IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MAKHANDIA, OUKO, KIAGE, M'INOTI,

J.MOHAMMED &, ODEK, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 1 OF 2016

BETWEEN

HON. (LADY) JUSTICE KAPLANA H. RAWAL ……..... APPLICANT

AND

JUDICIAL SERVICE COMMISSION ……….....1ST RESPONDENT

THE SECRETARY, JUDICIAL SERVICE COMMISSION ……..... 2ND RESPONDENT

OKIYA OMTATA OKOITI ……..... INTERESTED PARTY

INTERNATIONAL COMMISSION OF JURISTS…….....1ST AMICUS CURIAE

KITUO CHA SHERIA…….…..... 2ND AMICUS CURIAE

(Being an application for the recusal of the Hon. Mr. Justice Milton Asike Makhandia, JA.)

RULING OF THE COURT

The applicant, the ***Hon Lady Justice Kalpana H. Rawal*** is the Deputy Chief Justice of the Republic of Kenya. By virtue of that office she is also the deputy head of the judiciary and the vice-president of the Supreme Court. She was appointed to those offices under the Constitution of Kenya, 2010. Prior to the promulgation of the ***Constitution of Kenya, 2010*** on 27th August 2010, the applicant was serving as a judge of the Court of Appeal, having been appointed under the former Constitution, first as a judge of the High Court. Under *section 62(1)* of the former constitution as read with ***section 9*** of the ***Judicature Act***, the retirement age for judges was 74 years. Under ***Article 167(1)*** of the Constitution of Kenya, 2010 however, the retirement age of judges is 70 years.

When the applicant approached 70 years, the ***1st respondent, the Judicial Service Commission****,* advised her that she would have to retire at 70 years as provided in the Constitution. Taking the view that ***section 31*** of the ***Sixth Schedule*** to the Constitution guaranteed her retirement at the age of 74 years, the applicant instituted proceedings in the High Court for declarations, among others, that she was entitled to serve as a judge until the age of 70 years.

A bench of five judges of the High Court heard her petition and by a judgment dated 11th December 2015 held that the applicant's retirement age is 70 years as provided in the Constitution of Kenya, 2010. Aggrieved by the judgment the applicant challenged the same in this Court in ***Civil Appeal No. 1 of 2016*****.** A rather rare bench of seven judges of the Court was constituted to hear the appeal, among them the ***Hon. Mr. Justice Milton Asike Makhandia, JA. (the judge).***

It is apt to point out at this juncture that the ***Hon. Mr. Justice Philip K. Tunoi, SCJ.,*** judge of the Supreme Court, and the ***Hon. Mr. David Onyancha, J*****.,** judge of the High Court, finding themselves in the same circumstances as the applicant, also filed petitions in the High Court, which were heard by the same bench of five judges and suffered the same fate. Their appeal to this Court, namely ***Civil Appeal No. 6 of 2016***, and that of the applicant were to be heard by the same bench of seven judges.

Before the Court could get down to hearing her appeal, the applicant filed the application, the subject of this ruling, in which she sought the recusal of the judge. The basis of the prayer for recusal, as deponed in her supporting affidavit sworn on 15th February 2016, was that she had learnt from a confidential source that on the night of 5th and 6th February 2016 the judge held a meeting with the Attorney General, the ***Hon. Prof. Githu Muigai****,* at Karen Country Club, at which they discussed Tunoi, SCJ's pending appeal.

The two agreed, it was claimed, that the appeal would be dismissed *ex tempore* and reasons given later, so as to pre-empt appointment, by the President of the Republic, of a tribunal to inquire into the suitability of Tunoi, SCJ continuing to serve as a judge due to intervening allegations of corruption levelled against him.

Mr. Kioko Kilukumi and ***Mr. Waweru Gatonye****,* learned counsel, teaming up with ***Mr. George Oraro****,* learned Senior Counsel, for the applicant submitted that in light of the said information, the applicant was apprehensive that the judge would not be fair and ought to recuse himself from hearing the appeal. It was submitted that the Attorney General was a member of the 1st respondent, which had decided that the applicant's retirement age was 70 years, and was therefore for all intents and purposes a party to the appeal. In addition, it was argued, before the litigation in the High Court, the Attorney General had rendered to the 1st respondent a "partisan" opinion in which he had advised that the retirement age of all judges was 70 years.

Relying on the ***Constitution*****,** ***the Public Officer Ethics Act*** and the ***Bangalore Principles of Judicial Conduct*****,** ***2002*** learned counsel urged that the applicant is guaranteed by *Article 50* of the Constitution a fair hearing by an independent and impartial court; that a State or a public officer's authority is a public trust to be exercised in a manner that promotes public confidence in the integrity of the office; that such an officer is obliged to behave, both privately and officially, in a manner that avoids conflict of interest or compromising public interest at the expense of private interest and to carry out his duties in a manner that maintains public confidence in the integrity of the office; that a core value and principle of public service is high standards of professional ethics; that a judge is obliged to discharge his

duties independently and free of all extraneous influence from any quarter; that a judge in particular must be independent in relation to the parties to a dispute which he is called upon to adjudicate; and that a judge must not only be free from inappropriate connections and influence but must also appear to a reasonable observer to be free therefrom.

Learned counsel relied on ***Re Pinochet [1999] UKHL 52, Metropolitan Properties Co (FGC) Ltd v Lannon [1968] 3 WLR 694*** and ***Tumaini v Republic [1972] EA 441*** to make the point that the test was not whether the judge was indeed biased, but whether a reasonable person seized of the facts would be assured that the applicant would get justice before the judge.

Lastly it was contended that the applicant's averments relating to the alleged meeting at Karen Country Club had not been controverted through a replying affidavit and therefore we must conclude that they stand unchallenged under ***section 119 of the Evidence Act***. The refusal by the applicant to disclose the source of her information was defended as being consistent with the principles on protection of witnesses.

Dr. John Khaminwa, learned senior counsel for the 2nd *amicus curiae*, with respect, shed off the dispassionate and neutral robe of the *amicus curiae* as extrapolated by the Supreme Court in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others****, Petition No. 12 of 2013* and instead donned the robe of a partial participant in the application. Even without having to disclose the source of her information, counsel submitted, the applicant's averments must be taken seriously on account of her seniority in the judiciary.

Learned counsel further pressed a novel submission that in an application for recusal, all that a party needs to do is express apprehension that a judge might be biased, and the judge is automatically obliged to step down. In counsel's view, it did not matter whether the information that the applicant was relying on was true or not, and even statements in social media were sufficient basis for recusal. Judges, it was urged, must be committed to a life of solitude and it is unfathomable that a judge can interact socially with the Attorney General. Lastly it was argued that the motion for recusal should be granted to avoid taking the country back to the dark days of the one party system when judges got instructions from the Executive and citizens did not have any faith in the judiciary.

Dr. Ken Nyaundi*,* learned counsel for the 2nd amicus curiae, whose brief was held by Dr. Khaminwa indicated that he was not in support of the motion and did not make further submissions.

Mr. Okiya Omtata Okoiti, the ***Interested Party*** opposed the application contending it was wholly lacking in merit. In his view, the onus was on the applicant to establish the basis for recusal and she had failed to do so.

It was Mr. Okoiti's further submission that since the applicant's allegations were very serious and warranted removal of the judge from office, she ought to have presented some credible evidence rather

than hearsay evidence from a party who she was not prepared to disclose. He was also of the view that since there was no allegation that the judge would influence the other six judges, no basis for his recusal existed. He relied on among others, ***Cheney et al. v***

United States District Court for the District of Columbia et al, *No. 03-475.*

Mr. Ahmednassir Abdullahi*,* learned senior counsel and ***Mr. Charles Kanjama,*** learned counsel for the respondents also opposed the application. In their view, the application was not brought in good faith but was merely a part of the applicant's strategy to delay the hearing and determination of the dispute until she attained her preferred age of 74 years. It was contended that since the dispute started in the High Court, two years had elapsed while the applicant continued to hold office in violation of the Constitution; that an application for recusal is a serious matter which ought not to be made on flimsy or non-existent grounds and that acceding to recusal applications with ease would encourage parties to forum shop and delay the just and prompt determination of disputes.

On the merits of the application for recusal, counsel submitted that the same was based on plain gossip and hearsay, which was not assisted by the applicant's refusal to disclose the source of her information for its credibility to be assessed. He submitted that it was not possible for the judge to have been discussing the outcome of an appeal on the night of 5th and 6th February 2016 yet the current bench was empaneled only on 8th February 2016. He relied on the ruling of this Court in ***Teachers Service Commission v Kenya Union of Teachers & 3 Others****. CA No. 196 of 2015* to submit that an application for recusal must be based on reasonable grounds and foundation rather than hearsay and speculation. Counsel concluded by submitting that the applicant's affidavit amounted to perjury for which appropriate legal action ought to be taken.

Mr. Kanjama concluded the respondents' submissions by arguing that the rules on admissibility of evidence applied with equal force to affidavit evidence, which is no more than oral evidence, reduced into writing. Affidavit evidence therefore, it was contended, must be direct and exclude hearsay evidence. That is the reason why, counsel submitted, ***Order 19 Rule 3*** of the ***Civil Procedure Rules*** requires affidavits to be confined only to facts that the deponent is able to prove of his or her knowledge, and where an affidavit contains statements of information and belief, the source and grounds thereof must be disclosed. Therefore counsel submitted, the applicant could not hide behind vague assertions of witness protection to defeat disclosure of the source of information she was relying upon to ask for the judge's recusal.

We have anxiously considered this application, the submissions by the parties and the authorities that they have cited. 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, in accordance with the Constitution without any fear, favour, 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 reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk

violating a cardinal guarantee of the Constitution, namely the right to 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 an independent and impartial court. We would, with respect, agree with the Constitutional Court of South Africa when it stated as follows in ***The President of the Republic of South Africa v. The South African Rugby Football Union & Others,*** *Case CCT16/98*:

"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront." [Emphasis added]."

An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of a judge.

For quite some time there was contestation in several Commonwealth jurisdictions regarding the proper test to be applied in such case: was it real likelihood of bias or reasonable apprehension of bias by a reasonable person.

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

The *East Africa Court of Justice* adopted the same test in ***Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007*** when it stated:

"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 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."

The Supreme Court of Canada expounded the test in the following terms in ***R. v. S. (R.D.) [1977] 3 SCR 484***:

"The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that 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."

That is the test we propose to adopt in this application as it is the accepted test. Before we consider the merits of the application, however there are a few issues raised by the parties that we must dispose of. Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in ***Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451***, a judge:

"[W]ould be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

And in ***Kaplan & Stratton v. Z. Engineering Construction Ltd & 2 Others*** *[2000] KLR),* this Court stated thus:

"If disqualification issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. When a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts, which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar.

The converse is also true."

(See also ***Galaxy Paints Co. Ltd v. Falcon Guards Ltd, CA No. 219 of 1998).***

Secondly, the point urged by the interested party to the effect that bias on the part of one out of seven

judges is of no consequence, is equally doubtful.

The Constitution guarantees a litigant trial by an independent and impartial court. For present purpose, the Constitution guarantees the applicant the right to be heard by an independent and impartial court made up of seven judges. If one were to be partial, it matters not that the other six are not, the constitutional guarantee will have been violated. The Court is constituted by all the judges sitting, not some of them only. That is the reason why, we believe, the judgment of the House of Lords in ***Re Pinochet*** ***(supra)*** was vitiated purely by the fact that one and only one of the judges was reasonably perceived to have been biased.

Lastly, we do not think there is any basis for the respondents' suggestion that the applicant has necessarily committed the offence of perjury. Since the applicant avers to be relying on information from a confidential source who she declines to divulge, it is not possible to find, on the basis of the material before us, that as regards the alleged meeting between the judge and the Attorney General, the applicant has *knowingly* deponed to statements of fact that she knows not to be true.

Coming back to the merits of the application, before employing the test, the court is obliged to first ascertain all the circumstances, which have a bearing on the suggestion that the judge is biased. In this case, the recusal is premised on the allegation that the judge held a meeting with the Attorney General at Karen Country Club on the night of 5th and 6th February 2016 at which they discussed and agreed on the dismissal of Tunoi, SCJ's appeal. Although the alleged discussion did not touch on the appellant's appeal, it's her view that if Tunoi, SCJ's is dismissed, hers too, will suffer the same fate as both appeals raise a common issue.

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. In this case, the applicant does not pretend to have been in the alleged meeting or at Karen Country Club. She does not aver that her source, who she declines to divulge, was at the meeting either. So it is absolutely unclear to us how this source came by the information from which we are being asked to conclude that the judge is likely to be biased. We agree with the respondents that where a party wishes to rely on statements of information, which they cannot prove, the least that is expected is to disclose the source of the information so that its credibility may be gauged and assessed.

The credibility of the allegations that the applicant relies upon is further dented by the clear information on the Court record regarding the date when the President of the Court of Appeal empanelled this bench. The bench was empanelled on 8th February 2016. Before that date, the judge had no association with this appeal. Yet the applicant claims that he was discussing and guaranteeing the outcome of the appeal on a date when he was not even a member of the bench to hear the appeal.

In addition, the manner in which the applicant has chosen to handle the serious allegations against the judge is not consistent with the heavy duty vested in her office to ensure or assist in ensuring an independent, professional, ethical and corruption free judiciary and further renders credence to the

respondents' submission that there is indeed no substance in the allegations.

Having carefully considered this application, we are satisfied that no fair minded observer aware of the facts in this application can conclude that the judge held a meeting with the Attorney General to plot the dismissal of Tunoi, SCJ's appeal; that he is biased; and that the applicant's appeal will not get a fair hearing. Accordingly, the application is dismissed with costs to the respondents and the interested party.

Dated and delivered at Nairobi this *11th day of March 2016*

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO- ODEK (Prof.)

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR