



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Application 202 of 2005

HON. MR. JUSTICE MOIJO MATAVIA OLE KEIWUA
**APPLICANT**

AND

THE HON. THE CHIEF JUSTICE OF KENYA..... 1ST
RESPONDENT

MR. JUSTICE (RTD) AKILANO MOLADE AKIWUMI2ND
RESPONDENT

MR. JUSTICE BENJAMIN PATRICK KUBO3RD
RESPONDENT

JOE OKWACH4TH
RESPONDENT

PHILIP NZAMBA KITONGA5TH
RESPONDENT

WILLIAM SHIRLEY DEVERELL 6TH
RESPONDENT

*(The 2nd to 6th Respondents being the persons appointed as Chairman and Members
 respectively of the tribunal to investigate the conduct of Judges of Appeal)*

**Mbuthi Gathenji (As counsel assisting the tribunal to investigate the conduct
 of Judges of Appeal) 7TH RESPONDENT**

*(Intended appeal from the orders and directions and the ruling of the High Court of Kenya at Nairobi
 (Lady Justice J. Lesiit, Lady Justice R. Wendo, Mr. Justice Anyara Emukule) dated and delivered on
 the 14th June, 2005*

in

H.C.MISC. C. NO.1298 OF 2004)

ORDER OF THE COURT

Mr. Gathenji, who is the 7th respondent, has applied that the Presiding Judge of this bench the Hon. Mr. Justice Tunoi, disqualify himself from hearing this matter, on the ground that he is a potential witness in proceedings before a Tribunal appointed under **section 62(5)** of the Constitution to investigate the conduct of the applicant as a Judge of this Court. This application, with due respect to him has taken us by surprise because the matter could have but was not raised earlier so that another bench could be empanelled. This application was set down for hearing some time early last week. A cause list was released for general information which showed the composition of the bench to hear it. No objection was raised to any of the members of the bench until this matter was called for hearing.

We appreciate the fact that a party to any judicial proceedings has a right to object to any Judge or judicial officer sitting if he or she has good reason for raising such objection. However, whoever intends to raise such objection is obligated to raise his objection at the earliest opportunity. We have been informed that the parties respective counsel appeared before the Deputy Registrar of this Court for taking dates, and the names of the Judges presently constituting this bench were mentioned. Mr. Gathenji says he was not present but the indication we have is that his representative was present. In the circumstances and with due respect to him, it should not lie in his mouth now to raise objection to any of us sitting.

Besides, no Witness Summons has been served on or indication given to the Hon. Mr. Justice Tunoi, JA that he would be called as a witness in proceedings before the Tribunal hearing the matter concerning the Hon. Mr. Justice Keiwua.

There is also the more fundamental reason that the evidence which Mr. Gathenji says might be expected to be given by Tunoi JA, is merely peripheral. The learned Judge has not been asked to record any statement so far, and we think, it is because those collecting evidence for use in the aforesaid Tribunal do not consider his evidence central.

In the foregoing circumstances we are disinclined to allow Mr. Gathenji's informal application and order that this application proceed to hearing when it is convenient to the court to do so.

We have considered the time at our disposal today to hear this matter. It is quite clear that it is long past 1 p.m. and we think it is not possible to start hearing this matter today. We have been informed that the application before the superior court whose proceedings the applicant wants stayed is due for further hearing on 29th May, 2006. It is quite clear that this application may not be heard before then, and we think it fair that some interim orders for stay be made pending the hearing and final determination of this application. Accordingly, we hereby order that the present motion be taken out of the hearing list for today and be stood over to a date to be refixed at the Registry on a priority basis. In the meantime interim orders of stay to issue in terms of prayers **(2), (3), (4) and (5)** of the Notice of motion dated **14th July, 2005** pending the hearing and final disposal of the motion.

Made at Nairobi this 25th day of May, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.O O’KUBASU

.....

JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR