



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL CASE NO. 30 OF 2014

MARY WAIRIMU MURAGURI & 2 OTHERS.....APPELLANTS

versus

I.E.B.C. & 6 OTHERSRESPONDENTS

RULING

1. The 1st – 3rd appellants filed High Court Civil Appeal No. 30 of 2014 a memorandum of appeal under section 75(4) of the Election Act together with an application under certificate of urgency wherein they sought an order to enjoin the Speaker Nyeri County Assembly as a party and sought orders to restrain the Speaker of Nyeri County Assembly from receiving a certificate of validity of an election and issuance of direction allowing the nomination of appellants as members of the County Assembly Nyeri and further an order staying the execution of the judgment and or decree of Hon. Mrs. W. Juma pending the hearing and determination of this appeal.
2. When the application was placed before me under certificate of urgency I certified the same urgent and ordered it served upon the respondents for interpartes hearing. In the mention the 3rd, 4th – 13th appellants had filed High Court Civil appeal 227 of 2014 in the High Court of Kenya at Nairobi which was eventually transferred to Nyeri as High Court Civil appeal No 31 of 2014. They sought almost similar orders and when the matter was placed before justice J. Abuodha under certificate of urgency he certified the same urgent and issued an order to maintain status quo restraining the respondents from embarking on any process aimed at replacing the appellants.
3. When the matters were placed before me for interpartes hearing by the consent of the parties the same were consolidated for purposes of hearing and determination of the application for stay of execution of the judgment/decree of Hon. W. Juma pending the hearing and determination of the appeal herein.
4. **BACKGROUND**
5. After the election of 4th March 2013 the party list of nominated members of the County Assembly was challenged in the High Court in the case of the NATIONAL GENDER & EQUALITY COMMISSION v IEBC & OTHERS in Nairobi Constitutional Petition No. 147 of 2013 on the ground that the list as presented did not consider special interest groups. Arising from the judgment therein political parties were ordered to compile new lists for publication within 14 days of the judgment and in compliance with the said judgment IEBC published and gazetted a list of nominees.
6. Those who were aggrieved by the new list filed a constitutional reference No. 236 of 2013 ROSE WAIRIMU KAMOTHO & THREE OTHERS v IEBC at Nairobi which was subsequently dismissed.
7. Being aggrieved the petitioner filed an appeal in the Court of Appeal being Civil Appeal No. 169 of 2013 at Nairobi in which the Court of Appeal set aside the TNA nomination for the Nyeri

- County Representative and ordered that TNA shall within fifteen days of the date herein submit to the IEBC a proper party list. The IEBC shall in turn gazette the nominees within seven (7) days of receipt of the list.
8. The Court of Appeal for the purposes of this ruling had this to say:
 9. ***"In reaching this conclusion we are alive to the fact that once the nominees to parliament and to the County Assemblies under Article 97(1)(c) and 177(2) respectively have been gazetted as the High Court correctly observed in th National Gender and Equity IEBC and others petition No. 147/2013 [2013]eKLR they are deemed to be elected members of parliament and the County Assemblies and any challenge to the membership has to be by way of election petition under article 105 of the Constitution or part vii of the election Acts as the case may be. That however does not apply here as the complaint giving rise to this appeal was lodged with the IEBC and a constitutional petition filed in the High Court before the nominees were gazetted. We are therefore entitled to make the orders we have made.*** (emphasis added)
 - 10.
 11. This judgment to my mind is the genesis of the nomination problems in Nyeri County as in compliance with this judgment TNA the 2nd respondent submitted fresh lists to the IEBC 1st Respondent which now omitted the respondents but included the appellants in the gazette notice no. 15096 of 29th November 2013 leading to the filing of election Petition No. 2 of 2013 the subject of the appeal.
 12. At the interpartes hearing herein many issues were raised by the advocates for the parties most of which were purely procedural which I will leave to the judge who will deal with the substantive appeal to rule on. At this stage I will only confine myself to the issue of stay of execution pending appeal but must point out that Mr. Kibe Advocate for the 3rd-6th respondents raised a fundamental issue that is which law is applicable when it comes to an appeal from the decision of the magistrate court to the High Court as it seems that the elections Act has not provided for the same.
 13. **SUBMISSIONS**
 14. On behalf of the appellants Mr. Wamai Senior counsel submitted that the issues presented before the Chief Magistrate in petition No. 2 of 2013 raised issues which were substantially and directly in issue in civil appeal No. 169 of 2013 at Nairobi Court of Appeal and therefore the proper procedure would have been for the respondent to enforce the said order instead of filing petition No. 2 of 2013 which is prohibited by law.
 15. It was submitted that should stay not be granted the appellants will suffer substantial loss because they will lose all the benefits derived from holding the office member of County Assembly and when they lose those positions they might not be able to get the benefits of the judgment should they succeed on appeal. In support thereof the Supreme Court case of PETER MUNYA v DICKSON MUGODA KITHINJI & OTHERS PETITION No. 5 OF 2014 NKEN V HOLDER, ATTORNEY GENERAL 556 US and ANAMI SILVERSE LISAMULA V THE IEBC & 2 OTHERS SUPREME COURT PETITION NO. 9 OF 2014 were submitted.
 16. Mr. Ngige submitted that the appeal was arguable and has high chances of success from the basis that the trial magistrate wrongly assumed jurisdiction on how the judgment of the Court of Appeal was to be implemented or enforced contrary to the constitution as read with the Judicial Act. It was further submitted that since the lower court had issued a certificate in compliance with the Election Act this will set in motion the nomination process and therefore the balance of convenience is in favour of granting by taking into account public interest.
 17. It was further submitted that the function of County Assembly of Nyeri under Article 186 is likely to be affected since the 6th appellant will not be able to play her role thereto and that the respondent will suffer no prejudice since the appeal will be heard and determined within 6 months.
 18. Mr. Gori submitted that the memorandum of appeal raises triable issues and therefore the stay ought to be granted and the appellants allowed in the office since the 2nd respondent had complied with the order of the court of appeal.
 19. Mr. Ngunju for the 1st – 3rd appellants submitted that the 1st and the second appellants represented the marginalized group while the 3rd appellant represented the youth nominated by TNA. It was pointed out that they were not parties to High Court petition No. 236/2013 and Civil appeal No. 163/2013 and that the nomination of 17th July 2013 was not affected by the decision of the court of appeal. It was submitted that this is an arguable issue in the appeal herein.

20. It was submitted that the issue of the jurisdiction of the Chief Magistrate to give meaning to the decision of the court of appeal is an arguable issue in the appeal. It was submitted that this court has jurisdiction by virtue of its appellate jurisdiction to issue the orders sought.
21. Miss Kairu for the 1st respondent supported the application and submitted that order 44 rule 6 of Civil Procedure Rules 2010 gives provisions for stay and that the appellants have met the conditions set out therein in that the appellants are likely to suffer substantial loss and that the appeal was filed without undue delay.
22. Mr. Omboga for the 2nd respondent supported the application for stay pending appeal and submitted that TNA had complied with the decision of the Court of appeal and that none compliance with the Election Act by the same was as a result of the judgment of the court of appeal which has not been reviewed or set aside. He submitted that the law states that election disputes should be concluded within six months from the date of election which is now not the case.
23. Mr. Kibe Mungai for the 3rd – 6th respondents opposed the application. He submitted that the High Court sitting on appeal from the lower court has six months to determine the appeal from the date of judgment by virtue of Article 105 of the Constitution. He submitted that the judgment of the Court of appeal of 8th November 2013 should not have been made in the first place since they created an exception to the Election Act.
24. He submitted that before the lower court the respondents were able to demonstrate that IEBC never gazetted anybody. He submitted that there was no appeal before this court since under section 75(3) of the Election Act gives only two orders which the court can make

i. declaration whether the candidate was validly elected.

ii. Whether or not a fresh election should be held.

1. It was submitted that since the lower court held that TNA had not followed the law in nominating candidate no nomination has taken place and the process is incomplete. It was further submitted by Mr. Mungai that the Civil Procedure Rules are not applicable in the appeal since it is an appeal arising out of election petition where the election rules are applicable unless in the court of appeal where the rules say that the court of appeal rules are applicable. In support of this submission Mr. Mungai relied on the following cases:
 - a. JARED ODOYO OKELO vs IEBC & OTHERS NAIROBI COURT OF appeal CIVIL APPEAL NO. 164 OF 2013.
 - b. TWAHER ABDULKARIM MOHAMED V IEBC & OTHERS MOMBASA HIGH COURT CIVIL appeal NO. 154 OF 2013.'
1. From the submissions herein the court has identified the following issues for determination in this application.
2. ***a. Whether this court can grant stay of execution pending appeal.***
3. ***b. On what grounds should the stay be granted.***
4. ***c. Whether the appellant have made up a case for the grant of orders sought.***
5. The jurisdiction of the High Court to hear appeals is derived from the provision of Article 165(3) of the Constitution giving any other jurisdiction original or appellate conferred on it by legislation. In the case of election of County Assembly representative, the appellate jurisdiction is conferred by section 75(1A) of the Election Act which provides as follows:
6. ***75(1A) a question as to the validity of election of a member of a County Assembly shall be heard and determined by the Resident Magistrate court designated by the Chief Justice.***
- 7.
8. ***4 An appeal under subsection 1(A) shall lie to the High Court on matters of law only***
9. Rule 34 of the Election (Parliamentary and County Assembly) Petition Rules 2013 provide for the procedure in appeals to the High Court as follows:
10. ***34(1) an appeal from the magistrates court under section 75 of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition....***

11.

12.(10) *The High court may confirm, vary reverse the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction* emphasis added

13.

14.I therefore take the considered view that in exercise of the powers under Rule 34(iv) as read together with the overriding objectives under Rule 4 of the Election Rules this court has powers to grant order of stay of execution pending determination of an appeal on an intended appeal.

15.The principles upon which stay pending appeal can be granted have now been set by the Supreme Court in many election petition cases which have been filed before it and in GATIRU PETER MUNYA v DICKSON MWENDA KITHINJI & OTHERS PETITION No. 5 of 2014 that before a court can grant an order for stay of execution the appellant or the intended appellant must satisfy the court that

i. *The appeal or the intended appeal is arguable and not frivolous and*

ii.

i. *Unless the order of stay is sought is granted the appeal or the intended appeal were it to eventually succeed would be rendered nugatory.*

ii.

i. *That it is in the public interest that the order of stay be granted.*

ii.

1. Based upon the above principles is the appeal herein arguable?? It has been pointed out by the appellants that the Chief Magistrate did not have jurisdiction to entertain petition No. 2 of 2013 and that the respondent if they were not satisfied with the nomination process as a result of the decision of the Court of Appeal should have proceeded to or with execution of the said judgment. The respondent has urged that it was the court of appeal which did not have jurisdiction and therefore the said judgment/ruling was made without jurisdiction these issues to my mind are arguable grounds of appeal.

2. The appeal also raised the issue as to whether the election petition filed in petition No. 2 of 2013 was an interpretation of the decision of the court of appeal or the same rose out of a new cause of action the 2nd respondent having nominated the appellants herein.

3. There is further the issue raised by Mr. Kibe as to whether the 2nd appellant complied with the court of Appeal decision in gazetting the appellants or whether it was just an amendment of the gazette notice which had been annulled by the Court of Appeal and fourth whether the trial court was right in finding that the 1st respondent had not complied by the election law in view of the time lines set by the court of appeal in its judgment.

4. On the issue as to whether the appeal will be rendered nugatory relying on the Supreme Court decision in PETER MUNYA supra I take the view that if stay is not granted and the judgment of the Chief Magistrate is executed the nomination process will be commenced and chances are that the appellants might not secure fresh nomination and therefore should they succeed in the appeal their appeal will be rendered nugatory as they might be new set of nominees who are not a party to these proceedings.

5. On the issue of public interest, I take the view that should the judgment of the Chief Magistrate be executed and the nomination exercise commenced the parties who will not be satisfied with the said exercise including but not exclusive to the parties before this court will file fresh petitions and therefore the circle will continue. It is therefore in the best interest of the public that a stop be put in the process at this stage pending the determination of the appeal herein on merit.

6. **ORDER**

7. Having considered all the relevant matters herein I therefore allow the application and grant stay of execution of the judgment of the Chief Magistrate in petition No. 2 of 2013 pending hearing and determination of he appeal.

8. The party to comply with Rule 34 of Election (Parliamentary and County Assembly) Petition Rules 2013 and the matter fixed for mention before the Resident Judge on 3rd November 2014 for direction.

9. The cost of this application should be in the cause.

Dated, signed and delivered at Nyeri this 26th day of September 2014.

J. WAKIAGA

JUDGE

Read in open court by Justice J. Abuodha on behalf of Justice J. Wakiaga.

J. ABUODHA

JUDGE