



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 65 of 2013

MUSA TIPEPE NAINI.....PETITIONER

AND

TOM MBOYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

COMMISSION ON HIGHER EDUCATION.....3RD RESPONDENT

JOSIAH TARAIYA KIPELIAN OLE KORES.....4TH RESPONDENT

RULING

1. This is the 4th Respondent's/Applicant's **Notice of Motion** dated **12th February 2013**. The application seeks one main order that pending the hearing and determination of the appeal, this honourable court do order stay of execution of the judgment of the court delivered on **7th February 2013** together with the consequential decree and orders. In the alternative, pending the hearing and determination of **Civil Application No. 27 of 2013** in the Court of Appeal there be a stay of execution of the judgment and decree of the court delivered on **7/2/2013**.
2. The application is based on the several grounds stated in the application and is supported by the affidavit of **JOSIAH TARAIYA KIPELIAN OLE KORES** sworn on **12th February 2013** as well as his **Further Affidavit** sworn on **13th February 2013**.
3. Briefly, the Petition herein was heard and on **7/2/2013**, when the Court rendered its judgment whereby the court allowed the petition and made orders quashing the applicant's nomination certificate issued by the Returning Officer, the 1st Respondent herein. The Court also ordered the Returning Officer to consider the Applicant's nomination papers in light of the 3rd Respondent's letter of 22nd January 2013. The applicant herein seeks a stay of execution of the said judgment.
4. The Applicant is apprehensive that should the Respondent proceed to execute the judgment and decree of the court he stands to suffer substantial injustice for various reasons among them that he will be prevented from contesting for Governorship of Kajiado county hence denying him his constitutional right to contest for the post. It is also the Applicant's contention that the People of Kajiado County will be denied their right to vote for a contestant of their choice, the Court having quashed his nomination.

5. The Applicant avers that in view of the short time set by the 2nd Respondent in preparation for the elections scheduled to take place on **4/3/2013** he shall be locked out from contesting the Governorship position and his right to appeal against the Judgment will be rendered moot, and in the event that the Court of Appeal finds in his favour his rights would have been violated without any remedy.
6. The application is opposed. The 3rd Respondent opposed the application by filing **Grounds of opposition** dated **13th February 2013** and filed on even date. It is their contention that the application is bad in law, misconceived, incompetent and an abuse of the court process. It is their case that the applicant has laid no basis, legal or factual, to warrant the court to exercise its discretion to grant orders staying the judgment delivered on **7/2/2013** as well as the consequential decree and orders.
7. In opposing the application, the 2nd Respondent filed a **Replying affidavit** sworn on **13th February 2013** by **MAHAMUD MOHAMED JABANI**, described as the Manager Legal Services of the 2nd Respondent. It is deponed in the said affidavit that in compliance with the orders of the Court in the judgment delivered on **7/2/2013**, the 1st Respondent called the Applicant in order to reconsider his decision in terms of the order of the court. However, the Applicant did not honour the 1st Respondent's invitation and as a result the 1st Respondent proceeded to issue the nomination certificate to another candidate. It is the 2nd Respondent's case that in view of the foregoing, the present application has been overtaken by events.
8. It is also deponed on behalf of the 2nd Respondent that the printing of the ballot papers for the forthcoming general elections is at an advanced stage and the orders sought in the present application, if granted will impede and/or disrupt the work of the commission on the forthcoming general elections.
9. The application was also opposed by the Petitioner who filed Grounds of opposition on **13th February 2013**. It is contended on behalf of the Petitioner that the application is frivolous, vexatious and an abuse of the court process. It is the Petitioner's case that there is nothing to stay as the order to "quash the certificate forthwith" was self-executing thus the certificate is already quashed and can only be reinstated by the Court of Appeal. It is also the Petitioner's case that the application of 'stay of judgment' is in form and effect an application to 'set aside' the orders of the court.
10. I have considered the application, the affidavits in support thereof, the Grounds of Opposition as well as the Replying affidavit and the oral submissions of counsel. Having done so, I take the following view of the matter.
11. This Court quashed the applicant's nomination certificate because it was apparent that the Returning Officer was not privy to the letter dated **22nd January 2013** addressed to the Applicant by the Commissioner for Higher Education (CHE). The Applicant had made an application requesting the CHE for recognition of the degree of Bachelor of Business Administration awarded by Universidad Empresarial de Costa Rica. In their reply, the CHE stated categorically that the said degree was not recognised by the commission. That fact has not changed. The CHE has not changed their position as stated in the letter dated **22nd January 2013**.
12. To grant a stay of execution in this matter will in effect mean that the Court has reneged from its Judgment delivered on **7th February 2013**. Although this Court is not privy to the grounds of appeal advanced by the applicant, if any, it is apparent that CHE's position on the non-recognition of the degree of Bachelor of Business Administration will not change.
13. I am alive to the fact that the Applicant has a constitutional right to contest for whichever elective post he desires, in this case, the post of Governorship. However, this right cannot be used as a leverage to subdue constitutional and other legal requirements for elective leadership. The integrity of the Constitution and the institutions established under the said Constitution must be upheld. It should also be remembered that this Court has to balance between the interests of the public in the integrity of a free, fair transparent and democratic election vis-à-vis the rights of the applicant.

14. In view of the foregoing and for purposes of preserving the integrity of the Electoral process, I hereby dismiss the applicant's application dated **12th February 2013** with costs to the Petitioner/Respondent.

DATED, READ AND DELIVERED AT NAIROBI

THIS 15TH DAY OF FEBRUARY 2013

E. K. O. OGOLA
JUDGE

Present:

Ojwang Agina & Ndubi – for Respondent

Malonza for 1st and 2nd Respondent

Wetangula & Okwaro for 4th Respondent