



**Homa Bay Hotels Ltd v County Government of Homa Bay & 2 others (Environment & Land Case E009 of 2023) [2024] KEELC 6520 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6520 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE E009 OF 2023  
GMA ONGONDO, J  
OCTOBER 2, 2024**

**BETWEEN**

**HOMA BAY HOTELS LTD ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF HOMA BAY ..... 1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of an application by way of Notice of motion dated 11<sup>th</sup> April 2024 brought under, inter alia, Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Order 51 of the [Civil Procedure Rules, 2010](#) by the plaintiff/applicant, through Amondi and Company Advocates seeking the following orders;
  - a. That the Honourable Justice G. A. Ong’ondo do recuse himself from this matter and the same be referred to the Presiding Judge for directions.
  - b. Costs
2. The application is founded upon three grounds as infra:
  - a. The Learned Judge has manifested a reasonable apprehension of bias by his conduct and management of the proceedings herein.
  - b. The Learned Judge’s conduct in exercise of his judicial discretion contravenes Kenya’s public policy to the extent that he denies the plaintiff its Article 50(1) rights to a fair hearing.



- c. The plaintiff has lost confidence in the conduct of the Judicial Officer and in any case any reasonable person seized of the facts would be assured that the applicant would not get justice before the judge.
3. Further, the application is anchored on the applicant's supporting affidavit of twenty-eight paragraphs sworn on even date, by Maxwel Otieno Odongo, alongside the annexed document marked as MOO-1 which is; a copy of the resolution of the applicant's Board of Directors dated 18<sup>th</sup> March 2024.
  4. Briefly, the applicant laments that he lodged an application dated 21<sup>st</sup> March 2024 under Certificate of urgency. That however, the court failed to certify the same as urgent and directed that it be served upon the respondents. The application was then slated for directions on 10<sup>th</sup> April 2024 but the said date was declared a public holiday thereby necessitating the matter to be presented to court on 11<sup>th</sup> April 2024. That the 1<sup>st</sup> respondent escalated illegal excavations and constructions on the applicant's beach front property hence, causing the applicant to file a further affidavit dated 27<sup>th</sup> March 2024. That when the matter came up on 11<sup>th</sup> April 2024, none of the respondents had filed a response thereto despite service having been effected on them. That the court did not issue orders of status quo. That instead, the court directed that the matter comes up for mention on 13<sup>th</sup> May 2024 in respect of the preliminary objection dated 19<sup>th</sup> January 2024. That the Honourable Judge is biased in favour of the 1<sup>st</sup> defendant herein and has failed to establish the urgency in the matter or grant temporary orders of injunction sought or status quo so as to preserve the suit land. That further, the Honourable Judge is procrastinating the hearing of the matter by fixing it for directions and mentions.
  5. The 1<sup>st</sup> defendant through Wilberforce Akello and Company Advocates filed Grounds of Opposition opposing the application. Counsel deponed in part that the instant application has not demonstrated any ground wherein the learned judge has manifested a reasonable apprehension of bias in his conduct. That in any event, the plaintiff has the liberty to prefer an appeal against any ruling of the court. Thus, counsel urged the court to dismiss the application with costs.
  6. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants through Felix Kajo, Senior Litigation Counsel Office for the Attorney General, filed Grounds of Opposition dated 7<sup>th</sup> May 2024. Counsel stated that the application does not meet the reasonable test and threshold for recusal. That the applicant's grievances, if any, can best be addressed by way of an appeal or review and not recusal of the trial Judge.
  7. Hearing of the application proceeded by way of written submissions pursuant to the court's directions of 13<sup>th</sup> May 2024.
  8. The applicant's counsel filed a list of authorities in respect of the application but did not file any submissions herein.
  9. The 1<sup>st</sup> defendant's counsel filed submissions dated 27<sup>th</sup> April 2024 and identified two issues for determination thus: whether the plaintiff/applicant is entitled to the reliefs sought and which party bears the costs of the application? Learned counsel submitted inter alia; that the applicant has not provided cogent reasons to warrant recusal or disqualification of the Judge. That the applicant has not even appealed the orders or directions issued by this Court. That judicial officers must balance their duty to recuse themselves with their duty to sit. That this application lacks merit and ought to be dismissed with costs. To fortify the submissions, reliance was placed on various authoritative pronouncements, including the case of *Shollei & another v Judicial Service Commission & another* (Petition 34 of 2014) [2018] KESC 42 (KLR) (3 July 2018).
  10. In the foregone, the following issues fall for determination;



- i. Whether the instant application is merited.
  - ii. What orders can the court issue herein, to meet the ends of justice?
11. It is noteworthy that justice must not only be done but also be seen to be done; see *Republic v Sussex Justices ex parte McCarthy* (1924) 1 KB 256, (1923) All ER Rep 233.
  12. The test for recusal was set in the case of *Porter v. Magill* [2002] 1 All ER 465 where the House of Lords was of the opinion thus:
 

“...The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased...”
  13. The Porter case (*supra*) was cited with authority by the Court of Appeal in *Philip Tunoi v Judicial Service Commission and another* (2016) eKLR, where the Court stated that:
 

“...In determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balance approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is real possibility of bias...”
  14. In the present case, the applicant contends that the Honourable Judge is biased in favour of the 1<sup>st</sup> defendant herein and has failed to establish the urgency in the matter or grant temporary orders of injunction sought or status quo so as to preserve the suit land. That further, the Honourable Judge is procrastinating the hearing of the matter by fixing it for directions and mentions.
  15. From the proceedings herein, the application came up for mention for directions on 10<sup>th</sup> April 2024. The court did not issue any interim orders sought in the application. Upon service of the application on the respondents and during the first date for directions on 23<sup>rd</sup> January 2024, the court noted that there was the 1<sup>st</sup> defendant’s Preliminary Objection dated 19<sup>th</sup> January 2024 on the jurisdiction of this court over the suit. Guided by the Court of Appeal decision in *Kakuta Maimai Hamisiv Peris Pesi Tobiko & 2 others* (2013) eKLR and Section 3 of the *Environment and Land Court Act*, 2015 (2011), Articles 48, 25(c), 50(1) and 159 (2)(b) of the *Constitution* of Kenya, directed that the preliminary objection be heard on priority basis.
  16. It is important to observe that a Preliminary Objection is on a point of law and may dispose of the suit. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:
 

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...”
  17. I bear in mind that one of the grounds upon which the 1<sup>st</sup> defendant raised the preliminary objection hereinabove referenced is that this court lacks jurisdiction to hear the suit pursuant to Section 129 of the Environment Management and Coordination Act.
  18. Indeed, jurisdiction is everything. Without it a Court has no power to take one more step; see *Owners of Motor Vessel “Lillian S” v Caltex Oil (K) Ltd* [1989] KLR 1. Therefore, it behoves this court to first



establish whether it is properly seized of the matter including the application before it prior to issuing any orders herein.

19. It is therefore, my considered view that the instant application has not met the threshold to warrant my recusal. The same is without merit .
20. A fortiori, the application be and is hereby dismissed with costs to the respondents.
21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 2<sup>ND</sup> DAY OF OCTOBER 2024.**

**G.M.A ONGONDO**

**JUDGE**

PRESENT

Ms Nyambeki learned counsel for the plaintiff/applicant

Mr W. Akello learned counsel for the 1<sup>st</sup> defndnt/respondent

Mr T. Luanga, court assistant

