



REPUBLIC OF KENYA



KENYA LAW
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**Munasya v Mitalo & 2 others (Election Petition Appeal E01 of 2023)
[2023] KEHC 1018 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
ELECTION PETITION APPEAL E01 OF 2023
PJO OTIENO, J
FEBRUARY 17, 2023**

BETWEEN

AMOS LIYALI MUNASYA APPELLANT

AND

GEOFFREY MUHONGO MITALO 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

ORANGE DEMOCRATIC MOVEMENT 3RD RESPONDENT

RULING

1. Before the court is an application seeking stay of the decision by the trial court in which the nomination of the appellant was nullified and directing the 2nd respondent to be gazetted as the nominee in place of the appellant.
2. The judgment was delivered on January 10, 2023 and this appeal filed on the January 16, 2023 and an application for stay simultaneously lodged. In essence the application prays that the court grant stay of execution or enforcement of the judgment pending the determination of the appeal on the fear that without stay the judgment would be implemented and this appeal with high chances of success would be rendered nugatory and irreparable loss visited upon the appellant. The irreparable loss alluded to is identified to be the prospects of the 1st respondent being gazetted and taking the position at the county assembly as a nominated member representing the disabled.
3. In resisting the application, the 1st respondent filed not only a replying affidavit but also notice of preliminary objection. In the preliminary objection faults the appeal for having been filed in violation of order 9 rule 9 regarding change of advocates as well as section 78 of the *Elections Act* as read with rule 13 of the *Elections (Parliamentary and County Elections) Petition Rules* 2017 regarding deposit of security for costs. On those four points the 1st respondent prays that the appeal be struck out.



4. In the replying affidavit, the position taken is that when the appellant sought and obtained interim stay, the applicant was already enjoying a stay for 30 days granted by the trial court. It was thus contended that even the order as extracted suggested that the stay was granted pending outcome of the appeal yet the application had been set to be heard inter partes, yet the appellant has not offered nor has he deposited any security, a mandatory requirement.
5. In addition, it was contended that no substantial loss has been alleged nor substantiated as the appellant only allege irreparable loss which is never a ground to order stay as compensation can always be ordered. The affidavit then reiterates the failure to seek leave to change counsel and the fact that there was never deposit of security for costs and concludes that the court was misled in issuing the interim orders.
6. The court has perused the papers filed as well as the oral submissions by parties and discerns the question for determination to be whether a case has been made out for stay pending appeal. However, there are three ancillary issues raised in the preliminary objection and manner of extraction of the interim order which ought to be dealt with first and in limine.
7. The first is the question of application of order 9 rule 9 of the *Civil Procedure Rules*. That issue is to court mundane and deserves no serious consideration when the provision is given the plain and natural meaning of the words used. To this court leave to take out a file by an advocate is only invited where a judgment has been entered in the particular file. This appeal is a new file and the papers filed by Ms Abok Odhiambo & Co Advocates were filed in a fresh file without a judgment and it would be anomalous to ask a party to first be counsel in the trial court file before he files an appeal.
8. It is a matter that should be well settled noting that the right to an advocate of one's choice is constitutionally underpinned. This court's position is that there is no legal requirement that an advocate being instructed to file an appeal must first go to the trial with file and obtains leave before he files the appeal. He can only do that if he is minded to take proceedings in the trial court file but not the goal is to merely file an appeal and proceed. In the court did say:-
9. That is the position held by the Court of Appeal in *Tobias Wafubwa vs Ben Butali* [2017] eKLR. That point was improperly taken and it lacks merits hence is dismissed.
10. On the second point regarding payment of security for costs, the court finds that as worded, section 78 and rule 13 of the rules under the act are clear that only a petitioner before an election court deposits security for costs. There is no stipulation I have read in the act and the rules that impose similar obligation upon an appellant challenging the decision of the election court. I find that section 78 and rule 13 are not applicable to the appeals.
11. The last issue concerns the order extracted which purports that by the *ex parte* order of January 16, 2023 did grant stay pending determination of the appeal. That is obviously erroneous and misleading. The order of the court clearly granted prayer 2 in the interim which was seeking stay pending the determination of the application inter partes. I consider the order extracted and issued on the January 17, 2023 to be inconsistent with the court orders and direct that the same be expunged from the record.
12. Now on the substantive issue regarding stay, the law remains that the applicant demonstrate existence of an appeal which is arguable and which would be rendered nugatory if stay is not granted by the appellant being exposed to suffer substantial loss. It is also a requirement that security for the due performance of the decree that may be ultimately binding upon the appeal, if the appeal fails be provided.
13. The court appreciates that the subject of dispute in the office to which the appellant was nominated which the 1st respondent contends was so occupied illegal or unlawfully. It is to court not just the



occupation of the office but it is the remuneration and emoluments associated with that office that is fought over. The court takes it that none of the parties is only propelled by the need to serve the people of Kakamega in the assembly as law makers.

14. Accordingly, if there is any loss to be suffered by any of the parties, it is the known remuneration and emoluments that is at stake.
15. On the other hand, I have read the memorandum of appeal and i do not consider it a frivolity but rather i consider it the present arguable points that needs to be ventilated by the court and a final determination made. The court envisages a situation where it refuses to grant stay, the 1st respondent is gazetted and takes office then the appeal succeeds then the entire process be undone and done again as untidy and involves the application of public resources in an inefficient manner. The court is thus of the view that the status quo be maintained and the appeal is fast tracked as already directed.
16. Such an order however keeps away the 1st respondent from fruits of litigation already yielded and exposes him to the obvious loss of the benefits associated with the officer for the period it shall take to conclude the appeal. If the appeal succeeds, he shall suffer no loss indeed. However, if the appeal fails, he would have suffered the expected benefits that were to accrue to him from the date the Judgment was delivered. I consider those benefits to be the measure of security to be imposed by this court.
17. The court therefore grants stay pending appeal but on terms that the record of appeal and submissions are filed as ordered on January 26, 2023 and further that the appelland deposits in court the sum equivalent three months gross salary of the office, less the statutory deductions. The sum be deposited in court within twenty one (21) days from today.
18. Mention on March 27, 2023.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents

Court Assistant: Polycap

