



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION NOMINATION APPEAL NO. 31 2017

JUBILEE PARTY OF KENYA.....APPELLANT

VERSUS

AGNES NDUNGE MUTWIWA.....RESPONDENT

RULING

[1] The Notice of Motion dated **15 August 2017** seeks Orders that there be stay of execution of the Judgment and Decree of the Political Parties Disputes Tribunal dated **31 July 2017** pending the hearing and determination of the Appeal. It was filed pursuant to **Section 1A and 1B of the Civil Procedure Act, Order 22 Rules 1 and 3 as well as Order 43 Rule 1(3) and Order 51 Rule 1 of the Civil Procedure Rules**. It was the contention of the Applicant that if the said judgment is not stayed, then the Applicant and many other members of the Applicant who were not party to the said decision or the said proceedings would be adversely affected; and that the Tribunal arrived at the decision without first ascertaining if it had the jurisdiction so to do.

[2] The application was supported by the Affidavit annexed thereto, sworn by **Peter Mwangi Kahara** annexed thereto, to which the Judgment of the Tribunal was attached. According to the Applicant, the Tribunal delivered a judgment in which the Applicant was directed to reconstitute its Party List of Nominees to the **Muranga County Assembly**; and that the Respondent did not exhaust the Applicants internal dispute resolution mechanisms before approaching the Tribunal. The Applicant posits that unless the execution of that judgment is stayed, the Appeal herein would be rendered nugatory.

[3] The application was opposed by the Respondent and in this regard she relied on the Replying Affidavit sworn on **21 August 2017** in which she averred that the nomination exercise was rightly set aside by the Tribunal for the reason that she was the most deserving of the nomination to represent the minority in the **Kakuzi/Mitubiri Ward**. She averred that all those affected by the Tribunal's decision opted out of the case by choice after having been duly served. She accordingly defended the Tribunal's decision and urged the Court to dismiss the instant application with costs.

[4] **Order 42 Rule 6 of the Civil Procedure Rules** provides that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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..."

Thus, the only conditions such an applicant needs to satisfy as set out in **Rule 6(2) of Order 42** aforementioned are:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[5] Accordingly, whereas the court has the discretion to grant stay orders, the interests of justice require that the discretion be exercised judiciously and within the aforesaid parameters. **Mr. Rono** for the Applicant, in his submissions before me, was of the posturing that the Tribunal did not consider the legal provisions attendant to nomination and the Party Lists; and that the Tribunal proceeded to assume jurisdiction while the law provides for an avenue, pursuant to **Section 40 of the Political Parties Act**, for the resolution of such disputes between parties and their members. He further argued that **Article 88(4)(e) of the Constitution** and **Section 84 of the Election Act** provides for the resolution of disputes arising from the submission of Party Nomination Lists. He therefore submitted that no prejudice would befall the Respondent if the orders sought were to be granted and urged that the application be allowed in terms of Prayer (2) thereof.

[6] **Mr. Mugo**, Learned Counsel for the Respondent, relied on the Respondent's Replying Affidavit and contended that it is the Respondent would suffer great prejudice if the order for stay is granted. He explained that the Respondent was on the initial Party List that was submitted to **IEBC** and that there was no reason why her name was left out in the subsequent List, considering that she comes from a minority within the County of Muranga. It was therefore Counsel's argument that the PPDT had the jurisdiction to grant the orders that it granted. He urged the Court to dismiss the application

[7] A consideration of the affidavits filed in support of the instant application and the submissions of Counsel appear to focus more on the Appeal itself. The Court was not told, for instance that the Applicant is ready to furnish security; or the explanation for the delay between **31 July 2017** and **15 August 2017** when the appeal was filed; though it may not amount to inordinate delay. More importantly, there was no proof that the Applicant stands to suffer substantial loss should stay not be granted. This is significant because, in principle, a party is entitled to the fruits of his judgment. This principle was well explicated by the Court of Appeal in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, thus:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[8] It is therefore insufficient for the Applicant to say simply that the Appeal will be rendered nugatory. Indeed the Court of Appeal in the case of **Kenya Shell Limited vs Kibiru [1986] KLR** held that:

"It is not sufficient by merely stating that the sum of shs.20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What

assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment" (per Hancox, JA)

[9] It is instructive that the requirements of Order 42 Rule 6 are conjunctive, and the Applicant having failed to prove substantial loss, it is immaterial that the application was filed without unreasonable delay or that sufficient security has been provided. This was also the principle set by the Court of Appeal in the Kenya Shell Limited case (supra), that:

"...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money." (per Gachuhi, Ag. JA, as he then was)

[10] In the foregoing premises, it is my finding that the Notice of Motion dated 15 August 2017 is devoid of merit and the same is hereby dismissed with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST, 2017

OLGA SEWE

JUDGE