Case Number:	Petition 4 of 2021 (Formely Constitution Petition E094 of 2021)
Date Delivered:	15 Sep 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	James wakiaga
Citation:	Mbuvi Gedion Mike Sonko v Director of Public Prosecution & 4 others [2021] eKLR
Advocates:	Ms Wambugu for 2nd Respondent Ms Wangia for 1st Respondent Dr. Khaminwa for the Petitioner
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition and applications dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO. 5 OF 2021

(FORMELY CONSTITUTION PETITION NO. E093 OF 2021)

CONSOLIDATED WITH

PETITION NO. 4 OF 2021

(FORMELY CONSTITUTION PETITION NO. E094 OF 2021)

BETWEEN

MBUVI GEDION MIKE SONKO.....PETITIONER /APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

HON. DOUGLAS OGOTI CHIEF MAGISTRATE.....5TH RESPONDENT

JUDGEMENT

INTRODUCTION

1. The petitioner is the impeached Governor of the County Government of Nairobi City County. He was elected on the ruling party Jubilee ticket, having before then served as a member of the National Assembly representing Makadara Constituency and as the First Senator for Nairobi. He is a flamboyant citizen of the Republic of Kenya and amongst the allegedly self-made politicians.

2. The petitioner was charged and is currently facing prosecution before the Chief Magistrate Court Anti-Corruption at Nairobi in ACC No. 1 of 2020 currently pending before Hon. Ogoti and two other cases ACC No. 31 and 32 of 2019 before Hon. Ooko.

3. For the purposes of this judgement, while the matter before Hon. Ogoti was proceeding, the petitioner filed the following matters, at the Anti-Corruption and Economic Crimes Division and The Constitutional and Human Rights Division of the High Court:-

a) High Court ACEC Misc. Criminal Application No. E008 of 2021 dated 24th March, 2021 in which he sought an order that criminal case No. ACC 1 of 2020 be transferred from Hon. Ogoti to any other court of equal jurisdiction for hearing and determination

b) ACEC PETITION No. 4 of 2021 was originally filed in the Constitutional and Human Rights Division as petition No.E095 of 2021 dated 12th day of March, 2021 under certificate of urgency in which the petitioner sought for conservatory order of stay of proceedings in ACC No. 1 of 2020 pending the hearing and determination of the petition wherein he sought for declaration and orders that the continued conduct of the proceedings by the trial court was in violation of his right to a fair hearing and that the court do exercise its supervisory jurisdiction by transferring the case to another magistrate of similar jurisdiction

c) Anti-Corruption Petition No.5 of 2021 was originally filed as, petition No.E093 0f 2021 in the Constitutional and Human Rights Division dated 23rd March, 2021 in which the petitioner sought for a declaration that the continued conduct of the proceedings in ACC No. 1 of 2020 was in violation of his right to fair hearing and sought for an order quashing the entire proceedings before the trial court together with an order of permanent restraint against the respondents from investigating and or recharging the petitioner on account of the facts in issue in ACC 1 of 2020

d) While these matters were still pending determination, the 1st Respondent filed ACEC Misc. Application No. E014 of 2021 dated 11th May, 2021 in which it sought among other orders, that the court do find and order that the applications as filed by the petitioner were frivolous vexatious a duplication and an abuse of the court process, that the court be pleased to strike out all the matters filed by the petitioner or in the alternative consolidate all of them for hearing and determination.

4. By a ruling dated 3rd June, 2021 this court ordered that all the matters specified herein be consolidated and heard together in this petition since they raised the same issue and had same substratum.

PETITIONER'S CASE

5. The petitioner's case as stated in the affidavit in support of the two petitions and the two applications, was that the trial court issued orders that the statements by the protected witnesses be redacted and that the said witnesses to testify in a closed session, to use pseudonyms and witness box during the taking of their evidence.

6. It was contended that the said order was ambiguous and had been interpreted by the trial court to cover witness statements which were made after the said order and to make all the prosecution witnesses protected.

7. It was the petitioner's further case that as a result of the said order, the 2nd respondent supplied him with totally redacted statements which made it impossible for him to prepare for his defence. It was contended further that the way the said statements were redacted was unlawful and violated the rules, guidelines and international standards required while redacting statements, thereby defeating his ability to prepare for his defence.

8. It was his case that when he raised the issue through his Advocates then on record after the witness protection order had been made, the trial court proceeded to allow the prosecution to rely and produce the said statements, including those that were not covered by the protection order.

9. It was contended that the trial court did not accord him adequate time to enable him prepare for his defence, having ordered that the un-redacted statements be supplied to him within 36 hours of the next hearing date, without taking into account the fact that some statements were supplied to him during weekends and some at night, outside the working hours.

10. It was contended that the trial court had exhibited bias, impartiality and discrimination against him on several occasions in the course of the trial and would in some occasions conduct the trial hurriedly on account of the fact that it was governed by a special law involving protected witnesses and in total disregard of the Ministry of Health Guidelines on Covid 19 Protocols.

11. It was further the petitioner's case that on several occasions the trial court dismissed his applications for adjournment even when the reasons were clearly justified and would further overrule his objections on admissibility of documentary exhibits in total disregard of the evidence Act.

12. Based upon the conduct of the trial court, the petitioner instructed his Advocates then on record to have the same recuse himself by way of an oral application, which the court dismissed. He further filed a formal application on 29th January, 2021 but before the

same could be heard, his Advocates then on record withdrew from representing him and on 4th March, 2021 the same was dismissed before his new team of Advocates made any presentation and/or submissions thereon and as his current Advocates were addressing the court on the same, Hon. Ogoti refused to record them and stormed out of the court.

13. To safe guard his interest under Article 50 of the constitution ,the petitioner lodged a complaint with the Judicial Service Commission on the conduct of the trial court, who had on 6th December, 2020 given an interview at KTN checkpoint where he indicated that his court was working towards concluding matters within the shortest time and therefore the manner in which he was conducting the case means that his objective was not to administer justice but to conclude matters within a very short time without taking into account the petitioners constitutional rights.

14. It was further contended by the petitioner that he had previously appeared before Hon. Ogoti in August, 2016 when he was stationed in Mombasa, when he had stood surety to one Omar Hamisi Mwamnwadzi of the Mombasa Republican Council, who failed to attend court and was fined Ksh.100,000. In November, 2018 he also appeared before the same in a case where he was a complainant **REPUBLIC v BENSON OLIANGA & ANOTHER** who were charged with demanding bribes from him and were acquitted in clear violation of the weight of evidence.

15. He contended further that when the trial court was informed by his Advocate on record that he was sick and admitted at Nairobi hospital and could not attend the hearing, the magistrate directed that a medical report be availed to court on his condition by a team of three Doctors from Kenyatta National.

16. It was further deposed by the petitioner that on 27th February, 2021 while still admitted at Nairobi Hospital, his present Advocate on record made an oral application for adjournment which was opposed by the special prosecutor Mr. Taib SC, on the ground that his absence from court was an act of impunity and made disparaging and prejudicial remarks on his character, stating that the sickness he was suffering from was of his own making and the trial court in his characteristic bias towards him declined to grant the application, being readily swayed by the submission by the prosecutor and ordered that he appear in court the following day, which he did in the company of two nurses having been taken to court in an ambulance.

RESPONDENTS CASE

17. In response to the applications and the petition, the respondents filed replying affidavits. On behalf of the 1st respondent to the main petition Ms ANNETTE WANGIA stated that on 9th December, 2019 the petitioner was charged alongside others in Anti-Corruption Case No 31 of 2019 with various corruption offences relating to the Nairobi County Government

18. It was deposed that Witness Protection Agency moved to court and obtained protection orders, which the petitioner was now complaining of and that at the pre-trial conference the court directed the 1st respondent to disclose its evidence within two weeks, which the 2nd respondent complied with, but not to the satisfaction of the court, which ordered the respondents to prepare a new inventories and thereafter matter set down for hearing, wherein 12 prosecution witnesses had testified and the 13th one stood down as at the time of the filing of the petitions herein.

19. In response to **MISC CRIMINAL APPLICATION NO. E008 OF 2020 MS CHRISTINE NANJALA** swore an affidavit wherein she stated that the application was a legal misadventure, calculated at circumventing the interest of justice as he did not join his co-accused.

20. It was contended that the pre-trial directions and orders were applicable to all the parties and that the petitioner had not demonstrated any bias on the part of the trial court.

21. The second respondent through an affidavit sworn by **ELIZABETH GICHERU,** opposed the petition and deposed that the allegations of bias against the 5th respondent were not substantiated and that the trial process had been fair and complied with the principles of natural justice.

22. It was contended that the petitioner made applications for the recusal of the 5th respondent on the grounds of bias which were ruled against and the only avenue available to the same was to file an appeal to this court and or seek review.

23. It was deposed that the petition was an abuse of the court process as since the trial began the petitioner had filed several applications, without success to delay frustrate and/or stop the proceedings an **ACC NO 1 of 2020** these being:-

A) Petition No. 34 of 2019 in which he sought stay of proceedings in the case herein and an empanelment of a bench to hear and determine the constitutionality of the mandate of the commission to investigate, which petition was withdrawn on 11th March, 2020.

B) High court ACEC MISC NO. 23 of 2020 seeking stay of proceedings and review of the witness protection order which application was dismissed on 5th January, 2021.

C) High court ACEC Petition No. 24 of 2020 (formerly Machakos E006 of 2020) in which he sought stay of proceedings and review of the witness protection order which application was dismissed on 23rd February, 2021.

D) Thereafter the petitioner filed the matters consolidated herein.

24. It was contended further that to date the petitioner had filed more than seven petitions whose gravamen was the alleged bias on the part of the trial court and the only deduction that could be made from the multiplicity of the cases was the quest to obtain ex parte conservatory order staying the trial as opposed to a quest for justice.

SUBMISSIONS

25. Directions were issued that the petition herein as consolidated be

heard by way of written submission which were filed and duly highlighted by the Advocates for the respective parties.

PETITIONER'S SUBMISSIONS

26. It was submitted that Article 165 of the constitution grants this court supervisory jurisdiction over the subordinate courts as confirmed under Section 81 of the Criminal Procedure Code.

27. It was contended that the petitioner had shown that the actions of the 5th respondent had exhibited an open bias towards the petitioner in breach of his rights under Article 50 (1) of the Constitution.

28. It was submitted that Black's Law Dictionary 8th Edition defines bias as:-

"inclination, prejudice …. judicial bias. A judge's bias towards one or more of the parties to a case over which the judge presides. judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extra judicial reasons"

29. It was contended that the issue of bias is a matter of public importance and confidence in the judicial system as was stated in the case of **KIMANI v KIMANI [1985-1989] 1EA 134** that the correct test to apply is whether there is an appearance of bias rather than whether there was actual bias.

30. It was submitted that on the authorities of **ERNEST & YOUNG LLP v CAPITAL MARKETS AUTHORITY & ANOTHER [2017] eKLR** and **ALNASHIR POPAT & 8 OTHERS v CAPITAL MARKET AUTHORITY [2016] eKLR** the test of bias was defined as:-

"Is there a real possibility that a reasonable person properly informed and viewing the circumstances realistically and practically could conclude that the decision maker might well be prone to bias."

31. It was submitted further that bias is divided into actual bias where the decision maker has a direct interest and reasonable

apprehension of bias as was stated in the case of **THE COMMITTEE FOR JUSTICE AND LIBERTY & OTHERS v THE NATIONAL ENERGY BOARD & OTHERS [1978] 1RCS 369** thus:-

"The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded on the concern that there be no lack of public confidence in the impartiality of adjudicative agencies."

32. It was submitted that the issue of bias is a matter of public confidence and failure of public confidence in the judicial process cast dispersion on the integrity of the judicial officers and thus put into jeopardy the basis of the rule of law, which is one of the corner stones of any modern democratic society. It was submitted that the test of reasonable apprehension of bias is a subjective one and that in dealing with the issues of disqualification of a judicial officer on the ground of bias, the court hearing the matter cannot go into the question of whether the officer is or will be actually bias

33. It was contended that the test as to whether the trial court ought to recuse itself was stated in the case of **JASBIR SINGH RAI &3 OTHERS v TARLOCHAN SINGH RAII & 4 OTHERS [2013] eKLR** that: -

"the court has to address its mind to the question as to whether a reasonable and fair minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

34. It was submitted that the petitioner though being an accused person was entitled to the right to a judicial process that is equal and maintain the Rights in the bill of Right afforded to him, as was stated in the case of **JORAM MWENDA GUANTAI v CHIEF MAGISTRATE [2007] 2 EA 170.**

35. It was submitted that the petitioner had tendered to court what he considered as apprehension that he might not receive fair hearing, including not allowing the petitioner and his Advocates adequate time to prepare and insisting that he appear in court while receiving medical treatment which was tantamount to cruel, inhuman and degrading treatment or punishment as defined under the provision of Section 2 of the Prevention of Torture Act 2016.

1st RESPONDENT'S SUBMISSIONS

36. It was submitted that the applications as consolidated raised the following issues:-

a) The issue of bias and impartiality of the trial Magistrate is an abuse of the court process

b) Transfer of ACC NO. 1 of 2020 from Hon. Ogoti

c) The quashing of proceedings and charges as against the petitioner in ACC NO. 1 of 2020

d) Abuse of the court process by the petitioner

37. It was contended that in respect to High Court ACEC Misc. Criminal Application No. E008 of 2021 dated 24th March, 2021 and High Court Misc. Criminal Application No. E094 of 2021 dated 18th March, 2021, this court has jurisdiction under Section 81(1) of the Criminal Procedure Code, however for good order, the issues advanced by the petitioner should be properly subjected to the High court appellant/supervisory jurisdiction under Article 165 of the Constitution.

38. It was stated that the issues raised by the petitioner were the subject matter of the decision by the trial court on 4th March, 2021 and hence should have been a subject for revision/review and or Appeal and not the applications filed herein to circumvent due process as was stated in the case of **SATYA BHAMA GANDHI v DPP & 3 others [2018] eKLR** thus:-

"It's trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate

nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

11. As Somervell L.J. stated [2] ***res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. All the facts raised in this case, including the alleged violation of constitutional rights or violation of statutory provisions are matters that could have been raised in the previous proceedings. In fact, all the matters raised herein including violation of Article 47 rights were raised and considered in the said Petition. The case is founded on the same cause of action, same issues, same facts, and same circumstances.***

12. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[3]

13. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

14. Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[4]

15. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the Court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case in limine i.e. from the beginning.[5] ***The rule of res judicata presumes conclusively the truth of the decision in the former suit.***[6]

16. Also known in the US as claim preclusion, res judicata is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues."

39. It was submitted further that the petitioner if aggrieved by the decision of the trial court as regards the recusal application, should have filed an appeal or revision application and in filing fresh applications before this court the matter became res judicata as was stated in the case of **TOM MARTINS KIBISU v REPUBLIC [2014] eKLR.**

40. On the issue of the transfer of the case, it was submitted that where the application is made to this court under the provisions of Section 81(1) of the CPC, the applicant must demonstrate that the conduct of the judicial officer while handling the matter, cannot guarantee a fair and impartial trial of the petitioner and that the transfer of the case will be to ensure that the ends of justice is met as was stated in the case of **KINYATTI v REPUBLIC [1984] eKLR**

41. It was contended the onus is on the petitioner to demonstrate that the judicial officer has demonstrated bias in the conduct of the trial and that on the authority of **ERICK AGBEKO v DPP [2020] eKLR** the court must:-

"Consider whether there is a reasonable ground for assuming the possibility of bias and whether the ground is likely to produce in the mind of the public a reasonable doubt about the fairness and administration of justice

2) the test itself being objective

3) that the facts constituting the alleged bias or apprehension must be specifically stated and established on a balance of probabilities."

42. It was submitted that the petitioner failed to place any material to demonstrate bias and that Hon. Ogoti was mandated to sit beyond working hours to ensure expeditious hearing and had taken into account the petitioner's medical conditions when fixing trial hours.

43. It was contended that the petitioner was under a duty to place before the court material indicating that his apprehension was reasonable and founded on sufficient material as those touches on the trust integrity and independence of the judiciary as was stated in the case of **REPUBLIC v STEPHEN LELEI & ANOTHER [2020] eKLR**

44. It was submitted that a complaint against a judicial officer lodged at the Judicial Service Commission was not a ground for recusal and/or transfer of a case from the trial court as was stated in the case of **WAMBUA MAITHYA v PHARMACY AND POISON BOARD & 3 OTHERS [2019] eKLR** as follows:-

"..... In this case, the first ground is that there is a complaint lodged by the 3rd interested party against the trial judge before the Judicial Service Commission. Suffice it to say that I have not been notified of any such complaint. Even if such a complaint was to exist, the mere fact that a complaint has been made does not necessarily amount to a ground for recusal. If that were the position, parties would simply lodge complaints against judges and judicial officers and based on their own machinations contend that there is likelihood that they may not get justice from the court. In my view a party cannot be permitted to create an awkward situation and then use the same as a ground for seeking recusal of a judicial officer. It is akin to a party applying for a transfer of a case and based on the said grounds applying that the matter be transferred from the trial court on the ground that now that he has sought the transfer of the case, he is unlikely to get a fair trial." (Emphasis supplied.)

45. It was stated that the making of orders on interlocutory applications which are against a party, who is not satisfied, should not be a ground for recusal or transfer of a case as was stated in the case of **JOSEPH MAINA THEURI v GITONGA KABUGI & 3 OTHERS [2013] eKLR** where the court stated that those are only grounds for review and or appeal.

46. On the quashing of the proceedings it was submitted that it was for the petitioner to demonstrate the breach of his fundamental rights and freedoms as was stayed in the case of **LEONARD OTIENO v AIRTEL KENYA LTD [2018] eKLR.**

47. It was submitted that in exercising the right to fair hearing under Article 50 of the constitution, the court is expected to balance the interest of all the parties appearing before it by ensuring fair determination of the cases as was stated in the cases of **NATASHA SINGH v CBI SUPREME COURT OF INDIA CRIMINAL APPELATE JURISDICTION CRIMINAL APPEAL NO. 709/2013, JOHN LENDRIX WASWA v REPUBLIC [2020] eKLR and REPUBLIC v IGP & 4 OTHERS Ex parte CHARLES OCHIENG WAMIYA [2020] eKLR.**

48. It was contended that the petitioner had not made out a case for the grant of this prayer as the trial court had granted the petitioner ample time to cross examine witnesses and to be provided with the witness statements.

49. It was finally submitted that the petitioner had abused the process of court in the manner in which he had filed the cases herein in an attempt to circumvent the court processes and to make unlawful interlocutory appeals over the decision of the trial court of 4th March 2020 and in support thereof reference was made to the cases of **JOSEPH LENDRIX WASWA** (supra) and **PAUL KIHARA KARIUKI ATTORNEY GENERAL & 2 OTHERS EX PARTE LAW SOCIETY OF KENYA [2020] eKLR.**

50. In conclusion it was stated that the entire reading of the four matters herein was a clear demonstration by the petitioner who seeks and intend the trial court to be an arena where he wishes to be likened to the "boy with the red ball" as was stated in the case of **JOSEPH MAINA THEURI v GITONGA KABUGI & 3 OTHERS (supra)** where the court stated:-

"The court has carefully considered the grounds as submitted for the respondents. The court finds that the grounds are the kind

of matters that might entitle the respondents to apply for review of interlocutory orders or to invoke the appellate jurisdiction are not in themselves sufficient grounds for a Judge's recusal from continued hearing and determination of the case before the court." (Emphasis supplied)

2ND RESPONDENT" S SUBMISSIONS

51. The 2nd respondent identified the following issues for determination and made submissions thereon: -

A) Whether the consolidated petitions should be struck out for being an abuse of the court process.

B) Whether the petition has proved bias on the part of the court.

C) Whether prayers sought are capable of being granted.

52. On the issue of abuse of the court process it was submitted that the petitioner made an application on 29th January, 2021 for the recusal of the trial court on allegations of bias for failing to allow any objection raised by him during the trial and that the petitioner was now purporting to raise the very issue which had been ruled upon by the trial court.

53. It was submitted that the supervisory jurisdiction of the court should not be used as a short cut for an appeal where circumstances for appeal clearly pertain and are appropriate as was stated in the case of **DPP v PERRY MANSUKH KANSAGARA & 8 OTHERS [2020] eKLR**

54. It was submitted that the consolidated petitions were a clear case of forum shopping and a gross abuse of the court process as an appeal would have been the most appropriate process since where the law provides for a relief, the same must be perused as was stated in the case of **ERICK WAMBUA MULI & ANOTHER v PRIME BANK LTD & 3 OTHERS [2017] eKLR.**

55. On the issue of bias, it was submitted that there was no evidence tendered by the petitioner to show the existence of a reasonable apprehension of bias, based on the manner in which the trial court had conducted the proceedings in **ACC NO 1 of 2020**. It was contended that the petitioner had neither shown any evidence of perception of bias and further failed the competency test set out in the case of **ANARITA KARIM NJERU v REPUBLIC [1976-80] KLR 1272** by not indicating with precision the constitutional violation complained of.

56. It was submitted that the apprehension of bias must be a reasonable one and one held by a reasonable and right minded person applying them. In support of thereof the following cases were referred to: **PHILIP K. TUNOI & ANOTHER v JUDICIAL SERVICE COMMISSION & ANOTHER [2016] eKLR, REPUBLIC v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS EX PARTE WAVINYA NDETI [2017] eKLR**.

57. It was submitted that the petitioner had not adduced evidence to show the existence of reasonable apprehension of bias based on how the trial court had conducted the proceedings complained of and that mere apprehension of bias was not a ground for recusal as was stated in the cases of **NATHAN OBWANA v ROBERT BISAKAYA WANYERA & 2 OTHERS [2013] eKLR** and **KENYA HOTEL PROPERTIES LIMITED v A.G & 4 OTHERS**

58. It was contended further that to hold that the trial court is bias merely because it had ruled against objections raised by the petitioner would amount to dangerous and unacceptable affront to the judicial independence and result in the abduction of judicial authority as was stated in the case of **JOHN KARANI MWENDA v JAPHET BUNDI CHABARI [2017] eKLR** where the court held:-

"44. As already pointed out, our system of Justice is adversarial. Everyday litigants win and lose cases. If every loser accuses the concerned Judge of bias, and we embraced the propositions postulated by the petitioner, there would be need to have an infinite number of Judges ready to be called upon to hear matters raised by the losing parties in future disputes. This would be a veritably ridiculous scenario bordering on the phasmagoric. It would promote untrammeled Judge shopping and unbridled forum shopping.

45. If the petitioner's propositions are embraced by this court, every Judge in this planet who applies his mind to the facts and the law apposite to the particular case and decides it in favour of one of the parties will be in conflict in as far as the losing party is concerned.

46. A judge cannot just recuse himself because he had handled an earlier dispute involving the parties. A litigant cannot through contrivance of oblique traducent allegations, postilutating unsubstantiated generalities thrown around with unabashed alacrity and abandon attain the threshold needed for a Judge to recuse himself.

47. By embracing the propositions postulated by the petitioner, this court would be asserting that every loser in a dispute is a victim and every winner is a villain. The villainy of the winner would finally be foisted on the Judge who arbitrated over the dispute. This would amount to embracing veritable escapism in the delivery of justice. Such a scenario deserves deprecation."

59. It was further contended that where a party alleges bias, it must state with such specificity that it is clear to a reasonable man that there was bias and whereas there is a duty on the court to recuse itself, there is also a concomitant duty not to recuse itself in the absence of a valid reason for recusal as was stated in the case of **GLADYS BOSS SHOLLEI v JSC & ANOTHER.**

60. It was contended that the timing of the filing of the application for recusal was critical in the determination of the same as was stated in the case of **A.G v ANYANG NYONGO & OTHERS [2007] 1EA 12**

61. On whether the prayers sought were capable of being granted, it was submitted that the petitioner had not proved bias on the part of the trial court and that the court could not grant orders restraining the respondents from investigating or charging the petitioner neither could the order for the transfer of the case as bias on the part of the trial court was not proved.

62. These submissions were highlighted by Dr. Khaminwa on behalf of the petitioner assisted by Mr. Kahingu, Mr. Akula on behalf of the 1st respondent and Ms Shamala on behalf of the 3rd respondent. The 4th and the 5th respondents though served were not represented during the proceedings.

ANALYSIS AND DETERMINATION

63. I have taken into account the pleadings herein and the submissions by the parties and in particular I have taken into account my ruling in ACEC Misc. Application No. E014 of 2020 in which I ordered the consolidation of all these matters and in doing so stated as follows:-

*"**40. Since the petitions and the applications raise the same issue and have the same substratum and whereas the petitioner/applicant is entitled to his day in court for a just determination of the issues raised, I am of the considered view that an order for consolidation will best serve the cause of justice in these matters. I therefore order that all the petitions and applications filed by the respondent in respect of the subject matter arising out of the conduct of the trial in ACC NO 1 of 2020 be and is hereby consolidated to be heard together in Petition NO 5 of 2021 which involve all the parties.***

***41. Having ordered consolidation of the cases, it follows that the issue of striking of the suits for being an abuse of the process of court does not now arise since the petitions/applications shall be dealt with on its own merit and should the court reach a conclusion that they are an abuse of the court process an appropriate order shall be issued** (emphasis added)".*

64. For judicial accountability, I must state for record purposes, that pending the hearing and determination of this petition, in a rather unhappy turn of event to the respondents but a big relief to the petitioner, the court granted temporary conservatory orders in respect of the proceedings complained of, against strong objections from the respondents, who felt that the petitioner will succeed in achieving that which he had failed to do so far, from the numerous applications and petitions which he had filed in different Courts and Divisions of the High Court at Nairobi.

65. The constitutional protection under the Bill of Rights is available to all and there is no "stronger" or "lesser" case where this court will fold its constitutional hands, be it a case of a "bad man" or "worse man" and/or a "good man" or a "better man", all are children of the constitution of Kenya 2010, which does not have grandchildren and are entitled to their Daddy's protection. It

should be noted that this court takes seriously any allegation of violation of constitutional rights, real and/or perceived.

66. In exercising the discretion to grant the order, the court judiciously took into account the fact that in almost all the applications and petitions filed by the petitioner, his cry was that he was unlikely to get free and fair trial before the 5th respondent and the court noted that the right to free and fair hearing is the legal bedrock upon which Article 50 of the constitution is founded and therefore the court must analyse the interface between the applicant's allegations and the reality from the trial court, so as not to lead to unfair result. That is the sole reason upon which the order was granted.

67. For the purposes of this judgement, there are two applications and two petitions now consolidated, the gravamen of which is that the petition is dissatisfied with the manner in which his trial is being conducted and is seeking through a multiple approach, the transfer of the case from the 5th Respondent to any other court with competent jurisdiction to try the same on allegation of bias on the part of the 5th Respondent.

68. It is not in dispute that the trial of the petitioner has been on going and so far 12 witnesses have testified on behalf of the respondent and the 13th witness is current on the witness stand. It is also not in dispute that there is a witness protection order in place, issued by a court of competent jurisdiction and that the petitioner challenged the said orders in ACEC MISC. CASE No. 23 of 2020 which was dismissed on 5.3.2021 and trial directions issued by the 5th respondent to effect the said protection orders, have not been reviewed and or set aside.

69. It is also not in dispute that the petitioner filed an application for recusal before the trial court, which was ruled upon, not in his favour, on 4th March, 2021, which has not been appealed against and which seems to me to be the genesis of the applications and petitions, the subject matter of this judgement.

70. It is also not disputed as confirmed through the affidavit evidence that the pre-trial directions on the disputed trial were challenged by the petitioner on an application for revision before Mumbi Ngugi, J (as she then was) and from which the petitioner has lodged an appeal to the Court of Appeal.

71. Having set up the undisputed facts in respect of the matters before the court and for the purposes of this judgement I have identified the following issues for determination: -

a) Whether the petitions and applications are properly before the court.

b) Whether they are an abuse of the process of court.

c) Whether the petition has made up a case in respect of violation of constitutional right.

d) What order should the court grant.

72. It is clear that the issue of bias of the trial court which forms the basis of the applications and petitions consolidated was the subject matter of the application filed by the petitioner before the trial court which by a ruling delivered on 4th March, 2021 dismissed the same. I would therefore agree with the submissions by the respondents that the petitioner should have approached this court by either way of an appeal or revision. In this I find support in the case of **SPEAKER OF THE NATIONAL ASSEMBLY v NJENGA KARUME CIVIL APPLICATION NO. 92 OF 1992** where the Court of Appeal at Nairobi held that where there is a clear procedure for redress prescribed in the constitution or an Act of parliament, that procedure should be strictly followed.

73. This position was confirmed in the case of **DPP v PERRY MANSUKH KANSAGARA AND 8 OTHERS (supra)** where the court had this to say:-

"150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction" I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:

a) Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;

b) Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;

c) Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.

d) In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice";

This list showing rationale for intervention is of course not exhaustive.

151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:

i.) A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court's independence in the conduct and management of its proceedings

ii.) Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question

iii.) Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;

iv.) Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;

v.) Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;

152. The above situations are not exhaustive neither are they unique to only the exercise of Supervisory Jurisdiction."

74. Whereas the petition herein is coached in terms of the violation of the petitioner's constitutional rights, a clear reading of the same shows that they are an attempt to either appeal or reverse the decision of the trial court in refusing to recuse himself through the backdoor, as should this court grant the orders sought, it will amount to allowing the application which was denied by the trial court without following the proper procedure.

75. It is therefore clear that there being no appeal from the decision of the 5th respondent on the issue of recusal, the matter raised in the petition herein is res judicata as was stated in the case of **SATYA BHAMA GANDHI v DPP (supra)** where the court stated as follows: -

"10. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defense of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

11. As Somervell L.J. stated [2] res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. All the facts raised in this case, including the alleged violation of constitutional rights or violation of statutory provisions are matters that could have been raised in the previous proceedings. In fact, all the matters raised herein including

violation of Article 47 rights were raised and considered in the said Petition. The case is founded on the same cause of action, same issues, same facts, and same circumstances.

12. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[3]

13. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

14. Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[4]

15. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the Court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case in limine i.e. from the beginning.[5] The rule of res judicata presumes conclusively the truth of the decision in the former suit.[6]

16. Also known in the US as claim preclusion, res judicata is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defense already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues."

76. It is therefore not available to the petitioner to challenge the court's determination by way of a constitutional petition or an application for transfer of the trial from the 5th Respondent to another court. I therefore find and hold that the petitions and applications filed herein are an abuse of the court process as they were only intended to forum shop for a favourable decision in stopping his ongoing trial.

77. This would have disposed of the matter before the court, but the court is still under a duty to determine the merit of the petitions and applications as presented. The issue therefore is whether the petitioner has presented material to prove that the trial court is bias and therefore he is unlikely to get free and fair hearing before the same and for which the court ought to intervene.

78. The question as to whether a judicial officer should be disqualified from sitting on a matter is both a question of law and facts, depending on the circumstances of each case. This position was stated by the Supreme Court in the case of **HON LADY JUSTICE KALPANA RAWAL v JSC & ANOTHER [2016] eKLR:-**

"…… as argued by Mr. Nowrojee. I am guided by the observations of Lord Browne – Wilkinson in Ex parte Pinochet Ugarte whether a judge should be disqualified from sitting may be a question of law depending on the facts and circumstances of a particular case and is not always an issue that falls within the discretion of the court No 2), where he stated that the fundamental principle that a man may not be a judge in his own cause has two similar but not identical implications. The first is that if a judge is in fact a party to the proceedings or has a financial or proprietary interest in the outcome, he is a judge in his own cause. In these circumstances, the mere fact that he is a party to the proceedings or has a financial interest in the proceedings automatically disqualifies him from sitting without any factual investigation.

[31] The second is where a judge is not a party to the proceedings and does not have a financial or proprietary interest in the outcome, but his conduct or behavior may give rise to the suspicion that he may not be impartial, such as by an association with

the parties in lis. This second category is not the principle in the strict sense and does not invite automatic disqualification. The Pinochet case was cited with approval by this Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR (Jasbir). The test set out there is therefore applicable in this case provided it arrives at an outcome that accords with the dictates of the Constitution. Do Mr. Omtatah's allegations of bias fall under the category which calls for disqualification without the need to investigate any facts" Only when the answer is in the affirmative can the ground of bias bring his Preliminary Objection under Mukisa Biscuit Co. test. I say so because the test requires only questions of law, which do not require an exercise of discretion by the court and the ascertainment of which do not require factual investigation."

79. The above principles were restated by the High Court in the case of ***REPUBLIC v SPEAKER OF THE SENATE & ANOTHER EX PARTE AFRISON EXPORT IMPORT LTD & ANOTHER [2018] eKLR*** where the court had this to say***:-***

"70. The Rule Against Bias, (Nemo in propria causa judex, esse debet), i.e.; no one should be made a judge in his own cause, is the minimal requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. Bias means an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Dictionary meaning of the term "bias" suggests anything which tends a person to decide a case other than on the basis of evidences.

71. The rule against bias strikes against those factors which may improperly influence a judge or a decision maker against arriving at a decision in a particular case. The basic objective of this rule is to ensure public confidence in the impartiality of the administrative adjudicatory process, for as per Lord Hewart CJ, in R. v. Sussex, "justice should not only be done, but also manifestly and undoubtedly seen to be done." A decision which is a result of bias is a nullity and the trial is "Coram non judice." Principle of Natural Justice occupied the very important place in the study of the administrative law. Any judicial or quasi-judicial tribunal determining the rights of individuals must conform to the principle of natural justice in order to maintain the rule of law. Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker.

72. As the bias rule has expanded to include a great range of decision-makers it has also become more flexible. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[42] ***There are many similar judicial pronouncements which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.***[43] ***This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.***

73. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that "justice should not only be done, but be seen to be done."[44] ***On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.***[45] ***This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the general public.***

74. The High Court of Australia explained that "Bias, whether actual or apparent, connotes the absence of impartiality." Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[46] ***A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias.*** [47]

75. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed

from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the actual views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the possible views and behavior of the decision-maker.[48] ***Each form of bias also requires differing standards of evidence.***[49] ***A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy.***[50] ***A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer might conclude there was a real possibility that the decision-maker was not impartial.***[51]

76. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[52]***The Lords also made it clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair minded observer would take account of the circumstances of the case at hand.***[53]***"***

80. In this matter, the petitioner's complaint is the way the trial court has been conducting the trial, which in his mind is that he may not have a fair and impartial trial, notwithstanding the fact that there may be no real bias in the matter, thereby violating his right under Article 50(1) of the constitution and that the test to be applied by the court is whether the apprehension in the mind of the petitioner is reasonable.

81. The court is therefore required to apply the principles set out herein above to the facts as presented by the petitioner and contested by the respondents, to come to a determination thereon. I must however state at the onset that in the trials of the nature the petitioner is facing, there is always a very thin line between robust case management and judicial intervention and therefore whether a trial is conducted fairly, must be assessed subjectively and with the necessary benefit of hindsight, taking into account that in the applications of these nature, the court does not have the input of the trial court, as the sad practice in our jurisdiction is that the defense of the trial court is seldom left to the respondents.

82. In any trial, I take the view that while the court is expected to be as objective and free of bias as possible, the same is entitled to a wide degree of latitude in case management and in conducting and overseeing the overriding principles of free and fair trial, as stated in Article 50 of the constitution of Kenya 2010, taking into account the fact that the trial is not a dress rehearsal and last night of show and therefore the court must while upholding the rights of the accused person make appropriate use of the limited judicial resources and in making decisions on how those resources will be utilized, must take into account the whole sea of material availed to it, including the conduct of the parties before it. I therefore find and hold that the petitioner's complaint that the trial court has been conducting the trial outside the working hours and making all efforts to conclude the same does not amount to bias. Expeditious disposal of cases is what the court is mandated to do under Articles 50(2) (e) of the Constitution.

83. In this cause all that the petitioner has placed before the court is his dissatisfaction with the courts case management style and court rulings arising out of several applications made in the course of the trial, which does not to my mind amount to bias on the part of the trial court when looked at against the evidence provided by the Respondent that in the course of trial, the same court had also made several rulings favourable to the petitioner, as to rule so will amount to injunction against the court from doing that which it is constitutionally and statutorily mandated to do.

84. I am in agreement with the court decision in the case of **WAMBUA MAITHYA v PHARMACY AND POISON BOARD (supra)** where the court was of the view that there are two-fold test for reasonable apprehension of bias and stated as follows: -

"23. It was similarly held in South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000, where the same Court expressed itself as follows: -

"The Court in Sarfu 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. This two-fold aspect finds reflection also in S v Roberts, decided shortly after Sarfu, where the Supreme Court of Appeal 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. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis

does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

'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.'

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…The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasized. In South Africa, 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, emerging as it has from the evils and immorality of the old order 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. On the one hand, 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. On the other, 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 or frivolous objection as it is to ignore an objection of substance…We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping."

85. Based on the material place before the court and in particular the petitioner's complaint on the conduct of the trial by the Prosecuting Counsel, including his alleged influence over the court, the petitioner's complaint to the Judicial Service Commission against the 5th Respondent, the use of witness protection order lawfully issued by a court of competent jurisdiction and the trial court's case management style cannot amount to bias on the part of the trial court.

86. There is further no evidence tendered by the petitioner to support his allegation of violation of his constitutional right to free and fair trial which would warrant the court intervention to stop his trial at this stage, as all the issues raised can be adequately addressed in the course of trial and any violation of the rules of procedure on the part of the trial court and/or the prosecution shall constitute grounds of appeal in the event that the same is convicted at the end of the trial.

87. The answer to the petitioner's claim herein is that all trials must be disposed of in a just and expeditious manner and sanctions given by the trial court against any party for non-compliance with the court pre-trial directions and case management orders do not to my mind amount to violation of constitutional rights in the absence of any serious and substantial violation on the part of the prosecution and the trial court.

88. By reason of the matter stated herein I find and hold that the petitioner has failed to satisfy the court that his ongoing trial in ACC No. 1 of 2021 is not free and fair, so as to entitle him to the orders sought in the petition and applications as consolidated and therefore find no merit therein and hereby dismiss the same with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15th DAY OF SEPTEMBER, 2021

.....

J. WAKIAGA

JUDGE

In the presence of:

Ms Wambugu for 2nd Respondent

Ms Wangia for 1st Respondent

Dr. Khaminwa for the Petitioner

Court Assistant - Hope