In re Estate of Fai Amario Omar aias Peter Gilbert Njoroge Ng'ang'a (Succession Cause 354 of 2010) [2025] KEHC 6593 (KLR) (20 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6593 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE 354 OF 2010

SM MOHOCHI, J

MAY 20, 2025

IN THE ESTATE OF FAI AMARIO OMAR ALIAS PETER GILBERT NJOROGE NG'ANG'A

AND N THE MATTER OF APPLICATION FOR RECUSAL FROM CASE BY JUSTICE MOHOCHI

BETWEEN

ELVIS KAREE AMARIO ..... APPLICANT

SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE PENINAH SHINTA WAMBUI AMARIO

AND

MIKI NG'ANG'A NJOROGE ..... 1ST RESPONDENT

SHEENA EUSTON AMARIO ..... 2ND RESPONDENT

MASHADI AMARIO ELIOR ..... 3RD RESPONDENT

JAMES NG'ANG'A KAMAU ..... 4TH RESPONDENT

YURI GILBERT AMARIO ..... 5TH RESPONDENT

DEBBIE AMARIO ..... 6TH RESPONDENT

SALOME WANJIKU MWANGI ..... 7TH RESPONDENT

BERNICE NJERI KAMAU ..... 8TH RESPONDENT

SHEILA WANGARI ..... 9TH RESPONDENT

RULING

1. On the 8th of August 2024 this Court dismissed a Summons for Revocation of grant dated 9th May 2024, by Elvis Karee Amario who had moved Court for injunctive reliefs against the Administrators

of the estate of the deceased, as well as his recognition as a beneficiary to the estate. In his Application the Court found and observed that he could then not agitate on behalf of the estate of her deceased mother's estate as he was yet to be appointed a personal representative. Elvis Karee Amario did not contest the decision on Appeal or review.

2. Consequently, Elvis Karee Amario moved the Nakuru Chief Magistrate's Court on the 13th November 2025 and obtained a limited grant Ad Litem appointing him as the personal representative in the estatePenninah Shinta Amario. Following the issuance of the said limited grant the Applicant filed a summons for revocation of grant dated 18th February 2025 and directions including a ruling dated for the 6th March 2025.

3. No sooner had Elvis Karee Amario filed his summons for revocation of grant that on the 25th February 2025 that he filed a subsequent notice of motion for recusal of myself from considering the summons for revocation of grant on the ground of "lack of impartiality" and "actual bias" drawn from the ruling of 13th November 2024 and oral observation by the judge while delivering the aforesaid ruling.

4. Before me is a Notice of Motion dated 25th February 2025, by Elvis Karee Amario filed pursuant to the provisions of Article 48 And 50(1) of the *Constitution* of Kenya, 2010, Sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Cap 21 laws of Kenya, Order 51 Rule 1 of the *Civil Procedure Rules* 2010 seeking for the following orders: -

    i. Spent

    ii. Spent

    iii. That the Court be pleased to hereby postpone the rulings scheduled on the 6th March 2025 pending the hearing and determination of the application herein Inter partes.

    iv. That the learned Honourable Justice Mohochi Samwel Mukira recuses and disqualifies himself from further hearing and determining the Applicant's Application dated 18th February 2025.

    v. That the matter be assigned to any other judge of competent jurisdiction for a hearing determination of the Applicant's Application dated 18th February 2025.

    vi. That the costs of this application be in the main cause.

5. The Application is premised on the following twelve (12) grounds;

    i. That the Applicant has moved this Honourable Court to have the learned Honourable Justice Muhochi Samuel Mukira recuse himself from determining the application dated 18th February 2025.

    ii. That this application for recusal is on account of lack of impartiality and actual bias and prejudice by the learned Honourable Justice Muhochi Samuel Mukira for having pronounced himself on an issue he had held was moot and goes to the heart of the Applicant's application dated 18th February 2025.

    iii. That the said bias and lack of impartiality infringes on the on the Applicant's rights to access to justice as enshrined under Article 48 and a fair hearing as enshrined under Article 50 (1) of the *Constitution* of Kenya, 2010.

    iv. That vide a ruling delivered on 8th August 2024, the learned Honourable Justice Muhochi Samuel Mukira at paragraph 130 on page 38 held that "Elvis Karee Amario has not on his part initiated proceedings to be appointed as the representative of the Estate of Peninah

Shinta Amario to agitate for her rights interests (if any) in this cause. And as such the making of pronouncements and declarations on entitlements of a deceased spouse to the deceased remains moot."

v. That further while delivering the said ruling orally, the learned Honourable Justice Muhochi Samuel Mukira held that "The Court notes that Mrs Peninah is a former spouse having been divorced under Kikuyu Customary Law." However, the said holding is uncannily not reflected in the typed ruling.

vi. That the Applicant's advocates on record requested for the link of the recorded proceedings of the Court on 24th February 2025. They were directed to fill "a request for the digital recording."

vii. That on the 25th February 2025, the relevant department of the judiciary shared a link to the recorded transcription and upon keenly listening to the proceedings, indeed the learned Honourable Justice Muhochi Samuel Mukira is clearly heard holding that "The Court notes that Mrs Peninah is a former spouse having been divorced under Kikuyu Customary Law."

viii. That the issue of whether the Applicant's mother was still a wife or divorced was equally moot as correctly held by the learned Honourable Justice Muhochi Samuel Mukira at paragraph 130 on page 38 of the ruling delivered on 8th of August 2024.

ix. That as such the issue of the Applicant's mother having been divorced or not is only ripe for determination in the pending application dated 18th February 2025, that the learned Honourable Justice Muhochi Samuel Mukira has scheduled it for a ruling on 6th of March 2025.

x. That by dint of the earlier pronouncements by the learned Honourable Justice Muhochi Samuel Mukira on 8th August 2024, he is not Impartial to Fairly and Justicially determine the application dated 18th February 2025 on its merits.

xi. That serious prejudice will be occasioned to the Applicant if the orders sought herein are not granted. Justice must not only be done but seen to be done.

xii. That it is thus imperative that in the interest of justice and fairness, the learned Honourable Justice Muhochi Samuel Mukira recuses himself from hearing and determining the Applicant's application dated 18th February 2025 that he has scheduled it for a ruling on 6th March 2025.

Applicant's Case

6. The Application is supported by the Sworn Affidavit Brian Patrick Ochleng an advocate with the conduct of the matter on behalf of the Applicant who deponed that,

a. He has been involved in this matter since coming on record for the Applicant and is thus fully conversant with the matters deponed to and therefore competent to swear the affidavit.

b. The Applicant has moved this Honourable Court to have the learned Honourable Justice Muhochi Samuel Mukira recuse himself from determining the application dated 18th February 2025, which has been scheduled for a ruling on 6th March 2025.

c. The basis of this application is on account of lack of impartiality and actual bias and prejudice by the learned Honourable Justice Muhochi Samuel Mukira for having pronounced himself

on an issue he had noted was moot. The issue goes to the heart of the Applicant's application dated 18th February 2025.

d. The said bias and lack of impartiality infringes on the on the Applicant's rights to access to justice as enshrined under Article 48 and a fair hearing as enshrined under Article 50 (1) of the Constitution of Kenya, 2010.

e. Brian Patrick Ochieng advocate attended Court virtually on 8th August 2024 at 2:00 PM when the Applicant's application dated 9th May 2024 was scheduled for a ruling before the learned Honourable Justice Muhochi Samuel Mukira.

f. In the ruling delivered on the 8th August 2024, the learned Honourable Justice Muhochi Samuel Mukira at paragraph 130 on page 38 held that "Elvis Karee Amario has not on his part-initiated proceedings to be appointed as the representative of the Estate of Peninah Shinta Amario to agitate for her rights interests (if any) in this cause. And as such the making of pronouncements and declarations on entitlements of a deceased spouse to the deceased remains moot."

g. Further while delivering the said ruling orally, the learned Honourable Justice Muhochi Samuel Mukira held that "The Court notes that Mrs Peninah is a former spouse having been divorced under Kikuyu Customary Law." However, the said holding is uncannily not reflected in the typed ruling.

h. They requested for the link of the recorded proceedings of the Court on 24th February 2025. We were directed to fill "a request for the digital recording."

i. On the 25th February 2025, the relevant department of the judiciary shared a link to the recorded transcription and upon keenly listening to the proceedings, at 2:14:10 indeed the learned Honourable Justice Muhochi Samuel Mukira is clearly heard holding that "The Court notes that Mrs Peninah is a former spouse having been divorced under Kikuyu Customary Law."

j. It is uncanny that the oral sentiments of the learned Honourable Justice Muhochi Samuel Mukira tha "The Court notes that Mrs Peninah is a former spouse having been divorced under Kikuyu Customary Law." is not reflected in the typed ruling delivered on 8th August 2024.

k. The issue of whether the Applicant's mother was still a wife or divorced was equally moot the learned Honourable Justice Muhochi Samuel Mukira held on paragraph 130 on page 38 of the ruling delivered on 8th of August 2024.

l. Further no evidence was presented to support any averments that the applicant's mother was divorced and the holding by the learned Honourable Justice Muhochi Samuel Mukira is an indication of actual bias and lack of impartiality.

m. As such the issue of the Applicant's mother having been divorced or not is only ripe for determination in the pending application dated 18th February 2025, that the learned Honourable Justice Muhochi Samuel Mukira has scheduled it for a ruling on 6th of March 2025.

n. By dint of the earlier pronouncements by the learned Honourable Justice Muhochi Samuel Mukira on 8th August 2024, he is not Impartial to Fairly and Justicially determine the application dated 18th February 2025 on its merits.

o. Serious prejudice will be occasioned to the Applicant if the orders sought herein are not granted. Justice must not only be done but seen to be done.

p. It is thus imperative that in the interest of justice and fairness, the learned Honourable Justice Muhochi Samuel Mukira recuses himself from hearing and determining the Applicant's application dated 18th February 2025 that he has scheduled it for a ruling on 6th March 2025.

q. It is in the interest of justice and fairness that the Learned Judge recuse himself from hearing and determining the Applicant's application dated 18th February 2025.

r. What is deponed to is true to the best of the Advocate's knowledge. information and belief, sources of which are disclosed

Applicants written Submissions

7. In his filed written submissions dated 16th April 2025, the Applicant submits that, it is common ground that the Video Link attached on paragraph 9 of the supporting affidavit sworn on 25th February 2025 clearly captures the leaned judge making a pronouncement, which is uncannily not reflected in the ruling. The said pronouncement goes to the heart of the application dated 18th February 2025, which the Applicant has sought the learned judge to recuse himself. The Applicant moved the Court vide a Notice of Motion dated 25th February 2025, seeking the recusal and disqualification of learned Honourable Justice Mohochi Samuel Mukira from further hearing and determining the Applicant's Application dated 18th February 2025.

8. That the crux of the Application is want of impartiality, actual bias and prejudice derived from the Ruling of the Court dated 8th August 2024 and oral pronouncement made thereon.

9. That the main issue for determination is whether the Applicant has demonstrated reason for the Honourable Judge to recuse himself from determining the application dated 18th February 2025?

10. That indeed the Applicant has established and met the conditions set for the Court to consider and allow the Application seeking the recusal of Honourable Justice Mohochi Samuel Mukira, as it is common ground that the Video Link attached on paragraph 9 of the supporting affidavit sworn on 25th February 2025 clearly captures the leaned judge making a pronouncement, which is uncannily not reflected in the ruling.

11. That the said pronouncement goes to the heart of the application dated 18th February 2025, which the Applicant has sought the learned judge to recuse himself.

12. That, the *Judicial Service (Code of Conduct and Ethics) Regulations* enacted under Legal Notice 102 of 2020 contains general rules of conduct and ethics to be observed by Judicial Officers to maintain the integrity and independence of the Judicial service states under Regulation 21;

    21. Recusal

    A Judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the Judge;

    a. .....

    b. .....

    c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;

    d. Has actual bias or prejudice concerning a party.

e. .....

13. All Judges are bound by this Code. In *Rawal & 2 others v Judicial Service Commission & 2 others; Okoiti (Interested Party); International Commission of Jurists & 2 others(Amicus Curiae)*(Civil Application 11 & 12 of 2016(Consolidated)) [2016] KESC 1 (KLR), Honourable Njoki Ndung'u, J, in reference to Justice Aharon Barak in *Efrat v Dir of Population Registry at Ministry of Interior*;

> " This requirement for objectivity imposes a heavy burden on the Judge. He must be able to distinguish between his personal desire and what is generally accepted in society. He must erect a clear partition between his beliefs as an individual and his outlooks as a Judge. He must be able to recognize that his personal views may not be generally accepted by the public. He must carefully distinguish his own credo from that of the nation. He must be critical of himself and restrained with regard to his beliefs. He must respect the chains that bind him as a Judge."

14. It is the Applicant's submission that, in rendering his ruling delivered on 8th August 2024, the learned Justice Mohochi Samuel Mukira, in paragraph 130 on page 38 held that "Elvis Karee Amario has not on his part-initiated proceedings to be appointed as the representative of the Estate of Peninah Shinta Amario to agitate for her rights interests (if any) in this cause. And as such the making of pronouncements and declarations on entitlements of a deceased spouse to the deceased remains moot."

15. That the learned Judge, while delivering the said ruling orally, held verbatim, "The Court notes that Mrs. Peninah is a former spouse having been divorced under Kikuyu Customary Law." The said holding, however, was uncannily not reflected in the typed ruling.

16. The issue of whether the Applicant's mother was still a wife or divorced was equally moot and is ripe for determination in the pending application dated 18th February 2025, which the learned judge is being moved to recuse himself pursuant to the recusal application dated 25th February 2025, on account of the judge's pronouncement while delivering the ruling on 8th of August 2024.

17. It is common ground that the Video Link attached on paragraph 9 of the supporting affidavit sworn on 25th February 2025 clearly captures the leaned judge making a pronouncement, which is uncannily not reflected in the ruling. The said pronouncement goes to the heart of the application dated 18th February 2025, which the Applicant has sought the learned judge to recuse himself.

18. It is the Applicant's submissions that the learned Justice Mohochi Samuel Mukira pronounced himself in such unqualified terms on an issue that goes to the heart of the application dated 18th February 2025, which was still pending determination.

19. Reference is made to Professor Groves M who observes, in "The Rule Against Bias" (2009), U Monash LRS 10, "That a claim against actual bias requires proof that the decision maker approached the issue with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.

20. Further reference is made to the case of *Dimes v Grand Junction Canal* (1852) HLC 75, the question of whether any form of interest may give rise to a reasonable apprehension of bias ought to be determined by a single test;

> " First, it requires the identification of what is said might lead a judge to decide a case other than on its legal and factual merits. The second step is no less important. There must be an

articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits..."

21. The Applicant's claim for recusal and disqualification from hearing the matter is predicated on the untimely expressions and views of Honourable Justice Mohochi Samuel Mukira on a matter that is yet to be determined on its merits, alluding to apparent bias.

22. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* 2013 (eKLR), the Court held:

> " Public confidence in the administration of justice required that the Judge implicated disqualifies himself, it was irrelevant that there was, in fact, no bias on the part of the Judge, and there is no question of investigating whether there was any likelihood of bias on the fact of that particular case." SCJ Ibrahim, in the same matter, further states,
>
> "This Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable".

23. That the Court further observed that, even where a judge finds that even after holding a particular position, he is still able to rise above that position and is willing to be persuaded, in such a case, a judge may wish to possibly persuade the parties that he wishes to hear the matter and he will be open-minded and objective. Where parties, after being so informed, agree, the judge may continue to sit.

24. That the Supreme Court in that matter (Jasbir), cautioned that despite a judge's duty to sit being of great importance, it would be a tragic risk, in the circumstances, to continue to sit because first, the issue of bias had already been raised expressly and the Judge's disqualification was sought. Secondly, the question of perception as it relates more so to

the parties and the public is extremely important. Once the impression is given, it is still not possible for the Applicant, and more importantly, a reasonable observer, to believe that the Judge is not biased in the matter. The Judgement will still not be acceptable.

25. That Supreme Court Justice Ibrahim further provides that: -

> " Recusal is a Judicial duty, and it does not amount to a Judge abrogating his duty to sit. Recusal helps protect the integrity and dignity of the bigger institution, the Judiciary, and aids in championing its independence. The integrity of the Institution of the Judiciary is a matter not to be eroded or treated cursorily or of secondary importance."

26. That it is for this reason that the Applicant prays that the Application seeking the recusal of Honourable Justice Mohochi Samuel Mukira dated 25th February 2025 be allowed ex-debito justitiae.

The 1st Respondents case

27. In his replying affidavit dated 17th April 2025 the 1st Respondent opposes the Application deposing that, the facts and matters deponed to are derived partly from his own knowledge and partly from information and advice received from the 1st Administrator/Respondent's Advocates Messrs. Robson Harris Advocates LLP and to the extent that any statement made herein is based on information or belief, he has disclosed hereunder the source or ground (as the case may be) of such information or belief and he verily believe the same to be true.

28. That, he has read and understood and where necessary had explained to me by the said 1st Respondent's Advocates the meaning and import of the Applicant's Notice of Motion dated 25th February, 2025 together with the Affidavit sworn by Brian Patrick Ochieng in support of the said Application on the even date and filed under Certificate of Urgency on 25th February, 2025.

29. That, from the foregoing, the Applicant's instant Application is not only misconceived but also impotent, bad in law, full of misrepresentations and heavily laden with material non-disclosure of facts and tantamount to an abuse of the judicial process.

30. That, the Applicant had sought vide a Notice of Motion Application dated 9th May, 2024 seeking to be recognized as a beneficiary in the estate of the deceased for being a biological son of the deceased.

31. That, upon consideration of the Application and submissions by Counsel for the respective parties, this Honourable Court found that the Applicant was not entitled to benefit from the estate of the deceased as he was not a biological son.

32. That, further, the circumstances leading to the deceased meeting the Applicant's biological mother was pursuant to a newspaper advertisement which was placed eight (8) years after the birth of the Applicant.

33. That, further, the Applicant herein filed an Application under Rule 5 (2)(b) in the Court of Appeal seeking to appeal against the decision of this Honourable Court vide Notice of Motion Application dated 9th September, 2024, which appeal was withdrawn by consent of the Parties herein on 11th December, 2024 on the basis that the Appellant had not sought leave to appeal from the Honourable Court.

34. That, concurrently, the Applicant herein had filed a Notice of Motion Application dated 13th November, 2024 seeking leave from the High Court to appeal to the Court of Appeal against the Ruling delivered by this Honourable Court on 8th August, 2024, which application was not opposed by the parties.

35. That, on apprehension that the appeal might not succeed, the Applicant mischievously filed a Notice of Motion Application dated 18th February, 2025 seeking inter alia to recognize the Applicant's deceased mother as a wife of the deceased and thereby entitled to inherit from the estate absolutely.

36. That, the foregoing has given rise to the instant Application for the Honourable Judge to recuse himself, which Application he objects by virtue that, it is clear from the foregoing that the Applicant's intention is to inherit from the estate by whatever means necessary.

37. That, further, the instant Application is a clear indication of an Applicant who is in business of forum shopping seeking to derail the conclusion of the distribution of the deceased's estate, noting that this suit has been long-standing since 2010.

38. That, in any event, the Applicant is keen on pursuing an appeal against this Honourable Court's Ruling delivered on 8th August, 2024.

39. That, as it is, noting the aforementioned Ruling of this Honourable Court, the Applicant herein is not a beneficiary to the estate of the deceased and therefore has no locus in this matter.

40. That, allegations that the Honourable Judge will be biased and should therefore recuse himself are unsubstantiated as the Honourable Court addressed itself on the same in its Ruling delivered on 8th August, 2024,

41. That the issues raised in the Ruling will be addressed by the Court of Appeal and the Appellate Court is vested with the authority to make any necessary orders.

42. That it is not disputed that there is no stay of the proceedings before this Honourable Court and this matter should therefore proceed to its logical conclusion.

43. That, he is advised by his advocates on record, that for recusal to succeed, the Applicant ought to have demonstrated bias against them and that, the Applicant has also not demonstrated that the Honourable Judge has a pecuniary interest in the matter as was stated in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others*.

44. That, in any event, he is advised by his advocates on record which advice he believe to be verily true, that the instant application is not objective but based on mere paranoia that the Applicant's pending applications may be dismissed.

45. That, the instant Application and Notice of Motion Application dated 15th February, 2025 in their entirety are fatally defective and it is clear that its sole purpose is to frustrate the progress of this matter.

46. That, on the whole, on a consideration of the facts and the law he verily believe that the Applicant's Application dated 25th February, 2025 lacks in merit, is mischievous and a clear abuse of the Court process and the same ought to be dismissed with costs.

3rd Respondent's Case

47. The 3rd Respondent on her part depones under oath that the application dated 25th February 2025 cites only the estate administrators as respondents, notwithstanding that the matter involves ten parties, including a minor. The omission of the remaining parties from the formal list of respondents constitutes a procedural irregularity, particularly as all legal representatives on record were duly served with the application.

48. That during the mention held on 6th March 2025, the Court acknowledged the procedural oversight and accordingly directed all counsel on record to file responding affidavits and written submissions. This directive was issued with a view to ensuring that all parties affected by the proceedings are afforded a full and fair opportunity to participate meaningfully.

49. That the 9th Respondent, Sheila Wangari, has been continuously and consistently represented in these proceedings by Messrs. Ndegwa & Ndegwa Associates. The record clearly demonstrates that said firm has actively engaged in the matter from as early as 18th October 2021, long prior to their formal Notice of Appointment dated 18th March 2025. At no point was Sheila Wangari unrepresented or deprived of the opportunity to participate meaningfully in these proceedings.

50. That the importance of legal representation lies not merely in formal designation as a respondent, but in whether a party has had adequate notice, access, and capacity to respond to proceedings affecting their interest. In this regard, the firm of Ndegwa & Ndegwa Associates was duly served and has participated actively, including by filing affidavits, corresponding with counsel on record and with myself as a self-represented party, and submitting written submissions on behalf of the 9th Respondent. The continuity and consistency of Sheila Wangari's legal representation are further substantiated by annexed documentary evidence. It is therefore wholly untenable for the Applicant to now allege procedural prejudice or deliberate exclusion from the proceedings as a Respondent. The record clearly demonstrates that the Applicant was not excluded, but rather declined to participate despite having full opportunity to do so.

51. That, the Honourable Court, during the mention held on 6th March 2025, expressly acknowledged the representation of all parties and directed all counsel on record to file their respective affidavits and submissions. This directive further affirms that all affected parties were afforded a full and fair opportunity to be heard. Accordingly, any allegation of procedural impropriety in relation to Sheila Wangari's participation is devoid of merit.

52. That the foregoing exhibits collectively affirm the continuous and consistent legal representation of Sheila Wangari throughout the course of these proceedings, thereby rendering any claims of inadequate or absent legal counsel demonstrably unfounded and devoid of legal merit. Moreover, the said exhibits unequivocally refute any allegation that Sheila Wangari was intentionally excluded from participation as one of the Respondents in this succession matter.

53. That, Messrs. Ndegwa & Ndegwa Associates previously acted for Monica Wanjiru, the biological mother of Sheila Wangari, in matters relating to the estate of the late Fai Omar Amario (also known as Peter Gilbert Njoroge Ng'ang'a). In correspondence dated 6th April 2016, the firm unequivocally stated that 'the issue of Sheila Wangari be deemed as settled', thereby affirming that she held no standing as a beneficiary to the estate. This position was subsequently acknowledged and referenced by the Honourable Justice A.K. Ndung'u in the ruling delivered on 8th June 2016. Exhibiting copy of the said letter from Ndegwa & Ndegwa Advocates dated 6th April 2016, and a copy of the Court Order dated 9th June 2016.

54. That, history gives rise to a significant conflict of interest, given that the same firm — Messrs. Ndegwa & Ndegwa Advocates — now formally represents Sheila Wangari in the present succession matter. In the interest of safeguarding the integrity of these proceedings and preventing undue delay to the prejudice of legitimate beneficiaries, I raise no objection to the firm remaining on record. However, I respectfully submit that the Court should bar the said firm from participating in any aspect of these proceedings where a direct conflict arises between the interests of Sheila Wangari and those of Monica Wanjiru. This includes, but is not limited to, matters relating to the inclusion of Sheila Wangari as a beneficiary. It is impermissible for counsel to approbate and reprobate — to assert a factual position when it serves their client's interests and later repudiate the same position when it becomes inconvenient, particularly those touching on the inclusion or exclusion of Sheila Wangari as a beneficiary, where a direct and material conflict exists.

55. That she acknowledges that, the circumstances underpinning Sheila Wangari's claim to beneficiary status are analogous to those of Elvis Karee, in that both claims are premised solely on the purported matrimonial connection between their respective biological mothers and the deceased. In each case, the claimant seeks to derive beneficiary standing not from any direct, legally cognizable relationship with the deceased — such as biological or adoptive affiliation — but rather through their mothers' marital ties to the deceased, which were either subsequently dissolved (in the case of Elvis Karee Amario) or terminated by remarriage (in the case of Sheila Wangari's mother)

56. That it is an established fact that, the Applicant, Elvis Karee, acting in his capacity as the legal representative of the estate of the late Peninah Karuga, filed an application dated 18th February 2025. Notably, the pleadings have misleadingly referred to the deceased as 'Peninah Shinta Wambui Amario.' Be that as it may, the Applicant possesses the requisite locus standi to sustain both the application dated 18th February 2025 and the subsequent application dated 25th February 2025, as the validity of the former is inherently predicated upon his legal standing and representative authority over his late mother's estate.

57. That the assertion in clauses 3 and 4 of the 9th Respondent's written submissions dated 03.04.2025 — filed by the same firm now representing Sheila Wangari—that the Applicant "fundamentally lost the locus to approach this Honourable Court" following the ruling of 8th August 2024, is both untenable and inconsistent. The same firm previously disavowed Sheila Wangari's beneficiary status and now seeks to undermine the Applicant's standing while promoting a claim that remains actively contested in a pending High Court matter filed on 3rd July 2024. Moreover, the beneficiary claim raised by the 9th Respondent is further barred under the doctrine of res judicata and estoppel, as affirmed by the Court order dated 9 June 2016

58. That the submissions made exemplify the proverbial case of the "pot calling the kettle black". Counsel for the 9th Respondent cannot approbate and reprobate by asserting beneficiary status to sustain their client's locus standi, while simultaneously seeking to deny similar recognition to another party in analogous circumstances. This inherent contradiction not only undermines the coherence and integrity of their argument but also highlights that Sheila Wangari, like the Applicant, is not a beneficiary.

59. That the suggestion by the 9th Respondent that the Applicant is a 'stranger' to the proceedings, and therefore incapable of being heard, is fundamentally flawed. The justice system does not regard citizens as strangers. Every individual, whether represented by counsel or self-representing, is entitled to access the Courts and present their claim. I assert that every citizen has an inherent right to seek resolution through the judicial system.

60. The 3rd Respondent contends that, while the estate of the late Amario has faced challenges from individuals advancing illegitimate claims, it is imperative that all proceedings be grounded in the constitutional principle enshrined in our national ethos — "justice be our shield and defender" — which applies equally to all citizens. This principle ensures equitable access to justice, meaningful participation in judicial processes, and the rightful distribution of the estate to legitimate beneficiaries, thereby fostering peace of mind.

61. That, any claims to an interest in the estate must be substantiated through judicial determinations founded on evidence and lawful submissions, rather than relying on mere opinion or conjecture.

62. The 3rd Respondent contends that this matter progresses, trusting that all arguments presented before this Honourable Court will maintain the decorum befitting its esteemed status as a pillar of governance. Remarks such as those found at Clause 9 of the 9th Respondent's submissions — questioning whether the Applicant is a mere "busybody" — are not only disparaging and disrespectful but also detract from the focus of the proceedings by inviting unnecessary provocations and diverting attention from the substantive legal questions that this Court is called upon to resolve. All submissions should remain anchored in evidence and respectful reasoning, in keeping with the dignity and solemnity of these proceedings.

63. That she had previously filed a Notice of Objection dated 26th February 2025, where she respectfully set-forth substantive grounds opposing the application for the recusal of the Honourable Judge. This affidavit reaffirms the position articulated therein and also addresses and elaborates on pertinent issues subsequently raised by the 9th Respondent.

64. That, key among the grounds articulated, is the documented proof of divorce between the Applicant's mother, Peninah Karuga, and the deceased; the formal settlement thereof; the absence of any post-divorce dependency or recognition by the deceased; and her non-participation in familial or estate affairs. Collectively, these facts reinforce the impartiality of the Honourable Judge and underscore the lack of merit in the recusal application.

65. That, the Applicant's allegations of bias are speculative, unsupported by evidence, and appear calculated to delay the resolution of this matter. The law requires more than mere dissatisfaction or conjecture: recusal must be grounded in a demonstrable and reasonable apprehension of bias.

66. The test is not the subjective view of an aggrieved party, but whether a fair-minded and informed observer would conclude that there exists a real possibility of bias. The Applicant's assertions fall far short of this threshold. Bias must be proved to a high standard, not inferred from unsubstantiated allegations. Honourable Justice Muhochi is thoroughly familiar with the case, has demonstrated impartiality, and there exists no credible basis for the allegation of bias.

67. That, Justice Muhochi's extensive familiarity with the details of the case ensures efficiency, continuity and timely resolution of this succession matter. Granting the motion for recusal would disrupt proceedings at an advanced stage, delay the rightful distribution of the Amario Estate, and impose unnecessary costs on legitimate beneficiaries.

68. That she respectfully requests the dismissal of the application for recusal with costs, on the grounds that it is unsupported by any evidence of bias or conflict of interest. The application is devoid of merit and does not serve the interests of justice but rather disrupts the orderly progression of these proceedings. She further request that Honourable Justice Muhochi be permitted to proceed with the hearing and determination of pending applications.

69. That the contents of this Affidavit are true to the best of my knowledge, information, and belief, and are made in steadfast commitment to the principles of justice, fairness, and the orderly administration of the estate.

70. The Applicant refined 3 issues in submissions for consideration firstly whether the application meets the procedural and substantive requirements for recusal? Urging that applicable test for judicial recusal is well established in *Republic v Mwalulu & Others* [2005] eKLR, where the Court held:

> "The mere fact that a judge has previously rendered a decision against a party or made findingsadverse to that party is not, by itself, sufficient to infer bias. The proper test is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

71. As reiterated in Mwalulu, the standard is objective and not based on the subjective perception or dissatisfaction of a litigant. A fair-minded and informed observer—after evaluating all relevant facts—would not conclude that a real possibility of bias exists on the part of the learned Judge in the present matter. The Applicant's allegations fall far short of this threshold.

72. The Applicant's reliance on an oral remark allegedly made during the delivery of the ruling dated 8th August 2024 is wholly misplaced. The reference to a possible customary divorce was a contextual observation made within the framework of the record and in response to arguments then before the Court. This does not, by any objective measure, constitute bias or impropriety warranting recusal.

73. That the Supreme Court in *Kaplana Rawal v Judicial Service Commission & Another* [2016] eKLR reaffirms this position, noting that:

> "The perception of bias must be reasonable and informed; it must be based on cogent material facts, not on mere speculation, apprehension or dissatisfaction."

74. That the Court's statement that "Ms. Peninah is a former spouse having been divorced under Kikuyu Customary Law" was not a definitive pronouncement on her marital status but a reflection

of the evidentiary and procedural record as it then stood. It was not a conclusive finding, but an acknowledgment of the prevailing material before the Court. In light of the subsequent evidence now introduced, which clearly substantiates the divorce, that procedural remark cannot be construed as indicative of bias or prejudgment.

75. In sum, the application for recusal is devoid of merit—both in law and in fact. It is unsupported by admissible evidence and fails to meet the established legal threshold for recusal. It appears to be a tactical attempt to deflect from the substantive issues and impede the orderly progression of this cause.

76. The Applicant's relies on *Rawal & 2 others v Judicial Service Commission & 2 others* [2016] KESC 1 (KLR), and the excerpt from Justice Njoki Ndung'u quoting Justice Aharon Barak, is similarly misplaced. The cited passage articulates the ethical ideal expected of judges in separating personal views from judicial function—it does not alter the objective legal test for recusal. While that standard is unobjectionable, it has no application to the facts at hand.

77. The jurisprudential test in Kenyan law, as affirmed in *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR and in SARFU (South Africa), remains whether a reasonable, informed observer would apprehend bias based on cogent facts, not conjecture or dissatisfaction with rulings.

> "The test is not the subjective perception of an aggrieved party but whether, viewed objectively, a reasonable and informed person would conclude there is a real likelihood of bias." — *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR
>
> "The apprehension of bias must be assessed in the light of the true facts, not suspicions. The reasonable person is informed, balanced, and does not jump to conclusions." — *President of the Republic of South Africa v SARFU* (1999) (4) SA 147 (CC)

78. Furthermore, *in Re Estate of George Musau Matheka* [2010] eKLR, the Court discouraged frivolous recusal applications aimed at delaying proceedings. The ruling emphasized that recusal applications should be based on valid, substantive grounds, not on speculative or unfounded claims. The Court stated:

> "Recusal requests should not be used as a tactical tool to obstruct the timely progress of judicial proceedings."

79. In the present matter, no allegations have been raised that the presiding judge has allowed personal beliefs or private interests to override judicial duty. The issues raised by the Applicant concern procedural observations grounded in the evidence available at the material time. It is important to note that the authority cited by the Applicant reinforces the need for judicial restraint and critical self-reflection—qualities that are evident in the ruling of 8th August 2024. This ruling was firmly grounded in the record, without recourse to extraneous or personal considerations, further underscoring the impartiality and fairness of the presiding judge.

80. On the 2nd issue as to whether the conflict arising from past representation by Messrs. Ndegwa & Ndegwa Associates compromises the integrity of the proceedings the 3rd respondent submits that while the present application seeks the recusal of the learned Judge, it is necessary to address a related concern affecting the integrity of these proceedings—namely, the conflict of interest arising from Messrs. Ndegwa & Ndegwa Associates' dual representation.

81. The firm previously acted for Monica Wanjiru, the biological mother of Sheila Wangari, in these same succession proceedings. In a letter dated 6th April 2016, the firm unequivocally stated that "the issue

of Sheila Wangari be deemed as settled," thereby affirming her lack of standing as a beneficiary. This position was subsequently acknowledged in the ruling of Hon. Justice A.K. Ndung'u on 8th June 2016.

82. The same firm, Messrs. Ndegwa & Ndegwa Associates, now appears on record for Sheila Wangari, asserting interests that are diametrically opposed to those it previously advocated on behalf of Monica Wanjiru within the same succession proceedings. This duality of representation gives rise to a manifest and material conflict of interest, particularly insofar as it pertains to Sheila Wangari's purported standing as a beneficiary of the estate.

83. That the firm's present conduct is irreconcilable with the position it formerly adopted and affirmed in these proceedings. In *Trusted Society of Human Rights Alliance v Mumo Matemu* [2014] eKLR, the Court of Appeal emphatically held that a party who has participated in proceedings with knowledge of material facts is estopped from subsequently advancing objections or positions inconsistent with their earlier conduct. Similarly, in *Isaac Theuri Gichia v Gichuki King'ara & 2 Others* [2014] eKLR, the Court restated the well-settled principle that, a party cannot be allowed to blow hot and cold by taking inconsistent positions before the Court. These doctrines apply squarely to the circumstances at hand. Such conduct offends the principles of coherence, finality, and procedural fairness that underpin the administration of justice.

84. While no formal objection is raised to the firm's continued presence on record, it is respectfully submitted that the Court should exercise its inherent jurisdiction to restrict Messrs. Ndegwa & Ndegwa Associates from participating in any aspects of the proceedings where conflict of interest arises.

85. This approach finds support in the reasoning adopted by Hon. Justice Matheka I*n re the Estate of theLate Peter Gilbert Njoroge Ng'ang'a a.k.a. Fai Omar Amario (Deceased)* (Succession Cause No. 354 of 2010) [2021] KEHC 2592 (KLR) (25 October 2021) (Ruling) where the Court confronted with a similar question —whether the firm of Robson Harris & Co. Advocates LLP ought to be disqualified on account of conflict of interest —held that a firm may remain on record for non-conflicted aspects of a case but must be barred from participating in areas of conflict. Hon. Justice Matheka, held:

> "...Having the firm removed at this stage would prejudice other family members who are not parties to this particular application and who have not opposed the application. It may also slow down the progress made so far in the matter. Hence the tenable thing to do is to bar the firm from acting in matters that are in conflict with the applicant's issues."

86. A similar approach is warranted in the present matter. To preserve procedural fairness while maintaining continuity of representation in non-conflicted areas, the firm should be barred from participating in or making submissions on any aspect where the interests of Sheila Wangari are pitted against those of Monica Wanjiru, their former client.

87. The legal maxim nemo potest approbare et reprobate (one may not approbate and reprobate) is apt: counsel cannot assert a factual position when convenient, only to later disavow the same when it becomes adverse to a new client's interest. Advocates owe a duty of undivided loyalty and confidentiality to their former clients and cannot act against those interests.

88. As the Court held in *King Woollen Mills Ltd & Another v M/s Kaplan & Stratton Advocates* [1993] eKLR:

> "an advocate cannot act in a matter where their duty to a former client conflict with the interests of a current client..."

89. The 3rd Respondent urges the Court to preserve the fairness and impartiality of these proceedings, and to exercise its inherent jurisdiction and bar Messrs. Ndegwa & Ndegwa Associates from participating in all aspects of the matter where a conflict arises—most notably, those involving the inclusion or exclusion of Sheila Wangari as a beneficiary.

90. That, in view of the foregoing, it is respectfully submitted that the application dated 25th February 2025 lacks merit both in law and in fact. The allegations of bias are speculative and unsupported by cogent evidence. Additionally, the issue of conflict of interest raised in these submissions is material and should be addressed by limiting the participation of conflicted counsel in aspects where their prior representation gives rise to a conflict.

91. The 3rd Respondent prays that the Court dismisses the application for recusal with costs; and Bars Messrs. Ndegwa & Ndegwa Associates from participating in any aspect of the proceedings where a conflict of interest arises in relation to their previous representation of Monica Wanjiru.

9th Respondent's Case

92. Shiela Wangare contends under oath that the Applicant lacs locus standi to bring the motion.

93. That, following the dismissal of the application and the determination of the same vide the ruling delivered on the 8th August 2024 the applicant fundamentally lost the locus to approach this Honourable Court.

94. That, this Court made a finding to the effect that the applicant herein is not a beneficiary to the deceased estate. How then can he seek the recusal of this Court?

95. That, the applicant does not just lack the requisite locus standi to sustain this application, but that his conduct amounts to abuse of the process and that If the Court has made a finding that the applicant is not a beneficiary to the deceased's estate, how then can this Court entertain an application from a stranger?

96. She poses the question of "how will the call for recusal or lack of it" affect the applicant? That the applicant not a mere busy body who should otherwise find something better to do?

97. Therefore, this Court lacks jurisdiction to entertain such a challenge if the same is brought by a stranger who is not capable of falling within the definition of a beneficiary. And that, If this Honorable Court recuses itself on an account of a challenge that has been raised by a stranger, then the Court will be bending too low, and it's ruling dated 8th August 2024 will have no meaning in the eyes of the Law, she urges the Court to dismiss this application with cost.

Analysis and Determination

98. Allegations of actual bias, partiality and prejudice on the part of a judicial officer are extreme serious and profound allegations that can constitute ground for removal from office of a judge and where such allegations are raised then the Court ought to deeply consider the same and where such actual bias is revealed then this Court shall not hesitate to recuse itself.

99. The only issue at hand is if the Applicant has satisfied the test for recusal as has long been established to test for recusal has been stated in may decisions in various jurisdictions.

100. In the case of the *President of the Republic of South Africa & others v South African Rugby Football Union* (Case No 16/1998) 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) (Surf case), the Constitutional

Court of South Africa, after reviewing several decisions on the subject, stated that the approach to an application for recusal is objective and the onus of establishing it rests upon the applicant.

101. The Court then formulated the test as follows:

> (48) ...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 predispositions. 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 officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

102. This test was applied in *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Ltd Sea Foods Division Fish Processing* (CCT 2/2000) [2000] ZACC 10; 2000 (3) SA 705; 2000 (8) BCLR 886 (9 June 2000), where the same Court emphasized that not only must the person apprehending bias be a reasonable person, but the apprehension itself must, in the circumstances, be reasonable and be based on reasonable grounds.

103. Actual bias cannot be proved by conjecture of legalistic construction or interpretation only may be demonstrated where an applicant goes an extra -mile in showcasing the actual bias from the eyes of a “reasonable man” in this instance the onus was upon the Applicant to showcase how the statement made outside the ruling manifested actual bias.

104. The Actual sentiments of the applicant would have been better articulated in a sworn affidavit as he had done seven days earlier. No explanation was offered as to why the Applicant never swore an affidavit in support of the motion.

105. In this instance the Applicant did not swear an affidavit but the supporting Affidavit is sworn by Brian Patrick Ochleng the Advocate on record. It is safe to then conclude that the Advocate on record is on a lay person whose evidence can be subjected to the “reasonable mans test: that is necessary in this instance.

106. The general rule is that advocates should not swear affidavits in contested matters. Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swear an affidavit in contested matters potentially of exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits.

107. In this instance the said Brian Patrick Ochleng Advocate swore the supporting affidavit in a contentious matter where he depones that while delivering the said ruling orally, the learned Honourable Justice Muhochi Samuel Mukira held that "The Court notes that Mrs Peninah is a former spouse having been

divorced under Kikuyu Customary Law." However, the said holding is uncannily not reflected in the typed ruling.

108. It is the oral statement that the Advocate contends manifest bias and which then the applicant was expected to expound in line with the "reasonable man's test".

109. One would pose if the statement made is contradictive of the ruling of the Court? Does is manifest bias to a reasonable man? Is further expounding necessary?

110. This Court further recalls the Applicant had initially moved Court to be recognized as a child and beneficiary in the estate of the deceased and has now returned as the personal representative of the estate of his deceased mother who seeks recognition as a wife and beneficiary pursuant to the same ruling he now faults.

111. This Court observes that, the issue at hand in the Application dated 18th February 2025, is a summons for revocation of grant that equally seeks recognition of the Applicant's mother as a beneficiary to the estate and that, it matters-not whether she was divorced or not. The succession law recognizes former wives as possible beneficiaries

112. The onus was upon the Applicant to rebut the constantpresumption of judicial impartiality of this Court he did not do so in any way.

113. The Supreme Court in *Jasbir Singh Rai & 3 others* (*supra*) gave the following guidelines to apply in determining recusal applications:

> "(6) Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been considered. The term is thus defined in *Black's Law Dictionary*, 8th ed. (2004) [p.1303]:
>
> "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."
>
> (7) From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

114. The Applicant has not in any way demonstrated the alleged want of impartiality and on the contrary this Court remains committed to its oath of office and in this instance its priority is disposal of backlog succession cases such as this that is now almost fifteen years, the deceased had an huge family, the large number of beneficiaries is a consideration when determining the question of prejudice to be occasioned should the Court recuse itself, this Court contends that in balancing the interests of all other beneficiaries versus the interests of the applicant it will be prejudicial to recuse myself as the delay resulting from the recusal shall be not less than six months before any other judicial officer has taken up the matter and is ready to continue.

115. This Court is unpersuaded and unsatisfied that, the threshold for my disqualification has been met by the Applicant. I thus dismiss the application and grant costs to the 1st 3rd and 9th Respondents.

116. Any plea to disqualify the Advocates for the 9th Respondents by any other Respondent may be argued separately to allow all parties participate.

117. Any party Aggrieved has leave to move to the Court of Appeal within the next 45 days which period shall serve as stay against execution

118. The Court shall proceed to fix a ruling date for the summons for revocation of grant Application dated February 18, 2025.

It is So Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF MAY 2025

_____

MOHOCHI S. M

JUDGE

Quorum

Mr. Mutanda & Mr. Ochieng of Mutanda Law Advocates for the Applicant

Ms Odongo of Robson Harris & Co. Advocates, for the 1st Respondent

Mutua-Waweru & Company Advocates,

MS. Mwai and Mr. Wairegi of Wairegi Kiarie &Associates

AKO Advocates LLP

Njiru Ndegwa Ndegwa & Ndegwa. Advocates,

Marsha Amario-Appearing in person

Ms. Karanja Holding Brief for Ms. Kinuthia- Murugi Kariuki & Co. Advocates, for Bernice Njeri