



Koluwa & 5 others v County Assembly of Vihiga (Being Sued through its Honourable Members) & another (Constitutional Petition E006 of 2021) [2025] KEHC 1172 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E006 OF 2021
JN KAMAU, J
FEBRUARY 28, 2025**

BETWEEN

**DR AMOS KUTWA KOLUWA 1ST PETITIONER
PAMELA MBAGAYA KIMWELE 2ND PETITIONER
ENG KENNETH ELVUNA KESEKO 3RD PETITIONER
PAUL JISEVE MBUNI 4TH PETITIONER
STEPHEN CHAHASI 5TH PETITIONER
JULIUS MASIVA 6TH PETITIONER**

AND

**COUNTY ASSEMBLY OF VIHIGA (BEING SUED THROUGH ITS HONOURABLE MEMBERS) 1ST RESPONDENT
GOVERNOR OF THE COUNTY OF VIHIGA 2ND RESPONDENT**

RULING

1. The Petitioners' Notice of Motion application dated and filed on 12th February 2025 sought the recusal of this court and that the Principal Judge of the High Court assign this file to another judge.
2. In the Supporting Affidavit that was sworn by the 2nd Petitioner herein on 12th February 2025, the Petitioners herein had sought recusal of this court on account that there was a complaint against it pending before the Judicial Service Commission (JSC) on account of delayed disposition of the pending application. They asserted that this matter would be further delayed as the outcome of the JSC was awaited.



3. In opposition to the said application, the County Attorney of Vihiga County, Aggrey B.L. Musiega swore a Replying Affidavit on behalf of the 2nd Respondent herein on 13th February 2025. The same was filed on the same date.
4. The 2nd Respondent averred that it was never served with the complaint to the JSC against this court. He listed the Grounds of Recusal set out in Regulation 21 of the Judicial Service (Code of Ethics) Regulations and was emphatic that a complaint to the JSC for delay in determining a matter was not a ground of recusal of a judge.
5. He pointed out that the Petitioners secured interim orders in the Petition herein but never served the same on him as a result of which he acted on the resolutions of the 1st Respondent which gave rise to the instant proceedings. He averred that the Petitioners filed an application for contempt of court proceedings but the same was dismissed for non-service of the said orders.
6. He asserted that the matter was in court for over a year but they never complained to the JSC for the delay or recusal of the Trial Judge.
7. He also stated that they did not take any action after Justice P.J. Otieno delivered his judgment only to mislead him to reverse its findings in his judgment as a result of which he preferred an appeal, a fact he contended the Petitioners did not disclose to this court and to the JSC.
8. He added that the Petitioners abandoned the present Petition and filed Kisumu ELRC JR No E011 of 2021 and only reverted to it after they were turned away on account of duplicity of suits.
9. He therefore urged this court to dismiss the present application for being an abuse of the court process and to award him costs.
10. On 14th February 2024, this court reserved its Ruling of the present application after being satisfied that the 1st Respondent herein had been duly served with the Mention Notice to attend court as was evidenced in the Affidavit of Service of Kelly Malenya that was sworn and filed on 12th February 2025. It failed to attend court either physically or virtually.
11. As the 1st Respondent did not file any papers herein, the Ruling herein was based on the affidavit evidence of the Petitioners and the 2nd Respondent herein.

Legal Analysis

12. This court became seized of this matter on 24th April 2024 after the same was transferred by Kakamega High Court which was handling the same. This court directed the parties to file their respective Written Submissions and on 31st July 2025, it reserved a Ruling of the 2nd Respondent's Notice of Motion application dated 18th March 2024 and filed on 27th March 2024 for 28th January 2025. It declined to grant the 1st Respondent herein an order for stay of execution as there was no threat of execution.
13. The Petitioners' complaint to the JSC was that in not granting an order for stay of execution to the 1st Respondent, this court had administratively restrained them from realising the fruits of their judgment.
14. As this court was not familiar with this matter, it granted them leave to institute mandamus proceedings against the 1st and 2nd Respondents herein in Vihiga JR No 8 of 2024. They filed their substantive application for mandamus whereupon this court fixed the same for hearing on 7th November 2024. It only became aware that the said matter was related to the Petition herein when it received the Petitioner's said complaint dated 9th August 2024.



15. Believing that the Petitioners were genuinely apprehensive of not getting justice in this court and considering that a court could recuse itself suo moto on any of the grounds in Regulation 21 of the Judicial Service (Code of Ethics) Regulations, it recused itself on 7th November 2024, which was the earliest opportunity so as not to cause any delays in the determination of the 2nd Respondent's Notice of Motion application dated 18th March 2024 and filed on 27th March 2024. Vide its letter dated 19th November 2024, it then forwarded all the files to the Principal Judge of High Court of Kenya for allocation of the same to another judge.
16. This court was of the considered view that Regulation 21(1) of the Judicial Service (Code of Ethics) Regulations did not require the making of any application for it to recuse itself. It provided that:-
 1. A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge—
 - a. is a party to the proceedings;
 - b. was, or is a material witness in the matter in controversy;
 - c. has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - d. has actual bias or prejudice concerning a party;
 - e. has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - f. had previously acted as a counsel for a party in the same matter; or
 - g. is precluded from hearing the matter on account of any other sufficient reason (emphasis court); or
 - h. or a member of the judge's family has economic or other interest in the outcome of the matter in question.
 2. Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings.
 3. A judge may not recuse himself or herself if— (a) no other judge can deal with the case; or 15 The Judicial Service (Code of Conduct and Ethics) Regulations 2020
17. This court took the firm view that a complaint at the JSC was a sufficient reason for a court to recuse itself suo moto under Regulation 21(1)(g) of the Judicial Service (Code of Ethics) Regulations.
18. In his letter dated 4th December 2024, the Principal Judge declined to allocate the files to another judge, returned the same and directed that this court could only recuse itself upon hearing and determining a formal application seeking its recusal. It was on that basis therefore that on 28th January 2025, this court directed the Petitioners to file a formal application seeking its recusal with a view to giving its decision on the matter.
19. From the decision of Onyango J on 14th June 2021 in Kisumu ELRC JR E011 of 2021 that the 2nd Respondent attached to his Replying Affidavit, it was clear that the Petitioners had filed several matters in different courts seeking similar orders. The Learned Judge observed that they had obtained orders in that matter through non-disclosure of material facts. She stayed those orders pending the hearing and determination of the Petition herein.



20. Bearing in mind that this matter had taken three (3) years to be concluded at the Kakamega High Court, this court was therefore surprised to receive the Petitioner's complaint seeking its recusal citing delays in resolving this matter when this court had only handled the matter twice. This was an observation that the 2nd Respondent also alluded to in their Replying Affidavit.
21. Having looked at the 2nd Respondent's Replying Affidavit, it was very clear that the complaint at the JSC and the present application were calculated to delay this matter and cause irritation and annoyance to the 2nd Respondent. This court could not purport to arrive at a similar conclusion in respect of the 1st Respondent herein as it did not participate in the hearing of the present application.
22. It was the considered view of this court that having become seized of material information that this court was not privy to, it did appear to this court that the Petitioners' application for this court to recuse itself was not genuine. As the 2nd Respondent correctly pointed out, the application for recusal consisted of personalised attack on the court which was merely a neutral arbiter with no previous knowledge of the dispute. It was apparent that the application seeking this court's recusal was tantamount to forum shopping.
23. Notably, a party who was aggrieved by any decision of a court had an opportunity to seek redress from the court above it. Dislike of a court or apprehension of not getting a favourable decision was not a ground for seeking the court to recuse itself. Litigation had to come to an end one way or the other in any particular court leaving the aggrieved parties to seek redress from the court above it.
24. In the event the Petitioners were aggrieved by any orders that this court would make going forward, they were at liberty to seek redress from the Court of Appeal. Having considered the circumstances of this matter which were ably disclosed by the 2nd Respondent herein, it was clear that this was not a suitable case for this court to recuse itself.
25. The above notwithstanding, this court noted that in her Supporting Affidavit, the 2nd Petitioner had stated as follows:-

“I am an adult female of sound mind, one of the Petitioners herein thus competent to swear this Affidavit in support of this Application (emphasis court).”
26. Indeed, there was no averment in the 2nd Petitioners Supporting Affidavit that the 1st, 3rd, 4th and 5th Petitioners had authorised her to swear the Affidavit on their behalf. On this ground only, this court was not persuaded that it should have granted the orders the 2nd Petitioner had sought as there was nothing to show that the 1st, 3rd, 4th and 5th Petitioners wished this court to recuse itself.
27. Even so, this court noted that the application was filed on behalf of all the Petitioners herein as was indicated in the pleadings. As they were ably represented by counsel, this court did not find the fact that the present application was filed on behalf of the Petitioners to have been an inadvertent mistake and/or error. It was for that reason that this court found and held that all the Petitioners herein were jointly liable for any costs that would be awarded herein.

Disposition

28. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Notice of Motion application dated and filed on 12th January 2025 was not merited and the same be and is hereby dismissed. The Petitioners' will pay the 2nd Respondent's costs of this application.



29. To progress this matter further, this matter will be mentioned on 8th May 2025 with a view to giving a Ruling dated of the 2nd Respondent's Notice of Motion application dated 18th March 2024 and filed on 27th March 2024 and/or for further orders and directions.

30. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE

