



**Waruguru v Abdullahi & 2 others (Election Appeal E001 of 2023)  
[2023] KEHC 3341 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
ELECTION APPEAL E001 OF 2023  
TW CHERERE, J  
APRIL 20, 2023**

**BETWEEN**

**KELVIN WARUGURU ..... APPELLANT**

**AND**

**ABDI FATUMA ABDULLAHI ..... 1<sup>ST</sup> RESPONDENT**

**UNITED DEMOCRATIC ALLIANCE ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. By a judgment dated 17<sup>th</sup> January, 2023, the election court in Isiolo Election Petition No. E001 OF 2022 ruled that Appellant/Applicant was not validly nominated as a member of County Assembly of Isiolo and further directed the 3<sup>rd</sup> Respondent to allocate the representative of minority community to the 1<sup>st</sup> Respondent.
2. Aggrieved by the judgment, Applicant filed this appeal on 27<sup>th</sup> January, 2023. Simultaneously with the appeal, Appellant/Applicant on 31<sup>st</sup> January, 2023 filed the notice of motion dated 30<sup>th</sup> January, 2023 mainly seeking stay of execution of the judgment pending the hearing and determination of the appeal.
3. The application is supported by an affidavits sworn by the Appellant/Applicant on 30<sup>th</sup> January, 2023 avers that the appeal which was filed timeously will be rendered nugatory if the judgment is executed, the appeal raises weighty matters of law and fact and that he is ready to abide with any direction as to security for costs as the court may direct. Additionally, Appellant/Applicant avers that he has already been sworn in as a county member of the County of Isiolo and has taken loans and mortgages and is therefore likely to suffer substantial loss if the orders sought are not granted.



4. By her replying affidavit sworn on 31<sup>st</sup> January, 2023, 1<sup>st</sup> Respondent opposes the application and states that Appellant/Applicant's appeal has no chance of success for the reason that he is a registered voter in Laikipia County and ought not to have been nominated as a member of County Assembly for Isiolo County.
5. By a replying affidavit of its Chairperson, National Elections Borad, Mr. Antony Mwaura sworn on 09<sup>th</sup> February, 2023, 2<sup>nd</sup> Respondent supports the application on the grounds that Appellant/Applicant who has been been sworn in and has taken loans and mortgages is likely to suffer substantial loss.
6. By a replying affidavit of its Director, Legal Sevices, Mr. Chrispine Owiye sworn on 13<sup>th</sup> March, 2023, 3<sup>rd</sup> Respondent also supports the application on the grounds that the County Government of Isiolo will be exposed to uncertainty in representation thereby affecting service delivery.
7. The application was argued by way of writtens submissions in which Appellant/Applicant reterared the grounds on the application and the avermenst in the supporting affidavit. It was argued for the Appellant/Applicant that whereas there are no particular provisons in the electoon laws dealing with stay of execution, this court has jurisdiction under the provisions of Section 4 (2) of the [Elections \(Parliamentary and County\) Petition Rules](#), 2017 to invoke the provisions of Order 42 rule 6 of the [Civil Procedure Rules](#) so as to fill the lacunae in the election rules and to ensure that the overriding objective specified in the election rules are met.
8. It was additionally argued on behalf of the Appellant/Applicant that Rule 34 of the [Elections \(Parliamentary and County\) Petition Rules](#), 2017 ought to be read in the spirit of Rule 18 of the [Court of Appeal \(Election Petition Rules\)](#), 2017) and find that the filing of the Memorandum of Appeal grants the Appellant/Applicant an automatic stay of execution. Rules urged that the court should aim at substantive justice instaed of procedural technicalities. In support of this proposition, Appellant/Applicant placed reliance on [Samwel Kazungu Kambi v Nelly Ilongo Returning Officer, Kilifi County & 2 others](#) [2017] eKLR in which the timelines of 6 months for determination of election petition other than the Presifential Election Petition was reiterated.
9. 1<sup>st</sup> Respondent argues that Appellant/Applicant's applied is devoid of merit for the reason that he was not legible for nomination in the County of Isiolo, that the Election Court's judgment is a true reflection of the law as it stands and cannot be impugned.
10. It was argued for the 1<sup>st</sup> Respondent that the Appellant/Applicant has not demonstrated sufficient cause and substantial loss which are the cornerstone for an application for stay pending appeal. In support thereof, reliance was placed on [Vishram Ravji Halai vs. Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365. 1<sup>st</sup> Respondent additionally urged court to find that it was the successful party entitled to the fruits of the judgment and in support thereof relied on [Machira t/a Machira & Co Advocates v East African Standard](#) [2002] eKLR.
11. 2<sup>nd</sup> Respondent submitted that Appellant/Applicant had complied with the provisiosn of Order 42 rule 6 of the [Civil Procedure Rules](#) by filing the application timeously, had demonstrated substantial loss ( See [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR), and that the appeal was likely to be rendered nugatory if the orders sought were not granted(See [WW v EKW](#) [2019] eKLR) and was additionally willing to provide security (See [Focin Motorcycle Co. Limited v Ann Wambui Wangui & another](#) [2018] eKLR).
12. 3<sup>rd</sup> Respondent similarly submitted that Appellant/Applicant had complied with the provisiosn of Order 42 rule 6 of the [Civil Procedure Rules](#) set out in [Vishram Ravji Halai vs. Thornton & Turpin](#) (*supra*), had demonstrated substantial loss (See [Amir Suleiman v Amboseli Resort Limited](#) [2004]



eKLR, *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331 and *Kenya Airports Authority v Mitu-Bell Welfare Society* [2016] eKLR), and that the appeal was arguable (See likely to be rendered nugatory if the orders sought were not granted (See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR).

### **Analysis and Determination**

13. I have considered the notice of motion in the light of affidavits, submissions and authorities filed on behalf of the the parties.
14. All the parties are in agreement that Order 42 (6) of the *Civil Procedure Rules* which require a party seeking an order of stay of execution and the conditions provided thereto are applicable to this application.
15. The impugned judgment was delivered on 17<sup>th</sup> January, 2023 and this application was filed timeously on 31<sup>st</sup> January, 2023.
16. It is trite that filing an appeal perse does not entitle a party to an order of stay of execution nor is the existence of an arguable appeal sufficient ground for stay pending appeal for the reason that parties are only expected to file an appeal if it is arguable.
17. As rightly appreciated by the parties, the order for stay of execution pending appeal is discretionary and requires the court to weigh the interests of not only the Appellant/Applicant by also of the successful party.
18. It is to be remembered that substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. There is a myriad of cases on what constitutes substantial loss and unless demonstrated, it would be a rare case when an appeal would be rendered nugatory.
19. Accordingly, if there is any loss to be suffered by any of the parties and more particularly the Appellant/Applicant and 1<sup>st</sup> Respondent, it is the known remuneration and emoluments that is at stake and the loss thereof is quantifiable and compensatable.
20. From the foregoing analysis, I find that Appellant/Applicant has not demonstrated substantial loss.
21. I have consideration that this appeal must be determined within six months from date of filing. Until such a time as the court will determine the appeal, the orders that commend themselves to this court are as follows:
  1. The court declines to grant an order of stay of execution of Orders (1) and (2) of the judgment dated 17<sup>th</sup> January, 2023
  2. Execution of orders (3) and (4) of the judgment dated 17<sup>th</sup> January, 2023 is however stayed pending the hearing and determination of the appeal
  3. Since the Record of appeal has already been filed. It is additionally ordered as follows:
    - a. The Record of Appeal, if not already served, be served in the next 7 days from today's date
    - b. The Appeal shall be disposed of by way of written submissions to be filed and served by the Appellant within 14 days from today's date and each Respondent 14 days from date of service



c. Mention on 22nd May, 2023 to confirm filing of submissions and to take a date for judgment.

4. Costs shall abide the outcome of the appeal

**DATED AT MERU THIS 20<sup>TH</sup> DAY OF APRIL 2023**

**T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Abwuor for Abwuor & Co. Advocates

For 1<sup>st</sup> Respondent - Mr. Kariuki for P.K.Njiiri & Co. Advocates

For 2<sup>nd</sup> Respondent - Ms. Kurgat for Andrian Kamotho Njenga & Co. Advocates

For 3<sup>rd</sup> Respondent - Mr. Hassan for Hassan Mutembei & Co. Advocates

