



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 10 OF 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT OF 2012**

**AND**

**IN THE MATTER OF DEVOLVED GOVERNMENT ACT**

**BETWEEN**

**BENSON OKERA MAGANA**

**ABDI HUSSEIN**

**NATHAN LUGAKA NUNU**

**DAVID AGESA**

**WYCLIFF A. ASUGA**

**ABSALOM M. AMBAKA**

**KHALAF ABDI HASSAN**

**ABDI FATA HASSAN**

**FATUMA MOHAMEED HASSAN**

**BEATRICE OVOLEZA MKUZI**

**GEOFREY OMAMBIA MOSETI**

**DENNIS OMWOYO ONCHIEKU**

**SOLOMON ONDEGO SILINGI.....PETITIONERS**

**VERSUS**

**THE MIGORI COUNTY PUBLIC SERVICE BOARD**

**THE COUNTY ASSEMBLY SERVICE BOARD MIGORI COUNTY**

**THE COUNTY GOVERNMENT MIGORI.....RESPONDENTS**

**RULING**

1. Before me is an application by way of the Notice of Motion dated 31/01/2017 seeking my recusal from further hearing of this matter. The application is supported by the twin affidavits of the first Petitioner herein sworn on 31/01/2017 and 24/02/2017 respectively.
2. The application is premised on allegations that there is over-familiarity between myself and the County Governor of the third Respondent, The County Government of Migori.
3. The application is opposed. The Respondents filed twin affidavits as well through one Mr. Christopher Rusana, the County Secretary of the third Respondent on 08/02/2017 and 18/05/2016 respectively.
4. Parties were then directed to file written submissions. Whereas the Respondents complied, the Petitioners did not. The Respondents referred to case law on the subject culminating with a call for the dismissal of the application.
5. I have carefully considered the application and the submissions. I am quite clear in my mind on the gravity of the application before me and the calling on my part not only to the parties in this matter but all such parties who appear before me seeking justice.
6. Briefly, this matter has a history worth revisiting. The Petition was filed in the High Court at Kisii before being transferred to this Court. That was through the firm of *Messrs Minda & Company Advocates*. Contemporaneously with the filing of the Petition was the filing of an application seeking conservatory orders. The application was heard and determined in favour of the Petitioners. The Respondents appealed and the appeal was successful. That outcome earned the exit of the then Advocates then on record for the Petitioners by the filing of a Notice to act in person by the Petitioners. Later, the current firm of Advocates came on record for the Petitioners and sought that the matter be transferred from Kisii to this Court.
7. The matter came up before me where parties took directions on the hearing of the main Petition. Part of the directions were that the parties were to file written submissions for highlighting. When the matter came up for the highlighting of the submissions, Counsel for the Petitioners applied that the matter be held in abeyance so that he could file an application for constitution of a 3-Judge bench. Upon going through the record, this Court found out that indeed the Petitioners had earlier on filed that application in Kisii on 19/03/2014 and withdrew it on 07/10/2014 after losing at the Court of Appeal. The request was therefore declined and matter ordered to proceed on on another day.
8. Without venturing into an unsuccessful attempt by the Petitioners' Counsel that followed thereafter, an oral application for my recusal was made on the day the matter was set for highlighting of the submissions. That did not surprise me. Luckily, there were several Counsels in Court and when I asked Counsel for the Petitioners to substantiate the allegation, he was very clear that his instructions were based on rumours allegedly heard by his clients. I recall explaining to the Counsel that the prevailing law and practice require the County Governors to be members of the Court Users Committees and as such the Court's interaction was only on official lines. However, in view of the history and the nature of the matter, this Court directed the Petitioners to file a substantive application.
9. When the application under consideration was eventually filed, the allegation was over-familiarity between myself and the Governor of the third Respondent. The Petitioners' cited a day and time that I had been allegedly seen at the residence of the Governor and inside my official car. That day was the very day I declined to hold the matter in abeyance and ordered parties to take a date for highlighting of the

submissions.

10. When the first Petitioner was challenged by the Respondents and elsewhere, the version changed. This time round it was only the car that had been seen coming out of the said residence. The time was also changed since the initial time the first Petitioner had stated was at variance with the official Work Ticket of the vehicle. The first Petitioner then went into a political spree where he ventured into various encounters with some people whom he alleged to be agents of the Governor and who were putting pressure on him and persuading him with money to withdraw the matter. One may pose here and wonder why the alleged agents of the third Respondent would belabor themselves that much if it is true the Governor is that close to the Judge.

11. In such a serious application like the one before Court, forthrightness is expected of an applicant moreso because one eats into the integrity of the Court. Giving varying versions on oath of alleged incidences reveals the truth that such an applicant is not truthful but attempting to achieve a certain hidden goal. A reading of the affidavits on record for and in opposition to the application clearly brings out the fact that the applicant is not truthful. Any fair-minded and informed observer prevented with the said facts and circumstances cannot conclude that there is a real or even perceived possibility of bias on the part of the Court. I am fully persuaded that the application is clearly an afterthought aimed at delaying the finalization of this matter. The same is for rejection as it does not attain the legal parameters for recusal of a Judge. (See the cases of **R v. Gough (1993) AC 646**, **Kalpana H. Rawal v. Judicial Service Commission & 2 others (2016) eKLR**, **Philip K. Tunoi & Another v. Judicial Service Commission & Another (2016) eKLR** among many others).

12. The Notice of Motion dated 31/01/2017 is hereby dismissed with costs.

13. However, since the first Petitioner further complained elsewhere and contended that he had earlier on suffered in the hands of another judicial officer and in view of the steps taken by this Court in respect to the allegations coupled with the said unsuccessful attempt, I would not wish to unnecessarily crowd the issues in this matter which to me are not complex ones. I hereby give the opportunity to determine this Petition to another Judge. I now recuse myself from any further participation in this petition.

14. I direct that this matter be fixed for directions before the **Presiding Judge at Homa Bay High Court** on **19/06/2017**.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 6<sup>th</sup> day of June 2017.**

**A. C. MRIMA**

**JUDGE**