



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 2 OF 2018

ERIC KAMANDE.....APPELLANT

VERSUS

AMOS MURIGI.....1ST RESPONDENT

SIMON KAMAU2ND RESPONDENT

JUBILEE PARTY3RD RESPONDENT

SECRETARY GENERAL, JUBILEE PARTY.....4TH RESPONDENT

THE SPEAKER OF THE COUNTY

ASSEMBLY OF MURANG'A.....5TH RESPONDENT

RULING

1. The appellant, *Mr. Eric Kamande*, filed this appeal against the judgment and decree of the Political Parties Disputes Tribunal (the Tribunal) made on 20th April 2018 at Nairobi in *Complaint No. 3 of 2018*. All the parties in this appeal were also parties in the complaint heard and determined by the Tribunal. The appellant in this appeal was the 5th respondent while the 1st respondent was the petitioner. The other respondents in this appeal were also respondents in the aforesaid complaint.
2. The appellant (applicant) was aggrieved by the Tribunal's decision that the 1st respondent was validly elected on 5th January 2018 to replace him as the leader of the majority party in the Murang'a County Assembly (the Assembly) and that the respondents in the complaint who included the Jubilee Party and the Speaker of the Assembly should facilitate his assumption to the said office.
3. The applicant then filed this appeal simultaneously with a Notice of Motion dated 23rd April 2018 in which he sought stay of execution of the judgment and decree of the Tribunal's decision pending the hearing and determination of the appeal. The application is anchored on the provisions of *Section 1A, 1B and 3A of the Civil Procedure Act; Section 41 (2) of the Political Parties Act; Order 42 Rule 6 (1) (2) and Order 51 (1) of the Civil Procedure Rules* and all other enabling provisions of the law. It is premised on the grounds stated on its face and an affidavit sworn by the applicant on 23rd April 2018.
4. The applicant contends that he is currently serving as the leader of majority of the Murang'a County Assembly having been validly elected as such in accordance with the Jubilee Party Constitution shortly after the conclusion of the General Elections held in August 2017; that he was illegally and unfairly removed from the said office by a party caucus which was irregularly convened by the 2nd respondent; that on learning about his purported removal, he remained in office but filed an appeal with the relevant party organ; that before the party's internal dispute resolution mechanism could be exhausted, the 1st respondent filed *Complaint No. 3 of 2018* before the Tribunal; that his appeal is arguable and raises substantial issues of law; that the *status quo* ought to be maintained pending determination of the appeal and that it is in the interest of justice that the application be allowed.
5. The application is opposed by the 1st and 2nd respondents. The 3rd and 4th respondents expressly supported the application while the 5th respondent remained impartial as he did not either support or oppose the application.
6. In support of the motion, *Ms. Mary Karen Kigen Sorobit* swore an affidavit on behalf of the 3rd and 4th respondents on 7th May 2018. She deposed that it was just and fair that the *status quo* in the Assembly be maintained pending the outcome of the appeal because if stay is refused, there will be a change in the leadership of the Assembly and in the event that the appeal is allowed, another change would be occasioned and this will throw the Assembly into confusion and destabilize its operations; that allowing the application will not occasion the

1st and 2nd respondents any prejudice since the hearing of the appeal can be expedited; that refusing to grant stay orders and hence allowing the Tribunal's decision to be enforced will be setting a bad precedent as it will encourage unlawful removal of leaders of county assemblies without following due process.

7. The application is opposed by the 1st and 2nd respondents through a preliminary objection filed by the 1st respondent dated 2nd May 2018 and replying affidavit sworn on 8th May 2018.

In the preliminary objection, the 1st respondent challenged the competence of the appeal and the application on grounds that the appeal is filed as an election petition appeal whereas the matter giving rise to the appeal was not an election petition; that election petitions are determined by an election petition court and are governed by a distinct legal regime.

8. Besides giving the background to the filing of the instant appeal, the 2nd respondent in his replying affidavit reiterated the grounds taken in the 1st respondent's preliminary objection. In addition, he deposed that as the appeal was filed irregularly, this court lacked jurisdiction to hear it and the instant application was for that reason fatally defective and ought to be struck out.

9. In the alternative and without prejudice to the challenge on jurisdiction, the respondents averred that the orders of stay of execution were not available to the applicant as he had failed to fulfill the preconditions stipulated under *Order 42 rule 6 (2) of the Civil Procedure Rules (the Rules)* especially the requirement that an applicant must prove that he will suffer substantial loss if the application was not granted; that the 1st respondent is equally competent to run the affairs of the office of leader of majority of the Assembly and that the business of the Assembly will not be affected by merely having a new leader of majority assume office as ordered by the Tribunal; that refusing to allow the application will not render the appeal nugatory and that allowing the application will amount to discrimination against the 1st respondent.

10. On 3rd May 2018, the court directed that the preliminary objection be argued in opposition to the application. Parties on the same date agreed to file written submissions on the application but the 5th respondent had not filed his submissions by 16th May 2018 when the application was scheduled for interparties hearing. All the other parties had filed their submissions by then. At the hearing, learned counsel on record made oral submissions buttressing the positions taken by their respective clients in this matter.

11. I have carefully considered the application, the affidavits on record, the record of appeal, the rival submissions both written and oral made on behalf of each of the parties and all the authorities cited. Having done so, I find that only two key issues emerge for my determination. These are:

- i. Whether the application is fatally defective for want of jurisdiction.
- ii. If the answer to (i) is in the negative, whether the applicant is deserving of the orders of stay as sought.

12. Starting with the first issue, the 1st and 2nd respondents argued that the court does not have jurisdiction to hear both the appeal and the application because the appeal has been filed as an election petition appeal. This claim was been denied by the applicant, the 3rd, 4th and 5th respondents who maintained that despite its title, the appeal is in substance an appeal against the decision made by the Tribunal on 20th April 2018.

13. As noted earlier, I have perused the record of appeal. Though I agree with the parties that the appeal is filed as Election Petition No. 2 of 2018, a cursory look at the memorandum of appeal filed on 23rd April 2018 leaves no doubt that the appeal was filed against the entire judgment and decree delivered by the Tribunal at Nairobi in Complaint No. 3 of 2018 on 20th April 2018. Apart from its title, there is nothing to suggest that what is before the court is an election petition appeal.

I am thus unable to agree with the 1st and 2nd respondents' contention that the appellant's appeal is in fact an election petition appeal. The mere fact that it is titled as such does not change the subject matter of the appeal which is the decision of the Political Parties Disputes Tribunal. Under *Section 41 (2) of the Political Parties Act*, appeals from decisions of the Tribunal are supposed to be filed in the High Court. The instant appeal is filed in the High Court and nothing on the face of the memorandum of appeal suggests that it seeks to invoke the court's special jurisdiction under any of the laws that govern the resolution of electoral disputes.

14. As noted by the applicant and the 3rd, 4th and 5th respondents, the 1st and 2nd respondents have not claimed that this court does not have jurisdiction to entertain appeals from the decisions of the Tribunal. In my considered view, the objection taken by the 1st and 2nd respondents to the validity of the appeal goes more to form rather than the substance of the appeal.

In the new constitutional dispensation, courts are enjoined to lay more emphasis on substantive justice and give less regard to procedural technicalities. In the circumstances and in the interest of administering substantive justice, I will disregard the title of the appeal and find that the appeal is not an election petition appeal but an appeal from the decision of the Tribunal.

15. Having made that finding, I wish to point out that I am in agreement with the decision of the Supreme Court in ***Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, [2012] eKLR*** that jurisdiction flows from either the Constitution or other written law or both and that the court cannot arrogate to itself jurisdiction by judicial craft. But having found that this is in essence an appeal from the decision of the Tribunal, I have come to the conclusion that this court has jurisdiction to hear and determine the applicant's appeal under *Section 41 (2) of the Political Parties Act*. It is therefore my finding that the instant application is properly filed within the appeal and it is thus not fatally defective as alleged by the 1st and 2nd respondents.

16. Turning to the prayer for stay of execution pending determination of the appeal, the 1st and 2nd respondents have opposed the grant of

stay mainly on grounds that the applicant has failed to satisfy the conditions precedent to grant of stay as set out under *Order 42 Rule 6 (2)* of the *Rules*. This provision in a nutshell provides that to qualify for grant of stay of execution pending appeal, an applicant must establish that if stay is not granted, he will suffer substantial loss; that the application was filed timeously and that the applicant is ready and willing to give security for due performance of the decree as the court may in its discretion ultimately order.

17. Having considered the parties' rival submissions, I find that it is not disputed that the decision whether to grant or refuse stay of execution pending appeal is discretionary but needless to state, the discretion must be exercised judiciously. The Court of Appeal in ***Butt V Rent Restriction Tribunal (1982) KLR 419*** emphasized the point that determination of applications such as the instant one is dependent on the exercise of the court's discretion but that each case must be decided on its own facts and circumstances. The court expressed itself as follows:

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. ... The general principle in granting or refusing stay is; If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be rendered nugatory should that appeal court reverse the judge's (read Tribunal's) discretion. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”.

Madan JA (as he then was) stated thus at page 419:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory”.

18. As I recently held in ***Hon. Musalia Mudavadi & 4 Others V Angela Gathoni Wambura & 2 Others HCCA No. 177 of 2018***, with the enactment of the overriding objective in *Section 1A (1)* of the *Civil Procedure Act* which aims at facilitating the just, expeditious, proportionate and affordable resolution of all civil disputes under the Act which includes appeals and the imposition of a duty on courts under *Section 1A (2)* of the Act to give effect to that overriding objective when interpreting any of the provisions of the Act and the Rules, the exercise of the court's discretion in deciding whether to grant or refuse stay pending appeal is no longer fettered by the three conditions enumerated under *Order 42 rule 6 (2)* of the *Rules*.

The conditions set out under that provision should be taken as guidelines which the court should use as beacons while exercising its discretion in determining applications for stay pending appeal. What should be of paramount consideration by the court is whether the applicant had established sufficient cause to justify grant of stay.

19. I think that it is important to point out at this juncture that the purpose of grant of stay pending appeal is to preserve the subject matter of the appeal so that in the event the appeal is successful, it is not rendered nugatory. In making its decision, the court must strive to balance the competing interests of the parties and wherever possible, ensure that neither party suffers prejudice. The court must have in mind that the applicant being aggrieved by the decision in question is entitled to exercise his constitutional and statutory right of appeal and to have it safeguarded by avoiding any situation that may render the appeal nugatory while the respondent being the successful litigant is entitled to enjoy the fruits of his judgment or decree without undue delay.

20. In the instant application, the memorandum of appeal shows that the applicant is challenging the validity of the Tribunal's decision mainly on grounds that the Tribunal did not have jurisdiction to entertain the complaint lodged before it and that it erred in failing to appreciate that the purported removal of the applicant from the office of leader of majority in the Assembly was done in contravention of the Constitution and the relevant law.

21. Having the foregoing in mind, it is my finding that if the stay orders are not granted, the applicant is likely to suffer great prejudice since he will be forced to vacate the aforesaid office before he is given an opportunity to ventilate his grievances on appeal and before a final decision is made by this court on the validity of the Tribunal's decision. In the event that his appeal is successful, the applicant will have been denied his constitutional right protected by *Article 383 (c)* of the *Constitution* to hold office within his political party for the period between the day stay is denied and the time the appeal is determined.

22. In addition, if the stay orders are not granted and in the event the appeal is successful, there will be change of leadership in the office of leader of majority in the Assembly twice, that is, at the interlocutory stage before the appeal is heard and after it is determined. In my view, such changes will undoubtedly cause undue disruptions in the running of the Assembly and may destabilize its operations.

23. On the other hand, if the application is allowed, the 1st and 2nd respondents are not likely to suffer much prejudice if the hearing of the appeal is expedited. In fact, the two respondents did not claim that they will suffer any prejudice if the application is allowed. The 1st respondent only claimed that allowing the application would be unjust as it will amount to discrimination against him. With due respect, I do not find any substance in this submission. The relief of stay of execution pending appeal is provided for by the law and in granting or refusing to grant it, the court applies the law to the facts and circumstances presented before it and makes a decision that serves the interests of justice. The court's decision is not meant to favour or discriminate against any party.

24. That said, it is worth noting that it is not disputed that the applicant has been in office as leader of majority of the Assembly since he was elected to that office on 8th September 2017 and remained in office even after his purported removal. He is still in office to date since the decision of the Tribunal has not been implemented.

Given the foregoing, it is my view that allowing the application will best serve the interests of justice in this case since it will ensure that the status quo is maintained pending determination of the legality of the Tribunal's decision. It will also ensure that there is continuity and

minimal disruption in the affairs of the Assembly and in the delivery of services to the people of Murang'a County.

25. Having made the above findings, I am satisfied that sufficient cause exists in this case to justify the grant of stay of execution pending determination of the applicant's appeal. I consequently find merit in the Notice of Motion dated 23rd April 2018 and it is hereby allowed in terms of prayer 3.

26. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 27th day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Nganga Mbugua: for the Appellant

Ms Mathenge h/b for Mr Chege Wainaina for the 1st Respondent and Mr Wageni for the 2nd Respondent

Mr Kiptum: for the 3rd & 4th Respondents

Mr Kamau: for the 5th Respondent

Mr Fidel Salach: Court Clerk