REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 370 OF 2007

ALLIANCE MEDIA KENYA LIMITED ……...……..CLAIMANT

VERSUS

MONIER 2000 LIMITED ……..…….1ST RESPONDENT

NJOROGE REGERU ……...……..2ND RESPONDENT

RULING

Mr. Njoroge Regeru is an Advocate of the High Court of Kenya practicing under the name and style of **Njoroge Regeru & co**. Advocates. Under the said firm there are several partners and/or employees, where I believe **Mr. Regeru** is the King. In a letter dated 9th March 2005, **Mr. Regeru** was proposed by **Mr. Singh Gitau** acting on behalf of the applicant herein to preside over and determine a long standing dispute with the 1st respondent herein. Among the Advocates employed by the firm of **Njoroge Regeru & Co**. Advocates as at 16th May 2005 was one **Fellicine N. Oriri**. And according to the letter heads of **Njoroge Regeru & co.** Advocate the name of the said lady was later changed to **Fellicine N. Havi**. It is essential to note that **Mr. Nelson Havi** is the Advocate for the 1st respondent. It appears **Mr. Havi** Advocate was a former employee and/or partner in the firm of **Muriu Mungai & Co.** Advocates who were initially acting for the 1st respondent. **Mr. Havi** is the husband to **Fellicine**.

The parties agreed **Mr. Regeru** to be the sole arbitrator in the dispute between the claimant and 1st respondent. **Mr. Regeru** Advocate accepted the proposal to be the arbitrator and invited both parties for a preliminary meeting on 24th May 2005, where his appointment was endorsed by the parties as the arbitrator. It is clear that at the first preliminary meeting, the applicant was represented by **Mr. James Gitau Singh** and the 1st respondent by **Mr. Nani Mungai** and **Nelson Havi**, where several preliminary points and disclosures were discussed and ironed out. It is also important to note that Mrs. Fellicine Havi left the employment of the law firm of **Njoroge Regeru** and co. Advocates, in which the 2nd respondent is a partner in September 2006.

It is essential to note that **Mrs. Fellicine Havi** got married to the 1st respondent's Advocate on 13th August, 2005 in a public ceremony in which it is alleged that the applicant's Advocate was invited, promised to send a gift which was never received. However the applicant's former legal officer **Mr. Philip Muchumuti**, a close friend and village mate of the 1st respondent's Advocate was invited and did attend. It is further alleged that the applicant's Advocate have since 13th August 2005 been aware of the marital status of the 1st respondent Advocate and his wife's former employment in the firm in which the

2nd respondent is a partner.

The arbitration proceeding then proceeded before the 1st respondent and the uncontroverted position is that the dispute has been fully heard, submissions filed and all that is pending, is the delivery of the arbitral award. The present debacle was started by Mr. Singh acting on behalf of the applicant by writing a letter dated 18th June 2007 seeking the disqualification of **Mr. Njoroge Regeru**, as the arbitrator and nullification of all the proceedings conducted before him to pave way for the appointment of a new arbitrator. It is important to reproduce the contents of the said letter which goes;

"***Advance Copy By Fax***

Njoroge Regeru & company

Advocates

Arbor House

Arboretum Drive

NAIROBI Fax Number:2718631

Dear Sirs

In the Matter of an Arbitration between Alliance Media Kenya Limited & Monier 2000 Ltd

We refer to the above matter.

It has come to our client's knowledge that during the course of the Arbitration proceedings, a Mrs. Felicine Oriri was employed as an Advocate in your firm. Our clients have now discovered that Felicine Oriri is married to Mr. Nelson Havi, Advocate for the Respondents.

We are dismayed that such an issue, which gives rise to an obvious potential conflict of interest, was never raised by the Arbitrator.

Our clients are particularly concerned that halfway through the proceedings, the Respondents changed advocates from Muriu Mungai Advocates to Havi Wanyaga Advocates.

Our clients have instructed us to demand that you forthwith disqualify yourself as Arbitrator, nullify the proceedings and have a new Arbitrator appointed.

In the event that we do not hear from you within the next twenty four (24) hours, agreeing to your withdrawal, we shall, regrettably, have to apply to the High court to stay proceedings.

Yours faithfully

J G SINGH"

In the said letter, **Mr. Singh** Advocate requested the arbitrator to respond within 24 hours failure of which the applicant would move to the High Court to stay further proceedings before the arbitrator.

In a letter dated 22nd June 2007 the arbitrator complained against the conduct of the applicant and its advocate for making a plea for his disqualification. **Mr. Njoroge Regeru** Advocate complained against the style and language used by **Mr. Singh** against him. He was of the view that **Mr. Singh** Advocate ought to have first ascertained the facts pertaining to the matter before reaching unfounded conclusions. He also termed the allegation against him as patently irrational and baseless. And after giving thorough

consideration to all the issues raised in the letter dated 18th June, 2007 **Mr. Njoroge Regeru** refused to disqualify himself. It is essential to reproduce the said letter in full.

Sing Gitau

Advocates

Unity House, 3rd Floor

Koinange Street

NAIROBI

Attn: Mr. J. G. Singh

Dear Sirs,

Re: In the Matter of an Arbitration between Alliance Media Kenya Limited & Monier 2000 Ltd.

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I refer to Mr. Singh's letter dated 18th June, 2007. Mr. Singh had imposed a time deadline of twenty four (24) hours, within which I was required to respond. I consider this imposition to be impetuous, oppressive and unreasonable.

I have serious reservations as to the manner in which Mr. Singh has decided to raise the issue under consideration. Mr. Singh demands, on the basis of a mere letter which is long on innuendo and short on clear facts, that I forthwith disqualify myself, nullify the proceedings and have a new Arbitrator appointed. In so demanding, Mr. Singh is not only the accuser but also the prosecutor and ultimately the Judge. Mr. Singh does not think it is necessary that all interested parties, myself included, should be accorded a fair and reasonable opportunity to be heard.

With tremendous respect to Mr. Singh, he ought to have first ascertained the facts pertaining to the matter before reaching conclusions which, upon establishment of the true position, are shown to be patently irrational and baseless. When the objective and reasonable bystander considers the facts and circumstances pertinent to the issue raised by Mr. Singh, including the facts relating to the Respondents' representation from time to time (I have no recode of a firm known as Havi Wanyaga & Company appearing at any time for any of the parties) and the fact that as Arbitrator my mandate and authority is vested in me personally, is non-delegable and is not affected at all by the identities of the persons employed in our law firm from time to time in whatever capacity, the absurdity of Mr. Singh's insinuations becomes clear.

Where the possibility of conflict of interests exists or certain facts give rise to a reasonable perception of partiality, the adjudicator, whether Judge or Arbitrator, should obviously address the matter. As a matter of fact, the Minutes of the Preliminary meeting held on 24th May, 2005 will show that I did raise those matters which I considered relevant to a potential conflict of interests and both parties confirmed that they had no objection at all to my taking up the appointment.

As will be readily appreciated, this is a small town and the legal fraternity is relatively small. Members of that fraternity continually deal and interact with each other on both personal and professional matters and if objections such as that raised by Mr. Singh were to be sustained, the administration of justice both in Court and otherwise, would be stymied completely. I would not, for example expect my impartiality to be questioned on the fact that I have known Mr. Singh for almost thirty years ever since we met at the Alliance boys High School in the late 1970s. and now that Mr. Singh has introduced matrimonial relationships into the picture, I would consider any challenge to my impartiality on the

fact that I have known Mr. Singh's dear wife, Phoebe, since the 1970s when she was at the Alliance Girls High School at the same time when Mr. Singh and I were at the Boys School to be petty and frivolous. Similarly, the fact that Mr. Singh wrote to me on 11th May, 2007 requesting a donation for the very worthwhile cause of rhino protection (see coyly of his letter enclosed) and our Firm contributed a sum of Kshs.5,000/= (see copy of forwarding letter enclosed) would not, in my view be a reasonable ground for questioning my impartiality in this matter.

In addition, the timing of Mr. Singh's letter is not lost on me. The letter comes after a long history of delays by the Claimant and its Advocate. Mr. Singh wrote at a time when he had applied for yet another extension of time to respond to Mr. Havi's written submissions. The date proposed by Mr. Singh himself (18th June 2007) to which he sought extension fell on the same day that he wrote the letter under reply and not surprisingly, no Reply had been received from him. In the meantime, I have written to the parties' Advocates on a date for oral highlights of the submissions as I would like to conclude this long-outstanding matter as soon as possible.

I am satisfied in view of the foregoing and upon due consideration of all relevant factors that there exist no valid reasons why I should disqualify myself as demanded by Mr. Singh or at all. I am also mindful of my duty as Arbitrator to conduct the arbitration fairly, impartially and expeditiously and not to allow any party to scuttle and put to waste, without a solid basis for doing so being established, the tremendous amount of work which has gone into this matter for over two years now.

Yours faithfully,

NJOROGE REGERU FCL Arb

ARBITRATOR

Having received the letter dated 22nd June 2007 from the arbitrator, **Mr. Singh Gitau** Advocate wrote back through a letter dated 26th June 2007 and informed the arbitrator of his client's instructions to proceed to the High Court for appropriate orders and directions. The said letter is reproduced as hereunder;

"***Njoroge Regeru & company***

Advocates

Arbor House

Arboretum Drive

NAIROBI Fax Number:2718631

Dear Sirs

In the Matter of an Arbitration between Alliance Media Kenya Ltd & Monier 2000 Ltd

Thank you for your letter of 22nd June 2007.

I have noted your views on the matter. Please note that the reservations expressed on your impartiality have been raised by my clients whose interests I represent, my personal relationship with you notwithstanding.

Our clients are aware that on the onset of the hearing, you did raise matters in which you considered pertinent to your impartiality. However, you did not raise the issue of Mr. Havi's wife being employed in your firm even though Mr. Havi was on record as appearing for the Respondents together with Mr.

Nani Mungai.

We also note that you are laying blame on the Claimants for delaying the matter. If indeed you were of the opinion that they were wasting time, we would have expected you to sanction them then at the time.

In view of the position that you have taken, we are proceeding to the High Court.

Yours faithfully

J G SINGH"

Having reached a dead end, **Mr. Singh Gitau** learned counsel for the claimant/applicant filed the present application dated 23rd July 2007. It is an originating summons under Order 36 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main and essential prayers in the said application are;

(1) The 2nd respondent be restrained from hearing and/or further hearing and/or proceeding any further with the said Arbitration and all proceedings in the said Arbitration be stayed.

(2) The appointment of the sole arbitrator be terminated and/or substituted.

(3) A substitute Arbitrator be appointed in place of the 2nd respondent.

The grounds in support of the application are that;

(1) The arbitrator did not disclose that counsel for the 1st respondent was married to an Advocate employed in the Arbitrator's firm.

(2) That the 1st respondent's counsel, in breach of his duty as Advocate did not disclose to the applicant that his wife was employed in the Arbitrator's firm.

(3) That there is potential conflict of interest which the applicant should have been informed about.

(4) That the Arbitrator, Mr. Njoroge Regeru has refused to voluntarily step down as the Arbitrator despite valid objections taken by the applicant as to his impartiality.

(5) That the applicant stands to suffer great hardship and prejudice unless the mater is heard urgently.

The applicant also filed a supporting affidavit with several annextures some of which are unnecessary save for clouding the real issues and/or contest between the parties herein. The deponent is the applicant's General Manager and contends that in June 2007 while in the course of soliciting business at **Safaricom**, he learnt that there is a **Mrs. Fellicine Havi** employed by them. Upon further and proper inquiry he learnt that the said **Mrs. Havi** worked in the legal department and was an Advocate previously employed in the firm of **Njoroge Regeru & Co**. Advocates, the arbitrator's law firm.

The deponent claims that he was stunned by the potential conflict and immediately telephoned **Mr. Singh Gitau** Advocate who informed him that **Mrs. Fellicine Havi** was initially known as **Fellicine N. Oriri** as per the letter heads of **Njoroge Regeru & co**. Advocates. In paragraph 17, the deponents aver;

"**That in September 2005 and during the course of the arbitration proceedings, the name changed from Fellicine N. Oriri to Mrs. Fellicine Havi (Exhibit JN8 are copies of the letters). It would appear that she was employed in that firm until January 2007".**

And on the strength of that information, the deponent contends that the employment of **Mrs. Havi** as an Advocate in **Njoroge Regeru** Advocate raises a conflict of interest that the 2nd respondent was under a duty to disclose. He further contends that the applicant would never have agreed to the 2nd respondent's appointment as an arbitrator had this information been revealed and that out of abundant caution there should be a stay of proceedings and the 2nd respondent disqualified.

The 1st respondent filed a lengthy replying affidavit, the gist of which is that the arbitration proceedings started and/or commenced in March 2005 and at the time **Fellicine** was not married to the 1st respondent's Advocate. And that **Mr. Nelson Havi** Advocate got married to Fellicine Advocate on 13th August 2005 in a public ceremony within the knowledge of the applicant's Advocate and legal officer. It is also alleged that **Mrs. Havi** left the employment of the law firm in which the 2nd respondent is a partner in September 2006 a fact that is within the knowledge of the applicant's Advocate who is well known to her.

It is further stated that the applicant and its Advocates have since 13th August 2005 been aware of the marital status of the 1st Respondent's Advocate and his wife's former employment in the firm in which the 2nd respondent is a partner. And that the marital status of the 1st respondent's Advocate is of no relevance to the arbitration proceedings before the 2nd respondent.

The 2nd respondent did not file any replying affidavit and was contended with the material available before court.

The parties through their Advocates filed skeleton submissions after which I heard oral submissions from **Mr. Singh Gitau**, **Mr. Nelson Havi** and **Mr. Waweru Gatonye** Advocate, appearing for the applicant, 1st respondent and 2nd respondent respectively.

According to **Mr. Singh Gitau** learned counsel for the applicant the duty of disclosure runs from the time of appointment and throughout the proceedings. And by virtue of section 13(2) of the Arbitration Act No.4/95 that duty is placed on all parties from the onset till the determination of the matter. The test is not subjective and it is for the parties to determine whether or not doubts arise as to the impartiality or independence of the arbitrator.

Mr. Singh Gitau Advocate submitted that the arbitrator might have thought nothing about **Ms Fellicine** but he was under obligation to disclose the same to the parties. The applicant has seen the letters of the arbitrator's firm being amended to reflect the new marital status to **Mr. Havi** Advocate. And since the dispute between the parties is very acrimonious the issue of the marital status of the 1st respondent's Advocate should not be seen as a small matter. There are several suits and counter suits filed by the parties. According to **Mr. Singh** Advocate the applicant is worried and has reason to be worried when the 1st respondent causes the file to leave the former Advocate when **Mr. Nelson Havi** Advocate left. They are also concerned because **Mr. Nelson Havi** was not a lead counsel but a junior Advocate compared to **Mr. Nani Mungai** Advocate who was earlier handling the matter on behalf of the 1st respondent.

According to **Mr. Singh Gitau** Advocate it is the duty of the arbitrator to raise instances that may impede his impartiality but he now claims that he did not see the connection of a lawyer employed by him and married by a counsel for one of the parties to the dispute before him. He also contended that potential bias is a factor which can disqualify an arbitrator and where there is a potential bias, the proceedings must be halted. In short **Mr. Singh Gitau** learned counsel for the applicant submitted that the purpose of disqualification is to preserve the administration of justice from any suspicion.

Mr. Havi learned counsel for the 1st respondent raised a fundamental issue by stating that before the court examines a matter of evidence, it must first determine whether it has jurisdiction, since section 10 of the arbitration Act limits the intervention of the High court. That the claimant made an admission that it

did not make a formal application before the arbitrator. And that under Section 14(3) of the Arbitration Act, the authority to deal with such circumstances has not been constituted by the Attorney General.

Secondly **Mr. Havi** Advocate submitted that the claim that the 1st respondent's Advocate did not disclose to the claimant that his wife was employed in the arbitrator's firm is without merit. The appointment of the arbitrator was proposed by the claimant in its Advocate's letter of 9th March, 2005. The 1st respondent's acceptance of the appointment was communicated to the 2nd respondent on 13th May 2005. The preliminary meeting was convened and the arbitration proceedings commenced on 24th May 2005 after the arbitrator had disclosed and set out all pertinent facts within his knowledge which would have raised grounds of possible challenge to his acceptance of the appointment.

Thirdly the claimant's claim that there is suspicion in the movement of the 1st respondent's file from **Muriu, Mungai** to **Havi, Wanjama** Advocates is without basis. The 1st respondent has every right to choose its Advocate and the applicant's suspicion as to the choice is irrelevant. The claimant must establish its case before the arbitrator on merits and should cling on the alleged wickedness of the 1st respondent's advocate therefore he urged me to dismiss the application as one without merit.

Mr. Waweru Gatonye learned counsel for the 2nd respondent submitted that;

(1) The appointment of the arbitrator was suggested by the applicant herein and full disclosure was made at the first meeting. Therefore the applicant must have been satisfied about the integrity and impartiality of the 2nd respondent. And despite that, an allegation of bias has been made, hence it is important to look that nowhere has it been suggested that the arbitrator has misbehaved himself. Indeed the arbitrator has overindulged the applicant by granting unnecessary adjournments.

(2) The test for bias is an objective test and unless an objective evidence is placed before this court as it relates to the conduct of the arbitrator, it must remain that the application cannot be granted.

(3) Once an allegation is made against a judicial officer, the disqualification of the said officer is not automatic. It is upon the judicial officer to consider on the basis of the objective criteria and decide whether the officer should disqualify himself.

(4) On the contents of the letter written by the arbitrator refusing to disqualify himself **Mr. Gatonye** Advocate submitted that the language was necessary in order to convey the strong feeling that the arbitrator had been attacked unfairly. In his view parties cannot be allowed to make unfounded allegations against a judicial officer, therefore it was within the powers of **Mr. Regeru** to use strong language to defend himself against the attack on his integrity.

Lastly **Mr. Gatonye** Advocate was of the persuasion that the attack on **Mrs. Havi** is scandalous, totally unnecessary and to say the least unfortunate. The attack does not add any credit to the success or failure of a party's case or claim before the arbitrator.

I have considered the application and all the arguments presented by the parties in support and opposition. I have also read the written submission filed by the parties together with the many authorities cited to me. My view of the matter is as follows: That no doubt disqualification is a serious matter, which must be taken seriously. The seriousness of seeking disqualification is a true reflection or testimony that one party either by design, default and/or genuinely has no faith in the determination of his case by a particular judicial officer.

In the **Republic vs Honourable Jackson Mwalulu & others Civil Application No.310/2004**, (unreported) the Court of Appeal held;

"**that being the position as I see it when the courts in this country are faced with such proceedings as this (i.e. proceedings for the disqualification of the 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 established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi-judicial tribunal 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".

And in **Musiara Ltd vs William Ole Ntimama**, **Civil Appeal No.271/2003 (2004) K.L.R**., the Court of appeal again held;

"**If bias is indeed established, there has been breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy….In our view the past relationship between Shah JA and the respondent cannot be regarded by a fair minded and informed observer as raising a possibility of bias nor was it capable of affecting the approach and the decision of the learned judge. Moreover full disclosure was made before the motion was called to hearing and the applicant unequivocally stated that it had no objection to the learned judge presiding over the proceedings. It is instructive to note that the complaint was only resurrected after the applicant lost".**

In my understanding the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice. In my view justice is deeply rooted in the public having confidence and trust in the determination of disputes before court. It is of paramount importance to ensure, that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made. I am aware and appreciate the sentiment expressed by his **Lordship Tunoi JA** in **Mwalulu** case that bad or irritant litigants might be more inclined to explain the weakness of their case on their perception or assumption against the presiding judge. Although I must say that if a presiding judge has been attributed to have certain wickedness, which make him/her unfit to preside over the case of a complainant, it is essential for him to consider an exist point, so that his wickedness is not an excuse for a loosing litigant.

The problem may be elsewhere but, it is my humble view that as judges we should avoid the temptation to be over protective of a litigant raising a plea on disqualification. Let it be known that the integrity, independence and impartiality of the particular judge or the judges at large would be held intact or in high esteem if we readily accede to a request for disqualification. Of late there has been a tendency that a plea for disqualification directed against a particular judge is a collateral attack on the integrity of that particular judge or the judges at large. We must endeavour, as we always do to weigh the scales of justice. My position has been against the stringent and strict measures which has been laid down against disqualification. I think we should readily disqualify ourselves if it would serve the interest of justice and uphold the confidence of the public in the administration of justice. I am therefore advocating for a liberal approach that even in certain types of cases involving parties who are regularly in the court corridors over one or similar disputes, the judges should exercise the option to disqualification. The only way to cement public confidence is to discourage judges to clinging to a matter no matter the gravity or otherwise of the allegations involved. I appreciate that sometimes parties or their counsel would make scurrilous abuse or would levy unfounded allegations against learned judges who have nothing to do with the complaint. However even in such circumstances the judges must try with utmost care to balance the situation and if possible allocate the matter or dispute to another judge.

Of course if a party makes constant applications seeking disqualification, then the conclusion is that he is either shopping for a particular court or that he is prompted by malice or attempts to gain some mileage out of the delay. It is such situations, which must be deprecated and frown at.

As was rightly pointed by all the Advocates, the test to be applied is an objective test and the onus of establishing it rests upon the applicant. In my view where there is a reasonable or apparent apprehension of danger of bias, the court is employed to intervene. Usually the court is concerned with the likelihood, impression or perception of bias or possible partiality. It is essential to understand that apprehensions do strongly at times lead to a risk or danger of possible bias or lack of impartiality. Perhaps it is important at

this juncture to note that what is intended to be achieved is to avoid or overcome the feeling and fear that the court is likely to be biased. In my view the satisfaction and confidence of the litigants must always be maintained up to the delivery and determination of the dispute.

In order not to undermine the impartiality and independence of the judges, it is necessary to dispel appearance of bias, since actual bias is not a consideration for disqualification. It is therefore my view that in determining whether was a real likelihood of bias, the court does not look at the mind of the trial judge but it looks at the impression which could be given to other right minded people faced with the facts and circumstances of the allegations made against the judge. Even if he was impartial as he could be, nevertheless if right minded persons would think that in the circumstances, there was/is a real danger or possibility of bias on his part, then he must give way.

This application for disqualification involves an arbitration being conducted before **Mr. Njoroge Regeru**, an Advocate of the High Court of Kenya. The appointment was proposed by the present applicant and at the first preliminary hearing certain disclosures were made to the parties, wherein the appointment was endorsed by both sides. No doubt, the arbitration proceedings have been substantially completed and the only thing remaining is the delivery of the award. It is also undisputed that the arbitration started in 2005 and has been going on since sometimes in June, 2007, when the question of bias was raised by the applicant.

The bone of contention is that the wife of the 1st respondent's Advocate was previously employed by the firm in which the arbitrator is a partner. No doubt that **Mr. Havi** and **Fellicine** were married on 13th August, 2005 long after the arbitrator's acceptance of the appointment and commencement of the arbitration. **Mrs. Havi** left the employment of the firm in which the arbitrator is a partner on 31st August, 2006 a year after the marriage. The arbitration continued and proceeded for a whole year without objection until after the submissions by the 1st respondent was filed.

It was contended by **Mr. Gatonye** Advocate that the applicant has not disputed the facts set out in the affidavit by **Mr. Goga** that it was aware of the past employment relationship of **Mrs. Havi** in the firm in which the arbitrator is a partner. It is alleged that the applicant's Advocate and its legal office were both invited to the wedding ceremony and did not raise any objection to the continued arbitration by the 2nd respondent. In my humble view there are two issues for determination in whether to disqualify the arbitrator.

The first is the past employment of the 1st respondent's Advocate's wife in the firm which the arbitrator is the partner. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that **Mr. Njoroge Regeru**, has not or will not bring an impartial mind to the determination of the dispute before him because of the past employment of **Mrs. Fellicine Havi**, by his firm. And that his mind is not absolutely open to persuasion based on the evidence tendered to him and submissions made and/or to be made by the learned counsels on behalf of their clients. It is incumbent upon the applicant to establish that there exists reasonable grounds for apprehending that in his judicial mind and capacity the arbitrator was or will not be impartial. In my view no act and/or conduct should be allowed which creates even a suspicion that there has been an improper interference with the administration of justice. I therefore must say that the issue is a question of perception and not necessarily proof of actual bias which matters. The measure is that of reasonable perception by other people.

Mr. Singh Gitau Advocate was of the view that the past employment and marital status of **Mrs. Fellicine Havi** is a factor which can give rise to a conflict of interest, therefore it is pertinent to disqualify the arbitrator from further hearing and determination of the dispute between the applicant and first respondent. There is no evidence whatsoever to show that the arbitrator was involved in any form of transaction adversely or otherwise with the wife of counsel for 1st respondent's advocate. The only ground set out by the applicant is that wife of counsel for the 1st respondent was sometimes back in the employment of the firm in which the arbitrator is a partner. No evidence has been adduced to the effect that 2nd respondent delegated or even attempted to delegate to her any responsibility including doing

research as regards this case. In any case the appointment, honour, privilege, duty and/or obligation to conduct the arbitration in a fair manner was personal to **Mr. Njoroge Regeru**. It was not shared with the firm and/or employees in the firm of **Njoroge Regeru & Co.** Advocates. In my view there is absolutely no reasonable basis for thinking that **Mr. Njoroge Regeru** will be biased because, the firm where he is a partner had previously employed the wife of the 1st respondent's Advocate.

As stated there is no evidence to show that **Mrs. Fellicine Havi** was privy and/or participated in the arbitration proceedings in any manner. She did not appear at any of the sitting conducted by the arbitrator. And more so there is no evidence that she tried to handle the arbitration file in a manner to suggest her involvement or in a manner to assist the clients of her husband. I do not think the circumstances as narrated to me would lead a fair minded and informed bystander to conclude that there was a real possibility or a real danger that the arbitrator was and/or would be biased. I also do not think the past employment and marital status of **Mrs. Fellicine Havi** is capable of affecting the approach and decision of the learned arbitrator. In my view the facts and circumstances relied upon by the applicant for the disqualification of the arbitrator is so remote, so scanty and more so amounts to a non existent paranoia. In my conviction there is not a slightest reason for the applicant to warrant a suspicion that justice will not be done or seen to be done by the arbitrator.

I reckon that where allegations are made the court must be able to construe after carefully investigating the averments contained in the affidavit or otherwise of the aggrieved party that the possibility of bias is present. The question is not the correctness of the verdict to be delivered but whether a right minded party would leave the court having in his mind that justice was done or would be done to his case. I do not believe that a fair minded person would conclude that the decision of the learned arbitrator would be influenced and/or compromised by the past employment and marital status of the 1st respondent's Advocate's wife.

My firm position is that there was no duty on the part of the 1st respondent's advocate to disclose to the 2nd respondent or to the applicant as his marital status and the past employment of his wife is not and cannot be an issue that is likely to give rise to justifiable doubts as to an arbitrator's impartiality or independence, since the appointment was personal and not general to the firm in which the arbitrator is a partner.

The other issue to investigate is whether the arbitrator misconducted himself or demonstrated acts or likelihood of biasness against the applicant. It must be noted that disqualification cannot be automatic upon mere complaint by a party especially by an arbitrator. I say so because the test and/or standard for the disqualification for an arbitrator is higher than an ordinary disqualification of a judge or magistrate. It is essential to appreciate that the procedure of appointing an arbitrator is by consent or mutual agreement by the parties to the dispute, therefore extreme care and caution must be exercised in line with the limits set out by the Arbitration Act.

There is no dispute that the appointment of the arbitrator was suggested by the applicant and endorsed by the respondent. Having gone through the documents tendered before me there is no evidence to show that the arbitrator misconducted himself in a manner to suggest that he is biased and/or would be biased against the applicant. In my view the applicant has not alleged and/or demonstrated any bias, misconduct or impropriety in the 2nd respondent's conduct of the arbitration. What I gather is that there has been equal and fair treatment by the 2nd respondent, despite the applicant's numerous attempts to scuttle and derail the determination of the arbitration reference. It was contended by **Mr. Havi** Advocate that the 2nd respondent allowed more than 10 unwarranted applications for adjournments on the part of the applicant not to mention his entertainment of the applicant's failure to comply with the orders for directions on time or at all.

On my part and in consideration of the material placed before me, I hold that there is no material placed before me to show and/or proof that the arbitrator had misconducted himself in a way to show that the limits or boundaries of an impartial judicial officer has been or would be undermined. There is no evidence that he did not or would not give a fair or adequate opportunity to the applicant in the

prosecution or defence of its case. I am in agreement with **Mr. Gatonye** Advocate that it is no business of the arbitrator to disclose the marital status of all employees under the firm where he is a partner. In my view that is preposterous, that is too involving, that is a great deal of task to expect him to perform. I hold the view that the marital status of Mrs. Havi is insignificant to the mandate, task, obligation and/or weight on the shoulders of the arbitrator. It is diversionary and to say the least preposterous to expect the arbitrator to be concerned with the marital status of junior employees under his firm. With respect I do not think the allegations leveled against **Mr. Njoroge Regeru** is tenable or justified. I also do not think hat he would favour the 1st respondent unfairly on the account that the firm of **Njoroge Regeru** Advocates had previously and say two years ago employed the wife of the 1st respondent's Advocate.

The applicant through **Jacqueline Nkatha** says that sometimes in June 2007 while in the course of soliciting for business at **Safaricom** Limited learnt that **Fellicine Havi** employed by **Safaricom** was previously employed in the firm of **Njoroge Regeru & co**. Advocates. According to the witness that was a potential conflict. The question is that can such allegation be true. It is strange to note that the objection and discovery of the marital status of **Mrs. Havi** is made two years after the commencement of the arbitration.

In his submission before me **Mr. Singh Gitau** learned counsel for the applicant acknowledged and/or admitted that he had been invited to the wedding of **Mr.** and **Mrs. Havi** but did not attend the same because he was out of the country. The wedding took place in 2005, which means, **Mr. Singh Gitau** Advocate was aware that the status of his learned friend **Mr. Nelson Havi** had changed. And that his wife **Mrs. Fellicine** was employed in the law firm of **Njoroge Regeru & Co**. Advocates. So he had an obligation and duty to his client to disclose that the wife of the 1st respondent was employed in the firm where the arbitrator is a partner. It is for that reason that, I must say that the contents of the letter dated 18th June 2007 cannot be factually true.

There is no justification why the applicant was dismayed at the alleged new discovery since the information subject of this application was with its Advocate and legal officer way back in 2005. If it was not revealed, if it was not raised with the arbitrator and if no application had been made at the appropriate time, inescapable or inevitable inference is that it was not relevant to the issue at stake before the arbitrator or that it was a factor to seek for the disqualification of the arbitrator. I am therefore in agreement with the Advocates for the respondents that the timing and reasons for disqualification is somewhat suspicious. One may be tempted to conclude that the application is not made in good faith. I tend to believe so. The submission by **Mr. Waweru Gatonye** that the application and allegations therein is nothing but unnecessary and unfair attack against the integrity and character of the arbitrator and **Mrs. Havi** cannot be far from the truth. I therefore think that it would be dangerous to disqualify the arbitrator merely on allegations which have no basis.

As stated earlier in this ruling, the applicant has not established any facts constituting bias or likelihood of bias on the part of the arbitrator. In my humble view the allegations made against the arbitrator are unjustified, annoying, scandalous and are made without any reasonable cause or basis. The letter dated 18th June, 2005 is shockingly rude and amounts to a misplaced aggression against the arbitrator.

I am saying so because **Mr. Singh Gitau** Advocate who is an agent of the applicant had knowledge of the facts of the past employment of **Mrs. Havi** way back in September 2005, when he admits he saw changes in the letter heads of the firm of **Njoroge Regeru & Co**. Advocates. He was earlier invited to the wedding of **Mr.** and **Mrs. Havi** but was unable to attend because he was out of the country. **Mr. Singh Gitau** had the opportunity to raise an objection at that crucial time, when the baby was still in the mother's womb. He did not raise a finger in the direction of the arbitrator and **Mr. Nelson Havi** Advocate.

I think it is now too late in the day for him to object when the baby is about to be borne. He and his client participated in the conceivement, conceptualization and nurturing of the baby. And it would be against the order of justice and nature to allow the applicant to be contumacious to the delivery of the intended joint baby. The medication and expertise was provided by both parties but now one party do not want the

baby to see the light of the day due to flimsy and flippant reasons. To allow the applicant in its design or desire to stop further delivery of the baby would be a conundrum difficult for all parties to resolve without unnecessary time and costs.

In my view it is no fault of the arbitrator that he is about to preside over, the delivery of a baby that legitimately belongs to both parties herein. To deny him that fundamental and obligatory duty would mean that no baby can be borne within the corridors of justice because one party thinks the baby may not be to his expectation and colour. I think that is not within the standard benchmarks for such complaints like the one undertaken by the applicant. I also think that the problem or fear of the applicant is not the marital status of **Mr**. and **Mrs. Havi** or failure of the arbitrator to disclose such alleged or potential bias in time but a veiled attempt to change the direction and determination of the dispute.

The timing of the application should not be lost for it is made after the conclusion of the arbitration reference that has taken 2 years, monies have been spent and witnesses have testified on each side. In any case the effect of the orders sought would undo what has been done by the parties for two years at a stage when the arbitration has been concluded and what is essentially remaining is the filing of the applicant's submission and writing of the award. I think substantial injustice would result if parties were allowed to take such a route. I therefore hold that this is not an appropriate application to enable me make the orders sought by the claimant.

In my view, I think I have answered the question that stands out in the heart of this contest, that there is no justification or basis for the disqualification of the arbitrator. The question posed to me by the applicant fails the benchmarks or standard procedure for the disqualification of **Mr. Njoroge Regeru** Advocate as the arbitrator in the dispute between the applicant and 1st respondent.

There are two other issues which were raised before me. The first issue is the corruption allegations in **Tanzania** in a matter involving these same parties. And without being respectful to the Advocates, I think that issue is extraneous since it did not concern the issues for my determination. In short I am saying it was a non issue which was not relevant to be raised before me.

The other issue is the allegation by the applicant that the arbitrator's letter dated 22nd June 2007 in response to the applicant's request for his disqualification was dismissive, derisive and insultive to a party whom he is expected to administer justice. **Mr. Singh Gitau** Advocate complained that the said letter summarily dismissed the request made by the applicant without being accorded an opportunity to be heard. I have gone through the contents of the said letter and shorn of the language and style, I do not see any impropriety in the contents. The claimant was aware that it was required under Section 14 of the Arbitration Act to make a formal application to the arbitrator but none was made. Instead it sought to engage the arbitrator in correspondences demanding his disqualification within 24 hours. That was not correct or proper procedure to adopt. In my view a formal application ought to have been made, responded to by the 1st respondent, heard on its merits and acted upon by the arbitrator for his verdict. At this stage, I must make the following observations;

(1) The manner in which the disqualification of the arbitrator was sought is improper.

(2)The language and style used by **Mr. Regeru** Advocate was out of proportion, though the gravity and degree of the contents was commensurate to the style in the letter seeking his disqualification.

I think it is incumbent upon person exercising judicial mandate to use sober and temperate language under whatever circumstances. I think it was not necessary for the arbitrator to convey his displeasures at the accusation, in the manner he employed. Be that as it may nothing attaches to the language used and/or employed.

(3) I also observe that in view of the decision made by the arbitrator in his letter dated 22nd June, 2007, it was perfect for the applicant to come to the High court for the present application. The decision in the letter dated 22nd June, 2007 was final; hence there was no need for **Mr. Singh Gitau** to make a formal

application before the arbitrator. By questioning the style and language, I do not in any way cast any doubts as to **Mr. Regeru's** impartiality or ability to hear and determine the dispute on merit and to the best interest of justice. I believe he would fulfil the calling and mutual trust and confidence placed on him by the parties herein.

(4) I hold that the applicant has not contravened the provisions of Section 10, 14, 15, 16, 17 and 39 of the Arbitration Act No. 4/95.

Now having carefully and meticulously considered the allegations against **Mr. Njoroge Regeru**, (the arbitrator), I find no merit in the application and it is disallowed with costs to the respondents.

Before I depart I must express a word of gratitude to all the Advocates for their industry and tremendous research on the law applicable. The material and authorities cited were greatly beneficial to the making of this decision.

For **Mr. Singh Gitau** learned counsel for the applicant, I say to him that although you act on the instructions of your client diligently, honestly and properly at all times, but you must too remember that you owe a duty to **Mr. Njoroge Regeru** Advocate and **Mr.** and **Mrs. Havi Advocates**. Please tell your client to differentiate between unfounded allegations from justifiable apprehension. It does not lie in the mouth of your client to attack and/or bring the conduct of **Mr.** and **Mrs. Havi**. You must note, the accomplice to the crime of suspicion is in our inability to separate truth from falsehood. Do not be indifferent, to the commission or conveying of unfounded allegations. Always uphold what is right even if it means seeking a divorce from your client. You must endeavour to recognize justice even when it is hidden in extreme darkness. Please note we all work for the common good of justice. You have done a tremendous job but the fact/law is not on your side.

For **Mr. Nelson Havi**, please note that life is not a bed of roses and human beings by their nature are strange characters. They may attack you unfairly, they may abuse your integrity and character. And above all, they may bring your innocent loved ones into a dispute which does not concern them. But note that the Almighty God breaks our spirit to save our soul and allows pain so that we can be bolder and stronger. **Mr. Havi** you have carried yourself in a dignified manner before me despite the grave accusations made against you and your wife. Take courage and life continues.

For **Waweru Gatonye** you have been the peace maker during this acrimonious litigation that was conducted before me. May be you have the expertise and experience under your hut, you deserve a credit.

Order: The application dated 23rd July, 2007 is dismissed with costs to the respondents.

M. A. WARSAME

JUDGE