was the runner up. The petition by the 1st respondent was successful and the election of the appellant was nullified. The appellant filed Civil Appeal No. 48 of 2013 before the Bungoma High Court. Caleb Gikonde and the IEBC filed Misc. Civil Application No. 196 of 2013 before the Bungoma High Court seeking stay of execution of the decision of the trial magistrate. There was also filed High Court Criminal Appeal No. 50 of 2013 by Caleb Gikonde and IEBC. In essence therefore there were three separate files dealing with the same issue. The Bungoma Civil Appeal No. 50 of 2013 became Kakamega High Court Civil Appeal No.133 of 2013. Misc. Application No. 196 of 2013 became Kakamega Misc. Application No. 135 of 2013. Bungoma Civil Appeal No. 48 of 2013 became Kakamega High Court Civil Appeal No. 138 of 2013.

The three files have always been dealt with together. The record shows that when the appellant filed Bungoma Civil Appeal No. 48 of 2013 he also filed an application dated 11.9.2013 seeking stay of execution in the same file. That application went before Justice Gikonyo on the 16.9.2013 and the judge noted as follows:-

> **"16.9.2013**
>
> **Before Gikonyo J.**
>
> **Khisa – court clerk**
>
> **Court – There is no urgency in this matter. There is no impending danger that will befall the Appellant at the seat is yet to be declared vacant and election date announced by IEBC. In the circumstances I decline to certify the application dated 11/9/2013 as urgent. Instead, I direct that the Appellant to prepare and file the record of Appeal as per Rule 34 (6) of the Elections (Parliamentary and County**

Elections) Petition Rules 2013. The 21 days allowed for that exercise started running from 11/9/2013 when he filed the memo of Appeal. The Appellant should have complied with Rule 34(5) of the Election Rules, 2013 by the close of 18th day of September 2013.

The appeal be fast tracked by the Deputy Registrar.

The matter be placed before me on 10/10/2013 for directions and for fixing a hearing date. The timeline laid down in Rule 34 must be strictly complied with.

GIKONYO, J."

The record further shows that when the 2nd and 3rd respondents filed Bungoma Misc. Application No. 196 of 2013 the file was taken to the Busia Court on the 24.9.2013. Justice Tuiyot noted as follows:-

"24th September 2013

Before Justice F. Tuiyot

Akengo for the Appellant

Court – I disqualify myself from hearing or dealing with this matter. The firm representing the Appellant Nyaundi Tuiyot& Co., a law firm I owned prior to my appointment to public service.

TUIYOT, J.

24/09/2013"

After justice Tuiyot disqualified himself the file was brought to the Kakamega High Court. Justice Majanja called me on phone informing me that there was an urgent matter that had emanated from Bungoma and that justice Tuiyot had disqualified himself from hearing the matter and that I should handle it. The file for Misc. Application No. 196 of 2013 and the other two files were placed before me on the 26.9.2013 and I did grant interim orders of stay. The matter was listed for further directions on Tuesday 1.10.2013 at 11.00 a.m. At this juncture I had not read the record in Civil Appeal No. 48 of 2013 where Justice Gikonyo had listed it for directions on 10.10.2013. On 1.10.2013 the record of the court shows as follows:-

"01.10.2013

Before S. J. Chitembwe, J.

Court clerk – Juma

Mrs. Mumalasi for 1st respondent

Mr. Akenga for the appellant

Mr. Mokua for the 2nd respondent

Court – This file was placed before me on 26/9/2013 after Justice Majanja called me indicating that Justice Tuiyot of Busia had recused himself from hearing the matter. I was under the impression that the Appeal had been referred to the Busia Court from Bungoma. However, when I checked Appeal file No. 48/2013 – Bungoma, I saw the order of Justice Gikonyo who listed the matter for mention on 10th October 2013.

There is also Appeal No. 50/2013 dealing with the same issue. Since Justice Gikonyo did not recuse himself and there is no written instructions from Nairobi asking me to hear this appeal, I do direct that the three files be listed for mention before Justice Gikonyo of Bungoma on 10/10/2013 for further directions. It would be unfair on my part to vacate the inerim orders. The interim orders are hereby extended up to 10/10/2013.

SAID CHITEMBWE

JUDGE"

I was not sitting on the 10.10.2013 when the file was supposed to be mentioned in Bungoma before Justice Gikonyo. The file was brought back to Kakamega and placed before Justice Dulu who extended the interim orders and referred it back to Bungoma for mention before Justice Gikonyo on 30.10.2013. An order was extracted and the three files were taken back to Bungoma. On the 17.10.2013 the files were placed before Justice Hellen Omondi who noted the following:-

17th October 2013

Before H. Oomondi, Judge

Order - This file has been placed before me by the Deputy Registrar, Bungoma for directions. It has a sad life, an appeal having been filed, it has shuttled between the courts at every turn without getting to be heard. I have spoken to Majanja, Judge in his capacity as the Judge heading the Election Court. due to likely conflict as the Judge sitting in Bungoma had handled Election Petitions involving the County and Constituencies (which include the Wards), none of us can handle this matter, without antennae being raised on issues of likelihood of bias.

This file was then sent to Busia, on instructions of Majanja, Judge, but the Resident Judge there disqualified himself due to a possibility of conflict of interest.

The Hon. Majanja, Judge, then advised that the file be sent to Kakamega High Court for hearing and determination. Unfortunately, since no such order was recorded, the file found its way back to Bungoma.

I now direct the Deputy Registrar, Bungoma to URGENTLY transmit this file to Kakamega High Court, and the same be placed before the resident Judge for further directions

H. OMONDI, JUDGE

17.10.2013

It is the order of Justice Hellen Omondi issued on 17.10.2013 which brought back all the three files to Kakamega. The files were placed before me on the 30.10.2013 and the proceedings of that date were as follows:-

"30.10.2013

Before – S. J. Chitembwe, J.

Court clerk – Juma

Miss Mumalasi for 1st respondent

Mr. Akenga for applicants

Mr. Mokua for 2nd respondent

Miss Mumalasi – The orders are hampering the interest of the 1st respondent. We pray that it be handled as a matter of urgency.

S. J. CHITEMBWE, J.

COURT – Matter is listed for hearing on 12/11/2013 at 2.30 p.m. The interim orders are extended to that date.

S. J. CHITEMBWE, J."

I wish to state that when the files were placed before me on the 30.10.2013 all counsels for the parties herein were present in my chambers. The operating file was Misc. Application No. 196 of 2013. In the presence of all the counsels I did call Justice Gikonyo on his mobile phone inquiring why the files had been brought back to me. Justice Gikonyo informed me that he was not at the station and the directive to have the matter heard in Kakamega came from Nairobi. Justice Gikonyo further informed me that he had handled an election petition dealing with the position of the Senator and was not comfortable to hear an appeal arising from a Ward that was included in the Senator's petition. Counsels for all the parties herein were present in my chambers and heard the conversation. It is after that conversation when the directions to have the matter listed for hearing on 12.11.2013 was granted. On 12.11.2013 the Misc. Application dated 20.9.2013, that is, application No. 196 of 2013 was withdrawn with no orders as to costs.

On the other hand Civil Appeal No. 50 of 2013 was mentioned on the 30.10.2013 when counsels were present as indicated herein above. The proceedings for that date are as follows:-

"30th October 2013

Before Hon. Mr. Justice Said J. Chitembwe, Judge

Court clerk – Juma

Miss Mumalasi for 1st respondent

Mr. Akenga for the appellants

Mr. Mokua for 2nd respondent

Miss Mumalasi – We have filed an application to have the appeal struck out. We would like to have that application heard first before the issue of consolidation of the appeals is considered.

S. J. CHITEMBWE, J.

Mr. Akenga – It is okay, I need three days to respond.

S.J. CHITEMBWE, J."

File No. 50 of 2013 came before me on the 6.11.2013 and the record for that day was as follows:-

"6th November 2013

Before Hon. Mr. Justice Said J. Chitembwe, Judge

Court clerk – Juma

Mrs. Mumalasi for 1st respondent/applicant

Mr. Akenga for appellant

Mr. Mokua for 2nd respondent

Mrs. Mumalasi – It is our application dated 30/10/2013. It seeks to have the Appeal struck out.

Mr. Akenga – I have instructions from my client not to proceed with the appeal. I pray that Appeal No.50 of 2013 be marked as withdrawn with no orders as to costs.

Mrs. Mumalasi – We have no objection to the withdrawal save for costs.

S. J. CHITEMBWE, J.

Mr. Mokua – We have no objection to the withdrawal of the appeal. However, there is new development on the issue of stay as it was obtained in this appeal.

S. J. CHITEMBWE, J.

Court – The appeal No. 50 of 2013 is marked as withdrawn. Costs to the respondents assessed at KShs.25,000/= each.

S. J. CHITEMBWE, J."

With regard to file No. 48 of 2013 the same was also mentioned on 30.10.2013 when counsels for all the parties were present and the proceedings for that date were as follows:-

"30.10.2013

Before – S. J. Chitembwe, J.

Court clerk – Juma

Miss Mumalasi for 1st respondent

Mr. Mokua for appellant

Mr. Akenga for 2nd and 3rd respondent

Court – Matter is fixed for directions on 12th November at 2.30 p.m."

The file was mentioned on 12.11.2013 for purposes of directions at 4.15 p.m. On that date Mrs. Mumalasi was in court by 2.30 p.m. as correctly indicated in the application herein. The court had resumed at about 1.00 p.m. and went on up to about 3 p.m. when all the other matters listed for that date other than the appeal herein had been finalized. The court informed Mrs. Mumalasi to wait for the other

counsels. At about 4.15 p.m. the court resumed with all counsels present and the proceedings for that date were as follows:-

"12th November 2013

Before Hon. Justice Said J. Chitembwe, Judge

Court clerk – Juma

At 4.15 p.m.

Mrs. Mumalasi for 1st respondent

Mr. Mokua for appellant

Mr. Akenga for 2nd and 3rd respondent

Mr. Mumalasi – We have filed an application dated 11/11/2013. We have just served.

Court – I have read the application dated 11/11/2013 seeking to strike out the appeal. The reason given is that the advocate who filed the appeal did not file an authority to indicate that the advocate has authority to file the appeal. I do find that the issue is technical and does not assist in settling the dispute herein. The court is at liberty to order for the filing of the authority if need be. The application dated 11/11/2013 is hereby summarily dismissed with no orders as to costs.

S. J. CHITEMBWE, J.

Mr. Mokua – I do prefer to have the appeal heard orally.

S. J. CHITEMBWE, J.

Mrs. Mumalasi – I prefer to file an appeal first. The appeal is not ripe for directions.

S. J. CHITEMBWE, J.

Mr. Akenga – We can have the appeal heard orally.

Court – The appeal is fixed for hearing on Friday 29th November 2013 at 8.30 a.m. The appellant is allocated one (1) hour. The 1st respondent shall take 40 minutes, 2nd respondent and 3rd respondents one hour. The 1st respondent is at liberty to appeal against the ruling of the court that has just been delivered. Parties to file their list of authorities within ten (10) days.Appellant to serve the 1st respondent hereof.

S. J. CHITEMBWE, J.

Mr. Akenga – We shall not nee the ballot papers as they were counted during the hearing of the petition.

Court – Since parties have confirmed that the ballots were recounted, there shall be no need to call for the ballot boxes. Directions as above.

S. J. CHITEMBWE, J.

Mr. Mokus – I filed the application dated 11/9/2013 seeking orders of stay in terms of prayer three (3). We rely on the application and the supporting affidavit.

S. J. CHITEMBWE, J.

Mr. Akenga – I have no objection.

Court – Application dated 11/9/2013 is granted in terms of prayer three (3) in form of stay of execution of the orders of the subordinate court pending the hearing of the appeal.

S. J. CHITEMBWE J."

A summary of the contentions by the applicant can be itemized as follows:-

1. That counsel for the 1st respondent was shouted at and told to sit down on the 12.11.2013.
2. That the applicant filed an application dated 11.11.2013 seeking to strike out the appeal but the same was summarily dismissed by the Judge.
3. That when the Judge saw the application dated 11.11.2013 he became angry and told the applicant's counsel that if the application was the same as an earlier one then he was not going to hear it yet no similar application had been made in that file.
4. On the 12.11.2013 an application for stay of execution was heard in the absence of the 1st respondent yet it had not been listed for hearing on that date.
5. On the 12.11.2013 the court gave directions on how the appeal would be heard. The appellant was allocated one hour, the 2nd and 3rd respondents were jointly allocated one hour while the 1st respondent was allocated 40 minutes.
6. The court kept on extending the interim orders of stay of execution which orders were detrimental to the 1st respondent.
7. That Mrs. Mumalasi attended court on the 12.11.2013 at 2.30 p.m. when the matter was listed for directions but counsels for the other parties were not in court. Despite the fact that her colleagues had not called her to explain their lateness the court told Mrs. Mumalasi to sit and wait and it appeared that the Judge had contacted the other counsels.

According to the applicant the above issues lead to only one conclusion that the court is biased against the 1st respondent. The applicant is apprehensive that justice will not be done to him as there is a consistent pattern of bias against him.

The current application is brought under Articles 50, (1) 52 (1) and (2) and 159 (1) (2) (a) and (d) of the Constitution of Kenya 2010 and Order 51 Rule 1 of the Civil Procedure Act.

The Oxford English Dictionary define bias **as an inclination or prejudice for or against one thing or person**. The Blacks' Law Dictionary defines the word bias in the following manner:

"Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."

The background to this matter shows that it was not meant to be heard before the Kakamega court but due

to unavoidable circumstances the file was brought to this court. I have purposely reproduced all the proceedings in the three files so that a reasonable man can know the history of this matter. When the matter was placed before me on the 30.10.2013 all the counsels were present in my chambers when I contacted Justice Gikonyo on phone. The idea was to return the files to Bungoma but Justice Gikonyo somehow declined to hear the appeal. Counsels on that date agreed to have the appeal fixed for directions on the 12.11.2013. The Misc. Apllication No. 196 of 2013 was fixed for hearing on 6.11.2013. As at that time no issue of bias had been raised. The interim orders were granted in Misc. Application No. 196 of 2013 on the 26.9.2013. The orders were further extended on the 1.10.2013. The file was mentioned before Justice Dulu on 10.10.2013 and the interim orders were extended. Once again Justice Dulu directed that the files be placed before Justice Gikonyo on the 30.10.2013. Thus far, it was not clear where the appeal was going to be heard.

On 17.10.2013 Justice Hellen Omondi made an order to the effect that the files be placed before the Kakamega court on the 30.10.2013. The background shows that the file has been shuffling from Bungoma to Busia, Busia to Kakamega, Kakamega to Bungoma and back. When Justice Gikonyo mentioned the file for appeal No. 50 of 2013 he noted that the Election Petition Rules were to be complied with and the appeal was to be fast tracked. He directed that the matter be placed before him on the 10.10.2013 for directions and for fixing of a hearing date. Similarly when the files were placed before Justice Hellen Omondi the court noted that the Appeal **has shuttled between the courts at every turn without getting to be heard.**It is agreed that the appeal has to be heard within a period of six (6) months from 9.9.2013 when it was filed. By the time the appeal was fixed for directions on the 12.11.2013 three months had elapsed before any directions were given.

Counsel for the applicant filed an application seeking to strike out Appeal No. 50 of 2013. The grounds for that application were that the appeal was filed on 20.9.2013 but 21 days had elapsed yet no record of appeal had been served upon her. That application was compromised as the appeal was withdrawn. For purposes of clarity that appeal had been filed by the Independent Electoral and Boundaries Commission together with one of its staff who was a party in the petition. After that appeal was withdrawn and Misc. Application No. 196 of 2013 was marked as settled, what remained was Appeal No. 48 of 2013 filed by the Appellant who had won the election. The three files had always been mentioned together and Appeal No. 48 of 2013 was listed for direcitons on 12.11.2013. As indicated herein above the appeal was filed on 11.9.2013. As correctly pointed out by counsel for the applicant no application had been filed seeking to strike out the appeal. The file had an application for stay of execution filed on the 11.9.2013. Since parties had agreed on the 30.10.2013 as well as on the 6.11.2013 that the appeal was coming for directions on 12.11.2013, the court could not understand how an application though dated 11.11.2013 was filed on the same date of 12.11.2013 when the matter was coming for directions. Indeed the application was not in the court file and when the matter was called for directions, counsel for the applicant was of the view that her application ought to have been heard before directions were given. Counsel for the applicant contends that the court was biased as it allowed an application for stay of execution on the 12.11.2013 yet that application had not been listed for hearing. It is not clear why counsel for the applicant wanted her application for striking out of the appeal to be heard on 12.11.2013 yet it had been filed on that date and served to the other parties in court.

The allegations of bias are as explained herein above. The interim orders were granted by the court as it is the discretion of the court to grant or deny orders. At the rate at which the matter has been proceeding, if there were no interim orders a by-election would have been conducted and completed by now. The orders were meant to maintain the status quo and fast track this appeal. Counsel for the applicant complains that the amount of Kshs.25,000/= awarded to the respondents as a result of the withdrawal of Appeal No. 50 of 2013 was on the lower side and once again this shows bias on the part of the court. The costs were awarded to two parties and each got an equal amount. Other than a notice of appointment of advocate nothing had been done in that file. In any case all the three files had been dealt with together and the issue of costs will follow the outcome of the appeal. Although counsel is entitled to costs as she was instructed, it would have been punitive to award exorbitant costs for an appeal that was withdrawn by consent. If the applicant feels that the sum of KShs.25,000/= was awarded because the court is biased against her, the same can be said by the appellant herein who was awarded the same amount when the appeal was withdrawn. Costs are assessed by the court and cannot be a subject of bias on the part of the

court.

From the history of this matter, it is clear that when the court dismissed the application dated 11.11.2013 seeking to strike out the appeal as the same had not been signed by the appellant, counsel for the applicant did not take it lightly. Counsel is of the view that even the devil is entitled to be heard. The courts are there for purposes of litigating disputes between parties. The adversarial nature of our Judicial system requires that the presiding judicial officer be an umpire and balance the hearing process between the parties. Counsel for the applicant had never mentioned about filing an application to strike out the appeal when she appeared before me on the 1.10.2013, 30.10.2013 and 6.11.2013. Any judicial officer presiding over a court is supposed to take charge of the proceedings. This was not the first application I summarily dismissed in a matter involving an election petition. In Kakamega Election Petition No.**4** of **2013**, the court did summarily dismiss an application filed by the petitioner as it was of the view that the same was a waste of court's time. Counsels in that matter took the ruling humbly and proceeded with the petition.

The Notice of Motion dated 11.11.2013 was based on the contetion that the appeal was signed by the Firm of Kamau Langat Advocate without due authority from the appellant. Counsel contended that no authority had been filed with that appeal. Rule 34 (1) of the Election Petition Rules requires that an appeal arising from an election petition be signed in the same manner as a petition. The Memorandum of Appeal indicates at the bottom as follows:-

"KAMAU LAGAT & COMPANY

DULY AUTHORISED ADVOCATES FOR THE APPELLANT"

The main question is why would a counsel file an appeal without authority. Is the appellant not interested in the appeal and if so why did he file an application for stay of execution dated 11.9.2013 and signed the affidavit in support of that application. Should the court simply strike out an appeal on that ground. Counsel for the applicant is of the view that the appeal was fatally defective and it ought to have been struck out. The application was filed three months after the appeal was filed on a date the appeal was fixed for directions. It is clear that counsel was not happy when the application was dismissed. The court tried to take directions on the 12.11.2013 but counsel was insisting that the matter was not ripe for directions as some other documents were not part of the record. Counsel also informed the court that she intended to appeal against that ruling and the court was aware about that intention. All what the court wanted to do was to give directions on the determination of the appeal and the issue of leave to appeal was going to be dealt with. Indeed leave was granted to the applicant to appeal after counsel for the applicant had walked out. Before counsel walked out of the court, she was asked by the court how long she would take but insisted that the appeal was not ripe for directions. That is recorded in the proceedings of that day and the court proceeded to get directions from counsel for the 2nd and 3rdrepsondents.

The issue of recusal of a judicial officer has been dealt with in many cases. In some cases courts have granted the request and in some the request has been denied. In some cases courts have recused themselves from hearing a matter without any application being filed. Justice demands that it must not only be done but should be seen to be done. This was explained in the case of **RVSUSSEX JUSTICES, EX PARTEMcCARTHY, [1924] 1 KB 256**.In that case Mr. McCarthy was involved in a road accident while riding a motorcycle. He was charged before a magistrate court for dangerous driving. Unknown to him and his Advocates, the presiding clerk to the court was a member of the firm of solicitors that had lodged a civil claim against Mr. McCarthy for the accident victim. The trial court convicted Mr. McCarthy and held that the presiding clerk did not in any way interfere with the proceedings as the court had reached its verdict without consulting the clerk.

On appeal by McCarthy while setting aside the conviction, Lord Hewart C.J. stated that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. The issue is not what actually was done but what might appear to have been done.

In Kenya the Court of Appeal in the case of **REPUBLIC V MWALULU & 8 OTHERS: [2005] 1 KLR** the court did set up the principles on which a judge would disqualify himself from a matter and stated as

follows:

1. *When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.*
2. *In such cases the Court must carefully scrutinize the affidavits on either side,, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.*
3. *The Court dealing with the issue of disqualification 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 interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.*
4. *The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself.*

In the case of **R V BOWSTREET METROPOLITAN STIPENDIARY MAGISTRATE AND OTHERS, EX PARTE PINOCHET UGANDA (NO.2) (1999)1All ER 577** at page 586 the court noted as follows:

> *"The fundamental principle is that a man may not be a judge on his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not be normally himself benefiting, but providing a benefit for another by failing to be impartial."*

In the case of **KIMANI V KIMANI [1995-1998] VOL.1 EALR page 134** the Court of Appeal allowed an appeal on the ground that the presiding judge had exhibited a biased attitude towards women in general. The court noted as per Justice Lakha that the correct test to apply is whether there is the appearance of bias rather than whether there is actual bias. In the case of **KAPLAN & STRATON V Z ENGINEERING CONSTRUCTION LIMITED & 2 OTHERS [2000] KLR** Justice Lakha was asked to disqualify himself with one of the grounds for the request being that the judge had had two lunches with one of the counsels appearing in that matter. The judge declined the request and held as follows:-

> *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*

From the above case law it is clear that the test to be applied is an objective one and the fact alleged to constitute bias must be specifically pleaded and established. All what is complained about by the applicant herein is the manner in which the court conducted the appeal. The interim orders were initially granted exparte and were extended by this court on the 1.10.2013 as well as 30.10.2013. As explained herein above if the orders had not been granted a by-election would have been conducted by now. It is

better to stay the process of a by-election pending the finalization of the appeal as opposed to allowing the IEBC to incur expenses in preparation of the by-election only for the court to stop it at the last minute so as to hear the appeal. The orders were granted lawfully and there was no complaint of bias until when the current application was filed. Similarly, the contentions by counsel for the applicant that the judge could have contacted the other counsels in this matter is misplaced. The same is made without any proof and is a wild allegation. On the 12.11.2013 it is true that the court did its work up to 3.15 p.m. and Mrs. Mumalasi was already in court at that time. Since the other counsels were not in court which was a fact, I told Mrs. Mumalasi to wait for her colleagues. If doing so can be interpreted to mean that I had talked to the other counsels then let it be it. That is the opinion of Mrs. Mumalasi as is contained in her sworn affidavit.

As indicated herein above, due to some unavoidable circumstances, this file was brought to the Kakamega court. I did not call for the appeal to be brought here. There is no judge in Bungoma who can hear the appeal. The judge in Busia recused himself. Justice Dulu who is the other judge in Kakamega is on leave. There is no genuine reason given for me to disqualify myself. Allegations of bias touches on the conscience of the judge and his impartiality in handling the matter. It is common knowledge that an appellant would submit on his appeal and later respond to the submissions by the respondents. It is also clear from these proceedings that the 2nd and 3rd respondents are represented by one counsel. Each of the two respondents could have opted for a different advocate who would have been allocated separate time. A consolidated time of one hour was given to the two respondent's but that was construed to be an act of bias by the court. That is the applicant's opinion and there is nothing to prove that the allocation of time was biased.

When the court told Mrs. Mumalasi to sit down it was only exercising its power to control proceedings in court. If the court is to allow counsels or their parties to conduct the proceedings in the manner they want then there will no order in court. Counsel was not shouted at as alleged. It is true that counsel was told to sit down and wait which she complied. The taking of directions started and the court heard from counsel for the appellant that the appeal be heard orally instead of by way of written submissions and that was noted. It was the turn for counsel for the 1st respondent to give her indication on directions but counsel was not willing to take directions and as the record shows counsel stated that the file was not ripe for directions and she would prefer to file an appeal. That was noted. It was at that juncture that counsel politely requested to be excused and leave. The request was politely granted and the directions were taken. Such a process cannot be held to amount to bias as it is evident that Mrs. Mumalasi was not happy with the summary dismissal of her application. Counsel contends that the sum of KShs.25,000/= awarded as costs amounts to undercutting which is unethical. However, it would be a more serious professional misconduct for a counsel to file an appeal without instructions which was what Mrs. Mumalasi was contending through her application dated 11.11.2013. If indeed the issue being raised was merely the absence of the appellant's signature on the memorandum of appeal, counsel could have simply notified her colleague for the matter to proceed. But to wait three months down the line to raise an issue of signature on the memorandum of appeal is not to be sincere. The fundamental concept of justice is to hear parties substantively and make a determination on their dispute. I am certain that Mrs. Mumalalis would not have been happy had the election petition before the subordinate court was struck out on technicalities. As noted by Justice Gikonyo the time lines had to be complied with. If we were to allow parties to dictate how the proceedings are to be conducted then I was to allow the appellant and the 2nd and 3rd respondents to file a response to the application dated 11.11.2013. Fix that application for hearing, thereafter make a ruling and either strike out the appeal without hearing it or dismiss the application then come back for directions.

From the way the three files were handled, it is established from the record that at no given time before 12.11.2013 were the parties seen by the court. All along the matter was mentioned in chambers. On 6.11.2013 the matter was handled in open court and nothing much happened on that date as parties agreed to withdraw Appeal No. 50 of 2013 as well as mark Misc. Application No. 196 of 2013 as settled. I have never seen the parties in this file and I don't even know them. It was my first time to see counsels for the appellant and 2nd and 3rd respondents. I cannot remember having seen them appearing before me in other matters leave alone having their mobile numbers. In the case of **ANDREW ALEX WANYANDEH –**

VS- THE ATTORNEY GENERAL & KENYA RAILWAY CORPORATION; NAIROBI MILIMANI HCCC NO. 844 OF 2005, Justice Hatari Waweru was asked to disqualify himself on the allegations of being biased due to several commends he had made when the matter was proceeding. The judge noted as follows:

> *"There is nothing like a litigant veto of the court or judge hearing his matter; litigants cannot choose their judges. Applications for disqualification of judges should not be lightly allowed. That would tend to erode public confidence in the courts and the determination of justice."*

Counsels appearing before court should be well guided that the courts are supposed to take charge of the proceedings and when that is done it is out of proper court management as opposed to partisanship. I do wish to associate myself with the sentiments of justice Mutuku in the case of **ABDIWAHABABDULLAHI ALI VS GOVERNOR, COUNTY GOVERNMENT OF GARISSA & OTHERS [2013] eKLR** when she stated the following:-

> *"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 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 court are hierarchical. I want to believe that we have moved away from the old era when it used to be a "jungle out there".*

In the new Constitutional dispensation it is clearly stated that the judicial authority is derived from the Kenyans. Some of the complaints against the Judiciary, more specifically against the Court of Appeal, was that the court was technical and used to dismiss matters on simple technical issues. Kenyans demand that their matters be heard substantively. Gone are the days when a whole record of appeal would be struck out merely because the decree appealed against was not included in the record yet the record of the trial court is before the court. Rule 34 (8) of the Election Petition Rules requires that the court whose decision is being the subject of appeal should send its proceedings and all relevant documents relating to the petition to the High Court to which the appeal is preferred. It is clear that even if some of the documents were not included in the record of appeal, the entire record of the trial court was going to be brought before this court and counsels were going to refer to them during the hearing of the appeal. The non-inclusion of some of the documents was not fatal to warrant the postponement of the taking of directions to another date.

I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter.

In the end, I do find that the application dated 13.11.2013 lacks merit and the same is dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 10th day of December 2013

SAID J. CHITEMBWE

J U D G E