Gikenyi B & 6 others v Moi Teaching and Referral Hospital & 24 others; Chumba & 46 others (Interested Parties) (Petition E011 of 2024) [2024] KEHC 12759 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

PETITION E011 OF 2024

SM MOHOCHI, J

OCTOBER 23, 2024

BETWEEN

DR MAGARE-GIKENYI B .... 1ST PETITIONER

LINAH NYABATE KINGSLEY .... 2ND PETITIONER

PHILEMON ABUGA NYAKUNDI .... 3RD PETITIONER

PAULINE NDUTA KINYANJUI .... 4TH PETITIONER

SHALLUM KAKAK NYAUNDI .... 5TH PETITIONER

JAMLICK OTONDI ORINA .... 6TH PETITIONER

AGNES WAMBUA WANZUU .... 7TH PETITIONER

AND

MOI TEACHING AND REFERRAL HOSPITAL .... 1ST RESPONDENT

MOI TEACHING & REFERRAL HOSPITAL BOARD .... 2ND RESPONDENT

SITOYO LOPOKOIYOT .... 3RD RESPONDENT

DR. PHILIP KIPTANUI KIRWA .... 4TH RESPONDENT

PERIS BIRICHI .... 5TH RESPONDENT

JUDITH JEROTICH .... 6TH RESPONDENT

MESHACK KOIMA .... 7TH RESPONDENT

JAMES MUCHIRI NDUNGU .... 8TH RESPONDENT

DR. MICHAEL GICHANGI .... 9TH RESPONDENT

GEORGE OMBUA .... 10TH RESPONDENT

DR. ERNEO NYAKIBA .... 11TH RESPONDENT

PROF. ROBERT TENGE KUREMU .... 12TH RESPONDENT

MR. FELIX K. KOSKEI .... 13TH RESPONDENT

PUBLIC SERVICE COMMISSION .... 14TH RESPONDENT

HON. ATTORNEY GENERAL .... 15TH RESPONDENT

DR. BENJAMIN KIPCHUMBA TARUS .... 16TH RESPONDENT

DR. OWEN MENACH .... 17TH RESPONDENT

DR. WILSON K. ARUASA .... 18TH RESPONDENT

ANN CHEMORSIO .... 19TH RESPONDENT

ENG. JOSEPH MUNGAI KAMAU .... 20TH RESPONDENT

ATHI WATER WORKS DEVELOPMENT AGENCY .... 21ST RESPONDENT

AGNES KALEKYE NGUNA .... 22ND RESPONDENT

KENYA BROADCASTING CORPORATION .... 23RD RESPONDENT

ABDALLAH MOHAMMED HATIMY .... 24TH RESPONDENT

KENYA NATIONAL SHIPPINGLINE LTD .... 25TH RESPONDENT

AND

DR JOHN CHERUIYOT CHUMBA .... INTERESTED PARTY

DR EVANS RONO CHERUIYOT .... INTERESTED PARTY

DR SIMON KIPCHIRCHIR KIBIAS .... INTERESTED PARTY

TITUS TARUS .... INTERESTED PARTY

DR ANDALE THOMAS OKWARO .... INTERESTED PARTY

DR MAURICE NYONGESA WAKWABUBI .... INTERESTED PARTY

DR EVERLINE MUSANGI NYAMAI .... INTERESTED PARTY

DR ANDREW JOSEPH OJIAMBO WANDERA .... INTERESTED PARTY

DR RICHARD MOGENI MOGAKA .... INTERESTED PARTY

DR CHEPTINGA PHILIP KIPKURUI .... INTERESTED PARTY

PROF MICHAEL KIPTOO .... INTERESTED PARTY

KENNEDY ADONGO .... INTERESTED PARTY

ARNOLD MANGI MWABILI .... INTERESTED PARTY

MACDONALD SABWA .... INTERESTED PARTY

JOSPHAT MUTUKU .... INTERESTED PARTY

MARTIN ALFRED WEKESA WAFULA .... INTERESTED PARTY

EDWARD S OMONDI .... INTERESTED PARTY

ALIO IBRAHIM ADEN .... INTERESTED PARTY

DR STANLEY CHERUIYOT BII .... INTERESTED PARTY

DR JUSTA WAWIRA KIURA MWANGI .... INTERESTED PARTY

DR NICKSON KIPCHIRCHIR KIPKORIR .... INTERESTED PARTY

ZETH OUMA OMOLLO .... INTERESTED PARTY

ANANGWE MUNALA SAMSON .... INTERESTED PARTY

DR ISAAC OBORE OMERI .... INTERESTED PARTY

DR ISAIAH TANUI .... INTERESTED PARTY

WILLY MUKOMA MUYUTHE .... INTERESTED PARTY

BEN SAMOEI .... INTERESTED PARTY

RACHEL MUSYOKI .... INTERESTED PARTY

JOSEPH K CHOGE .... INTERESTED PARTY

DR TARUS FELIX KIPLIMO .... INTERESTED PARTY

FRANKLYNE MISIKO OMUHOLO .... INTERESTED PARTY

KUASHIK HALDER .... INTERESTED PARTY

BENSON BIWOTT .... INTERESTED PARTY

DAVID NAMU KARIUKI .... INTERESTED PARTY

DR ROBERT KIPLAGAT RONO .... INTERESTED PARTY

DR GIDEON KIBET TOROMO .... INTERESTED PARTY

DR EDWARD KIMUTAI SEREM .... INTERESTED PARTY

JULIANA SYOWEU TISNANGA .... INTERESTED PARTY

WEKESA CHRISTINE NAKHUMICHA .... INTERESTED PARTY

DR SAMSON KIPKURGAT NDEGE .... INTERESTED PARTY

DR ALEXANDER IRUNGU WANJIRU .... INTERESTED PARTY

LUCY AKOTH OKOTH .... INTERESTED PARTY

DR NGOITSI HENRY NONO .... INTERESTED PARTY

DR WILSON KIPTOO SUGUT .... INTERESTED PARTY

DR VICTOR KIPYEGON MAINA .... INTERESTED PARTY

DR KANDIE NG'OCHOCH .... INTERESTED PARTY

DR PHILIPH KIPKIRUI TONUI .... INTERESTED PARTY

RULING

1. On the 20th June 2024 this Court delivered its ruling pertaining to a Notice of Preliminary Objection dated 6th June, 2024 by the Hon. Attorney General, on behalf of the 15th, 23rd and 24th Respondents.

2. The Preliminary Objection was supported by the 1st, 4th, 12th, 18th, and 19th Respondents.

3. In the aforesaid ruling, this Court found no merit in the preliminary objection on want of jurisdiction raised by the Respondents, and directed that, the Petition, dated 20th May 2024, was to be disposed-off by way of written submissions, the Petitioners were to file and serve its written submissions within fourteen (14) days, and the Respondents and interested parties were to have a corresponding fourteen (14) days. The matter was to be mentioned virtually, on 23rd July 2024, for compliance, and further directions. The interim orders were to remain in force till 23rd July 2024.

4. On the 23rd July 2024 the matter was mentioned to determine compliance and it emerged that the 20th and 21st Respondents had moved the Court of Appeal contesting the Ruling dated 20th June 2024 and had filed an interlocutory Application under Rule 5(2) b of the Court of Appeal rules to stay proceedings in the High Court which Application was pending hearing and determination. Counsel for the 20th and 21st Respondents sought an extension of an initial order of stay of proceedings granted in this petition on the basis of the Application pending before the Court of Appeal.

5. The 5th 6th, 8th and 10th Respondents Supported this position, the 22nd Respondent had complied and was awaiting further directions. The Respondents had failed to comply with the Courts directions and the Court granted the parties a further fourteen (14) days to comply reserving a judgment date for 19th November 2024.

6. It is at this juncture that the counsel for the 2nd and 3rd Respondent indicated that he shall be formally moving Court for the judge to recuse himself as he appears biased in favour of the petitioner and was granted a three (3) day leave to file his motion.

7. The Application before Court is a Notice of Motion Application filed pursuant to Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, Article 50 and 159 of *the Constitution* of Kenya 2010, dated 25th July 2024 seeking the following relief(s):

   i. Spent

   ii. That, the Honorable Mr. Justice Samwel Mukira Mohochi do recuse himself from the further conduct of these proceedings.

   iii. That, this matter be placed before another Judge in the same Division other than Honorable Mr. Justice Samwel Mukira Mohochi for hearing and determination.

   iv. That, this Honorable Court give other and further Orders and/or directions as the circumstances of their case may require.

   v. That, the costs of this Application be provided for.

8. The Application is supported by the Sworn Affidavit of Odera Obar Kennedy Advocate and is premised on the following Twelve (12) grounds that generally regurgitate the proceedings before Court as follows:

   a. On or about 20th May, 2024, the Petitioner moved this Honorable Court vide Petition dated 20 May, 2024.

   b. Together with the Petition, the Petitioner took out a Notice of Motion Application of even date seeking diverse interlocutory reliefs.

c. The Application was placed before the Honorable Mr. Justice Samwel Mukira Mohochi (the learned Judge) on 29th May, 2024, who upon due consideration, certified the Application urgent and granted Orders in the following terms:

   i. The Application and the Petition is hereby certified extremely urgent to be heard on priority basis and service of the same is dispensed in the first instance.

   ii. THAT a Conservatory Order is hereby issued against the Respondent suspending the Press Release, Gazette Notice or any other authority or document dated 17th May, 2024 or any other date purporting to appoint Dr. Philip Kiptanui Kirwa as the 1st Respondent's CEO, pending heating and determination of this Application.

   iii. That a Conservatory Order is hereby issued suspending the Press Release, Gazette Notice and/or any other document or authority appointing the 20th, 22nd and 24th Respondents as Chief Executive Officer (CEO) and/or managing directors of the 21st, 23rd and 25th State Corporation respectively.

   iv. That a Conservatory Order is hereby issued restraining Dr. Philip Kiptanui Kirwa, the 4th Respondent or any other person appointed pursuant to the impugned notice from performing or continuing to perform/function as 1st Respondent CEO whatsoever, pending the determination of this Application inter-partes.

   v. That the Respondents files and serves its response upon the Petitioners and all the Interested Parties within 7 days from the date of their service.

d. Vide two separate Notice of Motion Applications respectively dated 24th May, 2024 and 29th May, 2024, the Interested Parties and the Respondents raised a Preliminary Objection on the jurisdiction of the Constitutional Division of the High Court to handle this matter instead of the Employment and Labour Relations Court.

e. On 11th June, 2004, the Learned Judge upon briefly hearing all the parties, directed that the Preliminary Objection on the Jurisdiction of the Court be heard first, therefore holding the Application and indeed the Petition to await the outcome of the Preliminary Objection. The bearing for the Preliminary Objection was fixed for 14th June, 2024.

f. On 20th June, 2024, the Learned Judge dismissed the Preliminary Objection holding of relevance as follows:

> "Finally, I find no merit in the Preliminary Objection on want of Jurisdiction raised by the Respondents, and I hereby disallow the same. Consequently, I do hereby direct that, the Application dated 20th May, 2024 be disposed-off by way of Written Submissions, to

be filed and exchanged within 14 days. The Petitioners shall file and serve its Written Submissions and the Respondents and the Interested Parties shall have a corresponding 14 days. The matter shall be mentioned virtually on the 23rd day of July 2024 for compliance and further directions. The Interim Orders shall remain in force till 23rd July, 2024".

g. At the request and instance of the 2nd and 3rd Respondents, which request was reiterated by the other Respondents and Interested Parties, the Learned Judge granted a stay of proceedings for 30 days to enable the Respondents file a substantive Application for stay pending appeal in the Court of Appeal.

h. On or about 15th July, 2024, the 20th and the 21st Respondents in the exercise of its rights of Appeal, filed their Memorandum of Appeal and took out a 5(2)(b) Application for stay pending Appeal.

   i. The Court of Appeal, certified the Application urgent and directed as follows;

   ii. The Applicant to serve the Respondents with the Application within 3 days from the date of these directions;

   iii. The Respondent to file and serve Reply to the Application within 7 days of Service;

   iv. The Applicant may file and serve response to the reply and Written Submissions within 7 days of service;

   v. The Respondent to file and serve Written Submissions within 7 days of service of the above, and

   vi. The Application shall be listed for Case Management to confirm

i. On 23rd July, 2024 when the matter came up before the learned Judge, a number of distorting developments occurred which led the Applicants to have a reasonable apprehension that the Learned Judge is biased against the Respondents and the Interested Parties in the Petition in favour of the Applicant in the Petition.

j. The Proceedings of the 23rd July, 2024 before the learned Judge holistically viewed together with the earlier Orders and/or directions given has caused the Applicants great apprehension regarding the impartiality of the learned Judge in the handling of this matter.

k. From the proceedings of 23rd July, 2024, the following directions and/or pronouncements of the learned Judge are disturbing.

l. Notwithstanding the fact that vide his ruling of 20th June 2024, the Learned Judge had specifically directed parties to file submissions on the Application for injunction in the High Court, the Learned Judge, without the consent of the parties and contrary to procedure, now directed that parties file Submissions on the Petition.

m. Notwithstanding that on 20th June, 2024, the Learned Judge granted a stay of proceedings, the Learned Judge nonetheless appears to expect parties to proceed with filing documents and Submissions within the period of stay.

n. That indeed it is difficult to understand how one of the parties managed to file Replying Documents on 19th July, 2024 during the period of stay of the proceedings.

o. Notwithstanding the express directions of the Court of Appeal which prima facie reveal the urgency of the Court of Appeal to deal with the jurisdictional issues raised in the Appeal, the learned Judge, clearly with a view to defeating the possible pronouncement of the Court of Appeal, had no hesitation in setting in motion the process of hearing of the Petition and even curiously fixing a Judgement date.

p. The million-dollar question is how the Learned Judge, without the consent of the parties, sidestepped the pending Notice of Motion to proceed with the Petition.

q. A question placed before the Learned Judge by one of the parties as to the order of dealing with the motion and the petition was casually dismissed with the Learned Judge wrongly stating that he had given directions on filing submissions on the petitions and not the Application.

r. Granted that the Respondents and the Interested Parties had raised the issue of forum shopping noting that the Petitioners had to file these proceedings before the Nakuru Court and not the Eldoret Court, which is the correct Geographical Court, it is evident that the Learned Judge, is confirming the suspicion that indeed the Petitioners deliberately filed this Petition before him and there is a pre- determined outcome.

s. A clear perusal of Order 3 of the Learned Judge's Order of 21st May, 2024 reveals that the learned Judge suspended the appointment of the 20th, 22nd, and 24th Respondents ad infinitum. The suspension was not to await the hearing of the Application inter-parties nor the Petition.

t. The said Paragraph 3 of the Orders of 21st May, 2024, viewed against the conduct of the Learned Judge in these proceedings thus far, clearly speak to the bias of the Learned Judge.

u. Similarly, at Paragraph 7 of the Orders of 21st May, 2024, the Interested Parties appear not to have been granted the right to file responses by the Learned Judge This again viewed in the context of proceedings herein thus far, may have been deliberate.

v. In the totality of the circumstances, it would seem that the Learned Judge is inclined to quickly dispose of the Petition with a pre-determined outcome.

w. It is equally disturbing that the Learned Judge vide his Orders of 21st May, 2024, certified the Petition Urgent, a prayer that was never sought by the Petitioners in the Notice of Motion Application dated 20th May, 2024. This

again speaks to the urgency of the Learned Judge to dispose of the Petition even in total disregard of the due process.

x. It is in the interest of Justice and to uphold the due process and the right to fair hearing that the Learned Judge recuses himself from these proceedings.

9. This Court directed the Parties to file written submissions in support or opposition to the Application for recusal by the 2nd and 3rd Respondent and the Petitioners filed their Written Submissions dated 5th August 2024, 5th, 6th, 8th, and 10th Respondents, and 1st, 4th, 27th, 30th, 44th, and 45th interested parties grounds of in support for recusal while the 1st, 4th, 12th,18th and 19th Respondents filed a replying affidavit by Justus Otiso in support for recusal dated 14th August 2024 together with written submissions dated 13th August 2024. The 2nd and 3rd Respondents/Applicants filed their written Submissions dated 5th August 2024.

The Applicants (2nd and 3rd Respondents) Case

10. The Applicants - 2nd and 3rd Respondents in their filed written submissions dated 14th August 2024 cites Bangalore Principles of Judicial Conduct, The Judicial Service (Code of Conduct and Ethics) Regulations, 2020, the case of *Rawal Vs. Judicial Service Commission & another, Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) Civil Appeal (Application) 1 of 2016* and the case Philip K. *Tunoi & Another Vs. Judicial Service Commission & Another Civil Application No. Nairobi 6 of 2016*, to lay basis for the Applicable test for recusal applications which leads him to two sub-issues namely:-

a. Whether a fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the Court is biased?

b. Whether the action of the Honourable Court violates the Applicant's right to fair hearing?

11. As to Whether a fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the Court is biased? The Applicants - 2nd and 3rd Respondents guided by the aforementioned dicta in Rawal Vs. Judicial Service Commission & another, Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) (supra) and Philip K. Tunoi & Another Vs. Judicial Service Commission & Another (supra), it is clear that there must be a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the mind of right thinking, well informed and reasonable member of the public reasonable doubt about the fairness of the administration of justice.

12. The Applicants - 2nd and 3rd Respondents relies on the following grounds to emphasize that the Learned Judge was biased and his conduct in the proceedings of 23rd July 2024 was impartial and likely to impede a fair trial:

a. The Learned Judge had earlier directed the parties to file Submissions on the Application for Injunction vide his Ruling of 20th June 2024. However, on 23rd July 2024, the Learned Judge without the consent of the parties and contrary to procedure now directed the parties to file Submissions on the Petition.

b. Despite the Learned Judge granting a stay of proceedings to the Respondents on 20 June 2024, the Judge on the 23 July 2024 appeared to expect parties to proceed with filing of documents and Submissions within the period of stay.

c. Even after the Learned Judge was informed that the Respondents had filed a Memorandum of Appeal and an Application for Stay pending Appeal Civil Application E067 of 2024 and E068 of 2024, and that there were directions issued by the Court of Appeal with regards to filing and exchange of documents amongst the parties, the Judge did not hesitate to fix a Judgement date for the Petition.

d. The Conservatory Orders issued by the Honorable Court on 21st May 2024 reveals that the Learned Judge suspended the appointment of 20th, 22nd and 24th Respondents to infinity. The suspension was not to await the hearing of the Application nor the Petition.

e. The Orders of 21st May 2024 did not grant the Interested Parties the right to file responses.

f. The Learned Judge vide his orders of 21st May 2024 certified the Petition urgent, a prayer that was never sought by the Petitioners in the Notice of Motion Application dated 20th May 2024.

13. The Applicants - 2nd and 3rd Respondents are apprehensive of the outcome owing to the facts stated above.

14. The Applicants - 2nd and 3rd Respondents contend that a fair-minded observer aware of the facts in this Application can conclude that the conduct of the proceedings by the Learned Judge was biased.

15. As to whether the action of the Honourable Court violates the Applicant's right to fair hearing? It is submitted that the entire judicial edifice is built on the right to a fair trial. Article 50(1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body. (see page 3 of the Applicant's List of Authorities)

16. That, Article 25(c) of *the Constitution* has listed the right to a fair trial as one of the rights that shall not be limited. (see page 2 of the Applicant's List of Authorities).

17. That allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial Court.

18. That, the right to fair trial of the Respondents and the Interested Parties has been violated because the parties have not been given an opportunity to address themselves on the Application for Injunction.

19. That it is worth mentioning that directing parties to file Submissions on the Petition and giving Judgement date when there are two pending applications in the Court of Appeal for stay of proceedings pending the hearing of the Appeal clearly undermines the right to fair hearing for the Respondents.

20. That, the outcome of the Appeal will indeed have an impact on the Petition since the appeal is against the Ruling of this Court that held the Court had jurisdiction to deal with the matter. So, for the Court to force the Respondents and the Interested Parties to continue with the Petition in a Court whose jurisdiction is in question undermine the parties' right to fair hearing.

21. That, the proceedings of 23rd July 2024 before the Learned Judge, the earlier Orders and directions collectively forming the grounds for biasness under paragraph 16 of these Submissions, has caused the Applicants - 2nd and 3rd Respondent's great apprehension regarding the impartiality of the Learned Judge in the handling of this matter.

22. Accordingly, the lack of impartiality of the Honourable Court has affected and therefore violated the Applicants - 2nd and 3rd Respondent's right to fair trial.

23. That, by allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the Constitutional guarantee of a trial by independent and impartial Court.

24. That, all in all, the Applicants - 2nd and 3rd Respondent's urges the Court to bear in mind the sound legal principles of law enunciated above and allow the Notice of Motion Application dated 25th July 2024.

The 1st, 4th, 12th, 18th and 19th Respondents Written Submissions in Support of Recusal

25. The 1st 4th, 12th, 18th and 19th Respondents Supported the Application by filing a sworn Affidavit of Justus Otiso dated 14th August 2024 and in their Written Submissions dated 13th August 2024 where they enumerate their self-crafted ground as follows:

    a. The judge suo-moto and unilaterally elected to deal with the main Petition thereby and in effect: -

        i. Disregarded challenges to the ex-parte orders.

        ii. Acted for, represented, and confirmed ex-parte orders in favor of the Petitioners and damnified the Respondents and the interested parties.

        iii. Reviewed his earlier orders for filing of responses and submissions to the interlocutory application.

    b. Making a decision to determine the case based on affidavits and submissions as opposed to viva-voce evidence, without taking on-board the preference in the best interest of justice, of the parties and participants.

    c. Set the main Petition for judgment before determining the interlocutory issues including non-suited parties and the question of the Court's jurisdiction already pending at the Court of Appeal.

    d. Scheduling the main Petition for judgment even before ascertaining whether all the parties have been given an opportunity to be heard.

    e. Proceeded to schedule the Petition for consideration and judgment despite the Appellate Court's certification of urgency and consideration on whether the judge has jurisdiction.

    f. Making orders freezing the functioning of the four (4) parastatals by suspending appointment of the C.E. O's in infinity.

    g. Failing to place on Court's records orders made on 20th June 2024 for 30 days stay, and leave to appeal that he indicated verbally as having been granted.

    h. Issuing ex-parte orders of stay on 21st May 2024 for a period long exceeding the normal fourteen (14) days for ex-parte orders.

26. The 1st, 4th, 12th, 18th and 19th Respondents have refined the two issue for consideration as:

    i. Whether the issues raised amount to actual bias and amount to sufficient basis to fear of bias, to a reasonable person, and on an objective criterion.

    ii. ii. Whether the 1st, 4th, 12th, 18th and 19th Respondents grounds deserve the Court's grant of orders of recusal.

27. As to whether the issues raised amount to actual bias, and or amount to sufficient basis to fear of bias in the eyes of a person on an objective criteria. 1st, 4th, 12th, 18th and 19th Respondents herein aver that the grounds they advanced for recusal, which include that the judge: -

    i. Unilaterally confirmed ex-parte orders in favour of and to help the Petitioners.

    ii. Gave exparte orders, (i) ad infinitum and, (ii) for a period long exceeding fourteen (14) days.

    iii. Seeking to hurriedly decide the case before determination of the judge's jurisdiction already pending at the Court of appeal for determination.

    iv. Failing to maintain the Court's accurate record, especially as to orders of stay and of leave to appeal granted on 20th June 2024 but not recorded. This in part caused delay in the filing of the appeal and application for stay of proceedings pending the decision on the Appeal Court on jurisdiction.

    v. Scheduling the main Petition for judgment before ascertaining if all parties have been served.

28. That in every other cases, the Courts have said that the basis of recusal need not be to the level of actual and or tangible bias. Even adequate grounds to fear for bias are adequate. In this case, the 1st, 4th, 12th, 18th and 19th Respondents aver that there exist actual acts of bias on the basis of what a reasonable person can see. In addition, there are more than enough grounds to fear for bias

29. That, the Courts have stated that the criteria in bias is not necessarily actual existing bias:

    a. Jasbir Singh Rai and 30 others Vs. Tarlocha Singh Rai and 4 others; S C Petition No. 4 of 2012 [2013] e KLR, where the Supreme Court cited with Approval the American case of Pery Vs. Schwarzenegger 671 F.3d 1052 (9th Circ. February 7, 2012) and held that;

        > "According to the definition in the Black's Law Dictionary, it was evident the circumstances calling for recusal for a judge are by no means cast in stone. The objective view in the recusal of a judicial officer is that;
        >
        > a. Justice as between the parties be uncompromised;
        >
        > b. The due process of law be realized and be seen to have had its role and lastly:
        >
        > c. The profile of the rule of law in the matter in question is seen to have remained uncompromised."

    b. Trust Bank Ltd v Midco International (K) Ltd & 4 others [2004] eKLR Civil Case 336 of 2001, where the Court held that:

        > "a reasonable person looking at the situation now would have the impression that there could have been a real danger of bias on the part of the judge due to his past relationship with the respondent as a result of non-disclosure of the relationship between the Judge and the respondent."

    c. Mumias Sugar Co. Ltd v Director of Public Prosecutions & 2 Others [2012] eKLR, where Hon. J. Gikonyo observed stated that:

        > "Real likelihood of bias would therefore occur when the matters complained of create a reasonable doubt in the minds of the public about the fairness in

the administration of justice in the particular case in question. The operating phraseology is a reasonable doubt-an elusive expression-but ordinarily refers to an impression of doubt that goes beyond mere apprehension or belief of the parties to a more concrete and cogent grounds based on the judge's personal interest, pecuniary or otherwise in the case. The applicant must therefore specifically set out the facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of a judge."

d. Serah Njeri Mwobi v John Kimani Njoroge (2013) JELR 96652 (CA), where it was noted that:

> " …due process requires that the parties be given a hearing before an unbiased and impartial decision-maker as part of the resolution process… In a constitutional order like ours, grounded on the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflict of interest. Accordingly, this in our view, is the basis upon which when a judge is appointed to the bench, he/she takes an oath to uphold *the Constitution* and administer justice without fear or favor. Public confidence in the administration of justice is indispensable. It is not enough that judges be impartial, the public must perceive them to be so,"

e. The 1st, 4th, 12th, 18th and 19th Respondents for this preposition relies on the case of Attorney General of Kenya Vs. Professor Anyang' Nyong'o & to 10 Others EACJ Application No. 5 of 2007, it was held: -

> " 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. A litigant who seeks disqualification of a Judge comes to Court because of his own perception that there is an 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."

30. That a judge is also disqualified if there is a likelihood or apprehension of bias arising from circumstances of a relationship with one party, or where preconceived views exists on the subject matter in the dispute. On this, the 1st, 4th, 12th, 18th and 19th Respondents rely on the case of Philip K. Tunoi & Another Versus Judicial Service Commission & Another (2016), where the CA held:

> " In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balance approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or suspicious in determining whether or not there is real possibility of bias."

31. The, 1st, 4th, 12th, 18th and 19th Respondents herein submit that, Judicial disqualification is also based on the natural justice principle embodied in the Latin phrase Nemo Judex In Re Causa Sua; being the rule that no person shall be condemned unheard and no person should be a judge in his own cause. It

imposes impartiality in decision-making. The rule against bias is immutable and cannot be curtailed even by statute.

32. The 1st, 4th, 12th, 18th and 19th Respondents submit that they have demonstrated that there are grounds to justify recusal in the best interest of justice.

a. The application herein for disqualification is not presumed. The 1st, 4th, 12th, 18th and 19th Respondents have established bias. Additional there have established adequate grounds to fear for bias by the learned judge. It is not a mere figment of their imagination, nor a petty worry, nor a tenuous concern.

b. The 1st, 4th, 12th, 18th and 19th Respondents herein submit that all the grounds highlighted show actual bias. Further, there are adequate grounds to fear for bias. Therefore, the application warrants recusal. The Respondents aver that the judge conduct shows solidly that a reasonable person, looking at the situation, gets the impression that there is real danger of bias on the part of the judge.

33. As to whether the 1st, 4th, 12th, 18th and 19th Respondents' grounds deserve the Court's grant of orders of recusal? It is submitted that enough grounds have been adduced to establish that the Honorable Judge has already acted in a biased manner, and is also continuing to act in a way on an objective criteria, by a reasonable bystander, shows bias and of being conflicted.

34. The 1st, 4th, 12th, 18th and 19th Respondents, on this prepositions, relies, by way of emphasis, on the case of Charity Muthoni Gitabi Versus Joseph Gichangi Gitabi (2017) eKLR, and Kalpana H. Rawal Versus Judicial Service Commission and 2 others (2016) eKLR, were the Court of Appeal held:

> " An application for recusal of a Judge is a necessary evil. On the one hand, it calls into question the fairness of a judge who has sworn to do justice impartially, the accordance with *the constitution* without any fear, favour bias, affection, ill will, prejudice, political, religious, or other influence. In such applications, the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When a reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it maybe. That is the lesser of the 2 evils. The alternative is to risk. Violating a cardinal guarantee of *the constitution*, namely the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial Court....."

35. That the risk in declining recusal is that, the Judge would then be participating in the hearing of the matter where the same judge can be perceived to be both the judge and accuser. Of being seen as acting as counsel for a party/petitioner on a cause in dispute. Such a situation makes it hard for any decision made by the Court to be seen as having given all parties a fair hearing.

36. That, Impartiality, which applies not only to the decision, but also to the decision-making process as well, is recognized as essential to the proper discharge of office in the Bangalore Principles of Judicial Conduct, 2002. It is a value precedent to the true realization of the right to a fair hearing. The said Bangalore Principles in relevant parts states in Value 2 that:

> " 2. 1 A judge shall perform his or her judicial duties without favour, bias, or prejudice, 2.2 A judge shall ensure that his or her conduct, both in and out of Court, maintains and enhances the confidence of the public, the legal

profession, and litigants in the impartiality of the judge and of the judiciary, a judge shall, so far as is reasonable. so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases,"

37. The, 1st, 4th, 12th, 18th and 19th Respondents also relies on Rule 3(1) of the Judicial Service Code of Conduct and Ethics is made under Section 5 of the *Public Officer Ethics Act*, Cap 183 which states: -

> " (a) where the judicial officer has a personal bias or prejudice concerning a party or his lawyer, or personal knowledge of facts in the proceedings before him; (b) where he has served as a lawyer in the matter in controversy; (c) where he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceeding; or (d) where he, or his spouse, or a person related to either of them or the spouse of such person or a friend is a party to the proceeding."

38. The 1st, 4th, 12th, 18th and 19th Respondents submit that, they have demonstrated adequate grounds and have met the legal threshold in law for orders of recusal to issue and based on all facts set out herein, the law, and the relevant circumstances the 1st, 4th, 12th, 18th and 19th Respondents submit that, they have discharged the burden on them, and met the necessary standard of proof in law to warrant grant of orders of recusal prayed for.

39. That from the facts and evidence shown there is enough basis for recusal for actual, likely, and reasonable objective concern of conflict of interest and bias.

The 5th, 6th, 8th, and 10th Respondents, and the 1st, 4th, 27th, 30th, 44th, and 45th interested parties' case in support of recusal

40. The 5th, 6th, 8th, and 10th Respondents, and the 1st, 4th, 27th, 30th, 44th, and 45th interested parties filed grounds in support of the Application dated 2nd September 2024 and adopted the Applicants - 2nd and 3rd Respondents written submissions as follows:

    i. There is a likelihood of apprehension of bias arising from the honourable judge's conduct of proceedings in this petition. On 20th June 2024 the judge directed parties to file and exchange submissions on the Petitioner's application for conservatory orders dated 20th May 2024. On the same day the judge issued a stay order on the said directions for a period of thirty days lapsing on 23rd July 2024.

    ii. On 23rd July 2024, in complete disregard of the previous directions on filing of submissions on the pending application, and despite being informed by counsel that there was a pending application, the learned judge proceeded to issue directions on disposal of the main petition and gave a judgment date.

    iii. By so doing the learned judge unprocedurally extended the exparte conservatory orders in favour of the Petitioner to last until the delivery of judgment on the matter without hearing any of the Respondents who had already filed responses opposing the grant of conservatory orders.

    iv. In the interest of justice, the learned judge ought to recuse himself from these proceedings to forestall a further miscarriage of justice.

v. The 5th, 6th, 8th, and 10th Respondents, and the 1st, 4th, 27th, 30th, 44th, and 45th interested parties fully adopt the submissions filed by the 2nd and 3rd Respondents dated 13th August 2024 and the 1st, 4th, 12th, 18th and 19th Respondents dated 13th August 2024 filed in support of the application for recusal.

Submissions by the Petitioners/Respondents;

41. The Petitioners/Respondents in their filed written submissions dated 5th August 2024 contend that the two issue for the Court to consider:

    i. Whether applicant herein has satisfied threshold for recusal of a trial judge?

    ii. Conclusion/final reliefs and orders.

42. As to whether Applicants - 2nd and 3rd Respondents herein, have satisfied threshold for recusal of a trial judge? The Petitioners/Respondents, posit that, the Applicants - 2nd and 3rd Respondents filed the application laying myriad of "supposed grounds" that the trial judge is biased and need to recuse himself from further proceedings on this matter.

43. That one may ask, what is the threshold for recusal? In a matter *Rawal vs Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) (Civil Appeal (Application) 1 of 2016*) [2016] KECA 717 (KLR) (11 March 2016) (Ruling) south Africa case held:

> We would, with respect, agree with the Constitutional Court of South Africa when it stated as follows in The President of the Republic of South Africa v. The South African Rugby Football Union & Others, Case CCT16/98:
>
> > " At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his (or her recusal as a personal affront." [Emphasis added]."

44. That, from the foregoing, where actual bias is established, there is no doubt that there is only solution of recusal of Judge immediately. The problem comes, like in the present case where Applicant just makes wild allegations against a judge. How do we handle it", Paragraph 21 of The Rawal case(supra) held:

> " 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. The challenge however arises where, like in the present case, the application is founded on "appearance of bias"...of a judge. (emphasis ours)

45. That the Applicants - 2nd and 3rd Respondents herein, only alleges bias against a judge does not have any iota of evidence to prove the same. In fact, he supports his case even by outright falsehoods like claiming

that the judge was biased by granting a prayer of being certified urgent when it was not prayed, despite clear and unequivocal evidence proving otherwise. Then what test do we use to find out whether the honorable judge should recuse himself or not?

46. That the Courts in Rawal case at paragraph *24* and *25* chose to use reasonable apprehension of bias test". The Court held:

24. The East Africa Court of Justice adopted the same test in Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 when it stated:

> " 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."

25. The Supreme Court of Canada 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."

47. That, from the going, for a judge to recuse himself, then "real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The Applicants - 2nd and 3rd Respondents herein, just presents suspicions and falsehoods like he seeing a small typo, then he magnifying them and saying that the honourable judge don't want interested parties to be involved in the proceedings (no evidence). That there is forum shopping - (no evidence provided). That judge wants to complete petition with pre-determined outcome- (again no evidence provided).

48. That, at paragraph 26 of Rawal case, the Court held 26. That judges should not recuse themselves on flimsy and baseless allegations. As was stated in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB

451, a judge: "[W]ould be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."(Emphasis ours)

> " It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn."

49. That, from the litany of hearsays and unfounded bare allegations made by the Applicants - 2nd and 3rd Respondents herein, which have been fully rebutted by the replying affidavit of Dr. Magare- Gikenyi, the 1st petitioner, there is nothing, completely nothing which shows bias on the side of the Honorable Judge. For instance, that an allegation insinuating that the petition should not be expeditious be heard is not only immoral but against good practice. The Applicants - 2nd and 3rd Respondents herein, want to just intimidate the good judge.

50. That, an allegation that the judge refused to hear a notice of motion when in fact the Court held that, the application and petition be heard together is now a crime? That the judge needs to deem a notice of appeal and/or an application of stay of proceeding and a Court of Appeal application certified urgent as a Court Order from Court of Appeal or else they get forced to recuse themselves? That losing party in a ruling demands recusal of a judge? This can't be. That in any case with the adversarial system of Courts, there are bound to losers and winners. That cannot and will never form a basis of recusal of a judge.

51. That, further in a matter *Shollel & another v Judicial Service Commission & another (Petition 34 of 2014)* (2018) KESC 42 (KLR) (3 July 2018) (Ruling), the Supreme Court through Justice D.K Maraga, C.J & P, PM Mwilu, D.C.J & V-P, MK Ibrahim, J.B Ojwang & N.S Ndungu, SCJJ held:

    It is useful to refer to the case from the New Zealand Court of Appeal Muir Commissioner of Inland Revenue PARA 2007] 3 NZLR 495 in which the Court stated as follows: -

> " the requirement of independence and impartiality of a judge is counter balanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 "it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion of appearance of bias encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."(Emphasis ours)

52. That, the Applicants -2nd and 3rd Respondents herein, having not provided any evidence against the purported "bare" grounds in support of this application are only hoping for recusal of trial judge as part of the maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. The new Land Court advices judges not to accept these improper motives by the applicants.

53. That, the learned friend/advocate don't seem to apprehend that notice of appeal, application of stay of proceeding and/or an application which has been certified urgent is NOT ipso facto a Court order from Court of appeal. That the same should not for the basis for recusal.

54. That, from the forgoing we pray that the application for recusal is an abuse of Court processes filed solely to intimidate the honourable learned judge into fear so that he can stop him from doing his judicial work. The applicant should never be allowed to intimidate a judge especially with concoctions of falsehoods without any total of evidence. That apart from the wild allegations, the Applicants -2nd and 3rd Respondents herein, has not given any evidence to support their application.

55. That, from the foregoing, the Petitioners/Respondents submit that, no fair-minded reasonable and informed observer aware of the facts in this application can conclude that the trial judge herein is biased; and that the Applicants - 2nd and 3rd Respondents herein, will not get a fair hearing contrary to assertions made in the application dated 25th July 2024.

56. That, accordingly, the Application herein is frivolous, vexatious and slanderous and the same is brought in bad faith and is an abuse of the Court process. The we pray that the same be dismissed with costs to the Petitioners/Respondents.

Analysis & Determination

57. Upon hearing and considering the pleadings for the Applicants - 2nd and 3rd Respondents, the 1st 4th, 12th, 18th and 19th Respondents and the 5th, 6th, 8th, and 10th Respondents, and the 1st, 4th, 27th, 30th, 44th, and 45th interested parties all in support and the Petitioners/Respondents in opposition am of the view that the only issue to determine whether applicant herein has satisfied threshold for recusal of a trial judge? And whether I should recuse myself from this petition?

58. The Parties herein have discussed the standard that have since crystalized on the law of recusal. In this instance the Application is underpinned by apprehended bias, that the impugned ruling subject to an Appeal at the Court of Appeal and directions to hear and dispose of the Petition in an expedite fashion triggered the instant motion.

59. Black's Law Dictionary 8th Ed. (2004) (P.1303) defines recusal as 'the removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest'. Furthermore, that the test to determine when a judicial officer should recuse himself was cited in the case of Jan Bonde Nielson vs Herman Philipus Steyn & 2 others (2014) eKLR as follows:

> " The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali and Others C.A Criminal Application No Nai 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & Others C.a. Civil Application No Nai 310 OF 2004 (Unreported) where the Court of Appeal stated that: "…When Courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established…"

60. It is noteworthy that by the 23rd of July 2024 all the Respondents and interested parties save for the 21st and 22nd Respondents had complied and filed response.

61. This Court is alive to its solemn duty to administer justice fairly without fear or favor, the nature of the petition is such that it is directed at public bodies and individuals and what is at stake is a greater public interest of holders to public offices and custodians of public resources.

62. This Court is equally alive to the uniqueness and distinction of conservatory orders from the injunctive orders and as a remedy sought or issued by a Court to preserve a subject matter until the Suit/Petition is heard and determined. It is in other words an order of status quo ante so that the substratum of the suit/petition is preserved, or so that the same is not rendered an academic exercise.

63. Expedited hearing and disposal of matters cannot be a ground for apprehended bias. The Applicants - 2nd and 3rd Respondents, have not laid evidence in support of the Apprehended bias or demonstrated reasonableness on their part and the apprehension of bias is reasonable in the circumstances of the case.

64. It is the duty of this Court to deter those that weaponize litigation, abuse the process, drag and delay motions in abuse as has happened in this instance. Public officers and public bodies are to be the last ones to hide behind technicalities or besmirch the Court by making flimsy Applications for recusal.

65. In the Court of Appeal in Galaxy Paints Company Limited v. Falcon Guards Limited [1999] eKLR, the Court reemphasized the duty of the Court by holding that:

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

66. In this instance parties challenging the ruling of the Court were granted thirty (30) days leave to move to the Court of Appeal and argue an application for stay of proceedings there. In the absence of a stay of proceedings order then this Court was at liberty to proceed on with the motion.

67. This Court further noted that, should stay of proceedings orders be issued by the Court of Appeal the said orders shall arrest my delivery of judgment. I am now being invited to exercise my discretion and recused myself on the basis that, I shall not be impartial and that the directions so far favor the Petitioners.

68. The Applicants - 2nd and 3rd Respondents bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased.

69. In this instance the Court notes sadly that the Applicants - 2nd and 3rd Respondents on very shaky and flimsy basis alleges that this Court proceeding shall undermine the interlocutory Application pending before the Court of Appeal.

70. This Court has this year alone dealt with over 1300 cases and this is the 1st Application for recusal in my Court for issuing directions on expedited hearing of the case. Parties are reminded that the judiciary has an obligation to hear and determine matters expeditiously and that the desire is to hear and conclude matter in under one year.

71. I do not think any reasonable man, aware of the extent of the Applicants - 2nd and 3rd Respondents grievance, and being conscious of the obligation that comes with the solemn oath of office of Judge to defend *the Constitution* and do justice without fear or favour will even in the remotest sense habour the apprehension put forth by the Applicants - 2nd and 3rd Respondents of a likelihood of bias in the determination of the issues raised in the Petition.

72. I am not satisfied that the threshold for my disqualification has been met. I thus dismiss the application and order that the trial on merits of this Petition shall proceed before this Court as earlier scheduled.

73. The Court shall vacate the scheduled Judgment date to allow parties yet to comply, to file their respective written submissions.

74. Orders accordingly

DATED, SIGNED AND DELIVERED AT NAKURU

THIS 23RD DAY OF OCTOBER 2024.

MOHOCHI S.M.

JUDGE