



**Hipora Security Solutions Limited v Omondi (Appeal E038 of 2024)  
[2024] KEELRC 2459 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2459 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E038 OF 2024  
M MBARÚ, J  
OCTOBER 11, 2024**

**BETWEEN**  
**HIPORA SECURITY SOLUTIONS LIMITED ..... APPELLANT**  
**AND**  
**ZACHARIAH OTIENO OMONDI ..... RESPONDENT**

**RULING**

- 1 There are several applications filed by persons represented by the firm of Mung’oma Mung’oma & Company Advocates all generic and seeking similar orders. There is a ruling in each such file but the issues raised being similar, a similar ruling is hereon found necessary. These files include Mombasa ELRC No.E125 of 2023, ELRCA E136 of 2023, and ELRCA E012 of 2024.
- 2 The ruling herein relates to the application dated 14 May 2024 filed by the respondent, Zachariah Otieno Omondi under the provisions of Section 50(1) and 47 of *the Constitution*, Section 1A and 1B of the *Civil Procedure Act* and Section 3 of the *Employment and Labour Relations Court Act* and seeking orders;
  1. This court be pleased to stay any further proceedings in this matter pending the hearing and determination of this application.
  2. The Honourable Justice Monica Mbaru be pleased to recuse and or disqualify herself from hearing and determining this suit.
  3. This matter be placed before any other court of competent jurisdiction for its just and conclusive determination.
  4. Costs of this application be in the course [cause].
- 3 The application is supported by the affidavit of the respondent who aver that he was employed by the appellants as a retail security and his employment was terminated unfairly. The firm of Mung’oma and



- Company Advocates has represented other respondents before this court and is aware that appeals have been allowed thus dismissing the claimant's case and where the appeals succeed partially the award is reviewed insignificantly even where the court finds there was unfair termination. The respondent has reasonable doubt about the fairness of the administration of justice before this court.
- 4 The respondent aver in his affidavit that the continued hearing of this matter by this court would be a violation of his constitutional right to a fair hearing by an independent court and impartial court. The firm of Mung'oma Mungo'ma & Company Advocates has served protest letters to the Judicial Service Commission (JSC) against the conduct of this court. The protest letters have equally been served to this court and the JSC is yet to respond. There is the likelihood that this court shall be biased against the respondent and infringe on his rights to a fair hearing as enshrined under Article 50(1) of *the Constitution* for being represented by the firm of Mung'oma Mungo'ma & Company Advocates his preferred advocates.
  - 5 The respondent aver that he is apprehensive that serious prejudice shall be occasioned if the orders sought are not granted since justice must not only be done but also seen to be done. There is a need for the court to recuse itself to allow another court to hear the matter on merit without any form of bias.
  - 6 In response, the appellant filed the Replying Affidavit of Edward Ntonyiri the human resources manager who aver that the recusal of a judicial officer is an ultimate recourse in a litigant's request for justice and ought not to be invoked but for good cause which does not exist in this matter.
  - 7 Mr. Ntonyiri aver that the application lacks merit for the reasons that the judicial officer in question is not a party to these proceedings nor a witness. The judge in question does not have evidential facts concerning the proceedings in this appeal. The judge does not have known or unknown personal interest in the outcome of this appeal. There is no relationship with any party in this matter or that is known with third parties with any vested interests in the outcome of this matter. The judge has never acted for the parties previously nor been a family member with any economic or vested interest in the outcome of the appeal. There exists no legitimate reason demonstrated by the respondent to have the appeal heard and determined by another judge.
  - 8 Mr. Ntonyiri avers that to the best of his knowledge, the judge is committed to the oath of office and has pronounced herself unbiased, fair, ready and willing to own up to her constitutional mandate of dispensing justice in matters within her jurisdiction. The respondent is forum shopping for a judge who would simply be sympathetic to his cause, advance his position and uphold the impugned judgment of the trial court. The respondent simply wants to be heard by a Judge who is favourable to his case.
  - 9 The judge has a constitutional duty to sit, and recusal should not be used to cripple and or gag the court from being impartial. The application is filed with the intent to circumvent justice and steal a match in this appeal. to seek recusal of a judicial officer from adjudicating over a matter on the grounds that he had determined a matter with similar facts is an implication that another judge will arrive at a different decision and that justice depends on a particular judge rather than the rule of law which essentially risks bringing the whole judicial process into disrepute hence the instant application should be dismissed.
  - 10 Both parties attended and the respondent filed written submissions. The respondent opted to rely on the filed Replying Affidavit.
  - 11 The respondent as the applicant submitted that the firm of Mung'oma Mungo'ma & Company Advocates has represented several parties before Justice Monica Mbaru who has expressed their reservations over the quality of judgments they obtained from this court. It is outright that the litigants were unfairly terminated from employment but the judgments of the court are with bias. The firm



of Mung'oma Mung'oma & Company Advocates has filed a letter of protest to the JSC against the conduct of the judge without a response.

- 12 The respondent submitted that whereas a party aggrieved by the decision of this court has the right of appeal before the Court of Appeal, an injustice should not be left to perpetuate. The firm of Mung'oma Mung'oma & Company Advocates finds there is a likelihood of bias against the respondent whom they represent. In the case of **Kalpna Rawal v Judicial Service Commission & 2 others [2016]** eKLR the court held that;

... An application for recusal of a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with *the Constitution* without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial judge. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating a cardinal guarantee of *the Constitution*, namely the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial court. We would, with respect, agree with the Constitutional Court of South Africa when it stated as follows in *The President of the Republic of South Africa v. The South African Rugby Football Union & Others*, Case CCT16/98:

At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought, there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront." [Emphasis added]."

- 13 The respondent hence submitted that there is a need for recusal to pave the way for another court to hear the appeal on merit without any form of thought or bias in the mind of the respondent.

### Determination

- 14 The case by the respondent is that there should be recusal of the judge since he has been made aware that the firm of Mung'oma Mung'oma & Company Advocate has represented other respondents before this court and that these appeals have been allowed thus dismissing a claimant's case and where the appeals succeed partially the award is reviewed insignificantly even where the court finds there was unfair termination. The case is also that the respondent has reasonable doubt about the fairness of the administration of justice before this court. The continued hearing of this matter would be a violation of the respondent's constitutional right to a fair hearing by an independent and impartial court. The respondent further asserts that the firm of Mung'oma Mung'oma and Company Advocates has represented other respondents before this court who have expressed their reservations over the quality of judgments they obtained from this court.



- 15 The respondent as the applicant has a right to be represented by an advocate of his choice. This right is secured under Section 20 of the *Employment and Labour Relations Court Act* read together with Article 48 of *the Constitution* on access to justice.
- 16 The apprehension in this appeal is that the respondent's chosen advocates have made him aware that they have represented other respondents whose appeals have been allowed thus dismissing a claimant's case and where the appeals succeed partially the award is reviewed insignificantly even where the court finds there was unfair termination of employment. The apprehension is also that if the matter proceeds before this court, there will be a violation of the respondent's right to a fair hearing.
- 17 The respondent in the written submissions has relied on the case of *Kalpna Rawal v Judicial Service Commission & 2 others* [2016] eKLR. In this case, the issue at hand related to allegations by the applicant that she had learnt from a confidential source that on the night of 5<sup>th</sup> and 6<sup>th</sup> February 2016 the presiding judge in a case where she was the applicant had held a meeting with the Attorney General, at which they discussed a pending appeal. There was agreement that the appeal would be dismissed hence, in light of the said information, the applicant was apprehensive that the judge would not be fair and ought to recuse himself from hearing the appeal.
- 18 The Court of Appeal in the above-cited matter defined what constitutes "reasonable apprehension of bias" and relied on the case of *Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others* EACJ Application No. 5 of 2007 that;

We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise 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 and informed about all the circumstances of the case.
- 19 In an application such as herein, an applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair-minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn. What has the judge done or failed to do to create such a perception of the applicant? The applicant has never been before this court and in the exercise of his right to representation has been made aware that others before him had their appeals succeed and where not successful, the award was not substantial. Is this a proper foundation for bias on the part of the judge or a bias of the legal representative agitated by the applicant?
- 20 In *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR an application such as herein was filed for recusal of the presiding judge. The applicant highlighted five (5) other matters that the judge had presided over and was likely to be biased. The judge dismissed this application on the basis that the applicant had failed to demonstrate that the applicant was a party in the cited matters to form a basis or perception that there would be bias in his case.
- 21 Indeed, judges in their judicial role are regulated by standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020. Under Regulation 21 Part II, a Judge can recuse



herself in any of the proceedings in which 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;
- (g) Is precluded from hearing the matter on account of any other sufficient reason; or
- (h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.

22 The appellant in the Replying Affidavit addressed these principles at length. The respondent as the applicant has not addressed himself to these principles save to urge the court that he has been made aware by his advocate that other respondents succeeded in their appeals and where the appeals were not successful, the awards were not substantial.

23 I agree with the respondent that although the advocates representing him are the same in other cases, each case is separate and distinct and based on its facts and any party dissatisfied with the decision is entitled to appeal. Indeed, there are appeals lodged from the cases cited and to go on any analysis of the findings would not aid justice. Further, merely because this court decided any of these cited cases does not automatically form a basis for recusal.

24 It would be improper for me to justify my decisions in these cases. Each appeal is addressed on the merits and the applicable law. A right of appeal is constitutional and lawful.

25 In determining a similar application as herein, the court in *Republic v Independent Electoral & Boundaries Commission & Another ex parte Coalition for Reforms and Democracy (CORD)* HC NRB Misc. Appl. No. 648 of 2016 [2017] eKLR held that;

- (74) To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would



be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.

26 Concerning whether this appeal should be reassigned to another court of competent jurisdiction, I rely on the case of Gladys Boss Sholei v The JSC & Another (2018) eKLR the Supreme Court relied on the case of Simonson –Versus-General Motor Corporation USDCP 425 RSupp574,578(1978) and held that;

Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have a concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.

From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge’s duty to sit where no grounds of disqualification exist in fact or in law as the duty in itself helps to protect the independence of our courts against manouvering by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the Newzeland court of appeal in Mnir-versus-Commissioner of Inland Revenue(2007)3NZLR 495.

27 The court finds no factual or legal basis established for its recusal or reassignment of the matter to another court. The application dated 14 May 2024 is tantamount to seeking to stop this court from the conduct of judicial function and I consequently dismiss the same with costs to the appellant.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

