# Gachagua & 5 others v Maingi & 80 others (Civil Appeal E829 of 2024 & E022 of 2025 (Consolidated)) [2025] KECA 790 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 790 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E829 OF 2024 & E022 OF 2025 (CONSOLIDATED)**

**DK MUSINGA, M NGUGI & F TUIYOTT, JJA**

**MAY 9, 2025**

**BETWEEN**

**H.E RIGATHI GACHAGUA ........................................................ APPELLANT**

**AND**

**THOMAS KIMOTHO MAINGI .................................................. 1ST RESPONDENT**

**HON. JANE NJERI MAINA ...................................................... 2ND RESPONDENT**

**DAVID MUNYI MATHENGE .................................................... 3RD RESPONDENT**

**PETER GICHOBI KAMOTHO .................................................. 4TH RESPONDENT**

**GRACE MUTHONI MWANGI .................................................. 5TH RESPONDENT**

**CLEMENT MUCHIRI MURIUKI .............................................. 6TH RESPONDENT**

**EDWIN MUNENE KARIUKI .................................................... 7TH RESPONDENT**

**SHERIA MTAANI NA SHADRACK WAMBUI ........................ 8TH RESPONDENT**

**FATHER EDDIE WAIGURU ..................................................... 9TH RESPONDENT**

**ANTHONY MWITHAGA ........................................................ 10TH RESPONDENT**

**VICTOR NGATIA ..................................................................... 11TH RESPONDENT**

**ASSUMPTA WANGUI MUIRURI ............................................ 12TH RESPONDENT**

**CHRISTINE MUKAMI NJUGUNA .......................................... 13TH RESPONDENT**

**PETER KIMANI KOIRA ......................................................... 14TH RESPONDENT**

**ALICE WAMUHU MBUGUA .................................................. 15TH RESPONDENT**

**MWANGI MANYEKI ............................................................... 16TH RESPONDENT**

**MBUGUA WA MUMBI ............................................................ 17TH RESPONDENT**

**KIGO KAHARI ............ 18TH RESPONDENT**

**PRISCILLAH WAMBUI GITARI ............ 19TH RESPONDENT**

**F. MUCHIRI NGATIA ............ 20TH RESPONDENT**

**MARIA NJERI ............ 21ST RESPONDENT**

**ERICK WARUI MWANIKI ............ 22ND RESPONDENT**

**BRIAN HUNJA ............ 23RD RESPONDENT**

**MARGARET WANJIRA ............ 24TH RESPONDENT**

**SERAH MUMBI N ............ 25TH RESPONDENT**

**SAMUEL NJENGA ............ 26TH RESPONDENT**

**HEBRON GAKIRU ............ 27TH RESPONDENT**

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**GEMA WATHO ASSOCIATION ............ 40TH RESPONDENT**

**BERNARD WANGOMBE KIRUGUMI ............ 41ST RESPONDENT**

**MORARA OMOKE ............ 42ND RESPONDENT**

**DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY ......... 43RD RESPONDENT**

**HON. MWENGI MUTUSE ............ 44TH RESPONDENT**

**THE SPEAKER OF THE NATIONAL ASSEMBLY OF KENYA ............ 45TH RESPONDENT**

**THE NATIONAL ASSEMBLY OF KENYA ............ 46TH RESPONDENT**

**THE SPEAKER OF THE SENATE OF KENYA ............ 47TH RESPONDENT**

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**THE HON. ATTORNEY GENERAL ........................................ 49TH RESPONDENT**

**H.E. WILLIAM RUTO ................................................................ 50TH RESPONDENT**

**THE LAW SOCIETY OF KENYA ............................................. 51ST RESPONDENT**

**KITHURE KINDIKI .................................................................. 52ND RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 53RD RESPONDENT**

**DR. JOHN KHAMINWA ........................................................... 54TH RESPONDENT**

**KITUO CHA SHERIA ................................................................ 55TH RESPONDENT**

**MT. KENYA JURISTS ASSOCIATION .................................... 56TH RESPONDENT**

**KATIBA INSTITUTE ................................................................ 57TH RESPONDENT**

**JUBILEE PARTY OF KENYA .................................................... 58TH RESPONDENT**

**WIPER DEMOCRATIC PARTY ................................................ 59TH RESPONDENT**

**UNITED DEMOCRATIC ALLIANCE .................................... 60TH RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT ................................ 61ST RESPONDENT**

**KENYA KWANZA ALLIANCE ................................................. 62ND RESPONDENT**

**FORD KENYA PARTY .............................................................. 63RD RESPONDENT**

**AMANI NATIONAL CONGRESS ............................................ 64TH RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES ................................. 65TH RESPONDENT**

**DR. CLARENCE EBOSO MWERESA ...................................... 66TH RESPONDENT**

**WANJIRU MWANGI ................................................................. 67TH RESPONDENT**

**AS CONSOLIDATED WITH**

**CIVIL APPEAL E022 OF 2025**

**BETWEEN**

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***(Being an appeal the whole of the ruling/decision and orders of the High Court at Nairobi by E. Ogola, A. Mrima and F. Mugambi, JJ., issued on 23rd October 2024 in Nairobi High Court Constitutional Petition No. E565 of 2024 as***

## JUDGMENT

1. *The Constitution* under Article 50(1) guarantees every person 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. The right to a fair hearing comprises several elements, including a litigant's entitlement to be heard by a competent, independent, and impartial court or tribunal. Competence, in this context, refers to the court's legal authority, jurisdiction, and capacity to adjudicate matters properly before it. An improperly empaneled court may compromise its jurisdiction. Equally fundamental is the expectation that judges and judicial officers will conduct proceedings free from bias, conflicts of interest, or external influence; that is, with impartiality.

2. At the core of these two appeals, which emanate from two separate decisions of the High Court, is the question whether the three- judge bench of the High Court was properly constituted as to vest upon it proper jurisdiction to hear and determine the matters before it; and secondly, the question whether the appellants' right to fair hearing was violated when the three-judge bench declined to recuse itself on grounds of bias and conflict of interest said to have had an impact on the judges' impartiality.

3. Civil Appeal No. E829 of 2024, which was the first in time, is an appeal from the ruling delivered on 23rd October 2024 in Nairobi High Court Constitutional Petition No. E565 of 2024 as consolidated with Kerugoya Constitutional Petitions Nos. E013 of 2024, E014 of 2024 and E015 of 2024. In this ruling, the three-judge bench of the High Court held that the Hon. Deputy Chief Justice Philomena Mbete Mwilu (hereinafter referred to as "the Hon. DCJ") had power under *the Constitution* to empanel the three-judge bench to hear the petitions related to the impeachment of H.E. Rigathi Gachagua, who was then the Deputy President of the Republic of Kenya.

4. The second appeal, to wit, Civil Appeal No. E022 of 2025, is an appeal arising from the ruling delivered by the same bench on 25th October 2024 in Constitutional Petition Nos. E565 of 2024 & Petition E013 (Kerugoya), E014, E015, E550 (Nrb), E570 & E572 of 2024 (Consolidated). This was an application seeking recusal of the learned judges on grounds of bias and conflict of interest. The learned judges declined to recuse themselves, holding that there was no compelling evidence to support the claims against any of them.

5. Although the decisions of the High Court, which are the subject matter of these appeals, were delivered on different dates, the two appeals raise inter-twinned issues which may have an implication on the competence of the three-judge bench to hear and determine the petitions pending before it. Parties therefore agreed to have the two appeals consolidated. This judgment therefore applies in respect to the two appeals.

6. Aside from the consolidated appeals raising interrelated issues, they share a common background which we proceed to set out as hereunder.

### Background

7. In the general election of 9th August 2022, H.E. Rigathi Gachagua was elected Deputy President alongside H.E. William Ruto as President. Their election was validated by the Supreme Court on 5th September 2022, paving the way for their swearing-in on 13th September 2022.

8. While it was expected that the duo would serve together for a full term under Articles 142(1) and 148(6) of *the Constitution*, their working relationship quickly deteriorated, leading to the introduction of an impeachment motion against H.E. Gachagua.

9. On 1st October 2024, Hon. Mwengi Mutuse, Member of the National Assembly for Kibwezi West Constituency, introduced a motion in the National Assembly pursuant to the provisions of Article 145 as read together with Article 150 of *the Constitution*, seeking to impeach H.E. Gachagua. He cited 11 charges, including corruption, incitement, and undermining government policies. After debate on 8th October 2024, the motion passed with 281 Members of the National Assembly voting in favor, 44 against, and one abstaining, surpassing the required two-thirds majority threshold.

10. Pursuant to Article 145(2) of *the Constitution*, the National Assembly's resolution to impeach H.E. Gachagua was communicated to the Speaker of the Senate for investigation and hearing, as outlined in Article 145(4) of *the Constitution*. It is important to note that as the impeachment process was ongoing in Parliament, several constitutional petitions were filed by H.E. Gachagua and other Kenyan citizens at the High Court in Nairobi, challenging the constitutionality of the impeachment proceedings. These included, Petitions Nos. E522/2024, E509/2024, E537/2024, E528/2024, E524/2024, and E506/2024. The petitioners had, contemporaneous with the petitions, filed applications seeking various conservatory orders. On 11th October 2024, the High Court (LN. Mugambi, J.) recognizing the significant public interest surrounding the impeachment and the substantial questions of law raised, issued orders under Article 165(4) of *the Constitution*, referring the petitions to the Chief Justice for the empanelment of an expanded bench, the lead file being Petition No. E522/2024.

11. On 14th October 2024, the Chief Justice appointed a three-judge bench comprising of Ogola, Mrima, & Dr. Mugambi, JJ. to hear the said Petitions E522/2024; E509/2024; E537/2024; E528/2024; E524/2024 and E506/2024.

12. Vide a separate Constitutional Petition filed at the High Court in Nairobi, to wit, Petition E550 of 2024, H.E. Gachagua sought to challenge the decision by the National Assembly to pass the motion to impeach him. The grounds in support of the petition included violation of his right to fair hearing and public participation, among others. Contemporaneous with the petition, H.E. Gachagua filed an application seeking, inter alia, a conservatory order restraining the Senate from proceeding with the impeachment hearings scheduled for 16th, 17th and 18th October 2024 until determination of the petition.

13. Mwita, J. considered the application and, in a ruling delivered on 15th October 2024, declined to grant the conservatory orders sought. The judge observed that the issues raised in the petition were closely aligned with those in Petition No. E522 of 2024, which had been certified for assignment of a bench comprising an uneven number of judges. As a result, he certified this petition as raising substantial questions of law and public interest under Article 165(4) of *the Constitution*. He directed that the file be placed before the Chief Justice for consideration of the appointment of an uneven number of judges to hear the petition. In light of the similar issues, the Chief Justice was also invited to decide whether this petition should be heard by the same bench designated for Petition E522 of 2024.

14. Following the empanelment of a three-judge bench by the Chief Justice to hear Petitions E522/2024, E509/2024, E537/2024, E528/2024, E524/2024, and E506/2024, the parties appeared before the bench on 15th October 2024 for the hearing of various applications, including one seeking a conservatory order to restrain the Senate from commencing impeachment hearings on 16th October 2024. The court issued a ruling on the morning of 16th October 2024, declining to grant the interim orders sought. As a result, with no conservatory orders in place, the Senate proceeded with its hearings.

15. The Senate began its hearings as gazetted by the Speaker, after which a vote was held pursuant to Article 145(7) of *the Constitution*. A majority of Senators voted in favor of five out of the eleven impeachment charges against H.E. Gachagua. These charges included gross violations of *the Constitution*, threatening judges, and engaging in ethnically divisive politics.

16. After the Senate approved H.E. Gachagua's impeachment, the Speaker of the Senate communicated the decision to the public through Gazette Notice CXXVI-No. 170 on 17th October 2024. In response, H.E. William Ruto, the President, nominated Kithure Kindiki (Prof.), the then Cabinet Secretary for the Ministry of Interior and National Administration, to fill the vacant position of Deputy President. On the morning of 18th October 2024, the National Assembly convened to consider Prof. Kindiki's nomination. The Speaker of the National Assembly, through Gazette Notice CXXVI-No. 171 on the same day, informed the public that the National Assembly had voted in favor of the nomination of Kithure Kindiki (Prof.) to fill the vacancy in the Office of the Deputy President of the Republic of Kenya.

17. Two significant court developments occurred on 18th October 2024, the same day the National Assembly voted in favour of Kithure Kindiki (Prof.) to fill the vacancy in the Office of the Deputy President of the Republic of Kenya. The first was in regard to Petition No. E565 of 2024, Rigathi Gachagua vs. State Law Office & 4 Others, an earlier petition and application filed by H.E. Gachagua on 8th October 2024. The petition came before Mwita, J. for directions, and on the same day, the judge issued an ex parte temporary order halting Gachagua's removal from office pending further hearings. The court made three key orders: First, the pleadings were to be served immediately, with responses required within three days of service; second, recognizing the significance of the issues raised, the judge certified the petition as presenting substantial questions of law and public interest, and thus, suitable for hearing by a bench of an uneven number of judges to be assigned by the Chief Justice. The file was to be forwarded to the Chief Justice for consideration. Third, given the urgency and importance of the matters raised, a conservatory order was issued, staying the Senate's resolution to uphold the impeachment charges against the Deputy President, as well as the appointment of his replacement. This order was to remain in effect until 24th October 2024, when the matter would be mentioned before the appointed bench for further directions.

18. The second court development on 18th October 2024 arose from a separate petition filed at the Kerugoya High Court, Petition No. E015 of 2024 – Hon. David Mathenge & Others v. The National Assembly & Others, which sought, among other reliefs, orders restraining Kithure Kindiki (Prof.) from assuming office as Deputy President. Mwongo, J. certified the petition as raising matters of great national importance and urgency, with substantial legal questions, warranting the empanelment of a High Court bench of an uneven number of judges. Accordingly, the file was to be placed before the Chief Justice for the appointment of such a bench. Further, the court issued conservatory orders preventing implementation of the Senate's resolution, specifically restraining any person, including the second interested party appointed by the President and approved by the National Assembly, from assuming the office of Deputy President. The matter was scheduled for mention on 24th October 2024 before the bench which was to be appointed by the Chief Justice.

19. Following an application made by the Hon. Attorney General seeking the lifting of the ex-parte conservatory orders, the three- judge bench of the High Court (Ogola, Mrima, & Mugambi, JJ.), vide a ruling delivered on 31st October 2024, lifted the conservatory orders issued by the High Court at Kerugoya (the conservatory orders issued by Mwita, J. having already lapsed), thereby allowing the

swearing-in of Kithure Kindiki (Prof.) as Deputy President. In discharging the conservatory orders, the three-judge bench held in part thus:

> "Allowing these orders to stand would leave the office of the Deputy President vacant. The problem, however, is that no other person is authorized to carry out the constitutional functions specifically assigned to the Deputy President under Article 147(2), once those assigned by the President revert to the President in the absence of an officeholder. The result would be a de facto suspension of Article 147(2) of *the Constitution*— an outcome that no Court should knowingly permit...Drawing from the above, we hereby find and hold that public interest in this matter favours giving way to *the Constitution*, which in any event is the will of the people. That is also the dictate under Article 3 of the 2010 Constitution where every person has an obligation to respect, uphold and defend *the Constitution*. We choose to abide by that calling. As such, public interest demands that the office of the Deputy President should not remain vacant."

20. On 1st November 2024, Kithure Kindiki (Prof.) was officially sworn in as the Deputy President of Kenya, succeeding H.E. Gachagua.

**The High Court Proceedings Challenging Empanelment Of A Three-judge Bench By The Hon. DCJ**

21. The proceedings challenging the empanelment of a three-judge bench by the Hon. DCJ were brought in Kerugoya Petition No. E015 of 2024. Vide a Notice of Motion dated 22nd October 2024, the petitioners in the said matter challenged the Hon. DCJ's authority to empanel a bench under Article 165(4) of *the Constitution*. The empaneled bench comprised Justices Ogola, Mrima, and Mugambi. They argued that only the Chief Justice has the constitutional mandate to constitute such a bench. They further sought to quash the Hon. DCJ's decision to assign only 3 out of 10 related impeachment cases to the said bench. The petitioners alleged that the Hon. DCJ's actions violated multiple constitutional provisions, including Articles 25, 27, 47, 48, and 50, and raised questions about the impartiality of the assigned judges. As an alternative, they contended that the Hon. DCJ could only act with such authority after being formally sworn in as Acting Chief Justice pursuant to Articles 74 and 259(3)(b) and relevant provisions of the *Judicial Service Act*.

22. Their complaint stemmed from events following the filing of the petition on 18th October 2024, when Mwongo, J. issued conservatory orders and referred the matter to the Chief Justice for empanelment. Unexpectedly, the applicants received a court direction the next day (Saturday, 19th October 2024) from the three-judge bench in Nairobi, listing several applications for inter- partes hearing on 22nd October 2024. This bench had allegedly been constituted by the Hon. DCJ on the night of 18th October.

23. For clarity, the order issued by the three-judge bench on Saturday, 19th October 2024, in relation to Kerugoya High Court Petition No. E015 of 2024 is partially reproduced below:

> "This matter coming up on 19th October 2024 for directions on the Notice of Motion dated 18th October 2024 before Honourable Justice E. Ogola, Justice A. Mrima and Lady Justice Dr. Freda Mugambi. upon considering the pleadings and supporting affidavit,
>
> It is hereby ordered:
>
> 1. That in light of the urgency of the matter and the weighty issues raised therein, we direct that the application be served and responded to forthwith, for hearing inter-partes on Tuesday 22nd October 2024 at 11.00am in open court No. 18.

given under the hand and seal of the Honourable court this 19th October 2024.

Signed By: Hon. Lady Justice Dr. Githiru Freda Mugambi"

24. On the same date (Saturday, 19th October 2024) the bench issued similar orders in respect of Nairobi High Court Petition No. E565 of 2024- Rigathi Gachagua vs. State Law Office & 4 Others.

25. The petitioners took issue with the selective assignment of only 3 cases for expedited hearing, arguing that it reflected bias in favor of the government and key state organs. They asserted that no urgent or exceptional reasons justified the Saturday sitting, and that such sittings could only be authorized by the Chief Justice under the *High Court (Organization and Administration) Act*. They expressed concern that other cases, filed earlier, had been sidelined, which they believed indicated partiality and undermined judicial fairness.

26. H.E. Gachagua, through counsel, opposed the bench's directions of 19th October 2024, which consolidated his Petition No. E565 of 2024 with others and scheduled them for hearing without notifying his legal team. He argued that the bench was not authorized to hear his matter, having been constituted for unrelated petitions (E522 of 2024 series), and criticized the prioritization of later-filed cases over his. He viewed this as procedurally irregular and indicative of bias. Other parties, through counsel, supported the application, stressing that only the Chief Justice has constitutional authority to empanel a bench.

27. Opposing the application, counsel for various parties including SC Githu Muigai, SC Prof. Tom Ojienda, Mr. Nyamodi, Mr. Gumbo, Mr. Wanyama, among others argued that there is no express constitutional or statutory prohibition against the Hon. DCJ empaneling a bench in the absence of the Chief Justice. Citing Article 161(2)(b) of *the Constitution* and section 5 (3) and (4) of the *Judicial Service Act*, they maintained that the Hon. DCJ, as Deputy Head of the Judiciary, is empowered to act in the Chief Justice's stead, especially when the Chief Justice is unavailable. They added that if the Hon. DCJ can perform functions such as swearing in a President or appointing a tribunal, she can also assign a bench. Further, they noted that while the Chief Justice holds multiple roles, the Hon. DCJ deputizes in all except as Chairperson of the Judicial Service Commission. They urged the court to be persuaded by the decision in Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties) [2021] eKLR.

28. After hearing all parties and considering their submissions, the three-judge bench delivered its ruling on 23rd October 2024. The court framed three key issues for determination: the applicable principles for interpreting *the Constitution* and relevant statutes; whether the Hon. DCJ has the authority to assign judges under Article 165(4) of *the Constitution*; and other ancillary issues raised in the application.

29. On the question of constitutional and statutory interpretation, the court held that *the Constitution* prescribes its own interpretive framework under Articles 20(4) and 259(1). Article 20(4) requires courts to interpret the Bill of Rights in a manner that promotes the values of an open and democratic society based on human dignity, equality, equity, and freedom. Article 259(1) mandates that *the Constitution* be interpreted to promote its purposes, values, and principles; advance the rule of law and human rights; permit legal development; and foster good governance. The court underscored the doctrine of living constitutionalism, which views *the Constitution* as a dynamic, evolving document that must be interpreted in light of contemporary realities and societal changes, consistent with the principle that "the law is always speaking".

30. In relation to the Hon. DCJ's powers to empanel a bench, the three-judge bench observed that courts have taken fundamentally opposing views on the issue. One viewpoint asserts that the assignment

of judges is a constitutional duty solely vested in the Chief Justice, meaning the Hon. DCJ lacks authority to assign judges under Article 165(4). The other perspective is that, while *the Constitution* mandates the assignment of judges, this is an administrative task, which the Hon. DCJ is authorized to undertake. The court reviewed several past key decisions on the matter, including Kenya Medical Research Institute v Attorney General & 3 Others [2014] eKLR, Leina Konchellah & Others v Chief Justice and President of the Supreme Court of Kenya & Others; Speaker of National Assembly & Others (Interested Parties) [2021] eKLR, and *Okoiti v Judicial Service Commission & Another; Mwilu & Another (Interested Parties) (Constitutional Petition E408 of 2020*) [2021] KEHC 421 (KLR).

31. The court examined the terms 'administrative act' and 'judicial act' as defined in Black's Law Dictionary and the decision in Royal Aquarium and Summer and Winter Garden Society Vs. Parkinson 1892 1QB 431. From the definitions, the court concluded that the Chief Justice's constitutional mandate could encompass judicial, administrative, or political functions. Specifically, the court determined that the duty of assigning judges under Article 165(4) of *the Constitution* is an administrative function.

32. After reviewing Articles 161, 163, 165(4), and 171 of *the Constitution* and section 5 of the *Judicial Service Act*, the court held that the Chief Justice's role in assigning benches could be delegated to the Hon. DCJ when the Chief Justice is unable to perform the task for valid reasons. The court emphasized the constitutional design for the Hon. DCJ to act as the Deputy Head of the Judiciary and Vice-President of the Supreme Court, though not in the Judicial Service Commission. It further affirmed that the Hon. DCJ may exercise the powers under Article 165(4) when acting in an interim or auxiliary capacity.

33. In the end, the bench held as follows as regards the issue of empanelment:

> "To us, it is beyond peradventure that the Hon. DCJ can assign Judges under Article 165(4) of *the Constitution* whenever he/she is discharging any of the constitutional functions on behalf of the Hon. Chief Justice. In this case, we do not find any fault in the Hon. DCJ assigning Judges to sit in this bench more so when the Hon. Chief Justice has not raised any red flag."

34. Regarding the allegations of the court's improper sitting on a Saturday, the court provided a chronology of petitions and applications filed before the Chief Justice's empanelment of the bench, including subsequent orders issued by various courts. The court noted that the applicants failed to mention that the court had been convened in response to petitions filed by the respondents (National Assembly, Senate, President William Ruto, and the Attorney General) in cases E565/24 and E015/24, and not suo motu. The court also addressed the applicants' reference to the Saturday session as a 'sitting', clarifying that since the COVID-19 pandemic and the introduction of the Court Tracking System (CTS), the practice of handling urgent matters had evolved, as outlined in Practice Direction 19(a) of the High Court Practice Directions (January 2022). Consequently, the court found no irregularity in the Saturday session and held that the applicants' accusations were entirely without merit.

35. In the end, the court observed that the proceedings before it raised enormous public interest and it was in the interest of the public that the said proceedings be heard and finalized expeditiously. The applicant's notice of motion dated 22nd October 2024 was thereby disallowed, with an order that costs be in the cause. Leave to appeal was also granted.

**The Appeal Against The Empanelment Decision: Civil Appeal No. E829 OF 2024**

36. Dissatisfied with the ruling by the three-judge bench, H.E. Gachagua preferred the instant appeal. His Amended Memorandum of Appeal dated 8th November 2024 contains nine grounds of appeal. He contends that the High Court erred in law: in holding that the Chief Justice's constitutional power to empanel judges under Article 165(4) of *the Constitution* is an "administrative function" that the Hon. DCJ could dabble in; in finding, on the facts of this case, that the Hon. DCJ validly empanelled the bench on 18th October 2024 without proof that the Chief Justice was "for good reason unable to perform" that function, the Chief Justice having, four days earlier on 14th October 2024, empanelled a bench for six related matters; in basing its decision, contrary to Article 2(4) of *the Constitution*, on the Chief Justice's alleged acquiescence or failure to raise "any red flag"; and in holding that the Hon. DCJ could assign judges under Article 165(4) of *the Constitution* when discharging constitutional functions "on behalf of the Chief Justice" without evidence that the Chief Justice had assigned the Hon. DCJ the duty to empanel judges to benches.

37. The High Court is further faulted for: ignoring the evidence, pleadings, and submissions that the Hon. DCJ's decision to usurp the Chief Justice's mandate and to empanel the bench late into the night of Friday, 18th October 2024 (and the bench's subsequent sitting on Saturday 19th October 2024 outside official court hours) had raised fairness concerns contrary to Article 50 of *the Constitution*; making a costs order in proceedings it had found to "raise enormous public interest" and to be "of paramount concern to the citizens of this country"; digressing from the matters and facts before it as presented by the litigants for determination in the application by making disparaging remarks against the counsel appearing in the matter without affording the parties or those counsel an opportunity to be heard, thus offending Article 50 of *the Constitution*; straying into the merits of the main dispute that was pending before it, thus pre-judging the dispute and upsetting the stage for a fair determination of the matter; and in ignoring and disregarding the evidence, pleadings, and submissions that the court, considering the Kerugoya application, had allowed the request for the Chief Justice to appoint a bench of at least five judges.

38. The orders sought are that this appeal be allowed; the ruling of 23rd October 2024 be and is reversed;- The ruling be and is substituted with an order allowing the application dated 22nd October 2024; an order does issue remitting the High Court proceedings to the Chief Justice to empanel, under Article 165(4), an expanded bench of five judges to hear the pending petitions; such bench to exclude Ogola, Mrima, & Mugambi, JJ., and there be no order as to costs, considering the public interest in this matter.

**The High Court Proceedings Calling For The Recusal Of The Three-judge Bench**

39. Following orders issued by Mwongo, J. on 18th October 2024 in Kerugoya High Court Petition No. E015 of 2024, specifically that the file be placed before the Hon. Chief Justice for empanelment of a bench, the Hon. DCJ constituted a three-judge bench comprising Ogola, Mrima, and Mugambi, JJ. On 19th October 2024, a Saturday, the bench issued directions, citing the urgency and gravity of the matter, that the application be served and responded to immediately, with an inter-partes hearing scheduled for Tuesday, 22nd October 2024.

40. These developments prompted the filing of an application dated 21st October 2024 by Hon. David Munyi Mathenge and four others in Petition No. E015 of 2024. The applicants expressed concern that, contrary to their expectation of appearing before a bench appointed by the Hon. Chief Justice as directed by Mwongo, J., they were instead served, without notice, with an order issued by a bench constituted by the Hon. DCJ. They questioned the propriety of the file being placed before that bench on a Saturday without evidence of express authorization by the Chief Justice, arguing that this

undermined constitutionally mandated procedures, and raised legitimate doubts about the court's impartiality.

41. Further, the applicants pointed to perceived inconsistencies in the handling of related matters. While the same bench had declined to grant an earlier mention date for Nairobi Petition No. E522 of 2024 (filed by H.E. Gachagua) despite a request on 16th October 2024, it nonetheless issued a hearing date of 22nd October 2024 for Petitions E015 and E565 of 2024, both filed thereafter. This, they argued, reflected procedural irregularities and preferential treatment that violated their right to a fair hearing.

42. In conclusion, the applicants contended that the conduct of the three judges in managing Petition No. E015 of 2024 and related matters fell short of the standard of impartiality required of judicial officers. They urged the judges to recuse themselves in order to safeguard the rights of the parties and uphold public confidence in the integrity of the court.

43. A second recusal application, dated 22nd October 2024, echoed the concerns raised in the earlier application of 21st October 2024, while introducing further allegations of judicial bias. In addition to objections regarding the bench's Saturday sitting, the applicant claimed that certain judges had undisclosed personal ties to key figures. It was claimed that Justice Mrima was a close associate of Prof. Kithure Kindiki, the proposed Deputy President, and a long-time friend of Senate Speaker, Hon. Amason Kingi; that Justice Ogola's impartiality was compromised due to his spouse's appointment to the Kenya Water Towers Board by the President, who had nominated Prof. Kindiki; and that Justice Mugambi had previously studied under Prof. Kindiki during her LL.M. studies at Moi University.

44. To support these claims, the applicant attached a gazette notice of the appointment of Justice Ogola' spouse, photographs of Justice Mrima with the Senate Speaker at a wedding, and a tweet by Senior Counsel Ahmednassir Abdullahi suggesting the bench was constituted with a predetermined agenda. The applicants sought recusal of the three judges, and requested that the Hon. Chief Justice empanel a new bench. They argued that the petitions raised weighty constitutional issues requiring the highest standard of judicial impartiality, and that public confidence in the court's integrity was at stake.

45. The various parties in support of the two applications argued that the matter before the bench involved significant constitutional issues that necessitated public confidence in the judiciary. They expressed concerns that the bench could be biased, potentially compromising its ability to render a fair and impartial determination.

46. Several parties, including the Hon. Attorney General, the National Assembly, the Senate, and their respective Speakers opposed the recusal applications. They contended that the applications failed to meet the legal threshold for judicial disqualification. The Hon. Attorney General contended that no reasonable basis had been shown to conclude that a fair-minded and informed observer would apprehend bias by the bench. Citing Attorney General of Kenya vs. Anyang Nyong'o, App. No. 5 Ref No.1 of 2006 and Republic vs. Independent Electoral and Boundaries Commission and 3 others Ex-parte Wavinya Ndeti (2017) eKLR, it was argued that suspicion or sensitivity on the part of an applicant was insufficient to justify recusal, a position echoed in Philip K. Tunoi & another vs. Judicial Service Commission [2016] eKLR. The National Assembly further on its part contended that none of the grounds under the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Legal Notice No. 102 of 2020) had been demonstrated. In support, they cited National Oil Corporation of Kenya vs. Real Energy Kenya Ltd [2017] eKLR, arguing that the events of 19th October 2024, referred to by the applicants as a "sitting," were administrative in nature and did not justify recusal.

47. It was further emphasized that the bench had not issued any substantive rulings, and that public confidence in the judiciary required judges to discharge their duties unless clear grounds for recusal

existed. This principle was supported by references to Dobbs vs. Tridios Bank NV [2005] EWCA 468 and Gladys Boss Shollei vs. Judicial Service Commission & another [2018] eKLR. The respondents dismissed allegations of personal relationships between judges and key parties, asserting that social or professional associations do not automatically undermine judicial impartiality. Regarding the appointment of Justice Ogola's spouse, it was clarified that the appointment was made by the Cabinet Secretary, not the President, and did not create a conflict of interest. They also argued that the issue of the Saturday sitting had already been conclusively addressed in the court's ruling of 23rd October 2024 and was now res judicata. In conclusion, the respondents urged the court to dismiss the applications for lack of merit and allow the main petitions to proceed for determination on their merits.

48. In its ruling dated 25th October 2024, the court identified four key issues for determination: the concept of recusal, bias and impartiality as grounds for recusal, the applicable threshold, and whether the applications were merited. Citing Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2013] eKLR, the court emphasized that recusal safeguards the integrity of justice and the rule of law by ensuring that judicial officers remain impartial. On bias, the court distinguished between actual and perceived bias, applying the presumption of impartiality principle from President of the Republic of South Africa vs. South African Rugby Football Union & Others (CCT 16/98), and reiterating that recusal should not be used as a shield against discomfort, as noted in Dobbs vs. Tridios Bank NV (supra).

49. On the threshold for recusal, the court adopted the objective test, whether a reasonable and informed observer would apprehend bias, referencing Saxmere Company Ltd vs. Wool Board Disestablishment Company Ltd [2009] NZSC 72 and Harb vs. HRH Prince Abdul Aziz [2016] EWCA Civ 556, both of which cautioned that litigants' subjective perceptions are not decisive. As for the allegations surrounding the court's Saturday "sitting," the court held that the matter had already been conclusively addressed in its ruling of 23rd October 2024 and was now res judicata, with any further recourse lying only through an appeal.

50. The court dismissed the claims concerning the judges' associations with political figures, holding that social or professional relationships, without credible evidence of a direct impact on impartiality, do not meet the threshold for recusal. It reiterated that speculation or suspicion is insufficient; a clear, reasonable link between the alleged association and the judge's ability to adjudicate fairly must be shown, and that no such link had been demonstrated by the applicants.

51. In particular, the court found no evidence of an ongoing relationship between Mrima, J. and the Speaker of the Senate, noting that the only cited interaction occurred three years prior, diminishing any legitimate apprehension of bias. The court also rebuked the applicants' counsel for irresponsibly making and later retracting false allegations against Mrima, J. and Mugambi, J., describing the conduct as a serious lapse in professionalism and a misuse of judicial process aimed at discrediting the bench.

52. As for the claim regarding Justice Ogola's spouse's appointment to a public board, the court held that the allegation was unsubstantiated. No proof of familial connection was provided, and the appointment, which was made by a Cabinet Secretary over three years prior, was legally and temporally remote. The court emphasized that judges' family members are entitled to public service careers and that such appointments, without more, do not compromise judicial impartiality.

53. Ultimately, the court found that the applicants had failed to present credible evidence warranting the recusal of the learned judges. As a result, both applications were deemed unmeritorious and were dismissed.

**The Appeal Against The Recusal Decision: Civil Appeal No. E022 OF 2025**

54. Hon. David Munyi Mathenge, Peter Gichobi Kimotho, Muthoni Mwangi, Clement Muchiri Muriuki, and Edwin Munene Kariuki, being dissatisfied with the ruling delivered on 25th October 2024 in Milimani High Court Constitution Petition No. E565 of 2024 as consolidated with Kerugoya Petition No. E031 of 2024, E014 of 2024; E015 of 2024 and Nairobi Petition No. E550 of 2024, E570 of 2024 and E572 of 2024, preferred this appeal.

55. Their Memorandum of Appeal dated 13th January 2025 contains 12 grounds of appeal. They contend that the High Court erred in law and in fact by: purporting to raise the burden of proof in recusal applications so high as to defeat the applications even where real and apparent bias is demonstrated, thus permitting judges to decline to recuse themselves in the face of real bias; holding that there existed no long-standing relationship between Mrima J. and the Speaker of the Senate, despite the Speaker of the Senate's confirmation of such relationship on his Twitter handle; preempting the outcome of recusal applications in its ruling on 23rd October 2024 before hearing parties, thus denying them the right to a fair hearing contrary to *the Constitution*.

56. The other grounds of appeal are: failing to comprehend the import and consequences of non-recusal in such a high-profile public interest case, where their impartiality was under question; failing to take into account the appellants' submissions; suo moto importing an instance where Mrima J. received an award from one of the parties in purporting to justify non-recusal while the two instances were completely different as the learned judge had received a gift on behalf of the judiciary and not on his own behalf as was the case in this matter, where Justice Mrima received a wedding gift from one of the parties; and failing to consider an oral application for extension of orders issued by Mwita, J. on 18th October 2024 pending determination of recusal applications, and instead displayed absolute bias in considering the respondent's assertions that the applicants could not seek extension of orders from the same bench they sought to recuse themselves.

57. The orders sought are that this appeal be allowed and that the impugned ruling be set aside and substituted with a decision of this Court allowing the application dated 12th October 2024 seeking recusal of the three judges. The appellants further urge that they be awarded the costs of this appeal.

**The Submissions Made In The Two Consolidated Appeals**

58. At the hearing of the consolidated appeals, H.E. Gachagua was represented by Mr. Paul Muite, Senior Counsel (SC), along with learned counsel Elisha Ongoya, Victor Swanya Ogeto, Tom Macharia, Dudley Ochiel, Faith Waigwa, Willies Echesa, and John Njomo. Thomas Kimotho Maingi was represented by learned counsel Ms. Teresia Kimotho, while Hon. Jane Njeri Maina was represented by learned counsel Mr. George Sakimpa and Mr. Muge. Learned counsel Mr. Ogada appeared for Hon. David Munyi Mathenge, Peter Gichobi Kamotho, Grace Muthoni Mwangi, Clement Muchiri Muriuki, and Edwin Munene Kariuki. Additionally, learned counsel Mr. Kibe Mungai represented the 9th to 41st respondents in E829 of 2024. Learned counsel Mr. Obura and Mr. Muchemi appeared for Hon. Mwengi Mutuse, while learned counsel Mr. Peter Wanyama and Mr. Kuiyoni represented the Speaker of the National Assembly. Representing the National Assembly of Kenya were learned counsels Mr. Nyamodi, Mr. Gumbo and Ms. Debra Ochola, whereas the Senate of Kenya was represented by Prof. Tom Ojienda, SC, alongside learned counsel Mr. Mukele and Ms. Opiyo. The Law Society of Kenya was represented by learned counsel Mr. Michuki, while learned counsel Dr. Muthomi Thiankolu, Mr. Kipkogei, Mr. Melly, and Mr. Steve Ogola appeared for Prof. Kithure Kindiki. Learned counsel Mr. Nura represented the Independent Electoral and Boundaries Commission, whereas learned counsel Mr. Ndegwa Njiru appeared for Mt. Kenya Jurists Association. The Hon. Attorney

General was represented by learned counsel Mr. Bitta, while Dr. Khaminwa appeared for Kituo Cha Sheria, and Dr. Kamotho represented the United Democratic Alliance.

59. We acknowledge that while some counsel argued the consolidated appeals jointly, others presented their submissions separately over the two hearing days, that is, on 24th and 25th February 2025. For clarity and coherence in this judgment, we shall address the submissions in each appeal separately, beginning with the appeal challenging the empanelment of the bench by the Hon. DCJ.

**Submissions Made In The Appeal Challenging The Decision On The Empanelment Of The Bench By The Hon. DCJ (Civil Appeal No. E829 Of 2024)**

60. Mr. Muite, SC in his oral submissions on behalf of H.E. Gachagua, argued that the High Court erred in concluding that the powers of the Chief Justice under Article 165(4) of *the Constitution* are administrative and could therefore be exercised by the Hon. DCJ. He contended that the High Court incorrectly relied on Article 259(3)(b) of *the Constitution*, which deals with general interpretation provisions, to justify the actions of the Hon. DCJ. It was submitted that a general provision like Article 259 could not override the specific and explicit language of Article 165(4), which vests the empanelment powers exclusively in the Chief Justice. He emphasized that the well-established rule of constitutional interpretation dictates that a specific provision such as Article 165(4) takes precedence over a general one like Article 259(3)(b). Therefore, the High Court erred in allowing the Hon. DCJ to exercise the powers vested in the Chief Justice under Article 165(4) in an administrative capacity.

61. To support this argument, counsel cited two key Supreme Court decisions, namely, Law Society of Kenya vs. Attorney General & 4 others (Petition 45 of 2019) [2023] KESC 19 (KLR), where it was held that the court must adopt a purposive and holistic interpretation of *the Constitution*, and Katiba Institute vs. Attorney General [2023] KESC 47 (KLR), where the Court stated that where constitutional provisions are precise and unambiguous, they must be given their natural and ordinary meaning. Senior Counsel argued that, being a general provision, Article 259 could not lawfully support the High Court's finding that the Hon. DCJ could exercise the Chief Justice's powers under Article 165(4).

62. With respect to the interpretation of Article 259(3)(b), which provides that a reference to a State or public officer includes a reference to someone acting in or performing the functions of that office, Senior Counsel argued that the Hon. DCJ was not acting as the Chief Justice in this case. No evidence was presented before the High Court to show that she was officially performing the Chief Justice's duties. Counsel maintained that merely holding the title of Deputy Chief Justice did not equate to acting as the Chief Justice. A distinction must be made between a person formally appointed to act in a particular office, and one who merely holds a related or designated position. To illustrate, he referenced the office of the Deputy President, who, absent a formal appointment as Acting President, cannot exercise the powers vested solely in the President under *the Constitution*.

63. Senior Counsel further argued that the phrase "otherwise performing" in Article 259(3)(b) should be read in conjunction with the concept of "acting" in an official capacity, and conflating the two would misinterpret the provision. In conclusion, since no evidence was presented showing that the Hon. DCJ was lawfully acting as the Chief Justice, she could not rely on Article 259(3)(b) to justify her actions.

64. Regarding the Saturday "sitting" of the three-judge bench empaneled by the Hon. DCJ on the night of Friday, 18th October 2024, counsel argued that the sitting, and the fact that the bench was available to hear the Attorney General's application to discharge the conservatory orders on Monday, 21st October 2024, despite previously refusing to grant a mention date for the appellant's petition, created a perception of judicial bias. He likened this situation to the expedited impeachment proceedings in the

National Assembly, where resolutions were transmitted past midnight. The Saturday "sitting," which was not authorized by the Chief Justice, was said to have violated section 10(7) of the High Court Organization and Administration Act.

65. Finally, Senior Counsel raised concerns about the inconsistent positions taken by the National Assembly and the Senate regarding the powers of the Hon. DCJ to empanel a bench. It was noted that in a previous case, National Assembly & Senate vs. Chief Justice of the Republic of Kenya & Attorney General; Leina Konchellah [2021] KECA 539 (KLR), the National Assembly and the Senate, supported by the Attorney General, had sought and obtained stay orders by arguing that the Hon. DCJ could not assign judges to benches under Article 165(4) of *the Constitution*.

66. Mr. Elisha Ongoya, also appearing for H.E. Gachagua, submitted that while *the Constitution* permits the Hon. DCJ to exercise functions under Articles 141, 144, and 148 in the absence or incapacity of the Chief Justice, Article 165(4) does not extend such authority to the empanelment of benches. He argued that this power is exclusively reserved for the Chief Justice, and no evidence was presented to demonstrate the Chief Justice's inability to act in this regard.

67. Counsel further challenged the Hon. DCJ's assumption of the role of Acting Chief Justice, referencing letters in the supplementary record of appeal. He contended that *the Constitution* does not envisage an acting Chief Justice where the substantive officeholder remains in post, and questioned whether the Hon. DCJ could lawfully perform the Chief Justice's functions without first taking an oath of office under Article 74. Without such an oath, any such actions were, in counsel's view, unconstitutional and void.

68. Lastly, in response to the High Court's finding that the Chief Justice's silence amounted to implied approval of the Hon. DCJ's actions, counsel argued that constitutional violations cannot be cured or legitimized by acquiescence.

69. Mr. Tom Macharia, also on behalf of H.E. Gachagua, anchored his arguments on Articles 1(1) and 2(2) of *the Constitution*, which define and limit the exercise of state authority. He contended that any exercise of power contrary to these provisions is invalid under Article 2(4). He faulted the High Court for characterizing the Chief Justice's power under Article 165(4) to empanel a bench as merely administrative and therefore delegable. If the power were indeed administrative, he argued, it would necessitate compliance with Article 47 and sections 4 and 5 of the *Fair Administrative Action Act*, requirements that were not met. Citing Leina Konchellah (supra), counsel emphasized that any assumption of such power by the Hon. DCJ must be justified by necessity, which was not demonstrated in this case.

70. Counsel also referenced Articles 135, 153(1), 234(5), and 245(5), which require that decisions by constitutional office holders be in writing. He argued that any delegation of authority, particularly the appointment of an Acting Chief Justice, must be documented. Yet, no written authorization from the Chief Justice appointing the Hon. DCJ to act in that capacity was produced or exists on record.

71. On the shifting stance of the National Assembly and Senate, counsel contended that in Leina Konchellah (supra), both houses, supported by the Attorney General, had successfully argued that the Hon. DCJ lacked the power to constitute a bench under Article 165(4). Their reversal in this case was, according to counsel, contradictory and disingenuous. He cited the decision of this Court in Attorney General vs. Okoiti & 3 others [2025] KECA 309 (KLR) for the principle that it is disingenuous for a party to abandon a position taken at trial and adopt a contrary one on appeal.

72. In conclusion, counsel urged the Court to find that the High Court erred in holding that the Hon. DCJ had the constitutional authority to empanel a bench, a power that, he maintained, is exclusively vested in the Chief Justice under Article 165(4) of *the Constitution*.

73. Several parties made submissions in support of the appellant's position that the power to empanel a bench under Article 165(4) of *the Constitution* is vested exclusively in the Chief Justice and is non-delegable. Dr. Khaminwa, for Kituo Cha Sheria, emphasized that a plain reading of Article 165(4), when interpreted alongside Article 161, leaves no room for the Hon. DCJ to exercise such power, and that her actions were unlawful. Mr. Ndegwa Njiru, appearing for the Mt. Kenya Jurists Association, reiterated that the Chief Justice's powers are constitutionally reserved and cannot be delegated, save in exceptional cases which were not present here. Similarly, Ms. Teresia Wanjiru Kimotho, for Thomas Kimotho Maingi, argued that delegation was unjustified, especially given that the Chief Justice was publicly seen performing official functions at the time, raising concerns of bias.

74. Mr. Sakimpa, representing Hon. Jane Njeri Maina, raised procedural inconsistencies, noting that both the Chief Justice and the Hon. DCJ appeared to be exercising the same power concurrently, which undermined the legality of the Hon. DCJ's actions. Mr. Evans Ogada, on behalf of several respondents, echoed these submissions and also challenged the idea of the Chief Justice being "digitally absent," noting that in the current digital age, physical absence does not equate to incapacity. Finally, Mr. Kevin Michuki, representing the Law Society of Kenya, asserted that the empanelment power is judicial, not administrative, and therefore could not be exercised by the Hon. DCJ unless the *Judicial Service Act* specifically permitted it, which it did not in this case.

75. The appeal was opposed by several respondents, including the National Assembly, the Senate, the respective Speakers of both Houses, the Attorney General, the United Democratic Alliance (UDA), and Prof. Kithure Kindiki. Across the board, these parties largely aligned in their defence of the Hon. DCJ's authority to empanel a bench under Article 165(4) of *the Constitution*. They unanimously argued that the empanelment function is administrative in nature and may be validly performed by the DCJ, especially in the absence of the Chief Justice, pursuant to Article 161(2) and related statutory provisions.

76. Mr. Nyamodi, for the National Assembly, argued that the power to empanel a bench under Article 165(4) derives from Article 161(2), which establishes the offices of the Chief Justice and Deputy Chief Justice. While the function is expressly vested in the Chief Justice, he contended that it is not exclusive and may be exercised by the Hon. DCJ, particularly as it is administrative in nature, akin to assigning judges to court stations. He cited section 5 of the *Judicial Service Act* to support this administrative interpretation.

77. He asserted that no constitutional provision requires an explanation for the Chief Justice's absence when the Hon. DCJ performs this role. Responding to the appellant's reliance on provisions like Articles 141(1) and 144(4), he maintained that Article 165(4) must be interpreted holistically, and the Hon. DCJ's omission therein does not preclude her from acting under delegated authority.

78. On the nature of the function, he submitted that Article 165(4) contains a judicial element related to certification of a substantial question of law by a High Court judge, and an administrative element related to assignment of judges by the Chief Justice. The latter, he argued, is procedural and can be delegated under Article 161(2)(a) or (b).

79. Regarding the claim of an improper Saturday sitting, Mr. Nyamodi clarified that no hearing occurred; rather, a judge issued directions on 19th October 2024 for the matter to proceed the following Monday.

He defended this as an urgent, technology- enabled process, noting that the appellants themselves had previously benefited from after-working hours judicial actions.

80. Finally, counsel referred to the Leina Konchellah appeal pending before this Court, and postulated that the decision in the consolidated appeals should apply to it. However, he conceded that in Leina Konchellah (supra), his client had taken a contrary position: that the Hon. DCJ lacked authority to empanel a bench. Prof. Tom Ojienda, SC, representing the Senate, fully supported Mr. Nyamodi's position, asserting that empanelment of a bench is an administrative function following High Court certification and does not impact substantive rights. He cited Republic vs. Moses Nderitu Ndumia [2007] eKLR and Peter Nganga Muiruri vs. Credit Bank Limited & another (Civil Miscellaneous Application 1382 of 2003) [2006] KEHC 3532 (KLR) to emphasize that empanelment is an administrative function. He also referenced Leina Konchellah (supra), where a five-judge bench of the High Court affirmed that empanelment is an administrative task, not a judicial one. He relied on the *Judicial Service Act* and the High Court Organization and Administration Act to argue that the Hon. DCJ, as deputy head of the Judiciary, may perform such administrative duties.

81. Regarding the Hon. DCJ's empanelment, Prof. Ojienda cited Teresia Kamene King'oo vs. Harun Edward Mwangi (Civil Appeal 113 of 2015) [2019] KECA 734 which upheld a presumption that official acts are lawfully performed. He further criticized the appellant for failing to join the Chief Justice in the proceedings, noting that the consequences of non-joinder should fall on the responsible party, as established in Republic & another vs. Kenya National Highway Authority; Public Private Partnerships Unit (Interested Party) (Judicial Review 3 of 2021) [2022] KEHC 17171 (KLR).

82. Mr. Peter Wanyama, representing the Speaker of the National Assembly, fully aligned himself with the submissions of Mr. Nyamodi and Prof. Ojienda. He denied any of the respondents' involvement in the empanelment process, and criticized the appellant for forum shopping. Counsel emphasized that in the absence of an affidavit from the Chief Justice, no adverse finding could be made against the respondents regarding the Hon. DCJ's authority to empanel.

83. Dr. Muthomi Thiankolu appearing for Prof. Kithure Kindiki, argued that empanelment is an administrative function, not a judicial one, as it follows certification by a High Court judge, and does not determine substantive rights. He maintained that since *the Constitution* permits the Hon. DCJ to exercise the Chief Justice's substantive powers in cases of absence or incapacity, it logically follows that she may also perform the lesser administrative task of empanelment. He dismissed the appellants' claim of usurpation of authority as unfounded, noting that neither the Chief Justice nor the Hon. DCJ had been joined as parties to the proceedings and thus had no opportunity to respond.

84. Mr. Edwin Mukele aligned with Mr. Wanyama, faulting the appellants for failing to serve the Chief Justice and the Hon. DCJ with the amended memorandum, thereby denying them a chance to be heard. He argued that any challenge to empanelment, being an administrative act, should have been brought by way of judicial review or a constitutional petition.

85. On his part, Emmanuel Bitta, representing the Hon. Attorney General, argued that the court lacked jurisdiction to entertain fundamental rights violations through an interlocutory application. He provided historical context, stating that the Chief Justice's role had evolved away from direct judicial involvement. He dismissed the Article 47 claim, affirming that High Court judges are presumed competent and impartial, and existing judiciary records sufficiently explained judicial assignments. On remedies, Mr. Bitta noted that all impeachment petitions had been consolidated before the same bench, and even if the appeal succeeded, the Chief Justice would likely reassign the same judges, rendering the relief moot.

86. Dr. Kamotho, appearing for the United Democratic Alliance, argued that under Articles 165(4) and 161(2)(b), the Hon. DCJ has constitutional authority to empanel a bench in the Chief Justice's absence. Citing the Supreme Court decision, In the matter of Kenya National Commission on Human Rights (2014) eKLR and the decision of this Court in Attorney General vs. Law Society of Kenya & 4 others (2019) eKLR, he advocated for a holistic and purposive interpretation of *the Constitution* to ensure efficient judicial administration. Referring to Black's Law Dictionary (9th Edition), he emphasized that a deputy is inherently empowered to act in place of a principal and that no specific justification or affidavit is required. He concluded by invoking Article 259(3), which supports flexible interpretation of constitutional functions to promote institutional effectiveness, thereby validating the Hon. DCJ's role in empanelment.

87. Several other respondents submitted written arguments opposing the appeal, but opted not to provide oral highlights during the hearing. Having reviewed their submissions, it is clear that their positions are consistent with those already outlined by the opposing parties. Accordingly, restating their arguments would serve no useful purpose.

88. In a brief rejoinder, Mr. Ochiel Dudley addressed the issue of joinder, arguing that under rule 5 (b) of the Mutunga Rules, neither joinder nor non-joinder of the Chief Justice or the Hon. DCJ could hinder constitutional litigation, as courts are guided by the need to resolve substantive questions. On judicial estoppel, he criticized the respondents, particularly the National Assembly, for failing to engage meaningfully with the issue, noting Mr. Nyamodi's admission of unfamiliarity with the pending Leina Konchellah appeal, despite his client's contradictory stance. He further rejected claims that judicial estoppel should have been raised earlier, explaining it could not have been anticipated since it was not addressed at the High Court level.

**Submissions Made In The Appeal Related To The Non- Recusal Of The Learned Judges (Civil Appeal No. E022 OF 2025)**

89. Learned counsel, Mr. Ogada, highlighted the written submissions of Hon. David Munyi Mathenge, Peter Gichobi Kamotho, Grace Muthoni Mwangi, Clement Muchiri Muriuki, and Edwin Munene Kariuki, the appellants in Civil Appeal No. E022 of 2025. He emphasized that the application for recusal of the High Court judges was filed reluctantly, recognizing the sensitivity of the matter, but driven by the need to safeguard judicial impartiality. His submissions focused on three core issues, chiefly, whether there existed a reasonable apprehension of bias, whether the legal threshold for recusal was met, and whether the failure to recuse undermined the appellants' right to a fair hearing.

90. On the issue of reasonable apprehension of bias, Mr. Ogada pointed to unchallenged photographic evidence of a close personal relationship between Justice Mrima and the Speaker of the Senate, Hon. Amason Kingi. He also raised concern over Justice Ogola's impartiality, noting his spouse's appointment to a parastatal position by the Executive, the same appointing authority behind Prof. Kithure Kindiki's nomination. Counsel argued that such associations created a legitimate perception of partiality, eroding public confidence in the judiciary. He stressed that judges must maintain not only actual impartiality but also the appearance of it.

91. Turning to the legal standard for bias, Mr. Ogada cited Jan Bonde Nielsen vs. Herman Philipus Steyn & 2 others (2014) eKLR, in which the Supreme Court adopted the objective test for bias, affirming the standard in R vs. David Makali and Others, C.A. Criminal Application No. Nai 4 and 5 of 1995

(unreported) and R vs. Jackson Mwalulu & Others, C.A. Civil Application No. Nai 310 of 2004 (unreported). In Jackson Mwalulu, this Court stated thus:

> " When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective, and the facts constituting bias must be specifically alleged and established."

92. He also relied on the English decision in Metropolitan Properties Co. Ltd v Lannon (1969) 1 QB 577, where the Court held that:

> " In a case where bias is alleged against a court or judge, it is not the likelihood that the court or judge did favor one side at the expense of the other that is important, but rather whether any person looking at what the court or judge has done would have the impression that there was a real likelihood of bias."

93. Citing Article 50(1) of *the Constitution* which guarantees the right to a fair hearing before an impartial tribunal, counsel argued that the photographic and circumstantial evidence met the evidentiary threshold under sections 107 to 109 of the *Evidence Act*. On this basis, he contended that his clients were unlikely to receive a fair hearing. In response to a question from the bench, counsel reiterated that Justice Ogola's spouse had been appointed by the Executive, either directly by the President or through a Cabinet Secretary, and noted that this evidence had not been rebutted.

94. With respect to the right to a fair hearing, counsel relied on the well-established principle in R v Sussex Justices, ex parte McCarthy (1924) 1 KB 256, which holds that: "Justice must not only be done but must also be seen to be done." He contended that the refusal by the judges to recuse themselves, despite credible concerns of bias, compromised the integrity of the proceedings. The High Court's reasoning was described as lacking objectivity, especially given that a Judge of this Court, Joel Ngugi, JA, had previously recused himself when a rule 5(2)(b) application involving the impeachment of H.E. Gachagua came up for hearing to avoid perceived conflict.

95. Mr. Ogada also invoked the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, emphasizing section 20(1), which states:

> "A judge shall use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judge's official duties." He underscored the duty of judicial officers to recuse themselves not only where an actual conflict exists, but also where there is a perceived conflict, to uphold the integrity and impartiality of the judiciary.

96. He concluded by urging the Court to exercise its discretion in favor of granting the recusal application, asserting that doing so would uphold the principles of fairness, impartiality, and public confidence in the judiciary. He maintained that the threshold for recusal had been met and that the appeal should be allowed to preserve the rule of law and judicial integrity.

97. Supporting the appeal, Mr. Muite emphasized that the key issue in recusal applications is the perception of bias, rather than actual bias, citing R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119. He argued that public perception of bias, even without actual bias, is critical for upholding judicial integrity.

98. Echoing Counsel Ogada's submission, Mr. Muite referred to Justice Ngugi's decision to recuse himself, noting that although the appellants trusted his impartiality despite his spouse's presidential

appointment, the Judge recused himself due to public perception. Mr. Muite urged the Court to apply the same standard here, prioritizing the appearance of impartiality in this appeal.

99. Mr. Sakimpa aligned with Ogada's arguments, highlighting that judges must disclose personal relationships with parties involved. He pointed out that Justice Mrima failed to disclose his relationship with the Speaker of the Senate until it was raised by the parties. Counsel argued that Justice Mrima's failure to disclose this relationship, unlike Justice Ngugi, undermined public confidence in judicial impartiality.

100. Counsel criticized the reasoning in paragraph 63 of the impugned ruling, where the court conflated two distinct events: the Speaker of the Senate presenting a personal gift to Justice Mrima at his wedding, and the Deputy President offering an institutional gift on behalf of the judiciary. Counsel argued that the former was a personal gesture, while the latter was an official act. Additionally, he criticized the High Court for disregarding the binding precedent in Dari Limited & 5 others vs. East African Development Bank [2024] KESC 58 (KLR), where recusal was required in similar circumstances. He emphasized that serious allegations of bias, particularly when raised by a party to the proceedings, should necessitate recusal to safeguard judicial integrity.

101. Several other respondents also supported the appeal, largely aligning themselves with Mr. Ogada's arguments, and we shall not, in the circumstances rehash their submissions. Their main contention was that the judges should have recused themselves, given the clear evidence of personal relationships with key parties in the petitions. Additionally, it was argued that the High Court's decision contradicted Article 50(1) of *the Constitution*, which guarantees the right to a fair hearing.

102. The appeal was opposed by several respondents who made oral submissions. In opposing the appeal, Mr. Gumbo contended that the High Court applied a standard for recusal consistent with established jurisprudence from the Court of Appeal, the Supreme Court of Kenya, and comparative jurisdictions. He highlighted paragraph 46 of the ruling, which adopted a two-pronged test from the New Zealand Supreme Court: whether a fully informed, reasonable observer would apprehend bias, and whether a logical connection exists between the apprehension and the alleged facts.

103. Counsel cautioned against readily granting recusals, which could undermine judicial duty and promote forum shopping. As an example, he questioned whether attending the same church as a judge would justify recusal. He submitted that the High Court properly considered the Bangalore Principles and Judicial Service Regulations, and that the appellants failed to challenge the court's four key considerations for recusal outlined in paragraph *48*. Accordingly, no error had been shown.

104. On Justice Mrima, counsel argued that a longstanding relationship with the Speaker of the Senate did not meet the threshold for recusal, absent a clear pointer to partiality, which the appellants failed to demonstrate. He also dismissed as false the claim that Justice Ogola's spouse was appointed by the President, noting the court had clarified that it was a Cabinet Secretary's appointment. Such misstatements, he argued, reflected attempts to engineer recusals.

105. On the available remedy, counsel emphasized the public interest in the impeachment matter and argued that any procedural flaws were cured by the consolidation ordered by the Chief Justice and Deputy Chief Justice. He submitted that no prejudice would result from the case proceeding in the High Court, as appeal rights remained intact.

106. Finally, counsel distinguished Dari Limited (supra), asserting that bias requires more than allegations, there must be a clear nexus between the alleged relationship and the judge's impartiality.

107. SC Prof. Ojienda largely aligned his submissions with those made by Mr. Gumbo. He contended that the appellants' claim of an unreasonably high recusal threshold was unfounded, noting that all

grounds for recusal had been withdrawn before the High Court's decision, including those against Justice Mugambi and Justice Mrima. He maintained that the court applied the correct legal standard, relying on Kalpana H. Rawal vs. Judicial Service Commission & 2 Others [2016] eKLR where the court stated that the standard in recusal applications is high, and Martha Wangari Karua v. Independent Electoral & Boundaries Commission & 3 Others [2018] KECA 41 (KLR) which affirms that the test for recusal is objective, and the burden of proof lies with the applicant. He also cited the South African Constitutional Court decision in Electoral Commission of South Africa vs. Umkhonto Wesizwe Political Party and Others [2024] ZACC 6, which emphasized that recusal applications are assessed based on the presumption of judicial impartiality, with the burden of proof resting on the applicant under a double requirement of reasonableness. Counsel warned against allowing judges to be easily disqualified, which would disrupt justice and invite abuse through persistent objections.

108. On his part, Dr. Muthomi Thiankolu described the appellants' allegations as baseless and sensational, many of which were publicly aired and later withdrawn in court. He stressed that judges should not step aside without sound reason, referencing Stubbs v The Queen; Davis v The Queen; Evans v. The Queen [2019] AC 868, PC, para 34, National Oil Corporation of Kenya v Real Energy Limited (2017) KEHC 1469 (KLR), and Uhuru Highway Development Ltd v Central Bank of Kenya, Civil Appeal No. 36 of 1996 (Unreported), which affirm the judicial duty to sit and determine cases. Further, he maintained that social or professional associations do not justify recusal without evidence of compromised impartiality, as affirmed in Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) (2016 KECA 717 (KLR).

109. Mr. Wanyama reinforced the argument that judges, as other members of society, naturally have past social interactions, which cannot alone ground recusal. Referring to Regulation 21 of the Judicial Service Code, he reiterated that recusal is only warranted in specific, well-defined instances. Counsel argued that no credible evidence of bias had been shown, the judges acted within their constitutional mandate, and the appeal should be dismissed.

110. The Attorney General and other parties filed supporting submissions, unanimously aligning with the main respondents in opposing the appeal.

111. In a brief rejoinder, Mr. Ogada emphasized that recusal applications are not made lightly, as they carry significant responsibility, and are assessed on a prima facie basis. He argued that constitutional principles, particularly the right to a fair trial under Article 50, must not be sacrificed for expediency, noting that fairness includes both actual and perceived impartiality. Citing Navin Premji Kerai v. Virunga Limited & Virunga Apartments (Miscellaneous E346 of 2023), where an arbitrator recused himself due to involvement in a traditional ceremony with a party's counsel, he submitted that Justice Mrima, whose wedding was attended by the Speaker of the Senate, should have done likewise. He urged the Court to uphold public confidence by allowing the appeal.

**Analysis And Determination**

112. This first appeal arises from preliminary objections taken up before the trial court. Our remit is to re-evaluate and assess the material that was before that court and make our own conclusions.

113. The two main issues for determination in these consolidated appeals are, first, whether the Deputy Chief Justice had constitutional authority to empanel the bench, and second, whether the learned judges ought to have recused themselves on grounds of alleged bias or the appearance of bias.

114. Regarding the empanelment of the bench, we see the following as the issues that fall for determination:

i. Is the power to assign judges granted to the Chief Justice under Article 165 (4) of *the Constitution* a judicial or administrative function?

ii. Is that power exercisable by the Deputy Chief Justice, and if so, in what circumstances?

iii. In view of the answers to the two questions above, did the empanelments made by the Deputy Chief Justice on 18th October 2024 pass the constitutional test?

115. It may be helpful to begin by making some short observations regarding provisions touching on expanded benches of the High Court under the repealed Constitution. Section 67 read, in part, as follows:

> "(1) Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.
>
> 2. Where a question is referred to the High Court in pursuance of subsection (1), the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.
>
> 2. When the High Court is determining a matter in connexion with a reference to it under subsection (1) (other than an interlocutory matter) it shall be composed of an uneven number of judges, not being less than three.
>
> (4) …."

116. These provisions were silent as to who would constitute the bench. However, under the powers conferred by section 65(3) and section 84(6), the Chief Justice made *The Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedures Rules, 2006. Under rule 10, the Chief Justice reserved for himself the function of constituting the bench. In constituting the bench, the Chief Justice was not only acting as the Head of the Judiciary, but also as a High Court Judge (by dint of section 60 (2)).

117. Juxtapose this with Article 165(4) of the current Constitution which provides as follows:

> "Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

118. The current Constitution specifically gives the function of assigning the bench to the Chief Justice, who, by the design of the Constitution, is not a High Court Judge. The importance of the comparison is that under the current Constitution, the mandate to empanel is given constitutional underpinning. In Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties) [2021] eKLR, the High Court posits that "the import of a constitutional mandate in our view is to ring fence that mandate from frivolous unwarranted interference and intermeddling hence the special procedures provided for before such a mandate can be changed." We think that, in addition, by reserving that role for the Chief Justice in *the Constitution*, the framers of *the Constitution* considered that function to be important enough to be exercised by the Head of the Judiciary. We return to this later.

119. The vexing question as to the nature of this mandate has been the subject of at least two previous decisions at the High Court. In Kenya Medical Research Institute vs. Attorney General & 3 others [2014] eKLR, a three-judge bench of the High Court found the power of empanelment granted to the Chief Justice under the article to be a constitutional mandate, as opposed to similar functions under the former Constitution which were not hinged on the constitutional provisions and were merely administrative. The Court expressed itself thus:

> "The power to empanel a Bench composed of not less than 3 judges is provided for under Article 165(4) of *the Constitution*. Therefore, by empanelling this Bench, the Chief Justice was carrying out his constitutional mandate as opposed to similar functions under the former Constitution which were not hinged on the constitutional provisions and were merely administrative. The exercise of the power of the Chief Justice to empanel the Bench has not been challenged. It is arguable whether this Court can go round the exercise by the Chief Justice of his constitutional mandate and make a decision whose effect is to set aside the said decision when the said decision has not been challenged. To hold, as the interested parties have urged this Court to do, that the Bench as empanelled has no jurisdiction to deal with the matter would in our view amount to overturning the decision made by the Chief Justice. We hold this view without necessarily deciding that a decision made by the Chief Justice empanelling a Bench ought to form part of the proceedings since it is in our view not just a legal process but a constitutionally mandated process."

120. In Leina Konchellah, a more recent decision, the High Court held as follows:

> " ...It is also our view that a constitutional mandate of the Chief Justice can be judicial, administrative or political, and the current Constitution does indeed state that the Chief Justice is the Head of the Judiciary which embodies all these functions."

121. In the same decision, the High Court, after analysing the meaning of the word 'assign' as appearing in Article 165(4) and after considering the difference between an administrative and judicial act expressed itself as follows:

> "It is thus evident that the constitutional mandate exercised by the Chief Justice under Article 165(4) is an administrative function."

122. The High Court in Leina Konchellah makes the important point that a constitutional mandate granted to the Chief Justice can be judicial, administrative, or political. This interpretation, in our view, accords with the scheme of *the Constitution*, as we shall seek to demonstrate. But first, what do the terms "judicial" function and "administrative" function mean?

123. The Black's Law Dictionary 'Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern' by Henry Campbell Black, M. A. Revised Fourth Edition defines 'judicial' as:

> " Belonging to the office of a judge; as judicial authority. Relating to or connected with the administration of justice; as a judicial officer. Having the character of judgment or formal legal procedure; as a judicial act. Proceeding from a court of justice; as a judicial writ, a judicial determination. Involving the exercise of judgment or discretion; as distinguished from ministerial. Of or pertaining or appropriate to the administration of justice, or courts of justice, or a judge thereof, or the proceedings therein; as, judicial power, judicial proceedings., State v. Freitag, 53 Idaho 726, 27 P.2d 68."

124. It further defines 'judicial function' as follows:

> "The capacity to act in the specific way which appertains to the judicial power, as one of the powers of government. The term is used to describe generally those modes of action which appertain to the judiciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers."

125. The *High Court (Organization and Administration) Act* on the other hand defines 'administrative function' as

> " administrative function" in relation to the Chief Justice, Principal Judge, presiding judge or a judge means the discharge of non-judicial functions assigned under this or other law, which are necessary to facilitate the exercise of the judicial authority by the Court;"

126. The Black's Law Dictionary, Ninth Edition defines 'administrative act' as:

> " An act made in a management capacity; esp., an act made outside the actor's usual field (as when a judge supervises court personnel). An administrative act is often subject to a greater risk of liability than an act within the actor's usual field."

127. In A. K. Kraipak & Ors. Etc vs Union of India & Ors [1970] 1 SCR, the Supreme Court of India, in distinguishing whether the proceedings before a statutory body were administrative or quasi- judicial, made the following observation:

> "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law."

128. Article 161 of *the Constitution* reads:

> " 161. Judicial offices and officers
>
> 1. The Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff.
> 2. There is established the office of—
>     a. Chief Justice, who shall be the Head of the Judiciary;
>     b. Deputy Chief Justice, who shall be the Deputy Head of the Judiciary; and
>     c. Chief Registrar of the Judiciary, who shall be the chief administrator and accounting officer of the Judiciary.

3. The Judicial Service Commission may establish other offices of registrar as may be necessary."

129. Under this provision, the Chief Justice is named as the Head of the Judiciary. The Article ordains the Chief Justice as the administrative Head of the Judiciary. A role distinguishable from that of the Chief Registrar of the Judiciary who is the chief administrator and accounting officer of the Judiciary.

130. Under Article 163(1), which sets up the Supreme Court, the Chief Justice is the President of the Court. This acknowledges the judicial function of the Chief Justice as not only a member, but also the President of the apex court.

131. In determining under which category the constitutional mandate of Article 165(4) lies, the word "assign" in that provision must be interpreted. In this regard the following passage in Leina Konchellah (supra) is useful:

> " 66. Coming to the provisions of Article 165(4), the function allocated to the Chief Justice is that of assigning Judges. The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is, its proper and most known signification. If there is more than one ordinary meaning, the most common and ordinary is preferred. This interpretation is an application of the plain meaning rule of construction and only applies where the word or enactment under inquiry is either grammatically capable of one meaning only, or where an informed interpretation of that word or enactment raises no doubt as to what grammatical meaning was intended by the legislature. As put in Halsbury's Laws of England Volume 44 (1) at paragraph 1487;
>
> "If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."
>
> 67. The ordinary and plain meaning of "assign" is to allocate a job or duty. The Oxford Learner's Dictionary defines assign as to 'give someone something they can use or some work or responsibility'. It is clear that the context in which the function of assigning Judges is given to the Chief Justice in Article 165(4), is to facilitate the hearing of matters that raise a substantial question of law by the High Court. In our view, the Chief Justice in doing so exercises an administrative function. The reason why we say so, is because in exercising that mandate the Chief Justice is not addressing his judicial mind to the decision of whether or not to empanel the bench, but rather is implementing the decision already made by the High Court certifying that the matter discloses a substantial question of law."

132. 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. In response to a question posed during the plenary hearing on what the Chief Justice must consider when empaneling a bench, Senior Counsel Muite drew from his experience in the Mau Mau case in England, stating that registrars, who are themselves lawyers, take into account a judge's years of service, judicial experience, and the complexity of the issues involved.

Counsel was of the view that similar considerations guide the Chief Justice in Kenya when constituting a bench. Senior Counsel further posited that the task of determining the complexity of issues and which judge ought to sit is not mechanical, and the Chief Justice would have to exercise his/her judicial mind.

133. On his part, Mr. Nyamodi asserted that during empanelment, the Chief Justice does not receive submissions from the parties regarding which judges should be empaneled. Rather, the decision on which judges to assign is made independently and without input from litigants, reflecting the administrative discretion of the Chief Justice.

134. We can think of some considerations that may weigh on the Chief Justice in appointing judges to an expanded bench: the expertise and specialization in the relevant area of law of a judge, judicial seniority and experience; the need for balance and diversity of perspectives often achieved by selecting judges with varied legal philosophies, regional representation, or professional backgrounds; any 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 availability of the proposed judges. This list is not exhaustive.

135. There might also be something to learn from section 13 of the *High Court (Organization and Administration) Act* which is on transfer and deployment of judges. In section 13(3), the Chief Justice is required to take into account the expertise and legal specialization in deploying judges to a division of the High Court.

136. Some of the considerations when the Chief Justice empanels a bench are plainly administrative. For instance, whether the judge, given, his/her work docket/load, is available to be a member of the bench. In this category could belong whether or not a judge has the expertise on the question that has already been determined by the High Court to require consideration by an expanded bench or the gender parity on a bench. Then there are those that may seem less administrative and take on a flavour of judicial reflection. For instance, given the nature of the dispute and the exigencies of the day, the need to constitute a bench that reflects regional or ethnic balance, or one that takes into account the judicial philosophy that the judges may hold or have displayed.

137. Underpinning these considerations is the need for not only effective and efficient disposal of disputes, but that the parties benefit from specific expertise of the assigned Judges and diversity of opinion. In addition, a bench that engenders public confidence that justice will not just be done but seen to be done. Without doubt, the Chief Justice cannot act mechanically or by tossing a coin. While the task of empanelment of benches may seem mechanical, clerical, mundane or even dull, the Chief Justice is expected to give careful thought to the decision, and the list we have set out above is only illustrative of the factors that the Chief Justice must bear in mind.

138. That the task of assigning cases to judges requires a modicum of discretion is also acknowledged elsewhere. In the U.S. Department of Labor Website, the Office of Administrative Law Judges, answering the question 'How are judges assigned to cases?' the following is stated:

> " The Administrative Procedure Act requires that administrative law judges "shall be assigned to cases in rotation so far as practicable." 5 U.S.C. § 3105. This provision does not require mere mechanical rotation. Rather, a "modicum of discretion" is accorded in assignment decisions. Factors such as the complexity of the case as well as the experience and ability of the judge, may be considered when case assignments are made. Also relevant is the particular judge's caseload and assignment schedule."

139. Administrative decisions call for reflective, careful and pragmatic thinking. Yet, that alone does not turn the task into a judicial function because the Chief Justice is not interpreting the law or resolving a dispute, and importantly, is not exercising judicial authority as a Judge of the Supreme Court. We think that this conclusion finds support from the short evolution of the empanelment power in Kenya. Under the repealed Constitution, the Chief Justice was also a High Court judge and it could be argued that the power to constitute a bench then was exercise of power by the Chief Justice in his/her capacity as a High Court Judge, and could possibly be categorized as a judicial function. Not so now, where the Chief Justice is not a High Court judge or a judge of the courts of equal status, and cannot possibly carry out any judicial functions of those courts.

140. In leaning towards holding that the constitutional mandate of the Chief Justice under Article 165(4) is administrative, we are not alone.

141. The Supreme Court of India discussed the role of the Chief Justice in constitution of benches in State of Rajasthan v. Prakash Chand, (1998) 1 SCC 1 and stated that:

> " ...administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial and administrative. He alone, has the right and power to decide how the Benches of the High Court are to be constituted: which Judge is to sit alone and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words, the Judges of the High Court can sit alone or in Division Benches and do such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice."

142. The Court took a similar view in Campaign for Judicial Accountability and Reforms v. Union of India (2018) 1 SCC 196;

> "We have to make it clear without any kind of hesitation that the convention is followed because of the principles of law and because of judicial discipline and decorum. Once the Chief Justice is stated to be the master of the roster, he alone has the prerogative to constitute Benches. Needless to say, neither a two-Judge Bench nor a three-Judge Bench can allocate the matter to themselves or direct the composition for constitution of a Bench. To elaborate, there cannot be any direction to the Chief Justice of India as to who shall be sitting on the Bench or who shall take up the matter as that touches the composition of the Bench."

143. Closer to us, the Supreme Court in Ghana was emphatic that the empanelment role of the Chief Justice is one of the administrative incidents of the Office of the Chief Justice. In Frank Agyei Twum v. v. Attorney General and Another [2005-2006] SCGLR 732, Dr. Date-Bah, J.S.C was of the opinion that:

> " ... I would like to highlight the basis for the Chief Justice's constitutional authority to empanel this Court. This is article 125(4) of the 1992 Constitution, which reads as follows: "The Chief Justice shall, subject to this Constitution, be the Head of the Judiciary and shall be responsible for the administration and supervision of the Judiciary." Thus, for as long as the Chief Justice is in office, the right to constitute panels of the Supreme Court is exercisable by him as one of the administrative incidents of his office. Indeed, his is not only a right, but also an obligation, to constitute such panels....
>
> ...the principles of natural justice are not, in any case, applicable nor relevant to the empanelment decision, since that decision is neither judicial nor quasi- judicial, but merely ministerial. When the Chief Justice empanels a bench, he acts as an administrator and

not as a judge. Accordingly, a principle of natural justice tailored to the requirements of proceedings cannot be relevant to that exercise. Rather, what is relevant is the Chief Justice's implied duty to be fair and candid in the exercise of his discretionary power, as laid down in Article 296 of *the Constitution*."

144. Having reached the conclusion that the function of the Chief Justice under Article 165(4) is administrative, it is easier to answer the second question: whether the empanelment power can be exercised by the Deputy Chief Justice, and if so, in what circumstances. Under Article 161(2) of *the Constitution*, the Office of the Deputy Chief Justice is established in the following terms:

> " (2) There is established the office of—
>
> a. ...;
>
> b. Deputy Chief Justice, who shall be the Deputy Head of the Judiciary"

145. In Article 163 (1) of *the Constitution* regarding the Supreme Court, *the Constitution* provides:

> " (1) There is established the Supreme Court, which shall consist of—
>
> a. the Chief Justice, who shall be the president of the court;
>
> b. the Deputy Chief Justice, who shall—
>
> i. deputise for the Chief Justice; and
>
> ii. be the vice-president of the court;
>
> c. five other judges."

146. Article 161 establishes the administrative arm of the judiciary, while Article 163 establishes the Supreme Court and sets out the judicial role of the Chief Justice in that apex court. It is clear to us that in both instances, whether in administrative or judicial functions, the Deputy Chief Justice deputizes for the Chief Justice. This is so notwithstanding that, unlike in Article 163(1), the words "deputise for" do not appear in Article 161(2). This is because the latter provision is explicit that the Deputy Chief Justice is the Deputy Head of the Judiciary, an unequivocal indicator that she deputises the Chief Justice in the administrative arm of the Judiciary.

147. The *Judicial Service Act* (JSA) is an Act, inter alia, to make provision for judicial services and administration of the Judiciary. Some of the provisions of that statute fleshes out the administrative structure set out in Article 161(1). In particular, and relevant to the matter at hand, is section 5 which reads:

> " 5. Functions of the Chief Justice and the Deputy Chief Justice
>
> 1. The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.
>
> 2. Despite the generality of subsection (1), the Chief Justice shall—
>
> a. assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal

Judge of the High Court and the Chief Registrar of the Judiciary;

b. give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;

c. exercise general direction and control over the Judiciary.

3. As the Deputy Head of the Judiciary and the Vice- President of the Supreme Court, the Deputy Chief Justice shall be responsible to the Chief Justice in the exercise of the functions and duties of the office.

4. In the event of the removal, resignation or death of the Chief Justice, the Deputy Chief Justice shall act as the Chief Justice for a period not exceeding six months pending the appointment of a new Chief Justice in accordance with *the Constitution*."

148. Regarding the executive, Article 147(3) makes provision for when the Deputy President can act as President. Article 147 reads:

" 147.

(1) The Deputy President shall be the principal assistant of the President and shall deputise for the President in the execution of the President's functions.

2. The Deputy President shall perform the functions conferred by this Constitution and any other functions of the President as the President may assign.

3. Subject to Article 134, when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President.

4. The Deputy President shall not hold any other State or public office."

149. We do not have similar provisions regarding the office of The Chief Justice, but section 5 of the *Judicial Service Act* fills that lacuna. We are not told that those provisions are unconstitutional. Subsection (4) of section 5 of the *Judicial Service Act* contemplates three instances where the Deputy Chief Justice can act as Chief Justice, in the event of the removal, resignation or death of the Chief Justice. We have no doubt that the Deputy Chief Justice, when acting as a Chief Justice within the contemplation of section 5(4) of the JSA, can carry out the function obligated by Article 165((4) to empanel a bench.

150. But as is evident, section 5(4) of JSA restricts instances when the DCJ can act as a CJ to only three. Whether this list is limiting and should include instances when the CJ is absent, on leave, or is

temporarily incapacitated is a matter for another day. For now, our concern should be whether the difficulties that may be caused by the restrictive provisions of section 5(4) of JSA can be ameliorated by the provisions of subsection (2) which permits the Chief Justice to assign administrative duties to the Deputy Chief Justice. The Chief Justice could, for instance, assign certain administrative duties to the Deputy Chief Justice in the event of her absence or temporary incapacity.

151. The word used in section 5(2) of JSA is assign. As correctly pointed out by the High Court in Leina Konchellah, assign means to allocate a job or duty or give some work or responsibility. It has to be remembered that the duty to empanel is reserved for the Chief Justice by *the Constitution*, and we do not think it is one of those administrative duties that the Chief Justice can allocate or pass over to the Deputy Chief Justice by dint of section 5(2) of JSA.

152. So, what is to happen when the Chief Justice is, for whatever reason, absent physically or temporarily incapacitated, 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? In this day and age, we do not think that the Chief Justice can be 'electronically absent' for an inordinately long period of time, such that she cannot empanel a bench or give appropriate directions. That can be done electronically from nearly any part of the world. In this case, there was no suggestion that the Chief Justice was electronically unreachable, or physically unable to perform her constitutional administrative function.

153. In Leina Konchellah, the High Court held that the Deputy Chief Justice is the Deputy Head of the Judiciary, and that a holistic and purposeful interpretation of Article 161(2)(b) of *the Constitution* and section 5 of the *Judicial Service Act* leads to the conclusion that "the Deputy Chief Justice substitutes the Chief Justice in administrative functions in the absence of the Chief Justice, or when necessary or when for good reason the Chief Justice is unable to act".

154. The High Court reached this conclusion after reasoning;

> "74. Who then is a deputy? The Black's Law Dictionary at page 547 defines a "deputy" as 'a person appointed or delegated to act as a substitute for another especially for an official'. Further, a "general deputy" is defined as 'a deputy appointed to act in another officer's place and execute all ordinary functions of the office' while a "special deputy" is defined as 'a deputy specially appointed to serve a particular purpose such as keeping the peace during a rally'.
>
> 75. The provisions in *the Constitution* and the *Judicial Service Act* as regards the functions of the Deputy Chief Justice are in the nature of a general deputy, as the holder can undertake any of the functions of the Chief Justice. Neither *the Constitution* nor the *Judicial Service Act* places any limitations on the functions that the Deputy Chief Justice can deputise."

155. The decision hinges on the rationale that since the functions of the Office of Deputy Chief Justice are in the nature of a general deputy, then the holder can undertake any of the functions of the Chief Justice because a "general deputy" executes all ordinary functions of the office. We agree, but add that the Deputy Chief Justice can only exercise the extra-ordinary constitutional administrative function of Article 165(4) in the exceptional circumstances we have set out, and the existence of those circumstances must be demonstrable and communicated, not just to parties in the dispute, but the public at large. It is singularly important that, in the interest of justice, transparency and accountability, the parties and public are informed why it is the Deputy Chief Justice and not the Chief Justice who is exercising this constitutionally underpinned administrative mandate. The absence of such communication leaves room for suspicion and speculation and is inimical to the administration of justice.

156. Given our understanding of the circumstances when and how the Deputy Chief Justice can exercise the power reserved for the Chief Justice by Article 165(4) as articulated above, we now turn to the specific circumstances of the matter at hand.

157. Regarding the three impugned empanelment directions, the Deputy Chief Justice signed them as "DCJ/Ag CJ". To be observed is that it is common ground that none of the three instances contemplated by section 5(4) of the *Judicial Service Act* had arisen for the Deputy Chief Justice to act as Chief Justice. Secondly, the reason why it was not the Chief Justice who empanelled the bench was not communicated to the parties at the time of empanelment.

158. In reaching the conclusion that the empanelments made by the Deputy Chief Justice on 18th October 2024 did not pass the constitutional test, we do not accept the argument by the respondents that no such finding can be made without joinder of the Chief Justice or the Deputy Chief Justice to the proceedings, or that simply because the Chief Justice did not raise a red flag, then an assumption must be made that the Deputy Chief Justice properly exercised the mandate. And while we do not doubt the bona fides of the Deputy Chief Justice in constituting the benches, we have discussed why it is critical for the reason or reasons why the Chief Justice did not exercise the constitutional administrative mandate reserved for the Chief Justice is communicated to the parties and public, and that reason or those reasons be set out in the empanelment order.

159. Indubitably, we find and hold that there was no evidence that the Deputy Chief Justice was the acting Chief Justice, or that there existed exceptional circumstances that permitted the Deputy Chief Justice to exercise the mandate constitutionally reserved for the Chief Justice by Article 165(4) of *the Constitution*.

160. The second key issue for determination in the consolidated appeals is whether the learned judges erred in declining to recuse themselves on grounds of bias, either actual or perceived. In addressing this issue, we will focus, inter alia, on the concept of bias as it pertains to impartiality; the proper test for recusal; and whether the appellants successfully satisfied this test at the High Court.

161. Article 50 (1) of *the Constitution* guarantees every person the right to a fair and public hearing before a court or an independent and impartial tribunal. It stipulates:

> " 50.
>
> (1) 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."

162. The right to a fair trial is paramount and non-negotiable. A key component of this right is the expectation that judges will conduct proceedings with impartiality, that is, free from bias, conflicts of interest, or any external influence.

163. Impartiality is essential for fair decision-making and lies at the core of the rule of law. Bias, whether real or perceived, compromises impartiality. Therefore, when credible allegations of bias arise, the judicial officer concerned must step aside from the proceedings to uphold due process and engender public confidence in the judiciary. This raises the question: what amounts to bias?

164. The Bangalore Principles of Judicial Conduct (2002), which set out ethical standards for judges and provide a framework for regulating judicial conduct, do not offer a single-line definition of bias.

However, bias is understood to encompass any influence that undermines or appears to undermine a judge's impartiality.

165. In Republic vs Independent Electoral & Boundaries Commission & Another Ex Parte Coalition for Reforms and Democracy (CORD) [2017] KEHC 8519 (KLR), Odunga, J. (as he then was), addressed the issue of bias with reference to the Bangalore Principles of Judicial Conduct, stating as follows:

> " Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law."

166. In the impugned decision, the High Court considered the meaning of the term 'bias' in the following terms:

> " 33. Bias is defined in the Black's Law Dictionary as an inclination; prejudice or predilection. It may manifest in two forms; actual or perceived. Actual bias is defined as genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject. Perceived (or implied) bias is defined as prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person.
>
> 34. In other words, perceived bias arises where there is no actual prejudice but a reasonable apprehension that exists that the judge's impartiality might be compromised. This often arises from associations, relationships, or conduct that, though not overtly improper, may give an impression of partiality."

167. Bias encompasses not only actual prejudice, but also the appearance of pre-judgment. In the English case of Otkritie International Investment Management Ltd & Others vs Urumov [2014] EWCA Civ 1315 A3/2014/1451, Longmore, LJ. stated:

[1] It is a basic principle of English law that a judge should not sit to hear a case in which "the fair- minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see Porter v Magill [2002] 2 AC 357 para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "prejudged" the case.

(2) This can give rise to potential difficulties in long running cases where a judge has been case-managing a case and has then to conduct the trial or in cases where a trial has occurred and the judge has then to consider consequential matters such as, in the present case, proceedings for contempt. It is obviously convenient for a single judge rather than different judges to deal

with a complex case but the question can arise whether there comes a point where findings made by a judge pre-trial disqualify a judge from continuing with a case or findings made at trial disqualify a judge from hearing consequential matters. This is the question at the heart of this appeal." [Emphasis added]

168. Regulation 9 of the Judicial Service (Code of Conduct and Ethics) Regulations highlights the fundamental importance of judicial impartiality. In particular, regulation 9 (1) stipulates:

> "A judge shall, at all times, carry out the duties of the office with impartiality and objectivity in accordance with Articles 10, 27, 73 (2) (b) and 232 of *the Constitution* and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices."

169. The primary purpose of the rule against bias is to maintain public confidence in the impartiality of the judicial process. As Lord Hewart, CJ. stated in R vs Sussex Justices, Ex-parte MacCarthy [1923] All E.R. 233, "justice should not only be done, but should manifestly and undoubtedly be seen to be done." Therefore, when bias, whether actual or perceived, is demonstrated, a judge may be required to recuse himself or herself to preserve the integrity of the judicial process and uphold public confidence in the administration of justice.

170. Black's Law Dictionary defines 'recusal' as "Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest."

171. In Jasbir Singh Rai and 3 Others vs Tarlochan Singh Rai and 4 Others (2013) eKLR, the Supreme Court addressed the issue of judicial recusal, stating:

> "Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303]:
>
> "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."
>
> From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non- participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

172. In Kibisu vs Republic (Peti*tion 3 of 2014*) [2018] KESC 34 (KLR) (28 February 2018) (Ruling), the Supreme Court reiterated the legal principles governing the recusal of a judge on grounds of bias, stating:

> "(59) We agree that bias is prima facie a factor that may lead to a judge recusing himself from a matter.
>
> Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of *the Constitution* thus:

"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".

[60] What is bias? The Oxford English Dictionary defines bias thus: "as an inclination or prejudice for or against one thing or person". The Blacks' Law Dictionary 9th edition defines the word bias as "Inclination; prejudice; predilection". Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.

173. In Rawal vs Judicial Service Commission & Another; Okoiti (Interested Party); International Commission of Jurists & Another (Amicus Curiae) (Civil Appeal (Application) 1 of 2016) [2016] KECA 717 (KLR) (11 March 2016) (Ruling), this Court considered recusal applications and held thus:

> " An application for recusal of a Judge is a necessary evil. On the one hand, it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with *the Constitution*, without any fear, favour bias, affection, ill will, prejudice, political, religion or other influence. In such applications, the impartially of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human and above all, *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the two evils. The alternative is to risk. Violating a cardinal guarantee of *the Constitution*, namely, the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial court ....."

174. The question of bias as a ground for recusal has also been addressed in the Judicial Service (Code of Conduct and Ethics) Regulations. Regulation 21 provides as follows:

" 21.

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

a. is a party to the proceedings;

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

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

d. has actual bias or prejudice concerning a party;

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

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

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

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

175. The decisions above, in our view, underscore that recusal is a fundamental safeguard in the administration of justice, essential for preserving the integrity and impartiality of the judicial process. With this in mind, we now turn our attention to the test to be applied in recusal applications.

176. The test has been considered by various courts before. In R. vs Gough (1993) AC 646, the House of Lords adopted the 'real danger' test, which focused on whether there was a real risk that a fair trial would be compromised. However, this test did not gain acceptance across the Commonwealth. In Magill vs Porter (2002) 2 AC 357, the House of Lords refined the test, introducing the standard of whether a fair-minded and informed observer, considering all the facts, would conclude that there was a real possibility of bias. The House of Lords held thus:

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

177. In Committee for Justice and Liberty et al. vs National Energy Board et al [1978] 1 SCR 369, 1976 Can L 112 (SCC), the Supreme Court of Canada (per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson, JJ) considered an objection to Mr. Crowe's involvement in the National Energy Board, which was reviewing applications under section 44 of the National Energy Board Act. The objection stemmed from Mr. Crowe's prior participation in a Study Group in a representative role. Given the quasi-judicial nature of the Board and its duty to uphold the principles of natural justice, the Court ruled as follows:

> " ...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."

178. In another decision by the Supreme Court of Canada to wit, Ontario Labour Relations Board, (International Brotherhood of Electrical Workers, Local 894 vs Ellis – don Limited [1990] 1 SCR 282), the Court held thus:

> "In the case of bias, the state of mind of the decision- maker, evidence of bias is often difficult to apprehend directly. Therefore, the test adopted had to be usually limited to the demonstration of a reasonable apprehension that the mind of the adjudicator might be biased. If a requirement to establish actual bias had been adopted as a general principle, judicial review for bias would be a rare event indeed."

179. Closer home, the Constitutional Court of South Africa in The President of the Republic & 2 Others vs South African Rugby Football Union & 3 Others, (Case CCT 16/98) held, inter alia, that:

> " The test of bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in the dissenting judgment by de Grandpre, J. in Committee for Justice and Liberty et al v National Energy Board:
>
> "...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is 'what would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude.'"
>
> ...the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case...
>
> An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application." [Emphasis added]

180. In Kenya, the Supreme Court in Jasbir Singh (supra) cited with approval the American case of Perry vs Schwarzenegger, 671 F. 3d 1052 (9th Cir. February 7, 2012), wherein it was held that:

> " ...the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts," and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice."

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

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

182. In Republic vs Mwalulu & 8 Others [2005] KECA 344 (KLR), this Court set the principles on which a judge would disqualify himself from a matter and stated as follows:

> "1. When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.
>
> 2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.

3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself." [Emphasis added]

(183) A five-judge bench of this Court, in Rawal vs Judicial Service Commission (supra), identified two competing tests that jurists appeared to grapple with in determining the appropriate standard for recusal of a judge. The Court observed as follows:

"22. For quite some time there was contestation in several Commonwealth jurisdictions regarding the proper test to be applied in such case: was it real likelihood of bias or reasonable apprehension of bias by a reasonable person?

23. In R. v. Gough (1993) AC 646, the House of Lords adopted the real danger test, meaning that the question to ask is whether there was a real danger that a fair trial was likely to be denied. The test did not win universal acceptance within the Commonwealth and in Magill v. Porter (2002) 2 AC 357, the House of Lords subsequently modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.

24. The East Africa Court of Justice adopted the same test in Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 when it stated:

"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say,

(a) litigant who seeks disqualification 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 and informed about all the circumstances of the case." [Emphasis added]

184. Similarly, in Philip K. Tunoi & Another vs Judicial Service Commission & Another [2016] eKLR, an expanded bench of this Court, after examining the test for recusal as articulated in the English cases of R vs Gough (supra) and Porter vs Magill held as follows:

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

185. We are in full agreement with the established jurisprudence on the applicable test in recusal applications. The test is objective: whether a fair-minded and informed observer, having considered all the circumstances, would conclude that there exists a real possibility of bias. This standard is concerned, not with the judge's actual state of mind, but with the appearance of partiality as perceived by a reasonable observer. Since the law is settled on this issue, we do not intend to re-invent the wheel.

186. Having delineated the applicable legal principles governing recusal applications, we now turn our attention to the specific issues raised by the appellants, which, in their estimation, bore directly upon the perceived partiality of the bench. The appellants' concerns primarily revolve around the alleged close associations between certain members of the bench and key parties to the consolidated petitions, associations which, in their view, ought to have necessitated the judges' recusal. We shall consider each of the allegations in turn, commencing with those directed against Mrima, J.

187. The appellants contended that Mrima, J. shared a longstanding personal relationship with the Speaker of the Senate, Hon. Amason Kingi, who featured prominently as a party in the consolidated petitions. In support of this assertion, they pointed to the Speaker's attendance at the judge's wedding ceremony in 2021, producing photographic evidence, including an image showing the judge receiving a gift from the Speaker. It was argued that this relationship ought to have been the subject of formal disclosure by Mrima, J., and that his failure to do so gave rise to a legitimate concern regarding the appearance of bias. According to the appellants, the judge's silence on the matter created an impression of partiality, thereby undermining confidence in the integrity of the proceedings.

188. On this issue, the High Court rendered itself as follows:

> "…it is important to recognize that mere social or professional associations do not automatically disqualify a judge from hearing a case unless there is substantial evidence that such relationships materially impact the judge's impartiality. Legal precedent requires a high threshold to justify recusal, one that demands credible proof of a reasonable likelihood of bias. In the absence of such evidence, mere speculation or suspicion based on professional or social ties does not suffice to meet this threshold. The burden lies with the applicants to show a direct link between the associations and the judge's ability to adjudicate fairly."

189. The High Court went on to hold as follows regarding the alleged relationship between Mrima, J. and the Speaker of the Senate:

> " First, the applicants have not provided evidence of any ongoing or sustained relationship between the judge and the Speaker following the event, which occurred three years before this case was brought to court. The passage of time further weakens any reasonable apprehension that this social interaction could currently influence the judge's impartiality. Moreover, at the time, Hon. A. Kingi was not the Speaker of the Senate, and no one could have reasonably foreseen that this litigation would arise in the future."

190. We fully align ourselves with the conclusions reached by the High Court. In doing so, we note that, aside from the assertion of a past friendship between Mrima, J. and the Speaker of the Senate, no evidence was presented to establish that such a relationship endures to the present time. Moreover, as the High Court appropriately observed, the interaction occurred over three years prior to the initiation of the petitions, at a time when Hon. Amason Kingi was not the Speaker of the Senate. This passage of time significantly weakens any legitimate concern that these prior interactions could now influence the judge's impartiality.

191. In Locabail (UK) Ltd vs Bayfield Properties Ltd [2000] QB 451 (CA), the Court of Appeal of England, while considering a recusal application held in part as follows:

> " We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a

danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." [Emphasis added]

192. Regarding the claim that Mrima, J. received a gift from Hon. Amason Kingi, we note that the event in question was Justice Mrima's wedding. In this context, it is pertinent to emphasize that it is neither unusual nor exceptional for judges to be invited to social gatherings, or to host social gatherings, including weddings. Additionally, it is widely accepted, if not customary, for guests at such occasions to bring gifts for the couple. Therefore, the appellants' contention that the gift could have influenced the judge's impartiality is, in our view, speculative and lacking in merit.

193. It is important to emphasize that judges, like everyone else, inevitably have social and professional relationships, and recusal should not be premised on such relationships alone. Mere social or professional associations, in and of themselves, do not satisfy the legal criteria for disqualification. In our view, there must be a clear and reasonable apprehension that, because of the social or professional relationship, the judge cannot impartially decide the matter at hand. The applicable test remains whether a reasonable and informed observer, cognizant of all relevant facts, would perceive a genuine risk of bias, rather than simply any association or familiarity. This view aligns with the holding of this Court in Kaplan & Stratton vs L. Z. Engineering Construction Ltd & 2 Others [2001] KECA 161 (KLR) where the Court stated:

> "If disqualification issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. When a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar. The converse is also true."

194. Turning to the concerns raised about Justice Ogola's impartiality allegedly stemming from his spouse's appointment to a parastatal position by the President, who had nominated Prof. Kithure Kindiki, the High Court found that no evidence was presented to establish that the appointee was, in fact, the judge's spouse. It further held that even if such evidence had been provided, the allegation did not meet the requisite threshold for recusal. Additionally, the court determined that the appointment was made by Hon. Soipan Tuya, the then Cabinet Secretary for Environment, Climate Change and Forestry, and not by the Head of State.

195. The appointment of the person alleged to be Justice Ogola's wife was made through Gazette Notice No. 7515 dated 7th June 2023 and published in Vol. CXXV No. 129 on 9th June 2023. We have reviewed the said Gazette Notice and wish to reproduce the pertinent portions as hereunder:

> " In Exercise of the powers conferred by paragraph 6 (1)
>
> (g) of the Kenya Water Towers Agency Order, 2012, as read together with section 51 (1) of the *Interpretation and General Provisions Act*, the Cabinet Secretary for Environment, Climate Change and Forestry appoints-
>
> Rose Ombaki,
>
> Florence Auma Oluoch,
>
> to be members of the Kenya Water Towers Agency Board, for a period of three (3) years, with effect from the 9th June, 2023. The appointments effected vide Gazette Notice Nos. 11515/2021 and 9368/2022 are revoked.

Dated the 7th June, 2023.

Soipan Tuya,

Cabinet Secretary for Environment, Climate Change and Forestry."

196. Although not explicitly named, the individual whom the appellants alleged to be Justice Ogola's wife, as referenced in the Gazette Notice, was Florence Auma Oluoch. A perusal of the gazette notice reveals that the appointments of the two individuals to the Kenya Water Towers Agency Board were made by Soipan Tuya, the then Cabinet Secretary for Environment, Climate Change, and Forestry. Therefore, the appointment was not made by the President, as suggested by the appellants. Moreover, these appointments occurred on 7th June 2023, more than a year prior to the filing of the petitions challenging the impeachment of H. E. Gachagua. Given that Soipan Tuya was not a party to the proceedings before the Court, it is implausible to suggest, even remotely, that this appointment could have had any bearing on the judge's impartiality, assuming that the said appointee was the Judge's wife.

197. We fully endorse the findings of the High Court that family members of judges are entitled to pursue independent careers, and such pursuits, in and of themselves, should not cast doubt on a judge's impartiality. Family members of judges, like any other qualified Kenyan, can lawfully be appointed to any public office, and that, per se, cannot be a ground for a judge's recusal, unless it is demonstrated that the appointment was intended to give the appointing authority an undue advantage in judicial proceedings, or for any other improper factor relating to the appointment and the judge's discharge of judicial duties. To suggest otherwise would impose an unreasonable and disproportionate burden on judges and judicial officers. The professional undertakings of a judge's spouse, particularly where they bear no direct relevance to the matter before the court, cannot serve as a valid basis to question the judge's objectivity. In the absence of specific and compelling evidence of a conflict of interest, such allegations amount to mere speculation and fail to meet the requisite legal standard for recusal.

198. In our view, the allegations concerning both Justice Ogola and Mrima fail to meet the requisite threshold for recusal. In the absence of any other substantive evidence, a fair-minded and informed observer, after considering all relevant circumstances, would not reasonably conclude or infer that there existed a real possibility of bias against the appellants by the two judges.

199. It is beyond dispute that the appellants had the burden of establishing facts that could justify an inference that a fair- minded and informed observer could conclude that the judges were, or were likely to be, biased. Having carefully considered the evidence that was presented before the High Court, we are convinced that no fair-minded observer, fully appraised of the facts in this appeal, could reasonably conclude that the judges were biased or likely to be biased against the appellant.

200. We need not address ourselves to other grounds for seeking recusal of the three judges that were expressly withdrawn by the appellant, upon realizing that they were factually incorrect. Suffice it to add that parties should exercise due diligence before they seek a judge's recusal from a matter on false and speculative allegations that cause judges embarrassment.

201. We now turn to address two other issues raised by the appellants which were alleged to have cast doubt on the judges' impartiality, thus warranting their recusal. The first issue pertains to the claim that since a complaint had been lodged with the Judicial Service Commission against the judges by one of the petitioners, the bench was obligated to recuse itself. It was argued that by declining to do so, the bench failed to adhere to the binding precedent set by the Supreme Court in Dari Limited & 5 Others vs

East African Development Bank [2024] KESC 58 (KLR), where recusal was mandated under similar circumstances. In the Dari Limited case, the Supreme Court stated as follows:

> " 26. What is undeniable, is the fact that by resorting to this course of action, the applicants are unequivocally accusing this Bench of lack of impartiality, fairness, and integrity. Such an accusation against a Judge goes to the very core of his/her oath of office. Coming from a party to ongoing proceedings, such an allegation, must strongly persuade the Judge to recuse him/herself from further participation in the proceedings. Indeed, the honourable recourse by the litigant is to seek the recusal of the Judge. This is precisely what has happened to us, save that instead of applying for our recusal, the applicants herein would rather this court stayed the proceedings until the JSC determines their complaint, a very strange move, to say the least."

202. Although the Supreme Court recused itself from hearing the matter before it, it held as follows at paragraph 28 of its decision:

> " In taking this decision, we are keenly aware of its consequences on the appeal before us, given the constitutional provisions as to quorum of this court. Indeed, such a decision is one that ought only to be taken very sparingly, on a case-by-case basis, and in the most compelling circumstances. However, in the face of the accusations of impropriety and bias, levelled against an entire Bench of the court, even the doctrine of necessity cannot be available to the appellant/applicants. Furthermore, what would become of the administration of justice in the Country, if courts of law, leave alone the Supreme Court, were to be required to stay proceedings before them, pending the determination by the Judicial Service Commission of complaints filed against Magistrates and Judges?" [Emphasis added]

203. Having reviewed the Dari decision, we are not persuaded that the Supreme Court definitively established a principle that judges must recuse themselves solely because a complaint has been lodged against them before the Judicial Service Commission.

Recusal applications must be assessed on a case-by-case basis, with due consideration of the applicable test outlined above. Consequently, in our view, this issue has no relevance to the present matter.

204. The second concerns the alleged sitting of the High Court on a Saturday, and the directions and/or orders issued by the court on that day. To begin with, we fully align with the views of the learned judges that this issue had been sufficiently addressed in the prior ruling delivered on 23rd October 2024. Accordingly, this matter was, in all respects, res judicata. That notwithstanding, we have reviewed the directions issued by the court on Saturday, 19th October 2025, in both Kerugoya High Court Petition No. E015 of 2024 and Nairobi High Court Petition No. E565 of 2024 – Rigathi Gachagua vs State Law Office & 4 Others. The directions in both cases were as follows:

> " That in light of the urgency of the matter and the weighty issues raised therein, we direct that the application be served and responded to forthwith, for hearing inter-partes on Tuesday 22nd October 2024 at 11.00am in open court No. 18."

205. There is no evidence to suggest that the bench held a formal sitting on a Saturday. It is clear that the bench simply conferred and provided directions electronically. The only relief granted by the court concerned the scheduling of inter partes hearings, in light of the urgency of the matters.

206. Practice Directions No. 19 (ii) of the Practice Directions on standardization of Practice & Procedures in the High Court 2021 provides as follows:

> " 19. Application under Certificate of Urgency
>
> ii. The Court may in its discretion, issue orders/directions without the attendance of the advocates or parties."

207. The directions issued by the court on Saturday, 19th October 2024, in our view, were consistent with Practice Direction No. 19 (ii). In the absence of any evidence to the contrary, it is evident that the directions were intended to further the overarching goal of the *Civil Procedure Act*, namely, to ensure the just, expeditious, proportionate, and affordable resolution of civil disputes governed by the Act.

208. Having said that, however, we wish to point out that it is important that the Chief Justice issues practice directions regarding how parties can, in urgent matters, access courts over the weekend and public holidays. This is necessary given that the *Judicature Act* still provides that the official working hours of the Judiciary are Monday to Friday. Since matters are now filed electronically any day and hour of the whole week, we do not think that there is anything wrong with a judge or a bench issuing directions in a matter on a Saturday or Sunday, or on a public holiday, as long as the directions are not prejudicial to any party in the matter.

209. In the end, we are not satisfied that the appeal on recusal has any merit.

**Disposition**

210. Turning to the orders to make regarding appeal E829 of 2024, the appellant had, in his amended memorandum of appeal dated 8th November 2024, proposed that in allowing the appeal, we reverse the ruling of the High Court dated 23rd October 2024 and substitute it with an order allowing his application dated 22nd October 2024. In addition, he urged us to remit the High Court proceedings to the Chief Justice to empanel an expended bench of five judges to hear the pending petitions, and that bench to exclude E. Ogola, A. Mrima and Dr F. Mugambi, JJs.

211. The notice of motion dated 22nd October 2024 sought the following prayers;

1. That this application be certified urgent and service be dispensed with and heard at the first instance;
2. That the honourable court be pleased to find that the Deputy Chief Justice has no power under Article 165 (4) of *the Constitution* to assign a panel of judges to hear and determine the subject matter certified for empanelment.
3. That an Order be issued to quash the decision of the Deputy Chief Justice to assign the hearing and determination of 3 out of 10 of the cases referred to them by various judges touching on the impeachment proceeding against the Deputy President to assign to the Honourable Justices, E Ogolla, Mrima and Lady Justice W. Mugambi.
4. That the honourable court be pleased to find that the deputy Chief justice violated Article 25, 27, 47, 48, 50 1. and 260 of *the Constitution* in assigning this honourable bench to hear and determine only 3 out of 10 of the cases refereed to them by various judges touching on the impeachment proceeding against the Deputy President.
5. That the invalid assignment of the 3 cases out of the 10 cases to this Honourable bench comprising of Justice E. Ogolla, Justice A.C Mrima and Lady Justice Freda Mugambi whose

impartiality has been questioned by the petitioners will violate the petitioners' rights under Article 1,19, 20, 21,23, 25, 27, 47 and 50 of *the Constitution*.

6. That an alternative to prayer 4 above, the honourable court be pleased to find that the Deputy Chief Justice must take oath of office as the acting Chief Justice before she can exercise the powers under Article 165 (4) as provided for Article 74 of *the Constitution* read together with Article 259 (3) (b) of *the Constitution* and Section 5 (4), and 5 (5) of the *Judicial Service Act*.

7. That costs of this Application be provided for.

212. Given the findings we have made, we would allow that motion in terms of prayer 3 only, and quash the orders of the Deputy Chief Justice dated 18th October 2024 assigning 3 out of 10 of the cases referred to the Chief Justice touching on the impeachment proceedings against the Deputy President to Honourable Justices E. Ogolla, Mrima and Lady Justice F. Mugambi.

213. Regarding the request that we order the Chief Justice to empanel an expanded bench of five judges, this is a prayer we must decline. 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, and this answers the related prayer that we direct that the Chief Justice excludes the three named judges from the bench to be constituted afresh.

214. We have given reasons why we have upheld the decision by the three judges to decline the recusal application. We have not found any conflict of interest or any other reason that would bar the three from hearing the consolidated matters. We have not found any impropriety in the manner in which the bench has conducted or dealt with the matters. We do not perceive the bench to be biased or lacking impartiality. Whether or not to include the three judges or any of them in the reconstituted bench is a decision to be made solely by the Chief Justice.

215. In the end, we make the following orders:

1. Appeal No. E022 of 2025 is hereby dismissed.

2. Appeal No. E829 of 2025 is hereby allowed, only to the extent that we do hereby quash the orders of the Deputy Chief Justice dated 18th October 2024 assigning Kerugoya High Court Petition No. E013 of 2024 Thomas Kimotho Maingi v The Deputy President of Kenya Hon. Rigathi Gachagua and anor, Kerugoya High Court Petition No.E015 of 2024 Hon David Munyi Mathenge and anor v The Senate of the Republic of Kenya , Speaker of the Senate and 2 others and Nairobi High Court Petition No. E565 of 2024 H.E. Rigathi Gachagua v The Speaker of the National Assembly of Kenya and 4 others to Honourable Justices Eric Ogolla, Anthony Mrima and Lady Justice Dr Freda. Mugambi.

3. The three matters shall immediately, in any event not later than 14 days from the date hereof be placed before the Honourable the Chief Justice for her Ladyship to empanel a bench under Article 165(4) of *the Constitution* to hear the matters.

4. Considering that both appeals are public interest matters, we make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.**

**D. K. MUSINGA (PRESIDENT)**

**..........................................**

**JUDGE OF APPEAL**

**MUMBI NGUGI**

**.........................................**

**JUDGE OF APPEAL**

**F. TUIYOTT**

**.........................................**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

Deputy Registrar.