



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

ELECTION PETITION APPEAL NO. 1 OF 2018

BARIDI FELIX MBEVO.....APPELLANT

VERSUS

MUSEE MATI.....1ST RESPONDENT

THE RETURNING OFFICER

KITUI WEST CONSTITUENCY.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Being an Appeal against the Judgment and Orders in Kitui

Chief Magistrate's Court Election Petition No. 1 of 2017

by Hon. J. Munguti P M on 31/01/18)

R U L I N G

1. **Baridi Felix Mbevo**, the Appellant/Applicant filed a Notice of Motion dated the 5th day of **February, 2018** seeking an order of stay of execution of the Decree in **Kitui CMCC Election Petition No. 1 of 2017** and specifically orders issued on **31st January, 2018** cancelling the Appellant/Applicant's Certificate of Member of County Assembly for Mutonguni Ward and nullifying the gazette notice declaring the Appellant/Applicant as the winner, pending the hearing and determination of this application and the Appeal.
2. The application is premised on grounds that: following the order of the Court execution may proceed which will result in a grave injustice to the Appellant as he has lodged an Appeal to the High Court against the Judgment and subsequent orders. That the execution of the orders will result into undue prejudice to the Appellant who will be condemned unheard as the Appeal filed is arguable with high chances of success and will be rendered nugatory. And, that the 1st Respondent shall not suffer any prejudice that cannot be redressed by way of damages.
3. The Appellant/Applicant swore an affidavit where he reiterated what is stated in the grounds upon which the application is based and added that the decision of the learned Magistrate was erroneous as it was not backed by either law or facts. That if orders sought are not granted he will be removed from office and the 1st Respondent will take over before the Appeal is determined and that the balance of inconvenience is in his favour as he is the one currently holding the position of the County Assembly for Mutonguni Ward.
4. Subsequently, during the pendency of the Appeal and the application dated **5th February, 2018**, the speaker of the County Assembly, Kitui declared the Applicant's seat vacant and proceeded to notify the 3rd Respondent, the **I. E. B. C.** to fill the vacancy. Consequently the 3rd Respondent issued a Certificate of the Election to the 1st Respondent.
5. This development prompted the Applicant/Appellant to file another Notice of Motion dated the **12th day of February, 2018** seeking stay of execution of the Judgment of the **Hon. Munguti P M** in **CMCC Election Petition No. 1 of 2017** together with all consequential orders and actions pending the hearing and determination of the application and the Appeal. And in particular, the Notice of Vacancy dated **5th February, 2018** issued by the speaker of the County Assembly of Kitui, Kenya **Gazette Notice No. 1173** published in the Kenya Gazette

issue of **9th February, 2018** and the Certificate of Election dated **8th February, 2018** issued to the 1st Respondent be suspended pending the hearing and determination of the application and Appeal.

6. The basis of the application was that the execution of the orders of the learned Magistrate had commenced and it would be prejudicial as the Applicant/Appellant would be condemned unheard, yet, the Appeal has a high chance of succeeding.

7. The application dated **12th February, 2018** was placed before the **Hon. Justice Kemei** at the first instance who certified it as urgent and granted conservatory orders staying the execution of the Judgment together with all consequential orders pending hearing of the application.

8. **Musee Mati**, the 1st Respondent filed Grounds of Opposition and a Replying Affidavit to both the application dated **5th and 12th February, 2018** stating that orders of **12th February, 2018** were granted *per incuriam* and hence should be discharged/vacated and/or dismissed. That the **Election Act No. 24 of 2011** and the **Elections (Parliamentary and County Petition Rules, 2017)** do not give an Appellate Court (High Court) powers and discretion to entertain interlocutory application for stay of the determination of a Magistrate's Court for the very reason that timelines for determination of the Appeal is very short.

9. On the **15th February, 2018**, the 1st Respondent filed a Notice of Motion seeking the Court's order discharging, vacating and/or lifting the *exparte* orders issued on the **12th February, 2018** and to condemn the Appellant/Applicant to pay costs of the application.

10. The application was premised on grounds that the whole spectrum/design and architecture of the **Election Act No. 24 of 2011** and the **Election (Parliamentary and County) Petition Rules, 2017** do not envisage and/or give powers and/or discretion to the Appellate Court (High Court) to entertain interlocutory applications or stay of the determination of Magistrate's Court; the overriding objectives of the rules militates against stay orders on the appellate jurisdiction; That the orders granted are oppressive to the 1st Respondent, a holder of a valid determination by a Magistrate that declared that his victory had been stolen and who has been issued with a Certificate of Election of Member of County Assembly for Mutonguni Ward after a declaration of the seat as vacant by the Speaker of the County Assembly. The 1st Respondent swore an affidavit in support of the application where he deposed that the determination of the Election Court was valid, legitimate and the High Court has no power and/or discretion to entertain the interlocutory application.

11. The 2nd and 3rd Respondents filed grounds in support of the application dated **12th February, 2018**. They averred that if orders of stay are vacated and/or lifted the Appeals filed by both the Appellant and 2nd and 3rd Respondents will be rendered nugatory and reduced to a mere academic exercise. That it is in the interest of justice that the order be stayed for failure to do so would lead to an untidy situation at the County Assembly of Kitui as the sitting Member of County Assembly will be robbed of his seat by a person directly declared by the Court.

12. That if both Appeals succeed the 1st Respondent would have to step down from the seat and such intermitted changes in representation will disenfranchise the people of Mutonguni.

13. Following directions given by the Court, both applications were canvassed simultaneously.

14. It was the submission of learned Counsel for the Applicant/Appellant, **Mr. Kimuli** that no law bars the Court from issuing orders sought. That in the absence of any law barring the Court from issuing the orders sought it has the discretion to exercise in accordance with settled principles. That the matter being of public interest, the people of Mutonguni will be prejudiced; the order should issue as the Appeal is arguable. He relied on the case of **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others (2014) eKLR** where the Supreme Court set principles the Court ought to take into account while granting stay.

15. **Ms. Mulando**, learned Counsel for the 2nd and 3rd Respondents supported the application for granting stay of execution. Citing the case of **Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others (2013) eKLR** she argued that all the Applicant was required to do was to demonstrate that the intended Appeal is arguable with arguable points. That if the application is not granted the success of the Appeal would be rendered nugatory. She urged the Court to use its discretion and grant orders sought.

16. Regarding the application to vacate conservatory orders granted by **Kimeu, J.** she stated that the purpose intended by the order have not been served therefore lifting them would not be equitable to the parties and especially the one who sought the order and that the application was made without inordinate delay.

17. **Mr. Kilonzi**, learned Counsel for the 1st Respondent argued that the **Election Act** and the **Rules** do not give the Court the jurisdiction to entertain interlocutory applications for conservatory orders.

18. That the Appeal was filed after the Applicant/Appellant had been stripped of his legitimacy as a Member of County Assembly and the 1st Respondent duly issued with a certificate as the validly elected Member of the County Assembly and gazetted as the valid member to occupy the vacant seat. That the Appeal was filed on **2nd February, 2018** immediately after the determination of the Petition but was not brought to the attention of the 1st and 3rd Respondents which paved way for change of his status. The Speaker declared the seat vacant, on the **5th February, 2018** and **I. E. B. C.** issued the 1st Respondent with a Certificate of Elected Member of the County Assembly on **8th February, 2018**. On **9th February, 2018** he was gazetted as a Member of Mutonguni Ward, Kitui West Constituency. As a result, the Appellant cannot benefit from the automatic stay.

19. Further, he argued that the certificate held by the Appellant could not be stayed because it did not exist. He cited the case of **The Kenya National Examination Council, exparte George Gathenji Njoroge & Others CA No. 266 of 1996** to emphasize that fact.

20. The jurisdiction of this Court to grant an order of stay of execution has been questioned. **Section 85A(2)** of the **Elections Act 2011**

provides thus:

“Appeal under subsection (1) shall act as stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.”

21. From the foregoing it is apparent that where an Appeal has been filed from the High Court there is an automatic stay of a certificate of election issued. There is however a lacuna in an instant where the Magistrate’s Court has issued a certificate like in the instant case and the Appeal filed is threatened to be nugatory. The Court would be obligated to look at the circumstances of the case and use its discretion to do what is just.

22. The peculiar circumstances of the instant matter is that following the decision of the Lower Court, the 1st Respondent was issued with a certificate as a validly elected Member of the County Assembly and subsequently gazetted to occupy a seat that was occupied by the Appellant following the results of the elections. He has since appealed the decision of the learned Magistrate which means that if the 1st Respondent is sworn in as the Member of the County Assembly, Mutonguni Ward, there will be nothing to be determined on Appeal.

23. In the case of **Gitarau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, Supreme Court Civil Application No. 5 of 2014** the Court held that the Court could consider staying proceedings if the intended Appeal is arguable, would be successful and be rendered nugatory and if it is in the public interest.

24. An Election Petition is a matter of public interest. In this case the people of Mutonguni Ward elected their representative, the results were challenged in an Election Court. The determination by the Court ultimately affect the people therefore such circumstances cannot be overlooked.

25. In the cited case of **Samvir Trustee LTD vs. Guardian Bank LTD HCC.C No. 795 of 1995, Warsame, J** (As he then was) stated that:

“... The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner.”

26. The special circumstances in this case is that the Appellant was stripped off the power of representing the people of Mutonguni Ward. A certificate has been issued to the 1st Respondent. All that remains is to be sworn in, to legitimately occupy the position of Member of County Assembly, Mutonguni Ward.

27. It is argued by the 1st Respondent’s Counsel that there is nothing to stay because the certificate that had been issued to the Appellant was cancelled therefore does not exist.

28. What is not in doubt is that if the order sought is not granted and the Appeal succeeds then the Appeal shall be rendered nugatory. However, considering the fact that a certificate has already been cancelled and another one issued, granting a stay order may amount to reversing or suspending what has already been done. But, in view of the fact that the 1st Respondent has not been sworn in, it would call for the status quo to be maintained. In the premises the 1st Respondent’s application dated the **15th February, 2018** seeking to vacate exparte orders issued by **Kemei, J.** fails and is dismissed.

29. In the result, status quo shall be maintained pending determination of the Appeal.

30. of both applications to abide the outcome of the Appeal.

31. It is so ordered.

Dated, Signed and Delivered at Kitui this 8th day of March, 2018.

L. N. MUTENDE

JUDGE