REPUBLIC OF KENYA

High Court at Malindi

Constitutional Petition 22 of 2011 & Civil Case 27 of 2012

IN THE MATTER OF: THE CONSTITUTION OF KENYA

A N D

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 22, 23, 49 AND 50(2) (C)

A N D

IN THE MATTER OF: CHIEF MAGISTRATE'S COURT (MALINDI) CRIMINAL CASE NUMBER 345 OF 2011, REPUBLIC -VS- DAVID MWANGI MUIRURI

A N D

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES, 2006 AND PART 5 RULE 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA

A N D

IN THE MATTER OF: UNIVERSAL DECLARATION OF HUMAN RIGHTS 1968

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CAP 75 AND THE PENAL CODE CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE PRINCIPLE OF FAIRNESS

BETWEEN

DAVID MWANGI MUIRURI ….....APPLICANT

AND

CHIEF MAGISTRATE'S COURT, MALINDI ….....1ST RESPONDENT

THE HON. ATTRONEY GENERAL..... 2ND RESPONDENT

A N D

MIRKO BLAETTERMAN (*suing through*

his Power of Attorney) SHABIR HATIM ALI ….....PLAINTIFF

VERSUS

DAVID MWANGI MUIRURI ….....1ST DEFENDANT

GHOTMAN COTOVA ….....2ND DEFENDANT

EMPIRES AND PARTNERS INVESTMENTS ….....3RD DEFENDANT

R U L I N G

1. The Petitioner herein and 1st Defendant in HCCC 27 of 2012 , David Mwangi Muiruri was in June, 2011 arraigned before the Chief Magistrate's court in Malindi criminal case no. 345 of 2011, charged with the offence of Forgery of Judicial Documents contrary to Section 351 of the Penal. The particulars of the charge are that:

"On the 29th March, 2004 at Malindi Law Courts within Kilifi county, jointly with others not before court, forged court decree and judgment in Civil suit no. 18A of 2004 where you were declared the legal owner of plot no. 622 Malindi purporting it to be genuine decree and judgment issued by the then Chief Magistrate JOYCE MANYASI MATU, which was in fact not true."

2. The Petitioner pleaded not guilty to the charges and was released on bond. The commencement of the hearing was delayed by preliminary matters and especially the petitioner's rightful demand to be furnished with certain documents. Following some back and forth between the prosecution and the defence, the trial court made a ruling on the matter on 7th October, 2011. In that ruling the trial court observed inter alia that

"the court could not compel the prosecution to produce a document, namely the original file in CMCC NO. 18A of 2004 whose existence the prosecution disputed."

3. By a letter lodged in the High Court registry through his lawyers Gekanana & Co. Advocates, pursuant to Section 364 (1) b(2) of the Criminal Procedure Code, the Petitioner sought to have the Chief Magistrate's orders revised. The letter was placed in a file and presented before the Resident Judge as Criminal Revision No. 417 of 2011. In the letter the petitioner was requesting the High Court to *"call for Malindi CMCR Case No. 345 of 2011 from the Lower Court in order for this Honourable Court to examine the record to its satisfaction as to the legality or propriety of the order recorded on 7th October, 2011, and as to the legality and regularity of the trial court ordering the case to proceed to hearing before the defence is supplied with copies of proceedings in Malindi CMCC No. 18A of 2004..."*

4. On 18th November, 2011 the High Court gave directions in the following terms:

"Having considered the complaints raised by Mr. Gekanana for the accused in criminal case 345 of 2011 in the letter dated 19th October, 2011 and having perused the proceedings in criminal no. 345 of 2011 now pending before the Chief Magistrate's Court in Malindi, I direct that Mr. Gekanana files a

substantive petition in respect of his complaint.

I decline to interfere by revision"

Thus on 7th December, 2011 the petitioner filed a constitutional petition No. 22 of 2011 under article 22, 23, 49 and 50 (2) (c) of the Constitution. The petition was filed alongside a chamber summons under Certificate of Urgency seeking inter alia, that the proceedings in criminal case no. 345 of 2011 be stayed pending the hearing of the application and petition and orders to restrain the Attorney General, named as the 2nd respondent from prosecuting the petitioner in the said case which action he alleged was an infringement of his constitutional rights.

5. Apart from recounting the history and background of the case, the main petition takes issue with the decision of the state to charge the petitioner "without any proper or tangible evidence or investigations for an ulterior motive...an affront to criminal law and criminal justice administration..."(sic). The petitioner had since instructed a different firm, George Wakahiu and Njenga to replace Messrs Gekanana & Co.

6. The petition sought several orders, namely:

1. A declaration that the accused has been subjected to an unfair trial and his constitutional rights have been infringed.

2. A declaration that the proceedings in Chief Magistrate's Court case no. 345 of 2001 Republic -vs- David Mwangi Muiruri are unfair, irregular and unlawful and an infringement of the petitioner fundamental rights and the same be quashed and /or be nullified.

3. An order directed to the Director of prosecution or anyone acting on his behalf barring him from subjecting the petitioner to any further or future prosecution on charges related to the matters riased in the petition herein.

4. The 2nd respondent or anyone acting on behalf of the State and especially the Kenya Police at Malindi Police station be restrained and prohibited from arresting and/or harassing the petitioner forthwith in any matters related to the matters raised in the petition herein.

5. Damages (sic)

6. On 7th December, 2011 the High Court noting the long history of the matter declined to certify it urgent and directed that dates be taken in the registry. The matter was fixed for hearing of the chamber summons of 7th December, 2011 on 21st March, 2012 after the Christmas vacation.

But before then, the petitioner filed a fresh Notice of Motion on 29th December, 2012 under the Vacation Rules. Seeking inter alia that pending the hearing of the Petition the court orders the transfer of Criminal case no. 345 of 2011 from the Chief Magistrate's Court Malindi to Chief Magistrate's Court Mombasa and an order barring one George Ogolla a police officer from handling "any matters related to the criminal case no. 345 of 2011..." Tuiyott J. the vacation judge sitting in Momabasa declined to admit the matter for hearing during the vacation, observing that there was neither "new or urgent" matter requiring the intervention of the court before March, 2012.

8. On 21st March, 2012 Mr. Gekanana reappeared on behalf of the petitioner. Mr. Kemo appeared for the State and parties regularized by consent the status of the 2nd respondent, initially erroneously sued as the Attorney General rather than the DPP. Mr. Kemo thereafter sought time to get instructions. Mr. Gekanana unsuccessfully pressed for stay orders in respect of the Lower Court criminal case. Eventually a mention was agreed for 23rd March, 2012. On that date Mr. Kemo opposed the petitioner's repeated request for stay orders citing the impending hearing date 3rd April 2012 for which several witnesses; most of them Judicial Officers had already been bonded. The court agreed with Mr. Kemo and directed that application for adjournment be made in the Lower Court as it was unlikely the case would be heard to conclusion in a day.

9. Meanwhile the matter was set for hearing on 24th April 2012 which like many other matters, unfortunately fell in the leave period of the judge. Hence on 24th April 2012 the Petitioner through Wakahiu Advocate took a mention date for 9th May, 2012. The petitioner informed the Court that he would be acting in person and sought leave to file a further affidavit and submissions. The court directed that the State Counsel who was absent be served to attend mention on 10th May, 2012,

"For further directions"

10. On that date the Petitioner addressed the Court as follows:

"***I am not ready to proceed in this court. Disqualify yourself. I have made a complaint. The court has a conflict of interest."***

The court observed that the matter was listed for mention not hearing. Whereupon the applicant who was visibly agitated shouted at the judge saying:

"you have an interest in the property...I have complained about your conduct to the JSC. I do not want you to hear my case. I have evidence. There is a conflict of interest."

The judge advised the petitioner to file a formal application; which he did eleven days later on 22nd May, 2012. He also filed a similar application in HCCC 27 of 2012.

11. That Notice of Motion is the subject matter of this ruling. It seeks inter alia that the judge presiding over the petition disqualifies herself from presiding over the petition and any other matter affecting a property described as plot no. 622 Malindi the subject matter of criminal case number 345 of 2011. The main grounds are that the petitioner had complained against the judge to the Judicial Service Commission (JSC), office of the Ombudsman and the Judges and Magistrate's Vetting Board regarding her handling of the petition. That therefore it was impossible for the judge to remain impartial or to afford the petitioner a fair hearing.

12. That is the gist of the supporting affidavit, which, primarily takes issue with the fact that the court has declined to stay proceedings in criminal case no. 345 of 2011. Annexed to the supporting affidavit are the respective complaints to the Commission on Administrative Justice, the Judicial Service Commission (both dated 23rd March, 2012) and the Judges and Magistrates Vetting Board (dated 29th March, 2012. These complaints touch on the petition and Malindi HCCC no. 27 of 2012, the latter which the petitioner describes as:

"founded on allegations of fraud. It is alleged that the 1st defendant (petitioner) forged court judgment and decree in another suit CMCC 18A of 2004 at Malindi, to transfer this property (land portion No. 622 Malindi) to the 2nd defendant..."

13. The petitioner also complains that the "whole of the Malindi Law Courts is compromised in his (plaintiff in HCCC 27 of 2012) favor and I should not expect to get any justice from there." Malindi HCCC 27 of 2012 pits Mirko Blaettermann (suing through is attorney) Shabir Hatim Ali against the petitioner and two others. The petitioner is clearly aggrieved by the orders given by the Judge in that case.

14. Before the disqualification application in the petition could be heard as scheduled on 12th June, 2012 the Petitioner filed yet another constitutional petition No. 247 of 2012 in the Constitutional and Human Rights Division of the High Court in Nairobi. The same was filed on 7th June, 2012 and the accompanying application, sought inter alia, a prohibition against the respondents, namely the DPP the Commissioner of Police, the JSC and the Hon. Attorney General and

"particularly the Hon. Lady Justice C. W. Meoli sitting at the High Court of Kenya at Malindi from further conducting proceedings in the Constitutional Petition no. 22 of 2011 at Malindi, HCCC no. 27 of 2012 at Malindi or any other matter relating to the petitioner which directly or indirectly touches on the issues giving rise to the petition herein.... all suits and cases involving the petitioner be removed

from all courts falling under the jurisdiction of the resident judge sitting at Malindi (including Kilifi Law Courts) and be placed before court's outside her supervisory jurisdiction to avert compromise and or conflict of interest and influence" (sic).

15. The latter part of the above prayer adverted to Kilifi Court criminal case no. 532 of 2012 in which the petitioner had since been charged with Creating a Disturbance contrary to Section 95(1) (b) of the Penal Code arising from his conduct before the High Court in Malindi on 10th May, 2012. The charge was subsequently substituted to one of showing Disrespect to Judicial Proceedings contrary to Section 121(1) (i): of the Penal Code. This is the highlight of the petitioner's Further Affidavit in HCCC 27 of 2012.

16. On 8th June, 2012 Majanja J. declared the proceedings in Nairobi petition No. 247 of 2012 an abuse of the court process citing his concurrent jurisdiction as a High Court Judge and the fact that the disqualification application before the Malindi Judge was pending hearing and determination. He therefore struck out the petition.

17. The disqualification applications in petition 22 of 2011 and HCCC 27 of 2012 were eventually heard on 12th June, 2012 and 13th July, 2012, respectively. The Petitioner argued his application on the basis of the grounds thereon and his affidavits which can be summarized as follows:

a) the court despite finding substance in his revision and directing him to file petition has given him a run-around

b) the court has willfully delayed his case and unreasonably denied him stay orders in criminal

c) the judge has been compromised.

d) the judge will not act impartially in view of the complaints to JSC etc.

18. In addition, he raised the new developments involving the criminal case no. 532/2012 preferred against him before the Kilifi Court. He stated that the complainant in the said case was the judge, hence it was imperative for the disqualification application to be allowed "to avoid conflict of interest" between him and the judge and that the State had no right to make objections. He urged the court to strike out the grounds of objections filed by the State in the petition No. 22 of 2012.

19. Mr. Kemo for the State asserted the DPPS Mandate to prosecute and be heard in application of the nature before us by virtue of Article 157 of the Constitution. Arguing his grounds Mr. Kemo contended that the petitioner's application is based on a misconception of the discretion of the Court in a revision under Sections 362 to 365 of the Criminal Procedure Code and court's direction in revision no. 417 of 2011: the petitioner appears to believe the court had found merit in his letter seeking revision, hence the direction that he files a substantive petition. Mr. Kemo recounted the proceedings of the petition since filing and argued that the petitioner ought to have appealed the decision of this court declining to certify the matter urgent.

20. He pointed out the anomalies of erroneous joinder of the Attorney General rather that the DPP, which necessitated the regularization on 21st March, 2012 when the application was scheduled to be heard. That the DPP had not entered appearance before then due to the anomally. Mr. Kemo submitted that the applicant had the onus to establish bias on the part of the court, and that the court should not accede to an unjustified disqualification application. For these propositions he cited two authorities in the Court of Appeal.

1. **Kaplan and Stratton vs LZ Engineer & Others Civil Application No. NAI. 105 of 2000.**

2. **Galaxy Paints Co. Ltd -vs- Falcon Guards Ltd Civil Appeal No. 219 of 1998.**

He further cited the case of **Samuru Gituto Farmers Co-op -vs- Teresia Muiruri & Others [2009]e KLR** in which the facts were almost similar to those herein: the judge therein had declined to certify a

matter urgent and was asked to disqualify himself. Mr. Kemo urged the Court to find that no evidence of bias had been demonstrated as to warrant a qualification.

21. In his reply, the petitioner revisited revision No. 417 of 2011 and asserted that the direction of the Court suggested that there was substance in his complaint letter to the High Court. He therefore filed a petition as directed. He further contended that the criminal case in the Lower Could should have been stayed pending the final determination of the petition. His position, he said, was that justice will not be done in the Lower Court in the absence of proceedings in the disputed (allegedly non-existent) CMCC 18A of 2004. Finally, the petitioner said that the court's disqualification in this matter should be "automatic" in light of the criminal case in Kilifi in which the Petitioner is the accused and the judge named as complainant.

22. In HCCC 27 of 2012 the two respective applications filed on 29th February, 2012 and 2nd March, 2012 by the plaintiff and 1st defendant had been heard through written submissions and set for ruling on 12th June, 2012. But before that date, on 22nd May, 2012 the petitioner who is the 1st defendant therein field an application similar to the one in petition 22 of 2011 in every respect seeking disqualification of the judge. The court having overruled a preliminary objection to the said application raised by Mr. Otara for the plaintiff, proceeded to hear the same on 13th July, 2012.

23. The applicant relied on the supporting affidavit and further affidavit to which he annexed the substituted charge sheet dated 13th June, 2012 in which he is charged with showing disrespect to judicial proceedings contrary to section 121 (1) (i) of the Penal Code, particulars being that on 10th May, 2012 he showed disrespect in proceedings in HCC Petition 22 of 2011 by shouting and banging a table in the course of proceedings. He has also attached the judge's statement to the police. He submitted that "no proof is required but mere suspicion is enough" to justify disqualification. He relied on **NAI Civil Appl. 310 of 2004 R vs Jackson Mwalulu and others Petition no. 671 of 2006 Home Park Caterers Ltd -vs- the Hon. AG.** The test he said is that of a reasonable man's apprehension.

24. For his part Mr. Otara submitted that there was no evidence of bias and the existence of the criminal case is not conclusive proof of friction between the judge and the applicant. He gave the example of his contempt application and Preliminary Objection against the petitioner which had been dismissed in the course of the proceedings. He urged the court to dismiss the application as an abuse of the court process. One similarity of the applications and the commonality of the subject matter in dispute, I found it prudent and proportionate to write a consolidated ruling on both petition 22 of 2011 and HCC 27 of 2012.

25. The foregoing is a summary of the background and substance of the two disqualification applications before me. It is purposely detailed because of the breadth of material presented before the court by the petitioner, which must be subjected to known legal tests, in evaluating the merit of Petitioner's application. But before setting out the applicable legal principles, I find it necessary to outline the various facets and the patently evolving nature of the petitioner's complaints against the presiding judge, as can be discerned from the material presented by the petitioner himself.

1. Complaint to JSC dated 23rd March, 2012, delivered to JSC offices on 29th March, 2012:

Complaints in Malindi HCC 27 of 2012 Mirko Blaetterman vs. David Muiruri & 2 others

a) failure to record proceedings in full

b) issuing orders to restrain the petitioner which amounted to

"eviction...through the back door."

c) delivering a ruling in chambers under the pretext of being tired

and thereafter dismissing the parties while the advocates remained behind.

d) threatening to put the subject property under the management of the Public Trustee

2. Complaints to JSC related to Criminal case no. 345 of 2011:

a) judge's refusal to grant 'automatic' stay of the lower Court proceedings in the Petition 22 of 2011 where constitutional issues have been raised.

3. Complaint through questionnaire to the Judges and Magistrates Vetting Board (JMVB) dated 29th March, 2012.

a) no justice

b) “open bias, abusive, jumpy in recording proceedings where my case falls to my favor” (sic) The questionnaire of the JMVB is divided into items. To the question under item 11(b): have you asked the judge or magistrate to withdraw from handling the matter, the petitioner stated: Yes but declined and not recorded in proceedings....on...March, 2012 on the very first appearance in HCC 27 of 2012 I asked the judge to stay the ammeter as the issues therein were subject to petition no. 22 of 2011...”

4. In Court on 10th May, 2012

a) judge's conflict of interest

b) judge's interest in the property

c) pending complaint before JSC against Judge.

5. Application of 21st May, 2012 in HCCC 27 of 2012 and Petition 22 of 2011:

a) In light of pending complaint against judge before JSC and JMVB and the Ombudsman the judge cannot be impartial.

6. In affidavits, supporting Chamber summons:

a) Judge found substance in Revision 417 of 2011 and advised petitioner to file petition but subsequently denied him interim orders.

b) judge delayed the hearing of petition

c) judge gave petitioner run-around - “a tactic to delay” hearing of petitioner yet quick to give interim orders against petitioner in HCC 72 of 2012.

d) Judge compromised therefore hostile to petitioner

e) Judge cannot be impartial in light of complaint by petitioner to JSC and other bodies

f) Judge complainant in Kilifi Criminal Case no. 352 of 2012 NRB

7. Pet. No. 247 OF 2012 Nairobi:

a) Compromise

b) conflict of interest

c) prosecution in criminal case no. 532 of 2012 Kilifi. wherein judge is complainant

26. The petitioner therefore presents complaints of bias past and present and apprehension of future

bias. These are based on both alleged procedural and substantive aspects of the case as well as events which have occurred in the currency of the proceedings and ultimately the petitioner's own alleged perception of the court's attitude towards him.

27. In the case of **Kaplan and Stratton vs LZ Engineering Construction Ltd and 2 others** the learned judge [Lakha JA) traced the evolution of the law relating to disqualification, starting with **R V Sussex Justices ex parte Mc Carthy [1924]I KB 256** following which a liberal approach to disqualification developed until **R V Cambourne Justices exparte Pearce [1954]2 ALL ER 850** which set back the clock. The Judge (Lakha JA as he then was) finally summed up the law as follows:

"To sum up, the present state of the law in relation to apparent bias, as it applies to judges, is that there is an automatic disqualification for any judge who has a direct pecuniary or proprietary interest in any of the parties....

Apart from that, if an allegation of apparent bias is made it is for the court to determine whether there is a real danger of bias...in the sense that the judge might have unfairly regarded with favor on disfavor the case of a party...".

The court also referred to the decision in **Locabail (UK) Ltd v Bayfield Properties Ltd [2000]1 ALL ER 65** where the Court of Appeal in England stated: *"by contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case."*

28.***The Sussex case*** case is the origin of the famous dictum "justice must not only be done but be seen to be done", of which the present petitioner has repeatedly reminded this court. Reading through the petitioner's arguments and application, the petitioner urges the view that before this court the only requirement is "mere suspicion", and should have automatically, disqualified itself in light of the events he has highlighted. But as Lakha JA outlined in the **Kaplan Case** this argument is based on the pre- **R - vs- Cambourne** jurisprudence which our highest courts have also abandoned.

29. Indeed in the case of **R vs Hon. Jackson Mwalili and others (2005)e KLR** upon which the petitioner places reliance, the Court of Appeal cited the following paragraph as a rendition of Lord Denning's proposition in the English Case of **Metropolitan Properties (FG-C) Ltd vs Lannon & Others-:**

"That being the position as I see it when the courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...where such allegation is made, the court must carefully scrutinize the affidavits....remembering that when some litigants lose their cases before a court or quasi - judicial tribunal, they are unable on willing to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge...." (per Tunoi J in R vs David Makali & 3 others in Criminal Application NAIROBI 4 and 5 of 1994(U R)"

30. The above proposition does not mean that all that is required is mere suspicion of bias, as the petitioner has submitted. The second authority cited by the Petitioner emanates from a Court of concurrent jurisdiction, (Nyamu and Wendoh JJ) in ***Home Park Caterers vs AG & 3 others [2007]e KLR*** on disqualification. The test is not mere suspicion or doubt regarding fairness but reasonable suspicion, based on reasonable grounds.

*31.*The case law on disqualification as applied in the Home Park Caterers case is common to that considered by *the* **Lakha JA in the Kaplan & Stratton Case** and by the bench of the Court of Appeal in the **Galaxy Paints Case** as to the test of a reasonable man, the assumptions in respect of the judges training and experience, oath of office and predilection to a dispassionate mind. Automatic disqualification is is only tenable where it has been shown that the Judge has a direct pecuniary and/or proprietary interest in any of the parties or is so closely connected to a party that he can be said to be

acting as a judge in his own cause.

32. The very first verbal objection raised by the petitioner before me on 10th May, 2012 were words to the effect that the judge had an interest in the suit property. Hence I expected this allegation to be contained in the affidavits to the formal application filed subsequently. It is not. And neither has it been repeated in the various complaints made to different bodies by the petitioner. Because no evidence of such connection exists: I have no pecuniary or proprietary interest in any of the parties or the outcome of the Constitutional petition no. 22 of 2011 or Malindi HCC 207 of 2012. It is puzzling that the petitioner could boldly make an accusation of such a serious nature in open court

against the judge and thereafter fail to support it by affidavit evidence, while at the same time continuing to insist that the judge should automatically disqualify herself. There is no legal or factual ground in this case to compel my automatic disqualification.

33. The next question, based on the myriad other allegations of bias by the petitioner, is whether there is a "real danger of bias in the sense that the Judge might have unfairly regarded with favor or disfavor the case of a party under consideration by him or ….might be predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issue.." See **Kaplan & Stratton Case and R V Jackson Malulu & others)**.

34. The petitioner has made a great deal of the criminal case facing him in Kilifi arising from his conduct before me on 10th May, 2012. It is true that the judge was subsequently approached by the police to record a statement in the matter but the judge did not initiate the complaint: police got wind of the incident that had occurred before the judge and visited the court on the same day. The judge is a state witness and is not personally prosecuting the petitioner. It is in my view correct to state that the petitioner's conduct before the court on 10th May, 2012 was disgraceful, but petitioner cannot hope to use his own deliberate conduct and consequences thereof to accuse the judge of personal animosity or bias against him.

35. This too applies to his various complaints to the JSC, JMVB and Ombudsman. What the petitioner appears to have done is to engineer situations in order to justify his stated desire for this court to be disqualified from handling his case. He was entitled to complain to the JSC and the other bodies. But he cannot now use the existence of such complaints to compel the judge to opt out of the cases of which she is properly seized. In other words, give the judge a *fait accompli.*

36. The petitioner in his affidavits supporting the application has amplified the direction the judge gave in Rev. 417/11. He seems to have concluded that the judge had somehow found merit in and endorsed his complaint, and hence the direction for him to file a "substantive petition." He was therefore dismayed when he did not get orders (automatically) to stay the criminal case upon filing his petition. As learned counsel for the State Mr. Kemo has stated the petitioner expectation was based on a misreading of the actual direction and the provisions of sections 362 – 365 of the Criminal Procedure Code.

37. There is nothing in the body of the directions to support what the petitioner appears to think is the purport of the directions. Indeed the court did not direct that a Constitutional petition be filed: in declining to interfere the judge directed that a "substantive petition" be filed. Paragraph 6 of the petitioner's supporting affidavit clearly displays the misapprehension:

"THAT it beats logic that ever since the petition was ordered and having appeared before her (judge) on several occasions and even after certificate of urgency, no orders either interim or otherwise has even been given. What changed her view has never been explained" (sic).

The petitioner clearly misunderstood on deliberately misconstrued the court's directions even though he was represented by counsel.

38. Throughout his affidavits the petitioner's officer repeated refrain is this: That in this petition and HCC no. 27 of 2012 he has not received favorable orders. Regarding HCCC 27 of 2012 that is untrue. He has

two decisions in his favor: regarding contempt of court application against him and the Preliminary Objection by Mr. Otara. The reasons for all the decisions in both cases are on record. These include the refusal by this court to certify the petition urgent on 7th December, 2011 – the complaint in paragraph 6 of the supporting affidavit. His application of 2nd March, 2012 in HCC 27 of 12 was indeed certified urgent and heard.

39. The petitioner complains in his letter to the JSC that his ruling in HCC 27 of 2012 was given in chambers. He was present with his counsel. As for other allegations concerning what happened thereafter, these are not in his supporting affidavits. Nor are the allegation to the JMVB that this court failed to record his application to disqualify itself on his "first appearance" - itself an untruth. A similar allegation is made in paragraph 14(l) of the complaint to the JSC: that the judge did not record the words used in relation to a dead dog on the property in dispute. It is impossible for courts to record everything that occurs or is said during proceedings. But as I understand the petitioner's grouse, it is that he has not received fair treatment before the judge by way of favorable orders. If indeed he was not satisfied with reasons given for the various orders he complains about, the petitioner had the right to appeal. He has not.

40. In the **Kaplan Case,** the learned judge stated that "apparent bias may be readily inferred if sufficient evidence exists."

He cited a decision of the Constitutional Court of South Africa **President of the Republic of South Africa vs South Africa Rugby Football Union (1999) (4) SA 147 at page 177** on the question of reasonable suspicion:

"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 favor; 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 coconut the fact that they have a duty to sit in any 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."

41. There is in my view no evidence before this court that the judge *"cannot bring an impartial mind to bear on the adjudication of the case. That is a mind open to persuasion by evidence and the submissions of counsel."* If evidence of this predisposition is required, it is in the proceedings in HCCC 27 of 2012 and in the record of the petition proceedings on 10th May, 2012 and thereafter. On 10th May, 2012 the court could have but did not invoke its powers to summarily punish what was a patent contempt committed by the petitioner in its face. Instead the Judge directed the filing of a formal application.

42. Much has been made of the subsequent criminal case mounted by the State against the petitioner arising from his conduct during proceedings on 10th May, 2012. But I think the petitioner is seemingly oblivious or ignorant of the court's own power to summarily punish acts of contempt committed in its face under Section 121 of the Penal Code. That power can be invoked by the court in the course of proceedings to punish a party in contempt, but there is no corresponding requirement that the judge must thereafter automatically disqualify herself. The same is true of other provisions prescribing the punishment of contempt by the Court under the Judicature Act by the High Court and Order 40 of the Civil Procedure Rules.

43. The underlying rationale to these provisions must encompass some of the assumptions summed up in the **President of the Republic of South African Case** namely, the judge's fidelity to the oath of office to

administer justice without fear or favor, ability to disabuse their minds of any irrelevant personal beliefs or predispositions and their duty and responsibility to sit in any case in which they are not obliged to recuse themselves. The petitioner has not shown that these assumptions do not apply to the judge in this case and if anything this court's ruling of 12th June, 2012 in HCC 27 of 2012 suggests the contrary, as submitted by Mr. Otara for the plaintiff.

44. I would use the words of Lakha JA in the **Kaplan Case** and state that:

"There is no actual evidence that there are real grounds for doubting my ability to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before me"

And secondly, I would adopt the counsel in **Case of Clenae (1999) V SCA 35** also cited by Lakha JA as follows:

"As a general rule, it is the duty of a judicial officer to hear and determine cases allocated to him of her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."

This reasoning was adopted by the Court of Appeal **Galaxy Paints Company Ltd vs Falcon Guards Ltd (Civil Appeal No. 219 of 1998)** stating:

***"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. See* Raybos Australia Property Limited & another v. Tectram Co-operation Property Ltd. & Others 6 NSWLR"**

45. In view of the foregoing I have found no merit in the petitioner's applications in the petition no. 22 of 2011 and HCCC 27 of 2012, and like the judges in the **Galaxy Paints Case** would observethat the now common practice by lawyers and litigants to make scurrilous unfounded allegations against judges in a bid to disqualify them in hopes of shopping for more favorable judges must be deprecated. What the petitioner in this case has done is to attempt to black mail and intimidate the court through unsubstantiated allegations of impropriety and bias, in some instances through contrived and self induced predicaments.

46. It appears to me from his affidavits, submissions and conduct that the petitioner's understanding of justice is limited to automatic orders issuing invariably in his favor, on demand, against his adversaries, and without delay. In short, a fast acting over-the-counter legal analgesic. That is a parody of justice.

47. The petitioner's applications for disqualification in both the petition 22 of 2011 and HCCC 27 of 2012 are hereby dismissed. The costs in HCCC 27 of 2012 are awarded to the plaintiff. Ruling on the two pending applications therein (29th February, 2012 and 2nd March, 2012) will be delivered on 11th October, 2012. In petition 22 of 2012, the chamber summons dated 7th December, 2011 will be heard on 11th October, 2012.

Delivered and signed on this **11th** day of **September, 2012** in the presence of the applicant and Mr. Naulikha holding brief for Mr. Kemo for State, Mr. Otara for plaintiff in HCCC 27 of 2012 absent.

C W Meoli

JUDGE

Mr. Muiruri

I seek leave to appeal the decision and also stay of proceedings pending appeal and certified copies of proceedings and ruling.

C W Meoli

JUDGE

COURT – The applicant is at liberty to file appeal: He is granted seven days stay of proceedings pending formal application.

C W Meoli

JUDGE