REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 104 OF 2019

LONDON DISTILLERS (K) LTD.....PLAINTIFF/RESPONDENT

VERSUS

MAVOKO WATER & SEWERAGE CO.....1ST DEFENDANT/RESPONDENT

MACHAKOS COUNTY GOVT.....2ND DEFENDANT/RESPONDENT

ERDERMANN PROPERTY LTD.....3RD DEFENDANT/APPLICANT

RULING

1. In the Application dated 30th January, 2020, the 3rd Defendant/Applicant has sought for the following orders:

> **a. That the Honourable Court be and is hereby pleased to hear and determine this Application in priority to any other issue of substance in the matter, to preserve the integrity of the judicial process.**
>
> **b. That *the Hon. Mr. Justice Oscar Angote, do recuse himself from the hearing of this matter and any further proceedings herein.***
>
> **c. That this file be forthwith placed before the Principal Judge of the Environment and Land Court, for further directions/re-allocation to any other suitable and disinterested Court of competent jurisdiction for hearing and disposal.**
>
> **d. That the costs of this Application be in the cause.**

2. The Application is supported by the Affidavit of the 3rd Defendant/Applicant's Managing Director, Zeyun Yang, who has deponed that the gravamen of the dispute which had necessitated the Applicant's institution of judicial review proceedings therein, and primarily the dispute between the parties herein, is predicated upon London Distillers (K) Limited's (LDL) wanton pollution arising from the discharge of untreated effluents from its factory into the environment and the ensuing action and or apparent inaction by the lead agencies in curbing the pollution by LDK.

3. The Applicant's Director deponed that the National Assembly, through a report adopted by the whole House, unequivocally held that the Plaintiff was endangering the aquatic and human life through discharge of its untreated effluent and directed the Respondent to oversee compliance by the Plaintiff in strict conformity with the law.

4. The Applicant's Director deponed that to date, there has been no compliance with the report of the National Assembly and that the recommendations *inter alia* directed that LDK *(the Plaintiff)* invests in a state-of -the art facility to curb its air and water pollution in its factory, failure to which NEMA should consider giving an order for closure and relocation of its factory.

5. It was deponed by the Applicant's Director that instead of ensuring compliance as recommended by the Parliamentary report, LDK has initiated malicious campaigns alleging that the said Parliamentary investigation was instigated at the behest of the Applicant and that LDK has instigated various law suits against the Applicant both before this Honourable Court and the National Environment Tribunal, all intended to evade compliance with the recommendations of the said Parliamentary report.

6. According to the Applicant's Director, the suits filed by LDK appear to be revenge attacks that are intended to ruin the Applicant's business or drive it out of business through stoppage of its affordable housing projects situate within the Athi River area, which are part of the Presidential Big 4 Agenda.

7. It was further deponed that the Plaintiff (LDK) has also unsuccessfully sought orders from the NET seeking the demolition of the Applicant's residential units, more commonly referred to as the Greatwall Gardens Phase I, II and III, most of which have been sold and transferred to third party purchasers.

8. According to the Applicant's Director, the Applicant commenced proceedings by way of judicial review in *Judicial Review Case No. 41 of 2019 [Republic vs. National Environment Tribunal Ex parte Erdemann Property Limited]* pursuant to leave granted by the Honourable Court on 12th September, 2019; that by an Application dated 1st November, 2019, the Plaintiff (LDK) moved this court seeking to strike out the entire Judicial Review proceedings commenced by the Applicant in JR 41 of 2019 and that vide its Ruling delivered on 18th October, 2019, this court allowed the Plaintiff's Application and consequently set aside the leave previously granted to institute the Judicial Review proceedings.

9. The Applicant's Director deponed that despite the aforesaid clear machinations and revenge attacks and blatant refusal by LDK to comply with the recommendations of the Parliamentary Committee's report, it was shocking to the Applicant that this court would, shortly after the delivery of the Ruling, make certain remarks to the effect that the Plaintiff could not have been liable for the alleged environmental pollution allegedly because it had operated on the same site for over 30 years without ostensible environmental pollution complaints from its neighbours.

10. The Applicant's Director deponed that the remarks by the court were construed as being a calculated and pre-judged notion aimed at fostering the implication that the Plaintiff would in no way be involved in pollution.

11. It was deponed by the Applicant's Director that in light of clear evidence of previous pollution included and highlighted in the recommendations of the Parliamentary Report, it is evident that the remarks by the court were grossly unwarranted.

12. The Applicant's Director deponed that the said remarks implied that the Applicant, which is a new entrant in the Athi River area, and is involved in various affordable housing projects, is encroaching on a pre-existing industrial zone, yet the Applicant had already invested in the acquisition of various huge chunks of land in the area whose user was already residential and has already developed and sold over 2,000 residential units in the said vicinity.

13. It was deponed by the Applicant's Director that the aforesaid appearance of bias by the court as a result of a pre-determination or pre-judgment is a recognized ground for recusal; that the appearance of bias includes a clear indication of a prematurely closed mind as has been expressed above and that the said remarks by the Court were made in blatant contravention of Rule 5 (4) and (5) of the Judicial Code of Conduct.

14. The Applicant's Director deponed that the Applicant was constrained to file a petition to the Judicial Service Commission seeking the removal of the Honourable Justice O. Angote citing the conduct of the Honourable Court as more particularized in its complaint and petition dated 22nd October, 2019; that the Applicant is reasonably apprehensive that there exists a real likelihood of bias and that the Applicant faces the risk of not being accorded a *"fair hearing"* pursuant to the remarks by the Honourable Court.

15. The Applicant's Director deponed that in light of the pendency of the Petition he lodged for removal of the Honourable Trial Court, and having considered the preceding facts, he is convinced that any impartial, fair minded and informed observer would conclude that there exists a real possibility that the Honourable Trial Court is or would be biased.

16. The Applicant's Director finally deponed that it is imperative and in the interest of the Applicant's right to a fair trial as guaranteed by Article 50 of the Constitution that justice can only be seen to be done if the Honourable Trial Court is excused from handling the instant proceedings and that the Applicant is desirous of having its matters handled by an impartial Court.

17. In his Further Affidavit, the Applicant's Managing Director deponed that the question as to whether LDK *(the Plaintiff)* is engaged in pollution activities is not a trivial issue; that he is gravely displeased that the Judge before whom this serious question is posed, would preliminarily in open court declare that LDK cannot be polluting the environment, merely because LDK has been in existence for over 30 years, and that he was personally present in Court when the Judge made this very prejudicial statement.

Response by the Plaintiff:

18. In response to the Application, the General Manager of Administration of the Plaintiff deponed that the Notice of Motion application dated 30th January, 2020 is based on distorted facts and deductions and has been filed mala fides to disrupt/delay and frustrate the hearing and final determination of the application seeking the striking out of the Judicial Review proceedings.

19. It was deponed that on 30th January, 2020, the Plaintiff was ready to proceed with the hearing of the application when Counsel for Erdermann Property Limited *(the Applicant)* informed the Honourable Court that they had filed an application seeking recusal for the Judge on the same day.

20. It was deponed by the Plaintiff's Manager that on the same day, Mr. Lusi, who was representing the Applicant in several matters, together with Ms. Mireri Advocate, stage managed the proceedings accompanied with a battery of journalists, apparently with instructions, to cover their similar application in these matters seeking the recusal of the Hon. Justice Angote and thereafter extensively addressed the media misrepresenting facts of the case in blatant disregard of the *sub-judice* rule with a view to intimidating and embarrassing the trial Judge with the press coverage.

21. It was deponed that the video clips on the statements by Ms. Nancy Mireri Advocate has been given wide publicity on several online platforms and are still available at the following links: http://www.africantimes.co.ke/erdermann-properties-want-judge-out-of-the-ongoing-

court-matter/,https://.the-star.co.ke/counties/eastern/2020-01-30-developer-wants-judge-to-recuse-himself-in-ldk-case, https://www.facebook.com/1477009359271091/posts/2251968598441826/?sfnsn=mo&d=n&vh=e and https://youtu.be/4HcmvbbhYqY.

22. It was deponed that owing to the contemptuous conduct on the face of the Court, several newspapers articles have been published as a result of the said press statements, with completely misleading information regarding the disputes before this Honourable Court; that the media has further reported that Hon. Mr. Angote J. had made continuous orders in favour of London Distiller (K) Ltd herein without considering facts and that this is injurious to the character and person of the Judge in conduct of the matter.

23. It was deponed that the purport of the Application for recusal and which was equally on the basis of a Complaint filed before the Judicial Service Commission was to scuttle the hearing and determination of the Plaintiff's Application dated 1st November, 2019; that the Court *(Hon. Justice Angote)* directed parties to be heard before Hon. Justice Mbogo sitting at Makueni and that after the issuance of the directions, Erdermann Property Limited *(the Applicant)*, through its Counsel, sought to withdraw the Application seeking orders for recusal of the Judge – clearly revealing their intention with the recusal application being to frustrate/delay any hearing on the material day.

24. It was deponed that contrary to the allegations by Erdermann Property Limited, there is no conclusive finding in any Parliamentary Report to the effect that the Plaintiff is polluting the environment at all; that the Departmental Committee on Environment and Natural Resources of the National Assembly at a consultative meeting asked NEMA to prepare a Report on environmental pollution and forward the same to the Committee to enable the Committee arrive at a finding and that to date, the issue has not been finalized and no final determination and report has been made.

25. According to the Plaintiff, on 2nd September 2019, Erdermann Property Limited in conjunction with MAWASCO vandalized the Plaintiff's sewer line joining to the EPZA Main Trunk Sewer, and commenced an active media campaign accusing the Plaintiff of polluting Athi River by emitting effluents directly into the river, a fact which they knew was false.

26. It was deponed that unknown to the adverse parties, Erdermann Property Limited *(the Applicant)* filed a complaint before the Judicial Service Commission against Hon. Justice Angote and that there is no legitimate basis for the said Complaint which culminated into the instant Application.

27. It was deponed that the Complaint before the Judicial Service Commission was premised on alleged averments in Machakos Judicial Review No. 48 of 2019, which matter was settled by Consent of the adverse parties to the Cause namely London Distillers K Limited and EPZA; that Erdermann Property Limited was not a party to the proceedings in its legal personality as a Company; that Erdermann Property Limited received a response vide a letter dated 4th November 2019 and that the said response does not in any way implicate the Judge for any judicial misconduct or any conduct unbecoming of a judicial officer in contravention of the Judicial Service of Conduct.

28. The Plaintiff's General Manager deponed that before a judicial officer is recused from hearing a dispute, the objective test of real bias must be satisfied; that the Judge is not a party to this suit and has no direct pecuniary or proprietary interest in the outcome of the instant dispute and that there is no possible interest on the part of the judicial officer in the instant suit.

29. It was deponed that Erdermann Property Limited unwillingness to see the correctness of the verdict of the Court in its decision rendered on 18th October 2019 and subsequent decisions has caused it to carelessly file the instant Application attributing the verdict to bias on the part of the judicial officer; that setting aside of *ex parte* Orders is a matter of judicial discretion based on strong grounds which the Judicial Officer correctly determined and that Machakos Judicial Review No.48 of 2019 was settled by consent of the parties and the matter marked as settled.

30. The Plaintiff's General Manager deponed that the instant Application has been filed to intimidate the Judge from hearing and determining the matter in an objective, impartial, fair and right manner and to condescend the Judge into granting Erdermann Property Limited the Orders it seeks; that recusal is a matter of discretion by the Judge concerned and that the test for recusal is what right thinking members of the public think on the matter in question.

31. It was deponed that there is no evidence of bias or its likelihood and that by acceding to suggestion of appearance of bias is likely to encourage Erdermann Properties Limited 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.

Submissions:

32. The Application proceeded by way of written submissions. The Applicant's advocate submitted that recusal has been defined in the *Black's Law Dictionary, 8th Ed (2004) (p.1303)* as being, *"the removal of oneself as judge or policy maker in a particular matter, (especially) because of a conflict of interest*."

33. It was submitted by counsel that it is now well established in law that a Judge must recuse himself or herself if a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased and that this test has been espoused by the Court of Appeal in the case of *Philip K. Tunoi vs. Judicial Service Commission & another [2016] eKLR* which held that:

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

34. Counsel submitted that the above test is not concerned with matters from the viewpoint of a reasonable Judge, but from that of a

reasonable lay observer and that this bystander would be taken to be, at least in a very general way, aware of the strong professional pressures on adjudicators to uphold traditions of integrity and impartiality.

35. It was submitted by the Applicant's advocate that a court seized of an Application as the one that is before Court, must take cognizance that the circumstances calling for recusal of a Judge, are by no means cast in stone. Counsel relied on the decision of the Supreme Court of Kenya in *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2013] eKLR* where the court held as follows:

> "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 the 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."

36. Counsel submitted that the objective test of the reasonable apprehension of bias was also adopted by the Court of Appeal in *Kalpana H. Rawal vs. Judicial Service Commission & 2 Others [2016] eKLR* which quoted with approval the East Africa Court of Justice in *Attorney General of Kenya vs. Prof Anyang' Nyong'o & 10 others [EACJ Application No. 5 of 2007]* where it stated as follows*:*

> "we think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

37. The Applicant's counsel submitted that the rule against bias is one of the twin pillars of natural justice. Counsel relied on the case of *Gillies vs. Secretary of State for Work and Pensions [2006, UKHL, 2]* in which the court held as follows:

> "the bias rule is the second pillar of natural justice and requires that a decision maker must approach a matter with an open mind that is free of prejudgment and prejudice."

38. It was submitted that the principle upon which the bias rule has been founded can be traced back to Lord Hewart's famous statement that "*justice should not only be done, but be seen to be done*"; that indeed, Rule 5 (4) and (5) of the *Judicial Code of Conduct and Ethics* stringently imposes the requirement for the impartiality of a judge and that the utterances attributed to the trial court shortly after the delivery of the Ruling on the 18th of October, 2019, as to the apparent blamelessness of the Plaintiff in its impugned acts of pollution, manifest the absence of impartiality and are a ground for the reasonable apprehension of bias.

39. The Applicant's counsel submitted that a complaint of judicial bias is a constitutional matter for it goes into the very heart of the right to a fair hearing. Counsel cited the decision of the constitutional court of South Africa in *Brian Patrick De Lacy & another vs. South African Post Office [2011] ZACC 17,* which was considered by Mwita J. in *Kenya Hotel Properties Limited v the Attorney General & 5 Others [2018] eKLR* as follows:

> "thus, when a litigant complains that a judicial officer has acted with bias or perceived bias he is in effect saying that the judicial officer has breached the Constitution and her oath of office. This is so because courts are final arbiters on the meaning of the Constitution and the law- a high duty that must be discharged without real or perceived bias. The issue is one of grave constitutional concern that demands the unfailing attention of the court seized with the complaint.
>
> …another consideration is that once a claim of judicial bias is made, the judicial officer concerned would generally be entitled to a definitive outcome on the accusations. An accusation of bias, however frivolous, if not dispelled, may tarnish the judicial officer concerned and corrode public confidence in the judiciary as a whole."

40. It was submitted by the Applicant's advocate that on the background of Lord Hewart's statement, it is uncontroverted that justice shall indeed be seen to be done, from the prism of the Applicant's judicial lens, if the Honourable Court recuses itself from handling the instant matter.

41. On his part, the Plaintiff's advocate submitted that the Application should be dismissed for reasons that the Honourable Judge has no direct pecuniary or proprietary interest in the outcome of the instant dispute; that the *Judicial Service Code of Conduct and Ethics* lays out the general rules of conduct and ethics to be observed by judicial officers to maintain the integrity and independence of the judicial service, which the presiding Judge is well aware of and that Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts, as public officers, to carry out their duties under the law.

42. The Plaintiff's advocate submitted that by dint of Rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned, including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules, it was submitted, are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.

43. Counsel relied on the case of *Republic vs. Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017] eKLR* which quoted the decision of the Court of Appeal in *Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996* which held as follows:

> "…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 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..."

44. The Plaintiff's Counsel submitted that it is a fact borne by the documents sought to be relied on by the Applicant, and more particularly the Interim Report on the Inquiry into Complaints of Environmental Pollution by the National Assembly's Departmental Committee on Environment and Natural Resources repeatedly relied on, that the Plaintiff had been in the neighbourhood for more than 30 years before Erdermann Property Limited commenced the construction of the impugned residential estate.

45. It was submitted that the test to be applied is objective and the facts constituting bias must be specifically alleged and established. It was submitted that 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.

46. The 2nd Respondent's counsel relied on the case of *Bernard Chege Mburu vs. Clement Kungu Waibara & 2 Others [2011] eKLR* in which the court quoted the decision in *King Woolen Mills Limited & Another vs Standard Chartered Financial Services Ltd & Another, Civil Appeal No. 102 of 1994* where the Court of Appeal concluded that for a judge to disqualify himself, a reasonable and fair minded person sitting in court, and knowing all the relevant facts, would have a reasonable suspicion that a fair trial for the Appellants would not be possible.

47. Counsel also relied on the decision in the case of *Locabail Ltd vs. Bayfield properties [2000]1 ALL E.R 65*, at page 78, that:

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

48. The Plaintiff's advocate submitted that 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; that recusal is a matter of discretion by the Judge concerned and that the practice in our Courts has seen judges recusing themselves from hearing matters where they feel they may not appear to be fair or where they feel their impartiality would be called into question.

49. To buttress the above argument, counsel relied on the decision of Odunga J. in Republic vs. Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017] eKLR in which he quoted the decision of the Court of Appeal in *Miller vs. Miller [1988] KLR 555*, where the Court 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 in 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 familiarize 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…"

50. Counsel also relied on the decision of Ogola J. in *Tatu City Limited & 3 others vs. Stephen Jennings & 6 others [2015] eKLR* in which he held as follows:

> "In conclusion I will quote from the Ruling rendered by the Court of Appeal in the **TSC – VS – KNUT** case above:
>
> "Allowing the application on the basis of unstained allegations would not only be interfering with independence of the bench and dereliction of the constitutional duty of judges who have taken an oath of office, but also undermine the independence of the Judiciary as stipulated in Article 160 (1) of the Constitution."

51. Counsel submitted that the Applicant has not placed before this Court evidence which may lead a fair-minded and informed observer to conclude that there is a possibility that the Judge is biased or which may give rise to want of impartiality and impede fair hearing and that the conduct of the Applicant has been frowned upon in all jurisdictions.

52. The Plaintiff's advocate submitted that Erdermann Property Limited is using recusal applications and Petitions to the Judicial Service Commission as weapons against Hon. Justice Angote and Hon. Mr. Justice Mbogo, and any other Judicial officers who dare make any decision against them.

53. Counsel submitted that the Applicant has failed to demonstrate evidence of real danger of bias or its likelihood; that acceding to the suggestion of appearance of bias is likely to encourage the Applicant to believe that by seeking the disqualification of a Judge, it will have its case tried by someone thought to be more likely to decide the case in its favour and that the instant Application has been filed to intimidate

the Judge from hearing and determining the matter in an objective, impartial, fair and right manner and to condescend the Judge into granting the Applicant the orders it seeks.

54. When allegations of bias are not factually founded, it was submitted, an Application for disqualification of a Judge amounts to intimidating a Judge and is meant to affect independent foundation of the justice system. Such an Application, it was submitted, intends to instill fear in the Judge, and this is itself against the Bangalore Principles of Judicial Conduct.

Analysis and findings:

55. The Applicant is seeking for the recusal of this court *(Angote J)* from hearing the dispute herein. According to the Applicant's Director, this court should recuse itself because it made a remark in the proceedings, shortly after the delivery of the Ruling on 18th October, 2019, in this matter, to the effect that the Plaintiff (LDK) had been in operation for more than 30 years during which period there were no complaints as to its alleged pollution of the environment.

56. According to the Applicant's Director, the said remarks by the court shows the court's pre-judged notion that the Plaintiff would in no way be involved in pollution, which pollution is the gravamen of the dispute which necessitated the filing of the Applicant's Judicial Review Motion.

57. "Recusal" has been defined in the *Black's Law Dictionary, 8th Ed.* as being, "*the removal of oneself as judge or policy maker in a particular matter, (especially) because of a conflict of interest."* Indeed, it is now well established in law that a Judge must recuse himself or herself if a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased.

58. The test to be applied where an allegation of bias is raised by a party was espoused by the Court of Appeal in the case of *Philip K. Tunoi vs. Judicial Service Commission & another [2016] eKLR* which held that:

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

59. This position had been restated earlier on in the English case of *Panday vs. Virgil, (2008) 1 AC 1386* where the court observed that:-

> "The judge deciding an apprehended bias claim is not and can never be a lay observer. In order to determine the likely attitude of a fair minded lay observer, the judge must be clothed with the mantle of someone the judge is not…one must be particularly careful not to attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other."

60. The objective test of the reasonable apprehension of bias was also adopted by the Court of Appeal in *Kalpana H. Rawal vs. Judicial Service Commission & 2 Others [2016] eKLR* which quoted with approval the decision of the East Africa Court of Justice in *Attorney General of Kenya vs. Prof Anyang' Nyong'o & 10 others [EACJ Application No. 5 of 2007]* where it held as follows:

> "we think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

61. On the same issue of recusal of a Judge on the ground of being biased, the Supreme Court of Kenya in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR* observed that:

> "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 the 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."

62. The Judicial Service of Code of Conduct, *2003*, at Rules 5 (a) provides as follows:

> "A judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which—
>
> (a)he has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him."

63. The 2003 Judicial Code of Conduct and Ethics has since been replaced by the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, which, at regulation 21 provides as follows:

"21. (1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge

(a) ……

(b)…….

(c)…….

(d) has actual bias or prejudice concerning a party."

64. The facts constituting bias must be specifically alleged and established. For a Judge to recuse himself on the ground of bias, the Applicant has to show that 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.

65. In the case of *Bernard Chege Mburu vs. Clement Kungu Waibara & 2 Others [2011] eKLR* , the court quoted the decision in *King Woolen Mills Limited & Another vs Standard Chartered Financial Services Ltd & Another, Civil Appeal No. 102 of 1994* where the Court of Appeal concluded that for a judge to disqualify himself, a reasonable and fair minded person sitting in court, and knowing all the relevant facts, would have a reasonable suspicion that a fair trial for the Appellants would not be possible.

66. In the *Kalpana Rawal (supra)* case, the Court of Appeal observed as follows:

"An application for recusal of a Judge in which actual bias is established on the part of the Judge hardly poses any difficulties: the Judge must, without more, recuse himself. Such is the situation where a Judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the Judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of a Judge… It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn."

67. The record shows that on 12th September, 2019 Erdermann Property Limited *(the Applicant)* instituted Machakos Judicial Review No. 41 of 2019: *Erdermann Property Limited -Versus- National Environment Tribunal & Others (this suit)* and obtained *ex parte* Orders staying the implementation of the Order issued on 04th September, 2019 and all proceedings before the Tribunal in NAIROBI NET NO.21 of 2019.

68. The Plaintiff (L.D.K) filed an Application seeking orders to set aside the *ex parte* orders granted by this court on 12th September, 2019 on account of, *inter alia*, active concealment of material facts and more particularly the existence of parallel proceedings, misrepresentation of material facts, and unclean hands on the part of Erdermann Property Limited. After hearing both parties, this court *(Angote J.)* on 18th October, 2019 rendered a decision vacating the *ex parte* Orders issued in their entirety.

69. After the delivery of the Ruling, the advocate for Erdermann Property Limited *(the Applicant herein)* made an oral Application to have the Ruling of the court stayed. In a brief Ruling, this court declined to stay its Ruling as follows:

"This court has made a finding that the Tribunal should be allowed to exercise its mandate, whereafter the decision of the Tribunal will be a subject of either an appeal or judicial review. In the circumstances, I shall not stop the process by way of staying my decision any further. The ex parte Applicant to move the Court of Appeal appropriately under Rule 5(2) (b) of the Court of Appeal Rules."

70. It would appear that the Applicant never filed an appeal against the two Rulings of the court. However, according to the deposition of the Applicant's Director, immediately after the delivery of the Ruling of 18th October, 2019, this court made certain remarks that warrants its recusal.

71. The Applicant's Director has deponed as follows:

"That despite the aforesaid clear machinations and revenge attacks and blatant refusal by LDK to comply with the recommendations of the Parliamentary Committee's report, it was shocking for the Applicant that the Honourable Court would, shortly after the delivery of the ruling, make certain remarks to the effect that the 2nd Interested Party could not have been liable for the alleged environmental pollution allegedly because it had operated on the same site for over 30 years without ostensible environmental pollution complaints from its neighbours.

That according to the Applicant, these remarks were ostensibly construed as being a calculated and pre-judged notion aimed at fostering the implication that the Plaintiff would in no way be involved in pollution. Moreover, in light of clear evidence of previous pollution included and highlighted in the recommendations of the said Parliamentary Report, it is evident that these remarks were grossly unwarranted.

That further, according to the Applicant, the said remarks implied that the Applicant, which is a new entrant in the Athi River area,

and is involved in various affordable housing projects is encroaching on a pre-existing industrial zone yet the Applicant had already invested in the acquisition of various huge chunks of land in the area whose user was already residential and has already developed and sold over 2,000 residential units in the said vicinity."

72. The remarks which have been attributed to this court, and which I have quoted above, are not on record. Indeed, the Applicant has not stated the circumstances under which the said remarks were uttered by the court. Were the remarks by the court in a form of a question, calling for answers from parties or a statement? Were the remarks made in respect to a particular Application by any of the parties, and if so, in which suit.

73. It is trite that the issues of whether the Plaintiff (LDK) has been polluting the environment can only be determined after all the parties have been heard and tendered evidence, either before this court, or the Tribunal. The remark attributed to this court that it had suggested that the Plaintiff cannot be accused of having polluted the environment because it had been in operation for more than 30 years, can only be in the Applicant's mind.

74. If the issue of the Plaintiff having been in operation for 30 years was raised by the court after the Ruling of 18th October, 2019, the same must have been raised in context, and in a different matter, *(and not in JR No. 41 of 2019 in which the Ruling was delivered on 18th October, 2019)* with a view of eliciting responses from the parties.

75. However, that question cannot amount to a predetermined decision on whether the Interested Party has been polluting the environment or not, whether by the court, or by a member of the public who is not only reasonable, but also fair minded and informed about all the circumstances of the case.

76. Indeed, as was held by the East Africa Court of Justice in the case of Attorney *General of Kenya vs. Prof Anyang' Nyong'o & 10 others [EACJ Application No. 5 of 2007],* a litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.

77. The issue of whether the Plaintiff is culpable of polluting the environment has never been heard and determined by this court. Indeed, the Ruling of 18th October, 2019 had nothing to do with whether the allegations leveled against the Plaintiff *viz –a-viz* pollution are true or not.

78. That being the case, and in the absence of any record to show that the remarks attributed to the Judge by the Applicant were ever made, and that if the same were ever made, they were in the form of a question to elicit a response from the opposite party, it is my finding that a fair minded and informed member of the public cannot conclude that this court was or is likely to be biased while dealing with the issue of pollution attributed to the Plaintiff.

79. Indeed, this court is aware that under the Judicial Service Code of Conduct and Ethics, a Judge is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned, including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him.

80. However, this court can only disqualify itself from hearing this matter where there is actual evidence of bias or prejudice concerning the Applicant in this matter. The court cannot disqualify itself on the basis of the Applicant's own perception that there is appearance of bias on the part of the court, and more so on an issue that this court has neither heard, nor received evidence on.

81. As was held by the Supreme Court in the case of *Gladys Boss Shollei vs. Judicial Service Commission and Another (2018) eKLR,* once a court has clothed itself with the jurisdiction to hear and determine a matter it has a general duty to sit. Allowing an unsubstantiated application such as the one before me is tantamount to gagging a Judge from conducting his duty.

82. Acceding to the Applicant's Application on the basis of unsubstantiated allegations and personal perception of bias by the Applicant's Director will interfere with the administration of justice and independence of the court, and will be a dereliction of the court's constitutional duty to determine cases before it without fear or favour.

83. For those reasons, I find the Application dated 30th January, 2020 to be unmeritorious. The Application is therefore dismissed with costs to the Plaintiff.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE