



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Election Petition 35 of 2008**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT CAP 7  
PARLIAMENTARY AND PRESIDENTIAL ELECTIONS REGULATIONS  
AND THE NATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION)**

**RULES**

**AND**

**IN THE MATTER OF: THE ELECTION PETITION FOR KAMUKUNJI CONSTITUENCY**

**BETWEEN**

**IBRAHIM AHMED .....PETITIONER**

**AND**

**SIMON MBUGUA .....1<sup>ST</sup> RESPONDENT**

**PRISCYLLAR A. WAWIRU**

**(RETURNING OFFICER KAMUKUNJI CONSTITUENCY) .....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT**

**RULING**

**BACKGROUND**

1. After I dismissed the 1<sup>st</sup> Respondent's application of 12<sup>th</sup> February, 2010 seeking orders to strike out the petition, vide my ruling delivered on 5<sup>th</sup> March, 2010, the 1<sup>st</sup> respondent filed an application by way of Notice of Motion of 9<sup>th</sup> March, 2010 seeking orders of stay of proceedings herein pending the hearing and determination of the intended Appeal against the above mentioned Ruling.

2. The application is premised under Sec. 23 of the National Assembly and Presidential Elections Act (hereinafter referred to as 'The Act') and the court's inherent jurisdiction.
3. The application is based on grounds set forth on the face thereof and on supporting Affidavit sworn by the 1<sup>st</sup> Respondent on 9<sup>th</sup> March, 2010. It also enclosed a Notice of Appeal dated 8<sup>th</sup> March, 2010 as well as a letter to the Deputy Registrar of the High Court of Kenya asking for supply of certified copies of the proceedings and Ruling under issue.
4. As Mr. Kibe has submitted on almost all the grounds set forth on the face of the application, it may be appropriate to enumerate the same.
  - a) ***The interest of justice would be served by granting an order of stay of the proceedings relating to the Petition dated and filed on 28<sup>th</sup> August, 2008 in that:-***
    - i. ***The question of whether or not the petition was served in accordance with the law goes to the jurisdiction of this Court to hear and determine the said Petition.***
    - ii. ***The interests of justice can only be served by ensuring that at the commencement of the Petition hearing the preliminary issues relating to jurisdiction have either been resolved or settled.***
    - iii. ***The 1<sup>st</sup> Respondent/Applicant stands to suffer substantial loss and prejudice if he is constrained to proceed with the hearing of a petition that he contends was served in breach of law.***
  - b) ***The grant of stay will not militate against the expeditious disposal of the Petition herein as Section 23 (4) of the National Assembly and Presidential Elections Act (Cap 7) limits the time of filing the intended Appeal to 30 days whilst Section 23 (6) thereof requires that such an appeal be heard and determined on priority basis.***
  - c) ***In view of the need to ensure optimum utilization of judicial time, it will be prudent to grant an order of stay of Petition proceedings to await the determination of the Court of Appeal in the intended Appeal.***
  - d) ***The applicant has an arguable appeal against the ruling of the Hon. Lady Justice Rawal delivered on 5<sup>th</sup> March, 2010.***
  - e) ***The intended appeal will determine a critical issue on the import and effect of proviso (iv) to Section 20 (1) of Cap 7 in the background of the Court of Appeal decisions in the Kibaki vs. Moi (2000)1 E.A and Abu Chiaba Mohammed vs. Mohammed Bakari CA No. 238 of 2003 (unreported)***
  - (f) ***That the applicant has appealed against the whole of the Ruling delivered by the Honourable Lady Justice Rawal on the 5<sup>th</sup> March, 2010.***
  - (g) ***That the said ruling sought to determine whether there is a proper and valid Petition before the Honourable Court.***
  - (h) ***That while delivering the said ruling the Honourable Judge overlooked all the legal flaws raised by the applicant in respect of proviso IV to Section 20 of Cap 7.***
  - (i) ***That unless a stay of proceedings is granted, the 1<sup>st</sup> Respondent shall be highly prejudiced as the question of whether the Petition is properly before the court is yet to be fully determined.***
  - (j) ***That there has been no delay in presenting this Application.***
  - (k) ***Other grounds and reasons to be adduced during the hearing of this application***

5. However, I may revisit the same in this ruling as more emphasis was placed on some of the grounds by Mr. Kibe.
6. The application is opposed by the Petitioner as well as by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and they have filed their respective grounds of opposition of 11<sup>th</sup> March, 2010 and 10<sup>th</sup> March, 2010.
7. Before I dwell on the merits of the application on hand, I shall deal with the issue raised by Mr. Kibe on compliance of the Ruling delivered on 16<sup>th</sup> December, 2009 in respect of Preliminary Objection raised by the 1<sup>st</sup> Respondent, by two Judge bench.
8. Mr. Kibe submitted that the court directed that the IIEC be substituted with ECK while dismissing the Preliminary Objection of the 1<sup>st</sup> Respondent and thus the same should have been substituted substantively on the record of the petition. Mr. Adere was appointed by IIEC and thus be cannot represent ECK which is the party on record.
9. It was stressed that the new body called IIEC is now taking a stand before the court holding a position entirely unexpected by the 1<sup>st</sup> Respondent and that position could not have been taken if it was ECK, simply because it was ***'jointly accused of the electoral misconduct along with the 1<sup>st</sup> Respondent'***. It was further contended that if any of the Respondents now takes a stand acquiescing to that taken by the petitioner, the 1<sup>st</sup> Respondent is prejudiced although Mr. Kibe fell short of specifying those stands which would prejudice the 1<sup>st</sup> Respondent as alleged.
10. Mr. Owino, in response, submitted that a simple reading of Sec. 41 reveals that there is an automatic substitution of the IIEC in place of ECK and that it does not need an overt act by any party. It was also contended that there is no law imposing an obligation on a co-respondent to tail behind other respondents.
11. Mr. Adere objected to the in insinuation that IIEC, as it is now before the court, is taking a partisan stand. He stressed that no evidence or proof is before the court to substantiate the serious statement made by Mr. Kibe. Moreover, it was stressed that the contents of the petition are not yet touched. According to him, the election petition matters are not of quasi criminal in nature and referred to Sec. 23 (1) of the Act – which stipulates that the witnesses in the election petition be summoned and sworn in the same manner as far as circumstances admit as in the trial before the High Court in its original civil jurisdiction.
12. I may pause here and observe that at this juncture, I shall not deal with the issue of nature of the election Petition as it is irrelevant. However, even if it could be found that the election petition are of quasi-criminal nature, there is no provision and justifiably so, that all the respondents in the petition should always take same stand in their respective defences. The Election Commission whether known by whatever name is a constitutional body and is expected to have and keep an independent stand before the court. It is so, because at the end of the day, it has to abide by the wishes of the constituents and/or the electoral to choose the representative of their choice.

13. Coming to the application that the IIEC should be substantively substituted on the record, Mr. Adere submitted that IIEC became a part of these proceedings by the dint of Sec. 41 (2) of the Constitution and after 16<sup>th</sup> December, 2009 it was so declared by the court. He relied on the self-explanatory provision of Sec. 41 (2) of the Constitution which inter alia stipulates that “... **and any reference to the Electoral commission of Kenya shall, for all purposes, be deemed to be a reference to the Interim Independent Electoral Commission established under this section.**”
14. Thus I do tend to agree that the court, or the party before it, do not have to do anything further because ECK should be read as IIEC and thus the Ruling delivered and law are at tandem.
15. Mr. Adere finally submitted that 1<sup>st</sup> Respondent by making this suggestions intends to create an image that there was an arrangement or scheme to commit the wrong doings alleged amongst the Respondents and that image has to be obliterated.
16. The court did deliver an interim ruling on 12<sup>th</sup> March, 2010 which shall be deemed to be the part of this ruling and I shall reiterate by finding that there is no need to amend any pleadings before the court and that IIEC is appropriately substituted by the deeming provision stipulated in Sec. 41 (2) of the Constitution. Now I shall deal with the substantive prayers of stay proceedings as made before the court

#### **SUBMISSIONS**

17. Mr. Kibe in his submissions relied on the grounds in support of the application and commenced the submissions by commenting on the grounds of oppositions filed by the Petitioner and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
18. He pointed out that the main ground of opposition is that the 1<sup>st</sup> Respondent by taking the present step is intending to delay the expeditious hearing which is what the law has enjoined the Election Court to do.
19. He contended that Laws of procedure provides safeguards for all concerned and two factors in this regard be taken into consideration namely:-

(1)The parties must avoid a pre-disposition or mindset when another party takes a step as provided in law and that the same cannot be attributed to bad faith.

(2)The party has a right to apply for a stay of proceedings till the appeal is heard as Sec. 23 (4) of the Act confers right of appeal to a party. I shall for convenience of reference quote the said provision:

**“Sec. 23 (4) subject to sub-section (5) an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final, within thirty days of the decision.”**

I shall also take note that Sec. 23 (6) also stipulates that an appeal from a petition under this Act, shall be heard and determined on a priority basis and that this provision is similar to Sec. 19 (4) of the Act which enjoins the

Election Court to hear and determine the Petition on priority basis. These provisions are made pursuant to the powers conferred to the Parliament under Sec. 44 of the Constitution.

20. It was further contended that when a right of appeal is conferred, the consequent right of seeking stay of proceedings till the determination of the appeal is also available to a party.
21. The court could have made an erroneous decision as is vividly observed in the case of ***Erinford Properties Ltd. vs. Chesire County Council*** (1974) 2 All E.R. 448 wherein the possibility of the judgment be reversed or varied is considered and that the judge while considering an application for injunction may recognize that his decision might be reversed.
22. I may agree with the observation made in the said case at page 454 that no human being is infallible which includes a Judge, but I would also like to quote specifically a part of passage on the same page – to wit:-  
***“on the other hand, where the application is for an injunction pending an appeal the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of appeal.”***
23. In my considered view, that is in short, what a court is expected to decide while exercising the discretion to stay a proceedings pending appeal. That observation is adequately approved and established in the jurisprudence of the Court of Appeal that the two factors be considered while granting stay of proceedings, namely:  
(1)The appeal is an arguable one and,  
(2)The appeal, if successful, should not be rendered nugatory.
24. All the counsel seemingly agreed that the court has discretion to grant stay of proceeding and this court has concurrent jurisdiction to do so along with the Court of Appeal and that each case has to be considered looking at the unique circumstances it presents.
25. However, Mr. Kibe emphasized that this application deserves the order of stay as the issue raised involves the jurisdiction of the court because it involves the determination whether the Petition came before the court by way of a valid Petition because it is claimed that the 1<sup>st</sup> Respondent was not properly served.
26. He relied on many authorities to show the principles and factors on which the courts have been granting order of stay.  
(a)In the matter of ***Winding Up Cause No. 43 of 2000 between Global Tours and Travels Ltd (UR)***. On page 5 thereof, the court observed that the judicial discretion granted to this court is unlimited save that it should be exercised rationally and not capriciously or whimsically. The factors like expeditious disposal of cases, the prima facie merit, the scarcity and optimum utilization of judicial time etc were brought on fore by the court  
(b)The other cases like

**ii) Karanja vs. Kabugi & Another (1976-1985) EA 165**

were cited.

I must state that the second case was deciding the inter relation of Sec. 60 (1) and Sec. 44(1) of the Constitution when the Rules of Procedure of the Election Petition were not legislated. If it is only to show that invocation of Sec. 60 (1) is proper in this application, I could go along with it. I am not sure why *Githunguri's case* was cited as I was not invited to consider any part thereof.

**(c) *Nemised AG vs. Patchman Holdings Ltd.* Civil Application No. Nairobi 181/08 (UR).**

In this case, the Court of Appeal considered the factors like high expenses that could be incurred, inconvenience of witnesses traveling into the country and back, the disruption of their routine work and anxiety of travel which could not be easily quantifiable in monetary terms, while allowing the application for stay of proceedings pending intended appeal.

The court in the said case did consider also the case of *Silverstein vs. Chesoni* (2002) CLR 867 and *Kanu vs. Attorney General & 4 others* Civil Application No. Nairobi 7 of 2002, wherein the court of Appeal has held that the continuation of the proceedings in the superior court will not render the success of appeal nugatory as an appropriate order for costs can be made to compensate the applicant for any loss which he could have incurred.

**(d) *Oraro and Rachier Advocates vs. Co-operative Bank of Kenya* (1999)1 EA 236, wherein it was found by the**

Court of Appeal that while assessing the application for stay of proceedings pending appeal, the court must weigh the claims of both sides.

It was reiterated that as the issue in the intended appeal is the service of petition, the court should consider the seriousness thereof and grant the stay prayed for.

**(e) *Reliance Bank Ltd. vs. Narlake Investments Ltd.* (2002)1 EA. 218 At 233 – paragraph e, the Court of Appeal**

considered that the hardship of the Applicant would be out of proportion to any suffering the respondent might undergo while waiting for the Appeal to be heard and determined and grant the order.

**(f) *Ramco Ltd. vs. Mistry Jadv Parbat & Co. Ltd & Others* (2002) IEA. 227 at 239, the High Court in this case**

cited that proper service of summons to enter appearance in a litigation is a crucial matter in the process whereby the court satisfies itself that the other party to litigation has notice of the same. That again, I must stress that, before me it is not the issue whether the Respondent had notice of the petition but whether the service as allowed in proviso IV of section 19(4) was properly made.

**(g) *Kenya National Examination Council vs. Republic* (Nairobi court of Appeal Civil Application No.150/2000**

(U.R.) on page 9 thereof, the Court of Appeal considered that serious practical problems to the Examination process in the country as against individual prejudice or hardship the candidates are likely to suffer.

I was not told how the said case could be appropriately considered in favour of the 1<sup>st</sup> Respondent as the

issue before the court is wider and also based on individual rights and contentions between the Petitioner and the 1<sup>st</sup> Respondent.

(h) This court's ruling in the case of **Reuben Ndolo vs. Dick Wathika** (Election Petition No. 11 of 2008) was stressed on the point of humility of the court by accepting that the court can be fallible.

27. Lastly and in summarizing his submissions, Mr. Kibe stated that there are strong opinions from the bar and bench on the issue of service and the sitting M.P. should be given legal protection by considering that the factor of expeditious hearing should not compromise the grievances of the 1<sup>st</sup> Respondent.
28. The plea to give conditional order was placed by urging that the limit of 60 to 90 days be given to the 1<sup>st</sup> Respondent to finalise the hearing of appeal.
29. Taking this last plea, it was not shown how this court can control the schedule as well as hearing of the appeal before the Court of Appeal, even if the Act also enjoins the Court of Appeal also to hear and determine the appeal on priority. That plea tantamount to invite a result that this court is asked to grant an order which cannot be effectively complied with. I shall emphasize that this court cannot be expected to grant an order which is in vain.
30. I would also confess that the reliance on Section 28 of the Act in support of this application was misplaced. In my view, it may support the contention of the Petitioner. However, it was not specifically articulated either by Mr. Kibe or relied by any of the opposing counsel and I shall rest that issue at that.
31. Mr. Adere, on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, submitted on the general principles of law as regards the unique place of election Petition and principles established on the issue of stay of proceedings.
32. It was emphasized that jurisdiction of the court is conferred by a statute. According to him, any commission or omission, any conduct or misconduct or any action or inaction cannot vest or divest the jurisdiction of the court to hear the matter before it.
33. As against this submissions, I have also given serious consideration to the submissions made by Mr. Kibe that due to improper service the Petition as presented may not be proper before the Court. However, that issue was heard and determined and the court by doing so cannot be said to be lacking the jurisdiction to continue hearing the matter. The lack of jurisdiction results in the proceedings being nullified while in this proceedings such is not the result where the court has heard and determined on issue raised on the competence of a proceedings.
34. Without doubt, the election court has been conferred the jurisdiction to hear and determine the Petition by section 44 of the Constitution and section 19 of the Act, and Mr. Adere contended that it is now the matter of discretion to

be exercised by this court to proceed or not with hearing of this petition despite the intended Appeal. He stressed that the authorities cited would not limit that discretion of the court as each case must be looked at on its own merits. The authorities can only assist the court by way of guidelines.

35. Moreover, it is noted that none of the authorities cited in support of the application relates to the election petitions which could not be relevant specially looking at the emphasis of expeditious disposal made in the Act as well as in the proposed Constitution. It cannot be gain said that the Election Petition has a unique place in our Judicial system as well as in the country. The main actors in the Petition are the electors and they do expect that a rightly elected person be their representative in the National Assembly. It was pointed out that in none of the recent authorities of Court of Appeal in respect of Election Petition, that Court has stayed the proceedings.
36. The court was urged that the feelings of the electors should be considered by looking at the delay as a major factor.
37. Mr. Owino submitted in opposition that there is no arguable appeal which becomes apparent from the Ruling delivered. The court rightly found that *Kibaki's and Abuchulia's cases* are of limited value to the court in face of the insertion of proviso IV in Sec. 19 (4) of the Act. The long retinue of the cases has declared the Electoral laws as a complete code and unless the court of Appeal overturns this line of findings, order 5 of Civil Procedure Rules cannot be imported wholly in the electoral matter.
38. The court was taken through the process so far undertaken and it was contended that the 1<sup>st</sup> Respondent's purpose is to delay and gain time so that he would be able to be a sitting Member of Parliament for as long as that he could possibly stretch, and by doing so, the mandate of expeditious disposal would be frustrated. It was stressed that the time is running against the Petitioner.
39. Two Court of Appeal authorities on the application of stay of proceedings in the election Petitions were cited namely:

- (a) *Joseph Sanganyi Omambia vs. Manson Onyongo Nyamweya* Civil Application No. 282/09) (2002)  
eKLR

The court of Appeal after referring to the conclusion by the superior court that the application was not brought in good faith, observed as under:

***“Since the hearing of the petition has commenced, the same will eventually come to an end and a judgment delivered by the High Court at Kisii. But if the applicant succeeds in the appeal then the proceedings in the High Court would be rendered unnecessary but an appropriate order for costs can be made to remedy that.***

***We think that to allow this particular application would defeat the principle that Election Petitions should be disposed of expeditiously which would in effect forestall quick disposal of Election Petitions.”***

- (b) *The Hon. Joel Omagwa Onyantha vs. Simon Nyaundi Ogani & Another* Civil Application No.

104/2008 (2008) e KRL. This case was, on facts thereof, similar to the one on hand. The issue was the valid service on the 1<sup>st</sup> Respondent. The superior court found in favour of the Petitioner and in its Ruling, the Court of Appeal observed

***“We have set out briefly the background to this matter and the principles to guide the Court in an application of this nature. The issue in the intended appeal will be whether the applicant was served with the notice of the presentation of the petition as mandatorily required by the National Assembly Election (Election Petition) Rules. Assuming for a moment that the applicant has an arguable appeal (if he manages to clear the obstacle of the notice of appeal), would the success of that appeal be rendered nugatory if we refused to grant a stay of proceedings as sought in this application? Since the hearing of the petition has commenced, the same will eventually come to an end and a judgment delivered by the High Court at Kisii. But if the applicant succeeds in the intended appeal then the proceedings in the High Court would be rendered unnecessary but an appropriate order for costs can be made to remedy that.***

***We think that to allow this particular application would defeat the principle that Election Petitions should be disposed of expeditiously which would in effect forestall quick disposal of Election Petitions.”***

The court further adopted observations made in the case *of Silvestein vs. Chesoni* (2002) 1 KLR 867 – namely:

***“ ..... the onus of satisfying us on the second condition, that unless the stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant.***

***.....we remind ourselves that each case depends on its own facts .....***

***The appeal may be heard and, if successful, the proceedings in the superior court would be determined 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.”***

40. In the end, Mr. Owino stressed that even if an equal weight be given in this case for both sides, it shall be the petitioner who would suffer greater prejudice if the petition is not expeditiously heard. Thus the court was urged to dismiss the application.

## CONCLUSIONS

41. I have considered the application, affidavit in support and grounds in support and oppositions, authorities cited as well as submissions made with all the seriousness they merited.

I have tried to cull out the principles or factors which the court should weigh while determining this kind of

applications and bearing foremost in its mind, that each case depends on its own peculiar circumstances and that the Election Petition by its nature, should be given utmost priority with the Court of Appeal hammering this point times and again.

This Petition was presented late in the background of a previous Judicial Review Proceedings. Even if I do not place blame on any party on the presentation of various applications at separate stages of the Petition, it cannot be ignored that the court has not started hearing the Petition and that the next general election hopefully will be held in 2012. Election Petitions always involve emotions as well as studious and elaborate representation from both the sides, and that involves greater time than any other matter, although complex, would take.

This court, while admitting with humility that even if in my view I decided the issue of service correctly, there is a possibility of my decision been overturned. But as the Court of Appeal has observed in the cases cited and I have also made similar observation in my Ruling of *Ndolo's case* (Supra) that even if the Court of Appeal allows the appeal, the same would not be rendered nugatory and/or palpable waste of Judicial time.

On balancing the weight of interest of parties (which includes the electors), I am of a considered view that the side of the petitioner and the electors are for more weighty than that of the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent shall, without any hindrance, continue performing his duty as a sitting Member of Parliament and if successful, shall be adequately rewarded with costs by the Petitioner.

Having not satisfied that there is very pressing and justifiable reason to stay the proceedings of the Petition, I dismiss the application of 9<sup>th</sup> March, 2010. Costs in the cause.

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of March, 2010.**

**K. H. RAWAL**

**JUDGE**

**25.03 .2010**