REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 124 OF 2014

REPUBLIC..... APPLICANT

VERSUS

CABINET SECRETARY FOR TRANSPORT

& INFRASTRUCTURE .....1ST RESPONDENT

PRINCIPLE SECRETARY

STATE DEPARTMENT OF TRANSPORT .....2ND RESPONDENT

THE NATIONAL TRANSPORT & AUTHORITY.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE. ..... 4TH RESPONDENT

THE TRAFFIC COMMANDANT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

EXPARTE

KENYA COUNTRY BUS OWNERS ASSOCIATION

(Thro' PAUL G. MUTHUMBI – Chairman)

SAMUEL NJUGUNA – SECRETARY

JOSEPH KIMIRI – TRASURER .....1ST APPLICANT

MBUKINYA BUS SERVICE (KENYA) LTD..... 2ND APPLICANT

CROWN BUS SERVICES LTD. .....3RD APPLICANT

KAMPALA COACHES LTD.....4TH APPLICANT

TRATICOM ENTERPRISES LTD. .....5TH APPLICANT

UGWE BUS SERVICES.....6TH APPLICANT

TRISHA COLLECTIONS LTD.....7TH APPLICANT

PANTHER TRAVEL LTD.....8TH APPLICANT

NEON COURIER SERVICES LTD.....9TH APPLICANT

CONSOLIDATED WITH PETITION NO. 172 OF 2014

BETWEEN

UMOWA SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED AND 2 OTHERS……...……...….PETITIONERS

VERSUS

THE ATTORNEY GENERAL……..……....1ST RESPONDENT

CABINET SECRETARY FOR TRANSPORT

AND INFRASTRUCTURE……..…2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 25th April, 2014, the 3rd Respondent, **The National Transport & Safety Authority Board** (hereinafter referred to as the Board) seeks an order that I do recuse myself from further hearing and determining this and any other matter whose subject matter is Legal Notice No. 23 of 2014 as published on 11th March, 2014 and for an order for provision for costs.

The Board's Case

2. The application was supported by an affidavit sworn by **Francis Meja**, the Director General of the 3rd Respondent sworn on 25th April, 2014.
3. According to the deponent, this Court having already heard and determined a similar mater being Nairobi High Court Judicial Review Misc. Application No. 2 of 2014 between the same parties and relating to the same subject matter, it is humanly impossible for the Court to fairly and impartially determine the matter herein without being influenced by the findings in the said case. It was deposed that in the earlier case this court used strong words and phrases which demonstrate that the action of the 1st Respondent was an affront to the Court and to the Judge personally hence the impossibility of a fair determination without being influenced by personal feelings and beliefs against the 1st Respondent. As a result of the foregoing, it was contended that this Court unfairly and unjustly issued stay orders stopping the 3rd Respondent from implementing Regulation 11 of Legal Notice No. 23 of 2014 despite earlier finding that the same was lawful hence the Court demonstrated bias as against the Respondents and acted unfairly and with partiality when issuing the said orders.
4. According to him, the 3rd Respondent believes that the Court issued the said order and acted in such irregular and unconventional manner as a result of the Court's personal feelings and belief

against the 1st Respondent. It was therefore his contention that the 3rd Respondent will b greatly prejudiced should this Court proceed to hear and determine this dispute as the Court has lost objectivity and open mind as well as the requisite impartiality to fairly and justly hear and determine the dispute. He further contended that it is now a settled principle of are that non-participation of a judicial officer in a matter is necessarily called for even in absence of a real likelihood of bias if a reasonable man would reasonably suspect bias as is the case herein hence the Court ought to recuse itself in line with perception of fairness of the process leading to a decision.

5. In the deponent's view the Court's insistence that it must hear and determine this matter and the direction for the filing of a formal application makes the 3rd Respondent apprehensive that there may not be a fair ruling but that the same may be disallowed forcing the respondent to go to the Court of Appeal while the stay granted herein continues.
6. In support of the Board's Case, **Mr Agwara**, learned counsel submitted that the application was brought under the inherent powers of the Court. While clarifying that the Board had no personal problem with the Court **Mr Agwara** was at pains to explain that the only issue is that the Court has already determined a similar matter between the same parties, drawing from human nature the Court having exercised its mind and having rendered a position therein it would be hard to believe that the Court would reach a different from the earlier one taking into account the Court's conclusions in the application for stay argued in this matter. Having given directions for hearing, the Court was urged to refer the matter for hearing by another Judge who has not had the benefit of arguments by the parties herein. By making a decision that the 1st Respondent pays the costs personally, it was submitted, the Court was of the view that the Respondents had stolen a march on the Court hence his clients were reasonably apprehensive that if the Court determines this matter he may not get a fair hearing.
7. In **Mr Agwara's** view, the position would have been different had the Court instead of hearing this matter decided to transplant the earlier decision into this one. However, having ordered a fresh hearing it cannot be gainsaid that the Court would not arrive at a different decision. Learned counsel however submitted that the Board was not engaging in forum shopping but made the application in good faith and that the applicant was not questioning the conduct of this Court and was not insinuating that the Court has any personal interest in the matter. In his view allowing the application would not cause any prejudice since the judgement in the earlier matter can be cited in this one.
8. In his submissions, **Mr Agwara** relied on the Supreme Court decision of **Jasbir Singh Rai & Others vs. Tarlochan Singh Rai & Others Petition No. 4 of 2012** and contended that the test is that of apprehension of bias and that in this case the apprehension is not farfetched but real.

1st, 2nd, 4th, 5th and 6th Respondents' Case

9. On behalf of thither Respondents (hereinafter referred to as the Respondents), it was submitted by **Mr Bitta**, learned friend in support of the application that the substance of this matter has previously been before the Court and the Court has explicitly pronounced itself. The apprehension, it was submitted is premised on reasonable grounds hence it would only be fair that another judicial officer hears the matter as the Court has no reason to depart from the previous decision.

The Ex Parte Applicants' Case

10. In reply to the application the Applicants filed an affidavit sworn by **Paul G. Muthumbi**, the 1st Applicant's Chairman on 9th May, 2014.
11. According to the deponent, the application has no merit; is incompetent; is an abuse of the Court process; amounts to forum shopping; is bad in law; is frivolous; is vexatious and intended to burden the court with a perception of bias when no such bias exists; is an unconstitutional plea to violate 159(1) and 159(2)(d) of the Constitution; is a calculated move to deny the Ex parte Applicants fair trial; and is intended to delay the inevitable conclusion of these proceedings. According to him no evidence of bad motive or personal interests of the court in this matter has been demonstrated.

12. He deposed that the said Applicant (3rd Respondent) did not at any time earlier that April 25th 2014 complain that this court had any perceived bias against it in these proceedings. Further no jurisdictional power has been invoked by the 3rd Respondent/Applicant or legal bases cited for the Court to exercise its discretion or be guided by a party must base their pleas on some specified legal provisions so that the court is thereby guided in applying specific principles of law in granting or refusing the application. In his view without citing the basis of the application there is no sound or legal basis to seek the recusal of this Court in determining this matter, as application is incompetent.
13. He further deposed that the 3rd Respondent's recusal plea is entirely frivolous as the said plea was not made earlier, or at the commencement of the hearing of these proceedings when Judicial Review Case No.2 of 2014 had already been decided. He swore that he was inside the Courtroom when the 3rd Respondent through its learned Counsel, **Mr. Agwara** proceeded nonchalantly to defend its position without t as much as alleging that the Judge would be biased because of the holding in Judicial Review case No.2 of 2014 he had made, as now alleged. Based on the advice from his advocate he contended that the 3rd Respondent is within that context bound by the legal doctrine of estoppel by conduct and having not at the earliest instance objected, the 3rd Respondent expressly accepted this Honourable Court's unbiased hearing and determination of these proceedings. To him had the 3rd Respondent objected in the manner it now has at the very initial appearance, the integrity of the plea would not have fallen into doubt. However, seeing that an adverse decision was made on April, 14th 2014, the 3rd Respondent flowed with the tide of presentation and proceedings and mid-stream it is impermissible to allege bias.
14. He added that the alleged impartiality was not asserted, alleged or even hinted at in any manner even obliquely, when the application for leave was granted on April 1st 2014 to operate as a stay of the further implementation of any aspect of Legal Notice No.23 of 2014. Instead he 3rd Respondent openly and enthusiastically embraced full participation before the Court in all subsequent hearing and Court Appearances. He stated that when he attended Court on 1st April, 2014, the Court Requested which dates were convenient to **Mr. Agwara** and although their Advocates sought the earliest date possible, **Mr. Agwara** sought April, 7th 2014 which he was accorded. At no stage did he then allude to any possibility of bias in the 3rd Respondent appearing before the Judge, either orally or in any paragraph in the Replying Affidavit of **Francis Meja** sworn on 7th April, 2014.
15. According to the deponent, having carefully perused **Francis Meja's** deposition of 4th April, 2014 and although he now refers as his basis for alleged bias on his part the Judge due to the decision in J. R. No.2 of 2014, **Francis Meja** extensively cited and relied upon and praised the said decision of 14th March 2014 in paragraph 16, 23 and 24 of his Affidavit herein filed on 7th April, 2014 and sworn on 4th April, 2014. In his view, having embraced and accepted this Honourable Court's finding therein in the manner state above, it cannot fall from the mouth of **Mr. Francis Meja** that the Court will now be ostensibly biased against the 3rd Respondent as alleged, or at all since the 3rd Respondent cannot approbate and reprobate in the same breath. He therefore contended that grounds '2' of the Notice of Motion dated 25th April, 2014 and paragraph 3 & 4 of **Francis Meja's** Supporting Affidavit of even date are baseless, and border on false and contemptuous accusations. Further the 3rd Respondent has not shown in what manner it stands to be prejudiced as alleged in ground "3" of the motion under reference and there is no specific prejudice perceived by **Francis Meja** in paragraph 7 of his deposition. He believed that it is not sufficient ground of recusal for a Judicial Officer to make wild and unsubstantial allegation as made by **Francis Meja** in paragraph 6 of his supporting Affidavit sworn on 25th April 2014 and then offer no details thereto. He was equally concerned that the 3rd Respondent, out of the blue accuses the Court of lacking objectivity, yet it does not state the bases thereof. To him, the allegations in paragraph 3 of **Francis Meja** are totally baseless and without foundation. Since no appeal was filed against the stay order he contended that **Francis Meja** cannot be heard to complain as he does in paragraph 4 5 and 6 of his affidavit of 25th April 2014 since the best, lawful, and proper forum for such a lamentation is the Court of Appeal via an appeal, not through an incompetent application

for recusal as now sought.

16. He was therefore of the view that the 3rd Respondent's Motion dated 25th April 2014 is a red herring meant and calculated to delay the final conclusion of these matters and having no merit at all and ought to be dismissed.
17. On behalf of the ex parte applicants it as submitted by **Mr Kinyanjui**, learned counsel in opposing the application that the motion has no merit. According to him a look at the body of the application reveals that it is an omnibus motion without any legal basis for recusal. He submitted that even the inherent jurisdiction which is being relied upon has not been invoked yet the body of the motion ought to state so.
18. While relying on the doctrine of estoppel by conduct, he submitted that the a party is not permitted to depart from a course adopted and lead other parties to a specific belief , cause of action or arrangement in terms of their affairs. He submitted that the Board is bound by the doctrine of estoppel by conduct in so far as the proceedings prior to 14th April 2014 are concerned. According to him the deponent of the affidavit in support of the instant application swore an affidavit on 4th April 2014 in which he was heaping praise upon the Court's decision in the previous case as being well reasoned without alleging even obliquely or implicitly that this Court would be based in any respect or would have its mind so soiled by the decision that it would be incapable of rendering a just decision. It was therefore submitted that it cannot all from the mouth of the same deponent to say that he is unlikely to have a fair hearing after taking part in the subsequent proceedings. It was submitted that on 7th April 2014 the deponent was adamant that the Court hears the application for stay.
19. The totality of that conduct, it was submitted operates as an estoppel and therefore the 3rd Respondent cannot say he forgot to lament at the Court's objectivity. It was further submitted that the conduct the 3rd Respondent is a manifestation of mala fides since it has only come after the orders of 14th April 2014.
20. It was therefore submitted that taking into the said two elements of estoppel and bad faith borne of the same facts, the 3rd Respondent ought to have indicated that he should not have any aspect of this case before this Court.
21. According to the applicants there are no reasonable grounds upon which any reasonable court would not render a just decision since no personal interest has been shown. Further it has not been shown that these are the only matters which the 3rd Respondent will deal with before this Court. In support of his submissions, **Mr Kinyanjui** relied on inter alia **Civicon Limited vs. Kenya Revenue Authority the Commissioner of Customs & Another [2014] eKLR** and **Erastus Safari Kenga vs. Awanand Enterprises Limited [2013] eKLR**.
22. According to **Mr Kinyanjui**, the 3rd respondent was the beneficiary of the earlier decision since the Court suspended the invalidity of LN No. 219 of 2013 hence they cannot state that the Court will be biased. He added that the Court has taken the oath of office as per the Constitution and if the issue is that the oath has been violated that would be a violation of the Constitution and a party aggrieved ought to appeal. In the earlier case despite the 3rd Respondent having applied for leave to appeal, which leave was granted, no appeal to the best of learned counsel's knowledge was filed. It was contended that it would create a bad precedent if parties who have lost in a matter would be free to choose another Judge to hear them hence the application should be dismissed with costs.

The Case of the Petitioners in Petition No. 172 of 2014

23. The application was also opposed by the petitioners in Petition No. 172 of 2014 (hereinafter referred to as the petitioners). On their behalf, it was argued by **Mr Nzau**, learned counsel while associating himself with the submissions of **Mr Kinyanjui** that this Court is not the final Court and the Respondents still have another avenue of an appeal. According to him, the fact that the Court has dealt with a similar application and whereas the Legal Notice could be the same in substance, what the Court is looking at is the process of arising thereat. He submitted that there is nothing pointing to allegation of bias or even a likelihood of bias. In his view there are no strong words used in the earlier case and the parties ought not to choose who to hear their cases.

The Board's Rejoinder

24. In a rejoinder, **Mr Agwara** submitted that the 3rd Applicant has been a faithful participant in these proceedings and that the 3rd Respondent has other cases before this Court and hence its case is not that the Court should not hear the matters of the 3rd Respondent but that a distinction ought to be made in the instant matter. Therefore the issue which one must ask himself is whether a reasonable observer can say the Court can make a different conclusion.
25. In his view estoppel is not applicable and based on the peculiar circumstances of this case the Court the application is reasonable. He was further of the view that the Court ought to consider the application on the merits.

Determinations

26. I have considered the application, the affidavits filed herein and the submissions made.
27. 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.**

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

> **"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront…..A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes……In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence…..This consideration was put as follows by Cory J in R. v. S. (R.D.):37**
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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.'

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

> **'Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges are assumed to be [people] of conscience and intellectual discipline, capable of**
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> **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**
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> **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."

29. 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.'"

30. 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."

31. 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."

32. 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."

33. 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. "

34. 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."

35. 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."

36. See also Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998 [1999] 2 EA 83.
37. 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.
38. The procedure in applications for recusal is now well settled. The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of her or his opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court. The rationale for and the benefit from that procedure is obvious. Apart from anything else, in practical terms it helps the

litigant to avoid rushing to court at the risk of maligning the integrity of the Judge or Judges and of the Court as a whole, without having the full facts. See **Republic of South Africa vs. The South African Rugby Football Union & Others** (supra) and **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12.**

39. In this case although there were several issues raised in the affidavit in support of the application including the use of strong language by the Court in the earlier decision, at the hearing of the application no mention was made of such language and the 3rd Respondent seems to have substantially based the application on the ground that this Court ought not to hear and determine these proceedings having determined the earlier matter in which the subject matter is substantially the same and the parties are the same. 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."

40. It is however my view that where a Court of law of competent jurisdiction has pronounced itself on a particular piece of legislation the parties ought not to go round such a decision by simply re-enacting the same legislation and based thereon apply for the Judge in legal proceedings arising from the latter to recuse himself therefrom based on the ground that the Judge had entertained earlier proceedings. Similarly, where a Court has pronounced itself on a matter in the suit, the parties are not permitted to seek the same orders and based thereon seek the recusal of the Judge. 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."

41. In this case, it is not in doubt that right from the commencement of these proceedings the 3rd Respondent was aware of the earlier decision. As rightly submitted by **Mr Agwara**, learned counsel for the 3rd Respondent, the parties herein are the same, the Legal Notice under challenge is similar to the one which was challenged in the earlier proceedings and ***the advocates are also the same***. Yet none of the advocates raised the issue of perception of unfairness on the part of the Court. It was not until the Court made a decision on the application seeking that the grant of leave operates as a stay that **Mr Agwara** informed the Court that he had instructions to apply for the recusal of the Court. A dismissal of a matter ought not to be routinely followed by an application for recusal.

42. In the affidavits and even in his address the 3rd Respondent seemed to have been very comfortable with the Court until that decision was delivered. As rightly submitted by **Mr Kinyanjui** learned

counsel for the ex parte applicants vide an affidavit sworn herein by **Francis Meja**, the 3rd Respondent's Director General, who incidentally is the same person who has sworn the affidavit in support of the instant application, on 4th April 2014 deposed at paragraph 23 and 24 thereof as follows:

> ***23. THAT this Honourable Court has considered the substance content and purport of Legal Notice No. 23 of 2014 in the elaborate hearing of Judicial Review No. 2 of 2014 and gave a well considered judgement which is designed to assist the industry players which judgement the Respondents are in the process of implementing."***
>
> ***24. THAT this Honourable Court having determined the subject matter herein it would be prudent to apply the same judgement to the current matter before court with a view of upholding the integrity of the Court and ensuring fair administration of Justice as guaranteed by Article 47 of the Constitution***

43. Not to be undone, **Nduva Muli**, the 2nd Respondent's Principal Secretary , on 12th May 2014 similarly swore an affidavit in this matter in which he copiously reiterated the contents of paragraph 23 of the affidavit sworn by **Francis Meja**.
44. It is therefore clear that as at the time of the hearing of the application seeking that the grant of leave operates as a stay, the Respondents were contented with the decision in the earlier matter and were even urging this court to adopt the same judgement in this matter. In my view since the parties appreciate that the proceedings in this matter have not gone further than the application for stay, and the Respondents are satisfied with the earlier decision, there is nothing to bar them from urging this Court to arrive at the same decision. To urge the Court to recuse itself on the ground that the Court has arrived at a decision which in their view "*was well considered judgement… designed to assist the Industry players which decision the Respondents are in the process of implementing*" with due respect smacks of dishonesty and hypocrisy.
45. If therefore the decision to ask for the recusal of the Court was informed by the decision on stay, the 3rd Respondent ought to be made aware that a decision of the Court in the exercise of its discretion directing that the leave operate as a stay is not necessarily the decision which the Court will eventually arrive at the determination of the substantive Notice of Motion since at that stage the Court does not finally determine the issues in dispute. As properly stated by ***The Bangalore Principles of Judicial Conduct***:

> **"Judicial rulings or comments on the evidence made during the course of the proceedings do not fall within the prohibition, unless the judge appears to have a closed mind and is nolonger considering all the evidence."**

46. It ought to be remembered that the right to apply for the recusal of a Judge may be lost or waived. In **Attorney General vs. Anyang' Nyong'o and Others** (supra) it was held:

> **"A judicial officer is required to disclose facts that may raise apprehension of possible bias on his part, in order to show that he has no actual bias and to give opportunity to a party who considers that he might be prejudiced to exercise the right to apply for the Judge to recuse himself or to waive that right. The disclosure is not a pre-condition for the application to be made and it is not for public consumption in order to retain its confidence in the judiciary. A litigant who has knowledge of such facts is at liberty to make the application even in the absence of their disclosure by the Judge. It follows that an applicant who relies on the Judge's failure to disclose material facts must show that those facts were not within his or his legal advisor's knowledge... Failure of a Judge to disclose facts that are within public knowledge cannot be a ground on which a reasonable member of the public would apprehend bias... The suspension of Justice Moijo Ole Keiwua and the appointment of a tribunal to investigate his conduct, have been matters of public knowledge since they were published in the Kenya Gazette not to mention the publications in the mass media. Besides, both the appointment of the tribunal and the suspension of the Judge were acts done by the Government of Kenya to which the applicant is the principal advisor. It is**

reasonable to assume that he was consulted on those matters. In any case it was not suggested that the facts were not within his knowledge. If it was those facts that gave rise to any apprehension or the perception of possible bias on the part of Justice Moijo Ole Keiwua, then the Attorney General was in a position to object to the Judge sitting when the case came up for hearing and his omission to do so leads to only two possible inferences. Either he opted to waive his right to object or he did not harbour the apprehension or think that a reasonable, fair-minded and informed member of the public would perceive such apprehension. A litigant seeking disqualification of a Judge from sitting on the ground of appearance of bias must raise the objection at the earliest opportunity... The right to object to a disqualified adjudicator may be waived, and this may be so, even where the disqualification is statutory. The Court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts, which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings to continue without protest, they are held to have waived their objection and the determination cannot be challenged...A litigant who has knowledge of the facts that give rise to apprehension of possibility of bias ought not to be permitted to keep his objection up the sleeve until he finds that he has not succeeded. The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind. Applying that mind to the facts of this case would not produce the perception canvassed by the applicant. A reasonable man would not perceive that a Judge, whose conduct is under investigation, would risk conducting an unfair adjudication against the very authority investigating his conduct. A reasonable and informed person, knowing that the Judge sits in a panel of five Judges, trained and sworn to administer justice impartially, would not perceive that the Judge would skim to single-handedly deny the applicant a fair hearing or justice. A reasonable, informed and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the Judge with sufficient intelligence not to indulge in futile animosity... 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. The nature of the judicial function involves the performance of difficult and at time unpleasant tasks but judicial officer 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 and 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."

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

"The right to challenge proceedings conducted in breach of the rules against bias may be

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

48. As already noted hereinabove, the 3rd Respondent confirms that there is nothing personal between the Court and the 3rd Respondent. As submitted by **Mr Agwara**, it is not really the issue of the parties before this Court that is the borne of contention but the issues. 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. Here it is admitted that the parties are the same and the issues are similar. One would expect the Respondent instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision to appeal against the earlier decision. The law provides for mechanism for protection of a party while it is pursuing an appeal. But to open a different legal front and on that basis ask for the recusal of a Judge is a procedure which ought not to be countenanced. By asking another Judge to hear this matter, if I understand the 3rd Respondent correctly, there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by this Court. Whereas a Judge of the High Court is not bound by a decision of this Court to deliberately set out to have a 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 3rd 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.
49. Apart from the issues of waiver, it is my view an application for the recusal of a Judge ought to be made at the earliest opportunity when the material relied upon became known to a party. To make such an application after a decision has been made which a party believes is not favourable to him when he has in effect stated on oath that he is contented with the decision which forms the subject of his new found grievance may well be deemed to be an attempt at forum shopping and as rightly submitted on behalf of the applicants may be deemed to have been made in bad faith. As opposed to a situation where the facts are similar but the parties are different, the perception of forum shopping is more emphatic where the facts are similar and the parties are the same.
50. In this case one of the grounds which was relied upon by the applicant was that section 11 of the ***Statutory Instruments Act*** had not been complied with. As already stated hereinabove the Respondents' position was that the reason for the revocation of LN No. 219 of 2013 and promulgation of LN No. 23 of 2014 was the realisation that the said provision was not complied with. To now contend that another Judge ought to give afresh mind to that issue in my view amounts to dishonesty on the part of the Respondents. 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. If the Respondents themselves appreciate that the failure to comply with section 11 of the ***Statutory Instruments Act*** rendered the Legal Notice No. 219 of 2013 unlawful, how can the Court's decision to that effect give rise to a reasonable perception of partiality.
51. Having considered the application, the affidavits both in support of and in opposition to the application as well as submissions and authorities it is my view that the application seeking that I recuse myself is devoid of merits. Apart from that, the conduct of the Respondents in these proceedings point to the fact that if there was any perception that the Court would not be fair the same was waived and was only conveniently revived after the decision on the stay. A litigant ought not to be permitted the liberty of participating in legal proceedings on condition that the Court makes orders in its favour.

52. There was suggestion in the affidavit in support of the application that since the Court declined to hear the oral application for recusal the Court was inclined to dismiss the application. I have set out the procedure for application for recusal hereinabove which procedure, though was not followed the Court nevertheless accorded the Respondents a hearing.
53. I have also noted that most of the allegations on the perception that a fair hearing may not be accorded to the Respondents seems to be from the point of view of the 1st Respondent who has not procedurally applied for the Court to recuse itself.

Order

54. Accordingly, the Notice of Motion dated 25th April, 2014 is dismissed with costs to the ex parte Applicants and the Petitioners to be borne by the 3rd Respondent.

Dated at Nairobi this 9th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Harrison Kinyanjui for the ex parte applicants

Mr Agwara for the 3rd Respondent

Mr Odhiambo for Mr Bitta for the 1st, 2nd, 4th, 5th and 6th Respondents

Cc Kevin