



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELECTION PETITION NO. 2 OF 2008

JAYNE NJERI WANJIRU KIHARA.....PETITIONER/APPLICANT

VERSUS

CHRISTOHER L. AJELE

(Returning Officer Naivasha Constituency).....1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA2ND RESPONDENT

JOHN MICHAEL NJENGA MUTUTHO.....3RD RESPONDENT

RULING

1. The Applicant brought an election Petition following the General Elections of 2007. She lost the Petition by dint of a ruling at the Court of Appeal. The matter reverted to the High Court for taxation of costs. The Taxing Master gave a ruling on 12/10/2017 awarding assessed costs to the 3rd Respondent. The Applicant was dissatisfied with the award for various reasons. She applied to this Court for its setting aside.

2. On 19/12/2019, this Court gave a Ruling dismissing those objections and affirming the decision of the Taxing Master. The Applicant was dissatisfied with that Ruling. She approached this Court for leave to appeal against the Ruling and for an order for stay of execution of the Ruling.

3. The Applicant was substantially successful in her Application. In Ruling dated 24/06/2021, the Court granted to the Applicant leave to appeal against the ruling dated 19/12/2019. It also allowed stay in the following terms:

i.

ii.

iii. *Pending the hearing and determination of the appeal to be filed under the leave given in (ii) above, there will be a stay of execution or any further execution of the Ruling/decreed/order arising from the Ruling/decision dated 19/12/2019 on the following conditions:*

i. *The Applicant shall pay to the 3rd Respondent half of Kshs. 7,523,107 within 45 days of today;*

ii. *The Applicant shall deposit a bank guaranty for half of Kshs. 7,523,107 within 45 days of today;*

iii. *This stay of execution shall remain in force only for one calendar year (365 days) from today. If the Applicant shall require an extension of the stay of execution granted herein beyond that time, the Applicant shall move the Court of Appeal for extension of this order or prosecute her appeal at the Court of Appeal within that time. For avoidance of doubt, the extension of this stay of execution, if needed, shall be sought at the Court of Appeal and not at this Court.*

4. The Applicant was equally dissatisfied with the ruling of the Court of 24/06/2021. She has appealed to the Court of Appeal. She has, in addition, made an application to the Court of Appeal, dated 13/08/2021, with the following prayers:

1) *That this Application be certified urgent and notice thereof be dispensed with in the first instance.*

2) That the Honourable Court be pleased to grant an Order for a stay of execution and/or further execution of the Orders/Decree given on 19th December, 2019, by (Hon. Mr. Justice Professor Joel Ngugi) and any of the subsequent Orders given in favour of the 3rd Respondent in the subject case in Nakuru Election Petition No. 2 of 2008) until the hearing and determination of the intended appeal.

3) That in the alternative and/or in addition thereto this Honourable Court be pleased to grant an Order for stay of execution and/or any further execution by varying the time and one of the conditions granted by the High Court (Honourable Justice Professor Joel Ngugi) in the Order dated 24th June, 2021 to the following effect;

“Order 3 (i) and (ii) – the Applicant/Intended Appellant to deposit a bank guarantee (as already deposited) for the total sum of Kshs. 7,523,107/= until the hearing and determination of the Intended Appeal, instead of paying to the 3rd Respondent half of Kshs, 7,523,107/= within forty-five (45) days of 24th June, 2021.

Order (iii) This stay of execution shall remain in force until the hearing and determination of the intended appeal and/or further orders of this Honourable Court, instead of the previous paragraph (iii) that limited the stay of execution orders to only for one year (365 days) from the 24th June, 2021”

4) That in the alternative, and or in addition to the above the Honourable Court do issue and Order, stopping, restraining, or injuncting the 3rd Respondent and/or any other persons taking instructions or authority from him regarding the Decree/Orders issued in the Nakuru Election Petition No. 2 of 2008 on 19th December, 2019 from offering, alienating, transferring, or selling by public auction or taking all the goods away that had been subject of the proclamation of the 3rd Defendant’s auctioneers dated 3rd July, 2020, and/or any other subsequent proclamation, and/or an any other day pending the hearing and determination of the intended appeal, or further orders of this Honourable Court.

5) That any other or such orders as the Honourable Court shall deem fit and just.

6) That the costs of this Application be provided for.

5. That Application was placed before Nyamweya, JA. She gave directions dated 16/08/2021 certifying the Application urgent. The Applicant’s counsel says that both parties have already filed their submissions to the Application and are now awaiting the empanelment of a 3-judge bench to hear the Application.

6. Meanwhile, the Applicant has come back to this Court with an Application dated 23/08/2021. The Application has the following prayers:

1) That this Application be certified urgent and notice thereof be dispensed with in the first instance.

2) That the Honourable Court be pleased to grant an order for a stay of execution and/or further execution of the Orders/Decree given on 19th December, 2019 and any of the subsequent orders given including a stay of any further execution or sale, disposing, alienating the Applicant’s property in favour of the 3rd Respondent in the subject case in Nakuru Election Petition No. 2 of 2008 until the hearing and determination of this application inter partes and/or the hearing and determination of the now pending application for stay in the Court of Appeal vide Civil Application No. E046 OF 2021 and/or further orders of this Court.

3) That in the alternative and/or in addition thereto this Honourable Court be pleased to grant an order to recall back to Court from any further enforcement of the Warrants of attachment and sale dated 18th August, 2021, together with any proclamation issued thereto or any other subsequent order where decretal sum payable is in excess of the half (50%) of Kshs. 7,523,107/- on any terms found fair and just or pending further orders of the Court.

4) That in the alternative, and or in addition to the above, the Honourable Court do issue an order stopping, restraining, or injuncting the 3rd Respondent and or any other persons or auctioneer taking instructions or authority from him regarding the decree/orders issues in the Nakuru Election Petition No. 2 of 2008 on 19th December, 2019 from offering, alienating, transferring or selling by public auction or taking all the goods away that had been subject of the proclamation of the 3rd Defendant’s auctioneers dated 3rd July, 2020 and now dated 13th August 2021 or any other subsequent proclamation and/or any further Orders of this Honourable Court.

5) That any other or such orders as the Honourable Court shall deem fit and just.

6) That the costs of this application be provided for.

7. The Application was filed under Certificate of Urgency during recess. I certified it urgent and directed that it be served. It was duly served. The 3rd Respondent filed Notice of Preliminary Objection and a Replying Affidavit sworn by the 3rd Respondent. Counsel also filed a list of authorities; as did counsel for the Applicant. Counsel for the Applicant and the 3rd Respondent appeared before me on 27/08/2021 and made oral submissions on the Application.

8. In his submissions, Mr. Kihara, Counsel for the Applicant said that what the Applicant sought was protection until the Court of Appeal decides the Application she has filed before that Court. He sought to dissuade the Court from the impression that the Applicant’s Application is an abuse of the process of the Court – or an exercise in “judicial lottery” – as Counsel for the 3rd Respondent argued. Mr. Kihara insisted that his client is deserving of the orders sought as a fundamental right to the right to trial. He argued that his client had substantially complied with the orders of 24/06/2021; that the only order they had not complied with was one asking that she pays half the decretal amount. Mr. Kihara said that the Applicant had, instead, given a bank guarantee for the full decretal amount. He explained that this was caused by the

financial difficulties caused by the ongoing Pandemic. He said that his client had exhibited her payslip to demonstrate that it would be impossible to raise the amounts required under the orders of 24/06/2021 at this time.

9. Mr. Kihara urged the Court to take into account Articles 25 and 10 of the Constitution in determining the Application. In particular, he urged the Court to note that the Applicant is approaching the Court in a bid to preserve her right of appeal against the decision of the Court.

10. He also submitted at length on what he saw as faults or illegality on the proclamation. Finally, Mr. Kihara insisted that the Application before this Court is not the same as the one before the Court of Appeal. He said that the Applicant has moved this Court under the inherent powers of the Court as well as Order 22 Rule 22. That Rule, he said, allows a party to approach this Court when that party is before the Court of Appeal. This, he said, is different from a request for a stay of execution since this is a general order that gives the Court powers to do justice.

11. Mr. Busiega, Counsel for the Respondent, briefly responded to Mr. Kihara's submissions. He argued that the Applicant has no right of address before the Court because she was not in compliance with the Court orders of 24/06/2021. He argued vehemently that the present application is part of a pattern demonstrating an abuse of the process of the Court by the Applicant. He pointed out that the Applicant had previously filed a similar application and was successful before this Court. He sought to show that what the Applicant is really seeking is a stay of execution of the orders of 19/12/2019 – and that the Court was already *functus officio* because it had determined that application.

12. Mr. Busiega was of the view that since there is already an active appeal against the orders of 24/06/2021, it would lead to judicial anarchy if the Court was to re-open the orders for litigation before this Court yet again. Mr. Busiega submitted that his client is persuaded that the Applicant is merely determined to frustrate the process of the law and urged the Court to dismiss the Application.

13. As the history of this litigation clearly laid out above shows, this is the second Application the Applicant has brought before this Court seeking to stop the execution of the orders of 19/12/2019. In her first Application, the Applicant was substantially successful: this Court granted her, in the ruling of 24/06/2021, a stay but pegged it on two conditions – the payment of half of the decretal sum and depositing a bank guarantee over the rest of the amount.

14. The Applicant was unhappy with the conditions for the grant of stay granted by this Court – as she is entitled to be. She preferred her appeal to the Court of Appeal. She is entitled to do so. She also approached the Court of Appeal under Certificate of Urgency for a stay of the ruling of 24/06/2021 and 19/12/2019. She is also entitled to do so. What the Applicant is not entitled to do is to litigate in both this Court and the Court of Appeal over the same matter. The term “abuse of the Court Process” might defy precise definition but there is no doubt that it includes this type of vacillation between a higher and lower Court over the same subject matter hoping one of the two Courts would give better relief. Having lodged her appeal at the Court of Appeal over her dissatisfaction with the conditions for stay granted by this Court, it behooved the Applicant to remain in that Court for any emergency relief. I need not engage in lengthy analysis of case law to come to the conclusion that to prevent the abuse of legal and Court process, the Applicant needs to litigate her requests for stay of execution of the orders of 24/06/2021 and 19/12/2019 at the Court of Appeal. She already has a pending Application there. And that Application has already been certified urgent by that Court.

15. In this Court, the present Application dated 23/08/2021 is one for dismissing in its entirety without much ado. I hereby do so. The Applicant shall also pay the costs of this Application.

16. Orders accordingly.

Dated and Delivered at Nairobi this 31st day of August, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.