IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CAUSE NO. 48 OF 2022
(Before Honourable Justice Kenyatta Nyirenda)

BETWEEN

GEORGE KAINJA ……...…….... CLAIMANT

AND

DIRECTOR OF THE ANTI-CORRUPTION BUREAU …. 1ST DEFENDANT

THE DIRECTOR OF THE PUBLIC PROSECUTION ..... 2ND DEFENDANT

ATTORNEY GENERAL ……..……..……..... 3RD DEFENDANT

CORAM: HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Nankhuni and Phombeya, Counsel for the Claimant
Messrs. Khunga, Saidi and Chiwala, Counsel for the 1st Defendant
Mr. Sakanda, Counsel for the 2nd Defendant
Mr. Chisiza, Counsel for the 3rd Defendant

RULING

Kenyatta Nyirenda, J.

Introduction

1. This is my Ruling on an application by the 1st Defendant (The Director of the Anti-Corruption Bureau) for an order recusing myself from hearing the matter herein [hereinafter referred to as the "Application for Recusal"].

2. The Claimant (George Kainja) is opposing the Application for Recusal.

Background Information

3. It is desirable, before proceeding to consider the Application for Recusal, to state briefly the history of the matter and so much of the facts as is necessary to make the Application for Recusal intelligible.

4. On 22nd August 2022, the Claimant filed with the Court an application without notice for (a) permission to commence judicial review proceedings against the Defendants and (b) a stay of the decision of the 1st Defendant to arrest and prosecute the Claimant or any other person on the corruption or any other criminal charge based on information or evidence obtained from the British National Crime Agency without the sanction of the Attorney General and based on corruption report in respect of Sattar's dealing with Malawi Government's agencies given to the State President in June 2022 until a further order of the Court.

5. The decisions that the Claimant seeks to be reviewed are as follows:

> *"1] The decision of the 1st Defendant to collaborate with National Crime Agency without involvement or authorization of the 3rd Defendant to investigate the corruption cases involving Malawian resident and citizens including the Claimant or any other Malawian;*
>
> *2] The decision of the 1st Defendant to present a report of its investigation (which investigation did not involve calling the Claimant to present their side of the story) on the said corruption cases to the State President, the Speaker of the National Assembly and the Chief Justice of the Republic of Malawi;*
>
> *3] The decision of the 1st Defendant to arrest the Claimant or any other person and bring them before a court of law when they can simply summon them to attend court on a specific date;*
>
> *4] The decision of the 1st Defendant to prosecute the said Claimant and such other persons against the background of high negative publicity that the said Claimant and such other persons had acted corruptly in execution of their public duties and this negative publicity was partly due to the conduct of the 1st Defendant;*
>
> *5] The decision of the 1st Defendant to flout the Stay Order of the Supreme Court of Appeal stopping the 1st Defendant from acting on the evidence gathered by the Anti-Corruption Bureau working hand in hand with the National Crime Agency of the United Kingdom; and*
>
> *6] The failure of the 2nd and 3rd Defendants to supervise the 1st Defendant in execution of her duties relating to intended or actual investigation and prosecution of the Claimant in so far as the said corruption allegations are concerned."*

6. The application for permission to commence judicial review is a lengthy one – it has 58 pages, excluding attachments thereto. For purposes of the Application for Recusal, the following parts of the application for permission to commence judicial review are relevant:

> *"**GROUNDS ON WHICH RELIEF IS SOUGHT***
>
> ***1.0 THE ISSUE***
>
> *The issue in this case is whether the 1st and 2nd Defendants have correctly discharged their constitutional duties and statutory duties in relation to the impugned decision as set out above.*
>
> ***…***
>
> ***4.0 Factual Background***
>
> *4.1 On 5th October 2021, Zuneth Sattar ('Sattar') was arrested in the United Kingdom on allegations of committing bribery in Malawi with unknown politically exposed persons in Malawi*
>
> *4.2 Sattar's home and offices were searched on the same day and several documents and cell phones were taken from him.*
>
> *4.3 Simultaneously, on the same date and around the same time, the Anti Corruption Bureau (ACB) officers also searched and seized several documents and cell phones from Satta's offices in Malawi at Ocean Industries Ltd.*
>
> *4.4 The search in Malawi, while being spearheaed by the ACB, was carried out in the company of some officials from the United Kingdom Government, and Sattar confirmed this to be true*
>
> *….*
>
> *4.15 Since the day Sattar and Ashok were searched by the ACB both conventional print and electronic media and the social media have been carrying extensive negative stories relating to the said criminal case against the Claimant, Zuneth Sattar and Ashok.*
>
> *4.16 In the social media there has been concerted efforts by certain Malawian individualssuch as Onjezani Stanley Kenani, Iddris Nassar, Timothy Nundwe and Gogo Gowoka who enjoy large following both locally and internationally to discrecdit the Claimant as public official and Sattar as businessman and portray him as corrupt public official and businessman respectively that duped Malawian authorities.*

4.17 The said individuals have also been targeting lawyers representing the Claimant, Ashok and Sattar and accusing them of being unethical, corrupt and crooked lawyers.

4.18 Similarly, they have attacked any judge making any court order in favour of Ashok and Sattar and labelling him/her as corrupt judge.

4.19 So far there has been a deliberate crusade to intimidate:-

4.19.1 lawyers from representing the Claimant and Sattar; and

4.19.2 judges against making orders in favour of the Claimant and Sattar

4.20 Sadly, some of the negative publicity and decampaign has been carried by persons closely associated to the 1st Defendant; and some of the social media posts have carried news items coming from the ACB and those news items could only have been sourced from the 1st Defendant.

4.21 Consequently, it is not far from the truth that the 1st Defendant has been working with some influential social media influencers and commentators such as Onjezani Kenani and Idriss Nassar to negatively influence the judiciary against the Claimant and Sattar."

7. Having considered the application for permission to commence judicial review, I entertained some doubts on a number of issues, particularly on the allegation by the Claimant that the 1st Defendant was acting in breach of "*the Stay Order of the Supreme Court of Appeal stopping the 1st Defendant from acting on the evidence gathered by the Anti-Corruption Bureau working hand in hand with the National Crime Agency of the United Kingdom":* see paragraph 5 of this Ruling. In this regard, I decided to exercise the powers given to the Court under Order 19, rule 20(4), of the Courts (High Court) (Civil Procedure) Rules, 2017 [Hereinafter referred to as the "CPR"] by directing that the matter should come by way of notice on 8th September 2022.

Request by the 1st Defendant for Adjournment

8. Before the set hearing date, Counsel Saidi appeared before me in chambers on 2nd September 2022 to seek an adjournment. He told the Court that he had already discussed the issue with Counsel Nankhuni and that the latter had no objection to the prayer for adjournment to any date after 23rd September 2022. I asked Counsel Saidi if the other parties, that is, the 2nd Defendant and the 3rd Defendant were aware of the request by the 1st Defendant for an adjournment. His response was that he had not yet contacted them but he did not expect problems from them. I reminded Counsel Saidi of the requirement to have adjournments formally done on the set hearing date.

9. On 6th September 2022, the Court received the following letter from the 1st Defendant:

> "**RE: REQUEST FOR ADJOURNMENT IN THE STATE VS DIRECTOR OF ANTI-CORRUPTION BUREAU, DIRECTOR OF PUBLIC PROSECUTIONS AND ATTORNEY GENERAL EXPARTE KAINJA, JUDICIAL REVIEW CASE NO 43**
>
> *Refer to the above captioned subject and to our Counsel Imran Saidi's court appearances on the 2nd of September 2022.*
>
> *This matter is scheduled for hearing on the 8th of September 2022 for an application for an order granting permission to commence judicial review and stay orders.* ***We are grateful to the court for inviting us to be heard in the application****. We however request the honourable court for an adjournment of this matter so that counsels dealing can properly respond and attend to the application. This is a very important case for the Bureau. It needs our utmost attention. The application itself is quite bulky with many foreign cases. Since the date was obtained in our absence, Counsel Chizuma is out of the country and therefore unable to swear a sworn statement and attend court on the set date. Other counsels are also preoccupied with other matters this week e.g., preparation and hearing of the case of Republic v Trevor Hiwa Criminal Case No. 492 of 2017 before Justice Chipao on 5th and 6th September 2022.*
>
> *The above being the case, we are unable to adequately attend to the application as scheduled. We contacted counsel for the claimant, Counsel Gift Nankhuni who agreed to our request for adjournment. By this communication we are alerting counsel for second and third respondents and humbly repeat our request to the court. Any date after 23rd September 2022 would be convenient to us, My Lord."* – Emphasis by boding supplied

10. I pause to observe that the 1st Defendant went out of her way to express gratuity to the Court for not hearing the application for permission to commence judicial review ex-parte. This might be surprising, or should I say confusing, to those people (particularly lay persons) who are not well versed in the procedure that governs the consideration by the Court of applications without notice for permission to commence judicial review proceedings and stay of decisions being challenged. Ordinarily, such applications are dealt with in summary fashion, that is, the judge determines the applications without a hearing and the judge need not sit in open court for that purpose: see **State and others; Ex parte Ziliro Qabaniso Chibambo [2007] MLR 372**. The 1st Defendant is, therefore, grateful that the Court opted not to take the summary route. We will revert to this point in due course.

Documents filed with the Court by the Defendants

11. On 7th September 2022, the 2nd Defendant filed with the Court documents in response to the application for permission to commence judicial review, that is, a

sworn statement made by the learned Senior State Advocate. Mr. Festas Sakanda, and the 2nd Defendant's skeleton arguments. I have read the two documents and they are not relevant to the Application for Recusal in that there is nothing therein related to the Application for Recusal.

12. On 8th September 2022, the 3rd Defendant filed with the Court documents in opposition to the application for permission to commence judicial review, namely, a statement sworn by the learned State Advocate, Mr. Clement Maulidi, and the 3rd Defendant's skeleton arguments. I have read the two documents and they are not relevant to the Application for Recusal in that there is nothing therein related to the Application for Recusal.

13. When the Court convened on 8th September 2022, Counsel Nankhuni informed the Court that he would be fully engaged the week beginning 26th September 2022 with other Court business. This meant that unless the Court determined otherwise, the hearing of the application for permission to apply for judicial review would have to be pended until the week beginning 3rd October 2022.

14. It is trite that applications for permission for judicial review and stay of challenged decisions are by nature matters to be given urgent attention. In this regard and in judicious exercise of the Court's discretion regarding the granting of requests for adjournment, I took the view that hearing the application for permission to commence judicial review more than five weeks after the application had been filed with the Court on 22nd August 2022 would not be in the interest of justice and contrary to the overriding objective of the CPR, that is, to deal with proceedings justly and this includes, among other matters, ensuring that a proceeding is dealt with expeditiously and fairly: see Order 1, rule 5, of the CPR. I, accordingly, adjourned the hearing of the applications to 16th September 2022. We will come back to this decision in a moment because it would seem the 1st Defendant was not amused that the request for the application for permission to commence judicial review to be heard after 23rd September 2022 had been denied.

15. Before moving on, it may not be out of place at this juncture to restate some of the critical points to remember with regard to adjournment. Firstly, as reducing delays is one of the major focus of the Court, the Court wants its business to go ahead. As such a party seeking an adjournment must have a genuine reason for his or her application. Secondly, there is a duty on a party who intends to apply for an adjournment to notify other parties involved as soon as he or she is aware he or she

will be applying for an adjournment. The early notification allows the Court to use the time allocated to the case to run another case. This is one of the factors that the Court will consider in exercising its discretion as to whether to adjourn or not. Thirdly and perhaps more importantly, the decision to grant an adjournment is discretionary. The concerns of the party seeking an adjournment are not the be all and end all of the application. The Court is not confined to regarding the interests of the party making the application. It is also entitled to regard the interests of justice which may well be a different matter. Fourthly, a party requesting an adjournment must have a backup plan in case the application fails. He or she must be prepared to run the case as he or she cannot guarantee that the request for adjournment will be granted by the Court.

16. On 14th September 2022, the 1st Defendant filed with the Court documents in opposition to the application for judicial review, that is, a sworn statement made by Mr. Isaac Nkhoma, Principal Investigations Officer for the Anti-Corruption Bureau and skeleton arguments for the 1st Defendant. It is expedient that the sworn statement made by Mr. Nkhoma be quoted in full. It reads as follows:

> *"1.* ***THAT*** *I am a Principal Investigations Officer and am duly authorized to swear this sworn statement.*
>
> *2.* ***THAT*** *the matters of facts deponed herein have come to my knowledge through my conduct of this matter and I verily believe them to be true.*
>
> *3.* ***THAT*** *on the 4th day of October 2021, the Anti-Corruption Bureau (the "ACB") received a complaint, alleging that Zuneth Sattar and his Agent, Ashok Kumar Speedharan aka Ashok Nair had been giving bribes to Politically Exposed Persons with the aim of influencing various Malawi Government Departments to corruptly award contracts to Zuneth Sattar's companies which included Xelite Strips, Xaxier Ltd and Malachitte FZE.*
>
> *4.* ***THAT*** *upon receiving the complaint, the Director of the ACB authorized an investigation into the allegation in accordance with section 11 (1) (a) of the Corrupt Practices Act.*
>
> *5.* ***THAT*** *after conducting its investigations, the ACB (the 1st Defendant) found that George Kainja (the Claimant) flouted the procedures of the Public Procurement process and received bribes from Zuneth Sattar.*
>
> *6.* ***THAT*** *following these investigation findings, a recommendation that the Claimant be prosecuted under the Corrupt Practices Act was made, and the recommendation was duly approved by the 1st Defendant.*

7. ***THAT*** *an application for the issuance of a Warrant of Arrest for the Claimant was made and brought before the Chief Resident Magistrate Court in Lilongwe who granted it.*

8. ***THAT*** *on the 24th day of June 2022 the Claimant was arrested and brought before the Chief Resident Magistrate Court for him to be informed the reasons for the arrest.*

9. ***THAT*** *it is not correct that the decision to arrest the Claimant was entirely based on the information received from the National Crime Agency (NCA) of the United Kingdom as being asserted by the Claimant.*

10. ***THAT,*** *nevertheless, the issue of the NCA involvement in corruption investigation in Malawi an issue of litigation in the case of Kezzie Msukwa And Ashok Kumar Sreedharan Aka Ashok Nair Judicial Review Case number 54 of 2021 High Court, Lilongwe District Registry (See Exhibit marked "**IN 1**"). The Court found that there was nothing wrong in using such information by the 1st Defendant to base an arrest wholly or partly on NCA information.*

11. ***THAT*** *the issue of how the 1st Defendant should commence cases was also litigated in the above case.*

12. ***THAT*** *being dissatisfied with the decision in the above cited case, the Applicant in that case appealed to the Supreme Court of Appeal.*

13. ***THAT*** *the Supreme Court of Appeal is yet to decide on that case.*

14. ***THAT*** *the conduct of the Claimant therefore smacks of an abuse of Court processes in that the same issues pertaining to the information of the NCA and commencement of cases by the 1st Defendant are again before this Court notwithstanding the fact that the same matters are with the Supreme Court of Appeal.*

15. ***THAT*** *there is nothing wrong (as wrongly claimed by the Claimant in paragraph 1 of his Form 86A) for the 1st Defendant to collaborate with the National Crime Agency without the involvement or authorization of the 3rd Defendant to investigate corruption cases involving Malawian residents and citizens including the Claimant or any other Malawian.*

16. ***THAT*** *the fact of the matter is that the 1st Defendant is legally free to share intelligence with any agency within or without Malawi and use it to discover evidence.*

17. ***THAT*** *it is through that link with other agencies that the 1st Defendant received intelligence from the National Crime Agency of the United Kingdom which intelligence led to the discovery of evidence within Malawi that showed that the*

Claimant had violated the provisions of the Corrupt Practices Act and the Public Procurement and Disposal of Assets Act.

18. ***THAT*** *it is not correct (as wrongly claimed by the Claimant in paragraph 2 of his Form 86A) that the 1st Defendant was wrong to present a report of its investigation on the corruption cases which implicated the Claimant to the State President, the Speaker of the National Assembly and the Chief Justice of the Republic of Malawi.*

19. ***THAT*** *the fact of the matter is that the 1st Defendant is mandated to present reports to Head of State and to the National Assembly and naturally to the Chief Justice.*

20. ***THAT*** *it is not correct (as wrongly claimed by the Claimant in paragraph 3 of his Form 86A) that the 1st Defendant violated any law when she decided to use the arrest method of bringing the Claimant to Court rather than the summoning method.*

21. ***THAT*** *the fact of the matter is that the 1st Defendant has discretion to use either method without offending any law.*

22. ***THAT*** *the 1st Defendant denies any involvement in the claims made by the Claimant in paragraph 4 of his Form 86A.*

23. ***THAT*** *the fact of the matter is that the 1st Defendant has no control over any negative publicity of any person, including the Claimant, whom she may decide to prosecute on charges of corruption. Neither is she influenced by such negative publicity in any way.*

24. ***THAT*** *it is not correct (as wrongly claimed by the Claimant in paragraph 5 of his Form 86A) that the 1st Defendant flouted the stay order of the Supreme Court of Appeal when she arrested the Applicant.*

25. ***THAT*** *the truth of the matter is that the Order of Stay of the Supreme Court of Appeal in that case applied to the Applicants only and to nobody else.*

26. ***THAT*** *it is not correct (as wrongly claimed by the Claimant in paragraph 6 of his Form 86A) that the execution of duties of 1st Defendant, in her decision-making process, needs the supervision of the 2nd and 3rd Defendants.*

27. ***THAT*** *though the 1st Defendant may seek authority to prosecute corruption cases from the 2nd Defendant and though, like any other prosecuting agencies in Malawi, the 1st Defendant may request the 3rd Defendant to process Mutual Legal Assistance, these relationships of the two Defendants with the 1st Defendant do not make the two Defendants supervisors of the 1st Defendant when it comes to her decision-making process.*

28. ***WHEREFORE*** *I humbly pray to this Honorable Court for the following orders;*

a. an order dismissing the application for Judicial Review.

b. An Order for costs in favor of the 1st Defendant."

17. I have also taken time to read the skeleton arguments by the 1st Defendant and they are not relevant except perhaps the following:

"***2.0 ISSUE***

2.1 Whether or not permission to commence Judicial Review should be granted to the Claimant

3.0 THE LAW

3.1 Before we narrow down to the main argument, it is pertinent to observe and highlight at the outset that the Claimant is making this application for himself only and not the others as his application shows. Judicial Review remedy is ONLY (emphasis intended) available to an individual who has been affected by a decision that has been made. A claimant cannot make an application on behalf of another party.

…

4.1.4 The Claimant further faults the 1st Defendant to prosecute the Claimant and such other persons against the background of bad publicity which was due to the 1st Defendant. It is important that the Court takes judicial notice of the fact that matters of corruption are topical issues in the country and lead to all kind of emotions in the citizenry. Moreover we now live in times where information is speedily and widely shared on social media.

4.1.5 The 1st Defendant is not responsible for how such information gets handled by the general public. The 1st Defendant is not the one who went on crusade of spreading such information neither does she have any control on how the public opinion should be handled in respect of information that it receives. Thus, this too cannot be a plausible ground one which a competent court would grant permission to apply for Judicial Review.

…

4.2.8 The Claimant is further seeking a declaratory order because of the decision by the 1st Defendant in presenting a report of its investigation (which investigation did not involve calling the Claimant to present their side of the story) on the said corruption cases to the State President, the Speaker of the National Assembly and the Chief Justice of the Republic of Malawi. The court will take judicial notice that in respect of this report in question,

the 1st Defendant presented it on request of the State President. It is our submission that this claim against the 1st Defendant by the Claimant is misplaced, The report was only submitted at the request of the President. Moreover, it is trite that the Court notes that what the 1st Defendant submitted was not an investigation report but rather an overview of the Sattar bribery allegations following the issues that came out of court proceedings in United Kingdom and also preliminary findings in the ongoing investigations of the said allegations by the Bureau. There was no investigation report the Claimant is merely being speculative. We wish the Claimant produced such a report as their evidence on his assertion and because of that this court should not be moved at all to make a decision on a speculative aspect which the claimant is trying to rely on."

Notice of Motion for Preliminary Objections

18. On 15th September 2022, the 1st Defendant filed with the Court a **"NOTICE OF MOTION FOR PRELIMINARY OBJECTIONS**". The Notice is said to be made pursuant to Order 10 rule 1 of the CPR and section 9 of the Constitution. The body of the Notice will be quoted in full:

*"**TAKE NOTICE THAT** on 16th day of September 2022, prior to the hearing of this matter, the 1st Defendant shall through Counsel make the following preliminary objection;*

a. An application for recusal of the presiding judge namely Justice Kenyatta Nyirenda for being conflicted with the issues raised by the Claimant.

b. An application to discharge the 2nd and 3rd Defendants from the case on the grounds that they do not have authority to supervise the 1st Defendant in the execution of her investigative powers.

c. An application that the claimant cannot make an application on behalf of unknown people.

Dated the ---------- day of ---------- 2022

REGISTRAR" - Emphasis by underlining supplied

Application for Recusal

19. Having regard to the number of Counsel appearing in the case and acting in compliance with Covid-19 Precautionary Measures, the Court convened on 16th September 2022 in "open court" although what was before the Court for its

consideration was a chamber matter. Before introduction of Counsel could take place, Counsel Saidi stated that the 1st Defendant had an application which had to be made in chambers, that is, the Application for Recusal. Accordingly, Counsel of all the parties and I moved from "open court" to the Judge's Chambers.

20. Upon settling down in the Judge's Chambers, I asked the 1st Defendant to make the Application for Recusal and I thereafter asked Counsel for the other parties to make their addresses. The following is a written record of the notes that I took in long hand:

> *"Case called in Chambers at 10:10 am.*
>
> *Counsel Saidi*
>
> *We seek that you recuse yourself. The information is sensitive. It has to do with the Sattar Report. Because of that, filing an application in writing was not found to be the right thing. The Bureau deals with very sensitive information. This is why we have not filed it in writing. We are using the oral application route under Order 10, rule 9, of the CPR.*
>
> *Counsel Nankhuni*
>
> *We were served with the notice of Preliminary Objection yesterday afternoon. It was not signed by the Court. It is a defective document. It had to be signed by both the Registrar and Counsel of the 1st Defendant.*
>
> *By filing a written notice, the 1st Defendant has taken itself away from the right to do an oral application. Order 10, rule 4, of the CPR should have been followed: So too Order 20 of CPR as read with the case of NBS Bank Plc v. Dean Lungu MSCA Civil Appeal No. 19 of 2019. The case was dismissed for failure to file sworn statement and skeleton arguments.*
>
> *In essence, the Court should not even be hearing the preliminary objection.*
>
> *You should hear the main case.*
>
> *That is all.*
>
> *Counsel Sakanda*
>
> *We are not aware of this application. The notice of preliminary objection was not served on 2nd Defendant. That said, we have no objection to the application.*
>
> *Counsel Chisiza*
>
> *We were not served with Notice of the Preliminary objection but we are not opposed to the application in principle.*

Counsel Khunga

On irregularity, the Court should look at Order 2, rule 2, of the CPR. Any irregularity is not fatal. The Court should also apply the principles in Order 1, rule 5, of the CPR which is on the overriding objective of the Rules.

The nature of our application for your recusal are matters that the Court should also consider in its determination.

Court: Ruling reserved.to 3rd October 2022. I need time to read the documents on the Court file. Most of the documents, including the Notice of Preliminary Objections were not brought to my attention until late since I had another case this morning.

Signed

Justice K. Nyirenda
10:21 am"

Order 10 of the CPR

21. Order 10 of the CPR contains rules of procedure in respect of applications in proceedings and interlocutory orders in all civil proceedings in the High Court. Other rules of practice and procedure only apply when it is so provided by an Act of Parliament or any other written law: see Order 1, rule 3(2), of the CPR.

22. The relevant part of Order 10 of the CPR states:

> *" 1. A party may apply during a proceeding for an interlocutory order or an interlocutory direction of the Court by filing an application in a proceeding in Form 4.*
>
> *2. (1) An application in a proceeding shall—*
>
> *(a) be signed by the applicant or the applicant's legal practitioner;*
>
> *(b) cite the same parties as in the proceeding and anyone whose interests are affected by the order sought; and*
>
> *(c) be signed and sealed by the Registrar.*
>
> *(2) Nothing in this rule shall prevent a party to a proceeding from making an oral application during the proceeding or the Court making an order on an oral application.*

(3) A party may apply for an interlocutory order at any stage, namely, before a proceeding has started, during a proceeding, or after a proceeding has been dealt with, and whether or not the party mentioned the particular relief being sought in his summons or counterclaim.

(4) An application for an interlocutory order under rule 1 shall—

(a) state the relief sought by the applicant; and

(b) have with it a sworn statement by the applicant or his legal practitioner setting out the facts that support the relief sought, unless—

(i) there are no questions of fact that need to be decided in making he order sought; or

(ii) the facts relied on in the application are already known to the Court.

(5) An application for an interlocutory order shall be served on the other party to the proceeding, unless —

(a) the matter is so urgent that the Court decides the application in a proceeding should be dealt with in the absence of the other party; or

(b) the Court orders, for good reason, that there is no need to serve it on the other party.

(6) The application for an interlocutory order before the hearing of a proceeding shall be served at least 2 clear days before the time set for hearing, unless the Court orders otherwise.

(7) An application for an interlocutory order made during a proceeding shall not be dealt with in open court unless—

(a) it is in the public interest that the matter be dealt with in open court; or

(b) the Court is of the opinion, for good reason, that the matter should be dealt with in open court.

(8) (1) A person may apply for an interlocutory order before a proceeding has started ... [rule not applicable to the present case]

(9) The Court may allow an oral application in a proceeding to be made where –

(a) the application is for urgent relief;

(b) the applicant undertakes to file an application in a proceeding within the time directed by the Court; and

(c) the Court considers it appropriate –

(i) because of the need to protect persons or property;

(ii) to prevent the removal of persons or property from Malawi; or

(iii) because of other circumstances that justify making the order asked for."

23. The first thing to note is that unlike the Notice of Motion for Preliminary Objections which gave a citation of the law under which the Notice was being given, the 1st Defendant has cited no law under which the Application for Recusal has been brought.

24. It is commonplace that a party who seeks to move the Court has to cite the specific provision (s) of the law that clothes the Court with the jurisdiction that the party seeks to invoke. An application that does not cite the law under which it has been brought is as good as an application grounded on a wrong legal provision. Both are bound to fail, that is, the applications will be dismissed in limine: see **Chande v. Indefund Ltd** 2010 MLR 229 and the Kenyan case of **Aviation & Allied Workers Union Kenya v. Kenya Airways Limited & 3 others** [2015] eKLR. In the latter case, the Kenyan Supreme Court of Appeal had this to say on the need of moving the court under proper law:

> *"We have noted that the applicant has cited Sections of the Supreme Court Act and Rules which are applicable when one seeks leave, and grant of certification. In Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone, Sup. Ct. Application 2 of 2012, this Court stated [paragraph 23]:*
>
> > *... It is trite law that a Court of law has to be moved under the correct provisions of the law.*
> >
> > *A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make 'omnibus' applications, with ambiguous prayers, hoping that the Court will grant at least some.*

25. Failure by the 1st Defendant to cite the provision under which the Application for Recusal has been made is fatal. This is the first ground why the Application for Recusal has to be dismissed.

26. Even if the Court was to give the 1st Defendant the benefit of doubt by assuming that the Application for Recusal has been brought by invoking Order

10, rule 1, the CPR, as was the case with Notice of Motion for Preliminary Objections, the said provision is an "omnibus" provision, providing for the mode of making any application which the law gives a party a right to make. Order 10, rule 1, of the CPR does not provide for the making of an application for recusal of a judge. The right of a party to apply for recusal of a judge has to be found elsewhere. On that score alone, the Application for Recusal lacks legal basis. This is the second reason why the Application for Recusal has to be dismissed.

27. The Application for Recusal is an application in a proceeding. In terms of Order 10, rule 1, the CPR, an application in a proceedings has, among other things, to be signed and sealed by the Registrar. The Application for Recusal has not met this requirement. This is the third reason why the Application for Recusal has to be dismissed.

28. For the sake of argument, we will proceed as though the Notice of Motion for Preliminary Objections was the Application for Recusal. Even in that case, the Application for Recusal would have been deficient in that, as was rightly observed by Counsel Nankhuni, the Notice was neither signed nor sealed by the Registrar. This is the fourth reason for dismissing the Application for Recusal.

29. The Application for Recusal has also been brought contrary to the provisions of Order 10, rule 5, of the CPR. In terms of that provision, the Application for Recusal should have been served on all the other parties to this case. This was not done. This is the fifth reason why the Application for Recusal has to be dismissed.

30. Here again, we will proceed for the sake of argument as though the Notice of Motion for Preliminary Objections was the Application for Recusal. Even going on that basis, the Application for Recusal does not meet the requirements of Order 10, rule 5, of the CPR because the Notice was only served on the Claimant but not the 2nd and 3rd Defendants. This is the six reason for dismissing the Application for Recusal.

31. Order 10, rule 6, of the CPR is related to Order 10,rule 5, of the CPR in that it requires an application to be served at least two clear days before the time set for hearing. The 1st Defendant breached this requirement as discussed in paragraphs 29 and 30 of this Ruling but the breach here is with regard to time within which the application had to be done. This is the seventh reason for dismissing the Application for Recusal.

32. Order 10, rule 9, of the CPR deals with oral application. A Court may allow an oral application in a proceeding to be made where three conditions are met. Firstly, the application has to be for urgent relief. Secondly, there must be

an undertaking by the applicant to file an application in a proceeding within the time directed by the Court. Thirdly and lastly, the Court has to consider allowing oral application appropriate for one or more of the following reasons:

(i) the need to protect persons or property;

(ii) to prevent the removal of persons or property from Malawi; or

(iii) other circumstances that justify making the order asked for.

33. It is important to note that Order 10, rule 9, of the CPR uses the conjunctive word "and" to connect paragraphs (a), (b) and (c). This being the case, an oral application has to meet all the conditions in rule 9 for it to be granted: see **The State (On application of Lin Xiaoxiao and Others) v. The Director General – Immigration and Citizenship Services and Another,** Judicial Review Cause No. 19 of 2020 and **Phindu Hessian Scheme Limited v. Tobacco Commission and Another,** Civil Cause 507 of 2020.

34. The Application for Recusal does not satisfy most of the conditions in Order 10, rule 9, of the CPR, if not all. This is the eighth reason why the Application for Recusal has to be dismissed.

35. The ninth reason for dismissing the Application for Recusal has to do with skeleton arguments. The Application for Recusal was not accompanied by any skeleton arguments. This is contrary to the requirements of Order 20, rule 1, of the CPR which requires that *"in all interlocutory applications the parties shall file and serve skeleton arguments to be relied upon at least 2 days before the hearing of the application"*. The rationale behind Order 20(1) of CPR is to remove the element of surprise. To make matters worse, Counsel for the 1st Defendant made no reference at all to any authority, caselaw or otherwise, in support of the Application for Recusal. As a result of these omissions, the Court still entertains serious doubts as to whether the Application for Recusal is properly grounded.

36. I have said sufficient, I think, to make it clear that the Application for Recusal is seriously flawed – it has not been competently brought in so far as procedure is concerned. Looking at the serious nature and the many and varied irregularities at play in relation to the Application for Recusal, I am not persuaded by the oral submissions made by Counsel for the 1st Defendant that the irregularities are curable under Order 2, as read with Order 1, rule 5, of the CPR. The fact of the matter is that the Application for Recusal is beyond redemption.

37. However, the Court will not be so pedantic to rest its decision to dismiss the Application for Recusal solely based on the gross procedural irregularities.

Rather, the Court has opted to go one step further and examine the substance, if any, of the Application for Recusal, guided by the applicable law on recusal of judges.

Applicable Law and Principles Governing Recusal by a Judge

38. Impartiality of the courts is one of the fundamental principles of a legal system. The bedrock requirement of impartiality is that no one is to be a judge in his own cause. In the case of the **Government of the Republic of Malawi v. Malawi Mobile Limited**, Appeal No. 1 of 2016, COMESA Court of Justice, the point was put thus:

> *"One of the cornerstones of a legal system is the impartiality of the Courts by which justice is administered. The concept of a fair and an impartial judiciary is as old as the history of the courts, and rules designed to assure impartiality have been enacted since ancient times. It is obvious that bias and partiality are two characteristics anathema to the judicial robe."*

39. The Constitution, in section 9, acknowledges explicitly the paramount importance of the concept of impartiality. The section states as follows:

> *"The judiciary shall have the responsibility of interpreting, promoting and enforcing the Constitution and all laws and in accordance with the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law*." – Emphasis by underlining supplied.

40. Section 9 of the Constitution makes it clear that in deciding cases the Court is enjoined to act independently and in impartial and to take into account only legally relevant facts and prescriptions of the Court. To my mind, a judge who decides a case contrary to the requirements of sections 9 of the Constitution is not only unpatriotic but also a great threat to the rule of law: see **The State (On application of Lin Xiaoxiao and Others) v. The Director General – Immigration and Citizenship Services and Another**, Judicial Cause No. 19 of 2020 otherwise popularly known as *"The law is the law"* judgement. .

41. Impartiality falls into two broad categories, namely, actual bias and appearance of bias. Actual bias is best explained by Lord Bingham of Cornhill in **Donaldson v. Scottish Ministers** [2004] UKHL 34 as follows:

> *"The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on*

their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorized as one of actual bias. But the expression is not a happy one, since "bias" suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment." – Emphasis by underling supplied

42. Proof of actual bias on the part of a judge will lead to his or her automatic disqualification from hearing the case before the Court: see **In re: Pinochet** [1999] 1 AII ER 577, wherein Lord Browne Wilkinson expounded on both actual bias and appearance of bias as follows:

"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First, it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example, because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefitting, but providing a benefit for another by failing to be impartial." – Emphasis by underlining supplied

43. It is trite that a party who requests a judge's recusal must prove conduct or misconduct of the judge that would to a fair minded person or observer prevent the judge from acting with impartiality. Otherwise, a judge's impartiality will be presumed: see **Macdonald Kumwembe, Pika Manondo and Raphael Kasambala v. Republic,** Criminal Appeal No 5 of 2017 and Criminal Appeal No 6 of 2017 (unreported) and **President of the Republic of South Africa & ors v. South African Rugby Football Union** 1999 (4) SA 147 CC**.** In short, a party alleging partiality on the part of a judge must prove such allegation by cogent evidence. This position of the law makes a lot of sense because it cannot be, per the dictum of

Cardmore J. in **Drexel Burnham Lamber Inc, 861 F. 2d 1307 p1309 (2nd Cir, 1998),** that every time a litigant claims to see smoke then the court is bound to find that there is a fire.

44. The test of reasonable apprehension of bias is an objective one. The test has been stated in many various ways but it boils down 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 or her mind to the case impartially. It goes without saying that a party who seeks disqualification of a judge comes to court because of his own perception that there is an appearance of bias on the part of the judge. However, on its part, the court has to imagine 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: see **Government of the Republic of Malawi v. Malawi Mobile Limited**, supra.

45. In **Dublin Wellwoman Centre Ltd v. Ireland** [1995] 1 I.L.R.M. 408 at 421, Justice Denham, delivering the judgment of the Supreme Court of Ireland, said:

> *"But the test is objective; not whether the learned High Court Judge considered she was or was not biased; nor whether the appellant considered the judge was or was not biased; but whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions of the learned High Court Judge in her capacity as chairwoman of the Commission on the Status of Women would prevent a completely fair and independent hearing of the issues which arise. The apprehension of the reasonable person in the position of the appellant is what has to be considered."*

46. In **President of the Republic of South Africa v. South African Rugby Football Union,** supra, the Constitutional Court of South Africa expressed the objective test in the following terms, at paragraph 48:

> *"…the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial*

officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial." – Emphasis by underlining supplied

47. There is also the English case of **Davidson (AP) v Scottish Ministers** [2004] UKHL 34 where the House of Lords held that:

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal would be biased".*

48. It goes without saying that a motion for recusal of a judicial officer must not be based on the mere figment of imagination of an applicant. In line with what was said above about the need to adduce cogent evidence in order to successfully prove bias of a judicial officer, it was held in **S.A. Rugby Football Union case** (supra) as follows:

> *"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test."* – Emphasis by underlining supplied

49. The objective test has been endorsed by courts in Malawi. If at all any authority were to be needed, the decisions by the Supreme Court of Appeal in the cases of **Sumuka Enterprises Ltd v. The Registered Trustees of African Businessmen Association (MW)** 10 MLR 264 and **The State v. Council of the University of Malawi and Others** [2011] MLR 381 and **Macdonald Kumwembe, Pika Manondo and Raphael Kasambala v. Republic,** supra, would suffice.

50. **Sumuka Enterprises Ltd v. The Registered Trustees of African Businessmen Association (MW)**, supra, is well known for the oft-cited dicta by Skinner, C.J at page 270:

> *"We are satisfied that the test which should be applied in matters of this nature is whether or not a reasonable man, in all the circumstances of the case, would think that his case was not being fairly tried. It would be very rare indeed that a judge would recuse himself in the course of the trial on the basis that his conduct of it has been such as to give rise to a reasonable suspicion that the hearing was not unbiased. The test which we have enunciated, which in our view is all-embracing in the sense that it covers conduct at the trial and matters extraneous, such as where the judge might have a financial interest in the affairs of one of the parties or where he has dealt with criminal proceedings founded on the same facts as the civil proceedings. He would then recuse himself at the outset of the*

trial. But it would be very rare indeed where circumstances arose in the judge's conduct of the trial which would justify his recusing himself. Faults in the conduct of the trial should be left for a decision by the Supreme Court of Appeal on an appeal against the verdict of the trial court."

51. The following dicta by the Supreme Court of Appeal in **Macdonald Kumwembe, Pika Manondo and Raphael Kasambala v. Republic**, supra, at page 31, is pertinent:

"The test from this Court – Sumuka Enterprise v African Business Association – was that of a reasonable man. The court below in In re Republic v Kadwa and section 42 (2) (f) of the Constitution and the Criminal Procedure and evidence Code referred to the reasonable man and the fair-minded observer. This court in State v The State President of Malawi and others, ex parte The Council of the University of Malawi, adding on Sumuka Enterprises Ltd v African Business Association, refers to a reasonable man who has information. The test – now universally followed – is that of a fair-minded and informed observer."

52. The application of the objective test involves two steps. The following passage in the judgment of Basten JA in **Barakat v Goritsas** (No 2) [2012] NSWCA 36 is instructive and illuminating. At paragraph 9, Basten JA quotes Gleeson CJ, McHugh, Gummow and Hayne JJ as follows:

"Its application [objective test] requires two steps. First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second is no less important." – Emphasis by underlining supplied

53. Thereafter, Basten JA proceeded to expresses his position at page 9, para. 12, thus:

"It is accordingly incumbent upon the party seeking recusal to identify the issues which will need to be determined, the conduct which gives rise to the apprehension and the logical connection between the conduct and issues. There was a tendency in the applicants' submissions to gesture rather too sweepingly towards statements made by the judge…without seeking to articulate the relevant reasoning by which the fair-minded…observer would attribute a level of prejudgment warranting recusal". – Emphasis by underlining supplied

54. The long and short of the authorities discussed above is that, at a minimum, a person seeking recusal of a judge must lead cogent evidence to substantiate his or her allegation of biasness on the part of the judge. In the present case, the 1st Defendant has not adduced even an iota (scintilla) of evidence in support of the Application for Recusal. The 1st Defendant pleaded with the Court to understand

why the 1st Defendant could not be expected to give evidence in support of the Application for Recusal. The claim is that the information is sensitive. To my mind, the reason given by the 1st Defendant lacks merit. It will recalled that the Court moved from open court to chambers at the instance of the 1st Defendant. This was done so that the 1st Defendant could freely adduce whatever evidence the 1st Defendant had, be it sensitive, secret, confidential or otherwise. I, therefore, find it totally astonishing that once in chambers the 1st Defendant turned around and said that no evidence would be adduced in support of the Application for Recusal.

55. It is mind boggling how the 1st Defendant expects the Application for Recusal to succeed when there is no evidence in support thereof. As already alluded to, section 9 of the Constitution enjoins the Court to decide matters "with regard only to legally relevant facts and the prescription of law". The phrase "legally relevant facts" has to be unpacked. Generally, facts are proved by leading evidence which has to be relevant and admissible. I very much doubt if the utterances made by Counsel in respect of the Application for Recusal fall within the phrase "legally relevant facts" as used in section 9 of the Constitution particularly when regard is had to the fact that the said statements were not even made under oath.

56. To make matters worse, the 1st Defendant has cited no authority at all that would allow this Court to go against such a weighty provision of the Constitution, namely, section 9 of the Constitution. That no authority has been cited does not come to me with a sense of surprise. It appears to me that such an authority would be novel and somewhat strange. I like the way one of my brother judges expresses the point: in so far as court matters are concerned, there is no such thing as the oracle has spoken – you have to prove your allegation, claim, defence, etc

57. In so far as the Application for Recusal is not supported by "legally relevant facts and prescriptions of law," it is based on the mere figment of imagination of the 1st Defendant. An allegation that is not supported by evidence remains just that, an allegation – it is not a fact let alone a legally relevant fact. In this regard, the Application for Recusal is unfounded: see **Attorney General of the Republic of Kenya v. Professor Anyang' Nyong'o**, supra. It is trite law that an unfounded apprehension of bias concerning a judicial officer is not a justiciable basis for his or her recusal: see **President of the Republic of South Africa & ors v. South African Rugby Football Union,** supra**.** There is no evidence or basis to found such an apprehension. This is the tenth ground why the Application for Recusal has to be dismissed.

58. There is an eleventh reason why the Application for Recusal has to be dismissed. The 1st Defendant has failed to identify the issues that have to be determined. It will be recalled that according to the Notice of Motion for Preliminary Objections, the allegation is that I am "conflicted with the issues raised by the Claimant". The 1st Defendant has made no effort at all to identify (a) the issues raised by the Claimant, (b) the conduct on my part which gives rise to the 1st Defendant's apprehension of bias and (c) the logical connection between the conduct on my part and the issues raised by the Claimant. In any case, according to the Claimant, the issue in this case is whether the 1st and 2nd Defendants have correctly discharged their constitutional duties and statutory duties in relation to the impugned decision. Honestly, how can it be said that I am conflicted with such an issue. The allegation does not make sense by itself. There was need for the 1st Defendant to explain what is meant by "conflicted with the issues raised by the Claimant". Unfortunately, here again the 1st Defendant made no effort to shed light on this by way of evidence or otherwise.

Important Lessons from the Applicable Law

59. Firstly, whilst a proper application of recusal of a judge guards the impartiality of the justice system, any abuse or misapplication of the recusal rules would only serve to undermine the administration and delivery of justice. In this regard, the observations by the Supreme Court of Appeal in **The State v. Council of the University of Malawi and Others**, supra, at page 390, are instructive:

> *"It is vitally important that judicial officers should not be unjustifiably taken off a case, as it is that they should not take or continue a case where it would be inappropriate to do so. These are two sides of the same coin. One should not be emphasised at the expense of the other"* – Emphasis by underling supplied

60. To this end, I totally agree with the sentiments expressed by the Constitutional Court of South Africa in the **S.A. Rugby Football Union case** (supra) para. 104 that:

> *"…While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them a right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the cases in their favour…"*

61. Secondly, a party wishing to apply for the recusal of a judge must ensure that he or she conducts a thorough investigations into the matter. Needless to say, the question whether I have sat on other Sattar-related cases or not is relevant. In this

regard, I instructed the Assistant Registrar to list down all Sattar-related cases that I have handled and/or pending before my Court. The result of the research by the Assistant Registrar shows that there is only one such case before my Court, namely, **Ashok Kumar Sreedharan v. Martha Chizuma** (Civil Cause No. 64 of 2022). Civil Cause No. 64 of 2022. The case was filed with the Court on 15th February 2022.

62. In Civil Cause No. 64 of 2022, the claimant avers that the defendant in an audio recording of a conversation between the defendant and a person unknown to the claimant falsely and maliciously spoke and published words concerning the claimant. The claimant alleges that the words, in their natural and ordinary meaning, were understood to mean that the claimant (a) is an extremely corrupt person, (b) corrupted a judge to have him released from custody, (c) is so corrupt that the whole justice system will not help and (d) is a criminal who has committed an offence punishable with imprisonment.

63. The defendant in Civil Cause No. 64 of 2022 filed her statement of defence wherein, among other matters, she denies (a) recording or publishing the said confidential telephone conversation and (b) that in their natural and ordinary meaning, the transcribed words bear the meaning being ascribed to them by the claimant. She also avers that the statements that she made were fair comment on issues which are in the public domain and they are also privileged.

64. Both parties in Civil Cause No. 64 of 2022 have filed their respective statements of issues and the case is on the queue of so many other cases waiting to be assigned dates for mediation session.

65. I would have thought, in my not-so-fanciful thinking, that if indeed I am conflicted as alleged by the 1st Defendant, my recusal would also have been sought in Civil Cause No. 64 of 2022. As already stated, Civil Cause No. 64 of 2022 was commenced on 15th February 2022 but no application for my recusal has been made in that case. The fact that no application for my recusal has been made in that case raises a key question, that is, why is my recusal being sought in the present case?

66. It is significant to remember that the 1st Defendant highly praised my handling of the application without notice for permission to commence judicial review proceedings against the Defendants and a stay of the challenged decision. Where did things go wrong? I reckon it is when the Court decided not to entertain the application by the 1st Defendant to have the inter-partes hearing adjourned to a date

after 23rd September 2022. My worry is that this kind of conduct by the 1st Defendant might unwittingly give credence to the claims such as those by the Claimant that the 1st Defendant does not graciously accept defeat in a legal tussle before the courts of law.

67. Thirdly, there is cause for concern arising out of the number and the nature of applications for recusal coming before our courts. It would appear to me that some litigants are bent on borrowing a leaf from their counterparts in United Kingdom by heavily relying on recusal applications as a litigation strategy. In the words of Justice Peter Smith in **Emerald Supplies Ltd v. British Airways [2015] EWHC 2201 (Ch),** at paragraph 44:

> ***"****It is becoming a regrettable feature that some litigants now regard a recusal application as one of the tools they can deploy in aid of their case"*

68. Fourthly, allow me to quote the following passage, full of wisdom, in the Ruling by Katsala, J, as he then was, in the case of **Lingston M. Phekhani v. NBS Bank**, Commercial Cause No. 151 of 2014, Commercial Division, Blantyre Registry, at pages 9 and 10.

69. The passage at page 9 reads:

> *"In Mulli Brothers Ltd v Malawi Savings Bank Ltd MSCA Civil Appeal Number 10 of 2013 (unreported) the Supreme Court of Appeal reiterated what it said in The State and Council of University of Malawi v The President of Malawi and others MSCA Civil Appeal Number 41 of 2011 that it is the duty of counsel to inform his client that allegations of bias or prejudice against a judge are serious matters and should only be made when there are reasonable grounds that the judge may be impartial. This statement, in my view, goes to the root of the duty and responsibility of counsel as an officer of the Court. Counsel must understand that he "is a helper in the administration of justice. He is there to help the judge, and, when there is a jury, help the jury, to arrive at a proper result in the dispute between the parties" per Singleton LJ in Beevis v Dawson and others [1956] 3 All ER 837, at 839. Inasmuch as it is the duty of counsel to safeguard the interests of his client, it is also his duty to always work towards upholding and promoting the integrity of the Court and the entire judicial system. Thus he must accept instructions to attack the independence and impartiality of a judge only where there are reasonable grounds for doing so. Counsel should not just regurgitate every fear that his client may entertain in the course of the proceedings. It is his duty to always apply his professional judgment and to offer sound advice to the client. He must strike a balance between his duty to his client and his duty to the Court. I guess it is not easy especially when counsel is emotionally involved and charged with his client's case, something which, unfortunately, is becoming more common for lawyers these days. But I am confident that with experience and a great measure of maturity, counsel should not find this too difficult to embrace. It is my considered view that, in the present case, if counsel had applied himself soberly and approached the issue*

with a degree of professional detachment, he would have seen the hollowness in the application and would have advised his client not to make it. As I have already mentioned, no affidavit was filed in support of the application. Counsel only spoke from his head. He was not specific in the exact words that I am alleged to have said or which part of my Ruling on his client's application for injunction were the basis of his client's apprehension. As a result there is not much that one can look at as supporting this application. In my considered view, there were no reasonable grounds for making the application."

70. The following passage appears on page 10:

"Last, but certainly not least, I wish to remind judges that they must always be careful and vigilant when faced with applications for recusal. There is a danger that sometimes applications for recusal may be used as a masquerade for judge-shopping. Judges must be cognizant of the fact that judge-shopping takes diver forms and that those that engage in it are very crafty and will not stop at anything in their scheming. It is everyone's duty to ensure that this evil is not facilitated and that it does not take root in our judicial system. It is therefore imperative that the need to ensure the appearance as well as the reality of impartiality must always be reconciled with the proper functioning of the judicial system, Rooney v The Minister for Agriculture [2001] 2 ILRM 37. So, judges must not be too quick to disqualify themselves whenever there is an invitation to do so - lest they fall prey to the schemes of judge-shopping. Only in cases where the applicant has demonstrated to the judge's satisfaction that a reasonable man, in all the circumstances of the case, would think that his case was not being fairly tried should the judge accede to the invitation. Otherwise, the system in our Court that ensures judicial independence in the allocation of court business to judges and guarantees litigants to a 'natural judge' will be circumvented and compromised Re Ministry of Finance, ex parte SGS Malawi Ltd, Miscellaneous Civil Application Number 40 of 2003 (unreported)."

71. I cannot agree more with what is stated by His Lordship in the two passages quoted above. I have nothing useful to add except to stress one point. Application for recusal of a judge have the real potential of not only tarnishing the reputation of the judge concerned but also causing him or her to suffer psychological, mental and emotional pain (lest we forget, judges are human beings too), irrespective of whether the application for recusal succeeds or it fails for being frivolous. It is, therefore, imperative that a party thinking of making an application for recusal of a judge must not bring it unless he or she is definite that there are good grounds for doing so and, more importantly, he or she has "legally relevant facts" to prove the allegation to the high standard of proof set by the law. Bare allegations will not do. The practice of making unsubstantiated allegations of bias must be left to the Luhangas and Longwes of this world and people of their ilk.

72. Fifthly and finally, I have a message in the form of civic education, so to say, for litigants and all Malawians generally. Much as the High Court is vested with vast

powers (including unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law), the High Court is not the final arbiter on judicial matters. The apex court in Malawi is the Supreme Court of Appeal. A party that is not satisfied by a decision of the High Court is fully entitled to appeal to the Supreme Court of Appeal against the decision of the High Court. There is, therefore, to my mind, no justification whatsoever for a person who is dissatisfied with a decision of the High Court to issue threats of physical violence against High Court judges or indeed to resort to dastardly and primitive schemes of staging road accidents of judges with a view to causing them grievous harm and/or, God forbid, assassinating (the word is used advisedly) them.

Conclusion

73. By way of concluding (for good now), I am satisfied based on all the eleven reasons stated herein that the 1st Defendant has not made out a case for my recusal. Accordingly, the Application for Recusal is dismissed with costs.

Pronounced in Chambers this 3rd day of October 2022 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE