

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Maraga, CJ & P, Mwilu, DCJ & VP; Ibrahim, Ojwang, & Njoki SCJJ)*

**PETITION NO. 34 OF 2014**

**–BETWEEN–**

**GLADYS BOSS SHOLLEI..... PETITIONER**

**–AND–**

- 1. JUDICIAL SERVICE COMMISSION**
- 2. COMMISSION ON ADMINSTRATIVE JUSTICE ...** } **RESPONDENTS**

**RULING OF THE COURT**

**A. BACKGROUND FACTS**

[1] This Court has considered certain basic facts: the petitioner’s case had been referred to the Employment and Labour Relations Court, which upheld her claim, that the 1<sup>st</sup> respondent had violated her fundamental rights and freedoms, in removing her from office without a basis in law.

[2] The Court of Appeal had reversed the decision of the Employment and Labour Relations Court, leading to *an appeal now pending before this Court*. The petitioner prays for Judgment, setting aside the Appellate Court’s decision.

**B. AN INDIVIDUAL’S APPELLATE CAUSE -versus- PUBLIC-  
AGENCY QUEST FOR BENCH-DISQUALIFICATION**

**[3]** In the meantime, the 1<sup>st</sup> respondent has, at this stage, moved this Court by *application*, by way of notice of motion dated 24 May 2017, seeking Orders as follows:

(a) that the time-span for filing such an application be extended beyond the limit earlier prescribed, as from 17 May 2017, so as to cover the *belated date of lodgement* of the application;

(b) that most of the Supreme Court Judges, in the full seven-Judge bench of that Court – namely, *Maraga, C.J. & P., Mwilu, DCJ. & V-P, Ojwang* and *Njoki, SCJJ* – should recuse themselves from the hearing of the petitioner’s appeal;

(c) that the costs of the application be provided for.

**[4]** In the quest for such Orders, which if granted would leave *only two Judges* available for service (contrary to the terms of Article 163(2) of the Constitution of Kenya, 2010 which stipulates that “[t]he Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges”) – with the effect that the petitioner’s cause would stand *technically declined* – the applicant proffers the following justifications:

(a) *Chief Justice Maraga* as Chairperson of 1<sup>st</sup> respondent, and *Lady Justice Mwilu* as Supreme Court representative in 1<sup>st</sup> respondent [a *public agency*], had been involved in 1<sup>st</sup> respondent’s deliberations of 16 May 2017 at which 1<sup>st</sup> respondent *took the decision to file the instant application* – and so “they are conflicted and should not sit [on] the bench to determine this appeal”;

(b) *Both Lady Justice Njoki and Justice J.B. Ojwang* “are conflicted” and “there is real likelihood of bias in their hearing and determining the appeal,” for the following reasons:

(i) “Lady Justice Njoki has active pending litigation against 1<sup>st</sup> respondent in Petition No. 218 of 2016. In this petition, she is challenging the disciplinary mandate of 1<sup>st</sup> respondent. This petition is pursuant to a complaint filed by advocate Apollo Mboya on 9 October 2015”;

(ii) “Justice J.B. Ojwang has 3 pending disciplinary proceedings with 1<sup>st</sup> respondent, namely: a petition filed by Nelson Oduor Onyango on 29 January 2016 in respect of Supreme Court Misc. application No. 49 of 2014; a petition filed by advocate Apollo Mboya with respect to Supreme Court Applications No. 11, 12 and 13 of 2016 (judge-retirement cases), and another petition filed by [advocate Apollo Mboya] on 9 October 2015”;

(iii) “On 3 May 2017 Justice Lenaola recused himself from hearing the appeal, having been a member of the 1<sup>st</sup> respondent at the material time that the appellant’s case was before the [1<sup>st</sup> respondent].”

**[5]** What is the factual material given to support such averments? The 1<sup>st</sup> respondent’s registrar, Ms. Winfrida Mokaya, on 25 May 2017, swore an affidavit stating, in effect, that all the Supreme Court Judges now sought to be disqualified from the mandate of resolving the petitioner’s appellate cause, are “conflicted,” and ought not to be part of the final appellate bench to entertain and adjudicate upon the petitioner’s quest for justice under the Constitution. The applicant resorts to Ms. Mokaya’s depositions in aid of the proposition that the Supreme Court is an *inappropriate forum to answer to the petitioner’s pursuit of justice* – and for the contention that the Court of Appeal’s Judgment which reversed the trial Court’s decision in favour of the petitioner, *should now stand as the final edict of the Kenyan Judiciary*.

### **C. PUBLIC AGENCY CLAIM, AND THE SUPREME COURT’S TIME-SCHEDULING**

[6] Of the statement by 1<sup>st</sup> respondent’s counsel – that at an earlier scheduling for the hearing of the petitioner’s case, on 3 May 2017, one of the Judges (*Lenaola, SCJ*) had recused himself – it is to be noted that the Court had then ruled that the said Judge would be replaced at the hearing by *Lady Justice Mwilu, DCJ & VP*. The Court had on that occasion also directed that the 1<sup>st</sup> respondent *do file a formal application* on the issue of Judge-recusal, within 14 days. This was not done as directed; and the 1<sup>st</sup> respondent is now asking that its procrastination be overlooked.

### **D. PUBLIC-AGENCY INTERESTS -versus- INDIVIDUAL’S QUEST FOR JUSTICE IN THE APEX COURT**

[7] Learned counsel for 1<sup>st</sup> respondent submits that his client is moved by *bona fides*, in asserting that public agency’s “right to fair hearing”, as proclaimed in Article 50(1) of the Constitution of Kenya, 2010 which thus stipulates:

***“Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

Counsel urges that his client was *not at all questioning the integrity of any of the Judges* claimed to be “conflicted” and ought not to be part of the bench entertaining the petitioner’s appeal. However, learned counsel states his apprehensiveness that the said Judges being “conflicted”, his client – the *public agency* (1<sup>st</sup> respondent) faces the risk of not being accorded “a fair hearing”, and that a “real likelihood of danger or bias” exists.

[8] In his quest for recusal by most members of the Supreme Court bench, counsel for the 1<sup>st</sup> respondent urged that there was indeed precedent for such recusal – the effect of which was to render the Supreme Court a *lame duck judicial forum*, with the Court of Appeal appearing as the ultimate Court of the judicial system. He cited the situation represented by the case, ***Kalpana H. Rawal, Philip Tunoi and David A. Onyancha v. Judicial Service Commission and the Judiciary*** [2016] eKLR.

**E. SUPREME COURT, RECUSAL, AND ENDS OF APPELLATE JUSTICE: PETITIONER’S SUBMISSION**

[9] Learned counsel for the petitioner contested the public agency’s prayer for Judge-recusal, in his submissions of May 2018. He urged that recusal of a Judge of the apex Court, the ultimate recourse in the citizen’s quest for justice, ought not to be invoked, but for *good cause* – and certainly, not so as to impede *access to justice by the individual-citizen appellant*, in the terms of Article 50(1) of the Constitution. Counsel urged that the *right to fair hearing*, for his client as for other citizens, is an *absolute right* which cannot be limited, in view of the terms of Article 25 of the Constitution:

***“Despite any other provision of this Constitution, the following rights and fundamental freedoms shall not be limited –***

***(a)....***

***(b).....***

***(c) the right to a fair trial.....”***

[10] In further demonstration of the Supreme Court’s obligation in regard to the instant matter, learned counsel cited the terms of Article 20(3) of the Constitution:

***“In applying a provision of the Bill of Rights, a court shall –***

***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***

***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”***

[11] Within the foregoing context of *constitutional imperatives* bearing upon the Courts of law, and in this regard bearing upon this *Supreme Court*, learned counsel submitted that the right to a fair trial must be viewed in the context of the *slender numerical span of the bench*: with only *seven* members, and with the prescribed quorum of *five Judges*.

[12] Learned counsel called upon the Supreme Court to discern a *mischief* in the quorum-deficit scheme of the instant application: that the Court may be rendered inadequate to its *prescribed constitutional function* as the ultimate appellate Court, with the last word in the safeguarding of the petitioner’s fundamental rights, secured by the *express terms of the Constitution*. Were the instant application to be allowed, counsel urged, the Supreme Court would have improperly taken leave of its obligation to ensure that *every person* enjoys the *right to fair trial*.

[13] Learned counsel urged it to be an unsound proposition, that the Supreme Court, merely for *having two of its members attending at any moment, meetings of the 1<sup>st</sup>-respondent public agency*, will constantly be unable to perform its constitutional mandate of dispensing justice, *whenever the 1<sup>st</sup> respondent is a party to a dispute*. The effect of such an impugned prospect, it was urged, would be that in many causes meriting *final determination* by the Supreme Court, *the constitutional rights of fair trial for the parties, would have been drastically abridged and negated*.

[14] Learned counsel called for an objective view of some of the broad claims made in limitless numbers of cases, in *petitions against serving Judges of the Supreme Court*, before the public agency which is the *1<sup>st</sup> respondent*. It was urged that, in this regard, the Court may address its mind to such objective impressions as must guide the perceptions of the *ordinary reasonable person*; and that it may reflect upon its standing as a proper judicial body, or perhaps, a body of irrational Judges who lack the capacity to render justice as necessitated by the situations, needs and deserts of the parties who come calling!

[15] The appellant invoked an earlier, precedent-setting decision of the Supreme Court, ***Jasbir Singh Rai and Another v. Tarlochan Singh and 4 Others*** [2003] eKLR, in which this Court had formally proclaimed the application of the *doctrine of necessity* – which ought to apply in this instance, to avert a *real danger of miscarriage of justice coming in the shape of Judge-recusal*. On those submissions the appellant urged us to dismiss this application.

## ***F. ANALYSIS***

[16] We have considered the above rival submissions. The Supreme Court has a *special constitutional mandate which cannot be delegated* to any other forum in

the entire governance set-up. The Court is firmly guided by certain precious values, which provide the context within which it takes *ultimate responsibility* for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late *Lord Denning* (1899-1999) of England who thus spoke of the *candour and trust* associated with the judicial appointment:

*“[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges”* [see Allan C. Hutchinson, ***Laughing at the Gods: Great Judges and How they made the Common Law*** (Cambridge: University Press, 2012), p.156.

[17] Benefiting from such profound observations, we conscientiously take the stand that the instant matter is *not* one calling for the recusal of any Judge of the Supreme Court. Committed to our *oaths of office*, we would pronounce ourselves unbiased, and *ready and willing to own up to our constitutional mandate* of dispensing justice in matters falling within our jurisdiction.

[18] It is our conviction that the concept of *fundamental rights, is a subject of constitutional safeguard, and a core pillar upon which the Supreme Court’s mandate is founded*. The rights in question are inherently and expressly attributed to *citizens*, as the legatees of good governance and democratic process. On this account, all rational and tenable perception of the question of *access to the judicial dispute-resolution process*, must be placed on balancing scale ensuring the *entitlement of **the citizen** to justice, fair trial, and constitutional safeguard*.

[19] In the circumstances, we decline the applicant’s call, and declare the undoubted principle that, in all cases of this nature, *the cause of the individual*

*who comes knocking on the doors of the Judiciary, is the very first consideration in determining whether or not a hearing falls due.*

[20] For these reasons, we are disinclined to grant this application.

**G. THE CONCURRING RULING OF JUSTICE M. K.  
IBRAHIM**

[21] I have had the advantage of reading the composite Ruling of my Brother Judges and the concurring opinion of my Sister Judge. I wholly agree with the reasoning and arguments therein, and would like to add further reasons for reaching the same conclusion.

[22] In the *Jasbir Singh Rai and Another v. Tarlochan Singh and 4 Others*, [2003] eKLR case, the Court alluded to the doctrine of necessity in the concurring opinion and the numerical challenge of the Supreme Court, more so as there was a vacancy. That doctrine is even more pronounced in this matter and it is amplified by the Constitution itself.

[23] First, the preamble to the Constitution is unequivocal that it is the People of Kenya who give unto themselves the Constitution. They give unto themselves the Constitution in its entirety. In this Constitution at Article 163, the People of Kenya have established the Supreme Court, consisting of seven Justices (the Chief Justice, the Deputy Chief Justice, and five other Judges). In this same Constitution, the People of Kenya have also established the Judicial Service Commission (hereinafter referred to as ‘JSC’), with its membership composition clearly stipulated under Article 171 (2). A scrutiny of this membership clearly shows that at any given time, two (2) members of the Supreme Court shall be JSC Commissioners.

[24] Another truth, which is a reality now, is that among the Supreme Court Judges, we shall/may have former JSC Commissioners. It cannot therefore be stated in general terms that any Supreme Court Judge who sits/sat in the JSC will, as a matter of course, not adjudicate in a matter where the JSC is a party. Such a pronouncement will be a total mockery of the Sovereign will of the People of Kenya who established the two institutions in the Constitution and willed that they carry out their various functions simultaneously.

[25] Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: *“to serve impartially; and to protect, administer and defend the Constitution.”* It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties’ right to have their cases heard and determined before a court of law.

[26] In respect of this doctrine of a judge’s duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – *“Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:*

***“A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him***

***or her and may only refuse to hear a case for an extremely good reason” (emphasis mine)***

[27] In the case of ***Simonson –vs- General Motors Corporation*** U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

***“Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a “duty to sit” . . .”***

[28] It is useful to refer to the case from the New Zealand Court of Appeal **Muir -v- Commissioner of Inland Revenue** [2007] 3 NZLR 495 in which the Court stated as follows:-

***“the requirement of independence and impartiality of a judge is counter balanced by the judge’s duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 “it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion 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.”***

**[29]** From my readings, it is not lost to my mind that there is a criticism of this doctrine for being subject of abuse by judges, so as to sit in matters when it is blatantly clear that they are biased and ought not to have sat. However, where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism. I will invoke that doctrine in this matter and hold that all Judges of the Supreme Court of Kenya, members of the Judicial Service Commission or former members, have a duty to sit in this matter so as to affirm Constitutionalism.

**[30]** Another issue raised is that some of judges have matters pending in the High Court against the Judicial Service Commission. It is beyond peradventure that judges too, as individual persons, enjoy all the Rights in the Bill of Rights. They too enjoy the protection provided by Article 22 to approach the High Court where they feel their Rights have been violated. Article 22(1) is emphatic that: *“[E]very person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”*. A person does not waive the protection of Article 22(1) when he/she becomes a Judge. Consequently, a judge who pursues his/her constitutional rights protected by the Bill of Rights cannot have that used against him/her as a ground for recusal. Also membership in the JSC by a judge in the Supreme Court or any other Court is a constitutional imperative and as such it cannot be used without very good and valid reasons to exclude such a member of JSC from sitting in a matter where the JSC is involved.

**[31]** It is also my considered opinion that an application for recusal should not seek to affirm the decision of the court/tribunal whose decision is subject of

appeal. An application for recusal is a shield, to protect the applicant's interest so that his/her matter is heard by an impartial court. It is not a sword to be wielded by an applicant to steal a match and deny a chance to the other party. Hence by praying that the effect of the application will be the affirmation of the Court of Appeal decision, the Respondent (applicant) seeks to go beyond the genuine province of a recusal motion.

[32] The 1<sup>st</sup> Respondent referred to the case of ***Kalpna H. Rawal, Philip Tunoi and David A. Onyancha v Judicial Service Commission and the Judiciary***, (2016) eKLR, as the basis or authority for this argument. With respect, the 1<sup>st</sup> Respondent has all its facts on the above case wrong. The fact that three (3) judges recused themselves from hearing the matter did not by itself affirm the decision of the Court of Appeal on the “retirement age of Judges appointed before the promulgation of the Constitution 2010”. This is clear and certain from the final orders of the Supreme Court in that matter thus:

***“These are the Orders of the Court:***

***1. The Preliminary Objection by the interested party (Mr. Omtatah) together with the application No. 13 is hereby allowed.***

***2. The ex parte Orders granted by the Duty Judge, on 27th of May, 2016, are hereby vacated.***

***3. The Judgment of the Court of Appeal shall stand until it is either affirmed, or reversed by a competent Bench of this Court.***

***4. In view of the fact that 2 members of this Bench were minded to allow preliminary objections No. 11 and 12, while 2 others were equally minded to disallow the said preliminary objections, and the 5<sup>th</sup> member has recused***

***himself from making a finding on the objections, there is no determination that has been made regarding preliminary objection No. 11 and 12.***

[33] As the matter before the Court was an interlocutory application, the recusal and inability of the five-Bench to determine the applications meant that, de facto, the Court of Appeal judgment remained in force. The Applications in the Supreme Court were not spent or determined but remained in abeyance until another Bench was/is empaneled. For these reasons I concur with the final orders in the main ruling.

#### ***H. THE CONCURRING RULING OF NJOKI NDUNGU, SCJ***

[34] I have read the decision of the majority. While I am in agreement with the final decision and orders in this matter, I wish to add the following to reinforce my learned sister's and brothers' decision.

##### ***(a) Right to a fair trial***

[35] It is important to note from the onset that pursuant to Article 25 (c) of the Constitution, that the Right to a fair trial is non-derogable.

[36] In my concurring opinion in ***Evans Kidero & 4 others v Ferdinand Waititu & 4 others, Sup. Ct. Petition No. 18 & 20 of 2014, [2015] eKLR***, I examined the scope of fair hearing and concluded that it is *trite law that all persons who come to the Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature.*

[37] Accordingly, this settled the question as to whether the right to fair hearing set out in Article 50(1) and the right to a fair trial set out in Article 50(2) of the Constitution

are different. The two rights are the same and they are both non-derogable by the provisions of Article 25 of the Constitution.

[38] As such, when an individual citizen petitioner rightly approaches this Court, seeking to assert their constitutional rights, this Court will be hard-pressed to turn them away on the basis of claims of bias by a respondent State organ.

[39] There is a *positive duty* by the State to ensure that every Kenyan has the right to fair hearing which involves the right of appeal where conferred by the law or the Constitution. This obligation includes the Judiciary's own participation as a State organ.

[40] The obligation equally applies to the Judicial Service Commission which is the 1<sup>st</sup> respondent. This stems from Article 21(1) of the Constitution which provides that "*It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.*"

[41] Article 19 (3) (a) of the Constitution is categorical that *the rights and fundamental freedoms in the Bill of Rights belong to each individual.*

[42] In my considered opinion, in the course of enforcement of the right to fair hearing, when balancing the rights of different claimants before the Court over the same right, and because of the personal nature of rights, priority must *first*, be given to the parties that are directly affected by the violation of that right, for instant the accused person, plaintiff, applicant, appellant, defendant, respondent, etc.; *secondly*, other parties to the suit that are indirectly affected, such as interested parties; *thirdly*, the general public; and *lastly*, the interests of the State.

[43] In the present matter therefore, this Court ought to have regard to the right to fair hearing of the petitioner first.

***(b) The question of bias***

[44] It is the 1<sup>st</sup> respondent's case that it will not be accorded a fair hearing as there is a real likelihood or danger of bias. The first thing to note here is that the 1<sup>st</sup> respondent is a *State organ*. 'State organ' is defined in Article 260 of the Constitution as "***a commission, office, agency or other body established under this Constitution.***"

[45] The 1<sup>st</sup> respondent is established under Article 171 of the Constitution. It is also listed in Chapter fifteen of the Constitution of which chapter pertains to commissions and independent offices.

[46] Under this chapter, pursuant to Article 249 of the Constitution, the 1<sup>st</sup> respondent is supposed to *protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism.*

[47] Bearing this in mind, it is unclear to me, what prejudice the 1<sup>st</sup> respondent will suffer if we hear this matter. The petitioner herself, who instituted this matter has not raised the issue of an impartial bench, bias or any prejudice that would arise if the bench as currently constituted sits on her matter. It therefore baffles the mind how the 1<sup>st</sup> respondent can claim bias in the face of an individual's right to a fair hearing.

[48] It is my considered opinion that the State organ (the 1<sup>st</sup> respondent) cannot claim prejudice or bias when an individual citizen is seeking to exercise their constitutional right to be heard. This flies in the face of *securing democratic values and principles and promoting constitutionalism.*

[49] In addition, the 1<sup>st</sup> respondent has not sufficiently demonstrated the nexus *between* the interest *and* the resulting apprehension of bias. For my part and my learned brother Prof. Ojwang, there is no nexus established between the facts of the relevant matter (s) between us and the 1<sup>st</sup> respondent and the instant matter before this Court.

[50] Additionally, to find that membership of a Judge in the 1<sup>st</sup> respondent, automatically disqualifies him or her on the basis of perceived bias from hearing and

determining any matter relating to the 1<sup>st</sup> respondent would be to stretch the perception of bias too far.

[51] This would inevitably mean that matters involving the 1<sup>st</sup> respondent would, more often than not, be determined by the Court of Appeal as the final Court; an absurdity and outright contravention of the Constitution.

**(c) Recusal**

[52] I am conscious that the majority and my learned brother judge Ibrahim have expressed themselves on this issue. I will only add the following. In my view, it is undisputable that a party is entitled to be heard, by a Court before which he or she appears even though it is perceived to be conflicted, if there is no other Court to which he or she can go. The doctrine of necessity and the duty to sit would have to apply.

[53] It must always be remembered that there is a presumption of impartiality of a Judge. In ***The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999]*** the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters.

[54] The role of a Judge is to ensure that cases are determined in accordance with the Constitution and the law. I am persuaded by the opinion of Justice Scalia (as he was) in ***Cheney v. U.S. Dist. Court, 541 U.S. 913, 915*** (2004) that an application for recusal of a Supreme Court Judge cannot be determined in a similar manner as that of a Judge of the other superior Courts due to the special consideration that must be given to its quorum.

[55] This court is the final bastion in the architectural design of our Constitution that protects and defends the rights of every citizen and enforces the obligations of State towards them. Its intervention, when rightly invoked, as in the instant case ought to be available to the citizens of this county.

***(d) The Court adjudicating on matters where the 1<sup>st</sup> respondent has been a party.***

[56] In as much as the 1<sup>st</sup> respondent submits that members of this Court have recused themselves in previous proceedings in ***Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v Judicial Service Commission & Judiciary [2016] eKLR***, this can be cited as the exception thus far.

[57] This Court has previously dealt with matters in which the 1<sup>st</sup> respondent has been a party and no issue of conflict of interest had arisen. For instance, in the ***Judges and Magistrates Vetting Board and Others v Centre for Human Rights and Democracy and Others Supreme Court Petition No. 13A, 14 and 15 of 2013; [2014] eKLR***, this Court heard and determined a matter that involved the 1<sup>st</sup> respondent as one of the respondents.

[58] Pertinent to note is that the former Chief Justice (Willy Mutunga) and Smokin Wanjala SCJ were part of the bench that heard and determined that matter despite being members of the 1<sup>st</sup> respondent at the time.

[59] Interestingly, the 1<sup>st</sup> respondent in this matter did not claim that this Court was *conflicted* and incapable of rendering an impartial decision. The fact that the 1<sup>st</sup> respondent does so now raises an eyebrow and might even be construed as cherry – picking an adjudication fora or forum shopping which the law frowns upon.

***(e) Jurisdiction of the Supreme Court under Article 168 (8) of the Constitution; how will it be affected?***

**[60]** Article 168 of the Constitution concerns removal of a Judge from office. This removal may be initiated by the 1<sup>st</sup> respondent on its own motion or upon petition by any person to the 1<sup>st</sup> respondent.

**[61]** If satisfied that the petition is merited, the Judicial Service Commission (JSC) sends the petition to the President. Within fourteen days after receiving the Petition, the President must suspend the judge from office acting in accordance with the recommendation of the JSC and appoint a tribunal.

**[62]** Article 168(8) of the Constitution allows a judge who is aggrieved by a decision of such tribunal to appeal against the tribunal's decision to the Supreme Court within ten days after the tribunal makes its recommendations.

**[63]** This then begs the question; would this Court have to down its tools merely because the 1<sup>st</sup> respondent (JSC) may be a party to such cause? The answer must be a resounding no!

**[64]** I am of the view that if this Court downed its tools in an Article 168 (8) petition, merely because the 1<sup>st</sup> respondent is a party to this suit, this would be tantamount the Court abdicating its constitutional duty.

**[65]** In addition, it would be equivalent to violating both the Judicial Code of Conduct which reveres the oath of office taken by Judges and **Section 10(1) of the Public Officers Ethics Act** which requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law.

**[66]** I conclude by stating that I have no doubt that my learned sister and brothers are able to determine the instant matter objectively, while nurturing transparency and accountability.

**I. FINAL ORDERS**

**[67]** In the result, it is the unanimous decision of this Court that:

- (a) This application be and is hereby dismissed.
- (b) The petitioner’s appeal shall be fixed for hearing on priority basis.
- (c) The costs of this application shall abide the determination of the main cause.

***Orders accordingly.***

**DATED and DELIVERED at NAIROBI this 3<sup>rd</sup> Day of July, 2018**

.....  
**D.K. MARAGA**  
**CHIEF JUSTICE/PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE/VICE PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**J.B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,  
SUPREME COURT OF KENYA**