



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 183 OF 2019

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED THREATS TO AND CONTRAVENTION OF RIGHTS UNDER ARTICLES 24, 25, 27, 28, 28, 29, 31, 40, 47, 48, 49 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 73, 156(6), 157(1) AND 245(4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ACT NO. 2 OF 2013

AND

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

BETWEEN

MOHAN GALOT.....1ST PETITIONER/APPLICANT

REAJEV MODI.....2ND PETITIONER/APPLICANT

PUSHPINDER SINGH MANN.....3RD PETITIONER/APPLICANT

JOPHENCE YOGO.....4TH PETITIONER/APPLICANT

GALOT INDUSTRIES LIMITED.....5TH PETITIONER/APPLICANT

MANCHESTER OUTFITTERS LIMITED...6TH PETITIONER/APPLICANT

KING WOOLLEN MILLS LIMITED.....7TH PETITIONER/APPLICANT

MOHAN MEAKIN KENYA LIMITED NOW

LONDON DISTILLERS KENYA LIMITED..8TH PETITIONER/APPLICANT

VERSUS

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....1ST RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION3RD RESPONDENT
THE CHIEF MAGISTRATES COURT AT NAIROBI.....4TH RESPONDENT
THE ATTORNEY GENERAL5TH RESPONDENT

AND

GALOT LIMITED.....1ST INTERESTED PARTY
PRAVIN GALOT.....2ND INTERESTED PARTY
RAJESH GALOT.....3RD INTERESTED PARTY
NARENDRA GALOT.....4TH INTERESTED PARTY

RULING

APPLICATION

1. The Petitioners/Applicants through two applications dated 7th October 2020 seek the following orders:-

a) That Hon. Justice Makau be pleased to recuse himself from further presiding over the instant Petition.

b) That the file be placed before the Hon. Chief Justice to appoint another Judge to handle the instant Petition to the exclusion of Hon Mr. Justice Makau.

c) Costs.

2. The Applications are premised on the several grounds on the face of the application. It is mainly urged that the Hon. Judge by his conduct refused to adhere with the **Judicial Service Act**, uphold the **Judicial Code of Conduct and Ethics** as well as the **Constitution of Kenya 2010**.

3. The Applicants/Petitioners contend that in the instant Petition, the Hon. Judge has constantly contravened the mandatory provisions of **paragraph 4(2) of the Judicial Code of Conduct and Ethics** which requires a Judge in exercise of Judicial authority to act independently on the basis of his own assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences and disregarded the fact that accessing Civil Appeal No. 130 of 2020 had been lodged challenging his decision, this exhibit extreme bias as against the Applicants in contravention of **Paragraph 4(2) of the Judicial Code of Conduct and Ethics**.

4. The Applicants contend that the Hon. Judge despite being aware that the Notice of Preliminary Objection had been filed without his leave sought and which allegedly amounted to violation of orders of stay denied to ignore this fact contravening provision **of Paragraph 4(3) of the Judicial Code of Conduct and Ethics**.

5. It is further urged the Hon. Judge in his conduct advanced illegitimate interest that of 2nd and 4th Interested Parties who are not directors of 5th to 8th Respondents. It is further urged the Judge in making his decisions and directions has constantly acted in gross contravention of **Paragraph 4(9) of the Judicial Code of Conduct and Ethics**.

6. The Applicants/Petitioners further contend the Hon. Judge has disregarded other Judges orders drawn to his attention and constantly making decision and directions to facilitate the prosecution in contravention of **Paragraph 4(1) of the Judicial Code of Conduct and Ethics**. It was urged the Judge has demonstrated bias as against the Applicants and contravened provisions of **Paragraph 5(1) of the Judicial Code of Conduct**.

7. It is further averred by the Applicants that the Hon. Judge has openly and visibly become irritated and annoyed by requesting the Applicant's why the Petitioners would want to Appeal against his ruling and making utterances castigating the said Advocates hence contravening **Paragraph 5(5) of the Judicial Code of Conduct and Ethics**. It is further averred that the Hon. Judge has purposefully failed to ensure that there is equality of treatment to all parties to this Petition.

8. It is further urged that the Hon. Judge has decided to determine the improperly instituted Notice of Preliminary Objection proceedings and irregular grounds in support thereof when there was a stay order in place.

9. It is further urged that Hon. Judge has misconducted himself by stifling the hearing of the applications herein when it has been demonstrated that he 2nd and 4th Interested parties have now by mischief sought to exclude the 1st Respondent from representation by the 3rd

Respondent. It is contended further that the Applicants fears are real and no longer mere apprehension and as such it is urged the application is well founded.

INTERESTED PARTIES RESPONSE

10. The Interested Parties are opposed to the Applicants/Petitioners application and places reliance on their Replying Affidavit sworn by Pravin Galot on 20th January 2021.

11. It is Interested Parties position that on 22nd May 2019 the Applicants/Petitioners application for stay of their prosecution in ***Criminal Case No. 1554 of 2012, 155 of 2012; 482 of 2014, 276 of 2018 and 2378 of 2018*** was granted by this Court. The 2nd to 4th Interested Parties filed an application on 27th May 2019 for joinder into these proceedings, which was allowed after parties were heard and 2nd to 4th Interested Parties were accordingly joined into these proceedings.

12. That upon the delivery of the ruling the Applicants/Petitioners sought to stay these proceedings pending appeal which application was granted staying these proceedings for 20 days pending the intended appeal.

13. It is Interested Parties position that the proceedings, which the Interested Parties followed virtually, the Court was patient, respectful and gave all parties ample time and opportunity to be heard. It is urged that the deponent herein never noticed the Hon. Justice Makau being ***“visibly angry or agitated”*** as claimed by the Applicants/Petitioners. The deponent stated the Petitioners allegations against the Court are far-fetched, unfounded and to say the least, very disturbing (see paragraph 16 of the Interested Party’s Replying Affidavit).

14. That after the lapse of stay on 18th March 2019, the Petitioners made several applications for stay in these proceedings. The Interested Party filed a Notice of Preliminary Objection, while there was an order which Interested Party contend cannot be the basis of the Petitioners unfortunate application for recusal of the Court from continuing to handle this matter.

15. It is further stated that the Applicants/Petitioners filed Civil Appeal No. 130 of 2020 seeking to have the Court of Appeal set aside this Court’s ruling of 27th February 2020 enjoining the Interested Parties in these proceedings and further sought to stay these proceedings pending the hearing of the said Appeal. However when the application for stay was placed before the Court of Appeal, the said Court upon perusal of the same declined to stay these proceedings because it was not convinced that the appeal was arguable.

16. It is further contended that on 25th May 2020, the Applicants/Petitioners again sought to stay these proceedings on the ground that they had filed Civil Appeal No. 130 of 2020 before the Court of Appeal. The Court after hearing all the parties, observed that it had not been served with any orders from the Court of Appeal and directed all parties to respond to the Interested Parties’ Notice of Preliminary Objection dated 18th March 2020 by filing respective responses and submissions thereto.

17. It is further deponed by the deponent hereunder paragraph 26 that they observed the proceedings virtually and was impressed by restraint dignity and the respect within which this Court handled the parties. It is further stated that he did not observe any agitation on the part of Hon. Justice Makau and that the Applicants unfounded allegations on the temperament and conduct should be dismissed with contempt.

18. It is further deponed that on 30th September 2020, this Court directed the parties to exchange written submission and fixed the matter for hearing on 15th October 2020 and fixing a ruling on the Interested Parties Notice of Preliminary Objection. The Applicants/Petitioners in final and disparate attempt to stall this matter, filed the instant application on 12th October 2020, three (3) days before the scheduled hearing date.

19. The Interested Parties urge from the history of this case, that it is evident and apparent the application for the recusal of Hon. Justice Makau from further hearing of this matter has been to frustrate the expeditious hearing and determination and conclusion of this matter it is further contended that the Applications have lifted several provisions of the Judicial Code of Conduct which they falsely claim the Hon. Judge violated. However it is their contention that there is no proof preferred or evidence adduced by the Petitioners to prove their outlandish on and disrespectful allegations against the Honourable Judge. The Interested Parties further contend that the application is instead a shameless attempt by the Petitioners to intimidate and blackmail the Judge to rule in their favour.

20. The Interested Parties further aver that the unfortunate practice by the Petitioners of falsely accusing any Judge, who rules against them of bias and seeking his recusal is a threat to Judicial Independence which the Interested Parties urge this court to dismiss with contempt it deserves and uphold its integrity and the rule of law.

21. The Interested Parties further state that it is clear that the Petitioners are no longer in hurry to prosecute their matter because they are enjoying interim orders and have now resorted to all manner of sideshows to ensure that they cling on the interim orders for stay including making false allegations against the Court and baselessly seeking the recusal of Hon. Justice Makau from further hearing this matter. It is therefore urged the Petitioners are reluctant to prosecute the Petition herein after obtaining interim stay orders on ***23rd May 2019*** which is demonstrated by the several stay applications. The Interested Parties urge that the Petitioners should not be allowed to abuse the process of the Court by obtaining unmerited ex parte stay orders and thereafter sitting on the stay orders indefinitely. The Interested Parties contend that the Petitioners have now lost interest in prosecuting their matter and that it is only just and fair that the stay orders granted by this Honourable Court on the ***23rd May 2019*** be recalled and set aside in the Interest of Justice.

THE 1ST, 2ND, AND 3RD RESPONDENTS RESPONSE

22. The 1st, 2nd and 3rd Respondents are opposed to the Petitioners application seeking recusal of the Honourable Court from further

presiding over the instant Petition. The Respondents contend the application is based on 26 grounds which are largely repetitive of the main grounds, thus the Honourable Court allegedly showed open bias against the Petitioners in the manner it conducted the proceedings herein and that in so doing the Judge violated several provisions of Judicial Code of Conduct and Ethics.

23. The 1st, 2nd and 3rd Respondents are opposed to the Application and rely on grounds of opposition dated 20th April 2021. The Respondents also rely on affidavit of the Interested Parties sworn by Mr. Pravin Galot on 26th January 2021 to the extent that it is also opposing the Application.

ANALYSIS AND DETERMINATION

24. I have carefully considered the application, the responses to the same, parties rival submissions and from the aforesaid pleadings I find the following issues arise for consideration:-

a) Whether the Applicants/Petitioners have met the threshold for this Honourable Court to recuse itself from the instant proceedings.

b) Whether the interim orders issued herein on 23rd May 2019 should be recalled and set aside in the Interest of justice.

A. WHETHER THE APPLICANTS/PETITIONERS HAVE MET THE THRESHOLD FOR THIS HONOURABLE COURT TO RECUSE ITSELF FORM THE INSTANT PROCEEDINGS.

25. The Applicants/Petitioners contend that the Judicial Service Code of Conduct and Ethics lay down the general rules of conduct and ethics to be observed by Judicial Officers in regard to integrity and independence of Judicial Service. **Rule 10(1) of the Code of Conduct** requires Judges of Superior Courts to carry out their duties under the law. By dint of **Rule 5 of the Code** a Judicial Officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned. The rules are indeed to ensure maintenance by Judicial Officers of integrity and independence of the Judicial Service.

26. The Applicants/Petitioners contend that the action of this Honourable Court violated the Applicants right to fair hearing. It is urged 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. **Article 50(1) of the Constitution** enshrines the right of every person to have a fair and public hearing before a Court or if possible another independent and impartial tribunal.

27. It is trite that an application for recusal of a Judge is a necessary evil but the same should be based on justifiable and reasonable basis but not with in a view to delay fair hearing and determination of a matter pending before the trial Judge.

28. In order to determine whether this Court conducted itself fairly and applied its discretion in accordance with the provisions of the law. I find it necessary to revisit the proceedings and find out whether the Court violated the Petitioners rights to fair hearing and acted without due regard to provisions of the law.

29. On perusal of the Applicants/Petitioners application and responses by the Respondents and Interested Parties it appears that the Applicants/Petitioners are aggrieved by the fact that the Court allowed the 2nd to 4th Interested Parties application dated 27th May 2019 in what the Interested Parties were enjoined in the proceedings as Interested Parties. The Court in its ruling of 27th February 2020, gave reasons and grounds for granting the application. I find if the Applicants were displeased or aggrieved with the ruling, they had the option of either challenging the same by way of an appeal or review.

30. In the instant Petition, the Applicants/Petitioners opted to file Civil Appeal No. 130 of 2020 Mohan Galot & 2 others vs. The Inspector General of National Police Service & 2 others. This Court had also granted the Applicants/Petitioners a stay for 20 days pending the filing of an appeal and/or seeking a stay in the Court of Appeal.

31. I find that it would not be proper for this Court to be accused of bias simply because it exercised its discretion in a manner that the Applicants/Petitioners did not like or agree with. I find whatever grievances the Applicants/Petitioners had with the Courts Ruling, in my opinion, should and will indeed be addressed by the Court of Appeal in their appeal.

32. I find further for Applicants/Petitioners to aver or state, without evidence, that the Court, in allowing the Application demonstrated bias, is an act of irresponsibility and in fact borders on an attempt to intimidate the Court to rule in a certain way. It is worth to note the Interested Parties in their uncontroverted Replying Affidavit, have clearly stated they virtually followed the proceedings and did not witness any agitation on the part of the Trial Judge in the cause of the proceedings; neither did they hear nor witness the Judge questioning the Applicant's right of Appeal as alluded to by the Applicants/Petitioners. This the Interested Parties and Respondents term as a very unfortunate and a false allegation against the Trial Judge. I find such practice of making unfounded allegations against a Judge should not just be discouraged but must be firmly dealt with by the Court or any Court so as to safeguard the independence of the Judiciary and the integrity of Court proceedings.

33. In view of the aforesaid I find that the Applicants/Petitioners have not demonstrated anything regarding the manner in which this Court handled the application for joinder of the 2nd to 4th Interested Parties, which would even remotely give rise to suspicion of bias in the mind of a fair minded and informed observer. I further do not find any evidence that this Court did not approach the matter before it with an open mind, that is free of prejudice.

34. The Applicants/Petitioners second grievance appear to arise out of directions given by this Court on 27th May 2020 in which this Courts

observed that the 2nd to 4th Interested Parties, Notice of Motion dated 18th March 2020 raises issues of jurisdiction and therefore directed that the same be heard and determined in priority to all applications, including the several applications for stay, that the Petitioner had filed in this matter in an attempt to frustrate its expeditious disposal.

35. It is observed and noted that the Applicants/Petitioners claim that this Court's directions that the 2nd to 4th Interested Parties Notice of Preliminary Objection be heard in priority to other applications as it raised the issue of jurisdiction of this Court to hear the Petition herein was evidence of bias on the part of the Court because the Court, allegedly, ignored the fact that they had a pending appeal, being Civil Appeal No. 130 of 2020, challenging the ruling delivered by the court on 27th February, 2020.

36. It is noted that the certified proceedings of the 27th May 2020 are annexed as "PG3" in the 2nd to 4th Interested Parties Replying Affidavit to the application sworn on 26th January 2021 by Mr. Pravin Galot. It is noted that on the said date the Applicants/Petitioners were duly represented in Court by Ms. Mutie; who confirmed to the Court that the Petitioners had served all Respondents and Interested Parties with Petition. She also acknowledged that the 2nd to the 4th Interested Parties had served the Petitioners with their Replying Affidavit to the Petition and the Notice of Preliminary Objection dated 18th March 2020.

37. It is further noted from the proceedings, that the Petitioners through their Advocate did not raise any issue related to the alleged pending Appeal before the Court of Appeal. The issue of pending Appeal was raised by Mr. Oggosso, State Counsel and Mr. George Gilbert, Advocate, who appeared for 4th Respondent and 1st Interested Party respectively, Mr. Oggosso only sought directions on how the matter was to proceed in view of the appeal. Mr. Gilbert on his part notified the Court that the appeal, if it succeeded, would mean that the Notice of Preliminary Objection could not stand. Mr. Kenyatta who appeared for the 2nd and 4th Interested Parties confirmed having served the Notice of Preliminary Objection on all the parties. It was the 2nd to 4th Interested Parties position that since there was no stay order from the Court of Appeal, the Court should hear the Preliminary Objection first. This position was supported by Mr. Kaka, Ms. Mutie, in response to the other counsel, prayed that the Petitioners be allowed to proceed with their Application.

38. The Court record reveal, that the Court noted that the PO filed by the 2nd to 4th Interested Parties dated 18th March 2020 contested the jurisdiction of this Court to hear and determine the Petition on the grounds that the subject matter of the Petition had already been heard and determined by this Court in previous Petitions. The Court further noted that although there was an appeal filed against the decision of the Court to allow the 2nd to 4th Interested Parties Application for joinder, there was no order of stay staying these proceedings. The Court therefore directed all those opposed to the Preliminary Objection to file their responses within 14 days. The Interested Parties were to file their submissions within 14 days from the date of service and the Respondents were to serve their submission within the further 14 days from the date of service. The Court thereafter fixed the matter for mention on the 30th September 2020 to confirm compliance.

39. I find, that the decision of this Court to hear the 2nd to 4th Interested Parties Notice of Preliminary Objection in priority to all the other pending applications was therefore based on the submission of the parties. All the parties, including the Petitioners were given a hearing and the Court exercised its discretion based on sound law after hearing the rival submissions in directing that, because the Notice of Preliminary Objection was raising an issue of jurisdiction, it be heard first.

40. The law on jurisdiction is now well settled. There are countless authorities which agree with the direction of the Judge, that issues of jurisdiction must be determined at the first instance. In the case of **Owner of Motor Vessel "Lillian" versus Caltex Oil (Kenya) Limited (1989) KLR** in which Justice Nyarangi (as he then was) of the Court of Appeal memorably stated as follows:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one move step. Where a court has no jurisdiction there would be no basis for continuation of the proceedings pending other evidence. A court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction."

41. Similarly in the case **Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 others (2012) eKLR** the Supreme Court held that:-

"A Court's jurisdiction flows from either the constitution or legislation or both, thus, a Court of Law can only exercise jurisdiction as counteracted by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondents in his Submissions that issue as to whether the Court of Law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality. I goes to very heard of the matter for without jurisdiction, the court cannot entertain any proceedings." (Emphasis added)

42. The Applicants/Petitioners contend that the directions by the Court that Notice of Preliminary Objection be heard as a matter of priority is evidence of bias against them by the Court. The Applicants/Petitioners urge that its trite law that 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 balanced approach and will neither be complacent nor unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

43. The Applicants/Petitioners place reliance in the case of **Benard Chege Mburu vs. Clement Kungu Waibara & 2 others [2011] eKLR** in which the Court relied on the decision in **King Woolen Mills Limited & Another vs. Standard Chartered Financial Services Ltd & Another, Civil Appeal No. 102 of 1994** where the Court of Appeal rightly concluded that for a Judge to disqualify himself a reasonable and fair minded person sitting in Court, and knowing all the relevant facts, would have a reasonable suspicion that a fair trial for the Appellants would not be possible.

44. The Applicants further sought support from case of **Metropolitan Properties (FG-C) Ltd s. Lannon & Others [1969] 1 QB 577**, where

the test applied by Lord Justice Edmund Davis stated that:-

“...Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias.... The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the Applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable....” *Emphasis added*)

45. The Applicants further urge that it is now equally well established in law that a Judge must recuse himself or herself if a fair minded and informed observer, having considered the facts would conclude that there was a real possibility that the Judge was biased. Indeed, this test has been espoused in the case of ***Philip K. Tunoi & another vs. Judicial Service Commission & Another [2016] eKLR*** where the Court of Appeal in considering an application for recusal the Court cited the decision of Mwakasendo J in the Court in ***Tumaini v.s R.*** where the Court held that:-

“...In considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people....”

“[The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.]”

46. It is further contended by the Applicants/Petitioners that this test is not concerned with matters from the view point of a reasonable Judge, but from that of a reasonable lay observer. This bystander would be taken to have at least in a very general way, to be aware of the strong professional pressures on adjudicators to uphold traditions of integrity and impartiality.

47. In issuing directions regarding the Notice of Preliminary Objection to be heard as a matter of priority, the same was based on sound law and a long list of judicial authorities right from the High Court to the Supreme Court. Besides, the mere filing of an appeal could not automatically act as stay of these proceedings. The Applicant themselves confirmed that they did not have a stay from the Court of Appeal staying these proceedings. In any event these were issues of appeal which cannot form the basis of an application for recusal.

48. On the issue of joinder and whether the fact that the Applicants had filed an Appeal and whether this particular issue should have automatically stayed these proceedings, the Court of Appeal in its ruling delivered on the 6th November 2020 in Civil Appeal No. 41 of 2017 as consolidated with Civil Appeal (Application) No. 130 of 2020 held as follows:

“On 27th May, 2019 three individuals, Pravin Galot, Rajesh Galot, Narendra Galot and Galot Limited applied to be joined in the proceedings; and that temporary orders of stay issued on 23rd May, 2019 be discharged, varied or set aside. Makau, J granted the prayer for joinder but dismissed the latter plea. The appellants were aggrieved and instituted Civil Appeal No. 130 of 2020. In the meantime, they have brought an application under Rule 5(2)(b) of the Court of Appeal Rules seeking that proceedings in the petition be stayed pending the hearing and determination of this appeal, (Civil Appeal No. 130 of 2020) as well as HCCC No. 55 of 2012.

Having considered the replying affidavits, grounds of opposition and written submissions, we shall once again apply the strictures of Rule 5(2)(b). We entertain serious doubt that the appeal is arguable, considering that all the court did was to include in the cause all those who have all along been involved in this protracted dispute, the interested parties. The petition itself makes reference to the interested parties as the persons who influenced their prosecution.

We have also not been told how the appeal will be rendered nugatory if we do not stay proceedings in the High Court. It is as strange as it is baffling that the appellants have now joined the chorus of those determined to delay the determination of HCCC No. 55 of 2012 by applying that it be stayed as this appeal is heard and determined. This application must fail. We dismiss it with costs. *(Emphasis added)*

49. From the decision of the Court of Appeal it is clear that the Court of Appeal indicated the decision of this Court to decline to further stay these proceedings after 20 day stay, they were granted on the 27th February 2020 had lapsed. The Court of Appeal correctly observed that all this Court did was to enjoin parties, who had all been part of the dispute. The Court also noted that it entertained serious doubts as to whether the appeal was even arguable.

50. It is therefore clear that the decision of this Court was based on sound law as confirmed by the Court of Appeal. It is therefore clear that the proper and correct exercise of a Court's discretion cannot be evidence of bias. I find that the proper way to challenge the decision by an aggrieved party is by way of appeal and not through a malicious and frivolous application for recusal. I find that the Applicants/Petitioners have therefore failed to demonstrate bias on part of this Court. The Applicants have indeed failed to demonstrate how the Court violated the plethora of Judicial Code of Conduct alluded to in various paragraphs, they have cited in both applications and the affidavit in support of the applications.

51. It turns out that in this matter that the Applicants have unfortunately used a serious application for recusal as a mere strategy to stay these proceedings. It is instructive to note that all along the Applicants knew that an Application for recusal would earn them an automatic stay of these proceedings. They therefore used the Application to obtain a stay which they had failed to convince both the Court of Appeal and this Court to grant. The practice of using applications for recusal to stay court proceedings should be discouraged. A party should not raise serious but baseless allegations of bias and violation of Judicial Code of Conduct and Ethics against a judicial officer as a strategy to get stay proceedings. It is not only unethical but also highly unprofessional.

52. My view as regards application for recusal is that the Courts should not give in to the blatant act of blackmail. Allowing the Applicants' Applications for recusal when the same is not merited would set a very dangerous and bad precedent where parties who are aggrieved by the judicial decisions will file frivolous applications for recusal to stay or frustrate the hearing of cases. The Applicants in such matters must therefore establish that there is bias on the part of the Judge. In the case of *Judicial Service Commission & 2 others (2016) eKLR* the Court of Appeal held that:-

“It cannot be gainsaid that the Applicant bears the duty to establish 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 allegations. Reasonable grounds must be presented from which an inference of bias may be drawn.” (Emphasis added)

53. Similarly in the case of *Republic versus David Makali & 3 others* the Court of Appeal held that:-

“How should judges treat the subject of disqualification when raised? When the Courts in this Country are faced with such proceedings as these, it is necessary to consider whether there is reasonable ground for assuming the possibility of 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 faces constituting bias must be specifically alleged and established.”

54. Additionally in the case of *Rachuonyo & Rachuonyo Advocates vs. National Bank of Kenya Limited (2021) eKLR* Justice Majanja held as follows:-

“The Principles in the cases I have cited buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics)

Regulations 2020 dated 26th May 2020. Under Regulations 21 Part II of the said Code of Conduct, 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 the 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.

Regulation 9 of the Judiciary Code of Conduct emphasises the importance of impartiality of a Judge. Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2)(b) and 232 of the Constitution and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

Turning to the facts of the case, there are two grounds for recusal which I shall now consider. The first ground for recusal by the advocates is that since I ruled on certain references between the parties, I should recuse myself. As I considered the Advocates' submission on the rulings I delivered in those references, I could not help but feel that I was being asked to sit on appeal from my own decisions.

I agree with the Respondents that although the parties to the references are the same, each case is a separate and distinct and based on its own facts and any party dissatisfied with the decision was entitled to appeal.

Further, merely because I made a decision in any of those cases does not automatically form a basis for recusal. It would be improper for me to justify my decisions in those cases.

Ultimately, the question for consideration is whether a person having knowledge of the fact that I heard those cases would reach the conclusion that I am biased in these cases. I think not. Each of the decisions complained about was made after arguments and if any party is dissatisfied, it is entitled to lodge an appeal.”

55. Further in the case of *Accredo AG & 3 others vs. Seffano Ucceli & another [2018] eKLR*, the Court of Appeal held that:

“The test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to

the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias. This current position was succinctly set out by the House of Lords in Porter vs. Magill [2002] 1 ALL ER 465 as follows:

“[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

Expounding on that test the Supreme Court of Canada in R. vs. S. (R.D) (supra) had this to say:

“The test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. The 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.” (Emphasis added)

It is also instructive to note that the threshold of making a finding to the effect that there is a real likelihood of bias that warrants recusal of a judicial officer is quite high. This is because the oath taken by a judicial officer under the Constitution to render justice and uphold the law whilst being impartial raises the presumption that such an officer will indeed uphold impartiality in carrying out his/her mandate. See this Court’s decision in the Kaplana H. Rawal case. Consequently, judicial officers ought not to accede to each and every application for recusal especially where the same is not based on reasonable grounds. To do so might encourage litigants to believe that by seeking the disqualification of a judicial officer, they will have their case tried by someone who they think will likely decide the dispute in their favour. See Kaplan & Stratton vs. Z Engineering Construction Ltd & 2 others [2000] KLR 364.

56. In view of the evidence on record, the authority relied upon, I find that it is clear that the Applicants/Petitioners have not met the threshold required to prove bias on part of this Honourable Court. The application has failed in its entirety and is for dismissal.

B. WHETHER THE INTERIM ORDERS ISSUED HEREIN ON 23RD MAY 2019 SHOULD BE RECALLED AND SET ASIDE IN THE INTEREST OF JUSTICE.

57. On 23rd May 2019 this Court granted interim orders staying all criminal proceedings against the Petitioners herein. That since interim orders were issued in favour of the Petitioners, in respect of their application dated 18th May 2019, the Petitioners have not bothered to prosecute the same but have instead engaged in filing several applications seeking various orders without setting down the application for hearing and determination.

58. It is contended under paragraphs 25 and 36 of the Interested Parties Affidavit sworn on 26th January 2021 by Pravin Galot, that it is clear that the Petitioners are no longer in hurry to prosecute this matter because they are enjoying interim orders and have resorted to all manner of sideshows to ensure that they cling on the interim orders for stay including making false allegations against the Court and baselessly seeking the recusal of the is Court from further hearing of this matter.

59. It is Interested Parties contention that the reluctance of the Petitioners in prosecuting their Petition herein is as a result of having obtained interim stay orders on 23rd May 2019 which is further demonstrated by the several stay applications.

60. In the instant Petition, the Petitioners were granted interim orders of stay and have never since 23rd May 2019, now a period over 2 ½ years, ever prosecuted their application to have the interim orders confirmed. Any interim orders have a limited lifespan and cannot be enjoyed for indefinite period. No party should be allowed to abuse the process of this Court by obtaining ex parte interim orders of stay and sit on the same for such long period as the Petitioners herein. I find indeed the Petitioners are not keen to prosecute their application nor do they have interest in prosecuting their application since they obtained interim orders. I am of the view that it is not just and fair that the stay orders granted on 23rd May 2019 continues to remain in force as the same has been abused by the Petitioners. In the interest of justice and upon consideration of **Rule 25 of the Mutunga Rules** I find it fair and reasonable to have the interim orders of stay issued on 23rd May 2019 recalled and set aside.

61. The upshot is that the Applicants/Petitioners applications dated 7th October 2020 are without merits. I proceed to make the following orders:-

a) The Petitioners/Applicants application dated 7th October 2020 for:-

i) This file to be placed before Hon. Chief Justice to appoint another Judge to handle the instant Petition to the exclusion of Hon. Mr. Justice Makau is without merits and is accordingly dismissed.

ii) The Hon. Mr. Justice Makau be pleased to recuse himself from further presiding over the instant Petition; is without merit and is accordingly dismissed.

b) The orders issued on 23rd May 2019 in respect of Petitioners/Applicants applications dated 18th May 2019 are recalled and set aside / or vacated forthwith.

c) Costs of the application awarded to the Respondents and 3rd and 4th Interested Parties.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF NOVEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA