



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
ELECTION PETITION APPEAL NO. 2 OF 2013

LESIIT J.

**JACOB MWIRIGI
MUTHURI.....
APPELLANT**

V E R S U S

**JOHN MBAABU
MURITHI.....
1ST RESPONDENT**

**LUCY MBITHI R/O BUURI
CONSTITUENCY.....2ND
RESPONDENT**

**THE INDEPENDENT ELECTORAL
AND BOUNDARIES
COMMISSION.....
.....3RD RESPONDENT**

RULING

1. The Applicant Jacob Mwirigi Muthuri is the 1st Respondent in the Chief magistrates Court Election Petition No. 1 of 2013. He has brought this Motion dated 10th June, 2013 and filed in court on 11th June, 2013 pursuant to Rules 4 and 5 of the Elections (Parliamentary and County Elections) Petition Rules 2013 and Article 59 of the Constitution, 2010. The application seeks the following orders:

1. “...
2. ...
3. **That there be a stay of proceedings Meru Chief Magistrates Election Petition No. 1 of 2013 pending the hearing and determination of the appeal.**
4. **That cost of the application be provided for.”**

2. The basis for the application cited on the face of the Motion are the following five grounds:

1. **That the 1st Respondent is aggrieved by the Order of the lower court made on 4.6.201 directing for the scrutiny and recount of all ballot papers as no basis had been laid.**
2. **That the Petitioner has instituted an appeal against the said ruling and the proceedings have been typed and certified.**
3. **That the Petitioner shall not be prejudiced in anyway if the orders of stay of execution are granted.**
4. **That this application is intended to facilitate the just and proportionate resolution of the dispute between the parties.**
5. **That this application has been instituted without unreasonable delay.**

3. The 1st Respondent in this application and appeal is JOHN MBAABU MURITHI. He has opposed the application vide a replying affidavit dated 18th June, 2013. The gist of his affidavit is that the main complaint and main prayer of his petition was recount of votes. He avers that his

- application for recount and scrutiny together with his affidavit in support laid a basis for the recount and scrutiny of votes ordered by the learned Petition court.
4. The 1st Respondent has filed grounds of opposition to the instant application raising 10 grounds.
 5. Mr. Mwanzia for the Applicant urged the court to order a stay of the Petition court's order for scrutiny and recount of votes pending the hearing and determination of Appeal. Counsel urged that the Petition court erred to issue the order as the Pre-Trial conference is yet to be conducted and further no basis has been set or scrutiny and recount. Furthermore, Mr. Mwanzia urged, the Petition did not include a prayer for scrutiny. Mr. Mwanzia urged that Rule 32(1) of the Election Rules provided that recount or re-tallying of votes could be ordered where recount is the only prayer in the Petition. He urged that the Petition had other prayers in addition to recount.
 6. Mr. Mwanzia submitted that all the allegations made by the Petitioner which are the basis of the order of scrutiny and recount was ordered were contested in several paragraphs of the Applicant's Replying Affidavit. Counsel urged the court to allow the application.
 7. Mr. Ondari for the 1st Respondent herein opposed the application counsel urged that a stay could only be ordered if there is an arguable/prima facie appeal with a probability of success and that the appeal was not arguable. Counsel urged that the Petitioner's main prayer in the Petition was recount of all votes cast at Kibirichia Ward and that all other prayers sought were dependant on it. Mr. Ondari urged that the prayer for recount was in line with Rule 32(1) of the Election Rules as it was the only issue in the Petition.
 8. Mr. Ondari urged that the Applicant stood to lose nothing and that he will suffer no prejudice. He urged that the Election Rules did not contemplate an interlocutory application. He urged that in any event the appeal was defective since it was not signed by the party and ought to be dismissed.
 9. Mr. Nyaburi for the 2nd and 3rd Respondent supported the application. Counsel urged that Rule 34 of the Election Petition Rules allows for appeals from Magistrates Courts. Counsel urged that High Court sitting on appeal from an Election Court does not sit as an Election Court and therefore ought to look at the appeal as any other appeal. He urged that in that case the normal rules to appeals apply. Mr. Nyaburi urged that Order 42 which dealt with stay pending appeals was applicable in this case.
 10. Mr. Nyaburi urged that the application is merited as there was an arguable appeal because the application for scrutiny was pre-mature since allegations set out in the Petition had not been tested. Counsel urged that the hearing of the Petitions has not started and that the Petition sought for several prayers including recount. Counsel urged that where scrutiny was ordered it could only be done in respect of Polling Stations where disputes have been raised and that only one Poling station was cited, Kibirichia Market, and yet the learned trial magistrate had ordered for recount generally. Mr. Nyaburi urged that the application before the lower court was an abuse of the court process and that the Petitioner, through it sought to introduce other polling stations. He urged that substantial loss will be occasioned if orders sought are not granted.
 11. This is an interlocutory application for stay of an order pending an appeal against the order made by a Petition court. It is therefore both urgent and critical. At this stage what the court should determine is whether the appellant has an arguable appeal, whether it has been without unreasonable delay, and whether the applicant should provide security and whether the appeal may be rendered nugatory if the order sought is not granted. Rule 34 of the Election (Parliamentally and County Elections) Petition Rules 2013 govern appeals from the magistrates courts. Rule 34(10) sets out the following powers of the High Court.

“The High Court may confirm, vary or 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 on final jurisdiction”

12. In answer to Mr. Ondari, this court has power to entertain, hear and determine an interlocutory application arising from a Magistrates Election Court. The Rule provides that the High Court will have same powers and perform same duties conferred on the court exercising its original jurisdiction. That means the laws that donate power, duties which and provide the procedure to

- be applied by the High Court in exercise of its civil appellate jurisdiction apply.
13. Order 42 Rule 6 of the Civil Procedure Rules provides for stay in case of appeal and gives the parameters within which such order can be made.
 14. The Appeal was brought on 11th June 2013, one week after the order appealed from was made. It has been brought without undue delay.
 15. The question is whether the appeal is arguable. The appeal is against an order for scrutiny and recount of all ballot papers within Kibirichia ward. The basis of the appeal is that the order was premature for reason the said order was made before any evidence was called for or heard by the court and that all the allegations made against the Respondents, especially the 1st Respondent were denied, controverted and therefore remain contentious issues until evidence is heard and a determination as to its credibility made.
 16. The Appeal is yet to be heard. However, there are sufficient grounds to find that the order for recount was premature for the reason the allegations upon which the order is based are contentions since the same have been denied by the opponent.
 17. Will the appeal be rendered nugatory if the order sought is not made or will irreparable loss occur. I think that the mere fact the Election Petitions have strict time lines which define inter alia, expedition means that if the High Court finds the order ought not to have been made, that will save a lot of courts time that would otherwise have been spent in scrutiny and recount of the ballots. I am aware that even if the appeal is allowed the learned trial magistrates court will be at liberty to still make that order any time during the proceedings after hearing the witness or some of them, whichever is the case.
 18. If on the other hand the stay is not granted but the order of scrutiny and recount ought not to have been made great harm would have been done as parties will be engaged in a time consuming and unnecessary exercise. I find that it is in the interest of justice that the order be stayed until the appeal is heard. As to the security, the Election Petition is still ongoing and there are no costs implications in this appeal except the cost of the appeal itself. That can be taken care of after the appeal is heard. I will therefore, not order any security to be provided by the Appellant.
 19. In the result the learned trial Election Courts order for scrutiny and recount of ballot papers within Kibirichia ward, and all other consequential orders be and are hereby stayed. The costs will be in the Appeal. The learned trial magistrate should continue with the pre-trials and subsequently the hearing of the Petition pending the outcome of this appeal.
 20. Those are my orders.

DATED, READ AND DELIVERED AT MERU THIS 24TH DAY OF JUNE. 2013.

LESIIT, J

JUDGE.