REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 301 OF 2017

IN THE MATTER OF AN APPLICATION BY HON. WAVINYA NDETI FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF AND/OR VIOLATION OF ARTICLES 10, 25, 38, 47, 50, 81 OF THE CONSTITUTION, 2010

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTERS 26, LAWS OF KENYA

AND

IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC…….....…….……..…….APPLICANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

WIPER DEMOCRATIC MOVEMENT (KENYA)…...…1ST INTERESTED PARTY

REGISTRAR OF POLITICAL PARTIES.....2ND INTERESTED PARTY

KYALO PETER KYULI.....3RD INTERESTED PARTY

EXPARTE HON. WAVINYA NDETI

RULING

Introduction

1. The ex parte applicant herein, **Hon. Wavinya Ndeti**, by these proceedings seeks that the order made on 8th June, 2017 by the **Independent Electoral and Boundaries Commission** (hereinafter referred to as "the Commission") by which the Commission allowed the complaint made in the IEBC Dispute Resolution Committee Complaint No. 79 of 2017 (hereinafter referred to as "the Complaint") effectively disqualifying the applicant from vying as the gubernatorial candidate for Wiper Democratic Party on the ground that the ex parte applicant belonged to two political parties contrary to section 14(5) of the ***Political Parties Act***, be quashed.

2. On 9th June 2017, this Court granted leave to the ex parte applicant and directed that the said leave would operate as a stay of the said decision and directed that the matter come up on 13th June, 2017. On that day, **Mr Nyamodi** and **Mr Muhoro**, learned counsel for the Commission orally applied that this Court should consider referring this matter to another Judge for hearing and determination. In effect the said counsel applied that this Court should recuse itself from the matter.

3. According to learned counsel, this matter revolves around the issue of which political party between **Wiper Democratic Movement Party** (hereinafter referred to as "Wiper") and **Chama Cha Uzalendo Party** (hereinafter referred to as CCU"), the ex parte applicant belongs to. It was submitted that before this Court is Miscellaneous Application No. 67 of 2017 (hereinafter referred to as "the earlier case") in which a perusal of the orders issued shows that the Court made a determination as to which party the applicant belonged. The Respondent was therefore of the view that the justice of this case would be better served if the matter was heard by a fresh mind, as they called it.

4. To learned counsel the issue in the earlier case was a request for an order of mandamus directed to the Registrar of Political Parties to Gazette the change of office bearers of the applicant therein who were set out in the letter dated 17th January 2017 annexed to the application and which list included the ex parte applicant herein. It was submitted that this Court found that the applicant in this matter was according to the said letter the party leader of the CCU and that that determination appears in the decree extracted pursuant to the said judgement though it was appreciated that the ex parte applicant herein has the right to change her political party.

5. It was submitted that while the Respondent does not doubt this Court's impartiality, competence and objectivity, it was nevertheless contended that the justice of this matter would be served if this matter was dealt with by another judicial officer with afresh mind since there exist pending contempt of court proceedings in the said earlier case. It was contended that the effect of the said proceedings would be to have the applicant in this this matter gazetted as the CCU Party leader. It was noted that the advocates appearing for the same party in both proceedings are the same. To learned counsel this is a matter in which learned counsel are blowing hot and cold at the same time.

6. It was reiterated that the Respondent was not alleging lack of confidence in this Court but counsel emphasised that as servants in the course of justice with important responsibilities to the Court they had a responsibility to urge their client's case.

7. Whereas it was appreciated that this Court is obliged to determine the subject matter, it was however submitted that perception of justice is paramount as it is the same that makes decisions palatable. It was therefore submitted that it is the responsibility of this Court to manage that perception and in this case as the Court has determined that the ex parte applicant is a member of CCU and there is a decree to that effect and as the same applicant is urging a different position, the Court ought to consider the perception of justice and refer this matter to a different Judge for hearing.

8. The oral applicant was supported by learned counsel for the 3rd interested party, **Mr Ngatia** and **Miss Mwanzia** who apart from associating themselves with the foregoing submissions added that given that

the dispute herein revolves around the membership of a political party, the same ought to be determined at the earliest opportunity and preferably with fresh pair of eyes. They submitted that it is only just and proper that another judicial officer be allowed to hear the instant suit.

9. The application was however opposed by the ex parte applicant who submitted through her learned counsel **Mr Otieno** that section 20 of the ***Political Parties Act*** requires gazettement of intended officials and an invitation for objections one of which might be whether the proposed officials are members of the party. It was therefore submitted that the present application is in bad faith since the grounds upon which a judicial officer can recuse himself such as bias and personal interest have not been shown.

10. It was submitted that the matter before the Court in the instant case, which is whether the applicant belonged to two political parties, have not been substantially dealt with. It was submitted that in the erlier case the Court was not dealing with the issue of the applicant's membership of political parties but whether the intended officials of the party ought to have been gazetted. That issue, it was submitted does not confer the status of officials of the party.

11. It was submitted that since learned counsel have expressed confidence in this Court there is no reason for the Court to recuse itself.

12. The application was also opposed by **Mr Sore**, learned counsel for **Wiper** who was of the view that it is better for a Judge who has knowledge of the history of the matter in question to deal with the same. He clarified that his client was not a party to the earlier proceedings.

13. Mr Manduku for the Registrar of Political Parties (hereinafter referred to as "the Registrar") informed the Court that the parties in the earlier case were in the process of settling the same by way of a consent which settlement might have a bearing on this matter. He however submitted that the Registrar has full confidence in this Court and that there is no reason for the Court to recuse itself.

Determinations

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

15. Since the oral application is predicated on the proceedings in Miscellaneous Application No. 67 of 2017, it is important that the substance of the said proceedings be properly understood in order to make an informed decision on this oral application. The said proceedings were grounded on section 20 of the ***Political Parties Act*** which provides as follows:

> ***1. Where a fully registered political party intends to change or amend—***
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> ***a. its constitution;***
>
> ***b. its rules and regulations;***
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> ***c. the title, name or address of any party official; or***
>
> ***d. its name, symbol, slogan or colour;***
>
> ***e. the address and physical location of the head office or county office:***
>
> ***it shall notify the Registrar of its intention and the Registrar shall, within fourteen days after the receipt of the notification, cause a notice of the intended change or alteration to be published in the Gazette.***
>
> ***2. The political party giving notification under sub-section (1) shall publish such notification in at least two daily newspapers having nationwide circulation.***

3. Upon the expiry of thirty days from the date of publication of the notice in subsection (1), the political party may, after taking into account any representations received from the public under subsection (1) and (2), effect the change or alteration in accordance with its constitution and rules.

16. After hearing the said application this Court on 6th May, 2017 issued the following orders:

> **"Accordingly, an order *mandamus* is hereby issued compelling the Respondent to cause a notice of the changes and alterations on the party's officials list, namely the National Executive Council list of officials of the Party, as per the Applicant's letter dated 17th January, 2017, to be published in the Gazette forthwith pursuant to section 20(1) of the *Political Parties Act*. The said notification to be gazetted within 14 days from the date of service of this order on the Respondent."**

17. Apart from the order relating to costs there was no other order issued by this Court. With due respect one does not need to be a rocket-scientist to see that the Court did not make a finding with respect to who are the genuine officials of the CCU Party. If someone was in doubt this position was clarified by a subsequent ruling delivered in the same case on 11th May, 2017 in which this Court expressed itself as follows:

> **"…it is clear that the Respondent had no discretion in the matter unless there was an order barring her from gazetting the notification. It is only after the said notification that the exercise of discretion is contemplated upon hearing any objections that other parties may wish to raise before her… In this case the mere fact that the Respondent gazettes the notification does not take away the rights of those whose interests are likely to be adversely affected from objecting to the intended change in the office holders. In other words the gazettement alone will not prejudice the rights of the parties herein or even third parties."**

18. The Court was therefore clear in its mind that it was not directing the Registrar on how to exercise her discretion. It was simply directing her to exercise her discretion one way or the other after complying with the law requiring representations. To interpret this Court's decision to imply that the Court made a decision as to which party the ex parte applicant herein belonged is clearly a misconception and with due respect a misrepresentation of what the Court held.

19. It was contended that there was a decree extracted from the said judgement in which the ex parte applicant herein was described as the CCU's party leader. Apart from the reference made to the self-description by the deponent to the supporting affidavit as the Party leader, this Court did not designate her as such and made no finding with respect to her status in the said party. This Court has no role to play in descriptions which parties attach to themselves. As was held in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No. Nai. 195 of 1997**:

> **"A judge is not concerned with what litigants may brag or boast as he is only concerned with dispensing justice according to law, and any boasts made by litigants ought not to perturb or even bother a Judge."**

20. I have perused the decree extracted in the judgement and nowhere does it designate the applicant herein as the Party leader. If such designation appears in the letter addressed to the Registrar, such designation cannot be termed to be the order of this Court. This Court was dealing with a list sent to the Registrar and simply directed that the same be gazetted. I must note that this Court even placed this matter aside for counsel to peruse the judgement in the said earlier case in order comprehend the substance thereof. I therefore hold that in the said earlier case this Court did not make a determination that the ex parte applicant herein was a member of the **Chama Cha Uzalendo** Party leave alone being an official of the said Party. Any Kenyan has a right to purport to belong to a political Party but whether he or she is an official thereof can only be determined by the Registrar of Political Parties pursuant to section 20 of the ***Political Parties Act***.

21. Since 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.

22. 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."**

23. The principles relating to recusal were discussed in details in the **President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98**, in which the Constitutional Court of South Africa pronounced itself as follows:

> **"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**
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> > **'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.'**
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> **In their separate concurrence, L'Heureux-Dube and McLachlin JJ say:38**
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> > **'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."

24. 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.'"

25. 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."

26. 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." [Emphasis mine].

27. 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."

28. 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. "

29. To paraphrase the above decision, Judges do not go to heaven in the evening and return to earth in the morning. Judges are human made of flesh and bones. When you prick them they bleed and when you tickle them they laugh.

30. 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."

31. 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."

32. 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."

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

33. 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.

34. In this case the Commission has made it clear that it has confidence in this Court to hear and determine this case impartially, competently and objectively. Its only apprehension is that the issues in the instant application being in *pari materia* to the issues in Miscellaneous Application No. 67 of 2017, there is a perception that justice may not be done. Surely if the Commission has confidence in the Court to decide the matter impartially, competently and objectively whose perception are we dealing with? It must be appreciated that in matters of perception the applicant must show that there exist ***reasonable perception***. Such reasonable perception in my view must be based on facts and in this case the Court was not informed the perception alluded to in order for the Court to decide whether that perception is reasonable or not. 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*." [Emphasis added].

35. 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 even if similar issues are involved. Where the parties are of the 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."

36. In this case, the Court has not been informed that any party has preferred an appeal against the earlier decision. In fact as is stated hereinbelow, that dispute has now been compromised by consent of the parties. 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.

37. In **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12** it was held:

"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."

38. 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.

39. 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. As I have stated hereinabove the only ground for seeking the Court's recusal was a misconception of this Court's decision in Miscellaneous Application No. 67 of 2017 which this Court has clarified.

40. Before I make the final order, as submitted by **Mr Manduku**, soon after the submissions in this matter, the parties in Miscellaneous Application No. 67 of 2017 who had, before the submissions herein were made, intimated that they were in the process of recording a consent, did record a consent therein on the following terms:

1. The applicant to file a fresh list of officials in the statutory Form PP7 for gazettement by the Respondent within 7 days of receipt of the list.

2. The contempt proceedings against the Respondent are hereby withdrawn.

41. In the premises I find no merit in the oral application seeking this Court to recuse itself or to refer this matter for hearing by another Judge which application is hereby dismissed with costs to the ex parte applicant to be borne by the Respondent.

42. It is so ordered.

Dated at Nairobi this 14th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimani Muhoro with Mr Nyamodi and Mr Muchoki for the Respondent

Mr Manduku for the 2nd interested party

Mr Omwanza with Mr Ngatia for the 3rd interested party

Mr Ochieng Oginga for Mr Willis Otieno, Mr Munyithya and Mr Nzamba Kitonga for the applicant

CA Mwangi