REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.11 OF 2015

HUSSEIN ROBA BORU.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF ISIOLO.....1ST RESPONDENT

HIS EXECELLENCY, THE GOVERNOR, ISIOLO COUNTY.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF ISIOLO COUNTY.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 4th December, 2015)

RULING

The petitioner filed the petition on 09.07.2015 through Mithega & Kariuki Advocates. The petitioner invoked Articles 1 (1), (2), (3,b) and (4,b), 2, 3, 10, 19, 20, 21, 22, 23, 73, 159, 174, 175, 232, 235, 251, 258 and 259 of the Constitution of Kenya, 2010. The petitioner alleged contravention of fundamental rights and freedoms under Article 27, 28, 41, 47, and 50(1) of the Constitution of Kenya, 2010. The petitioner also stated that the petition was in the matter of the purported suspension of the petitioner from the office of the chairman of Isiolo County Public Service Board. Together with the petition the petitioner also filed the certificate of urgency, and the Notice of motion seeking interim orders.

The notice of motion was initially heard ex-parte on 9.07.2015 and the court granted some interim orders pending the inter-partes hearing on 16.07.2015. On 14.07.2015 the petitioner filed another urgent application seeking orders that the OCS Isiolo Police Station and the National Police Service County Commander, Isiolo County, are directed and empowered to supervise and ensure enforcement and compliance of the orders given by the court on 09.07.2015. On the same 14.07.2015, through Kithi & Company Advocates, the respondents filed the notice of motion seeking orders to review the orders given on 09.07.2015, stay of those orders pending the inter-partes hearing of the notice of motion, that the court lacked jurisdiction to hear the matter in the petition and that the substantive petition be struck out, and that the petition be stayed pending the hearing and determination of the pending petition at the High Court in Meru. The parties' respective advocates appeared before the court on 14.07.2015 to urge their respective urgent applications as filed on the same date. The court directed the parties to serve their respective applications by close of 14.07.2015 for directions or hearing on 16.07.2015 at 9.00am when the petitioner's earlier application in the suit was scheduled for hearing. In the meantime, the 3rd respondent by the notice of appointment of advocate filed on 16.07.2015 appointed Mbogo & Muriuki Advocates to act for it in the petition.

Upon respective advocates making their submissions on 16.07.2015, by consent of the parties the court made orders as follows:

1. Pending the hearing and determination of the petition or further orders the petitioner shall not report on duty in view of the suspension but shall be paid all salaries, allowances and benefits.

2. For avoidance of doubt there is no vacancy in the office of the petitioner as there shall be no steps to recruit a chairperson for the County Public Service Board of Isiolo pending the hearing and determination of the petition or further orders by the court.

3. The preliminary objection be served upon the 3rd respondent's counsel by close of 17.07.2015.

4. 3rd respondent and the petitioner to file and serve submissions and authorities on the preliminary objection by close of 15.08.2015.

5. The applications on record are dispensed with as parties will take directions on hearing of the petition but subject to the outcome of the preliminary objection.

6. Costs in the course.

7. Hearing of preliminary objection on 22.09.2015 for 1 hour.

The preliminary objection was heard as scheduled and it failed as per the ruling delivered by the court on 02.10.2015 and thereafter, upon hearing the parties' advocates, the court directed thus, **"Mention on 09.10.2015 at 9.00am for further directions on hearing of the petition. For avoidance of doubt, interim orders remain in force till mention date or further orders by the court. Costs in the cause. 1st and 2nd respondents to file and serve answer to petition by mention date."**

On 09.10.2015 the 1st and 2nd respondents had not complied with the directions to file and serve answer to petition because the relevant officer to sign the replying affidavit had proceeded on leave to be back on 14.10.2015. In the circumstances the time for filing the 1st and 2nd respondent's replying affidavit was extended to 15.10.2015 with leave for the petitioner to file and serve a supplementary affidavit by 22.10.2015. By consent of the parties the matter was to be mentioned on 23.10.2015.

On 23.10.2015 the 1st and 2nd respondents had failed to file and serve the replying affidavit within the ordered time and had instead served on 21.10.2015 and at the petitioner's advocates' office in Nairobi and not the office as indicated on the petition. The 1st and 2nd respondents' advocates further delivered to the presiding judge during the proceedings in open court their letter addressed to the judge and dated 22.10.2015 and copied to the advocates for the other parties in the proceedings. The letter referred to another letter attached thereto which was not dated and whose author was unknown as it was anonymous.

The anonymous letter was addressed to the Registrar of the High Court at Nyeri, the Chief Justice, the Governor of Isiolo County Government, and Kithi & Company Advocates. The said copy of the anonymous letter made allegations of bribery of the presiding judge allegedly by the petitioner. The anonymous letter stated that the anonymous author had received confidential information that the presiding judge had allegedly been **"seen"** by the petitioner allegedly to make sure that the petition which the petitioner filed in the court at Nyeri to reinstate the petitioner succeeded. Further it alleged that the petitioner had failed to get the orders in the petition he had filed in the High Court at Meru and that when the petitioner had so failed, the petitioner was saying that he was referred to the presiding judge at Nyeri, given the judge's telephone contacts, and the petitioner was advised that since his issue was about employment, the judge was allegedly very approachable and the judge would allegedly help the petitioner. The anonymous letter further stated and alleged that the petitioner was boasting of how he made contacts with the judge as allegedly, the petitioner and the judge met in undisclosed place and according to the petitioner, the letter alleged, after the petitioner met the judge and agreed on an initial fee of Kshs. 1 million, the letter alleged that the judge assured the petitioner of the orders. Further the anonymous letter states that the petitioner allegedly paid the amount and the petitioner said upon filing the petition he got all the orders he needed. The anonymous letter further states that the petitioner was further boasting that what remained in the case was a mere formality and further that indeed the judge had promised the petitioner that by January 2016, the judge would have reinstated the petitioner back in the office. The anonymous letter further stated that the petitioner boasted that he was like on a paid leave since the judge ensured that he was paid all salary and allowances while he was not working as he awaited the finalization of the case. The anonymous letter further stated that the petitioner boasted that he had arranged and ensured that the petitioner's brother Abdikadir Suleiman who had a case against the County Government of Isiolo meets the judge who the petitioner, the letter alleged, cordially refered to as his good friend so that it was ensured that Suleiman gets back in office by January 2016. The anonymous letter further states that the petitioner was allegedly boasting that he is untouchable since he is also known to powerful people at the Ethics and Anti-corruption Commission who he has used to whistle blow and make sure that everyone in the county submits to him. The anonymous letter concluded thus, **"I am writing this letter as a concerned Kenyan citizen of goodwill who will not hesitate to come out and give evidence of this information. I am a close friend of Mr. Hussein Roba and I can for sure tell that he has personal contacts of the judge. I am therefore requesting the Chief Justice as the custodian of justice and fairness in Kenya to go into the depth of this issue and the revelation shall be incredible. The courts are temple of justice and the last frontier of the rule of law; if they are then infiltrated by corruption and bribery justice will remain a pipe dream for those who do not have money to approach the judge.**

Thank you."

In the letter by advocates for 1st and 2nd respondents attaching the anonymous letter and the submissions by counsel for the respondents on 23.10.2015 following an oral application, it was submitted for the respondents that the judge disqualifies from continued handling of the case. Upon hearing the parties' advocates the court directed and ordered as follows:

1) The replying affidavit of Lilian Kiruja filed on 16.10.2015 is deemed duly filed and to be served by noon today.

2) The petitioner at liberty to file a supplementary affidavit in response to the affidavit of Lilian Kiruja by 06.11.2015.

3) Parties at liberty to file and serve written submissions by 06.11.2015.

4) As the case is certified urgent, the petition will be heard on 23.11.2015 at 9.00am for 1 hour (Parties to take equal time).

5) With regard to the letter dated 22.10.2015 by counsel for 1st and 2nd respondents, and the attached anonymous letter, the court finds that the same will not constitute basis of directions of the court today and parties are at liberty to make steps as deemed appropriate.

6) Costs will be in the cause.

7) Petitioner to serve hearing notice upon the 3rd respondent by 30.10.2015.

On 23.11.2015, the 1st and 2nd respondents had filed an urgent notice of motion on 22.11.2015. The notice of motion was brought under section 3 & 12 of the Industrial Court Act, Articles 22, 47 and 50 of the Constitution of Kenya, 2010 and all enabling provisions of the law. The present ruling is the determination of that application taking into account the background to the case as earlier set out in this ruling. The

notice of motion prayed for orders:

1) That the application is certified urgent and dispensed with in the first instance.

2) That the honourable Justice Byram Ongaya be pleased to disqualify himself from any further conduct of the matter.

3) That this matter ought to be placed before any other Judge of the Employment and Labour Relation Court for its just and conclusive determination.

4) That the costs of this application be in the determination.

The grounds in support of the application were as follows:

a) That on 9.10.2015 the 2nd respondent received a letter from anonymous source delivered to his offices by G4S courier services; a copy of the same letter was received in the offices of the Advocates of the 1st and 2nd respondents.

b) That the said letter raises serious allegations of bribery of the Honourable judge by the petitioner.

c) That the said anonymous letter has consequently created in the mind of the respondents or applicants, a reasonable apprehension they may not get fair and impartial trial.

d) That accordingly, if the honourable judge continues to preside over this matter, it is highly unlikely that justice will be seen to be done to the prejudice of respondents or applicants.

e) Consequently, there is sufficient cause to warrant granting of the prayers sought.

f) If the orders sought herein are not granted no prejudice will be caused on the petitioner that cannot be compensated by liquidated damages.

g) It is therefore in the interest of justice that the orders sought in the application herein be granted.

The application was further supported by the affidavit of Lilian Kiruja, the 2nd respondent's legal advisor, attached on the application. The affidavit exhibited the letter dated 22.10.2015 by the 1st and 2nd respondent's advocates as addressed to the judge and which was handed to the judge in court at the proceedings of 23.11.2015. The affidavit also exhibited the anonymous letter as referred to earlier in this ruling. The affidavit then substantially reproduced the grounds as set out in the application.

The petitioner opposed the application by filing his replying affidavit on 23.11.2015. The substantive paragraphs of that replying affidavit stated as follows, thus:

3) That the application is a deliberate scheme by the respondent intended to intimidate the court and delay the hearing and determination of this suit.

4) That the basis of the application is an anonymous letter whose author is unknown and therefore I urge the court to disregard the same.

5) That if the author of the said letter was certain about the allegations therein and genuine in his or her quest, he or she would have been bold and courageous enough to disclose his or her identity.

6) That I have never influenced the court to make a favourable decision as alleged or at all and I do not have such intentions whatsoever.

7) That the allegations of bribery are careless and reckless only meant to annoy the court and myself with the aim of scuttling the course of justice.

8) That the court has a duty to do justice and uphold the rule of law without fear or favour and I urge the court to disregard the false and malicious allegations being levelled against the court and proceed to hear and determine this matter.

9) That all the allegations made in the anonymous letter as against me are equally baseless and malicious and the court should reject the same and refuse to be intimidated by faceless individual.

The petitioner concluded by urging the court to dismiss the application.

The 3rd respondent in the petition opposed the application by filing on 30.11.2015 the grounds of opposition thus:

1) The application is tailor made to procrastinate the hearing and determination of the suit.

2) The alleged letter is similarly tailor made for the application and authored by an anonymous entity who is not a party to the proceedings.

3) The court rejected a similar oral application made by the 1st and 2nd respondents.

4) The application is the epitome of abuse of court process.

The 3rd respondent prayed that the application dated 20.11.2015 be dismissed with costs. Despite service, the 3rd respondent did not attend the hearing of the application on 2.12.2015.

The court has considered the application, the supporting affidavit, the replying affidavit, the exhibits, the submissions and all the circumstances of the present application for recusal of the judge.

The **1st issue** for determination is to set out the kind of test the court should apply in determining an application for recusal like the present one. The principles are now settled by the various previous decisions by the courts. The applicants cited **Charles Koigi Wamwere & 2 Others –Versus- Republic, Criminal Case No. 29 of 1991** thus, **"The jurisdiction to disqualify oneself from a case is derived from the common law. It is a discretionary jurisdiction. It must, therefore, be exercised on the basis of facts and sound legal principles. The test to be employed must of necessity be objective....An applicant who alleges bias must either prove bias or grounds which suggest bias or raise a reasonable apprehension of it. It is not what the accused thinks. It is what any reasonable man observing the conduct of proceedings is likely to conclude."**

The applicants further cited and emphasised the holding in **Sussex Justices Ex-Parte Mc Carthy(1924)I KB 256** that justice must not only be done but be seen to be done. The applicants then submitted that as per **Jasbir Singh Rai & 3Others –Versus- Tarlochan Singh Rai & 4 others, Petition 4 of 2012 [2013]eKLR** thus, **"Recusal as a general principle has been much practiced 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 the Black Law Dictionary 8th Edition (2004) (P(303) "Removal of oneself as a judge or policy maker in a particular matter especially because of 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 be uncompromised; that the due process of law be realized and be seen to have its rules; that the profile of the rule of law in the matter in question be seen to have remained "uncompromised".**

The applicants further cited the Court of Appeal in **Uhuru Highway Development Ltd-Versus-Central Bank of Kenya and 2 Others, Civil Appeal No. 36 of 1996** that, **"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was real danger of bias on the relevant member of-the Tribunal in question; in the sense that he might unfairly regard or unfairly regarded with favour of disfavour the case of a party to issue under consideration by him; the real test in term of real danger rather than real likelihood to ensure that the court is thinking in terms of possibility rather than probability of bias. Although it is important that justice must be seen to be done, it is equally important that Judicial Officers discharge their duties to sit and do not, by acceding too readily to suggestion of appearance of bias, encourage parties to believe that by seeking the disqualification of Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour."**

The applicants further cited **Lord Denning MR in Metropolitan properties Co. (FGC) Ltd-Versus-Lannon (1969)1 QB 577 at 599** thus, **"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."**

The petitioner equally relied on the cited **Metropolitan Properties (FG-C) Ltd** case where Lord Denning MR stated that the test was objective and the facts constituting bias must be specifically alleged and established as was held in **R-Versus- David Makali & 3 Others in Criminal Application Nairobi 4 and 5 of 1994(U.R).** The petitioner further cited **David Mwangi Muiruri –Versus- Chief Magistrate's Court, Malindi & Another [2012]eKLR** where the High Court (Meoli J.) in considering the applicable principles stated that it did not mean that all that is required is mere suspicion of bias but as per **Home Park Caterers –Versus- AG & 3 Others [2007]eKLR** the test is not mere suspicion or doubt regarding fairness but reasonable suspicion, based on reasonable grounds.

This court follows the cited cases that the test is objective, that of a reasonable man that the court will do justice or that is biased in view of the established reasonable suspicion based on established reasonable grounds. Where the judge is shown to have a direct pecuniary interest or proprietary interest or if it is shown that there exist a conflict of interest, then the judge would disqualify automatically. In exercising the recusal jurisdiction the judge must be alert that the duty for recusal within the stated principles and where reason for recusal exist is as weighty and as compelling as the duty to hear and determine the case at hand if there is no established reason for recusal. Thus the court upholds its opinion in the ruling of 11.12.2013 in **Joseph Maina –Versus- Gitonga Kabugi and 3 Others [2013]eKLR** thus, **"The court considers that the judge carries an ethical obligation for recusal if the judge knows the reason to do so. Where no such reason is known or is not established, the court holds that the judge similarly carries an ethical obligation to hear and determine the case at hand. Thus, a judge holds an obligation to hear and determine matters brought before the court until a valid basis for recusal is established and, a judge should not invoke recusal unless a valid reason to do so exists. The court holds that the threshold and**

compelling obligation for recusal of a judge in an appropriate case in every measure, equals to the threshold and compelling obligation for hearing and determining the case for which the presiding judge is vested with the jurisdiction to decide and in absence of a valid disabling reason against the judge. Thus, in deciding for or against recusal, the presiding judge must carefully balance the thin line separating the two ethical obligations."

The **2nd issue** for determination is whether the anonymous letter as exhibited by the applicants constitutes an **"established reasonable suspicion based on established reasonable grounds"** that in the eyes of a reasonable man, the judge will be partial as biased. The court has considered the letter in issue. First, the author is not known as is anonymous. Secondly, there is no address or any lead to the author. Thirdly, the allegation of bribery as levelled are coined as to constitute hearsay or unfounded information in the author's story or account as alleged in the anonymous letter-the alleged source of the unknown author's information as alleged in the letter is not disclosed at all. Fourthly, there is no material before the court to substantiate the allegations as contained in the anonymous letter. Fifthly, no party to the proceedings has suggested or showed that the judge has acted in a manner as to harbour bias or deep rooted hostility or partiality throughout the proceedings in the present case.

It could be possible that a party may be dissatisfied with one or other order or direction given by the court in the proper exercise of the court's authority in the judging mechanisms and which dissatisfaction, in the opinion of the court, would be ventilated in the established judicial procedures of review or appeal. In that perspective, the court upholds its opinion in **Joseph Maina –Versus- Gitonga Kabugi and 3 Others [2013]eKLR** thus,

> **"The applicants have alleged bias against the presiding judge because the judge has made findings and orders in the suit one way or the other. Judicial bias is the judge's bias towards one or more of the parties to a case over which the judge presides and judicial bias is not enough to disqualify a judge from presiding over a case unless the judge's bias is personal or based on some extra-judicial reason, (See definition of judicial bias in Black's Law Dictionary, 9th Edition).**
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> **Thus, once the court has jurisdiction over the dispute before it, the court is obligated to hear and conclude the dispute on the basis of the material before the court. If the trial judge considers the material before the court and opines or finds any party before the court is a horrible or a wonderful person, that would be no ground for recusal of the judge. It is the opinion of the court that such are the judgments the judge would be entitled to make in the mechanics of judging to facilitate judging or as part of the judicial decision making process by the court.**
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> **Accordingly, the court holds that decisions by a judge in interlocutory proceedings against or for other party (like in the instant case) must be subjected to the very high measure of establishing the judge's deep-rooted prejudice against a party or the subject matter that the judge cannot be trusted to decide fairly. It is not enough for a party, like in the present case, to simply allege that the party is dissatisfied or not happy with interlocutory orders and attribute the same to speculative and unsubstantiated allegations of bias in applying to seek recusal of the presiding judge. It is only where genuine reasons are established to doubt a judge's impartiality that the judge should be required to recuse or may *sua sponte* recuse because the disabling grounds are visibly present. As it has been judicially decided again and again, the test is objective. It is not what rests in the mind of the judge to decide fairly but what a reasonable person with knowledge of all the circumstances and facts of the case will perceive of the judge's capacity to decide the case fairly."**

In the present case the court finds that the allegations in the anonymous letter were not substantiated, the parties to the suit have not suggested or alleged or established bias or partiality against the judge's judicial or other conduct throughout the proceedings and the court finds that there is no reasonable ground for the judge's recusal. To specifically answer the 2nd issue for determination, the court returns that the anonymous letter as exhibited by the applicants does not constitute an **"established reasonable suspicion based on established reasonable grounds"** that in the eyes of a reasonable man, the judge will be partial as biased.

The **3rd issue** for determination is whether the court can do anything about the anonymous letter.

At the initial stage when the application first came up under certificate of urgency on 23.11.2015, counsel for the petitioner submitted that when the letter was handed to the judge at the proceedings of 23.10.2015, the court found that there was no sufficient basis for recusal of the judge and the allegations were not true as they were baseless because the author was anonymous, had not given his or her identity, was not known to any of the parties, the address was not given and therefore the allegations could not be verified. Counsel for the petitioner further submitted that the anonymous letter was calculated to intimidate the judge and it was an attempt to delay the finalisation of the matter before the court. Thus counsel for the petitioner urged the court to ignore the anonymous letter all together with the application for recusal so that the hearing of the petition would proceed as scheduled to take place on 23.11.2015.

On the other hand, counsel for the applicants submitted that the anonymous letter was an issue before the court and it was vital for the court to determine the issue as prayed for in the application for recusal. It was further submitted for the applicants that determination of the issue would serve to safeguard and fortify the litigation environment as parties were entitled to the decisions by the court on matters as brought before the court by litigants. Without stating as much but by implication in adjourning the hearing that was scheduled for 23.11.2015 and allowing parties to argue the recusal application, the court found some favour with the submissions as were made for the applicants.

The court considers that this is the right point in time and space for the court to address the effect of the anonymous letter to the administration of justice and the fate of the unknown author of the letter.

The court appreciates, recognises and understands the harm that can be done to the reputation, authority and power of the court by anonymous authors or publishers. The court knows that such anonymous publications are generated by existing human beings who purport to mutate into spirits or ghosts with the hope of safety and freedom from the authority of the court as they stall the due processes of justice. It is the misguided desire and evil designs of such persons that the court will not have the necessary systems to punish them for their scandalous actions because such persons pretend to be the metaphysical spirits or ghosts. This court knows that such persons are not spirits or ghosts and

they are in fact within the court's jurisdiction. The court will always have jurisdiction and will deal with authors or publishers of such anonymous claims in a robust and appropriate manner. The courts will issue effective and efficient orders against unknown persons and will provide a clear roadmap for parties in positions of injury occasioned by such unknown publishers and authors whose sole purpose is to obstruct the path of justice or injure parties that genuinely seek justice in the courts. Thus, litigants who feel injured by the actions of unknown persons like it happened in this case and is likely to happen on website platforms, should today rest assure that they are entitled to seek reprieve from the courts. It is the opinion of the court that if the anonymous publishers or authors of injurious material are subsequently identified and which should be possible with modern scientific or forensic investigative systems, litigants should then be able to come back to the court, seek review of orders or further orders with a view of enforcing orders as may have been made by the court against such unknown persons. The court is guided that in **BrettWilson LLP-Versus-Person(s) Unknown, Responsible for the Operation and Publication of the Website http://www.solicitorsfromhelluk.com [2015]EWHC 2628 (QB),** the Queen's Bench Division allowed the claimant's application seeking default judgment against the unknown defendant who was an anonymous publisher.

This court is alert that the court's scandalising jurisdiction as founded in the common law offence of contempt of court may be largely outdated in this new republic under the Constitution of Kenya, 2010 under which the only type of sovereignty which informs our legal system and our laws is the democratic sovereignty of the people. The court is further alert that the Constitution enshrines the freedom of conscience, the freedom of expression, the freedom of the media, the right of access to information, political rights, and the freedom of association which must all be recognised, protected and upheld by the judiciary and not defeated by the manner in which the courts exercise the scandalising jurisdiction. The court further understands the need to protect the values and principles of governance in Article 10 and the values and principles of public service in Article 232 of the Constitution. Accordingly, this court recognises that the scandalising jurisdiction may be exercised by the court very rarely or sparingly. That is more so where publications usually by journalists, scholars and professionals may be made to review and fairly criticise the judgments and rulings as rendered by the courts.

However, it is the court's view that it would be contempt of court for a person, known or unknown (like in the present case), to publish unsubstantiated material imputing improper or corrupt judicial conduct in circumstances whereby taking into account the matters in dispute before the court (as in this case involving exercise of public authority with high public interest in the outcome of the litigation) and further taking into account the likely audience, the publication creates a real risk of impairing confidence in the administration of justice. It could be a possible defence that the publication is true or that it was for the benefit of the public but, the dangers are obvious; the judges would be put on trial and their conduct subjected to scrutiny outside the constitutional and statutory process for dealing with complaints about the judiciary.

Thus, it is the view of the court that the common law offence of scandalising the court remains relevant (in the rare cases that will come up, like the present one) because it gives the court a good remedy in situations where judges are unfairly subjected to venomous criticism or threatening behaviour. No doubt, the offence appreciates that judges, by nature of their position, have fewer options to deal with abuses they are subjected to than other holders of public or state offices. Judges cannot speak in public to defend themselves or their judgments and rulings. For that purpose, there is a clearly established constitutional and statutory judicial complaints process which is a crucial provision for upholding the public confidence in the judiciary. The authority of the law depends upon the public confidence in the judiciary and it is crucial to uphold that confidence. The judge knows that no one can impose public respect for administration of justice and judges must maintain public confidence by giving litigants an opportunity to be heard and delivering firm, fair and impartial judgments. The judge further knows that upon the shoulders of the court is the duty to uphold the integrity, leadership, and the values and principles provisions in the Constitution and the various statutes and in doing so, where the decisions of the court are firm, fair and impartial, and predictably so, it will become not uncommon for those who do not believe in a fair society that confers human dignity to all to want to obstruct the course of justice.

Litaba Oyiela in, **"Does the Offence" of Contempt by Scandalising the Court Have a Valid Place in Modern day Australia?" [2003]8(1) DeakinLaw RW; (2003) 8(1) Deakin Law Review** states that the little known offence of contempt of court by scandalising is the means by which the judiciary deals with publications that have, in its view, a tendency to undermine public confidence in the administration of justice. Further, where the publication relates to pending litigation, any charges brought are likely to fit more readily in one of the other forms of contempt such as contempt in the face of a superior court. As the anonymous letter in the present case was about or related to the pending litigation, the court finds that it would easily pass as amounting to contempt of court and the court finds as much.

The pertinent issue before the court is to determine whether the court can do anything about the anonymous letter. In **R-Versus-Gray (1900) QB 36 at 40,** Lord Russell defined the scandalising offence as any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority as that is contempt of court. The court finds that the anonymous, unsigned and undated letter filed in these proceedings was an intentional and calculated obstruction in the administration of justice; it should therefore be squarely repulsed and combated by being expunged and the author if and when identified punished because that anonymous letter spread the evil design of inciting the parties to the litigation against the presiding judge in the most unsubstantiated, reckless and scandalous manner. The court is satisfied that the allegations and more so the unsubstantiated allegations of bribery against the judge as conveyed in the anonymous letter were serious enough to constitute a real risk to the authority and independence of the court and the courts generally. Thus the court returns that the anonymous, undated and unsigned letter filed in these proceedings amounted to contempt of court as authored by the unknown person, it is liable to being expunged from record and the author is guilty of contempt of court to be sentenced accordingly if and when his identity is known.

The **4th and final issue** is about the further steps by the parties towards determination of the suit. The court has considered the prevailing interim orders and the need for efficient, effective, proportionate and just determination of the issue in dispute in the petition. The court reckons that the parties should by now have fully complied with all the directions including filing and serving of the final submissions on the petition. The court further observes that the Christmas vacation is due anytime after 18.12.2015. A judge will not be sitting in the court at Nyeri throughout the vacation period and the judge will proceed on annual leave immediately after the vacation to resume work sometimes in March, 2016. The parties would therefore be invited by the court to make proposals for appropriate disposal of the petition by the judge in a hearing before the commencement of the vacation or the disposal of the petition by any other judge during the vacation or soon thereafter as the Principal Judge of the court may direct towards efficient, effective, proportionate and just determination of the petition.

As the anonymous letter and the parties' submissions in this matter mentioned the Honourable Chief Justice and taking into account all the circumstances of the application, the Deputy Registrar of the court is directed to forward a copy of this ruling to the Honourable Chief Justice

for noting and information.

In conclusion, the notice of motion filed on 20.11.2015 for the 1st and 2nd respondents in the petition (the applicants) is hereby determined with orders as follows:

1) The notice of motion is hereby dismissed as prayers 2 and 3 therein are hereby declined.

2) The costs of the application shall abide the outcome of the petition.

3) The declaration that the anonymous, undated and unsigned letter filed in these proceedings amounted to contempt of court, it is hereby expunged and the unknown author is guilty of contempt of court to be sentenced accordingly if and when his identity is known.

4) Any party to the proceedings at liberty to move the court if and when the author of the letter is identified and for purposes of sentencing in terms of order (3) above.

5) The Deputy Registrar of the court is hereby directed to forward, within five days, a copy of this ruling to the Honourable Chief Justice for noting and information.

6) The parties are now invited to make proposals for appropriate directions on disposal of the petition by the judge in a hearing before the commencement of the vacation, or the disposal of the petition by any other judge during the vacation or soon thereafter as the Principal Judge of the court may direct towards efficient, effective, proportionate and just determination of the petition.

Signed, dated and delivered in court at Nyeri this Friday, 4th December, 2015.

BYRAM ONGAYA

JUDGE