REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

PETITION NO. 4 OF 2012

-BETWEEN-

1. JASBIR SINGH RAI
2. IQBAL SINGH RAI
3. DALJIT KAUR HANS **.....PETITIONERS**
4. SARJIT KAUR RAI

-AND-

1. TARLOCHAN SINGH RAI, ESTATE OF
2. JASWANT SINGH RAI
3. SARBJIT SINGH RAI **.....RESPONDENTS**
4. RAI PLYWOODS (KENYA) LIMITED
5. SATJIT SINGH & RAM SINGH, ESTATE OF

RULING

A. BACKGROUND TO THE CALL FOR RECUSAL BY SUPREME COURT JUDGE

[1] The substantive matter before the Court is an application asking for a departure from an earlier decision which would bar the case for a "review of [the] judgment and decision of the Court of Appeal dated 30th September, 2002 in....Court of Appeal Civil Appeal No. 63 of 2001". In the said earlier decision, in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & Two Others,*** Supreme Court Application No. 2 of 2011, this Court, for the material part, held:

> ***"...we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer 'special jurisdiction' upon the Supreme Court, contrary to the express terms of the Constitution."***

It is by virtue of the said Section 14 of the Supreme Court Act, 2011 (Act No. 7 of 2011) that the applicant herein has brought Petition No.4 of 2012 seeking leave to appeal against the decision of the Court of Appeal. Following the delivery of the Ruling in the ***Macharia*** case on 23rd October, 2012 learned counsel for the applicants, Mr. Nowrojee asked the Court to depart from its position, and still hear an application for leave to appeal on the basis of the said s.14 of the Supreme Court Act.

[2] Pending the hearing of the petitioner's application, Mr. Nowrojee moved the Court by a letter seeking the recusal of one of the Judges, on the ground that the Judge had similarly recused himself as a Judge of Appeal, at the commencement of proceedings pursuant to which the decision of that Court is now being contested. This application was duly heard, and is the subject of today's Ruling.

[3] Mr. Nowrojee submitted that no reasons had been expressed for Mr. Justice Tunoi's recusal from the Court of Appeal Bench hearing the case in question, and that whatever reasons led to that decision, ought again to justify recusal from the Supreme Court Bench hearing the matter now.

B. RECUSAL BY SUPREME COURT JUDGE: THE RELEVANT ISSUES

[4] This is the first application of its kind before this new Supreme Court, and, on that account, it is necessary to identify the most relevant issues, as a basis for establishing guiding principles, considering especially the fact that this Court of restricted numerical strength, is the ultimate judicial forum, bearing the mandate of defining the jurisprudential terrain for this country.

[5] It is pertinent to consider several specific questions, the answers to which will yield guiding principles from which more specific rules would emerge. In this regard, we pose to ourselves the following questions:

(a) *in what circumstances should the recusal of a Judge be sought by a party?*

(b) *when ought a Judge, as a matter of personal conviction, or of ethical considerations, to recuse himself or herself from decision-making by the collegiate Bench?*

(c) *should the grounds for single-Judge-Bench recusal apply in an identical manner to the case of the collegiate-Bench Judge?*

(d) *should the principles of recusal for other superior Courts, such as the High Court and the Court of Appeal, apply in an identical manner to the Supreme Court, the membership of which is limited to seven, under the Constitution?*

(e) *should the principles of recusal for other superior Courts apply unexceptionably to the Supreme Court, even where this Court requires a full Bench, as for instance, where it is sitting to*

reconsider its earlier precedent rendered by a majority of the Judges?

(f) how ought the Supreme Court to guide itself on the issue of recusal by its members, in the light of its unique position in relation to the integrity of the Constitution, as spelt out in the Supreme Court Act, 2011 (Act No. 7 of 2011), s.3 (a) and (b), thus –

> ***"The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things –***
>
> ***(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;***
>
> ***(b) provide authoritative and impartial interpretation of the Constitution....?"***

C. THE COMPARATIVE LESSON

[6] Recusal, as a general principle, has been much practised 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."*

[7] 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.

[8] It is an insightful perception in the common law tradition, that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the *judicial discretion* in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "*constructive intuition which operates after learning and analysis are exhausted"* [in G. Lewis, ***Lord Atkin*** (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.

[9] Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material

witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.

[10] ***In R. v. Bow Street Metropolitan Stipendiary Magistrate,*** *ex parte* ***Pinochet Ugarte*** (No.1) [2000] 1 A.C. 6, the English House of Lords [now the Supreme Court] had just rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member's wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the former Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had had an interest in the outcome of the proceedings.

[11] In an American case, ***Perry v. Schwarzenegger,*** 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge's impartiality is the perception of a *reasonable person*, this being a "well-informed, thoughtful observer who understands all the facts", and who has

"examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.

[12] Such a broad test is adopted too in ***South African Defence Force and Others v. Monnig and Others*** (1992) (3) SA 482 (A), p.491:

> *"The resusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial."*

D. RE-EXAMINING THE APPLICANT'S CASE

[13] In the instant case, the Judge is being asked to recuse himself, because he had done so when he served on the Court of Appeal Bench – *simpliciter*. The legal or factual grounds for the said recusal are not discernible from the Court records. Nor have our collegiate consultations yielded any results to guide the Court in filling this lacuna. We are therefore left with no option but to begin from broad principle, in constructing a framework of rationalization.

[14] We will dispose of the matter after considering the relevant questions, and on this basis we hope to provide general principles on the functioning of the Supreme Court.

(a) The Supreme Court's Limited Numerical Strength

[15] By Article 163(2) of the Constitution, the Supreme Court membership comprises ***seven*** Judges; and this Court is properly composed for normal

hearings only when it has a quorum of ***five*** Judges. We take *judicial notice* that, for about a year now, the Court has had a vacancy of one member; and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which *could* very well come up now before the Supreme Court. Recusal, in these circumstances, could create a quorum-deficit which renders it *impossible* for the Supreme Court to perform its prescribed constitutional functions.

[16] Such a possibility would, in our view, be contrary to public policy and would be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution is squarely anchored firstly, on the superior Courts, and secondly, on the *Supreme Court* as the ultimate device of safeguard.

(b) Good Cause

[17] The recusal principle, therefore, with regard to the Supreme Court, must not be invoked but for *good cause*; and neither is it to be invoked without weighing the merits of such invocation against the *constitutional burdens of the Court*, and the *public interest*.

(c) Construing the Supreme Court Act, 2011

[18] We have noted the express terms of s.8(2) of the Supreme Court Act, 2011:

> *"A judge of the Supreme Court shall not sit at a hearing of an appeal against a judgment or order given in a case previously heard before the judge."*

[19] We hold this provision to be subject to the terms of the Constitution, already considered; and on this basis we qualify s.8(2) of the Act to mean that any application made under it, stands to be determined in accordance with the judicially-established practices of recusal, and subject to the Supreme Court's integrity and obligations under the Constitution of Kenya, 2010.

(d) Merits of the Call for Recusal

[20] The comparative case-experience considered in this Ruling gives a direction on possible situations in which the recusal of a Judge on a collegiate Bench may be sought. In the case of the *Supreme Court*, a decision on an application for recusal will be given after considering the *merits of the claim*, in the context of the constitutional design and obligations of this Court.

[21] When ought a Judge of the Supreme Court, as a matter of personal conviction, or of objective ethical considerations, to recuse himself or herself from any particular proceedings?

(e) The Supreme Court Concept

[22] Even as this Court takes cognizance of the merits of the individual Judge's personal convictions, and of matters of ethics, in such a situation, it is

inclined in favour of a choice which begins with the Judge's commitment to the protection of the Constitution, as the basis of the oath of office. The shifting scenarios of personal inclination should, in principle, be harmonized with the incomparable public interest of upholding the Constitution, and the immense public interest which it bears for the people, whose sovereignty is declared in **Article 1(1).** It follows that the recusal of a Judge of the Supreme Court is a matter, in the first place, for the consideration of the collegiate Bench, whose decision is to set the matter to rest.

[23] It follows that the *Supreme Court concept*, as it stands in the Constitution, and as a symbol of ultimate juristic authority, imports a *varying set of rules of recusal*, in relation to the practice in other superior Courts.

[24] Being guided by the comparative lesson, and by the principles drawn from Kenya's special constitutional experience, we have no trepidation in disallowing the applicant's preliminary objection which sought the recusal of the Honourable Mr. Justice Tunoi.

[25] We will make no order as to costs.

[26] ***Orders accordingly.***

DATED and **DELIVERED** at **NAIROBI** this 6th day of February, 2013.

.....	.....
P.K. TUNOI	**M.K. IBRAHIM**
JUDGE OF THE SUPREME COURT	**JUDGE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG	**S. WANJALA**
JUDGE OF THE SUPREME COURT	**JUDGE OF THE SUPREME COURT**

.....

N.S. NDUNGU

JUDGE OF THE SUPREME COURT

I certify that this is a true
Copy of the original

REGISTRAR
SUPREME COURT OF KENYA

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

PETITION NO. 4 OF 2012

-BETWEEN-

1. JASBIR SINGH RAI
2. IQBAL SINGH RAI
3. DALJIT KAUR HANS } **.....PETITIONERS**
4. SARJIT KAUR RAI

-AND-

1. TARLOCHAN SINGH RAI, ESTATE OF
2. JASWANT SINGH RAI
3. SARBJIT SINGH RAI } **.....RESPONDENTS**
4. RAI PLYWOODS (KENYA) LIMITED
5. SATJIT SINGH & RAM SINGH, ESTATE OF

RULING

BY JUSTICE M.K. IBRAHIM

Your Honours, I have had the benefit of reading the draft Ruling of the Hon. Justice Tunoi, Hon. Justice Ojwang, Hon. Justice Wanjala and Hon. Lady Justice Njoki Ndungu. I wholly concur with the reasons and decision of my Brothers and Sister. But in view of the importance of this case and its wider ramifications I would like to add the following observations:

The issue of the circumstances under which a judge may be required to recuse himself has been explained by the elaborate decisions of the courts made over the years which go as far back as the 19th century when the House of Lords in ***Dimes vs Proprietors of Grand*** **Junction Canal**, set aside Lord Chancellor Cottenham's decision in the case on the ground that he had a pecuniary interest in the matter by virtue of the fact that he had a substantial shareholding in Grand Junction Canal. The Court set aside that decision and held that Cottenham LC was disqualified.

This is supported by the commonly cited holding of Lord Hewart CJ in ***R vs Sussex, ex parte McCarthy*** **that** ***"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***

In ***R vs Bow Street Metropolitan Stipendiary Magistrate & Others Ex perte Pinochet Ugarte*** the House of Lords in explaining the circumstances under which the Court applies the principle observed that where a judge does not have a direct pecuniary or proprietary interest in the outcome of the matter but in some other way his conduct may give rise to a suspicion that he is not impartial the principle applies.

The Court noted that it was faced with a novel case since the disqualification was sought on grounds which did not indicate that any person would get any

pecuniary interest out of the decision of the Court since the matter was a criminal case. It opined:

> ***"[t]he rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge is involved together with one of the parties."***

Further, the Court explained that it is only in exceptional circumstances as in this case *"should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."*

Lord Nolan in concurring with the decision of Lord Browne-Wilkinson and Lord Goff in *Ex parte Pinochet* stated that *"in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality."*

Similarly, Lord Hutton observed that if the nature of the interest was such that public 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.

In ***Sellar vs Highland Rly Co.*** the Court emphasized on the need to preserve the principle as much as possible. Lord Buckmaster stated that the rule was one that he would *"greatly regret to see even in the slightest degree relaxed."* He added that *"the importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."*

These precedents clearly indicate the weight with which the principle has been held by the Courts and the extent to which the Courts will jealously guard it. Even if it results in some inconvenience on the part of the Court it would be gladly borne for justice to prevail.

In ***R vs Gough*****[1993] 2 All E. R 724, [1993] AC 646** Lord Goff of Chieveley observed that:

> ***"[T]he nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of the impartiality."***

The Court must therefore, take into consideration the impact that the failure of the judge to disqualify himself will have on the public concerning their perception of the process of administration of justice.

THE TEST

Lord Justice Edmund Davis in ***Metropolitan Properties Co. (FGC) Ltd. Vs Lannon*** **[1969] 1 QB 577** stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in ***R vs Liverpool City Justices, ex parte Topping*** **[1983] 1 WLR 119** elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.

In an article by a writer, Holly Stout (11 KBW) on the subject of "Bias', the author states:

> ***"... The test to be applied by a judge who recognizes a possible apparent bias is thus a "double real possibility" test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias." (referred to PORTER –V- MAGILL (2002) 2 AC 357).***

NECESSITY AND STATUTORY AUTHORITY

In circumstances in which all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be allowed to sit

and determine the matter under the doctrine of necessity to avoid a miscarriage of justice. This common law principle will however, only apply in very exceptional circumstances which are required to be very clear.

The Supreme Court of the United States of America in the case of ***Caperton vs Massey*** vacated a decision by Justice Benjamin, a judge of the West Virginia Supreme Court, in which he had declined to recuse himself. The Justice had been requested to recuse himself on the ground that his campaign to ascend to office as judge had been heavily funded by the respondent.

Jeffrey W. Stempel in his article ***"Completing Caperton and Clarifying Common Sense through Using the Right Standard for Constitutional Judicial Recusal"*** expounded on the reasoning of the court in arriving at its decision and stated that:

> ***"While acknowledging that 'extreme cases often test the bounds of established legal principles' and that 'sometimes no administrable standard may be available to address the perceived wrong … in extreme cases intervention [is] required to protect the integrity of the legal system … the Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision."***

He added that in each case the Court had to articulate an objective standard to protect the parties' basic right to a fair trial in a fair tribunal.

Further, that the Court should recognize that any error in failing to recuse deprives the affected litigant of a fundamental constitutional right to have the case heard by a neutral person. Consequently, a rejection of a request to

recuse which has no legal justification is one of a constitutional nature that should be potentially subject to U.S. Supreme Court review and correction.

Steve Sheppard in his article ***"Caperton, Due Process, and Judicial Duty: Recusal Oversight in Patrons' Cases"*** published in the Arkansas Law Review volume 64 opines that:

> ***"There are times, of course, when motions to recuse are brought tactically by an opponent to a former patron, seeking to amplify the appearance of obligation of the judge toward a former sponsor. Such motions are likely to provoke anger, resentment, and defiance in the judge whose impartiality is questioned. Even so, there is simply no loss to justice in that judge stepping aside and allowing another judge to be assigned. The appearance of impropriety is all that is in issue, not impropriety itself."***

He strongly supports the decision of the Court in Caperton's case in the following words:

> ***"[T]he other litigant has a right to a fair trial. No amount of reassurance by the seemingly tainted judge can assure the litigant that the judge is not tainted. And, the litigant has a fundamental right to a neutral judge, who is not apparently biased against that litigant's cause."***

In ***Laird vs Tatum* 409 U.S. 824 (1972)** Justice Rehnquist declined to recuse himself in a case that came before him as judge in which he had testified as an expert witness at Senate hearing before joining the bench. The case was decided 5-4 in the U. S. Supreme Court, and a motion for recusal and rehearing was filed. Justice Rehnquist found that he had a duty to sit, particularly because there was no replacement for a recused Justice, which

could lead to an equally divided Court. This could be said to have been out of necessity to ensure that the quorum of the court was maintained.

PRINCIPLE APPLICABLE IN THE CURRENT CASE

Article 163 (1) establishes the Supreme Court comprising of seven judges. Sub-article 2 states that the Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges. The total number of the Supreme Court judges that this country can have at any given time under the Constitution is seven. The minimum that must sit and determine a matter is five. This means that the only allowance given by the Constitution of the judges who may be away for whatever reason, including illness or worse still, death, is two. If one of the remaining five is required to disqualify him/herself, it may be argued that out of necessity the judge would have to sit to ensure that there will be no failure of justice due to the bench being below the quorum set by the Constitution.

The decision in ***Laird vs Tatum*** would form persuasive precedent. Therefore, it would be of utmost importance that the judges of the Supreme Court sparingly and cautiously allow disqualification in order to ensure that the Court is not at any time incapacitated due to lack of quorum. Indeed the Court should consider the high likelihood that several judges may be required to recuse themselves in the same case. Take for instance two judges recuse themselves at a time when there is a vacancy in one of the positions of a judge

of the Court. The Court will become paralyzed and administration of justice will not be as expeditious as envisioned in the Constitution.

There are myriad of issues that may affect the delicate quorum of the Court including s. 8 (2) of Supreme Court Act 7 of 2011 which provides:

> ***"A judge of the Supreme Court shall not sit at a hearing of an appeal against a judgement or order given in a case previously heard before the judge."***

Currently, three of the judges will potentially be affected by this provision. Should another slight issue such as illness cause a judge to be incapable of attending to duty for a prolonged period of time, the operations of the Supreme Court would stall.

This is a unique case that the Court is faced with, and caution must be exercised because the Court will in its determination set guidelines for the circumstances under which litigants can seek disqualification of a judge at the same time ensuring that administration of justice is conducted in a manner that is not only fair and impartial but is seen to be fair and impartial.

The Supreme Court Act has no specific provision requiring that on reviewing its decision a greater number of judges should sit. This is contrary to the submissions made by Mr. Oraro, counsel for the respondents that under the Supreme Court Rules the term "full bench" has been defined to mean a bench of the seven judges and on review the full bench is required to sit. Counsel should note that the Supreme Court Rules cited have since been deleted by the Supreme Court Rule, 2012 which did away with the definition of "full bench"

and only defined the term "bench". "Bench" means a judge or any number of judges as may be constituted by the Chief Justice in connection with any proceedings. In that case, the Court may in reviewing its decision sit as five judges just as it sat in the previous matter whose decision is sought to be reviewed.

As a result, it is possible for the Court to consist of five judges in a review application. Ordinarily, the Honourable the Chief Justice would have power to constitute a bench of seven in view of the powers conferred on him. In such circumstances if there is a vacancy, as it is currently the case in the office of the Deputy Chief Justice, a bench of six could still sit. Section 4 of the Supreme Court Act provides that a vacancy in the Supreme Court as constituted under Article 163 (1) of the Constitution shall not affect the jurisdiction of the Court. However, there is a catch in that s. 25 (2) provides that if the bench is equally divided the decision sought to be reviewed is deemed affirmed.

The upshot is that I would also hold that in the circumstances Justice Tunoi is not disqualified since the **doctrine of necessity** must operate in order for the Supreme Court to perform its Constitutional functions

DATED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF FEBRUARY 2013.

JUSTICE M.K. IBRAHIM
JUDGE OF THE SUPREME COURT

I certify that this is
a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA