



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 1 OF 2016

From the original P.P.T.C No. 29 of 2015 of Political Parties Tribunal Complaint No. 29 of 2015)

MOHAMED ABDI FARAH APPELLANT/APPLICANT

V E R S U S

IBRAHIM ABDI ALI RESPONDENT

RULING

Before me is a Notice of Motion brought by the applicant/appellant Mohamed Abdi Farah through counsel Odero Osiemo and Company dated 12th February 2016 and filed on 15th February 2016. The application has been brought under Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules, as well as Section 3A and Section 1A and Section 1B of the Civil Procedure Act (Cap 21). The prayers are as follows:-

- 1. That the application be certified urgent and heard ex parte in the first instance.***
- 2. That there be a stay of execution of the judgment delivered on 11th February 2016 and the orders issued thereunder pending hearing and determination of the application interparties.***
- 3. That there be a stay of execution of the judgments delivered on 11th February 2016 and the orders issued thereunder pending hearing and determination of the appeal.***

On 15th February 2016, the court certified the application as urgent and ordered that it be served and fixed for hearing interparties. The court did not however grant any interim orders. In effect therefore prayers 1 and 2 were spent.

The application has several grounds on the face of the Notice of Motion. They are that the Political Parties Tribunal issued orders for removal of the applicant from office when it had no powers to do so. Secondly that the Assembly which the applicant was now the Leader of the Majority, had just commenced business in the new term and serious and irreparable consequences would follow if the orders issued by the Tribunal were effected. That the applicant was elected by 22 out of 26 members of the County Assembly and enjoyed the goodwill of all members, meaning that the respondent would face hostilities from members of the Cord Coalition thus paralyzing the business of the Assembly. That the appeal filed raised serious issues of legal interpretation which would be rendered nugatory if the Tribunal orders were implemented. That the respondent did not exhaust the Political Parties Disputes mechanisms because he was a lone ranger and knew that the coalition could not buy his claim. It was also a ground that the respondent had failed in his duties as the Leader of Majority in the County Assembly of Garissa and was using the court process to create chaos in the coalition especially at this critical moment when the Assembly was in its final term before elections. Lastly, it was a ground that the respondent would not suffer any prejudice when compared to the 26 members of the coalition whose interests in duties as members of the County Assembly would be at stake at this crucial moment of debate and legislation

before the elections.

The application was also filed with a supporting affidavit sworn by the applicant on 12th February 2016. It was deponed by the applicant in the affidavit that the respondent was elected Majority Leader in 2013 but had failed to discharge his duties for two years and thus the coalition voted him out on 12th October 2015 unanimously, except for 4 members who were away on the material date. He swore that the seat was declared vacant and he contested the same and received majority of votes and was declared the winner. He stated that the respondent went to the Tribunal and filed a claim No. 25 of 2015 alleging that he was not given a fair hearing but later withdrew the same, and immediately filed another claim alleging that the party was not willing to hear and settle the disputes. He deponed also that at no time did the party formally convene to deliberate on the issue since the respondent did not register a formal complaint with the party or coalition. It was deponed further that the position of Leader of Majority required goodwill of the majority of both nominated and elected members which the applicant commanded at the moment. It was further deponed that the respondent having been voted out unanimously would not be able to coordinate the office and attend duties and as such the system would be paralyzed. It was further deponed that the Assembly had just resumed with several business to be debated and passed, and disruption at this stage would cost the coalition dearly. It was deponed that the appeal filed raised serious issues of the law and that the court should to make a determination herein before the orders of the tribunal were enforced. It was deponed that the balance of convenience was in favour of the applicant and by extension, in favour of the majority in the coalition and that the respondent would not suffer any prejudice.

Annexed to the affidavit were several documents, including an extract of a Cord MCA meeting held on 12th October 2015 at the Assembly conference hall in Garissa, as well as a Hansard of the Garissa County Assembly Cord coalition meeting held on Monday 12th October 2015.

In opposition to the application the respondent Ibrahim Abdi Ali filed a replying affidavit dated 26th February 2016. He deponed in the said affidavit that the application was fundamentally defective since the applicant had not included all necessary parties, including the Orange Democratic Movement Party. It was further deponed that the application was defective in that the applicant had not annexed to his application the decree or judgment which he sought to challenge in the proposed appeal. The respondent also deponed that he initially filed a complaint No. 25 before the Political Parties Disputes Tribunal which he withdrew, but the Orange Democratic Movement party failed to constitute its internal dispute relation mechanisms and thus he went back to the Tribunal. He also deponed that since the judgment of the Tribunal the respondent had resumed office as the Majority Leader of Garissa County Assembly whose activities had been running smoothly without hiccups. He deponed also that the orders of the Tribunal had already been enforced and this application had as such been overtaken by events. He further deponed that the office of Majority Leader of Garissa County Assembly was a public office and as such not personal to the applicant. He concluded by deponing the applicant would thus not suffer irreparable loss if this application was not allowed.

Learned counsel for the applicant Mr. Otieno submitted that the applicant had filed an appeal against the entire judgment and one of the grounds was to challenge the jurisdiction of the Tribunal. He stated that they would seek to demonstrate to the court at the appropriate time that the Tribunal had no jurisdiction to entertain the matter and given orders in the first place. Counsel submitted that the decision to remove the respondent was made by the County Assembly under standing Order No. 15 of the Garissa County Assembly and as such, this was not a dispute within the meaning of section 40 of the Political Parties Act to enable the Tribunal take conduct of the hearing. Counsel submitted that jurisdiction was everything.

In consequences counsel, stated that if the orders of the Tribunal were executed the applicant's appeal would be of no consequences. Counsel emphasized that the respondent was removed from the position of Leader of Majority on 12th octoboer 2015 by a popular vote of members of the Assembly numbering 22 out of 24 who were entitled to vote. This was a clear demonstration that the members had lost confidence in him. Counsel submitted that the position of Leader of Majority was created by Article 108 of the Constitution and reinforced by Article 117 of the Constitution as well as standing Order No. 15.

Counsel submitted further that the position of Leader of Majority carried the weight of several members representing the people as emphasized in the preamble to the Constitution under Article 1. He stated that the position made the person a member of the committee which set the sitting calendar and oversaw the other function of the assembly. The holder also sat in the committee where staff and other matters were discussed. He was thus a key player in meetings or sittings in the Assembly and was also a key player in constituting other committees. Counsel stated that as the recess had now ended, there would be a major disruption in the business of the Assembly because it would not be possible for the respondent to table any motion in the Assembly as there would be no consensus.

With respect to the replying affidavit, counsel submitted that the applicant was still in charge as change of guard must come from the Chief Whip and the Speaker, and such communication had not been annexed to the replying affidavit. Counsel submitted that the Orange Democratic Movement party did not participate in the proceedings before the Tribunal as this was an Assembly and not a party issue. Counsel stated that the balance of convenience was in favour of the applicant. He urged this court to allow the application

Mr. Orwenyo Learned Counsel for the respondent, relied on the replying affidavit. Counsel submitted that the orders of the Tribunal sought to be stayed had already been executed and that the respondent had already resumed his duties. Counsel submitted further that the process of removal of his client was illegal and that the Tribunal thus acted in the right way. He stated that the Majority Leader was a public officer and as such no irreparable loss would be suffered by the applicant if the application was not allowed. He submitted that the respondent had resumed his duties and that the activities were running smoothly. He stated that important parties were not enjoined and thus the application was defective.

Counsel also submitted that the decree or judgment being challenged was not annexed, and as such the application should thus not be allowed. He stated that the Orange Democratic Movement party was a participant in the proceedings before the Tribunal. He stated also that since Standing Order No. 15 stated that the majority party leader was to be elected by those from the majority party, it was a party issue and the County Assembly merely adopted the nomination.

He submitted that the balance of convenience was in favour of the respondent as a competent Tribunal had determined that due process had not been adhered to. He urged that the interim orders sought should not be granted and that the main appeal be heard and determined on merits.

In response, Mr. Otieno submitted that the law requires court to deal with parties and issues before it. The applicant had no issue against the Orange Democratic Movement and choose not to join them as parties in the application and in the appeal. Counsel submitted also that the questions regarding the decree and judgment would be dealt with during the appeal. He emphasized that the ouster of the respondent was done by the majority coalition the Orange Democratic Movement party.

I have considered the application, and submissions on both sides.

This is an application for stay of execution of a decree or order. It was brought under Order 22 Rule 22 of the Civil Procedure Rules. That rule in my view deals with situations where a decree has been sent for execution to a court and an application is made in the executing court for stay of execution. It does not apply to applications for stay of executions pending appeal.

The correct order for the stay of execution pending appeal, is Order 42 of the Civil Procedure Rules, Rule 6 thereof provides, in the relevant part, as follows:-

6(1) No appeal or second appeal shall operate as a stay of execution of proceedings or 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 an 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 an 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 (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.

Counsel for the respondent has argued that the Orange Democratic Movement party was not named in the application and in the appeal and as such the application is fatally defective. I have perused the record herein. The application has Mohamed Abdi Farah as applicant and Ibrahim Abdi Ali as respondent. The appeal No. 1 of 2016 has the same parties. The description of the parties in the Tribunal as given in the memorandum of appeal, shows that Ibrahim Abdi Ali was the claimant and Mohamed Abdi Farah was 1st respondent and Orange Democratic Movement was the 2nd respondent. It is thus clear to me that Orange Democratic Movement was also a party in the Tribunal proceedings.

Even though Orange Democratic Movement was a party in the Tribunal, if the applicants or appellants has no issue with them, he needs not to join them as a party in the appeal or application. The court will deal with all issues on appeal as they relate to the parties before it. It will rely on the record of proceedings in the Tribunal to determine the rights of the parties before it. Therefore in my view, the fact that a party in the Tribunal proceedings was not named in these appeal proceedings and the application does not make the appeal or the application fatally defective. I dismiss that objection.

The second complaint of the respondent's counsel, is that the decree complained of was not annexed to the application for stay of execution. The rules do not specifically say that such a decree or judgment be annexed to an application for stay of execution pending appeal. However, the court staying execution of decree or judgment has to stay execution of something specific or something it can verify. As such, I would expect that either the judgment or decree order or the file of the Tribunal to have been brought to this court to assist in determining this application.

I do not see anything in this file which resembles the proceedings before the Tribunal or the decision made by the Tribunal. As such, this court is not sure what decision the Tribunal made and in what ways it can be stayed. The documents filed do not even paraphrase what the Tribunal decided. In my view this lapse of details by the applicant has disabled this court from its ability to exercise its discretion to grant the requested stay of execution. This court cannot grant stay of execution in the air, it has to grant stay of execution of specific orders.

Arguments have been put by both sides on whether or not a stay of execution of Tribunal decision granted by this court will disrupt the operations of the Garissa County Assembly. The applicant's advocate has stated that the applicant is still in charge and conducting the affairs of Leader of Majority until the Speaker communicates a contrary position. The respondent's counsel on the other hand, says that the respondent has resumed his position of Leader of Majority and is performing his functions without any problem.

None of the counsel has provided any evidence or facts to support their respective positions. It is not the function of this court to investigate or interfere with the internal running's of the Garissa County Assembly. In my view, both sides have been economical with the truth.. I will only observe that if indeed it was true that the Speaker had to communicate the changeover of guards then one would wonder

that if the Speaker had not done so, why the respondent's counsel is saying that his client is performing the functions from which he had been ousted.

The consideration to be taken by the court in an application for stay of execution of a judgment or decree or order, are clearly spelt out under Order 42 Rule 6(2) of the Civil Procedure Rules. Firstly the court has to be satisfied that substantial loss may result to the applicant unless the order is made and that the application was made without undue delay. Secondly that the applicant has offered to give security.

The Tribunal's ruling was said to have been delivered on 11th February 2016. The appeal and application were filed on 15th February 2016, which is about 3 days later. In my view, the application herein was made without unreasonable delay.

With regard to substantial loss, such loss is meant to relate to the applicant. The applicant, other than talking about possible disruption of business in the County Assembly which is a public institution, has not given any facts to state that as an individual he would suffer substantial loss. As such this application cannot be determined in his favour as he has not demonstrated the substantial loss which he would suffer, if the stay order is not made.

With regard to security, the applicant has not shown or indicated in any way that he is willing or able to give security for the due performance of the decree or order. The law requires, in my view, that he at least indicates that he is ready and willing to give security, even if the court in the end decides to give the stay order without the condition of the security. Since he has not indicated that he is able or willing to give security for satisfaction of the decree or order, he has failed to fulfil another requirement for a grant of stay of execution of decree or order. On that account also, the application will fail.

To conclude, I find that the application has no merits. The application is hereby dismissed. With regard to costs, since the appeal is still alive, I will order that costs will follow the decision to be made in the appeal.

Dated and delivered in Garissa this 23rd day of March 2016.

GEORGE DULU

JUDGE