REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICAL REVIEW APPLICATION NO. E.131 OF 2022

REPUBLIC……...……...……..…… APPLICANT

VERSUS

NAIROBI METROPOLITAN SERVICES (NMS)..…….....….1ST RESPONDENT

THE DIRECTOR ROADS, PUBLIC WORKS & TRANSPORT, NMS…….....2ND RESPONDENT

THE DIRECTOR OF ENFORCEMENT, NMS……..…..3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE……..….4TH RESPONDENT

THE DTO CENTRAL POLICE STATION……..….. 5TH RESPONDENT

THE HON. ATTORNEY GENERAL……...…….6TH RESPONDENT

AND

METRO TRANS E.A LTD……..INTERESTED PARTY/APPLICANT

AND

KAKA TRAVELLERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD……..…….EX-PARTE APPLICANT/RESPONDENT

AND

ROSANA OSCAR OMURWA……...CONTEMNOR

RULING ON RECUSAL

1. Before me for determination is an application dated 8th November, 2025 by the interested party Metro Trans E.A. Limited, a public transport company in competition with the exparte applicant Kaka Travellers Cooperatives Savings and Credit Society Limited, another public Transport Company, seeking my recusal from further conduct of these proceedings. The application followed my decision to decline the application to set aside the contempt of Court orders issued against the contemnor Rosana Oscar Omurwa, who, from the proceedings, is said to have been the Chief

Executive Officer of the interested party/applicant and who was convicted for being in contempt of court orders issued by this Court differently constituted.

2. Following that decision declining to vacate the contempt orders and a further refusal to grant the contemnor, leave to appeal against the ruling, the interested party, ostensibly acting as proxy for the contemnor, from the tone of the application and affidavits filed in court, sought for my recusal from handling these proceedings. An example of such tone is where the interested party claims that it is apprehensive that the judge is biased against some parties in these proceedings and is therefore unable to do justice for all the parties, yet the application which was dismissed was filed by the contemnor and not the interested party. It does not require rocket science to establish the truth from the pleadings filed on record in support of the application, where the person against whom orders are made sits on the fence and the company on whose behalf he was convicted of being in contempt of court for failing to implement court orders decides that the judge is biased, not against it but against the contemnor, only after the judge declined to vacate the orders of contempt against the contemnor and to grant him leave to appeal that ruling.
3. The application was opposed by the exparte applicant and the reasons for opposing the application are on record among them, that the recusal motion was for collateral purposes to buy the contemnor time.
4. The contemnor did not file any response to the application.

5. However, I need not delve into the merits of the allegations levelled against me by the interested party, which allegations are nothing but spurious friendly forum shopping maneuver.
6. Needless to say, that pending delivery of the ruling on the recusal application, an administrative development intervened, deploying me to serve in another Division of the High Court effective 1st April, 2026. This administrative development raises a preliminary question for this Court and that is, whether there remains any purpose in rendering a decision on the recusal application or whether the application has been overtaken by events and rendered academic.
7. It is however, important to highlight that applications for recusal of a judge or judicial officer are an important safeguard within the administration of justice. Such applications have a nexus to the constitutional guarantee of a fair hearing as espoused in Article 50(1) of the Constitution, which guarantees every person the right to have disputes 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.
8. It is for that reason that courts have long maintained that justice must not only be done but must also be seen to be done. This principle was well articulated in **Rex v Sussex Justices, ex parte McCarthy, [1924] 1 KB 256, [1923] EWHC KB 1, [1924] KB 256 (1923-11-09)** and continues to guide

courts when dealing with allegations of bias. In that case, the learned Justices stated *inter alia*, as follows:

> ***"It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***

9. The present-day test for apparent bias was restated in **Porter v Magill, Porter v Magill [2001] UKHL 67 (13 December 2001)** where the House of Lords held that the question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there exists a real possibility that the tribunal is biased.
10. Courts have at the same time consistently cautioned that recusal applications should not be made lightly. In **Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451,** the Court held that a judge:

> ***"[W]ould be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."***

11. The Court observed that such applications for recusal of a judge must be grounded on substantial reasons and not on mere suspicion or dissatisfaction with judicial decisions.
12. Back home, the Court of appeal in **Kalpana H. Rawal v Judicial Service Commission and 2 others [2016] e KLR** citing the **East Africa Court of Justice** case of **AG of Kenya v Anyang Nyong'o Appeal No.5, Ref No. 1 of 2006** set out the test for bias as follows:

"We think the objective test of reasonable apprehension "is good law" the test is stated variously, but amounts to this: do the circumstances give raise to a reasonable apprehension, in the mind of the reasonably fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially "needless to say…"

13. Thus, a litigant who seeks the recusal of a Judge comes to court because of his own 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 a member of the public who is not only reasonable but also fair minded about the circumstance of the case.

14. The supreme Court in **Gladys Boss Sholei v JSC and Another [2018] e KLR** cited the case of **Simonson v General Motor Corporation USDCP 425 RSupp574,578(1978)** where it was stated that:

"Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a "duty to sit". From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge's duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manoeuvring by parties

hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the Newzeland court of appeal in Mnir-versusCommissioner of Inland Revenue(2007)3NZLR 495.

15. In **Rai & 3 others v Rai & 4 others (Petition 4 of 2012) [2013] KESC 20 (KLR) (6 February 2013) (Ruling) (with dissent - MK Ibrahim, SCJ),** the Supreme Court emphasized that while recusal may be necessary in appropriate circumstances to preserve public confidence in the judiciary, judges also have a duty to hear and determine matters assigned to them unless there are legitimate reasons requiring them to step aside. This has often been referred to as the *"duty to sit"* principle.

16. Thus, the administration of justice would be severely hampered if judges were to recuse themselves too readily or if litigants could, through repeated applications, influence which judicial officer hears their matter, because that judicial officer or judge appears to yield to their demands to decide the case their way.

17. In **Republic & 3 others v Cabinet Secretary for Transport & Infrastructure & 5 others Ex-Parte Kenya Country Bus Owners Association & 8 others [2014] eKLR**, the High Court cautioned that recusal applications should not be used as tactical devices designed to delay proceedings or avoid the consequences of court orders. In that case, the 3rd

Respondent, the National Transport & Safety Authority Board, applied for the judge's recusal after an adverse decision in a prior case (Judicial Review No. 2 of 2014) involving the same parties. The ex parte applicants and other respondents opposed the recusal, arguing that no reasonable grounds for bias existed and that the application was an abuse of process to delay proceedings. The court dismissed the recusal request, finding no valid apprehension of bias and noting that the application was made in bad faith after the adverse decision. That ruling emphasized principles of judicial impartiality and the importance of preventing forum shopping.

18. With those principles in mind, it is helpful to briefly consider the procedural history of this matter. The record shows that earlier in these proceedings another judge of this Court recused himself from hearing the matter. The recusal was recorded on the court file, though no reasons appear to have been provided. Those reasons remain confidential.

19. This Court further notes that the present proceedings arise in the context of pending enforcement of an order of contempt of court issued against one of the parties, Rosana Oscar Omurwa, who remains a contemnor as the contempt has not been purged and application after application by the said party have all been dismissed by the Judges who have handled this matter before I came into the picture.

20. It was also after I had dismissed an application seeking to set aside orders of the court made by another judge that I was asked to recuse myself in the

ensuing oral application for leave to appeal against that decision, the issue being that I did ask the party seeking leave as to whether the appeal was automatic or whether leave had to be obtained and after hearing the parties orally, I declined to grant such leave.

21. As seen above, contempt proceedings occupy a special place in the administration of justice. Their purpose is to uphold the authority of the court and ensure that court orders are obeyed.

22. From the material on record, since the issuance of the contempt order, the matter has taken several procedural turns. The effect of those developments has been that the issue of enforcement has remained unresolved while the substantive motion which gave rise to these proceedings has not been heard for more than four years now.

23. The delay in concluding the substantive notice of motion arises from the proceedings relating to the contempt of court orders and as a result, the matter has oscillated through a series of applications and procedural steps without bringing it any closer to final resolution.

24. While this Court does not at this stage intend to make any definitive finding regarding the intentions behind the various dismissed applications in the matter, it is evident that considerable judicial time and effort have been expended in litigating the contempt issue, with an appeal pending before the Court of Appeal but with no stay of any proceedings, while the substantive motion itself remains unheard. It is however, against that background that

the present recusal application came before the Court, filed by the interested party.

25. The relief sought is that I should desist from further conduct of this matter.

26. However, it is public knowledge that I have since been deployed to another Division of the Court and that I am no longer seized of future proceedings in this matter, from today.

27. The practical consequence of my subsequent deployment by the Chief Justice is that this matter will inevitably and automatically be placed before another judge for further appropriate directions.

28. In those circumstances, the central issue raised by the application, being, whether I should continue handling this matter, is dissipated. Courts exist to determine live disputes capable of producing practical consequences for the parties before them. Where intervening events render the relief sought unnecessary or incapable of implementation, the main issue becomes moot and academic.

29. In the present case, even if I was to consider the merits of the recusal application in detail and make a determination, which I am capable of doing, the outcome would not alter the current procedural reality as I will no longer preside over the case.

30. Simply put, the result sought by the Applicant/ interested party that I should not continue hearing the matter, has already been achieved by reason of my administrative deployment.

31. Furthermore, recusal applications are inherently forward-looking. Their purpose is to determine whether a judge or judicial officer should continue presiding over a case. Once circumstances arise that independently prevent the judge or judicial officer from doing so, the practical purpose of the application falls by the way.

32. In the circumstances now before this Court, the application dated 8th November, 2025 has been overtaken by events.

33. Accordingly, I make the following orders:

    a. ***The Applicant's application dated 8th November, 2025 seeking my recusal from further hearing this matter is hereby found to have been rendered moot and academic by the intervening administrative deployment to another Division of the Court of the Judge handling the matter.***
    b. ***The application dated 8th November, 2025 is hereby struck out.***
    c. ***The matter is now placed before the Presiding Judge of the Judicial Review Division to fix a date for further directions, including directions relating to the pending enforcement of contempt of court orders and the hearing of the substantive Judicial Review Motion.***
    d. ***I make no orders as to costs.***

Dated, Signed and Delivered at Nairobi this 9th Day of April, 2026

R. E. ABURILI

JUDGE