



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

CONSTITUTIONAL PETITION NO. 22 OF 2019

SAMPARUAN OLE KIJAPE & 30 OTHERS.....PETITIONERS

-VERSUS-

THE CABINET SECRETARY, MINISTRY OF LANDS

& PHYSICAL PLANNING & 25 OTHERS.....RESPONDENTS

RULING

Before this court is a Notice of Motion dated 24/7/2020 brought under Article 50 (1) of the Constitution, Section 1A,1B, & 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules in which the Applicants/Petitioners are seeking the following Orders: -

1. That pending the hearing and determination of this application, the High Court be pleased to stay all the proceedings in the Petition herein being Narok ELC Constitutional Petition Number 22 of 2019.
2. That the Hon. Justice Mohammed Noor Kullow be pleased to recuse himself from continuing to hear and determine any facet of ELC Constitutional Petition Number 22 of 2019.
3. That the Narok ELC Constitutional Petition No. 22 of 2019 be referred to the Chief Justice for appointment of another Judge to hear and determine the Petition and or in the alternative be transferred to another ELC Court Judge within the region to hear and determine the matter.

The application is premised on the grounds that the Applicants are apprehensive that the Honourable Judge currently presiding over the matter will not be fair, impartial and an independent arbiter in this case and ought to recuse himself, the reason being that they have received overwhelming information and mockery from the respondents directly and through their relatives that this court has since been influenced to rule in favour of the Respondents, that there are several other Petitions filed by various complainants in respect of adjudication and demarcation of Naikarra Adjudication Section. As a result, there are reasonable grounds for assuming the possibility of bias and in the mind of any right-thinking person in the society there is reasonable doubt about the fairness of the administration of justice in this matter.

The Application is supported by the affidavit of Saruni Ole Ntayia, the 25th Petitioner, sworn on 24/7/2020 in which he avers that himself and other petitioner have been residents and land owners of Naikarra Adjudication Section seeking redress of this honourable court having been aggrieved with the actions of the Respondents. It is the Applicants contention that upon filing of this instant Petition they have received threats and insults and that the Respondents have sworn that they would by all means ensure that justice is not served. That in the year 2020, the Respondents alleged to have managed to have a plan to influence this court that justice would not be in their favour. That at a personal level, the 25th Applicant herein met Ampai Ole Mako who informed him that on 29/5/2020 at around 2pm in Naroomoru cluster group, he witnessed a confrontation that had ensued between Leina Ole Musanka (8th Respondent) and the members of the cluster group. That the 8th Respondent had an outburst that they need to raise 2,500,000/- to influence the court to consolidate all the matters regarding Naikarra Adjudication section. That several other meetings continued to take place on various dates in the month of June 2020 in the home of Moitalel Ole Rotiken the 17th Respondent herein and that the agenda of the discussion was to raise the funds and he went on to collect money from land owners who have benefited from the illegal actions. That it is on this basis that Counsel on record informed the Applicants that such allegations form basis of a reasonable perception of a Judge who is reasonably suspected of bias to continue presiding over the matter. There is also the sworn Affidavit of Ampai Ole Mako sworn on 24/7/2020 which buttresses the issues raised by the Affidavit of the 25th Applicant herein.

The Application is opposed by the Replying Affidavit of Kamakei Ole Nyakuni sworn on 6/9/2020 in which he contends that the allegations raised by the Applicants are largely unsubstantiated, that there is no evidence on record touching on this Court's character to suggest any likelihood of bias towards its integrity and impartiality. That the applicants are on a mission of forum shopping for a bench that would hear their case and give a determination that is favourable to their case. That the Applicants have not provided records of persons who have contributed any money either through cash, or deposits in any bank account, or money transfer. That the dates alleged for the meeting are false and border on contemptuous indictments. It

is the Respondents' contention that the dates alleged particularly on 29/6/2020, the 8th Respondent together with Counsel on record went to sell their livestock on market day from 10.00 am to 5.30pm. In summary the dates alleged by the Applicants in which meetings took place are unfounded for example 21/6/2020 Mr. Charles Ntinai Ole Mpoe contracted a traditional Maasai Customary wedding. That the mere mention of bias is too remote to warrant any reasonable person to suggest any bias. That as such the application is bad in law as it does not disclose any source of information. That **Order 19 rule 3 of the Civil Procedure Rules** requires that affidavits confined only to facts that the deponent is able to prove of his or her own knowledge and where an affidavit contains statements of information and belief, the source and grounds thereof must be disclosed. In conclusion, the Applicants' Affidavits amount to perjury for which appropriate legal action must be taken.

I have carefully read and analysed the Application, the Replying Affidavit and the Submissions filed by both parties and the issue for determination at this stage is whether this court presided over by myself should recuse itself from continuing to hear and determine any facet of ELC Constitutional Petition No. 22 of 2019.

In the case of *Charity Muthoni Gitabi v Joseph Gichangi Gitabi (Substituted By) Michael Wachira Gitabi [2017] eKLR* the court observed that:- 'Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a mere allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. **On the contrary decisions abound that judges should not recuse themselves on flimsy and baseless allegations**'. (emphasis mine)

From the foregoing it is clear that mere allegations of bias of a judge must be substantiated. In the instant case, the allegation raised that Kshs. 2,5000,000/= was raised in favour of the Respondents outcome are far-fetched. I have not received any money whatsoever. As a result, this court shall not be intimidated but will continue in pursuit of justice as I swore to the people of Kenya when I took oath of office.

The upshot of the foregoing is that the Application dated 24/7/2020 lacks merit and is dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK ON THIS 13TH DAY OF JULY, 2021

MOHAMED N. KULLOW

JUDGE

In the presence of:

CA:Chuma

Ms Thiongo for Kiplangat for the petitioners

N/A for the respondent