



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E243 OF 2020

(Consolidated with)

PETITION NO. 334 OF 2020

KENYA TEA DEVELOPMENT AGENC HOLDINGS LIMITED & 55 OTHERS.....PETITIONERS

-VERSUS-

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,

LIVESTOCK, FISHERIES & CO-OPERATIVES & 2 OTHERS.....RESPONDENTS

-AND-

KENYA SMALL TEA HOLDERS GROWERS ASSOCIATION (KESTEGA)...INTERESTED PARTY

RULING NO. 5

1. The Black's Law Dictionary, 10th Edition (2014) at page 1467 defines the term recusal to mean **'removal of oneself as a judge or a policy-maker in a particular matter, esp. because of a conflict of interest.'** This process is a matter of judicial discretion which can be initiated by the judicial officer or a party in a matter before the judicial officer. The significance of the doctrine of recusal is to promote a fair process that is impartial and therefore enhance public confidence in the administration of justice.

2. One of the ingredients of the right to a fair hearing is the impartiality of the court or tribunal. In that regard, Article 50(1) of the Kenyan Constitution provides for the right to fair hearing as follows:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

3. The High Court (Organization and Administration) Act, 2015 which gives effect to Article 165(1)(a) & (b) of the Constitution provides for the organization and administration of the High Court of Kenya. Section 41 of the Act provides that:

The Chief Justice shall, within six months of the commencement of this Act, prescribe the code of conduct applicable to a judge of the Court.

4. The Judicial Service (Code of Conduct and Ethics) Regulations, 2020 provides the manner in which a judicial officer should perform his/her official duties. Rule 36 requires each judicial officer to, at all times, carry out the duties of the office with impartiality and objectivity, in accordance with Articles 10, 27, 73(2)(b) and 232 of the Constitution. A judicial officer shall not practice favouritism, nepotism, tribalism, cronyism, religious bias, or engage in corrupt or unethical practices. Additionally, in the discharge of their duties, judicial officers are expected to:

(a) uphold and apply the law;

(b) observe fairness and impartiality; and

(c) perform the duties of judicial office, including administrative duties impartially, competently, and diligently, without bias.

5. According to the Bangalore Principles of Judicial Conduct, 2002 one of the values that a judicial officer should uphold is impartiality. This is provided for under Value 2 which states as follows:

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

6. What can be understood from the principles cited above is that there is a general presumption that a judicial officer will carry out their oath of office with due diligence and impartiality. The Judicial Service (Code of Conduct and Ethics) Regulations, 2020 anticipates that where impartiality cannot be achieved in a matter or where there is a reasonable perception of partiality, the judicial officer is accordingly required to recuse himself or herself. In that regard Rule 47 provides for recusal as follows:

(1) A judicial officer may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judicial officer—

(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) a member of the judicial officer's family has economic or other interest in the outcome of the matter in question.

(2) Recusal by a judicial officer shall be based on specific grounds to be recorded in writing as part of the proceedings.

(3) A judicial officer may not recuse himself or herself if—

(a) no other judicial officer can deal with the case; or

(b) because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

7. The doctrine of recusal has its foundational underpinnings in common law. The law on recusal was stated in **Metropolitan Properties (FGC) Ltd v Lannon [1969] 1 QB 577** as follows:

“A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject-matter. Second, "bias" in favour of one side or against the other.”

8. The Court went ahead and stated the test for apparent bias thus:

"In Regina v. Barnsley Licensing Justices (1960 2 Q.B. 187) Lord Justice Devlin appears to have limited that principle consider-ably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the Chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand, see The Queen v. Huggins (1895 1 Q.B. 563); Rex v. Sunderland Justices (1901 2 K.B. 373) by Lord Justice Vaughan Williams. Nevertheless there must appear to be a real likelihood of bias. Surmise, conjecture, or suspicion, is not enough, see Regina v. Camborne Justices (1955 1 Q.3. 41) at pages 58 to 51; Regina v. Nailsworth (1953 1 W.L.R. 1046). There must be circumstances from which a reasonable man would think it likely or probable that the Justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidences and confidence is destroyed when right-minded people go away thinking: "The Judge was biased".

9. The test for apprehended bias was provided in the South African case of **President of the Republic of South Africa v The South African Rugby Football Union & Others Case CCT 16/98 [1999] ZACC 9** as follows:

‘...the test for apprehended bias is objective and ... the onus of establishing it rests upon the applicant...the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case...An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.’

10. The Supreme Court gave the test for recusal in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR** as follows:

‘... it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.’

11. In this matter no party has asked me to recuse myself. However, where a reasonable perception of bias may be created, it is necessary for the judicial officer to get out of a case before being asked by the parties to do so. That is not to say I cannot do justice to the parties in this case. The circumstances of the matter will, nevertheless, leave an independent reasonable observer in doubt as to whether justice has been done owing to my participation as one of the judges in this case.

12. A number of former and current directors of some of the tea factories involved in this litigation are personally known to me. One of the issues to be determined in the consolidated petitions is whether or not the elections that were recently held and which brought on board the directors who are currently in office were lawful. Whenever I walk to the local market, as I often do, and I pump into any of the feuding directors we sometime share a cup of tea as we discuss village affairs. The outcome of the cases before this Court are going to directly affect the former and current directors. Anybody seeing me sitting with any of the directors will be forgiven for thinking we are discussing the cases before this Court. The perception of bias is highly likely and palpable in such circumstances. It is immaterial that I will properly exercise my judicial oath of office and determine the issues without fear or favour. What counts is the perception of the tea farmer who finds me talking to any of the feuding directors of some of the tea factories involved in this litigation. In view of the reasons stated above, it is only just and fair that I recuse myself from these cases, which I hereby do.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF AUGUST, 2021.

W. Korir,

Judge of the High Court