REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICAL REVIEW APPLICATION NO. E069 OF 2020

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

CABINET SECRETARY, IMMIGRATION &

REGISTRATION OF PERSONS.....2ND RESPONDENT

CABINET SECRETARY, FOREIGN AFFAIRS

& INTERNATIONAL CO-OPERATION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

GOVERNOR CENTRAL BANK OF KENYA.....5TH RESPONDENT

AND

BUILDING BRIDGES INITIATIVE

NATIONAL SECRETARIAT.....INTERESTED PARTY

RULING

On 9 June 2021 when this matter came up for further directions, Mr. Oginga, the learned counsel for the Interested Party made what I understand to have been an oral application for me to recuse myself from this matter on the ground that I sat in a bench of five judges that has declared, among other things, the Building Bridges Initiative to amend the Constitution of Kenya, 2010 through the Constitution of Kenya Amendment Bill, 2020 unconstitutional and for this very reason, a different judge should hear and determine this matter.

The case is in point is Constitutional Petition No. 282 of 2020 consolidated with seven other petitions, **David Ndii & Others vs. The Attorney General & Others. (2021) eKLR** popularly referred to as the BBI case.

Besides his bid to have me recuse myself from this case, Mr Oginga still submitted that the crux of this suit has been disposed of in the BBI Case. To be precise, the learned counsel urged that the BBI case disposed of the issue of national voter registration which, in his view, is the same subject that is in dispute in these proceedings. Since the judgment in that petition is subject to an appeal in the Court of Appeal, this matter ought not to proceed or should, at the very least, be stayed.

Mr. Oginga's position was supported by Mr. Odhiambo for the 1st respondent; Odhiambo, conceded, however, that the issue of registration of voters in the diaspora was never before the five judge Bench in the BBI case.

Ms. Nambirige, the learned counsel for the applicant opposed the application and contended that contrary to the 1st interested party's argument, the issue before court is not about nationwide voter registration but it has to do with the registration of voters in the diaspora. This particular issue was never raised or argued in the BBI case and, inevitably it was not ruled upon.

As far as the issue of recusal is concerned, the learned counsel urged that the 1st interested party's application serves no purpose other than to delay the disposal of this matter and should be ignored or dismissed altogether.

The submissions by counsel were that brief.

On the question of recusal, no law has been invoked and neither was any suggested according to which a judge ought to recuse himself from a matter in which one of the parties is of the view that the issue or issues arising in the matter for the judge's determination have been determined in a separate suit by a bench of judges of whom the judge was one.

Secondly, Mr. Oginga has proceeded on what, in my humble view, is a wrong presumption, that the issue for determination in this suit has been determined in the the BBI Judgment.

As far as I understand the applicant's case, the question at heart of his application is the right to vote by Kenyans who have a right to vote but who live outside Kenya, or Kenyans in the diaspora.

Despite their foreign residence, they have previously agitated for their right to vote and this right is now constitutionally acknowledged. One of the cases in which this right has been agitated is in High Court Petition No. 331 of 2012; New Vision Kenya & Others vs Independent Electoral & Boundaries Commission (IEBC). This case escalated all the way to the Supreme Court apparently after it had been dismissed at the High Court. While allowing the appeal, Court of Appeal noted as follows:

> 1. Considering that the right to vote is to be enjoyed without distinction, Kenyan citizens in the diaspora who are dual citizens are eligible to be registered as voters.
>
> 2. That the IEBC should progressively set up more registration centres in the diaspora.
>
> 3. Accordingly, the IEBC together with the other relevant authorities were directed to provide for progressive voter registration for Kenyans living in the diapora to participate in voting.

When the decision of the Court of Appeal was appealed against to the Supreme Court, the latter dismissed the Appeal and upheld the judgement of the Court of Appeal.

The supreme Court went further to direct the IEBC to put in place an infrastructure for comprehensive registration of Kenyan citizens in the diaspora as voters.

The applicant's case is that if the IEBC has not complied with these directions and registered Kenyans in the diaspora, they would effectively be disenfranchised in the plebiscite or referendum that the BBI initiative for amendment of the Constitution has been rooting for.

These questions were never in issue in the BBI case; if they were, it would have been very easy for Mr. Odinga or any other party, for that matter, to point them out either in the pleadings or in the judgment when the application for my recusal was made.

It follows that the application for my recusal has no foundation in fact and in law.

I need to caution counsel that the application for recusal shouldn't be approached in such a lackadaisical manner as appears to have been the case here. An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application.

While litigants have the right to apply for 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 simply because they believe that such persons will be less likely to decide the case in their favour.

In conclusion I would borrow the words of the Court in the South African Case of **South African Commercial Catering & Allied Workers Union & Another vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000** where it was noted as follows:

> ***"Courts considering recusal applications asserting a reasonable apprehension of bias must give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the court's very vulnerability serves to underscore the preeminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is wrong to yield to tenuous or frivolous objection as it is to ignore an objection of substance."***

I would regard the interested party's objection as such tenuous and frivolous objection to which I am not prepared to yield. The application is therefore dismissed. Costs will be in the cause.

SIGNED, DATED AND DELIVERED ON 23RD JUNE 2021.

NGAAH JAIRUS

JUDGE