



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 46 OF 2015

TATU CITY LIMITED 1ST PLAINTIFF
KOFINAF COMPANY LIMITED 2ND PLAINTIFF
NAHASHON NGIGE NYAGAH 3RD PLAINTIFF
VIMALKUMAR BHIMJI DEPAR SHAH 4TH PLAINTIFF

-VERSUS-

STEPHEN JENNINGS 1ST DEFENDANT
FRANCES HOLLIDAY 2ND DEFENDANT
HANS JOCHUM HORN 3RD DEFENDANT
PIUS MBUGUA NGUGI 4TH DEFENDANT
FRANK MOSIER 5TH DEFENDANT
ANTHONY NJOROGE 6TH DEFENDANT
CHRISTOPHER BARRRON 7TH DEFENDANT

RULING

INTRODUCTION

1. The application before the court is a Notice of Motion dated 10th September 2015, filed by the 7th Defendant in this matter. The application seeks orders that the judge, that is, I, disqualify and recuse myself from any further participation of this matter, which should then be referred to the Presiding Judge for directions regarding appointment of another judge to proceed with the matter, and that the costs of the application be in the cause.
2. The application is premised on the grounds set out on the face of the application *inter-a-lia* that allegations have been made to the Chief Justice over the handling of this case by one Wilfred

Gitonga of Kenyans for Clean Justice to the effect that Kshs.50,000,000/= had been paid in bribes to influence the outcome of the case before the court, and although the claim is mere allegations, at this stage the 7th Defendant/Applicant believes those allegations to be very serious on the administration of justice, and so the Applicant has lost confidence in the judge handling this matter, and the judge should recuse himself and refer this matter to the Presiding Judge in this division for re-allocation to another judge.

3. The application is supported by affidavit and further affidavit of Christopher Barron who is the 7th Defendant herein. The application is also supported by all other Defendants, and a Section of the Plaintiffs, who have filed affidavits in support as follows:-

- ***Affidavit sworn by Alex Kamuhia Kahu on 12th October 2015 on behalf of the 1st Plaintiff.***
- ***Affidavit sworn by Hasn Jochum Horn (3rd Defendant) on 12th October 2015.***
- ***Further affidavit by Mansu M. Isaa dated 12th October 2015.***
- ***Submission filed by the 6th Defendant on 13th October 2015.***

(Since, all the Defendants support the application I will refer to them in plural as the Applicants).

4. What is to be noted at this stage is that there has been mutation and changes in parties representation. The Defendants were all initially represented by the firm of M/s Ochieng, Onyango, Kibet and Ohaga, and later the Defendants split representation and the 3rd Defendant appointed M/s Mbugua, Atudo & Machaira to represent him. The four Plaintiffs were all represented by the firm of Havi & Company Advocates. This was between February to September 2015. As from September 2015 the Defendant further split representation and brought on board M/s MMA Advocates, LLP, to represent the 6th Defendant, while M/s Issa & Company Advocates took over from M/s Ochieng, Onyango, Kibet and Ohaga for the 1st, 2nd, 4th, 5th and 6th Defendants. For the Plaintiffs Mr. Ahmed Nassir has now filed change of advocates from M/s Havi & Company Advocates for the 1st and 2nd Plaintiff, although there is on record an application by M/s Havi & Company Advocates to strike out the said charge of advocates for the first two Plaintiffs. Counsel who submitted in favour of the application were Messrs Issa Masur, Mr. Dennis Mosote, Mr. Tom Macharia and Mr. Ahmed Nassir Abdullahi.
5. The application is opposed. The 3rd and 4th Plaintiffs filed replying affidavits to the application on 29th September 2015 and several annexures thereto.

GENESIS OF THE APPLICATION

6. This application is premised purely on the allegations contained in a letter dated 25th August 2015 addressed to the Chief Justice of the Republic of Kenya and copied to several other institutions including the Ethics & Anti – Corruption Commission; the Office of the Director of Public Prosecution; the Law Society of Kenya; and the Commission on Administration of Justice. The letter is written by one Wilfred Gitonga on behalf of Kenyans for Clear Justice. The letter informs the Chief Justice that a bribe of Kshs.50,000,000/= had been paid to the judge and a further similar amount awaits the Judge upon the completion of the matter. The said bribes were alleged to have been paid by Messer Nahashon Nyagah and Vimal Shah, the 3rd and 4th Plaintiffs herein and that the said bribe givers are on record stating that the judge would deliver a ruling in their favour. It is stated in that letter that the judge has been at the beck and call of the 3rd and 4th Defendants, and has granted them orders and rulings in their favour no matter how ludicrous their applications. The author asked the Chief Justice to investigate the claims. The said letter is attached to the affidavit of CHRISTOPHER BARON as annexure “CB 2”.
7. From the outset, the following attributes of the said letter are notable:-

There is no known organization in the name of Kenyans for Clean Justice (See annexure “NN2’ at page 193 and 194 of the Replying affidavit of Nahashon Nyagaah. The annexures are a search for reservation of name filed with the non-governmental organization board on 29th September 2015, and paid for by Mr. Osundwa Sakuna, who paid Ksh.s1,000/-).

- i. The said letter is not on a letter head of the said organization.
 - ii. The said letter does not give a physical address of the author except that the author resides along Wood Avenue.
 - iii. The said letter gives an incomplete mobile telephone number being 070834789.
8. It is clear that the author of the letter was up to some mischief, and preferred to remain unknown due to the serious baseless allegations which he knows would attract proceedings in Defamation. (*Henceforth I will refer to the said letter as the defamatory letter*).
 9. Despite the obvious incompetence of the said complaint, the letter somehow manages a dignified reporting in a Section of the gutter press, and with some legal edition, in the mainstream press. It is through these press avenues that the defamatory letter finds its way into court as an annexure to the Supporting Affidavit of Christopher Baron and hence these proceedings.
 10. The letter raises two issues, which are also the issues in this application. The first issue is the issue of the administrative process through which the current suit arrived into my court, while the second issue is that of allegation of bribery which now has allegedly caused the Defendants to lose confidence in the Judge.

THE APPLICANTS' CASE AND SUBMISSIONS

11. The Applicants case is that the suit first came to court on 6th February, 2015 under certificate of urgency and was allocation to Hon. Lady Justice Farah Amin who declined to certify the matter urgent and directed the parties to serve the same, including serving the process abroad if necessary. The Applicants are unhappy that when another Certificate of urgency on the said matter was filed on 23rd February, 2015, this Judge issued interim orders in favour of the Plaintiffs despite the fact that Lady Justice Amin had declined to give interim orders to the Plaintiffs. To the Applicants, this is an indication that the Judge had been compromised, and the giving of the interim orders indicates that the judge is biased, and will be biased against the Defendants.
12. There is the other twin issue that the rulings and orders hitherto given by the Judge are bias against the Defendants and to use the word's of the said defamatory letter, the judge has given orders favouring the Plaintiffs regardless of how ludicrous the applications. In support of their claim for bias and impartiality, the Applicants cited the following cases:-

Homepark Caterers – Vs Attorney General [2006] eKLR wherein, in determining whether or not bias existed, the court stated that:-

“To conclude this part of the judgment we take the view approved by the three judges in the Rep. – Vs – Attorney General ex-parte Saitoti. In that case, the court adopted as good law on bias, what we repeat here the holdings, in the Australia case of Webb – V – The Queen [1994] CL R41, where Mason CJ and Mc High J held:-

“in considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done . . .

The test of whether the objective onlooker might have a reasonable apprehension of bias is clearly more satisfactory and we have applied it in this matter. This test protects a fair hearing better than any other test. Perhaps we should add in a matter where a judicial officer is challenged for possible bias the challenge does assume a higher dimension in that in real life it is also a collateral attack on the administration of justice as a whole, and ceases to be a personal affair to the judicial officer. . . . It is the confidence of the common man that sustains the administration of justice.”

13. Mr. Issa also cited the case of **King Woolen Mills Limited & Another Vs Standard Chartered Financial Services & another [1995] eKLR** in which the Court of Appeal quoted Lord Denning

MR in **Metropolitan Properties Co. (FGC) Limited – Vs Lonnon [1969] IQB 577** where Lord Denning had the following to say in determining existence of bias:-

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will inquire whether he did, in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: ‘the judge was biased’.”

14.Mr. Issa also cited the **Bangalore Principles of Judicial Conduct 2002** which provides a code of conduct for judicial officers. The code requires the judge to exercise his judicial function:-

- independently
- impartially
- with integrity, etc.

In this regard, it was submitted that there is likelihood of bias and impartiality, yet the judge is required to perform his judicial duties without favour, bias or prejudice.

15.The Applicants also submitted that the allegations of bribery while not proved, are serious enough to enable this court recuse itself from the matter. Mr. Issa submitted that an allegation of bribery is serious, but acknowledged that the said letter of complaint in which these allegations are made was baseless and nothing turns on that letter as far as this application is concerned. Mr. Ahmed Abdullahi agreed that nobody, including this court should give credence to that letter whose contents should be ignored.

16.The other ground urged by the applicants are that this court, on 23rd September, 2015, when the matter came up for mention, was agitated and stated that the court was aware that the author of the said defamatory letter would in due cause come to court to seek the recusal of the Judge from the matter. Both Mr. Issa and Mr. Abdullahi submitted strongly that those sentiments expressed by the Judge would cloud the mind of the Judge, and the Judge had already made a determination that the 7th Defendant, being the Applicant, was the author of the said defamatory letter. At paragraphs 10-14 of his supporting affidavit Mr. Issa deponed that the comment by the judge on 23rd September, 2015 indicated that the judge had discussed the issue with some other persons. Counsel submitted that Rule 3(3) of the Judicial Service Code of conduct and Ethics Prohibits judicial officers from discussing any matters they handle in court outside the court. Counsel submitted that Rule 5 provides for disqualification where the impartiality of a judge could be inferred. Mr. Abdulahi also submitted that the affidavit by Alex K. Kahu states that Mr. Ahmed Abdulahi and Mr. Havi had sometime before the commencement of these proceedings discussed the issue of approaching a judge for orders in this matter, but that did not take place because both counsels failed to agree on whether or not they would work together. Mr. Abdullahi submitted that since Mr. Havi proceeded with the matter which was subsequently brought to my court, it is a scenario which creates in the least an element of bias or conspiracy, and that on this ground the judge should consider excusing himself from the matter. The same line of submissions was adopted by both Mr. Macharia and Mr. Mosota

17.Mr. Abdullahi submitted that the test of bias is what an officious bystander would think. Under the circumstances in which the file arrived in this court, and under the current cloud of bribery allegations, would an officious bystander say that there is bias? He answered in the affirmative.

THE RESPONDENT'S CASE AND SUBMISSIONS

18. Justice (Retired) Kwach and Mr. Havi for the Respondents opposed the motion vide affidavits filed by the 3rd and 4th Plaintiffs. Counsel submitted that the application for the disqualification has been argued on the grounds that there is a likelihood of bias from the judge and that the Applicants will not get fair justice from the court. The application is based on a letter of complaint by Wilfred Gitonga. The complaint in that letter is not that of bias, but of bribery. Counsel submitted that all parties supporting the motion have not associated themselves with this letter or claim of bribery. Counsel also submitted that Article 160 (1) of the Constitution lays the basis upon which a judge disqualifies himself. It is on the basis of this Constitutional provision that a judge takes the oath of service. Counsel submitted that the Respondents do not oppose the application because they want the Judge to hear the case, but because of the claims of bribery leveled against the 3rd and 4th Plaintiffs and Mr. Havi. Mr. Havi submitted that Mr. Issa had departed from his key grounds of seeking the court's recusal and then dwelt upon what transpired in court on 23rd September 2015. Counsel submitted that as a judicial officer the court has a privilege given to it under Section 129 of Evidence Act. It prohibits the conduct of a judge being questioned while he acts as a judge. Counsel also submitted that to date, four decisions have been made in the matter in court. On 23rd February the court granted *ex-parte* interim orders. The Defendant were aggrieved by that order, and on 6th March 2015 their application was allowed in part. Counsel submitted that that is what a reasonable litigant does.
19. The 3rd order was made on 28th April in which the court was fair to all the parties. There is no appeal by any of the Defendants supporting this application but there is an appeal by the Plaintiff against part of that decision. The last decision was given on 12th June 2015. There was no appeal against that order. Counsel submitted that court proceedings do not show any acts of bias. Further Mr. Justice Kwach submitted that none of the parties supporting this motion have told the court what wrong the judge had done to warrant the judge disqualification. The duration of time from February to October 2015 confirms that the claims of bias against the judge are an afterthought and baseless. Counsel submitted that a determination of bias is a factual process, and citing the case of *President of the Republic & 2 Others Vs – S.A. Rugby Football Union*, counsel submitted that:-

“the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining there from the required information.”

20. Counsel also cited the case of **Kaplan & Stratton – Vs – L.Z. Engineering Construction Limited & 2 Others** where the court observed that the duty of a judge is to hear and determine cases assigned to him or her, and subject to certain exceptions, a judge or magistrate should not accede to an unfounded disqualification application.
21. I have carefully considered the application and the submissions of the parties. In my view, the following are the issues I raise for determination:-
- i. ***The role of the letter of complaint to the Chief Justice dated 25th August, 2015;***
 - ii. ***The issue of bias or appearance of bias;***
 - iii. ***The proceedings before this Court on 23rd September, 2015;***
 - iv. ***What transpired between Mr. Havi and Mr. Abdullahi in Mr. Abdullahi's chambers;***
 - v. ***Disposition.***

22. To the first issue, the role of the said letter of complaint must firstly depend on its authenticity or validity. To date, although that letter was written and copied to all investigative agencies none of those agencies including the Chief Justice has sought any response from me. Neither had I seen that letter until I saw a copy of the same in the affidavit of Mr. Christopher Baron. I believe that the authenticity of that letter will be investigated and established, but for the purposes of this application, and what I have read in that letter, I believe that the said letter is a forgery procured by a faceless entity with a sinister motive to defame, abuse, annoy and intimidate the Judge towards a particular direction in this matter. Despite the fact that the author of the said letter is faceless, I

- will still respond to the issues raised therein.
23. The first issue is the administrative process through which the Judge came into this matter. The letter alleges that Nahashon Nyaga and Vimal Shah corrupted the registry and engineered the file to go before my court, whereupon I granted the interim orders and ruling in their favour no matter how ludicrous the applications. That allegation is false. The truth of the matter is that when the suit was first filed under certificate of urgency on 6th February 2015, I was the acting Presiding Judge in this division. I assessed the level of urgency in the matter and allocated the same to Lady Justice Farah Amin. If I had an interest in the matter, I would have allocated it to myself. On that day Justice Amin did not certify the matter urgent but gave orders that the application be served and necessary application be made for service out of the jurisdiction. The Judge then listed the matter, not for a hearing, but for a mention on 27th February, 2015 - 21 days away. The Judge had all the right to make those orders. On 23rd February, 2015, 17 days after the matter was filed, the Plaintiff through Mr. Havi came to Court with a revamped sense of urgency on the same matter. He came at a time when lady justice Amin had left the Court premises. I was still the acting Presiding judge and therefore the file had to come to me for allocation. After assessing the urgency, and having established that Judge Amin had left, I heard Mr. Havi in chambers in the presence of my Court Clerk M/s Teresia Njoki. I had no doubt that the application demonstrated urgency which merited the interim orders prayed for. For the reasons that I recorded, I granted interim orders and directed at prayer number 6 of my orders that the application be served for hearing inter-parties on 3rd March, 2015 before Hon. Lady Justice Amin since this is a matter I had allocated to her. If this narration is correct, then one would ask how come I continued to preside over the matter?
24. On 26th February, 2015 two days after the interim orders I granted, the Defendants, through Counsel Ochieng' Oduol, filed a Certificate of urgency seeking the vacation of the interim orders I had issued two (2) days earlier.
25. By that time Justice Fred Ochieng who is the Presiding Judge in the Division was back after a trip out of station. Justice Ochieng then allocated the matter to me. Before I proceeded with the matter, I informed the Presiding Judge that I had allocated the matter to Judge Amin and that I had directed further hearing before the Judge. However, Justice Ochieng advised me that since the orders sought to be vacated were my orders, I was the appropriate person to preside over a hearing for the lifting of the orders. When Mr. Ochieng Oduol appeared before me, I explained to him that although I had directed the matter to be heard before Justice Amin, the Presiding Judge was of the view that since it was my orders which were sought to be vacated, then it was in order for me to hear the matter. Mr. Ochieng had no problem with this, and so I proceeded. I certified the application urgent to be served for hearing inter partes the following day. When the parties appeared for hearing inter-partes both Mr. Havi and Mr. Ochieng Oduol had absolutely no problem with my presiding over the matter since both agreed that it was my orders to be vacated. The issue as to how I came to preside over this matter has never raised any dispute. It has never arisen since February, 2015 until this application in October, 2015. The suggestion that the registry was corrupted to bring this file before me is therefore factually incorrect, and is administratively faulty, and is being fashioned to achieve a sinister objective. By the time Mr. Tom Macharia was appointed by the 3rd Defendant sometime in April 2015, there was no issue of process through which this matter came to this Court, and even Mr. Machara never raised any issue of process until I heard him during the oral submissions herein questioning the process. The questioning of this process by Mr. Macharia was mischievous and ill-intentioned, and must have been meant to achieve an unknown objective. He has been in this matter since April 2015, and could not have waited until October, 2015 to raise an issue with the process in which he has participated fully without any reservations
26. The other issue which is related to the process of movement of the file to this court was raised by counsel Ahmednassir. In the affidavit of Alex K. Kahu at paragraphs 6 – 7 thereof, it is deponed that Mr. Ahmednassir Senior Counsel and Mr. Havi had met in Mr. Ahmednassir's chambers in the early stages of this case, and that the Senior Counsel was being requested to lead Mr. Havi in

this matter. In the process it is deponed that Mr. Havi asked the Senior Counsel if the Senior Counsel was in a position to approach the Judge then handling the matter. Nothing is stated about what transpired later, but evidently the Senior Counsel never took the instructions to lead Mr. Havi. It is now the submission that Mr. Havi's intention to see a Judge must have been the result of the movement of this file from one Judge to this court. Obviously, given the circumstances explained above as to how the file came to my court, that insinuation is wrong and cannot found a basis for disqualification.

27. To bring the matter of process herein to a close, I want to State clearly that in the month of May, 2015 two suits were filed by the Defendants herein against the 3rd and 4th Plaintiffs herein and others. These suits concern the same parties as in this suit and the dispute is about transactions on pieces of land alleged to be in billion of shillings. These are HCCC No. 237 and 238 of 2015. They were filed a day after each other. During that time, I was the acting presiding Judge in the Division. I allocated the matters to a Judge other than myself in the Division. The question which a reasonable human being should ask is this: if I had an interest in this matter, what stopped me from allocating to myself the HCCC No. 237 and 238 of 2015 in order to enhance the value of that interest since the parties are the same?
28. I have explained clearly how I got involved in this matter. I add that I have no personal interest in this matter or indeed in any matters I handle as a Judge. The suggestion or insinuation that I do is peddled by parties who simply want me out of this matter for reasons unknown to myself.
29. The other issue raised in the said letter is that the Judge has given favourable orders and rulings to the Plaintiffs regardless of how ludicrous the applications. This accusation is a blatant lie. This is a Court of record. The record will show that I have rendered four rulings in the matter. Indeed when the Defendants through Mr. Ochieng Oduol sought the vacation of the interim orders, their application was largely successful as I took the position that the Plaintiff companies business should not be unduly interrupted with, and I returned the status quo which existed before 5th February, 2015 when the Defendants purported to sack the 3rd and 4th Plaintiff and other employees. The Defendants were and are still happy with that order. If they are not they ought to have appealed. There is no evidence of any appeal against the ruling.
30. The second ruling was on the inter-partes hearing of Mr. Havi's application dated 23rd February, 2015. This ruling largely confirmed the position which gave the Defendant the control of the Plaintiff companies. It is to be noted that the Defendants are happy with the ruling and are enjoying the orders of this Court. To the contrary it is the Plaintiffs who have sought to appeal against part of that ruling. So the question is:- who is fooling who in this matter? Who is crying louder than the bereaved?
31. The last ruling was delivered on 12th June, 2015. In that ruling this Court simply appointed M/s PriceWaterHouseCoopers to perform the in-depth audit of the company loan accounts. That ruling was not difficult to make, yet it appears to be the one most resented to by a section of the parties hereto. The ruling was easy to make since the Court largely adopted what the parties themselves had consented to. In this ruling the Court simply agreed with what the parties had resolved in a meeting of the Board of Directors of the 1st Plaintiff, that is, to appoint PWC as auditors. It is also to be noted that none of the parties has appealed that decision, although PWC has opted out citing interference by a section of the parties herein. So how can there be ludicrous rulings when the record states the contrary? This allegation is baseless and like all the rest, is intended to achieve objective yet to be disclosed.
32. The last issue raised in that letter is the allegation of bribery. I need not say much in this respect. Anybody with a mouth is entitled to say whatever they want. However, when they want their allegation to be considered they must provide evidence. Kshs. 50,000,000/= or its dollar equivalent, is so large an amount whose movement is surely traceable. Without evidence, this allegation is defamatory. The complainant should be brave enough to lift his head and reveal his

face and either prove the allegations so that the Judge takes criminal responsibility for the same, or the complainant fails to prove allegations and assume civil liability in defamation. I challenge the complainant to table the evidence of bribery or that the Judge has been at the beck and call of the 3rd and 4th Plaintiffs.

I dismiss the contents of the letter dated 25th August, 2015. The author is faceless and a coward and without evidence of the said claims, this letter cannot form the basis for the current application for the recusal of the Judge. To the extent therefore that the 7th Defendant's application herein is premised on that letter, the same is herewith dismissed for lack of merit.

33. The second issue that I raised is that of bias or appearance of the same. **"Bias"** is defined in Black's Law dictionary as

"Inclination, prejudice, predilection, actual bias is a genuine prejudice that a Judge Juror etc. has against some other person. Implied bias is a prejudice that is inferred from the experiences or relationship of a Judge Juror or other person- it is also termed presumed bias."

34. Bias is a verifiable quantity. To determine whether a Judge is biased or not, it is important to consider the visible attributes that may lead to allegations of bias. These visible attributes in a judicial process must necessarily include the conduct of the Judge, his demeanour and utterances, his relationship with the parties or their Counsel and lastly, and also very important, the record of the proceedings and the process. It is a demonstrated fact that record of the proceedings in this matter including the contents of the rulings and orders herein has not been impeached by any of the parties. Indeed, while an option to appeal would in some cases be indicative of a party's dissatisfaction, the record has shown that parties have been satisfied with both the process and integrity of the record, and none of the parties has questioned the same. Indeed whereas the Respondents have preferred to appeal part of one of the rulings, the Defendants have not raised any issue with the orders of this Court. Neither has any party suggested that the Judge is in any way familiar with any of the parties or Counsel or that they are unhappy with the conduct of the Judge or his demeanour during the process. It is therefore clear that the application has not disclosed any possibility of actual bias since the record shows that the Judge has been fair to both parties and impartial in his work. This then leaves me with that kind of bias which an officious bystander would perceive to be bias.

35. In the case of **The President of the Republic & 2 others – Vs – South Africa Rugby Football Union & 3 others – Case CCT 16/98** in which the court had this to say on bias.

". . . 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.'

36. Clearly, the test here contains a two-fold objective elements. The person considering the alleged bias must be reasonable, and the apprehension of bias must itself also be reasonable in the circumstances of the case. An unfounded and unreasonable apprehension concerning a judicial officer is not a justification 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.

In the case of **Kaplan & Stratton – VS – L.Z Engineering Construction Limited & 2 others**, the Court of Appeal had this to say,

"As a general rule, it is the duty of a judicial officer to hear and determine the cases

allocated to him or her by his or her head of jurisdiction. Subject to certain exceptions, a judge or a magistrate should not accede to an unfounded disqualification application.”

37. Clearly what is emerging from case law is that element of bias should be capable of verification upon facts. The Applicants have since distanced themselves from the aforesaid defamatory letter, and that has taken away the substratum of their application upon the facts. As I have stated herein, it is clear that there has been no interference with the process in this matter. It is also clear that all the decisions that have been rendered largely favour the Applicants. They have not appealed any of those decisions, and they are enjoying the orders arising from those decisions. The Applicants have not alleged any impropriety issues against the judge. Neither have they questioned the judge's integrity. If that is so, then where is the bias or likelihood of impartiality? The possible bias and impartiality must be weighed against past acts which have accrued in the life of the matter, and in that regard, the Applicants have not complained of any bias. It is my finding that allegations of possible bias or impartiality are not well founded and are baseless.
38. As to the applicability of the Bangalore Principles, the same principles require a judge to be independent, and to perform his judicial duties without fear, favour, bias or prejudice. When allegations of bias are not factually founded, 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 intends to instill fear in the judge, and this is itself against the Bangalore Principles of Judicial Conduct.
39. In my view, the application before the court was filed with collateral objective to achieve other goals. However, as a judge who took oath under Article 160 (1) of the Constitution, I am alive to the need to exercise constitutional independence in discharge of my judicial duties. No litigant, regardless of their status in society, should feel that they have the latitude and liberty to intimidate and coerce courts towards a particular finding in matters before the court. Judges are free to adjudicate over matters before them, and must be allowed to render decisions without active or passive intimidation. It must be given to parties in a litigation to pick and chose for themselves arbitrators and mediators. However, they cannot be given free reign to choose and pick judges for their cases.
40. To allow this application will create a bad precedent whereby litigants who want a judge out of a case would simply make baseless allegations which are then reported in the gutter press, and which find their way in court through an affidavit in support of an application for the disqualification of a judge. That would be dangerous for the dispensation of justice. It will grind the wheels of justice to a halt. Nobody would be found standing in the corridors of justice to dispense justice if such kind of blatant blackmail were to be entertained. As a judge, I have worked on my reputation and integrity on a day to day basis, cause list by cause list, case by case, application by application, record by record. There is nothing in my judicial record to show that I have been biased, prejudiced or compromised, and in particular there is nothing in the current proceeding to evidence either past or future bias or possibility of bias.
41. This then brings me to the third issue I raised, and that concerns the proceedings of 23rd September 2015, and if those proceedings created a fertile ground for bias to germinate in these proceedings. Mr. Isaa states in his affidavit that the judge admitted to having discussed the matter with other parties who informed the judge that the author of the said defamatory letter would be the one to make application for the judge's recusal, and that for that reason the judge is already prejudiced against the 7th Defendant and other Defendants supporting the application. This assessment of what transpired in court on 23rd September 2015 by Mr. Issa is not correct. The truth of the matter is that on that day the matter was being mentioned to establish if the PWC had carried out the audit which was ordered by this court. By that date I had seen the said defamatory letter in the gutter press and I mentioned to the parties that it is not good to injure reputation of a judge in the gutter press. I also expressed in passing that such press cutting would be used as ground for urging recusal of a judge. I did not say that I had discussed the matter with other people outside the court. I stated in court what I thought would happen. In fact the deponement by Mr. Isaa is not based on facts of the record. I have looked at the court record of that day and I do not see any proceedings to that effect. The allegation by Mr. Isaa, if taken the way they are, would amount to gagging a judge from commenting in court about matters the judge is handling. The

- comment I made was in court, in the process of these proceedings and to counsels who were handling this matter. It was especially made in the light of submission by Mr. Peter Gachuhi for PWC, who had submitted that PWC had declined to do the in-depth audit ordered herein because PWC had received certain disparaging remarks from a section of the parties herein. Mr. Gachuhi then expressed sympathy and embarrassment about the said letter. I then commented that I would not be surprised if a party files an application for my recusal based on the said defamatory letter. The brief comment was on the general administration of the matter during a Mention process and the allegation by Mr. Isaa that I had discussed the matter outside court is not supported by record.
42. This brings me to the submission by judge (retired) Kwach who submitted that the grounds upon which the application is premised are contained in the said application, and have not been amended to include what Mr. Isaa deposed to have transpired in court on 23rd September 2015. I accept Justice (retired) Kwach's submission. Whatever a party may now allege to have transpired on 23rd September 2015 and wish that to form a ground for this application, must be part of this application as a ground. The grounds on the Notice of Motion dated 10th September 2015 did not change, and it was too late in the day for Mr. Isaa to introduce additional grounds through affidavit sworn by himself.
43. In my finding, the allegations of causation of bias pursuant to the proceedings of 23rd September 2015 are baseless and amount to gagging a judge from commenting on a matter in court during a Mention of the matter. I am actually shocked that counsel considered the record of this court of 23rd September 2015 as grounding a cause for bias.
44. In conclusion, I wish to cite the recent Court of Appeal decision in **Teachers Service Commission (TSC) – Vs – Kenya Union of Teachers (KNUT) & 3 Others, Civil Appeal No. 196 of 2015** in which the Court of Appeal bench constituting five learned judges had the following to say on a similar application which required three of their Lordships' disqualification from hearing the matter before them. The learned judges unanimously had the following to say:-

“in an application for recusal, perception and suspicion are relevant issues to be considered. Judicial decisions indicate that there is need for a reasonable basis and foundation for having suspicion or holding a particular perception. The affidavit in support of the present application deposed by Wilson Sossion in paragraph 10 of the affidavit raises serious allegations whose veracity has not been demonstrated. The allegations in this paragraphs, without disclosure of the sources amount to hearsay and speculation.

We are not satisfied that a scintilla of credible and verifiable evidence reasonably backing the suspicion or perception has been disclosed in the supporting affidavit. There is no allegation against any of the three judges of having a personal or pecuniary interest in the appeals or allegations of impropriety. However, there is allegation of being handpicked and micro-managed by the President of the Court of Appeal. No basis for these allegations has been disclosed.

Allowing the application on the basis of unsustainable 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.”

DISPOSITION

45. 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.”

46. For the foregoing reasons, the 7th Defendant's application herein dated 10th September 2015 is dismissed with costs to the Respondents.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Messrs Kwach & Havi & holding brief for Ahmednassir for the Plaintiffs

Mr. Issa for the 1st, 2nd, 4th, 5th and 7th Defendants

Mr. Macharia for the 3rd Defendant

Mr. Mosoto for the 6th Defendant

Teresia – Court Clerk