



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 35 OF 2020

HON. MIKE SONKO MBUVI.....PETITIONER

VERSUS

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT

THE SPEAKER NAIROBI CITY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT

HON. PETER ANYULE IMWATOK.....4<sup>TH</sup> RESPONDENT

THE SPEAKER, SENATE OF KENYA.....5<sup>TH</sup> RESPONDENT

HON. MICHAEL OGADA OKUMU.....INTENDED 6<sup>TH</sup> RESPONDENT

RULING

1. Without any written motion before me, the counsel for the 3<sup>rd</sup> Respondent one Mr. Njiru sought my recusal. In his submissions, he made some laughable allegations that I have been given some 7 million shillings by Hon. Mike Sonko Mbuvi the Petitioner herein. He asserts that the rationale for the request for my recusal is what the ordinary person would think. To his credit he has maintained a series of diatribe and lies against the Court hopefully with the intention to subvert the hearing of the notice of motion which was scheduled for hearing before me by the Principal Judge. He did so without any look of contrition or remorse given his brief is at the core to uphold justice not to hinder it. It would seem counsel has misapprehended the orders given on 1<sup>st</sup> and 2<sup>nd</sup> December 2020 in respect of the Notice of Motion dated 30<sup>th</sup> November 2020. The motion was heard *ex parte* wherein the Court gave directions that the Intended 6<sup>th</sup> Respondent be served forthwith. In addition, there was conservatory orders issued in respect of the motion before the 3<sup>rd</sup> Respondent which motion was to be served for *inter partes* hearing on 3<sup>rd</sup> December 2020 before any other Judge. On 2<sup>nd</sup> December 2020 a motion was presented under certificate of urgency wherein it was asserted that it was difficult to serve the Intended 6<sup>th</sup> Respondent and an order to serve him by substituted means was issued. Mr. Njiru cited the case of **Mumias Sugar Co. Ltd v Director Of Public Prosecutions & 2 Others [2012] eKLR** where Gikonyo J. held that

*When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a 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.*

2. It would seem the motion of 30<sup>th</sup> November 2020 is very heated. The said motion was part heard before the application for recusal was made. Recusal can be sought where there is perceived or real bias. In the decision by Gikonyo J. above he stated as follows:

*THE TEST: IS THERE REAL LIKELIHOOD OF BIAS?*

*What does bias entail?*

[24] According to the Black’s Law Dictionary, 7th Edition bias entails:- Inclination, prejudice; Judge’s bias usually must be personal or based on some extrajudicial reasons.

*Prejudice entails:- preconceived judgment formed without a factual basis, a strong bias.*

3. The test expressed above when applied would frame the issue for the Court to determine if in the circumstances of the case it will be fair and impartial. The question of impartiality thus arises and there are two aspects to this requirement. First, the court must be subjectively free from personal prejudice or bias. Secondly, a Court must also be impartial from an objective viewpoint i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect. It is clear that the Court seized of any matter must be truly independent and free from actual bias. It must not appear in the objective sense to lack impartiality and independence. I am mindful of the serious nature of the allegations made against the Respondents in general and the intended 6<sup>th</sup> Respondent in particular. I have been careful to give them a full opportunity to respond to these allegations as the motion was to be served for *inter partes* before any other Court on 3<sup>rd</sup> December 2020. In the morning of 8<sup>th</sup> December 2020, the Petitioner's counsel Mr. Kinyanjui and the 1<sup>st</sup> Respondent's counsel Mr. Ochich were heard.

4. As a judicial officer I retain and always maintain an open mind and further, I am not biased against any individual even when they are of the persuasion of Mr. Njiru the counsel who made the allegations. In my consideration of the disqualification application, I have sought to apply the test formulated which is *whether, in all the circumstances of the case, there appeared to be a real danger of bias*. In my considered view, a person who would care to ascertain the relevant circumstances of this case would not consider that I will regard unfairly any person's case with disfavour or apparent bias/prejudice. It has been suggested that I will find it difficult to find against the Petitioner due to my personal relationship with him. For the record, I do not know him and neither have I met him in person as at no time have our public lives converged nor have our private lives. Like many citizens of this nation I have only seen him on the television. Looking at the law and the facts, there is no basis on which I should disqualify myself, I therefore decline to recuse myself. When one looks at the matter through the eyes of a reasonable man there can be no bias from this Court as can be gleaned from my record in the 8 plus years I have served the people of Kenya in the Judiciary and the 7 plus years I served as an Anti-Corruption Commission Attorney and Investigator.

5. However, despite my finding that there is no basis for my recusal and because there is no property in a suit before me, I *suo motu* refer the file back to the Principal Judge to assign the file to any other Judge other than myself.

It is so ordered.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of December 2020**

**Nzioki wa Makau**

**JUDGE**