

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC PETITION NO. E010 OF 2020**

**(CONSOLIDATED WITH PETITION No. 1 OF 2022)**

JOEL MWARIAMA & 18 OTHERS (SUING ON THEIR BEHALF AND ON BEHALF OF ABOUT 3,000 RESIDENTS OF TIMAU AREA IN BUURI SUBCOUNTY, MERU COUNTY .....PETITIONERS

***VERSUS***

NATIONAL LAND COMMISSION .....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT

CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING  
.....3<sup>RD</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4<sup>TH</sup>  
RESPONDENT

NYAKIO HOLDINGS COMPANY LIMITED .....5<sup>TH</sup> RESPONDENT

KABARI WAMBUGU GITUMBI .....6<sup>TH</sup>  
RESPONDENT

AND

MERU COUNTY .....1<sup>ST</sup> INTERESTED  
PARTY

COUNTY COMMISSIONER MERU COUNTY ..2<sup>ND</sup> INTERESTED PARTY

AND

MONICA KAITHIORI KATHONO .....1<sup>ST</sup> AFFECTED PARTY

JY KARWITHA KAARIA .....2<sup>ND</sup> AFFECTED PARTY

GERSHON OTACHI BW'OMWANWA .....3<sup>RD</sup> AFFECTED PARTY

### **RULING**

1. What is before me is the Notice of Motion Application dated the 29<sup>th</sup> September, 2025; brought pursuant to provisions of **sections 1A, 1B, 3 & 3A of the civil procedure act; regulation 9 and regulation 29 of the judicial service; code of conduct and ethics] Regulations 2020; and order 51 rule 1 of the civil procedure rules 2010;** and wherein the applicants have sought the following reliefs:

- (i) That this Application be certified as urgent and be heard as a matter of priority in this matter.
  - (ii) That pending the hearing and determination of this application inter-parties, the Honourable court be pleased to arrest the delivery of the ruling scheduled on 2<sup>nd</sup> October 2025.
  - (iii) That Hon. Justice Oguttu Mboya FCIarb be pleased to recuse himself from the conduct of this matter.
  - (iv) That this matter be listed before the presiding Judge Environment and Land Court for further directions.
  - (v) That the costs of this application be provided for.
2. The subject application is premised on the various grounds which have been highlighted in the body thereof. In particular, it has been contended that the 5<sup>th</sup> and 6<sup>th</sup> respondents/applicants had filed the subject petition and thereafter the court, [differently constituted], rendered a judgment dated 5<sup>th</sup> October 2022 and wherein the 1<sup>st</sup> respondent was ordered to consider the application for regularization of ownership of the suit plot by

the applicants herein. In addition, it has been contended that the 1<sup>st</sup> respondent was enjoined/ commanded to make a decision within 6 months.

3. Additionally, it has been contended that the applicants herein filed yet another matter, *namely*; Nyakio Holdings Co. Ltd vs National Land Commission & Meru county ELC JR No. E007 of 2025; and wherein it is contended that the applicants sought *inter-alia* orders of mandamus. Moreover, it has been posited that this court entertained the judicial review proceedings and rendered a judgment on 25<sup>th</sup> September 2025, wherein this court dismissed the judicial review proceedings. It is contended that the decision rendered on 25<sup>th</sup> September 2025; is likely to impact on the subject matter and hence the judge is pre-disposed to be biased as against the Applicants; and thus the necessity for recusal/ disqualification of the Judge.
4. The subject application is supported by the affidavit of Wachira Wambugu Gitumbi who states that same is a director of Nyakio Holdings Ltd, *namely*; the 5<sup>th</sup> respondent/ Applicant. The supporting affidavit is sworn on 29<sup>th</sup> September 2025; and the deponent has annexed various documents inter alia a copy of the judgment rendered *vide* ELC JR No. E007 of 2025; and a copy of the judgment and decree issued on 5<sup>th</sup> October 2022, by Honourable Justice C. Nzili, Judge.
5. The 1<sup>st</sup> respondent filed a replying affidavit and wherein same has opposed the subject application. In particular, it has been contended that the averments at the foot of the supporting affidavit do not disclose any reasonable ground and or basis to warrant recusal/disqualification of the

court. Moreover, it has been contended that the subject application is based on misapprehension of the circumstances surrounding the dispute.

6. The subject application came up for hearing on 9<sup>th</sup> October 2025, whereupon learned counsel for the applicants intimated to the court that same had filed written submissions dated 8<sup>th</sup> October 2025. In addition, learned counsel for the applicant sought to highlight the submission[s]; and in this regard, the court granted liberty to counsel to highlight the key features of his submissions. For good measure, the highlights by and on behalf of the applicants are on record.
7. Learned counsel for the 1<sup>st</sup> respondent intimated that same would be adopting the contents of the replying affidavit filed; and invited the court to consider same in making the decision as pertains to the subject application.
8. The learned counsel for the petitioners intimated to the court that the subject application was not only misconceived and legally untenable; and that same ought not to have been made in the first place. Nevertheless, learned counsel for the petitioners posited that same would leave the matter to the discretion of the court.
9. Having reviewed the application beforehand; the supporting affidavit thereto; the response by the 1<sup>st</sup> respondent; and upon taking into consideration the written submission[s] filed by the Applicants; and the oral highlight[s] made by and on behalf of the parties, I come to the conclusion that the determination of the subject matter turns on one salutary issue, *namely*; whether the applicants have established a reasonable basis to warrant recusal by a judge or otherwise.
10. The application beforehand is premised on the basis that having rendered and or delivered the judgment *vide* ELC JR No. E007 of 2025 between

Nyakio Holdings Co. Ltd vs National Land Commission & another [which matter relates to the subject suit] this court is likely to be biased against the applicants as pertains to the pending application dated 14<sup>th</sup> July 2025. Moreover, it has been contended that taking into account the contents of the judgment rendered on 25<sup>th</sup> September 2025; *vide* Meru ELC JR No. E007 of 2025, there is a likelihood that this court shall be disposed to dismiss the application for contempt against the 1<sup>st</sup> respondent; and the various affected parties.

11. What I understand the applicant to be contending is that this court is biased; or is pre-disposed to determine the pending application dated 14<sup>th</sup> July 2025, in a manner that is pre-meditated. The question that does arise is whether the applicant has established a reasonable basis or apprehension to warrant a finding of bias or otherwise; and better still, whether the Applicants have surmounted the objective test applicable to warrant recusal on the basis of [sic] bias.

12. What constitutes bias was aptly addressed and expounded upon by the Court of Appeal in the case of **Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR (2016) eKLR** stated as hereunder;

*[60] What then amounts to bias?*

*The Oxford English Dictionary defines bias as an inclination or prejudice for or against one thing or person,” while Black’s Law Dictionary defines the word bias as follows:*

*“Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. The condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in a particular case. As used in law regarding disqualification of judge, refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.”*

*[61] From the above definition, it is clear that the issue of bias negates the twin virtues of impartiality and independence of the Court of the Judge hearing and determining a matter. These two principles are the hallmark of a fair trial as espoused in section 77 of the retired Constitution of Kenya and Article 50 of the current Constitution.*

*[62] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. Article 25(c) of the Constitution 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one’s case heard by an independent, impartial and unbiased arbiter or judge.*

*The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the judge or the court.*

*[63] Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of Lord Goff in the case of R vs Gough, [1993] 2 All CR 724:*

*“Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking 'the judge was biased'. (Emphasis ours)*

*[64] In Metropolitan Properties Co., Ltd v Lannon (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 it was observed that:-*

*“Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias”. (Emphasis ours)*

*[65] In the Australian case of Webb v The Queen (1994) 181 C L R 41 Mason CJ and McHigh J held:*

*“In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties*

*to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.*

*[66] The rule against bias is an important element of the right to a fair trial. This rule is to be very strictly applied, so that even the appearance of bias is done away with. This is because it aids in public confidence in the fairness and impartiality of the judicial system. In view of the jurisprudential importance and uniqueness of this application we find it necessary to say slightly more on perception or appearance of bias. As the court stated in the English case of R v Sussex Justices ExP. McCarthy [1924] 1 KB 256:*

*“Justice should not only be done but should manifestly and undoubtedly be seen to be done.”*

*[67] The import of the rule against bias, as well as its strict application, is that there need not be actual bias on the part of the judge for apprehended bias to be found. It is enough that the adjudicator might not appear to be impartial. In determining whether or not there has been bias, the test to be applied is whether a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias.*

*[68] In Kimani v Kimani (1995-1998) 1 EA 134 Lakha JA, who coincidentally was part of the bench that rendered the impugned decision herein, in the majority judgment stated as follows on the test of likelihood of bias:*

*“The correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias.”*

[69] In his dissent, Gicheru JA (as he was then) stated in the same case that:

*“.....the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would , that the judge is biased or is likely to be biased”*

[70] This test was endorsed by the East African Court of Justice in *Attorney General of the Republic of Kenya v Prof Anyang' Nyong'o and Others (5/2007) [2007] EACJ 1 (6 February 2007)* where the Court stated that:

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

*[71] We also cite with approval the proposition of the English Court in FLS Aerospace Ltd [1999] EWHC B3 (Comm) (20 April 1999) Ltd wherein it is stated that:*

*“First, actual bias will of course always disqualify a person from sitting in judgment. Even in the absence of actual bias, however, the importance of public confidence in the administration of justice is such that even the appearance of bias will disqualify.” (Emphasis supplied).*

*[72] This is the standard we must apply in this case in determining whether the Court, as constituted, was biased, or could have been perceived to have been biased when handling the impugned proceedings, which are the subject of this application.*

*[73] Before we discuss the issue of fair trial in the context of the current Constitution, it is important to look at the relevant provision of the retired Constitution, which was in operation when the impugned proceedings were conducted. Section 77 (9) of the retired constitution provided as follows:*

*“A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time”.*

[74] *The same provision was imported into the current Constitution 2010 vide Article 50(1) of the Constitution which provides that:*

*Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.*

[75] *As observed earlier, unlike in the old constitutional dispensation, the right to fair trial is now among four other rights that enjoy an eminent special place in the current Constitution as an inderogable right. This is the more reason why the Court must ensure that the said right is jealously guarded.*

[76] *Article 50 (1) of the Constitution imposes a twofold obligation in the dispute resolution process. These are independence and impartiality on the part of the adjudicator, and fairness in the resolution procedures. Thus, allegations of bias on the part of a judge presiding over a matter is a serious allegation which if proved amounts to breach of a constitutional right that vitiates the dispute resolution process.*

13. Other than the import, tenor and meaning of the concept of bias, the standard of proving/establishing bias has been the subject of various court pronouncements. Recently, the Court of Appeal in the case of **Gachagua & 5 others v Maingi & 80 others (Civil Appeal E829 of 2024 & E022 of 2025 (Consolidated)) [2025] KECA 790 (KLR) (9 May 2025) (Judgment)**, re-visited the standard and rendered themselves as hereunder;

*Closer home, the Constitutional Court of South Africa in The President of the Republic & 2 Others vs South African Rugby Football Union & 3 Others, (Case CCT 16/98) held, inter alia, that: “The test of bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in the dissenting judgment by de Grandpre, J. in Committee for Justice and Liberty et al v National Energy Board: “...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.’”...the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case...An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application.” [Emphasis added]*

*180. In Kenya, the Supreme Court in Jasbir Singh (supra) cited with approval the American case of Perry vs Schwarzenegger, 671 F. 3d 1052 (9th Cir. February 7, 2012), wherein it was held that: “...the test for establishing a Judge’s impartiality is the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts,” and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.”*

181. In *Kibisu vs Republic* (supra), the Supreme Court, referencing the Tanzanian decision in *Tumaini vs Republic* [1972] EA LR 441, stated thus: “

61. From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in *Tumaini v. Republic* [1972] EA LR 441 Mwakasendo, J. held that “ in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people.” [Emphasis added]

182. In *Republic vs Mwalulu & 8 Others* [2005] KECA 344 (KLR), this Court set the principles on which a judge would disqualify himself from a matter and stated as follows: “1. When the courts are faced with such proceedings for the disqualification of a judge, 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. 2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal. 3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased. 4. The single fact

*that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.” [Emphasis added]*

14. Other than caselaw which expounds on the concept of bias and the requisite standard to be applied in discerning whether bias has been established or otherwise, the provisions of rule 21 of the judicial service [code of standards and ethics] regulations 2020 has highlighted instances where a judicial officer or judge ought to recuse self from the conduct of a particular matter.

15. The rule stipulates thus;

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

*a. is a party to the proceedings;*

*b. was, or is a material witness in the matter in controversy;*

*c. has personal knowledge of disputed evidentiary facts concerning the proceedings;*

*d. has actual bias or prejudice concerning a party;*

*e. has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;*

*f. had previously acted as a counsel for a party in the same matter;*

*g. is precluded from hearing the matter on account of any other sufficient reason; or*

*h. a member of the judge’s family has economic or other interest in the outcome of the matter in question.” [Emphasis Supplied].*

16. Back to whether the applicant has established a basis for recusal. It is the applicant herein who filed judicial review *vide* Meru ELC JR E007 of 2025; and wherein same sought assorted reliefs. For ease of reference, it is imperative to reproduce the reliefs that were sought by/on behalf of the applicant.

17. Same are reproduced as hereunder;

- i. That a declaration do issue that approximately 50 acres forming part of L.R No. 2890 and adjoining L.R No. 7452 Timau Township Buuri Sub-County Meru belongs to Nyakio Holdings Company Ltd.***
- ii. That CEC in charge of lands Meru County is hereby compelled to submit a request to the national land commission for allocation of approximately 50 acres forming part of L.R No. 2890 and adjoining L.R No. 7452 failure to do so within 30 days of being served with the court order, the national land commissioner will be at liberty to cause the necessary action to have the land registered in the name of Nyakio Holdings Limited.*
- iii. That the C.E.C in charge of Meru County is hereby prohibited from interfering with the quiet possession of Nyakio Holdings Company Limited or in any other was interfering with the approximately 50 acres forming part of L.R No. 2890 and adjoining L.R No. 7452 Timau Township Buuri Sub-County Meru, contrary to the best interests of the applicant.*
- iv. That the chairperson of the national land commission be and is hereby compelled to take the necessary action to have the land measuring approximately 50 acres forming part of L.R No. 2890 and adjoining L.R No. 7452 Timau Township Buuri*

*sub county Meru registered within 60 days of being served with this order failure to which any registered surveyor will survey, develop the necessary map and have the land registered and the land registrar where this land is domiciled shall register the land in favour of the applicant.*

v. *That in the interim and pending the hearing and determination of this matter, an injunction do and hereby issue against Meru county from interfering with the quiet possession of Nyakio Holdings limited in the 50 acres of land forming part of L.R No. 2890 and adjoining L.R No. 7452 Timau Township Buuri Subcounty Meru.*

vi. *That any other appropriate orders do issue.*

18. The foregoing are the various reliefs which were sought by the applicant.

Suffice it to posit that this court was enjoined to consider the pleadings filed by the applicant and thereafter to render itself in accordance with the constitution, the relevant statutes and taking into account the doctrine of precedents [stare decisis]; touching on and concerning allocation of public land. Moreover, it is common ground that the suit property which underpins the subject dispute is public land and hence the desire of the applicant to be considered for allocation in accordance with the law. There was no question as to whether the County Government of Meru has registrable interest[s], or otherwise. Instructively, the suit property falls within the ambit of Article 62 of the Constitution, 2010.

19. This court extensively considered the provisions of the law governing allocation of public land falling under the purview of the County Government. In particular, the court reviewed the provisions of **articles 62, 67, 68, and 249 of the constitution 2010; sections 9, 12 and 13 of the Land Act 2012 [2016]; section 5 of the national land commission**

**act 2012**; and the decision of the Supreme Court [the apex Court] in the case of *National Land commission vs The Attorney General 2015 KESC*; and thereafter came to the conclusion that the court could not declare the applicant as the owner of the suit property.

20. Additionally, the court also reviewed the provisions of the land regulations [Allocation of public land] regulations 2017 and which essentially underscore the mechanisms to be deployed where an applicant desires to be allocated public land.

21. Following the extensive review of the law [details in terms of the preceding paragraphs] this court returned a finding that the applicant had not proved the claims at the foot of the originating summons underpinning ELC JR E007 of 2025. To this end, the court dismissed the claims by the applicant.

22. It is the said judgment that has now provoked the subject application. The question that does arise is whether the applicant herein would have been aggrieved and he had won the case. I remind myself that cases are filed by parties for purposes of adjudication and determination in accordance with the constitution; the relevant statutes and the doctrine of stare decisis [presidents]. Moreover, the mere fact that a party files a case does not guarantee such a party a favourable outcome.

23. I am afraid that the applicant herein has misapprehended the law as pertains to bias and the provisions underpinning recusal by judges. Nevertheless, it is important to underscore that in appropriate cases, judges or judicial officers ought to disqualify themselves so as to enable

decisions to be rendered on the basis of independence and impartiality. [See Article 50 (1) of the Constitution 2010]. Be that as it may, it is instructive to observe that a Judge ought not to recuse self from a matter merely for interpreting and applying the Constitution; and the Law is the manner not acceptable to one of the parties.

24. Furthermore, it is also imperative to highlight that recusal and disqualification of a court must not be undertaken for the mere asking. Instructively, a party seeking recusal must establish a reasonable basis and apprehension of bias. For good measure, proof of bias must be undertaken on the basis of credible; substantiated evidence and apprehension. It must not be based on omnibus; vague and generalized allegations, *devoid* of substance.

25. In respect of the instant matter, learned counsel for the applicant conceded during the course of the hearing[submissions] that same has no evidence or basis to underpin the recusal. Nevertheless, counsel merely propagated a wish that the court should allow the matter to be adjudicated upon by another court.

26. I beg to state that recusal should not be resorted to facilitate or aid parties who are hellbent on forum shopping, *namely*; seeking to try their luck before another judge, who [supposedly] would be more lenient and inclined to bend backward. Such a scenario would prejudice and bring the rule of law to disrepute. Forum shopping must be deprecated by all and sundry.

27. To buttress the observation hereinbefore, I beg to reference and invoke the words of the Court of Appeal in the case of **Galaxy Paints Ltd vs Falcon Guards Ltd (1999) eKLR**, where the Court stated as hereunder;

*As a result of the failure on the part of counsel to observe the Rules, many like Mrs. Dias, have turned to scurrilous abuse and unfounded allegations against the learned Judges and*

**applications to disqualify them, which were formerly very rare, are now a common feature. As we have said elsewhere, this practice is nothing but an attempt to shop around for Judges favourable to their cause. It is strongly deprecated.**

*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 Cooperation Property Ltd. & Others 6 NSWLR 272.***

28. Before concluding on this matter, it is important to highlight the doctrine of the duty to sit. To start with, every judge takes an oath of office to administer justice in accordance with the Constitution and the law. The importance of the oath is to enable judges to sit and hear all matters presented before them unless there exists a compelling basis/reasons to warrant recusal.

29. The concept of the duty to sit was amplified by the Supreme Court of Kenya in the case of **Shollei & another v Judicial Service Commission & another (Petition 34 of 2014) [2018] KESC 42 (KLR) (3 July 2018) (Ruling).**

28. For coherence, the Apex court [Per Ibrahim SCJ] stated thus;

26. In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine)

27. In the case of *Simonson –vs- General Motors Corporation* U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, In proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

28. It is useful to refer to the case from the New Zealand Court of Appeal *Muir -v- Commissioner of Inland Revenue* PARA 2007] 3 NZLR 495 in which the Court stated as follows:-

"The requirement of independence and impartiality of a judge is counterbalanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter

determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings.

As Mason J emphasized in *JRL ex CJL* (1986) 161 CLR 342 **“it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion 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.”**[Emphasis supplied].

30. Recusal or disqualification of a judge though a necessary evil, ought to be resorted to only where there is reasonable apprehension of bias. That is the import and tenor of Rule 21 of the Judicial Service [Code of Conduct and Ethics] Regulations, 2020. Same ought not to be resorted to for the mere asking of a disgruntled or dissatisfied party. Moreover, the test to be applied is the objective one, *namely*; the test of a reasonable person knowing of the facts of the case and forming an opinion that justice may not be granted in the circumstances.

31. For good measure, the test is not subjective in the manner that was canvassed and posited by learned counsel for the applicant for whom I have tremendous respect for.

#### FINAL DISPOSITION.

32. For the reasons that have been highlighted in the body of the ruling, it is evident that the applicant herein has failed to demonstrate and or establish the test for recusal. Suffice it to repeat that the test is an objective one and the burden of proof rests on the applicant. it must be discharged to the requisite standard.

33. In the upshot, and for the reason[s] alluded to; the final orders that commend themselves to the court are as here under;

- (i) The Application dated 29<sup>th</sup> September 2025; be and is hereby dismissed.**
- (ii) Costs of the Application be and are hereby awarded to the 1<sup>st</sup> respondent only.**
- (iii) The costs in terms of clause [ii] shall be agreed upon; and in default be taxed in the conventional manner.**

34. It is so orders.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF OCTOBER 2025**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].  
JUDGE**

**In the presence of:**

Hussein – Court Assistant

Mr. Gikandi Ngibuini for the 5<sup>th</sup> & 6<sup>th</sup> respondents/applicants

Mr. Kurauka for the petitioners/respondents

Miss Mwanyika for the 1<sup>st</sup> respondent

Mr. Eric Obura [Principal Litigation counsel] for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents

No appearance for the 4<sup>th</sup> Respondent

No appearance for the interested parties.