

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. NO. E250 OF 2021
IN THE MATTER OF THE ARBITRATION ACT, 1995

-AND-

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 14(3) & 15
OF THE ARBITRATION ACT CHALLENGE TO ARBITRATOR AND
THE ARBITRATION**

-BETWEEN-

DIRECTLINE ASSURANCE COMPANY LIMITED1ST APPLICANT
ROYAL MEDIA SERVICES LTD.....2ND APPLICANT
ROYAL CREDIT LIMITED.....3RD APPLICANT
SAMUEL KAMAU MACHARIA.....4TH APPLICANT
PURITY GATHONI MACHARIA.....5TH APPLICANT

-VERSUS-

MR. PHILIP ALIKER.....1ST RESPONDENT
SUREINVEST COMPANY LIMITED.....2ND RESPONDENT
STENNY INVESTMENTS LIMITED.....3RD RESPONDENT
TRIAD NETWORKS LIMITED.....4TH RESPONDENT
AKM INVESTMENTS LIMITED.....5TH RESPONDENT
KEVIN DERMOT McCOURT.....6TH RESPONDENT
JANUS LIMITED.....7TH RESPONDENT
GEOFFREY GORDON WERE RADIER.....8TH RESPONDENT
JAMES KABERERE GACHOKA.....9TH RESPONDENT

RULING NO. 3

1. The application before me is dated 14th December 2024. It has been brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 22 Rule 51-59, Order 49 Rule 7 and Order 51 Rules 1-3 of the Civil Procedure Rules, 2010. The applicants pray for an order for her Ladyship Hon. Justice Njoki Mwangi to disqualify herself from proceeding further with the Arbitration proceedings herein by way of highlighting of submissions filed in both this suit and in **High Court Commercial & Tax Division, Misc. Application No. E509 of 2022; Sureinvest Co. Limited and 4 others versus Royal Media Services Limited & others**, and that the costs of this application be provided for.
2. The application is anchored on the grounds in support of it, and an affidavit sworn on 14th December 2024 by Dr. Samuel Kamau Macharia, the 4th applicant herein.
3. He stated that the 2nd & 3rd applicants are limited liability companies of which he and his wife, who is the 5th applicant herein are the sole shareholders. He also stated that he has the authority of the 1st, 2nd, 3rd and the 5th applicants to make the affidavit in support of the application herein.
4. Dr. S.K Macharia deposed that the applicants are aggrieved by the Ruling which I delivered on 25th October, 2024, and they filed a Notice of Appeal and an application for stay of proceedings in the Court of Appeal, which application has not been heard.
5. He averred that the object of the said application is to stop further proceedings herein which are in the nature of highlighting of submissions that have been filed pursuant to the directions given by Hon. Justice Chacha Mwita in July 2023.

6. Dr. S.K Macharia further averred that her Ladyship Hon. Justice Njoki Mwangi has been seized of the application dated 24th June 2022 for supervision of arbitral proceedings by way of written submissions by the applicants in this suit and by the respondent/applicant in **High Court Commercial & Tax Division Misc. Application No. E509 of 2022; Sureinvest Co. Limited & 4 others v Royal Media Services Limited & others.**
7. He stated that on 11th April 2024, he jointly with the 1st, 2nd 3rd and 5th applicants herein, filed a Notice of Motion application under certificate of urgency dated the same day, seeking leave to adduce additional evidence and supplementary submissions filed, and for the hearing of the new application to take place before highlighting of submissions which was scheduled to take place on 6th May 2024.
8. He further stated that the additional evidence which they sought leave of the Court to introduce shows that all 5 claimants, the 5th and 7th respondents herein being among them, in whose favour an Arbitral Award was made on 22nd June 2022 are not shareholders in the 1st applicant as even if they are, which is denied, none of them could refer any dispute thereto to arbitration, and the entire arbitration was an exercise in futility.
9. Dr. S.K. Macharia contended that the additional evidence which they sought to introduce being a review by the Insurance Regulatory Authority, takes the form of a verdict reached after that Regulator reviewed the entire history of the 1st applicant, which indicates who the shareholders were in 2005 when the Insurance Act was last complied with by the claimants in the Award.
10. He indicated that their Advocates had advised him that the said application was intended to bring to the Court persuasive decisions in **Dalla Real Estate v The Government of Pakistan and others** referred to in the body of the

Motion, in which as in this case, the issue of whether additional evidence to the Award that was being supervised could be introduced and the answers were in the affirmative in that jurisdiction.

11. Dr. S.K. Macharia deposed that on 25th October 2024, her Ladyship Honourable Justice Njoki Mwangi delivered a Ruling in respect to their application dated 11th April 2024 in which she held that in the course of the supervision proceedings, she will not take account of the audit of shareholding by the Insurance Regulatory Authority showing the shareholding of the 1st applicant and the consequence of that holding is that the 5th to 7th respondents who have been shown to be non-shareholders in the 1st applicant by the Regulator, will be treated as shareholders with the consequence that they stand to benefit from the Ruling to come after highlighting of submissions before her Ladyship.

12. He averred that the said Ruling delivered on 25th October 2024 was followed by another through which her Ladyship declined to grant them leave to appeal to the Court of Appeal.

13. Dr. S.K. Macharia stated that the said Ruling was preceded by another Ruling of his Lordship Hon. Justice Mabeya through which he handed over their business to the non-shareholders herein. Further, that on 20th November 2024, his Lordship Hon. Justice Mabeya delivered a second Ruling through which the last action of handing over their business to non-shareholders was completed.

14. He contended that the Directors who were appointed to run their company embarked on a process of stripping the assets of the 1st applicant and on 9th December 2024, the applicants herein made an application for their removal, and that the said application shows that the firms of Dentons HHM, Kairu &

MCCourt, W.G. Wambugu and Gakoi Maina Advocates are to be paid fees for services they have not rendered to the 1st applicant.

15. Dr. S.K. Macharia asserted that this is a suitable case for her Ladyship to recuse herself from this matter for the reasons stated in the body of the Motion and affidavit in support thereof.

16. In opposing the application, Mr. Kevin Dermot McCourt, the 6th respondent herein filed an affidavit sworn on 17th December 2024 on his own behalf and on behalf of the 2nd, 4th and 9th respondents.

17. He stated that the applicants' supporting affidavit is argumentative, prolix, scandalous and vexatious. He also stated that the 2nd to 5th applicants have since the dispute between them and the 2nd, 3rd, 4th, 5th and 7th respondents arose, consistently sought to delay the determination of the matters in controversy, whose history is set out in his affidavits sworn on 17th April 2022 and 23rd April 2022 herein.

18. Mr. McCourt averred that the application herein is based largely on the same facts that the 2nd to 5th applicants have relied on in trying to stall the litigation, namely, any adverse decision must be unjust and has to be appealed. He stated that there are no facts to support the allegation of bias which is also misplaced.

19. Mr. McCourt listed other instances wherein the applicants requested the Arbitrator, a Chief Magistrate, Hon. Lady Justice Okwany and Hon. Mr. Justice Mabeya to recuse themselves in matters that were before them involving the parties herein.

20. He deposed that the application herein is yet another abuse of the Court process as there is no impropriety or illegality demonstrated by the applicants.

21. The 2nd, 4th, 6th & 9th respondents also filed grounds of opposition dated 16th December 2024 to the effect that-

- (i) The application has been filed to defeat the application dated 6th July 2022 filed in **High Court Miscellaneous Application No. E509 of 2022 - Sureinvest Company Limited & 4 others v Royal Media Services Limited & 3 others** to enforce the Arbitral Award published on 11th May 2022;
- (ii) The application has been filed to force an adjournment so that the applicants can have more time for the **Court of Appeal Civil Application 612 of 2024 - Directline Assurance Company Limited & 4 others v Mr. Philip Alier & 8 others** to stay these proceedings upon the filing of the application on 13th November 2024;
- (iii) The application is intended to delay the hearing of this matter and is an abuse of the Court process. It is part of a trend adopted by the applicants to file applications for Judges to recuse themselves and a continuation of the applicants' improper attempts to stall the resolution of the dispute and deny the respondents access to justice;
- (iv) The application does not meet the threshold set out under Regulation 21 of the Judicial Service (Code of Conduct & Ethics) Regulation, 2020 and the test for recusal as set out in **Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & others [2016] eKLR;**

- (v) The applicants have not presented to the Court any evidence proving the bias alleged. A mere allegation of bias cannot stand. See **Republic v David Makali & others** [1994] eKLR;
- (vi) There is no reasonable allegation of bias and there can be none in the circumstances. Ground 1 of the application does not provide any proper particulars; and
- (vii) Other grounds and reasons in the affidavit of Kevin Dermot McCourt to be filed herein.

22. The firm of Kairu & McCourt filed the 3rd respondent's grounds of opposition dated 16th December 2024, to the effect that-

- i. The application is a calculated move aimed at delaying the conclusion of this suit, thereby frustrating the expeditious adjudication of the case, wasting judicial time, and constituting a malicious, frivolous, and vexatious abuse of the Court process, contrary to Article 159(2)(b) of the Constitution of Kenya;
- ii. The application is an afterthought and only intends the delay the disposal (sic) of this matter as the respondents benefit from the status quo of this matter;
- iii. The applicants have not provided any evidence of actual or perceived bias by the Judge and their sole reason for the recusal request is dissatisfaction with prior Rulings, which does not constitute sufficient ground for recusal;
- iv. The Applicant's Application is perpetuated by bad faith, as evidenced by their pattern of filing similar baseless applications

against Judicial Officers, which amounts to an attempt to intimidate and undermine the authority of the Court;

- v. The baseless Application should not be allowed as it undermines the independence of the Judiciary, contrary to the principles outlined in Article 160(1) of the Constitution of Kenya, which guarantees that Judicial Officers shall not be subject to the control or direction of any person or authority in the exercise of their judicial functions;
- vi. The Application lacks legal merit and procedural soundness and is spurious and thus (sic) it should be struck out with costs; and
- vii. The Application is fatally defective and should be struck off with costs.

23. The 5th respondent filed a replying affidavit sworn on 19th December 2024 by Ms Lisa Anyango Amenya, a Director of the 5th respondent. She stated that the applicant has not ably demonstrated that the Judge was not impartial when she rendered the impugned Ruling. She stated that her Advocate had advised her that the application does not meet the threshold and the same ought to be struck off.

24. She averred that she is aware that the applicant herein is a vexatious litigant who files applications for disqualification willy-nilly. Ms Amenya listed down several instances in different cases where the applicant has filed applications for recusal after delivery of Rulings which were not favourable to them.

25. Ms Amenya expressed the view that the applicants are engaged in forum shopping contrary to law and good practice..

26. The 5th respondent also filed grounds of opposition dated 19th December 2024, to the effect that-

- (i) The application is an abuse of the due process of this Honourable Court;
- (ii) The application does not meet the threshold to merit the granting of the orders sought;
- (iii) The application is merely intended to vex and annoy the Court;
- (iv) The application is frivolous and vexatious and filed (sic) by an applicant who constantly files recusal applications reasons alien to law; and
- (v) The application is bad in law and the same ought to be struck off.

27. The applicants filed a further affidavit sworn on 21st March 2025 by Dr. S.K. Macharia. He contended that the contents of the affidavit sworn by Mr. Kevin Dermot McCourt are false. Although Dr. S.K. Macharia admitted paragraph 1 of the said affidavit, he denied paragraphs 2, 3, 4, 5, 6 and 7 thereof.

28. He further contended that the legal advice referred to in paragraph 2 of the said affidavit is wrong. He deposed that the said affidavit is based on a misapprehension of the law and the refusal to accept the verdict of the Insurance Regulatory Authority that AKM Investments Limited and Janus Limited are not, and have never been shareholders of the 1st applicant.

29. He stated that the advice given to Mr. McCourt is based on the wrong assumption common to Advocates that their arguments are always right despite the legal experience to the contrary, as described by Justice Megarry in a passage quoted in **C.M. Oloo v Kenya Posts Telecommunications Corporation** (1982 -88) KAR 655 at 659.

30. Dr. S.K. Macharia stated that in the Rulings delivered on 1st March 2024 and 19th July 2024, respectively, in **High Court Division Petition No. E006 of 2023 - Directline Assurance Company Limited v Business Registration Service**, her Ladyship Honourable Justice Njoki Mwangi, has already determined contrary to the audit referred to above, that AKM Investments Limited are shareholders (sic) in the 1st applicant as did the 1st respondent, the Arbitrator, in his Award of 22nd June 2022 in which he held at paragraph 256, that they are shareholders, that AKM Investments Limited holds 70.336% of the shares in the 1st applicant both in its name and in the name of its Trustees namely, Sureinvest Company Limited, Stenny Investment Limited and Triad Networks Limited. He stated that the said paragraph is to be found at pages 579-761 of the affidavit of Evans Nyaga sworn on 27th June 2022 in support of the applicants' Amended Originating Notice of Motion dated 24th June 2022.

31. The application herein proceeded for hearing by way of written submissions. The applicants' submissions dated 21st March 2025 were filed by the law firm of Kamau Kuria & Co. Advocates. The firm of Hamilton Harrison & Mathews Advocates filed written submissions dated 1st March 2025 for the 2nd, 4th, 6th and 9th respondents, whereas the 3rd respondent's submissions dated 28th February 2025 were filed by the firm of Kairu & McCourt Advocates.

32. The 1st respondent who was an Arbitrator in the dispute between the parties herein did not file any response to the instant application, as it does not concern him. No submissions were filed by the other parties' Advocates.

33. In the applicants' submissions, they took issue with my Ruling of 25th October 2024, in which I declined to accept the audit of ownership and shareholding

in Directline Assurance Company Limited as at 5th March 2024. It was submitted that as per the Audit, AKM Investment Limited and Janus Limited are not shareholders in the said company.

34. It was contended that I declined on 25th October 2024 to have the letter admitted in the course of the Arbitral proceedings which were held before the 1st respondent who made an Award in favour of the said AKM Investments Limited & Janus Limited as per paragraph 256 of the said Award. Dr. Kamau Kuria (SC) stated that the applicants have filed a Notice of Appeal and an application for leave to appeal against the determination referred to.

35. Senior Counsel contended that four conclusions emerge from the two affidavits, first that I have already determined who the shareholders are through the Ruling delivered on 1st March 2024 in **Petition No. E006 of 2023**. He stated that the second thing is that the Regulator made a determination that AKM Investments Limited and Janus Limited are not shareholders. In addition, that the third conclusion is that the applicants have appealed against the Ruling delivered on 25th October 2024, and the fourth conclusion is that if I hear the application, I will be called upon to sit in Judgment in my two Rulings.

36. He submitted that the applicable law on applications for recusal of a Judicial Officer from hearing a case was stated in **Shilenje v Republic (1980)** KLR 132 at page 134, and that the purpose of an application for recusal is to ensure that not only is justice done, but that it is manifestly seen to be done. He cited the East African Court of Justice case of **Attorney General of the Republic of Kenya v Anyang' Nyong'o & others** Application No. 5 of 2007, to buttress the applicants' position that an application for recusal is to ensure that justice is not only done but is manifestly seen to be done.

37. In citing the provisions of Article 50 of the Constitution of Kenya, Dr. Kamau Kuria (SC) submitted that the said provisions guarantee everyone enjoyment of a right to a fair hearing by an independent and impartial Tribunal. He contended that the said guarantee has now been eroded. He cited the decision made in Petition No. 36 of 2018 **Hon. Christopher Odhiambo Karani v David Ouma Ochieng & others** [2018] eKLR, to bolster his submissions.

38. On what constitutes a perception of bias, Dr. Kamau Kuria (SC) cited the decision in **Kaplan & Stratton v L-Z Engineering Construction Limited & 2 others** [2000] eKLR. He also referenced the case of **Philip K. Tunoi & another v Judicial Service Commission & another** [2016] eKLR, wherein the Court of Appeal cited the case of **Porter v Magil** [2002] 1 ALL ER 465, and stated that a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.

39. On the issue of costs, Counsel stated that in the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others** [2014] eKLR, the Supreme Court held that the awarding of costs is not to penalize the losing party but it is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. He also cited the case of **Republic v Communications Authority of Kenya & another exparte Legal Advice Centre aka Kituo cha Sheria** [2015] eKLR, on the same issue. Dr. Kamau Kuria (SC) urged this Court to allow the application as prayed.

40. Mr. Kiragu Kimani, Senior Counsel for the 2nd, 4th, 6th & 9th respondents referred to the affidavit of Kevin McCourt Advocate, which he stated

demonstrates at least twelve (12) instances where the applicants had alleged bias when they did not get the orders they sought from Courts and other decision makers. Senior Counsel urged this Court to view the instant application through the said lens.

41.He stated that the instant application was filed two (2) days before the parties were to highlight their submissions on 16th December 2024 on the application dated 6th July 2022 filed in **High Court Miscellaneous application No. 509 of 2022 Sureinvest Company Limited & 4 others v Royal Media Services Limited & 3 others**, to enforce on Arbitral Award published on 11th May 2022 and the application filed in the matter challenging the jurisdiction and competence of the Arbitrator.

42.Mr. Kiragu Kimani (SC) stated that despite directions having been given for the application dated 14th December 2014, at the time of filing their submissions herein, the applicants had not served their submissions for the said application.

43.He cited the Supreme Court decision of **Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others**, where the Court underscored the importance of adherence to rules of procedure.

44.Senior Counsel contended that the delay by the applicants in filing of their submissions and/or to follow the directions of 17th December 2024 delays the determination of this application and by extension, the applications referred to earlier in the submissions of the 2nd, 4th 6th & 9th respondents.

45.He submitted that the application herein does not meet the threshold set out under Article 21 of the Judicial Service (Code of conduct & Ethics)

Regulations, 2020, which provides for circumstances under which a Judge may recuse himself/herself.

46. Senior Counsel submitted that the only ground advanced by the applicants in their application is the allegation of impartiality, but none of the other grounds set out in Article 21 of the Regulations have been advanced. He stated that the basis of the allegations is that in this Court's Ruling delivered on 25th October 2024, this Court declined to admit into evidence the letter dated 5th March 2024, and that I also declined to consider case laws in arriving at the said decision, and refused to grant them leave to appeal against the said Ruling.

47. Mr. Kiragu Kimani (SC) relied on the Supreme Court decision in **Robert Tom Martins Kibisu v Republic** [2018] eKLR, where the Court considered the principles upon which a Judge should disqualify himself/herself from handling a matter based on bias and affirmed Judge Chitembwe's (as he then was) decision in **Nathan Obwana v Nathan Wanyera** [2013] eKLR at paragraphs 62 and 63 of its Ruling. He also cited the case of the **Attorney General of the Republic of Kenya v Anyang Nyon'go & others** (supra).

48. Senior Counsel emphasized that a party who alleges bias must provide cogent evidence to show reasonable apprehension of bias, but mere allegations cannot stand.

49. He referenced the case of **King Woollen Mills Ltd (formerly known as Manchester Outfitters suiting Division) Ltd & another v Standard Chartered Financial Services Ltd & 2 others** (1995) and the case of **Hermanus Phillipus Steyn v Giovanni Gnechi-Rusone** [2015] KeHC 2212 (KLR), to support his submissions.

50. Senior Counsel posited that the applicants have failed to adduce cogent evidence of bias and they have not demonstrated that the facts of this case show that Njoki Mwangi J., has been biased against them, but what the facts of the case show is the applicants' unwillingness to see the correctness of the Ruling. He termed the application herein, as another case of the applicants crying foul without cause.

51. He submitted that where a party is aggrieved with a decision of the Court, there are avenues for remedy that are available to the aggrieved party including review and appeal, as an application for recusal is not a forum for the Court to reconsider its decision. He referred to the decisions in **Aura v Cabinet Secretary, Ministry of Education Science & Technology & 9 others; Wainaina & another** (Interested Parties) [2023] KEELC 21087 (KLR) and **Engen Kenya Limited v Rukan Limited** [2020] KEELC 3954 (KLR), to support his argument.

52. He stated that the impression that the applicants are giving is that a decision which is against them calls for disqualification of a Judge. He expressed the view that is an absurd and untenable proposition which is a recipe for confusion in the judicial system as an unfavourable decision is not a ground for recusal of a Judge who has a duty to sit. To support that assertion Kiragu Kimani (SC) referenced the Court of Appeal decision in **Galaxy Paints company Limited v Falcon Guards Limited** [1999] eKLR, and the Supreme Court decision of **Gladys Boss Shollei v Judicial Service Commission & another** [2018] eKLR, and urged this Court not to recuse itself on calls that are unfounded and unsupported by evidence.

53. In addition, he urged this Court not to allow a speculative allegation of bias to lead to recusal because the applicants want to have the case tried by

someone it believes is more likely to decide the case in its favour, which is an abuse of the Court process and should not be allowed. He prayed for the application to be dismissed for failing to meet the threshold for recusal of a Judge.

54. Ms Ndumia for the 3rd respondent submitted that the application herein is a calculated move aimed at delaying the conclusion of this suit thereby frustrating the expeditious adjudication of the case, wasting judicial time and constituting a malicious frivolous and vexatious abuse of the Court process contrary to Article 159(2)(b) of the Constitution of Kenya.

55. She contended that the instant application is an afterthought intended to delay the disposal of the matter for the reason that the applicants have not provided any evidence of actual or perceived bias by the Judge and their sole reason for the recusal request is dissatisfaction with prior Rulings, which does not constitute a sufficient ground for recusal.

56. She stated that the applicants have formed a pattern to allege bias when they do not get the orders they seek from Courts and other decision makers. Counsel outlined several instances where the applicants had sought recusal of some Judges and decision makers, and stated that from the various instances she had outlined, it was evident that the applicants through their Advocates have chosen to consistently antagonize any decision maker who does not make decisions in their favour, repeatedly frustrating the Court process.

57. Counsel stated that it was evident that the applicants are in the game of forum shopping by asking Judges to recuse themselves any time the decision is against them.

58. Mrs Ndumia cited the case of **Shollei & another v Judicial Service Commission & another** [2018] KESC 42 (KLR), where the learned Judge quoted the decision in the case of the **President of the Republic of South Africa & 2 others v South African Rugby Union & 3 others** (CCT16/98) [1999], where the South African Constitutional Court held that there was a presumption of impartiality of Judges by virtue of their training.

59. She submitted that the applicants have only alleged bias on her Ladyship Hon. Justice Njoki Mwangi but failed to prove beyond reasonable doubt that there is clear bias present. She stated that when the applicants brought forward their application, Hon. Lady Justice Njoki Mwangi inquired about the applicants' reason for requesting for the Judge to recuse herself and Dr. Kamau Kuria SC, Advocate for the applicants, stated that he was waiting for the Court of Appeal to render its Judgment on an Appeal regarding a Ruling in this case. She asserted that the said Senior Counsel admitted in open Court that he was using that as a tactic to buy time, which shows the frivolous nature of the application herein.

60. Ms Ndumia cited the case of **Thugi River Estates Limited & another v National Bank of Kenya Ltd & 2 others** [2014] KEHC 8278 (KLR), where the Court cited the Court of Appeal case in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others** Civil Appeal No. 36 of 1996, where the Court stated that although it is important that justice must be seen to be done, it is equally important that Judicial Officers discharge their duties to sit and do not, by ascending too readily to suggestions of appearance of bias encourage parties to believe that by seeking the disqualification of the Judge, they will have their cases tried by someone who is thought to be more likely to decide the case in their favour.

61. Ms Ndumia contended that the application herein is an abuse of the Court process and frivolous. She urged this Court to award costs of the application to the respondents and to dismiss the instant application.

ANALYSIS AND DETERMINATION

62. I have read the instant application, its supporting affidavit, the grounds of opposition filed, as well as the replying affidavits and written submissions by Counsel for the parties. The issue for determination is if I should recuse myself from this case.

63. The basis of the application for recusal is the Ruling that I delivered on 25th October, 2024 in which I dismissed an application in which the applicants sought to adduce additional evidence, and the subsequent Ruling that I delivered on 28th October 2024 in which I declined to grant leave to the applicants to lodge an appeal to the Court of Appeal against the Ruling of 25th October 2024. The applicants state that following the Ruling of 25th October 2024, and being aggrieved by the said decision, they filed **Civil Application No. E612 of 2024, Directline Assurance Company Limited & 4 others v Philip Alier & 9 others**, in the Court of Appeal seeking for stay of further proceedings in this suit.

64. The applicants as such contend that the above circumstances are likely to undermine my impartiality in determining their Amended Originating Notice of Motion application dated 24th June 2022 for setting aside the Award made by the 1st respondent, Philip Alier.

65. In the instant application, the applicants allege that in arriving at the decision contained in the Ruling delivered on 25th October 2024, I declined to apply the law as laid down in Court of Appeal decisions which were referred to

this Court and binding on me. Dr. Kamau Kuria (SC) then delved into the merits of the audit dated 5th March 2024 which I declined to admit as additional evidence.

66.The applicants delved further into a decision that I had made in **High Court Commercial Division Petition No. E006 of 2023 Directline Assurance Company Ltd v Business Registration Service and others**. Senior Counsel contended that in the Ruling that I delivered on 1st March 2024 in the above petition, I determined who the shareholders of the 1st applicant are.

67.In making reference to the letter from the Insurance Regulatory Authority, Senior Counsel contended that the said Regulator has made a determination that AKM Investments Ltd and Janus Limited are not shareholders. He contended that if I hear the applications arising from the Arbitral Award, I will be called upon to sit in Judgment on my two Rulings.

68.From the outset, I must state that each case is determined in its own merits subject to the evidence adduced before the Court. Having rendered my decisions and the reasons in my Rulings of 1st March 2024, 25th October 2024 and 28th October 2024, I cannot revisit the same, as the application before me is not one for review of my Rulings of 25th and 28th October 2024, but an application for recusal.

69.In addition, the applicants have filed Appeals against the said decisions and it the Court of Appeal that is now seized with the jurisdiction to determine all the issues raised in the two Appeals.

70.My understanding of what the applicants have alluded to, is that since they lost in the Rulings of 25th and 28th October 2024, they have no faith in my

dispensation of justice in the application seeking enforcement of the Arbitral Award and the one seeking to set aside the Arbitral Award.

71.The respondents' view is that the issue of impartiality that has been raised by the applicants is speculative and that such an allegation must be proved and must meet the threshold set in decided cases and the Judicial Service Code of Conduct.

72.Ms Ndumia on her part submitted that the intention of the applicants is to buy time so that the application for enforcement of the Arbitral Award and the one for setting aside of the Award can be kept on hold pending the determination of the Appeals.

73.Mr. Kiragu Kimani (SC) and Ms Ndumia held the position that from the history of the applicants' litigation and the numerous cases they have filed in the past seeking recusal of Judges and other decision makers, the applicants are forum shopping for a Judge who will make decisions in their favour.

74.Under **Regulation 21 part II of the Judicial Service (Code of Conduct & Ethics) Regulations 2020**, a Judge or Judicial Officer can recuse himself or herself in any proceedings in which his or her impartiality might be reasonably 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. Has 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.*

75. The applicants herein seem to be riding on Regulation 21(d) above, to accentuate their application for my recusal. The above provisions cannot however stand on their own without making reference to case law.

76. The criteria to be applied in a case where recusal of a Judge is sought on the ground of likely bias was set out in the case of **Attorney General of Kenya v Prof. Anyong Nyong'o & 10 others** EACJ Application No. 5 of 2007, where the Court stated thus—

We think the objective that 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 a fair minded 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 disqualification of a Judge comes to Court because of his perception that there is appearance of bias on the part of the Judge. The Court however has to envisage what would be the perception of the public who is not only reasonable but also fair minded and informed about the circumstances of the case. (Emphasis added).

77. The above test was also the one which was applied in the case of **Kalpana H. Rawal v Judicial Service Commission & 2 others** (supra), where the Court of Appeal adopted the test of “*Whether a fair minded and informed*

observer, having considered the facts, would conclude that there was a real possibility that the Judge would be biased.”

78. In this instance, I am being requested to recuse myself based on the two Rulings that I delivered on 25th and 28th October, 2024 in which I dismissed the applicants' applications. The Ruling that I made in **HCCOMM Petition No. E006 of 2023** was brought in for good measure. The applicants have also expressed the view that if I hear the applications arising from the Arbitral Award, I will be sitting in Judgment over the two decisions that were made in October, 2025, as I have already determined who the shareholders of the 1st applicant are.

79. In my considered view, the applicants herein are being speculative on the outcome of the application for enforcement of the Arbitral Award and the one for setting aside the said Award. Apart from the fact that the applicants did not emerge successful in the Rulings that I delivered on 25th and 28th October, 2025, they have failed to establish that the impression that may be given to a fair minded and informed observer, who has considered the facts of the applications that I determined, would conclude that there is a real apprehension of bias against the applicants herein.

80. In **King Woollen Mills Ltd (formerly known as Manchester Outfitters Suiting Division & another v Standard Chartered Financial Services Ltd & 2 others** (supra), the Court of Appeal held as follows on the issue of recusal-

No matter what one alleges, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances for which a reasonable man would think it likely or probable that the justice or the chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.

81. Needless to say, a Judge or Judicial Officer seized with the duty of hearing a case must decide the case based on the circumstances of each case. Naturally, the loser will more often than not be unhappy with the decision made, and that is the reason why recourse lies in either appealing from the decisions made or by applying for review of such decisions. The applicants being dissatisfied with the two Rulings that I delivered in this case filed their Notices of Appeal. They are however apprehensive that they might not get a fair hearing under Article 50 and 25 of the Constitution of Kenya, due to the decisions that I have made before in this case.

82. In the case of **Gladys Boss Shollei v Judicial Service Commission & another** [2018] eKLR, the Supreme Court held as follows on the issue of recusal-

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 right to sit, in a matter which he 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 where he has to recuse himself.

83. What the applicants are saying is that they have no faith in the process of my sitting in determination of the pending applications in this matter but they have failed to present cogent evidence to prove their allegations. The long and short of what the applicants are indirectly saying is that having lost twice in their applications before me, I should let go, so that another Judge can hear their case and hopefully, render a decision which is favourable to

them. In the Austrian High Court case of **Re J.R.I ex parte CJL** (1936) 161 CLR 342, the Court stated as follows on the issue of recusal –

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.....It needs to be said loudly and clearly that the ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. (Emphasis added).

84. Closer home, in the case of **Galaxy Paints Company Limited v Falcon Guards Ltd** [1999] eKLR, the Court of Appeal stated thus-

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....

85. The above decision underscores the fact that recusal of a Judge is a serious matter, and that a Judge or Judicial Officer should not too readily cede ground just because a litigant or litigants have not previously successfully litigated their matters before the specific Judge/Judicial Officer.

86.I have said enough to show that the applicants are intent on forum shopping for a Judge whom they think will render decisions in their favour. I decline to recuse myself from this matter. The application dated 14th December 2024 is without merits. It is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 31st day of October, 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Dr. Kamau Kuria (SC) for the applicants

No appearance for the 1st respondent

Ms Kimani h/b for Mr. Kiragu Kimani (SC) for 2nd, 4th, 6th & 9th respondents

Ms Ndumia for the 3rd respondent

Mr. Mugo h/b for Mrs Wambugu for the 5th respondent

Ms Jan Mohammed (SC) for the 7th respondent

Ms B. Wokabi – Court Assistant.