just because a friend, even a close friend, appears as a lawyer. However, the extent of intimacy in that case was unusual and an objective observer might reasonably doubt the judge's impartiality when he was such a close friend of the prosecutor that both their families were just about to take a joint vacation.

27- Recusal may also be appropriate if it can be proved that the judge's extrajudicial bias or prejudice towards the lawyer can be imputed to the lawyer's client.

28- It must be pointed out, in this context, that relationships between judges and lawyers at their former firms naturally dissipate over time. In **Patterson v. Mobile Oil Corp., 335 F.3d 476 (5th Cir. 2003)**, the plaintiffs moved for disqualification because the judge had previously been employed by the law firm that represented the defendants. The court concluded that disqualification was unnecessary because the judge had terminated his relationship with the firm thirty years earlier.

29- Even though the present application is grounded on an alleged close and cordial relationship as a result of the acquisition of the Judge's law firm and subsequent occupation of his office premises as tenants by the respondent's agents, it is noteworthy that the respondent has not been explicit as to what amounted to or constituted this alleged close relationship.

30- It was argued on behalf of the respondent that there was regular communication with and access to the Judge to settle the purchase price of the firm and for issues in connection with rentals, maintenance and other related matters. However, no attempt was made to explain how this alleged communication and access could render disqualification necessary.

31- As we have already noted, a judge's acquaintance with a lawyer does not ordinarily require disqualification. A relationship between judges and lawyers is not sufficient to give

rise to likelihood or apprehension of bias arising from such relationship unless it is established that there is a real danger of bias on the part of the judge, in the sense that he might unfairly regard with favour or disfavour the case of a party under consideration by him.

32- This Court finds that the respondent has not been able to establish the existence of an intimate relationship arising from the commercial relationship in the instant case. The purchase of the Judge's law firm and the landlord and tenant relationship did not necessarily engender a close relationship between the two parties as it has been alleged by the respondent.

33- It was not disputed that the frequent communication between the respondent's agents and the Judge, as stated in the written application, was necessary to settle the purchase price and the usual rent of the premises. Intimacy cannot be automatically presumed. There is no evidence on record to substantiate the respondent's allegation that the respondent's agents and the Judge were keeping such a close and cordial relationship that might lead to a reasonable apprehension that the Judge may be biased in their favour or against them.

34- It is also to be noted that the respondent has not explained whether and how the alleged close and cordial relationship continued after the end of the commercial relationship with the Judge in 2012.

35- Moreover, the allegation of learned Counsel for the respondent that it was possible that the Judge might have directly or indirectly benefited from the fees received from the respondent has remained, to say the least, vague and tenuous.

36- We, therefore, find that a reasonable person would not perceive that a judge would conduct an unfair trial in favour of or against a lawyer as a result of the acquisition of his law firm. A reasonable, fair minded and informed person would not

reasonably, in our view, perceive that a judge may be biased in favour of or against a lawyer who purchased the judge's firm without cogent evidence that demonstrates that the relationship between the judge and the lawyer at the judge's former firm remained close a long time after the acquisition.

37- In this context, we cannot help noting that even after the present application for recusal was made, and on several occasions before that, Counsel for the respondent has appeared before the Judge without raising any issue as to the impartiality of the Judge.

38- In view of the foregoing, this Court is unable to find that the prior commercial relationship between the Judge and the respondent's agents in the instant case could disqualify the Judge from sitting in this appeal. We agree with the learned Attorney General that the respondent's case is built on mere conjecture and surmise.

The second ground: being judge in his own cause by belonging to the Malawi judiciary

39- The second ground for the application for recusal is that the Judge will be a judge in his own cause. He sits on the Malawi Judiciary in the High Court Commercial Division and an important part of the Reference in the First Instance Division is an alleged wrong conduct of the Supreme Court of Appeal in Malawi relating to the issue of its composition. The respondent contends that to that extent, the Judge will be bent on insulating the Malawi judiciary by killing the Reference in the appeal by the Government of Malawi on the question whether the COMESA Court has jurisdiction to entertain the Reference.

40- As already stated above, a fundamental principle is that a man must not be a judge in his own cause: the **Pinochet** case (supra).

41- The respondent contends that under this rule, although the Judge did not take part in the decision of the Supreme Court of Appeal or other court in Malawi, he earns an automatic disqualification due to his connection with the Malawi judiciary.

42- It is conceded by the respondent that the Judge cannot be challenged merely on the basis of his country of origin as there is nothing preventing a judge of the COMESA Court from hearing a case emanating from his country of origin. This is a similar position to that in the Court of the East African Community where Kenyan judges sat in a case involving the Kenyan Government - see **Professor Anyang' Nyong'o** case (supra). However, by submitting in another breath that the Judge cannot sit in a case involving the Malawi judiciary, the applicant is, as the learned Attorney General correctly submits, circuitously asserting that the Judge cannot sit in a matter from his country of origin.

43- The appellant submits that the Court will have to use the lens of a reasonable and well informed person. This person should be taken to be aware that COMESA Court judges have legal and institutional insulation under the COMESA Treaty and the Constitution of Malawi. Articles 20(2) and 22(4) of the Treaty require the judges to be impartial and not to have a direct or indirect prejudicial interest in a case.

44- Under the Constitution of Malawi, section 103(1) provides that all courts and all persons presiding in those courts shall exercise their functions, powers and duties independent of any other person or authority. Section 9 provides that the judiciary shall have the responsibility of interpreting, protecting and enforcing the constitution in an independent and impartial manner with regard only to relevant facts and the law. Section 119(6) provides that High Court judges shall have fixed tenure up to the age of 65 years and cannot be removed unless for incompetence or misconduct. Such removal can only be by impeachment in the National Assembly (section 119(3)). The

remuneration of judges is protected in that it is determined by the National Assembly, not the executive, it cannot be reduced without the judge's consent and it is mandatory that its value be maintained. In the light of these provisions, the learned Attorney General submits that a reasonable man well informed of this would not have apprehension that the judge would be biased.

45- In reply in open Court during oral submissions, learned Counsel for the respondent has submitted that these safeguards are not peculiar to Malawi and that despite their universal existence, judges have been recused including in England such as in the **Pinochet case** (supra) where it was held that Lord Hoffmann should have recused himself for his connections with Amnesty International, an interested party in the extradition of General Pinochet, a former Chilean dictator, wanted in Spain for human right abuses, and in the COMESA Court of Justice in **Eastern and Southern African Trade and Development Bank (PTA) and Dr. Michael Gondwe v Martin Ogang Reference Number 1B/2000**, where it was held that Justice Ogoola, who had close ties with the respondent, should have recused himself or disclosed his acquaintanceship with the respondent to the Court.

46- In its summation, the appellant argues that the respondent has not adduced evidence as to what the Supreme Court of Appeal in Malawi or the Judge will gain or lose if the Reference at hand is determined one way or the other for him to be partial.

47- Having considered the submissions from both sides, we are inclined to agree with the appellant that there is no evidence adduced by the respondent why the Judge would throw away his judicial oath and become partial. While being aware of the dictum in the criminal case of **Bongani Dube** (supra) at para 13 where it is stated that any doubt must be resolved in favour of recusal, we must emphasize that judges enjoy the presumption of impartiality- See the **S.A.Rugby Football Union case**

(supra). The one asserting otherwise must prove such allegations.

48- In addition, we may hasten to quote the judgment of the East African Court of Justice in **Professor Anyang' Nyong'o** case *(supra)* at page 25 that-

> ***"…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 that 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 and not indulge in futile animosity"***

49- We agree with the dictum of Cardmore J. in **Drexel Burnham Lamber Inc, 861 F. 2d 1307 p1309 (2nd Cir, 1998)** that it does not mean that every time a litigant claims to see smoke then the court is bound to find that there is a fire. To this end, we further agree with the statement 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…"***

50- It must be observed that judges of the same jurisdiction hear appeals from their brother judges but it would not occur to any reasonable person to contend that the appellate judge will be a judge in his own cause because the judiciary of which he is a member is being taken to task. In fact, appellate judges often

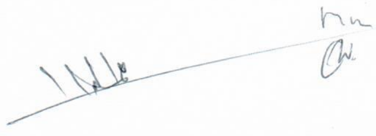
disagree or overrule their brother judges to the extent of sometimes holding that the first instance judges have been misguided or erred in law. We, therefore, see no reason why the Judge cannot disagree with the conduct of the Supreme Court of Appeal of Malawi at the COMESA Court if that were called for.

51- In fact, judges of the COMESA Court serve in their personal capacity and not on behalf of any particular government. It is worth noting that in the **Norwegian Fisheries case (Norway v. UK, 1951 I.C.J. 116, 134, Dec. 18)** before the International Court of Justice, Judge Helge Klaestad (Norway) continued to sit even though he had been a member of the Supreme Court of Norway that had given a decision invoked in the ICJ proceedings and relevant to them.

52- We, therefore, see no merit in the point raised by the respondent that the Judge may be awed by the fact that the decision of the Supreme Court of Appeal in Malawi to be considered in the main Reference in the First Instance Division involved the current Chief Justice of Malawi. As stated earlier on in this ruling, due to constitutional and institutional safeguards, judges in Malawi and elsewhere exercise their minds independent of any person.

53- On a final note, we wish to echo the words of the Constitutional Court in the **S.A. Rugby Football Union case** (supra), where the judges refused to recuse themselves, at para. 45 that-

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



IV - Conclusion

54- For the above reasons, we find no merit in the present application which is dismissed. We shall make a decision as to costs in the final determination of this appeal.

Done at Lusaka, Zambia this 22nd day of June, 2016.

Delivered this ..23rd.... day of June, 2016.

Hon. Lady Lombe P. Chibesakunda - Judge President

Hon. Mr. Justice Abdalla E. El Bashir - Lord Justice

Hon. Dr. Michael C. Mtambo - Lord Justice

Hon. Mr. David Chan Kan Cheong - Lord Justice

Hon. Dr. Justice Wael M. H. Y. Rady - Lord Justice