REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELECTION PETITION NO. 2 OF 2017

HON. MARTHA WANGARIKARUA.....1ST PETITIONER

HON. JOSEPH GACHOKIGITARI.....2ND PETITIONER

- VERSUS -

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANN WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

RULING

1. This ruling arises from a Court of Appeal Ruling delivered on 2nd March, 2018 which directed the parties to appear before this Court for directions on hearing and disposal of the Petition.

2. The parties and/or their representatives appeared before this Court on 5th March, 2018. This Court directed that the matter would proceed as per the ruling of the Court of Appeal. However, issues were raised by the parties. The Petitioners applied that I disqualify myself so that the matter can proceed before another Judge in view of the strong language this Court had expressed in its ruling which goes to the root of the Judgmental purpose of hearing. Counsels on record for the respondents however, felt that a formal application should be filed as the matters raised were weighty and serious. For the 3rd and 4th respondents while also pointing out that the Petitioner should file and serve a formal application for recusal, raised a preliminary objection on the jurisdiction of the Court. This was on the basis that the petition having been filed on 5th September, 2017, this Court lacks jurisdiction to deal with the matter since it had to deal with the Petition within a period of six months.

3. The Court directed the Petitioner to file a formal application and the preliminary objection to be argued on merits.

4. The Petitioner filed a notice of motion on 9th March, 2018 under **Section 3A, 3B** and **95** of the **Civil Procedure Act** and **Order 50 rule 6** of the **Civil Procedure Rules of 2010**, all enabling provisions of the

Law. The application was seeking the following three prayers:

(a) That the honourable Lady Justice Lucy W. Gitari do recuse/disqualify herself from further hearing and/or participation in these proceedings.

(b) That this file and proceedings be referred to the Honourable Chief Justice to constitute a fresh election Court and/or give further directions as will be necessary to facilitate compliance with the order of the Court of Appeal in Nyeri Court of Appeal Election Petition No. 1 of 2017.

(c) The costs of this application be provided for.

5. The application was based on the following grounds:

(i) That continuation of a hearing before the Honourable Lady Justice Lucy Gitari will result in a miscarriage of justice in that justice will not be seen to have been done in the light of the strong and disparaging comments she has made in relation to the Petitioner even though there are two Petitioners.

(ii) That in the light of the judgment of the Court of Appeal a fair hearing cannot take place before Lady Justice Lucy Gitari.

(iii) That the Appellant would be gravely prejudiced if the hearing was to proceed before Lady Justice Gitari.

(iv) That it is in the interest of justice that Lady Justice Lucy Gitari recuse/disqualify herself.

6. The application is also supported by the affidavit of the Petitioner, Martha Wangari Karua sworn on 8th March, 2018. It raises grounds that this Court had capped costs at Ksh.10,000,000/= which the Court of Appeal found to be excessive and highly punitive, that this Court termed the petition as hopelessly defective, dead pleading, beyond salvage, that the Court stated that the Petitioner was taking the respondents on a tiring, aimless journey. She further deposes that the Court stated that it could not aid a litigant who has chosen to disregard the rules despite her submission that the omission was lapse, rejecting her submissions as evidence from the bar, applying double standards by saying she should have filed an affidavit in opposition to respondents application to strike out when the application was not supported by affidavit. She further deposes that the Court ignored the pleadings, failed to accurately record her submissions, failed to have results of scrutiny filed, that the Judges of Court of Appeal termed the ruling as absurd. That the foregoing sufficiently discloses bias to warrant the Judge to recuse herself. That being a matter of public interest Justice must not only be done but seen to be done which will not be the case if the matter is heard before this Court.

7. The 1st and 2nd respondent filed grounds of opposition to the application raising the following grounds:

(i) That the Court of Appeal dismissed the contention that the Hon. Lady Justice Lucy W. Gitari was biased.

(ii) The petitioners have not given any good reason to warrant the recusal of the Judge.

(iii) The application lacks merits and is an abuse of Court process.

(iv) That this honourable Court does not have jurisdiction to entertain this matter including the application for recusal as six months have lapsed since the ruling of the petition herein.

8. The 3rd and 4th respondent filed grounds of opposition raising the following grounds:

(i) This Honourable Court does not have the jurisdiction to entertain the Petitioners' Notice of

Motion.

(ii) The Petitioners' Notice of Motion discloses no grounds of recusal.

(iii) The issues raised in the Petitioners' Notice of Motion were considered and determined by the Court of Appeal in Nyeri Election Petition Appeal No. 1 of 2017 and are therefore *Res Judicata.*

(iv) The Petitioners' Notice of Motion is tantamount to an Appeal from the Judgment of the Court delivered on 2nd March, 2018 in Nyeri Election Petition Appeal No. 1 of 2017.

9. I should point out that the 3rd and 4th respondent withdrew the Notice of Preliminary Objection dated 5th March, 2018 vide a Notice dated 13th March, 2018 and filed in this Court on 14th March, 2018.

10. I have considered the application and the grounds of opposition. Two issues arise for determination. They are:-

(1) Recusal; and

(2) Jurisdiction.

11. **RECUSAL**:

Applicants/Petitioners submissions:

Counsel Mr. Gitobu Imanyara submitted that the application is made pursuant to the decision of the Court of Appeal on a ruling made by this Court whereby the Court used the word absurd which he submits is a strong language to describe the Judgment. That the application seeks orders that I recuse myself and forward the file to the Chief Justice to compose another bench to hear the appeal.

12. That the Court of Appeal directed the parties to appear before me to give directions on hearing and disposal. That the Court should appreciate that the Court of Appeal directed the parties to appear before me as it is the Court gazette to hear the petition. That since the matter was coming for directions on hearing, it is on hearing that has not taken place and it means all opportunities for counsel to raise issues at the beginning are open.

13. He further submits that the Overriding Objective is the Oath of Office to treat all fairly and equally. That justice is not an objective test but what an ordinary person in Kutus town who hears about the petition perceives that justice is not only done but seen to be done. That it is when a party appears and says we have no confidence. It is not about that the Court ruled for Anne Waiguru and against Martha Karua. It is about justice and a feeling that a party lost fairly. That the applicant would not feel that way because of the manner the Court handled the matter.

14. That it started from the day one when the Court heard noises preventing them from entering the Court. There was no submission on hat I had to do with that and in case I kept the file aside until the Petitioner and her advocate entered the Court and raised the issue.

15. I directed the Deputy Registrar to address the issue of the security of the Petitioner.

16. The Counsel submitted that the application could have been done at an informal stage so that they could not go through what they were doing to make conflicting decisions where one party feels the Court is fair and another says it is unfair. However there was nothing wrong in arguing the application. In a matter of public interest like the present one every matter should be laid bare and Courts as I will show later have heard similar applications in open Court where all manner of allegations are made.

17. That the petitioner in her supporting affidavit at Paragraph -2- where costs were capped at Ksh.10,000,000/= the Court of Appeal found the costs to be excessively high and punitive. That at Paragraph -3- it is only this Court which could disqualify itself. That at Paragraph 4 she raised issue on the language used also goes to the Counsel who drafted. That the Court found the pleading as dead, beyond salvage. That there would be no purpose of hearing the case with such finding. That at Paragraph -5- of the affidavit where Court stated that the Court was taking the respondent on a tiring aimless journey – the Court should not make such a comment. That the Court stated it could not exercise discretion to a party who has chosen to disregard the rules. That this is a ground upon which they say they will not get justice.

18. That the Court stated they had not filed an affidavit. That the respondents would be heard without filing a replying affidavit.

19. That Court did not record fully what the petitioner stated. That she has pointed points of bias. That the Court failed to have the report of scrutiny filed in Court. That it is a matter of public interest that justice not only be done but seen to be done.

20. The Petitioner submitted that the Court cannot disparage a litigant's pleadings. That the Court went beyond the call of duty and she would not be comfortable to be heard in the same Court. That disparaging the pleadings is a matter showing bias or justice will not be done. That they did not have a ground of appeal on recusal because such an application is made before the Judge. That the law on recusal is a matter of discretion where there is a likelihood of bias.

21. She cited the case of **Kimani-V- Kimani (1995-1998) I.E.A. 134 at Page 142** which quoted Lord Denning in **Metroplitan Properties Co. FGC Ltd -V- Lannon 1 (968) 3 ALL E.R. 304 at 310** where it was stated that 'Justice must be rooted in confidence, and confidence is destroyed when the right minded people go away thinking the Judge was biased.' She further stated that the Court failed to record accurately her proceedings when she wondered why there was celebratory mood. That since the Court of Appeal directed that they come for directions, they are seeking recusal.

22. The Petitioner also cited the **H.C. Mis Appl. No. 301 of 2017 J.R. Wavinya Ndeti** – Para 22 and 23 – where the Court quoted the decision of the Supreme Court in the case of **Jasbir Singh Rai & 3 others -V- Tarlochan Singh Rai& 4 others Petition No. 4 of 2012**.

> ***"The principles relating to recusal were discussed in details in the President of the Republic of South Africa vs The South African Rugby Football Union & Others Case CCT 16/98, in which the Constitutional Court of South Africa pronounced itself as follows:***
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> > ***"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront…….A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes…….In applying the test for recusal, courts have recognized a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence…..This consideration was put as follows by Cory Jin R V S. (R.D.): 37***

'Courts have rightly recognized that there is a presumption that judges will carry out their oath of office……This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

In their separate concurrence, L'Heureux-Dube and McLachlinJJ say:38

"Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances: United Stated v Morgan, 313 U.S. 409 (1941) at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England III…..[t] the law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: R. v Smith &Whiteway Fisheries Ltd. (1994), 133N.S.R. (2d) 50 (C.A.) at pp. 60-61."

The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased."

23. For the 1st and 2nd respondent it was submitted by Mr. Kathungu that the Court of Appeal dismissed the allegation of bias and they were satisfied with the holding as the Court was not biased against an party. That the applicant has not given any reason to warrant a recusal. He referred the Court to **Civil Appeal No. 6 of 2016 Philip K. Tunoi& Another -V- Judicial Service Commission & another (2016) eKLR**where the Court had applied for two Judges to recuse themselves and the Court declined and stated 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 be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias."

24. He further submits that the Petitioners have not shown any personal bias against them. He cited the case of Wavinya Ndeti cited by the Petitioner and stated that the standard of establishing bias is high and must be done with cogent evidence.

25. He further submits that the Court of Appeal said the Court used strong language in expressing appreciation of the law but not because of bias. That no litigant should be allowed to do Judge shopping. He quoted a paragraph in Wavinya Ndeit's case where it was stated:

"Similarly, in South African Commercial Catering & Allied Workers Union &Anor. Vs Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000, he same Court expressed as follows:

"The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts decided shortly after Sarfu, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of

the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

"Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity."

The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. The Court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the Court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigants apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law…..The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasized. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance……We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping."

26. He further submits that the applicant was seeking orders that the appeal be allowed the matter be set down for hearing before another Judge. That the Court of Appeal considered the ground and directed that the matter be heard before this Judge and it does not make sense that the Court could not rule that it be heard by another Judge.

27. For the 3rd and 4th respondent it was submitted by Mr. Nyamondi that they have every confidence not just in the Courts ability to hear and determine the petition and also on impartiality. That this is shown by the dispassionate and the balanced manner in which the Court applied the law that regulates the petition before this Court.

28. That the application is unfortunate and based on flimsy grounds. That the petitioner seeks to take what she perceives as victory or moral success to bash the Court and persuade it to abandon the matter on the basis that there are many judges who are competent. That this Court in petitioner's view is least appropriate to hear the petition. That they oppose the application and rely on the grounds of opposition.

29. He submits the test applicable is the one of the decision in Justice Philip Tunoi (supra) which was cited by the Petitioner. That it is an objective test and is not the perception of the Petitioner but a fair minded and independent observer. That a fair minded and independent observer considering the totality of the facts would note that these same lamentations were substantive grounds of appeal and the relief is the same one being requested before this Court. That the fair minded and independent observer would come to the conclusion that having failed to persuade the Court of Appeal on the same grounds cannot

raise the grounds before this Court.

30. He further submits that the facts have been determined by a fair minded and informed observer, that is the Court of Appeal which found no merit on the Petitioners' complaints and did not accede to her request.

31. He further submits that in a matter like this the Court will be urged on various matters and the outcomes will not always be the same where the party succeeds and the other does not and the party abides or proceeds to appeal. That a party should not acquire a suspicious mind. He relied on **East Africa Court of Justice in A.G. –V- Anyang Nyongo & Others** where the Court dealt with what it called 'Suspicious mind' and stated that 'a suspicious mind in the literal sense will suspect even where no cause for suspicion exists." Unfortunately this is a common phenomenon among unsuccessful litigants. That the Court should not be a willing ally of shopping process where a party says you have not ruled in my favour, recuse and get another Judicial officer who is likely to rule in her favour.

32. That the Court of Appeal ruled on the language used that they do not result in a source of bias. That the Court of Appeal declined the request. He referred the Court to **Kalpana Rawal-V- Judicial Service Commission and 2 Others** where it was stated that mere suspicion is not enough, bias must be demonstrated. He also cited **Hassan Omar Hassan & Another -V- Independent Electoral & Boundaries Commission, & Others 2017 eKLR Justice Achode**, where it was held:

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

He also referred to **J.P. Lumumba -V-IEBC& 2 Others** where it was stated that "……but there must be a substantive basis in making claims about likelihood of bias not just blanket claims without a leg to stand in" He also cited a statement in**Abdi Wahab Abdulahi-V- County Governor of Garissa (2013) eKLR.**

33. Finally the counsel submitted that the issue of recusal is res judicata in line with the **Civil Procedure Act**. That this issue was before the Court of Appeal for the same reason raised before this Court and the Court of Appeal gave a determination. That this Court lacks jurisdiction to determine the issue. The Counsel referred the Court to the case of **Maina Kiai & 2 Others -V- Independent Electoral and Boundaries Commission& 2 Others (2017) eKLR** where it was stated:

"The elements of res judicata are as follows:

> ***(a) The former judgment or order must be final.***
>
> ***(b) The judgment or order must be on merits.***
>
> ***(c) It must have been rendered by a Court having jurisdiction over the subject matter and the parties and,***
>
> ***(d) There must be between the first and second action identity of parties of subject matter and cause of action.***

He also cited **Okinya Omtata Okoiti -V- Communications Authority of Kenya & 14 Others (2015) eKLR** where a similar holding as above was made and further that there must be an end to litigation and a party should not be vexed twice over the same cause. He urged the Court to find that it lacks jurisdiction to entertain the application and if not, not to accede to it.

34. In his rejoinder, the Counsel for the applicant reiterated the submissions and that the application was supported by an affidavit. That every aspect of the applicant's affidavit is uncontested and are

unopposed. The only reply is on points of law. That there was no ground in the Court of Appeal relating to an application for recusal. That for the Counsel to state that the ground was considered is abdication of duty. That they had requested that the matter be heard before another judge. That it was consequential and the order was not heard and is why they appeared before Court to pray that it be heard before another Judge. That it is true they raised the issue of bias before the Court of Appeal and that that cannot be construed to be an application for recusal. That there are no basis for asking the Court to dismiss the application.

35. The learned applicant in her rejoinder stated that they have taken this Court through the language which could not be made before another Court. That allegation of bias should not be confused with the application for recusal. That the application is not based on the ground that the Court ruled against them. That if they questioned the Court's jurisdiction, that can only be done in the Supreme Court. That they are not forum seeking as they do not know who would be allocated the case. The case was concluded though found by the Court of appeal to be erroneous. That there is nothing in the Constitution or Election Act which expressly provides for what should happen where the case was referred back for hearing. It was not the intention that the right of Appeal becomes nugatory. That the Petitioner had done nothing to delay. She referred to the **Tunoi Case** where it was stated:

> ***"We take cognizance that right to fair hearing is embedded in our Constitution which emphasizes that justice must be done to all without delay or undue regard to procedural technicalities. The Constitution has vested the Courts judicial authority and mandate and has expressly stated the right to fair hearing cannot be limited or abridged. It is absolute."***

She urged the Court to consider **Article 50** of the **Constitution** and if there is likelihood of bias it should recuse itself. The Court to apply judicial mind and let the case out of its mind.

36. I have considered the application. Recusal is a matter of discretion by the Judge. The practice that Judges recuse themselves where they feel that they may not appear to be fair or where they feel their impartiality would be called into question. A Judge can recuse himself or herself *'suomoto'*. What is called into question is the key principle of impartiality which the Judge applies in the decision and the decision making process. The term impartiality has been defined under **rule 3 (1) of the Judicial Service Act** and is one of the principles laid down inBangalore Principles of Judicial Conduct. It is defined as:

> ***"a mind which is free from external influence from any quarter."***

A Judge takes an oath of office to do justice fairly and impartially. The Judge must be seen to do justice, not only to be done but to be seen to be done. This must be seen to be done by fair minded and independent person. Where there is a likelihood of bias the Judge must disqualify himself or herself. The test to be applied has been stated in various authorities cited before this Court. In the case of **Philip Tunoi& Another -V- Judicial Service Commission** which has been cited by the parties, the Court of Appeal in considering an application for recusal stated:

> ***"In Tumaini v R. (supra) Mwakasendo J held, rightly in our view, 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 House of Lords held in R v Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.***
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> ***The test in R v Gough was subsequently adjusted by the House of Lords in Porter v Magill [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the***

test served no useful purpose and accordingly held that:

"[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."

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

37. This was also the holding in the case of **KalpanaRawal -V- Judicial Service Commission & 2 Others (2016) eKLR**:

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

An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a judge……

Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary decisions abound that judges should not recuse themselves on flimsy and baseless allegations.

The Court of Appeal proceeded to state that:

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

38. The same is the test in the case of **A.G. -V- Anyang Nyongo and Others (2007) E.A. 12** which I have cited supra where the Court stated:

"The Court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law and whether they are justifiable in relation to the reasons given for them. There is unfortunate tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgment. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for

recklessly attacking the integrity of judicial officer…….that this application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process……It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind……..While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour."

39. It is not unusual for parties to make allegation of bias based on the decision of the Court. The burden is on the applicant to prove that there is a likelihood of bias. The applicant alleges bias based on the language used by this Court when it delivered a ruling striking out the petition. She also alleged that the Court failed to record her proceedings. I have listened to the lengthy submissions by the applicant and I did not hear her give any evidence of bias or impartialityor any other allegation which would suggest that I have any interest in the matter or that I cannot be impartial. All she has expounded is what I have stated in the ruling. A litigant who has lost will do this with ease. Judges have refused to recuse themselves where parties have alleged bias on the part of the Judge arising from a determination on an issue before them. In **Hassan Omar Hassan & Another –V- Independent Electoral & Boundaries Commission & Others**, Judge L. Achode – (**supra)** where similar allegations were made against the Judge the Judge in dismissing the application stated that the application by the petitioner is critique of the decision of the Court which have gone against him. That the decision *per se* does not amount to evidence of bias o the part of the Court. She cited the case of **Re JRLexpCJL (1986) 161 CLR 342** at **352** cited in **Lakha J in Kaplan &Straton -V- L.Z. Engineering Construction and 2 Others (2000) eKLR** where it was stated:

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

40. Further Justice **A. Mushila in H.C. Petition No. 4 of 2017 Hon. Dickson Daniel Karaba -V- Hon. Kibiru Charles Reubenson & Others** where the applicant alleged that, 'the Judge is openly and unapologetically biased against him and playing the role of gate keeper for the 1st respondent, had replaced an order and that he had displayed the Judge as dishonest State officer and irredeemably biased against the applicant, had manipulated the record or falsified it in conscious scheme to refuse applicants case for recount of votes. That he was apprehensive that the impartiality and independence of the Judge have been irredeemably compromised amongst other allegations. The Judge held:

"In summary the reasons proffered by the petitioner are not likely to lead a reasonable observer who followed the proceedings to presume that the impartiality and independence of Court to have been imperiled or irredeemably compromised solely for the reason that it did not adopt the petitioner's arguments and that it did not rule in his favour. A reasonable person observing the events of 20th November, 2017 would not be wrong in presuming a sense of entitlement in the manner in which this instant application was brought, premeditation and in the language, a temperament particularly of the counsel for the petitioner, intimidation."

Despite the accusations, the Judge refused to recuse herself. These last two decisions are persuasive and show that no matter the allegations made against the Judge by litigants which they are entitled to make anyway, the test to be applied is not that of perception an ordinary person in Kutus town or suspicion by the litigant but that of a reasonable fair minded and informed observer or person. The case of **Wavinya Ndeti (supra)** which the petitioner relied on as well as the 1st and 2nd respondent it was stated that the standard of establishing bias is high and must be done with cogent evidence. The applicant has not

tendered such evidence. The ruling per se and the words used are not evidence of bias.

41. The petitioner raised issue that I failed to record her proceedings. It should be noted that it was after the Court read the ruling that she addressed the Court and stated that she was just wondering loudly. This was captured in the hand written notes. There was no allegation that the Court failed to record proceedings prior to that date and the allegation that I failed to record is disapproved by the record of my hand written notes which are available for scrutiny.

42. The petitioner stated that I rejected her submissions on the basis that she had not sworn an affidavit. In an application, a party swears an affidavit where she wishes to rely on facts. The affidavit contains statements of facts. The applicant raised facts in her submission. Where a party files grounds of opposition, what they are required to file are authorities. This is provided at **Order 51 rule 14 Civil Procedure Rules**. This holding was not based on an abstract but on the Law on applications. It provides:

> ***"A respondent who wishes to oppose any application may file a notice of preliminary objection and/or a replying affidavit and/or a statement of grounds of opposition. The party may also file a list of authorities. If a party raises facts in the reply then affidavit must be filed. Where the party seeks to rely on facts in response to an application he must swear an affidavit to include the facts. Where a party has not sworn an affidavit she will not be allowed to give statements of facts from the bar. That is the rule and not evidence of bias."***

The applicant in her affidavit has stated what I said in the ruling. The three eminent Judges of the Court of Appeal have looked at the allegations by the petitioner and were satisfied that the allegations were no proof of bias. Though the applicant stated that they had not filed any grounds for recusal,she had a prayer to have another Judge. The prayers were read by Mr. Kathungu for 1st and 2nd Respondent and they were: That the appeal be allowed. That the matter be heard before another Judge.

43. It must be concluded that by asking for another Judge they were asking the Court of Appeal to disqualify the Judge. In their submission the Petitioner has admitted that they complained of bias and that they had requested the Court to have matter proceed before another Judge. The petitioner never appealed against the decision. They appeared before me as directed by the Court of Appeal. The Court of Appeal never directed them to file the application for recusal before me. This was not stated anywhere in the Judgment. I am of the view that the Court of Appeal considered the allegation of bias and gave a determination. As such the allegation of bias and recusal was determined by the Court of Appeal. This is what the Judges stated in **Hon. Martha Wangari Karua -V- Independent Electoral and Boundaries Commission. & 3 Others Appeal No. 1 of 2017** Court of Appeal Nyeri:

> ***"Another ground that was "raised"(emphasis added) by the appellant is that the trial Judge used intemperate language, imported extraneous matters in the ruling and was biased. As a Court of record and having scrutinized the record of the proceedings before us and the rulings rendered by the trial Judge, we do not see anything to show that the trial Judge used inappropriate language or imposed extraneous issues in a manner that suggested any bias. She may have used unnecessary strong language to express her appreciation of the law and issues before her, but that per se cannot be construed to imply that she was biased. So we similarly reject that ground."***

44. There is nothing in the judgment to show that the applicant was directed to file the application for recusal before this Court. The Court of Appeal considered the allegation of bias exhaustively and gave a determination which was unanimous on that ground. It is futile to state that they had not raised the ground before the Court of Appeal. It is not a question of this Court hanging on to the matter, as submitted it is because this Court only gave a ruling like it had given others in honest and clean conscience and the applicant failed to convince three Judges of the Court of Appeal that I was biased.

45. The applicant had to demonstrate a reasonable apprehension of bias and that right minded person applying themselves to the question would conclude that the Judge was biased. The test is objective and is not the perception of the applicant but a fair minded and an independent observer. The three Court of

Appeal Judges who came up with a unanimous decision on the allegation of bias were independent, fair minded and informed observers who were not persuaded by the applicant that there was bias. The applicant is estopped from raising the same allegation before me having failed to persuade the Court of Appeal Judges and having not appealed. I am of the view that I need not say more on the issue of bias, I was put in the dock before the three Court of Appeal Judges, searched, tried and tested and found not wanting, I was given a clean bill of health on the allegation of bias. That decision binds me and the applicant in equal measure. I am persuaded by the statement by my sister lady Justice Stella Mutuku in a statement made in **Abdiwahab Abdullahi Ali -V- Governor, County Government of Garissa** where it was stated:

> ***"On last word of unsolicited advice to my brothers, legal counsels involved in this case; the same way this Court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, the same way the Court and the presiding officer demands respect from the parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practicing before this Court must submit to the rule of law. Any party who is not satisfied with a ruling of this Court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era when it used to be a "jungle out there."***

A party has no luxury to choose which orders of the judgment they will comply with. This may show a spirited effort to shop for a Judge who they hope would rule in their favour. They should have appealed or abide by the judgment. It is futile for the party to ask this Court to overrule the three Judges of the Court of Appeal on one aspect of the judgment and uphold the other. It was in the applicant's submission that this Court cannot overrule the Court of Appeal. I entirely agree with her.

46. I now come to the issue of *res judicata* which was raised by the Counsel for the 3rd and 4th respondents. The respondent has submitted that the applicant could not come to this Court and raise the same grounds. The applicant has submitted that recusal was not a ground before the Court of Appeal. It may not have been a ground but when you ask an appeal Court to order the matter to proceed before another Judge she must have laid grounds in support of that prayer. Her prayers before the Court of Appeal were that the ruling be set aside, appeal be allowed and matter be set down for hearing before another Judge. The Judges stated at page 42, 'Another ground that was raised by the appellant is that the trial Judge used intemperate language and imported extraneous matters.' A look at the supporting affidavit will show that these are same matters she has raised. These matters were raised in the Court of Appeal and a determination was made.

47. The doctrine of *res judicata* is addressed under **Section 7** of the **Civil Procedure Act** which provides:

> ***"No court shall try any suit or issue in which the mater directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

There are three grounds which must be established.

> (1) There is a former suit in which the same parties in the subsequent suit litigated that is Nyeri Election Petition Appeal No. 1 of 2017. The parties in the appeal were the same as those before me.
>
> (2) The matter in issue is directly or substantially in issue in the former suit,that is Nyeri Election Petition Appeal No. 1 of 2017.
>
> As can be seen from the passage I have quoted from the judgment the Court of Appeal dealt with the issue of bias and gave a binding determination.

(3) Court of competent jurisdiction had heard the matter and finally decided the matter in controversy.

48. This was also stated in case of **Maina Kiai and 2 Others -V- Independent Electoral and Boundaries Commission and 2 Others (2017) eKLR**. Supra.

> ***"The elements of res judicata are as follows:-***
>
> ***a. The former judgment or order must be final;***
>
> ***b. B. the judgment or order must be on merits;***
>
> ***c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and***
>
> ***d. there must be between the first and the second action identity of parties, of subject matter and cause of action."***

It was also stated in **Okiya Omtatah Okoiti-V- Communications Authority of Kenya & 14 Others (2015) eKLR:**-

> ***"For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title……The rationale behind the provisions of Section 7 above entrenching the doctrine of*** *res judicata* ***is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in OmondivsNational Bank of Kenya Ltd. and Others (2001)EA 177……***
>
> ***Para 22. Once they have been determined, they come to an end and that is why in E.T. vs Attorney General (supra) the Court stated as follows;***
>
> ***"The Courts must always be vigilant to guard against litigants evading the doctrine of*** *res judicata* ***by introducing new causes of action so as to seek the same remedy before the Court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction."***
>
> ***Para 24. The*** *locus classicus* ***of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson (1843) Hare 00, 115, where the judge says: Where given matter becomes the subject of litigation in, and of adjudication by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case.***
>
> ***The plea of*** *res judicata* ***applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

49. The doctrine was also considered in **John Florence Maritime Services Limited & Another -V- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR**, Court of Appeal

where it was stated:

> ***"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without*** *res judicata,* ***the very essence of the rule of law would be in danger of unraveling uncontrollably. The doctrine of*** *res judicata* ***has two main dimensions: cause of action res judicata and issue*** *res judicata****. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action*** *res judicata* ***extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."***

50. The doctrine is well settled. The issue of bias is res judicata having been determined by the Court of Appeal in this matter and between the same parties and there was no appeal. The allegation of bias and application for recusal are intertwined. Proof of bias will lead to recusal. The issue of bias was addressed conclusively by the Court of Appeal and should be laid to rest. If a party has litigated on an issue before a Court with competent jurisdiction and a decision has been made, the party should not be allowed to litigate on the same issue with the same parties. It amounts to a waste of precious judicial time and flies on the face of the overriding objectives in the Civil Procedure and even in the Elections Act for the expeditious and timely disposal of civil and electoral disputes. I am of the opinion that the matters raised in the application before this Court were substantially in issue before the Court of Appeal which determined them with finality as there has been no appeal. For a party to come before this Court seeking the same orders is an exercise in futility. The matter **is *res judicata.***

51. **Jurisdiction:**

The 3rd and 4th respondents raised the issue of jurisdiction when the matter came up in this Court on 5th March, 2018 as a preliminary objection. The notice of preliminary objection was however, withdrawn and the issue raised as a ground of opposition to the petitioners application. The counsel for the 1st and 2nd respondent also raised the issue of jurisdiction in his grounds of opposition. What the respondents are saying is that since this is an election petition which challenges the election of the governor, it is not a matter it is seized of under its jurisdiction as set out under **Article 165 (3)** of the **Constitution**. That the Court is clothed with special jurisdiction to hear and determine elections disputes under **Section 82 (2)** of the **Elections Act**. That the petition having been filed on 5th September, 2017, this Court lacks jurisdiction as the Court is enjoined to deal with the petition within a period of six months. That the **Constitution** at **Article 87 (2)** gives this Court the mandate to hear and determine the election petition and **Section 75 (2)** gives this Court the ability to hear and determine the election petition. It is contended that since the Petition was filed on 5th September, 2017 this Court had to exercise jurisdiction within a period of six months, the last date being 4th March, 2018. Simply stated the respondents are saying that the jurisdiction of this Court to hear the petition has lapsed.

The Counsel for the 1st and 2nd respondent submitted that this Court cannot hear the petition in contravention of the law and the Court of Appeal cannot confer that jurisdiction upon this Court.

52. For the 3rd and 4th respondent it was submitted that the petitioner expects some judicial sorcery which she says Court of Appeal can do without anchoring the same on any provision to extend jurisdiction.

53. That it is the principle of the Constitution that election Petitions are heard within set time lines. He referred this Court to the case of **Benjamin Ogunyo Andama -V- Benjamin Andola Andayi, C.A. Civil Application No. 24 of 2014 (2013) eKLR** where the Court was dealing with the issue of Constitutional timelines and constrains. It stated:

> ***"…..It is clear, that the Constitution, which is the supreme law is clear that the High Court has to settle election disputes concerning membership of national Assembly or in short Election Petitions in respect of National Assembly Elections within six months of the date of lodging the Petition and proceeds to direct parliament to enact legislation that would give full effect to that provision. It also says in Article 105 (3) that parliament shall enact legislation to establish mechanisms for timely settling of Electoral disputes. Thus the makers of the Constitution and the people of Kenya were clearly anxious to have Election disputes settled within a specific time frame and unlike the old Constitution where no time limitation was enshrined, the new constitution directs Parliament to ensure time limits are set out from the commencement to the finalization of the Election disputes both in the High Court and in the Court of Appeal and also in the subordinate courts in respect of count Assembly Elections……."***

He further cited the case of **Cornel Rasanga & Another -V- William Odhiambo Oduor** where the Court of Appeal made a similar holding and further stated that:

> ***"Once a petition has been lodged the clock starts ticking and within six months of lodging the petition a resolution must be made."***

54. He further cited **Basil Criticos -V- Independent Electoral and Boundaries Commission (I.E.B.C.) and 2 Others (2014) eKLR** where the Court of Appeal made a determination on here the statute sets timelines and stated:

> ***"Para [15] "……..A plain reading of this Rule shows that it does not provide for extension of time in regard to time limited by another statute, therefore, the applicant cannot get any help from Rule 4 of the Court of Appeal Rules. There is no other rule that provides for extension of time. Indeed, the Election's Act and Rules has provided specific timelines and clear guidelines. There is no room for extension of time as there is a specific period within which the appeal must be determined. The omission to provide extension of time is therefore not accidental but is a deliberate move, which cannot be countered by the exercise of the Courts inherent jurisdiction or the application of the oxygen principle. Indeed an interpretation adopting the strict timelines is consistent with the spirit of the Constitution as reflected by Article 87 that advocates for timely settlements of electoral disputes……."***

55. The other decision cited is **Ferdinard Ndungu Waititu –V- Independent Electoral and Boundaries Commission and 8 Others Court of Appeal (2013) eKLR.**

> ***"…….These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason. It is indeed they tyranny of time, if we may call it so. That means a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Elections Petition Rules be amended to bring about mechanisms of expediting trials. The Elections Act and the Rules made thereunder constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya……."***

56. Apart from the decisions of the Court of Appeal the counsel referred this Court to the Supreme Court of Kenya decision in **Lamanken Aramat -V- Harun Maitamei Lempaka & 2 Others (2014) eKLR** (Petition No. 5 of 2014) where it was stated:

> ***"……We would not agree with the opinion of counsel for the 1st respondent that the Appellate Jurisdiction Act (Cap. 9. Laws of Kenya) confers jurisdiction upon the Court of Appeal to remit an electoral-dispute matter back to the High Court after the six-month limit set out in Article***

105(1) and (2) of the Constitution has lapsed. The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes within six months; and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law.".

Para (140] "It is a commonplace that the Constitution is the supreme law of the land, in the terms of its Article 2 (1), which binds all persons and State organs. It follows that the Constitution is sovereign, and holds a place of superiority over any orders and decrees of a Court. Accordingly, the Court of Appeal could not confer jurisdiction upon the High Court to conduct a recount, as the jurisdiction of the High Court under Article 105 (1) and (2) of the Constitution, was in the first place contestable on the ground of expired timelines and would in any case have been already exhausted…..

[154] Upon an extensive consideration of the factor of timelines in the processing of electoral disputes, under the Constitution and the statute law, this Court has come to the conclusion that the jurisdiction of the Election Court is linked to timelines. Consequently , the trial Court lacked jurisdiction to entertain the electoral question remitted by the Court of Appeal, once its six-month mandate had lapsed……..."

57. He further submits that this Court retains a duty to itself and to the litigants it seeks to serve to determine its own jurisdiction. It is only by the exercise of jurisdiction that the Court is vested and can seek and be able to serve the dispensation of justice to the party it seeks to serve. The Counsel further relied on the case of **Rafiki Enterprises Limited -V- Kingsway Tyres (1996) eKLR**where it was stated that:

"Every Court has a duty to determine whether or not it has jurisdiction in the matter."

He also relied on **Patrick Musimba -V- National Land Commission & 4 Others (2015) eKLR and David Kosing -V- National Super Alliance 2017 eKLR** where the Courts made similar holding. He also relied on the Court of Appeal decision in **Owner of Motor Vessel "Lilian S" -V- Caltex Oil Kenya Ltd Civil Appeal No. 50 of 1989**, Court of Appeal where it was held:

"I think that 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 more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Counsel submits that he raised the issue of jurisdiction at the earliest possible opportunity. That the Court lacks jurisdiction to hear the matter or even to give a ruling on the application by the Petitioner.

58. The petitioner on her part submits that on jurisdiction, this is not a matter under the petition rules as six months has lapsed. That it is a hearing under clear and unambiguous order of the Court. That there is no room for the rules to apply where the hearing has been ordered by the Court of Appeal. That the respondent did not tell the Court of Appeal that they had made a decision which was not tenable though they were in Court when the judgment was delivered.

59. It was further submitted that the respondents were seeking the same orders they are seeking before this Court before the Supreme Court. That it was an afterthought to make an application before this Court when they failed to make the application before the Court of Appeal.

60. It is also submitted that it would be an injustice to deny a party the Constitutional right of appeal if a determination is made on the eve of the lapse of the six months. That there is nothing in the Constitution or the Elections Act which expressly provides for what should happen where the case was emitted back

for hearing. It could not have been the intention that the right of appeal becomes nugatory. The Court was urged to consider **Article 50** of the **Constitution** that right to fair hearing is absolute.

61. **Determination**:

I will deal with issue of jurisdiction since it was not addressed by Court of Appeal. The issue of jurisdiction was before me and as stated in the various authorities which were cited above, jurisdiction is everything and a Court seized of the matter is obliged to decide the issue right away before engaging itself into dealing with the matter. For these two reasons I will deal with the issue; In the words of **Nyarangi J. in Owners of Motor Vesel "Lilian S" -V- Caltex Oil Kenya Ltd.(supra)**; The importance of a Court in deciding the question of jurisdiction at the earliest opportunity is because a Judge will have no business handling the matter, the Judge must do the right thing and down his tools, he will not make one more move ifhe has no jurisdiction. The Court must therefore determine this issue of jurisdiction which is based on the ground that an election petition ought to be determined within six months.

62. **Timelines for determination ofElectoral Disputes:**

Article 87 (1) of the **Constitution** provides:

> ***"Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes. Article 105(1) of the Constitution provides:***
>
> > ***"The High Court shall hear and determine any question whether:-***
> >
> > ***(a) A person has been elected as a member of Parliament, or***
> >
> > ***(1) The seat of a member has become vacant."***
> >
> > ***(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.***
> >
> > ***(3) Parliament shall enact legislation to give full effect to this Article.***

63. Parliament enacted legislation to give effect to Article 87 of the Constitution and Article 105 in the Elections Act Chapter 7 of the Laws of Kenya. This legislation is the **Elections Act**. **Section 75** of the **Act** deals with **County Election Petitions**. It provides:

> ***"A question under subsection -1- shall be heard and determined within six months of the date of lodging the petition."***

Subsection -1- deals with the question as to the validity of an election of a County Governor.

64. The Chief Justice in accordance with **Elections Act** and the Rules made thereunder Gazettes the Courts and Judges where the disputes shall be heard and to hear them respectively. This Court was Gazetted vide Gazette Notice 9060 of 14th September, 2017.

65. This Court was supposed to hear and determine the dispute within six months of the date of lodging the Petition. The Petition was lodged on 5th September, 2017 and six months would have ended on 5th March, 2017. The jurisdiction of the High Court to hear electoral disputes is a special jurisdiction unlike the unlimited jurisdiction under **Article 165 (3) (a)** of the **Constitution**. The jurisdiction is both under the Constitution and the Elections Act. It is the intention of the **Constitution** and the **Election Act** that the electoral disputes are heard and determined within the timelines which have been set and Courts should therefore be wary to hear and determine the disputes within those timelines.

66. The Supreme Court has dealt with issue of timelines. In **Evans Kidero & 4 Others -V- Ferdinard Ndungu Waititu and Lemanken Aramat -V- Harun Maitamei Lempaka & 2 Others** which I have

quoted, (supra). The decision in the two authorities is that the Court of Appeal has no jurisdiction to extend the timelines for determination of the Election Petitions as provided in the **Constitution** and the **Elections Act**. That is the correct position. The Court of Appeal has no jurisdiction to extend the timelines for hearing and determination of the electoral disputes. In the **Aramat** case the High Court heard the petition and delivered its judgment. The Court of Appeal set aside the judgment and decree and substituted it with an order for recount. In the Supreme Court the issue of jurisdiction was raised. The Supreme Court held that jurisdiction of Election Court is linked to timelines and consequently, the trial Court lacked jurisdiction to entertain the electoral question remitted by the Court of Appeal once its six month mandate has lapsed. Under **Article 163 (7)**of the**Constitution** provides that*"All Courts other than the Supreme Court,are bound by the decisions of the Supreme Court."*

67. As I have pointed out, the issue of jurisdiction was not raised before the Court of Appeal. Though this be the case, I have to determine why the Court of Appeal had to remit the hearing to this Court. I have no doubt in my mind that when the three Judges of the Court of Appeal gave the Judgment they were fully aware of the decision of the Supreme Court in **Lemanken Aramat -V- Harun Maitamei Lempaka & 2 Others** (**supra**). My view is that the facts in this petition are distinguishable from those in **Aramat** case. I will endeavor to point out this facts.

68. The first issue is that the appeal to the Court of Appeal was on a ruling of this Court based procedural technicality. The ruling was given within the time frame of six months and determined the petition. Though the ruling was on an interlocutory application the outcome had the effect of determining the petition. **Section 80 (3)** of the **Elections Act** gave Court power to determine the application. It provides:

> ***"Interlocutory matters in connection with a petition challenging result of Presidential, Parliamentary or County elections shall be heard and determined by the election Court."***

69. The Petitioner filed an appeal based on that determination. **Section 85 A(1)** and **(2)** of the **Elections Act** provides:

> ***"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the Office of the County Governor shall lie to the Court of Appeal on matters of law only and shall be……***
>
> ***(2) An appeal under sub-section (1) shall act as a stay of the certificate of the election Court certifying the results of an election until the appeal is heard and determined."***

70. It should be noted that under **Rule 32 of the Election (Parliamentary and County Elections) Petition Rules, 2017** it is provided:

> ***"An appeal from the Judgment and decree of the High Court in a Petition concerning the membership of the National Assembly, Senate or Office of County Governor shall be heard and determined under the Court of Appeal Rules."***

The appeal by the petitioner was not against the Judgment and decree of this Court. It was under **Section 85 A (1) and (2)** of the **Elections Act**. The Section states further action by the Court is stayed pending the outcome of the Appeal. Although the Section does not expressly state that the proceedings before the High Court are stayed, this Court must give a wider interpretation of the stay given under the Section. It must be telling the Court that you are not through with the matter yet. It states that the Court must wait before it certifies the results of an election. My opinion is that the minute a party files an appeal on points of law, it operates as a stay of execution of the ruling and by extension, a stay of the proceedings pending the outcome of the appeal.

71. It then follows that the proceedings in this Court were stayed and the effect was that by the Court Appeal remitting the matter to this Court, it has to proceed from where it had stopped from the date when the ruling was delivered. The Court then resumes its jurisdiction from the date that the Court of Appeal directed the parties to come back to this Court and proceed. The Court of Appeal stated:

"We direct the parties to appear before Gitari, J. on 5th March, 2018 for directions on hearing and disposal of the petition".

72. These circumstances are different from those in the decision of Supreme Court in Aramat case. It is a wrong interpretation of the decision as the Court of Appeal did not extend the jurisdiction ofthis Court. It is also a wrong interpretation to state that the Court of Appeal has given this Court jurisdiction in its judgment and that there is a vacuum as to what should happen in the event that the Court gives such a determination. It is the intention of the Constitution that electoral disputes be heard expeditiously and it is not expected that a ruling like the one which this Court gave would be given on the eve of the expiry of six months.

73. In the decision of the Supreme Court in the case of **Aramat** the Court of Appeal had directed that the case proceeds before another Judge. In this petition the Court Appeal directed that it be heard by myself being the Judge who was gazette under **Rule 6** of **Elections (Parliamentary and County Elections) Petitions Rules** which provides:

"An election Court shall be properly constituted to hear and determine:-

(a) A petition in respect of an election of a member of Parliament or to the office of governor, if it is composed of one High Court Judge

(b) ……..

(2) The Chief Justice may:-

(a) In consultation with the Principal Judge of the High Court designate Judges for the purposes of sub-rule (1) (a).

(b) …….

(3) The Chief Justice shall publish the name of the Judges and Magistrates designated under Sub-rule 2 in the Gazette and in at least one newspaper of national circulation."

I have pointed out earlier that I was gazette to hear this petition.

74. I should also point out that unlike the Supreme Court decision in the case of Aramat, this case had not been heard and determined on merits. In the case the Election Court had heard the case and given a Judgment. The Court of Appeal ordered a recount and scrutiny of votes and the matter to proceed before another Judge. There was also an issue that the petition was filed out of time. These facts are different from the circumstances prevailing in this case. The Supreme Court emphasized that compliance with timelines is a constitutional principle.

75. In conclusion on the issue of jurisdiction, I am of the opinion that the Court of Appeal did not extend the jurisdiction of this Court. The appeal by the Petitioner which was based on a ruling of this Court based on points of law automatically triggered a stay of the proceedings in this Petition pending the outcome of the appeal. The Court of Appeal gave a determination. This Court is therefore seized of jurisdiction to hear and dispose off the petition as directed by the Court of Appeal.

76. **Conclusion**:

I find that on the application for recusal by the petitioner, it has no merits. The application flies on the face of the determination on the issue by the three Judges of the Court of Appeal which binds the petitioner as she did not appeal against the decision.

77. In view of the reasons given, I hold that this Court has jurisdiction to hear and dispose off the petition. Since the petition was filed on 5th September, 2017 and the ruling was delivered on 15th November, 2017,

a period of two months and ten days, there were still three months and twenty days within which this Court has jurisdiction to hear and determine the matter. This time starts running from 5th March, 2018 when the parties were ordered to appear before this Court by the Court of Appeal.

78. I will therefore proceed to give directions as ordered by the Court of Appeal.

79. I make no orders as to costs on this application as the respondents had also raised a substantive issue on jurisdiction which has been unsuccessful. Each party will bear its own costs.

Dated and delivered at Kerugoya this 6th day of April, 2018.

L. W. GITARI

JUDGE

Ruling read out in open Court, M/S Doreen Muisyo for Petitioner, Mr. Kathungu for 1st and 2nd Respondents, Mr. Nyamondi and Mr. Kamotho Waiganjo for the 3rd and 4th Respondents, court assistant Naomi Murage this 6th day of April, 2018.

L. W. GITARI

JUDGE

06.04.2018