



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 464 OF 2014

BETWEEN

KENNETH OGALO.....APPLICANT

AND

THE INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....RESPONDENT

REGISTRAR OF POLITICAL PARTIES....1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT...2ND INTERESTED PARTY

RULING

Introduction

1. By a Chamber Summons dated 11th December, 2014, the applicant herein who describes himself as a member of the Orange Democratic Movement (ODM) Party and a Kenyan citizen entitled under Article 3, 22, 23 and 258 of the Constitution seeks the following orders:
1. **This application be certified as urgent and heard ex parte in the first instance;**
2. **The applicant, Kenneth Ogallo be granted leave to apply for judicial review and an order of certiorari to remove into the High Court and quash the decision of the respondent contained in and reported in the respondent's publication dated Nairobi: Friday, December 5, 2014 directing all the Political Parties to carry out nominations of the Homabay Senate Seat by Friday the 19th of December, 2014 but a further decision reported in the Standard newspaper dated Thursday, December 11, 2014 that the nominations of the Homabay Senate Seat will be done on Monday 15 December 2014 and setting the date of the by election as the 2nd of February, 2015.**
3. **The applicant, Kenneth Ogallo be granted leave to apply for Judicial Review and an order of prohibition directed to the Respondent prohibiting it from carrying out and/or proceeding with the nominations and or by elections and or timelines set for the nominations and by elections, and or receiving names of nominees from political parties or gazetting the said names, until such time as the speaker of the National Assembly shall have declared the seat vacant.**
4. **The grant of leave aforesaid do operate as a stay the nominations of the Homabay Senate**

- and or the by elections and or timelines set for the nominations and by elections, and or receiving names of nominees from political parties or gazetting the said names, until such time as the Speaker of the National Assembly shall have declared the seat vacant.
5. **The costs of this application be in the cause.**
 2. These proceedings were triggered by the death of **Hon. Gerald Otieno Kajwang**, the late Member of the Senate for Homabay County on 18th November, 2014 and the subsequent directive given to the political parties to nominate their candidates by 19th December, 2014.

6. On 16th December, 2014 when the matter came before me for hearing, **Mr Gichugi** learned counsel for the 1st Respondent and 1st Interested Party informed the Court that his clients were not opposing the application for leave as sought in prayers 2 and 3 hereinabove. Accordingly prayers dealing with leave were granted as sought. It follows that the only pending prayer and which is the subject of this ruling is prayer 4 seeking direction that the leave granted herein do operate as a stay.

Applicant's Case

7. The Applicant's case as propounded by **Miss Opiyo**, his learned counsel was that unlike in the past bye elections where the 1st Respondent has given the political parties more than one month to conduct their party nominations, in the case under consideration the 1st Respondent only gave the parties one month to do so hence denying the applicant a chance to participate in the democratic process as contemplated under Article 38 of the Constitution.
8. According to the applicant the consequences of a flawed nomination would be that the Court would be liable to nullify the whole electoral process which ought not to be the case if a stay is granted and sufficient time granted for nomination as no prejudice would be occasioned to the Respondent.

Respondent's and 1st interested party's Case

9. In response to the application, the Respondent and 1st interested party contended that there are specific timelines provided for in the Constitution which the Respondent is duty bound to comply with if the Constitutional timelines for the bye-elections are to be adhered to. It was contended by **Mr Gichugi** that the applicant had not demonstrated the grounds which would justify the grant of the stay sought. According to learned counsel, the applicant ought to have followed the dispute resolution mechanisms provided in the law in order to resolve the issues in contention rather than moving the court for the orders sought. In support of his submissions learned counsel relied on **Republic vs. National Transport and Safety and 10 Others [2014] eKLR** and **Kenneth Odero and 2 Others vs. IEBC Constitutional Petition No. 611 of 2014.**

Determinations

10. I have considered the submissions made by the parties and this is the view I form of the issues raised.
11. It was contended that since the applicant's political party does not seem to be aggrieved with the Respondent's decision, the applicant ought not to have brought these proceedings. This contention was appropriately dealt with by **Lenaola, J** in **Kenneth Odero and 2 Others vs. IEBC** (supra) when he expressed himself thus:

“On my part, it is obvious to me that the Respondent's Counsel's submission that the Petitioners have no locus standi is misplaced. As members of a political party, ODM, they are entitled to file a case stating that IEBC may be acting in contravention of the IEBC Act and the Constitution. They need not be officials of ODM to do so...they are properly before the Court in their personal capacities as citizens out to ensure the compliance with the Constitution.”

12. On 16th December 2014 leave to apply for judicial review orders was granted in these proceedings. Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a *prima facie* case has been made out and ought not to be granted as a matter of course. See **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR.**
13. As leave had been granted in these proceedings without any opposition from the Respondents and as no application has been made to set aside the said leave, it is my view that it would be an exercise in futility for this Court to embark on an investigation at this stage whether or not the applicants' case is arguable since to arrive at a decision in the negative would impact negatively on the leave already granted. Consequently I do not intend to embark on that futile and absurd exercise.
14. However the mere fact that the application discloses a *prima facie* case does not necessarily qualify the matter to a grant of stay. The Court despite a finding that the applicants has established a *prima facie* case must proceed to address its mind on whether or not to direct the leave so granted to operate as a stay of the proceedings in question.
15. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially.
16. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**
17. However even where the leave is granted, it was held in **Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.
18. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.
19. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

20. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on

mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

21. In these proceedings, the by-election must constitutionally be conducted within 90 days of the vacancy occurring in the Senate and a vacancy occurs when for example the holder of the office in question dies. Unless therefore the proceedings herein are heard and determined within the next 60 days, the success of the instant application may well be rendered nugatory. As held hereinabove the stage at which the proceedings sought to be stayed have reached is important to the determination of the stay. In my view taking into account the period which the Respondent gave for nomination in similar circumstances, it cannot be said that the electoral timetable has gone too far beyond salvage.
22. As was held by the Supreme Court in Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR:

“The matter before us is similar to that in the Munya case, in that the constitutional timelines for a by election, which is a relatively short period, have already started running. It is apparent, therefore, that this Court runs the risk of an election being held while the appeal is pending, if a stay is not granted. This scenario would present an awkward situation for both the Court and all parties to this application; a situation best avoided. Therefore it is the opinion of this Court that this appeal would be rendered nugatory, if a stay is not granted. As to whether grant of such stay would be in the public interest, we note that the applicant cited the *dictum* in the Munya case in his submission that public funds are at risk of being expended for an election when there is an impending appeal that has a high probability of success. He asked that this Court safeguards this public interest. If this Court had any doubt as to this argument, our anxieties are allayed by the 2nd respondent’s submission. The 2nd respondent, IEBC, is a constitutional body charged with conducting elections in this Republic. In so doing, it expends public funds. The Constitution decrees under Article 201(d) of the Constitution that public money shall be used in a prudent and responsible manner. The IEBC has cited cases where it had expended public funds to prepare for elections that finally never materialized, because of the outcome of Court decisions. There can be no better reason for grant of stay than in this case where the IEBC itself is calling out loud for grant of stay so as to safeguard public funds.”

23. Similarly in this case since the Respondent has conceded to the grant of leave, a clear recognition of the existence of a *prima facie* case to paraphrase the Supreme Court, public funds are at risk of being expended for an election when there is an impending judicial review which the Respondent appreciates is not frivolous.
24. The Respondent and the 1st interested party have however relied on a case of Kenneth Odera and 2 Others vs. IEBC Constitutional Petition No. 611 of 2014 in which **Lenaola, J** declined to extend the period for nominations by three weeks *to allow efficient navigation into the hearing logistics involved in the Senatorial race*. What was in contention was the issue whether the Respondent herein ought to have consulted the Petitioner’s party before setting the date for nomination. I agree with **Justice Lenaola** that the order as framed by the Petitioner in that case was incapable of being granted. In this case however, what is sought is not an extension of the nomination period but a stay of the Respondent’s decision. What is in effect sought is that the time be abridged which in my view does not necessarily affect the constitutional period within which the by-election is to be conducted. As was held by the Supreme Court in Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others (supra):

“Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court

cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker.”

25. Based on the decision of the Supreme Court it is my view and I so hold that this Court has jurisdiction to direct that the leave granted herein operates as a stay of the decision in question.
26. The applicant has cited other previous by-elections in Makueni County and Trans Nzoia County in which the Respondent stipulated a period for party nomination which was more than one month. Whereas this Court is not the forum for determining the period for the political parties to nominate their candidates, where the period given by the Respondent is such as to deprive the electors of reasonable time within which to nominate their representatives the Court may well intervene to ensure that the purpose and principles of the Constitution being protected and promoted are achieved. Where for example the Respondent gives the parties one day after the notification of the vacancy to nominate their candidates, it is my view that this Court would be properly entitled to intervene. In my view a reasonable time must be determined with respect to the circumstances of the case and the Respondent’s practice.
27. The law is that if the decision-maker unreasonably departs from the publicly stated policy or customary practice or reneges on an earlier decision or undertaking thus confounding the applicant’s legitimate expectations from the decision-maker, then it can also be argued that there has been a breach of the duty to act fairly. A person or a group may have legitimate expectation that they will be consulted by the decision-maker or if the decision-maker has made promises or given undertakings which the decision in question will alter. However this procedural approach does not prevent the public body changing its policy, so long as it does so in a proper manner taking account of legitimate expectation for consultation, an oral hearing or whatever else is necessary to comply with the duty to act fairly. See Council of Civil Service Unions vs. Minister For Civil Service [1985] AC 374 At 408 HI; Attorney General of Hong Kong vs. Ng Yien Shiu [1983] AC 629; R. vs. Liverpool Corporation Ex Parte Liverpool Taxi Fleet Operators Association [1972] 2 QB 299.
28. As was appreciated by the Court in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240.

“By rejecting the applicants decision to change the tariff as proposed, the court will be sending out a clear signal that legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised...The applicant in conducting its affairs is entitled to rely on certainty and regularity of law. The capriciousness, oppression and arbitrary application of the tariff retroactively is the antithesis of certainty and regularity of law. Having written to the applicants’ predecessor and having by conduct made the applicant rely on it as the applicant having relied on the representations in planning its affairs, the law must intervene to protect settled expectations.”

29. Therefore whereas this Court cannot dictate to the Respondent the period within which party nominations are to be conducted and without pre-empting the outcome of the intended Motion, the Court is entitled to interfere where the Respondent actions are unreasonable in the sense that the said actions go against the expectations of the electorates based on the Respondent's prior conduct.

30. Order 53 rule 1(4) of the *Civil Procedure Rules* provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise

31. In other words the Court has the power to grant a stay on such condition as it deems appropriate including the period for which the said stay is to last depending on the peculiar circumstances of the case before it. Having considered the issues raised herein, it is my view that this Court ought to balance the interest of the applicant vis-à-vis the need for the Respondent to comply with the Constitutional provisions relating to the conduct of by-elections. In my view, in granting conditional or limited stay under Order 53 rule 1(4) aforesaid, the Court ought to take into account the overriding objective that when confronted with such circumstances it has a duty is to consider the twin principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. Therefore the Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

32. In this case it was not contended by the Respondent and interested party that the grant of the order of stay even for a short period would adversely affect the Respondent's ability to conduct the bye-elections as contemplated by the law. Taking into account the fact that the intended by-election was occasioned by the death of the holder of the senatorial post for Homabay County, it is my view that the Respondent ought to have given a reasonable period to allow for the nominations as it has done in the past.

33. Leave having been granted herein, in order to secure the interests of all the parties, the order which commend itself to me and which I hereby grant is that the order that the political parties do nominate their candidates for senatorial office of the Member of the Senate for Homabay County on or before 19th December, 2014 be and is hereby stayed for a period of 10n days from the date hereof.

34. The costs of the application will be in the cause.

35. It is so ordered.

Dated at Nairobi this day 17th of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Opiyo for the Applicant

Mr Gichagi for the Respondent and interested party

Cc Richard