Wanjigi v Chebukati & 2 others (Civil Appeal E404 of 2022)
[2022] KECA 724 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KECA 724 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E404 OF 2022

MSA MAKHANDIA, K M'INOTI & HA OMONDI, JJA

JULY 29, 2022

BETWEEN

JIMI RICHARD WANJIGI ..... APPELLANT

AND

WAFULA CHEBUKATI ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSIONCOMMITTEE ..... 3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ngaah, J.) dated 1st July 2022inHC JR No. E083 of 222)

JUDGMENT

REASONS FOR THE JUDGEMENT OF THE COURT

1. On 12th July 2022, we heard this appeal in which the parties were represented by learned counsel as follows: the appellant, Mr. Jimi Richard Wanjigi by Mr. Omwanza and Mr. Otieno, the 1st and 2nd respondents (Mr. Wafula Chebukati and the Independent Electoral and Boundaries Commission, respectively) by Mr. Gumbo, and the 3rd respondent, the Independent Electoral and Boundaries Commission Disputes Resolution Committee, by Mr. Ndaiga and Mr. Mukele. The dispute in the appeal involves nomination of the appellant as a candidate for election for the office of President of the Republic of Kenya in the general elections scheduled for 9th August 2022. Due to the urgency of the appeal and in particular, taking cognisance of the fact that the date of the election is set by Article 136(2) (a) of *the Constitution*, we rendered, on the same day pursuant to Rule 34(7) of the Court of Appeal Rules, 2022, an extempore judgment, dismissed the appeal with costs, and reserved the reasons for the judgment to 29th July 2022. These are the reasons for the judgment rendered on 12th July 2022.

2. On 6th June 2022, the appellant, who was duly nominated by Safina political as its presidential candidate in the forthcoming election, presented himself before the 1st respondent, the duly gazetted returning officer for the presidential election. The purpose of the appearance was for nomination or registration of the appellant to contest in the election as required by regulation 16 of the *Elections (General) Regulations*.

3. Among the documents that the appellant presented to the 1st respondent to prove his qualification for registration was a letter from Daystar University indicating that the appellant was a student at the said University pursuing a degree of Bachelor of Arts in International Relations and Security Management, and that they had completed his coursework. The appellant also presented copies of his course transcripts and a letter from the Commission for University Education which confirmed that Daystar University was accredited in Kenya, and its Degree of Bachelor of Arts in International Relations and Security Management was duly recognised. The appellant also presented what he stated were lists of voters from 24 counties who had nominated him for his presidential bid.

4. After examining the documents presented by the appellant in support of his registration, the 1st respondent ruled that the appellant was not qualified to be nominated to run in the presidential election and rejected his candidature. The 1st respondent proffered three reasons for refusing to nominate the appellant:

    (i) Lack of a university degree (as required by section 22(2) of the *Elections Act*);

    (ii) Lack of nomination by at least 2,000 voters each from at least 24 counties (as required by section 23(1) (d) of the *Elections Act*); and

    (iii) Lack of nomination certificate by Safina political party for the appellant's running mate.

5. The appellant was aggrieved by the 1st respondent's refusal to register him, and on 7th June 2022 lodged a claim with the 3rd respondent challenging the validity of the grounds upon which the 1st respondent had refused to nominate and register him. After hearing the claim, on 17th June 2022 the 3rd respondent upheld the decision of the 1st respondent and dismissed the appellant's claim but made no orders on costs.

6. The appellant was still aggrieved, and on 24th June 2022 took out Judicial Review Proceedings in the High Court for an order of certiorari to quash the aforesaid decisions of the 1st and 3rd respondents and orders of mandamus to compel the 1st respondent to gazette him as a candidate in the presidential election, to issue him with a nomination certificate, and to include him in the ballot for the presidential election. The above remedies were sought on the grounds of illegality, irrationality, unreasonableness, bias and legitimate expectation, which were set out in the appellant's statutory statement and verifying affidavit.

7. On illegality, the appellant's complaint was that the decisions of the 1st and 3rd respondents were contrary to *the Constitution* and section 22(2) of the *Elections Act*, were based on disregard of binding precedents, and violated his fundamental right to equal benefit and treatment of the law, as well as his right to fair administrative action. The binding precedents that the 1st and 3rd respondents were said to have ignored were *Janet Ndago Ekumbo Mbete v. IEBC & 2 Others* [2013] eKLR and *Mable Muruli v. Hon. Wycliffe Ambetsa Oparanya & 3 Others* [2013] eKLR.

8. On irrationality the appellant complained that the impugned decisions were made without regard to his fundamental rights and freedoms and in violation of due process. He averred that the conclusion

that he had not garnered the required number of registered voters in 24 counties was irrational because it was contrary to overwhelming evidence and based on purported analysis which was not provided for in the law. It was also the appellant's view that the 1st respondent acted irrationally when he rejected the certificate of nomination of his running mate, whereas Article 148 of the Constitution requires only that the running mate be nominated by the presidential candidate. He added that even the 3rd respondent acted irrationally when it addressed the issue of the clearance certificate for his running mate whilst the 1st respondent had not raised the issue.

9. Turning to unreasonableness, the appellant pleaded that the impugned decisions were unreasonable on account of being ultra vires *the Constitution*, Section 22(2) of the *Elections Act*, in breach of fair administrative action, and for not being reasonably justifiable in a democratic State. As regards bias, it was the appellant's contention that the decision of the 3rd respondent was tainted by apparent bias and conflict of interests because the chairperson of the 3rd respondent had acted as the private advocate of the 1st respondent in a different matter, High Court Miscellaneous Application No. 33 of 2021.

10. Lastly on legitimate expectation, the appellant pleaded that it was his legitimate expectation that the 1st and 2nd respondents would act in accordance with *the Constitution*, laws of Kenya and binding precedent.

11. The 1st and 2nd respondents opposed the application vide replying affidavits sworn on 29th June 2022 by Mr. Chrispine Owiye, the 2nd respondent's director of legal and public affairs and on 14th June 2022 by Mr. Moses Sunkuli, its acting director, voter registration and electoral operations. Other than some rather feeble objections regarding intitulement of the judicial review application, the suitability of judicial review to resolve the complaints raised by the appellant, and alleged delay on the appellant's part in making the application, the substantial grounds upon which the application was opposed were that the appellant was well and truly not qualified for registration as required by the law because he did not present a certified copy of a degree from a recognised university in Kenya; that the appellant was not nominated by not fewer than 2000 voters registered in each of a majority of the counties as required by Article 137 (1) of the Constitution; that the appellant's list of nominators did not bear some of the particulars required by the regulations, namely the names, signatures and identity card or passport numbers; and that the appellant did not submit the list of his supporters at least five days before the date for registration of candidates as required by regulation 18 of the *Elections (General) Regulations*.

12. As regards the precedents that the appellant alleged the 1st and 3rd respondents had ignored, it was averred that those precedents were based on the law as it was in 2013, and that the law had since been amended. On the complaint of bias, these respondents denied bias and contended that the appellant was not acting in good faith because he did not raise the issue when he appeared before the 3rd respondent and only clutched on the matter after the 3rd respondent ruled against him. Lastly the 1st and 3rd respondents averred that their decisions which aggrieved the appellant were strictly in accordance with *the Constitution* and the law and were therefore not amenable to judicial review.

13. On its part the 3rd respondent filed grounds of opposition to the application for judicial review. It was contended that the 3rd respondent was lawfully constituted under Article 252 (1) of *the Constitution* and sections 11 and 12 of the *Independent Electoral & Boundaries Commission Act* when it heard the appellant's complaint, that the 3rd respondent's decision was fair and unbiased, and that the said decision was properly justified under *the Constitution*, the *Elections Act* and the regulations made thereunder.

14. On 29th June 2022 the High Court granted the appellant leave to commence judicial review proceedings, but declined to order the leave to operate as stay of the decisions of the 1st and 3rd respondents as prayed by the appellant. In light of the urgency of the matter, the court directed the

appellant to file and serve his substantive motion for judicial review and the same to be heard the next day. After hearing the parties to the dispute, by a judgment dated 1st July 2022, the High Court *(Ngaah, J.)*, dismissed the appellant's application for judicial review with costs.

15. Relying on the traditional limits of judicial review, the learned judge reiterated that the remedy of judicial review is not concerned with the merits of a decision, but only with the decision-making process. For that reason, he concluded that he had no jurisdiction to substitute his own opinion for that of the 3rd respondent. The learned judge rendered himself thus:

> "...I am inclined to come to the conclusion that this honourable court would not be concerned about whether the 3rd respondent was correct in coming to the conclusion that the applicant had not satisfied the statutory ad regulatory requirements to contest as a presidential candidate in the forthcoming general elections but whether, in coming to that decision, the 3rd respondent confined itself within the four corners of the law from which it derives its mandate and, in holding so, whether it gave regard to the due process."

16. It is that judgment that has led to this appeal, premised on ten grounds of appeal, three of which are repetitions of the same issue. Reframed for precision, the appellant argues in the grounds of appeal that the learned judge erred by:

(i) holding that the application did not address recognised grounds of judicial review whereas issues of illegality, irrationality, unreasonableness, bias and legitimate expectation were raised;

(ii) holding that the application did not disclose grounds for judicial review yet he had granted the applicant leave to commence the judicial review proceedings;

(iii) finding that judicial review is not concerned with the merits of an impugned decision;

(iv) failing to find that the 1st and 3rd respondent had themselves concluded that the appellant was compliant as regards nomination by the prescribed number of registered voters in 24 Counties;

(v) failing to hold that the appellant had satisfied the requirements of Article 148 of *the Constitution* regarding nomination of the running mate;

(vi) failing to decide and hold that the proceedings before 3rd respondent were null and void on account of bias; and

(vii) failing to decide and hold that the 1st and 3rd respondents were bound by precedent from superior courts.

17. In his comprehensive written submissions which were orally highlighted by his two learned counsel on 12th July 2022, the appellant submitted, as regards whether his application disclosed the grounds for judicial review, that the conclusion by the learned judge was erroneous because the appellant's statutory statement in support of the judicial review application specifically raised, as grounds of complaint, illegality, irrationality, unreasonableness, bias, violation of fundamental rights and freedoms and legitimate expectation, which are the traditional grounds for judicial review.

18. The appellant therefore urged that on the basis of his pleading, the learned judge erred by shirking his responsibility to review the decisions of the 1st and 3rd respondents, which were vitiated by the above well-known grounds for judicial review.

19. On the second ground, the appellant submitted that the learned judge erred by holding that the application did not disclose grounds for judicial review even after having granted the appellant leave to commence judicial review proceedings. It was contended that having granted the appellant leave, the learned judge implicitly accepted that the appellant had a case which needed to be considered on merit, and therefore it was not open to the learned judge to turn round and say the application did not disclose grounds for judicial review. The appellant cited the decisions in *Republic v Kenya Revenue Authority ex parte Dennis Shijenje & Another* [2021] eKLR and *Agutu Wycliffe Nelly v Office of the Registrar, Academic Affairs, Dedan Kimathi University of Technology* [2016] eKLR and submitted that leave is granted to commence judicial review proceedings only after the court is satisfied that there is an arguable case deserving further interrogation and having so found, the learned judge was in error to hold at the substantive stage that the application was not arguable.

20. Turning to the third ground of appeal, the appellant submitted that whereas before 2010 availability of the remedy of judicial review was restrictive under the*Law Reform Act* and Order 53 of the *Civil Procedure Rules*, after the promulgation of the *Constitution of Kenya, 2010*, and the enactment of the *Fair Administrative Action Act*, the law was modified and the remedy of judicial review was freed from the former shackles. Henceforth, it was submitted, the courts could review all aspects of impugned administrative decisions, including their merits. In support of that submission, the appellant relied on a number of decisions, among them *Republic v. PPARB ex parte Syner- Chemie* [2016] eKLR *Republic v. PPRAB & Others ex parte Kenya Airports Parking Services Ltd* [2019] eKLR,*Child Welfare Society of Kenya v. Republic & 2 Others ex parte Child in Family Focus, Kenya* [2017] eKLR and*Judicial Service Commission v. Njora* [2021] KECA 366 (KLR). The appellant also cited *Australian Timeshare and Holiday Ownership Council Ltd and Australian Securities and Investments Commission* [2008] AATA 62 and submitted that merit review demands following of the rules of procedure and ensuring that the decision in question is correct in law and on facts.

21. The appellant submitted that had the learned judge not erred by restricting the scope of judicial review as he did, he would have found that the appellant had legitimate expectation that the respondents would follow and apply the law as pronounced by the superior courts, which expectation was violated by the 1st and 3rd respondents. Relying on the decision in Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR, the appellant submitted that legitimate expectation arises when a person has expectation that a public body will retain a long-standing practice or keep a promise or where the body, by representation or past practice, has aroused expectation in a person that it is within its power to fulfil the representation or follow established practice.

22. As regards illegality, the appellant submitted that the 1st and 3rd respondents' decision not to register him was tainted by illegality because he had satisfied the requirements of section 22(2) of the *Elections Act* and in that regard he was also backed by precedent from superior courts which in law was binding on the said respondents. Specifically on precedent, the appellant argued that stare decisis is binding on subordinate courts and tribunals like the 3rd respondent and that the learned judge erred in failing to hold as such. It was submitted that as the superior courts had interpreted section 22(2) of the *Elections Act* to mean that a person who had completed his education was qualified to run for election, that interpretation was binding on the 1st and 3rd respondents who were bound to apply and comply with it.

23. On unreasonableness and irrationality, it was similarly submitted that had the learned judge properly interpreted the law on the reach and scope of judicial review, he would have held that the 1st and 3rd respondents' conclusion that the appellant did not meet the signature requirement of Article 137 of the *Constitution*, was unreasonable and irrational. The appellant urged that having confirmed in writing that that he was compliant as regards nomination by the prescribed number of registered voters in 24

counties, it was unreasonable and irrational for the 1st respondent to turn round and claim that he was not compliant. The appellant relied on *Republic v. Betting Control & Licensing Board & Another ex parte Outdoor Advertising Association of Kenya* [2019] eKLR on the attributes of unreasonableness and irrationality as grounds of judicial review.

24. As for bias, it was contended that there was apparent bias because the chairperson of the 3rd respondent was the 1st respondent's advocate, a fact which was not disclosed during the hearing, thus leading to conflict of interest. It was the appellant's submission that the decision of the 3rd respondent was in violation of the rules of natural justice, and in breach of Article 50 of the *Constitution* which guarantees every person the right to a fair hearing. It was further argued that the principles of natural justice prohibit a person from being a judge in his own cause, and that in the instant case, the principle was violated when the 2nd respondent gazetted members of the 3rd respondent and appointed the 1st respondent's advocate as a panelist, which was tantamount to the 1st respondent choosing the panelists to hear the case against him.

25. The appellant added that the chairperson of the 3rd respondent had represented the 1st respondent in High Court Misc App. No. 33 of 2021 and therefore had conflict of interest which he did not disclose. In addition, it was contended that there was no law allowing the 1st respondent to appoint a non-commission member as a panelist. Relying on the decision of the High Court in *Leina Konchellah & Others v. Chief Justice & Others* [2021] eKLR, the appellant submitted that the participation by the chairperson of the 3rd respondent createdreasonable apprehension of bias in a right minded person and therefore the decision of the 3rd respondent should have been quashed in limine.The appellant also relied on *Australian Timeshare and Holiday Ownership Council Ltd and Australian Securities and Investments Commission* (supra) and submitted that the decision of the 3rd respondent was reviewable on merit for violating procedural fairness.

26. Lastly, as regards nomination of the running mate, the appellant submitted that the learned judge erred by failing to hold that he had complied with Article 148 of the and nominated his running mate as required by the law. The appellant contended that he nominated his running mate on 6th May 2022, and that the respondents had not challenged that fact in their replying affidavit before the 3rd respondent. He added further, out of abundant caution he submitted his running mate's nomination certificate on 6th June 2022 within the prescribed time.

27. For the foregoing reasons the appellant urged us to allow the appeal, consider his application before the High Court, review the decisions of the 1st and 3rd respondents and grant the orders he had sought.

28. The 1st and 2nd respondents opposed the appeal relying on their written submissions dated 8th July 2022 which their learned counsel orally highlighted on 12th July 2022. The two respondents submitted that the learned judge did not commit any error when he concluded that the appellant's application did not address recognised grounds of judicial review. They relied on Lord Diplock's classification of the grounds of judicial review into illegality, irrationality and procedural impropriety in *Council of Civil Service Unions v. Minister of the Civil Service [1985] AC 374*, and added that subsequently proportionality was recognised as an additional ground. In the view of these respondent's it would have been remiss for the learned judge to veer from the above grounds of judicial review. They added that it being common ground that what was before the learned judge was a judicial review application, the mandate of the court was limited to examination of the decision making process rather than the merits of the decision and that the learned judge could not substitute his decision for that of the 3rd respondent.

29. The 1st and 2nd respondents further submitted that beyond setting out the grounds for judicial review in the statutory statement, the appellant did not substantiate how the decision of the 3rd respondent was vitiated by the grounds of judicial review. It was further submitted that by approaching the court under the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*, the appellant has by his own choice constrained the remedies that the court could give.

30. On the extent of the jurisdiction of the court in a judicial review application, the 1st and 2nd respondents submitted that it did not extend to merit review. They relied on the decisions of this Court in *Orange Democratic Movement v. National Treasury & 3 Others* [2019] eKLR, *Energy Regulatory Commission v SGS Kenya Ltd & 2 Others* [2018] eKLR, *Kenya Pipeline Co Ltd v. Hyosung Ebara Co. Ltd & 2 Others* [2012] eKLR and of the Supreme Court in *John Florence Maritime Services Ltd & Another v. Cabinet Secretary, Transport & Infrastructure & 3 Others* [2021] eKLR and submitted that it was held in the latter decision that despite codification in *the Constitution* and the *Fair Administrative Action Act*, judicial review was concerned with the decision making process rather than the merits of the decision.

31. Turning to the issue of adherence to precedent, the 1st and 2nd respondents submitted that as a constitutional commission charged with the responsibility of conducting elections, the 2nd respondent was legally bound to comply with the *Elections Act* and the regulations made thereunder like section 22(2) and regulation 47 which required the appellant to submit a certified copy of a degree certificate before registration as a presidential candidate. They contended that the learned judge considered the cases of *Janet Ndago Ekumbo Mbete v. IEBC & 2 Others* (supra) and *Mable Muruli v. Hon. Wycliffe Ambetsa Oparanya & 3 Others* (supra) which the appellant relied upon as binding precedent, and rightly concluded that the 3rd respondent had correctly interpreted the law.

32. In any case, it was submitted, the said decisions were not applicable because they were rendered before the amendment of regulation 47(1) in 2017 to specifically require submission of a certified copy of a degree certificate, they concerned the question of who could be deemed a graduate, not who could be deemed a degree holder, and were decisions of a concurrent court which were not binding on the learned judge. The 1st and 3rd respondents relied on the judgment of the High Court in *Walter Onchonga Mongare v. Wafula Chebukati & 2 Others*, Const. Pet. No. E318 of 2022 which they contended properly interpreted regulation 47(1) as amended in 2017.

33. For the above reasons the 1st and 2nd respondents urged us to dismiss the appeal with costs.

34. The 3rd respondent associated itself with the submissions of the 1st and 2nd respondents and added that the appellant had not proved any bias on the part of its chairperson. Accordingly, the 3rd respondent also urged us to dismiss the appeal.

35. We have carefully considered the judgment of the High Court, the grounds of appeal, the record of appeal, the submissions by learned counsel, as well as the erudite authorities that were cited. We shall strive to address the grounds of appeal as we have set them out earlier in this judgment. The first issue relates to whether the appellant's application disclosed grounds for judicial review.

36. It is common ground that the application before the learned judge was a judicial review application. Other than being filed in the Judicial Review Division of the High Court, the Chamber Summons dated 24th June 2022 sought leave to apply for orders of certiorari and mandamus and was specifically taken out under Order 53 of the *Civil Procedure Rules*. In addition, the application was taken out in the name of the Republic with the appellant as the ex parte applicant. The application was supported by a statutory statement and verifying affidavit, all mandatory prerequisites of a judicial review application.

The learned judge granted leave after which the appellant filed a substantive notice of motion, again indisputable hallmarks of a judicial review application.

37. The appellant's complaint in the first ground is that the learned judge erred in holding that the judicial review application did not disclose the recognised grounds of judicial review. This is how the learned judge expressed himself on the issue;

> " As far as the rest of the prayers are concerned, I must start by saying the obvious: that the entry point for a judicial review court in disturbing a decision made by a quasi- judicial body such as the 3rd respondent is if the impugned decision is tainted by any, some or all of the grounds of judicial review. These traditional grounds are illegality, irrationality, and procedural impropriety. Proportionality as a ground for Judicial review is a latter development but it has since been embraced as one of the grounds upon which an aggrieved party may seek to impeach a decision by which he is aggrieved."

38. Later in the judgment, the learned judge concluded as follows on whether the application disclosed grounds for judicial review:

> " With due respect (to) the learned counsel for the applicant, I struggled together(sic) from the submissions how the 3rd respondent's decision had been vitiated by any judicial review grounds. I stand corrected if I missed it, but I did not hear them substantiate the grounds of illegality and irrationality spelt out in the statutory statement."

39. Looking at the appellant's statutory statement and his detailed verifying affidavit, it is clear to us that the application disclosed the ordinary grounds for judicial review, and we may add, much more. Paragraphs 5 to 25 of the statutory statement under the heading "Grounds of Relief Sought" addressed in sufficient detail the illegality, irrationality, unreasonableness, bias and legitimate expectation that the appellant was complaining about and how those breaches were allegedly committed by the 1st and 3rd respondents.

40. Thus for example, on illegality, the appellant's pleadings are clear that he was alleging that, in holding that he was not qualified for nomination, the 1st and 3rd respondents had acted illegally and contrary to the provisions of *the Constitution* and the *Elections Act*. On irrationality, the appellant was alleging that the decision to reject his supporters was irrational because it was contrary to the evidence on record, was based on analysis not provided by the law, and resulted from a change of position by the 1st respondent who had initially confirmed compliance. He also claimed that the rejection of his nomination on account of lack of nomination of his running mate by Safina party was irrational because the law did not require such nomination. As regards bias, the appellant was alluding to breach of the rules of natural justice, a classic ground for judicial review. Violation of his legitimate expectation was founded on the assertion that the 1st and 2nd respondent had failed to follow binding precedent.

41. We may add too that the appellant had also alleged violation of some 18 provisions of *the Constitution*, among them his fundamental rights and freedoms under Article 38 (political rights), Article 47 (fair administrative action), and Article 50 (fair hearing). It is worth of note that Article 165 (3) (b) of the Constitution as read with Articles 22 and 23 empowers the High Court to issue judicial review remedies in enforcement of fundamental rights and freedoms.

42. We are accordingly satisfied that the appellant's application disclosed cogently and in sufficient detail grounds for judicial review and that the appellant was entitled to a decision thereon from the High Court. Pleadings are not a fetish to be pursued obsessively for their own sake.

43. In view of our finding on the first ground of appeal the outcome of the second ground is obvious. In *Mirugi Kariuki v. Attorney General* [1990-1994] EA 156, this Court held that in an application for judicial review, the applicant only needs to demonstrate a prima facie case without going to the merits of his case. To have granted the applicant leave to apply for judicial review, the learned judge must have been satisfied that the appellant had made out a prima facie case justifying judicial review remedies and requiring the 1st and 3rd respondents to answer at the stage of the substantive notice of motion. It has been stated consistently that the purpose of leave is to weed out frivolous or undeserving applications which prima facie do not disclose a basis for orders of judicial review.

44. Thus for example, in *Republic v County Council of Kwale & Another ex parte Kondo & 57 Others* [1998] 1 KLR, Waki J. (as he then was) stated thus on the issue:-

> " The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration...
>
> Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review." (Emphasis added).

45. When the court grants leave, it is in effect saying that there is a prima facie case that requires to be heard. It cannot turn round after granting leave and say that there was no justification for leave, unless the grant of leave is specifically challenged on appeal, which was not the case here. Indeed, the 1st and 3rd respondents did not object to the application for non-disclosure of grounds for judicial review. Of course, grant of leave is not synonymous with saying that the application must or will succeed when it is heard inter partes. This ground of appeal reinforces the first, namely that the appellant had indeed based his application on known grounds for judicial review, otherwise he would not have obtained leave at all.

The third ground of appeal is the nature and reach of judicial review in Kenya today. The appellant and the respondents take diametrically opposed positions, with the applicant contending that judicial review today looks beyond the decision-making process into the merits of the decision where necessary. The respondents take the view that judicial review is still restricted to the decision-making process, with the court having no jurisdiction to consider the merits of the impugned decision.

46. Starting with the Supreme Court, whose decisions, by dint of Article 163(7) of *the Constitution* are binding on all other courts, the transformation that judicial review has undergone since the promulgation of *the Constitution* of Kenya and the enactment of the *Fair Administrative Action Act* has been acknowledged and approved. For example in *Communications Commission of Kenya v. Royal Media Services & 5 Others* [2014] eKLR, the Supreme Court held thus:

> " *The Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcend the technicalities of the Common Law."

47. Taking the cue from the Supreme Court, other superior courts have proceeded on the grounds that *the Constitution* has unmoored MV JR to sail steadily across the seas without let or hindrance, intercepting

and neutralising the pirates of maladministration whenever a distress SOS signal is received. In *IEBC v National Super Appliance Kenya & 6 Others* [2017] eKLR, this Court aptly held:

> " In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of *the Constitution* and as operationalised through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and Rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of *the Constitution*."

48. Those views were reiterated in *Child Welfare Society of Kenya v Republic & 2 Others ex parte Child in Family Focus, Kenya* (supra), where it was alleged that the High Court had erred by substituting its opinions for that of the Minister in a judicial review application. Rejecting the argument, this Court reviewed recent trends and developments in judicial review in the country and discerned a clear and deliberate trajectory towards unshackling judicial review from its traditional narrow confines. Minus the authorities it quoted, the Court held thus:

> " For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process... It was also principally concerned with the 3 'Is' -"Illegality, Irrationality and (procedural) Impropriety"-and many are the decisions which followed such narrow considerations... However, the dynamism of society and the events of recent history have decidedly thrust JR into a whole new trajectory. ...this Court expressed similar views ...stating that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. The bells for expansion of the scope of JR rang even louder after the promulgation of *the Constitution* 2010."

49. The more recent of this line of decisions is J*udicial Service Commission v. Njora* (supra) where it was contended that the Employment and Labour Relations Court had misapprehended the nature of judicial review. This Court took an unequivocal position that courts had jurisdiction to review merits in a judicial review application. Kiage, JA, writing for the Court stated:

50. In our own jurisdiction, judicial review has taken the same trajectory in recent years, spurred in large measure by *the Constitution* of Kenya, 2010. It changed the fundamental underpinnings of judicial review from the common law as codified in the *Law Reform Act*, to its article 22(3)(f), which recognises judicial review as one of the appropriate reliefs available. This is bolstered by article 47(1), which decrees the right to fair administrative action, given further effect by the *Fair Administrative Action Act* which, at section 7(2), sets out an expansive list of circumstances in which a court may review an administrative action or decision. The superior courts of this country have spoken with near-unanimity that the current constitutional and statutory landscape calls for a more robust application of the relief of judicial review to include, in appropriate cases, a merit review of the impugned decision."

51. In light of these consistent decisions, we agree with the appellant that the learned judge erred by strictly constricting judicial review to the pre-2010 days.

52. The remaining grounds of appeal raise the question whether, properly considered, the appellant's complaints were meritorious enough to warrant interfering with the decisions of the 1st and 3rd respondents that the appellant was not qualified for registration as a presidential candidate in the

forthcoming elections. The appellant has urged us to consider the application on its merits and find that the decisions by the said respondents were not justified. By dint of section 3(2) of the *Appellate Jurisdiction Act*, when hearing an appeal, this Court has the power, authority and jurisdiction vested in the High Court. In addition, Rule 33 of the Court of Appeal Rules confer on the Court jurisdiction to confirm, reverse or vary the decision of the High Court. (See Mirugi Kariuki v Attorney General (supra). Accordingly, we shall so proceed.

53. The first issue in this regard is whether the 1st and 3rd respondents erred by holding that the appellant was not qualified for nomination for purposes of section 22 (2) of the *Elections Act* due to lack of a degree. It is apposite to set out the relevant constitutional and statutory provisions to appreciate their tenure and effect. Article 82 (3)(b) of *the Constitution* expressly requires Parliament to enact legislation on elections and to specifically provide for among others, nomination of candidates. Article 88 of *the Constitution* which establishes the 2nd respondent as an independent constitutional commission vests in it the responsibility to, among other things regulate the process by which parties nominate candidates for elections and registration of candidates for elections (See Article 88(4) (d) and (f). Pursuant to the power granted by *the Constitution*, Parliament enacted the *Elections Act*, which provides as follows in section 22 regarding nomination or registration of persons contesting for election to the office of the president.

"22. Qualifications for nomination of candidates

A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under *the Constitution* and this Act; and

(b) holds—

(i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or

(ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.

(1A) Notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.

(1B) The provisions of this section apply to qualifications to nomination for a party list member under section 34.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy

President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya." (Emphasis added).

54. By section 99 of the *Elections Act*, Parliament vested in the 2nd respondent the power to make regulations for the better carrying out of the purposes of the Act and in particular the power to make regulations to provide for the manner of nomination and the process by which parties nominate candidates for elections. Pursuant to that power, the 2nd respondent made the *Elections (General) Regulations*.

Regulation 47 is specifically dedicated to ascertainment of education qualifications. The current provision reads as follows:

> " (1) For purposes of ascertaining the educational qualification of persons for an elective post, a person seeking nomination shall submit to the Commission certified copies of certificates of the educational qualification.
>
> 2. Where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of that body with the Kenya National Examinations Council,in the case of form four certificates, or the Commission for University Education, in the case of university degrees."

55. It is common ground that when he appeared before the 1st respondent on 6th June 2022 for registration, the appellant did not produce a "certified copy of certificate of the education qualification" which in our view, in the case of a presidential candidate, can mean only a certified copy of a degree certificate. The appellant instead produced a letter from Daystar University which read in the pertinent part as follows:

> " "Completion Letter
>
> Re: Jimi R. Wanjigi - ADM No. (19-0742)
>
> This is to confirm that the above named is a student at Daystar University in the School of Arts and Humanities and pursuing a bachelor of Arts degree in International Relations and and Security Management. Jimi has completed his coursework requirements.
>
> Any assistance given to him will be highly appreciated."

56. By its own terms, the above letter is clear enough that the appellant is still a student pursuing his bachelors degree at the university. The appellant himself readily concedes that he is yet to be conferred with the degree by Daystar University. According to him, however, he expects the University to confer on him the degree in November 2022 and he therefore submits that the above letter, the coursework transcripts and the letter from the Commission for University Education confirm that he is as good as already conferred with the degree and that regulation 47 (1) must be interpreted as such.

57. We are not persuaded, on the evidence on record that the appellant satisfies the requirements of Regulation 47 (1) as it stands. The letter from the University confirms that he is still a student at the University pursuing the degree course. Other than stating that he has completed his coursework it does not state he has a degree or in unequivocal terms that he shall be conferred with one in November or any other time. There is no room to read regulation 47(1) as set out above in a speculative manner. Worse for the appellant is the letter from the Commission for University Education whose relevance is not readily apparent to us in view of the terms of regulation 47(2). The letter from the Commission for University Education, which is addressed to the appellant himself, reads as follows in the pertinent part:

> " Re: Recognition of Qualifications Jimi Richard Wanjigi
>
> Thank you for your application dated 27th May 2002 in which you requested the Commission for University Education to confirm the accreditation status of the following degree program offered by Daystar University in Kenya:

Bachelor of Arts in International Relations and Security Management

Daystar University is a duly accredited Private University in Kenya having been chartered in 1994. The University has since been re-chartered under the *Universities Act* No 42 of 2012.

The degree in question is, therefore, duly recognised in Kenya and by convention in other countries in the world.

The Commission has confirmed that you were rightfully admitted to the University, pursued and passed all the relevant courses; and you are due for graduation in November, 2022."

58. One would have expected a lot of the information in the last paragraph of that letter to come from Daystar University itself, rather than the Commission. Be that as it may, the role the Commission under regulation 47(2) is restricted to authentication of a degree "where the body that issued the certificate is not based in Kenya." To the extent that Daystar University is based in Kenya, we wonder what is the value or relevance of the Commission's letter in this case. It is also doubtful to us whether the Commission could validly authenticate a degree which the appellant admits he has not yet been awarded.

59. The appellant has deployed a lot of firepower in the contention that the decisions of the 1st and 2nd respondents refusing to register him on account of lack of a degree should be quashed because of illegality, irrationality, contrary to precedent and his legitimate expectation. From what we have stated, we are not persuaded that those decisions are illegal, irrational, or unreasonable as understood in law. They are based on the provisions of valid law and we perceive nothing illegal, irrational or unreasonable in the manner in which the 1st and 3rd respondents have interpreted and applied the law as it stands. What remains to address is the alleged violation of precedent and legitimate expectation.

60. The direct precedent that the appellant contends was violated by the respondents is the High Court decision in *Janet Ndago Ekumbo Mbete v. IEBC & 2 Others* (supra). Rendered on 15th March 2013, the applicant in that case challenged the nomination on of the 3rd respondent, Hassan Ali Joho, to contest the office of Governor, Mombasa County on the basis of lack of a degree from a recognised university. The 3rd respondent's response was that he had enrolled for a degree in Business Management (Human Resource Management Option) at Kampala University, Uganda and that he had completed all the requisite study units required for the award of the degree. He argued further that section 22(2) of the Act did not require a physical degree but only proof that he had completed the process leading to award of the degree.

61. In a judgment rendered on 15th March 2013, the High Court (Lenaola, J., as he then was), dismissed the objection holding that although the definition of the term "degree" envisaged a situation where a degree would be conferred on a student upon completion of exams or studies, what mattered was not the physical degree, but that the person has attended school undertaken the studies envisaged and passed all the requisite exams for the conferment of the degree. It will be noted that the judgment was based on section 22(2) of the *Elections Act* as read with Regulation 47(1) of the Elections (General) Regulations as they stood in 2013.

62. In 2017, regulation 47(1) was amended by Legal Notice No 72 of 2017 to specifically require, as proof of a candidate's educational qualification, "certified copies of certificates of the educational qualification." The respondents argued that with that amendment, what is now required is a certified copy of the degree and it is on that basis that all the other presidential candidates have been nominated or registered. It may be apt to add that in a recent judgment rendered on 30th June 2022 in *Walter Onchonga Mongare v. Wafula Chebukati & 2 Others* (supra), the High Court (Mrima, J.) took the

view that a presidential candidate who relied for nomination on academic transcripts and completion letter from a University as well as a letter from the Commission for University Education did not satisfy the requirements of section 22(2) of the *Elections Act*. He concluded that the petitioner in that case was not a holder of a degree and was not eligible for nomination as a presidential candidate.

63. The other precedent cited by the appellant is *Mable Muruli v Wycliffe Ambits Oparanya & 3 Others* [2013] eKLR. The relevance of that decision in this appeal is not readily apparent to us. In that case the Independent Electoral and Boundaries Commission declined to nominate the petitioner to run for office of Governor for lack of a degree. The petitioner challenged, among others, that decision contending that her diploma transcripts which she had produced for nomination, were equivalent to a degree. That contention was rejected by the court which concluded the petitioner was required to produce a degree certificate for nomination.

64. Taking into account the amendment of Regulation 47 (1) of the *Elections (General) Regulations* in 2017, we are satisfied that the respondents did not err by ignoring any binding precedent as submitted by the appellant. The decision in *Janet Ndago Ekumbo Mbete v IEBC & 2 Others* (supra) was rendered under the 2013 regulations and the 1st and 3rd respondents therefore did not err by taking into account the tenure and import of the 2017 amendment. The recent decision of the High Court in *Walter Onchonga Mongare v. Wafula Chebukati & 2 Others* (supra), which we have adverted to above and which was rendered under the regulations as amended, is to the same effect.

65. The appellant also challenges the decision of the 1st and 3rd respondents holding that he had not complied with Article 137(1) of *the Constitution* on nomination by registered voters in a majority of the 47 counties. The said Article makes provision for qualifications and disqualifications for election as President as follows:

> "137(1) A person qualifies for nomination as a presidential candidate if the person -
>
> a) is a citizen by birth;
>
> b) is qualified to stand for election as a member of parliament;
>
> c) is nominated by a political party, or is an independent candidate; and
>
> d) is nominated by not fewer that two thousand voters from each of a majority of the Counties." (Emphasis added)

66. That Article is replicated in Section 23 of the *Elections Act*. In addition, regulation 18 of the *Elections (General) Regulations* provides for how the support of a presidential candidate's nomination by at least 2000 voters from each of a majority of the counties is to be established. The regulation reads as follows:-

> 18. Supporters of nomination of presidential candidate and statutory declaration
>
> The person delivering an application for nomination under regulation 16 or 17 shall at least five days to the day fixed for nomination, deliver to the Commission a list bearing the names, respective signatures, identity card or passport numbers of at least two thousand voters registered in each of a majority of the counties, in standard A4 sheets of paper and in an electronic form.
>
> (2) The sheets of paper delivered under this regulation shall-
>
> (a) be serially numbered;

(b) each have at the top, in typescript, the wording at the top of Form 12; and

(c) be accompanied by copies of the identification document of the voters referred to in sub-regulation (1).

(3) There shall be delivered to the returning officer together with the application for nomination, a statutory declaration in Form 13 set out in the Schedule, made not earlier than one month before the nomination day."

67. It is common ground that when the appellant appeared before the 1st respondent on 6th June 2022 for nomination and registration as a presidential candidate, his list of supporters was found to be compliant in 23 counties, but short by 7 voters in the 24th County, Siaya. The same day the 1st respondent allowed the appellant to rectify the shortfall and he submitted the names of 9 additional supporting voters from Siaya, thus satisfying the required numbers of at least 2000 voters in 24 counties, which the 1st duly respondent confirmed. The appellant contends that should have been the end of the matter, but instead, after conducting an illegal analysis that is not provided for in the law, the 1st respondent rejected the appellant's lists on the basis of other alleged anomalies.

68. Mr. Moses Sunkuli, the 2nd respondent's Acting Director, Voter Registration and Electoral Operations explained in his affidavit sworn on 14th June 2022 that the anomalies found in the appellant's lists of supporters were that:-

(i) copies of the identification documents were not matching with the list of supporters in the soft and hard copies supplied by the appellant;

(ii) a majority of the copies of the identification documents supplied by the appellant were blurred or illegible, thus making it impossible to ascertain the information required by the regulations; and

(iii) copies of the identification documents were not sequentially arranged and numbered.

69. These anomalies are explained in detail in the 2nd respondent's revised report dated the same day, 6th June 2022. It was the 1st and 3rd respondent's position that although from a numerical scan the appellant was informed that his list was compliant in terms of reflecting 2000 supporters in at least 24 counties, upon qualitative analysis, the lists completely failed to pass muster.

70. There is no dispute that Article 137 (1) of *the Constitution* and section 23 of the *Elections Act* expressly demand that to be qualified for nomination, a presidential candidate's bid must be supported by not fewer than 2,000 voters in a majority each of the 47 counties. It is absolutely clear to us that read together, the concern of Article 137(1), section 23 and regulation 23, is not a mere list of names of supporting voters. In addition to the list of names of supporting voters, the list must contain their signatures, identity card or passport numbers, in both hard and electronic copies. The lists are also required to be serially numbered and accompanied by copies of the identification documents of the supporting voters.

71. The appellant does not dispute the anomalies raised by the 1st respondent. All he complains about is that having informed him that he was complaint in terms of numbers of supporting voters and the number of counties, it was illegal, unreasonable and irrational for the 1st respondent to change his position and say that the appellant had not, after all, qualified. The appellant also contended that the

rejection of his nomination on this ground was also illegal because the 1st respondent has no power under the law to conduct what he terms a second analysis.

72. We are not persuaded that this argument has any merit. A reading of Article 137(1), section 23 and regulation 18 leaves no doubt in our minds that the purpose of these provisions is to ensure that a presidential candidate is supported by the prescribed number of genuine and verifiable voters in the prescribed number of counties. The concern is not production of a mere numerical list of names, even if they are just ghost voters. The law seeks to avoid manufactured list of non-existent supporters and that is why it requires, in addition to names of the supporters, their signatures and copies of identification documents. A candidate who for example, supplies a list of supporters numbered 1 to 2,000 but all the other details pertaining to those voters is rendered in hieroglyphics which no one can decipher, cannot claim to have complied with the above electoral laws merely because the list is 2,000 strong. Equally, when supplied copies of identification documents of the supporting voters are illegible and cannot confirm the particulars in the list of supporters, it is difficult to see how a candidate can claim to have complied with the law, and thus qualified for nomination.

73. Article 88(4) (f) has expressly vested in the 2nd respondent the responsibility of registration of candidates for elections including presidential candidates and to our minds that is clear authority on the part of the 2nd respondent to vet and analyse submitted lists to ensure compliance with *the Constitution*, the *Elections Act* and the regulations made thereunder. Indeed regulation 43 of the Elections (General) Regulations specifically requires the returning officer like the 1st respondent to hold a nomination paper invalid if:-

> (a) the particulars of the candidate or supporters contained in the nomination paper are not as required by the Act or the Regulations in respect of that elective post;
>
> (b) the nomination paper is not subscribed as required by the Regulations in respect of that elective post;
>
> (c) the candidate is not qualified to be, or is disqualified by law from being nominated or elected to the elective post for which nomination is sought;
>
> (d) so many of the supporters as would reduce the number of qualified supporters to less than the required number of supporters are not qualified to be supporters;
>
> (e) the candidate was not nominated by a political party under section 13 of the Act
>
> f. ...
>
> g. that the nomination paper was presented after the prescribed period had lapsed;
>
> h. ...
>
> i. ...
>
> j. ...

74. In view of the foregoing, we are satisfied that the 1st and 3rd respondents' rejection of the appellant's list and refusal to register him was well founded in law, and cannot be said to be illegal, unreasonable, irrational, or in violation of the appellant's fundamental rights and freedoms.

75. Turning to the refusal by the 1st respondent to nominate and register the appellant on the basis that there was no nomination certificate from Safina Political party for the running mate, the appellant contends that the decision was irrational, illegal and unreasonable because Article 148 of *the Constitution* merely requires the presidential candidate to nominate his or her running mate and that there is no legal requirement that the running mate should be nominated by a political party. We think the appellant's submission in this regard is bit disingenuous and is based on selective reading of the relevant provisions of *the Constitution*. The relevant clauses of Article 148 of the Constitution read as follows:

> "148 (1) Each candidate in a presidential election shall nominate a person who is qualified for nomination for election as President, as a candidate for Deputy President. (Emphasis added).
>
> (2) For the purposes of clause (1), there shall be no separate nomination process for the Deputy President and Article 137
>
> (1) (d) shall not apply to a candidate for Deputy President.
>
> (3) the Independent Electoral and Boundaries Commission shall declare the candidate nominated by the person who is elected as the President to be elected as the Deputy President."

There are two important salient points to note about Article 148.

The first is that it does not give the candidate contesting for election to the office of the President a carte blanche on who to nominate as a running mate. Article 148 (1) expressly requires the running mate to be a person "qualified for nomination for election as President". That therefore means we must turn to Article 137 (1) of *the Constitution* to find out who qualifies for nomination for election as President and thus for nomination as a running mate. That provision has four qualifications, namely the person in question must:

a) be a citizen of Kenya by birth;

b) be qualified to stand for election as a member of Parliament;

c) be nominated by a political party, or be an independent candidate; and

d) be nominated by not fewer than 2000 voters from each of a majority of the counties.

76,. Article 137(1) (c) is clear enough and does not require further elucidation. To qualify for nomination for election as President, and therefore as a running mate, the running mate must be nominated by a political party.

77. The second noteworthy feature about Article 148 is that of the four qualifications set out in Article 137(1), it exempts from application to the running mate only the requirement in Article 137 (1) (d) for nomination by not fewer than 2000 voters from each of a majority of the counties. The express exclusion of Article 137 (1) (d) means that to qualify for nomination by the presidential candidate as a running mate, the running mate must satisfy the other three requirements in Article 137 (1), namely, be a citizen by birth, be qualified to stand for election as a member of Parliament and be nominated by a political party or be an independent candidate.

78. Again, in light of these fairly clear provisions of *the Constitution*, we cannot see how the 1st and 3rd respondents' decisions in this regard can be said to be illegal, irrational, unreasonable, or tainted by breach of legitimate expectation.

79. As regards the alleged violation of the appellant's legitimate expectation, the same is based on the assertion that he expected the provisions of the law to be interpreted consistently and that binding precedent would be followed. The doctrine of legitimate expectation was extensively considered by the Supreme Court in *Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others* [2014] eKLR. Several principles of the doctrine were extrapolated as follows: It is a well-established and recognised doctrine in administrative law, legitimate expectation arises when a body, by representation or past practice has raised an expectation in a citizen that it is within its power to fulfil, a legitimate exception must be founded upon a promise or practice by a public authority, the representation must be one that the pubic authority is competently and lawfully capable of making, clear statutory words override any contrary expectation, and that a public authority that has made a representation which in law it has no power to make is not precluded from asserting the correct position in law.

80. Applying these principles to the assertions by the appellant, there clearly cannot be any basis to legitimately expect that a provision of the law will be interpreted and applied the same way, even after it has been amended. The 1st and 2nd respondents have no competence or lawful authority to make such representation. We do not see any representation or basis for the exaction that the 1st and 3rd respondents would wave application of *the Constitution*, the *Elections Act* and the regulations made thereunder. That is similarly a power or competency they do not possess. More importantly, in our view, a statement that the appellant has quantitively satisfied Article 137 of the Constitution and section 23 of the *Elections Act* as regards the numbers of supports does not and cannot in the circumstances of this appeal, mean that he has also qualitatively satisfied all the other requirements as regards the particulars and identification documents of the supporters contained in the lists. Accordingly, we do not perceive any legitimate expectation of the appellant's that the 1st and 3rd respondents violated. If there was any expectation arising from the circumstances we have set out about, it can only be fanciful rather than legitimate.

81. The last issue is whether the decision of the 3rd respondent is tainted by bias and is therefore null and void. The bias alleged against the chairperson of the 3rd respondent is apparent rather than actual bias. Actual bias would arise where the decision maker is a party to the litigation, or has financial or some proprietary interest in the outcome of the litigation. In such a situation, the decision maker is automatically disqualified because he or she would be sitting as a judge in their own cause. The second type of bias, which is what the appellant alleges, arises where the decision maker is not a party to the litigation and has no financial or proprietary interest in the outcome, but his or her conduct or behaviour gives rise to suspicion that the decision maker is not impartial. (See *R. v Bow Street Metropolitan Stipendiary Magistrate & Others ex parte Pinochet Ugarte*, (No.2) [1999] 1 All ER 577).

82. In a case founded on apparent bias, the test is an objective one, of whether there is reasonable apprehension of bias. The test was expressed as follows in *Attorney General of the Republic of Kenya v. Prof. Peter Anyang Nyongo & 10 Others,* EACJ Application No. 5 of 2007:-

> "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 areasonable 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 amember of the public who is not only reasonable but also fair minded and informed about all the circumstances of thecase." (Emphasis added).

83. Earlier on, expounding further on the above test, the Supreme Court of Canada explained as follows in *R. v S (R.D.)* [1977] 3 SCR 484:

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

85. The bias that the appellant apprehends is based on the fact that the chairperson of the 3rd respondent, in his capacity as an advocate had acted for the 1st respondent. Unfortunately, other than stating that it was in a miscellaneous application, the appellant did not give any details about the nature or character of the dispute. Reasonable likelihood has to be demonstrated and is not satisfied by mere suspicion. The onus of demonstrating reasonable likelihood of bias is on the appellant and as the Supreme Court of Canada noted, the threshold is high. In Kaplana H. Rawal v Judicial Service Commission & 2 Others [2016] eKLR, this Court stated:-

> " It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn"
>
> And in President of the Republic of South Africa v. South African Rugby Football Union Case CCT No.16 of 1998, the Constitutional Court of South Africa held as follows:-
>
> While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by a particular judicial officer merely because they believe that such persons will be less likely to decide the case in their favour...The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. J udicial officers are nonetheless required to 'administer justice without fear, favour or prejudice' in accordance with the Constitution and the law.To this end they must resist all manner of pressure, regardless ofwhere it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn /akn/ke/act/2010/constitution the Constitution}} itself."

86. In *Re Application for Recusal of Owiny-Dollo, CJ. by Male H. Mabirizi K. Kiwanuka* Misc. App No. 3 of 2021, the Supreme Court of Uganda was dealing with an application whose facts bear uncanny resemblance to this appeal. The application sought the recusal of the Chief Justice from hearing an election petition against the President of Uganda on the main ground that as a private practitioner, the Chief Justice had acted for the President. In rejecting the application, the Court held:

> " The onus to pass the test for bias is upon the person seeking recusal by a judicial officer. An unfounded or unreasonable apprehension of bias cannot be a justifiable cause for recusal. Furthermore, even where the apprehension of bias is expressed by a reasonable person, such apprehension must be assessed in the light of the true facts established at the hearing of the application. Courts are hesitant to make a finding of bias or to conclude that there is reasonable apprehension of bias in the absence of convincing evidence to that effect; meaning, it does not suffice to merely allege. The reasonable, objective, and informed person should be appraised of all the correct facts before determining whether or not, there is bias."

87. Other than the bland assertion that the chairperson of the 3rd respondent was biased because he had acted as an advocate for the 1st respondent, the appellant has not placed any material that would persuade us that a reasonable, well-informed and fair-minded person would conclude, merely from having acted for the 1st respondent in a matter, that the chairperson of the 3rd respondent would be biased against the appellant.

88. For all the foregoing reasons we found that the appellant's appeal had no merit and dismissed the same with costs to the respondents in the judgment dated and delivered in Nairobi on 12th July 2022.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. M'INOTI

.....

JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR