



**Koome & 6 others v Judicial Service Commission & another; Havi & 23 others  
(Interested Parties) (Petition E083 of 2025) [2025] KEHC 17206 (KLR)  
(Constitutional and Human Rights) (14 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17206 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E083 OF 2025**

**CM KARIUKI, LN MUGAMBI & B MWAMUYE, JJ**

**NOVEMBER 14, 2025**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 24, 25 (C), 28, 33, 47, 50,  
159, 160, 163, 165 (6), 166, 168, 172, 249, 252, 258, 259 AND SECTION 23 OF  
PART 5 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**-AND-**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**-AND-**

**IN THE MATTER OF THE JUDICIAL SERVICE ACT, CHAPTER 8A OF THE LAWS OF  
KENYA**

**-AND-**

**IN THE MATTER OF THE JUDICIAL SERVICE (CODE OF CONDUCT AND ETHICS)  
REGULATIONS, 2020**

**-AND-**

**BENCH PETITION E083/2025 RULING PAGE 1 OF 31**

**IN THE MATTER OF ALL PETITIONS UNDER CONSIDERATION BY THE JUDICIAL  
SERVICE COMMISSION (JSC) FOR THE REMOVAL FROM OFFICE OF ALL SEVEN (7)  
JUDGES OF THE SUPREME COURT OF KENYA**

**-AND-**

**IN THE MATTER OF VIOLATION OF THE RIGHTS OF JUDGES OF THE SUPREME**



**COURT AGAINST VILIFICATION IN THEIR EXERCISE OF JUDICIAL FUNCTIONS**

**BETWEEN**

**HON. LADY JUSTICE MARTHA K. KOOME EGH, CHIEF JUSTICE &  
PRESIDENT OF THE SUPREME COURT ..... 1<sup>ST</sup> PETITIONER**  
**HON. LADY JUSTICE NJOKI S. NDUNGU ..... 2<sup>ND</sup> PETITIONER**  
**HON. JUSTICE ISAAC LENAOLA ..... 3<sup>RD</sup> PETITIONER**  
**HON. JUSTICE WILLIAM OUKO ..... 4<sup>TH</sup> PETITIONER**  
**JUSTICE (DR.) SMOKIN C. WANJALA ..... 5<sup>TH</sup> PETITIONER**  
**HON.LADY JUSTICE PHILOMENA MBETE MWILU ..... 6<sup>TH</sup> PETITIONER**  
**HON.JUSTICE MOHAMMED KHADHAR IBRAHIM ..... 7<sup>TH</sup> PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NELSON HAVI ..... INTERESTED PARTY**  
**CHRISTOPHER ROSANA ..... INTERESTED PARTY**  
**ASLI OSMAN MAHAMUD ..... INTERESTED PARTY**  
**PETER MUCHOKI GICHURU ..... INTERESTED PARTY**  
**IRENE JELAGAT KOECH ..... INTERESTED PARTY**  
**ESTHER AMBOKO WANGA ..... INTERESTED PARTY**  
**COHEN KYAMPENE AMANYA ..... INTERESTED PARTY**  
**KHADIJAH SAID ALI ..... INTERESTED PARTY**  
**ELIZABETH WANGUI MUNGAL ..... INTERESTED PARTY**  
**TONY KIPROTICH TOWETT ..... INTERESTED PARTY**  
**MOHAMED BILLOW ABDI ..... INTERESTED PARTY**  
**JERIOTH MUTHONI GATERE ..... INTERESTED PARTY**  
**OMAR ATHMAN MWARORA ..... INTERESTED PARTY**  
**HILDA MULWA NDULU ..... INTERESTED PARTY**  
**JEMIMAH AILEEN MASUDI ..... INTERESTED PARTY**  
**DARI LIMITED ..... INTERESTED PARTY**  
**S.A.M. COMPANY LIMITED ..... INTERESTED PARTY**  
**RAPHAEL TUJU ..... INTERESTED PARTY**  
**MANO TUJU ..... INTERESTED PARTY**



ALMA TUJU ..... INTERESTED PARTY  
YMA TUJU ..... INTERESTED PARTY  
KENYA MAGISTRATES AND JUDGES ASSOCIATION ... INTERESTED PARTY  
KATIBA INSTITUTE ..... INTERESTED PARTY  
AHMEDNASIR ABDULLAHI ..... INTERESTED PARTY

## RULING

### (in Respect Of The 1<sup>st</sup> Interested Party's Notice Of Motion Application Dated 09 06 2025)

1. The 1<sup>st</sup> Interested Party's Notice of Motion Application dated 09 06 2025 seeks the following orders:
  - i. That the 1<sup>st</sup> Interested Party's Notice of Motion Application dated 09 06 2025 be certified as urgent;
  - ii. That Milimani HCCHRPET NO. E083 of 2025, Honourable Lady Justice Martha Karambu Koome v Judicial Service Commission & 4 Others be forwarded to the Hon. Chief Justice to delegate to the Deputy Chief Justice the function of assigning an uneven number of Judges of the High Court, excluding Hon. Mr. Justice Charles Kariuki, Hon. Mr. Justice Lawrence N. Mugambi, and Hon. Mr. Justice Bahati Mwamuye MBS to hear and determine that Petition;
  - iii. That the remaining six (6) consolidated Petitions being Milimani HCCHRPET NO. E079 of 2025, Milimani HCCHRPET NO. E086 of 2025, Milimani HCCHRPET NO. E087 of 2025, Milimani HCCHRPET NO. E089 of 2025, Milimani HCCHRPET NO. E090 of 2025, and Milimani HCCHRPET NO. E098 of 2025 be forwarded to the Hon. Chief Justice to assign an uneven number of Judges of the High Court excluding Hon. Mr. Justice Charles Kariuki, Hon. Mr. Justice Lawrence N. Mugambi, and Hon. Mr. Justice Bahati Mwamuye MBS to hear and determine those six consolidated petitions;
  - iv. That the Hon. Chief Justice and the Hon. Deputy Chief Justice should comply with the precedent and principles set out in caselaw with respect to the selection of the justices and the empanelment of an uneven number of judges to hear and determine the Petitions herein;
  - v. That the bench herein comprising of Hon. Mr. Justice Charles Kariuki, Hon. Mr. Justice Lawrence N. Mugambi, and Hon. Mr. Justice Bahati Mwamuye MBS consequently recuse themselves from any further hearing and determination of the seven (7) Consolidated Petitions herein; and
  - vi. That the costs of the Application be provided for.
2. The 1<sup>st</sup> Interested Party's Notice of Motion Application is supported by the Affidavit of Nelson Havi dated 09 06 2025, which elucidated the grounds advanced in support of the Application and which are summarized as below:
  - i. That the Hon. Chief Justice, as the Petitioner in Milimani HCCHRPET NO. E083 of 2025, had a clear and undeniable conflict of interest when she exercised her constitutional discretion in selecting and thereafter appointing the three members of this Bench to hear and determine a Petition in which Her Ladyship is the Petitioner; and consequently, that discretion ought not to have been exercised by the Hon. Chief Justice but rather by the Hon. Deputy Chief Justice;



- ii. That the Hon. Mr. Justice Lawrence N. Mugambi and the Hon. Mr. Justice Bahati Mwamuye MBS are both clearly and undeniably beholden to the Hon. Lady Justice Martha Koome as she was the Chairperson of the Judicial Service Commission that recommended each of those two Judges of the High Court for appointment as Judges of the High Court of Kenya;
  - iii. That the three members of the current bench as relatively junior and inexperienced when compared to the members of past benches of the High Court who heard and determined petitions regarding the broader thematic area;
  - iv. That noting the gravity and significance of the matters at issue in the subject Consolidated Petitions, a bench(es) comprising of five or seven Judges of the High Court with similar lengths of judicial experience as the Petitioners and with varied judicial philosophies, ethnic backgrounds, and gender representation ought to have been appointed by the Hon. Chief Justice and the Hon. Deputy Chief Justice respectively; and
  - v. That overall, the selection and empanelment of the present Bench was unconstitutional and illegal.
3. The relative position of the other parties with respect to the 1<sup>st</sup> Interested Party's Notice of Motion Application dated 09 06 2025 is as follows:

### **In Support Of The Application**

4. The 1<sup>st</sup>, 14<sup>th</sup> and 15<sup>th</sup> Interested Parties argued that the Hon. Chief Justice's action of empaneling this Bench undermines the constitutional guarantees of fair administration and fair trial as well as the core values of integrity, transparency, and accountability. Counsel submitted that by acting as a "judge in her own cause" at the administrative stage, the Hon. Chief Justice fell short of the standards of leadership and integrity required of her office under Article 73 of *akn ke act 2010 constitution the Constitution*, which demands objectivity and impartiality in decision-making and eschews any improper motives or conflict of interest.
5. It was contended, inter alia, that Article 73(2)(b) of *akn ke act 2010 constitution the Constitution* imposes upon the Hon. Chief Justice a constitutional obligation to eschew any personal interest that conflicts, or may appear to conflict, with the discharge of public duties, and to make an honest declaration of any such interest. The 1<sup>st</sup> Interested Party Applicant particularly emphasized that the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, which are binding upon all Judges and which codify and reinforce these constitutional imperatives. It was argued that Clause 20 of the said Code, which enjoins a Judge to "use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judge's official duties," and Clause 21, which provides that a Judge "may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned," including, where the Judge "is a party to the proceedings."
6. By the standards set forth under the foregoing constitutional and statutory provisions, the Applicant contends that Hon. Lady Justice Martha Koome, being the Petitioner in the subject Petition, was under a duty to recuse herself from the process of constituting the bench to hear and determine the said Petition. It is urged that she ought to have delegated that function to the Deputy Chief Justice, or alternatively, to have permitted the empaneling of the Bench through an impartial and transparent mechanism. The Applicant's position is that the failure by the Hon. Chief Justice to so recuse herself and to ensure an impartial bench-assignment process rendered the proceedings incurably defective from inception; thereby vitiating the legitimacy of this Bench and engendering a reasonable apprehension of bias in favour of the Petitioners.



7. The 1<sup>st</sup> Interested Party Applicant noted that each of the three Honorable Judges on this Bench had previously handled interlocutory applications in some of the consolidated matters before their consolidation, with two of the Judges proceeding to issue conservatory orders favourable to the Petitioners. The Applicant submits that by granting such orders, the judges “had each already pronounced themselves” to some extent on issues in dispute, and thus a fair-minded observer might question their impartiality in the final determination.
8. Secondly, the Applicant argues that Hon. Mr. Justice Lawrence Mugambi and Hon. Mr. Justice Bahati Mwamuye MBS are relatively junior judges appointed to the High Court during Chief Justice Koome’s tenure as Chair of the Judicial Service Commission, with Mugambi J having been sworn-into office in December 2022 while Mwamuye J was sworn-into office in May 2024.
9. Mr. Nelson Havi argued that these two judges “are perceived to be beholden to” the Hon. Chief Justice due to the fact that they were interviewed, recommended, and appointed as judges during her ongoing tenure as the Chief Justice. Although no personal misconduct is imputed on the two judges, the Applicant argues that the objective perception of their perceived loyalty or perceived indebtedness to the Hon. Chief Justice cannot be ignored, given human nature and career dynamics.
10. Thirdly, the Applicant contends that the Hon. Chief Justice, in selecting this particular trio of judges, allegedly failed to take into account the essential considerations of expertise, experience, and diversity, contrary to established practice and precedent. It is argued that the three judges are relatively new to the bench and none is especially known for expertise in complex constitutional adjudication or the subject matter at hand. It is further argued that the empanelment does not reflect regional, professional, or gender diversity; and it included no “senior judges or peers” of the Petitioners; contrary to the historical trend in matters involving senior judges. In the Applicant’s view, a bench of three relatively junior judges who owe their recent appointments to the Chief Justice gives an appearance of a hand-picked team that may tilt in favour of the Petitioner Supreme Court Judges.
11. The parties in support of the Application placed substantial weight on the recent Court of Appeal decision in *H.E. Rigathi Gachagua & 5 Others v. Thomas Kimotho Maingi & 80 Others* [2025] eKLR, which dealt with a Chief Justice’s role in bench assignment. In that case, the Court of Appeal outlined some of the factors that a Chief Justice should possibly consider when empaneling a bench under Article 165(4). The Appellate Court stated that those factors include
 

“Selecting judges with varied legal philosophies, regional representation, or professional backgrounds; prior involvement in related matters; the sensitivity of the case and the corresponding need to uphold public confidence in the judiciary; avoidance of conflicts of interest to ensure impartiality; and of course, the workload and ability of the proposed judges”.
12. The Applicant argues that the Hon. Chief Justice’s empanelment of the current Bench deviated from these principles, particularly the avoidance of conflicts of interest and ensuring public confidence.
13. The parties supporting the Application further observed that the Court of Appeal, in what has come to be referred to as the Gachagua Case, pertinently posed a rhetorical question in the following terms: “So what is to happen when the Chief Justice is, for whatever reason, absent... or when a matter certified as requiring empanelment relates to a matter where the Chief Justice is a party, or substantially relates to the office or person of the Chief Justice?” It was submitted that the Court of Appeal proceeded to answer that question by reference to comparative Commonwealth practice and judicial precedent. In particular, reliance was placed on the decision in *Leina Konchellah & Others v. Chief Justice of Kenya & Others* [2021] KEHC 12609 (KLR), wherein Chief Justice David Maraga, upon being named as a



Respondent in those proceedings, duly and appropriately delegated the function of empanelling the bench to the then, and current, Deputy Chief Justice, Hon. Lady Justice Philomena Mwilu.

14. The Applicant drew the Court's gaze to the decision of the UK Privy Council in *Yiacoub & Another v. The Queen* [2014] UKPC 22. In that case, the presiding judge appointed a judge to an appellate panel that was to hear an appeal from the presiding judge's own first-instance decision. The UK Privy Council held that the impugned action carried an unacceptable appearance of bias, observing that "appointing a judge to hear an appeal from himself... carries an appearance of lack of independence and impartiality... which would impact on an objective informed observer".
15. By analogy, the Applicant argues that the Hon. Chief Justice's action of constituting a bench to hear and determine a case in which she is the Petitioner is indefensible in light of the persuasive precedent of the UK Privy Council decision in *Yiacoub*. The Applicant concluded by pointing out that the UK Privy Council quashed the impugned proceedings and directed that a new panel be constituted by the next most senior judge who was not involved in the matter; and the Applicant sought that the same applies in the present scenario.

### **In Opposition To The Application**

16. The Application is strongly opposed by the Petitioners, the Respondents, and some of the Interested Parties. In omnibus, the parties opposed characterize the Application as misconceived, lacking in merit, and an abuse of court process. They urge that the Applicant has not met the strict legal threshold for recusal or disbandment of a bench, and that the Application is driven by extraneous motives, possibly to delay the hearing of the Petitions or to engineer a more favorable bench.
17. A preliminary objection raised by the 6<sup>th</sup> Petitioner is that the Application is barred by the doctrine of *res judicata*. Learned Counsel for the 6<sup>th</sup> Petitioner points out that this very issue on whether the 1<sup>st</sup> Petitioner could lawfully empanel the Bench to hear her case was raised, argued and conclusively determined by the High Court in a ruling delivered on 25 04 2025 by Hon. Mr. Justice Lawrence N. Mugambi. In that earlier ruling, the Court found that the Hon. Chief Justice could lawfully empanel a bench notwithstanding her status as the Petitioner in *Milimani HCCHRPET NO. E083 of 2025*.
18. The 6<sup>th</sup> Petitioner observes that the present Application is not in the nature of an application to review the Ruling dated and delivered on 25 04 2025 by the Hon. Mr. Justice Lawrence N. Mugambi, nor can this High Court sit in appeal of that decision of that High Court.
19. Accordingly, the 6<sup>th</sup> Petitioner argues that the 1<sup>st</sup> Interested Party's attempt to revisit the same question by way of this Application offends Section 7 of the *akn ke act 1924 3 Civil Procedure Act*, which codifies the principle of *res judicata*. The Court is urged to find that the issue is already decided between the same parties as the 1<sup>st</sup> Interested Party was and is a party to the each of the Consolidated Petitions and therefore this Court must decline to entertain the Application in limine.
20. The parties opposed further submit that this Court lacks the requisite jurisdiction to grant the orders sought directing the Hon. The Chief Justice or the Hon. The Deputy Chief Justice respectively to reconstitute benches in these matters. It is argued that the power to assign judges under Article 165(4) of *akn ke act 2010 constitution the Constitution* lies exclusively with the Chief Justice, and it is a matter of judicial administration not subject to supervision or direction by the High Court.
21. The Hon. Attorney General further argued that there is no provision in law that enables a High Court bench to "return" a matter to the Chief Justice for re-assignment once a bench is seized of a petition, and that the bench has a duty to hear it to conclusion unless lawfully disqualified. It is further contended by the 2<sup>nd</sup> Respondent that any perceived impropriety in the Hon. The Chief Justice's



administrative act can only be the subject of a separate judicial review or constitutional petition, but cannot be canvassed at the interlocutory stages of the same impugned proceedings.

22. The parties opposed also submit that the Applicant has failed to demonstrate any real possibility of bias or lack of impartiality on the part of the Bench that would warrant recusal. They urge the Court to apply the well-established objective test of “whether a reasonable, fair-minded and informed observer, looking at all the circumstances, would conclude that there is a likelihood of bias on the part of the judge or judges.” They argued that such an observer would be aware of the professional oaths and obligations of judges and would not jump to conclusions of bias on the basis of conjecture or remote associations.
23. It is further submitted that no concrete facts have been adduced that link any of the three judges appointed to form the present three-judge Bench to a disposition favouring the Petitioners or predisposing them to automatically hold or determine in favour of the Petitioners. Counsel noted that granting a conservatory order at an interim stage does not signify predetermination of the case, but rather it merely reflects a preliminary assessment of the case as warranting preservation of the obtaining status quo or the status quo ante.
24. As regards the appointment of two judges sitting in this Bench during the tenure of the 1<sup>st</sup> Petitioner as the Chief Justice and Chairperson of the 1<sup>st</sup> Respondent, the parties opposing the Application contend that being appointed by a particular authority is not a recognized ground for recusal. If it were, all judges would be disqualified from hearing any case involving the government or the appointing authority, which in the Kenyan context would be the President of the Republic of Kenya, the State Officer whom, by virtue of *akn ke act 2010 constitution the Constitution*, appoints all Judges of the Superior Court. To their minds, the law presumes that judges, once appointed, exercise independent judgment.
25. The parties opposed cited the Supreme Court’s dicta in *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others* [2013] eKLR in which the apex court held that while litigants have a right to a fair hearing by an impartial judge, that right does not equate to “a right to hand-pick a bench”, and recusal applications should not be used to try to “influence the composition of a bench to one’s liking”. The parties opposed warn that the 1<sup>st</sup> Interested Party’s Application veers into that territory.
26. They further argue that public confidence in the judiciary would be undermined, not enhanced, by allowing the instant Application. In their written submissions, the parties opposed contextualized the present Application against a background where, in their eyes, certain litigants, upon sensing an unfavourable or unpredictable bench, attempt to file complaints or applications to force the judges out. The parties opposing the Application contend that acceding to such unmerited requests would set a pernicious precedent, fostering an unending cycle of ‘bench shopping’ and thereby undermining the stability, integrity, and orderly administration of judicial processes. They further argued that Judges have a duty to sit and hear cases assigned to them unless there is a truly compelling reason to recuse. In support of this contention, the parties opposed relied on the decision of the Supreme Court in *Raila Odinga & 2 Others v. IEBC & 3 Others* [2013] eKLR, in which the Supreme Court stressed that recusal is not a matter to be lightly undertaken and that absent valid reasons, judges are obliged not to recuse themselves lest they abandon their responsibility to hear and determine all cases before them without fear or favour.
27. The opposing parties emphasize that no member of the Bench has, by word or conduct, exhibited any indication of bias or partiality. They assert that the three Judges seized of this matter have, throughout the proceedings, conducted themselves with the utmost propriety, restraint, and fairness to all parties before the Court.



28. The Attorney General submits that a fair-minded and informed observer would appreciate that it is not uncommon for judges to grant interim reliefs to preserve the status quo, while nonetheless retaining the capacity and obligation to impartially determine the substantive issues thereafter. It is urged that such conduct accords with the judicial oath and the fundamental duty of a judge. The 2<sup>nd</sup> Respondent further contends that a strong presumption of judicial impartiality attaches to every judge, a presumption which may only be displaced by cogent and credible evidence to the contrary. In the present case, it is submitted that the Applicant has tendered no such evidence, relying instead on conjecture, inference, and unsubstantiated speculation.

### **Hearing Of The Application**

29. The Parties in support as well as those opposed filed and exchanged written submissions. The Application was heard by way of highlighting of written submissions on 3<sup>rd</sup> October 2025. At that hearing, the participating parties canvassed their respective positions as set out in the preceding paragraphs.

### **Issues For Determination**

30. It emerges from the written submissions on record with respect to the 1<sup>st</sup> Interested Party's Notice of Motion Application dated 09 06 2025 and the highlights of 3<sup>rd</sup> October 2025 that the issues for determination are as follows:
- a. Whether the consolidated issues herein should be re-remitted to the Hon. Chief Justice for re-panelsment by Her Ladyship the Chief Justice or Her Ladyship the Deputy Chief Justice;
  - b. Whether the legal grounds for recusal have been established; and
  - c. The costs of the Application.
31. The two substantive issues, while closely related and somewhat intertwined, have sufficient unique aspects for them to be formulated, analyzed, and determined distinctly.

### **Analysis And Determination**

#### **ISSUE ONE: Whether the consolidated issues herein should be re-remitted to the Hon. Chief Justice for re-panelsment by Her Ladyship the Chief Justice or Her Ladyship the Deputy Chief Justice**

32. Upon a careful consideration of the issues raised for determination, the submissions of counsel, and the constitutional and statutory framework governing the empanelsment of benches under Article 165(4) of *akn ke act 2010 constitution the Constitution*, this Court is satisfied that the question before it has been conclusively settled, and that it is functus officio in respect thereof.
33. It is not in dispute that by Rulings delivered by Hon. Mr. Justice Bahati Mwamuye MBS on 10<sup>th</sup> April 2025 and Hon. Mr. Justice Lawrence N. Mugambi on 25<sup>th</sup> April 2025 the respective Judges, having heard the parties, certified that the Petitions before them raised substantial questions of law within the meaning of Article 165(4) of *akn ke act 2010 constitution the Constitution*. Consequently, and in compliance with the dictates of that provision of our supreme law, they referred the matters to the Hon. The Chief Justice for the empanelsment of a bench comprising of an uneven number of Judges, being not less than three, to hear and determine the Petitions.



34. Pursuant to the said judicial certifications, the empanelment was duly undertaken by the Hon. The Chief Justice in exercise of her constitutional discretion under Article 165(4). The Court of Appeal, in *H.E. Rigathi Gachagua & 5 Others v. Thomas Kimotho Maingi & 80 Others* (2025) eKLR, lucidly articulated the prevailing legal position as follows:
- “The role of the Chief Justice in setting up a bench under Article 165(4) is triggered by a matter being certified by the High Court or court of equal status as raising a substantial question of law under clauses (3)(b) or (d) of the said Article. Once the Court certifies that a matter qualifies to be heard by an expanded bench, the Chief Justice cannot question that decision. Anyone aggrieved by the certification has a right of appeal to the Court of Appeal.”
35. It is therefore beyond contestation that once the certification was made, and the Chief Justice undertook empanelment pursuant thereto, the process attained finality. The proper recourse for any aggrieved party lay in an appeal against the certification decision. No such appeal to the Court of Appeal has been preferred. To now invite this Bench to revisit, re-open, or remit the matter to the Chief Justice for a fresh empanelment would amount to an impermissible attempt to re-exercise a jurisdiction that has already been spent.
36. The Supreme Court in *Raila Odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 Others* (2013) eKLR restated the doctrine of *functus officio* in the following terms:
- “(18) ... Daniel Malan Pretorius, in ‘The Origins of the *functus officio* Doctrine, with specific Reference to its Application in Administrative Law’ (2005) 122 SALJ 832, explicates this concept thus: ‘The *functus officio* doctrine is one of the mechanisms by which the law gives expression to the principle of finality... Once such decision has been given, it is (subject to any right of appeal) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.’”
37. Similarly, in *Jersey Evening Post Limited v. Al Thani* [2002] JLR 542 at 550, it was held that:
- “A Court is *functus* when it has performed all its duties in a particular case... The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling must be taken to a higher court.”
38. Guided by the foregoing authorities, it is manifest that the High Court, having certified the matter under Article 165(4) and consequently caused the empanelment to be effected, the court has fully discharged its jurisdiction in that respect. The High Court cannot now recall, revisit, or re-remit the matter to the Hon. The Chief Justice for re-certification or re-assignment. To do so would not only offend the doctrine of *functus officio* but also undermine the principle of finality that undergirds judicial proceedings.
39. As to the contention that the Hon. Chief Justice, being the Petitioner in *Milimani HCCHRPET No. E083 of 2025*, had a conflict of interest and therefore ought to have delegated her constitutional mandate under Article 165(4) to the Honourable the Deputy Chief Justice, this argument is equally misconceived. The Court of Appeal in *Gachagua & 5 Others* (supra), at Paragraphs 149–155, examined the scope of section 5(4) of the *akn ke act 2011 1 Judicial Service Act* and held that the Deputy Chief Justice may only act as Chief Justice in three defined circumstances namely, removal, resignation, or death of the Chief Justice. The Court emphatically stated that the Deputy Chief Justice cannot act as a “general deputy” save in those exceptional and demonstrable instances.



40. Accordingly, neither the mere fact of the Hon. Chief Justice being a party to proceedings nor the perception of conflict constitutes an exception contemplated under the law. *akn ke act 2010 constitution The Constitution* vests the empanelment power exclusively in the Chief Justice, and that discretion cannot be usurped, directed, or fettered by any court. Indeed, as the Court of Appeal further held in *Gachagua (supra)* at paragraph 213:

“The discretion granted to the Chief Justice by Article 165(4) to empanel a bench is a power solely granted to the Chief Justice. It is the Chief Justice, and she alone, who can decide the number of judges to assign a matter. Similarly, it is only the Chief Justice who can decide which judge to assign to a bench...”

41. In light of the foregoing constitutional, statutory, and jurisprudential framework, this Court finds that it is *functus officio* in respect of the certification and empanelment of the present matter. The question of referring the same back to the Honourable the Chief Justice for re-empanelment does not arise. Any grievances regarding the empanelment or the composition of the Bench can be ventilated through the appropriate appellate process.

42. Accordingly, the Court holds that the empanelment was validly undertaken pursuant to Article 165(4) of *akn ke act 2010 constitution the Constitution*; that the Court’s jurisdiction on that issue has been fully and finally exercised; and that no order may now validly issue from the High Court purporting to direct or compel the Hon. Chief Justice in the discharge of her constitutional functions under Article 165(4) of *akn ke act 2010 constitution the Constitution*.

## **ISSUE TWO: Whether the legal grounds for recusal have been established.**

43. In the instant matter, the 1<sup>st</sup> Interested Party invited this Bench either to recuse itself or to remit the consolidated Petitions to the Chief Justice for re-assignment. The fundamental question that arises is has the threshold for recusal of the bench been met by the 1<sup>st</sup> interested party?

44. The right to fair hearing under Article 50 (1) of *akn ke act 2010 constitution the Constitution* underscores independence and impartiality as critical principles that must be insulated to protect the judicial decision-making process from bias, external influence or prejudices. Article 50 (1) states:

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

45. Pursuant to Section 47 of the *akn ke act 2011 1 Judicial Service Act*, Regulation 21(1) of the Judicial Service (Code of Conduct and Ethics) Regulations was formulated. This regulation provides for various instances when a Judge may be required to recuse himself or herself from a judicial proceeding. It states:

“A judge may recuse himself or herself in any proceedings where their impartiality might reasonably be questioned, including 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) previously acted as counsel for a party in the same matter; (g) is precluded from hearing the matter on account of any other sufficient



reason; or (h) has a family member with an economic or other interest in the outcome of the case.”

46. Nevertheless, it must be appreciated that this does not mean that these are the only circumstances that a Judge should recuse himself or herself in a matter. As was stated by the Supreme Court in *Rai & 3 others v Rai & 4 others* [2013] KESC 20 (KLR);

“... 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.”

47. In our view, the threshold of the recusal was aptly laid down by the Court of Appeal in the case of *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* [2016] KECA 534 (KLR) which citing the decision of Supreme Court of Canada held thus:

“25. The Supreme Court of Canada expounded the test in the following terms in *R. v. S. (R.D.)* [1977] 3 SCR 484:

informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

26. That is the test we propose to adopt in this application as it is the accepted test...”

48. Do the grounds relied upon by the 1<sup>st</sup> Interested Party meet the above test? Firstly, none of the said grounds relied upon by the 1<sup>st</sup> interested Party in his Application for recusal specifically falls within the range of circumstances specified under Regulation 21(1) of the Judicial Service (Code of Conduct and Ethics) Regulations, meaning the statutory test has not been established.



49. Having failed the obvious and the more direct test, the next limb is to consider whether alleged apprehension of bias by the 1<sup>st</sup> Interested Party is reasonable in the circumstances of this case.
50. The Constitutional Court of South Africa, in *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* (1999), articulated the test for apprehension of bias thus:
- “The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case... It must be assumed that [judges] can disabuse their minds of any irrelevant personal beliefs or predispositions... They have a duty to sit in any case in which they are not obliged to recuse themselves.”
51. Similarly, the Supreme Court in *Gladys Boss Shollei v. Judicial Service Commission & Another* (2018) eKLR, citing *Simonson v. General Motor Corporation* USDCP 425 R Supp 574, 578 (1978), emphasized the “duty to sit,” stating that:
- “Recusal and reassignment is not a matter to be lightly undertaken... while in proper cases we have a duty to recuse ourselves, we have a concomitant obligation not to recuse ourselves; absent valid reasons for recusal there remains what has been termed as a ‘duty to sit.’”
52. The obligation to demonstrate there exists a ‘reasonable apprehension of bias’ is essential so as to safeguard judicial independence by ensuring that judges do not recuse themselves on flimsy grounds; and that litigants cannot, through speculation or pressure, manipulate the composition of the court.
53. We have carefully assessed each and every allegation made against this Bench and we find they comprise wholly of unsubstantiated allegations that are devoid of any evidentiary or legal basis. The allegations range from regional and gender composition of the Bench, perceived inexperience by members of the Bench to handle complex constitutional questions, that two of the Judges heard and granted conservatory orders in favour of the Petitioners hence have formed their mind, that two of the members of the Bench were appointed during the tenure of the Chief Justice who is the Petitioner and hence the two Judges are beholden to her, and so on.
54. In our humble view, these are mere sensational allegations that have no bearing on the impartiality of the Bench. To act positively on such allegations will in our view subvert the integrity of the institution and the constitutional obligation imposed upon judges to discharge their duties without fear or favour.
55. The arguments advanced by the 1<sup>st</sup> Interested Party with regard to his perception that the judges on this Bench are ‘relatively junior’ can be easily settled by reference to the seminal decision of the Court of Appeal in *Butt v. Rent Restriction Tribunal* [1979] eKLR, in which the Court famously held that:
- “A judge of the High Court has the same jurisdiction and power as any other judge of the High Court. There are no senior or junior judges in the High Court; all are equal in jurisdiction and authority.”
56. Accordingly, any suggestion that the judges constituting this Bench lack the requisite seniority, expertise, or experience to sit together is totally misconceived and without merit. All judges of the High Court derive their authority from the same constitutional source Article 165 and exercise coordinate jurisdiction.



57. The grounds advanced do not satisfy the statutory or jurisprudential standards for recusal. All judges of the High Court enjoy equal constitutional standing, and this Court finds no reason to send the consolidated Petitions to the Hon. Chief Justice for re-certification or re-empanelment.

**ISSUED THREE: Costs of the Application.**

58. This Court has no reason to find that the Application, while unsuccessful, meets any of the criteria that would require the unsuccessful Applicant to bear the costs of the Application. Noting that the Consolidated Petitions herein touch on matters of public interest, we find that it is fit, right, and proper that each Party bears its own costs in the Application.

**Disposition**

59. For the foregoing reasons, the 1<sup>st</sup> Interested Party’s Notice of Motion Application dated 09 06 2025 is found to be without merit and is dismissed accordingly, with each party to bear its own costs in the Application.

60. The Court will after delivery of this Ruling proceed to issue comprehensive directions towards the expedited hearing and determination of the Consolidated Petitions herein.

It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI ON THIS 14<sup>th</sup> DAY OF NOVEMBER, 2025.**

.....

**CHARLES KARIUKI (PRESIDING)**

**JUDGE**

.....

**LAWRENCE N. MUGAMBI**

**JUDGE**

.....

**BAHATI MWAMUYE MBS**

**JUDGE**

In the presence of:

1<sup>st</sup> Petitioner’s Counsel – Mr. Chepkiwony h b Mr. Oraro

2<sup>nd</sup> Petitioner’s Counsel – Ms. Bett

3<sup>rd</sup> Petitioner’s Counsel – Ms. Lukoye

4<sup>th</sup> Petitioner’s Counsel – Mr. Ochieng Odour

5<sup>th</sup> Petitioners’ Counsel – Mr. Kipkosgei

6<sup>th</sup> Petitioner’s Counsel – Mr. Kere

7<sup>th</sup> Petitioner’s Counsel – Mr. Odhiambo Isaac

1<sup>st</sup> Respondent’s Counsel – Ms. Ahomo h b Mr. Issa Mansur

2<sup>nd</sup> Respondent’s Counsel – Mr. Bitta



1<sup>st</sup> Interested Party – Mr. Munyeri h b Mr. Havi acting in person

3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Interested Party’s Counsel – Mr. Kisigwa h b Mr. dennis Mosoti

14<sup>th</sup> and 15<sup>th</sup> Interested Party’s Counsel – Ms. Muthoni h b Mr. Ahmednasir SC

16<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> Interested Party’s Counsel – Ms. Mulei h b Mr. Nyamodi

22<sup>nd</sup> Interested Party’s Counsel – Ms. Gicheru h b Mr. Kiragu Wathuta

23<sup>rd</sup> Interested Party’s Counsel – Ms. Lukoye h b Mr. Nyawa

Court Assistants – Ms. Amondi, Ms. Lwambia

