



**Omo & another v Maosa t/a Maosa & Co Advocates (Civil Case 239 of 2018)
[2025] KEHC 18567 (KLR) (Commercial and Tax) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 239 OF 2018
F GIKONYO, J
DECEMBER 4, 2025**

BETWEEN

**JOHN ODIRA OMO 1ST PLAINTIFF
EDEN ODHIAMBO ROBINSON 2ND PLAINTIFF**

AND

**THOMAS GICHANA NYAKAMBI MAOSA T/A MAOSA & CO
ADVOCATES DEFENDANT**

RULING

1. The defendant, in the Notice of Motion dated 8.10.2025, seeks that I disqualify and/ or recuse myself from further handling this matter.
2. The application is made under Articles 47, 50, 159 (2) and 160 (1) of *the Constitution*, Sections 3 and 12 of the Fair Administrative Actions Act, Section 3 of the *Judicature Act* and Sections 1 and 3 of the *Civil Procedure Act*.
3. The application is supported by the supporting affidavit sworn by the applicant on 8.10.2025 and written submissions dated 30.10.2025.
4. The applicant's gravamen is that there is apparent bias towards him on the part of the judge and that he has a valid apprehension that he will not be accorded a fair trial and/ or decision if the matter is allowed to proceed to judgment before the judge.
5. The applicant contended that in the ruling of 19.6.2025 the judge misapprehended the law, relied on subsidiary legislation to override statutory provisions and purported to exercise jurisdiction and/ or powers reserved for a bench of either a two or three judge bench.



6. In particular, the applicant stated that he was aggrieved by the court's finding that the defect in the affidavit in support of the OS is curable and does not render the OS incurably defective as alleged by him.
7. The applicant indicated that he has lodged a notice of appeal against the ruling of 19.6.2025. He also indicated that he had been unable to lodge the appeal since the court file has not been available in the registry for typing of the court proceedings to prepare the record of appeal in good time.
8. The applicant submitted that the ruling of 19.6.2025 was a case of bias contrary to the provisions of the judicial code of conduct for judicial officers. He cited rules 36 and 41 of the Judicial Service (Code of Conduct and Ethics) Regulations.
9. The applicant relied on: -
 1. Bellevue Development Company Ltd v Gikonyo & 3 others [2020] KESC 43 (KLR)
 2. Jan Bonde Nielson v Herman Philipus Steyn & 2 others [2014] KEHC 7288 (KLR)
 3. George Arab Muli Mwalabu v Senior Resident Magistrate Kangundo & 2 others;
 4. Festus Mbai Mbonye (Interested Party) [2019] KEHC 2172 (KLR)
 5. Mongare v Attorney General & 3 others [2014] KECA 887 (KLR)
 6. Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested Parties) (Constitutional Petition E0304 of 2023) [2024] KEHC 1632 (KLR) (Constitutional and Human Rights) (23 February 2024) (Ruling)
 7. George Arab Muli Mwalabu v Senior Resident Magistrate Kangundo & 2 others; Festus Mbai Mbonye (Interested Party) [2019] KEHC 2172 (KLR)
10. There was no response filed by the plaintiffs/ respondents.

Analysis and Determination

11. The issue before the court is my recusal from this matter. Does it fit the threshold?
12. The legal threshold for a recusal application is "whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established..." Republic v Mwalulu & 8 others [2005] KECA 344 (KLR)
13. At the core of this recusal application are two grounds. I will state what is absolutely necessary for reason that he has filed an appeal on the ruling.
14. The applicant is aggrieved by the court's finding in the ruling of 19.6.2025 on the validity of the originating summons (OS) and the supporting affidavit. The ruling was upon the applicant's preliminary objection (PO) based on, among others, the ground that the suit was a nullity since the supporting affidavit in support of the originating summons was not properly commissioned.
15. The court made its decision and gave reason for the decision. See the ruling.



16. On this issue, the court found that: -

“Non-commissioning of affidavit

1. The defendant/ advocate submitted that the suit is a nullity since the supporting affidavit in support of the originating summons is not commissioned. He relied on *David Wamatsi Omusotsi v Returning Officer Mumias – East Constituency & 2 others* [2017] eKLR, where the court held that affidavits can only be commissioned by a Commissioner for Oaths, not a firm of advocates. He also relied on *Solomon Omwega Omache & Another v Zachary O. Ayieko & 2 others* [2016] eKLR where the court expunged from the record annexures neither marked nor sealed with commissioner’s stamp.
2. I have perused the affidavit sworn by John Odira Omo on 30th May 2018. At page 8, the affidavit bears a commissioner for oaths stamp for Kiarie, Joshua & Co. Advocates.
3. Article 159 (2) (d) of *the Constitution* enjoins the court to administer justice without undue regard to procedural technicalities.
4. Order 19 Rule 7 of the Civil Procedure Rules provides:-
 - “7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”
5. It is important to note that, these proceedings were commenced under Order 37, rule 3 of the Civil Procedure Rules by way of an Originating Summons.
6. The defect in the affidavit in support of the OS is curable and does not render the OS incurably defective as has been alleged.
7. Therefore, the contention that the suit is a nullity fails.”

17. The applicant should appeal the decision rather than use it as a basis for recusal.

Misapprehension of the law

18. The applicant alleges misapprehension of the law in arriving at its finding by relying on subsidiary legislation to override statutory provisions. Without attempting to justify my decision, nothing could be further from the truth that the court also relied on Article 159 (2) (d) of *the Constitution* in reaching its decision which cannot be a subsidiary legislation.
19. In the hierarchy of law ‘...At the apex is *the Constitution* of Kenya, which is the supreme law of the land...’ *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa HCCC No. 70 of 2002*, cited in *George Arab Muli Mwalabu v Senior Resident Magistrate Kangundo & 2 others; Festus Mbai Mbonye (Interested Party)* [supra].
20. The applicant has filed an appeal on my said ruling. Therefore, the less I say about the merits thereof, the better. Except, I must state that such grounds as cited by the applicant can only be for appeal rather than recusal. The invitation by the applicant is for this court to sit on appeal over its decision. I decline the invitation. Those grounds fail.



Jurisdiction of a two or three-judge bench

21. The second ground is that the court purported to exercise jurisdiction and/ or powers reserved for a bench of either a two or three judge bench.
22. The applicant questioned the court's finding that the OS raises serious questions to be determined by the court. The court is entitled and obligated to inquire into such matters under section 55 of the Advocates' Act.
23. The applicant asserted that under the Advocates' Act has mechanisms for disciplining errant advocates, through both the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. He added that the proceedings from the Tribunal can then be subject to an appeal to the High Court where the same statute provides that such appeals are to be heard and determined before a two-judge bench, and in case of a tie, by a three-judge bench. The applicant cited section 64 of the Advocates' Act.
24. The applicant therefore submitted that the court's decision to usurp these statutory powers and exercise them oppressively against him, without those factual issues being litigated on before the Disciplinary Tribunal on the guise of an advocate being an officer of the court manifestly shows an intention to deliver a "preconceived judgment formed without factual basis".
25. This court is alive to the provisions and mechanisms of handling of complaints against Advocates and their discipline under the Advocates' Act.
26. However, this claim was brought by way of originating summons under Order 37 rule 3 of the Civil Procedure Rules, which provides that: -

“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”
27. The above provision is a procedural mechanism for resolving claims arising out of or connected with the contract of sale of land or immovable property. It is distinct from the advocates' disciplinary mechanisms.
28. For this reason, the second ground also fails.

Conclusion

29. Overall, the court finds that the applicant has not satisfied the legal threshold required for a recusal. He has not specifically alleged and established facts constituting bias.
30. It is of great concern as this case was filed in 2018 and has not been concluded over 7 years later.
31. Recusal applications should be founded on sound reasons that fits the legal threshold. As a caution, a “recusal application should not be used for forum-shopping in the hope that (1) the applicant will be heard by a judge who will give favourable decision to him or (2) to intimidate or blackmail judges or (3) for other ulterior motives meant to delay cases.” *Lawrence Kinyua Mwai v Nyariginu Farmers Company Limited & another* [2017] KEHC 7884 (KLR)



32. In the upshot, the application dated 8.10.2025 is dismissed with no orders as to costs as there was no response.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 4TH DAY OF DECEMBER, 2025**

F. GIKONYO M

JUDGE

In the presence of: -

OTIENO for applicant

Kihiko for respondent

Kinyua C/A

