REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 648 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

AND

KPMG KENYA.....INTERESTED PARTY

EXPARTE

COALITION FOR REFORMS AND DEMOCRACY (CORD)

RULING

Introduction

1. The ex parte applicant herein, **Coalition for Reforms and Democracy** (CORD), by its Motion on Notice dated 22nd December, 2016, sought the following orders:

> **A. CERTIORARI to remove into this Honorable Court for purposes of being quashed and to quash the decision of The Independent Electoral and Boundaries Commission to advertise an open international tender No. IEBC/32/2016-2017 contained in an avert in the Respondent Website published on the 19th of December, 2016 for audit of voters Register and verify the accuracy of the register, recommend mechanisms of enhancing the accuracy and updating the register and its decisions made on the 16th of December, 2016 and contained in a press release (16/12/2016-by the IEBC Chief Executive Ezra Chiloba) awarding a tender to KPMG for the audit of the voter register pursuant to provisions of the Election Laws (Amendment) Act, No.36 of 2016.**
>
> **B. PROHIBITION prohibiting The Independent Electoral and Boundaries Commission to from carrying on with the award of the tender of in any way implementing result of the audit of the voters register based on its decision to advertise an open international tender No. IEBC/32/2016-2017 contained in an avert in the Respondent Website published on the 19th of December, 2016 for audit of voters Register and verify the accuracy of the register, recommend mechanisms of enhancing the accuracy and updating the register and its decisions made on the 16th of December, 2016 and contained in a press release (16/12/2016-by**

the IEBC Chief Executive Ezra Chiloba) awarding a tender to KPMG for the audit of the voter register pursuant to provisions of the Election Laws (Amendment) Act, No.36 of 2016.

C. <u>MANDAMUS</u> compelling the Respondent herein The Independent Electoral and Boundaries Commission to comply with the provisions of the Election Laws (Amendment) Act No. 36 of 2016 and in particular sections 17 of the Act in carrying out any audit of voters Register and verification on the accuracy of the register, in making any recommendation mechanisms of enhancing the accuracy and updating the register and in tendering or making any award for the audit of the voter register pursuant to provisions of the Election Laws (Amendment) Act, No.36 of 2016.

D. The costs of this application be in the cause.

2. The said Motion is based on the following grounds:

1. The Independent Electoral and Boundaries Commission on the 16th of December, 2016 awarded a tender to KPMG for the audit of the voter register pursuant to provisions of the Election Laws (Amendment) Act, No.36 of 2016.

2. Section 8A of the Election Laws (Amendment) Act provides that the Commission may at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

3. Section 8A (3) provides that For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

4. In awarding the tender for the audit of the Register of Voters, the Independent Electoral and Boundaries Commission proceeded without consultation and or engagement with the stakeholders including political parties in designing the criteria and or the methodology for the audit.

5. The ultimate objectives of the audit as set out under section 8A of the Election Laws (Amendment) Act is to verify the accuracy of the register and update it. This objective cannot be realized in the absence of an agreed methodology, criteria and or benchmarks for the audit of the register of voters.

6. In the presidential Election, petition No.5 of 2013 (Raila Odinga and 5 others Versus the Independent Electoral and Boundaries Commission) the commission presented different versions of the register of voters variant from what was gazette before the election. In this abundance of confusion, there is no clarity as to which register is being subjected to the audit.

7. The history behind the enacted Election Laws (Amendment) Act, 36 reveals that it was a

product of a long fought battle and process leading to a negotiated bipartisan legislation. This bipartisan legislation agreed on among other key issue the use of biometrics in voter registration and intergraded sharing of data as well as audit of the register by an internationally reputable firm.

8. The Respondent has not only acted maliciously and in a suspicious manner to dilute the gains in the Amendment Laws but has also sponsored Court Petitions and recommended rules and regulations to Parliament whose effect would be to undo the entire Election Laws Amendment Act.

9. The Cases sponsored by the Respondent through third parties are PETITION NO. 399 OF 2016: MUGAMBI IMANYARA & ANOR VERSUS THE ATTORNEY GENERAL AND 2 OTHERS and PETITION 415 OF 2016: COLLINS KIPCHUMBA TALLAM VERSUS THE ATTORNEY GENERAL & IEBC.

10. These sponsored petitions are a sign of bad faith on the Independent Electoral and Boundaries Commission.

11. In addition the Respondent has prepared draft regulations table with the National Assembly Justice and Legal Affairs Committee whose effect would be to negate and undo the entire gains of the Election Laws (Amendment) Act No. 36 of 2016. This is further evidence of bad faith.

12. The intended audit of the register of voters is clouded with opaqueness, secrecy and lack of accountability since no methodology or criteria for the audit has been disclosed to ensure the objectives set out in law are realized.

13. The Independent Electoral and Boundaries Commission set out irrelevant specifications during the advertisement of the tender having failed to seek stakeholders views and the Commission itself having no previous experience of offering tenders for audit of the Register of Voters and therefore the entire process was tainted with speculation, guesswork and experimentations that offends the objectives of the law set out under section 8A.

14. The objective of ascertaining the accuracy of the Register of Voters can only be realized if the biometric data in the register is cross-authenticated with the data from the Registrar of Persons, as well as the Registrar of births and deaths to weed out dead, underage and cases of double registration. As it is now, no criteria has been set out by the Commission to ensure the audit firm is availed with the above information and therefore the proposed audit will amount to nothing but an exercise in futility.

15. The firm awarded the tender to audit the register has no demonstrable experience of undertaking a similar task in any other jurisdiction in the world neither have any guarantees be given on its ability and capacity to undertake such an important exercise.

16. The elections of 7th August, 2017 largely if not wholly depends on the authenticity of the voter register and the award and process of audit of the register if not done in accordance with both the spirit and letter of the Election Laws (Amendment), Act No. 36 of 2016.

17. The decision is *ultra vires* the powers of the Independent Electoral and Boundaries Commission.

18. The decisions is capricious, irrational and wednesbury unreasonable.

19. The decision is against the legitimate and rightful expectations of the ex parte Applicant and against the expectations of millions of Kenyans who have a right to vote at the August, 7th

elections in 2017.

20. The Respondents decision is unfair, discriminatory, arbitrary, inconsistent and capricious.

21. The Respondents' decision is actuated by malice and extraneous consideration other than the administration of justice.

22. The decision is oppressive, punitive and an abuse of power.

23. The Respondents' decision is irrational, unjustifiable and wednesbury unreasonable.

24. The decision has been made in bad faith.

25. In making draft regulations to undo the Election Laws (Amendment) Act 36 of 2016 before JLAC and sponsoring Court petitions through third parties, the Respondent has acted in bad faith.

26. The audit of the voters register and its authenticity is very crucial to the enjoyment of the political rights under Article 38 stated above and any decision or exercise that would affect the enjoyment of the stated right must be above board, be inclusive, involving the broadest possible consultation incorporating the key players and stake holder who are the competing political parties.

27. The decision by the Respondent purporting to consult the amorphous outfit called the Political Parties Liaison committee is mischievous and intended to circumvent the requirement to form a technical committee to set the parameters and methodology and objectives of what the audit should achieve.

28. Among other things that required to be agreed on is what constitutes an international firm for purposes of a voter register audit.

29. The decision of the Respondent is in breach of the its duty under Article 249 of the Constitution

30. Section 2 (d) of the Election Laws (Amendment) Act No. 36 of 2016 defines the registrar of voters by deleting the expression principle register of voters and substituting therefore the expression ''Register of voters''.

31. The amendment contained in this definition part of the Act is crucial in light of the Supreme court finding in RAILA ODINGA VERSUS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION Supreme Court Petition No. 5 of 2013, that there were multiple registers relied upon by the Respondent.

32. In the internal management brief of September 26th 2016 The Respondent admitted that the post 2013 and the pre 2013 registrations are yet to be integrated into a single voter register.

33. The Respondent has to-date not gazetted an official voter register and if it has not opened it to stake holders and public scrutiny and public participation in the circumstances cannot properly engage any firm to carry out an audit as it is not clear what this firm will be auditing.

34. Section 2 (e) amends the Act by inserting a new definition that includes the term biometric which means ''unique identifier or exhibits including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA and signatures and integrated electronic

electoral systems which refers to ‘‘a system that includes biometric voter registration, biometric voter identification and electronic results transmission system.

35. The Respondents ‘decision are made for an illegal, improper motive and for extraneous reasons.

36. The Respondent currently has no Commissioners in office and the audit subject of the impugned decision being a policy issue within the ambit of the Commissioners cannot be conducted in the absence of Commissioners. To this extent the decision of the Respondent to commence the audit exercise and to award the tender to KPTMG is *ultra vires* the powers of the Chief Executive of the Respondent or any technical members of the Commission.

37. The audit exercise was not an administrative function reserved for the Secretariat in the absence of the commissioners who by dint of the amendment Act are responsible of formulating policy.

38. There was need for a policy formulation or direction by the Commissioners which in this case was absent and in the circumstances the decision to proceed with the audit and appoint a firm to carry out the audit contemplated under section 8 of the Amendment of the elections Act was ultra vires the powers of the Secretariat.

39. Pursuant to section 33 of the Election Laws (Amendment) Act, no. 36 of the 2016, amending section 7 of the Independent Electoral and Boundaries Commission Act, 2011, the President published a special gazette notice No. 121 of 6th October, 2016 declaring the position of chairperson and members of the Respondent Commission vacant.

40. The President further caused to be published another gazette notice No. 31 of 24th October, 2016 appointing a selection panel comprising nine (9) members to carry out the advertisement, short listing, interviewing and recommendation to Parliament of the new nominees to the Commission.

41. The interviews and appointment of the new Commissioners has not be concluded and there are no Commissioners in place to conduct the duty of formulating policy.

42. This application is not a challenge to the process of merits of the award within the meaning of the Public Procurement and Assets Disposal Act, 2012 but on legality and exercise of powers by the Respondent in breach of the provisions of the Constitution and the Election Laws amendment Act, No. 36 of 2016.

43. The Public Procurement Oversight Board in its decision/Judgement in PPOA Tribunal Claim No. 97 of 2016: PEARL ENTERPRISES LIMITED VERSUS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, the Tribunal addressed the issue of the limits of its jurisdiction and stated that it did not have the jurisdiction to delve into interpretations of the Election Laws Amendment Act, 2016, which were in its opinion the preserve of the High Court.

44. This matter is therefore properly before this Court and the alternative remedy of the PPOA Tribunal is not efficacious in the circumstances and the issue that fall for determination are outside the ambit of the Tribunal as stated in the Dispute no. 97/2016.

3. On 22nd December, 2016 this Court granted leave to the applicant to commence judicial review proceedings and seek the said reliefs. The Court also granted an order staying the decision of the Respondent herein, the Independent Electoral and Boundaries Commission (hereinafter referred to as “the IEBC” or “the Commission”) to award the subject tender to KPMG for the audit of the voter register.

4. On 17th January, 2017, this Court gave directions on the mode of hearing and listed the matter for hearing on 8th February, 2017 at 2.30pm on which day the parties informed the Court that they were desirous of negotiating an out of Court settlement. Pursuant to the provisions of Article 159(2)(c) of the Constitution, the Court adjourned the hearing and directed that the matter be mentioned on 10th February, 2017for the purposes of following up on the process of negotiations. In the meantime the hearing was fixed for 15th February, 2017 at 2.30pm.

5. On 10th February, 2017 when the matter came up for mention no settlement had been arrived at and the hearing date for 15th February, 2017 was confirmed.

6. On 15th February, 2017 when the matter was called out, **Mr James Orengo, SC** appeared with **Prof. Ben Sihanya**, **Mr Antony Oluoch**, **Mr Norman Magaya** and **Mr Alex Muchemi** for the ex parte applicant. **Mr Wambua Kilonzo**, appeared with **Mr Nicholas Malonza** and **Ms Sarah Okimaru** for the Respondent. **Mr Kiragu Kimani** with **Ms Kirimi** and **Mr Lawson Ondieki** appeared for the interested party.

7. Although the applicants were ready to proceed, **Mr Wambua Kilonzo** informed the Court that he had instructions to make an application. In his oral application, **Mr Wambua Kilonzo** referred this Court to this Court's decision delivered in ***Misc. Application No. 637 of 2016*** between **Republic vs. the Independent Electoral and Boundaries Commission & Ors. ex party the Coalition of Reform and Democracy** which matter related to the procurement of the polling materials. It was submitted that in the case the issue that was identified by the as falling for determination was whether the tender which was awarded by the IEBC was proper. It was contended that the issues for determination in that matter is similar to those that fall for determination in this matter and in arriving at its decision the Court dealt with the following matters: whether there was an alternative remedy; whether the Commission was properly constituted at the time the tender was being undertaken in view of the vacancy in its composition; whether the applicant had a right to directly approach the High Court by way of judicial review proceedings if it was not a candidate or a bidder for the tender in question; and whether the secretariat of the Commission was right in conduction the process as they did.

8. Learned counsel was however quick to point out that in his view the judgement was well-reasoned but stated that whether his clients agree with the same is another matter altogether. It was however submitted that the issues in the instant application are in *pari materia* to the issues in the said earlier proceedings and in learned counsel's view, it is improbable that this Court may arrive at a different decision. It was therefore learned counsel's view that having expressed itself as it did, this Court should let another Judge have another look at the matters with afresh mind.

9. It was however clarified by learned counsel that he was not seeking this Court's disqualification from the matter and would abide by whatever decision this Court arrives at.

10. **Mr Wambua Kilonzo** also applied that this matter be certified as one that merits being referred to the Hon. the Chief Justice pursuant to Article 165(4) of the Constitution for the purposes of empanelling an enlarged bench. In support of this application, it was submitted that this matter raises issues of great public importance with great impact, the substantial question being the availability of alternative remedies before invoking judicial review jurisdiction in light of several decision thereon and the finding of this Court that in determining that matter the efficacy of the alternative remedy ought to be considered.

11. It was further submitted that the issues raised in this application are novel and that since independent it is the first time that Parliament has deemed it fit that the audit of the register be undertaken by a contracted firm other than the electoral body itself. This issue together with the methodology to be adopted, it was submitted are issues that merit more than one mind. Another issue identified by learned counsel was the role of the Commission during the transition period. It was submitted that the effect of the decision on his issue has fundamental impact and if upheld is likely to take everybody to the drawing board in terms of the timelines for the elections. Learned counsel also referred to this Court's decision on the role of the Political Parties Liaison Committee and submitted that this is an issue that the Chief Justice

ought to address his mind to.

12. While appreciating the strict timelines under which the IEBC is operating, learned counsel submitted that it was with a heavy heart that he was making the application.

13. On the part of the interested party, **Mr Kiragu Kimani** left the matter in the hands of the Court.

14. The application was opposed by **Mr. James Orengo** and **Mr Norman Magaya** who submitted on behalf of the ex parte applicant. According to **Mr Orengo**, the ex parte applicant would have preferred that a formal application should have been made in order to enable them deal with the issues sufficiently. It was however submitted that there ought to be a legal foundation established for seeking that another Judge takes over the hearing of the matter. To learned counsel, if such an application is allowed, every time parties feels that the Court ought not to handle a matter, they would simply look for another decision decided by the Court as a basis for seeking such orders.

15. In learned counsel's view, the more serious matter, however, was that in urging the application, it was alluded to the fact that it was better if the Court did not handle the matter due to feasibility of impropriety. This, it was submitted was more of a moral issue than legal one and learned counsel took exception to this approach and took the view that a Court cannot be faulted for being consistent though he could not foretell what the outcome of these proceedings would be.

16. It was submitted that the question of the composition of a Commission was dealt with by a three judge bench in **Eng. Michael Kamau and Others vs Ethics and Anti-Corruption Commission and Others Nairobi (Milimani) High Court Petition No 230 of 2015** and therefore was not a novel point. It was similarly submitted that the issue of alternative remedies has been dealt with by the Court.

17. In this case the Court was reminded to take into account the history of these proceedings where both sides had expressed the wish to try and reach some settlement. It was submitted that in light of such expressions, the issues in these proceedings cannot be termed as being complex. It was also submitted that the issue of substantial question ought to have been raised at the early stages of the proceedings instead of waiting to be hit by the decision in Miscellaneous Application No. 637 of 2016.

18. It was submitted that the question of impropriety raised in this application cannot be left hanging and counsel cannot be permitted to walk away with such allegations and that the issue must be dealt with so that the dignity of the Court may be upheld at all times. It was submitted that for those who did not participate in the proceedings in Miscellaneous Application No. 637 of 2016, a wrong conclusion may be arrived at against not only the Court but also the parties to the said proceedings.

19. According to **Mr Orengo**, the issues in this application do not raise any substantial question of law but rather the application of the law and the principles developed or the years as confirmed by the judgement of the Court backed by rich jurisprudence from many jurisdictions including our Court of Appeal, the Supreme Court and foreign jurisdictions. The Court was therefore urged to either dismiss the application or direct that a formal application be made.

20. On his part **Mr Magaya** submitted that the issues which the Commission introduced in its application are not the subject of these proceedings as some such issues as the role of the Political Parties Liaison Committee was obiter. It was submitted that if public perception was the determinant factor in deciding matters, there would be no need for judicial review. Since the hearing date was set based on the Respondent's concern as relates to the timelines, it was submitted that this oral application does nothing but further strain the same timelines hence it is in the interest of the parties that this application be expeditiously disposed of.

21. Learned counsel submitted that the issues raised herein ought to have been raised earlier in the proceedings.

22. In his rejoinder, **Mr Kilonzo** reiterated his view that the decision in Miscellaneous Application No.

637 of 2016 was well reasoned and clarified that he did not take any issue with respect to the propriety of the Court but clarified that whether the IEBC greed with it was another matter. He submitted many times application under Article 165(4) of the Constitution are made orally5.

23. It was however submitted that the las time this matter came up the decision in Miscellaneous Application No. 637 of 2016 had not been delivered and so the issues raised herein could not be taken up.

Determinations

24. I have considered the submissions made for and against the oral application.

25. The first issue I wish to deal with is whether this Court ought to refer this matter to the Hon. the Chief Justice for the purposes of assigning it to an uneven number of judges, being not less than three. I intend to deal with this matter first because, if the Court finds in favour of the Respondent, it may not be necessary to deal with the issue of "stepping aside."

26. Article 165 of the Constitution provides as follows:

> ***(1) There is established the High Court, which—***
>
> > ***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***
> >
> > ***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***
>
> ***(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.***
>
> ***(3) Subject to clause (5), the High Court shall have—***
>
> > ***(a) unlimited original jurisdiction in criminal and civil matters;***
> >
> > ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
> >
> > ***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
> >
> > ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
> >
> > > ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
> > >
> > > ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
> > >
> > > ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and***
> > >
> > > ***(iv) a question relating to conflict of laws under Article 191; and***
> >
> > ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

27. The general rule in these sorts of matters was laid down by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** in which the Court held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. Therefore the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However like all discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.

28. As has been held by this Court before, the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. Despite appreciably great strides made in the expansion of the Judiciary in the recent past by the appointment of more judges, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and as was appreciated in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** where it was held that:

"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

> **"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**

At page 493 of the same case *Lord Templeman* delivered himself thus:

> **…"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**

…….

In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

> **"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."**

…..In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior

purpose to that of the court process, which is to protect the interests of justice… The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in *bona fides* and was oppressive to the appellant. All these in our view constitute abuse of process."

29. This was the position adopted by **Nyamu, J** in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

"In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time."

30. In my view the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law in the following instances:

1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or

2. That it involves a question respecting the interpretation of the Constitution and under this is included *(i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.*

31. Since the determination of such issue is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. Therefore the mere fact that parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification. Conversely the Court may without any prodding from the parties invoke the provisions of Article 165(4). It follows that an oral application may where appropriate be entertained by the Court.

32. According to the above provision, it does not suffice that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. Similarly the mere fact that a substantial question of law is disclosed does not suffice unless the issue also arises as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution.

33. As to whether this is the case is a matter for judicial determination based on the facts of the particular case and the law involved. This was appreciated in **Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011** where it was noted that:

"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

34. In **Chunilal V. Mehta vs. Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, it was held that:

> **"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."**

35. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

> **"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."**

36. The Indian tests for determining whether a matter raises substantial question of law are therefore: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

37. To my mind the above considerations offer proper guidelines and an insight in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution but the Court is not bound by them line, hook and sinker. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition.

38. These however are mere examples since the Article employs the word "includes". Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand. Even before the promulgation of the current Constitution, it was appreciated in **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2 KLR 6** that:

> **"in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any."**

39. In my view, the Court must adopt a holistic approach to the matter at hand. In other words, the mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the Constitution. In this case, it is contended that the matter is novel. Novelty alone with due respect does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of

jurisprudential moment. It is my view however that the mere fact that a matter is novel or jurisprudentially challenging does not *ipso facto* elevate it to a substantial question of law for the purposes of Article 165(4) of the Constitution. With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since this Court cannot abdicate its duty of determining disputes to any other organ.

40. In this case, the issue before the Court is substantially one of procurement. Those matters are routinely dealt with by this Court and there is no dearth of authorities in that field. It was contended that there is the issue whether the Court may entertain a matter notwithstanding the existence of alternative remedies. That issue is similarly not moot and if one is in doubt one only needs to refer to section 9(4) of the ***Fair Administrative Action Act*** which provides that:

> ***Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice***

41. It is therefore clear that the Court is now empowered to exercise a discretion notwithstanding the existence of alternative remedy. As to whether the facts disclosed justify the exemption is a matter which must depend on the facts of each case. I will say no more on the matter save to say that the issue is nolonger novel.

42. However as I have stated the substantial issue here is whether the law was complied with during the procurement process and as the Respondent conceded that that was the substantial issue in ***Misc. Application No. 637 of 2016.*** It must always be remembered that in terms of the doctrine of stare decisis a decision of an enlarged bench of the High Court, while may be more persuasive than one handed down by a single Judge of the same Court, such a decision is not binding on a single Judge as an appeal against both decisions lie to the Court of Appeal. I defer to the decision in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where this Court held:

> **"It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of *stare decisis* whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same."**

43. This was the position of **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** where he held that:

> **"the meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."**

44. However, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges and I have attempted to outline some of the issues for consideration hereinabove.

45. In this case the substance of this application is a procurement dispute. I am not satisfied that there is an issue whether any of the parties' rights or fundamental freedoms in the Bill of Rights has been denied, violated, infringed or threatened. It is also not alleged that there is anything that has been done under the

authority of the Constitution or of any law which is inconsistent with, or in contravention of, the Constitution. Similarly, there is no allegation that there is a question relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government. Lastly, there is no allegation of conflict of laws under Article 191. What is in issue here is simply the application of the constitutional and statutory principles to the facts of this case.

46. Reference was made to public interest. In my view whereas that is also a factor that can be considered by the Court, the mere fact that the matter is of great public interest or substantial national importance does not necessarily qualify it to amount to a substantial question of law in order to warrant reference to the Chief Justice under Article 165(4) aforesaid. Public interest and national importance are by themselves not necessarily grounds for the empanelling of a bench of not less than three judges as these are matters which the Court deals with on a daily basis. To make a determination on whether or not to refer the matter to the **Chief Justice** pursuant to Article 165(4) of the Constitution solely on public interest and national importance would amount to elevating such matters to a different class from other disputes and that in my view would amount to unjustified discrimination in dispute resolution mechanisms. As was held in **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996**, litigation is not a luxury as justice is for all and all must have equal access to courts as well as equal priorities in being heard. Sections 1A and 1B of the ***Civil Procedure Act*** require the Court to take into account "***the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing"*** See **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008.**

47. It is, in my view, only in cases contemplated under Article 165(4) of the Constitution that the Court will certify that a matter raises a substantial issue of law.

48. In **Community Advocacy Awareness Trust & Others vs. The Attorney General & Others** (supra) it was noted that the promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This Constitution has been recognised by the Supreme Court as being transformative in nature. It has expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than one judge, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the ***Civil Procedure Act*** would never be realised.

49. Although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country. As appreciated in **Santosh Hazari vs. Purushottam Tiwari** (supra):

> **"…the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis.*"**

50. Before concluding this matter, I wish to draw the attention of the practitioners to the position in the above case which I associate with that:

> **"To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is**

not a question involved in the case unless it goes to the root of the matter."

51. In this case all the parties appreciate and the Court is alive to the fact that the IEBC has strict timelines to comply with if it has to meet its obligations under the Constitution and the relevant statutes. To refer this matter, which I have found does not meet the threshold under Article 165(4) of the Constitution to the Hon. The Chief Justice to assign the matter to a bench which bench will have to give fresh directions on the mode of hearing in my view would militate against the expeditious disposal of this admittedly urgent matter.

52. In the circumstances, I decline to certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution and the said prayer fails and is hereby disallowed.

53. Having disposed of the first issue I now proceed to deal with the second one.

54. The Commission seeks an order in the nature of what it terms as stepping aside by his Court in this application and handing over these proceedings to another judge to determine the same. In its application, **Mr Wambua Kilonzo**, learned counsel for the Commission was visibly at pains to state that he was not seeking the disqualification of this Court or the recusal of myself from these proceedings. A term was however coined by one of the counsel that what was sought was "stepping aside". This Court is not aware that the term "stepping aside" is a term of art in legal sphere. It is a however a recent innovation crafted by the political class in this country for purposes of convenience to meet the exigencies of particularly embarrassing situations.

55. Since the ex parte applicant was of the view that what in effect the Commission seeks is an order of recusal, it is important for this Court to deal with the principles relating to recusal of judges in matters before them.

56. The foundation for the principal underlying recusal of judicial officers was restated by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** as follows:

> **"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.**

57. 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 a follows:

> **"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 recognised 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 J in 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 McLachlin JJ 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 States 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]he 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), 133 N.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."

58. The Court then proceeded to pronounce itself as follows:

"Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J:41

'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. . . . In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own…Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge.

It is appropriate for judges to bring their own life experience to the adjudication process. As it was put by Cory J in R. v. S. (R.D):42

"It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.'

Similar considerations were expressed in their concurring judgment by L'Heureux-Dube and MacLachlin JJ:43

'[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging…It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.'"

59. Relying on **Committee for Justice and Liberty et al vs. National Energy Board** the Court agreed that:

". . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude."

60. It was further held that:

"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.

It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test…. We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia [In *Re J.R.L.:Ex parte C.J.L.* (1986) 161 CLR 342 at 352.]:

> **"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…..It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."**

61. On the views held by judges the Court held:

"It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution

requires."

62. In conclusion, the Court decreed:

> **"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training…and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial…Under our new constitutional order, judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. 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 simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself. "**

63. Similarly, in **South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000**, the same Court expressed itself 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 scrutinise 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-emphasised. 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 two contending factors. On the one hand, it is vital to the integrity of our courts and the 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."

64. While dealing with the independence of judges, **Lord Denning** in ***What Next in the Law***, at page 310 had this to say:

"If I be right thus far – that recourse must be had to law – it follows as a necessary corollary that the judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused… [The judges] will not be diverted from their duty by any extraneous influences; not by hope of reward nor by the fear of penalties; not by flattering praise nor by indignant reproach. It is the sure knowledge of this that gives the people their confidence in the judges."

65. In our own jurisdiction the issue has been the subject of legal pronouncements. The Court of Appeal in **Uhuru Highway Development Ltd. vs. Central Bank Of Kenya & 2 Others Civil Appeal No. 36 of 1996** held:

"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

66. See also Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998 [1999] 2 EA 83.

67. On the same note, the Supreme Court of Uganda in **Uganda Polybags Ltd vs. Development Finance Co. Ltd and Others [1999] 2 EA 337** was of the view that litigants have no right to choose which judicial officers should hear and determine their cases since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will and the oath must be respected.

68. The procedure in applications for recusal is now well settled. The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of her or his opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court. The rationale for and the benefit from that procedure is obvious. Apart from anything else, in practical terms it helps the litigant to avoid rushing to court at the risk of maligning the integrity of the Judge or Judges and of the Court as a whole, without having the full facts. See **Republic of South Africa vs. The South African Rugby Football Union & Others** (supra) and **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12.**

69. In this case the Commission has made it clear that there is no impropriety on the part of this Court. It in fact does not intend that this Court recuses itself from hearing this matter. If the Court disallows the oral application it will abide by it and proceed with the matter. Its only apprehension is that the issues in the instant application being in *pari materia* to the issues in Miscellaneous Application No. 637 of 2016, it is improbable that this Court may arrive at a different decision. According to ***The Bangalore Principles of Judicial Conduct***:

> **"Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law."**

70. What I understand by that position that if a Court of law has pronounced itself on a matter and the parties view that as the correct legal position, there ought to be no valid objection to the same Court entertaining a subsequent matter in which similar issues are involved if the parties insist that the Court must do so. Where the parties are of he view that the matter in controversy has been decided, save for the option of an appeal where one is provided, parties are expected to order their lives in accordance with the said decision since courts of law are meant to set the law straight so that litigants may predict the outcome of their actions and either avoid taking a particular course or order their lives in accordance therewith. Therefore where the Court has pronounced itself on a matter, parties to the subsequent proceedings where the legal issues are similar ought not to seek that the same be heard by different judges in the hope of obtaining a different outcome. In **Miller vs. Miller [1988] KLR 555**, the Court of Appeal expressed itself as follows:

> **"No party should be placed in a position where he can choose his court. But this is not to say that no circumstances is it possible for a judge to disqualify himself from hearing a case.... There is nothing prejudicial in one Judge making several or more orders in a court record. In practical terms it is advantageous to the parties and therefore in the interest of justice for a judge to familiarise himself with the substance of a court file. In the absence of the evidence that the appellant's case was prejudiced by some order of the nine orders the trial judge made, it must be held that the submission on this aspect was without substance. No objection was taken to the trial judge making any of the nine orders....It would be disastrous if the practice was that once there are allegations made against a judge and the judge's honour is in question, that the judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification**

by judges with ease and the consequence would be a choice of trial judge by a party."

71. **Mr Wambua Kilonzo** found himself in an unenviable position of having to seek orders that this Court steps aside while appreciating that the decision in Miscellaneous Application No. 637 of 2016 was well reasoned. To paraphrase ***The Bangalore Principles of Judicial Conduct*** if a judge is inclined towards upholding the law, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law.

72. I however agree that applications for recusal ought to be made at the earliest opportunity since the right to apply for the recusal of a Judge may be lost or waived. In **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12** it was held:

> **"A litigant seeking disqualification of a Judge from sitting on the ground of appearance of bias must raise the objection at the earliest opportunity...The right to object to a disqualified adjudicator may be waived, and this may be so, even where the disqualification is statutory. The Court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts, which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings to continue without protest, they are held to have waived their objection and the determination cannot be challenged...A litigant who has knowledge of the facts that give rise to apprehension of possibility of bias ought not to be permitted to keep his objection up the sleeve until he finds that he has not succeeded. The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind...While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour."**

73. Similarly, in **Eastern and Southern African Trade and Development Bank (PTA) and Another vs. Ogang (2) [2002] 1 EA 54,** COMESA Court of Justice was of the view that:

> **"The right to challenge proceedings conducted in breach of the rules against bias may be lost by waiver either express or implied. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. However once those conditions are met a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity. The same principles apply where an adjudicator is subject to a statutory disqualification. In the case of statutory disqualification there appears to be a presumption that regularity cannot be conferred by waiver or acquiescence, but a party failing to take objection may be refused relief if he seeks a discretionary remedy when subsequently impugning the proceedings."**

74. To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.

75. Having considered the application and the submissions, it is my view that based on the Respondent's submissions, the issues raised herein do not meet the test for the recusal or disqualification of a Judge.

76. However, a Judge may on own motion decide to refer a matter pending before him or her to another Judge in the interest of justice without necessarily recusing himself from the matter. It is not always that a judge may only refer a matter to another Judge upon recusing himself or herself. Such matters do occur quite often and there is nothing unusual about it.

77. It is in the exercise of that discretion that whereas I decline to refer this matter to the Chief Justice for the assignment of the same to a bench of not less than three judges, I hereby direct that this matter be placed before the Presiding Judge of the Constitutional and Human Rights Division, **Hon. Mr Justice Chacha Mwita** for further orders with respect to the hearing and disposal of the same.

78. It is so ordered.

Dated at Nairobi this 16th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Hon. James Orengo with Prof Sihanya, Mr Antony Oluoch and Mr Norman Magaya for the ex parte applicant

Mr Wambua Kilonzo with Mr Malonza and Ms Okimaru for the Respondent

Mr Kiragu Kimani with Ms Kirimi and Mr Ondieki for the interested party

CA Mwangi