



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PET NO. 18 OF 2019

IN THE MATTER OF: ARTICLES 19,20,22,23,24,40,48,60,61,63,64,165,258 and 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE LAND ACT, 2012

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012

IN THE MATTER OF: THE LAND (GROUP REPRESENTATIVES) ACT, CAP 287 (REPEALED)

IN THE MATTER OF: THE COMMUNITY LAND ACT (2016)

IN THE MATTER OF: THE COMMUNITY LAND REGULATIONS (2017)

BETWEEN

LELETO KARAREI

JOSEPH NANCHI

MUSUURI NAIKU

(Suing on his behalf and on behalf of 15 others).....PETITIONERS/APPLICANTS

AND

KILESI OLE SAYIATON & 17 OTHERS.....RESPONDENTS

RULING

By a Notice of Motion dated 16th September, 2019 the Applicants sought for the following orders:-

1. Spent

2. Spent

3. That the Hon. Judge be pleased to recuse himself from continuing to hear and/or determine any facet of ELC Constitution Petition No. 18 of 2019.

4. That the Narok ELC Constitution Petition No. 18 of 2019 be referred to the Chief Justice for appointment of another judge to hear and determine the petition and/or in the alternative be transferred to another Environment and Land Court Judge within the region to hear and determine the matter.

5. That the costs of this application be in the cause.

The Application is based on the grounds that the honourable Judge presiding over the matter may not be fair, impartial and independent as they have heard from their clan members and other villagers that the honourable Judge has been influenced to deliver a ruling in their favour with regard to a Preliminary Objection dated 19th June, 2019 and that the respondents have been boasting about that the petition will be dismissed and therefore they have no confidence in the court to continue hearing the matter.

The applicant further contend that they are entitled to a fair hearing as shrew under Article 50 (1) of the Constitution of Kenya 2010 as every dispute must be adjudicated and decided in a fair and impartial manner. The application was further supported by the affidavit of the 1st petitioner in which he stated that the 1st to 10th Respondents had not received the filing of the petition very well and warned them justice will never be served and further that after filing of a Preliminary Objection the respondents have been mocking them about the impending dismissal of the petition. The 1st respondent further stated that on the 21st June, 2019 a fund raising was held in the village where political leaders had voiced out that the presiding judge will dismiss their case if the applicants will not have the petition withdrawn. The 1st applicant further averred that the instant petition will suffer the same fate as a similar one that was dismissed after a preliminary objection was raised and because of the above reasons the 1st applicant alleges there would be bias.

The application was opposed by the 1st to the 10th Respondents by a way of a replying affidavit. The respondent contend that the application for recusal lacks merit and amounts to gross abuse of the process of the court. It is the respondents' contention that the court had a duty to deliver a ruling upon hearing the notice of preliminary objection and that there exist no grounds for recusal. The respondents further averred that the filing of the intended application after the court heard the Preliminary Objection and 2 weeks before the delivery of the ruling the applicant, wants to circumvent the cause of justice and that the grounds sought for recusal are personal beliefs and no evidence was tendered that indeed the allegations were even made.

The 11th and 12th respondents also opposed the application stating that contrary to the applicant's allegations that the respondents and the applicant belongs to the same group ranch the same is not true and that the 11th and 12th respondents averred that there was no fund raising done in the area in which the issues raised by the applicants arose.

I have considered the application before me and the replying affidavit in opposition to the same and the submissions by counsel.

Judicial recusal is under pinned by constitutional statutory and constitutional law principles under Article 160 the courts are under a duty to exercise and exhibit independence in the discharge of its function and justice must be done to all irrespective of their status. In the instant application the applicants contend that the Judge may be biased and hence their right to a fair hearing will be imperiled. The above application is based on the allegation that the allegation by the respondents who mock them on the imminent dismissal of their case and despite making those allegations have not shown any evidence indeed those statements were actually made and furthermore the applicants have not shown that there exist any connection between the court and the parties that made those allegations and in the absence of the above I will take the allegations as village banter that cannot be a ground to my recusal in the matter.

In considering whether a Judicial Officer will exhibit bias the court's have developed what is commonly known as the objection test.

The court of appeal in **Kalpana H. Rawal-Versus-Judicial Service Commission and 2 others (2016)EKLR (Nairobi court of appeal and cited in the holding by the East Africa court of justice in AG of Kenya –Versus-Anyang Nyong'o ApealNo.5 , Ref No. 1 of 2006 set out the test for bias as follows:-**

“we think the objective test of reasonable apprehension” is good law” the test is stated variously, but amounts to this: do the circumstances give raise 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 about the circumstance of the case.

From the above decision it is clear that there must be a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the mind of right thinking, well informed and reasonable member of the public reasonable doubt about the fairness of the administration of justice.

From the above I find that the instant application lacks merit and I thus dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at NAROK on this 5th day of November, 2020

Mohammed N. Kullo

Judge

5/11/2020

in the presence of: -

CA:Chuma

Mr.Meingati for 1st to 8th respondent

Mr. Kinoti holding brief for Ms Thiong'o for the petitioner

N/A for the 9th, 10th, 12th, 13th and 14th respondents



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