



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Appeal 126 of 2008

**ELECTORAL COMMISSION OF KENYA 1ST APPELLANT
ELDORET NORTH CONSTITUENCY 2ND APPELLANT**

VERSUS

**JANE WANGUI MURIITHI 1ST RESPONDENT
WILLIAM CHEMNGAA KIPTUM 2ND RESPONDENT**

RULING

The Presidential, Parliamentary, and Civil elections were held on 27th December, 2007. The 2nd respondent William Chemngaa Kiptum was declared the winner in the Market Ward in Eldoret North Constituency. The 1st respondent Jane Wangui Muriithi who was one of the candidates for the market ward and who lost to the 2nd Respondent William Kiptum filed the inquiry on 23rd January, 2008 but the results were published in the Kenya Gazette on 25th January, 2008. The hearing of the inquiry started in the lower court but on 13th October, 2008 after two witnesses had testified, the applicant filed the application to strike out the inquiry. The applicant's application to strike out the inquiry was dismissed on 21st November, 2008

The applicant appealed against that ruling on 26th November, 2008 which is the instant appeal being Civil Appeal No. 126 of 2008. The applicant did not rest. On 24th June, 2009 he filed an application in the lower court for stay of the proceedings pending appeal. This was eight (8) months after the ruling to strike out the proceedings was delivered. The trial Magistrate refused to grant orders of stay of the proceedings on the ground that he was not persuaded that the order sought was merited and she ordered that the parties do take a hearing date for further hearing of the inquiry. The ruling dismissing the application for stay of the proceedings was delivered on 18th November, 2009 and immediately the parties took a hearing date for further hearing of the inquiry by consent.

One month after the ruling refusing stay of the proceedings was delivered and a hearing date for further hearing of the part heard inquiry had been taken by consent, the applicant on the 18th December, 2009 filed this Notice of Motion seeking orders that there be a stay of proceedings and/or further proceedings of this inquiry pending the hearing and determination of Appeal No. 126 of 2008. This is the only prayer sought by the applicant and the only ground upon which this prayer is based is that the petition was filed before the results of the elections for Market Ward were published in the Kenya Gazette 25th January, 2008 while the inquiry was filed on 23rd January, 2008.

Mr. Onyinkwa learned Counsel appearing for the applicant submitted that at the time the inquiry was filed there was no result to challenge while Mr. Ogeso learned Counsel appearing for the respondent in opposition to the application submitted that the application for

stay was filed eight (8) months after the ruling of the Court. This was inordinate delay. Secondly the applicant having participated in the proceedings and two witnesses had testified the application was an after thought. Further the applicant has not stated what prejudice he would suffer in the event the proceedings do proceed and that the appeal will not be rendered nugatory.

I have considered the rival submissions by Counsel appearing for the parties. The applicant had submitted to the proceedings and two witnesses had testified when he filed an application to strike out the inquiry. That application to strike out the inquiry was dismissed on 21st November, 2008. The applicant filed an appeal against that ruling on 26th November, 2008. The application for stay of the proceedings in the lower court was filed on 24th June, 2009. This was eight (8) months after the ruling to strike out the inquiry was delivered. The trial Magistrate declined to grant an order for stay on the ground that there was inordinate delay in filing the application for stay.

In his ruling he stated that he was not persuaded that the orders sought were merited and he ordered that parties do take an early hearing date for further hearing of the inquiry. Immediately the ruling was delivered the parties took a hearing date for the hearing of the inquiry by consent. One month later on 18th December, 2009 the applicant filed this Notice of Motion in the High Court for stay of proceedings and/or further proceedings of this inquiry pending the hearing and determination of the appeal.

Having considered the above cited proceedings I am of the view that this is not a proper case in which to order a stay of proceedings. In **MALDE TRANSPORTERS LIMITED VS. BASHIR ARAB MOHAMED AND FATUMA HAJI HASSAN SUING AS THE ADMINISTRATOR OF THE ESTATE OF ARAB MOHAMED AHMED AND JOHN NGANDU KINUTHIA – CIVIL APPLICATION NO. NAI. 155 OF 2005** the Court of Appeal had this to say:-

“We would think that every litigation is inconvenient to every litigant in one way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”

It is important to note that the applicant has appealed against the ruling of the lower Court in which the trial Magistrate dismissed the applicant's Chamber Summons which sought the striking of the inquiry. Should the applicant eventually succeed in this appeal the proceedings in the lower Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that.

I may add that even assuming that the applicant has an arguable appeal can it be said that the appeal would be rendered nugatory in the event that it is eventually allowed. I do not think so. The Court of Appeal in the case of **KENYA COMMERCIAL BANK V. BENJOH AMALGAMATED LTD & ANOTHER CIVIL APPLICATION NO. NAI. 50 OF 2001 (29/2001 UR)** said:-

“ The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the Superior Court would be terminated in accordance therewith. The hearing in the Superior Court might have been unnecessary for which appropriate costs can be ordered but the

appeal will not have been worthless.”

See also the case of **SILVERSTEIN V. CHESONI [2002] 1 KLR 867** where the Court of Appeal said:-

“.....what will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

These remarks aptly apply to this application before me. What will happen if I do not grant the stay sought is that the inquiry in the lower Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and if it succeeded, what would automatically follow is that the proceedings in the lower Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.

In view of the foregoing I am satisfied that this is not a proper case to grant a stay of further proceedings. Accordingly I dismiss the application with costs.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF FEBRUARY, 2010.

J. L. A. OSIEMO
JUDGE