REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. E009 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES 1,2(1), (2) and (5),3(1) and (2),4(2),10,19,20,21,22(1) and (2) (b) and(c),23(1),24(1),33(1)(a),35,38(1),47(1) and (2),48,50,52,93,96,165(3)(b) and (d)(ii),73(1),75(1)(c), 174,175,181,196(1)(b), 200,258,259,260;

AND

IN THE MATTER OF ARTICLE 1,2,3,47,50(B) AND (C),181 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURES RULES,2013)

AND

IN THE MATTER OF ARTICLE 1,3 AND 25(A) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1966

AND

IN THE MATTER OF THE STANDING ORDER NO.67 OF THE WAJIR COUNTY ASSEMBLY STANDING ORDERS

AND IN THE MATTER OF THE REMOVAL FROM OFFICE OF THE GOVERNOR OF WAJIR COUNTY BY WAY OF IMPEACHMENT

BETWEEN

ADEN IBRAHIM MOHAMMED.....1ST PETITIONER

OMAR JELLE ABDI.....2ND PETITIONER

BISHAR AHMED HUSSEIN.....3RD PETITIONER

SAFIYA MAHAMED ABDI.....4TH PETITIONER

YUSSUF IBRAHIM DIMBIL.....5H PETITIONER

VERSUS

COUNTY ASSEMBLY OF WAJIR.....1ST RESPONDENT

CLERK OF THE COUNTY ASSEMBLY OF WAJIR.....2ND RESPONDENT

SPEAKER OF THE WAJIR COUNTY ASSEMBLY.....3RD RESPONDENT

ABDULLAHI ISSACK.....4TH RESPONDENT

SPEAKER OF THE SENATE.....5TH RESPONDENT

THE SENATE.....6TH RESPONDENT

RULING

1. The 1st to 4th respondents **(hereinafter referred to as the applicants)** on 16/8/2021 approached this court by way of a notice of motion dated 13/8/2021, pursuant to sections 3A and 3B of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. In essence, the 1st to 4th respondents seek the recusal of Honorable Justice P.J. Otieno from further hearing of the instant petition.

2. The application is grounded on the allegations that the judge displayed bias and prejudice against the applicants and their advocates, which infringed on their right to a fair hearing as entrenched under Article 50(1) of the Constitution. In their supporting affidavit sworn on 16/8/2021 by their advocate, the applicants are apprehensive that serious prejudice will be occasioned if the orders sought are not granted. They accuse the judge of being biased against them as well as their advocate. All they crave is an opportunity to submit themselves to by an independent and impartial court.

3. Only the 6th petitioner and the 1st interested party succinctly opposed the application by respectively filling Grounds of Opposition and a Replying Affidavit sworn by the said interested party. The 1st, 3rd and 5th petitioners, like the 4th and 5th respondents, took no defined position in the matter while the 2nd interested party supported the application only to the extent that the court must be satisfied that the principles applicable have been met by the applicant. In that position the 2nd Interested party filed a list and digest of some four authorities. The 2nd and 4th petitioners were not represented when the application was argued.

4. In the grounds of opposition, it is contended that the application is devoid of merits in that it is speculative, fails to demonstrate that fair hearing cannot be achieved before the judge, thus fails the threshold of principles applicable for recusal, is otherwise intended to derail and delay the just determination of the matter by seeking to choose the forum, is therefore an abuse of the court process, and lastly that the decision to certify the matter as raising substantial questions of law and constitution of a three judge bench by refer the matter to the Chief Justice cannot be faulted.

5. For the 1st Interested Party, the position taken in the Replying Affidavit is the same with that by the 6th petitioner save that it is averred that in deed the censor of counsel for the 1st to 4th Respondents was justified on the basis of accusations by counsel that the court had been forum shopped and had recklessly issued orders left right and center. The affidavit then delves into great length on the history of the matter and touches on the orders issued, when issued, by which judge, that the same were duly served but ignored then annexed documents to support such position. It was also asserted that the matter had been before Muriithi J, who gave a date before Otieno J, and that no reservations were raised by counsel for the 1st to 4th respondents about the court having been forum shopped and that the first time the issues were raised was also the very first time counsel was appearing before Otieno J in the matter. In the opinion of the deponent and counsel, counsel for the applicants had misconducted self before the court with the purpose of undermining the authority of the court, having made allegations without proof and therefore the court was entitled to censor the counsel as it did. The deponent then ventured into demonstrating that the counsel had in fact in the past vilified the court and other judicial officers in social media and annexed a post attributed to the counsel as well as a video clip in which the same counsel is seen and heard castigating a judge in open court. The deponent thus takes the view that the same counsel having arrogated to himself the duty to demean the court by calling judges names and accusing them of unfounded impropriety and misconduct is not the person to assert being in the forefront for judicial accountability and that paragraph 7 of the affidavit in support was a clear demonstration of vendetta and hatred against the person of the judge and otherwise an attempt at intimidation by allusion to complaints to JSC which had not been exhibited, which in any event had no nexus with this matter. The affidavit makes the conclusions that nothing was untoward in making reference order for the Chief justice to empanel this bench as the order has legal foundation in article 165(4), the orders given were so given pursuant to article 23, that the application was made late in the day to delay the matter and the net for recusal has been, by paragraphs 17, 18 and 19 of the supporting affidavit, cast overly wide and the court is being asked to reinvent the wheel on the applicable principles with the urge that the application be dismissed.

6. The application having been filed on the 13/08/2021 was directed to be heard on the 01/09/2021 by which date only the applicants had filed written submission the previous day, the 2nd interested party had filed a list and digest of authorities with the rest of the parties present offering oral submissions. In their written submissions filed on 1/9/2021, and adding to some 25 pages, the applicants weightily submitted that, they had lost confidence in the court, in light of the unprovoked expressions made by the judge against their advocate. They urged the court, while relying on the decision in **Nyali Ltd vs AG (1955) ALL ER 646,** to not apply the common law principles and standards of *a* fair minded and informed or reasonable person because the same affords judges of undeserved protective amour against their hurtful and exploitative environment created by the same judges who have cut their teeth in a corrupt system that Kenyan judiciary is, but rather employ the test of "a Wanjiku" contended to be down trodden, angry and depressed person, one who answers not to the description of an informed reasonable English middle classman but rather the person who appreciates the rampant and runaway corruption in the Kenyan judiciary. The submissions take the very strong view that the judiciary in Kenya is nothing but corrupt, that history has it that the radical surgery sent home more than 50% of the judges and many judicial officers on account of impropriety and that such endeavor is still needed today, its failure to observe due process notwithstanding.

7. The decision in **Rai vs Rai (2013) eKLR** was cited and submitted to have introduced a huge paradigm shift on the applicable principles and the law away from the old, and that the foundation and considerations for recusal is now about the moral test and constitutionalism based on the national values and principles of governance.

8. For the application for recusal the submission took the position that the comments by the court at paragraph 12 were unprovoked and went on to make a determination upon a matter that was central to the determination by the court and shows that the judge has a prejudged position in the matter. To the applicants, in handling this matter, just like he did in Meru HC Petition No E002 of 2021, the judge and his court come out as the New Mecca for forum shopping with invitation for pilgrims from far and wide to come and shop for orders of their

liking. It was asserted that the decision exhibits clear animosity and hatred for counsel for which reason the 1st to 4th respondents have lost confidence in the judge being fair to them.

9. The other ground advanced in support of the application is that the matter was prejudged on the basis that at paragraph 16 the judge found that the orders had been disobeyed. It is thus contended, while citing the decisions in **Otkritie vs Urumov (2014) EWCA, Civ 1315, Livesey Vs The New South Wales Bar Association (1983)151CLR 288 and Findlay vs United Kingdom (1997) 24 EHRR 221,** for the propositions that a judge ought not to hear a matter on which a fair minded and informed person with full facts of the matter would discern a real possibility of bias, for example where is biased against any of the parties or where he has a personal interest.

10. The last attack and ground for recusal was that the judge has demonstrated flagrant judicial impunity from the handling of Meru Petition No. EOO2 of 2021 in that the orders issued therein was the fruit of grand conspiracy between the people in government, member of JSC and Judge Otieno.

Oral Arguments by the parties

11 In his opening submissions, counsel for the applicants urged the court to read the comprehensive submission and the application then allow the application as prayed. We have done that by the foregoing analysis of the filed submission

12 The next to address the court was, counsel for the 2nd interested party. He stated he was not taking any position in the matter but as an officer of the court would submit on the law applicable to assist the court come to the correct decision adding that it remains with the judge asked to recuse himself to determine whether the complaint is merited and whether the dictates of section 5 of the judicial code of conduct, itself derived from the requirements of Public Officers Ethics Act and article 75 of the constitution, have been upheld. Counsel cited **Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet* [2000] 1 AC 119** and submitted that the test is whether impartiality can be reasonably questioned.

13 Counsel additionally argued that there had not been demonstrated real bias but a perceived one and underscored the importance of the matter to the people of Wajir because the petitioners were questioning the conduct of constitutional organs in the matter of impeachment of a Governor.

14 For the 6th petitioner oral submissions were made in line with the Grounds of opposition to the effect that the applicants have manifestly failed to demonstrate any bias to justify grant of the orders sought. The 6th respondent views the application as being entirely speculative, an abuse of the court process meant to scuttle the expeditious determination of the matter and a deliberate attempt to derail justice. Counsel for the 6th Petitioner termed the application the weakest he had ever seen in his tenure as an advocate and stressed the need to apply the Bangalore Principles of Judicial conduct. The 6th respondent relies on the provisions of Article 165(4) of the Constitution, which empowers the court to issue directions for empanelment of a bench *suo moto,* which should not be interpreted as bias. He then underscored the fact that judges never conjure facts but rely on facts presented by parties and that counsel for the applicant in questioning why the matter was filed in Meru used a language not expected of him as an advocate and a senior counsel. He contended that it would be an abomination for a judge to fail in his duty to control his court and that what is complained about is sanction by the court against the advocate which is permissible adding that the court as of that date had issued three consecutive orders that were all disobeyed.

15 For the 1st interested party, Prof. Ojienda and Mr. Ndegwa placed full reliance on the Replying Affidavit by their client and asserted that no sufficient grounds had been put forth to merit recusal and that an order for recusal would only impede the fast determination of the matter as the bench would stand dissolved and cease to exist. They then added that the unhappiness of a counsel is no basis of recusal and that for the sake of expeditious disposal of the matter, they had restrained from filling an application for contempt and that allowing the application would visit grave prejudice upon the parties as valuable time shall have been lost. An addition submission was that the application was farfetched and amounted to a personal vendetta against a judge, which ought to be discouraged, as a judge has the duty to sit and handle a docket, as decided by the court in **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR.** Counsel added that it is the duty of the judge to call counsel to order and that when that duty is executed, it is no basis to seek recusal.

16 In his rejoinder to submissions by other counsel, counsel for the applicant averred that his colleagues were very shy to address the legal principles applicable and instead, without basis, attacked him as the applicant when his clients were the true applicants as parties. He reiterated that the English standards are inapplicable but urged the court to employ the principles in the Rai's case and concluded that the judge has no say in the matter but ***must recuse himself*** on account of actual and not just perceived bias.

17 As said before, Ms. Thanji did not take a definite position on the application but concurred with the submissions offered by the 2nd interested party while Mr. Onderi for the 2nd and 4th petitioner left it entirely to the court.

Analysis and determination

18 We have anxiously and in depth considered the application, the rival written and oral submissions by the parties and the authorities that they have cited. The first decision we have to make, as submitted divergently by counsel, is whether this determination ought to be by the judge sought to recuse himself or if it is the bench to make a determination. It was the position of counsel for the 6th petitioner that it is only the judge whose recusal is sought that needs to make conscious decision of the application while the rest of the counsel took the view that it is an application before the court and it's for the court to determine it. We find that once this bench was constituted, the file must be handled in all respects by the bench and not any one of the judges constituting the bench. We see no difficulty in coming to this conclusion because there in an order in the file that the matter raises substantial questions of law and the Hon Chief Justice having executed that order by empaneling the bench, to insist that one judge determines the application would be undoing the court order and the administrative action by the chief justice in a manner that would appear unwarranted if not wholly undesirable. Our second reason is the guidance from the collegiate benches of both the Supreme Court and the Court of Appeal decisions in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others***

[2013] eKLR and ***Attorney General v Anyang Nyongo & Others [2007] 1 EA 12*** where even though the applications for recusal were directed at individual judges, the decision was rendered by the full benches. We find no attraction in the invitation by counsel for the 6th petitioner because it lacks juridical persuasion.

19 On the substance of the application, we appreciate the law on recusal of a judicial officer from a case to have been aptly restated and finally settled by the Supreme Court in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR*** as follows:

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

20 Those sentiments had earlier on been observed by not only the predecessor of the apex court, the court of appeal in several decisions, as discernible from the authorities cited to us, but also by the East African court of justice. We may only cite ***Attorney General v Anyang Nyongo & Others (supra)*** where the court having set the rationale of the principles on recusal set caution and limitation intended to check on possible abuse and derailment of the course of justice in the following words: -

> **"The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind.....While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, *this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour."***

21 Applying the foregoing principles, we take the view that in order to succeed in an application of this nature, the applicants must lay some factual and cogent basis, and for a reasonable observer acquainted with the facts, to demonstrate a possibility of real or reasonably perceived bias or prejudice. It is not enough to just make bare allegations. When faced with a similar situation, the court in ***Haji Mohammed Sheikh T/A Hasa Hauliers v Highway Carriers Ltd. [1988] KLR 806; Vol. 1 KAR 1184; [1986-1989] EA 524*** **had this to say*:***

> **"One's experience teaches one that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatized as bias or judicial hatred. Nor does it justify an appellate court in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it…There was nothing wrong in the Judge restoring the judgement on the day fixed for mention since there was no defense. Such a course was eminently just since the Judge himself was under a statutory duty bestowed on him by section 3 of the Judicature Act to do justice to the parties without "undue delay". It was not and cannot be suggested that the Judge cannot properly do this. It was not suggested that in taking this course he infringed any procedure, rule or indeed any principle of justice. By what strength of imagination can this normal judicial action be interpreted as bias or hatred of the appellant's counsel? At all events, the judgement was not given against lawyers but was given against a party whom the Judge believed, with good reason, was seeking to employ tactics of delay to avoid or postpone the payment of what seems a just debt…A judge is always entitled to take judicial notice of notorious facts and therefore his comment that it is a well-known fact that in 1983 a registered letter posted in Nairobi cannot reach Mombasa earlier than five days cannot be faulted since there is nothing esoteric about the time a registered letter posted from Nairobi takes to reach Mombasa that it cannot be well-known to a Judge or can only become "known" to him by an adduction of formal evidence."**

22 In this matter the judge is faulted for the decision dated 24th May 2021 at page 12 which counsel and clients consider to demonstrate bias and thus impartiality against them. The said paragraph in the decision must be read and understood in the context of what counsel told the court in the address yielding that decision. We seek to lay a little background how the matter was placed before the judge. We take the view that it is important to do so for all the parties, even those who joined later so that the truth is laid bare.

23. The matter was filed on the 26/04/2021, under a certificate of urgency and was routinely placed before the Presiding Judge, as the duty judge that day who dealt with it on two other occasions till the 3/05/2021 when the judge directed the file to be placed before Otieno J because, he, the Presiding judge, was proceeding on annual leave. We do not understand the applicants to question the authority of the presiding judge to allocate the file as he did. Up to that date, we have consulted the record and noted that the counsel for the applicants had indeed attended court on two occasions and never raised the issue that the court had become '*the new Mecca for forum shopping with invitation for pilgrims from far and wide to come and shop for orders of their liking'*.

24. Our perusal of the file makes a revelation that as at the date the accusations were made, Otieno J, had indeed issued orders on the 18/05/2021. We find that single order to be incapable of answering to the description of orders issued left right and center to attract the accusation. We also find no material to merit the accusation that the matter was deliberately filed in Meru because Otieno J would deal with it favorably. We so find because there is a system in place at the station on how certificates of urgency are handled and duty is planned and executed in a known and overtly transparent manner. Those who practice in Meru High court regularly will attest to the fact that the judges' duty roster is known to litigants just like the leave plan is well circulated to court users. It is not our joint or singular making that we have to handle this matter. We do it because it is a matter filed by Kenyans who have a right to judicial services. However, we therefore call out on the counsel, that no institution will be made more accountable and strengthened by constant vitriols and besmirch but by constructive and well-meaning criticism delivered with decorum and devoid of vilification.

25. We further find that when an advocate uses a language that the court considers unbefitting, then it remains the duty of the court to call counsel to order. We consider the words used in paragraph 12 of the ruling of 24/5/2021 to amount to no more than the court sanctioning the counsel against brutality against the court. We have repeatedly urged counsel here to remain respectful and courteous to each other and the court. In fact, at the instance of the counsel for the applicants, we, as a bench, have reprimanded an advocate in the matter and meted out sanctions. We did that for the dignity of the court and its processes to be upheld and not demeaned. It cannot be the case that some are subject to being called to order but not others. We are commanded by article 27 of the Constitution to treat all equally and afford to all equal protection and benefit of the law. We find that the words complained of reveal no personal grievance with the counsel or his client as to impact negatively on the applicants' rights to a fair hearing. We therefore find and hold that there is no bias, real or perceived demonstrated in this matter.

26. In addition, we find that the words of the decision of 24/05/2021 at paragraph 16, complained about to make a final determination on substantive matters to be heard deserve no such interpretation. We read the first sentence in that paragraph to be an appreciation that the then counsel for the petitioners had complained that the orders of 26th and 29th April, 2021 had been disregarded. That is the interpretation we assign to the sentence with the deliberate use of the word **may.** In totality, we find nothing in the decision to be able to create, in the mind of a reasonable and discerning person, who has accessed the facts of the matter, a reasonable apprehension that the judge has suffered such an occlusion in his judicial, courtesy of bias, that he is unable to be impartial.

27. On a different consideration, we sit in this matter as a panel and our final decision, like all other decisions in the file, must be by the court and not by an individual judge. We do not understand the applicants to say that what they perceive of Otieno J to also pervade the entire bench in this matter. We thus assure the applicants and all the parties that even if it was to be demonstrated bias against the advocate by the judge, which we have answered in the negative, as a bench we are able to appreciate that the cause here is by the litigants and not their counsel. We will remain focused that the counsel remains counsel for the party and not himself a litigant.

28. Before we pen off, we have seen in these proceedings an undesirable attempt to argue the recusal application on the basis of orders made by the judge in a totally different file being **Meru HC Petition No E002 of 2021,** whose orders are said by the applicants to have been *the fruition of a grand conspiracy between the judge, members of the Judicial Service Commission and the Government* (sic, executive). Our first view and comment is that if such conspiracy exists then, it presents a grave matter that undermines the very foundation and existence of the judiciary as created and sanctioned by Kenyans. It is a matter that deserves proper and due confrontation in the right forum and by the right agency and not dragged here as recipe for sweetening the 1st to 4th respondents' case. We consider it a grave matter that, if credible, ought to be, and should have been reported to the Directorate of Criminal Investigations and Directorate of Prosecution for we think a conspiracy to pervert the course of justice remains a serious criminal offence that can't be just wished away.

29. Our second view and finding is that the submission in that regard are extraneous and irrelevant for our considerations and purposes in this matter because that petition is still active before the court, and thus, to us, is *sub- judice.* We find no justification to spent time on such extraneous matters unless one was to be out to unduly escalate the dispute beyond its necessary boundaries. We urge and remind the parties and counsel that it remains a constitutional dictate upon the court that legal disputes be dealt with expeditiously and that counsel and their clients have a duty to assist the court in that mandate. We equally urge that henceforth parties confine themselves to the dispute as disclosed in the pleadings filed and not otherwise.

30. Having come to the conclusion that there has not been demonstrated to our satisfaction existence of real or perceived bias, we now add that the standard of establishing bias is high and must be supported with some cogent evidence and get the persuasion from the decision in **Hassan Omar Hassan & Another v Independent Electoral & Boundaries Commission, & Others 2017 eKLR** where the court held:

> **"The application by the Petitioner appears to be a critique of the decision of the Court which has gone against him and the proper forum for such contention would be appellate arena. The decision of the Court per se *do not amount to evidence of bias on the part of the Court. The unsubstantiated suspicion of bias or prejudice do not suffice as reasonable grounds of recusal."***

31. In conclusion, we are not persuaded by the argument by the applicants that Kenya must depart from the English jurisprudence and earlier decisions so guided, on principles applicable on recusal and to adopt its own called the *test of wanjiku's perception.* We disagree with the argument that we must adopt that very subjective test that ordinary Kenyans view the judiciary as rotten corrupt and therefore whenever one whispers that they are unhappy or uncomfortable with a judge for any and every flippant reason, the judge has no say but must leave the matter. It is debatable that all reasonable and discerning Kenyans consider and view the judiciary in the deem light the applicants cast here. We also think that such subjective prototypes exist and are routinely cast on many sectors and professions. We can only talk of the legal profession often awash with negative jokes as the most dishonest and lavish lot. That surely cannot be the discerning way to judge and condemn all the lawyers in Kenya. We say in conclusion that every judicial officer, by virtue of such office has a duty to sit and hear cases and can only avoid doing so for reasoned and well-founded basis. To say otherwise would be to create a free for all unregulated and whimsical way of handling such applications with the obvious danger that mischievous litigants would make it impossible for a matter to progress. It would also reign in the mob lynching of judicial officers and defeat their duty to sit and work for Kenyans. In coming to this conclusion, we are reminded and remain cognizant of our constitutional office and duty as reiterated by the Supreme Court in **Gladys Boss Shollei v Judicial Service Commission & (Above)**. In that decision the court made finding and observations we consider to be the classicus of expressing the duty but also binding upon us as a court and serving judges. The court said:-

> **"… every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: *"to serve impartially; and to protect, administer and defend the Constitution."* It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.**

31. We equally disagree with counsel that the Supreme Court set a new standard and burden in the case of **Rai vs Rai**. Our understanding upon the reading of that decision is that the court subjected itself to what it called the ***judicially-established practices of recusal***. We read the Court to say and decree that before a judge recuses self from a matter, the applicant must demonstrate, a good cause and merits in the call for recusal. We see no novel principle sidestepping the requirement that the test of apprehension of bias must be that of a reasonable person, being a *"well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice"* will not suffice.

32. We have said enough to lead us to the conclusion that we find no substance in the applicants' assertions of bias whether real, perceived or apprehended, against the honorable judge. The consequence is that the application lacks merits and it is dismiss it with costs being in the cause.

DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY BY MS TEAMS THIS 14TH DAY OF SEPTEMBER, 2021.

E. MURIITHI PATRICK

JUDGE

J.O OTIENO

JUDGE

T.W CHERERE

JUDGE