REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Petition 671 of 2006

CONSTITUIONAL LAW·

What an independent and impartial court means under s 77(9) of the Constitution

- ***Rules against bias stated***
- ***The test of a reasonable man's apprehension applied***
- ***Bill of Rights binding on the Judiciary***
- ***Relevant case law and International instruments applied***
- ***Petition against the Judge upheld and order of transfer made.***

HOMEPARK CATERERS LIMITED…….....……PETITIONER

Versus

THE HON. THE ATTORNEY GENERAL……...……..…….1ST RESPONDENT

J.A.O……...……..……...…..…….2ND RESPONDENT

DR. PRIMUS OCHIENG…….…..…1ST INTERESTED PARTY

METROPOLITAN HEALTH SERVICES LIMITED…....2ND INTERESTED PARTY

JUDGMENT

This is a petition filed by Home Park Caterers Ltd. against the Hon. the Attorney General and J.A.O. the 1st and 2nd Respondents and Primus Ochieng and Metropolitan Health Services Ltd. who are Interested Parties. The petition is brought pursuant to Sections 70, 77(9) and (10), 84(1) of the Constitution. The Applicant seeks the following orders and declarations:-

(a) A declaration that the trial of **NRB HC Misc Civil Suit No. 38/03 by the Hon. Justice Ojwang** amounts to infringement of the Petitioner's rights to a fair trial;

(b) A declaration that if the trial of NRB **High Court Misc Civil Suit No. 38 of 2003** proceeds before the Hon. J. Ojwang, justice will not be seen to have been done;

(c) An order that the hearing of NBR HC Misc Civil Suit No. 38/03 do proceed for hearing before a judge of the High Court of Kenya

than Hon. Justice J.B. Ojwang;

(d) An order that the hearing of NRB HC Misc Civil Suit No. 38/03 before Hon. Justice J.B. Ojwang be stayed until a judge other than the Hon. Justice J.B. Ojwang is appointed to hear it;

(e) The costs of this petition.

The petition is grounded on the affidavit of Caleb Kibera the Director of the Petitioner dated 9th November 2006. It has numerous annextures to it which includes an affidavit sworn by Dr Sobbie Mulindi, dated 9th November, 2006.

The Petitioner also filed skeleton arguments on 16th April 2007 plus a list of authorities filed on 17th April 2007. The Petitioner is represented by Mr Eboso.

The 1st Respondent neither filed a replying affidavit nor skeleton arguments. Mr Njoroge appearing for the Attorney General submitted on points of law.

The 2nd Respondent opposed the Petition and filed a Notice of Preliminary Objection dated 30th January 2007, a Replying Affidavit by JAO Ombour dated 31st January 2007 and filed in court on the same date and another Affidavit sworn by Lilian Abishai on 17th April 2007 and filed in court on 18th April 2007. Mr. Otiende Amolo urged the petition on behalf of the 2nd Respondent. The Interested Parties were represented Mr Mwiti. The 1st Interested Party Primus Ochieng swore an Affidavit dated and filed in court on 22nd November 2006 and written submissions dated and filed in court on 25th April 2007.

This Petition arose out of **High Court Misc Civil Suit 38/03** which was filed as an Originating Summons but after directions were given, it was ordered to proceed as a normal suit. In that Originating Summons, the petitioner is the 1st Defendant, the Interested Party is the 2nd Defendant and J.A.O. the 2nd Respondent herein is the Plaintiff.

The 1st Respondent, the Hon. the Attorney General is not a party in **HC Misc 38/03** but is joined to these proceedings as the legal advisor of the Government which secures and guarantees the individual's fundamental rights which the Petitioner alleges have been or likely to be violated if **HC Misc 38/03,** which is partly heard proceeds to hearing before our brother, Justice Ojwang.

In the Originating Summons, the Plaintiff sought seven prayers which we shall set out later in this judgment as we compare and contrast them with the proposals and Recommendations of the Task Force on HIV & AIDS in which Justice Ojwang is said to have been one of the consultants.

Petitioners Submissions

According to Mr Eboso, during the trial in **HC Misc 38/03**, the Plaintiff relied on a draft bill (amongst other documents) prepared for Parliament's approval, which the Petitioners came to learn, was prepared by a Task Force on Legal Issues Relating to HIV & AIDS chaired by Mr Ambrose Rachier, Mr Otiende Amolo and Catherine Mumma as joint secretaries and Justice J.B. Ojwang was one of the 73 Consultants. Mr Eboso relied on the affidavit of Dr Sobbie Mulindi in which he averred that (annexture (CK 6) he too was a consultant in the Task Force and the issues they considered and adopted were,

(i) HIV & AIDS, and the right to privacy and confidentiality

(ii) HIV & AIDS in the workplace;

(iii) HIV & AIDS and sensitive language and phrases relating to HIV & AIDS

(iv) HIV & AIDS and other Human Rights Questions.

That the Task Force came up with a report exhibited as ZM 1 which acknowledged and extended special thanks to Justice Ojwang among others, for their contributions to the Report. By then Justice Ojwang was the Dean of the Faculty of Law University of Nairobi.

According to the averments of Dr Mulindi, some of the views taken by Justice Ojwang were captured in the Task Force Report, which Report has culminated in the enactment of an Act of Parliament, The HIV and AIDS Prevention and Control Act 2006 (Act No 14 of 2006). The said Act awaits a commencement date. (See para 10 and 12 of Dr Mulindi's Affidavit).

Mr Eboso submitted that Mr. Otiende Amolo, Mrs Catherine Mumma and Justice Ojwang never disclosed the fact that they were part of the Task Force that came up with the Report on policy issues on HIV & AIDS. It is Mr Eboso's contention that the opinions, guidelines and recommendations regarding HIV & AIDS have a direct bearing on the issues that were pending for determination by the Court in **38/03 (OS).** Counsel compared the statement of issues in HCC 38/03, issues No. 3, 8, 9, 11, 14, 15, 17 and 18 with the recommendations of the Task Force Report.

For example:-

Issue No 3 - is whether the HIV test was conducted with the informed consent of the Plaintiff. Recommendation (i) at page 22 of the Task Force Report is that there had to be consent of the party before any test could be conducted.

Issue 8 – whether the Plaintiff was provided with any counseling prior to the test. The Task Force Report recommended counseling before a test was done which is reflected as Part of Recommendation (i) at page 22.

Issue No 7 – whether the 2nd and 3rd Defendant advised the Plaintiff of the HIV test and therefore her status, it is reflected at recommendation No (ii) page 43 of the Task Force Report.

Issue 11 - whether the 1st Defendant terminated the employment of the Plaintiff on grounds of her HIV positive status or other reasons: This is captured as Recommendation No (ii) at page 35 of the report, that HIV infection does not constitute lack of fitness to work.

We shall consider and set out more of these comparisons later in the judgment. It is Mr Eboso's contention that considering the issues at hand in **HCC 38/03** and the recommendations of the Task Force, the judge may have a disposition to certain positions or inclinations towards certain issues which the Task Force dealt with and the Petitioner has a genuine apprehension that he will not get a fair hearing before that court. That there being no law in Kenya governing the subject of HIV and AIDS, the judge is likely to determine the case based on his own perception of the issues since his mind is already predisposed as a consultant in the Task Force.

Mr Eboso further submitted that during the pendency of **HC Misc 38/03**, the Plaintiff's Counsel, Mr Otiende Amolo had given interviews to the media on what they intended to achieve by the Task Force. Annexture (CK 7) a newspaper report, gives part of the interview. Some of the intended achievements as per the newspaper report are as follows:-

1) That no patient shall be tested without their consent;

2) That even if one is tested, he was not bound to disclose to the employer.

3) That and no employee would be sacked for being HIV positive.

Mr Eboso contends that these are the same views espoused by the Task Force and are similar to the issues raised in **HC Misc 38/03**. That in the interview with the media, Mr Amolo described **HC Misc 38/03** as a test suit and that is the more reason why the Petitioner is apprehensive that the judge handling the case may be predisposed to the same views as the Task Force proposals having shared the same platform with

Mr Amolo in the Task Force.

Counsel also submitted that Catherine Mumma (PW 3) was called as a witness in **HC Misc 38/03** and produced the Bill which was lifted from the Report of the Task Force, word for word. That the witness took the same position as the report on issues of consent of the party before a medical examination is carried out, confidentially of a person's medical report. The testimony of Catherine Mumma is exhibited as CK 5 Page 35-36.

On the question of Bias Counsel urged that the court allowed PW 3 Catherine Mumma to interpret the letter authored by the Petitioner but when Mr Eboso wanted to cross examine her an objection was raised that she was not the author and the court upheld that objection and that buttressed the Petitioner's fear that the judge's mind may have been influenced by the Task Force's stand on the HIV issues.

Counsel urged that S 77 of the Constitution guarantees an impartial and independent court and the trial court in 38/03 is unlikely to meet that test. Counsel relied on the following case law

1. REPUBLIC v SUSSEX JUSTICES (1924) K B p 256 where Lord Hewart held that it was important that justice should not only be done but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

2. **METROPOLITAN PROPERTIES & CO LTD v LANNON (1968) 3 ALL ER 304 (pg 310).** Lord Denning held that the test of whether there was real likelihood of bias was not to look at the mind of the judge but the court would look at the impression given to the other people.
3. **KING WOOLLEN MILLS v STD CHARTERED FINANCE LTD & OTHERS CA 102/1994,** the Court of Appeal upheld the principle in the **LANNON CASE** and Justice Dugdale was disqualified from hearing the case.
4. **LOCABAIL (UK) LTD v BAYFIELD PROPERTIES LTD (2000) 1 ALL ER 65** the court considered Applications which raised common questions concerning disqualification of judges on grounds of bias. In that case the court acknowledged that it was difficult to prove actual bias as that is not expected of a judge whose duty is to protect litigants but the court should look at the matter through the eyes of a reasonable man.

Mr Eboso concluded that if a reasonable man were told that issues to do with HIV were discussed at a forum and recommendations made and that the judge participated in the forum; that one of the joint secretaries gave evidence as an expert witness, while another represented the Plaintiff, the reasonable man would frown upon that as there would be questions raised.

On the question of this court's jurisdiction in a Constitutional matter arising out of a case before a court of concurrent jurisdiction, Counsel said that this court has jurisdiction and relied on the following cases:-

1. **MAHARAJ v AG OF TRINIDAD & TOBAGO (No 2) (1978) 2 ALL R 670**

2. **MARTHA KARUA v AFRICA RADIO T/A KISS FM HCC 288/04**

3. **KBS LTD & OTHERS v AG NRB HC MISC SUIT 413/05.**

It was held in the **MAHARAJ CASE** that a claim for redress in a motion that falls within the original jurisdiction of the High Court under S 6 (2) (c) (equivalent of our S 84) of the Constitution, involves an enquiry into whether the procedure adopted by the judge contravened the party's right that is complained of and that this court has jurisdiction to conduct such enquiry under s 6 (s84) of the Constitution. The **KARUA** and **KBS CASES** reached the same decision as the **MAHARAJ CASE.**

Mr Eboso urged that the Applicant's case has not been controverted by the averments in the Affidavits filed by the 2nd Respondent. That the Respondents have failed to show exactly what Prof Ojwang's contribution to the Task Force was and nothing has been put forth to rebut the Petitioner's evidence. That

the judge is unlikely to be impartial and independent as envisaged under S 77 (9) of the Constitution and should be detached from the proceedings so that another judge takes over. In conclusion, counsel clarified that he has all the respect for Justice Ojwang, his legal ability and as his teacher, but that the circumstances of this case dictate that he steps aside for another judge to take over and hear the matter.

1st Respondent's Submissions

Mr Njoroge, counsel for the 1st Respondent, submitted that the Attorney General being the legal advisor to the Government does not consider himself a proper party to the proceedings because the petition is as between two private parties who are the petitioner and the 2nd Respondent. That the Court has not been made party to this petition and the Attorney General cannot be presumed to be enjoined to these proceedings without the court being made a party. Counsel said that the issues that are before court are matters of private law which have been converted into public law issues and the Attorney General can only be joined to the proceedings of public law nature. Counsel also pointed out that the procedure adopted by the Applicant is improper as this Petition should have been filed as a Notice of Motion within the Originating Summons 38/03. That the petition alleges partiality which is not linked to lack of independence of the court in order for the matter to be a public law issue and that, for the issue to have been public law issue, impartiality should have been linked to lack of independence of the court. Counsel's submission seemed to be muddled up as regards the involvement of the Attorney General in this matter.

Mr Njoroge further said that the Attorney General does not side with any of the parties but on bias, counsel went on to contend that proof of bias relates to what is on the judge's mind and it is hard to ascertain what is on the judge's mind. That this court should restrict itself to what is before the court and consider whether the circumstances obtaining in 38/03 (OS) constitute likelihood of bias.

Submissions by 2nd Respondent

Mr Amolo, Counsel for the 2nd Respondent grounded his submissions on the two affidavits by Abishai and JAO, and the Notice of Preliminary Objection already referred to. Mr Amolo gave a background of the case and the manner in which the court has handled the various Applications made during the trial in **HC Misc 38/03 (OS).** Counsel said that by the time this Petition was filed, they had appeared before the court 39 times. That a similar Application for disqualification was made when the defence was about to commence cross examination of the Plaintiff, the court considered that Application and dismissed it. That before the Respondents resumed the hearing, this Petition was filed. That in the course of the trial in **HC Misc 38/03(0S)** the Petitioner had changed Counsel severally, Mr Eboso being the 5th. That among others, the Petitioner was represented by Mr. Karori and Mr Nzili and the changes would result in adjournment of the case and therefore that the allegations of bias cannot hold considering the manner in which the court overly accommodated the Petitioner on adjournments. To buttress the fact that the Judge was not biased or no likelihood of bias would be alluded to his conduct Mr Amolo recalled what transpired during the proceedings as hereunder:

That after the court rejected the Application seeking disqualification of the judge from the case, Mr Karori was allowed to cross examine the same witness again which would not ordinarily be allowed; that by the time of filing this Petition, the Petitioner had made 8 interlocutory Applications either to strike out the suit or for adjournment as follows:- Justice G B M Kariuki considered and ruled on an Application, seeking to strike out the suit; Justice Mugo ruled on another Application to strike out on 3rd September 2004. That on 17th October 2005, an Application was made for adjournment on grounds of new Counsel on record; on 1st November 2005, Application for directions was made; Another Application was made by Petitioners to file a bundle of documents after closure of Plaintiff's case to which the Respondents objected but the court allowed them to file. That in total 6 objections were ruled upon in favour of the Petitioner. That considering all the above findings where the court seemed to incline towards the Respondents, the allegations of bias are baseless and unsupported by the court record.

Counsel denied Mr Eboso's allegation that the judge declined to allow the Petitioner's Counsel to cross

examine the witness on a letter dated 30th April 2002. On the contrary, it is Mr Amolo who had objected to the witness being cross examined on the letter because she was not the author, but was overruled by the judge and Mr Karori proceeded to cross examine on it. Counsel said the allegation of bias is misplaced. Mr Amolo tried to show that the judge's conduct of the case was balanced and infact the judge leant more towards the Petitioner and no evidence that he favoured the Respondent.

Counsel submitted that the report of the task Force on HIV & AIDS that was produced in 38/03 (OS) was in the public domain since 2002 and open to all to read and that the allegation of non disclosure of the fact of the Judge, the 2nd Respondent's Advocate and Mrs Mumma sharing a platform at the Task Force is untenable.

On the judge's involvement in the Task Force, Mr Amolo submitted that the judge was one of the 73 consultants and that the judge never took part in the preparation of the Report but it was prepared by the 2 joint secretaries and one Grace Nzioka of Attorney General's Chambers. Averments of Abishai in her Affidavit denied that the judge made any strong views or opinions on the Report but that his only presentation was on HIV and criminal law which relates to intentional infections and is not the subject in the **HC Misc 38/03** proceedings. That the Task Force also met members of the Judiciary including judges and magistrates to discuss the issue of HIV & AIDS and all the Judicial Official Officers cannot be disqualified from hearing this matter on that basis. Counsel extended this argument to one of the Judge's involvement in the Rules Committee that drafted the Rules made pursuant to the Constitution in 2006.

On the question of jurisdiction, Mr Amolo submitted that upon consideration of Section 60 of the Constitution and the decision of Nyamu and Emukule JJ in **HON MARTHA KARUA CASE**, this court lacks jurisdiction to intervene, supervise or control the conduct of any matter before the court seized of it except in a Judicial Review Application. Counsel examined Legal Notice 6 of 2006 (the Rules made under the Constitution) and S 84 of the Constitution which deals with Enforcement of Fundamental Rights and concluded that the court does not act like as a Constitutional court under S 67 of the Constitution when so seized because under S 84, one judge can preside over the court. He acknowledged that the enforcement part of the 2006 Rules consist of three components:

(i) Rules 11-22 deal with allegations of breach of fundamental rights where there is no case pending in any court;

(ii) Rules 24-30 deal with allegations of breach where another matter is pending in a subordinate court;

(iii) Rule 23 deals with a situation where another case is pending before the High court.

It is Counsel's contention that since this matter arose in a case pending before the High Court, an Application for enforcement of fundamental rights should have been made by way of a Notice of Motion in 38/03 (OS) – as was done in the case in **HON MARTHA KARUA**. That Rule 23 obligates the trial judge to hear the application and thereafter any party who is dissatisfied must invoke Rule 33 by appealing to the Court of Appeal. Counsel further urged that in the **KARUA CASE,** the court properly held that they had original jurisdiction to hear the matter which was filed pursuant to Rule 10 of the 2001 Rules and that Rule 10 of the 2001 Rules and 23 of the 2006 Rules are in tandem as to where the Applicant should file an Application alleging breach of fundamental rights during the pendency of another case in the High Court. That in this case, the court's jurisdiction was not invoked and the Petition is incompetent having not been filed within the Originating Summons. That the Petition is brought under S 77 (9), Rules 11, 12 and 13 of the 2006 Rules which do not give this court jurisdiction.

Counsel went on to submit that the Applicant having invoked the wrong Rules, erroneously joined the Attorney General to these proceedings as the Attorney General can only be joined under Rule 15, that is, in a criminal matter.

It was also contended that in filing the Petition, the Petitioner is seeking to have this court sit on appeal of Justice Ojwang's decision though the parties sought leave to appeal against the judge's ruling then, but never appealed.

It is another submission by the Respondent that there is no recognizable Respondent before the court as Section 84 of the Constitution envisages a natural or legal person and there has to be full disclosure of that person. That the Petitioners can not seek solace in the 38/03 (OS) where special leave had been obtained to sue in the initials of 'JAO'.

The 2nd Respondent also objects to the joining of the Interested Parties to the Petition because S.84 does not recognize any Interested Parties. That they should either be Petitioners or Respondents. That if they wanted to be joined to the Petition as parties, they should have applied and the court would then decide in what capacity to join them. Counsel relied on the **KENYA BANKERS ASSOCIATION v MINISTER OF FINANCE (2002) 1 KLR 45** where the court observed that in order to be joined to proceedings, the party had to demonstrate their interest before their joinder.

Mr Amolo urged that this Petition is res judicata the same issue of disqualification on account of likelihood of bias having been raised before Justice Ojwang by Mr Nzili, the then Counsel for the Petitioner, and the judge having made a determination thereon. Counsel relied on the case of **BOOTH IRRIGATION v MOMBASA WATER PRODUCTS H.MISC APPLICATION 1052/04** where Justice Nyamu held that Res judicata applies to Constitutional Applications. Counsel said that the Application seeking disqualification of the judge from the case alleged that there was a close relationship between the judge and Mr Amolo which made the Petitioner apprehend that justice would not be done, Mr Amolo having been the judge's student. That the judge considered the application in a lengthy ruling and concluded that it lacked any basis. That after the ruling, Mr Karori, counsel for the Petitioner, raised no objection and Mr Mwiti was ready to proceed and distanced himself from the allegations of bias. That before referring the Petition to the Chief Justice for directions, the court noted that the Petition raised issues that had been raised before that court and the court overruled the Petitioner and the judge never suggested that it should be heard by another bench. Counsel concluded that the issue of bias is res judicata and should not be revisited before this court.

Counsel urged that allegations of bias against a judge are grave and should be backed by real evidence which is lacking in **38/03 (OS).**

Interested Parties' Submissions

In supporting the Petition, Mr Mwiti relied on the Affidavit of Dr Ochieng the 1st Interested Party and the submissions made by Mr Eboso. The Interested Parties also filed skeleton arguments. Mr Mwiti sought to clarify that the hearing in **HC 38/03 (OS)** commenced on 13th July 2005 upto 25th September 2006 when it was adjourned when PW 4 Geoffery was testifying. It was adjourned till November 2006 for further hearing but by then, the judge had been transferred to the Criminal Division. That the facts giving rise to the Petition came to being in November 2006 as per averments of Caleb Kibera at paragraph 15-16 of his Affidavit where Caleb deponed that it is then that he became aware that the judge had been involved in the Task Force and the Task Force Report had not been exhibited in that case.

Counsel submitted that the Report disclosed that Justice Ojwang had expressed views in the Task Force, was intricately involved in the work of the Task Force which made recommendations that resulted in a bill on HIV & AIDS and some recommendations urged Judicial Officers to consider HIV & AIDS matters with a sympathetic and accommodative attitude and with sensitivity. On seeing the recommendations, the Interested Party became apprehensive because of the predisposition of the judge, having been involved in the Task Force. That the apprehension was buttressed by the fact that the judge and Counsel had not seen it important to disclose their involvement in the Task Force especially at the point when Catherine Mumma testified on the recommendations of the Task Force. That had there been disclosure of involvement of the judge, the fear of the Interested Parties would have been alleviated. That is why they want an independent and impartial court envisaged under S 77(9) of the Constitution to take over the hearing of **HCC 38/03(OS).** Counsel relied on the case earlier referred to **WOOLLEN MILLS LTD v CHARTERED FINANCE (supra).**

Petitioner's Reply

In response to Mr Amolo's submission on Rule 23 of the 2006 Rules made under S 84 of the Constitution, he urged that Mr Amolo's submission was wrong because the word used is not mandatory but 'may'. It reads '**where a Constitutional issue arises in a matter before the High Court, the court seized of that matter 'may' treat such issue as a preliminary point and shall hear and determine the same."** That the Application is properly made under Rules 11, 12 and 13 of the 2006 Rules. That the matter was later placed before Justice Ojwang and all parties indicated that the matter be placed before the Hon. the Chief Justice for directions and they asked the Chief Justice to appoint a bench of 2 judges which he did.

In a brief response to the Respondents case, Mr Eboso reiterated that this petition is properly on record because the court is not obliged to proceed under Rule 23 of the 2006 Rules.

As to the objection raised in respect of the use, of initials 'JAO', Mr Eboso submitted that the party 'JAO' already exists in 38/02 and this Petition is in respect of the same parties save for the Attorney General and the name does not invalidate the Petition but if it is prejudicial, 'JAO' can seek to be struck off.

As regards the Attorney General's alleged misjoinder it was urged that since a judicial officer cannot be sued when acting in good faith, the Attorney General is sued as the representative of the judiciary under S 6 of the Judicature Act. That had the Attorney General filed an Affidavit it would have been useful in rebutting the Task Force's 'Report' but the issues raised therein stand unrebutted and the Petitioner having had legitimate apprehension and material to show legitimate apprehension, this court has jurisdiction to grant the orders sought.

Having summarized these submission by all the parties, we consider the following to be the issues raised in this petition and which this court will make its determination upon.

Issues

1. What is this court's jurisdiction under Sections 60 and 84 of the Constitution.

- Whether this court has jurisdiction to entertain this Petition;

2. Whether the Petition is Res judicata;

3. Whether there is misjoinder and misdescription of parties.

- Whether the Attorney General was properly joined to these proceedings;

4. Whether companies can invoke the court's jurisdiction under S.84 of the Constitution;

5. Whether prayers sought in **HCC 38/03 (O/S**) are comparable to the Recommendations of the HIV & AIDS Task Force Report

6. Whether the trial judge, counsel for the 2nd Respondent and a key witness in **HCC 38/03** shared a platform at the Task Force on HIV & AIDS;

7. Whether the Recommendations by the HIV & AIDS Task Force as read with the Prayers in **HCC 38/03** would create an apprehension of likelihood of bias against the judge;

8. Whether there was disclosure of the association of the judge, 2nd Respondent's Counsel and key witness of their involvement and Association in the HIV & AIDS Task Force in **HCC 38/03(OS)**;

9. Whether it is apparent that the judge's mind may be predisposed to certain views or positions on issues of HIV & AIDS.

- Whether the trial judges impartiality has been compromised;

10. Whether there is any other law in Kenya on HIV & AIDS that can guide the court in determination of **HCC 38/03**;

11. What constitutes an impartial and independent court/tribunal;

12. What is the test applicable in the law on bias

i. Automatic Disqualification or

ii. Real danger or possibility of bias

– whether the test has been met;

13. Whether the court can grant the prayers sought;

14. Who bears the costs of the Petition.

It is now necessary for us to make findings based on the above analysis of claims issues and submissions by the parties who were represented.

JURISDICTION

It has been argued that because the subject matter of the Petition is **High Court Miscellaneous Civil Suit No 38 of 2003** in which our colleague and brother Hon Justice Ojwang' is seised, we have no jurisdiction because all judges have a coordinate jurisdiction. This point has been argued before in several recent cases and found to lack any constitutional base for the following reasons:

1) The coordinate jurisdiction is that set out in s 60 of the Constitution. This jurisdiction is the unlimited Original jurisdiction vested in the High Court in both civil and criminal matters or any other jurisdiction vested in the High Court by any other Act of Parliament. The framers of the Constitution could not have seen the need to confer again the same jurisdiction in s 84 to the same court unless it was a special or unique jurisdiction or was different from that conferred under s 60.

2) The special jurisdiction vested in the High Court under s 84 is conferred to protect fundamental rights enshrined under the Chapter 5 provisions – thus the Chapter is described as Protection of Fundamental Rights and Freedoms of the Individual.

It is therefore a special jurisdiction which is binding on all organs of Government or State namely the Executive, Legislative and the Judiciary. All these organs are subject to the Constitution. S 84 demands that all the organs mentioned must secure and protect fundamental rights and where they infringe fundamental rights the section is invoked to have the rights protected or enforced. Any order or conduct which threatens contravention or causes actual contravention of a fundamental right is challengeable under the Section. The Constitution has not given any immunity to any of the three arms of Government. We would like to observe that while the jurisdiction under S 60 which is unlimited in the areas described, the jurisdiction under S 84 is original but limited to fundamental rights although vested in the High Court. It is true it can be exercised by any judge of the High Court and it is certainly not based on any ranking of the Judges. If it was based on rank, the framers could have vested it in the Court of Appeal but it is only vested in the High Court. Regardless of where the alleged contravention occurs, the High Court must exercise the jurisdiction before any appeal is filed pursuant to S 84(7) of the Constitution.

(3) The principle of law that no one can be a judge in his own cause is the reason why the jurisdiction must be exercised by any other Judge of the High Court except the judge whose order is challenged. Moreover our Constitution which is based on the rule of law gives or secures to all litigants an independent and an impartial court – see S 77(9). This guarantee is one of the major hallmarks of a democratic society.

On this point we are happy to observe that the jurisdiction has been firmly recognized and invoked by the Courts in the last three years in the following cases:

i. **LABHSON v MANULA HAULERS** Civil Suit No. 204 of 2003

ii. **KENYA BUS SERVICE v ATTORNEY GENERAL AND OTHERS** Misc Civil Application No. 413 of 2005

iii. HON MARTHA KARUA v AFRICA RADIO T/A KISS HCCC No. 288 of 2004

iv. PETER MUIRURI v CREDIT KENYA Civil Suit No. 1382 of 2003 (OS)

In the fourth case a ruling of the Hon the Chief Justice was unsuccesfully challenged under the section.

4) Our courts have not invented the wheel and the same jurisdiction was exercised in the comparable jurisdiction of Trinidad and Tobago in the case of MAHARAJ (2) where the wording of S 6 of the Constitution was on all fours with our S 84 and where a different judge had to exercise the jurisdiction.

It is for the above reasons that we find and hold that we have the jurisdiction. The second Respondent's argument on jurisdiction is therefore rejected. We further find that the Petition is properly brought under S 84 of the Constitution and the relevant rules. In particular Rule 23 of LN6/06 was duly complied with and the record is clear that upon the filing of the Petition it was first taken to Hon Justice Ojwang' the challenged Judge, who in turn made a reference order in the matter to the Chief Justice. He did not consider that there was any preliminary matter to determine under Rule 23 and it was now for the Chief Justice to appoint a Panel of Judges, hence our involvement

COMPANIES MAY INVOKE JURISDICTION

The respondents contend that since the plaintiff is a company it cannot invoke the jurisdiction which is reserved for individuals. Again this is a well trodden path, and there is nothing novel about it. In the case of **LAMUGURAN v THE ELECTORAL COMMISSION OF KENYA Lemeiguran Misc Civil Application No. 305 of 2004** a two judge constitutional bench allowed the articulation of rights by a non incorporated association of individuals representing a minority in the Baringo Constituency. In addition the definition of a "person" under S 123 of the Constitution includes incorporated and unincorporated associations. Such entities may articulate their fundamental rights in Court provided the contravention is in relation to them. A company for example would not be able to invoke the right to liberty because the right cannot be effectively and naturally attached to a corporate body. However, in the present case the plaintiff is asserting its right of hearing before an independent and impartial court under S 77(9). It cannot be rationally suggested that companies do not assert civil obligations and other rights in our courts. They do this every day in our courts.

5. The Bill of Rights applies to all and binds the legislature, the executive and the Judiciary. The Petition is one of the methods under the rules for accessing this Court and we cannot hamper, hinder or inhibit that access.

For the above reasons the 2nd Respondents objection on this point is also disallowed.

RES JUDICATA

As shown in the analysis above the issues stemming from the earlier dismissed application for disqualification are in our view quite different from what is before this court. The earlier ruling by the challenged Judge related to a teacher/student relationship with one of the counsel. On the other hand the issues before us are:

i. **In the circumstances described as above is there a risk of bias by the Judge in view of the**

alleged pre-deposition by the Judge concerning the issues now before him in the face of his participation in the Task Force on HIV and AIDS and his having shared a platform with the 2nd respondent's Counsel and the principal witness for the Plaintiff in the deliberations leading to the formulation and preparation of the Task Force Report and now an Act of Parliament – which now awaits commencement by notice according to the Attorney General's representative in this Petition. What exactly was the Judge's role as a Consultant and what views is he alleged to have publicly advocated during the deliberations. What did his written paper on HIV and AIDS and Criminal Law contain? In the light of all the above are the Petitioner and the Interested Parties' (the IPs) alleged apprehension that they might not get a fair trial or hearing in the matter justified?

ii. **What is an independent and impartial court as provided under S 77(9) of the Kenya Constitution**

iii. **Is the challenged Judge's "court," the Court or Tribunal as contemplated in S 77(9) in the face of the allegations made on possible bias or risk of lack of impartiality, whether apparent or real.**

iv. **What is the effect of the alleged non disclosure by the Judge and Counsel for the 2nd defendant and in the circumstances should he not have offered unsolicited or prompted disclosure of his past involvement.**

It is as clear to us as the light of day that the plea of res judicata cannot be sustained in that the issues before us are completely different from those the Judge dealt with in his ruling on disqualification and according to the Petitioner the issues now before us were unknown to them due to the non disclosure. The information or facts upon which this challenge is based became known to them November 2006, after the ruling on disqualification in the **Civil Case No. 38 of 2003**. The Petitioner could not reasonably have raised them in the earlier application in the suit or the o.s.

The two applications raise different issues and facts. For this reason the plea of res judicata is also dismissed.

JOINDER AND DESCRIPTION OF THE PARTIES INCLUDING THE INTERESTED PARTIES

Objections have been taken concerning the joinder of Interested Parties "IPs" and the description of the Plaintiff by initials J A O

We have reflected on this and our findings are that in an adversarial system, a party likely to be affected by a ruling, judgment or any important determination of rights must be accorded an opportunity of being heard. In other words the court must recognise each affected party's right to equality of arms – in other words the right to adversarial hearing. In the case of the initials JAO they have been taken or lifted from the ongoing suit 38 of 2003 OS and that JAO is a party is not in doubt. The joinder of JAO in the Constitutional reference is appropriate since the initials were used to disguise the party due to the sensitivity of the subject matter of the suit. The IPs are parties in HCCC 38 of 2003. They are parties likely to be affected by the decision that may be arrived at in this petition and are properly joined. The joinder, also, recognizes the important principle that a court of law must at all times hold the scales of justice evenly. For this reason we do overrule the objection.

INVOLVEMENT OF ONE OF THE JUDGES AND COUNSEL IN THE PREPARATION OF CONSTITUTIONAL RULES 2006 – LN6/06

Counsel for the 2nd defendant in a veiled argument did try to compare one of the Judges involvement in this matter with the matter before the Court. Upon being asked by the court to state whether there is any issue in the Petition that touches on the validity of the Rules, Counsel said that that was not the case. He therefore did not object to the Judge hearing the Petition.

Of course Judges involve themselves in matters outside their duties and quite rightly so. Their expertise in various lines is often needed by other bodies outside the judicial work – but they have a responsibility do conduct a conflict check in respect of any matter or transaction or affairs dealt by them

in the past so as to guard against any conflict or appearance of bias or any perceptions which might touch or impact on their independence or impartiality in the matters which come before them. In some of the matters, they would need to recuse themselves without being prompted. In others they make disclosures and if parties express satisfaction and confidence, they go on with the cases and in yet others where there is no discomfort they may choose to go on depending on the facts. Moreover in most cases the conflict checks is done using a common sense approach. It is a continuing duty on the part of the court which has to be discharged on a case to case basis. It is the circumstances of the case which determines the option the court should take at any given time.

To illustrate the point, there are situations where even without a direct conflict or adverse perception a judicial officer might want to recuse himself or herself on the basis that he or she feels uncomfortable handling a matter. Each situation in real life turns on its peculiar facts and circumstances and there are no prescribed rules laid down in a tablet, but over the years courts have come up with benchmarks, rules and standard which judicial officers should invoke in like situations.

PRAYERS SOUGHT IN H.C. 38 OF 2003 (OS) AND THE HIV-AIDS TASK FORCE PROPOSALS AND RECOMMENDATIONS CONTRASTED

In our inquiry we consider it important to set out the prayers sought in the suit and the Task Force Report because this is the heart of the Petition before us.

The prayers in H.C. 38/2003 (O.S.) are:

1. **That the Plaintiff herein proceeds with the matter with only a disclosure of her initials as instituted**
2. **That the 1st defendant's termination of the plaintiff's contract of employment on grounds of the plaintiffs HIV positive status violates her fundamental right to protection from discrimination as enshrined in the Constitution**
3. **That the 2nd and 3rd defendants conduct of an HIV Test on the plaintiff without her prior, informed and express consent violated the plaintiff's right to privacy and other fundamental rights enshrined in the Constitution of Kenya;**
4. **That the 2nd and 3rd defendants disclosure of the plaintiff's HIV status to the 1st defendant without the plaintiff knowledge or consent violated the plaintiffs right of confidentiality and other rights enshrined in the Constitution of Kenya;**
5. **That the 2nd defendant breached his professional and statutory duties and violated the plaintiff's right by the 2nd defendant's omission to counsel and disclose to the plaintiff her HIV positive status after the HIV test results were ready;**
6. **That the plaintiff is entitled to reinstatement and/or damages for violation of her fundamental rights from the defendant**
7. **That the costs of the suit be awarded to the plaintiff.**

Perhaps it is important to point out at this stage that the prayers do substantially, also constitute the issues for determination in HC 38 of 2003 (O.S.). In other words the above are the issues the challenged Judge is expected to adjudicate on and in this regard we do appreciate that HC 38/03 has been partly heard by our brother Hon Justice Ojwang' and the plaintiff has called some key witnesses and we have also been informed that further hearing is scheduled for 30th May 2007.

The Task Force appointed by the Attorney General was mandated to give opinion, formulate policies and guidelines and make recommendations on legal issues relating to HIV and AIDS. The Task Forces' mandate has resulted in a Report which is exhibited in this petition. A perusal of the Report reveals that it contains opinions, proposed guidelines, recommendations on legal issues and recommendations on policy issues relating to HIV and AIDS. The Report has also resulted in the enactment of an Act of Parliament entitled. The HIV and AIDS Prevention and Control Act, 2006 Act No 14 of 2006 which now awaits commencement by Notice of the Minister.

Both the Report and the Act based on Report have touched on the following issues or matters:

(i) HIV and AIDS and the right to privacy and confidentiality;

(ii) HIV ad AIDS in the Workplace;

(iii) HIV and AIDS and other Human rights questions;

(iv) **Sensitive language and phrases relating to HIV and AIDS.**

We have compared the two set of issues and our finding on this is that there is considerable similarity. In other words the issues for determination by the trial Judge are substantially the matters reflected or contained in the Report and the Act.

In addition, the 2nd respondents principal witness in the suit Mrs Catherine Mumma's evidence shows that she did describe herself as joint secretary of the Task Force and she also did touch on various topics in the Report Bill/Act which overlap with the issues for determination in the suit and which are also contained in the Report.

It is also significant to observe that the record of evidence exhibited in the Petition does not reflect any disclosure by the witness concerning the fact that the 2nd defendants Counsel Mr Amollo was also a joint Secretary of the said Task Force. In the affidavit in support of the Petition, Dr Sobbie Mulindi has deponed on the role of the Judge as follows:

(1) Paragraph 10 "Hon Justice Ojwang' (then a professor of law) at the Task Force platform shared with Counsel and witness and did present "strong personal opinions and views on human rights issues affecting employees and other workers living with HIV/AIDS."

(2) **Paragraph 12 "publicly gave his opinion which was accepted and translated into the Task Forces official Report and Recommendations."**

Arising from the above, the learned Counsel for the interested parties, makes the following important observation in his skeleton arguments:

"**From the point of view of the defendants in** HCCC No. 38 of 2003 **(Including the IPs), it would be difficult for such parties to avoid or overcome** the feeling and fear that the trial judge is likely to be predisposed in favour of the plaintiff **in that suit and against the defendants, whether by reason of the asserted sympathy, accommodation or simply bias. That feeling is buttressed by the fact that neither the Judge nor the 2nd respondent's counsel actually disclosed their close involvement between themselves and a close witness in the case on precisely similar issues at the Task Force."**

The Task Force itself contains the following recommendations:-

1. **Recommendation (vii) of the Report at page 123 "that policy guidelines should direct the approval and attitudes of legal and judicial officers towards persons with HIV and AIDS. They should encourage a sympathetic and accommodative outlook and the need to handle matters relating to HIV and AIDS sensitively and with the necessary expediency."**
2. **Recommendation (viii) at page 123 "that means of access for redress of alleged violations should be simple, sensitive and accommodative of the needs of people living with HIV and AIDS"**
3. **Recommendation (x) at page 123 "that public institutions concerned with legal issues should include legal advocacy and education of the citizenry and human rights."**
4. **Recommendation (i) at page 122 "that the Government should promulgate policies through its various departments that call for the promotion of non discriminatory practices in various sections both public and private."**
5. **Recommendation No. (ii) at page 43 « that disclosure of medical data and information**

relating to an employee as between the Healthcare provider and the Employers can only be done upon the written and informed consent of the employee."

6. **Recommendation (ii) at page 35 "that HIV infection does not in itself, constitute a lack of fitness to work"**
7. **Recommendation (xii) at page 36 "that there should be no obligation on the part of the employee to inform the employer of his/her HIV and AIDS status."**
8. **Recommendation No (xi) at page 36 "that persons in workplaces affected or perceived to be affected by HIV and AIDS must be protected from stigmatization and discrimination by co-workers, unions, employers and clients."**
9. **Recommendation (i) at page 22 "that HIV testing must be carried out with specific prior informed consent of those being tested with pre counseling and post counseling and with the guarantee of confidentiality."**

The Act has in turn captured the above recommendations.

Again a contrast of the issues for determination in the suit and the above recommendations clearly demonstrates to any objective mind that the recommendations have suggested answers to the issues raised in the ongoing suit. For example, termination of the contract, the 2nd defendants consent or lack of consent concerning the conduct of HIV test and the right to privacy, the defendants alleged disclosure of the plaintiff's HIV status and the right of confidentiality; alleged failure to disclose the HIV status after the HIV test and the issue of reinstatement in employment.

Finally we consider it appropriate to set out in extenso the Petitioner's apprehension as set out in the Petitioner's skeleton arguments and partly in the affidavits in support!

(1) The trial judge, counsel for the 2nd respondent and a key witness have shared a platform and have jointly published common opinions, recommendations and policy guidelines on the same issue that are pending determination by the same Judge

(2) None of them deemed it appropriate to make a disclosure of the said association, common views, common opinions, and common policy guidelines and their joint participation in the production of the Task Force Report which the plaintiff is relying on in HC 38/2003 OS

(3) It is apparent that the judge's mind may have been pre-disposed to certain positions, inclinations on issues that are awaiting his determination.

(4) There is no law which has been enacted to guide the courts on issues related to HIV and AIDS, particularly the issues awaiting determination in **HCCC 38/2003 OS**

(5) There are no local provisions, authoritative and binding judicial pronouncements on the novel issues pending determination in the said suit

(6) Determination of the issues would most likely be guided by the judge's own perceptions yet his mind is already predisposed by virtue his role, prior opinion, prior views, prior proposals and prior recommendations in the Task Force Report and in the resultant Bill/Act

(7) The judge's impartiality has been greatly compromised by reason of the said association and pre-disposition to the issues and the proposed answers as published.

The 2nd respondent has in short tried to counter the above apprehensions by demonstrating from the record of proceedings so far, in **HCCC 38/2003** that the trial Judge has bent over backwards in accommodating the Petitioner and the interested parties in the rulings he has made so far in the conduct of the hearing, and that they do not reflect the slightest iota of bias. The 2nd respondent has also endeavoured to show that there is delay occasioned by the Petitioner's applications for adjournment and that the record shows that they are not interested in the case being expeditiously disposed of. As regards

whether there is evidence of bias reflected by the record we are in full agreement with Counsel for the 2nd respondent that there is none. On the second point concerning delays in the suit this is for the trial court and we presume that each application must have been determined on merit and in any event we do not consider it relevant to the matter before us. On the apprehensions of the Petitioner and the "IPs" we find that they have not been controverted at all by the respondent or sufficiently countered by the respondents. Moreover it is not our function in law to even remotely try to ascertain or read the judges mind. We cannot do so and no one can and quite rightly so. Our finding on the issue of apprehension is that, even with the great and profound respect, we have for the Judge and the deference we have accorded him in this matter, as a respected brother, and colleague and conscious of the fact that in our judicial duties, we all fall short occasionally of the required standards and are guilty of lapses of commission and omission, we find that the apprehensions as described above by the Petitioner and the IPs do strongly lead to a risk or danger of possible bias or lack of impartiality. We further find that the facts and circumstances as described above should have led to both disclosure, by the judge and to his unsolicited, unprompted and automatic disqualification of the Judge himself. The fact that an opportunity was given to the need and the filing of this Petition, is matter of great regret and does with great respect, reveal a lapse or omission by the trial judge in upholding the applicable benchmarks on this important subject as clearly set out in decided cases and the ethical position of Judges as set out in international instruments and the Constitution. The Constitution demands of us as judges, that we accord to litigants a fair, impartial and independent hearing. Yet the inescapable conclusion in the face of the role of the trial Judge as a former Task Force consultant is that there is a risk that it is impossible for him to bring the trial an open mind to the issues before him if he were to continue with the suit and make a determination. The Petitioner and the "IPs" in our view are reasonably apprehensive of possible bias or danger or risk of bias.

In our view where there is reasonable or apparent apprehension of danger of bias, a court would not satisfy the constitutional requirements under S 77(9) of the Constitution. It is for the above reasons that we feel strongly inclined to rule that the trial Judge ceases to be the Judge in the matter and we shall now proceed to address the relevant law and how comparable jurisdictions have handled similar situations. The authorities will demonstrate more than words why we have reached the conclusion that the trial Judge should cease to handle the matter and the file allocated to another Judge. In the circumstances described, the Petitioner and the IP have sufficiently established the basis of likelihood, impression or perception of bias or possible partiality and have given reasons for their feelings and fears. As we shall shortly demonstrate with several leading authorities it is a question of perception and not necessarily proof of actual bias which matters. It is a question of reasonable impression by other people. The position taken by the court will become clear upon detailed examination of the relevant case law including comparables like the case of **PINOCHET** below.

LEGAL POSITION

In our view counsel for the Petitioner, Mr Eboso and Counsel for the Interested parties Mr Mwiti both of whom have quite rightly expressed their unshaken faith in the Judge and his ability, have in their presentations persuaded the Court that there is immediate need for court's intervention in order to uphold the well known cherished goals of proper administration of justice.

It was therefore fitting for counsel for the Petitioner to have cited from the landmark judgment of Chief Justice Hewart on this important subject in the case of **THE KING v SUSSEX JUSTICES (1924) K B** at page 256. In the case the learned Judge came up with the following immortal words often quoted in many jurisdictions:

"**... along line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have or offered, the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of Justice."**

The above citation represents a universal principle which has been adopted and applied in many jurisdictions. Our own Court of Appeal did endorse the principle in the case of **KING WOOLLEN MILLS LTD & ANOR v STANDARD CHARTERED FINANCE LTD & OTHERS NBI CA 102 of 1994.**

Lord Denning restated the same principle in the case of **METROPOLITAN CO [GGC] LTD v LANNON & OTHERS (1968) 3 ER 304** as follows:

"**A man may be disqualified from sitting in a judicial capacity on one of these grounds. First a direct** pecuniary interest **in the subject matter. second,** bias **in favour of one side as against the other ... In considering whether there was a real likelihood of bias, the court does not look at the mind of the Justice himself or at the mind of the Chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the** impression **which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part then he should not sit."**

When we apply the above test or principle to the facts, right minded people would in the circumstances described above concerning the role of the trial Judge form an impression of likelihood of bias, risk of bias or a apprehension of bias –although it cannot actually be proven or shown to have existed. That is why counsel for the respondent missed the point by trying to demonstrate from the court proceedings recorded so far, that the trial Judge has been fair to the parties. We are certain that the trial Judge was as fair as the circumstances could permit but this is not what is in issue in the matter before us. Before us are facts pointing to apparent or perceived bias. The question is, his role as described capable of creating an impression of likelihood of bias in the Petitioner or the right thinking persons? In our view as expressed above we find that his role does create an impression or likelihood of bias or a risk of possible bias. His role as a consultant and the alleged public expression of opinion as a consultant in some matters which also now feature in the case he is handling, including the sharing of the platform by one of the Counsel and the principal witness for the plaintiff, does in our view unfortunately, rightly or wrongly sufficiently identify him with the Task Force Report, its proposals and recommendations which in turn share a rare commonality with the issues before him, for determination in **HCCC 38/03 OS.** This makes him unfit to continue with the hearing. In addition in the eyes of the Petitioner the "IPs" and the right thinking persons, due to the same facts he is likely to be identified with the cause for one of the parties. This is why he must quit the case. Thus the trial Judge's predisposition to the issues due to his past involvement as described above and which has not been controverted at all, coupled with his uncontroverted association with the 2nd defendants witness and the 2nd defendant's counsel, make it impossible for justice to be seen to be done yet we all know that the test is even higher as stated by Chief Justice Hewart in the **SUSSEX CASE** above in that it must be manifestly and undoubtedly be seen to be done.

For the same reasons as above, we find that the trial Judge cannot properly constitute an independent and impartial court under S 77(9) of the Constitution. We find that the Petitioner and the "IPs" grounds for apprehension that their fundamental right to a fair hearing before an independent and impartial court would be under threat unless we grant appropriate orders to have the case reallocated before another Judge.

We would now like to turn to an English case which is almost on all fours with the matter before us. It is a case which by a strange twist of fate also involved a Judge. It is an important case in many ways including the principle that in the administration of justice, no judicial officer regardless of his rank is spared by the rule against bias. It involved a judge of the House of Lords and the majority judgment, in which the Judge was part of, was set aside for offending the rule. It is important to set it out because of the striking similarities with the matter before us. The case is **R v BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE, ex parte PINOCHET UGARTE (No 2) [2000 IAC119 (HL):**

"**The applicant was the former dictator and Head of State of Chile in Latin America. He was**

residing in the United Kingdom at the material time and as Head of State he was said to have committed crimes against humanity during his reign in Chile. As a result extradition proceedings were brought in the United Kingdom at the request of a Spanish Judge in respect of the allegations of crimes against humanity and said to have been committed when Pinochet was President of Chile. In the proceedings two arrest warrants had been issued by a magistrate, but they were subsequently quashed in an application for judicial review brought on behalf of the applicant. However the quashing of the second arrest warrant was stayed to pave way for the hearing of an appeal by the House of Lords. The scope of the appeal was to ascertain the extent of immunity of a former Head of State from arrest and extradition proceedings in the United Kingdom. In respect of acts committed while Pinochet was Head of State. In the proceedings Amnesty International (AI) was permitted to act as a third party intervener. By a 3:2 majority the House of Lords allowed the appeal and as a result the second arrest warrant was restored. After the order the applicant became aware that one of the judges in the majority judgment was a member and Chairman of Amnesty International Charity Ltd (AICL) a body which carried out A1 charitable purposes and an application was made to the House of the Lords to set aside the majority judgment. It is was set aside."

It is important for us to quote some of the pronouncements by the learned Judges because they explain in different words why we have reached this decision against our friend and brother, obviously with heavy hearts, but with our minds focused on our oath of office, because proper administration of Justice is greater than any one of us, and it is in the public interest that in every situation it prevails.

In the **PINOCHET CASE Lord Browne – Wilkinson** delivered himself as under:

"**The contention is that there was real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias. The fundamental principle is that a man may not be a judge in 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 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 and 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 behaviour may give rise to a suspicion that he is not impartial for example because of his friendship with a party. The 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 normally be himself benefiting but providing a benefit for another by failing to be impartial. In my judgment this case falls within the first category of case viz where the Judge is disqualified because he is a Judge in his own cause. In such a case, once it is shown that a Judge is himself party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure! See Shetreet Judges on Trial (1976) p 303 De Smith, Woolf and Jowell, Judicial Review of Administration Action, 5th (ed) (1995) **p 525 I will call this automatic disqualification.**

The important point to emphasise at this stage is that a judicial officers' interest need not be financial to earn an automatic disqualification. It could arise from a judicial officers conduct or anything else as in the circumstances we have had to confront in the case before us. Thus in the case of **DIMES v PROPRIETORS OF GRAND JUNCTION CANAL [1852] HL Cas 75,** the then Lord Chancellor, Lord Cottenham owned a substantial shareholding in the defendant canal which was an incorporated body. In the action, the Lord Chancellor sat on appeal from the Vice Chancellor, whose judgment in favour of the Company he affirmed. Lord Campbell at page 793 observed!

"**No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but my Lords, it is of the last importance that the maxim that no**

man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

In the **PINOCHET** case it is important to emphasize that there was no financial interest or a direct interest by the Judge as such because the interest of AI in the litigation was certainly not **final**: AI's interest was in achieving the trial of the dictator and his possible conviction for crimes against humanity. Both AI, and AICL where Lord Hoffman served were a close knit group carrying on the work of AI which was in turn was a party to the litigation. It did not matter that AICL was a charity.

Judge Browne concluded his judgment in these illustrative words:

"**The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goal: If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as director of a company, in promoting the same causes in the same organization as a party to the suit. There is no room for fine distinctions; if Lord Hewart CJ's famous dictum is to be observed;** it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.

Lord Hope held:

"**But every one whom the prosecutor seeks to bring to justice is entitled to the protection of law however grave the offence or offences with what he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to immunity ... I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside".**

Applying the above well reasoned and pursuasive pronouncements to the matter before us we find striking similarities in that the trial Judge is said to have shared a platform in the Task force on HIV-AIDS both with the Counsel for the plaintiff in the trial case before him and the key witness. He presented a paper on the subject of HIV-AIDs and is said to have publicly supported the cause of the Task Force of which he was a consultant. We do not think it matters whether that he was just one of the 73 consultants. Failure to disclose at the commencement of the case what he knew and the fact that he did serve as consultant to the Task Force that touched on almost similar issues as those for determination in the case before him does severely impair his impartiality in the eyes of right thinking people including the Petitioner and the IPs. In the circumstances he is reasonably accused of identifying himself with a cause of one of the parties to the suit.

We now wish to turn to the case of **LOCABAIL (UK) LTD v BAYFIELD ROPERTIES LTD [200] QB 451, Court of Appeal** Lord Bingham, Lord Woolf and Sir Richard Scott V C dealt with the second test which is the test of real danger or possibility as opposed to the automatic disqualification rule expressed in the **DIMES**. In this test it is recommended that the court hearing the challenge should inquire from the challenged Judge whether the Judge knew of the matter relied on as appearing to undermine his impartiality because if it is shown that he did not know of it, the danger of it having influenced his judgment is eliminated and the appearance of possible bias is dispelled. In our view the acts before us bring the matter in both tests and the verdict is that the facts in this case, cannot pass any of the two tests.

We had no duty to undertake the inquiry for the reasons set out in the New Zealand case of **AUKLAND CASINO LTD v CASINO CONTROL AUTHORITY [1995] INZLR HZ at 148:**

"**There can, however be no question of cross-examining or seeking disclosure from the Judge. Nor will the reviewing court pay attention to any statement by the Judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value and it is for the reviewing court not the Judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision.**

The benchmarks or rules established by the Judges in the **LOCABAIL CASE** can be summarized as under:

(1) In any case giving rise to automatic disqualification on the authority of **DIMES** and **PINOCHET,** the Judge should **recuse** himself from the case before any objection is raised;

(2) The same course should be followed, if for solid reasons, the Judge feels personally embarrassed in hearing the case;

(3) In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the Judge should stand down at the earliest possible stage, not waiting until the eve of the day of hearing;

(4) Parties should not be confronted with a last minute choice between adjournment after a valid objection;

(5) If in any case not giving rise to automatic disqualification and not causing personal embarrassment to the Judge, he or she becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the Judge to consider that objection and exercise his judgment upon it.

(6) A Judge would be wrong to yield to a tenuous or frivolous objection as he would, to ignore an objection of substance;

(7) Where the facts before the reviewing court lead to the apprehension of the reasonable suspicion test, the Court of Appeal adopted the principle set out in the Constitutional Court of South Africa in the case of **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v SOUTH AFRICAN RUGBY FOTBALL UNION 1998(4) SA 147 at 177:-**

"**It follows from the foregoing that the correct approach to this application for recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or propositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial office should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer for whatever reasons was not or will not be impartial."**

(8) In **Re JRL exp CJL Re** (1986) **161 CLR 342 at 352 Mason J** in the Australian High Court held:

"**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 disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."**

(9) In **Re EBNER v OFFICIAL TRUSTEE IN BANKRUPTCY (1999) 161 ALR** 557 at 56 & para 37, the Australia, Federal Court asked:

"**Why is it to be assumed that the confidence of fair minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the**

waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?"

This question is relevant due to the argument by the 2nd respondent counsel that the Petitioners are interested in delaying the hearing of the civil case. Going by the above rules the Petitioner will not necessarily be the cause of the delay in finalizing of the trial because it is clear to us that the issue of disqualification ought to have been addressed by the court when the trial court became seised of the matter. And for this reviewing court the five lost years due to the rehearing necessitated by our verdict, while painful, cannot be avoided because justice has a price and it is better to finally achieve justice by sticking to the rules of a fair hearing, than reaching a final unjust decision under the shadow of a reasonably challenged hearing.

(10) In the case of CLENAE case [1999] VSA 35 Callaway JA observed para 89(e):

"**As a general rule it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions a judge or magistrate should not accede to an unfounded disqualification application.**

A judges' religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form a sound basis of an objection. Nor, ordinarily can an objection be soundly based on the judge's social, educational, service or employment background or that of his family, his previous political associations; his previous judicial decision; his extra curricular utterances; his previous receipt of instructions to act for or against any party, advocate solicitor engaged in a case before him, or his membership of the same Inn, circuit, Local Law Society or Chambers."

On our part we adopt and approve the 10 ethical rules for judicial officers as set out above and further point out that they also constitute important ingredients of a fair trial. To conclude this part of the judgment we take the view approved by the three judges in the **R v ATTORNEY GENERAL ex-parte SAITOTI.** In that case, the court adopted as good law on bias, what we repeat here the holdings, in the Australia case of **WEBB v THE QUEEN (1994) 181 C L R 41** where Mason CJ and McHigh J held:

"**In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done ...**

The test of whether the objective onlooker might have a reasonable apprehension of bias is clearly more satisfactory and we have applied it in this matter. This test protects a fair hearing better than any other test. Perhaps we should add in a matter where a judicial officer is challenged for possible bias the challenge does assume a higher dimension in that in real life it is also a collateral attack on the administration of justice as a whole, and ceases to be a personal affair to the judicial officer. It is the benchmarks as set out above which sustain any self respecting judicial system and the involvement of an informed on-looker or observer in the test, is apt because justice is after all naked and not a choistered virtue or what necessarily issues from a bewigged head! It is the confidence of the common man that sustains the administration of justice.

On the other hand the European Court in the case of **EUR COURT HR CASE OF DAKTARAS v LITHUNIA**, judgment of 10th October 2000 para 30 – courts website http llechr.coe.int. the court considers that:

"**the notion of impartiality contains both a** subjective **and an** objective **element: not only must the tribunal be impartial in that no member of the tribunal should hold any personal prejudice or bias but it must also be impartial from an** objective **viewpoint in that it must offer** guarantees **to exclude any legitimate doubt in this respect."**

With the above definition of an impartial and independent court in view, we find and hold that the trial

court as constituted does threaten or has threatened the fundamental right as set out in s 77(9) due to the judicial officers involvement with the Task Force Report as a consultant, and his sharing the platform with both counsel for the second defendant and the plaintiffs key witness in the matter before him.

AN IMPARTIAL AND INDEPENDENT COURT/TRIBUNAI

As observed above by Lord Hope, everyone is entitled to the judgment of an impartial and independent court. It follows that where there is apprehended bias or risk of bias such a court cannot satisfy the requirements of S 77(9) of the Constitution which guarantees to all an impartial and independent court. It would therefore, be a contravention of this provision to permit the current trial to proceed before the challenged court in the face of the circumstances as described above..

In view of the challenge based on S 77(9) it is important to consider the meaning of the two words "independence" and "impartiality" because there is a tendency to give them almost the same meaning.

The concept of independence is an expression of the constitutional value of judicial independence as it connotes not only a state of mind but also a status or relationship to others eg to the Legislative and the Executive branches of Government – that rests on objective conditions or guarantees. Thus status or relationship of independence of the judiciary involves both individual and institutional relationships; the individual independence of a judge and the institutional independence of the court as reflected in its institutional or administrative relationships to the Executive and the Legislative. In this case, the institutional independence is not under challenge, nor can it be challenged at all on the facts. However what is challenged is the individual judge independence in relation to the parties in the suit. On the facts there is ample basis for the challenge. On this we would like to rely and adopt the Supreme Court of Canada case of **VALIENTE v THE QUEEN (1985) 2 SCR 673** where the court described the concept of judicial impartiality as referring to:

"**a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case."**

At international level in the United Nations Human Rights Committee case of **ARVO KARTTONEN v FINLAND** Communication No.387 of 1989 – see UN doc GAROR, A/48 Vol II p 120 para 7.2 where the Committee held that the notion of "impartiality" in Article 14(1):

"**implies that judges must not harbour preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties."**

As stated elsewhere a case such as this does in a very unique way challenge our system of justice and whether it is strong enough to deal with "the guard of the guards," namely the judicial officers who serve in it. Yes, it is strong enough. In this verdict, we have as in the case of **LABHSONS v MANULA HAULERS** cited earlier answered Lord Dennings question: "**And who is to be the guard of guards**?" The guard is the Constitution and the law. In particular the Judiciary is also subject to the Bill of rights. We believe that a triumph for justice, in a matter such as this one, inspires greater confidence in the administration of justice more than any high sounding pronouncements of our commitment to it – this being a test on our system of justice .

The upshot is that we must grant the declarations and orders as sought and in particular order that the file in 38/03(OS) be immediately transmitted to the Hon the Chief Justice for reallocation to any other Judge except our brother Justice Ojwang'.

It is so ordered.

DATED and delivered at Nairobi this 25th May 2007.

J.G. NYAMU

JUDGE

ROSELYN WENDOH

JUDGE