



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**ELECTION PETITION NO. 7 OF 2017**

**JUSTRY P. LUMUMBA.....PETITIONER**

**VERSUS**

**I.E.B.C..... 1<sup>ST</sup> RESPONDENT**

**ROBERT ISAAC SIDNEY.....2<sup>ND</sup> RESPONDENT**

**JAMES ELVIS OMARIBA ONGWAE.....3<sup>RD</sup> RESPONDENT**

**RULING**

When this matter alongside other election petitions in Kisii came up for directions on 28/9/2017, I called all counsel who were present in my chambers and informed them that my spouse had been an ODM Senatorial candidate in both 2013 and 2017 in the General Elections in Nakuru. I did so out of abundance of caution, and to avoid theatrics, and bashing which the Judiciary has been lately exposed to disclosed this information and asked them to raise it with their clients in the event that anyone of their clients have any objection to me hearing the matter. I requested that if there were any concerns then the same ought to be indicated in court when I would be giving direction. That morning no one raised any issues.

However, subsequent to that the Petitioner has applied for my recusal in the interest of fairness and justice saying that there is likely to be a conflict of interest. The reasons for stating this is that the 3<sup>rd</sup> Respondent JAMES ELVIS OMARIBA ONGWAE who is the Governor of Kisii County and my spouse DR. SAMWEL OMONDI OGADA (a cardiologist in NAKURU county) are close friends to the Orange Democratic Movement (ODM) Party leader The Right Honourable RAILA AMOLO ODINGA and are described as kingpins of the ODM Party in Kisii and Nakuru counties.

It is also said that my said spouse is the personal physician to the Right Honourable Raila Amolo Odinga.

Further that DR. SAMWEL OMONDI OGADA was one of the key organizers in all National Super Alliance (NASA) meetings in Nakuru and that such meetings were attended by the Petitioner.

In the affidavit supporting the application it is deposed that since the 3<sup>rd</sup> Respondent is a good friend to Honourable RAILA AMOLO ODINGA, and DR. OMONDI OGADA is also a good friend to the same individual, and because Hon. ODINGA had shown a great interest in the 3<sup>rd</sup> Respondent winning the gubernatorial elections in Kisii, then somehow this friendship will affect the manner in which I handle this Petition and that I am likely to be biased.

It is his contention that from the eyes of a reasonable man, even if I would be performing my duty to protect the litigants my spouse's interest in the matter would be detrimental to this case and the rights of

the litigants. He relies on the provisions of Article 50 of the Constitution to say the right to a fair hearing is an unlimited fundamental right under Article 25(c) of the Constitution and the lack of confidence in this court would haunt me for the rest of my life should I decline the prayer.

In response the 3<sup>rd</sup> Respondent has filed grounds of opposition which adopted by 1<sup>st</sup> and 2<sup>nd</sup> Respondents pointing out that during the pre-trial conference on 5<sup>th</sup> October 2017 the Petitioner made an oral application for my recusal on grounds that one MR. BIRUNDU (a witness for the 3<sup>rd</sup> Respondent in this matter) attended a meeting in Nakuru during the campaigns on the 7<sup>th</sup> August 2017 and discussed political matters with my spouse. Further that the said MR. BIRUNDU is a patient to my spouse, but no proof was produced.

The Respondent points out that after the court directing that the Petitioner files a formal application, he now shifted gear and introduced a fresh angle that my spouse is a close friend and personal doctor to the Hon. RAILA ODINGA and the 3<sup>rd</sup> Respondent is also a friend to Hon. ODINGA. The 3<sup>rd</sup> Respondent contends that there is no evidence to show how these allegations will interfere or prejudice my mind as a judicial officer and terms the allegations as rumours and completely unrelated to the petition filed herein.

It is contended that there aren't any sufficient grounds for recusal.

At the hearing, MR. SONYE on behalf of the Petitioner reiterated the issue of what constitutes a fair hearing before an impartial tribunal under Article 50 of the Constitution of Kenya. He argued that for the Petitioner, he is associating me as a judicial officer with my spouse who is a cardiologist and that there is nothing to show I would be able to separate my spouse's political interest with my own preferences or sympathies and there will be a conflict of interest.

Mr. Omogeni on behalf of the 3<sup>rd</sup> Respondent (his arguments were largely adopted by Mr. Rigoro for 1<sup>st</sup> Respondent) urged the court to dismiss the application saying the Petitioner is simply on a derailment trip-going by his conduct ever since this Petition was filed. He asked this court to take note that on two occasions when this matter has come up for mention with a view to pre-trial directions, the Petitioner has indicated his intentions to possibly abandon the Petition. However, because the court gave strict timelines within which to make up his mind on the issue, he has now thrown a new spin to the Petition. It is on account of this that he urges this court to find that the applicant/petitioner is simply employing delaying tactics in the matter.

Counsel wonders how the alleged friendship between DR. SAMWEL OMONDI OGADA and Hon. RAILA AMOLO ODINGA, has anything to do with the gubernatorial election petition in Kisii involving JUSTRY P. LUMUMBA, IEBC, ROBERT ISAAC SYDNEY and JAMES ELVIS OMARIBA ONGWAE (the Governor of Kisii County).

He points out that there is nothing presented to this court to even confirm that DR. OMONDI OGADA is the Hon. RAILA's physician and even if he is – how would that affect the court hearing this Petition. In his view the application is simply intended to embarrass and annoy this court.

As for claims that my spouse organized NASA meetings in NAKURU, counsel urges the court to treat these as mere hearsay since

- a) There are no minutes annexed to prove that such a meeting ever took place –
- b) Even if such meetings took place in Nakuru in aid of DR. OMONDI OGADA's Senatorial campaign, what would that have to do with the election of Kisii County Governor.

Counsel urged this court to be guided by three principles enunciated in the case of JUSTICE PHILLIP K. TUNOI and ANOR V JSC and ANOR Court of Appeal No. 6 of 2016 which stated that the issues a court ought to consider in recusal is

(1) It is a matter of judicial officer's discretion, not a provision in law, and the mere fact that someone places a plea for recusal does not automatically translate into a reality – there must be a basis

(2) The court must analyze what is presented and draw an inference on what a right thinking member of the public would perceive

(3) If there is no evidence of bias then there is no reason for recusal.

MR. WANYAMA (assisting MR. OMOGENI) added that it would have been totally different if the Petitioner was making his aspersions on the court's impartiality were he to allege that

(1) I am a personal friend to the Hon. RAILA ODINGA

(2) I have had interactions with the said Hon. RAILA ODINGA in the company of DR. SAMWEL OMONDI OGADA or that I attended any of the political meetings alluded to

I will not deny that

(a) DR. SAMWEL OMONDI OGADA is my spouse.

(b) He resides in NAKURU and contested on an ODM ticket for the seat of Senator – which election he lost. This is the second loss – the first attempt being in 2013.

(c) He is a physician/cardiologist in Nakuru

Those are factual matters. Counsel claims that he is a personal friend to Hon. RAILA ODINGA – I don't know that – and as MR. OMOGENI put it – does the fact that he contested on an ODM ticket (which party is affiliated to the NASA alliance make him a CLOSE friend to Hon. Raila Odinga?

Even if it were to be confirmed that such friendship exists and that the said friendship also exists between Hon. JAMES ELVIS OMARIBA ONGWAE and Hon. RAILA ODINGA, would that translate into a friendship between my spouse and the 3<sup>rd</sup> Respondent?

Is there any evidence to demonstrate that DR. SAMWEL OMONDI OGADA and the 3<sup>rd</sup> Respondent are known to each other or were involved in each other's campaign? As pointed out these were two candidates in two far flung counties (Nakuru in the Rift Valley, and Kisii in the Greater Nyanza). They were contesting two different positions – there is no evidence that the two met, or that Hon. RAILA AMOLO ODINGA has discussed this matter with DR. OMONDI OGADA.

Indeed even if there were political meetings held in Nakuru where the said DR. OMONDI and HON. RAILA attended – it has not been demonstrated that

(1) The issue of Kisii gubernatorial elections were discussed.

(2) I was in attendance

(3) That I am politically active in national and county politics

Indeed no minutes to support these claims or even a photograph has been presented to this court to support those claims.

The Petitioner's counsel has attached a horde of decisions on the subject without specifically referring to what opinion this is applicable here- nonetheless, I have perused them. The case of **Home Park Cateress Ltd Vs Attorney General and Anor (2006)e KLR** addressed the issue of an impartial and independent court or tribunal and it acknowledged that everyone is entitled to the judgment of an impartial and

independent court and focused on issues regarding any individual and institutional relationships. What the applicant must demonstrate is whether this court has a state of mind or attitude that would prejudice the issues and parties in this case.

Indeed at the international level in the **United Nations Human Rights Committee Case of ARVO KARTTONEN V FINLAND, Communication No. 387 of 1989 – (UN dvc GAROR A/48 VOL. II p 120 para 7.2** – the Committee held that the notion of “impartiality” in Article 14

“Impress that the judge must not harbor preconceptions about the matter put before them and that they must not act in ways that promote the interest of one of the parties”

Has this been demonstrated here? Can anyone pick out any aspect of my conduct, by word, deed or perceptions that would suggest I am promoting the interest of one party.

The concern over recusal was also addressed in the Court of Appeal decision **KALPANA H. RAWAL V JUDICIAL SERVICE COMMISSION and 2 OTHERS (2016)e KLR** which emphasized that there must be credibility to the allegations made concerning why an officer sitting in a court or tribunal would be deemed to portray conflict of interest.

Is there a basis to allege “reasonable apprehension as was discussed in ATTORNEY GENERAL OF KENYA VS PROF ANYANG NYONGO and 10 OTHERS EACJ Appeal No. 5 of 2007.

Do “the circumstances give rise to a reasonable apprehension, in the mind 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 –

The reasonable person must have an informed knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form the background.

In my mind it is clear to me as daylight – as Respondents counsel said there is no knowledge of the circumstances alluded to, no specifics, they are general claims cast on a wide sea, hoping to net some floating seaweed. The application is tenuous, frivolous, and intended to annoy and embarrass me. I am not flattered by the veiled insinuation about what goes on between spouses in thinly veiled paragraphs about translating emotions to the pen – that is in bad taste.

When the issue was raised – I expected a professional approach to it, certainly not some fanciful technical-coloured sob stories based on guess work without an iota of specificity.

Certainly, the Constitution guarantees a litigant trial by an independent and impartial court – but there must be a substantive basis in making claims about likelihood of bias, not just blanket claims without a leg to stand in.

Which then bring me to the test set out in Civil Application No. 6 of 2016 Justice Phillip K. Tunoi and Anor V Judicial Service Commission and Anor – my impartiality is being questioned but is there reasonable grounded basis with full incorporation of – the standards test set which is expected to be objective based on FACTS constituting bias – I am afraid this is not such an instance. The application to recuse myself has no basis and is dismissed with costs to the 3<sup>rd</sup> Respondent.

**[Read and signed this 19<sup>th</sup> day of October 2017].**

**H. A Omondi**

**Judge**