REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISON

HCCA NO. 7 OF 2016

JOHNSTONE KASSIM.....1ST APPELLANT/RESPONDENT

ALEX MUNYASYA MUUMBO.....2ND APPELLANT/RESPONDENT

CAROLYN KALUNDE MUUMBO.....3RD APPELLANT/RESPONDENT

V E R S U S

BILLY MBUVI MUUMBO.....1ST RESPONDENT/APPLICANT

MWINZI MUUMBO.....2ND RESPONDENT/APPLICANT

(IN THE MATTER OF BURIAL OF T. M. (DECEASED)

(Being an appeal from the Judgment and Decree of the Honourable Resident Magistrate P. Muholi, Delivered on the 13th January 2016 in Milimani CMCC No. 3773 of 2015)

RULING

The Court delivered judgment on appeal from Trial Court's decision on 6th August 2018.The application of Notice of Motion filed on 6th August 2018 under certificate of urgency was placed before this Court on 30th August 2018, sitting in Chambers as Duty Court, and parties sought directions on how to proceed. Counsel for Applicants intimated to the Court vide letter dated 27th August sought that the Court recuse itself before hearing and determination of the instant application and in default the Applicants were to file the Application of 27th August 2018. The Court declined to do so and advised any/all parties with details on bias of the Court and/or any contact with any of the parties be filed in form of affidavits.

The parties agreed by Consent to proceed on 25th September 2018.The Respondents and parties were to file affidavits and Replying Affidavits respectively.

PLEADINGS

APPLICANTS' CASE

The Motion I am tasked to determine is dated 24th August, 2018 filed on 27th August 2018 replicating the application filed on 6th August 2018 and contents of letter dated 24th August 2018 filed on 27th August 2018. The same was brought under Certificate of Urgency on the following grounds:-

a) That on the 6th August 2018 Justice Honourable Lady Justice M. Muigai delivered a Judgment wherein the Honourable Justice erroneously ordered that the remains of Timothy Mwandi Muumbo be interred in Land Parcel No. Mwingi/Nzeluni/318 (hereinafter referred to as Nzatani) Contrary to the wishes of the deceased.

b) That Applicants have reasonable apprehension that Justice Muigai is not able to handle this matter in a dispassionate manner having already been informed of the fate of the application dated 6th August 2018 by the Respondents scheduled for adjudication before her.

c) That it is a fundamental constitutional principle that the court has to ensure and it has to be seen to conduct a fair hearing and the litigant has a fundamental right to a neutral Judge, who is not apparently biased against that litigant's cause.

d) That there is a reasonable probability that Justice Muigai is biased in favour of the Respondents herein.

e) That the Applicant's herein will suffer irreparable detriment if the orders sought herein are not granted since their dispute will be irregularly determined by what they perceive to be an impartial court, which in turn does not meet the constitutional threshold of fair hearing enshrined in **Article 50(1) of the Constitution.**

f) That it would serve the interests of justice and would not prejudice the Respondent's interests if the matter is certified as urgent and the application placed before Justice Muigai for adjudication on a priority basis in chambers in the presence of the Respondent's counsel.

In that Motion the Applicant sought the following orders:-

i) That the Hon. Lady Justice Muigai be pleased to recuse herself from hearing and /or rendering any further determination in **CIVIL APPEAL 7 OF 2016 – JOHNSTONE KASSIM & ORS –Vs- BILLY MBUVI MUUMBO & ORS.**

ii) That this Honourable Court be pleased to direct that the matter be placed before the Resident Judge of the High Court of Kenya at Family Division for directions in respect of the hearing of the application dated 6th August 2018.

The application was based on the following grounds:-

i) That on the 6th August 2018 Justice Honourable Lady Justice M. Muigai delivered a Judgment wherein the Honourable Justice erroneously ordered that the remains of Timothy Mwandi Muumbo be interred in Land Parcel No. Mwingi/Nzeluni/318 (hereinafter referred to as Nzatani) contrary to the wishes of the deceased.

ii) That the orders issued by the learned Judge are a gross deviation from the wishes of the deceased and also the wishes of the majority of the family members who lived with and catered for the deceased during his lifetime.

iii) That the applicants herein prior to the Judgment being delivered heard the Respondents bragging as to how the Judgment shall be in their favour.

iv) That albeit the fact that the Applicants' communicated their suspicion as to the court's bias to their advocates on record: the advocates advised the applicants that as the officers of the court they had faith in the legal system and that justice would be meted out and as such the apprehension of the applicants was not brought forth to the court's attention.

v) That of interest further is the fact that from the time the Honourable Court took over the matter on 14th June 2018 from Justice Ougo; the first thing the Honourable Court rendered a decision on was that the wishes of the deceased cannot be ascertained from the court's perusal of the file on the 19th of June 2018.

vi) That further to the aforementioned the applicants herein have openly been told by the 1st Respondent that the instant application before the court dated 6th August 2018 shall not succeed and neither will the **Succession Cause No. 1673 of 2016** before Honourable Justice Muigai. Can such warnings be disregarded in light of the earlier statements that were made and were affirmed by the Court?

vii) That from the foregoing in depth elaboration it is prima facie that the apprehension of biasness is reasonable and as such the applicants are apprehensive that justice that ought to be dispensed by a neutral arbiter will not be done so by this Honourable Court.

viii) That natural justice requires that a Judge shall disqualify herself in any proceeding in which her impartiality might reasonably be questioned as it has been questioned herein.

ix) That the Applicants herein are apprehensive that they will suffer irreparable detriment if the orders sought herein are not granted since their dispute will be irregularly determined by a impartial court which does not meet the constitutional threshold of fair hearing enshrined in **Article 50(1) of the Constitution**.

LETTER FROM APPLICANTS TO COURT

On 24th August 2018 the Applicant wrote a letter addressed to this Honourable Court stating as follows:-

"Reference is made to the above captioned matter as was held in Attorney General vs Anyang' Nyong'o and others (2007) 1 EA 12: 'Where a party has an issue with a Judge or any Judicial Officer the well settled practice is as follows:-

'The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the Judge or the Judges in the presence of the opponent. The grounds for the recusal are put to the Judge who would then be given an opportunity, if sought, to respond to them. In the event of the recusal being refused by the Judge the applicant would, if so advised, move the application in open court' (We attach a copy the said ruling for ease of reference)."

APPLICANTS' AFFIDAVITS

In the Supporting Affidavit sworn on 24th August 2018 the Applicant stated:-

i) That on the 6th August 2018 Justice Honourable Lady Justice M. Muigai delivered a Judgment wherein the Honourable Justice erroneously ordered that the remains of Timothy Mwandi Muumbo be interred in Land Parcel No. Mwingi/Nzeluni/318 (hereinafter referred to as Nzatani) Contrary to the wishes of the deceased.

ii) That the orders issued by the learned Judge are a gross deviation from the wishes of the deceased and also the wishes of the majority of the family members who lived with and catered for the deceased during his lifetime.

iii) That prior to the Judgment being delivered we heard the Respondents bragging as to how the Judgment shall be in their favour.

iv) That we communicated the said information to our advocate on record but the advocates advised us that as the officers of the court they had faith in the legal system and that justice would be meted out and as such the apprehension of the applicants was not brought forth to the court's attention.

v) That it was thus an affirmation of our fear when not only was the Judgment delivered in the Respondents' favour but the exact things the Respondents were propagating as to the contents of the Judgment was exactly what was pronounced by the court.

vi) That of interest further is the fact that from the time the Honourable Court took over the matter on 14th June 2018 from Justice Ougo; the first thing the Honourable Court rendered a decision on was that the wishes of the deceased cannot be ascertained from the court's perusal of the file on the 19th of June 2018.

vii) That further to the aforementioned the applicants herein have openly been told by the 1st Respondent that the instant application before the court dated 6th August 2018 shall not succeed and neither will the Succession Cause No. 1673/2016 before Honourable Justice Muigai. Can such warnings be disregarded in light of the earlier statements that were made and were affirmed by the court?

A further affidavit was sworn by **Mwinzi Muumbo** on 29th September 2018 as follows:-

i) That on or about 25th July 2018 I met with the 1st and 2nd Appellants in Mwingi kwa DC Kianda Hotel pursuant to the court's sentiments issued on 20th July 2018 for parties to see whether they can reach an understanding over the burial dispute. The appellants approached me.

ii) That in the meeting, the 1st Appellant asked me to agree for the deceased to be buried in Nzatani but I declined stipulating that the wishes of the deceased should be enforced.

iii) That on disagreeing with the proposal in paragraph 4 above the 1st Appellant categorically and emphatically informed me that we shall never win the burial case or any other case before Hon. Justice Muigai as the decision has already been made and that I should stop wasting money with the Advocates.

iv) That I was further told by the 1st Appellant that all the efforts I was making in regards to the cases before Justice Muigai were useless.

v) That the 1st Appellant later resulted in abusing me as being stupid man and threatened met hat bed things should be done to me, inferring to witchcraft.

vi) That on being threatened I left and relayed this information to the 1st Applicant and my advocate on record who took this lightly and was confident that justice would be done as we were relaying the truth about the deceased.

vii) That expectedly the judgment was delivered on 6th August 2018 and just as retorted by the 1st Appellant it was in their favour.

viii) That how the Appellants knew of the outcome of the Judgment prior to its pronouncement is subject to speculation but I firmly believe that this Honourable Court was compromised.

RESPONDENTS' AFFIDAVITS'

On 24th September 2018 one **Alex Munyasya Muumbo** swore a Replying Affidavit to the Applicant's/Respondents' Notice of Motion dated 24th August 2018 and in response to 2nd Respondent's/Applicant's Further Affidavit dated 21st September 2018 where he averred:-

i) That I wish to state that on the 25th day of June, 2018, pursuant to the trial Court's suggestion that was made on 20th July, 2018 that we make efforts to meet and see whether we could come up with an agreement regarding the matter of our late father, Johnstone Kassim Muumbo, Richard Muthengi Matiti and myself travelled all the way from Nairobi to Mwingi town in order to meet up with our brother Mwinzi Muumbo.

ii) That on the 25th day of July 2018, we arrived in Mwingi at around 2.30pm where upon I called Mwinzi Muumbo and informed him that we had arrived and had parked at SATSON PETROL STATION.

iii) That after travelling for a distance of about one (1) KM from Mwingi Town towards Garissa Town, we arrived at a Restaurant known as JAMRISE RESTAURANT and we were welcomed by the proprietor who led us to a lounge upstairs where upon we immediately ordered something to eat.

iv) That it is absolutely not true that Johnstone Kassim Muumbo informed Mwinzi Muumbo that the burial case had already been determined in our favour and that therefore, they cannot win that particular burial case of any other case that was being handled by the Honourable Lady Justice Muigai as pleaded in Paragraphs 5 and 6 of the said Further Affidavit because if it were so, then what would have been the need for us to meet and seek to agree with them (ie, Mwinzi Muumbo and Billy Mbuvi Muumbo) on the way forward?

v) That at no time did by brother Johnstone Kassim Muumbo utter abusive words to Mwinzi Muumbo as pleaded in Paragraph 7 of his Further Affidavit dated 21st September 2018.

The third Respondent **Carolyn Kalunde Muumbo** went further to file her Replying Affidavit to the Applicants'/Respondents' Notice of Motion application dated 24th August 2018 where she stated as follows:-

i) That I wish to categorically state that paragraphs 2,3,7,8,9,10 and 11 of the Supporting Affidavit are all challenging the Court's Judgment and should form part of an appeal and not an Application for recusal.

ii) That in response paragraphs 4, 6 and 12, I wish to state that the parties herein were not talking to each other before the Trial, during the trial, before the Judgment was delivered or even after the Judgment was delivered other than on one occasion before the Judgment was delivered when a meeting was scheduled between the Applicants and ourselves BUT the Applicants completely refused to engage us for whatever reasons best known to themselves.

iii) That it is absolutely not true as alleged in paragraph 4 of the Supporting Affidavit that my Co-Respondents and I bragged about the outcome of the Judgment and this allegation by the Applicants lacks substantiation and/or proof, it is neither here nor there and should be out rightly rejected by this Honourable Court.

iv) That further to paragraph 11 afore, I wish to state that that allegation is vague as the Deponent of the Affidavit (Billy Mbuvi) does not specifically state who was given the alleged information and by whom, and also, when the alleged information was given. It is Trite Law that he who alleges a fact must prove the same.

v) That further to paragraphs 11 and 12 afore, I wish to state that my Co-Respondents and I appeared in Court along with the Applicants on the 31st July 2018, and patiently waited for the delivery of the Judgment when the same was deferred and the Applicants never at any one given point in time alluded to the fact that my Co-Respondents and I were in contact with any Judicial Officer.

vi) That I vehemently deny the contents of paragraph 6 of the Supporting Affidavit and state that indeed the Judgment was no entirely delivered in our favour. I wish to reiterate that our prayer to Court was that all the Children of the Deceased be equally involved in the burial of the Deceased yet the Court's decision was that the 2nd Applicant who is the eldest son, does lead all the children of the Deceased in the burial.

vii) That further to paragraph 14 afore and in response to paragraph 4 of the Supporting Affidavit, I wish to state that if at all the contents of the Judgment were ever communicated to the Applicants by the Respondents before the delivery of the Judgment, which is totally denied, them it was the duty of the Applicants to raise an alarm and/or bring that information to the Court's attention or even complain to the Respondents' Counsel and their failure to do so can only mean that those allegations are an afterthought.

viii) That the contents of Paragraphs 7, 8 and 9 of the Supporting Affidavits are mere apprehensions which are not supported in the Affidavit and which do not have basis in law. It is surprising that the Applicants are only raising these issues after the Judgment has been delivered yet they were at all material time represented by Counsel (two Advocates) who should/could have raised those issues and/or an objection at the appropriate time BUT they deliberately failed to do so.

ix) That I also wish to point out to the Court that the Applicants have formed a habit of complaining and/or "throwing tantrums" whenever a Court rules in my favour as was the case in the Subordinate Court when Orders were granted in my favour and a baseless complaint was made by the Applicants against the Honourable Magistrate who was on duty.

The first Respondent **Johnstone Kassim Muumbo** went further to file his Replying Affidavit to the Applicants' / Respondents' Notice of Motion application dated 24th August 2018 where he states as follows;

The allegation that the judgment of 6th August 2018 was erroneous and contrary to wishes of the deceased is misconceived. Further the decision to bury the deceased at Nzatani was reached because it was the deceased's ancestral home in which he established burial site for the family.

In response to paragraph 2 of the application, it is in fact the deceased who took care of the Applicants and not the reverse as alleged by them. The slight fact that they lived with the deceased does not give them the right to mistreat the deceased in his death by going against his

wishes which are also shared by the majority of the deceased's family and the larger Nzunga family which is to have him buried in his ancestral home.

He vehemently denied what is alleged in paragraph 3 of the application and put the applicants on strict proof of the same. The allegation in paragraph 4 is a mere afterthought. The Applicants should have raised any issues of biasness during the course of proceedings and not after the Judge had concluded the matter and judgment issued.

Under ground 5 in alleging the Applicants fears as to alleged bias of the Court were confirmed when judgment was delivered was without merit. The Applicants did not offer any evidence in support of the assertions alleged in Clause 6 of the grounds.

The allegation in Paragraph 7 is misconceived. The Court made its observation in form of rhetorical question but was not in any way seeking direction from parties or their advocates. The Applicants should be put on strict proof thereof as to biasness of the Court from the onset as alleged.

That he seeks to rebut the contents of ground 11 of the application and puts the Applicants on strict proof thereof and they ought to produce evidence of the malicious allegation. That due process of the law was followed and any contrary view should be supported with evidence and not mere allegations.

On 25th September 2018 **Richard Matiti Muthengi** swore a Replying Affidavit to the Applicants/Respondents' Notice of Motion Application dated 24th August 2018 where he stated:-

> i) That on the 25th day of June 2018, I accompanied Johnstone Kassim Muumbo and Alex Munyasya Muumbo (the 1st and 2nd Appellants/Respondents herein) to Mwingi Town in order to meet up with their brothers Mwinzi Muumbo and Billy Mbuvi Muumbo.
>
> ii) That I can state for a fact that all along, Johnstone Kassim Muumbo, Alex Munyasya Muumbo and Mwinzi Muumbo were all in a jovial mood and were conversing well and there was no indication from either of them that there was something wrong.
>
> iii) That I did not at any one given point in time hear Johnstone Kassim Muumbo or Alex Munyasya Muumbo abuse or threaten Mwinzi Muumbo in any way or brag about the outcome of the burial Appeal and as such, the contents of the Further Affidavit dated 21st September 2018, sworn by Mwinzi Muumbo are a falsehood.

SUBMISSIONS

APPELLANTS' SUBMISSIONS

The Appellants through their counsel submitted that the principles under which a Judge can disqualify himself from a matter were stated in **REPUBLIC Vs MWALULU &8 OTHERS [2005]1 KLR 1** where the Court of Appeal held as follows:-

> ***a) when the courts are faced with such proceedings for the disqualification of a Judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the fact constituting bias must specifically be alleged and established.***
>
> ***b) In such cases the court must carefully scrutinize the affidavits on either side remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are opt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.***
>
> ***c) The Court dealing with the issue of disqualification is not indeed, it cannot go into the question of whether the officer is or will be actually biased. All the court can do is to carefully examined the facts draw an inference as any reasonable and fair minded person would do that the Judge is biased or is likely to be biased.***
>
> ***The Appellants stated that if the Respondents/Applicants are aggrieved by the decision of this Honourable Court, then the remedy available is an appeal and not an application for recusal. It is our submission that this Honourable Court is functus officio and cannot determine these matters.***

They relied on **JOSEPH MAINA THEURI Vs GITONGA KABUGI & 3 OTHERS [2013]eKLR** where the Court found as follows:-

> ***"The grounds advanced for recusal in the instant case have not been shown to originate from a source outside the case itself; they are not extra judicial source. The grounds as alleged may be summed up to include that the presiding judge mad interlocutory orders in favour of the claimant against the respondents' opposition; the respondents are not satisfied with some of the interlocutory orders allegedly that the judge may not have considered some of the material before the court and generally that the respondents are not happy with the interlocutory orders.***
>
> ***The court has carefully considered the grounds as submitted for the respondents. The court finds that the grounds are the kind of matters that might entitle the respondents to apply for review or to invoke appellate jurisdiction. The court holds that such matters and grounds that would entitle a litigant to invoke the appellate jurisdiction are not in themselves sufficient grounds for a judges recusal from continued hearing and determination of the case before the court."***

The 1st Respondent/Applicant avers at paragraph 4 that prior to the judgment being delivered, "they heard the respondents bragging as to how judgment shall be in their favour. The 2nd Respondent's/Applicant's further affidavit sworn on 21st September 2018, the 2nd Respondent shifts from having "heard" to "being informed" and states as follows:-

> **a) That on disagreeing with the proposal in paragraph 4 above, the 1st Appellant categorically and emphatically informed me that we shall never win the burial case or any other case before Hon. Justice Muigai as the decision has already been made and that I should stop wasting money with advocates. (See paragraph 5 of the affidavit).**
>
> **b) That I was further told by the 1st Appellant that all the efforts I was making in regards to the cases before Justice Muigai were useless. (See paragraph 6).**
>
> **c) That on being threatened I left and relayed this information to the 1st Applicant and my advocate on record who took this lightly and was confident that justice would be done as we were relaying the truth about the deceased. (See paragraph 8)**
>
> **d) That expectedly the judgment was delivered on 6th August 2018 and just as retorted by the 1st Appellant it was in their favour. (See paragraph 9)**
>
> **e) That how the Appellants knew of the outcome of the judgment prior to its pronouncement is subject to speculation but I firmly believe that this Honourable Court was compromised. (See paragraph 10).**
>
> **The appellants further submitted that the application is based on unjustified imaginations the Applicants having failed to prove the allegations as required.**

We pray that the court is guided by **A-Z SHAH T/A FASHION SPOT Vs JAN MOHAMMED INVESTMENTS LTD & ANOR [2009]eKLR** in which case the court further noted as follows:-

> ***"It is obvious that in their anxiety concerning their suits, litigants are bound to be suspicious and this may result in very fertile and unjustified imagination particularly when things do not appear to go their way .... The test however is not what the applicant thinks or imagines but what is reasonable but what a reasonable and fair minded person would infer from the circumstances."***

The Appellants'/Respondents' relied on **JOSEPH MAINA THEURI Vs GITONGA KABUGI & 3 OTHERS [2013]eKLR** where the court held as follows:-

> ***"Judicial bias is the judge's bias towards one or more of the parties to a case over which the judge presides and judicial bias is not enough to disqualify a judge from presiding over a case unless the judge's bias is personal or based on same extra-judicial reason."***

They further prayed for the application to be dismissed with costs as they concluded with the finding in **KAPLANA H. RAWAL Vs JUDICIAL SERVICE COMMISSION & 2 OTHERS [2016]eKLR** in which the court held as follows:-

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

APPLICANTS' SUBMISSIONS

The counsel for the Applicants stated the principles envisaged for recusal of Judicial Officers as follows-

> **a) Applicants' grounds for seeking recusal are simple. The Respondents appear to have known the outcome of the judgment delivered on 6th August 2018 prior to its delivery. What does this mean? To the applicants' minds it appears as if this Honourable Court was compromised and in retrospect the issue of apparent bias and pre determined decisions made by this court prior to the parties presenting their case becomes apparent. My lady we have to take cognisance of the fact that this is a family dispute and a well publicised matter especially from where the parties hail from and word spread like bush fire in such small set ups. My lady we have filed the affidavit of the 2nd applicant herein who has been brave enough to aver what he was told despite the intimidation and threats meted out against them.**
>
> **b) The question then that suffices is why wasn't this information brought forth prior to the delivery of the judgment on 6th August 2018? My lady as averred on the grounds advanced in the application dated 24th August 2018 and the affidavit thereto the applicants' communicated their suspicion as to the court's bias and impropriety to their advocates on record; the advocates advised the applicants that as the officers of the court they had faith in the legal system and that justice would be meted out and as such the apprehension of the applicants was not brought forth to the court's attention. As such the only way that the applicants' apprehension was affirmed is when the same exact thing that the respondents were perpetuating was affirmed by the court in its delivery of judgment.**
>
> **c) The Applicants are not an investigative body nor do they have any investigative authority over a judicial officer that would have assisted them affirm their suspicion prior to the delivery of judgment and neither are they able to bring tangible proof**

before this court as to whether indeed there was contact between the court and the respondents and whether the court was compromised or financially or otherwise. These are facts that can only be affirmed by an investigative arm.

It was held in the Supreme Court application in **Petition 4 of 2012** that:

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

In the American case, **PERRY Vs. SCHWARZENEGGER, 671 F. 3d 1052 (9TH CIRC. FEBRUARY 7, 2012)** it was held that the test for establishing a judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.

In carrying out that duty, the court needs to bear in mind the following words of Sachdeva J. in **KARANJA Vs REPUBLIC, MISC. CRIMINAL APPLICATION No. 199 OF 1976**;

> ***"I am well aware of the maxim that justice must not only be done but seen to be done. Justice is administered by persons who had their ample share of human weaknesses and frailties ...."***

In **KAPLAN & STRATTON Vs. L.Z. ENGINEERING CONSTRUCTION LIMITED & 2 OTHERS, [2000] KLR 364**, at page 370, Lakha J.A. held as follows-

> ***"To sum up, the present state of the law in relation to apparent bias, as it applied to judges, is that there is automatic disqualification for any judge who has a direct pecuniary or proprietary interest in any of the parties or is otherwise so closely connected with a party that he can truly be said to be a judge in his own cause. Apart from that, if an allegation of apparent bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, h e might be predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issue."***

Lakha J.A. went on to note that when the court was carrying out its function of weighing the allegations of bias, it must nonetheless bear in mind the following considerations, as set out by Mason J. in **RE: JRL EXPARTE CJL (1986) 161 CLR 342, at page 352."**

In **BERNARD CHEGE MBURU Vs CLEMENT KUNGU WAIBARA & 2 OTHERS [2011]** Justice Ochieng restated the principles envisaged in an application for recusal of a judge on grounds of likely biasness as hereunder:-

In **KING WOOLEN MILLS LIMITED & ANOTHER Vs STANDARD CHARTERED FINANCIAL SERVICES LTD & ANOTHER, CIVIL APPEAL No. 102 of 1994.** The Court of Appeal concluded that for a judge to disqualify himself a reasonable and fair minded person sitting in court, and knowing all the relevant facts, would have a reasonable suspicion that a fair trial for the appellants would not be possible.

In the case of **LOCABAIL LTD Vs BAYFIELD PROPERTIES [2000]1 ALL E.R 65**, at page 78, that;

> ***"But the question which now needs to be answered is who is to determine what the reasonable and fair minded person sitting in court would say, if faced with the situation in which a judge is being asked to disqualify himself. Surely, the court would not be expected to go out into the streets to look for such a reasonable and fair-minded person."***

The answer is to be found in the case of **REPUBLIC Vs MWALULU & 8 OTHERS [2005] 1 KLR 1,** wherein, the Court of Appeal restated the following words of **Tunoi J.A in REPUBLIC Vs DAVID MAKALI & 3 OTHERS, CRIMINAL APPLICATION Nos. NAI 4 & 5 of 1994:-**

> ***"That being the position as I see it, when the courts, in this country, are faced with such proceedings as these [i.e. proceedings for the disqualification of a Judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice."***

DETERMINATION

This Court outlined the substantive application and contents of affidavits to capture in full the gist of the matter at hand. Both parties through Counsel have ably elucidated on the law of bias and/or recusal of judicial officer(s) from hearing a matter before it.

All litigants are guaranteed right to fair trial provided by **Article 50 of Constitution of Kenya 2010** and in the event any party is aggrieved it

is within their right to raise it with the Trial /Appellate Court as in the instant application. The contents of the application disclose allegations that the aggrieved party /Parties have not been accorded fair hearing and impartial decision. The parties are entitled to voice their dis content and the Court ought to examine the allegations if there is basis for the orders sought or not.

The Grounds of the instant application are;

> a) That on the 6th August 2018 Justice Honourable Lady Justice M. Muigai delivered a Judgment wherein the Honourable Justice erroneously ordered that the remains of Timothy Mwandi Muumbo be interred in Land Parcel No. Mwingi/Nzeluni/318 (hereinafter referred to as Nzatani) contrary to the wishes of the deceased.

This Court conducted proceedings and read judgment on 6th August 2018, the Respondents made oral application or stay of execution and the Court said a formal application be filed and served before hearing. The instant application was filed after conclusion of proceedings culminating with the judgment.

Therefore, this Court is *functus officio* with regard to discussing, amending varying or in any way interfering with the decision of 6th August 2018. The issue regarding the process of hearing the appeal culminating to the outcome are matters subject of the Appellate Court. The merits and demerits of the decision can only be canvassed before Court of Appeal. This includes the issue of allegation of bias by this court.

> b) That the applicants herein prior to the Judgment being delivered heard the Respondents bragging as to how the Judgment shall be in their favour.

That albeit the fact that the Applicants' communicated their suspicion as to the court's bias to their advocates on record: the advocates advised the applicants that as the officers of the court they had faith in the legal system and that justice would be meted out and as such the apprehension of the applicants was not brought forth to the court's attention.

That of interest further is the fact that from the time the Honourable Court took over the matter on 14th June 2018 from Justice Ougo; the first thing the Honourable Court rendered a decision on was that the wishes of the deceased cannot be ascertained from the court's perusal of the file on the 19th of June 2018.

That further to the aforementioned the applicants herein have openly been told by the 1st Respondent that the instant application before the court dated 6th August 2018 shall not succeed and neither will the Succession Cause No. 1673/2016 before Honourable Justice Muigai. Can such warnings be disregarded in light of the earlier statements that were made and were affirmed by the Court?

These averments constitute alleged bias by the Court during proceedings and perhaps thereafter. I wish to add on the outlined jurisprudence as follows;

> In **ELECTION PETITION 10 OF 2017 HASSAN OMAR HASSAN & LINDA MARIWA Vs IEBC NANCY WANJIKU KARIUKI & HASSAN ALI JOHO** the Court Hon.L. J. L.Achode had the following to say;
>
> **3 questions must be answered; the 1st question begs and answer is who is a reasonable man? Making reference to the case of Court of Appeal stated; PHILLIP TUNOI & ANOR Vs JUDICIAL SERVICE COMMISION & ANOR [2016]eKLR;**
>
> ***"In determining the existence or otherwise of bias, the test to be applied is that of 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 real possibility of bias."***

The 2nd Question is what is the test for bias? In Phillip Tunoi case supra the Court said thus;

> ***"The question is whether the fair minded and informed observer having considered all the facts, would conclude that there is real possibility that the Tribunal was biased."***

The Court went on thus;

> ***"How should judges treat the subject of disqualification when raised before them?***
>
> ***When Courts in this Country are faced with such proceedings as these, it is necessary to consider whether there is reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established."***

With regard to the first part of the allegation is the fact that from the time the Honourable Court took over the matter on 14th June 2018 from Justice Ougo; the first thing the Honourable Court rendered a decision on was that the wishes of the deceased cannot be ascertained from the court's perusal of the file on the 19th of June 2018. It is indeed true that the Court asked for time to peruse the Court file. On 19th June 2018, after perusal the Court reported that in the Trial Court proceedings there were various witnesses' testimonies that the deceased told each party his preference of burial and it was difficult to tell from the record what were the true wishes of the deceased with regard to burial. In light of this and exercise of Section 78 of Civil Procedure Act which outlines the various processes the Appellate Court may take, how did the parties and Counsel wish to proceed, which witnesses would be called for each side to help determine the true wishes of the deceased? To

the Court's mind that is not bias but to consult and seek any/all evidence to help determine the matter.

The allegation that the applicants herein prior to the Judgment being delivered heard the Respondents were bragging as to how the Judgment shall be in their favour. That albeit the fact that the Applicants' communicated their suspicion as to the court's bias to their advocates on record: the advocates advised the applicants that as the officers of the court they had faith in the legal system and that justice would be meted out and as such the apprehension of the applicants was not brought forth to the court's attention. That further to the aforementioned the applicants herein have openly been told by the 1st Respondent that the instant application before the court dated 6th August 2018 shall not succeed and neither will the **Succession Cause No. 1673 of 2016** before Honourable Justice Muigai. Can such warnings be disregarded in light of the earlier statements that were made and were affirmed by the Court?

These allegations if true amount to grave aspersions on the Court of impropriety and compromise as alleged in the Applicant's affidavits on the part of the Court in extra judicial processes. I have not been in contact with any of the parties and/or their representatives or advocates on record at any time before during and after these proceedings. I am not privy or aware of what transpired outside Court between the parties on the said allegations of bragging that judgment would be in the Respondents' favour and no application before this Court by Respondents would ever succeed even if what amounts of money are used as alleged by the Applicant in the affidavits. If the Applicant was told by the informer, then the said informer should have been disclosed and ought to tender evidence in court how she/he obtained such information and what the role of the court was in the process. The court is alive to the fact that parties cannot undertake investigative role but since the Applicant was told and/or heard there is no further investigation required but full disclosure of the informant to disclose source of information. What **Johnstone Muumbo** is alleged to have said and/or Respondents or their advocates cannot be visited/blamed on the court unless and until evidence of contact and/or communication is disclosed.

I was aware of these allegations for the first time on reading the application and the oral submissions made in Court. There is no nexus established by evidence on record that I promised any party/any favour in advance of the Court decision and in the absence of the same the Court cannot be held to account and responsible for what happened outside the Court proceedings. I wish to state that he who alleges must prove the allegations. I have no spokesperson to speak on my behalf on judicial matters except through Court Orders, Rulings or Judgments, that are subject to review or appeal.

The Applicant is advised that even if he cannot give tangible and cogent evidence in this Court of the Court's impropriety and compromise, if he has any cogent and tangible evidence that I met any party on this matter or their representative and/or received directly or through an emissary any comprise to officially report to the relevant legal institutions and administrative bodies of the Judiciary so as to accord me also a fair hearing on the truth of the allegations of bias in extra judicial activities advanced.

The 3rd set of allegation of bias; That natural justice requires that a Judge shall disqualify himself/herself in any proceeding in which his/her impartiality might reasonably be questioned as it has been questioned herein. That the Applicants herein are apprehensive that they will suffer irreparable detriment if the orders sought herein are not granted since their dispute will be irregularly determined by an impartial court which does not meet the constitutional threshold of fair hearing enshrined in **Article 50(1) of the Constitution.**

From the above the Court finds that the rules of natural justice apply to all equally as provided by **Article 27 of Constitution of Kenya 2010.** We are all entitled to equal benefit and protection of the law; the Court, parties and advocates equally**.** If parties are aggrieved by a court order, ruling or judgment, the same ought to be dealt with on appeal.

In **KAPLAN & STRATTON Vs L.Z.ENGINEERING & 2 OTHERS (2000) Lakha J** stated as follows**;**

> ***"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 dis qualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."***

In **SUCCESSION CAUSE 599 OF 1986 ESTATE OF ANDREW SAIKWA (DECEASED)** Hon J W .Musyoka stated**;**

> ***"The above statement speaks to the fact of the adversarial nature of our legal system. The parties in a matter are engaged in a legal combat, and contrasting positions are taken and arguments to back them placed before the Court, from which as an arbiter, is expected to make a determination in the best interests of the cause of justice. It would be unreasonable for any party to expect that the Court would always rule in its favour in order to be able to say that the decision of the Court is impartial. The decision of the Court either way, dependant as it should, on the evidence adduced and the arguments presented."***

DISPOSITION

The totality of the above excerpts is that the court should in an impartial manner render its decision based on facts evidence presented and applicable law and the process and outcome shall be subject to interrogation on appeal.

i) The parties' rights are intact and there is no basis for apprehension as another Court shall look into the matter on appeal.

ii) On the allegations of bias, the party ought to have exercised its rights and raised the same during proceedings and not after the judgment as it is not clear what part of the proceedings the Court was biased.

iii) Extra judicial activities alleged raise serious misconduct questions on the Court and if found to have been true and the basis of the decision, then the entire proceedings and outcome would be irregular and illegal. Unfortunately, these allegations have not been established at this stage.

iv) Therefore, I am not persuaded that a case has been made out for me to disqualify myself from further proceedings in the instant matter. I dismiss the application. The parties may exercise right of appeal.

DELIVERED SIGNED DATED IN OPEN COURT ON 16TH NOVEMBER 2018.

M.W. MUIGAI

JUDGE FAMILY DIVISION HIGH COURT

IN THE PRESENCE OF:-

IN THE ABSENCE OF THE APPLICANTS

IN THE ABSENCE OF THE RESPONDENTS