



Nyaga v French Embassy & another; Transparency International (Interested Party) (Constitutional Petition 365 of 2017) [2023] KEHC 1913 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 365 OF 2017**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

REGINALD NJAGI NYAGA APPLICANT

AND

FRENCH EMBASSY & ANOTHER RESPONDENT

AND

TRANSPARENCY INTERNATIONAL INTERESTED PARTY

RULING

1. The instant application which is subject of this ruling is the third one of its kind. It is an application for the recusal of the Judge. In two previous instances, Hon. Justice E. Mwita and Hon. Justice A. Makau recused themselves on applications by the Petitioner. Both applications were mainly mounted on similar reasons; from the way the Hon. Judges were handling the matter, the Petitioner perceived that he was not going to get justice.
2. The application at hand is a Notice of Motion dated 10th March, 2022. It is basically raised on similar grounds that the Petitioner is not likely to get justice. The application is opposed by the 1st Respondent whereas the 2nd Respondent left the matter to the Court.
3. This Court has keenly considered the application alongside the record and the parties' submissions.



4. An application for recusal of a Judge has a constitutional underpinning. Its basis is in Article 50(1) of *the Constitution*. The provision provides 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.

5. The right to a fair trial is one of the rights which cannot be abridged. Article 25(c) of *the Constitution* categorically states as under: -

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited -

- a.
- b.
- c. The right to a fair trial.

6. There is also the Public Officers Ethics Act, 2003. Section 5 thereof requires every independent Commission under *the Constitution* to establish a specific Code of Conduct and Ethics for the public officers for which it is the responsible Commission. In the case of the officers in the Judiciary the Commission is the Judicial Service Commission.

7. The Judicial Service Commission enacted the Judicial Service Code of Conduct and Ethics. As stated by the Court of Appeal in Nairobi Civil Application No. NAI 6 of 2016 *Philip K. Tunoi & Another vs. Judicial Service Commission & Another (2016)* eKLR ‘Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of *the Constitution*.’

8. The Court further stated that ‘... under Rule 5 of the Code, a judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he/she has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.’

9. Courts have also variously dealt with the aspect of recusal of Judges. The Supreme Court of Kenya in Petition No. 34 of 2014 *Gladys Boss Shollei vs. Judicial Service Commission & Another (2018)* eKLR distinguished applications for recusal of Supreme Court Judges from the other Judges of the superior Courts. The Court stated thus: -

(54) An application for recusal of a Supreme Court Judge cannot be determined in a manner as that of a Judge of the other superior Courts due to the special consideration that must be given to its quorum.

10. In *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 (2013)* eKLR the Supreme Court dealt with the basis of recusal of Judges. The Judges, rightly so, expressed themselves as follows: -

Recusal, as a general principle, has been much practiced in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black’s Law Dictionary, 8th ed. (2004) [p.1303]: “Removal of oneself



as judge or policy maker in a particular matter, [especially] because of a conflict of interest.” From this definition, 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. Mutunga, CJ (as he then was) in Supreme Court Application No. 11 of 2016 Hon. Kalpana H. Rawal, *Philip Tunoi & David A. Onyancha vs. Judicial Service Commission & Judiciary (2016)* eKLR had the following to say on the rationale behind the recusal of Judges: -

35. The issues raised in Mr. Omtatah’s Preliminary Objection are not insignificant. Nor are they narrowly limited to the rights of the applicants. They speak to the integrity of the Court as an institution and the urgent need to engender public confidence on this Court’s ability to dispense with justice equitably, fairly and with due regard to the spirit and letter of *the Constitution*. Whatever outcome that will arise from this Court as presently constituted, will raise serious questions about the impartiality and independence of its members. This Court’s mandate is not only to adjudicate on matters brought before it, but dispensing with impartiality and independently, with due regard to the principles enunciated in Article 10 of *the Constitution*.

36. The pursuit of justice demands that judges act independently and impartially. Where lack of impartiality may raise perceptions of bias, such that members of the public may think justice has not been rendered, it is only fair and equitable that the court declines to adjudicate such matters.....

(emphasis added)

12. Adding his voice to the recusal of a Judge My Lordship Ibrahim SCJ in Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha case (supra) stated that: -

(125) Recusal is indeed a judicial duty and it does not amount to a judge abrogating his/her duty. Apart from personally recusing to safeguard one’s integrity and the sanctity of proceedings, recusal also helps protect the integrity and dignity of the bigger institution, that is, the judiciary and aids in championing its independence. While it may be argued that recusal in this matter or disqualification may compromise the parties’ right to appeal, the integrity of the institution of the judiciary is a matter not to be eroded or treated cursorily or of secondary importance.

13. The Bangalore Principles of Judicial Conduct provide as follows on ‘bias’ or ‘prejudice’: -

Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated



without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law.

14. Having laid the law on the subject of recusal of Judges, I must as well look at the threshold for the success of such applications. In other words, there is need to look at the test or the legal principles relating to recusal.

15. The test was laid by the Supreme Court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* (*supra*). At the risk of repetition, the Court held that: -

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.

16. My Lordship Ibrahim SCJ in the said case further stated that: -

[P]ublic confidence in the administration of justice required that the judge implicated disqualifies himself, it was irrelevant that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any reasonable suspicion of bias on the fact of that particular case. (emphasis added).

17. Further, my Lordship Ibrahim SCJ in Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha case (*supra*) revisited the applicable principles as follows: -

(98) 98] In the case of *Bernert v Absa Ltd* [2010] ZACC 28 the Constitutional Court set down the applicable legal principles in a case that concerned the apprehension of bias thus:

The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.

(99) The Court held that the test for recusal which had been adopted by the Court was whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. Further, it was stated that judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without and without fear, favour or prejudice, that their oath of office



requires them to administer justice to all persons alike without fear, favour or prejudice, in accordance with *the Constitution* and the law. (emphasis added).

18. The test was further discussed by the Court of Appeal in Nairobi Civil Application No. NAI 6 of 2016 *Philip K. Tunoi & Another vs. Judicial Service Commission & Another* (*supra*) as under: -

39. The House of Lords held in *R vs. Gough* [1993]AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

40. The test in *R v. Gough* was subsequently adjusted by the House of Lords in *Porter v. Magill* [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purposes and accordingly held that-

[T]he 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.

41. 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 balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

42. In *Taylor v. Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs’ solicitors many years previously, the House of Lords in the judgment of Lord Woolf CJ reiterated:

...we believe the modest adjustment in *R v. Gough* is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland.

The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

46. We take cognizance that the right to fair hearing is embedded in our Constitution which emphasizes that justice must be done to all without delay or undue regard to procedural technicalities. *The Constitution* has vested in the Courts judicial authority and mandate and has expressly stated that the right to fair hearing cannot be limited or abridged. It is absolute.

47. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to Section 5(1) of the *Public Officer Ethics Act*, 2003 contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. Rule



10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of *the Constitution*.

48. Specifically, under Rule 5 of the Code, as judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.

[emphasis added].

19. The Court of Appeal, differently constituted, in *Malindi Civil Appeal (Application) No. 43 of 2018 Accredo AG & 3 Others vs. Stefano Ucceli & Another (2018)* eKLR discussed the test as follows: -

19. Be that as it may, as rightly observed by this Court in *Kalpana H. Rawal vs. Judicial Service Commission & 2 others* [2016] eKLR an application for recusal of a Judge in which actual bias is established on the part of the judicial officer hardly poses any difficulties. The challenge arises where the application is founded on real likelihood or reasonable apprehension of bias attributable to behaviour or conduct of a judicial officer.
20. The test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias. This current position was succinctly set out by the House of Lords in *Porter vs. Magill* [2002] 1 All ER 465 as follows:

[T]he 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.

Expounding on that test the Supreme Court of Canada in *R. vs. S. (R.D.)* (*supra*) had this to say:

The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This 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.” [emphasis added]

21. It is also instructive to note that the threshold of making a finding to the effect that there is a real likelihood of bias that warrants recusal of a judicial officer is quite high. This is because the oath taken by a judicial officer under *the Constitution* to render justice and uphold the law whilst being impartial raises the presumption that such an officer will indeed uphold impartiality in carrying out his/her mandate. See this Court’s decision in the *Kaplana*



H. Rawal case. Consequently, judicial officers ought not to accede to each and every application for recusal especially where the same is not based on reasonable grounds. To do so might encourage litigants to believe that by seeking the disqualification of a judicial officer, they will have their case tried by someone who they think will likely decide the dispute in their favour. See *Kaplan & Stratton vs. Z. Engineering Construction Ltd & 2 Others* [2000] KLR 364.

20. The foregone discourse yields that the test for recusal of a Judge on the ground of bias is what is commonly referred to as ‘the reasonability test’. The parameters of this test were further looked at length by Hon. Odunga, J in *Nairobi Judicial Review Case No. 124 of 2014 Republic & 3 Others vs. Cabinet Secretary for Transport & Infrastructure & 5 Others ex parte Kenya Country Bus Owners Association & 8 Others* (2014) eKLR. In that decision the Learned Judge referred to several decisions of the Constitutional Court of the Republic of South Africa. In paragraph 34 the Judge stated as follows: -

34. Similarly, in *South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000*, the same Court expressed itself as follows: -

The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.

The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant’s anxieties. It attributes to the litigants’ apprehension a legal value, and thereby decides whether it is such that it should be



countenanced in law... The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasized. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance... We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping.

21. The foregoing must be weighed against the fact that a Judge of a superior Court, as a State Officer, takes an oath of office prior to assumption of the office pursuant to Article 74 of *the Constitution*. I will hereunder reproduce the requisite Oath of Office: -

I,, (The Chief Justice/President of the Supreme Court, a judge of the Supreme Court, a judge of the Court of Appeal, a judge of the High Court) do (swear in the name of the Almighty God)/(solemnly affirm) to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. (So help me God.)

22. From the above analysis, it is apparent that the reasonability test hinges on the following two key considerations namely: -
- a. That the person apprehending bias must be a reasonable person; and
 - b. That the apprehension itself must in the circumstances be reasonable.



23. A Judge or judicial officer may even after forming an opinion to recuse himself/herself from the matter still seek the consensus of the parties not to opt out of the matter. My Lordship Ibrahim SCJ in Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha case (*supra*) had the following to say on the issue: -

[105] Even where a judge finds that even after holding a particular position, he is still able to rise above that position and is willing to be persuaded, in such a case, a judge may wish to possibly persuade the parties that he wishes to hear the matter and he will be open-minded and objective. Where parties after being so informed agree, the judge may continue to sit. This happened in the case of National Bank of Kenya vs Anaj Ware Housing Corporation Limited, Petition No. 36 of 2014, in which I had heard the matter as a High Court judge. When the matter finally reached the Supreme Court on appeal, I revealed to the parties that I had heard the matter in the High Court and invited the parties if they so wished that I opt out. However, I indicated that I was open to be convinced otherwise on merit since I had made my decision in the High Court by only applying the principles of stare decisis. Both parties before the Court submitted that they did not wish that I recuse myself, I heard the case and agreeing with my colleagues, we rendered a unanimous decision that reversed my holding in the High Court.

24. Further, a Judge or judicial officer may not opt out of a matter on the basis of the doctrine of necessity. This doctrine was discussed in detail in Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha case (*supra*).

25. There are two main ways in which a Judge or a judicial officer may recuse himself/herself from a matter. The first way is on an application by any of the parties in the matter. The application may be oral or written. The other way is on the Judge's or a judicial officer's own motion (*sue moto*).

26. The guiding principles in instances where a Judge or a judicial officer is called upon to recuse himself/herself on account of bias or conflict of interest differ from those in cases of self-recusal. When the application is made by any or all the parties in a matter, the principal consideration by the Judge or the judicial officer is the reasonability test. The Judge must decide whether there is reasonable apprehension in the mind of the Applicant that he/she may not have a fair and impartial trial before that Judge or the judicial officer.

27. On the other hand, the consideration by a Judge or a judicial officer on self-recusal depend largely *inter alia* on the Judge's or judicial officer's own conviction and perception in his/her participation in the matter.

28. Having dealt with the applicable legal principles in cases of apprehension of bias and conflict of interest, I will now apply those principles to this case. Suffice to say, I have carefully considered the parties' submissions and the law on the matter at hand.

29. I must make it clear from the onset that I am not in doubt of my integrity, independence and fidelity to *the Constitution* and the law. Nevertheless, that must be juxtaposed with the concern raised by the Petitioner.

30. The grounds in support of the application have been running through all similar applications. Is it possible that all the three Judges who have so far handled this matter been unfair to the Petitioner? Two of them have already distanced themselves from such allegations.



31. On my part, and going by the short period in which this Court handled this matter and interacted with the Petitioner, it is highly possible that the Petitioner cannot be at peace if he does not direct the proceedings. I noted as much and severally reminded him that it is the Court to give the way forward in the matter and not the Petitioner. Going by the history of the matter and the way the Petitioner wanted the proceedings conducted solely in his favour, I was not surprised that the instant application was filed.
32. Without any second thought, I am very clear in my mind that none of the allegations levelled against me are sustainable. To me, the Petitioner is just going about forum shopping. There is nothing laid before me to suggest that the Petitioner will not get justice. To that end, I find that there are no holding grounds in support of the application. The application, therefore, suffers a false start. Had it not been for the reason that I was transferred from the Division, I would take deliberate steps towards finalizing this matter which has been in Court since 2017.
33. Consequently, the following final orders do hereby issue: -
 - a. The Notice of Motion dated 10th March, 2022 is hereby dismissed with costs.
 - b. For the sole reason that I am now transferred from the Division, this matter shall be placed before the Presiding Judge of the Division for directions on the way forward.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

