Sere Technologies Limited & another v Forward Cars Limited & 6 others (Environment & Land Case 246 of 2018) [2022] KEELC 13608 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13608 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 246 OF 2018

JO MBOYA, J

OCTOBER 13, 2022

BETWEEN

SERE TECHNOLOGIES LIMITED ..... 1ST APPLICANT

DAVY KIPROTICH KOECH ..... 2ND APPLICANT

AND

FORWARD CARS LIMITED ..... 1ST RESPONDENT

WALTER KIPROP CHUMO ..... 2ND RESPONDENT

HFC LIMITED ..... 3RD RESPONDENT

MIRIAM JEPKOSGEI MAINA ..... 4TH RESPONDENT

JUMA WAHAGA MAULIDI ..... 5TH RESPONDENT

CHIEF LANDS REGISTRAR ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

RULING

1. Vide the notice of motion application dated (*sic*) the April 24, 2021, the plaintiffs/applicants herein have approached the court seeking for the following reliefs;

   i. Spent

   ii. The Hon Justice Oguttu Mboya be pleased-to recuse himself from this matter; or any other matter involving the applicants herein touching on all that property known as LR No 3734/710 (original No3734/3/268) situate at Lavington Estate, Nairobi County.

   iii. All proceedings undertaken and orders issued by Hon Justice Oguttu Mboya in this matter be set aside.

iv. The court file in respect of the cause herein be placed before the presiding judge of the Environment and Land Court for urgent directions on further proceedings.

v. Costs of this application be awarded to the plaintiffs/applicants.

2. The subject application is premised on the various, albeit numerous grounds contained in the body of application and same is further supported by the affidavit of one Dr David Kiprotich Koech sworn (*sic*) on even date and to which the deponent has made several averments/allegations.

3. On the other hand, it is also appropriate to state and mention that the supporting affidavit also contained various annextures including a purported petition addressed to Judicial Service Commission, but which up to and including the time of rendition of the subject ruling, has not been formally lodged with the Judicial Service Commission for their necessary consideration or attention.

4. Upon being served with the subject application, the 6th and 7th defendants/ respondents, filed a response thereto vide grounds of opposition dated the June 14, 2022.

5. Nevertheless, the rest of the defendants/respondents did not file any response to the subject application. However, same indicated that they would adopt and rely on the grounds of opposition filed on behalf of the 6th and 7th defendants/respondents.

Deposition By the Parties:

a. Plaintiffs'/applicants' case:

6. The plaintiffs/applicants' case is contained at the foot of a supporting affidavit sworn by Dr David Kiprotich Koech and wherein same has averred that he is the 2nd plaintiff/applicant in respect of the subject matter and also a Director of the 1st plaintiff/applicant.

7. Premised on the foregoing, the deponent has averred that same is therefore conversant with and knowledgeable of the facts pertaining to and concerning the subject matter.

8. On the other hand, the deponent has added that on or about the year 2018 the 1st plaintiff/applicant and himself filed the subject suit with a view to recovering the suit property, which was (*sic*) illegally acquired by the 1st and 2nd defendants, before same was allegedly charged to and in favor of the 3rd defendant/respondent.

9. On the other hand, the deponent has further averred that on the November 11, 2021, the 1st plaintiff/ applicant and himself filed an application before this court, namely, Hon Justice Oguttu Mboya, Judge, wherein same sought various reliefs with a view to protecting their right to and over the suit property.

10. Further, the deponent has added that the application dated the November 11, 2021 was thereafter heard and canvased before this court and that the court after entertaining submissions from the respective parties reserved a ruling, which was ultimately delivered on the January 27, 2022.

11. On the other hand, the deponent has averred that vide the ruling rendered on the January 27, 2022, this court found and held that the application dated November 11, 2021 constituted an abuse of the due process of the court and same was consequently dismissed.

12. The deponent has also averred that by dismissing the application dated the November 11, 2021, the judge displayed coldness and insensitivity to the plight of the 1st plaintiff/applicant and the deponent.

13. Other than the foregoing, the deponent has stated that prior to the filing of the application dated the November 11, 2021, the 4th and 5th defendant/respondent herein had moved to the Chief Magistrate's Court vide Milimani CMC ELC No E270 of 2021 and procured *ex-parte* orders of eviction.

14. It was further averred that the act of the 4th and 5th defendants of moving to the Magistrate's Court and procuring an eviction order, during the subsistence of the instance suit, amounted to an abuse of the due process of the court.

15. However, the deponent has added that despite the illegal action by and on behalf of the 4th and 5th defendants/respondents being brought to the attention of the judge, the judge failed to chastise the 4th and 5th defendants/respondents but instead chose to find and hold that the 1st plaintiff/applicant and the deponent were guilty of abuse of the due process of the court.

16. At any rate, the deponent has also stated that in the course of crafting the ruling rendered on the January 27, 2022, the judge made substantive findings, albeit in an interlocutory application. In this regard, it has been averred that the judge therefore committed a serious and grave error, which has prejudiced the 1st plaintiff/applicant and the deponent.

17. Notwithstanding the foregoing, the deponent has added that the totality of the ruling rendered by the judge exhibits and shows sheer incompetence or outright compromise of the judge.

18. As a result of the foregoing, the deponent has therefore averred that same has lost confidence in the competency and ability of the judge to entertain and adjudicate upon the subject dispute with the requisite fairness and impartiality.

19. Finally, the deponent has added that as a result of the ruling rendered and delivered by this judge, same has since generated a petition to the Judicial Service Commission for purposes of seeking the removal of the judge from office.

20. In view of the foregoing, the deponent has therefore averred that this is a fit and proper matter to warrant the reliefs sought being granted.

Response By the 6th & 7th Defendants'/Respondents':

21. Upon being served with the subject application, the 6th and 7th defendants/ respondents filed ground of opposition dated the June 14, 2022.

22. For coherence, the 6th and 7th defendants/ respondents raised and amplified the following grounds;

    a. That the application is frivolous, an abuse of court process and made *mala fides* and is meant for nothing else than to derail the hearing of the suit.

    b. That the questioning of the impartiality and of Hon Justice Oguttu Mboya is unreasonable, out of context, irrelevant and not applicable under rule 5 of the Judicial Service Code of Conduct and Ethics

    c. That a judge is a public good and is not intended to serve individual's personal interests

    d. That the application filed by plaintiffs is suspect for being filed just 3 days preceding the hearing date and all it aims at is an assault on the judge's duty to sit and their presumed impartiality under oath of service

    e. That the mischief revealed in this application is just but styles, tactics and designs to forum shop for a judge of their choice

Submissions By The Parties:

a. Plaintiffs'/applicants' submissions:

23. The plaintiffs/applicants herein filed written submissions dated the September 16, 2022 and in respect of which same raised and highlighted two issues for determination.

24. First and foremost, Learned Counsel for the plaintiffs/applicants submitted that it is incumbent upon every siting judge/judicial officer to comply with and adhere to the provisions of article 50(1) of the *Constitution 2010*. In this regard, it was stated that the right to fair hearing before an impartial judge, is critical and paramount in the determination of a dispute before the court.

25. Further, counsel submitted that despite the centrality and importance of the principle of fair hearing, the judge herein has displayed and exhibited outright bias and lack of impartiality.

26. Counsel for the plaintiffs/applicants has further added that despite the sufficient evidence and credible basis that was contained in the application dated the November 11, 2021, the judge herein still had the courage to find and hold that the said application constituted and amounts to an abuse of the due process of the court.

27. In any event, counsel for the plaintiffs has also submitted that vide the impugned application, the plaintiffs/applicants brought to the attention of the judge the most despicable conduct of the 4th and 5th defendants, which conduct ought to have attracted chastisement.

28. However, instead of chastising or rebuking the 4th and 5th defendants, the judge looked at the opposite side and instead condemned the plaintiffs/applicants for abusing the due process of the court.

29. Other than the foregoing, counsel for the plaintiffs/applicants has also submitted that in the course of crafting the ruling which was rendered on the January 27, 2022, the judge made substantive pronouncement, albeit at an interlocutory stage.

30. According to Learned Counsel for the plaintiffs/applicants, the judge stated that the 4th and 5th defendants/respondents have a valid title to the suit property, albeit without the benefit of a plenary hearing.

31. Premised on the foregoing, counsel for the plaintiffs has therefore contended that the judge has therefore exhibited open bias, lack of impartiality, incompetence and in any event, same appears to have been compromised.

32. In view of the foregoing, Learned Counsel for the plaintiffs/applicants contends that there exists reasonable suspicion to warrant disqualification of the judge from hearing and entertaining the subject suit and any other suit touching on and concerning the suit property.

33. In support of the contention that there exists reasonable suspicion and hence a basis for recusal, Learned Counsel for the plaintiffs/applicants has cited and relied on the decision in *Kipkoech Kagongo & 62 others versus Board of Governance, Sacho High School & 5 others* [2015]eKLR, *Wilson Mwaduna Mwabire & another v Attorney General* [2009]eKLR and *Kings Woolen Mills Ltd, Formerly Manchester Outfitters Suiting Division Ltd & another v Standard Chartered Financial Services Ltd & another* [1995]eKLR.

34. Secondly, counsel for the plaintiffs/applicants has submitted that the plaintiffs'/applicants' have lost confidence in the judge and in this regard, it is appropriate and imperative that the judge disqualifies and recuses himself from entertaining further proceedings in the subject matter.

b. Submissions by the 6th and 7th defendants'/respondents:

35. The 6th and 7th defendants/ respondents filed written submissions dated the June 14, 2022 and same have similarly raised and highlighted two issues for determination.

36. The first issue raised and ventilated by Learned Counsel for the 6th and 7th defendants/respondents, relates to the circumstances under which a judge/judicial officer ought to disqualify him/herself from hearing a particular matter/case.

37. According to Learned Counsel, disqualification and recusal of a judge ought not to be taken lightly and before such disqualification is undertaken, the applicant is obligated to place before the court sufficient and credible evidence to show the existence of real bias or apprehension.

38. Further, Learned Counsel has submitted that towards establishing what constitutes reasonable bias, there must be evidence that is capable of convincing a reasonable person that indeed there exist a basis to find and hold that real bias is likely to arise.

39. Secondly, Learned Counsel for the 6th and 7th respondents has also submitted that the fact that a party has lost a case/application does not by itself found a basis for recusal. In this regard, counsel has pointed out that if every party against whom an unfavorable decision has been made, were to move the court for recusal then the business of the court would be ground a halt.

40. Finally, Mr Allan Kamau, Learned Counsel for the 6th and 7th defendants/respondents has also submitted that a judge has a duty to sit. Consequently, it has been contended that before a judge disqualifies himself, the judge must be mindful of the oath that same took and that recusal should not be a common place occurrence.

41. In support of the foregoing submissions, Learned Counsel for the 6th and 7th defendants/respondent has cited and relied on inter-alia *Jasbir Singh Rai & 3 others versus Taralochan Singh Rai & 4 others* [2013]eKLR, *Accredo AG & 3 others v Stephano Ucceli & another* [2018]eKLR, *Samuel Kazungu Kambi versus IEBC & 2 others* [2017]eKLR, *Philip K Tunoi & another v Judicial Service commission & another* [2016]eKLR, *K H Rawal v Judicial Service Commission & 2 others* [2016]eKLR and *Dari Ltd & 5 others v East African Development Bank & 2 others* [2020]eKLR.

Submissions by the 1st, 2nd, 3rd, 4th and 5th defendants/ respondents:

42. Learned Counsel for the 1st to 5th defendants/respondents adopted and reiterated the elaborate submissions that were filed by and on behalf of the 6th and 7th defendants/respondents.

Issues for Determination

43. Having reviewed the application dated the April 24, 2021 (but which ideally should be dated the April 24, 2022) together with the supporting affidavit thereto and having considered the grounds of opposition dated the June 14, 2022; and having taken into consideration the written submissions filed on behalf of the respective parties, the following issues are pertinent and thus worthy of determination;

    i. Whether the plaintiffs/applicants have established and proved a basis for the recusal or disqualification of the judge.

    ii. Whether this court is seized or possessed of the requisite jurisdiction to set aside the orders issued in this particular matter, including but not limited to the ruling rendered on the January 27, 2022.

Analysis And Determination

Issue number 1

Whether the plaintiffs/applicants have established and proved a basis for the recusal or disqualification of the judge.

44. Before venturing to address and consider whether the plaintiffs/applicants have established or otherwise laid a basis for the recusal of the judge, it is appropriate to supply a brief background to the subject matter/dispute.

45. It is common ground that the plaintiffs/applicants herein filed and/or lodged the subject suit on or about the year 2018 and simultaneous with the lodgment of the suit, same took out a notice of motion application for inter-alia, temporary injunction pertaining to and concerning the suit property.

46. Upon the filing of the said application, same was placed before the duty judge and thereafter the application was indeed certified as urgent and designated for hearing on priority basis. Indeed, the court thereafter proceeded to and granted interim orders for purposes of preserving the status of the suit property.

47. During the intervening period, several applications were filed by both the plaintiffs/applicants and others by some of the defendants/respondents.

48. Be that as it may, a compromise was reached by the parties whereupon it was agreed that the matter does proceed for substantive hearing, in lieu of the various applications. In this regard, a consent was thereafter entered into relating to the maintenance of status quo over and in respect of the suit property.

49. For coherence, the court thereafter proceeded to and set down the suit for hearing. For clarity, the main suit was set down for hearing on various dates, inter-alia, the November 18, 2020, May 20, 2021, July 16, 2021 and July 21, 2021.

50. Despite the main suit being set down for hearing in terms of the preceding paragraph, the hearing did not take place. Indeed, it is appropriate to mention that to date the matter has not taken off for hearing, for reasons, which are well documented in the records of the court.

51. Nevertheless, the important point to observe is that as a result of the applications for adjournments, which were sought for by and at the instance of the plaintiffs/applicants, Lady Justice K Bor, Judge noted that the plaintiffs/applicants were not keen to prosecute the suit.

52. Premised on the observation, that the plaintiffs/applicants were not keen to prosecute the suit, Lady Justice K Bor, Judge, proceeded to and indeed discharged the orders of *status quo* which have hitherto issued in favor of the plaintiffs/applicants and apparently which made the plaintiffs/applicants comfortable, nay complacent.

53. It would appear that after the orders of status quo were discharged by Lady justice K Bor, Judge, the 4th and 5th defendants put in place some mechanism with a view to taking possession of the suit property. However, the events that were taken or which are said to have taken by the 4th and 5th defendants have no bearing in respect of the proceedings herein. In any event, the court was informed that an application had been filed before the surbodinate court to address the said issues.

54. Subsequently, the plaintiffs/applicants (while alive to the discharge and vacation of the orders of the status quo) filed an application dated the November 11, 2021 and sought inter-alia, that this court should proceed to grant orders of temporary injunction.

55. Suffice it to point out that the said application was canvased and ventilated before this court and same was duly considered and disposed of vide ruling rendered on the January 27, 2022. For completeness, the application was dismissed.

56. It is important to note that it is the said decision, that is the ruling rendered on the January 27, 2022, that has provoked and irritated the plaintiffs/applicants and their learned counsel and thus culminated into the filing of the current application.

57. To my mind, a judge or judicial officer who is confronted with a dispute, whether same be a substantive hearing or an application, is called upon to calibrate on the issues raised and thereafter render a decision.

58. It is also common ground that in judicial proceedings, unlike football matches, there can never be a draw. In short, the court is called upon to make a decision, which no doubt would favor one person as against the other, given the adversarial nature of the Kenyan legal system.

59. In view of the foregoing, this court calibrated on the issues that were raised by the respective parties and alive to the orders which had been given by Lady Justice K Bor, Judge on the July 21, 2021, this court found and held that same could not re-issue orders akin to temporary injunction or otherwise *status quo*.

60. Respectfully, this court found and held that to grant any orders of temporary injunction, either in the manner that was sought by the plaintiffs/applicants or at all, would be tantamount to sitting on appeal on a decision on court of concurrent jurisdiction, which had dealt with an issue of *status quo* and indeed found that such orders were being abused by the plaintiffs/applicants.

61. Similarly, the plaintiffs/applicants herein had sought and invited this court to strike out a suit which was filed in the Chief Magistrate's court Nairobi CMC ELC No E270 of 2021.

62. However, this court with due consideration of the law and being cognizant of the import of the provisions of order 2 rule 15 of the *Civil Procedure Rules*, found and held that same was not seized of jurisdiction to strike out a suit that was not before him. For clarity, it is worth repeating that the only court that can strike out the impugned proceedings is the chief magistrate's court before whom same were filed, albeit subject to a suitable application being mounted and proved.

63. Similarly, this court was cognizant of the fact that what was before this court was an interlocutory application and therefore the court could not make substantive pronouncement. However, the court was nevertheless obliged to carry out assessment of the evidence before it and discern whether a prima facie case had been established.

64. Truly, this court was alive to and was well guided by the decision in *Mbuthia v Jimba Credit Finance Corporation Ltd & another* [1988]eKLR, where the Court of appeal underscored the scope and mandate of a judge whilst dealing with an interlocutory application.

65. I have endeavored to re-harsh the foregoing background because it is important to underscore that this court exhibited and displayed an objective analysis of all the factual issues and thereafter juxtaposed same against the obtaining law and *stare-decisis*.

66. Whereas this judge does not lay a claim to infallibility, the manner in which the impugned ruling issued on the January 27, 2022 was crafted, same was such that if the plaintiffs/applicants were aggrieved, the only recourse available was to mount an appeal to the Honourable Court of Appeal or better still apply for review, subject to the provision of order 45 of the *Civil Procedure Rules 2010*.

67. Be that as it may, it is common ground that no appeal was ever filed or lodged against the impugned decision. The reasons, if any, why no appeal was filed is only known to the plaintiffs/ applicants and their wise Legal Counsel.

68. Nevertheless, the plaintiffs have now reverted to this court and same have raised a host of issues, including bias, hostility, incompetence and possibility of compromise.

69. Well said, but it is important to observe that the plaintiffs/applicants are supposed to tender substantive and credible evidence to show that indeed the allegation being made/ bandied around are real.

70. Suffice it to point out that there is an established test for proving existence of real bias. For clarity, it must be bias that is discernable and palpable in the eyes of a reasonable person, that is, a person who is devoid of anger, ill will, bitterness, self-interest and vindictiveness.

71. Simply put, the reasonable person must be one who has a sense of respect for objectivity, the rule of law, the general administration of justice and above all, the *Constitution, 2010*.

72. To buttress, the foregoing observation it is imperative to take cognizance of the holding in the case of *Republic v Honourable Jackson Mwalulu & others* Civil Application No 310/2004, (unreported), where the Court of Appeal held;

> " That being the position as I see it when the courts in this country are faced with such proceedings as this (ie proceedings for the disqualification of the judge) it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice.
>
> The test is objective and the facts constituting bias must be specifically established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi-judicial tribunal they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal".

73. The circumstances under which a judge/judicial officer may recuse himself/herself were also considered and deliberated upon vide the decision in the case of *Philip K Tunoi & another v Judicial Service Commission & another* [2016] eKLR it was held:

> "40. The test in R v Gough was subsequently adjusted by the House of Lords in Porter v Magill [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –
>
> "[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."
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> 41. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.
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> 42. In Taylor v Lawrence [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the judge was biased, the judge

having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:

"... we believe the modest adjustment in R v Gough is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."

"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

74. Other than the foregoing decision where the Honourable Court of Appeal considered the test applicable in determining the existence or otherwise of bias, it is also imperative to take cognizance of the dictum of the East Africa Court of Justice in the case of *Attorney General of Kenya v Anyang Nyong'o*, App No 5,Ref No 1 of 2006, where the court held as follows;

> " For the purposes of this application, we do not find it necessary to delve into the controversy on the test that Dr Kuria addressed us on at length. We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair- minded and informed member of the public, that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case would be"

75. Nourished by the dicta obtaining in the various decisions which I have alluded to in the preceding paragraphs, it is therefore imperative to observe that any applicant, the plaintiffs/applicants herein not excepted, who is desirous to apply for a recusal of a judge/judicial officer must not only pick allegation and throw same on the face of the court, but is required to place before the court tangible, believable and credible evidence.

76. On the other hand, there is also no gainsaying that prior to and before resorting to recusal, the judge/judicial officer must be aware of the obligation and the requirement that same has a duty to sit.

77. Consequently, an application for recusal must be balanced against the principle/doctrine of duty to sit. Otherwise, cunning litigants and I may add, their Legal Counsel who are keen to scuttle hearings, would throw any sort of allegations and thereafter, require recusal.

78. To this end, it is appropriate to acknowledge the elaborate and breathtaking exposition of the law by the Supreme Court of Kenya in the case of *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR, where the court observed as hereunder;

> (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 v General Motors Corporation USDC 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" . . ."

79. Premised on the foregoing, it is my finding and holding that the plaintiffs/applicants herein have not placed before the court any credible and believable evidence to show and demonstrate that there exists evidence of any bias, let alone real bias, on the part of the judge. For clarity, what the law requires is proof of the latter.

80. Similarly, I also found and hold that the plaintiffs/applicants have not placed before the court any evidence to anchor any allegation of compromise. Clearly, compromise connotes/suggest that the court may have been approached and perhaps corrupted prior to the rendition of the impugned decision, which informs the charges being alleged.

81. As pertains to the charge or allegation of compromise, it is common ground that same borders on commission of a criminal offense and breach of Judicial Code of Conduct and in this regard, some scintilla of evidence, pointing to such compromise would suffice.

82. Unfortunately, both the plaintiffs/applicants and their Learned Counsel, were complacent, nay content with flaunting heavy words (read compromise), without endeavoring to dissect, breakdown/ interrogate their import, tenor and implication.

83. In the respect of the accusation and charge of incompetence, the best that I can say is that it appears that incompetence has a different connotation and meaning in the eyes, thinking and mind of the plaintiffs/ applicants and their Learned Counsel.

84. Nevertheless, my short answer to the allegation of incompetence can quickly be addressed by invoking and relying on the wise words and commendations by the Court of Appeal in the case of *Seventh Day Adventist Church East Africa Ltd & 2 others versus Masosa Company Ltd* [2005]eKLR, where the court in acknowledgement of not only the competence, but also meticulousness of the current judge observed as hereunder;

> " When the motion came up for hearing before us on June 22, 2005, Mr Ogutu, in his usual humility, meticulously argued the same in a bid to convince us that the respondents' record of appeal was so defective that we had no option but to strike it out. He referred us to a few authorities in support of his submission."

85. Surely, like wine that grows sweeter/ better with age, the judge herein must have acquired additional wisdom, knowledge and greater sophistication, with age and experience.

86. In view of the foregoing, the best I can say to the allegation/charge of incompetence; is that it must have lost meaning elsewhere and particularly, at the door steps of the plaintiffs/applicants and their Learned Counsel.

87. Finally, I must point out that the current application seeking recusal was merely meant to antagonize the judge/court or otherwise to intimidate same with a view to conjuring fear and disaffection.

88. In a nutshell, to accede to the application herein would be tantamount to abdicating and abandoning the discharge of a constitutional mandate at the altar of thinly veiled threat, blackmail and shrewd intimidation, which must not be countenanced.

89. Simply put, no credible basis has been placed before me to warrant the recusal that has been sought by and at the instance of the plaintiffs/applicants. Consequently and with the usual humility and with a clear conscience, I decline the invite.

Issue number 2

Whether this court is seized or possessed of the requisite jurisdiction to set aside the orders issued in this particular matter, including but not limited to the ruling rendered on the January 27, 2022.

90. Other than the prayer for recusal, the plaintiffs/applicants herein have also contended that this court should proceed to vacate and set aside all the orders that the court has hitherto made in respect of the subject matter.

91. To my mind, the plaintiffs/applicants herein are seeking to invite this court to sit on appeal on own orders and therefore discharge same, albeit without any lawful foundation or basis.

92. However, it is important to point out that the law stipulates and provides limited instances when a court can set aside own orders. However, such instances do not envisaged a court siting on appeal on own orders.

93. In this regard, I have the pleasure and privilege to take cognizance of the holding of the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Benzene Holdings Ltd* (2016)eKLR, where the court stated as hereunder;

> "Apart from the provisions of order 10 rule 11, order 12 rule 7 and order 36 rule 10 of the Civil Procedure Rules, dealing with the setting aside of default judgments, the Civil Procedure Rules does not have a provision for the setting aside of the final judgment. A party aggrieved by a final judgment can either move the court under order 45 for a review of the resultant decree or by lodging an appeal in terms of order 42".

94. From the foregoing decision, it is appropriate to find and hold that the invite by the plaintiffs/ applicants herein, is not only misconceived but is otherwise legally untenable.

95. On the other hand, it is also appropriate to state that the moment a court of law makes a decision, like the impugned decision rendered on the January 27, 2022, the court becomes functus officio. In this regard, this court is not seized of the requisite jurisdiction, mandate or legal capacity to set aside the orders hitherto made in the manner sought.

96. For coherence, it is worthy to recall that the impugned orders that the court is being invited to set aside, were made inter partes and in the presence of Learned Counsel for the plaintiffs/ applicants.

97. Be that as it may, case law abound on the doctrine of functus officio. However, it suffices to cite and reiterate the observation vide the case of *Telkom Kenya Ltd versus John Ochanda (suing on his own*

behalf and on behalf of 996 former employees of Telkom K Ltd) [2014]eKLR, where the court stated as hereunder;

> "The Supreme Court in Raila Odinga v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" [2005] 122 SALJ 832 in which the learned author stated;
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> ..."The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."
>
> The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd v Ai Thani[2002] JLR 542 at 550, also cited and applied by the Supreme Court;
>
> "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

98. Informed and guided by the principle/doctrine of functus officio, I find and hold that this court has no jurisdiction to set aside or vacate the impugned orders which were decisions made inter-partes and certainly in the presence of the concerned parties.

99. Consequently, it is my finding that the prayer herein is not only misconceived, but constitutes a gross abuse of the due process of the law. In this regard, I am duly guided by the meaning, import and tenor of the definition of abuse of the due process enunciated vide the decision in the case of *Muchanga Investment Limited v Safaris Africa Unlimited Ltd* [2009] eKLR.

Final Disposition

100. Having reviewed and analyzed the various perspectives/nuances argued and ventilated by the respective parties, I come to the conclusion that the impugned application, which is erroneously dated April 24, 2021, is devoid of merits.

101. Notwithstanding the foregoing, I beg to reiterate that even on the face of the petition to the Judicial Service Commission which has never been walked to the said Commission ever since the April 24, 2022 (when same is dated) I would still arrive at the same outcome in terms of the impugned ruling rendered on the January 27, 2022.

102. Be that as it may, I have come to the conclusion that the impugned notice of motion is misconceived, legally untenable and bad in law.

103. In a nutshell, the application dated (*sic*) the April 24, 2021 (April 24, 2022) be and is hereby dismissed with costs to the defendants/respondents.

104. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Midenga for the Plaintiffs/Applicants

Mr. Makori for the 1st and 2nd Defendants/Respondents

Mr. George Mutua for the 3rd Defendant/Respondent

Mr. Gitonga for the 4th and 5th Defendants/Respondents

Mr. Allan Kamau for the 6th and 7th Defendants/Respondents