IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA

(Coram: Nestor Kayobera, P; Geoffrey Kiryabwire, VP; Sauda Mjasiri, Anita Mugeni and Kathurima M'Inoti, JJA)

APPLICATION NO. 2 OF 2022

MALE H. MABIRIZI K. KIWANUKA..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA..... RESPONDENT

(Application arising from Appeal No. 7 of 2020 from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi, PJ, Charles Nyawello & Charles Nyachae, JJ.)

RULING OF THE COURT

INTRODUCTION

1. This application has been filed by Male H. Mabirizi Kiwanuka, a lawyer resident in the Republic of Uganda, (hereinafter referred to as the Applicant) by way of Notice of Motion against the Attorney General of the Republic of Uganda, (hereinafter referred to as "the Respondent"). The Notice of Motion is supported by the Affidavit of Mr. Mabirizi. The Respondent has also filed an Affidavit in Reply despite the short notice he was afforded.

2. The objective of the Applicant's application is for Hon. Justice Geoffrey Kiryabwire (hereinafter "the Vice President") to recuse himself from hearing Appeal No. 7 of 2020 between the Applicant and **the Attorney General of the Republic of Uganda.**

3. The Applicant is seeking the following orders from the Court: -
   "That the Vice President recuse himself and or be prevented from participating in the hearing and determination of Appeal No. 7 of 2020, **Male Mabirizi Kiwanuka v. The Attorney General of the Republic of Uganda** (arising from the decision of the First Instance Division in Reference No. 06. of 2019)."

4. At the hearing of the Application, the Applicant represented himself while the Respondent was represented by the Hon. Attorney

General, Mr. Kiryowa Kiwanuka, who appeared in person and was assisted by a team of lawyers from the Attorney General's Chambers namely: -

1. Mr. Martin Mwambusya, Director Civil Litigation.
2. Ms Christine Kaahwa, Commissioner Civil Litigation.
3. Mr. George Kalemera, Commissioner Civil Litigation.
4. Mr. Richard Adrole, Principal State Attorney.
5. Mr. Geoffrey Madete, Senior State Attorney.
6. Ms. Jackie Amusgut, State Attorney.
7. Mr. Johnson Nathwera, State Attorney.
8. Mr. Sam Tusubira, State Attorney.

BACKGROUND

THE REFERENCE

5. The Applicant filed in the First Instance Division of the East African Court of Justice (the Trial Court) Reference No. 6 of 2020 (the Reference), **Male H. Mabirizi K. Kiwanuka v. The Attorney General of the Republic of Uganda.** The Reference was filed under Article 30 of the Treaty contesting the legality of various actions, directives and decisions of the Executive, Legislative and Judicial branches of the Government of the Republic of Uganda for their role in the conceptualization, processing and validation of Uganda's Constitutional (Amendment Act of 2018).

6. Two issues were considered in the Reference.

1.Whether the Reference was time barred and

2.Whether the process leading to the enactment of the Constitutional (Amendment) Act, 2018 was consistent with the principles of Articles 6 (d), 7(2), 8(1) (c), 30 and 123 (3)(c) of the Treaty.

7. The Reference was dismissed by the Trial Court with costs to the Respondent.

THE APPEAL

8. Being dissatisfied with the decision of the Trial Court, the Applicant lodged in this Court a Notice of Appeal dated 16th October, 2020 in respect of Appeal No. 7 of 2020.
9. The Applicant's Memorandum of Appeal contained the following grounds:-

"1.The learned Principal Judge and Judges of the Trial Court committed ***procedural irregularities;***

2. The learned Principal Judge and Judges of the Trial Court erred in holding that they ***Lacked Jurisdiction*** *to entertain the Appellants complaints relating to:-*

1. *The legislative processes in the Parliament of Uganda;*
2. *The actions of violence in the Parliament of Uganda;*

3. The pre-assent steps and the assent;

4.The processes, actions and decisions of the Uganda Constitutional Court;

5. Judicial Fraud/mis-pronouncement of the verdict by the Uganda Supreme Court in Constitutional Appeal No. 2 of 2018, ***Male H. Mabirizi K. Kiwanuka v Attorney General of Uganda*** *all of which resulted in the enactment and validation of the Uganda Constitution (Amendment) Act, 2018.*

3. The learned Principal Judge and the Judges in the Trial Court committed ***Errors of Law*** *when they held that the Reference was time barred in relation to:-*

i. The Complaints against Uganda Parliament legislative processes in the Parliament of Uganda;

ii. The actions of violence in the Parliament of Uganda;

iii. The pre-assent of violence in the Parliament of Uganda;

iv. The processes, actions and decisions of The Uganda Constitutional Petition No. 49 of 2017, **Male H. Mabirizi K. Kiwanuka v Attorney General of Uganda.**

All of which resulted into the enactment and validation of The Uganda Constitution (Amendment) Act, 2018."

THE APPLICATION

10. The Application is based on the following grounds: -

1. The Vice President is directly a subject of an objection in a case instituted by the Applicant at the East African Court of Justice in the First Instance Division in Reference No. 23 of 2021, **Male H. M. Mabirizi Kiwanuka v the Attorney General of the Republic of Uganda** (hereinafter, "the Reference").

2. Under paragraphs 3(10), 6(1)(j), 6(6)(1), 6(7)(f), 6(8)(i) of the Reference and paragraphs 61-65 of the affidavit in support of the Reference, the appointment and sitting of the Vice President on the Judiciary Council of Uganda is being challenged by the Applicant for being unlawful. The applicant is seeking the following orders:-

    a. That the said appointment be declared unlawful and be nullified.

    b. That a permanent injunction be issued against the said appointment.

    c. That the position be declared vacant.

11. The Application was brought under Article 26(6) of the Treaty for the Establishment of the East African Community (hereinafter referred to as the Treaty); Rules 4, 94 and 95 of the East African

Court of Justice Rules of the Court (hereinafter referred to as "the Court Rules").

12. According to the Applicant, he has been compelled to make this application for the reason that he has filed the Reference in the First Instance Division against the Attorney General of Uganda seeking the removal of the Vice President from the Judicial Council of Uganda for being improperly appointed. The Applicant's reasoning is that in view of the Reference and the complaint therein, the Vice President will be biased against him and will not accord him a fair hearing in Appeal No. 7 of 2020 hence the reason for this application.

13. The Appeal was scheduled for hearing on 15th February, 2022.

14. When the Appeal was called on for hearing, both parties were ready to proceed with the hearing of the Appeal. However, since in the intervening time the applicant had filed the application for recusal, the Court directed that it was prudent to deal with the application for recusal first.

15. The Applicant informed the Court that he was ready to proceed with the application as he did not wish to file a rejoinder or written submissions. The Respondent had no problem with that proposal. Both parties therefore proceeded by way of oral submissions. The

Court requested the parties to file a list of Authorities relied upon in their oral submissions. A list of Authorities was duly filed by the Respondent on 17th February, 2022 but the Applicant failed to do so.

APPLICANT'S CASE

16. The Applicant submitted that the Vice President should recuse himself from hearing Appeal No. 20 of 2020 as he is a subject matter in Reference No. 23 of 2021 filed by the Applicant seeking an order for the Vice President to be removed from the Judiciary Council of Uganda.

17. The Applicant further submitted that according to Article 26(6) of the Treaty, the nature of the Vice President's interest is such that it would be prejudicial for him to take part in this appeal. The Applicant submitted that any doubt should be resolved in favour of recusal. He relied on the case of **Locabail (UK) v. Bay Field Properties** (DWACIV 2004). In that case the UK Court of Appeal held that the policy of the Common Law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to prove that such bias actually exists. Any doubt should be resolved in favour of disqualification.

18. The Applicant submitted further that in **Government of Seychelles v Seychelles National Party & Others**, Constitutional Appeal No. SCA 04 & 03 of 2014, the Court of Appeal of Seychelles at page 3 of the decision held as follows:-

"*It is not enough for a judge to be a diamond, he /she should be a refined diamond".*

At page 3 of Tomey J.'s decision, it was found thus:-

''Much harm is done by the myth that merely putting on a black robe and taking the oath of office as a judge, a man ceases to be human, and he strips himself of all predilections, becomes a passionless thinking machine."

19. The Applicant also made reference to the case of the **Attorney General of Kenya v. Anyang' Nyong'o**, Application No. 5 of 2007. He submitted that at page 14 to 15 of that decision, the Court held as follows: -

"that where a recusal application comes before a court, constituted by several Judges, it appears to us that; subject to the judge whose recusal is sought giving his individual decision on the matter, all the judges constituting the Coram for the case have collective duty to determine if there is sufficient ground for the judge to recuse himself from further participation in the case."

20. The Applicant further submitted that the decision in **Anyang' Nyong'o** (supra) is no longer applicable following the amendment of the Treaty. The Court must apply Article 26(2) of the Treaty which came into force after the said decision.

The Applicant further submitted that he is fully aware that the Reference filed in the First Instance Division will not cause the Vice

President to lose his seat in the Court. The objective under Article 26(6) is to ensure that there is no fear of having an unfair decision.

21. On the complaint that the Applicant has not provided any evidence in support of the lack of impartiality of the Vice President, the Applicant stated that his application is supported by his own affidavit which is itself evidence. He relied on the decision of **Union Trade Centre v The Attorney General of Rwanda,** Reference No.10 of 2013 that an affidavit is evidence.

22. He also revisited the case of **Locabail UK** (supra) on the protection of litigants who can discharge the lesser burden of showing the real danger of bias without requiring them to know that such bias exists.

23. The Applicant stated that no malice was intended when he stated that the Vice President should have been the real Respondent but no suit can be filed against him as he has immunity both in the Ugandan Courts as well as the Regional Court.

24. In relation to the argument that because a Judge will rule against him is not a reason for recusal, the Applicant submitted that he had not indicated that the Vice President will rule against him, and that what was in issue is maintaining the integrity of the Court.

25. The Applicant also relied on the decision of the COMESA Court of Justice in **Eastern and South African Trade and Development Bank (PTA Bank) and Another v Martin Ogang**, in Reference No. 1B of 2000 at paragraph 34 where the Court held that:-

"the test is not whether Justice Ogoola can disabuse his mind of any knowledge he may have of the Respondent. But rather that: whether a reasonable man, having this background information, would reasonably suspect the possibility of bias on the part of Justice Ogoola. We do not for a moment doubt that Mr. Justice Ogoola is a man of integrity and would not allow his prior acquaintanceship with the respondent to crowd his judgment, but the fundamental rule of the law that: justice should not only be done but, should manifestly and undoubtedly seen to be done, must apply. We are therefore of the opinion that Mr. Justice Ogoola should have recused himself or disclosed his interest in the matter to the Court, that he enjoyed bed and board at the Respondent's home."

26. According to the Applicant, this decision from the COMESA Court (supra) is very relevant. Any decision which undermines the principle of fair hearing should be nullified. The Applicant submitted that he does not doubt the integrity of the Vice President of the Court, and that this application is not a personal attack on his Lordship. However, the doubt in his mind is whether justice would be seen to be done.

27. The Applicant further made reference to Annexture A of the affidavit in support of the Reference filed in the First Instance Division challenging the appointment of the Vice President as a member of the Judiciary Council of Uganda. He stated that he knows that Section 4(1) (f) & (g) of the Administration of the Judiciary Act 2020 provides for representatives of both the higher Courts and the

lower Courts to the Judiciary Council. He submitted that the Vice President and Her Worship Bareebe Rosemary were named as members of the Judiciary Council representing the higher Courts and lower Courts without an election being conducted. Therefore the appointment was illegal. The Applicant therefore wants the Vice President to be removed from the Judiciary Council of Uganda. The Applicant stated that save for the requirement under the Treaty of suing the offending Partner States, the Vice President would have been made a party to the Reference.

28. The Applicant prayed for the application to be granted with no order as to costs. He reiterated that the application should not be taken as a personal attack against the Vice President.

RESPONDENT'S CASE

29. The Hon. Attorney General of the Republic of Uganda (the Attorney General) commenced his submissions by faulting the procedure used by the Applicant in bringing his application for recusal before this Court. He stated that the Application is not properly before the Court. As there is an established procedure under which such an application is made, and for that reason alone, it should be dismissed. This issue was also raised by the Respondent in the Affidavit in Reply.

30. According to the Attorney General, the procedure for bringing an application such as this has been traversed and well stated in in the case of **Anyang' Nyong'o** (supra). The procedure laid down in

the said case is that the Applicant should bring the application in Chambers before the Judges before it is brought in Open Court. He submitted that this case has been cited at great length by the Applicant. However, the Applicant despite having ably read a substantial part of page 14 of the judgment, he left out the part relating to the procedure to be followed. The Attorney General further submitted that the Applicant having made reference to page 14, is fully aware that the procedure used to bring this matter before the Court is wrong and as such this application should be dismissed.

31. The Attorney General further stated that it is incumbent upon the applicant to always follow the procedures as set out by the Courts and these procedures are not all in vain, they have a purpose. He prayed for the dismissal of the application as this procedural ground alone suffices to dismiss the same.

32. On the substance of the application, the Attorney General submitted that the issue of appointment of the Vice President to the Judiciary Council of Uganda has no effect at all on the office he holds at the East African Court of Justice. Even in the event that the applicant is successful in his application, the holding of the position of a Justice of the East African Court would not be affected at all.

33. He submitted that there is a danger of setting a very bad precedent to the effect that whenever an applicant files any application on any matter even if misconceived against a member of the Bench, then that member will have to recuse himself. According to the Attorney General, that is not the principle for recusal. The Applicant has not provided any proof of bias on the part of the Vice

President. In fact he even contends that he does not doubt in anyway the integrity of the Honourable Judge. He cited this Court's decision in **Anyang' Nyon'go** (supra) relying on the **President of the Republic of South Africa v. South African Rugby Football Union (S.A. Rugby Football Union Case)** No.16 of 1998 in paragraph 45 where the Court held as follows: -

> *"...an unfounded and unreasonable apprehension concerning a judicial officer is not a justifiable basis for a recusal application."*

34. He further stated that the Applicant in his oral submissions read a substantial portion of page 18 of the judgment to the Court but conveniently skipped to read this relevant part.

35. According to the Attorney General, the mere fact that the Applicant has filed an application or intends to file any more applications against one or more members of the Bench is not a justifiable ground for recusal. No evidence has been led to show that the Judge is biased against the Applicant. The Applicant has clearly indicated that he regards the Judge very highly and by his submission alone it should be enough to dismiss this application.

36. The Attorney General further submitted that if a party does not bring any evidence to back up the apprehension of bias he may have, the Court is only obliged to dismiss the application.

37. In relation to the argument that that Applicant intends to bring an application against the Vice President, as the true respondent, it was submitted that it is a clear manifestation of the kind of abuse that this Court must absolutely frown upon. The Attorney General

wondered if indeed the Applicant holds the view that the real respondent should have been the Vice President, why was he then before the Court? He submitted that the application is absolutely an abuse of the process of the Court, used to tie the ability of the Court to conduct its business.

38. The Attorney General concluded by submitting that where there is an application for recusal, the Court must find that there is a good ground for bias or a real reason for apprehension of bias. It is not enough to think that the sitting Judge has a different view or is likely to rule against a party. Ruling against a party is not evidence of bias.

39. The Attorney General therefore prayed to the Court to dismiss this application and for an order for the Applicant to pay costs.

ANALYSIS AND DETERMINATION BY THE COURT

40. Having carefully reviewed, the pleadings, the rival submissions by the parties and the authorities relied upon, we would like to make the following observations. There are two parts to this application. The first part is as to whether the application is properly before the Court and the second part is the merits on the substantive application.

41. Before considering the substantive application, we shall commence by determining whether the application for recusal is properly before the Court. The Attorney General has strongly argued that the application is not properly before the Court whereas the

Applicant holds the view that the application is properly before the Court, as there was no other way of filing the application.

42. The first time this Court encountered an application for recusal is during the hearing of the **Anyang' Nyong'o** case (supra). This Court had not yet laid down the proper procedure for handling applications for recusal. However when considering the said Application, the Court held that the procedure used to file the application for recusal by the Attorney General of Kenya was wrong. The Court held as under:-

> *"With regard to an application for a judge to recuse himself from sitting on a Coram as from sitting as a single judge, the procedure practiced in the East African Partner States, and which this Court would encourage litigants before it to follow, is similar to what was succinctly described by the Constitutional Court of South Africa in the* ***S.A. Rugby Football Union case****."*

43. The Court relied on the **S.A. Rugby Football Union case** (supra) which held as follows in paragraph 50 of the judgment: -

> *"The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the Judge or Judges in the presence of her or his opponent. The grounds for recusal are put to the Judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge, the Applicant would, if so advised, move the application in open court."*

44. The Court also concluded that:

"If one or more of its members is disqualified from sitting in a particular case, this Court is under a duty to say so and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication process."

45. It was further concluded that the rationale for and benefit from that procedure is obvious. Apart from anything else, in practical terms it helps the litigant to avoid rushing to Court at the risk of maligning the integrity of the judge or judges and of the Court as a whole, without having the full facts, as clearly transpired in the instant case.

46. In this matter the Applicant filed a Notice of Motion directly to the Court and did not therefore comply with the prescribed procedure laid down in the **Anyang' Nyong'o** case (supra), thus departing from the laid down procedure. We are therefore inclined to agree with the Attorney General that the prescribed procedure was not followed. The Applicant by making reference to **Anyang' Nyong'o** case (supra) in his submissions was aware of the previous guidance of this Court in the matter of a recusal but chose to ignore it and proceeded by way of Notice of Motion; thus wasting a substantial amount of the Court's time instead of dealing with the substantive Appeal. In view of our findings on noncompliance with the recommended procedure, there is clear evidence of lack of reasonableness and good faith. We however find that, this irregularity alone is not sufficient to dismiss the application without first addressing the merits of the application before us.

47. Given the importance of dealing with the legal requirements relating to recusal we are of the considered view that for posterity we should also deal with the substantive application.

48. In **Black's Law Dictionary** (Tenth Edition), *Recusal* is defined as follows:-

> *"Removal of oneself as judge or policy maker in a particular matter especially because of a conflict of interest."*

49. In **Council of Review, South African Defence Force and Others v Monnig and Others,** 1992 (3) SA 482 (A) at p. 491 E-F **Corbett CJ** held as follows: -

> ***"****The recusal right is derived from one of a number of Rules of Natural Justice designed to ensure that a person accused before a court of law should have a fair trial."*

50. In the **S.A. Rugby Union Case** (supra) it was held as follows:-

> *"A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the court 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 appearance of bias in the official or officials who have the power to adjudicate on disputes."*

51. The Court has a duty to ensure that its decisions are arrived at with strict adherence to the established principles that ensure judicial impartiality. The first being that "*a man ought not to be a judge in his*

own cause" and the second being *"justice must not only be done but must be seen to be done."*

52. The Applicant has brought his application under Article 26 (6) of the Treaty. We would like to state at the outset that the said Article does not envisage a recusal application as presented by the Applicant in the present case. Article 26 (6) provides as under:-

> "*If a Judge is directly or indirectly interested in a case before the Court and if he or she considers that the nature of his /her interest is such that it will be prejudicial for him or her to take part in the case, such a Judge shall if in the First Instance Division, make a report to the Principal Judge or if in the Appellate Division, make a report to the President and if the President or Principal Judge considers the Judge's interest in the case prejudicial, the President or Principal Judge as the case may be, shall appoint a temporary Judge to act for the case only in place of the substantive Judge."*

53. In **Anyang' Nyong'o** (supra) the Court found as follows on page 15 -16 of the judgment:-

> *"Judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a judge to adjudicate disputes before him impartially, without bias in favor or against any party to the dispute. It is in that context that Article 24 of the Treaty ordains that: -*

"Judges of [this] Court shall be appointed by the Summit from amongst persons recommended by the Partner States who are of proven integrity, impartiality and independence ..."

54. Two categories of bias were mentioned in the **Anyang' Nyong'o** case (supra). The first category is where it is established that the judge is a party to the cause or has a relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause. The Court made reference to the case of **R v Bow Street Metropolitan Stipendiary Magistrate & Others Exparte Pinochet Ugarte,** (No. 2) (1999) 1 All ER 577 (the **Pinochet case**), where the House of Lords held that:-

"Automatic disqualification applies not only where the judge is directly or indirectly a party or has financial proprietary interest in the suit. In a case where an automatically disqualified judge does not recuse himself, the decision or order he makes or participates in, will be set aside, notwithstanding that he did not act with bias".

55. The second category is as follows:-

"Where a judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is a likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views of the subject matter in dispute. The disqualification is not presumed like in the case of automatic

disqualification. The applicant must establish that bias is not a mere figment of his imagination".

56. For a long period the test for bias leaned on the *"real likelihood of bias"* as reflected in various decisions in the Courts in England as well as Commonwealth countries including the **Pinochet case** (supra). However, over the years the position changed and the test for bias changed to a *"a reasonable apprehension of bias by a reasonable person".*

57. In the **S.A Rugby Football Union Case** (supra) the Court in para 45 of the judgment stated that:-

> *"An unfounded or unreasonable apprehension concerning a judicial officer is not a* ***justifiable basis for recusal application"*** (Emphasis provided)

58. In **R v Gough** (1993) AC 646, the House of Lords adopted *the real danger* test meaning that the question to consider is whether there was a real danger that a fair trial was likely to be denied. This test did not win universal acceptance within the Commonwealth countries.

59. In **Magill v Porter** (2002) 2 AC 357 the House of Lords subsequently modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased.

60. In the **Anyang' Nyong'o** case (supra), the Court adopted a similar test. It was held 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) a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."*

57. In the **S.A. Rugby Union Case** (supra) it was found thus: - for the past two decades the approach is the one contained in a dissenting Judgment by De Grandpre J. in the **Committee for Justice and Liberty et al v National Energy Board,** (1976) 68 DLR (3d)716 at 735.

> *"... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the*

matter realistically and practically – and having thought the matter through conclude."

58. The Supreme Court of Canada in **R. v S.R.D** (1997) 3 SCR 484 elaborated in detail what constitutes a reasonable apprehension of bias. The Court held that:-

"The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ***The test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also the fact that impartiality is one of the duties the judge swear to uphold...***

The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of

demonstrating bias lies with the person who is alleging its existence."

(Emphasis provided)

59. In the case of Hon Lady Justice **Kalpana H. Rawal v Judicial Service Commission & 2 Others** (2016) eKLR the Court of Appeal of Kenya applied the test of *"reasonable apprehension of bias".* It was held that: -

> *"It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn."*

60. **In Re: Application for Recusal of Hon. Justice Owiny Dollo CJ by Male H. Mabirizi K. Kiwanuka,** Miscellaneous Application No. 3 of 2021, the Supreme Court of Uganda also applied the test of "reasonable apprehension of bias". The Court held that:-

> ***"The apprehension of bias test is objective and the onus of establishing it rests upon the applicant or objector.*** *The test has a two-fold objective element. The person alleging bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case.* ***Unfounded or unreasonable apprehension of bias on the part of a judicial officer can never be a justifiable basis for seeking recusal."***

(Emphasis provided)

61. The Supreme Court of Uganda found the "reasonable apprehension of bias" test most persuasive. Many common law countries have departed from the old position and have now adopted the "reasonable apprehension of bias" test. The Supreme Court was compelled to depart from the test propounded in **Professor Isaac Newton Ojok v Uganda –** SCCrA No. 33 of 199.

62. **In S.A. Rugby Football Union case** (supra) the Court found as follows:

"While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, ***this does not give them the right to object to their cases being heard by a particular judicial officer merely because they believe that such persons will be less likely to decide the case in their favour...****The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice without fear, favour or prejudice' in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself."*

(Emphasis provided)

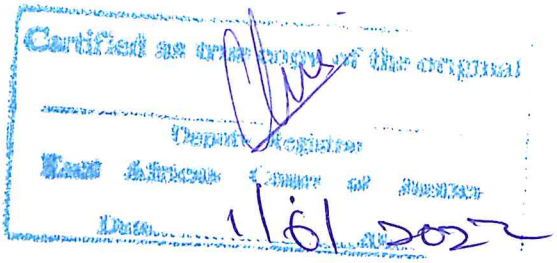
63. The allegations made by the Applicant no doubt calls into question the integrity of the Vice President. However no evidence has been established to justify why the Vice President should recuse

himself from hearing Appeal No. 7 of 2020. The Vice President has no link whatsoever with Appeal No. 7 of 2020. The conclusion reached by the Applicant that the Vice President will rule against him because he has filed a Reference against him is but mere speculation.

64. On the other hand, the principle of automatic disqualification does not apply in this case and the legal requirement for recusal is the reasonable apprehension of bias.

65. We find that the Applicant has not shown good faith in his application. While on one hand he is singing songs of praises to the Vice President on his integrity and impartiality, and that he personally does not have anything against him, on the other hand he is asking for his recusal simply because he is speculating that in view of the Reference filed in the First Instance Division against him, he would be biased and impartial. This approach does not meet the test of a reasonable person alleging the bias. This approach further shows the lack of objectivity and seriousness of the Applicant and the fact that his application is an abuse of the process of the Court.

66. We therefore reject the said allegations and innuendos as incorrect and incapable of establishing bias. The Applicant's complaints cannot form a basis for a recusal application. The Attorney General in his submissions sounded a warning that such kind of allegations merely and unjustifiably targets the integrity of a Judge and the Courts should be reluctant to entertain such application for recusal.



67. We entirely agree with the observations that the speculations made by the Applicant can hardly be a complaint or a factor forming a basis for a recusal application.

68. An application for recusal is a serious matter which ought not to be made on flimsy or non-existent grounds. Acceding with ease to recusal applications made on a whim would encourage parties to forum shop and delay the just and proper adjudication of disputes.

69. In **Teachers Service Commission v Kenya Union of Teachers & 3 Others** CAK No. 196 of 2015, it was held that:-

> *"An application for recusal must be based on reasonable grounds and foundation rather than hearsay and speculation".*

70. William Shakespeare in **Othello** had this to say on spoiling someone's good name:-

> *"Good name in man and woman, dear my lord, is the immediate* ***jewel of their souls****: Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands: But he that* ***filches from me my good name Robs me of that which not enriches him And makes me poor indeed"****.*
>
> (Emphasis provided)

71. The onus is on the Applicant to establish the basis for recusal but we find that the Applicant has failed to do so.

72. A recusal application must be founded on reasonable grounds. Such applications must always be supported by cogent evidence and

should only be made after considering the harm that an unfounded recusal application may inflict on the integrity of the Judiciary. An application for recusal must have a well founded basis.

CONCLUSION

73. In view of our findings hereinabove, we are of the considered view that the allegations against the Vice President have no weight and do not form a basis for his recusal. The purported impression of bias is neither reasonable nor justified.

74. The Applicant has failed to establish that, objectively regarded, there are grounds for the Vice President to recuse himself.

75. It therefore follows as night follows day that the allegations and complaints made against the Vice President would not cause a reasonable and informed person to apprehend that the Vice President would be biased and would not bring an impartial mind to bear on the issues in Appeal No. 7 of 2020.

76. The Application for recusal is accordingly dismissed.

77. In relation to costs, whereas the Applicant did not ask for costs, the Respondent pressed for costs. Under Rule 127(1) of the Court Rules, costs follow the event unless the Court for good reasons otherwise order. Given the nature of the application, we are of the considered view that we should depart from the requirements under Rule 127(1) in view of Rule 4 of the Court Rules. We therefore order that each party should bear its own costs.

ORDER ACCORDINGLY

DATED, DELIVERED AND SIGNED at Arusha this ..30th.....day of May 2022.

30-05-2022

.....
Nestor Kayobera
PRESIDENT

.....
Geoffrey Kiryabwire
VICE PRESIDENT

.....
Sauda Mjasiri
JUSTICE OF APPEAL

.....
Anita Mugeni
JUSTICE OF APPEAL

.....
Kathurima M'Inoti
JUSTICE OF APPEAL

Certified as a true copy of the original
Deputy Registrar
East African Court of Justice
Date 1/6/2022