



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO.03 OF 2018**

**IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTION (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017**

**AND**

**IN THE MATTER OF NOMINATION OF A MEMBER OF COUNTY ASSEMBLY WARD**

**AND**

**IN THE MATTER OF THE APPEAL OF ROSE MOTURI MWENE**

**BETWEEN**

**ROSE MOTURI MWENE.....APPELLANT / APPLICANT**

**-VERSUS-**

**I.E.B.C.....1<sup>ST</sup> RESPONDENT**

**THE JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**HARRIET KERUBO ONGERA.....3<sup>RD</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellant/applicant hereinafter referred to as the applicant has filed a **Notice of Motion dated 15<sup>th</sup> of February 2018**. It is brought under Rule 34 of the Rules of Procedure on Settlement of Disputes, Rule 34 of the Elections **[Parliamentary & County Elections petitions] Rules, 2017 and Section 75 of Elections Act No.24 of 2011**. She seeks the following orders :

a. Spent

b. That this Honorable Court be pleased to order stay of implementation and/or Execution of the judgment/decree of the Learned trial Deputy Registrar and/or Magistrate dated 12<sup>th</sup> February, 2018 till the hearing and final determination of this Application.

c. That this Honorable Court be pleased to Order stay of implementation and/or the execution of the judgment/Decree of the Learned Trial Deputy Registrar/Magistrate dated 12<sup>TH</sup> February, 2018 till the hearing and final determination of this Appeal.

d. That this Honorable Court be pleased to grant such further relief (s) as it will fit and expedient to grant in the circumstances of this

case.

e. That the costs of this application be provided for.

2. The application is grounded upon the grounds set out hereunder and upon the affidavit of Rose Moturi Mwene dated the 15<sup>th</sup> of February 2018.

i. The Learned Trial Deputy Registrar/Magistrate read and delivered her final judgment on 12<sup>th</sup> February, 2018.

ii. The Learned Trial Deputy/Magistrate declined to grant any oral application for stay of execution of her judgment.

iii. The Learned Trial Deputy/Magistrate stated in Court that she will issue a certificate of [election] determination and/or judgment.

iv. If this Application is not allowed this Appeal will be rendered nugatory.

v. The Appeal has high chances of Success.

vi. It will be only fair and just that this application be granted.

3. **Rose Moturi Mwene** deposes as follows in her affidavit dated the 15<sup>th</sup> of February 2018 that; she filed this appeal against the judgment of the Learned Trial Deputy/Magistrate delivered and dated 12<sup>th</sup> February, 2018. She sought stay of execution of judgment orally and Appeal immediately against the judgment, but the Magistrate declined to grant any orders. She proceeded to file an appeal immediately and an application for stay of judgment. Her appeal has high chances of success. If this application is not allowed, her appeal will be rendered nugatory.

4. The application was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Respondent. The 2<sup>nd</sup> and 4<sup>th</sup> Respondent did not file any response to the application. The 1<sup>st</sup> respondent filed a replying affidavit dated the 11<sup>th</sup> May 2018, sworn by **Salome Oyugi** the Manager Political Parties and Campaign Financing Officer of IEBC. The 3<sup>rd</sup> Respondent filed an affidavit dated the 2<sup>nd</sup> of March 2018.

**Salome Oyugi** deposed that she is as the Manager political parties and Campaign Financing and she have full access to documents, records and information relating to election of political party members and party lists and the Commission's legal and constitutional mandate in declaration of and gazettement of a party's nominee as the designated party member. That upon being served with the Appellant's petition in **Kisii CMCC Election petition No.8 of 2017**, the Commission instructed its lawyers to file a Replying Affidavit, dated 26<sup>th</sup> September, 2017, wherein the Commission opposed the petition and argued, *inter alia*, That it was required under Section 36 of the Elections Act to select members of special seats in the order given by the political party and that there was an apparent error when the seat was allocated to the Petitioner. The anomaly was corrected, a corrigenda issued and the 3<sup>rd</sup> Respondent was correctly allocated the seat. That trial court in its judgment, delivered on 12<sup>th</sup> February 2018, held at paragraph 43, **that "the rightful procedure was for the 2<sup>nd</sup> Respondent to conduct a fresh nomination as the mistake on the list had serious implications. That would not be rectified through publishing a corrigenda"**. The trial court further held that, though illegally done, the court could not reinstate her back to her position. That the trial court in its judgment at paragraph 44 held, *inter alia*, that the Applicant/Appellant herein would not have been nominated if the 3<sup>rd</sup> Respondent had been indicated as female because she ranked number 11 in the order of priority and the 3<sup>rd</sup> Respondent was ranked as number two (2). Thus the Applicant/Appellant would have been disqualified pursuant to **Section 36[2] of the Elections Act No.24 of 2011**. That the trial court further directed the fresh nominations be conducted in order to fill the vacancy. In view of the above, the Applicant/Appellant ought to have extracted a decree from the trial court and served the same upon the Commission and the 2<sup>nd</sup> Respondent, which she has not done. The Applicant/Appellant has not demonstrated why she has not complied with the court's express orders. That the Applicant/Appellant has not made out a prima facie case with a probability of success. She has not demonstrated any infringement of a right and has not demonstrated the appeal has probability of success if prosecuted. She has also not demonstrated what, if any, substantial loss she would suffer if stay is not granted. That the balance of convenience lies in her favor. That the probability of success tilts against the Applicant's favor because she has not complied with the express orders of the trial court. The Applicant has not satisfied the above requirements and the said application is, therefore, vexatious, brought in bad faith and is an abuse of the process of the court. **THAT** in view of the orders of the trial court the said Application and appeal are highly misplaced because the court does not have powers to declare the Applicant/Appellant as the nominated member of County assembly upon determination of the appeal. This is because where the court is unable to discern, from the record, the will of the people the only option is for the court to order for fresh nominations – as the trial court correctly did.

5. **Harriet Kerubo Ongera** in her affidavit reiterated what was deposed by the 1<sup>st</sup> Respondent on the Election petition and the judgment of the court. Adding that the nomination Process in relation to the Appellant/Applicant and herself was null and void and the **Gazette Notices Numbers 8380 and 8847** were hence revoked. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were also directed to conduct fresh nominations for Gender op up list to fill the vacancy in line with the provisions of the Electoral Laws and Rules. That the instant Notice of Motion Application has been lodged out of suspicion and/or fear in that no decree has been prepared and served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to enable the same conduct fresh Nominations. That the Appeal as presented is not capable to succeed as the Appellant/Applicant has not persuaded the Court that the Appeal is arguable. That the Appellant/Applicant has not demonstrated that if orders sought in the application are not granted, the successes of Appeal, were it to succeed would be rendered nugatory. That besides, the Appellant/Applicant has not demonstrated that she would suffer substantial loss if orders being sought are declined by the Court. That the Appellant/Applicant being apprehensive has brought the instant application seeking orders for stay while no certificate of determination has been issued by the trial Court to warrant the stay orders being sought. That an Application for orders of a stay cannot be lodged and or mounted by the Appellant/Applicant as a result of agitation and/or suspicion. That the Appellant/Applicant must demonstrate to the Court that the Orders and/or Judgment of the trial Court have been effected. Mere suspicion does not warrant the grant of orders being sought. That in the application for stay of execution does not meet and/or satisfy the minimum threshold, for granting an order for stay of execution pending Appeal. That Appellant/Applicant herein is

merely intent on delaying, obstructing and/or defeating the realization of the fruits of the judgment and Decree and the application is devoid of merits.

6. Mr. Ondimu for the 4<sup>th</sup> Respondent informed the court that they had taken a neutral position, that there are neither opposing nor supporting the motion. That they seek direction as the house needs to be fully constituted.

7. The application was argued by way of oral submissions. Counsels reiterated what is deposed in the affidavits adding the following; Mr. Momanyi for the applicant argued further that they have an arguable appeal. He relied on Sections 34 (7) (10) of the Elections Act No. 24 of 2011 which states that once the lists are surrendered to IEBC it concludes the matter of nominations. For this argument he relied on the judgment of Supreme **Court in Election Petition No. 1 of 2015** at paragraphs 96, 97, 98,105,106 and 107. He argued that the applicant will suffer prejudice if the application is not granted as she was sworn in and she has been representing the special categories since 7<sup>th</sup> September 2017 to date. That as an MCA she will suffer prejudice together with the interests. That she will also suffer substantial loss together with the people she represents. That the balance of convenience tilts in her favor. That there was a consent of stay, as they agreed that prayer “b” be granted between the applicant and the 3<sup>rd</sup> Respondent. That the court at that stage ordered a stay of execution until the hearing and disposal of the application. That the 3<sup>rd</sup> respondent was served together with the 2<sup>nd</sup> respondent and the gazette notice annexed to the replying affidavit is an affront to the court order, it is to test the integrity and authority of the court. That the notice was done a month after the court order.

8. Mr. Oguttu for the 3<sup>rd</sup> Respondent submitted that the jurisdiction of court is limited and is circumstantially defined. That the court cannot interrogate the facts as decided by the lower court but the court’s jurisdiction is limited to issues of law. That the orders the court can grant are stated at Section 75 (4) of the Election Act No.24 of 2011 revised in 2016. That the orders the court can grant are stated at Rule 34 sub rule (10) of the Elections (Parliamentary and Country Election) Petition Rules 2016. That under the said Sections the court has no powers to grant a stay. That in Election Petition rules the Civil Procedure Rules in terms of Order 42 do not apply, the application has been made in a vacuum and cannot be granted. It was further submitted that the Motion has been overtaken by events and is legally untenable. That there is Gazette Notice that was issued on the 6<sup>th</sup> of April 2018 which the applicant has acknowledged and has not challenged. That the import of the judgment of the lower court has been implemented and a new member of the county assembly was gazetted hence the judgment of the lower court was consummated. That a stay order can only issue if that which a party seeks to stay has not happened. On the Appeal it was submitted that it untenable as the error committed was rectified through a corrigenda, as stated in the lower court judgment. That this was not the case as the case in the Supreme Court. On substantial loss and irreparable loss it was submitted that the application is for stay not an injunction. That the issue of substantial loss would arise in cases where there can be no compensation. That the applicant is not seeking any claim against the 3<sup>rd</sup> Respondent, that the 4<sup>th</sup> Respondent could be the one to pay the claim but it has not been stated that the 4<sup>th</sup> Respondent is not able to compensate the applicant. That the loss can be atoned for if the applicant wins the appeal all the allowances can be paid. That the issue of the persons she represents is not the issue. That the issue of balance of convenience does not apply and cannot supersede the law. On the issue of disobedience of the court order, it was submitted that the court is dealing with a stay of execution and not contempt and until the Motion is argued the submissions on the same is premature. On the issue of consent it was argued that the applicant has misread the court order. That Justice Karanja indicated that he was not gazetted and that he was on transfer.

9. Mr. Momanyi in reply argued that Section 75 (4) of the Elections Act No. 24 of 2011 does not limit the inherent jurisdiction of the High Court and that the Court can deal with the facts and the law. That the court has jurisdiction to hear matters of elections. That the gazette notice of 6/4/2018 did not implement the lower court’s decision. That Section 75 allows an aggrieved party to make an application and that time has not lapsed. That the applicant is still the MCA of Kisii County legally sworn in. that there is an arguable appeal as nothing shows that the mistake alleged to have been made was amended. Counsel referred to Rules 54 to 56 of 2012 Election Rules.

## **DETERMINATION**

10. I have carefully considered the affidavits and submissions. The judgment the applicant seeks a stay was delivered on the 12<sup>th</sup> of February 2018. Before I get into the conditions for granting a stay I need to address the issue raised by the 3<sup>rd</sup> Respondent’s counsel that the Election Act does not provide for applications for stay. I have read the said Act and note that Section 75 (4) provides for appeals on County Elections. The appeals are filed in the High Court, though the section does not provide for stay orders, in my view nothing bars the applicant from seeking a stay of execution as provided under the law, in Order 42 of the Civil Procedure Rules.

11. Now back to the matter for consideration. The conditions for stay pending appeal are provided under **Order 42 Rule 6**, which provides as follows;

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order for stay of execution shall be made under sub rule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

**(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

The applicant filed this application on the 14<sup>th</sup> of February 2018. There was no undue delay the appeal was filed promptly. The next issue is whether the applicant has satisfied the court that there will be substantial loss. The Court of Appeal in the case of **Carter Sons Ltd vs. Deposit Protection Fund Board & Two others C.A.No. 291 of 1997 at page 4** stated as follows;

***“... The mere fact that there are strong grounds of appeal would not, in, itself, justify an order for stay....the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security and the application must, of course, be made without unreasonable delay.”***

The applicant has to demonstrate that she will suffer substantial loss. She deposes that if the stay is not granted then she will suffer loss and that the people she represents will suffer. In my view her argument that she will suffer loss is not persuasive. Her anticipated loss has not been clearly explained. She will not suffer any loss that cannot be compensated, if at all. She also will be able to ventilate her case during the appeal. On the Supreme case cited, the paragraphs cited were not dealing with issues of stay but issues of party lists. The applicant is at liberty to refer to it during the hearing.

On the issue of security, I note that she has failed to offer any security. I will not penalise her for an order for security. The respondent submitted that the orders being sought cannot stand as the orders being sought to be stayed has been overtaken by events as the lower court judgment has been consummated. I do not wish to comment on the issue of the gazette notice at this stage. There is a danger of getting into the issues to be canvassed at the hearing of the appeal. On the consent I have perused the court record and I note that Justice Karanja granted interim orders in terms of prayer ‘b’ of the application. There was no consent by the parties on the order of stay. The record is clear that there would be a stay as prayed for in prayer “b” until the hearing and determination of the application. All in all I find no merit in the applicant’s application dated the **15<sup>th</sup> of February 2018**. Cost shall be in the cause. It is so ordered.

**Dated signed and delivered this 22<sup>nd</sup> day of June 2018**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Momanyi For the Applicant**

**Absent 1<sup>st</sup> Respondent**

**Absent 2<sup>nd</sup> Respondent**

**Miss Mireri For the 3<sup>rd</sup> Respondent**

**Absent 4<sup>th</sup> Respondent**