



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 509 OF 2004**

**IN THE MATTER OF AN APPLICATION BY THE HONOURABLE JUSTICE TOM  
MBALUTO FOR**

**JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI, PROHIBITION AND  
MANDAMUS**

**AND**

**IN THE MATTER OF THE DECISIONS EMBODIED IN THE LETTER OF THE REGISTRAR  
OF THE**

**HIGH COURT OF KENYA REF. CONF/P.J. NO. 13485 MADE ON 27<sup>TH</sup> OCTOBER 2003**

**AND**

**IN THE MATTER OF SECTION 62 AND SECTION 104 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF THE PROMISSORY OATHS ACT CHAPTER 100 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF THE GAZETTE NOTICE Nos. 7282 AND 8829 OF 2003 RELATING TO  
THE POWERS**

**CONFERRED BY SECTIONS 62(5) AND (6) OF THE CONSTITUTION OF KENYA ON HIS  
EXCELLENCY THE PRESIDENT**

**AND**

IN THE MATTER OF THE CONSTITUTIONAL OFFICES (REMUNERATION) ACT  
CHAPTER 423

REPUBLIC.....APPLICANT

VERSUS

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

THE REGISTRAR OF THE HIGH COURT OF KENYA.....2<sup>ND</sup> RESPONDENT

THE PERMANENT SECRETARY, SECRETARY TO

THE CABINET AND HEAD OF CIVIL SERVICE.....3<sup>RD</sup> RESPONDENT

THE CHIEF COURT ADMINISTRATOR.....4<sup>TH</sup> RESPONDENT

THE SENIOR PRINCIPAL PERSONNEL

OFFICER, HIGH COURT.....5<sup>TH</sup> RESPONDENT

THE ACTING ACCOUNTS CONTROLLER, HIGH COURT.6<sup>TH</sup> RESPONDENT

THE PERMANENT SECRETARY TO THE TREASURY....7<sup>TH</sup> RESPONDENT

THE ATTORNEY-GENERAL.....8<sup>TH</sup> RESPONDENT

*Ex parte* HON. JUSTICE TOM MBALUTO

JUDGEMENT

On 26<sup>th</sup> May, 2004 the Applicant filed his judicial review application which was dated 6<sup>th</sup> May, 2004. This was brought under Sections 8 and 9 of the Law Reform Act (Cap. 26); Sections 62, 65 and 104 of the Constitution of Kenya; Section 1(2) of the Constitutional Offices (Remuneration) Act (Cap. 423); and Order LIII of the Civil Procedure Rules. Leave to file the Originating Motion was granted by the Honourable Mr. Justice Kihara Kariuki on 30<sup>th</sup> April, 2004 and on that basis the Applicant sought orders as follows:

(a) that, the Respondents be **prohibited** from taking any decisions prejudicial to the applicant “until the Tribunal appointed by His Excellency the President vide Gazette Notice No. 7782 later revoked by Gazette Notice No. 8829 dated 10<sup>th</sup> December, 2003 has completed its work and its decision on its report made to the President and action is taken on it”;

(b) that, the second respondent be **prohibited** from “intermeddling or in any way circumventing, overriding or rendering inoperative the clear, elaborate... and mandatory provisions of section 62(3) of the Constitution...”;

(c) that, the second respondent be prohibited from pre-determining the decision of His Excellency the President following the suspension of the applicant;

(d) that, the seventh respondent be prohibited from purporting to act through the second respondent, his servants or agents in withholding or suspending the payment of the applicant’s salary and

allowances;

To the above prayers there were alternatives, though without prejudice to those prayers. These were as follows:

(i) that, an order of **prohibition** be issued to prohibit the second respondent, his servants or agents from acting on behalf of the seventh respondent in withholding and/or suspending payment of the applicant's allowances;

(ii) that, the respondents be **prohibited** from acting in pursuance to Gazette Notice No. 7282 or Gazette Notice No. 8829 dated 10<sup>th</sup> December, 2003 contrary to section 104 of the Constitution.

(iii) that, **mandamus** be issued to compel the seventh respondent to pay and/or remit to the applicant his monthly salary allowances and comply with their terms as provided under section 104 of the Constitution.

The grounds in support of the application were set out at length, but may be summarised as follows:

(a) that, the second respondent had purported to suspend the applicant's salary and allowances with effect from 15<sup>th</sup> October, 2003;

(b) that, the Chief Justice had not made any representation as required under section 62 of the Constitution, that the applicant should be removed from his position as a Puisne Judge;

(c) that, the applicant is a Puisne Judge under the Constitution, until the tribunal appointed to investigate him completes its work, reports back to the President, and action is taken on the basis thereof;

(d) that, in so far as Gazette Notice No. 7282 and 8829 only seek to investigate the conduct of the applicant, the notice and suspension are **ultra vires** the provisions of section 62 of the Constitution and thus illegal and a nullity;

(e) that, the appointment and terms of the applicant are governed by section 61 of the Constitution, the Constitutional Offices (Remuneration) Act (Cap. 423) and the Promissory Oaths Act (Cap. 100);

(f) that, only the President may suspend or revoke the appointment of the applicant, and his terms of appointment are subject only to the Constitution, the Constitutional Offices (Remuneration) Act and the Promissory Oaths Act, and therefore it was **ultra vires** for the second respondent to purport to exercise these functions;

(g) that, the power to investigate and punish for offences related to corruption is vested solely in the Kenya Anti-Corruption Commission, and the purported suspension of the applicant is illegal;

(h) that, the provisions of section 62(3) of the Constitution were intended to protect and safeguard the security of tenure of the applicant and the independence of the judiciary, and certain letters issued by the second respondent have the effect of intermeddling, circumventing, overriding and rendering inoperative the safeguards and protection of that security of tenure.

(i) that, the second respondent has no authority to direct, suspend, revoke, cancel or in any way interfere with or determine the salary and allowances of the applicant.

The foregoing points were elaborated further, in the depositions of the Applicant, sworn on 6<sup>th</sup> May, 2004.

Although the application was duly served on the Attorney-General on 11<sup>th</sup> May, 2004 **there was no response filed**. The effect would have been that, counsel representing the Attorney-General would, in the absence of any depositions, be limited to submissions on points of law. Even that, however, was not to happen, as Mr. Bitu representing the Attorney-General, on 24<sup>th</sup> June, 2004 stated in Court that full concession has been made on the gravamen brought up by the Applicant, and a consent had been reached that the payments lying at the core of this application would be paid, and the matter would be marked as settled.

Mr. Kilonzo, however, submitted that the making of the payments in question – which he acknowledged – by no means disposed of all the questions coming up for resolution. So he urged that Orders be made, even though the payments had been made.

By consent prayer No. 7 - for

MANDAMUS directed to the 7<sup>th</sup> respondent compelling him to pay and/or remit to the applicant his monthly salary [and] allowances and [satisfy his] other terms of service as provided under section 104 of the Constitution” -

was granted. Although in granting that prayer I did make the order that

“a comprehensive ruling in respect of the other prayers to be delivered”,

I have now had an opportunity to consider the question as to the purpose that would be served.

A fundamental principle that guides the functioning of this Court is that **it shall not act in vain**. It is worth explicating here the essence of this rule, at least, so as to show why it must guide me in respect of the present application.

The judiciary, which is the third arm of government, may not be omnipresent in terms of visibility and dynamism, in the way law-makers and policy-makers may be said to be; but in its **reserved position**, it is the sole organ that, when it speaks solemnly and formally, declares the state of validity, and defines rights and liabilities, and its pronouncement sets directions with finality. For the Courts to retain this final voice of legality, they must confine themselves to the most essential questions, and must not annunciate gratuitously. The laconic demeanour of the Courts is safeguarded by the law of contempt, which ordains that their terse pronouncements shall be obeyed.

Considering that the Respondents have been so modest as to respond favourably to the main grievance of the Applicant, it can only amount to a superfluity and a largely theoretical undertaking if I were to consider granting all the six other prayers. In any case, I would have no basis for granting them since they were not at all canvassed in Court by either of the counsel appearing before me. That means that those prayers are now largely academic, as they are not likely to bring any material satisfaction to the Applicant.

I will, however, record that these proceedings have been determined in favour of the **ex parte** Applicant, and so I award him costs, against the Respondents.

DATED and DELIVERED at Nairobi this 22<sup>nd</sup> day of October, 2004.

**J. B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J.**

**Court clerk: Mwangi**

**For the Applicant: Mr. Kilonzo, instructed by M/s. Kilonzo & Co. Advocates**

**For the Respondents - Mr. Bitu, instructed by the Hon. The Attorney-General**