



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION NO. 20 OF 2008**

*IN THE MATTER OF : THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT  
(CHAPTER 7, LAWS OF KENYA) AND THE REGULATIONS MADE THEREUNDER*

AND

*IN THE MATTER OF: ELECTION FOR THE KANDARA PARLIAMENTARY CONSTITUENCY*

AND

*IN THE MATTER OF: THE PETITION OF ALICE MUTHONI WAHOME*

**BETWEEN**

**ALICE MUTHONI WAHOME .....PETITIONER**

**VERSUS**

**JAMES MAINA KAMAU .....1<sup>ST</sup> RESPONDENT**

**REUBEN WARUI CHEGE .....2<sup>ND</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

When the court sat on the 9<sup>th</sup> day of November, 2011 it was so that the hearing of the Petition could commence. Mr. Ondieki, one of the counsel for the 1<sup>st</sup> Respondent told the court that the other counsel for the 1<sup>st</sup> Respondent was before the Court of Appeal for the hearing of Civil Application no. Nai. 298 of 2010 and therefore sought an adjournment. Mr. Ondieki added that he was ready to argue their application dated and filed in court on 8<sup>th</sup> November 2011 which he thought should be heard before the Petition.

Mr. Havi, one of the counsel for the Petitioner stated that he had seen Mr. Kibe's letter dated 8/11/2011 only in the evening of 8/11/2011 and that hearing dates had been taken by consent. He had also seen the application filed on 8/11/2011 but which had not even been served on him. Mr. Havi then stated the following:-

The Petition was assigned to this court in February and it had not progressed save for applications. They would not achieve justice if the Petition is not finalized within six months before the next election and that is where we are headed. The Respondents are delaying the case. Since the court has a busy criminal diary it will not conclude this case timeously. His client is entitled to a speedy and fair hearing. His client felt that because of matters between the client and the court, this court may not be the right forum to have her case determined. Mr. Havi added that he did not wish to make a formal application to that effect unless so ordered by the court. He asked that the file be sent to the Honourable the Chief Justice to assign it to another judge who will hear it on a day to day basis. He prayed that this court recuses itself from this case.

Mr. Omwanza counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents left the matter to the court for its decision.

Mr. Nguyo counsel for the Honourable the Attorney General of the Republic of Kenya left the matter to court noting that justice should be served without delay.

Mr. Ondieki was not of the view that the court had occasioned delay in the matter and noted that the issue of recusal was a new matter and thought that the application was brought in bad faith and it should be disallowed.

Mr. Havi replied that no advocate or judge takes pleasure in an application for recusal of a judge but that he was acting on instructions adding that the court may recuse itself or he would take his files and go away. Quoting Article 159(1) of the Constitution he added that judicial authority is derived from the people and he was not going to abrogate from his responsibility to his client and that his client's opinions are hers whether they were acceptable to any one or not. He concluded that his client was ready to make a formal application.

The court gave a ruling that a formal application for its disqualification be made supported by proof of whatever was alleged against the court so that the court could give its side of the story. The court was indisposed and would not hear any matters that day including the criminal ones. The court would not hear any cases on the following day either as it was still recovering from chest pains and recovery of its voice. As the Petition was scheduled to be heard on 14/11/2011, the court ordered that the same do proceed then.

On 14/11/2011 Mr. Havi urged that his application of 11/11/2011 be heard and the file be placed before the Hon. the Chief Justice for directions, the appointment of this court to hear this Petition be revoked and any other judge be appointed to hear the Petition on a day to day basis and determine it by 1<sup>st</sup> January, 2012. That was not in compliance with what the court had ordered on 9/11/2011 and Mr. Havi's then position that his client was ready to file a recusal application. However, it is abundantly clear that the application dated 10<sup>th</sup> November, 2011 and filed in court on 11/11/2011 is a veiled attempt at having this Petition court removed from hearing the Petition which is a strange application not least because the court is not being asked directly to recuse itself but rather the honourable the Chief Justice is being called upon to intervene on some undefined jurisdiction on his part.

To the extent that certain serious allegations have been made against this court, the court is entitled to respond and thereby bring material upon which an arbiter could assess the case of the Petitioner as against this court. I must have missed the provision in the Constitution that denies judges rights and protection of the law.

It was alleged by Mr. Havi that this court was assigned the case in February 2011 and since then the same has not progressed.

The then Chief Justice gave orders appointing this court as the election court on 25.2.2011. The court was Gazetted on 4<sup>th</sup> March 2011 vide Gazette Notice Number 2060 and the matter came for directions before this court on 24/03/2011 by which time there were two applications on file one filed way back on 24/10/2008 and the other on 10/03/2011. Another application dated 10/5/2011 was filed in the intervening period. Those had to be heard first, naturally, and I do not recall any objection from Mr. Havi to their

being heard first. The one of 10/5/2011 was heard on 11/5/2011 and 12/5/2011 and Rulings delivered on 31/5/2011. What is the delay there?

Mr. Havi had no objection to Mr. Kibe's application for adjournment on 6/6/2011 for taking out the application dated 24/10/2008 scheduled to be heard on 9/6/2011 when Mr. Kibe was before the Court of Appeal. They agreed to have the application heard on 16/6/2011 and it was heard then and continued on 21/06/2011 and Ruling was scheduled for 21/7/2011. This court was subsequent to 16/06/2011 appointed as one of three judges to hear Petition no. 102/2011 and because the same was ordered by the Hon. the Chief Justice to be heard on priority this court was unable to deliver the ruling on 21/7/2011 and summoned **all** the counsel involved and as the court was proceeding into the August vacation we all agreed that I would deliver the Ruling on the first day of term i.e 19/9/2011 and I did. Mr. Havi raised no objection at all. There were indeed two applications decided on 19/9/2011, that of 23/3/2011 which was dismissed in favour of the Petitioner and that of 24/10/2008 in which the Petitioner was partly successful.

On 20/09/2011 all parties agreed on hearing dates for the Petition and hearings would start at 10 a.m. and continue until 5 p.m., end of business hours.

On 10/10/2011 the court heard the applications by the 1<sup>st</sup> Respondent and another one brought under s.23 of cap. 7 of Laws of Kenya. The same were determined four days later on 14/10/2011.

I have no idea what delay is being attributed to the court. The court cannot stop parties from filing applications.

The application by the 1<sup>st</sup> Respondent for stay of proceedings while he pursued an appeal was summarily dismissed by this court.

On 19/10/2011 the case was not taken out of hearing list because the court was going for the Chief Justice's address. The real reason was that Mr. Kibe stated that certain ballot boxes had gone missing and he would, in the premises be unable to proceed until that issue was resolved. The court sent the parties to the Executive Officer of the court to sort out the issue and in the press of the following morning Mr. Havi was shown holding a ballot box, he had fully participated in the exercise.

On 24/10/2011 Mr. Omwanza asked for a week to 9 days to sort out the issue of the missing ballot boxes. He had been absent from court on 19/9/2011. The court gave him upto 1/11/2011 and ordered that the Petition would proceed then. As it turned out the court, a mortal body, was indisposed on 1/11/2011 and the events of 9<sup>th</sup> and 10<sup>th</sup> November 2011 are dealt with earlier in this Ruling.

The Petition itself was filed in early 2008 and the Petitioner only moved the Honourable the Chief Justice on 17/2/2011 to appoint a new court after the previous court was promoted.

Records will show that on any day that this Petition was listed for hearing the court would remove from the hearing list all murder trials listed to be heard on those days. That would be done between 9 a.m. and 10 a.m. when the hearing of the Petition/Application would begin.

Was it not this court that announced in open court in the presence of all that it had forgone its leave in November so as to hear and determine the Petition before the court's Christmas vacation? Why would the Petitioner conveniently twist that and talk of "*favours*", if she was well meaning?

I leave it to whoever to discern any delay on the part of the court.

There was an allegation that there were matters of differences between the Petitioner and this court. I have to state here that I have agonized over this allegation since it was made and it still puzzles me. The Petitioner knows that our paths, personal, social, professional or any other that might be thought of have never crossed. NEVER. Never crossed for better or worse, we have just never related, well or badly. And that is the reason I still agonize as to why such a sad allegation would be made.

As concerns Petition no. 102/2011, the Petitioner was but one of many counsel that represented the Petitioner in that case. This Petitioner played no lead role whatsoever in Petition no. 102/2011. My recollection informs me that she introduced the coram once or twice. The Petitioner's lead counsel was one Mr. Ongoya. More importantly the party that made an application for my disqualification was not this Petitioner's client. Why then would I take it against this Petitioner?

The Petitioner and her advocate Mr. Havi know that the Petitioner heard nothing of my disappointment about the application for my disqualification in Petition no. 102/2011 from any women caucus. That they know for sure. There was nothing the Petitioner heard from any women caucus because of two reasons, firstly had she indeed heard anything she would have revealed her source(s) and not bring blanket allegations that are unsubstantiated. Secondly there was nothing heard at any women caucus because nothing about my disappointment was said at any women caucus. What happened is that Mr. Havi, counsel for the Petitioner came to see me in Chambers on Monday 17/10/2011 in the afternoon. He came with my clerk. I never see parties alone except in the presence of my clerk. He told me that there was a problem. His client wanted him to file an application for my disqualification because she thought that I did not like her after Petition no. 102/2011. He told me that he had advised her that he had never made an application for the disqualification of any judge and he would not do it against this court. He and a retired judge talked to his client and told her that it was not necessary to make such an application and antagonize a judge. His client had then told Mr. Havi that if he did not wish to file the application then she would engage Mr. Ongoya (the lead counsel in Petition 102/2011) to make the application.

I told Mr. Havi that I had absolutely nothing against his client but that I would not be threatened or intimidated and that I would do her case and any other assigned to me according to law and to the best of my ability. That was when I told Mr. Havi that despite what his client said about me I would obey the law and base my decision on evidence and the law.

As concerns allegations about unethical conduct, details of which are not given, I will deal with those anytime the same is referred to the right organs, The Judicial Service Commission and the Ethics and Anti Corruption Commission. I have absolutely nothing against the Petitioner, I have done nothing unethical, I have caused no delay and if the Petitioner hates the court, as it would appear to be the case, that feeling is not mutual and will not be reciprocated by this court. Hate is a very strong word. I am incapable of revenge even, because revenge belongs to the Lord my God.

In any event if the Petitioner considered that I was wrong in my findings she was entitled to appeal as this is not a court of last resort. And she indeed appealed.

Has there been shown sufficient cause for this court to recuse itself from hearing this Petition? The procedure for a party to ask a judge to recuse is well known.

***“The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.”***

see **The President of the Republic & 2 others –vs- South African Rugby Football Union & 3 others – case CCT 16/98 at pg. 59.**

That is not what Mr. Havi did. He made a visit to the judge's chambers without the opponent and when asked to make a formal application supported by evidence he did not. That visit fell short of the required procedure and it was akin to intimidating the court as well as threatening it.

An applicant for recusal must establish bias, not as a mere figment of the applicant's imagination as ***“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application”.***

see the authority above at para 45.

An allegation without substantiation is not enough and courts should not lightly accede to veiled intimidation in the form of such unsubstantiated allegations and outright untruths as in this case.

The timing of this application is also suspect and so also the Petitioner's advocate's visit to the judge's chambers on 17/10/2011 soon after the Ruling of 14/10/2011 in which the Petitioner lost prayer (b) of her Petition. It came after that loss and Mr. Havi's allegation to the court on 17/10/2011 that the Petitioner's clerk had gone missing after he was sent by the Petitioner to deliver a copy of the register to Mr. Havi and then on 14/10/2011 the prayer on the register was struck out. Surely the court cannot know what goes on in counsels' offices and relies only on what happens in court. The Petitioner was happy to participate in the proceedings before me since 11/5/2011 until she lost on 14/10/2011. That must be why in the **Southern African case** quoted above the court held at 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 the 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 case in their favour ----- . The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself.”***

And in the case of **OLE KEIWUA V CHIEF JUSTICE OF KENYA & 6 OTHERS [2006]E KLR** where the court stated

***“We appreciate the fact that a party to any judicial proceedings has a right to object to any judge or judicial officer sitting if he or she has a good reason for raising such an objection. However, whoever intends to raise such objection is obliged to raise his/her objection at the earliest opportunity.”***

And that is because the court must guard against litigants who all too often blame their losses in court to bias on the part of the court.

In the exercise of the judicial function a judge acts independent of another, including independent of the honourable the Chief Justice. The judicial function enjoins a judge to proceed on a conscientious understanding of the law free from any extraneous matters from any person. Judicial impartiality, itself a fundamental principle, is the bedrock of every civilized and democratic judicial system. I do not intend to deviate from that principle for without judicial independence there is no rule of law and I shall be the last to violate. Individual judicial independence implies that no judge can direct another what to do in the discharge of his role as a decision maker.

I think I have said enough to show that the allegations against this court are without merit unsubstantiated as they are and in most instances untrue. They appear to have been made to malign the court. It cannot be sensible to remain silent when falsely accused with a motive not so clear. I have given my side of the story, as I had to, because in the absence of any reply it would be assumed against this court that the allegations are true. This court has as much a right to defend itself as it has the duty to be accountable. It will not falter in the two.

I shall isolate myself from any external pressures or influences and will give my decision irrespective of the parties involved. My decision will be advised by the evidence and the law and I will do what I honestly believe to be right in the circumstances of the case as that is the least that is expected of me as a judge. I have conducted myself with responsible professionalism as to behave otherwise would put my own integrity on the line. I will not behave otherwise. I refuse to embroil myself in the political controversies of Kandara Constituency and the unsubstantiated allegations of the Petitioner. I shall ensure that the powers given to me by the law are neither exceeded nor abused but exercised lawfully. I will never lose sight of what is right and just in obedience to the solemn oath of office that I took. I will do justice to all without fear, favour, ill-will, affection or prejudice. And if I should be unable to do that

justice in that manner then I would do the honourable thing and quit as I am not chained to the bench for life with unbreakable shackles.

I am saddened by the allegations against me, particularly because they are untrue but I shall harbor no bitterness as bitterness would only serve to destroy me. I will embrace forgiveness and I am fully at peace with my maker. Unlike Pilate there is no blood in my hands concerning this case necessitating washing it off. Hate is a strong word and I shall have nothing to do with it.

The Petitioner and his counsel are senior members of the Kenyan bar. The Bar and the Bench complement each other in the process of dispensing justice even in adversarial systems such as ours. It behoves both the Bar and the Bench to strike a working formula based on professionalism, etiquette and simple good manners. Happily this court refuses to be vindictive in due obedience to its oath of office. The court's fidelity will remain to the law.

There is nothing shown to call for my recusal and I refuse to recuse myself. I have no jurisdiction to grant prayers 2 and 3 of the application dated 10<sup>th</sup> November, 2011 and filed on 11/11/2011 and in any event those prayers cannot have been directed to this court. Petition number 20 of 2008 will continue before this court.

**DATED AND SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2011.**

**P.M. MWILU**  
**JUDGE**

**In the presence of:**

Mr. Osundwa for the Petitioner

Mr. Ondieki & Mr. Kibe for the 1<sup>st</sup> Respondent

Mr. Kiarie holding brief for Mr. Omwanza for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Mr. Nguyo for the Attorney General  
Court clerk – Tabitha

**P.M. MWILU**  
**JUDGE**