



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VIHIGA
CONSTITUTIONAL PETITION NO 006 OF 2021 AS CONSOLIDATED WITH
PETITION NO E005 OF 2021 AND E007 OF 2021

B E T W E E N:

- 1. DR AMOS KUTWA KOLUWA**
- 2. PAMELA MBAGAYA KIMWELE**
- 3. ENG. KENNETH ELVUNA KESEKO**
- 4. PAUL JISEVE MBUNI**
- 5. STEPHEN LUMWAJI CHAHASI**
- 6. JULIUS OBUGA MASIVA.....PETITIONER/APPLICANTS**

AND

THE COUNTY GOVERNMENT OF VIHIGA
THRO' ITS SPEAKER.....RESPONDENT/ALLEGED CONTEMNOR

AND

H.E. THE GOVERNOR OF THE
COUNTY OF VIHIGA...INTERESTED PARTY/ALLEGED CONTEMNOR

RULING ON SHOW CAUSE HEARING

1. Counsel before the Court representing the Respondent and the Interested Party are urging the Court to recuse itself summarily on the basis of an application that cannot be repeated in the light of day if Mr Rakewa's hesitation is anything to go by.
2. Directions were given for the service of the application – still it was not served. In the meantime the contempt proceedings rumbled on. Mr Musiega and Mr Rakewa were happy to proceed on the basis of hearsay affidavit evidence but not with a show cause conducted as a fair trial. It should be made clear that these are civil proceedings and the Applicants must prove their case. Allegations are not evidence.
3. On the question of recusal, Judge's of the High Court swear an oath of office. The Oath requires a Judge to hear to the end, no matter how difficult, no matter how daunting, no matter how distressing the evidence we hear. That is what we must do. There is no option to recuse oneself summarily. That would be a dereliction of duty and in fact a breach of the very code of conduct that Mr Musiega urges the Judge to bear in mind. It should be reiterated that directions were given immediately on the recusal application and the Parties have neglected to prosecute their case before today.
4. Mr Musiega has also brought other applications, one to arrest a ruling which was not scheduled for delivery and another for stay of proceedings. In light of the Order of 19th July 2021, that stay does not apply to the contempt proceedings.

5. Therefore, should this Court recuse itself? A Court must work through insults threats and harassment etc without fear or favour. It does not have the luxury that Counsel has of picking and choosing which cases it will handle. Therefore the Court will proceed until the Recusal application is heard fully.

6. As to geographical location of the Court. It is well known and well documented that the gazettment of the High Court in Vihiga is a recent phenomenon. It is so new that at this point in time files are still being transferred to develop a case load. A High Court is an indication that a County is successful. It is a fundamental aspect of a functioning High Court in Vihiga that the Judges posed to Kakamega also hand Vihiga matters as a circuit court. What matters is not physical location but access to justice. Given that a human being cannot split themselves into two, the Court must follow the Judge.

7. It is clear that the Advocates making the application of irregularity of sittings are perfectly happy for disposal of Vihiga matters when they appear before judicial officers who have been here longer.

In the circumstances, this Court is bound by its Oath of Office and therefore the proceedings for contempt will continue. All other applications made on the floor of the Court (in open Court) are dismissed with costs. Costs to be assessed as ½ day it now being after mid-day.

Order accordingly,

FARAH AMIN

JUDGE

DELIVERED, DATED AND SIGNED THIS THE 16TH DAY OF DECEMBER, 2021

AT KAKAMEGA HIGH COURT (2)

In the Presence of:

Court Assistant: Clement Okoit

For Petitioners: Mr Malenya, Mr Sore

Julius O. Masiva (in person in Court 2)

For Respondents: Mr Rakewa and Ms Andisi

For Interested Party/Applicant: Mr Musiega and Ms Andisi assisted by Kennedy Esuchi