



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**PETITION NO.14 OF 2013**

JOHANAH GITHINJI NJOROGE & 400 OTHERS..... PETITIONERS

**VERSUS**

THE ATTORNEY GENERAL & 5 OTHERS.....RESPONDENTS

**RULING**

The application herein was certified urgent on the 24/4/2014 and slated for hearing today the 13/5/2014. The applicant seeks prayers that the file relating to Nairobi E.L.C No.401 of 2013 be forthwith returned to Milimani Environment Land Court to be heard on 3/6/2014 as previously ordered by Hon. Lady Justice P. Nyamweya. That clauses No.8 and 9 of the Order issued on 19th March, 2014 by this Court in Petitioner No.14 of 2013 at Nyeri be set aside. That I do disqualify myself from hearing the matter herein.

The grounds of the application are that by reason of the order made on 19/3/2014 relating to the affected parties, the affected parties are deemed as having been enjoined in this petition. That ELC No.401 of 2013 at Nairobi previously Constitutional petition No.398 of 2006 has been pending since 2006 and the same is scheduled for highlighting of submissions on 3/6/2014. The intended consolidation of ELC NO.401 of 2013 at Nairobi and Petition No.14 of 2013 at Nyeri will create unnecessary confusion because the two matters are at different stages and involve different parties. The applicants argue that Milimani Environment and Land Court registry had irregularly remitted the file relating to ELC No.401 OF 2013 at Nairobi to the Nyeri Environment and Land Court without having first obtained an order from the court to do so. The same should be returned to Nairobi Milimani Law Courts for disposal. That Clause 8 and 9 of the order made on 19th March 2014 violate one of the cardinal principle of Natural justice, that is, that no person should be condemned unheard as the affected parties in ELC No.401 of 2013 at Nairobi were not involved in the proceedings that led to the consolidation of ELC No.401 of 2013 at Nairobi and Petition No.14 of 2013 at Nyeri. Most important is that in ELC No.401 of 2013, I was for quite some time the advocate appearing for the Attorney General, the Minister for Lands and Settlement, Commissioner for Lands, the District Land Registrar Nyeri District, thus the 1st to 4th respondents in the aforesaid matter. As such, the 2nd principle of Natural Justice that no person should be a judge in his own cause would dictate that the I do humbly recuse myself from dealing with the matter herein as the suit property herein is similar to that in ELC No.401 of 2013.

On the 19/3/2014 this Court enjoined the plaintiffs in Nyeri HCC 212 of 2011 in petition No.14 of 2013 and ordered that civil case Nyeri HCC No.212 of 2011 be stayed pending the determination of petitioner No.14 of 2013 and thereafter to abide by the outcome of this case. Therefore all persons listed in the suit No.212 of 2011 as members of Nyeri Hill Farm Maganjo Land owners association who were not parties in this suit be deemed as petitioners. The 1st and 2nd respondents were given 30 days to file and serve

replying affidavits. Thereafter the petitioners were to file and serve submissions within 30 days after service. The respondents were to file and serve replying submissions within 30 days of service and the court was to visit the disputed parcel of land on the last day of the hearing. Nairobi High Court E.L.C No.401 of 2013 was to be transferred to Nyeri E.L.C Court to be determined together with petition No.14 of 2013 at Nyeri. The transfer was to be effected within 14 days of the Order. Finally that Mr. Wanyiri Kihoro, Mr. Gatundu and Mr. Nzioka were to appear for petitioners. Thereafter the matter was fixed for hearing on 3rd, 4th, 5th and 7th November 2014.

This court has heard all parties on the application to recuse itself and agrees with Gikandi Ngibuini that having handled the Attorney General's brief in Nairobi HCCC No.401 of 2013 I should not sit on the same matter as it amounts to being a judge in my cause as the Attorney General whom I appeared for as a party is still a party. Though one can say that as judge of integrity, I cannot be influenced by a position in law taken earlier, perception of a reasonable man would be that I was influenced by my previous position when making a final decision in this matter.

The right of any litigant to apply for recusal of a judge is derived from the right to fair hearing before an independent, impartial and unbiased Tribunal under Article 50 of the Constitution of Kenya which is buttressed by Article 160(1) of the said constitution that provides for an independent judiciary.

When courts are faced with such proceedings for recusal of a judge it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to form 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.

In such a case it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or the judge has done will have the impression in the circumstances of the case that there was real likelihood of bias.

The facts of the matter in NBI HCCC No.401/13 are that on the 10/11/2011 the matter came up for purposes of taking a hearing date. Mr. Nyamweya was holding brief for Gikandi for petitioner, Mr. Litoro appeared for 5, 6th respondent, Mr. Wasike holding brief for Mr Ombwayo state counsel as he then was, for 1st, 2nd, 3rd and 4th respondent when orders were made requiring the 5th, 6th Respondents to file further affidavits in response to the affidavit of one James Theuri.

On the 15th December 2011, Miss Kipkorir held brief for Mr. Gikandi for petitioner, Mr. Litoro appeared for Kioni for 5th and 6th respondent. Mr. Abdulle held brief for Mr Ombwayo for the 1st – 4th respondents when parties were ordered to file submissions.

On the 14/5/2012 Mr. Wasike held brief for Mr. Ombwayo for 1 – 4 respondent when it was ordered that the matter be mentioned before Hon Lady Justice Ngugi on 17/5/2012 for further orders.

On the scheduled date, it is on record that Mr. Muchiri appeared for the Attorney General and informed the court that Mr. Ombwayo who was handling the matter was busy in the High Court handling the I.E.B.C boundary matters.

Further perusal of the record indicates that the Attorney General had not filed any papers and had not taken any position. Nothing on record indicates that I had taken any position or filed any papers. Mr. Gikandi Ngibuini has not demonstrated that there is any actual bias however, this court takes the position of what a reasonable man would perceive this circumstances. Having been the advocate for the Attorney General in the matter and now as a judge in the matter, a right thinking man would perceive a likelihood of bias.

The upshot of the above is that I uphold the application and recuse myself from the matter. I order that the Nyeri High Court petition No.14 of 2013 and Nairobi E.L.C No.401 of 2013 be transferred to Kerugoya Environment and Land Court for hearing and determination. It follows that all other issues raised by the parties will be addressed by the Environment and Land court in Kerugoya.

*Dated, signed and delivered on 13th day of May 2014.*

**A. OMBWAYO**

**JUDGE**