REPUBLIC OF KENYA

AT NAIROBI

COMMECIAL AND ADMIRALTY DIVISION

COMMERCIAL CAUSE NO. E469 OF 2019

DARI LIMITED.....1ST PLAINTIFF/APPLICANT

RAPHAEL TUJU .....2ND PLAINTIFF/APPLICANT

MANO TUJU.....3RD PLAINTIFF/APPLICANT

ALMA TUJU.....4TH PLAINTIFF/APPLICANT

YMA TUJU .....5TH PLAITNIFF/APPLICANT

S.A.M COMPANY LIMITED ..... 6TH PLAITNIFF/APPLICANT

VERSUS

EAST AFRICAN DEVELOPMENT BANK.....1ST DEFENDANT/RESPONDENT

MUNIU THOITHI.....2ND DEFENDANT/RESPONDENT

GEORGE WERU .....3RD DEFENDANT/RESPONDENT

RULING

1. The ruling herein relates to a notice of motion application dated 21st May 2020, brought under the provisions of; Article 25 and 50 of the Constitution of Kenya 2010, and Order 51, Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. The plaintiffs (herein "applicants"), are seeking for orders as follows: -

(a) That Honourable Lady Justice Grace Nzioka do recuse herself from presiding over this matter;

(b) The matter be remitted to the Presiding Judge Commercial & Tax Division for assignment to a Judge other than Judge Grace Nzioka;

(c) The costs of the application be in the cause.

3. The application is premised on the grounds on the face of it and an affidavit of even date, sworn by Raphael Tuju, the 2nd applicant, who is also the director of the 1st applicant. The deponent avers that, on 3rd January 2020, when this matter came before the court, the Judge took the view that; there was ambiguity on whether or not the injunctive orders issued by; Lady Justice Maureen Odero in the matter, on 24th December 2019, were in place by 3rd January 2020, despite the clear injunctive orders on the court's record.

4. That on the same date, the Judge did not immediately seek for clarification from; Lady Justice Maureen Odero, as to whether or not those orders were in place and whilst refusing to address the advocates' request to have the orders of; 24th December 2019, extended, engaged the advocates on record for parties, in this matter in the polemic informal conversation of, whether it was possible to injunct receivers once appointed, thus in effect, questioned the legitimacy of orders that had been made by another Judge of the same court.

5. On the same date, instead of dealing with the issue that was before her, which was the applicants' application of; 24th December 2019, the Judge pressganged the advocates representing parties in the matter into abandoning the various applications they had made. She then assigned herself the matter and fixed the same for hearing on 13th February 2020; without extending the injunctive orders that were in place. That eventually the judge sought for clarification from Lady Justice Maureen Odero, as to whether or not the orders issued in the matter were in place on 3rd January 2020. Lady Justice Maurice Odero confirmed that, the orders were in place on 3rd January 2020.

6. That, the failure to address the request of extension of interim orders or making a finding on the same during the proceedings of; 3rd January 2020, when the matter was mentioned on the issue of the ambiguity of lapse of events granted by Hon. Lady Justice Maureen Odero, on 24th December 2019, has been prejudicial to the applicants. That in any case, the orders granted by Lady Justice Maureen Odero ought to have been extended prior to hearing of the arguments set forth by the parties in the application for extension of interim orders.

7. The applicants aver that; the Judge has exhibited favoritism towards positions taken by the respondents through their counsels on record in the conduct of the proceedings. That an application dated 14th January 2020, was filed by the applicants' seeking to have the respondents declared to be in contempt of court has never been heard. The Judge stated on record that, the prayers sought in the aforementioned application would be addressed in her ruling dated 2nd March 2020. However, she failed to address the application in her ruling and therefore, no orders were granted on the same. Consequently, that has occasioned great prejudice and injustice to the applicants.

8. That, since 3rd January 2020, when this matter was first before the judge, she has conducted proceedings in this matter by way of informal conversations between herself and advocates representing parties in this matter. The informal conversations have many times been one sided to the applicants' detriment and informed the ruling delivered on 13th March 2020.

9. The manner in which the Judge has conducted proceedings and the matter as a whole goes against the provisions of; Article 50 and 25, of the Constitution of Kenya, which enshrines the right to fair trial as a universal fundamental right that shall not be limited and is likely to deny the applicants a fair trial.

10. That the Judge has openly demonstrated bias when recording the court proceedings by excluding submissions by the parties, especially the applicants' submissions from the court record and exhibiting leniency towards accepting informal requests from the respondents, thereby negatively impacting the applicants' right to a fair trial. The Judge in proceedings of 20th May 2020, failed to address issues of law raised by the applicants, which issues went to the crux of the matter before her, being the respondents notice of motion application dated 19th March 2020 and the subsequent orders of; 23rd March 2020.

11. The Judge remained adamant on proceeding with the hearing of the application dated 19th March 2020, in clear disregard of the fact that, the applicants had filed an application dated 19th May 2020, for the review of the orders of 23rd March 2020. It was clear from these proceedings that, the court was intent on proceeding with the hearing, despite the fact that, there is nothing left to be heard in that respect to that application to the detriment of the applicants.

12. That while conducting the proceedings, the Judge allows the respondents ample time to address the court on some occasions granting them opportunities to respond where no such right to respond lies. The same courtesy is not accorded to the applicants advocates on record who are quite often interrupted during their submissions to their detriment.

13. The court is a court of record and therefore the Judge is mandated to record court proceedings including but not limited to written and oral requests by parties in court. That, Rule 8 of the Judicial Code of Conduct and Ethics which requires the Judge to ensure equality of treatment to all before the courts is essential to the due performance of the judicial office.

14. The Judge's failure to effectively record court proceedings may be prejudicial especially where a party wishes to prefer an appeal. The Judge has conducted this matter "off record" even in instances where the applicants were making submissions on pertinent legal issues arising in this matter. Rule 9 of the Judicial Code of Conduct and Ethics sets out the standard of professionalism required of Judges by providing inter alia; that a Judge shall perform all judicial duties including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness. The Judge failed to effectively execute her mandate to perform all judicial duties including the delivery of reserved decisions efficiently, fairly and with reasonable promptness thereby prejudicing the applicants.

15. That pursuant to Rule 5 of the Judicial Code of Conduct and Ethics, a judge is expected to maintain a certain level of conduct in proceedings, It states that; a Judge shall as 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.

16. The applicants' right to access to justice as enshrined in Article 48 of the Constitution of Kenya 2010, has been tremendously compromised by refusing to hear and determine their contempt application. Rule 5(6) provides that a Judge should recuse himself, where it is obvious the Judge is incapable of properly performing their functions by providing inter alia; a Judge shall disqualify himself or herself in any proceedings in which his or her impartiality might reasonably be questioned, that is to say if the Judge has actual bias or prejudice concerning a party.

17. That by dint of the above provisions of law and the reasons set out above, the judge should disqualify herself at the earliest opportunity from hearing and determining the matter. The applicants do not believe that they will for the reasons deposed to in the affidavit get a fair hearing before the Judge.

18. However, the defendants (herein "the respondents"), responded to the application vide a replying dated 25th May 2020, sworn by Loise Muigai, Acting Head of Business, County office, of the 1st respondent. She deposed that, the applicants have no right of audience in the court while continuing to blatantly and arrogantly disobey several orders of the court. Therefore, they cannot be heard by the court until they

purge their contempt.

19. That, at the time of filing the recusal application, the applicants deliberately and willfully failed to comply with the following orders issued by the Honorable court and have not complied with the same orders to date; -

(a) In respect of the court orders of 3rd January 2020, the applicants blatantly refused to consult with the respondent in respect of the 1st applicant's affairs;

(b) On 4th February 2020, the court ordered that, both parties should hold a meeting within 24 hours to discuss the outgoings in respect of the 1st applicant's bank accounts operations and financial transactions. The applicants ignored the order to have the said meeting and declined to meet with the receivers despite the respondents being ready to have consultative meetings in this regard;

(c) Further on 19th February 2020, the court ordered the applicants to furnish information in respect of the receivers' email dated 4th February 2020 within seven days. The applicants yet again and in flagrant breach of the court's orders decided to only provide rudimentary information in respect of the 1st plaintiff's debts and liabilities and refused to furnish the rest of the documentation directed by the court. On 3rd, 9th and 12th March 2020, and on several visits to the 1st applicant's premises at great expense to the 1st respondent, the 1st applicant frustrated the receiver's access to the premises and have never complied with any orders of this court;

(d) On 23rd March 2020, Honourable Lady Justice Mary Kasango reiterated the above orders and directed that, the applicants forthwith grant the receivers access to the 1st applicant's premises. The applicants have yet again disregarded and disobeyed the court's orders to date and have instead locked up the premises, sent away the employees and carted away all the documents.

20. The applicants do not have the discretion to decide whether or not to comply with court orders as they are bound by law to comply. The application for recusal should be deferred until the applicants have complied with the numerous orders issued by this court.

21. That, the foregoing notwithstanding, the application seeking recusal is yet another attempt by the applicants to delay the hearing of this matter to the 1st respondent's detriment, as no evidence whatsoever has been produced to support the allegation of actual or supposed bias against the Honourable court but instead reference has been made to matters regarding the conduct of the Judge on issues which any Judge exercising diligence would inquire from the parties. For instance, at paragraph 4 of the affidavit in support of the recusal application, the applicants claim: -

"……..Lady Justice Nzioka whilst refusing to address my advocates request to have the orders of 24th December 2019 extended, engaged the Advocate on record for the parties in this matter in the polemic informal conversation of whether it was possible to injunct receivers once appointed. Lady Justice Nzioka in effect questioned the legitimacy of orders that had been made by another Judge of this Honourable court."

22. That the averments are clear manifestation of the applicants' misapprehension of the law. That, section 173 of the Evidence Act (cap 80) laws of Kenya, empowers the Judge to make inquiry from the parties on any issues in order to discover or obtain proper evidence. It is quite clear that, the overall conduct of the applicants in this matter has been to delay the hearing of the substance of the dispute while they continue to deprive the 1st respondent of its contractual rights and to default on their legal obligations and to retain possession of the charged assets unlawfully and indefinitely.

23. That, for an application for recusal to succeed, the applicant has the onus of establishing whether a reasonable, objective, and informed person would on the facts reasonably apprehend that the Judge would not be impartial. Despite the allegations in the supporting affidavit, no evidence has been presented to substantiate the allegations of actual bias. In addition, it is noteworthy that the applicants' counsel has not during the proceedings, raised any objection before the Honourable Judge with regard to the allegations of the perceived bias and the applicants ought to be estopped from now raising the allegations which are mere attempts to circumvent court orders and to delay these proceedings.

24. That, although it is important under the law that, justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not accede 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.

25. Further, under the common law, a Judge has a duty not to recuse herself on unsupported speculation. There is as much obligation for a judge not to recuse when there is no occasion for her to do so, as there is for her to do so when there is. The recusal application is a thinly veiled attempt to intimidate the court and delay the hearing of the contempt application which was served on the applicants two months ago. To date, the applicants have not responded to the application. Further the allegations of bias are belated and an afterthought, as between 3rd January and 21st May 2020, the parties have been in court on numerous occasions and the applicants' did not raise any of these allegations despite having ample opportunities to do so.

26. The mere fact that, the court has made a ruling adverse to a party is not a ground for imputing bias on the court. It is of significance that the court's orders have been confirmed by an independent judge being the Honourable Justice Kasango, when she considered the contempt application ex parte. The Honourable Justice Kasango noted the applicant's conduct in the entire course of the proceedings and ordered that they forthwith grant the receivers access and provide the information requested.

27. That, on several occasions, the 1st respondent has gone to a great expense to act on the court's orders by having the receiver's attempt to

perform their duties at the 1st applicant's premises and all along they have been frustrated and prevented by the applicants and their agents.

28. The respondents averred that, there is no requirement under the law for a Judge to seek clarification from any other Judge on the contents of an order. The Judicial Code of Conduct requires Judges to act independently and Rule 12 sub-rule 7, specifically provides that, in performing judicial duties, a judicial officer shall be independent of judicial colleagues in respect of decisions that the Judicial officer is obliged to make independently. It is, therefore, improper for the applicants to suggest that, the Honourable Judge was required to seek clarification from Lady Justice Maureen Odero.

29. Further, it is not correct as alleged at paragraph 3 of the Supporting Affidavit that, the court took the view that there was an ambiguity on whether the injunctive orders were extant. That the issue was raised by the respondents in the second further affidavit of; George Weru filed on 2nd January 2020. The said injunctive orders were strictly expressed to last for 7 days. The file was nevertheless referred to the Honourable Lady Justice Maureen Odero at the plaintiffs' insistence. Lady Justice Maureen Odero then confirmed that, her orders were to last only until 3rd January 2020 and had, therefore, lapsed.

30. On 3rd January 2020, the court suggested to the parties that, the applications be disposed of and parties proceed to the main suit. This suggestion was freely accepted by both parties and the applicants have never challenged it. It is, therefore, untrue for the plaintiffs to belatedly claim that they were "pressganged" into abandoning their applications. Similarly, the court did not assign itself this matter as alleged by the applicants The matter came up on 3rd January 2020, during the court vacation when the Honourable Judge was on duty.

31. It is not true that, the alleged failure to extend the court orders have prejudiced the applicants as alleged at paragraph 7 of the supporting affidavit. The applicants have unlawfully and contemptuously maintained possession and control of the charged assets since the court order of 24th December 2019, to the 1st respondent's extreme prejudice.

The ruling of; 2nd March 2020 only applied sound judicial principles, as laid down in several cases, on the law of receivership.

32. The extension of injunctive court orders is not automatic as the applicants' suggest. It is within the court's discretion, exercised on the basis of sound judicial principles, to decide whether to extend orders particularly those that have been obtained ex-parte.

33. It is also not true that, the court did not address the applicants' application for contempt as alleged by the applicants. The respondents duly responded to the application and the applicants chose to proceed by way of written submissions. Despite being allowed seven (7) days to file their submissions in support of their contempt application, the applicants failed to do so. Further, the court by its ruling of; 2nd March 2020, did address the issue raised in the applicant's application; as the court specifically addressed the operations of the 1st applicant's bank accounts. The allegation that this application was abandoned is a blatant attempt to misconstrue the record, misrepresent facts and mislead the court.

34. That, the court has handled this matter as all other courts do with regard to oral arguments by counsel in court. The applicants' counsels have always taken part in the oral arguments and addressed the court without any complaint whatsoever. The court allowed all parties ample opportunity to make submissions on their applications in accordance with; Article 50 of the Constitution of Kenya. It is not correct as alleged at that, the court has failed to proceed with reasonable promptness. To the contrary, it is the applicants' own deliberate actions and omissions that have prejudiced the conclusion of this matter to the respondents' detriment.

35. The court has in no way breached the Judicial Code of Conduct or the Constitution, the allegations are unsupported by any evidence and are highly spurious speculations. It is not true that, the court ignored the applicants' application for review of the Honourable Lady Justice Kasango's orders. The application was belatedly filed and served late afternoon on 19th May 2020, being the eve of the hearing of the contempt application, despite the fact that the applicants' counsel was served with the contempt application over two months earlier and has appeared in court twice to confirm that, the contempt application was to be heard on 20th May 2020.

36. The applicants in this matter have made similar baseless allegations of bias against Daniel Toledano QC (the presiding judge) in proceedings between the same parties in the United Kingdom. By an email of 18th June 2019, the applicants' English Counsel sought to have the case transferred to a different judge on allegations of conflict of interest as Daniel Toledano QC is from the same chambers as the First Defendants' English counsel. Toledano QC considered the allegations and dismissed them, finding that there was no reason why he should not hear the case, having been allocated to do so.

37. The English counsel yet again raised the allegation in their application seeking permission to appeal. The applicants argued that, the judge erred in refusing to recuse himself. Upon considering their application for permission to appeal, Lord Justice Leggatt in his judgment, dismissed it as "totally without merit" and stated at paragraph 7 of his reasons stated;

> "*The appellants have not identified any relevant information which the judge failed to provide nor any reasonable basis for suggesting that he should have recused himself."*

38. That, it is strange that, the same applicants can blithely make allegations of bias against two High Court Judges sitting in two jurisdictions without a scintilla of supporting evidence in matters involving the same parties. The applicants yet again raise allegations of bias without any supporting evidence whatsoever. It should not be lost on the Honourable court that, it is the applicants' *modus operandi* to attempt to delay and frustrate the course of justice and to evade the payment of a debt which is in excess of; USD 17 million (equivalent to approximately Kenya Shillings One Billion Seven Hundred Thousand) owed to the 1st respondent.

39. The application for recusal is an abuse of process and an attempt by the applicants to bully and intimidate the court and *'forum shop or "judge shop"'* for a judge of their own choice. Parties should not be allowed to manipulate the judicial system by harassing Judges through

spurious and unfounded allegations so that, the Judges withdraw from the cases assigned to them. That, a strongly worded personal attack against a Judicial officer does not constitute sufficient and appropriate basis for recusal. Dissatisfaction with court orders, rulings or apprehension that a litigant may lose a case are not grounds for seeking the recusal of a judge.

40. It is important for judges to resist the temptation to recuse themselves simply to avoid nefarious and unfounded allegations, because that would make it possible for litigants to disrupt court proceedings and select judges; by criticising and hounding out judges they do not want to preside in cases in which they are a party. Judges have a duty to sit and hear cases that are assigned to them and having taken the oath of office must dispense justice without fear, ill will or favour. The applicants bear the legal and evidential burden of proving their allegations and it is not the duty of the Honourable court to prove its impartiality.

41. That the 1st respondent has been prevented from accessing assets charged to it as security for debt owed by the applicants through its impunity and continuous disregard of this Honourable court's orders. The present application undermines the judicial system and the rule of law as it allows the applicants who have continuously disobeyed court orders to escape the consequences of their contempt by belatedly accusing the Judge of bias without any legal basis or evidence.

42. The applicants' actions are calculated at rendering both the respondent and the court helpless in enforcing the court's orders which the applicants have contemptuously breached, amounts to a grave miscarriage of justice. That, after blatantly ignoring the Honourable court's orders with impunity, the applicants now have the audacity to demean the court's honour further through these frivolous, malicious and vexatious allegations.

43. That, an unsubstantiated allegation of personal bias or prejudice is insufficient to mandate recusal under the Judicial Code of Conduct and Ethics. The applicants have made allegations of bias against the court with the necessary implication that, either the respondents or their counsel have acted inappropriately so as to bias the judge. Such a serious allegation should be supported by evidence and the applicants should strictly prove it. It is in the interest of justice and the duty to uphold the dignity of this Honourable court that, the application ought to be dismissed with costs.

44. However, the applicants filed a further affidavit and averred that they have complied with all the orders of the court and the respondents are at liberty to, as they have, file an application for the contempt in respect of the alleged non-compliance with any court orders. Moreover, the orders of the 23rd March 2020, are the subject of an application that is yet to be determined. Those orders seek to enforce orders issued by the Honourable court, on 2nd March 2020, which enforcement is suspended by express edict of; the National Council on the Administration of Justice (NCAJ) in its directives issued on 16th March 2020 and 15th April 2020.

45. The applicants reiterated that by filing the application, they are exercising their right of access to justice and to have their disputes determined by a fair and impartial judge. It is not in any way an attempt to delay the hearing of this matter but the exercise of the right to a fair trial.

46. That the respondents indeed acknowledge that, there were inquires made by court, off the record, which inquiries inform the ruling of 2nd March 2020. The applicants crave the leave of court to refer to the record of proceedings in this matter, in support of this application. That a reasonable, objective and informed person, well versed with the facts of this matter would reasonably apprehend the partiality of the Judge in the circumstances.

47. That, on several occasions the applicants' advocates took objection to the one-sided manner in which these proceedings were being conducted, as will be borne out from the record as soon as the same is made available by the court. That, a balance ought to be struck between the discharge of duty by judicial officers and the need to ensure that justice is not only done, but seen to be done. In this matter, the balance tilts in favor of the need to ensure justice is seen to be done.

48. The applicants argued that, the application is not in any conceivable an attempt to intimidate the Judge. Further, the respondent's application for contempt was essentially determined by Lady Justice Kasango in her orders of 23rd March 2020. Moreover, this is the subject of the application for review filed by the applicants. No directions have been given by the Honorable court in respect of the application.

49. Further, the respondents' application dated 19th March 2020, having been heard and determined ex parte by Lady Justice Kasango on 23rd March 2020, there is, subsequent to Lady Justice Kasango's orders of 23rd March 2020, nothing left in the application dated 19th March to respond to. The proceedings before Lady Justice Kasango on 23rd March 2020, were irregular as the Honorable Judge made a final determination on the application, ex parte and without affording the applicants and opportunity to be heard in their defense.

50. Further, no ruling was made by the Judge in respect of the interim injunctive orders that, were in place in this matter on 3rd January 2020 and that fact forms the grounds in support of the instant application. The clarification sought by the Judge of; Lady Justice Maureen Odero was not whether the interim orders had lapsed on the date but whether, on the 3rd of January 2020, the interim orders were in place. The ambiguity on when the interim orders of the 24th December 2019, would lapse and failure to extend those interim orders, resulted in the freezing of the 1st applicant's bank accounts and subsequently, the closure of the 1st applicants' premises.

51. On 3rd January 2020, the matter came up for mention for directions in respect of the applications dated 24th December 2019 and 27th December 2019 and not the hearing of the suit. The allocation of the Judge who would hear and determine the suit ought to have taken the normal course. Further, the court did not give direction on the hearing of the applicants' application for contempt. What was before the court was not an application for the opening of bank accounts but an application for contempt of court orders.

52. In the ruling of 2nd March 2020, the court did not make a determination on whether by closing the bank accounts, the respondents were in contempt of court. The applicants averred they crave on the leave of the court to rely on the electronic record of the proceedings in support

of the fact that the applicants have constantly been denied an opportunity to present their case.

53. The record would bear the applicants witness to the fact that this matter has been listed on several occasions for delivery of the ruling which was eventfully delivered on 2nd March 2020. It is not true as alleged the applicants have delayed the hearing of the matter. There is on record a constitutional challenge to the foundation to proceedings founded on the orders of; 23rd March 2020 issued *ex parte*.

54. That the proceedings before the United Kingdom Commercial Courts are the subject of an appeal, being civil appeal No.70 of 2020; *Dari Limited and 5 Others versus East African Development Bank and Civil Application No. 49 of 2020* between the same parties. The appeal challenges those proceedings in view of the manner in which the United Kingdom Judgment was obtained which was unconstitutional, as it violates Article 50 of the Constitution of Kenya, 2010, and is contrary to the rules of natural justice and manifestly contrary to public policy in Kenya. The grounds in support of this application have no correlation with the grounds stated in the proceedings in the United Kingdom. Whereas the appeal is being prosecuted, it cannot form the basis for a finding in law in this matter.

55. That the applicants have not made any personal attack on the Judge nor in any way capable of intimidating the Judge. The applicants are simply exercising their constitutional right to ensure justice is indeed served. The legal and evidentiary burden in the application has been discharged. The respondents indeed admit that, on various occasions, the electronic recording of proceedings were turned off.

56. The application was disposed by the parties' oral address to the court and filing of legal authorities in support their respective submissions. I have considered the application in the light of the same and the affidavits filed by the respective parties in support and opposition thereto and I find that, the only issue to determine is whether the applicants have met the threshold for grant of the orders sought.

57. However, before I deal with that issue, I wish to point out at this stage that, the application before the court is for recusal of the Judge. I say so because, in the course of canvassing this application, other issues have been raised in relation to but not limited to; the non-compliance or contempt of court orders given herein by the applicants and the validity of the orders issued on the 23rd March 2020, the Honourable Lady Justice Mary Kasango, which are alleged to be irregular. As these issues are a subject of the applications dated 19th March, 2020 filed by the respondents and application dated 19th May, 2020, filed by the applicants, which applications are still pending. To preserve the integrity of the proceedings relating to those applications, I shall not deal with any averments relating thereto.

58. To revert back to the issues herein, I also wish to observe that, there are several averments made herein of very serious nature levelled against the court and/or the Judge that are; either misleading, misrepresented and/or purely factually incorrect. These are indeed the issues the applicants are relying on heavily to argue that, the court has been biased against them and favoured the respondents. In that case, it of great importance that, the court should deal with these issue first, so that, set the record can be set clear.

59. The said issues and/or averments relate to the allegations that: -

(a) The court allocated itself this matter

(b) The court took the view that, the orders issued on 24th December, 2019. were ambiguous thus questioning legitimacy of the orders of another judge;

(c) The court was recording proceedings and in particular submissions selectively and omitting submissions by the applicants' counsel;

(d) On several occasions the applicants counsel raised objections on the one sided manner in which the proceedings were being conducted;

(e) No ruling was made in respect of the applicants' contempt application and the ruling rendered on 2nd March 2020, was in respect of a non-existent and/or abandoned applications;

60. However, as I address these issues, I shall still be determining the key issues raised herein. Be that as it were, to put the aforesaid issues in perspective, it is important to lay the historical background of this matter. The suit was commenced by the plaintiffs filing a chamber summons and a notice of motion applications, dated 24th December 2019, under certificate of urgency, seeking for orders inter alia; that an order of injunction issue to restrain the 2nd and 3rd respondent, who were appointed by the 1st respondent as receivers of the 1st applicant, from interfering in any way, with the operations of the 1st applicant, pending, initially the hearing and determination of the application and thereafter the hearing and determination of the suit.

61. The applicants also sought for an order to stay the notice dated 23rd December 2019, issued by the respondent, appointing the 2nd and 3rd respondents as receivers of the 1st applicant and finally, an order that, pending the hearing and determination of the suit, the receivers and/or their agents be ejected and removed from the 1st applicant's premises.

62. The application was filed alongside a plaint dated 24th December 2019, seeking for various orders ranging from; a permanent injunction order to restrain the receivers from taking over the management of the 1st applicant; a declaration order that, the notice of appointment of the receivers was invalid and a declaration order that; the 1st respondent has persistently frustrated the 1st applicant's right of redemption.

63. Upon hearing the application, the duty court presided over by the Honourable Lady justice Maureen Odero, granted a temporary injunction order for seven (7) days in terms of prayer (b) of the notice of motion application. The Honourable Judge then directed that the application be served for directions on 3rd January 2020, for mention before, before the duty Judge on that date.

64. This court was on duty on the following week and in particular, on the material date of, 3rd January 2020 and that is how, the court and I came into contact with this matter. Therefore, it is completely misleading and mendacious to aver that, the court or the judge allocated itself this matter. For clarity and this is subject to verification, the practice in the Commercial and Tax division of the High Court is that, the Judge on duty deals with all matters filed under certificate of urgency referred to him or her. The duty court is on duty for the relevant period assigned. If the Judge's period on duty ends before the matter is finalized and the matter is urgent, the Judge refers the matter to the next Judge on duty.

65. If the next judge hears the matter inter parties, the Judge is literally seized of the matter and proceeds with the matter, unless there is an application by both or either party that the Judge does not to hear the matter. There was no such application by either and in particular by the applicants, before this court started hearing the matter on 3rd January, 2020 and thereafter. The applicants aver that; the court should have send the matter to be allocated in the "usual or ordinary course" of business, but they do not outline this "usual way" of allocation of matters is. It is therefore evidently clear that, the applicants' averments are not factually correct.

66. Be that as it were, it also suffices to note that, while on duty that week and/or date, another matter was filed and placed before the court relating the same parties herein, in relation to; adoption of and recognition of a foreign judgments. To uphold the integrity of the court and proceedings, the court did not deal with it at all. It was noted that, the court was already seized of this matter relating to the same parties and therefore referred that other matter to the next duty court, just as had been done herein. Therefore, in the circumstances this court could not refer this matter to the next duty court and/or Judge, as the court could not handle both matters at the same time.

67. The duty court the matter was allocated to; was presided over by the Honourable Lady Justice W. Okwany, who subsequently heard the matter and determined it. This court is aware that, the applicants herein were represented in that matter by the same legal team of learned counsels. However, the court is not aware of similar allegation against that court that it allocated itself the matter, yet the matter was fully determined by that court. The Honourable judge did not refer the matter back to this court that referred it or even to any other court or presiding judge for allocation to another Judge. All courts of the High Court and Judges exercise concurrent jurisdiction and are eligible to preside over any matter before the court.

68. In the same vein on the 19th March, 2020, when an application was filed by the applicants, the same matter was dealt with by the duty court presided over by Honourable Lady Justice Mary Kasango, the Presiding Judge, who was on duty and then fixed it for hearing before the trial court. The court dealt with the matter procedurally so, and in accordance with the procedure outlined above.

69. Therefore, based on the aforesaid, in my considered opinion, and with undue outmost respect, the averments that, this court and/or the Judge the court allocated itself this matter, is not only demeaning to the integrity of the court but personal reputation of the judge and is certainly not made in good faith.

70. To revert back to the history of the matter, having been served with the application, the responds filed the following documents;

(a) Grounds of opposition dated 24th December 2020;

(b) A letter dated 31st December 2019, addressed to the Hon. Deputy Registrar, expressing their views on the orders issued on 24th December 2019, indicating that the defendants were opposed to the ex parte orders given and strongly opposed further extension thereof; (emphasis mine);

(c) A chamber summons application dated 24th December 2019, filed under certificate of urgency and an accompanying notice of motion application of even date, praying that (i) the order issued on 24th December 2019, ex parte be set aside and/or discharged (emphasis mine); (ii)further, the plaintiffs issue a bank guarantee in the sum of; USD 16,550,608.83 and an injunction order be issued to restrain the plaintiffs from interfering with the Receivers duties; (iii) the OCS Karen police station to provide security to the Receivers to assume their duties;

(d) A further affidavit dated 2nd January 2020.

71. At this stage, I wish to address the 2nd issue raised by the applicants in relation to the interim orders issued on 24th December 2019. In my understanding the applicants argue that; (a) the court "ought" to have extended those orders, (b) ought to have referred the matter to Honourable Justice Maureen Odero, to clarify if those orders were in force on 3rd January, 2020, or had expired and/or were ambiguous or otherwise, and (c) that the failure to extend the orders on 3rd January 2020, caused the 1st applicant prejudice as its bank accounts were closed by the respondents.

72. It is clear from the court record that, the subject orders were given ex parte on 24th December, 2019. By 31st January 2010, when the matter came before the court, the respondents had filed responses to the application filed on 24th December, 2020 and in addition filed their application seeking that the ex parte orders be vacated. Therefore, both parties were before the court and were entitled to be heard on 3rd January 2020. Therefore, for the applicants to aver that, the court should have extended the ex parte orders before hearing the arguments is erroneous. The court could only give further orders after hearing both parties.

73. In fact, on 3rd January 2020, when the both parties addressed the court on the issue of those orders, the court transcripts records will bear evidence that, there was a very heated argument by the learned counsels representing the parties as to whether, the ex parte orders should be extended or not. In the course of the arguments the respondent submitted that, pursuant to the procedural provisions of Order 50 of the Civil Procedure Rules, the orders issued for seven (7) days on 24th December, 2020 had expired before 3rd January, 2020. However, the applicants maintained that, the orders were in force on 3rd January, 2020, as it cannot have been the intention of the court to have issued orders that would expire before the next mention date. That is how the issue of ambiguity came in.

74. Therefore, at this stage, I wish to set the record clear that, it is not the court but the respondents who raised the issue of the validity of those orders (and they have deposed and confirmed the same in the replying affidavit filed in response to this application. It is not therefore misleading in the circumstances, to allege wrongfully so, that this court cast aspiration and questioned the legitimacy of the orders of another court.

75. At that point, the court suggested instead of counter arguments the parties should address the circumstances in which, the subject matter of the suit will be preserved pending the hearing of the main suit, so that, the court would consider whether to extend the ex parte orders or not. Whereas the respondents counsel was in agreement, the applicants' counsel insisted the matter should be referred back to; Honourable Lady Justice Maureen odero, for clarification. That generated another heated argument with allegations of; "forum shopping".

76. To maintain the integrity of the proceedings and to allow the court that gave the orders an opportunity to clarify the same, I allowed the applicants request, adjourned the proceeding and referred the matter accordingly. It is therefore not correct to aver that, the court declined to refer the matter as alleged. Even then it is conceded that, the matter was referred accordingly. Subsequently, Honourable Lady Judge Maureen Odero, clarified orders were in force up to 3rd January, 2020, but in any event they had expired. She directed the duty court should deal with the extension thereof.

77. Upon resumption of the hearing in the afternoon, it was clear that, the parties would not agree to the extension of those orders. It therefore became necessary for the court to direct the matter in view of the fact that, the orders given ex parte by the court, although restraining the 2nd and 3rd respondents from interfering with the management and/or operations of the 1st applicant, they did not lift the notice of appointment issued by the 1st respondent on 23rd December 2019, appointing the 2nd and 3rd respondent as receivers of the 1st respondent.

78. That notice has not been lifted to date. Therefore, the directors of the 1st applicant were in physical occupation and/or management and control; of the assets charged whereas the 2nd and 3rd respondents/receivers were off the premises of and/or control of the assets charged. To reconcile the varying positions held by the parties based on the arguments advanced and in view of the urgency of the matter and the need for expeditious disposal of the matter, the court directed that, it would address the issue of extension of the ex parte orders raised, in the two pending applications of 24th and 27th December 2019.

79. In that regard, the court formulated the following salient issues for the parties to address, which the parties had no objection thereto.

(a) Whether the orders given on 24th December 2019, were still valid and/or whether they should be set aside or extended and;

(b) What interim orders should be made in relation to the management of the 1st plaintiff's company by either the directors of the company or the receivers;

(c) Does the court have the power to suspend a receiver's application by debenture holder?

80. As the parties were given time to file skeleton submissions on those issues, the court in the meantime ordered that, the assets caught under the debenture should not be disposed of and any decision made by the management of the 1st applicant should be in consultation with the receivers. The question is: In whose favour were these orders? Wasn't the preservation of assets charged in favour of the applicants? Didn't that order by its nature not amount to restrain of the receivers from disposing of the 1st applicant's charged assets, which the ex parte did? Which party should therefore have been aggrieved?

81. It should not also be lost that, the respondents application dated 27th December, 2019, was seeking that; the receivers be given an orders inter alia, that, to the OCS Karen Police Station, to provide them with security, to gain access to the suit premises That application come before the court on 30th December 2019, when I was on duty and unlike the applicants who had been granted ex parte orders on 24th December, 2020, I did not grant any ex parte orders thereon. I ordered that, the same be served for directions on 3rd January, 2020, (although the order was erroneously recorded as 31st January 2020, but the parties appeared on the date pronounced on 3rd January, 2020), when the applicants' application was fixed for mention. Therefore, if there is a party who should be alleging prejudice or favourisn so far, if at all, it can only be the respondents.

82. Even then, let's consider the provisions of; Order 50 and in particular Rule 4 of the Civil Procedure Rules, 2010, in relation to the ex parte orders issued on 24th December, 2020. These provisions stipulate that: -

"*Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:*

Provided that this rule shall not apply to any application in respect of a temporary injunction". (emphasis added)

83. The subject orders were issued on the 24th December, 2019, for seven (7) days only, therefore, based on the above provisions, the orders expired at most on 31st December 2019. However, the court directed for good reasons, as mandated under the above provisions that, the orders last to 3rd January 2020 and indeed they did, as the receiver had not entered into possession of the charged property by 3rd January, 2020.

84. However, as aforesaid, the orders were not subject to renewal ex parte in the presence of both parties and as sated earlier on that

applicants' averments at paragraph 9 of the supporting affidavit sworn by the 2nd applicant that; "in any case, the orders by Lady Justice Maureen Odero "ought" to have been extended prior to hearing the arguments set forth by the parties in the application for extension of interim orders", is not correct. I agree with the respondents' submissions that the orders were not to be extended automatically.

85. The plaintiffs have also averred that, the court has been biased and/or favoured the defendants by inter alia: (a) according the defendants more time in submissions, (b) not recording what their counsel has submitted and/or merely failing to address the concern raised by the plaintiffs. However, on 3rd January 2020, when I was seized of this matter for the first time, both parties were given audience by the court to address it on the various applications that were pending. It is on the basis of these arguments that, the court gave directions and the orders referred to above.

86. Of great significance is that, the although the applicants' counsel complains that, on first date of appearance, he was accorded adequate time to address the court, but the court transcript record, of all the proceedings herein, which are easily and readily available upon request, will bear evidence that, both parties were accorded equal right of audience and address to the court. The transcript of the court proceeding of 22nd January, 2020, run into 84 pages, for the 17th February, 2020 run into 27 pages and while those of 24th February 2020, run into 18 pages. Therefore, if the applicants are really serious that they were not treated fairly, they should have raised that issue from the outset. They did not. In fact to address the applicants allegations, all that one needs to do is look at are the court transcript proceedings. They are res ipsa loquitor. Even then, the applicants do not state with precision and/or tabulate the particular dates when they were "pressganged".

87. The applicant further avers that, they will crave for the leave of the court to rely on the court oral and electronic evidence and submits that, failure to record oral evidence amounts to breach of the provisions of the Judicial Service of code of Conduct. The question is: Have the applicants ever applied for court proceedings since inception of this matter? The answer is in the negative. The applicant appeared before the court on 22nd May 2020 and that is when they sought late in the afternoon to be supplied with proceedings of the court both in handwritten for the last five months. The same were meant to be supplied for hearing of the application on Tuesday, 26th March 2020, being in mind that Monday 25th May 2020, was a public holiday.

88. In fact, it should be noted that, during this COVID-19, the Government has advised employees to work from home and with the curfew at 7pm even the staff to process the request would not be available. How was that request tenable? If the alleged conduct of the court has been ongoing for so long, why didn't the applicants seek for the proceedings earlier. It also suffices to note that the evidence in all proceedings in the Commercial and Tax divisions are recorded electronically and any notes taken by the judges are: judge's side notes.

89. It therefore suffices to reiterate and stress that, the entire record will reveal, that the applicants' counsel has never since first appearance on; 3rd January 2020, to the date of filing this application complained of; the selective recording of submissions, failure to be accorded adequate time to address the court or the alleged pressganging or informal conversation or polemic conduct. Sum it up, handling the matter casually, or proceeding of the court. It is not surprising that, he respondents submit that all these allegations are an afterthought and the applicants should be estopped from raising the same.

90. The other issue raised is failure to address the applicants' contempt application filed vide a chamber summons application under certificate of urgency dated 13th January 2020, alongside a notice of motion application of the same date seeking that; the Honourable court do issue a notice to show cause why the receivers cannot be committed to civil jail for harassing, interfering and intimidating and disrupting the 1st plaintiff's business operations. Further, the court issue orders that, the management of the 1st defendant rest solely in the management of the directors, and all restrictions placed on the 1st plaintiff's bank account with several financial instructions be removed and an injunction be issued to restrain the receivers from disrupting the 1st plaintiff's operations.

91. The applicants filed the subject application alongside a replying affidavit dated 10th January 2020, in response to the respondents' application. At the same time, the respondents filed skeleton submissions on the issues raised by the court on 3rd January 2020 alongside a supplementary affidavit sworn by the 1st respondent's Accountant, Head of business Ms. Loise Muigai. Similarly, the 3rd respondent also filed a supplementary affidavit.

92. As the parties continued to file their respective responses and make oral arguments, it became apparent to the court that, the orders issued on 3rd January 2020, requiring the parties to consult in relation to decision making in respect to the management of the 1st plaintiff was not tenable. The court then decided to deal with the two notice of motion applications dated 24th and 27th December 2019. The court heard the parties' arguments on 20th January, 17th and 24th February 2020. The ruling relating to the same was delivered on 2nd March 2020 in the presence of all the counsels representing the parties including the two Senior counsels.

93. At this stage, may I dispel or correct the allegations that, this court it has delayed decisions making in this matter. If the deponent was sincere and honest, he would disclose that as per the record of the court, the first adjournment of the initial decision was due to non-availability of transcripts. Justifiable so, as the transcribers had a very short time frame to avail the same, secondly it is on record the next short adjournment was informed by the Election Appeal No. 4 of 2018, which was filed under certificate of urgency and the court had to deal with the same. There was no delay in delivery of the decision set for 2nd March 2020, following last arguments on 24th February, 2020.

94. Be that as it may, it is important to clarify that the final orders given by the court were that, as the notice of appointment of the receivers had not been vacated, and could not be vacated before the hearing of the main suit, then pursuant to that notice, the receivers were legally in the office. As such since the 1st applicant's management could not be run by two entities: Receiver and Directors, at the same time and as they order to consult was not tenable, the receivers were to run the management of the 1st applicants. Further, they were to deal with all concern raised by the 1st applicant and/or directors in particular, the issue of bank account raised in the applicants' contempt application.

95. Therefore, it is not correct again to argue or allege that, the court did not address that application at all in that ruling. It is also misleading to aver that; the court gave a ruling over non-existent applications after coercing the parties to abandon the application for hearing of the

main suit. First, both parties addressed the court at length after filing the submissions on the issues the court had requested them to deal with, before the date for ruling was given. But even then the ruling was delivered in the presence of all learned senior and other counsel without protest. In fact, to the best of my knowledge there is no appeal lodged against that ruling.

96. Further, when the parties appeared in court on the 4th May 2020, the applicants counsel requested that application be heard on 20th May 2020, together, with the respondents' application of 19th March, 2020. A request I had no objection to and allowed and finally, it is the applicants who sought for early hearing dates and participated in fixing of the same. Therefore, the allegation that the court has failed to address that application is not factually correct.

97. It is indeed noteworthy as already stated herein, the court has on several occasion declined to arm the respondents with police escort to gain access to the 1st applicant's premises when the application dated 19th March, 2020, was filed I declined ex parte orders, directed it be served and advised that, the best cause of action was to file a relevant application, if the respondents were of the opinion that the applicants had disobeyed court's orders. Therefore, I accorded the applicants an opportunity to be heard. Is this a court order biased against the applicants?

98. I wish to put the record clear that, the court has indeed conducted this matter expeditiously as evidenced by the number of appearance by the parties since the filing of the suit and indeed with great restraint even where it became evident, there was little regard and respect for the court. In that regard, it suffices to note and the recorded proceeding will reveal that, on 20th May, 2020, when the matter commenced, the applicants learned counsel Mr Paul Nyamodi requested the court to consider several issues before hearing the respondents' application. The learned counsel did not start by telling the court to recuse itself, it is only when court did not grant the orders sought, that he learned counsel, told the court he had instructions to ask the court to recuse itself.

99. It is unlikely that, application would probably arise had the court upheld the Applicants request. It is noteworthy that, the reasons why the court was told to stay the proceeding was to enable the applicants' application dated 19th May, 2020, be heard first. Now let's consider the issues that informed the court's decision; first that application had been filed on 19th May 2020, a day before the hearing of the respondents' application and had not been certified urgent nor scheduled for hearing on 20th May, 2020. Secondly, hardly one and a week earlier the applicants had confirmed they were ready for the application dated 19th march, 2020 and finally the applicant had been served with the respondents' application two months earlier and ordered impugned as far back as the 23rd March, 2020.Therefore, the court not adjourn due to an application which was not before it and lay aside another application due for hearing.

100. But even more interesting is the fact that, when the court took a brief adjournment, the applicants who had earlier indicated that, they were filing an application for recusal of the court, informed the court that, they had instructions to proceed with the application on merit and passionately sought for limited time of adjournment. The court accorded them an opportunity to be heard despite heavy opposition. What followed was this application for recusal and which then effectively stayed the respondents' application. What does this tell of the applicants' conduct? Is that a sincere and honest litigant? I say no more.

101. However, to revert back to the issue as to whether the applicants should be granted the orders sought, I shall consider the law on recusal of a judge. In that regard I wish to state that, I have considered the authorities by the parties and noted that the Respondents submissions were on contempt proceedings and are shelved to await the relevant application. The Applicants last two authorities are on stay of proceedings when the matter is under consideration by a court of higher jurisdiction and in relation to the same I wish to state that, those authorities are more relevant to the pending application and can be argued alongside issue of stay of enforcement proceedings by NCAJ directives. All other relevant authorities have been considered.

102. Recusal is "removal of oneself as a judge or policymaker in a particular matter, especially because of a conflict of interest. It is based on the maxim that; judges are **charged with a duty of impartiality in administering justice**. The Black's Law Dictionary defines recusal as "the process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice."

103. In the instant case, the applicants rely on the ground of bias. The Black's Law Dictionary 9th Edition defines bias as "inclination, prejudice, pre-direction" whereas the Oxford English Dictionary defines bias as "an inclination or prejudice for or against one thing or person."

104. The tests for bias on the part of a judicial officer are objective: whether, as a matter of fact, there is a real possibility of bias, or whether there is a reasonable belief that, a real likelihood of bias exists. In either case the party seeking recusal must show a reasonable fear, based on objective grounds, that the trial will not be impartial as held in; *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H).*

105. There are indeed numerous cases where the courts have considered the test to be applied when bias is raised as a ground for recusal of a judge and in *Mahlangu v Dowa & Ors* HH-4-11 the court held that;

> "*the test to be adopted in determining whether or not a judicial officer should recuse him or herself is a two-fold, objective, test: 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. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial. Where an applicant makes an application of this nature, the court should not*

take it as an affront. What defines the reasonableness of the applicant and the apprehension itself is the nature of the link or association between the judicial officer and the parties in the litigation" (emphasis mine).

106. In the same vein, in the South African case of: *President of The Republic of South Africa and others v. South African Rugby Football Union and others, 1999(4) SA 147 (CC), CCT 16/98*, the court stated that:

> "*--- the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial*." *(emphasis added)*

107. Similarly, the court stated in the case of *"Re Reunad ex Parte CJL (1986) 60 AL JR 528*, stated that:-

> "*Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty and do not, by acceding too readily to suggestions and 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."*

108. *In addition, Lord Denning M.R. observed:in* ***"Metropolitan Properties Co (FGC) Ltd. v. Lannon*** *[(1969) 1 QB 577, 599) observed that*

> "*. . . in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."*

109. In addition, Rule 5 of the **Judicial Service Code of Conduct and Ethics** made by the Judicial Service Commission pursuant to Section 5(1) of the **Public Officer Ethics Act**, 2003, requires a judicial officer disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.

110. Thus bias will lead to a judge recusing himself or herself from a matter to safeguard the sanctity of the judicial process in tandem with the principles of natural justice that, no man should be a Judge in his own process and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is enshrined for in Article 50 (1) of the Constitution a with Articles 25 which 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" Article 25 of the Constitution of Kenya 2010 duly provides that, despite any other provision in the Constitution, the rights and fundamental freedoms of a person to inter alia, fair trial shall not be limited

111. From all these decisions and many others, it settled law that the test of bias, 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. (see:* ***Porter v. Magill [2002] 1 All ER 465, Taylor v. Lawrence*** *[2003] QB 528)*

112. Therefore, applying these principles to the facts herein; the question that arises is whether: A reasonable fair minded person can conclude on the facts herein that, the applicants will not have an impartial trial. In my considered opinion the answer is in the negative. Indeed it is the responsibility of the applicant tin such an application to adduce evidence to support alleged bias. The applicants must provide tangible evidence.

113. In the Court of Appeal case of; *Ansar v Lloyds TSB Bank Plc (2006) EWCA 1462*, Burton J approved a summary of principles given in the EAT in relation to Employment Tribunals, and stated inter alia

> "*the mere fact that, a judge earlier in the case, or in a previous case, commented adversely on a party or witness, or found their evidence to be unreliable would not, without more, found a sustainable objection. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case, something 'more' must be shown. Tribunals (courts) need 'broad backs', especially where litigants are well aware that to provoke actual or ostensible bias can achieve what an application for an adjournment may not" (emphasis mine)*

114. Finally, Lord Justice Longmore, giving the decision of the Court of Appeal in *Otkritie International Investment Management & Ors v Urumov [2014] EWCA Civ 1315*, setting aside the judge's decision to recuse himself said that, contrary to Eder J's reasoning, there was "a consistent body of authority to the effect that, bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard, unless it can be shown he is likely to reach his decision 'by reference to extraneous matters or predilections or preferences'.

115. Having addressed the chronology of the events in this matter it is clear that, the trigger for the application for recusal is the applicants' presumed "unfavourable orders" given by the court, in particular the failure to extend the ex parte orders and stay the hearing of the respondents' application dated 19th March, 2020, until, the applicants' application dated 19th May 2020 was heard and determined. That cannot amount to bias and a reasonable prudent person cannot arrive at the conclusion.

116. However, before I conclude this decision I wish to make the following observation, first the application herein is strong worded and at times the court has been treated with little respect. It will be clear from transcripts of the proceedings of; 20th May, 2020, the learned counsel Mr. Paul Nyamodi representing the applicants interjected the court and stated that, what the court "was doing by allowing the defendants to make arguments off record, is what the applicants were complaining of." At that time the court was responding to the issue raised by learned senior counsel Mr. Paul Muite. The court had to intervene and request the learned counsel Mr. Paul Nyamodi, to respect the court.

117. Similarly, while addressing the court on 26th May, 2020, the learned Counsel Mr. Nyamodi stated as follows, as evidenced from the transcripts:

> "*Your Ladyship, the importance of that code is that it is recognized in Article 168 sub Article 1 of the constitution in the following manner: Article 168 sub Article 1B of the constitution provides that where, or that any infraction of; The Judicial Service code of conduct is a ground for the removal of a Judicial Officer: And the submission I wish to make is this. That a consideration of the Articles of the constitution that I have submitted on in their totality leads to the conclusion that where conduct of a Judicial officer officer is established to be in breach of any of the provisions of the judicial code of conduct*.
>
> *I'm sorry I wish to phrase that differently; that where conduct is established that would lead to the removal of a Judicial officer under Article 168 of the constitution. Then if that conduct is established in a matter, then, that is enough grounds, that is sufficient grounds for the judicial officer to recuse themselves. Whether the party offended by the conduct of the judicial officer, then at a later stage, then decides to take on or to then, pursue remedies available to them under Article 168 is a totally different and separate and distinct issue. But where grounds for removal under Article 168 are established, then that is a sufficient ground for recusal. I submit with tremendous respect that the particulars upon which the plaintiffs rely on in support of the application, as contained in the two affidavits that are sworn in support of the application and are submitted by both by myself and leaned senior counsel who leads me in this matter clearly demonstrates a prima facie breach of rules 4 and rules 5 of the Judicial service code of conduct and ethics made under the Public Officers Ethics Act 2003"*.

118. A consideration of the provisions under which the application is premised, do not reveal citation of, the provisions of; Judicial service code of conduct and ethics or any provisions of the Constitution of Kenya and in particular Articles 48 and 168 thereof. In my considered opinion, that submissions by the learned counsel were aimed at threatening the court with a petition for removal, if it did not allow this application. In arriving at this conclusion, I am guided by the same principle herein of whether; a reasonable, objective and informed person would Cconsidering this submissions in the circumstances of this case would arrive at that conclusion.

119. Indeed, it is as a matter of good professional practice, the lawyer who makes the application for the recusal of a judicial officer should do so respectfully and tactfully. Before an application for recusal is made, the judicial officer should be informed of the fact and the grounds of the application to avoid embarrassment and to give him or her time and opportunity to consider the same and for facts to be verified before the formal application is made.

120. The usual procedure is that, counsel for the applicant seeks a meeting in chambers with the judge in the presence of his opponent. The grounds of recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court. Of course that was not the case herein.

121. Be that as it may, I find in the instant application, there is absolutely no evidence to support the allegations of bias on the part of the court in the manner in which it has conducted this matter and I find no reason to warrant this court to recuse itself from this matter.

122. In that regard, I associate myself with the sentiments of the Honourable court in the case of: *Nathan Obwana v Robert Bisakaya Wanyera & 2 others (2013) eKLR*, where the court stated as follows:

> "*I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter*."

123. I therefore decline to allow the application and dismiss it. In the circumstances of this case, I make no orders as to costs. However, in the case of; *Hon. (Lady) Justice Kaplana H. Rawal v Judicial Service Commission and 2 Others, Civil Appeal 11 of 2016*, Hon. Justice Ibrahim stated that:

> "*Recusal is indeed a judicial duty and it does not amount to a judge abrogating his/her duty. A part from personally recusing to safeguard one's integrity and the sanctity of proceedings, recusal also helps protect the integrity and dignity of the bigger institution, that is, the judiciary and aids in championing its independence*."

124. Be that as it were, it suffices to note that, the subject application filed on the 19th May 2020, is seeking that the orders made on the 23rd March 2020 be set aside and or reviewed. The provisions of; Order 45 Rule 2 of the Civil Procedure Rules 2010, which are couched in a mandatory terms require that, the application seeking for review and/or setting aside orders by heard in the first instance by the court that

issued those orders and since the Honourable Lady Justice Mary Kasango who issued those orders is available in the court, pursuant to those provisions, and to accord the Honourable Judge an opportunity to address the issues raised in relation with those orders. I order the matter be mentioned before the Honourable Lady Justice on 3rd May, 2020 for further orders on the same.

125. In recognition of provisions of; Article 159 of the Constitution of Kenya, and the need to promote the overriding objectives under the Civil Procedure Act, of expeditious of matters in an efficient and expeditious manner I don't believe, it will be in the interest of justice that this matter should revert back to this court.

126. Again, to release the matter and the parties from the shackles or arguments on the trial court and/or judge and entangling the same with substantive issues therein thereby delaying the matter, and finally to uphold the integrity of the court and the entire institution of the judiciary, I find that, it will be in the interest of substantive justice that the matter can be heard before any other court.

127. Those then, are the orders of the court.

Dated, delivered on line and signed on this 2nd day of June, 2020.

G. L. NZIOKA

JUDGE

In the presence of:

Ms. Ndong for the Applicants

SC Dr. Fred Ojiambo and Ms. Opiyo for the Respondents

Robert ----------Court Assistant

Delivered via virtual communication