



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 365 OF 2017**

**IN THE MATTER OF: EMPLOYMENT AND LABOUR RELATIONS**

**COURT (ELRC) AT NAIROBI CAUSE NO.160 OF 2011**

**IN THE MATTER OF: ARTICLE 22, 23 AND 165 OF THE**

**CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: ORIGINAL JURISDICTION OF THE HIGH**

**COURT OF KENYA UNDER ARTICLE 23 AND 165**

**IN THE MATTER OF: ARTICLE 165(3)(B) AND (D)(II)**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS UNDER ARTICLE 25, 27, 28, 29, 35, 41, 47, 48 AND 50**

**-BETWEEN-**

**REGINALD NJAGI NYAGA.....APPLICANT/PETITIONER**

**AND**

**THE FRESH EMBASY – NAIROBI.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE TRANSPARENCY INTERNATIONAL.....INTERESTED PARTY**

**RULING**

**THE PETITION**

1. Before me is an application by the Applicant/Petitioner dated 15<sup>th</sup> April 2019 seeking the following reliefs :-

*a) That the trial Judge Hon. James A. Makau do disqualify himself from hearing the Ex-parte Application dated 11<sup>th</sup> March 2019 including nay other matter regarding this Petition.*

*b) That the said Ex-parte Application be referred to His Lordship the Hon. Chief Justice for Constitution of an uneven member bench of judges not less than three and for direction as requested thereof pursuant to Article 22(3) and 165(4) of the Constitution*

*of Kenya*

***c) That the costs of this application be on cause.***

2. The application is premised on several grounds on the face of the application.
3. The application is further supported by affidavit sworn by the Applicant Reginald Njagi Nyaga sworn on 15<sup>th</sup> April 2019.
4. The Respondent and Interested Party did not file response to the application.

#### **GROUND IN SUPPORT OF THE APPLICATION**

5. That the Court violated the Petitioner's rights to fair hearing.
6. That the Court is biased and supports Respondents and their Counsel.
7. That the Court gave its personal view in the matter and the Petitioner is prejudiced; as the Court is not impartial.
8. The Petitioner is aggrieved by failure to have orders issued to Chief Justice to constitute a Bench of three Judges to hear this Petition.
9. That the Petitioner contends there seem to be a well orchestrated collusion between the Respondents advocates Mr. D. Michuki for 1<sup>st</sup> Respondent and M. M. Mutindi for 2<sup>nd</sup> Respondent, to obstruct and defeat the cause of justice and have created personal Court arguments in person against the Petitioner, through Court insubordination, impersonation, false pretense and contempt of Court with impunity on the basis, that their clients are immune and above the law and Constitution of Kenya, to respond to Court summons thereof in person for cross-examination in Court of law without demonstrating any constitutional provisions to support them.

#### **ANALYSIS AND DETERMINATION**

10. I have perused the applicant's application and affidavit in support and the issue for consideration can be summed up as follows:-

***a) Whether the Petitioner has met the threshold for this Court to recuse itself.***

11. In determining this issue I endeavour to consider the Petitioners' affidavit in support and Court proceedings in this Petition.
12. The Court record reveal, that this matter commenced on 24<sup>th</sup> July 2017 before Hon. Justice E. C. Mwita. That on 7<sup>th</sup> August 2018 directions were issued, that the Petitioner do file and serve written submission in support of the Petition within 14 days and Respondents to file their responses and submissions within 14 days from the date of service with Petitioners' submissions. Hearing was set for 21<sup>st</sup> May 2018.
13. On 21<sup>st</sup> May 2018 the Petitioner raised several issues against the Trial Court, to which the Court stated it was not aware of the serious allegation labelled against it by the Petitioner, leading to the Court recusal from proceeding on with the matter.
14. The matter was taken over by Hon. Lady Justice Okwany, on 11<sup>th</sup> July 2018, who upon hearing counsel and the Petitioner, directed the parties to file and exchange responses and set the matter for hearing on 24<sup>th</sup> October 2018. The court delivered a ruling on 9<sup>th</sup> January, 2019 directing parties to file and exchange written submissions to the Petition and set highlighting on submissions on 15<sup>th</sup> May 2019.
15. I took over this matter on 1<sup>st</sup>, April, 2019 upon being transferred to this Division and on 5<sup>th</sup> April 2019 I gave directions on how to proceed with the matter in presence of Petitioner and M/s Mutindi, State Counsel.
16. The Court record reveal that on 9<sup>th</sup> October, 2019 in presence of parties I directed that the application dated 15<sup>th</sup> April 2019 be heard first. The parties were to file responses and submission to the application within 14 days from the date of service of the responses. Highlighting was set for 11<sup>th</sup> December, 2019. On 11<sup>th</sup> December, 2019 parties had not complied with the Court's directions and the matter was once again set down for confirmation of compliance on 30<sup>th</sup> March 2020 but due to Covid-19, there was no open Court hearing and no appearance of the parties.
17. The matter was subsequently virtually mentioned on 8<sup>th</sup> June 2020; 7<sup>th</sup> October, 2020; 1<sup>st</sup> December 2020; 2<sup>nd</sup> March 2021; in absence of the Petitioner and lastly on 31<sup>st</sup> May 2021, when Petitioner and M/s Mutindi, State Counsel, appeared and matter set down for ruling on the Petitioner's application of 15<sup>th</sup> April 2019.

18. Looking at the Petitioners affidavit sworn on 15<sup>th</sup> April 2019 in support of the application for this Court's recused, there is no single date disclosed when the Petitioner's right to fair hearing was denied nor particulars of the alleged use of abusive language and threats as, averred in the application, nor are there particulars of biasness or partiality, neither are there particulars of the Court advising M/s Mutindi, state Counsel, on how to write submission nor on how she was being assisted. The Petitioner's allegations all lack particulars and are generalized as none of the alleged incidents ever occurred. The Petitioner alleges the incident happened in open Court, yet he has not disclosed the date, nor attached the Court proceedings of the day or causelist nor caused anyone to file affidavit in support of the allegations. The issues raised

are serious and the standard of proof required is high and that has not been met. It is noted other than putting on the ground, no affidavit evidence in support was filed.

19. I am surprised of the Petitioner's allegations against the Court and the Respondent's counsel, simply because no such incident occurred nor would I have acted as alleged since I am aware of my duties and obligation as a Judge and I strongly apply and comply with bungalow principles which binds me as a Judicial Officer. I find it hard to understand the Petitioner's complaint without particulars pointed out hereinabove.

20. I have considered what Justice E. W. Mwita, who was handling this case before me stated in response when the Petitioner raised demanding remarks against him and to which he stated, he did not know, what the Petitioner was talking about. On my part I am a total stranger to the allegations attributed to me by the Petitioner. In handling this matter I was out to do Justice unfortunately the Petitioner without any justification has accused me on unfounded allegations and which I state have no basis.

***21. In view of the aforesaid, I find no basis in Petitioner's application for my recusal from hearing this matter. However to demonstrate, I have no personal interest in this matter and, that I wish Justice not only to be done but be seen to be done, and as in this Division, we have three Judges, I would refer this matter to the Presiding Judge of the Division to allocate the Petition to any other Judge other than myself to hear and determine prayer (b) in the application and the Petition. No orders as to costs.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF JULY, 2021.**

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**J. A. MAKAU**

**JUDGE**