IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA

(Coram: Moijo M. ole Keiwua P, Joseph N. Mulenga VP, Augustino S. L. Ramadhani J, Kasanga Mulwa J, Harold Nsekela J)

APPLICATION NO. 5 OF 2007

IN THE MATTER OF KENYA REPRESENTATIVES TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY

BETWEEN

ATTORNEY GENERAL

OF THE REPUBLIC OF KENYA ..... APPLICANT

AND

PROF. ANYANG' NYONG'O & 10 OTHERS ..... RESPONDENTS

(Arising from EACJ Reference No.1 of 2006 : Prof. Anyang' Nyong'O & 10 Others vs. Attorney General of the Republic of Kenya &2 Others.)

DATE: 06TH DAY OF FEBRUARY, 2007

RULING OF THE COURT.

This is an interlocutory application emanating from a reference pending in this Court, in which the respondents herein pray *inter alia* for orders by way of declarations that the process of "electing" the nine members of the East African Legislative Assembly (the EALA) to represent the Republic of Kenya and the rules under which the process was undertaken, violated the provisions of Article 50 of the Treaty for the Establishment of the East African Community (the Treaty). The Attorney General of Kenya, who is the 1st Respondent in the reference, brings this application by Notice of

Motion dated 19th January 2007 and filed on 22nd January 2007. The application is stated to be made under Articles 23, 26, 27 and 35 of the Treaty and rules 17 and 70 of the East African Court of Justice Rules of Procedure (the Court Rules), praying for **ORDERS –**

1. That the application be certified urgent;
2. That Hon. Justice Moijo Ole Keiwua, President of this Court and Hon. Justice Kasanga Mulwa, Judge of this Court, disqualify themselves from further hearing of the reference and applications therein;
3. That the Court sets aside its ruling delivered on November 27, 2006; and
4. That the costs of the application be provided for.

Although, as we shall indicate later in this ruling, the applicant belatedly and informally made substantial alterations to the application in the course of submissions by counsel, it is necessary to first set out the prayers and the grounds of the application as pleaded for proper appreciation of the full context. The motion lists 19 statements expressed to be the grounds on which the applications therein are made. We hereunder reproduce them in slightly abridged form, namely that -

a. a judge who is involved, whether personally or jointly with any party to a suit, in promoting a joint cause through that suit, is automatically disqualified from hearing that suit;
b. judges of the EACJ are mandated to be impartial – (Art.24)
c. a ruling or judgment by an automatically disqualified judge who failed to disqualify himself at or before the hearing is null and void and will be set aside by the court on application by the aggrieved person;

d. an aggrieved party is entitled to apply for an order that an automatically disqualified judge who fails to disqualify himself does disqualify himself;
e. failure of Justice Moijo Ole Keiwua and Justice Kasanga Mulwa to disclose their interests and disqualify themselves has adversely affected the integrity of the Court and undermined the confidence of East Africans in the Court;
f. the Partner States are aggrieved by the immense consequences of the ruling delivered on November 27, 2006 and in view thereof agreed to urgently convene a Special Summit;
g. on 15th October 2003 Justice Moijo Ole Keiwua was suspended from the performance of his functions of a Judge of Appeal and a tribunal to investigate his conduct as such was appointed;
h. the tribunal was to investigate allegations that Justice Moijo Ole Keiwua was involved in corruption, unethical practice, and absence of integrity in the performance of his office;
i. Justice Moijo Ole Keiwua and Kasanga Mulwa failed to disclose to the parties a material fact, namely, the fact that they were related to the Republic of Kenya in a manner which rendered it impossible for them to give a fair hearing to the 1st respondent herein
j. on 15th October 2003 Justice Kasanga Mulwa was suspended from the performance of his functions of a Judge of Appeal (sic) and a tribunal to investigate his conduct as such was appointed;
k. the tribunal was to investigate the allegations that Kasanga Mulwa was involved in corruption, unethical practice, and absence of integrity in the performance of his office;

l. the conduct of Justice Moijo Ole Keiwua and Justice Kasanga Mulwa, by failing to disclose those facts to the parties, has undermined and eroded the confidence of the people of East Africa in this Court;

m. through the Summit and other organs of the Community the people of East Africa have set in motion necessary measures to restore public confidence in this Court;

n. by virtue of the rule in ***R vs. Bow Street Metropolitan Stipendiary Magistrate & others Ex parte Pinochet Ugarte***, (No.2) (1999) 1 All ER 577, (the ***Pinochet case***) the two judges were on November 24, 2006 and still are automatically disqualified from hearing this reference;

o. by virtue of the Treaty and the common law, the two judges were under a duty to disclose their interests on November 24, 2006 but failed to do so;

p. justice was neither done nor seen by people of East Africa to have been done on November 24, 2006;

q. if Justice Moijo Ole Keiwua and Justice Kasanga Mulwa hear the reference and other applications herein, justice even if done, will not be seen to be done by the people of East Africa;

r. this Court has jurisdiction to set aside the ruling delivered on November 27, 2006;

s. the ruling was given pursuant to proceedings that violated both the rules of natural justice and provisions of the Treaty.

Needles to say, that while some of the statements constitute the grounds on which the motion is based, others are a mixture of the propositions of law,

assertions of fact and arguments in support of the grounds. It is also important to note at the outset, that the motion contains two distinct, though related, applications. The first is that the named judges of the Court disqualify themselves from further hearing of the reference and applications therein. The other is that the Court sets aside its ruling delivered on November 27, 2006.

For clarity, it is useful to separate the grounds for each application although there is bound to be some overlapping. The grounds for the application that the two judges disqualify themselves from further hearing of the reference and related applications may be discerned from the statements listed as g, h, i, j, k, n and q. In summary they are that as a result of being suspended from performance of their functions as a Judge of Appeal and a Puisne Judge in the Republic of Kenya, respectively, –

- the two judges are related to the Republic of Kenya in a manner that renders it impossible for them to give a fair hearing to the Attorney General of Kenya as the 1st respondent in the reference;
- the two judges are automatically disqualified from hearing the reference by virtue of the rule in **Pinochet's case** (supra);
- justice will not be seen to be done if the two judges hear the reference.

The grounds for the application that the Court's ruling delivered on November 27, 2006, be set aside are discernable from the statements listed as c, f, i, l, n, o, p and s. Although in the course of arguing the application counsel for the Attorney General appears to have made some variations in the grounds, he did not amend the motion and so it is necessary to refer to them as pleaded. We would summarise them as follows –

- the Partner States are aggrieved by the immense consequences of the ruling;
- Justice Moijo Ole Keiwua and Justice Kasanga Mulwa were automatically disqualified from hearing the reference and applications therein and failure to disqualify themselves rendered the ruling null and void;
- failure of the two judges to disclose to the parties their interests/material fact that they were suspended from judicial functions in the Republic of Kenya, and to disqualify themselves from participating in the proceedings on November 24, 2006 was in breach of their duty under the Treaty and the common law, to be and appear to be impartial;
- the conduct of the two judges in failing to disclose their said suspension undermined and eroded the confidence of the people of East Africa in the Court;
- the proceedings that resulted in the ruling of the Court in issue violated both the rules of natural justice and provisions of the Treaty.

Background to this Application

The Treaty establishes the EALA as one of its organs and provides in Article 50 that the National Assembly of each Partner State shall elect nine members of that organ. Pursuant to Proclamations dated 16th November 2006, the Summit of the East African Community dissolved the first EALA with effect from 29th November 2006, and proclaimed that the second EALA was to commence on the same date.

By a letter dated October 30, 2006, the Clerk to the National Assembly of

the Republic of Kenya informed the Secretary to the East African Community, that on 26th October 2006 the National Assembly of Kenya had elected nine members of the EALA whose names he listed in the letter.

On 9th November 2006, the respondents in this application filed the reference making the prayers we indicated above. At the same time they filed an *ex parte* application for an interim injunction for the purpose of stopping the nine representatives from Kenya taking office as members of the EALA, until determination of the reference. When the *exparte* application came up for hearing on 17th November 2006, the Court directed that it ought to be heard *inter partes* and fixed 24th November, 2006 for the hearing.

The application was heard by a full bench (Ole Keiwua P., Mulenga V.P., Ramadhani J., Mulwa J. and Warioba J.) on 24th and 25th November 2006. Mr. Mutula Kilonzo S.C., led a team of counsel for the Claimants. The Attorney General of Kenya, Mr. Amos Wako, appeared in person assisted by the Solicitor General, the Principal Litigation Counsel and a Senior State Counsel. The other respondents to the reference were also represented by counsel. The unanimous ruling of the Court, granting the interim injunction, was delivered on 27th November 2006.

After delivering the ruling, the Court invited the parties, in view of the serious implications the interim injunction was to have on the functioning of the EALA, to consider expediting the conclusion of outstanding pleadings, in order that the reference may be heard and disposed of at the earliest time possible. In response, all counsel agreed to abridge the time allowed by the

rules for filing their respective pleadings. At a meeting between the President and Registrar of the Court with the counsel of all parties in the President's chambers, the Attorney General undertook to file the response to the reference not later than 30th December 2006, and Counsel to the Community representing the 3rd and 4th Respondents, (the only other two respondents remaining in the reference after the Court struck out the rest in the ruling), undertook to file his amended response to the reference not later than 18th December 2006. Counsel for the Claimants undertook to file the reply, if any, not later than 8th January 2007. The respondents' rejoinder, if any, was to be filed by 15th January 2007. Accordingly, pursuant to provisions of rule 52 of the Court Rules, the scheduling conference was fixed for 22nd January 2007.

However, on 22nd January 2007, just before the Court was due to start the scheduling conference, the most unexpected happened. Kenya's Solicitor General, Mr. Wanjuki Muchemi, in the company of his Deputy, Ms Muthoni Kimani and Dr. Gibson Kamau Kuria S.C., called on the President of the Court in his chambers to inform him that unless he and Justice Kasanga Mulwa disqualified themselves from further hearing of the reference, he had instructions to file this application. He handed to him copy of the Notice of Motion duly signed and dated 19th January 2007 with the Supporting Affidavit sworn by Amb. Dr. Hukka Wario, on the same date.

The President consulted the other members of the Court present. Needless to say, the judges were all extremely surprised by the move, considering that no indication whatsoever had been given prior to that day that the Attorney General of Kenya had any apprehension about the two judges being on the

Coram for hearing the reference, a fact he knew before the 24th November 2006; and notwithstanding that the facts on which he based the application for recusal were within his knowledge years before the reference was filed in this Court. The move was incredibly inconsistent with the assurances the Attorney General Mr. Amos Wako made in open court personally on 24th November 2006 when he said –

> ***"My Lords, if you should come to the unlikely conclusion that you have jurisdiction …….even if we shall be thoroughly dissatisfied with the decision, we shall have no alternative but to comply in terms of Article 38"***

We shall revert to this later in this ruling. Be that as it may, thereafter the judges went to court to appraise other parties of the new development and to adjourn the scheduling conference until disposal of the new application, which was then fixed for hearing on 30th January 2007, allowing time for service of the application on the other parties and for them to respond if they so wished.

The issues for determination

It is with this background that this application came up for hearing. In his opening address, the learned Solicitor General Mr. Wanjuki Muchemi outlined the issues arising from the pleadings to be addressed and determined by the Court. However, in the course of his submissions, Dr. Kamau Kuria S.C., who addressed us on the rest of the case for the Attorney General, abandoned such substantial assertions on which the applicant's case was founded, that it is necessary at this juncture, to appreciate what remained of the case.

First, in the course of his main submissions the learned Senior Counsel abandoned the express pleading to the effect that by virtue of the rule in ***Pinochet's case*** (supra) the two judges were "automatically disqualified" from hearing the reference, and that failure to disclose their interests and to recuse themselves from the proceedings, violated the rules of natural justice and provisions of the Treaty, thus rendering the resultant ruling null and void. He also submitted that he was not relying on actual bias on the part of the judges. He maintained instead, that the application should be considered on the premise of a perception that the judges may be biased as a result of their relationship of "animosity" towards the Government of Kenya.

Secondly, in the course of his submissions in reply on the second day, the Court asked the learned Senior Counsel to elaborate on and substantiate his repeated submission that the people of East Africa had lost confidence in this Court as a result of the failure of the two judges to recuse themselves; or if necessary to avail for examination Dr. Wario, in whose affidavit that contention was made. Counsel asked and was given ten minutes to consult with his legal team. After the consultation he withdrew his submissions on the contention that the East Africans had lost confidence in this Court. For what it is worth, he withdrew all the averments and arguments related to it and specifically withdrew the contents of paragraphs 16 and 17 of Dr. Wario's affidavit which directly alluded to the contention.

However, the learned Senior Counsel, quite rightly in our view, observed that statements concerning the events that followed the Court's ruling delivered on 27th November 2006, namely the hurried process of amendments to the Treaty in reaction to the ruling, could not be withdrawn

as they were indisputable facts of history that cannot be undone. That of course is obvious. What we found unacceptable was for the applicant to allege without substantiation, that the hurried process was necessitated by the loss of public confidence in the Court. As members of the Court, the judges, individually and collectively, must be in the forefront in ensuring the maintenance of public confidence in the Court. They however must not lightly accede to veiled intimidation in form of unsubstantiated allegation that they or any of them has undermined public confidence in the Court.

Thirdly, towards the conclusion of his submissions the learned Senior Counsel conceded that it was an error to include Justice Kasanga Mulwa in the application. This was in consequence of the Court drawing his attention to two documents. The first document is copy of the Kenya Gazette dated 22nd March 2004, in which under Gazette Notices Nos.2128 and 2129, H.E. Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya amended Gazette Notices Nos.8829 of 2003 and 378 of 2004 by deleting the name of Justice Kasanga Mulwa from the list of Puisne Judges whose conduct was to be investigated by a Tribunal. The second is a letter from Office of the President dated 26th March 2004 and addressed to Justice Kasanga Mulwa through the Hon. Chief Justice Evans Gicheru. In the letter, Amb. Francis K. Muthaura, MBS., Permanent Secretary/Secretary to the Cabinet and Head of the Public Service wrote that H.E. the President had considered and accepted the request of Justice Kasanga Mulwa to retire early from the Judicial Service with benefits in accordance with his terms of service. He further wrote –

> ***"Meanwhile, I wish to thank you on behalf of the Government for the services you rendered to the Judicial Services <u>and wish</u>***

<u>you a prosperous time with the East African Court of Justice</u>."

When asked what the applicant's position was in regard to the application against Justice Kasanga Mulwa, the learned Senior Counsel retorted –

> ***"My Lords, I did say that when the application was made, this letter was not available. So, any counsel preparing an application with this letter would conclude that it would be wrong to include Hon. Justice Mulwa in the application. I also wish to apologise for the inclusion of Justice Mulwa in the application in light of this."***

In response to a further question Dr. Kuria confirmed that he was withdrawing the application against Justice Mulwa.

Later, in his winding up remarks, Mr. Wanjuki Muchemi, the learned Solicitor General, on behalf of the Attorney General, expressly associated himself with the withdrawals and apology Dr. Kuria had made.

What then remains of the application is that the ruling of the Court be set aside by reason of Justice Moijo Ole Keiwua's participation in it and that the said judge disqualifies himself from further participation by reason of perceived bias. Consequently, the broad issues that remain for the Court to consider and determine are –

- whether Justice Moijo Ole Keiwua was under duty to make the disclosure as contended by the applicant;
- whether Justice Moijo Ole Keiwua was under duty to recuse himself from participating in the hearing of the application for the interim injunction on the ground of perceived bias;

- whether the ruling of this Court granting the interim injunction is null and void by reason of the failure of Justice Moijo Ole Keiwua to make any disclosure and/or to recuse himself from participating in the proceedings.

The applicable law:

(a) Jurisdiction

It was not seriously disputed that this Court has jurisdiction to hear and determine an application to set aside its order on the ground that it was made in breach of the fundamental principle of judicial impartiality. Although Dr. Kuria repeatedly pointed out that the practice in the Court of Appeal of Kenya and in the House of Lords in the U.K., whenever there is such an application, was to empanel a different set of judges from those who made the impugned order, he did not go so far as to suggest that this Court as constituted did not have jurisdiction. Even Mr. Otiende Amollo, learned counsel for the respondents/claimants who broached on the subject of the Court being *functus officio*, turned his argument on whether the application was properly brought within the review jurisdiction. We therefore need not discuss the issue of jurisdiction in any detail. It suffices to say that only through strict adherence to the principle of judicial impartiality can protection of the universally accepted right of every litigant to a fair trial, be enforced. We think that apart from inherent jurisdiction at common law, in appropriate circumstances, this Court can invoke its jurisdiction under Article 35 of the Treaty to review its order as unjust if the order was made in violation of the principle.

With regard to an application for a judge to recuse himself from sitting on a

Coram, as from sitting as a single judge, the procedure practiced in the East African Partner States, and which this Court would encourage litigants before it to follow, is similar to what was succinctly described by the Constitutional Court of South Africa in ***The President of the Republic & 2 Others vs. South African Rugby Football Union & 3 Others,*** (Case CCT 16/98) (the ***S.A. Rugby Football Union case***). That court said at para 50 of its judgment –

> ***"…The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court."***

The rationale for and benefit from that procedure is obvious. Apart from any thing else, in practical terms it helps the litigant to avoid rushing to court at the risk of maligning the integrity of the judge or judges and of the court as a whole, without having the full facts, as clearly transpired in the instant case.

In our view, the Solicitor General's call on the President in the morning of 22nd January 2007, fell far short of the accepted practice for it was more akin to intimidation than to an effort to discover the judge's response to the alleged apprehension concerning his impartiality. We are further strengthened in this view by the fact that no similar visit was extended to Justice Kasanga Mulwa though he was also subject of the same recusal application.

Where a recusal application comes before a court constituted by several

judges, it appears to us that, subject to the judge whose recusal is sought giving his individual decision on the matter, all the judges constituting the Coram for the case have collective duty to determine if there is sufficient ground for the judge to recuse himself from further participation in the case. We agree with the view of the Constitutional Court of South Africa where in the ***S.A. Rugby Football Union Case*** (supra) it said at para. 31-

> ***"If one or more of its members is disqualified from sitting in a particular case, this Court is under duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case."***

Consequently, notwithstanding the deficient approach in the instant case whereby the recusal application was rushed to open court, without following the appropriate usual procedure, we are satisfied that the best course is to dispose of the application in the manner we have just indicated.

(b) Impartiality and disqualification by reason of bias

All counsel for parties and the Amicus Curiae ably addressed us at length and referred us to numerous judicial precedents from diverse jurisdictions which we have read and found extremely helpful in the exposition of the law governing the duty of a judicial officer to administer justice with impartiality and the corresponding duty to disqualify himself from exercising the judicial function by reason of bias.

Judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute. It is

in that context that Article 24 of the Treaty ordains that –

> ***"Judges of [this] Court shall be appointed by the Summit from among persons recommended by the Partner States <u>who are of proven integrity, impartiality and independence</u>…"***

In the same vein, before taking office, every Judge of this Court, like judges of other courts universally, takes the judicial oath undertaking to serve the Community and to do justice in accordance with the Treaty as by law established and in accordance with laws and customs of the Community –

> ***"without fear or favour, affection or ill will."***

There are two modes in which the courts guard and enforce impartiality. First, a judge, either on his own motion or on application by a party, will recuse himself from hearing a cause before him, if there are circumstances that are likely to undermine, or that appear to be likely to undermine his impartiality in determining the cause. Secondly, through appellate or review jurisdiction, a court will nullify a judicial decision if it is established that the decision was arrived at without strict adherence to the established principles that ensure judicial impartiality. The first is that "*a man ought not to be a judge in his own cause"*. The second, which additionally is intended to preserve public confidence in the judicial process, is that *"justice must not only be done but must be seen to be done."*

Of the first principle, Lord Browne-Wilkinson said in ***<u>Pinochet's case</u>*** (supra) at p.586, -

> ***"This principle, as developed by the courts, has two very similar but not identical applications. First it may be applied literally: if a judge is a party to the litigation or has a financial or proprietary interest in its outcome then indeed he***

> ***is sitting as a judge in his own cause. In that case 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 in its outcome, but in some other way his conduct or behaviour may give rise to 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 …….. since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."***

There are two categories of scenarios. In the first, where it is established that the judge is a party to the cause or has a relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause. In ***Pinochet's case*** (supra) the House of Lords held that automatic disqualification applies not only where the judge is directly or indirectly a party or has financial or proprietary interest in the suit, but also where he has some other interest in the outcome of the suit. In a case where an automatically disqualified judge does not recuse himself, the decision or order he makes or participates in, will be set aside, notwithstanding that he did not act with bias.

In the second category, where the judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination. In the ***S.A. Rugby Football Union***

Case (supra) the Court said in para. 45 –

> ***"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application."***

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.

Consideration of the issues

Much as the applicant's case is grounded on the judge's failure to make disclosure to the parties at the commencement of hearing on 24th November 2006, the applicant has not been explicit as to what the judge was under duty to disclose. The initial pleading in the Notice of Motion was that the judge failed to disclose –

1. his interest – (para. e);
2. material fact that he was related to the Republic of Kenya in a manner which rendered it impossible for him to give a fair hearing to the

Attorney General – (para. i);

3. facts that he was suspended from performance of functions of Judge of Appeal and that a tribunal was appointed to investigate allegations that he was involved in corruption, unethical practice, and absence of integrity – (pares. g, h and l).

Since counsel for the applicant conceded that the judge did not have any interest in the case and chose not to rely on actual "animosity" but on only perception of possible "animosity" towards the Government, we only need to consider if the judge was under obligation to disclose the third set of facts.

We have no hesitation in holding that the judge was not under any such obligation. A judicial officer is required to disclose facts that may raise apprehension of possible bias on his part, in order to show that he has no actual bias and to give opportunity to a party who considers that he might be prejudiced, to exercise the right to apply for the judge to recuse himself or to waive that right. The disclosure is not a pre-condition for the application to be made. We were not persuaded by Dr. Kuria's contention that disclosure is for public consumption in order to retain its confidence in the judiciary. A litigant who has knowledge of such facts is at liberty to make the application even in absence of their disclosure by the judge. It follows that an applicant who relies on the judge's failure to disclose material facts must show that those facts were not within his or his legal advisor's knowledge. See ***Pinochet's case*** (supra). Failure of a judge to disclose facts that are within public knowledge cannot be a ground on which a reasonable member of public would apprehend bias. See ***S.A. Rugby Football Union case*** (supra) (para. 93)

The suspension of Justice Moijo Ole Keiwua and the appointment of a tribunal to investigate his conduct, have been matters of public knowledge since they were published in the Kenya Gazette of 15th October 2003, not to mention publications in mass media. Besides, both the appointment of the tribunal and the suspension of the judge were acts done by the Government of Kenya to which the applicant is the principal legal advisor. It is reasonable to assume that he was consulted on those matters. In any case it was not suggested that the facts were not in his knowledge. If it was those facts that gave rise to any apprehension or the perception of possible bias on the part of Justice Moijo Ole Keiwua, then the Attorney General was in a position to object to the judge sitting when the case came up for hearing on 24th November 2006. His omission to do so leads to only two possible inferences. Either he opted to waive his right to object or he did not harbour the apprehension or think that a reasonable, fair-minded and informed member of the public would perceive such apprehension.

It was strenuously argued for the applicant that there was no waiver and that the applicant did not lose the right to raise the objection at a later stage as he eventually did in this application. Significantly, however, no attempt was made to explain the omission. From the authorities we have consulted, the prevalent view, with which we agree, is that a litigant seeking disqualification of a judge from sitting on the ground of appearance of bias must raise the objection at the earliest opportunity. The Court of Appeal of Kenya in ***Ole Keiwua vs. Chief Justice of Kenya &6Others,*** (2006) eKLR, expressed the same view thus –

> ***"We appreciate the fact that a party to any judicial proceedings has a right to object to any judge or judicial***

> ***officer sitting if he or she has good reason for raising such objection. However, whoever intends to raise such objection is obliged to raise his objection at the earliest opportunity."***

However, our attention was drawn to an earlier decision of the same court in ***King Woollen Mills Ltd & Another vs. Standard Chartered Financial & Another*** Civil App. No.102 of 1994, where it observed with approval that in a previous decision it had emphasised that *"delay in bringing the [recusal]application did not defeat the duty or obligation of [the respondent in that application]"*. Mr. Kilonzo submitted, and we are inclined to agree, that the decision of 2006 is to be preferred as the latest stand of that court on the matter.

In ***Administrative Law (8th Ed.) by H.W.R. Wade & C.F. Forsyth*** the learned authors wrote at p.455 –

> ***"The right to object to a disqualified adjudicator may be waved, and this may be so even where the disqualification is statutory. The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings to continue without protest, they are held to have waived their objection and the determination cannot be challenged."***

The learned authors cite as authority for that proposition ***Locabail (UK) Ltd vs. Bayfield Properties Ltd &Another [2000] QB 451***

We respectfully agree that a litigant who has knowledge of the facts that give rise to apprehension of possibility of bias ought not to be permitted to keep his objection up the sleeve until he finds out that he

has not succeeded. The court must guard against litigants who all to often blame their losses in court cases to bias on the part of the judge. In the ***S.A. Rugby Football Union case*** (supra) para 68 the court observed-

> ***"Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment ….. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer"***

In the instant case the applicant's position in this regard is exacerbated by the events following the granting of the interim injunction. The applicant did not only file the response to the reference within the abridged time he had undertaken to the Court, but according to the information disclosed in his application, he was involved in a parallel process of amending the Treaty. We note that clearly the amendment is a direct reaction to the impugned ruling of the Court. In his response to the reference filed on 30th December 2006, the applicant continues to protest the Court's jurisdiction, an issue that was already decided, but does not hint at, let alone raise, any objection to the sitting of any member of the Court on ground of any appearance or perception of bias. He chooses to do so only when the case is moving close to hearing and uses the opportunity to inform the Court through the affidavit of Dr. Wario that the amendments to the Treaty have been ratified by the

Republic of Kenya and awaits ratification by the other two Partner States to come into force.

While we are anxious to refrain from commenting on the merits and/or demerits of the process of amending the Treaty in reaction to an interim Court order, we are constrained to say that any reasonable court would conclude as we are inclined to do, that this application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing. In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the application on that finding alone. However, in the peculiar circumstances of this case, we think that it is prudent to consider if on the facts complained of, Justice Moijo Ole Keiwua ought to have recused himself from the hearing on 24th November 2006, and/or to recuse himself from any further hearing of the reference and applications therein.

As we have already noted, the facts the applicant finally relies on are not in dispute. They are that more than three years ago, in October 2003, Justice Moijo Ole Keiwua was suspended from duty as a Judge of Appeal in the Republic of Kenya and that a tribunal was appointed to investigate his conduct. The suspension and the appointment were made pursuant to the provisions of Section 62 of the Constitution of the Republic of Kenya. To this may be added the fact that in November 2006, a reference was filed in this Court in which the applicant, the Attorney General of Kenya, in his official capacity as the Legal Adviser of the Government, was cited as the 1st Respondent.

The applicant's case was that from those facts members of the public must have perceived reasonable apprehension or suspicion that the judge would be biased. By way of elaboration Dr. Kuria argued that the perception was based on the assumption that as a human being the judge would harbour animosity against the Government that suspended him from his duty and subjected him to the resultant disadvantages and would seek "to hit back" by deciding the case against the Government of Kenya represented by the applicant.

For the respondents, several counsel countered that argument variously. Mr Kilonzo submitted that the perception contrived by the applicant was not the perception a reasonable member of the public would conceive. He opined that it was more likely to conceive a perception that judges on suspension would want to ingratiate themselves with the Government in order to get reprieve. However, the main thrust of his reply was that the Court had to view the facts through the eyes of a fair-minded and well informed member of public. He forcefully argued that such a person, would not perceive a judge of the ability, skills and experience of the President of this Court adjudicating a case unfairly merely because a tribunal was appointed under section 62 of the Kenya Constitution to investigate allegations against him. Another point highlighted by several other counsel for the respondents was that the alleged animosity was farfetched as neither the President nor the Government were responsible for the allegations that led to the suspension.

It is indisputable that different minds are capable of perceiving different images from the same set of facts. This results from diverse factors. A "suspicious mind" in the literal sense will suspect even where no cause for

suspicion exists. Unfortunately this is a common phenomenon among unsuccessful litigants. That is why, as we pointed out earlier in this ruling, the mind envisaged in the test to determine perception of possible or likely bias on the part of a judge is a reasonable, fair and informed mind. We think that applying that mind to the facts of this case would not produce the perception canvassed by the applicant.

In our opinion, a reasonable person would not perceive that a judge whose conduct is under investigation, would risk conducting an unfair adjudication against the very authority investigating his conduct. A reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in our view, perceive that the judge would skim to single handedly deny the applicant a fair hearing or justice. We think a reasonable, informed and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence not to indulge in futile animosity.

In view of the foregoing, we find that the applicant has not satisfied us that Justice Moijo Ole Keiwua was disqualified from sitting in the proceedings of the Court held on the 24th and 25th November 2006 and from participating in the resultant ruling of 27th November 2006. Similarly, by his admission through the learned Solicitor General, Mr Wanjuki Muchemi and Dr. Kamau Kuria S.C., Justice Kasanga Mulwa was not disqualified. We therefore hold that the said ruling was not vitiated by their participation and reject the prayer for setting it aside.

In response to the prayer that the judges disqualify themselves from further hearing of the reference and applications therein, Justice Moijo Ole Keiwua has made a response declining to do so. We agree with his position as there is no basis for the prayer. His response shall be deemed to be incorporated in this ruling. In view of the withdrawal of the application against Justice Kasanga Mulwa he thought it unnecessary to respond. Accordingly the prayer that the two judges disqualify themselves from further hearing of the reference and applications therein, is also rejected.

In conclusion, we would like to borrow the words of the Constitutional Court of South Africa in the ***S.A. Rugby Football Union case*** (supra) para.104 –

> ***"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 the 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 case in their favour ……The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself."***

In Article 6 of the Treaty the Partner States agreed to include among the fundamental principles to govern the achievement of the objectives of the Community the principle of the Rule of Law. In addition they agreed to establish this Court which they mandated under Article 23 to be the judicial

body that "shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty." One of the cardinal rules in the doctrine of the Rule of Law is respect of court decisions. If that rule is deviated from then the principle becomes hollow and remains on paper only. In the case of the Community, the Treaty and all it seeks to achieve will stand on sinking sand.

In the result we dismiss the application with costs to the respondents.

DATED at Arusha this day of 2007

MOIJO. M . OLE KEIWUA
PRESIDENT

JOSEPH. N. MULENGA
VICE PRESIDENT

AUGUSTINO. S . L . RAMADHANI
JUDGE

KASANGA MULWA
JUDGE

HAROLD. R. NSEKELA
JUDGE