Assets Recovery Agency v Odiero (Anti-Corruption and Economic Crimes Civil Suit E033 of 2023) [2024] KEHC 5255 (KLR) (Anti-Corruption and Economic Crimes) (2 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E033 OF 2023

EN MAINA, J

MAY 2, 2024

BETWEEN

ASSETS RECOVERY AGENCY ..... APPLICANT

AND

ANTHONY KEFA ODIERO ..... RESPONDENT

RULING

1. This is a ruling on the Applicant's Notice of Motion dated 15th January 2024 which seeks my recusal from this suit. It will be noted that the application was first filed in this court on 6th December 2023 in Miscellaneous application No. E027 of 2023 but because that file had been spent and closed, the Applicant withdrew that application and filed it in this suit. The application is expressed to be made under Articles 22, 23, 48 and 50 of *the Constitution*, Regulation 21(d) of the Judicial Service (Code of Conduct and Ethics), Sections1A and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules.

2. The application is premised on the following grounds;

   i. THAT the applicant herein is the respondent in the Misc. Civil App. No. E027 of 2023

   ii. THAT as evidenced by the record herein, the matter has been proceeding before this court, presided over by Hon. Lady Justice E.N. Maina.

   iii. THAT when the matter was still pending the applicant filed an application dated 8th September 2023 which application was subsequently dismissed on its merit by this Honorable court on the 23rd November 2023.

iv. THAT during the pendency of the application dated 8th September 2023; the applicant was approached by a gentleman who introduced himself as Anthony Manyara who called the respondent through his mobile phone No. 0701026344 on the 6th September 2023.

v. THAT to the Applicant's shock, the said Anthony Manyara informed him that he had received this court's blessings to approach the applicant and inform him that the Judge, Lady Justice E.N. Maina, was ready and willing to assist the applicant with the case and that the success of the case will be entirely dependent on how the applicant behaves.

vi. THAT the applicant's response was that he had all the faith with the court and he was not in the habit of bribing Judges and as such declined the invitation.

vii. THAT upon learning that the applicant had declined the invitation to offer solicited bribe of Two Million five hundred Kenyan Shillings (2,500,000/=) the said Anthony Manyara threatened that the applicant would never ever get justice from this court and that the judge would mess up the applicant's case.

viii. THAT since then, the said Anthony Manyara has been pursuing the applicant and making all efforts to solicit for the said bribe from the applicant and making threats that he would have himself to blame if the case turned against him.

ix. THAT the said Anthony Manyara has been sending the applicant text messages (SMS) through his captioned phone number from which he identified himself:

a. He identified himself as Hon. Anthony Manyara.

b. He identified the reasons as to why he was reaching out to me.

c. He identified the case No. as E027 of 2023.

d. He identified that the matter was pending in the High Court before Hon. Lady Justice Maina.

x. THAT from the said WhatsApp the said Anthony Manyara indicated that, "If all goes well, am glad to be of help."

xi. THAT on 7th September 2023 the said Anthony Manyara via his captioned phone number supporting his WhatsApp application at around 1348 hours sent the applicant a message detailing that the court would make certain findings and even advised the applicant to ask his advocate on record to file an application to that effect.

xii. THAT from the said WhatsApp extracts, it's clearly evident that the said Anthony Manyara could be in actual connection with this court and that the court is conveying the information relating to this court with third parties who are not privy to the suit, or he could be a mere imposter who is out to tarnish the court's reputation.

xiii. THAT the applicant is in no way questioning the integrity of this court but largely apprehensive that the application dated 8th September 2023 was eventually dismissed by this court, as had been promised by Mr. Anthony Manyara, for the failure to pay the solicited bribe of Two Million, five hundred Kenyan Shillings (2,500,000/=) contrary to the purported fact that the same was dismissed on merits.

xiv. THAT the matter of integrity of the court is in the public domain as raised by a Constitutional office in the nature of the Deputy President and this further buttresses the application for recusal where the integrity of the court is called to question.

xv. THAT the applicant is apprehensive that the court will not dispense with substantive justice as the Judge is biased and/or prejudicial towards the applicant herein and as such sufficient ground upon which a Judge ought to recuse him/herself.

xvi. THAT the applicant is apprehensive that this court will not dispense with substantive justice in that regard and it's only fair, just and equitable that the file be forwarded to the presiding judge of this division for the purposes of appointing a neutral court that will hear and determine the pending application.

xvii. THAT following the said averments, the applicant has herein filed complaint before the Judicial Service Commission, being the body that is vested with the mandate to investigate such allegations.

xviii. THAT the applicant having filed a complaint against this court as aforementioned, he is thus overly apprehensive that the hon. Judge is likely to be bias as against him, and that this is a classical case where a judge ought to recuse herself.

xix. THAT the application is in no way intended to actuate any attempt to forum shop for a friendly court as I am confident that any other court, save for this one, will be capable of dispensing substantive justice in this matter.

xx. THAT the applicant is apprehensive that if this court continues to adjudicate over this matter he will suffer irreparable loss and prejudice as it will further punish the applicant for failing to oblige in payment of the solicited bribe thus infringing on my rights as enshrined under Article 50 of *the Constitution* of Kenya 2010.

xxi. THAT the applicant is well informed that an application for recusal is not a simple matter and that an application such as this one must be made as a matter of cest resucts, and must be made conscientiously.

xxii. THAT the alleged link between the said Anthony Manyara and this court has completely eroded the applicants' confidence in this court and further weathered his legitimate expectations that this court will dispense with substantive justice herein.

xxiii. THAT the applicant is apprehensive that this court will be biased, owed to the fact that the applicant herein has resisted and declined the invitation to offer a bribe as sought by Mr. Anthony Manyara.

xxiv. THAT the conduct of this court has the ability of creating a reasonable doubt in the minds of the Public as regards the fairness in the administration of Justice and further, from the conduct of the court, a reasonable fair-minded man would conclude bias on the Judge's side."

3. The application is supported by the affidavit of ANTONY KEFA ODIERO sworn on 15th January 2024 which reiterates the grounds upon which the application is brought and in which the Applicant further deposes that the said Anthony Manyara has been pursuing him trying to solicit for the bribe threatening that he, the Respondent/ Applicant would have himself to blame if the case turned against him. The Applicant has annexed an extract of the purported WhatsApp conversation between him and the alleged Anthony Manyara who he opines who he could, either be in actual connection with this court or could be a mere imposter who is out to tarnish the court's reputation.

4. He also reiterates his contention that he is in no way questioning the integrity of this court but contends that he is apprehensive that the application dated 8th September 2023 was eventually dismissed by this court, as had been promised by Anthony Manyara, for the failure to pay the solicited bribe of Two Million, five hundred Kenyan Shillings (2,500,000/=). He states that his apprehension that this court will not dispense with substantive justice is enough ground upon which a judge ought to recuse him/herself.

5. He further deposes that since he has also lodged a complaint dated 14th December 2023, before the Judicial Service Commission against me, he is overly apprehensive that I shall be biased against him. That it is only fair, just and equitable that the file be forwarded to the Principal Judge for allocation to another Judge. He asserts that this application is in no way intended to forum shop for a friendly court as he is confident that any other court, save for this one, will be capable of doing justice in his case.

6. In opposing the application, the Assets Recovery Agency filed a replying affidavit sworn on 21st February 2024 by its investigator Mohammed Godana, who was one of the officers who investigated the case against the Applicant. The gist of that affidavit is that the Applicant and Anthony Manyara are well known to one another and have been in constant communication; that according to the Applicant's own evidence, he had saved the latter as "Arch. Anthony Manyara HSC" in his phone demonstrating that they were already known to each other; that the Applicant had not demonstrated any link between Lady Justice E. Maina and the alleged Anthony Manyara; that from the evidence of the Applicant, none of the texts by the said Manyara mentioned that he was speaking or communicating on behalf of the Judge, or quoted the figure alleged to have been solicited; that his investigations have established that there has never been any kind of communication between the Judge and Anthony Manyara; that the investigations however established that on 27th September 2023, the Applicant transferred Kshs10,000 to Anthony Manyara whose purpose he has not disclosed or explained and that the application for recusal, is based on mere falsehoods and unsubstantiated insinuations with the aim of maligning the reputation of the Court and the Judge.

7. He contends that the Applicant's application for variation was dismissed for lack of merit and the same is not fulfilment of the alleged threat by Manyara. He asserts that the Court has not demonstrated any acts of bias or prejudice towards any party to this suit and the application should be dismissed.

8. Following the filing of the replying affidavit, the Applicant filed a further affidavit sworn on 2nd April 2024 where he averred that the Mohamed Godana is a stranger to these proceedings and as such he is not competent to swear the replying affidavit as the Misc. Application No. E021 of 2024 dated 15th January 2024 where he obtained orders to investigate the Applicant's allegations, and this case are not related.

9. He acknowledged that one Mr. Anthony Manyara is known to him, and that they had been in constant communication with the said Anthony Manyara since their first meeting where he purported to be a conduit for the Judge; that an application for recusal of a judge is a matter that exists in personam and as such the Agency as currently impleaded cannot purport to defend this court.

10. On 5th April 2024 this court directed that the application be canvassed through written submissions. Only those of the Applicant were received.

The Applicant's submissions

11. Ndegwa Njiru, Learned Counsel for the Respondent Applicant, submitted that the Assets Recovery Agency has not shown that they conducted a thorough investigation including summoning the

Applicant and one Anthony Manyara, to record statements on the serious allegations of bribery and/or extortion on behalf of the Hon. Judge E. N. Maina.

12. He contended that Mr. Mohamed Godana claimed to have applied for warrants to investigate the Mpesa accounts of the Applicant and Anthony Manyara, whereas the application was actually made by one Collins Ipapo.

13. It was the Applicant's submission that the investigations by the Respondent on the link between the Anthony Manyara and the Applicant, was not only skewed, incomplete and manipulated to show that there was no link between Anthony Manyara and the Hon. Judge E. N. Maina.

14. He further submitted that he had stated his genuine apprehension of receiving justice before the court after the threats and extortionist maneuvers and/or manipulation by one Anthony Manyara who unfortunately, the Assets Recovery Agency has now cleared without conducting impartial, objective and independent investigations. He further claimed that The Assets Recovery Agency investigations did not and could not establish whether Anthony Manyara demanded Ksh. 2.5 Million and whether he had issued threats of interfering with the course of justice if the Applicant failed to pay the same. Further, the investigations conducted by the Assets Recovery Agency vide the Misc. Criminal Application No. E021 of 2024 was founded on the basis that they were investigating a case of money laundering and proceeds of crime involving the Applicant's Phone number and that of Anthony Manyara.

15. He further submitted that if the Assets Recovery Agency was genuine, serious and desirous of establishing the truth in the claim by the Applicant against Anthony Manyara who claimed to have been acting on behalf of the Judge, they would have referred the matter for investigations by either the Ethics and Anti-Corruption Commission or the Directorate of Criminal Investigation who have the mandate to investigate criminal activities.

16. Learned Counsel asserted that he had brought to the attention of the court that Collins Ipapo committed the offence of perjury in Misc. Criminal Application No. E021 of 2024 when he stated on oath that he was investigating money laundering and proceeds of crime through the Mpesa accounts of the Applicant whilst in fact they wanted to fraudulently obtain information of communication between the Applicant and Anthony Manyara to be used in the defence and exoneration of the judge. The Applicant submitted that he filed a notice of intention to cross-examine Mr. Mohammed Godana and Mr. Collins Ipapo in respect to the question of perjury as elucidated herein but the court decline to grant the said leave and ordered that the matter be disposed of by way of this submissions.

17. Learned Counsel stated that both Mr. Mohamed Godana and Mr. Collins Ipapo committed perjury under Section 108 of the Penal Code Cap 63. Counsel placed reliance on the case of James Mulinge – Vs- Freight Wings Ltd & 3 Others [2016] eKLR where the court cited with approval the case of David Omwenga Maobe v Republic [2015] eKLR, where it was stated:-

> " The meaning of (the offence) perjury [in] Halbury's Laws of England Vol. 11(P.938) Fourth edition defines perjury as follows :-
>
> "Any person lawfully sworn as a witness or as an interpreter in [a] judicial proceedings who willfully makes a statement, material in that proceedings, which he knows to be false or does not believe to be true is guilty of perjury, and is liable on conviction on indictment".

18. Counsel stated that the Agency's evidence, having been obtained illegally through perjury is inadmissible and should not be relied upon. Counsel cited the case of Anthony Watuku Kabadi -Vs-

Republic (2020) eKLR, where the court faced with a similar question of whether illegally obtained evidence was admissible stated:

> "...Constitution of Kenya had changed that position and that such evidence which was illegally obtained is not admissible by dint of Art. 50(4) of *the Constitution*. My Lady, the evidence that was complained of herein was obtained vide perjury, contrary to..."(sic)

19. Counsel contended that the facts which led the Applicant to seek the recusal of the Hon. Judge E N. Maina have not been in any way rebutted. He contended that the investigations by the Assets Recovery Agency missed the critical issue, which is the doubt and apprehension created by the actions of Anthony Manyara to the Applicant's confidence on the impartiality and integrity of the proceedings before this court, in the eyes of a fair-minded man in the streets. He relied on the finding in the case of Rawal –Vs- Judicial Service Commission & another; Oikiti (interested party); International Commission of Jurists & another (Amicus Curiae) Civil Appeal 2016 KLR where a bench of seven Judges, held as follows at paragraph *21*:-

> "An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified."

20. He further relied on the reasoning in Magill v. Porter (2002) 2 AC 357, where the House of Lords stated the test to be: "whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased."

21. He further relied on the finding by The East Africa Court of Justice in Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 that:-

> "We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

22. Counsel also cited the decision of the Supreme Court of Canada which expounded the test in the following terms in R. v. S. (R.D.) [1977] 3 SCR 484:-

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties

the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

Counsel argued that the Applicant herein is a reasonable and right-minded person capable of viewing the matter at hand realistically and practically, well informed and with the knowledge of all the relevant circumstances surrounding the issues at hand as well as aware of the social reality that forms the background of bribery in the judicial systems; that the Applicant is a reasonable, fair minded and informed member of the Public, thus apprehensive that this court will not be impartial in dealing with these proceedings. Counsel that given the serious nature of the claims of extortions on behalf of the court, this court should have, suo moto, been the first to order the Directorate of Criminal Investigation, to conduct thorough investigations with a view of bringing the culprits to the book and thereby bringing to a halt anything or any person that has or continues to prejudice the due process, and that the failure and or omission by the court to take action against a serious allegation of an extortionist claiming to act on behalf of the court, amounts to failure by the court to do justice. He added that the involvement or mere suspicion that this Honorable Court is in cohorts with the extortionist of whatsoever nature erodes the Applicant's confidence.

23. He further contended that this court should while adjudicating over this application for recusal, factor in the possibility that the Applicant's Petition 75 of 2024 filed before the JSC could go for a full trial and the Applicant would appear as a witness as against this Honorable Court.

24. He contended that mere apprehension is a sufficient ground for a recusal of a judge, the Applicant's apprehension is well founded. He thus submitted that the Applicant has made out a case for which this court should recuse itself, and that it is the duty of the court to jealously guard its independence and its integrity.

25. Although the ARA filed submissions on 4th April 2024 through the e-filing portal, the same could not open and hence this court could not advert to them.

The Issues for determination.

26. Having considered the material placed before me by the parties and the law, I consider the following to be what arises for consideration:

    i. Whether ARA is a proper participant in this application and whether the evidence it has presented in this application was illegally obtained.

    ii. Whether I should recuse myself from this case.

    Issue No. (i): - Whether ARA is a proper participant in this current application and whether the evidence it has presented in this application was illegally obtained.

27. Just by way of introduction the Applicant is before this court because the Assets Recovery Agency has filed an application before it for forfeiture of his property. These proceedings were preceded by an application by ARA which resulted in an order for forfeiture of the properties meaning that they would be out of the Applicant's reach pending investigations and decision by ARA on whether it would

seek a forfeiture order. That preservation order was granted by Kavedza, J of the Criminal Division who happened to be holding forte for this Division. The application for a preservation order is made exparte but the law requires ARA to serve the order upon the Respondent within 21 days (see Section 83 of the *Proceeds of Crime and Anti-Money Laundering Act*). Upon being served with the order the Respondent may apply to have the order varied or rescinded provided they meet grounds set out in Section 89 of the Act. This is what the Applicant herein did through an application dated 8th September 2023. I considered the application and finding that it had no merit, dismissed it in a ruling delivered on 23rd November 2023. That closed the preservation file.

28. The record shows that on 24th November 2023 ARA filed an application for forfeiture of the preserved property which coincidentally was allocated to my court for hearing. For clarity there are two judges in the Division and the file could have been heard by either of them and it was by sheer coincidence that it landed in my court. It would appear that the Applicant was waiting in the shadows to see where his case would go because it was soon thereafter that he filed this application for recusal.

29. It is his argument that ARA is not a proper party in this case; that it ought not to have filed a response as the allegations are in personam, against the specific judge and ARA should not come to her rescue.

30. I have considered this issue carefully and I must say that I am confounded that it is raised by a party who is represented by Counsel. This suit was instituted by ARA and as a party and like any other person it is entitled to participate in all applications filed within the suit. I am sure that had the application been brought by ARA, the Applicant would not take it were he to be excluded. In any event the integrity and propriety of the court before who ARA brings its matters is certainly a concern to ARA, as it would be to any other person with a case before the court including the Applicant and in my view it would have been unjust to shut ARA out.

31. Moreover, I note that in the heading of the Application itself, the Applicant name ARA as a respondent meaning that he anticipated that the Respondent would participate.

32. As to whether the evidence presented by ARA is illegal the Applicant has not presented to this court the application and proceedings through which the order was obtained as would help this court to interrogate its veracity and as the same was issued by a court of competent jurisdiction the same cannot be said to be illegal in the absence of proof. Learned Counsel for the Applicant intimated to this court that he intends to institute proceedings to contest the orders meaning that he appreciates fully well that this is not the right forum for that, as the real question in controversy in this application is one for recusal.

Issue No. (ii):- Whether I should recuse myself from this case.

33. Initially this application was predicated on the Applicant's apprehension that this court will not be impartial because he lost an application before it after he refused to co-operate with one Antony Manyara who had asked him to pay a bribe on my behalf. Later it became that it was because he had now filed a petition against me at the Judicial Service Commission and to bring that home he attached a copy of that petition to his further affidavit. In his affidavits and submissions, the Applicant contends that he has sufficiently demonstrated the reasons why he is apprehensive that the Court will not deal with his matter justly, and that his application has met the threshold for my recusal. I have reproduced the decisions upon which he places reliance and upon which his application shall be weighed.

34. Regulation 21 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 sets out the circumstances under which judges should recuse themselves and those under which they cannot recuse themselves. We are here interested in those where they should and they are stated as follows:-

> " a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;
>
> (a) Is a party to the proceedings;
>
> (b) Was, or is a material witness in the matter in controversy;
>
> (c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (d) Has actual bias or prejudice concerning a party;
>
> (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
>
> (f) Had previously acted as a counsel for a party in the same matter;
>
> (g) Is precluded from hearing the matter on account of any other sufficient reason; or
>
> (h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question."

35. The operative words in this regulation are "might be reasonably questioned" and the test as held in the cases cited by Learned counsel for the Applicant is that of "a reasonable, fair minded and informed member of the public." The test is in my view is objective but not subjective as misrepresented by counsel for the Applicant. To have a judge to recuse him/herself the Applicant must meet this subjective test. The Applicant is not in my considered view not the reasonable, fair minded and informed member of the public envisaged. That must be a member of the public looking into the case from the outside. To rule otherwise would be to apply a subjective test. In the case of Attorney General of Kenya v Prof Anyang Nyong'o & 10 others EACJ Appcn Attorney General No.. 5 of 2007 (supra) the Court underscored the necessity of the objective test and stated: -

> " ....Needless to say, a litigant who seeks disqualification of a judge comes to court because of his perception that there is appearance of bias on the part of the judge. The court however has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances."

36. In this case the Applicant relies on his own perception but not on the perception of a reasonable fair minded man and this despite the countless times he has brought the matter to the attention of the public through the media. Does it mean that there exists not even one single reasonable and fair minded and informed person out there who could support his cause? My bet is that any reasonable, fair minded and informed person on the street is not convinced by the Applicant and sees what he is doing for what it is: a strategy to hound the court into submission. The media is after all awash with reports of people caught impersonating public officers and conning people out of their money or even people who approach claiming to be acting on behalf of public officers in order to scam them.

37. In my view it is perhaps upon realizing that the application fell short for the reasons enumerated above, that the Applicant and his counsel introduced the allegation of corruption. It is my finding that even then the Applicant has still not met the threshold.

38. To begin with, the Applicant has stated, in the grounds and on oath in his affidavits, that the alleged Antony Manyara could be in actual connection with the court or he could be a mere imposter who is out to tarnish the court's reputation. His choice of words is to me testament that, even he, is not convinced by the position he has taken. Indeed, this is made even clearer by his contention that "the Applicant is in no way questioning the integrity of this court but largely apprehensive ...." If he has doubt that the so called Antony Manyara is not after all a scammer and if he is in no way questioning the integrity of this court, then what is he doing here? In my considered view it can only be that he is actuated by malice and ulterior motive to embarrass this court for dismissing his application. I say for several reasons the first being that one would wonder why he waited until after the Originating Motion for forfeiture was filed instead of immediately he was approached yet he had all the information he needed to bring the alleged Manyara to book? This is curious given that, in his own words, he was not in the habit of bribing judges and as such he declined the advances. It is also curious that even after losing the application he still did not take any action despite being the law abiding citizen he claims to be.

39. Whether the alleged Antony Manyara is connected to this court and whether he was sent by this court to solicit for a bribe is a matter of fact capable of being established and it could have been so established had the Applicant reported the matter to law enforcement. The submission that it behoved this court to call for investigations must be seen for what it is, misleading his client. It is trite that he who asserts must prove and hence in this application the onus remains with the Applicant to prove the allegations which he asserts.

40. In any case the Applicant having filed a complaint at the Judicial Service Commission, which has its own machinery for investigating complaints, this court would have been seen to be interfering by ordering its own investigations.

41. Further, would those investigations have not been dismissed by counsel for the Applicant in the same manner he has dismissed those carried out by ARA merely because they have revealed the lies they have been propagating against this court and exonerated it?

42. If I can attempt a guess and I am convinced that I am right because this was also unearthed by the ARA investigator, the reason the Applicant did not report the matter is simply because he and Manyara are in cahoots. In his affidavit the Applicants swears that even after he lost the application Manyara continued to barrage him with calls soliciting for the bribe so the question still begs why he did not go to the police yet he knows very well that corruption is a crime. The only inference that one can draw from the Applicant's inaction is that they are in cahoots. It could also be that Antony Manyara does not even exist: that he is a mythical character created by the Applicant. This would then explain why the alleged screenshot sent to his number does not have any indication of the identity of the person who sent it. The allegation that I returned a text to Manyara and said I was in court has also not been proved. Nothing prevented the Applicant from having my phone investigated. His conduct speaks volumes and it is that his motive which is actuated by malice is to malign my name and to embarrass me for dismissing his application even though in ground (iii) of the application he concedes that it was dismissed on its merits.

43. In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, observed as follows:

> " Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

44. The above applies in our jurisdiction and for that reason I reject the submission that mere apprehension that justice will not be done, is enough reason for a Judge to recuse herself more so where, as in this case, the circumstances giving rise to that apprehension are crafted by the Applicant.

45. The text messages exhibited by the Applicant do not have anything to link me to Manyara and as a matter of fact I do not know and I have never met anyone by that name and neither have I ever sent, him or anyone for that matter, to solicit for a bribe on my behalf.

46. In its replying affidavit, ARA presented evidence of long telephone conversations between the Applicant and Manyara, demonstrating evident familiarity between the two. It is instructive that it was not until this familiarity was raised by ARA that the Applicant alleged to have had a physical meeting with Manyara, in the presence of another man. The Applicant did not also reveal that on 27th September 2023 he sent the purported Manyara a sum of Kshs10,000 through M-pesa and has not explained the purpose of that payment. To me this only goes to show that, if Manyara is indeed a separate person from the Applicant, then they are working in cahoots so as to intimidate this court into allowing this application. The Applicant has also not explained why he continued having lengthy conversations with Manyara, even after losing the application, if he was not his friend but an extortionist. That a judge has dismissed an application in a matter does not imply that the other party will proceed in the main suit and certainly it is not a ground for demanding that a judge recuse him/herself. The remedy is to appeal.

47. To allow this application would be tantamount to giving in to their harassment especially through the media; to giving up because of fear; to endorsing or partaking in their scheme; and it would also amount to an admission of the baseless allegations that they have crafted in order for the Applicant to have his way. Whereas I am alive to the damage the incessant hounding through the media has done and will continue to do to my reputation I cannot give in. That would be a betrayal of the public trust bestowed upon my office by the people of Kenya. It would also be a betrayal of the oath of office that I abide by as a judge.

48. And just as an indication that I have no personal interest in this case it is to be noted that the same had been listed as one of those cases that would be heard by another judge during the service week that was concluded last week. However, because of this application, it could not be cause-listed and so it was returned to me to first hear the application. Parties will confirm that a notice was sent to them by the Deputy Registrar through an email dated 1st of March 2024 a copy whereof is in this file.

49. The upshot is that this application has no merit and it is dismissed with costs to the Respondent.

50. Now that the application has been determined let the suit be mentioned before the Deputy Registrar on 15th May 2024 for case management before it can be returned to court to be given a hearing date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 2ND DAY OF MAY, 2024.

.....

E. N. MAINA

JUDGE