



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**MISC APPLI 764 OF 2004**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND FOR THE ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE DECISION MADE BY THE TRIBUNAL INVESTIGATING THE CONDUCT OF JUDGES ON THE 28<sup>TH</sup> MAY 2004 IN TRIBUNAL MATTE RNO. 1 OF 2003 RE: JUSTICE ROSELYN NALIAKA NAMBUYE**

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

**IN THE MATTER OF: GAZETTE NOTICE NO 8829 DATED 10<sup>TH</sup> DECEMBER 2003**

**IN THE MATTER OF: GAZETTE NOTICE NO 96 OF 2004 DATED 6<sup>TH</sup> JANUARY 2004**

**IN THE MATTER OF: GAZETTE NOTICE NO. 378 OF 2004 DATED 19<sup>TH</sup> JANUARY 2004**

**IN THE MATTER OF: A HEARING NOTICE DATED 30<sup>TH</sup> JANUARY 2004 OF THE TRIBUNAL OF INQUIRY ESTABLISHED VIDE GAZETTE NOTICE NO 8829 OF 2003**

**IN THE MATTER OF:**

**THE REPUBLIC.....APPLICANT**

**versus**

**HON. THE CHIEF JUSTICE OF KENYA.....1<sup>ST</sup> RESPONDENT**

**HON. JUSTICE (RTD) ABDUL MAJID COCKAR.....2<sup>ND</sup> RESPONDENT**

**HON JUSTICE JOHN MWERA.....3<sup>RD</sup> RESPONDENT**

**HON. JUSTICE LEONARD NJAGI.....4<sup>TH</sup> RESPONDENT**

**HON. JUSTICE DANIEL MUSINGA.....5<sup>TH</sup> RESPONDENT**

**HON. JUSTICE ISAACK LENAOLA.....6<sup>TH</sup> RESPONDENT**

**EX-PARTE**

**HON. LADY JUSTICE ROSELYN NALIAKA NAMBUYE ..... APPLICANT**

**R U L I N G**

Before me is an application dated the 17th June 2004 brought by way of Chamber Summons under order 53 of the Civil Procedure Rules in which the Applicant, the Honourable Lady Justice Roselyn Naliaka Nnmbuye seeks leave to apply to this court for orders for judicial review of certiorari, prohibition and mandamus as is more particularly set forth in prayer 2 of the application.

The application is based on the nine grounds stated therein and on the further grounds as particularized in the statement of facts also dated the 17th June 2004 and supported by the affidavit of the Applicant also made on the 17th June 2004.

The background, facts and circumstances giving rise to the application are well detailed in the said statement of facts and grounds as well as in the Applicant's said affidavit and need not be repeated herein. It suffices to summarize then thus:-

a) that the Applicant is the subject of a hearing, being Tribunal Matter No. 1 of 2004, by a Tribunal to investigate the conduct of Puisne Judges appointed by His Excellency, the President under the powers in that behalf conferred by section 62(5) of the Constitution of Kenya vide Gazette Notice No. 8829 dated the 10th December 2003 and published on the 11<sup>th</sup> December 2003; and

(b) that the Applicant raised preliminary objections before the Tribunal, which objections are reproduced in paragraph 9 of the said statement of facts and grounds, and being dissatisfied with the Ruling thereon of the Tribunal dated the 28th May 2004, the Applicant filed the application now before me seeking leave to apply for orders, *inter alia*, of certiorari to quash the decision of the Tribunal as contained in the said Ruling of the 28<sup>th</sup> May 2004.

At the hearing of the application, and given that my seniority and experience as a judge is far lesser than that of the Applicant, I enquired from Mr. Peter Simani, learned counsel for the Applicant, whether the Applicant would have objection to my hearing the application in light of paragraph 15 of the statement of facts. Mr. Simani assured me that the Applicant does not have any objection whatsoever.

Having considered the application in light of the numerous grounds upon which it is premised as well as the Applicant's said affidavit in support thereof in conjunction with the submissions of learned counsel for the Applicant, and adopting the principles of law now well established and settled as restated and enunciated by the Court of Appeal in **Aga Khan Education Service Kenya v Republic through Ali Seif and Three Others** (Civil Appeal No 257 of 2003) (unreported) that "**in order to enable a judge to grant leave under order 53, there must be prima facie evidence of an it arguable case**", I am satisfied on the material now available before the court without going into the matter in depth that the Applicant has an arguable case for the granting of leave. Accordingly, leave, in terms of prayer 2(a)-(e) inclusive of the application is hereby granted.

Having granted leave, I now confider prayer 3 of the application that the grant of leave do operate as a stay of the proceedings of the Tribunal. In doing so, I note that notwithstanding that the Tribunal in its Ruling of the 28th May 2004 ruled on all and several the Applicant's preliminary objections before the Tribunal as reproduced in paragraph 9 of the statement of facts and grounds and as summarized in grounds 1 - 9 inclusive of the grounds set out in the application, the Applicant raises issues that the Tribunal does not have jurisdiction to proceed with any proceedings thereunder by reasons, *inter alia*, that the provisions of section 62(5) of the Constitution have been violated. I have considered, most carefully, grounds 3 - 9 inclusive of the application in conjunction with the Tribunal's ruling thereon as expounded in particular at pages 17, 18, 19, 20, 21, 27, 28, 30, 32, 33, 34, 35, 37, 38, 39 and 41 of the: said Ruling of the Tribunal dated the 28th May 2004.

While it is that there are several issues under the Constitution of Kenya on which the Applicant is unable to agree with the Ruling of the Tribunal, it is equally clear that I cannot, and must not, without usurping the functions of the trial judge or judges before whom the substantive application for judicial review will be brought for hearing, consider or decide on the merits or otherwise of the issues the Applicant has raised. Nonetheless, where any question as to the interpretation of the Constitution arises, this court has a duty to determine such question at the earliest opportunity. Finding, as I do, that such a question has indeed arisen in the application before me, I rule that that question must first be determined by this court before any further proceedings of the Tribunal. In the words of the Court of Appeal in **The Commissioner of Lands v. Kunste Hotel Limited** (Civil Appeal No. 234 of 1995) (unreported) that **“judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”**, it is imperative that this court determines whether or not the Applicant is being unfairly treated as the Applicant has alleged in order to avoid a possible miscarriage of justice. I would, therefore, exercise my discretion in favour of the Applicant and allow prayer 3 of the application and grant a stay accordingly.

I so order and further that:-

- a) the Applicant do file and serve the substantive Notice of Motion for judicial review within the next seven (7) days of the date hereof;
- b) the Respondents do file and serve their respective responses to the Notice of Motion for judicial review within ten ( 10) days of service;
- c) that as soon as is reasonably practicable after service of the Notice of Motion, the same be mentioned before the Hon. the Chief Justice on such date to be taken at the Registry as shall be convenient to His Lordship in order that the Hon. the Chief Justice may constitute the Bench to hear the application and grant such orders and/or give such further directions as His Lordship shall deem appropriate and expedient so as to ensure that the application is heard and determined at the very earliest opportunity.

Dated and delivered at Nairobi this Twenty-eighth day of June 2004.

P K Kihara Kariuki

Ag Judge