**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**HCCOMARB/E002/2020**

**NATIONAL WATER CONSERVATION & PILELINE CORPORATION.....APPLICANT**

**VS**

**RUNJI & PARTNERS CONSULTING ENGINEERS & PLANNERS LIMITED....RESPONDENT**

**RULING**

**Introduction**

1. For a better appreciation of the applicant's application dated **21st** April 2021 the subject of this ruling, it is necessary, albeit briefly, to highlight the history of this case culminating in the ruling dated **22nd** February 2021 because the instant application was triggered by the nomenclature deployed at paragraph **67** of the said ruling, hence the need to contextualize of the impugned sentence. As the Supreme court of India in *Reserve Bank of India v Peerless General Finance and Investment Co. Ltd. and others:* -[1]

*"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

2. For starters, the parties herein entered into a contract dated **10th** October 2012 for "*Review of Draft Final Designs and Supervision of Construction for Muruny (Siyoi) Kapenguria Water Project" Contract NO. NWC/HQ/202/201 1-2012.* Clause **7.2** of General Conditions of Contract provided arbitration as follows: -

*"Any dispute between the Parties as to matters arising pursuant to this contract that cannot be settled amicably within thirty (30) days after receipt by one part of the other Party's request for such amicable settlement may be referred by either party to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party."*

3. A dispute arose between the parties which was referred to arbitration culminating in the arbitral award dated **10th** August 2020. Vide an application dated **6th** November 2020, the applicant applied to set aside portions of the award on grounds that the award dealt with disputes falling outside the arbitrator's terms of the reference, and that the award is in conflict with public policy.

4. The Respondent opposed the application on grounds *inter alia* that this court has no appellate jurisdiction over the arbitral award, that the court cannot entertain issues canvased during the arbitral proceedings, and that an erroneous decision in law or fact by the arbitral tribunal is not a ground upon which a court may set aside an arbitral award under section **35** of the Arbitration Act.[2]The Respondent also stated that this court has no jurisdiction to review the merits of the arbitral award. Additionally, the Respondent opposed the application on grounds that the applicant had not satisfied the requirements of section **35** of the Arbitration Act, and, that under sections **5** and **17(2)** & **(3)** of the Act, the applicant is deemed to have waived its right to object.

5. In the ruling dated **22nd** February 2021, I held that the applicant had not demonstrated that the arbitrator dealt with matters outside the scope of the reference to arbitration nor did the applicant demonstrate that the award was in conflict with the public policy of Kenya. Additionally, I held that the applicant was caught up by the provisions of sections **5** and **17(3)** of the Act which require jurisdictional objections to be raised before the arbitrator not later than at the time of submission of the defense, otherwise a party is deemed to have waived its right to raise the objection.

6. Relevant to this ruling, at paragraph **67** of the ruling, I observed that: -

*67.…The applicant carefully avoided annexing the documents referred to in the supporting affidavit among them the Arbitral Award, the contract, and the above-mentioned letters. The applicant only uploaded a schedule of annexures and failed to upload the annexures. Section 35 (2) of the Act requires in peremptory terms that an application to set aside an arbitral award can only be allowed if the party making the application furnishes proof of the grounds provided therein. The applicant's grounds are not supported by evidence. Failure to furnish evidence as decreed by the said provision is a fertile ground for the application to be refused.*

7. Even though the entire paragraph ought be read as a whole so as to put it into a proper context, the applicant only picked the words, *"the applicant carefully avoided annexing the documents referred to in the supporting affidavit among them the Arbitral Award, the contract, and the above-mentioned letters"* and lodged a Petition dated **14th** April 2021 with the Judicial Service Commission seeking my removal as a judge alleging unsuitability to serve. Further, the applicant filed the application dated **21st** April 2021 the subject of this ruling. The applicant also filed grounds of opposition to the Respondent's application dated **1st** March 2021 in which the Respondent seeks to enforce the arbitral award. I now turn to the application.

**The application for recusal**

8. In the instant application dated **21st** April 2021, the applicant prays that I recuse myself from further hearing and/or adjudicating any application touching on this case. It also prays that I direct that this case and applications emanating therein be placed before a different judge other than myself for determination and/or it be referred to the presiding judge of the Division for such re-allocation.

9. The application is anchored on the grounds that by an *ex parte* ruling dated **10th** November 2020, I stated that: - *"I have carefully considered the applicant's Notice of Motion dated **6th** November 2020, the supporting affidavit of Sharon Obonyo and the annexures thereto."* The applicant states that for the four times after **10th** November 2020 when this matter came up before me, I never raised the issue of the applicant's annexures not being on record. Further, the applicant states that vide the ruling dated **22nd** February 2021 *"delivered prematurely without notice"* several days prior to the scheduled date of **1st** March 2021, at paragraph **67,** I observed that: -

*"...the applicant carefully avoided annexing the documents referred to in the supporting affidavit among them the arbitral award, the contract and the above-mentioned letters…"*

10. The applicant states that its advocates on **16th** April 2021 lodged a Petition dated **14th** April 2021 with the Judicial Service Commission pursuant to Article **168(2)** of the Constitution against myself. In the premises, the applicant states that there being questions on the manner I handled this matter up to **22nd** February 2021, and on account of the said Petition, there is sufficient reason that I recuse myself from further hearing this case. Lastly, the applicant states that the application is not a personal affront to this court but it is made in the interests of justice and it is in the interests of justice and fairness that it be allowed.

**The Respondent's Replying affidavit.**

11. On record is a replying affidavit sworn by Mr. Runji Ngware, the Respondent's Managing partner in opposition to the application. The nub of the affidavit is that the applicant and its advocates have at all material times employed unorthodox means to scuttle and delay these arbitral proceedings; that the applicant deliberately disregarded the time-lines for filing of pleadings before the arbitrator occasioning a delay of more than 20 months contrary to the letter and spirit of the Arbitration Act; and that with a view to scuttle the arbitral proceedings, the applicant's advocates on **16th** August 2016 applied for the disqualification of the Arbitrator, but the application was dismissed for want of merit. Further, the applicant filed High Court Misc. Civil Application No. **37** of 2017 under section **14(3)** of the Arbitration Act which was also dismissed for want of merit and the court at paragraph **27** of the Ruling observed: -

*"There is now a further allegation the Arbitrator was high-handed and harsh. Yet going through the entire documents (including affidavits made for and on behalf of MMUST), this new allegation was never raised").*

12. Also, the Respondent contended that the applicant's advocates were hell-bent on castigating, besmirching and/or strategically antagonizing the arbitrator out of the proceedings and towards the said goal, the applicant's advocates fabricated allegations that the arbitrator was high-handed and harsh.

13. Regarding the instant application, the Respondent deposed that this court clearly indicated that the ruling could be ready for delivery before the scheduled date on **1st** March 2021, and, that, the judge usually indicates to the parties that their judgement/ ruling could be ready for delivery ahead of the scheduled date. Additionally, the Respondent states that the Court assistant informed both advocates that he forgot to notify them about the ruling, hence, the complaint that the ruling was delivered pre-maturely is misconceived and it depicts self-serving malice aimed at scuttling these proceedings.

14. The Respondent also states that the applicant' advocates deliberately excluded critical documents so as to mislead the court on the thematic limitations of their applications, and, that most of the documents exhibited by the applicant had no evidential value under section **35** of the Arbitration Act. Further, the Respondent states that the court evaluated all the material before it, hence, the applicant's complaint is baseless, and even though it is not for the applicant to comment on the purported Petition to the Judicial Service Commission, this court is undoubtedly cognizant of its oath of office to do justice to all in accordance with the law and without fear or favour and to dutifully resist all manner of pressure; and that the Commission is aware of its mandate to protect and entrench judicial independence.

15. The Respondent also contends that the applicant and its advocates are trying to smoke this court out of this matter by resorting to this oft-employed dirty trick of impugning the trial court on any conceivable lapse and/or indiscretion, real or imagined. Further, it is not clearly pleaded whether the application is grounded on alleged bias or definable judicial misconduct on the part of the Judge.

16. The Respondent also states that the applicant is desperately looking for an escape route out of the strictures of section **35** of the Arbitration Act and its devious strategy is to lodge an application for setting aside the ruling/order dated **22nd** February 2021 in case the instant application succeeds. Further, that the Petition was conjured up for the strategic purpose of laying a legally plausible basis for the instant application and not to conscionably vindicate any constitutional right as spuriously contended by the applicant, and, to that extent, the instant application is a gross abuse of the court process. Also, that, there is no way the applicant's perception of the judge's evaluation of the records can stand the test of perception by a reasonable person seized of the full facts. Further, the applicant states that the Petition is a thematic prelude to the filing of the instant application aimed at scuttling the Respondent's application seeking to enforce the award which was scheduled for hearing on **22nd** April 2021. Lastly, this court has a duty to protect the processes of the court from abuse by unsuccessful litigants and their advocates so as to uphold administration of justice.

17. The other averments in the Respondent's Replying affidavit are essentially legal submissions complete with authorities as opposed to issues of fact. I will consider them later while analysing the submissions.

**The applicant's affidavit dated 7th June 2021**

18. Sharon Obonyo an advocate of the High Court of Kenya and the applicant's Acting Chief Executive Officer/Managing Director swore the above affidavit in reply to the Respondent's Replying affidavit. The substance of the affidavit is that the averments at paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 28 and 32 of Mr. Ngware's Replying affidavit seek to re-litigate already litigated matters which is an attempt to invite this court to sit on appeal on its own Ruling of **22nd** February 2021 which is also before the Judicial Service Commission and the Court of Appeal, and that the applicant will seek to have the said affidavits

expunged from the record.

19. Further, that it is not for the Respondent to filter or gate keep for any Kenyan their constitutional right to invoke Constitutional safeguards and that the Respondent ought not to second guess the Petition. Also, that by an e-mail dated **21st** April 2021 the Respondent's advocates Njagi Wanjeru stated that he will be a witness for the judge by writing to the Judicial Service Commission. Further, it is untenable for the judge to continue adjudicating this matter when his handling of the same is pending before the Judicial Service Commission. Lastly, the Respondent has not disclosed what prejudice it will suffer if this case is heard by any other Judge.

**Applicant's advocates submissions**

20. The applicant's counsel cited Article **50 (1)** of the Constitution which guarantees every person the right to have a dispute determined by an impartial court. He also cited the foundational principles underlying recusal of judicial officers restated by the Supreme Court in *Jasbir Sinqh Rai & 3 Others v Tarlochan Sinqh Rai & 4 Others***[3]** among them that "perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. He also referred to the Court of Appeal in *Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others***[4]** which adopted *Bernert v Bank Ltd***[5]** which held that *"the apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself...the test for recusal…was whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court."*

21. Counsel argued that the courts utterances at paragraph **67** of the ruling were unfair because the least the judge would have done was to ask for the documents before rendering the ruling. He submitted that the court demonstrated its bias by proceeding to write the ruling without requesting the applicant to supply the missing documents if any. He argued that in doing so, this court violated Articles **25** and **50** of the Constitution which provide that the right to a fair hearing cannot be limited. He also argued that the Respondent had been served with the same documents and did not raise similar complaints which fact the court should have noted.

22. Additionally, counsel argued that despite this court having scheduled the delivery of the ruling on **1st** March, 2021, it delivered it on **22nd** February, 2021, ahead of the scheduled date without notice to the applicant. He argued that at the *ex parte* stage this court observed that: - "*I have carefully considered the Applicant's Notice of Motion dated 6th November, 2020 the Supporting Affidavit of Sharon Obonyo and the annextures thereto"* yet the court did not, at this point or at any other point, raise the issue of missing documents. He submitted that the remarks complained of, delivery of the ruling without considering the duly filed and served documents and the delivering the ruling prior to the scheduled date taken in aggregate, demonstrate utter bias against the applicant, hence, there exists a reasonable apprehension of bias, so much so that, the applicant strongly believes that the bias will cloud this court thus prejudicing its case. He argued that it is in the interests of justice that this court recuses itself. He argued that the applicant has lodged a complaint with the Judicial Service Commission which was served upon the court.

23. Counsel submitted that the Respondent's counsel vide an e-mail dated **21st** April 2021 addressed to the applicant's counsel wrote that *"…we shall be writing to the JSC about the other frivolous and malicious application for recusal you had also filed against the Honourable Arbitrator. It seems that any arbiter who does not agree with you must be strategically attacked. Is that the way to practice law*"" He submitted that the said communication is "*an indication that the Respondent's counsel will be this courts witness at the JSC demonstrating the emerging special relationship this court has with the Respondent and their Counsel."* He submitted that the applicant has initiated a process of appealing against the said ruling.

24. Counsel referred to *Isaya Oyoo, The DCIO, Nyeri Police Station v Joseph Wachira Gitai***[6]** in which the court observed that *"the applicant had not complained about the final outcome of the case, but the attack is directed against the perceived offensive words which the learned magistrate made in the course of his ruling. It's also important to mention that no appeal has been preferred against the said ruling or even a review. The implication is that the applicant has no issues with the final orders or final outcome of the said application, or has not said so, but complaints about the "harsh" language of the court. In any event, if the applicant was dissatisfied with the said ruling, he would have appealed which he has not."* He argued that unlike the said case, the applicant in the instant case has lodged a complaint with the JSC and is in the process of appealing. Further, he argued that this court would be second-guessing or anticipating the proceedings before the JSC and sitting in its own cause were it to proceed with this matter any further.

25. Counsel argued that there exists reasonable apprehension of bias owing to the circumstances of this case and cited *Gladys Boss Shollei v Judicial Service Commission & another*[7] which emphasized on the rationale for recusal of a judge citing Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise that an issue of recusal is a balancing exercise. On one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence to the administration of justice and on the other hand, a judge has a duty to sit in the cases assigned to him and may only refuse to hear a case for an extremely good reason.

**The Respondent's advocates submissions**

26. The Respondent's counsel submitted that the law on recusal was comprehensively dealt with in the *Committee for Justice* for *Liberty v The Energy Board*. He submitted that the applicant's complaint has no merit, but it only captures the usual character of some unsuccessful litigants. He cited *Attorney General v Anyang' Nyong'o and Others*[8] which held *inter alia* that *"the court must guard against litigants who all too often blame their losses in court cases to bias on the part of the judge… What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgement."*

27. Counsel submitted that this is not the first time the applicant is exhibiting such a behavior. He recalled that before the arbitrator, the applicant also applied for the arbitrator to disqualify himself. He argued that the applicant is not complaining about the reasoning of the court. He submitted that in every dispute there is a winner and a loser and that reasonable apprehension of bias must be demonstrated. He submitted that a suspicious mind is not an informed mind and cited *Republic v IEBC & 3 Others -Ex parte: Wavinya Ndeti*[9] which held that an applicant seeking recusal on a bias-induced grievance must entertain a reasonable apprehension of bias as would be "*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. "*

28. Additionally, counsel argued that the applicant and its advocates are driven by rash conclusions of poorly evaluated circumstances, that an unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for seeking recusal. Further, that the ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. He also submitted that it is is a common tendency by some unsuccessful litigants and their over-zealous advocates to express their litigation frustration, as in the instant case, by attacking the integrity of the trial court rather than examining the reasons for the judgement which is a mere escapist scapegoating.

29. He relied on *Attorney General v Anyang' Nyong'o and Others*[10] which held that "the court must guard against litigants who all too often blame their losses in court cases to bias on the part of the judge. Counsel submitted that the applicant and his advocate are simply engaging in judge-shopping which is plainly unethical and must be condemned. Further, he argued that personal attack against a particular judicial officer cannot be a basis for seeking recusal or disqualification. He argued that the applicant and its advocates are desperately trying to "blackmail" the court into recusing itself by cynically waving the Petition so that they can have another throw of the dice by having the matter placed before another judge. Lastly, that the applicant only seeks to intimidate the court.

**Determination**

30. I cannot think of a more eloquent exposition of the law on recusal of judicial officers than the succinct exposition proffered by the Constitutional Court of South Africa in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[11] which indisputably articulated the proper approach as follows: -

*"... The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the*

*same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."*

31. Because of the relevancy of the above elucidation to the issues at hand, some of the salient facets of the judgment merit some emphasis in the present context. In articulating the test in the terms quoted above, the court observed that two considerations are built into the test itself. *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 favour or disfavour the case of a party to the issue under consideration by him.

36. Steered by the tests laid down in decided cases discussed above, I now examine the reasons propounded by the applicant in support of its application. *First*, the applicant states that at the *ex parte* stage I noted that: - *"I have carefully considered the*

*applicant's Notice of Motion dated* ***6th*** *November 2020, the supporting affidavit of Sharon Obonyo and the annexures thereto.*" He argues that at this stage, I did not mention that some documents were missing. Plainly, there is an attempt to misinterpret the above phrase. The court could only consider the annextures which had been filed. In fact, it would have been a misdirection on my part if I were to consider documents which were not part of what was filed by the applicant.

37. Further, the attempt to imply that the said phrase suggests I considered the unfiled documents is not supported by the natural and ordinary meaning of the cited by sentence. In this regard, I find it useful to recall *Firestone South Africa (Pty) Ltd v Genticuro AG***[20]** in which the court made some general observations about the rules for interpreting a court judgment or ruling. It stated: -

*"…the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it….*

*It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."*

38. In any event, at the *ex-parte* stage the court is only interested in establishing whether there is a basis to grant any *ex parte* orders. The threshold at this stage is low. A heightened decree of scrutiny is deployed at the *inter partes* stage. In any event, it is not for the court to guide counsel on the documents to file.

39. The second ground propounded by the applicant is that during the four or so court appearances, the court never mentioned that any documents were missing. By advancing the said argument, counsel is dangerously suggesting that the court ought to have descended into the arena of the dispute and help him to reconstruct his case by curing his omission. The court is a neutral arbiter and it cannot do so without infringing on the requirement that it has to remain fearlessly neutral. Ironically, counsel on one hand is accusing the court of bias for failing to inform him that he had omitted to file crucial documents, and on the other hand he is suggesting it was okay for the court to incline one side and assist him in his case.

40. The applicant's counsel does not deny failing to file crucial documents in support of his case nor does he explain why during the four or so court attendances up to hearing/submissions he never realized his omission or why he never sought leave to introduce the documents he omitted to file. The documents he omitted to include are the arbitral award which was under challenge, the contract containing the arbitration clause and some letters referred to in the supporting affidavit. Undeniably, these are crucial documents in arbitration proceedings. Up to now no attempt has been made to explain this glaring omission. Instead, the blame is being shifted to the court glazed as bias and a ground for disqualification.

41. It is argued that I delivered the ruling earlier than scheduled. Counsel has not mentioned that at the close of the trial I informed the parties that the ruling will be delivered earlier than scheduled if ready. True, upon finalizing the ruling, I instructed the court assistant to notify the parties that the ruling would be delivered on **22nd** February 2021 at 8.00am. The matter was listed in the cause list for day which was published online as is the practice. As the law permits, I rendered the ruling the absence of the parties not withstanding and uploaded it into the e-filing system were parties are able to access and even download rulings.

42. Expeditious disposal of court cases is a constitutional dictate. Arbitration law has at its heart a set goal to achieve quick resolution of disputes and minimum court interference. The applicant filed its section **35** application on or about **6th** November 2020. Hearing closed on **3rd** February 2021, and I rendered the ruling on **22nd** February 2021, effectively determining the case with a period of about **3** months from the date it was filed. Delayed court proceedings has been the bane of Kenya's judiciary and legal practice, an atrocity which must be halted. If adhering to this constitutional dictate of determining matters expeditiously within such a record period constitutes bias or misconduct so, be it.

43. It has been argued that in the ruling, I commented that "*the applicant carefully avoided annexing the documents referred to in*

*the supporting affidavit among them the arbitral award, the contract, and the above-mentioned letters."* Whereas the applicant is aggrieved by the foregoing observation, as stated above, this glaring omission is not contested nor has it been explained. As pointed out earlier, the omitted documents are crucial in a case of this nature. The Respondent noted the omission and included the documents in its reply, and during his submissions, the Respondent's counsel mentioned the omission and stated that he filed the documents. Curiously the applicant's counsel now purports to blame the court for not assisting him to rectify his own blunder. It is preposterous for a party to disregard including crucial documents in support of his case and then purport to shift the blame to the court.

44. In his bid to persuade the court that the said remarks demonstrate bias on the part of the court, counsel placed reliance on *Isaya Oyoo, The DCIO, Nyeri Police Station v Joseph Wachira Gitai*[21] a decision rendered by this court in 2015. However, cases are context and fact sensitive. Time without a number, I have stated that a case is only an authority for what it decides and it is not meant to be a general exposition of the entire law. The following passage elaborates this sound proposition of the law: -[22]

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)*

45. The ratio of any decision must be understood in the background of the facts of the particular case.[23] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[24] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[25]

46. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[26] In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[27] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[28]

47. In *Isaya Oyoo, The DCIO, Nyeri Police Station v Joseph Wachira Gitai*[29] relied upon by the applicant's counsel, I spared time and ink and addressed a pertinent issue which distinguishes the said case from the instant case. This is the difference between observations and comments made by a judge in the course of judicial proceedings and extra-judicial comments. In addressing this pertinent issue, I drew inspiration and insight from the US Supreme Court decision in *Litekey v United States* which stated: -[30]

*"The judge who presides at a trial may, upon completion of the evidence be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were probably and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task" However, in the above case the court was quick to point out that the extra judicial source is not the only basis for disqualification and referred to two different scenarios, namely; when the remarks reveal an extrajudicial bias and when the remarks reveal an excessive bias arising from information acquired during judicial proceedings. In the present case, no extra judicial bias has been alleged nor has it been shown that the words complained of do not emanate from observation from the information acquired during the proceedings and since the proceedings and the application that gave rise to the ruling in question was not annexed to the present application and only the ruling was attached, I am unable to make a firm conclusion as to whether or not the words complained of arose from the proceedings or documents tabled in court or whether they are extra judicial comments.*

48. As the court explained in the Litek case cited above: -

*"Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, **ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favouritism or antagonism as to make fair judgement impossible**."*

49. The underlined part of the above excerpt says it all. The latter form of bias-one that arises from what the judge learns in the

courtroom-must be truly excessive to warrant disqualification: -

*"A favourable or unfavourable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at the trial, it is so extreme as to display clear inability to render fair judgement."*

50. The passages cited above informed the *ratio decidendi* of the cited decision, hence the case is distinguishable from the instant case. In the instant case, the words in paragraph **67** of the ruling have not been shown to have been derived from *an extrajudicial source*. In fact, the court's observation represents the correct and the undenied position that the applicant's counsel failed to upload into the e-filing system crucial documents in support of his client's case. The observation is not an extra-judicial pronouncement. On the contrary, it is an observation and conclusion arrived at after analyzing the case and the documents filed. Judges are entitled to make observations and conclusions upon hearing the parties and evaluating the material before them. It's part of the decision-making process. That is why and how a judge evaluates the credibility of the material before him and finds as he is entitled to which evidence is credible and reliable. Additionally, it has not been shown that the said words reveal such a high degree of favoritism or antagonism as to make fair judgement impossible. On the contrary, they depict the naked truth as supported by the e-filing system. They reveal a patent error or omission on the part of the applicant's counsel.

51. The other argument propounded by the applicant's counsel is that the least I could have done was to ask him to avail the missing documents before writing the ruling. This suggestion offends the well-established principles of impartiality. It suggests that I should have taken the dangerously unusual step of assisting the applicant's counsel to repair his case. This translates to assisting one party in the dispute. Ironically, the same counsel who is accusing the court of bias and urging me recuse myself from this case is on the other hand arguing that it would have been proper for me to incline towards his client's case and assist him to cure his omission. The said argument goes against the constitutionally entrenched requirement of impartiality expected of a judge. It is not the duty of the court to help a party to file his pleadings or remedy his lapses. The court being an impartial and independent umpire must never be seen or even be perceived to be assisting a party before it.

52. Much as the applicant anchors his application for recusal on the paragraph cited at paragraph **67** of the ruling, a reading of the ruling shows that the application did not collapse on account of the said observation. On the contrary, the application was dismissed on merit. All the cited grounds were not proved. In particular, the applicant did not establish that the arbitrator had decided matters outside the scope of the arbitration. Second, the applicant failed to raise jurisdictional objections before the arbitrator as the law demands, so he was deemed to have waived the grounds. Further, the argument that the award offended public policy of Kenya also failed. (This ground is described in leading jurisprudence as a ground which is never cited unless all the other grounds fail).

53. The applicant states that arising from the grounds cited above, it lodged a Petition with the Judicial Service Commission seeking my removal as a judge, hence I should recuse myself and that it is in the interests of justice that I recuse myself. Whereas the Petition will certainly take it full course, flowing form the facts and circumstances of this case, the unconcealed attempt by counsel to shift blame for his lapses to the court and considering the tests for recusal discussed above, it would be a momentous dereliction of duty and a derogation from my constitutional duty for me to succumb to the threats just because there is a Petition being dangled over my head. Of such constitutional dishonesty, I am incapable. As Andrew Smith J. warned in *Dar Al Arkan v Majid Al-Sayed Bader Hashim Al Refai*,[31] a judge "should decline to hear a case only for proper and sufficient reason to do so" and that "recusal is not an excuse for avoiding embarrassment." A Commonwealth judge similarly warned against an adjudicator using a recusal as a "possibly convenient course of retiring from difficult litigation merely because one of the litigants asked him to do so."[32]

54. There is a tension in the common law on bias, between adjudicators' responsibilities to withdraw when disqualified, and, to sit when not disqualified. For Rix L.J. in *JSC BTA Bank v Ablyazov and others (No 9)*,[33] this tension is "between the principles that justice must be seen to be done and that litigants must not be allowed to pick their own judges or disrupt proceedings unfairly," Keane C.J. in *Rooney v Minister for Agriculture*[34] saw it as a "dilemma" arising from the "need to ensure that the appearance, as well as the reality, of impartiality is reconciled with the proper functioning of the judicial system.[35] The tension inheres in the propositions that the application of the bias principles is "extremely,"[36] or highly,[37] or "wholly"[38] fact-sensitive[39] or fact-specific,[40] that judges have a "duty to sit,"[41] that "real" doubts must be resolved in favour of recusal,[42] and that a judge "would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

55. A recusal decision based on appeasement was rightly overturned in *WestLB AG London Branch v Pan.*[43] The judge considered that the requirements for recusal had not been satisfied, but decided to recuse herself anyway, in order to save costs on both sides, enable to parties to concentrate on the substantive issues in the run up to the hearing, and to ensure "that any upset that this issue is

causing to the Claimant, who is unwell, does not continue." On appeal, HHJ Richardson said that it was "plain that the judge did not decide the application to recuse herself upon correct principles." Among other things, she did not give sufficient weight to the authorities. It was clear that her decision to recuse herself on grounds of bias "was without foundation," and her decision to order a fresh panel was set aside. Chadwick L.J. in *Triodos Bank NV v Dobbs*,[44] said:-

*"It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so."*

56. In *Ansar v Lloyds TSB Bank Plc*[45] the Court of Appeal emphasized that "a mere complaint cannot give rise to an automatic decision to recuse."[46] An applicant's argument that his case is "unassailable" is likewise insufficient,[47] and, as Denham J. said in *Talbot v McCann Fitzgerald Solicitors*, the applicant's "belief in the strength of his case does not establish any bias by the Court."[48] Courts have also rejected the proposition that the mere fact that someone is criticizing judges renders the judges bound to recuse themselves for bias. Chadwick L.J. explained: -

*"The reason is this. If judges were to recuse themselves whenever a litigant … criticized them …we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticizing all the judges that they did not want to hear their cases."*[49]

57. The mere fact that a party claims to have "no confidence in the fairness" of the court is similarly insufficient. In *Automobile Proprietary Ltd. v Healy*,[50] an industrial tribunal had purported to order a rehearing before a different tribunal after more than one day of the hearing of a case of unfair dismissal. Despite rejecting allegations of bias, it said that, if the employee had "no confidence in the fairness of the hearing he is getting we cannot proceed and the case will need to be heard by another tribunal." On appeal, Talbot J. noted that the tribunal had stated that they were unable to see any ground upon which the application could be made. That being so, he found it "difficult to see how they could correctly in law have sought to exercise a discretion and grant the application." The employee's stated lack of confidence was, by itself, "no ground which would entitle an industrial tribunal to discontinue the hearing and to order a rehearing." The appeal was allowed, and the matter was remitted to the industrial tribunal to continue the hearing.

58. One issue emerging from the case law concerns personal attacks against adjudicators. Strongly-worded personal attacks against adjudicators do not by themselves constitute appropriate grounds for recusal. Neither do threats or complaints to the Judicial Service Commission all designed 'to force recusal and manipulate the judicial system, rather than arising from actual malice.[51] If such threats, personal attacks to judges or even complaints to the Judicial Service Commission were to constitution a recusal of a judge a dishonest, vexatious or disgruntled litigant would: -

*"readily manipulate the system, threatening every jurist assigned on the 'wheel' until the defendant gets a judge he preferred. Also, the defendant could force delays, perhaps making the cases against him more difficult to try, perhaps putting witnesses at greater risk. Such blatant manipulation would subvert our processes, undermine our notions of fair play and justice, and damage the public's perception of the judiciary."*[52]

59. The above excerpt buttresses the need for a robust application of the standards. The Supreme Court of Papua New Guinea similarly confirmed in *Yama v Bank South Pacific*[53] that it "is not the law that a Judge should disqualify himself just because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous." Sedley L.J. continued:- "Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation."Ward L.J. said that the judicial duty must be "performed both without fear as well as without favour."

60. Lord Neuberger (the President of the Supreme Court of the United Kingdom and lead judge of the Judicial Committee of the Privy Council) in *'Judge not, that ye be not judged' : judging judicial decision-making FA Mann Lecture 2015 (29 January 2015)* stated:-

*"36. … It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court."*

61. Stanley Burnton J in *R (Toovey and Gwenlan) v The Law Society*[54] stated:-

*"Applications for the court to recuse itself have become increasingly fashionable of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the Court when he perceives his case if failing, but that is no justification for counsel to make the application … it is for counsel to satisfy himself that there are reasonable grounds for making such an application."*

62. Sir Stephen Sedley in his foreword to Judicial Recusal by Hammond (2009) stated:-

*"The judicial oath in England and Wales, widely echoed in the common law world, is to do justice 'without fear or favour, affection or, ill-will'. Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. That makes the law relating to recusal a serious business ...*

*Recusal – an odd word, signifying withdrawal, originating in the religious concept of a recusant – is both an assurance of the impartiality of justice and a field of opportunity for manipulation. If not only every litigant who thinks the judge is going to be against him but every party who has waited for judgment and lost cost of litigation will become uncontrollable, legal certainty will become a chimera and the principle that litigants cannot handpick the court will be shot through with exceptions. Thus, there is a risk that a doctrine designed to assure the quality of justice may be used to the opposite effect. But few laws and procedures are not capable of being abused, and the risk of abuse is a price that has to be paid for ensuring, so far as can be done, that judges are independent and impartial."*

63. The legal test to be applied as to whether a Judge should recuse himself from sitting on a particular case was set out in *Eurotrust International Limited and Others v Barlow Clowes International Limited and Others:* -[55] "it was whether a fair minded and informed observer, who had knowledge of all material facts, would conclude that there was a real possibility that the tribunal was biased." In determining an application to recuse a court must take great care to ensure that such application was not merely a vehicle for `forum shopping, ` a position stated in South *Africa (President) v South African Rugby Football Union*[56]where, at 177, the court stated: -

*a. The fair-minded and informed observer is a person who has knowledge of all material background facts and not just a 'casual' observer notwithstanding the warning that over-zealous acceptance of this point might lead the observer to be in a position akin to that of a judge.*

*b. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither complacent or naive nor unduly cynical or suspicious.*

*c. Regard must be had to the judicial oath and a judge's ability to disabuse their minds of any irrelevant personal belief and predispositions. Judges must take account of the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves but they must disqualify themselves if there are reasonable grounds on the part of a fair-minded and informed observer for apprehending that the judge will not be impartial.*

*d. A judge would be as wrong to yield to a tenuous or frivolous objection as he would be to ignore an objection of substance.*

*e. A must take great care to ensure that a recusal application is not merely an opportunity for 'forum shopping.'*

64. The Court of Appeal in *Republic v Mwalulu & Others*[57] addressing the question of disqualification of a judge stated: -

*i. When the 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 specifically be alleged and established.*

*ii. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the Judge, Magistrate or Tribunal.*

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

iv. *The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.*

65. In *Kaplan & Stratton vs Z Engineering Construction Limited & 2 Others*[58] the court stated:

*"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."*

66. A lawyer, according to Black's Law Dictionary, is "a person learned in the law; as an attorney, counsel or solicitor; a person licensed to practice law." The profession of law is called a noble profession. It does not remain noble merely by calling it as such unless there is a continued, corresponding and expected performance of a noble profession. Its nobility has to be preserved, protected and promoted. An individual or an institution cannot survive in his/its name or on his/its past glory alone. The glory and greatness of an institution or an individual depends on his/its continued and meaningful performance with grace and dignity. The profession of law being noble and honorable one, it has to continue its meaningful, useful and purposeful performance inspired by and keeping in view the high and rich traditions consistent with its grace, dignity, utility and prestige.

67. By now it is evident that the reasons proffered by the applicant emanate from the undenied lawyer's omission to file crucial documents in support of his client's case. It is also clear that there is an attempt to shift the blame to the court disguised as a ground for bias. This is a highly cavalier manner. The grounds propounded in support of the application are frivolous, flimsy, and disrespectful to the court. They are an affront to common sense and logic. The grounds cannot pass the test of a reasonable person in a similar situation. These tests are enunciated in the numerous cases cited in this ruling. None of the grounds cited can meet the heightened decree of scrutiny required in applications for recusal. To say the least, the grounds cited border on contempt of court.

68. It is my finding that the applicant's application is extremely unmerited and fit for dismissal. Accordingly, I dismiss the applicant's application dated dated **21st** April 2021 with costs to the Respondent.

## ORDERS ACCORDINGLY SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 17TH DAY OF AUGUST 2021

## JOHN M. MATIVO

## JUDGE

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[1] {1987} 1 SCC 424.

[2] Act No. 4 of 1995.

[3] Petition No. 4 of 2012 [20131 e KLR.

[4] {2016} e KLR.

[5] {2010}

[6] {2015} e KLR.

[7] {2018} e KLR.

[8] {2007} 1 EA 12.

[9] {2017} e KLR.

[10] {2007} 1 EA 12.

[11] 1999 (4) SA 147; 1999 (7) BCLR 725 (CC).

[12] Id at para 42.

[13] R v S (RD) (1997) 118 CCC (3d) 353 (SCC), per l=Heureux-Dubé and McLachlin JJ at paras 35-84.

[14] Ibid.

[15] Id at para 35.

[16] Id at para 45.

[17] 1999 (4) SA 915 (SCA) at para 32, per Howie JA.

[18] R v S (RD) (1997) 118 CCC (3d) 353 (SCC), per l=Heureux-Dubé and McLachlin JJ at paras 35-84.

[19] *Liebenberg and Others v Brakpan Liquor Licensing Board and Another* 1944 WLD 52 at 59.

[20] 1977 (4) SA 298 (A) Trollip JA.

[21] {2015} e KLR.

[22] *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967

[23] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986

[24] Ibid

[25] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[26] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C). No. 6254/2006, *Prashant Vats Versus University of Delhi & Anr*. (Citing Lord Denning).

[27] Ibid

[28] Ibid

[29] {2015} e KLR.

[30] 510 U.S. 540, 550-551 {1994}.

[31] *[2014] EWHC 1055 (Comm), at [33]*

[32] Schutz A.J.A. in Lesotho Electricity Corporation v Forrester, 1979 (2) L.L.R. 440, at 454-455 (CA, Lesotho).

[33] [2012] EWCA Civ 1551, at [19].

[34] [2001] 2 I.R.L.M. 37, at 40-41 (SC, Ireland).

[35] Compare Cameron A.J. in *SACCAWU v Irvin & Johnson*, 2000 (3) S.A. 705, at [18].

[36] Longmore L.J. in *Otkritie Finance Limited v Urumov* [2014] EWCA Civ 1315, at [13].

[37] *Wewaykum Indian Band v Canada* [2003] 2 S.C.R. 259, at [77] (SC, Canada).

[38] Rix L.J. in Ablyazov, at [65].

[39] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451, at [25] ("Locabail"); compare Fennelly J. in Kenny v Trinity College [2008] 2 I.R. 40, at 45 (SC, Ireland) ("Kenny"); Lord Steyn in Man O'War Station Ltd & Anor v Auckland City Council [2002] UKPC 28, at [11].

[40] Wewaykum, ibid; US v Spangle, 626 F. 3d 488, at 495 (9th Cir. 2010); US v Holland, 519 F.3d 909, at 913 (9th Cir. 2008)

[41] The Lord Justice-Clerk in Robbie *The Pict v Her Majesty's Advocate* [2002] ScotHC 333, at [16]. Also, Locabail, at [24]; Bienstein v Bienstein [2003] HCA 7, at [35]-[36] (HC, Australia), SACCAWU, at [13]; Denham J. in Bula Ltd v Tara Mines Ltd (No 6) [2000] 4 I.R. 412, at 449 (SC, Ireland) ("Bula"); Hammond J in Muir v C.I.R. [2007] 3 N.Z.L.R. 495, at [35] (CA, NZ); D. Goldberg et. al., "The Best Defense: Why Elected Courts Should Lead Recusal Reform" (2007) 46 Washburn L.J. 503; generally, J.W. Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit" (2009) 57 Buff. L. Rev. 813

[42] Locabail, at [25]; compare Keane C.J. in Rooney, above, fn.4, at 40.

[43] 2011 WL 2747817, UKEAT/0308/11/DM (EAT, 19 July 2011).

[44] [2005] EWCA Civ 468.

[45] [2006] EWCA Civ 1462.

[46] Waller L.J. at [20]. See also Underhill J. in The Queen on the Application of Mayo-Denman v Secretary of State for Communities and Local Government [2007] EWHC 3529 (Admin) – upheld on appeal ([2010] EWCA Civ 473, at [9]-[10], Sullivan L.J.); Cooch R.J. in State of Delaware v Desmond, above, fn.27; Guni J. in Sole v Cullinan [2003] LSHC 19, 19 (HC, Lesotho).

[47] See Denham J. in Talbot v Hermitage Golf Club [2009] IESC 26, at [9], [16]-[19] (SC, Ireland).

[48] [2009] IESC 25, at [37] (SC, Ireland).

[49] [1979] I.C.R. 809.

[50] [1979] I.C.R. 809.

[51] See US v Cao, No. 11-50200 (9th Cir. May 31, 2013); US v Holland, above, fn.10, at 915;

[52] [2008] PGSC 41, at [27].

[53] (2008) SC921.

[54] {2002} EWHC 391 (Admin) at paragraph 80:

[55] {2001-03} MLR 330.

[56] {1999] SA 147, at 177.

[57] {2005}1KLR.

[58] {2002} KLR.