



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION CASE NO. 6 OF 2013

**IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE
ELECTIONS (GENERAL) REGULATIONS 2012 AND ELECTIONS (PARLIAMENTARY AND
COUNTY) PETITION RULES**

AND

**IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR SENATE MAKUENI COUNTY
HELD ON 4TH MARCH, 2013**

BETWEEN

PARTY OF INDEPENDENT CANDIDATES OF KENYA.....1ST PETITIONER

JOHN HARON MWAU.....2ND PETITIONER

VERSUS

HON. MUTULA KILONZO.....1ST RESPONDENT

JOSEPH KAMANDI KITONYI.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. The applicants filed a Notice of Motion dated the 28th day of July, 2014 seeking interalia:
 - Stay of execution of the ruling and orders issued herein on the 10th June 2014 pending lodgment, hearing and determination of an intended appeal.
 - Pending the lodgment of the appeal, hearing and determination of the appeal, an injunction order do issue against the 2nd and 3rd Respondents either by themselves, agents, servants and/or employees from attaching and selling the alleged properties of the 1st and 2nd applicants.
2. The application is premised on grounds that: The applicants herein filed an Election Petition against the respondents. The 1st respondent passed away necessitating the withdrawal of the petition wherein the court awarded the costs of the petition to the 2nd and 3rd respondents. A bill of costs filed was fixed at Kshs.2,223,076 – a reference filed was summarily dismissed. The applicants filed a Notice of Appeal on the 16th June 2014 and they intend to appeal.

3. In the meantime the 2nd and 3rd Respondents through their Auctioneers. M/s Keysian Auctioneers Limited, have purportedly proclaimed goods purported to belong to the 2nd applicant with the intention of attaching and selling the same through a public auction without taking out execution proceedings as required by the law.

4. That the 2nd and 3rd Respondents intend to proclaim for an amount that is more than the security deposited in court of Kshs.500,000 which has been released to them; the properties proclaimed belong to the 2nd applicant whereas costs were awarded against both applicants who are separate legal entities. Unless an order of stay of execution is granted the applicants will suffer substantial loss and the appeal which has a high chance of succeeding will be rendered nugatory.

5. The 2nd applicant swore an affidavit in support of the application reiterating what is stated in the grounds upon which the application is based and added that the sum awarded in costs was inordinately excessive and unjustifiable. Costs were not capped, reasons for the award were not given. The proclamation made is unfair and unjust as the 2nd and 3rd defendants are only pursuing him without regard to the 1st applicant while costs were awarded against both of them. The proclamation was made in bad faith as the 2nd and 3rd applicants were never served with any decree, demand and/or notice prior to the attachment of goods purported to be his.

6. The 2nd and 3rd respondents filed grounds of opposition. They opposed the application on grounds that it is an abuse of the court process without any merit for grant of stay of execution and that recovering costs awarded by the court cannot make one suffer substantial loss.

7. Rival submissions by both counsels have been taken into consideration.

8. In seeking stay of execution the applicants invoked the provisions of Order 22 Rule 22 of the Civil Procedure Act that provide thus:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

9. The applicants have averred that the ruling of the Deputy Registrar dated 7th April 2014 that was subsequently confirmed by the court that condemned them to pay costs of Kshs.2,218,412 were inordinately high. They have also sought injunctive orders against the execution of the decree by the respondents. In exercising the discretion bestowed upon it, the court must ensure that neither party suffers prejudice.

10. Stay of execution pending appeal under the Civil Procedure would be governed by Order 42 and specifically Rule 6. The court is seized of jurisdiction to grant orders sought. The discretion is exercised pursuant to conditions stipulated. It would have to consider whether: The applicant will suffer substantial loss; the application should be made without unreasonable delay and on provision of such security that the court may impose.

12. The application herein was filed on 28th July 2014 some 21 days after the ruling was delivered. It was therefore made without any delay.

13. Reasons given by the applicant for the loss to be suffered as deponed in paragraph 4 of the affidavit are that the 2nd applicant is the one who will be subjected to payment of costs which are illegal and

unlawful; the proclamation was done in bad faith; if the appeal is successful the 3rd respondent being a public institution that works through a budget cycle will take long before reimbursing the costs awarded.

14. The applicants have not demonstrated the kind of loss they may suffer. In essence they acknowledge that costs will be refunded if the appeal is successful save that it will take long. The only issue being the delay in payment envisaged does not amount to substantial loss. This court is therefore not satisfied that substantial loss may result to the applicant if the relief sought is not granted.

15. Having reached that finding the application must fail. Accordingly, it is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of JULY, 2015.

L. N. MUTENDE

JUDGE