



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 60 of 2010

INTERIM INDEPENDENT ELECTROL COMMISSION OF KENYA.....1ST APPEALLANT

RETURNING OFFICER ELDORET NORHT COSNTITUTENCY.....2ND APPEALLANT

KIPROP RONO.....3RD APPEALLANT

=VERSUS=

MURAMBI ISAAC ROBERT.....RESPONDENT

R U L I N G

Application for stay of Proceedings pending Appeal

I. **Background**

1. An Election was held on 11th June 2008, being a Civic Election for the Kapyamit Ward of Eldoret North Constituency of Uasin Gishu District.
2. Being dissatisfied with the election results the original petitioner/Respondent filed an Inquiry No.2/2008 in the Magistrate's Subordinates Courts on 18th June 2008. a Certificate of Urgency was filed with it seeking the Courts Orders to restrain the registration of the alleged winner. The trial Court then declined to give such orders. (27/6/2008).
3. In the mean time the Electoral Commission of Kenya (as it was then) appointed an advocate who filed an application dated 30 July 2008, seeking orders to strike out the whole inquiry. This application is still pending to-date.
- (4) An application of 25th January 2010 was then filed seeking for the Electoral Commission of Kenya (E.C.K.) to be substituted by the Interim Independent Electoral Commission (I.I.E.C). This application was granted by Consent and orders made to amend the pleadings to reflect this. Unfortunately at the time the consent was being made, the 1st

Respondents brief was held by another (18/2/2010). Orders were further made that the main inquiry do proceed on 1st April 2010.

- (5) On the day called out for hearing, the 1st respondent /appeallant applied for the application of 30th July 2008 to be heard. The trial magistrate declined and ordered that it be heard within the main Petition. The reasons given on 6/4/2010:-
- (i) **The application was “Obliterated” by the consent entered into by parties on 18th Febraury 2010.**
 - (ii) **That the intentions of the parties was to do away with the said application by consent**
 - (iii) **The effect of the consent means that the Application became barred with the disbanded Electoral Commission of Kenya.**
 - (iv) **The application be therefore heard in the main suit.**
- (6) The 1st respondent/appeallant appealed to this High Court, being dissatisfied with the ruling as a matter of urgency, the trial is and or will be proceeding on the 3rd June 2010. A stay of proceedings was requested till the determination of the appeal on this point.

(7) No reply was made on this point by the Respondents original Petitioner and Respondent 3.

II. Arguments

- (8) The applicant/original 1st respondent argued that their application of 30th July 2008 was to first be heard before the main suit. These are the normal procedure in any civil matter. That the interlocutory application be heard first. The trial magistrate declined to hear them first. In the meantime the inquiry would proceed on to their detriment.

III. Opinion

- (9) The advocate for the appeallant referred me to three authorities to illustrate the aspects of the principles in granting stay, namely:

(i) **Reliance Bank Ltd**
-vs-
Norlake Investments Ltd
(2002) (EA 218 (CAK)
(Omolo, Bosire, Owuor JJA)

(ii) **Blue Shield Insurance Co. Ltd**
-vs-
Samuel Kamau Muhindi
C.A. Appli. 219/09
CA
E.O. O’kubasu, E.M. Githinji, D.K.S. Aganyanya

(iii) **Guadson Kiragu Karani**
-vs-
Barclays Bank of Kenya
Civil Appli. Nairobi 306/2009
(P.K. Tunoi, S.E.O. Bosire, J.G. Nyamu JJA)

Whereby the Principle held for a stay of execution that an appeal must be arguable;

that failure to grant the stay must render the appeal nugatory if successful and that failure to grant stay will cause hardship.

(10) The arguments in the above three case law concerns appeals from the High Court to the Court of Appeal and dealt with the Court of appeal rules on the subject (5(2)(b) 74, 81 and 84).

(11) The application herein was brought under

Order XLIV r 4 Civil Procedure Rules that “vests in the High Court powers to grant stay of execution or proceedings with sufficient cause”. The requirements under the High Court rules as outlined also in the decisions of:-

Salmond Ndalo Obede

-vs-

National Bank of Kenya Limited
(2010) EKLRC HCCC 1/2005 Nakuru

Ouko J.

Is that there must be sufficient cause;

That the appellants may suffer substantial loss

unless stay orders are granted that the application must be brought without reasonable delay and that the applicant must give an undertaking as to security.

(12) In the above decision the Hon. Judge held that

it is not for the High Court to consider whether an appeal is arguable but for the Court of appeal.

(13) I must say that the rules governing the Local Government (Election Inquiry) introduced on 22nd September 1983

(A.H. Simons Chief Justice) specify that:- **“subject to the foregoing (rules 1-8) the Civil procedure act and the rules made thereunder shall so far as practicable apply to an Election Inquiry”.**

(14) This therefore means that the applicants are in order by bringing in an appeal and application for stay under the Civil Procedure Act.

(15). Order XLIV r 4 Civil Procedure Rules applies herein. It is noted therefore that the application was brought to Court without reasonable delay; the appellants may suffer substantial loss unless stay is granted and that there must be sufficient cause.

(16) The Civil procedure Act Section 6 provides that application and or cases filed first ought to be heard first. It is therefore for sufficient cause that orders for stay be made. The question arises can stay of proceedings be granted? As a general rule this ought not be granted. The fact that the question arising in the appeal is of a point of law this Court herein would grant a stay of proceedings of Election inquiry under Local Government Act in the Subordinate Court case No. 2/2008 till the finalization of the appeal filed.

(17) I order that the applicant provides an undertaking that in the event these orders were incorrectly obtained, there be security of costs to issue and damages.

(18) I award costs to the applicant on this application.

Dated this 2 day of June 2010 at Eldoret.

**M.A. ANG'AWA,
JUDGE.**

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- (i) F.M.O. Kadima Advocate instructed by the firm of M/s Kadima & Co. Advocate for the 1st and 2nd Appellants
- (ii) Kigen & co. Advocates instructed by the firm of M/s Kigen & Co. Advocates for the Applicant
- (iii) S.K. Kitur Advocate instructed by the firm of M/s Kitur & Co. Advocate