



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. E005 OF 2020**

**INNOCENT ENOCE OMBOKO .....PETITIONER**

**VERSUS**

**THE SPEAKER & CHAIRPERSON OF BUSIA**

**COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**THE CLERK & SECRETARY OF BUSIA**

**COUNTY ASSEMBLY SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**THE BUSIA COUNTY ASSEMBLY SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**THE CHAIRPERSON, BUSIA COUNTY**

**ASSEMBLY STAFF ADVISORY BOARD.....4<sup>TH</sup> RESPONDENT**

**BENARD MUBINJA WAMALWA.....5<sup>TH</sup> RESPONDENT**

**ALLAN WAFULA MABUKA.....6<sup>TH</sup> RESPONDENT**

**GABRIEL ERAMBO ESONGA.....7<sup>TH</sup> RESPONDENT**

**RULING.**

1. On 15<sup>th</sup> March, 2021, the Respondents' application dated 17<sup>th</sup> November, 2021, was coming for further hearing, the same having been partially heard on 23<sup>rd</sup> February, 2022. The Respondents' Counsel had submitted in support of the application orally before court, and the Petitioner who is the Respondent in the application was slated to respond to the application on 15<sup>th</sup> March, 2022.
2. On the day of the further hearing, the Petitioner sought that the court deems submissions and precedents filed by him before the hearing, as being properly on record. The Respondent objected the admission of the submissions premised on the fact that the submissions were filed without leave of the court and served a few hours to the hearing, hence to him, this amounted to an ambush.
3. The court declined to admit the submissions for reason that the Respondents had already urged their applications and will therefore not have an opportunity to respond on the submissions, coupled with the fact that the submissions were filed without leave, and the Respondents did not have sufficient time to familiarize with the submissions.
4. The court proceeded to issue an order expunging the submissions from the court record and further directed that the Petitioner proceeds to respond to the application on the basis of the replying affidavit and precedents already filed in the matter just as the Respondents did.
5. The Petitioner proceeded to respond to the application, but contrary to the directions given by the court, sought to base his arguments on the submissions and the precedents that had been expunged from the court record.
6. The court declined to take the Petitioner's arguments premised on his defiance of the court's directions. The Petitioner then made an application seeking that the court recuses herself from hearing the matter on the basis that the court appears to be biased in favour of the Respondent and requested that the file be placed before another judge.

7. The Respondents' Counsel submitted that the application for recusal serves no purpose, and is only intended to intimidate the court and scuttle the proceedings. It is the Respondents further submission that if the Petitioner is not satisfied with the decision of the court, he has a right of appeal. He submits that the application does not meet the threshold for recusal.

**Determination.**

8. I have considered the Petitioner's oral application for recusal and the submissions in opposition by Counsel for the Respondents. An application for recusal is premised on Article 50(1) of the Constitution of Kenya, 2010, which guarantees every person the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

9. To the Petitioner, for the court to decline submissions that have been expunged from the record, points to the biasness and/or impartiality of the court. Before this application for recusal was made, the Petitioner had sought an adjournment of the hearing of the Respondents' application based on the fact that he has lodged an appeal against previous orders of this court on a different application. The court declined to grant the adjournment on the premise that the court of Appeal had not issued stay of the proceedings before this court to warrant the adjournment.

10. An application for recusal calls into question the fairness of a Judge who has sworn to do justice impartially in accordance with the Constitution without any fear.

11. It has now largely been agreed that the test on whether a judge should or should not recuse themselves in a matter, is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. The East Africa Court of Justice adopted the test in *Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007* in the following words:

*“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say,*

*(a) litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.”*

12. The general rule in an application such as this, is that a Judge MUST not recuse herself/himself. The application herein is premised on nothing but baseless allegations. It is a mere suggestion of appearance of bias. If indeed the Petitioner believed in the truthfulness of his allegations, he ought to have sought time to file a formal application so as to swear an affidavit in support of his allegations. He did not. In the case of *Teachers Service Commission v Kenya Union of Teachers & 3 Others, CA No. 196 of 2015* it was held that an application for recusal must be based on reasonable grounds.

13. Justice Rolston F. Nelson of the Caribbean Court of Justice, spelt out the doctrine of a judge's duty to sit in the following words:

*“A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason”*

14. I see no substance in the Petitioner's application, and in the absence of valid reasons for recusal, what remains is what has been termed a “duty to sit” (*See JUSTICE M. K. IBRAHIM in Gladys Boss Shollei v Judicial Service Commission & Another (2018) eKLR*). I will invoke that doctrine in this matter and hold that I have a duty to sit in this petition.

15. The upshot is that the Petitioner's application for recusal is dismissed with no orders as to costs.

16. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4<sup>TH</sup> DAY OF APRIL, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**APPEARANCE:**

**MR. I. O. OMBOKO PETITIONER/APPLICANT PRESENT IN PERSON.**

**MS. OKOTH H/B FOR MR. JUMA FOR THE RESPONDENTS**

