Monda v Senate & 7 others (Constitutional Petition E004 of 2024)
[2024] KEHC 17023 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEHC 17023 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CONSTITUTIONAL PETITION E004 OF 2024

TA ODERA, J

APRIL 23, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES. 1, 2(1), (2) AND (5), 3(1) AND (2), 4(2), 10, 19, 20, 21, 22(1) AND (2)(B) AND (C), 23(1), 24 (1), 33 (1)(A), .35, 38 (1), 47(1) AND (2), 48, 50, 52, 93, 96, 165 (3) (B) AND (D) (II), 73(1), 75(1) (C) 174, 175, 181, 196(1) (B), 200, 258, 259, 260

AND

IN THE MATTER OF ART. 1, 2, 3, 47, 50 (B) AND (C), 181 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURES RULES 2013

AND

IN THE MATTER OF ART 1, 3, AND ART. 25(A) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1966.

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012, SECTIONS 8, 30, 31, 33(1) AND (2) AND 87

AND

IN THE MATTER OF THE STANDING ORDER OF THE SENATE.

AND

IN THE MATTER OF THE STANDING ORDER OF THE KISII COUNTY ASSEMBLY. AND IN THE MATTER OF THE REMOVAL FROM OFFICE OF THE DEPUTY GOVERNOR OF KISII COUNTY BY WAY OF IMPEACHMENT

BETWEEN

HON DR ROBERT ONSARE MONDA ..... PETITIONER

AND

THE SENATE ..... 1ST RESPONDENT

THE SPEAKER OF THE SEANATE ..... 2ND RESPONDENT

THE GOVERNMENT PRINTERS ..... 3RD RESPONDENT

HON ATTORNEY GENERAL ..... 4TH RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF KISII ..... 5TH RESPONDENT

COUNTY GOVERNMENT OF KISII ..... 6TH RESPONDENT

THE COUNTY ASSEMBLY OF KISII ..... 7TH RESPONDENT

HON WILCLIFFE SIOCHA GESONGORI ..... 8TH RESPONDENT

RULING

Introduction

1. In the Notice of Motion dated 2nd April 2024, the Applicant seeks Lady Justice Odera Teresa Achieng to recuse herself, withdraw and cease from hearing and handling this Petition.

2. The application is supported by the affidavit of Hon. Dr. Robert Onsare Monda, the petitioner herein, sworn on 2nd April, 2024. The Applicant in support of his Application avers that;

    a. The Judge has multiple times deliberately delayed attending to pleas brought to her court by the Petitioner. This has resulted in the Petitioner's causes becoming overtaken by events, futile and otiose. The judge's conscious procrastinations are either because of disinterest in the Petitioner's pleas, bias against the Petitioner, or otherwise are owing to the desire to assist third parties, including the Governor, who wishes the Petitioner/Deputy Governor every worst damnation.

    b. The Judge is otherwise conflicted and is unlikely to act impartially given that she has been a visitor to the Governor's personal house [not official residence] nor did the official offices where she led a delegation of Judicial Service Commission members [J.S.C] to meet the Governor and his wife at the Governor's personal residence. While at his home the Governor requested the [J.S.C] for a partnership, and also to be assigned a court.

    c. The judge should otherwise recuse herself as she is already handling petitioner's other related matter, High Court Kisii Constitution Petition No. E003 OF 2024; H.E Hon. Dr. Robert O. Monda v (1) The Speaker Kisii County Assembly, (2.) The Clerk, Kisii County Assembly and (3) Hon. Wycliffe Siocha Gesongori, MCA. This Petition is on the same subject matter and is very closely related to this Petition as explained above, hence it would be better that this Petition be heard by another judge.

    d. The judge, in bias against the petitioner, or otherwise to assist the Governor's cause, considered, certified, and prioritized motions by Governor and sundry 3rd parties who had not sought to be heard during vacations, did not have leave to be heard during vacation, and on applications not filed under vacation rules. The learned judge relegated urgent, scheduled and vital application, and gave preference to these new motions.

e. On its face the Honourable Judge seems to have made up her mind to delay the petitioner's case herein brought to her, until its substratum is wholly lost, to decimate the Petitioner's causes brought to her. She already applied the same approach on the petitioner's earlier motion, Kisii High Court PetitionE003 Of2024. The Honourable Judge has failed to give the Petitioner herein the same level of attention and legal consideration, equitably, especially Vis-a–vis the Governor.

f. The Honourable Judge is not observing and/or upholding his constitutional rights to a fair trial and equal treatment before the law.

3. The Application was opposed by the Respondents through grounds of opposition filed by the County Assembly, Kisii the 7th Respondent herein dated 18th April, 2024. The 7th Respondent's grounds opposition are that;

a. The Petitioner's application for recusal seeks to invite the court to sit on appeal against its own decision in Kisii High Court Petition No..E003 OF 2024, since the recusal is grounded on the contention that this Honourable Court heard and determined an application during vacation.

b. The application for recusal is based on the proceedings in Kisii High Court Petition No..E003 of2024 which matter is still active and pending before Court. The Petitioner has never raised any issues, complaints and/or allegations whatsoever with regards to how the Honourable Judge conducted herself in Petition No. E003 Of2024 therefore drawing a conclusion that the application was brought in bad faith.

c. Instead of seeking appropriate legal redress the Petitioner resolved to employ unorthodox tactics by filing multiple suits over the same subject matter. The instant suit is the conduit for the application for recusal by the Petitioner which suit was filed while Petition No.E003 of2024 is still pending before this Honourable Court.

d. The Petitioner's application does not meet the required threshold for recusal since the grounds relied upon are merely speculative. Not a scintilla of evidence has been adduced in support of the Petitioner's allegations of bias, lack of impartiality and conflict of interest.

e. The instant application is misconceived, hopelessly and incurably defective, a monumental substantive and procedural legal nullity and an abuse of the court process.

4. Equally the Application is opposed by a Replying Affidavit sworn by one John Ombasa on behalf of the 5th and 6th Respondent sworn on 16th April 2024. Mr. Ombasa claimed that the instant Application is an abuse of the court process, scandalous, vexatious and merely meant to disparage the image of the court and the 5th Respondent herein. He equally claimed that The Application is defective and bad in law for various reasons including:

a. That the Court is being invited to draw negative inferences and make adverse findings and conclusions against persons that are not parties to the proceedings. Paragraph [5] of the Application and Paragraph [11] of the Applicant's Affidavit casts aspersions in regard to the visit by a delegation of the Judicial Service Commission to the Governor.

b. That the Petitioner is casting aspersions in regard to the Governor's wife, and unnamed persons from the Judicial Service Commission and no such particulars are given for instance the names of such persons, the dates, time and all such necessary particulars to enable the Court and the Respondents to adequately and sufficiently respond to the said allegations.

c. That the Application is founded on proceedings pending before this Court in Kisii High Court Petition No.. E003 Of 2024, H.e Hon. Dr. Robert Monda v Speaker, Kisii County And Others,and the Applicant has not made any such complaints, application or allegations in the same file so that the issues in that file can be dealt with accordingly. In any event, the Applicant himself, through his Counsel, requested for more time in the said file to seek instructions on the withdrawal of the said file citing that it had been overtaken by events, as evidenced in the proceedings of 5th March, 2024.

d. That the Petitioner is deliberately is abusing and misusing the Court process by filing a multiplicity of suits over the same subject matter and has thus filed the instant suit despite his other pending PetitionE003 of2024, which he is now using as a basis of the instant Application.

e. That the Applicant is merely inviting the Honourable Court to unprocedurally and illegally sit on appeal and review its own Orders and directions as issued in Kisii High Court Petition No.. E003 Of 2024, H.e Hon. Dr. Robert Monda v Speaker, Kisii County And Others.

f. That the Contention that this Court heard and determined an Application during the High Court vacation, is a question of law and this Court is being invited to sit on appeal over the exercise of its discretionary powers on the same and use it as a basis to recuse itself.

g. That the Application is founded on newspaper cuttings and social media online reports, whose source cannot be verified and/or authenticated and the reliance on the same is contrary to Section 106 of the *Evidence Act* and an infringement of the Respondents right to a fair trial and hearing.

h. That Neither can a Judge nor the JSC be castigated for undertaking an official visit to a sitting Governor for official duties.

5. The 1st ,2nd ,3rd, 4th and 8th Respondents did not file any response to this Application.

6. This court directed that the instant Application be disposed of by way of written submissions. The Applicant filed his submissions on 5th April, 2024, the 5th and 6th Respondent filed their submissions on 16th April, 2024 while the 7th Respondent filed their submissions on 18th April, 2024.

The Applicant Submissions

7. The learned counsel for the Applicant submitted on three issues which included;

a. Whether the issues raised amount to bias and also of fear of bias, to a reasonable person, and on an objective criteria.

b. Whether the Applicant's grounds have met the threshold for recusal of a Judge.

c. Whether the Applicant's grounds deserve the court's grant of orders of recusal.

8. Regarding the 1st issue the learned counsel submitted that in several cases, the courts have held that the basis of recusal need not be to the level of actual and or tangible bias, though the Applicant herein avers that there exists actual acts of bias on the basis of what a reasonable person can see. The courts have stated that the criteria in bias is not necessarily actual existing bias but what an objective bystander would be inclined to suppose. To support his submission learned counsel relied on the cases of Jasbir Singh Rai and 30 others v Tarlocha Singh Rai and 4 others; S C Petition No. 4 of 2012 [2013] eKLR, Trust Bank Ltd v Midco International (K) Ltd & 4 others [2004] eKLR Civil Case 336 of 2001,

Mumias Sugar Co. Ltd v Director Of Public Prosecutions & 2 Others [2012]eKLR, and Serah Njeri Mwobi v John Kimani Njoroge [2013] JELR 96652 (CA).

9. The learned counsel equally submitted, a judge is also disqualified if there is a likelihood or apprehension of bias arising from circumstances of a relationship with one party, or where preconceived views exists on the subject matter in the dispute. On this, the Applicant relied on the case of Philip K. Tunoi & another v Judicial Service Commission & Another [2016], where the CA held;

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

10. On the 2nd issue as to whether the Applicant's grounds have met the threshold for recusal of a judge the learned counsel for the Applicant submitted that the grounds raised in the Application meet the threshold of bias to justify recusal sought. The learned counsel contended that it is the Applicant's case that (I) based on previous situation, the judge was biased, (II) based on previous and current handling, the judge is biased against the Applicant. The judge is prejudiced, as manifested in the course of the cases, considering that the judge;

    i. is biased against the Applicant personally,

    ii. is going out of her way to protect 3rd parties including the Governor who are acting against the Applicant,

    iii. is personally known to the Governor and his family,

    iv is prioritizing motions during vacation that were not filed under vacation rules, and simultaneously undermining the Applicant's application already certified urgent

    v is already handling another application between the Applicant and substantially same Respondents, on the subject matter and cause.

11. The learned counsel argued that the grounds above are adequate for a judicial officer to be asked to recuse herself/himself. He argued too that Rule 5 of the Judicial Service Code of Conduct and Ethics 2003 spells out certain criteria for recusal which include:

    a. Where the judicial officer has a personal bias or prejudice concerning a party or his lawyer, or personal knowledge of facts in the proceedings before him;

    b. Where he has served as a lawyer in the matter in controversy;

    c. Where he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceeding; or

    d. where he, or his spouse, or a person related to either of them or the spouse of such person or a friend is a party to the proceeding.

12. The learned counsel thus underscored that the Applicant case fits into the said criteria on account of personal bias and prejudice, personal knowledge, and relation with the Governor.

13. It was equally the submission of the learned counsel that Judicial disqualification is based on the natural justice principle embodied in the Latin phrase Nemo Judex In Re Causa Sua; being the rule that no person shall be condemned unheard and no person should be a judge in his own cause. He contended that the said principle imposes impartiality in decision-making wherein the rule against bias

is immutable and cannot be curtailed even by statute. He argued that applicant's Application is not presumed given that applicant has established bias which is not a mere figment of his imagination. To support his argument the learned counsel relied the case of Attorney General of Kenya v Professor Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 where it was held as follows: -

> "We think that the Objective test of "reasonable apprehension of bias" is good Law. The test is stated variously, but amounts to this -do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded, and informed member of the public that the Judge did not (will not) apply his mind to the case impartially? Needless to say- A litigant who seeks disqualification of a Judge comes to court because of his own perception that there is 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."

14. On the issue as to whether the applicant's grounds deserve the court's grant of orders of recusal, the learned counsel for the Applicant submitted that the applicant adduced sufficient grounds to establish that the Honorable Judge has already acted in a biased manner already, and is also continuing to act in a way that would be perceived on an objective criteria, by a reasonable bystander, as being biased, and of being conflicted by reason of events set out in the Application. The learned counsel placed reliance on the case of Charity Muthoni Gitabi v Joseph Gichangi Gitabi (2017)eKLR, and Kalpana H. Rawal v Judicial Service Commission and 2 others (2016)eKLR, where the Court of Appeal held;

> "An application for recusal of a Judge is a necessary evil. On the one hand, it calls into question the fairness of a judge who has sworn to do justice impartially, the accordance with *the constitution* without any fear, favor bias, affection, ill will, prejudice, political, religious, or other influence. In such applications, the impartiality of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human, and above all *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When a reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it maybe. That is the lesser of the 2 evils. The alternative is to risk. Violating a cardinal guarantee of *the constitution*, namely the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial court ....."

15. The learned counsel submitted that the risk in declining recusal is that the Judge would then be participating in the hearing of the matter where the same judge can be perceived to be both the judge and accuser or being seen as acting as counsel for a party or cause in dispute. He underscored that such a situation makes it hard for any decision made by the court to be seen as having given all parties a fair hearing. He further stated that Impartiality, which applies not only to the decision, but also to the decision-making process as well, is recognized as essential to the proper discharge of office in the Bangalore Principles of Judicial Conduct, 2002. He underscored too that Bangalore Principles relevant states in Value 2 that;

> "2.1 A judge shall perform his or her judicial duties without favour, bias, or prejudice, 2.2 A judge shall ensure that his or her conduct, both in and out of, maintains and enhances the confidence of the public, the legal profession, and litigants in the impartiality of the judge and of the judiciary, A judge shall, so

far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases."

16. The learned counsel equally relied on Rule 3(1) of the Judicial Service Code of Conduct and Ethics which is made under Section 5 of the *Public Officer Ethics Act*, Cap 183.

The 5th and 6th Respondents Submissions

17. While reiterating the averments of the Affidavit of Mr. John Ombasa sworn on behalf of the 5th and 6th Respondent, the learned counsel for the 5th and 6th Respondent submitted that the Applicant has not satisfied the threshold for granting an Application for recusal and no such evidence has been tendered on the allegations of bias, conflict of interest, and lack of impartiality. The learned counsel equally submitted that the allegations by the Applicant are unfounded, and mere apprehension and the Honourable Court is merely being invited to sit on appeal over its own decisions in the form of Orders and directions issued in Kisii High Court Petition No.. E003 of 2024.

18. The learned counsel in bid to support his submission relied on the case of Director of Public Prosecutions v Charles Kiprotich Tanui and Others, Anti-Corruption & Economic Crimes Division, Criminal Revision No. E003 Of 2024 where Justice Prof Sifuna opined as follows in a similar Application for recusal thus:

> (13) Judicial recusal is the withdrawal of a judicial officer from ongoing proceedings, for reason of a conflict of interest, bias, or lack of impartiality. It cannot be on the basis of a litigant's mere displeasure, whim, or unfounded apprehension. This is because the bedrock of this determination rests on the test that a recusal is necessitated where it is proved beyond peradventure, speculation, conjencture, and sheer paranoia, that a judicial officer will not impartially handle a case before him, as a result of actual bias or apprehension of bias.
>
> (14) Where the Application is based on apprehension rather than actual bias, the apprehension should be that of a reasonable person and must be assessed in the light of the true facts as they emerge at the hearing of the application; and the test to weigh the apprehension should be an objective one, and not a subjective one based for instance, on mere paranoia. In other words, the apprehension should not be such as is unfounded or unreasonable.
>
> (15) Where the plea for recusal is based on apprehension such as in this Application, the apprehension must be reasonable, honest, logical and objective, and must be based on solid facts. For instance, if it is demonstrated that he is related to any of the parties in the proceedings, or he has other personal interests.
>
> (17) I dare say that this Application is among its other intentions, a forum shopping scheme that should not find glorification of whatever colour. The Court of Appeal in Galaxy Paints Company Limited v Falcon Guards Limited [1999] eKLR stated as follows: "Although it is important that justice must be seen to be done. It is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."
>
> (24) Needless to say, recusal should not be used by litigants for intimidation, insubordination, blackmail, arm-twisting, capture, or the boxing of a Judge into conforming with a litigant's whims; or for throwing him into panic, subservience or dishonor. Such ulterior motives if

allowed have the undesirable consequence of chipping away on the authority, dignity, integrity and independence of courts.

(27) My response to this is that apart from this reasoning being without any jurisprudential basis or honest legal anchor, a judge is neither shackled to nor bound by his previous decisions even on identical facts. It is therefore incumbent upon any litigant prosecuting a similar matter before the judge to persuasively present arguments to the Judge in the subsequent matter legally sound enough arguments that will persuade him to decide differently.

(28) Such a party should at the hearing of the subsequent matter, skillfully and persuasively persuade the judge to take a contrary or different position. A party should not cite a previous decision as a ground for urging the judge's recusal. Judicial determination once pronounced should be presumed to have been made in good faith to meet the ends of justice in the case. Therefore, no person or entity should be permitted to use a judge's ruling or judgment to intimidate, blackmail, or victimize the judge, or use a judge's previous ruling or judgment, to debar him from handling similar matters. That will be judicial hypocrisy or judicial capture."

19. The learned counsel submitted further that in as much applicant claims to have aggrieved, the by the various Orders and directions issued in PETITION NO. E003 OF 2024 and has neither applied to set aside, vacate and review those orders or even appealed against those Orders to the Court of Appeal. The learned counsel thus contended that the Applicant cannot therefore peg his recusal Application in this matter based on a different file to which he is a party.

The 7th Respondent Submissions

20. The learned counsel the 7th Respondent herein humbly submits that the instant application is an affront to justice for reasons that it is an abuse of the court's process, vexatious, scandalous and defective in both form and substance.

21. The learned counsel equally submitted that Petitioner's application is merely grounded on speculations, aspersions and tittle-tattle with regards to the Honourable Judge's conduct in Kisii High Court Petition No.. E003 OF 2024. The learned counsel further submitted the Petitioner's application for recusal on the grounds contained in the Application amounted to seeking this Court to sit on appeal of its own orders issued in Kisii High Court Petition No.. E003 OF 2024. To support this argument the learned counsel relied on the case Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited [2021] eKLR where the court pronounced itself as follows;

> "26. Turning to the facts of the case, there are two grounds for recusal which I shall now consider. The first ground for recusal by the Advocates is that since I ruled on certain references between the parties, I should recuse myself. As I considered the Advocates' submissions on the rulings I delivered in those references, I could not help but feel that I was being asked to sit on appeal from my own decisions.
>
> I agree with the Respondents that although the parties to the references are the same, each case is a separate and distinct and based on its own facts and any party dissatisfied with the decision was entitled to appeal. Further, merely because I made a decision in any of those cases does not automatically form a basis for recusal. It would be improper for me to justify my decisions in those cases."

22. It was the also the argument of the learned counsel that the Petitioner was at liberty to appeal and/or apply for review any decision he felt aggrieved with, made by the Honourable Judge in exercise of her discretionary powers instead of spamming the Honourable Court with multiple suits over the same subject-matter.

23. Regarding the issue of the allegation of the Judge and a contingent of Judicial Service Commission officials being hosted by the 5th Respondent and his wife in their residence, the learned counsel submited that the application for recusal by the Petitioner based on the said allegation does not hold water since the accusations meted against the Honourable Judge are not anchored on cogent evidence as to infer any bias, partisanship, and conflict of interest. The learned counsel placed reference to the case of National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited [2021] eKLR where held as follows;

> "'First, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. One, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. Two, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted.
>
> 32. Second, the other in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. [12] This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colorless neutrality stands in contrast to judicial impartiality [13] - a distinction the above cited decision vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views - that is the keystone of a civilized system of adjudication. Impartiality requires in short "a mind open to persuasion by the evidence and the submissions of counsel" [14] and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. This is because: -
>
> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."[15]
>
> 33. The Constitutional Court of South Africa in the above cited case further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable.
>
> (16) This two-fold facet finds replication in S v Roberts [17] where the court required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. The reasonable person should not entertain unreasonable or ill-informed apprehensions. The two-fold emphasis serves to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated: - "Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of

real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity."[18]

34. The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law.

35. The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. Adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. One, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. Two, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is "as wrong to yield to a tenuous, questionable or frivolous objection" as it is "to ignore an objection of substance."[19] An applicant in a recusal application must meet the high threshold of satisfying the "real danger of bias" test, namely that there was a real danger that the judge might unfairly regard with favor or disfavor the case of a party to the issue under consideration by him.'

24. The learned counsel reiterated further that the Petitioner/Applicant has not demonstrated through cogent evidence any real and/or perceived danger of bias. He contended that the Petitioner has baselessly chastised the Judge who undertook an official visit to a sitting Governor as part of her official duties.

25. Based on the above submissions the learned counsel called upon this court to dismiss the Application with costs.

Analysis And Determination

26. I have carefully considered the applications , the replies and the submissions . The principles governing recusal are based on the Bangalore Principles of Judicial conduct which were domesticated in the Kenyan Judicial Service (Code of Conduct and Ethics) Regulations 2020.

Rule 21 of the said code provides : -

21.	Recusal (1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge — (a) is a party to the proceedings; (b) was, or is a material witness in the matter in controversy;

(a) has personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) has actual bias or prejudice concerning a party;

(c) has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;

(d) had previously acted

as a counsel for a party in the same matter;

(g) precluded from hearing the matter on account of any other sufficient reason; or

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

(a)	is a party to the proceedings;
(b)	was, or is a material witness in the matter in controversy;
(c)	has personal knowledge of disputed evidentiary facts concerning the proceedings;
(d)	has actual bias or prejudice concerning a party;
(e)	has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;

	(f)	had previously acted as a counsel for a party in the same matter;
	(g)	is precluded from hearing the matter on account of any other sufficient reason; or
	(h)	or a member of the judge's family has economic or other interest in the outcome of the matter in question.
	(2)	Recusal by a judge shall

	be based on specific grounds to be recorded in writing as part of the proceedings.
(1)	A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge— (a) is a party to the proceedings; (b) was, or is a material witness in the matter in controversy; (c) has personal knowledge of disputed evidentiary facts concerning

	the proceedings;
(d)	has actual bias or prejudice concerning a party;
(e)	has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
(f)	had previously acted as a counsel for a party in the same matter;
(g)	is precluded from hearing the matter on

		account of any other sufficient reason; or
	(h)	or a member of the judge's family has economic or other interest in the outcome of the matter in question.

(a)	is a party to the proceedings;
(b)	was, or is a material witness in the matter in controversy;
(c)	has personal knowledge of disputed evidentiary facts concerning the proceedings;
(d)	has actual bias or prejudice concerning a party;
(e)	has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
(f)	had previously acted as a counsel for a party in the same matter;
(g)	is precluded from hearing the matter on account of any other sufficient reason; or
(h)	or a member of the judge's family has economic or other interest in the outcome of the matter in question.

(2)	Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings.

27. In the case of Jan Bonde Nielson v Herman Philipus Steyn & 2 others HC COMM No. 332 of 2010 [2014] eklr where the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali And OthersC.A Criminal Application No Nai 4 And 5 Of1995 (Unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & OthersC.A. Civil Application No Nai310 of2004 (Unreported) where the Court of Appeal stated that:

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

28. In Philip K. Tunoi & another v Judicial Service Commission & Another CA Civil Application NRB No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in Porter v Magill [2002] 1 All ER 465, where it stated that,

> " The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court (per Ibrahim J.) in Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR where he observed that, "The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

29. In order to determine this Application it would be prudent to determine the following;

    a. Whether this court has been biased by delaying the hearing of this Petition and Petition E003?

    b. Whether this court has a personal relationship with the 5th Respondent having met him in the company of members of the Judicial Service Commission sometime last year which relationship will likely influence my impartiality in determining this suit?

On whether this court has with bias been delaying the hearing of this Petition and Petition E003?

30. The Applicant outlined the following as the particulars to support his touching on this question.

    a. That he filed Kisii Petition No. E003 of 2004 on 26th February 2024 under certificate of urgency , and inter-partes hearing was set for 27th February 2024.

b. That his earnest requests through his legal representatives, the court decided to reschedule this matter to far off date of 5th March 2024. The impeachment process was already scheduled for on 29th February 2024 and thus mention of the 5th March 2024 was ineffective because by then, the matters and requests in the original Petition on 26th February 2024 had already been overtaken by events

c. That the rescheduling not only delayed justice but rendered the issues raised in the Petition no longer relevant or actionable.

d. That all these distended dates fell, as the judge knew, long after the County Assembly debate, and the public participation, hence rendering the sub-stratum of the case void and wasted.

e. That this court delayed giving her orders and direction regarding the Application for conservatory he filed together with this petition on 18th March, 2024 up to 19th March 2024.

f. Upon giving directions for the said Application she scheduled it for inter-parties hearing on 26th March 2024 a far of date.

g. That on 26th March 2024 the Judge suspended her attention to his attention to his urgent application for conservatory order and diverted attention to two applications filed by the 5th to 7th Respondents which were not eligible for consideration during vacation and proceeded to allocate the new application for a ruling date of 16th April 2024 which was an inordinate far-off date that had the effect of defeating the purpose of the prayers and sub-stratum of his the application and petition.

31. Regarding issue of this court's decision to schedule his Application filed together with Petition E003 on 5th March, 2024, the Applicant has in his Affidavit admitted that his Petition No E003 came up for Interpartes hearing on 26th February, 2024 and his advocate who was given an opportunity to address the court. He also has admitted that this court directed that the matter be mentioned on 5th March, 2024 to enable service of the Respondents and to enable them respond to the Application before the same could be heard Interpartes. He however claims the mention date given was far off and hence not favorable given that he was impeached on 29th February, 2024 and thus his Petition was rendered nugatory. He blames the court for being so inclined to giving a decision that was not sensitive to the urgency of his cause of action despite knowing the date for his impeachment motion.

As correctly submitted by counsel for the respondents, this court cannot sit on Appeal of its own decision made on 26th February, 2024. If at all the Applicant was aggrieved with the Ruling and orders of this court made on 26th February, 2024 he ought to have appealed against the same but not to ask the court to recuse itself on allegations of bias. The same case Applies to the decision of this Court rendered on 19th March, 2024 scheduling the Interpartes hearing for the Application dated 18th March, 2024. Dates are given by courts as per the courts diary. The record is clar that the dealy herein was occasioned by non -joiner vof the 5th to 8th respondents in the first instance and in petition no. E003 of 2024 , the date of 7.5.24 was given at the instance of Mr Ochoki for the applicant who sought time to consult their client on the way forward upon his impeachment.

32. It is imperative to note that the law is very clear on what should happen should a party be dissatisfied with the Orders of the Court. Such a party has a right to seek for review or appeal against the said orders. The Applicant did none of the above. There is no laid down rule which enjoins Judges to grant interim orders in every matter before them and refusal by a Judge to grant interim orders is not a ground for his disqualification. If I were to oblige to allegations of this sort, then I would no doubt recuse myself

from all proceedings where I have declined to grant conservatory orders which move will amount to great injustice to litigants who come before this court for determination of disputes.

33. Regarding the Applications filed by 5th to 7th Respondents seeking to be enjoined the Petition, the Applicant ought to know that this court has a duty to hear who comes before it however flimsy their claims to could be. All the court did on 26th March, 2024 was to accord an opportunity to the Applicant to reply to the Applications filed and as he correctly pointed out, this court deferred the Ruling to admit the Respondents to 16th April, 2024 to the Petition a date which all the parties confirmed to have been convenient to them. The Applicant was accorded sufficient opportunity challenge Applications based on their claim that the same were not viable of being admitted having been filed without following vacation rules. It shocking that before this court could render its rulings on the two Applications, the Applicant showed up with this Application on 2nd April, 2024, seeking recusal of this court for reasons that decision to defer the Ruling to 16th April, 2024 to him to respond to his Application was biased against him and in favor of the Parties whose Application for enjoinment I was yet to be determined.

34. The above notwithstanding this court has since allowed the 5th to 7th Respondent to be enjoined to the suit given that they are a necessary parties to this Application and by extension, this Petition and given that they equally were Parties to Petition E003 which the Applicant has extensively based this Application on. If the Applicant is dissatisfied with the decision of this court to enjoin the 5th to 7th Respondent, he ought to Appeal against my decision.

Whether this court has a personal relationship with the 5th Respondent having met him in the company of members of the Judicial Service Commission sometime last year and whether this is likely influence my impartiality in determining this suit?

35. The Applicant alleges as follows in paragraph 11 of his Affidavit;

> " That the Court is otherwise conflicted and is unlikely to act impartially. The judge has been a visitor to the Governor's personal house [not official residence] nor official offices where she led a delegation of Judicial Service Commission [J.S.C] members. I was present. She took the JSC to meet the Governor and his wife at a personal residence. At his residence, the Governor requested JSC for a partnership and to be assigned a court.

36. The Applicant has not specifically stated or provided any evidence other than the photos of persons who attended the meeting as to how this meeting relates to this court's impartiality in handling the issues he has raised in his two petitions with a view to convincing any reasonable person with the knowledge of the facts of his two petitions that this court is likely to be biased in determining his cause of action therein. The Applicant who admits to have been present when the meeting took place only alleges that the Governor requested the Judicial Service Commission for a partnership and to be assigned a court which allegation he has also not proved. It is equally clear that the Judicial Service Commission is not party to this suit to deny or confirm that such request was made; that it did consider alleged request and assigned the 5th Respondent a court. Further too it is clear the Applicant has neither pleaded nor confirmed that this court made any prejudicial comment to the alleged request by the 5th Respondent having admitted that it was an open meeting, which he personally attended. The applicant was well aware from the word go that this court, Members of the Kisii law Courts Leadership and Management Team and members of JSC attended the meeting and still filed Kisii Petition no. E003 of 2024 and the instant petition in this court . It is only upon denial of interim orders that he realised that this court is biased. In any event, the 5th and 6th Respondents are crucial stake holders in the administration of Justice and thus engagements with them are necessary and healthy provided that they are done in a transparent manner and no live court matters are subject thereto. The Criticism

of the said meeting between JSC with the Governor is thus made either out of ignorance or selfish interests.

37. From the foregoing, a reasonable man directing his mind to the facts herein cannot conclude that the meeting between the 5th Respondent and the Judicial Service Commission to which the Applicant and this court was in attendance has any nexus to this case which is likely to have a bearing on the determination of the petitions herein.

38. If thiscourt were to recuse its self from handling these Petitions merely for reasons that it accompanied the Judicial Service Commission to meet the governor sometime last year, then it will mean that it will have to recuse myself from all matters to which the 5th Respondent is a party which were filed after such meeting a move that will be not only stall all proceedings involving the 5th and 6th respondents herein and cause a crisis impede access to Justice. In the case of Galaxy Paints Company Limited v Falcon Guards Limited [1999] eKLR, the Court of Appeal held as follows at page 6:

> " Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favor."

39. A similar holding was made in Kaplan & Stratton v L.Z. Engineering Construction Ltd & 2 Others [2001] eKLR, where the Court of Appeal stated as follows:

> " Shah JA in Kenya Shell Limited v James G.K Njoroge (Civil Application No. Nai. 292 of 1998) (unreported) in which case there was an informal application for his disqualification referred to an English House of Lords decision in Locabail Ltd v Bayfield Properties Ltd [2000] 1 All. E.R. 65. At page 77 of that report their Lordships referred to a passage in the judgment of Callaway JA in the case of Clenae Pty v Australia & Newzeland Banking Group Limited [1999] vCA 35, Vic SC wherein Callaway JA observed at para 89(e):
>
> 'As a general rule, it is the duty of the judicial officer to hear and determine the case allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.'" (Emphasis mine).

40. This court has a duty to sit and determine matters before it and applications for it's disqualification must be well founded and not based on imagination or mere suspicion.

41. In conclusion, the application dated 2.4.24 has not met the threshshold for recusal under the Code of Conduct regulations. I find that the application is based on mere surmise, conjecture and is aimed at forum shopping. The application has no merit and is a gross abuse of the process of this court. I proceed to dismiss with costs to the , 5th, 6th and 7th Respondents.

T.A ODERA

JUDGE

23.4.24

Delivered and virtually Via Teams Platform on this 24th day of April 2024 in the presence of : -

Katwa , Ochoki and Michuki Advocartes for appellant: For he applicant.

Opolla and Wamblwa for the 1st and 2nd respondents

Ochieng Oginga : I am for the 5th and 6th respodent

N/A For 3rd respondent

N/A: For 4th respondent

Elias Mutuma Mr Mwenda : For 7th respondent

Mutuma H/B Ndegwa Njuru for the 8th respondent

Court Assitant: Owiwa

Kawta: We are most obliged we seek copies of typed proceedings and leave to appeal in the event it is necessary that we obtain leave.

Order: Leave to appeal is granted. Proceedings be prepared and supplied to applicant. Mention on 8.5.24 for directions.

T.A ODERA

JUDGE

23.4.24

Ochoki: The principal judge had directed that this court be heard in Nyamira with other related matters. The said matters are coming up for directions on 16.5.24.

Ochieng oginga: I also wish to bring to the attention of the court that Justice Okwany rendered a ruling on consolidation and hearing the issue of consolidation. I sought the order. I will furnish the court with it. There is no such order at the moment.

Mutuma: The order by the PJ has since been vacated and Justice Okwany she rendered herself that each matter to proceed in the court where it was filed. She dore ted that the matter be heard in Kisii. The submission by Mr Ochoki is not right.

Ochoki: The order was not set aside. Mr Mutuma was not in court yesterday. Justice Okwany said that the PJ might not have been aware of the active cases in Kisii. Counsel owe the Court a duty to inform the court of the position. The orders of PJ were not set aside.

Katwa: The consolidation was delayed by Hon. Justice Okwany but not set aside. The judge also said that because she had not acceded to consolidation. each of the files should go to Nyamira and will be dealt with.The Nyamira order will clarify the issue.

Order: I can only deal with the issue upon the order order of Justice Okwany be availed.

T.A ODERA

JUDGE

23.4.24