



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E256 OF 2021**

HON. MUCHIRI KARIUKI.....1<sup>ST</sup> APPELLANT/APPLICANT  
HON. KITHIKA SULEIMAN KIMANI.....2<sup>ND</sup> APPELLANT/APPLICANT  
HON. GATHUNGU PETER KAMAU.....3<sup>RD</sup> APPELLANT/APPLICANT  
HON. NJATHA SAMUEL KINYANJUI.....4<sup>TH</sup> APPELLANT/APPLICANT  
HON. MWANGI ESTHER NYAMBURA.....5<sup>TH</sup> APPELLANT/APPLICANT  
HON. IRERI MARGARET WANJIRU.....6<sup>TH</sup> APPELLANT/APPLICANT  
HON. GEORGINA WANJIRU CHIRA.....7<sup>TH</sup> APPELLANT/APPLICANT

**-VERSUS-**

JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT  
RAPHAEL TUJU, SECRETARY GENERAL, JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT  
NELSON DZUYA, NATIONAL CHAIRPERSON,  
JUBILEE PARTY.....3<sup>RD</sup> RESPONDENT  
SPEAKER, COUNTY ASSEMBLY OF NYANDARUA.....4<sup>TH</sup> RESPONDENT

**RULING**

1. The appellants/applicants took out the Notice of motion dated 13<sup>th</sup> May, 2021. The Motion sets out the grounds it is based and it is also supported by the facts stated in the affidavit sworn by the 1<sup>st</sup> applicant.
2. The applicants sought for an order of stay of any further implementation of the decision made by the 1<sup>st</sup> respondent on 9<sup>th</sup> February, 2021 purporting to de-whip the applicants from all assembly committees; suspending the applicants from house sittings; and imposing a fine of Kshs.100,000/, pending the hearing and determination of the appeal against the decision delivered by the Political Parties and Disputes Tribunal (“the Tribunal”) on 10<sup>th</sup> May, 2021 in PPDT Complaint No. E002 of 2021. The applicants also sought for costs of the Motion.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the replying affidavit sworn by **Franklin Mwendani** to oppose the motion.
4. The 4<sup>th</sup> respondent also filed a replying affidavit sworn by James Wahome Ndegwa to resist the Motion.
5. When the motion came up for interpartes hearing this court gave directions to have the application disposed of by written submissions.
6. I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits plus the submissions and the authorities cited.

7. A brief background of the matter is that following a decision to suspend the applicants from the 1<sup>st</sup> respondent, the said applicants filed a complaint with the Tribunal and sought for various declaratory orders and damages, among other orders.
8. Soon thereafter, the 1<sup>st</sup> to 3<sup>rd</sup> respondents lodged a notice of preliminary objection in which they raised a jurisdictional issue on the part of the Tribunal, on the basis that the applicants had not exhausted the internal dispute resolution mechanisms set out by the 1<sup>st</sup> respondent.
9. Upon hearing the parties on the preliminary objection together with an application separately filed by the 4<sup>th</sup> respondent seeking to set aside interim orders earlier issued by the Tribunal, the said Tribunal vide the judgment delivered on 10<sup>th</sup> May, 2021 struck out the complaint for want of jurisdiction. The applicants are now desirous of challenging the aforementioned decision on appeal.
10. It is clear that the application now before me concerns itself with the granting of an order for a stay of execution of the decision dated 9<sup>th</sup> February, 2021 and issued by the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> respondent.
11. However, before determining the merits of the appeal, it is necessary to determine two preliminary issues raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
12. The first preliminary issue is that the appeal and the instant Motion have been overtaken by events. In his replying affidavit, Franklin Mwendani states on behalf of the 1<sup>st</sup> to 3<sup>rd</sup> respondents that the decision by the 1<sup>st</sup> respondent which the applicants are seeking to stay has already been implemented and hence the Motion and appeal are unfounded.
13. The record shows that the applicants did not offer any response to the above issue. It suffices to state that upon the perusal of the documentation availed by the parties it is noted that prior to the impugned decision by the Tribunal, the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> respondent, issued the correspondences dated 9<sup>th</sup> February, 2021 to the respective applicants indicating that they had been de-whipped from all assembly committees forthwith and that they had been suspended from the house sittings for a period of either three (3) or six (6) months from the abovementioned date; and that they were to pay a sum of Kshs.100,000/ each as a fine, at the earliest opportunity. The applicants are now seeking to stay any further implementation of the above decision.
14. It is also clear that thereafter, the Tribunal entertained the preliminary objection on jurisdiction before allowing it and striking out the applicants' complaint.
15. Subsequently, the record shows that the 2<sup>nd</sup> respondent issued the applicants with the letters dated 26<sup>th</sup> May, 2021 basically extending the suspension periods by either three (3) or six (6) months from the date of the letters and further demanding the aforementioned penalty fine amounts.
16. It is noteworthy that while in some instances, the suspension periods have since lapsed, it is also apparent that in other instances, the suspension periods continue to apply.
17. Further to this, the respondents have not brought any credible evidence to demonstrate that the terms of the letters dated 9<sup>th</sup> February, 2021 and extended on 26<sup>th</sup> May, 2021 have fully been implemented against the applicants.
18. In view of the foregoing, I am not convinced that in the present circumstances, the instant Motion and/or appeal have been overtaken by events. Consequently, the first preliminary issue must fail.
19. The second preliminary issue touches on the jurisdiction of this court to entertain the appeal. The 1<sup>st</sup> to 3<sup>rd</sup> respondents arguing that this court lacks jurisdiction to entertain the instant Motion and appeal on the basis that the appeal lies against the decision where the Tribunal declared that it lacked jurisdiction to hear and determine the applicants' complaint and hence that situation cannot be remedied on appeal.
20. The aforementioned respondents have cited the case of **Jerry Kenyansa v Albert Nyaundi & another [2016] eKLR** in which the court held that:

***“From the record there is no evidence that the dispute that was registered with the Political Parties Tribunal was ever subjected to those provisions. The tribunal was therefore correct in declining jurisdiction to address the said dispute in view of the provisions of Section 40 aforesaid. The appeal before me is therefore misplaced and therefore fit for dismissal.***

***The question is, what is the court to do under such circumstances?***

***It has been submitted that by breaching the party constitution the members have been robbed of their political voice. In such circumstances the best that this court can do is to order all the parties herein to submit themselves to the constitution of the party which establishes the internal dispute resolution mechanism under clause 8B. I am unable to quash the resolution as sought by the appellant for the sole reason that, the same was not subjected to the internal party dispute resolution. I make no orders as to costs.”***

21. In his replying affidavit however, James Wahome Ndegwa who indicates that he is the 4<sup>th</sup> respondent, states that the appeal is rightly before this court since the Tribunal became functus officio upon making its determination whereas this court is vested with supervisory and appellate jurisdiction.

22. Upon considering the rival arguments, I find that the issue of jurisdiction being raised by the 1<sup>st</sup> to 3<sup>rd</sup> respondents at this stage cannot stand. The 4<sup>th</sup> respondent rightly put it, that this court has the appellate jurisdiction to hear and entertain matters arising out of decisions made by subordinate courts and Tribunals. In any event, it is worth noting that in the case of **Jerry Kenyansa v Albert Nyaundi & another (supra)** cited by the 1<sup>st</sup> to 3<sup>rd</sup> respondents, the court arrived at the decision it did upon hearing the appeal on merit.

23. In the present instance, the appeal is yet to be heard on merit. Be that as it may, for all the foregoing reasons, I respectfully disagree with the position being taken by the 1<sup>st</sup> to 3<sup>rd</sup> respondents and I find that both the instant Motion and the intended appeal are properly before this court. This preliminary issue must equally fail.

24. On the merits of the Motion, the relevant provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions to be met when it comes to an application seeking an order for a stay of execution, as follows:

- i. The application must be brought without unreasonable delay;*
- ii. The applicant must demonstrate that substantial loss may result; and*
- iii. Provision should be made for security.*

25. I will begin with the first condition on whether the application has been timeously filed. As earlier mentioned, the decision sought to be stayed was initially issued on 9<sup>th</sup> February, 2021 and apparently extended as at 26<sup>th</sup> May, 2021. The instant Motion was filed on 13<sup>th</sup> May, 2021. In my view, the delay of three (3) months is not inordinate.

26. This brings me to the second condition of substantial loss. In his supporting affidavit, the 1<sup>st</sup> applicant states that unless the order for a stay of execution is granted, the 1<sup>st</sup> respondent in particular will seek to continually enforce its decision of 9<sup>th</sup> February, 2021 thereby rendering the appeal nugatory and causing the applicants to suffer gravely.

27. In their submissions, the applicants contend that the appeal will be rendered nugatory since it seeks to challenge the wrongful reasoning and conclusion by the Tribunal, and that the appeal touches on matters affecting the rule of natural justice and a violation of their constitutional rights. They have cited, among others, the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** where the Court of Appeal decided that:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
- 5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

28. Zachary Mwangi Njeru in his replying affidavit states that the applicants do not stand to suffer any loss since they will remain in the same position they were at before approaching this court.

29. The importance of substantial loss in any application seeking an order for a stay of execution was aptly addressed in the Court of Appeal case, namely **Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** thus:

- “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”*

30. In the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] e KLR**, the court held that an applicant ought to establish other factors to demonstrate substantial/ irreparable loss.

31. Upon considering the unique circumstances of the matter at hand, I am satisfied that the applicants have reasonably shown that unless an order for a stay is granted, the appeal if successful will be rendered nugatory thereby resulting in substantial loss.

32. On the third condition, given that the order made by the Tribunal is non-monetary in nature, the condition for the provision of security would not arise here.

33. Consequently, the Motion dated 13<sup>th</sup> May, 2021 is allowed giving rise to issuance of the following orders:

a) There shall be a stay of any further execution/ implementation of the decision by the 1<sup>st</sup> respondent dated 9<sup>th</sup> February, 2021 and extended on 26<sup>th</sup> May, 2021 pending the hearing and determination of the appeal against the decision delivered by the Political Parties and Disputes Tribunal on 10<sup>th</sup> May, 2021.

b) Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellants/Applicants

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

..... for the 4<sup>th</sup> Respondent