



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Civ. Suit 512 of 2004

REPUBLIC APPLICANT

VERSUS

THE REGISTRAR HIGH COURT OF KENYA.....RESPONDENT

THE HONOURABLE CHIEF JUSTICE

OF THE REPUBLIC OF KENYA.....1ST INTERESTED PARTY

THE PERMANENT SECRETARY, SECRETARY TO THE CABINET &

HEAD OF PUBLIC SERVICE.....2ND INTERESTED PARTY

THE PERMANENT SECRETARY TO THE TREASURY.....3RD INTERESTED PARTY

THE CHIEF COURT ADMINISTRATOR

**HIGH COURT OF KENYA.....4TH INTERESTED
PARTY**

THE SENIOR PRINCIPAL PERSONNEL

OFFICER I, HIGH COURT OF KENYA.....5TH INTERESTED PARTY

EX-PARTE

HONOURABLE MR. JUSTICE JOSEPH VITALIS ODERO JUMA.....APPLICANT

RULING

Before me is an application brought under certificate of urgency by way of Chamber Summons dated and filed on the 27th April 2004 in which the Applicant, the Honourable Mr. Justice Joseph Vitalis Odero Juma seeks leave to apply for judicial review and for orders of certiorari and mandamus as is more particularly set out in the application. The application is founded on the eleven grounds set forth therein as well as the facts set out in the statutory statement dated the 26th April 2004 supported by the verifying

affidavit of the Applicant made on the 26th April 2004.

The grounds, facts and circumstances giving rise to the application are well expounded in the said statement of facts and affidavit respectively and it is therefore not necessary to repeat them here. Suffice it to say that subsequent to the publication of Gazette Notice No. 7282 of the 15th October 2003 (which was subsequently revoked vide Gazette Notice No. 8829 dated the 10th December 2003), under and by virtue of which the Applicant was suspended as a Puisne Judge by His Excellency, the President pursuant to the powers in that behalf conferred by section 62 (4) and (6) of the Constitution of Kenya, the Respondent by letter dated the 27th October 2003 advised the Applicant, *inter alia*, that **“following the suspension, your salary and allowances have been stopped with effect from 15th October, 2003.”** It is such withdrawal of salary and allowances that the Applicant seeks to redress by way of judicial review.

In his submissions, Mr. Stephen Mwenesi, learned counsel for the Applicant, challenged the withdrawal of the Applicant’s salary and allowances by the Respondent on several grounds including, but not limited to, that such withdrawal was contrary to the letter and spirit of the Constitution. Mr. Mwenesi contended that pursuant to Section 104(1) of the Constitution, the salary and allowances payable to the Applicant are prescribed by the Constitutional Offices (Remuneration) Act (Cap. 423) and are not liable to be altered to the disadvantage of the Applicant after his appointment. It is for these and other reasons that the Applicant seeks leave so as to enable the Applicant challenge the validity of the Respondent’s said letter of the 27th October 2003 which, in the Applicant’s view, clearly violates sections 64 and 104 of the Constitution and other written law. Finally, Mr. Mwenesi urged me also to grant prayer (d) of the application to the intent that leave (if granted) do operate as a stay of the decision of the Respondent as contained in the said letter of the 27th of October 2003 because the Respondent’s decision was a glaring contravention of the Applicant’s constitutional rights.

The test I have adopted in deciding whether or not to grant leave is well settled in **Njuguna v Minister for Agriculture** [2000] 1EA 184: the Applicant must show that without examining the matter in any depth, he has an arguable case that the reliefs sought might be granted on the hearing of the substantive application. This principle has been restated by the Court of Appeal in the more recent decision in **Aga Khan Education Service Kenya v Republic Through Ali Seif and Three Others** (Civil Appeal No. 257 of 2003) (unreported) the following terms:

“ in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case.”

Having considered prayers 2 (a) (b) and (c) inclusive of the application in the context of the accompanying statement of facts and supporting verifying affidavit in conjunction not only with the submissions of counsel but also with the principles of the law applicable, I find that there is before me prima facie evidence of an arguable case and accordingly hereby grant leave in terms of prayers 2 (a) (b) and (c) inclusive of the application and so order.

I now consider the prayer for the grant of leave to operate as a stay of the Respondent’s decision of the 27th October 2003 pending the hearing and determination of the main application. In this regard, the Applicant seeks that:

“such stay to be a stay of any proceedings or action founded thereon by the Respondent whether alone or in conjunction or consultation with any or all of the Interested Parties unless such proceedings or action are for the purposes of setting the matters raised by the application for Judicial Review.”

In my judgment, an order of stay in these circumstances cannot be properly granted without usurping the functions of the judge before whom the substitutive application for judicial review will be brought for hearing as the effect of granting such stay at this ex-parte stage would be virtually to determine the application for judicial review without the benefit of hearing the other parties. For this reason, and for this reason alone, I decline to exercise my discretion in favour of the Applicant and hereby dismiss prayer

2(d) of the application.

It is so ordered and further that:

- a) the Applicant shall file and serve the substantive motion within the next seven (7) days hereof;
- b) each of them the Respondent and Interested Parties respectively shall file and serve their respective responses to the application within fourteen (14) days of service; and
- c) the application shall be listed and heard (*inter alia*) before any Judge on the 27th May 2004 on a priority basis.

The costs of this application shall be costs in the main application.

Dated and delivered at Nairobi this 3rd day of April 2004.

P. Kihara Kariuki

Ag. Judge