Mwenda (Suing by his Next Friend Jerusha Kanario Mwenda) v Mioro & another (Environment & Land Case E005 of 2023) [2025] KEELC 3282 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3282 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E005 OF 2023

JO MBOYA, J

MARCH 27, 2025

BETWEEN

SAMUEL M'IMAINGI M'LAARU ..... PLAINTIFF

SUING BY HIS NEXT FRIEND JERUSHA KANARIO MWENDA

AND

ABEDNEGO MATATA MIORO ..... 1ST DEFENDANT

INSPECTOR GENERAL OF POLICE ..... 2ND DEFENDANT

RULING

1. Vide Notice of Motion Application dated the 18th of February 2025, the Plaintiff/Applicant has sought the following reliefs:

    i. That this Honorable court be pleased to order that the scene visit report dated 18th July 2024 conducted pursuant to the court's order of 1st July 2024 be struck out for being biased, irregular and prejudicial to the Plaintiff/Applicant.

    ii. That this Honourable court be pleased to order that a new site visit be conducted by an independent officer or a different deputy registrar in the presence of the parties and their advocates to establish the true status of the suit properties namely Njia/Cia Mwendwa/3090 and Njia/Cia Mwendwa/3460.

    iii. That the costs of this Application be provided for.

2. The instant application is premised on the various grounds which have been highlighted in the body thereof. In addition, the application is supported by the supporting affidavit sworn by Jerusha Kanario Mwenda; and a Further affidavit of the same deponent sworn on the 24th of February 2025.

3. Furthermore, the Supporting affidavit and the Further affidavit in question have annexed a copy of the scene visit report [the Report] that was filed by the Deputy Registrar, namely; Hon. E.W Ndegwa.

4. The 1st Respondent filed a Replying affidavit sworn on 21st February 2025; and wherein the same has opposed the application. In particular, the 1st Respondent has contended that the scene visit was conducted by the Deputy Registrar in the presence of all the parties and their respective advocates.

5. Furthermore, the 1st Respondent has averred that during the scene visit, both parties were afforded a reasonable opportunity to inform the deputy registrar of the facts obtaining on the ground and in particular, as far as the status of the two [2] properties are concerned.

6. The application came up for hearing on 27th February 2025, whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court obliged and proceeded to issue directions as pertain[s] to the timelines for the filing and exchange of the written submissions.

7. The applicant filed written submissions dated 24th February 2025; and wherein the applicant has revisited and reiterated the averments to the effect that the Honourable Deputy Registrar who conducted the site visit was biased against the applicant and thus same arrived at conclusions which are at variance with factual situation[s] obtaining on the ground, namely; suit properties.

8. It was the further submissions on behalf of the applicant that owing to lack of impartiality on the part of the Honourable Deputy Registrar, the Applicant's right to fair hearing and fair trial has been breached, violated and or infringed upon. In this regard, the Applicant has cited and referenced the decision[s] in the case of Christopher Odhiambo Karan vs David Ouma Ochieng (2018) eKLR and Kidero & 4 others vs Waititu and 4 others (2014) KESC 11 (KLR) [29th August 2019] respectively.

9. The 1st Respondent filed written submissions dated 28th February 2025; and wherein same adopted the averments at the foot of the replying affidavit sworn on 21st February 2025; and thereafter highlighted two [2] issues namely; the applicant has not proven and or established the plea of bias and lack of impartiality; and that the applicants right to fair hearing and fair trial were not violated or at all.

10. Having reviewed the application and the response thereto and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the instant application turns on two [2] key issues, namely; whether the plea of bias and lack of impartiality against the Honourable Deputy Registrar has been established or otherwise; and whether the applicant's right to fair hearing and fair trial have been breached, violated and or infringed upon, either as alleged or at all.

11. Regarding the first issue, namely; whether the applicant has established and or proven the plea of bias and or lack of impartiality on the part of the Honourable Deputy Registrar, it is imperative to state and outline that it is the applicant herein who filed an application before the court and sought an order to have the Deputy Registrar of the Environment and Land Court [ELC] to visit the locus in quo and thereafter to file a report arising out of the site visit.

12. Pursuant to and at the instance of the applicant, the learned judge issued an order on the 1st of July 2024 and wherein the judge directed the Deputy Registrar to visit the locus in quo [the suit properties] in the presence of the parties and their respective advocates. Furthermore, the judge directed that the visitation to the site was to be undertaken on a date set by the Deputy Registrar albeit within 10 days with effect from the 20th of July 2024.

13. Moreover, the terms of reference and or purpose of the visit were to enable the Deputy Registrar to establish the true status of the two parcels of land, namely; Njia/Cia Mwendwa/ 3090 and 3460, respectively. Instructively, the purpose of the visit was circumscribed by the learned judge.

14. Put differently, the learned Deputy Registrar was not directed and or ordered to facilitate any hearing, including examination in chief, cross-examination and or re-examination of the parties and or witnesses. Simply put, the obligation of the deputy registrar was to gather the data and or information obtainable from the ground as pertains to the status of the two [2] properties, in terms of developments thereon, occupation, possession and use and thereafter compile the report.

15. Pertinently, the Deputy Registrar visited the locus in quo [the suit properties] in the presence of the parties and their respective advocates. To this end, there is no gainsaying that the Deputy Registrar complied with the first aspect of the orders issued by the learned judge.

16. Moreover, it is also evident that the date set for the visitation was undertaken within the set timeline, namely, within 10 days of the orders of the judge. In any event, there is no gainsaying that the date was taken with due notice to and involvement of the parties and their respective advocates. For good measure, the presence of the parties and their respective advocates is testament to the fact that same were duly notified and involved.

17. Other than the foregoing, it is also apparent that the Honourable Deputy Registrar took cognizance of the parties who were present during the visitation to the locus in quo. Having taken notice of the parties who were present, the report shows that the deputy registrar then engaged herself in an endeavor to obtain data pertaining to the status of the two [2] properties that were the subject of the orders of the Judge.

18. In the process of procuring data and or information pertaining to the status of the two [2] properties, the Honourable Deputy Registrar interrogated and or consulted with the parties and the persons who were reportedly present. The fact that the Deputy Registrar engaged the parties and those present including an additional person, namely; Eliud Murungi who joined the proceedings midstream, are captured in the body of the report.

19. Additionally, the report itself does not contain any protest and or objection, [if any], that was raised by either of the parties or their advocates. In any event, it is not lost on this court that if any objection, whether on biasness or lack of impartiality, were to be raised, then same would no doubt have been raised/canvassed by the advocate[s] for the concerned parties.

20. I have examined the report filed by the Honourable Deputy Registrar and same shows that Mr. Brian Mwenda, advocate for the Plaintiff, was present. Furthermore, the report does not show and or capture that the said Learned Counsel raised any objection and or reservations at all.

21. Other than the foregoing, it is worth recalling that learned counsel Mr. Brian Mwenda, who was present during the visitation to the locus in quo, has not sworn any affidavit to intimate that same raised and or canvassed any objection[s] during the visitation. To my mind, the lack of an affidavit by learned counsel Mr. Brian Mwenda speaks volumes.

22. Nevertheless, I come to the conclusion that if there was any issue worthy of objection, learned counsel for the Plaintiff/ Applicant would have raised same during and in the course of the proceedings at the locus in quo [site].

23. Additionally, it is also worthy to recall that after undertaking the scene visit, the Deputy Registrar filed a report and wherein same [deputy registrar] has indicated that the parties did not agree on various/a number of issues. The conclusion by the Deputy Registrar is crystal clear on the face of the report.

24. Being a matter where the parties are disputing issues, there is no gainsaying that consensus was not anticipated. However, it is imperative to underscore that the report filed was merely to be used by the parties during the proceedings and same was to form the basis of further cross-examination or otherwise.

25. Be that as it may, the applicant herein has now filed an application seeking to impugn the contents of the report that was filed by the Hon. Deputy Registrar on various grounds. In particular, the applicant contends that the Hon. Deputy Registrar was biased and lacked impartiality in the manner in which the report was crafted and the manner in which the information contained therein was procured/ obtained.

26. Owing to the allegations pertaining to and or concerning bias and lack of impartiality, it is apposite to venture forward and discern what biasness constitutes and how allegations of biasness ought to be substantiated.

27. What constitutes bias was considered and elaborately examined by the Court of Appeal in the case of Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR (2016) eKLR where the Court stated as hereunder;

> [60] What then amounts to bias?
>
> The Oxford English Dictionary defines bias as an inclination or prejudice for or against one thing or person," while Black's Law Dictionary defines the word bias as follows:
>
> "Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. The condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in a particular case. As used in law regarding disqualification of judge, refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."
>
> (61) From the above definition, it is clear that the issue of bias negates the twin virtues of impartiality and independence of the Court of the Judge hearing and determining a matter. These two principles are the hallmark of a fair trial as espoused in section 77 of the retired Constitution of Kenya and Article 50 of the current Constitution.
>
> (62) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. Article 25(c) of *the Constitution* 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge. The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the judge or the court.
>
> (63) Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of Lord Goff in the case of R vs Gough, [1993] 2 All CR 724:

"Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking 'the judge was biased'. (Emphasis ours)

(64) In Metropolitan Properties Co., Ltd v Lannon (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 it was observed that:-

"Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias". (Emphasis ours)

(65) In the Australian case of Webb v The Queen (1994) 181 C L R 41 Mason CJ and McHigh J held:

"In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.

(66) The rule against bias is an important element of the right to a fair trial. This rule is to be very strictly applied, so that even the appearance of bias is done away with. This is because it aids in public confidence in the fairness and impartiality of the judicial system. In view of the jurisprudential importance and uniqueness of this application we find it necessary to say slightly more on perception or appearance of bias. As the court stated in the English case of R v Sussex Justices ExP. McCarthy [1924] 1 KB 256:

"Justice should not only be done but should manifestly and undoubtedly be seen to be done."

(67) The import of the rule against bias, as well as its strict application, is that there need not be actual bias on the part of the judge for apprehended bias to be found. It is enough that the adjudicator might not appear to be impartial. In determining whether or not there has been bias, the test to be applied is whether a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias.

(68) In Kimani v Kimani (1995-1998) 1 EA 134 Lakha JA, who coincidentally was part of the bench that rendered the impugned decision herein, in the majority judgment stated as follows on the test of likelihood of bias:

"The correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias."

(69) In his dissent, Gicheru JA (as he was then) stated in the same case that:

".....the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would , that the judge is biased or is likely to be biased"

[70] This test was endorsed by the East African Court of Justice in Attorney General of the Republic of Kenya v Prof Anyang' Nyong'o and Others (5/2007) [2007] EACJ 1 (6 February 2007) where the Court stated that:

"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public

that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks the disqualification of a judge comes to court because of his own perception that there is an appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case."

(71) We also cite with approval the proposition of the English Court in FLS Aerospace Ltd [1999] EWHC B3 (Comm) (20 April 1999) Ltd wherein it is stated that:

"First, actual bias will of course always disqualify a person from sitting in judgment. Even in the absence of actual bias, however, the importance of public confidence in the administration of justice is such that even the appearance of bias will disqualify." (Emphasis supplied).

(72) This is the standard we must apply in this case in determining whether the Court, as constituted, was biased, or could have been perceived to have been biased when handling the impugned proceedings, which are the subject of this application.

(73) Before we discuss the issue of fair trial in the context of the current Constitution, it is important to look at the relevant provision of the retired Constitution, which was in operation when the impugned proceedings were conducted. Section 77 (9) of the retired constitution provided as follows:

"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time".

(74) The same provision was imported into the current Constitution 2010 vide Article 50(1) of *the Constitution* which provides that:

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

(75) As observed earlier, unlike in the old constitutional dispensation, the right to fair trial is now among four other rights that enjoy an eminent special place in the current Constitution as an inderogable right. This is the more reason why the Court must ensure that the said right is jealously guarded.

(76) Article 50 (1) of *the Constitution* imposes a twofold obligation in the dispute resolution process. These are independence and impartiality on the part of the adjudicator, and fairness in the resolution procedures. Thus, allegations of bias on the part of a judge presiding over a matter is a serious allegation which if proved amounts to breach of a constitutional right that vitiates the dispute resolution process.

28. Suffice it to underscore that it was the obligation of the applicant to tender and place before the court plausible, cogent and credible evidence [not hearsay or innuendos], towards demonstrating that there was bias or lack of impartiality on the part of the Hon. Deputy Registrar.

29. Pertinently, proving bias could not be achieved by throwing around and or propagating generalized allegations, either in the manner posited or at all. At any rate, it is not lost on this court that allegations of bias or lack of impartiality on the part of judicial officers is a serious issue and therefore no applicant

is at liberty to propagate the same unless there exists a solid basis to warrant an inference of such bias or lack of impartiality.

30. To underscore the burden and obligation of proving bias and lack of impartiality, it is imperative to take cognizance of the decision in the case of Dr. Samson Gwer and 5 others vs KEMRI (2020) eKLR where the Supreme Court discussed the incidence of burden and standard of proof.

31. For coherence, the Supreme Court stated thus;

> Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> 50. This Court in Raila Od*inga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
>
> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

32. Arising from the foregoing, my answer to issue number one [1] is two-fold. Firstly, the allegations touching on and or concerning bias/lack of impartiality have been generalized without the requisite particulars. In my humble view, the seriousness of such allegations requires that same be duly substantiated, which is not the case.

33. Secondly, it is imperative to underscore that the applicant herein was duly represented by an advocate at the time of the visitation to the locus in quo and the said advocate neither raised nor canvassed any objection during the proceedings under reference. Furthermore, the said advocate has not sworn any affidavit. To my mind, this creates a justifiable room to warrant an adverse inference being made against the applicant.

34. Next is the issue of whether the applicant's right to a fair hearing, fair trial and due process of the law was breached, violated and or infringed upon. Instructively, the applicant herein has contended that the report by the Hon. Deputy Registrar is coloured with bias and inaccurate facts and because of such inaccuracies, the applicant's right to a fair hearing has been breached and violated.

35. Before venturing forward to interrogate the claim by the applicant, it is imperative to recall that the deputy registrar was acting pursuant to the orders of the judge and thus same [deputy registrar] could only undertake the obligations in accordance with the terms of reference adverted to at the foot of the order. No more.

36. Moreover, it is not lost on this court that pursuant to the order under reference, the Hon. Deputy Registrar was not tasked to undertake any hearing and or conduct any trial at the locus in quo. In any event, it is evident that the Hon. Deputy Registrar did not take and or record any evidence from

any witness or otherwise. Furthermore, none of the parties or their advocates were allowed to cross-examine anyone.

37. Pertinently, the mandate and or obligation[s] of the deputy registrar were to collect data and or information relative to the status of the two properties, which were the subject of dispute. For clarity, the data to be collected was circumscribed to ascertaining the nature of the developments, possession and occupation of the disputed properties and thereafter prepare a report pertaining to what was seen on the ground.

38. Additionally, it is important to underscore that the order of the judge which directed the deputy registrar to generate a report on the status obtaining on the suit property upon visitation, did not restrict the deputy registrar to only talk to the parties. For good measure, the deputy registrar was also at liberty to record what same saw and or observed on the ground.

39. The report by the deputy registrar has indeed captured the various perspectives, including what same saw/observed on the ground, the clarifications that were given by the parties and persons who were present. Notably, the observations under reference shall be subject to cross-examination, where appropriate.

40. Having taken the foregoing into consideration, it is now expedient to return to the issue as to whether the Hon. Deputy registrar undertook any hearing and or conducted any trial at the locus in quo. Suffice it to state that the right to a fair hearing and or fair trial can only be breached or violated by the court and or independent tribunal, where apposite, which is tasked to conduct the hearing and or trial.

41. Was the deputy registrar tasked to conduct any hearing and or trial during the visitation to the locus in quo? To my mind, the deputy registrar was not undertaking any hearing and or conducting any trial and thus same [deputy registrar] cannot be stated to have breached and or violated the applicant's rights to fair hearing and or trial.

42. The scope of the right to fair hearing; fair trial and the due process of the law have been highlighted in various decisions. Nevertheless, it suffices to cite and reference the decision in the case of Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment), where the Supreme Court [the apex Court] court stated;

> 68. In Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others, SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR (Njoki Ndungu, SCJ, Concurring), this court made the following finding concerning the right to a fair trial under article 50(1) and 50(2):
>
> > "(255) Article 50(1) refers to the right to a fair hearing for all persons, while article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms 'fair hearing' and 'fair trial' are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect...

(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making.

Further, he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled. ... (261) It is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See Steel and Morris v. United Kingdom, [2005] ECHR 103, paragraph 59).

43. To the extent that the Hon. Deputy Registrar was not tasked to undertake any hearing and or conduct any trial at the locus in quo, the contention by the applicant that her rights to fair hearing and a fair trial were contravened are certainly premature and misconceived.

44. Nevertheless, it is also important to reiterate that the report which is sought to be set aside and or expunged from the record of the court, is not an exhibit and or evidence to be relied on by the court in the course of determining the dispute beforehand. Notably, the determination of the dispute beforehand can only be undertaken and premised on evidence tendered and produced before the court in the conventional manner.

45. To this end, it is appropriate to take cognizance of the holding in the case of Kenneth Nyaga Mwige vs Austin Kiguta & others (2015) eKLR where the Court of Appeal addressed the import of the documents and materials which can be taken into account by a court of law in the course of adjudication of a matter.

46. For coherence, the court stated as hereunder;

> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine

the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record.

    If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

47. Finally, and for the sake of argument only, it is important to underscore that the report which was filed by the deputy registrar is a document which may be used by either party subject to necessary objection [if any] by the adverse party. In any event, the adverse party is also at liberty to cross-examine on the basis of the document where expedient and or appropriate.

48. From the foregoing, what becomes apparent is that the report under attack, by and of itself cannot [sic] be said to constitute a basis for alleging breach and or violation of the right to fair hearing or fair trial.

49. Quite clearly, the allegations of breach of fair hearing, fair trial and the submissions attaching thereto are being propagated merely to camouflage some issue which have not been brought to the fore.

However, the hearing and trial of the matter shall be undertaken by the Environment and Land Court and in this regard, I do not discern any breach and or violation of the provisions of Article 50 of *the Constitution* 2010.

50. Flowing from the foregoing, my answer to issue number two [2] is two-fold. Firstly, the Hon. Deputy Registrar was not tasked and or mandated to undertake any hearing and or trial of the matter during the visitation to the locus in quo. Suffice it to state that the mandate of the deputy registrar was circumscribed to ascertaining the ground status in respect of the two [2] properties.

51. Secondly, no right to fair hearing and or trial has been breached and or violated, either in the manner alleged or at all. To my mind, the allegations being propagated are misconceived and otherwise amounts to a red herring.

FINAL DISPOSITION:

52. Having considered the two [2] thematic issues which were highlighted in the body of the ruling, I come to the conclusion that the applicant herein has neither established nor demonstrated the plea of bias and lack of impartiality; nor has the applicant established any breach/violation of her right to fair hearing or fair trial.

53. In a nutshell, the final orders that commend themselves to the court are as hereunder;

    i. That the Application dated 18th February 2025 be and is hereby dismissed.

    ii. That costs of the Application be and are hereby awarded to the 1st Defendant/Respondent.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF MARCH 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma Court Assistant

Mr. Brian Mwenda holding brief for Dr. Gibson Kamau Kuria – S.C for the Plaintiff/Applicant.

Miss Kiyuki for the 1st Defendant/Respondent.

No appearance for the 2nd Defendant/Respondent.