



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CONSTITUTIONAL PETITION NO. 2 OF 2021

ADRIAN KAMOTHO NJENGA.....PETITIONER

VERSUS

MURANG'A COUNTY ASSEMBLY.....RESPONDENT

RULING (NO. 2)

1. The petitioner craves three principal reliefs: Firstly, that I recuse myself from considering the petition; secondly, that all orders, directions and rulings issued so far be set aside; and, lastly, that the earlier motion dated 26th January 2021 be heard *de novo* by a new judge.
2. The prayers are contained in a notice of motion dated 21st October 2021 and supported by a deposition of the petitioner. He contends that the court lacks jurisdiction having issued orders by consent on 5th July 2018 in Murang'a High Court Constitutional Petition 14 of 2017. In that case, the parties entered into a written consent agreeing that the office of Deputy Speaker of the County Assembly of Murang'a was unconstitutional.
3. In the main petition, the applicant contends that the failure by the County Assembly of Murang'a to elect a member as the deputy speaker offends the **Constitution**. Accordingly, he opines that I have expressed a contrary opinion without disclosing it to the parties and that the just course is to leave the matter to another judge.
4. Regarding earlier orders made in the present suit, on 21st September 2021, this court for considered reasons dismissed the petitioner's application to certify the petition as raising substantial questions of law to be heard by an uneven number of judges under **Article 165 (4)** of the **Constitution**. It is that ruling and related directions on the earlier motion which the petitioner wishes to set aside.
5. On 16th December 2021, I heard arguments from the petitioner. The respondent did not file a reply or appear at the hearing.
6. The bedrock of this application is *bias*. It is a well-trodden path. The test whether a judge should recuse is an *objective* one. In **Jan Bonde Nielson v Herman Philip Steyn & 2 others**, High Court, Nairobi, Civil Suit 332 of 2010 [2014] eKLR it was stated:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED), and reinforced in subsequent cases. See R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported) where the Court of Appeal stated that:

'...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...' [underlining added].

7. See also **Philip K. Tunoi & another v Judicial Service Commission & Another**, Court of Appeal, Civil Application NAI No. 6 of 2016 [2016] eKLR; **Porter v Magill** [2002] 1 All ER 465; **Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited**, High Court, Nairobi, Misc. Civil Application No. 263 Of 2019 [2021] eKLR.

8. Returning to the matter at hand, I have *never* made a ruling or expressed any opinion whether the office of a deputy speaker of the county is unconstitutional or unlawful. In Murang'a High Court Constitutional Petition 14 of 2017 it was the parties to that suit who filed a *written consent* agreeing in general that the office was unconstitutional. The Deputy Registrar of this court placed the file before me in chambers to merely *enter or adopt* the consent. I never heard the parties or delivered any determination. It is worth noting that the present petition is the

first opportunity where I am being invited to bring my mind to bear on the subject.

9. It must follow that facts alleged as constituting bias are superficial and far-fetched. They fail the *objective test*. It was thus unnecessary for the court to disclose to the petitioner or respondent about the written consent by other parties in Murang'a High Court Constitutional Petition 14 of 2017.

10. The upshot is that no suitable foundation for recusal has been laid. Accordingly, all the prayers in the petitioner's notice of motion dated 21st October 2021 are dismissed with no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of January 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Wambui Mwai holding brief for Mr. Kamotho for the petitioner instructed by Adrian Kamotho Njenga & Company Advocates.

No appearance for the respondent.

Ms. Susan Waiganjo, Court Assistant.