



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E1 OF 2020**

JOEL TITUS MUSYA T/A MAKORI UCTIONEERS.....PETITIONER

**-VERSUS-**

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

THE PRINCIPAL MAGISTRATE COURT, KWALE.....3<sup>RD</sup> RESPONDENT

MUNGAI KAMAU T/A MUNGAI KAMAU & CO. ADVOCATES....4<sup>TH</sup> RESPONDENT

ANNE GLEBKE..... 5<sup>TH</sup> RESPONDENT

ELIZABETH STOCKER.....6<sup>TH</sup> RESPONDENT

**RULING**

1. This is a **Ruling** determines the 4<sup>th</sup> Respondent's oral application made on **28<sup>th</sup> October, 2020** seeking the court to recuse itself and have the matter transferred to Constitutional, Human Rights and Judicial Review Court for directions and disposal of the Petition.
2. The 4<sup>th</sup> Respondent contends that he lacks confidence with this court for incidences as that have shown up in the matter and particularly as deponed at **paragraph 21** of his **Replying Affidavit** dated **9<sup>th</sup> October, 2020**.
3. The Counsel explained one of the incidences including the orders made by this court on **6<sup>th</sup> October, 2020** and further allegation that the court has ignored to determine the 4<sup>th</sup> Respondent's **Notice of Preliminary Objection** dated and filed on **5<sup>th</sup> October, 2020**.
4. With regard to the orders of **6<sup>th</sup> October, 2020**, the 4<sup>th</sup> Respondent submitted that the orders were issued in the absence of the parties that had the effect of staying the criminal proceedings at **Kwale Law Courts**. Further, that the said orders had the effect of finally determining the main petition in the absence of parties.
5. With regard to the **Preliminary Objection**, the Counsel argued that the main ground in the preliminary objection is that the Petition is *res judicata* and should be struck out. The Counsel reiterated that the court ought to have determined the **Preliminary Objection** first but it (the court) has failed to do so.
6. Based on the foregoing, the 4<sup>th</sup> Respondent averred that the Petition and the application were filed in the Constitutional and Human Rights Division of the High Court at Mombasa and only Justice Ogolla should hear the matter.
7. Further, the Counsel asserted that Justice Ogolla abdicated his duties by assigning this matter to this court without any Notice being given to the parties. According to the Counsel, both Justice Ogolla and this court have colluded with an intendment to have the Respondents not participate in the hearing especially by not cause-listing the matter for on **6<sup>th</sup> October, 2020** when it was intended to be heard.
8. Finally, the **Mr. Muigai** submitted that the orders issued by this court staying the criminal proceedings at Kwale were unfair, injudicious

and illegal bearing in mind that there was a **Preliminary Objection** raised and further that some of the parties had not been served.

9. The Petitioner's Counsel opposed the application and insisted that no evidence for the allegations made against the court had been adduced. **Mr. Opullu**, Counsel for the Petitioner asserted that the orders being complained of were not made ex-parte. That parties had submitted on the issues under consideration and the court exercised its discretion in granting the orders as it did. The Counsel asked the court to disregard the submissions made by the 4<sup>th</sup> Respondent.

10. All the other parties left it upon the court to decide on whether the 4<sup>th</sup> Respondent had made a case to warrant the court to recuse itself.

### **The Determination**

11. Having carefully listened to the arguments that have been advanced by Counsel for either party, I find that the only issue for determination is whether this Court should recuse itself from hearing and determining this case.

12. From the court records, I note that this matter came up before me on **29<sup>th</sup> September, 2020** pursuant to directions of the Hon. Justice Ogolla that the matter should be placed before this court for directions and hearing. On the said **29<sup>th</sup> September, 2020**, this court considered the Petitioners application dated **28<sup>th</sup> September 2020** and allowed the application in terms of **prayer no.1** which only sought the matter to be **Certified Urgent**. The court further directed that the application be served upon the Respondents for an inter-parties hearing on **6<sup>th</sup> October, 2020**.

13. When the court reconvened on **6<sup>th</sup> October, 2020**, **Mr. Opullu** appeared for the Petitioner/Applicant, **Mr. Mungai** for the 4<sup>th</sup> Respondent and **Mr. Nguyo Wachira** for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. **Mr. Opullu** indicated that the matter had been scheduled for hearing of an application dated **28<sup>th</sup> September, 2020** and that he was ready to proceed with the same. However, **Mr. Wachira** and **Mr. Mungai** were not ready to proceed with the hearing for the reason that they had not yet filed any response to the application and needed more time to do so. In addition, Mr. Mungai then informed the court that he had filed a **Preliminary objection** dated **5<sup>th</sup> October, 2020**.

14. In response, **Mr. Opullu** was not opposed to the Respondents being allowed time to respond to the application dated **28<sup>th</sup> September, 2020**. However he was concerned that there are criminal proceedings going on in **Kwale Law Courts** which ought to be stayed on interim basis. **Mr. Opullu** further expressed the view that court should call for the original lower court files so that the court can adequately examine the parties' grievances in the **Preliminary Objection** and the application dated **28<sup>th</sup> September, 2020**.

15. **Mr. Mungai** on the other hand asserted that the issues raised by **Mr. Opullu** were already determined the same having been dealt with by a competent court. His proposal was that directions issue that the **Preliminary Objection**, the application and the **Petition** be merged and dealt with together.

16. On the Part of **Mr. Wachira**, his view was if any orders were to be issued, then they would have the effect of preempting the Lower Court Criminal matter at Kwale which had reached the Defence stage. He further told the court that the earliest date for defence hearing in the said lower court matter would be given in **January, 2020**.

17. In response to those submissions, **Mr. Opullu** was critical that **Mr. Mungai** had failed to inform the court that the case in Kwale had not been determined since the defence case was ongoing. He submitted that this court should exercise its supervisory jurisdiction conferred by the **Constitution, 2020** by calling the lower court matters so that the issues at hand can be adequately determined.

18. Having considered those submissions, the court issued temporary Stay Orders in **Criminal Case No.174 of 2017** pending the hearing and determination of the application dated **28<sup>th</sup> September, 2020**. The court further directed that **Cr. Case No. 174 Of 2017, Kwale** and **CMCC No. 543 of 2016 Kwale**, be called for and availed before the court. Finally, the court directed that the parties do proceed with the **Preliminary Objection** and the Notice of Motion application dated **28<sup>th</sup> September, 2020** by way of written submissions. Parties were then expected to file their responses to the application as well as the **Notice Of Preliminary Objection** alongside their submissions. It is those directions which culminated in this instant application for recusal.

19. The court in the case of **Francis Nganga Mundia...Vs...Isaac Gathungu Wanjohi & 3 Others [2019] eKLR** while considering a similar application had the following to say;

**“How should Judges treat the subject of disqualification when raised before them?**

**...when the courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.’**

20. It cannot go without saying that for an application for recusal, the Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the court was biased. Would the facts of this case then lead a fair-minded and informed observer to conclude that there is real possibility that this court will be biased?

21. Having set out the chronology of events in this matter, it is clear that **Mr. Mungai**, the 4<sup>th</sup> Respondent is not being truthful in alleging that the orders that have temporarily stayed the Kwale criminal matter were issued ex-parte and without notice to the Respondents as **Mr.**

**Mungai**, the 4<sup>th</sup> Respondent was present in court when the court granted the said orders and he ought to have appealed against the orders in the event that he was not agreeable with the same.

22. There is also the allegation by **Mr. Mungai**, the 4<sup>th</sup> Respondent that this court has colluded with the Hon. Justice Ogola so that the Respondents might not be heard. He has also lamented that this court has ignored to determine his **Preliminary Objection** dated 5<sup>th</sup> **October, 2020**. I do not wish to repeat that on 6<sup>th</sup> **October, 2020**, the court gave directions that the **Preliminary Objection** be canvassed by way of written submissions. I believe those allegations are figments of the 4<sup>th</sup> Respondent imaginations and/or utter falsehood, solely calculated at giving a semblance of credence to an otherwise hopeless application for recusal.

Such behavior, I find is incompatible with the status of an **advocate**.

23. **Mr. Mungai**, the 4<sup>th</sup> Respondent further has averred that he has no faith in this court, but I wonder where that view has come from. The fact that one is not particularly happy with a particular Judge is not by itself reason for a Judge to recuse himself or herself, for if that were the case, then applications for recusal will be all that Judges handle on a daily basis.

24. My own view of this application is that the 4<sup>th</sup> Respondent is not happy with the fact that the court allowed a temporary stay of the Criminal proceedings against the Petitioner pending the hearing and determination of the application dated 28<sup>th</sup> **September, 2020**. But Rulings are not made by a court in order to make a litigant happy. Rulings are made depending on whether or not the Judge feels that the application is merited, and if the other side in a litigation is not agreeable to the Ruling, the avenue available to him/her is to appeal or seek for a review but not to ask the Judge to recuse himself or herself.

25. I must also hasten to add that parties who come to court are not to choose which court is to adjudicate over their disputes. All courts are deemed to be impartial unless there is evidence to the contrary. Judges are like umpires. Umpires do not make the rules, they apply them by making sure that everybody plays by the rules.

26. Lastly, in responding to the 4<sup>th</sup> Respondent's concern that the matter ought to be heard by Hon. Justice Ogola, who is the head of the Constitutional and Human Rights Division, I refer to the provisions of **Article 162** and **165 of the Constitution** which I direct the parties herein to reconsider. It is clear from the said provisions that the High Court has unlimited original jurisdiction in Civil and Criminal matters apart from matters falling within the jurisdiction of Employment and Labour Relations Court and the Environment and the use and occupation of, and title to land, which jurisdiction lies squarely with the respective courts as spelt out in **Article 162** of the **Constitution**.

27. It should be noted that the Constitution does not create a distinction in the jurisdictions of the High Court save for what is expressed under **Article 162(2)**. In my view, the divisions created within the High Court are purely administrative and only meant to facilitate effective and efficient administration of justice. Accordingly and legally speaking, there can be no question of jurisdiction as between the different divisions of the High Court. In that regard, this notion gets support from the case of **Rachael Muaka...Vs...Kahawa Sukari Ltd & Another [2010] eKLR** which states that: -

**“The High Court of Kenya is only one court with unlimited original jurisdiction in civil and criminal matters, and such jurisdiction and powers as may be conferred on it by the Constitution or any other law. The divisions in High Court are purely administrative and do not erode the Constitutional jurisdiction conferred on the court. This court is therefore empowered to handle, hear and determine this matter”.**

28. In view of the above findings, I find the Application by the 4<sup>th</sup> Respondent for me to recuse lacking in merit and the same is therefore dismissed.

29. I now proceed to confirm whether the parties have complied with the directions of this court on 28<sup>th</sup> **October, 2020**, filed their respective responses to the application dated 28<sup>th</sup> **September, 2020** as well as the **Preliminary Objection** dated 5<sup>th</sup> **October, 2020** alongside the written submissions as earlier directed by this court.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 1<sup>st</sup> day of DECEMBER, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on 15<sup>th</sup> **March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**