Ameli v Ong'ondo (Environment and Land Case E025 of 2025)
[2025] KEELC 7253 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7253 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND CASE E025 OF 2025

FO NYAGAKA, J

OCTOBER 21, 2025

BETWEEN

RAPHAEL ACHACHA AMELI ..... PLAINTIFF

AND

GEORGE OKOTH ONG'ONDO ..... DEFENDANT

((On recusal of a Judge))

RULING

1. This Court, and I know of many others, has always emphasized on the importance of parties drafting and filing good pleadings that are precise, focused to the point and clearly articulating the issue they wish the court to determine. There is no dearth of decisions this Court has given calling on parties to draft pleadings properly and that where they act in person they need to seek legal advice not from quacks but properly trained legal counsel. This is because I have seen often parties lose cases or defences which extremely good for reason of poor drafting of pleadings and seeking and relying on improper 'legal advice'.

2. From the lamentations in the instant application, this appears to be the case: the Plaintiff/ applicant must have heavily relied on the advice of his son, George, who admitted in the testimony he gave, as shown below, that he is not a lawyer yet he insisted on urging his father's case from a point of his own understanding of what the law is and not what actually the law is. If this is to continue, whether in this Court or any other without the father seeking proper legal advice, the Court can only decide the case as will be presented. Courts do not sit to assist any parties frame their cases or panel beat their pleadings and point to parties the gaps in presentation of evidence in one way or other. To do so would cause them to be partial in the adversarial legal system.

3. This court states the foregoing for the reason that the instant application, dated 9th September, 2025, was very poorly drafted. In summary, after stating the urgency on pages 1 and 2 it cited at page 3 the

provisions of the law it was brought. It then listed at pages 3 the prayers in it followed at page 4 by the grounds upon which it was brought. Then rather that it being signed off and giving the person/s who presented it, it proceeded at pages 5 and 6 to attach the Supporting Affidavit, and once again repeated payers at page 7. It then in subsequent pages annexed to it between (other) pages 1 to 21 of the attachments, which were not commissioned before any commissioner for oaths. One other defect was that the ground of the application had annextures to it rather than these being annexed to the Affidavit in support and being commissioned. This, indeed, was a mix of procedure and prejudicial to the applicant himself.

4. These were grave defects which, if this court were to take into account, it would strike out this application in an instance. But since the applicant appears to have been misadvised, and it is in respect of an application the learned Judge herein is asked to recuse himself, if this court proceeds in that direction it will deny the applicant and the whole Republic from understanding the issues in contention herein by the applicant. That would give an impression that this Court had something to withhold from the public. Justice must not only be done but be seen to be done. Therefore, this court will, as an exception, apply very broadly, magnanimously and loosely the provisions of Article 159(2)(d) of the *Constitution* 2010 to allow determine the application on merits.

5. That said, before me is a Notice of Motion dated 9th September 2025. It was brought under Articles 25(c), 40, 47, 48, 50(1) and 159 of the *Constitution* of Kenya, 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 50 Rule 4 (Vacation Rules), and all other enabling provisions of the law.

6. As I have often stated, a party who decides cite a provision of law in reliance of his prayer before should explain the relevance of that legal provision. It is not enough for them to throw a litany of provisions or less to the Court to interpret and relate them to the facts of the case. If courts were to venture into interrogating and interpreting unexplained provisions given by parties and relate them to the facts of cases without the parties doing so and asking the Court to interpret the said provisions and apply them to the facts, it would mean the Court would have been subtly been made to side with the party and arguing the cases on their behalf. Nevertheless, courts can interpret the provisions in a general manner and pronounce themselves as to the relevance or otherwise of the provisions.

7. The applicant herein merely gave the provisions and a phrase "all other enabling provisions of the law' and proceeded to urge his application. This is demonstrative of the paucity of legal advice the applicant has had. Suffice it to say that the phrase "all other enabling provisions of the law" is meaningless to the extent that such other provisions are not given or explained.

8. The application sought the following ORDERS that:

    1. ...spent

    2. This Honourable Court do acknowledge and give full effect to the Plaintiff's Notice of Withdrawal filed on 1 September 2025 at 18:09:50 in E044/2025 (Annexure H, p.12), and direct that the said withdrawal stands as valid and final under Order 25 Rule 1 CPR.

    3. Upon such acknowledgment, this Honourable Court do reconsider the urgency of the Plaintiff's application in E025/2025 strictly on its own merits, without reference to the withdrawn E044/2025.

    4. Hon. Dr. Iur Fred Nyagaka, J., be pleased to recuse himself from further hearing or handling of this matter (E025/2025), and any related matter (including E055/2025), on grounds of apparent bias, procedural prejudice, and failure to give effect to valid withdrawals and filings.

5. This matter and any related matter (E055/2025) be reassigned or transferred to another Judge of concurrent jurisdiction, and if necessary, to another Environment and Land Court station outside Homa Bay, given that the issues raised touch not only on the conduct of the Judge but also the Registry.

6. That upon reassignment of this matter, the Court do issue firm administrative directions to the Registry staff and all other court officers handling the file, to ensure accuracy, timeliness, and accountability in all filings, without misrepresentation or alteration of the e-portal records.

7. That this Honourable Court be pleased to prioritize and dispose of this application within the shortest time possible, given the ongoing prejudice and destruction of property

8. Any further orders this Honourable Court may deem just.

9. The application was based on a number of grounds. They were that on 29th August 2025, the applicant filed the ELC Misc. E044/2025 whose urgency was denied by the Judge. He referred to as Annexture C, at pp.13–14, Doc ID 400786623592901292176121565278) which was copy of the document. Further, on 1st September 2025 at 18:09:50, he "filed" (sic) a Notice of Withdrawal of the ELC Misc. No. E044/2025. To evidence it, he annexed as H, at p.12, the Notice of Withdrawal which he added expressly stated his intention to refile properly (sic) under the Vacation Rules. That the portal initially displayed "request approved." He did not serve the Respondent, and the said party had not participated in the matter. Furthermore, it was not set for hearing hence the withdrawal was valid under Order 25 Rule 1 Civil Procedure Rules.

10. On 2nd September 2025, a Registry officer Mr. Adongo Aloo confirmed the Withdrawal Notice in the said file was before the Deputy Registrar for transmission (sic).

11. Later that day, the applicant filed a fresh suit, the instant matter, at 13:54:18. Despite this, the Honourable Judge denied urgency, citing "similarity" with ELC Misc. No. E044/2025 which had been withdrawn. He referred to an Annexure, D, at p.17.

12. On 3rd and 4th September 2025, he wrote to the Deputy Registrar requesting reconsideration. He attached Annexures A & B, at pp.7–11). On 5 September 2025, the Deputy Registrar write a letter, referred to as Annexure E, pp.18–19), "claiming" the "withdrawal was filed" on 3rd September, unpaid, and not considered by the Judge. This response directly contradicts the portal record, which he attached as Annexure H, at p.12 and to which the initial "request approved" status showed otherwise as per Annexure F, at p.20, and the "Registry confirmation to me on 2 September."

13. The other ground was that in ELC. No. E055 of 2025, the Honourable Judge also declined urgency despite clear affidavit evidence of trespass and destruction. He attached an Annexure G, at pp.15–16).

14. He added that he had since escalated these issues to the Judicial Service Commission, the Chief Justice, and the Principal Judge. He attached Annexure J, at pp.1–6) to evidence the step and stated that the matter was now under administrative consideration for accountability.

15. He relied on the decisions of Republic v Mwalulu & 8 Others [2005] 1 KLR 557 and Jasbir Singh Rai & Others v Tarlochan Singh Rai & Others [2013] eKLR and argued that they establish the legal position that once an application for recusal is made, the Judge must put down his tools and first determine it before handling the substantive matter as this ensures impartiality and upholds Article 50(1) of the *Constitution*. Lastly, that the cumulative effect of these actions demonstrates apparent bias, misrepresentation, procedural prejudice, and erosion of public confidence.

16. The application was supported by the Affidavit of the applicant himself which he swore on this 9th day of September 2025. He deposed that he relied on the grounds above and further that the Judge's continued handling of his cases created an appearance of bias and hostility, contrary to Article 50(1) of the *Constitution*.

17. Further, he deposed that the Deputy Registrar's conduct and the unexplained e-portal alteration raised doubts about the neutrality of the Homa Bay Registry. He added that he had formally escalated these issues to the Judicial Service Commission and other oversight offices, whose stamped copies and annexed as Annexure J, at pp.1–6.

18. He added that the circumstances of the case were such that it was just and fair that the instant matter and the related case (E055/2025) be transferred from the Homabay Station to restore confidence and ensure impartial adjudication. Further, that he was genuinely concerned that even if the matter is reassigned to another judge within the Homa Bay station, the same Registry officers, whose conduct had already raised issues of misrepresentation and tampering, would continue to process my filings. He urged that he be assured from the Honourable Court that the Registry and all officers would handle his matters with seriousness, accuracy, and neutrality, failing which a transfer outside the station remained the only viable safeguard. He deposed that the Honourable Judge puts down his tools and not proceed further in his matters until the determination of the application for recusal.

19. He annexed to the Affidavit five documents which were not commissioned before the Commissioner for Oaths who administered the oath or indeed any other commissioner (although that would have been irregular and against the law on oaths).

20. This matter came up for inter partes hearing when defendant elected not to participate in the application. He left it to the court to determine the issue as it awaited the outcome. That did not of itself imply that the Court was not enjoined to examine the merits or otherwise of the application. All issues before any court should be determined on merits, unless preliminary objections raised against them succeed, irrespective of whether the other party opposes the same or not. This is because some issues are frivolous, vexatious or an abuse of the process of the court or a misapprehension of the law and facts.

21. Regarding the instant application, the applicant submitted and made references to conduct which was questionable on the part of the Registry staff, the Judge and the Deputy Registrar.

22. In his oral submissions the applicant stated that the application was filed on 1st September 2025. He added that he wrote the notice of withdrawal but he could not find the option of withdrawal. About the instant suit he added that he wrote the notice of withdrawal on 1st September 2025 in respect of Miscellaneous No. E044 of 2025. When he could not find the withdrawal option in the CTS he followed it up through his son Geoffrey Otieno Achacha. That Mr. Adongo of the registry staff assured him that the document had been received and forwarded to the Deputy Registrar and taken to the Judge. The this happened on 1st September 2025. He was given a go ahead to file the instant suit on 2nd September, 2025, which was the 2nd day.

23. He added that he filed a fresh case. He added that he did not file any document in the said suit that he had withdrawn Homabay ELC Misc. No. E044 of 2025 since from the summary that the Court read to him from the record he did not hear of anything like that mentioned. He admitted that to date he had not paid for it because he could not find the option of payment for it. Further, he stated that he was not aware that by the time the son attended the Registry he had only the letter of complaint.

24. With the allegations above, the Court, in its wisdom, decided to receive oral testimony on these apparently conflicting allegations leveled against the registry staff who may never have the opportunity to state their case on the serious allegations such as tampering with the portal or files of the applicant. The learned Judge, therefore, gave the applicant and the registry staff an opportunity to state on oath the issues and gave a further chance that they be subjected to cross examination to test the credibility of their testimony. Here below is the oral testimony.

Oral testimony of three witnesses

25. First, the Court called on the registry staff, Mr. Adongo, to confirm on oath how he attended applicant's representative, the son on the material date. Mr. Adongo testified that on 1st September 2025 someone visited the registry about 12:00 PM and informed him that he had filed a Miscellaneous Application. He, Mr. Adongo, checked the CTS and found that indeed one Raphael Ameli had filed the matter. He informed him that the Judge would automatically see the matter in the CTS. Mr. Adongo opened a physical court file and advised the applicant's son to go home and return later, or check in his account, to see what the judge may had done upon looking at it. The son came back after one or two days with the intention of filing another case. Mr. Adongo informed him that he had withdrawn the earlier matter. He advised the applicant's son that even though he, the party, had filed the other matter and it had been fixed for 21st October, 2025 he could wait for that date to raise the matter. Before the applicant's son would leave the Registry, he insisted to see the Deputy Registrar. The Deputy Registrar was in a court session. Mr. Adongo in informed him as much. After that he referred the party to Mr. Terence Lwanga, the in charge of the Registry, to talk to him. He, Mr. Adongo, once more checked the CTS after the party had left and noticed that he had not paid for the Notice of Withdrawal.

26. On cross examination he stated that the Plaintiff's son visited the Registry with the Notice of withdrawal on 2nd September 2025. He added that the Plaintiff's son did not have the Notice when he visited first when he, the witness, referred him to Mr. Terence. He added that on that date he had only the letter to the Deputy Registrar (the D/R).

27. The court the called Mr. Terence to testify on the events of the material date. He stated that he was a Court Assistant in charge of the Homabay Environment and Land Court Registry. He added that on that material date someone came to be at the Registry but as that happened he was loud. He inquired what the issue was. Mr. Adongo informed him that there was a party who was not satisfied with the application he filed. Mr. Terence requested to talk to him. He went to him. He introduced himself as Pr. Raphael. Upon an inquiry from him what the problem was he informed him that he had filed a case and filed a Notice of Withdrawal which Judge ignored and proceeded to give another date.

28. He added that he could not understand how the party could file the Notice of Withdrawal and another case at the same time. He inquired from the party if that was the position and the party answered in the negative. Then he informed him that since the two documents were not filed at the same time the Judge must have handled what was placed before him.

29. He added that he, the witness, confirmed from the CTS that the application in the Miscellaneous matter was filed on 29th August 2025 at about 10:57 AM. He did not know of the new (instant) case by the time he checked the CTS. He checked about the Notice of Withdrawal and realized that it was filed on 1st September 2025 about 06.00 PM. The examination of the CTS further showed, and he realized, that the Notice was only uploaded and not paid for. Further, that it was uploaded wrongly and assessed at Kshs 2,250/=.

30. At that he informed the party that he had heard what he said, and that the judge did as per what was in the system. He told the party that all was not lost because since the matter had been given a date he could raise the same at the hearing. Further, he told the party that way because the party wanted his matter to be withdrawn straight away when he still stood by the window. Further, he told the party that the Notice was both not paid for and wrongly assessed since Withdrawal Notices were charged KShs 100/=. He made the party aware of the filing that needed to be done but the party insisted that the matter be acted upon straightaway by the Judge withdrawing it. He advised the party that since the judges were on Vacation he, the staff, would raise it with the judge later. The party started shouting. This prompted even other members of staff to come to the office registry to know what was going on. The Court Assistant referred him to the Deputy Registrar and informed him that even as he went to see her, the Deputy Registrar, she was in court and he would have to wait for her. That ended his interaction with the party.

31. On cross examination by the applicant he repeated that the Notice of Withdrawal was uploaded about 6 PM on 1st September, 2025. Further, that the party did not pay for it; it was supposed to be paid for at KShs 100/= yet it had been wrongly uploaded as a Certificate of Urgency which are paid for at KShs 2,250/=. Further, the upload was made after working hours, at 06:06 PM.

32. The Court called on the Plaintiff's son also to testify on to the events. He stated that on 1st September 2025, under the instructions of Pastor Raphael, he filed a Notice of Withdrawal of Misc. No. E045 of 2025, sworn on 28th August 2025, about 18:09:50 hours. During the filing of the withdrawal there was no direct option of withdrawal. He decided to submit it under the General zero rated documents. After that he submitted "lodging request" which is a request to notify the Registry that a document had been filed. He did it immediately at the time of filing. The status was that lodging request had been made. He added that he knew that when one withdraws a matter he is required to make some payment for the Notice. Therefore, the following day, on 2nd September, 2025, he proceeded to the Registry to inquire about how the Withdrawal would be. On arrival he met Mr. Adongo who informed him that the Notice had been received. Mr. Adongo pulled out the file and showed him that it had been received and was to be transmitted to the D/R for immediate action or the withdrawal.

33. Further, the said Notice was that the applicant specifically stated that he intended to withdraw wholly the matter. When he expressed to Mr. Adongo the fear of the Notice not being transmitted immediately, being, that there would be parallel suits in court Mr. Adongo even called another lady in the Registry who, with him, they assured him that it was to be acted immediately. It was around 11:00 AM.

34. The witness added that he waited up to about 13:48 hours and filed the fresh suit since he knew that Certificates of Urgency are handled before noon of every day. He even made calls at 3:45 PM and 3:53 P to be assured that the Notice of Withdrawal was acted upon. He attached screenshots of the calls. In the evening of that day, acting on instructions of the Plaintiff, when he checked the portal found that the Judge had already responded (sic) and linked the latter matter to the previous one which, according to the Plaintiff and in terms of the Order 25 Rule 1 of the Civil Procedure Rules (sic), provides that a matter could be wholly withdrawn by a Notice of Withdrawal before it is set down for hearing and the Notice takes effect and should not be used for any reason when the matter had been withdrawn.

35. On 3rd September 2025, on instructions of the Plaintiff, he wrote a letter to the Deputy Registrar about the issue. He stated further that Order 9 Rules 1 and 2 of the Civil Procedure Rules gives a Plaintiff, as his father, to appoint persons to represent them. After reading the orders the Court issued on that date, and because he did not expect the Judge to review the matter on that day since he filed it after the noon of the material date, he again visited the Registry the following date. He added that the Registry did not

ask him to identify himself, and at no time did he did tell the Registry staff that he was Pastor Achacha. He did not identify himself in any other way than by the case number he was following. He stated that he had initially identified himself to Mr. Adongo as a representative of the Plaintiff, Pr. Achacha.

36. He added that about 10:00 AM of the 3rd of September 2025 the Registry staff whom he asked the status of the Notice of Withdrawal he had notified them of the previous day. They confirmed that the Judge was fully aware of the "Withdrawal Notice" (sic). He added that the staff member who confirmed about the Notice usually sits close to the window (This Court noted in that context that it was Mr. Terence, the in charge of the Registry). He insisted that the staff told him the Judge was aware of the Notice of Withdrawal. Upon that he asked the staff if he could see the D/R. They responded that the D/R was in Court five where he could go and see her.

37. From there, he reported to the Plaintiff. It was upon that that they (understood by this Court to mean the he and the Plaintiff) acted the way they did (he did not say what they did).

38. He denied ever being asked to pay for the Notice of Withdrawal of the Miscellaneous. He added that on 5th September, 2025 the D/R responded to the two letters the Plaintiff had written. That was when he, the witness, decided that the issue was one of misrepresentation and concealment by the Registry and the Court in general. He added that, in accordance to Article 172 of the *Constitution*, parties were empowered to report such misconduct from judges and registry (sic) to the Judicial Service Commission.

39. He admitted that to date the Notice of Withdrawal has never been paid for. He stated that to date there had never been any notification in the portal that they pay for it. He added that since in their ("our") application for recusal it was a matter to be dealt with first they left the issue of the payment to be among the first to be dealt with.

40. In response to the question whether the Miscellaneous Application whose Notice of Withdrawal had never been paid for had ever been withdrawn, he added that the purpose of payment in the E portal was for the registry to act (understood to mean, on any document). To him, when he was told that the document had been received and no requirement to pay, which payment is only KShs 100/= or KShs 200/= to the highest (sic), that was a trivial issue which Article 159(2)(d) of the *Constitution* regards as a technicality and rather than substantive law. He added, regarding filing of cases that if a party uploads documents for a new case or document and does not pay for it, the Court cannot act on it. Regarding a Notice of Withdrawal of a matter, he added, it can be filed under "general documents" and not paid for but the Court should still act on it non payment notwithstanding. He added that, according to him, the *Constitution* is lenient regarding notices of withdrawal of suits hence the court should have acted on it even without payment for it.

41. He stated further that if a party submitted, for instance, a Notice of Motion or Originating Summons, under general documents and did not pay for them yet he expected the court to act on it, the court should not act on it and such a party should never be taken to be serious. He added that for a Notice of Withdrawal although filed under general documents and not paid for, still the party should be taken to be serious. He added that if the Notice of Withdrawal is not paid for and the Plaintiff is informed to pay for it, he would pay, and the "Notice of Withdrawal will continue".

42. That ended the oral testimony of the three witnesses to the occurrences in issue.

43. In submission the Plaintiff summed that he agreed with all that the son had stated since the son was acting under his instructions.

Issue, Analysis and Determination

44. This court has considered the application, the law and the submissions of the applicant. It is of the view that the two issues for determination herein are whether the application is merited and who to bear the costs of the application.

45. At the outset it is important to note that the annextures which the applicant sought to relay on were not commissioned before the Commissioner for Oaths who commissioned the Affidavit. This is contrary to Rule 9 of the Oaths and Statutory Declarations Rules as made under Section 6 of the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya. It stipulates, that, "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."

46. To the extent that none of the documents were commissioned before the commissioner who administered the oath for the Plaintiff, they are not part of the Affidavit. Thus, they cannot be relied on for any evidentiary value. It means therefore that any facts deposed to about the documents are unsupported by them and at best inadmissible hearsay. They must be disregarded. This is not a mere technicality which Article 159(2)(d) of the *Constitution* can cure. Failure to adhere to the Rule is fatal to the depositions relating to any documents referred to in an affidavit. Such facts remain bare and must be rejected in evidence.

47. That said, this court has often, just as many others, emphasized the cardinal point that the basis for an application for recusal of a judge should be objective. It should not be grounded on whimsical imaginations of a party. It should be genuine and not merely arising from the fact that a party has not been granted orders, reliefs or prayers that he sought because in the adversarial system when the Judge determines an issue there must be a winner or successful party and a losing or unsuccessful one. The fact that a party moves the court for any orders it does not mean that his prayer is the only one merited. Further, even when there is no response to any averments or allegations made therein it may not be merited depending on how the law applies to the facts. Each case depends on its facts.

48. Suffice it to say that definitions of the term recusal abound. In Kenya, in Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] EKLR as follows:

> " The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303] as: "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."

49. Further, in Dobbs v Tridios Bank NV [2005] EWCA 468, it was held:

> " ... But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant- whether it be a represented litigant or a litigant in person- criticized them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticizing all the judges that

they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticized-- whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr. Dobbs a fair hearing because he is criticizing the system generally. Mr. Dobbs' appeal could never be heard."

50. Additionally, this Court, in Gatatha Farmers Company Limited v Chemtingei & 3 others; Kaitet Tea Estates (1977) Limited & another (Interested Parties) (Environment & Land Case 9 of 2023) [2024] KEELC 3299 (KLR) (22 April 2024) (Ruling) held;

> "It has been a practice, and for good reason, that before assuming office, a judge takes oath to serve impartially, without fear, favor, and ill-will and protect, administer and defend the *Constitution*. There are two profound doctrines that attend to that: one a judge has to sit and, two, a litigant does not choose a judicial officer who is to listen to his case. The Supreme Court of Uganda in the case of UGANDA POLYBAGS LTD VS DEVELOPMENT FINANCE COMPANY LTD AND OTHERS [1999] 2 EA 337 held that litigants have no right to choose which judicial officer should hear and determine their cases since all judicial officers take oath to administer justice to all people impartially and without fear, favor, affection or ill-will."

51. From the decisions referred to above, the legal position is that there is a rebuttable presumption that the Judge or Judicial officer is fair and impartial in all circumstances. This is a view supported by the South African decision in President of the Republic of South Africa vs. The South African Rugby Football Union [supra] where the Court held as follow:

> "In applying the test for recusal, courts have recognized 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..."

52. Additionally, in Cory J in R. vs. S. (R.D.) [1977] 3 SCR 484 the court stated:

> "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."

53. Therefore, in Nathan Obwana v. Robert Bisakaya Wanyera & 2 others [2013] eKLR, the learned judge held:

> "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."

54. Also, in the case of Republic Vs. David Makali & 3 Others, Criminal Application Nos. Nai 4 & 5 of 1994 (unreported) Per TUNOI JA summarized the legal position on recusal in Kenya as follows:

> " That being the position as I see it when the courts, in this country are faced with such proceedings as these, [i.e. 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. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi -judicial tribunal, 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."

55. Additionally, in Porter v. Magill [2002] 1 All ER 465 the House of Lords was of the opinion that the words "a real danger" in the test served no useful purpose. Accordingly, it held that:

> " [T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

56. Also, in Philip K. Tunoi & Another v Judicial Service Commission & Another [2016] eKLR,

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

57. The New Zealand Supreme Court held, in Saxmere Company Ltd-vs- Wool Board Disestablishment Company Ltd [2009] NZSC 72, [2010] 1 NZLR 35, thus;

> " The standard for recusal [on grounds of bias] is one of "real and not remote possibility", rather than probability. The test is a two-stage one. The judge must consider:
>
> i. First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and
>
> ii. Second, whether there is a "logical and sufficient connection" between those circumstances and that apprehension."

58. Thus, the issue of recusal of a judge or judicial officer is such a serious matter that it is not to be handled carelessly and at the whims or unsubstantiated or misapprehended wishes of an applicant since it goes against the very core of the duty to sit. Allegations aimed at dislodging the judge from sitting also go against the oath of office of the judge or judicial officer to act impartially and without bias or ill-will hence get to the integrity of the officer.

59. The onus is on the party alleging bias, partiality, misconduct or other ground for recusal to go beyond mere imaginations, feelings, perceptions and the like and produce cogent evidence which warrants the recusal. A mere decision that is not in favour of a party's position is not evidence of bias. Otherwise how will judges and judicial officers ever make decisions if they are held at ransom by parties' wishes or desires and be tormented and scared of threats to be reported to their employers or other bodies

deemed to be oversighting them? Such actions, if acted upon merely at that surface and no more, are a recipe of disintegration of the judicial system and a war against the independence of the judiciary as a whole. I dare caution that the public should not be excited and venture into this treacherous route because the day we lose the independence of the judiciary is the day the same society or public be eaten alive by the other arms of government, and it will have no body to uphold their rights and freedoms. Woe unto those who are happily playing with this fire!

60. In as much as judges and judicial officers must remain steadfast and singular to the course of justice, for we all must at one time appear before the righteous judge of the universe for our judgment, in the same manner as all parties who appear before them need fairness in the way their matters are handled, so judges and judicial officers too expect that to be to them. Judges and judicial officers are human, but they should not permit their human nature to triumph over their Oath of Office: they must be beyond reproach and be faithful to their oath no matter what befalls them including losing their jobs, if need be.

61. Thus, in Gladys Boss Shollei v Judicial Service Commission & Another, Petition No. 34 of 2014; [2018] eKLR (Justice Ibrahim, SCJ) made this point in his concurring opinion at paragraph 25:

> " Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the *Constitution*." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law."

62. It is not in dispute that the duty to sit may be impugned in many instances. But it must be objective and cogent. In Jasbir Singh Rai v. Talochan Singh Rai (supra):

> " 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."

63. Further, Justice Ibrahim, JSC stated in the matter (Jasbir Rai (supra) as follows:

> " The Test Lord Justice Edmund Davis in Metropolitan Properties Co. (FGC) Ltd. vs Lannon [1969] 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in R vs Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair- minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable".

64. Indeed, the circumstances which may warrant a recusal for reason of semblance of bias or partiality are wide and various. Each case must be looked at against on its facts. Thus, in the President of the

Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98, the Court had this to say:

> " 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"

65. Also, in Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another [2018] eKLR, the Court had this to say:

> " The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that "justice should not only be done, but be seen to be done. "[44] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies. [45] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the general public."

66. The meaning of the term bias may confuse the simple mind. But it is defined in the Black's Law Dictionary as an inclination; prejudice or predilection. It may manifest in two forms; actual or perceived. Actual bias is defined as genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject. Perceived (or implied) bias is defined as prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person.

67. In Kenya, Regulation 21 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 largely replicates from the Bangalore Principles. It provides as follows:

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

(h) or a member of the judge's family has economic or other interest in the outcome of the matter in question."

68. These reasons above this court does not have. This court has said much above. Both the law and judicial precedents as cited above point to the legal position that there have to be concrete reasons for a judge or judicial officer to recuse himself from handling a matter. The reasons this Court has gone into the great lengths to give the precedents and the provisions of law on recusal above are that from this Court's assessment of the circumstances of this application it is apparent that the plaintiff who is not a lawyer and has no legal counsel advising him on this matter may have genuinely sought advice from time to time from his son who admittedly saying he is not a lawyer, and received it. Unfortunately, the advice is not sound or grounded on the law and the Plaintiff is likely to be prejudiced if he does not seek proper legal advice. It would not change the position irrespective of the number of courts he may move his matters to. Proper legal advice coupled with adduction of relevant evidence are the cornerstone of success in legal matters just as sound medical advice from an expert in an aspect in issue is apt for one's good health.

69. Turning to the instant application, it is based on apprehension and imagination that this Court is biased rather than actual bias. The plaintiff/ applicant's complaint is that this court is biased because the judge did not grant interim orders as sought by the applicant, that the learned judge linked this instant case to Homabay ELC No. E044 of 2025 which, according to him, he had withdrawn by "filing" a Notice of Withdrawal of the same; that the Registry staff tampered with the CTS and the file herein to change the position which, to him, was that the Notice of Withdrawal had been properly filed and received to one which showed that the said document had not been filed. He, however, admitted that even after being notified by the letter by the Registrar that he had not paid for the Notice of Withdrawal. His son, one Geoffrey, did not make his case any better. He gave sensational but misapprehended and unsound testimony that the law permits the court to act on or take action od documents which require to be paid for but are not, particularly, a Notice of Withdrawal of a suit. He testified further that for other documents such as a Notice of Motion or Originating Summons, among others, for which payment is required, a party must pay for them before the court acts on them or they form part of the record. But when it regarded a Notice of Withdrawal for which his father had not paid, he termed it a trivial technicality which Article 159(2)(d) of the *Constitution* provided for as not to be relied on to defeat substantive justice. He even attempted to mislead the court that Order 9 Rules 1 and 2 of the Civil Procedure Rules permitted him to represent his father as a recognized agent, yet he had no power or attorney or affidavit from his father and to which the court had approved for that matter. Why should one document be treated as serious and another be trivial yet both ought to be paid for? It is a serious contradiction.

70. The court finds the Plaintiff's son's testimony and argument the most insincere opinion and misleading to the father and it cannot rely on it. Moreover, the two court assistants who attended to him on the various dates indicated that he misled them at first that he was the Plaintiff. This court finds their testimony credible and to the point. Further, the two members of staff advised the said Plaintiff' son to pay for the Notice of Withdrawal of the suit but instead he chose to create noise or a commotion to the extent of other staff members going to the Registry to witness what was going on, and insisted on seeing the Deputy Registrar whom after she wrote to him on the position of the Notice of Withdrawal and the ELC Misc. No. E044 of 2025 he resorted to accusing her too of bias and misrepresentation of facts. He accuses the court and the registry staff in general of apparent bias, misrepresentation and procedural prejudice leading to "erosion of public confidence."

71. It is clear beyond question that a judge can recuse himself or herself where he/she has actual bias or where when the apprehension is viewed from the lens of a reasonable man it can be found that such perception is reasonable. The test of apprehension should be an objective and not a subjective one.

72. To date the Notice of Withdrawal of the Misc. No. E44 of 2025 has never been paid for. It means that Miscellaneous matter has never been withdrawn. The directions therein still stand. There was no misrepresentation or with bias as alleged by the applicant. In any event the Registry staff acted within their mandate to check through the CTS to find out which document was not paid for or which a party may have 'sneaked in' through the zero rated window of the CTS to avoid payment as it seems the Plaintiff did.

73. This Court will not hesitate to conclude that the allegations of bias, misrepresentation and procedural prejudice in the instant application are tailored towards tainting the image of the court for no apparent reason. The applicant admitted in his submissions, and it is clear from the application and record which was filed under certificate of urgency at the institution of this suit, that he never brought it to the attention of this court that he has withdrawn or even given a notice of withdrawal of the Homabay ELC Misc. No. E044 of 2025. He also admits that to date he has never paid for the Notice of Withdrawal of the said Miscellaneous Application. Thus, as it stands, the said ELC. Misc. No. E044 of 2025 is still alive in this court, and the orders or directions that were issued therein on 29th August 2025 at 12:37 hours still exist since the matter has never been withdrawn. This court cannot therefore issue further and contrary orders to those ones in a matter filed subsequent to it between the same parties over the same subject. That would be contrary to the provisions of Section 6 of the Civil Procedure Rules. Further, that informed the reason why when, on 2nd September 2025 this matter was placed before this court, two of the Directions it gave are that "2. This matter is related to Homabay ELCLMISC E044 of 2025 between the same parties over the same subject hence subject to the application of the Civil Procedure Rules" and "4. The parties are directed to submit orally, for at most FIVE (5) minutes each on 21st October, 2025 at 08:30 AM regarding similarity of the two matters."

74. This court is even surprised that the party who wished the matter to be heard urgently would dare to complain that he was surprised that having filed this matter in the afternoon of on 2nd September 2025 he was surprised that the court gave directions the same date yet, to him, the court should have done so the following day by noon. This complaint about quick action of the court which instead should be commended, is puzzling.

75. In the humble opinion of this court, this application is made to serve two purposes; one for forum shopping and two to tarnish the reputation of the judge and Deputy Registrar and intimidate the members of staff and cause them psychological, mental and emotional pain.

76. The upshot is that for the reason that the Notice of Withdrawal of Homabay ELC Misc. No. E044 of 2025 has never been paid for to date, this court cannot give effect to such a document as prayed for in prayers 2 and 3 of the instant application. Those prayers are misplaced and premature for want of payment for the document to make it an official document the court can act on. To the extent that the Notice has not been paid for it cannot be acknowledged as being valid as envisaged under Order 25 of the Civil Procedure Rules.

77. In any event, any import of the said document when duly filed in that file can only be manifest in the said file and not in this one. These two files are not consolidated as to have the order in that other to apply in this one. The two prayers are respectfully declined.

78. In any event, this court finds the lumping of the two prayers and indeed any other substantive ones in the same application where there is a prayer for recusal of the Judge a great procedural problem in the

sense that if this court were to find the prayer for recusal merited, what would become of the rest of the prayers? Does the court determine the application half way and leave it for another Judge to handle similar facts some of which have been considered? That will be difficult to do. Parties who wish to file applications for recusal should always focus on nothing but that prayer.

79. Regarding the prayer for recusal, as a parting shot this court refers to the holding of Prof. (Dr.) Sifuna J in DPP vs Charles Kiprotich Tanui & 2 Others Nairobi HC Anti-Corruption Criminal Revision Number E003 of 2024, where he held that:

> "24. Needless to say, recusal applications should not be used by litigants for intimidation, insubordination, blackmail, arm-twisting, capture the boxing of a judge into confirming with litigants whims; or for throwing him to into panic, subservience or dishonor, such ulterior motives if allowed have the undesirable consequence of chipping away on the authority, dignity, integrity and independence of courts".

80. I agree agrees entirely with the learned judge. The Applicant having not tendered any evidence of bias from me I, with tremendous respect, decline his invitation for my recusal. I am of the humble opinion that the facts presented do not merit my recusal. Therefore, I respectfully decline prayers 4, 5 and 6. Further, this learned Judge could not give effect to a Notice of Withdrawal which was mistakenly clothed by the applicant as being "valid" yet it was it. The party should file the said Notice of Withdrawal immediately, otherwise this suit will stand stayed, in terms of section 6 of the *Civil Procedure Act*, pending the determination of the Misc. No. E044 of 2025 or a clarification being made as to the similarity or otherwise of the that matter and the instant one.

81. Last but not least costs follow the event. The applicant is lucky that the Respondent did not oppose the frivolous application. He would have been ordered to pay costs. Thus, for now there shall be no order as to costs.

82. This matter should be mentioned after the Court considers and is of the view that Homabay ELC Misc. No. E044 of 2025 has been withdrawn or determined upon the clarification referred to in paragraph 74 above.

83. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 21ST DAY OF OCTOBER, 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Pastor Achacha, the Plaintiff

Ms Ogalo Advocate for the 1st Respondent