



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koinange & another v Royal Gardens Limited (Environment and Land Appeal E098 of 2022) [2025] KEELC 111 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 111 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND APPEAL E098 OF 2022**  
**AA OMOLLO, J**  
**JANUARY 23, 2025**

**BETWEEN**

**BARBARA WAMBUI KOINANGE ..... 1<sup>ST</sup> APPELLANT**

**HARIKI AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ROYAL GARDENS LIMITED ..... RESPONDENT**

*(Being an appeal from the orders issued in Nairobi Business Premises Rent Tribunal Case No.E781 of 2022 Issued by the Business Premises and Rent Tribunal Issued by Hon. P May on the 30th September 2022)*

**JUDGMENT**

1. The Appellants filed a memorandum of appeal dated 18<sup>th</sup> October 2022 seeking for the following orders;
  - a. That the Appeal be allowed and the orders issued by the Nairobi Business and Rent Tribunal be vacated and/or set aside for being null and void with costs to the appellant.
  - b. That costs of this appeal and the costs in the Environmental and Land Court be awarded to the Appellants.
2. The Appeal was based on seventeen (17) grounds as follows;
  1. That Learned Vice Chair erred in law and in fact in failing to consider all the grounds in the Application dated 15<sup>th</sup> September 2022 and proceeding to dismiss the said Application.
  2. The learned Vice Chair erred in law and in fact in holding that the Appellant had not adduced reasonable evidence to allow the Application for recusal.



3. The learned Vice Chair erred in Law and in fact in failing and neglecting to consider the pleading together with all the compelling evidence tendered by the Appellants in support of the Application dated 15<sup>th</sup> September 2022.
  4. The learned Vice Chair erred in Law and in fact in completely ignoring all the existing precedents in support of the Appellants application.
  5. The learned Vice Chair erred in law and in fact by entertaining a reference and granting orders without jurisdiction.
  6. The learned Vice Chair erred in law and in fact by entertaining a reference and granting orders to party that lacks locus standi.
  7. The learned vice chair erred in law and in fact by issuing substantive ex-parte orders against the appellant as the Tribunal lacks jurisdiction to hear and determine the matter there being a lease agreement that exceeds 5 years.
  8. The learned Vice Chair erred in law and in fact in issuing conflicting orders releasing the motor vehicle registration number KBV 562E to the 1<sup>st</sup> Interested Party while there were orders issued by the Honourable Chair staying the release of the same.
  9. That learned Vice Chair erred in law and in fact by issuing orders in favor of the respondent/tenant who lacks locus standi to apply for the said orders as none of their properties has been attached by the 2<sup>nd</sup> appellant.
  10. The learned Vice Chair erred in law and in fact by issuing orders for the release of Motor Vehicle Registration No. KBV 562E where the respondent/tenant is not the registered owner.
  11. The learned Vice Chair erred in law and in fact by issuing draconian orders against the applicant landlord without giving her a fair hearing.
  12. The learned Vice Chair erred in law and in fact by authorizing the police to execute the said tribunal orders that have been issued in bad faith.
  13. The learned Vice Chair erred in law and in fact by failing to consider the auctioneer's fees remains unpaid and the same exposes the auctioneer to losses.
  14. The learned Vice Chair erred in law and in fact by only safeguarding the interests of the Respondent, whereas those of the appellant are not being considered.
  15. The ruling/orders of the tribunal are not balanced and are against the appellants but in favour of the respondent.
  16. The learned Magistrate erred in law in condoning apparent illegality orchestrated against the Applicant by the Respondents.
  17. The learned magistrate erred in law and in fact in considering extraneous facts that were not relevant to the issues for determination and in failing to consider relevant facts and documents.
3. In opposition of the appeal, the 2<sup>nd</sup> Interested Party filed a replying affidavit sworn on 21<sup>st</sup> November 2022 by Harishchandra Gupta, a director of Recon Supplies Limited. He contended that there was no basis for the allegation that the Applicants were denied a right to be heard because the application had been set for hearing on 30<sup>th</sup> September 2022.



4. They contended that the Lease in issue between the Applicant and the Respondent being for 5 years the Tribunal had jurisdiction to hear the matter as the tenancy is clearly controlled. That the 2<sup>nd</sup> Interested Party as a sub-tenant, being the party whose goods were attached was entitled to have the benefit of this Tribunal's orders. The deponent stated that Susan Wanjiru Kihonge is the personal representative and administrator of the estate of Francis Kihonge and as such entitled to fully represent Kihonge in all his affairs, including in the Company where he was sole director.
5. He averred that the 1<sup>st</sup> Applicant has not demonstrated that she is the administrator of the estate of the Late David Waiganjo, neither has she demonstrated that the estate of the Late Mbiyu Koinange has been divided and she has a share of the demised property. Additionally, there is no evidence that the Late David Waiganjo own the demised property.
6. The 2<sup>nd</sup> Interested Party contended that the Applicants are on record defending the proceedings before the Tribunal without seeking reference to Arbitration thus cannot rely on Arbitration clause belatedly now. They stated that the Respondent has paid all the rent due to the 1<sup>st</sup> Applicant in accordance with the Lease Agreement and that also the application for the release of the Motor Vehicle was made by the Advocates acting for the 2<sup>nd</sup> Interested Party.
7. The 2<sup>nd</sup> Interested Party stated that from the Memorandum of Appeal filed, it is not clear as to which orders the Applicants seek to set aside and also there is no evidence of bias on the part of the Tribunal to warrant its recusal.

#### **Submissions.**

8. The Appellant filed submissions dated 30<sup>th</sup> October 2023 in support of the appeal and the 2<sup>nd</sup> Interested Party filed submissions dated 5<sup>th</sup> November 2024 in opposition to the same. The Appellant stated the background that the 1<sup>st</sup> Appellant herein being the legally registered proprietor of 30 Acres in Close Burn Estate has leased out most of the land to various tenants including the parties hereto and the Interested parties herein defaulted in paying their rent, in particular the 2<sup>nd</sup> Interested Party had a total rent arrears amounting to Kshs 14,835,000/=
9. That the 1<sup>st</sup> Applicant authorized the 2<sup>nd</sup> Appellant to lawfully levy distress for rent against the 2<sup>nd</sup> Interested party on the 30<sup>th</sup> August, 2022, proclaimed and attached the 2<sup>nd</sup> Interested Party's motor vehicle registration number KBV 562E together with assorted metals.
10. That on 1<sup>st</sup> September 2022, the Respondent filed a reference in the Business Premises Rent Tribunal together with an application seeking ex-parte injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to which order were granted and the Appellants being aggrieved filed a motion dated 6<sup>th</sup> September 2022 seeking for variation of the earlier issued court order to the respondent ex parte to which the same was done to the extent that the Motor vehicle be released to the 2<sup>nd</sup> Interested Party. That the said Application was heard on 28<sup>th</sup> September and was dismissed in the ruling delivered.
11. The Appellants contended that the deponent of the Tenant Company one Susan Wanjiru Kihonge lacks Locus Standi to swear any affidavit on behalf of the interested party and in support cited the case of Law Society of Kenya –Vs- Commissioner of Lands & Others, Nakuru High Court Civil Suit No. 464 of 2000 and Alfred Njau & Others –Vs- City Council of Nairobi [1982] KAR 229 on the definition of Locus Standi.
12. That one Susan Wanjiku Kihonge, is a complete stranger to the proceedings before this court and a non-director of the Respondent/Tenant company. From the Certificate of official search conducted by the Appellants, the Respondent's company only had one sole director, being Francis Kihonge Nganga



- who passed away on 3<sup>rd</sup> April 2021 and no steps have been taken by the 1<sup>st</sup> interested party or the alleged deponent to correct the error apparent on the record.
13. That no authorization has been tabled by the alleged deponent mandating her to represent the Respondent in this matter, thus has no legal capacity to sue in her own individual capacity and or on behalf of the company since she is not a director of Respondent company and neither is she a shareholder.
  14. Equally there is no company minutes and or resolution to that effect, therefore lacks the requisite authority to institute this proceeding and to swear any affidavit on behalf of Royal gardens Ltd and in support cited the case of East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR, where Justice Mumbi Ngugi concurred with the reasoning held in Affordable Homes Africa Limited v Ian Henderson & 2 Others HCCC No 524 of 2004 that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders.
  15. In reliance to the case of Nairobi High Court Civil Suit No. 611 of 2004, Elkana Mukundi Gatimu & Anor –Vs- John B. M. Muya & Others [2006] eKLR , Nairobi Commercial case Number 1766 of 2000, Alcon Holdings Ltd –Vs- KCB Ltd & Another and Okech & 3 others (Suing for and on behalf of Kasgam Community – Wadhari Clan) v Victory Construction Co. Ltd & Kisumu Water & another they argued that legal representation of the deceased estate is completely separate to the operations of the Respondent company despite the fact that the deceased is the sole director of the company.
  16. That the issue of grant would not ipso facto transmit to the shares and therefore the Respondent Company does not have the requisite quorum to authorize the Deponent to institute the proceedings before this court. The Appellants submitted that the Business Premises Rent Tribunal lacks jurisdiction to entertain the matter in that the purported lease that was annexed and relied upon by the Respondent is an expired lease, having been drawn on 1st August 2011 and registered on 2nd October, 2013.
  15. That in any event, the expired lease agreement promptly referred any disputes that would arise to Arbitration before a single arbitrator guided by the Arbitration Act, 1995, of laws of Kenya or any other act or acts for the time being in force in Kenya or Related to Arbitration and no attempts have been made by the Tenant to refer the matter to arbitration before instituting the suit.
  16. In support that the matter should have been placed before an arbitrator for adjudication, they cited the case of Wringles Company (East Africa) –v- Attorney General & 3 others (2013) eKLR and Kenya Airports Parking Services Ltd & Another –v- Municipal Council of Mombasa (2010) eKLR.
  17. The Appellants stated that the Vice Chair of the Tribunal was biased thus should have recused herself as provided under Article 160 of the Constitution and Rule 5 of the Judicial Code of Conduct, owing to the fact that she gave ex-parte orders and further proceeded to rule in favor of the Respondents without considering the Appellant’s arguments in the suit before her.
  18. They relied on the case of Philip K. Tunoi & Another –v- Judicial Service Commission & Another (2016) and Kalpana H. Rawal V Judicial Service Commission and 2 Others (2016) eKLR where the Nairobi Court of Appeal cited in the holding by the East Africa Court of Justice in AG of Kenya –V- Anyang’ Nyong’o Appeal No. 5, Ref No. 1 of 2006 on the set test for bias that 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.



19. The 2<sup>nd</sup> Interested Party also outlined the factual background in their submissions leading up to the Appeal. That on 2<sup>nd</sup> September 2022, pursuant to a Reference and a Notice of motion under Certificate of Urgency filed by the Respondent, the Tribunal granted an order restraining the Appellants from selling the Motor Vehicle Registration No. KBV 562E pending interpartes hearing and vide the same order, directed the 2<sup>nd</sup> Appellant to release of the said vehicle together with the goods therein to the 2<sup>nd</sup> Interested party.
20. That on 6<sup>th</sup> September 2022, the Appellants filed a motion seeking setting aside/stay of the execution of the orders issued together with all consequential orders pending hearing and determination of Appeal in Nairobi ELC Appeal No. E076 of 2022 and the Tribunal issued orders staying order No.3 issued on 2<sup>nd</sup> Sep 2022 pending hearing of the application interparties. This variation was only to the extent that the Appellants would not release the Motor Vehicle and goods to the 2<sup>nd</sup> Interested Party but enjoined the Appellants to preserve the goods till interpartes hearing which was reserved for 14<sup>th</sup> Sep 2022.
21. That it is on this background and the orders issued on 2<sup>nd</sup> September 2022 that the Appellants filed a Motion dated 15<sup>th</sup> September 2022 seeking recusal of Hon. P. May and by a verdict returned on 30<sup>th</sup> September 2022, the application was disallowed with costs to the Respondent and the 2<sup>nd</sup> Interested party. Dissatisfied with these orders, the Appellants lodged an Appeal to this Court on 18<sup>th</sup> October 2022.
22. The 2<sup>nd</sup> Interested party submitted that the appeal is incompetent because the Application appealed against together with the supporting affidavit has not been included in the Record of Appeal as provided for under Order 42 Rule 13(4) of the Civil Procedure Rules, 2010.
23. Without prejudice, the 2<sup>nd</sup> Interested Party submitted on issues raised in the Memorandum of Appeal that most of the grounds set out could be grounds of an Appeal from the decision of a judicial officer to a higher court and not grounds for recusal. That the Appellants have also filed ELC Appeal No. E023 of 2023 against the Ruling delivered on 13<sup>th</sup> February 2023 that allowed the Respondent's Application dated 1<sup>st</sup> Sep 2022 in terms of prayers no. 5 and 6.
24. In reliance to precedents that laid out the principles guiding the exercise of the first Appellate court in an appeal; Mbogo vs Shah [1968] E. 93, *China Zhongxing Construction Company Ltd Vs Ann Akuru Sophia Civil Appeal No.38 of 2017*, Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 invited this court to reconsider and re-evaluate the evidence adduced at trial and draw its own independent conclusion.
25. The 2<sup>nd</sup> Interested party submitted that the grounds relied upon by the Appellants were mostly grounds for Appeal and did not meet the threshold for grounds of recusal and that no evidence has been produced to prove biasness by the Tribunal. That there ought to be reasonable grounds to seek recusal of a judge from a matter not merely by displeasure with the court's decision and that the Appellants did not meet the threshold for recusal.
26. In support of their argument they cited the case of Attorney General of the Republic of Kenya Vs Prof Anyang' Nyong'o and others (5/2007) [2007] EACJ 1(6 February 2007) and Philip K.Tunoi & Another vs Judicial Service Commission & Another Civil Application No. Nai 6 of 2016.
27. The 2<sup>nd</sup> Interested Party submitted that they demonstrated to the trial court that the case was clear for grant of a mandatory injunction at exparte stage and in support cited the case of Joseph D. Kimani t/ a as Pyramid Auctioneers & Another *Vs Simon Chege Kamangu Civil Appeal 169 of 2010* stating that a mandatory injunction can be granted on an interlocutory application as well as at the hearing , but in the absence of special circumstances it will not normally be granted.



28. Further, the 2<sup>nd</sup> Interested Party stated that the Appellants were not denied their right to be heard as there was a hearing date pencilled for the application. The 2<sup>nd</sup> Interested party submitted that Susan Wanjiku Kihonge had locus standi to institute the Tribunal proceedings as an administrator of the estate of the deceased director of the Respondent through grant of letters of Administration intestate dated 12<sup>th</sup> November 2021 found at page 15 of the record of appeal.

**Analysis and Determination:**

29. Having perused the record of appeal and considered the submissions rendered, I frame the following questions for determination of the dispute;

- a. What is the subject matter of this appeal
- b. Has the Appellant demonstrated bias that required recusal of the Chairperson of the Tribunal
- c. What orders should this court make?

30. To begin with, under the heading of this appeal, it is referenced as being an appeal from the orders issued in NBI BPRT case number E781 of 2022 by Hon. P. May (V. Chair) on 30<sup>th</sup> September, 2022. Upon perusal of the record, there is a ruling dated 30<sup>th</sup> September, 2022 found at pages 336-343 and the order at page 344 of the record of appeal. At the introductory statement of the impugned ruling, the hon. Vice chair stated that the application being determined was the one dated 15<sup>th</sup> September, 2022 which sought for orders of her recusal from further conduct of those proceedings and provision be made for costs of the said application.

31. The 2<sup>nd</sup> Interested Party in its submissions faulted the Appellants for their failure to include a copy of the application together with the supporting affidavit in the record of appeal contrary to order 42 rule 13(4) of the Civil Procedure Rules. I have perused the index page of the appeal and noted that the application dated 15<sup>th</sup> September 2022 is not included. It is also not among the documents bound in the record of appeal. However, the 2<sup>nd</sup> Respondent ought to have pointed out this issue at the directions stage on 2<sup>nd</sup> October 2023 when they confirmed receipt of the record of the appeal

32. It becomes difficult for this court to ascertain that the issues discussed by the Appellants in their submissions to wit want of locus standi and jurisdiction formed part of their grounds in that application. Despite the omission, this court was able to get the gist of the contents of that application from the background information provided by the Vice Chair in the impugned ruling. It is trite law that parties are bound by their pleadings and in this instant, the appeal must be strictly considered in respect with the issues that arose before the Tribunal -which is a prayer for recusal.

33. The following issues were raised and discussed by the Appellants in their submissions dated 30<sup>th</sup> October, 2023:

- i. Does the Respondent herein have locus standi?
- ii. Should the vice Chair recuse herself?

34. The issue of locus standing did not arise in the application dated 15.9.22 and so I will not consider it. In any event, the Respondent has stated in their submission that the Appellant did lodge an appeal ELC E023 of 2023 which allowed the orders sought in the substantive motion dated 1<sup>st</sup> Sept 2022. The Appellants can raise the issues of locus in that appeal.

35. Now to the merit of this appeal, the appellant submitted that because the vice chair issued orders ex-parte in the motion dated 1<sup>st</sup> September, 2022, it showed great partisanship and favouritism. That she



did not also give reasons for the issuance of the drastic orders. They stated that since the orders were made without addressing the auctioneer's costs meant the vice chair acted with ulterior motives.

36. Order 40 rule 4 of the Civil Procedure Rules provides that:
1. Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.
  2. An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.
37. The Rules allow a court (read Tribunal) to grant orders ex parte where it is satisfied for reasons to be recorded that the injunction would be defeated by any delay. Since the Rules allow for making orders ex parte, doing so per se does not constitute bias. From the Appellants' submissions, their reason for believing that the Vice Chair acted with ulterior motives was because she did not make provision for payment of the Auctioneers costs (2<sup>nd</sup> Appellant). However, the grant of an injunction is a discretionary remedy which this court (appellate) can only interfere with where a party demonstrates that the discretion was not exercised judiciously.
38. The honourable Vice Chair at paragraph 18 of the impugned Ruling stated thus; "While pointing out that this court is biased, the Applicant states that the orders given on 2<sup>nd</sup> sept 2022 were granted through corruption. I disagree. These orders were granted by myself after having thoroughly read the application, the grounds in support, the supporting affidavit and all material before me and I was convinced as I still am that the orders granted were the appropriate orders in the circumstances." In the proceedings of 2/9/22 at page 325 of the record, the Vice Chair stated that "upon perusal of the application dated 1/9/2022, it is hereby ordered that prayers 2,3,4, and 6 granted pending inter parties hearing"
39. Thus, the Vice Chair was satisfied after perusing (reading) the reasons present by the Respondent in the application dated 1/9/2022 to grant the ex parte orders. In one of the cases cited by the Appellant, *Kalpana H. Rawal vs Judicial Service Commission & 2 Others* (2016) Eklr, the Court of Appeal stated that "when reasonable basis for requesting a judge to recuse himself/herself exists, the application has to be unpleasant as it may be." And in the case of *Philiph K.Tunoi & Another vs Judicial Service Commission & Another* supra, the CA held that the test to be applied is that of a fair minded and informed observer who will adopt a balanced approach.
40. There are no provisions in the Rules that the granting of ex parte orders must be conditional. Neither do the Appellants submit that the exercise of the discretion, was not judicious. They still had opportunity to challenge the said ex parte orders and indeed they did so by filing the application dated 5<sup>th</sup> September, 2022 seeking for variation of the same. Other than citing the applicable law that sets standards for recusal of a judicial officer, the Appellants do not with specificity outline the basis for citing corruption on the part of the vice chair or the compelling evidence they tendered for the recusal which was not considered.
41. Further, it is my considered opinion and I hold that the grounds 5 to 17 of the memorandum of appeal form grounds against the issuance of an order of the injunction and not related to grounds for recusal. As already stated in the body of this judgement, there is a substantive appeal filed against the orders of the vice chairman for confirming the injunction in favour of the Respondent.
42. In light of the foregoing analysis, I find no merit in this appeal. It is hereby dismissed with costs to the Respondent and the 2<sup>nd</sup> Interested Party.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2025**

**A. OMOLLO**

**JUDGE**

