**Jillo & 3 others v United Democratic Movement & another; Speaker Isiolo County Assembly (Interested Party) (Civil Appeal E067 of 2023) [2023] KEHC 17467 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17467 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**CIVIL APPEAL E067 OF 2023**

**EM MURIITHI, J**

**MAY 16, 2023**

**BETWEEN**

**ABDNOOR DIMA JILLO ..... 1ST APPELLANT**

**ABUBAKAR ABDI GODANA ..... 2ND APPELLANT**

**MEJJA ABDULAHI GOLICHA ..... 3RD APPELLANT**

**NURA MOHAMED HUKA ..... 4TH APPELLANT**

**AND**

**UNITED DEMOCRATIC MOVEMENT ..... 1ST RESPONDENT**

**ABDIRASHID ALI DIBA ..... 2ND RESPONDENT**

**AND**

**SPEAKER ISIOLO COUNTY ASSEMBLY ..... INTERESTED PARTY**

**RULING**

1. Before the Court is a Notice of Motion under certificate of urgency dated 3/5/2023, brought under Order 51 Rule 1, 3, 4 and 10 of the *Civil Procedure Rules*, Sections 3A of the *Civil Procedure Act*, Articles 47(1), 48 and 50 of *the Constitution* and all other enabling provisions of the law, where the Appellants/Applicants seek that:

    1. Spent

    2. Pending the interpartes hearing of this application, this Honorable Court be pleased to stay execution of the orders in rem issued on 3rd May 2023 in MERU PPDT E001 of 2023.

3. Pending the inter partes hearing of the application, this Honorable Court be pleased to reinstate the status quo with regards to house leadership and House Committee Membership ante 27th March 2023 and reverse the orders of the ruling of the PPDT dated 3rd May 2023.

4. Pending the Hearing and determination of the appeal and the conclusion of the complaint by the trial Tribunal, Hon. Abdi Rashid Ali Diba be barred and/or restrained from assuming the office and role of Leader of majority Isiolo County Assembly and from in any other way receiving any monetary or material benefits that accrue thereto.

5. Any other orders deemed fit to be granted by this court.

6. Costs be in cause.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Hon. Abdinoor Dima Jillo, the 1st Appellant/Applicant herein, sworn on even date. He avers that despite having established a prima facie case, the Tribunal, alive to the public interest in the matter and having been presented with overwhelming material evidence, and having been repeatedly informed of the breaches of rights and injustices that may be occasioned to the Appellants, attempted to quantify the harm and found against them for want of proof of quantum of damage which ingredient cannot be achieved in circumstances of political and public nature. He accuses the 2nd Respondent and the Interested Party of conniving and forging minutes dated 27th March 2023 which they relied on to eject the 1st Appellant from the position of Majority Leader and further de-whip the Applicants from their committees and/or suspend them from the assembly for 21 sittings. The said minutes having been a forgery are not conclusive evidence of facts and intents of the members of the 1st Respondent, but the Honorable Tribunal erred in basing its findings solely on the falsified documents which are not admissible as material evidence. The orders of the PPDT issued on 3/5/2023 are contrary to public policy for admitting material evidence filed by the 2nd Respondent and the Interested Party since that evidence was materially, consciously and intentionally falsified leading the trial court to arrive at a judgment obtained by such fraud and an injustice. When the Appellants learnt of the existence of the fraud on 4/5/2023, they reported the same to the police at Isiolo under OB/NUMBER 20 of 7TH APRIL 2023 and made a corresponding affidavit to the trial court dated 5/4/2023 to root out the fraud. He has been advised by counsel that the Interested Party cannot vest legitimacy to the 2nd Respondent as a leader of majority unless the vestment has not been given by the 1st Respondent through a process set out in the statutes and the standing orders. He faults the Tribunal for failing to take judicial notice of the words ELECT AND MAJORITY as provided by the Standing Orders and Section 10 of the *County Governments Act* thereby occasioning a coup within the County Assembly of Isiolo contrary to Order 20 of the Standing Orders and consequently apportioning both a right in rem and a right in personam to the 2nd Respondent from 3/5/2023. He further faults the Tribunal for failing to appreciate the constitutional and statutory provisions as mandatory rules of process and procedure of the change of house leadership an issue that is substantially before the court. His position as leader of majority and that of the co-Applicants in various house Committees as well as the privileges thereof stem from a construct of socio-political rights which cannot be compensated by an award of damages as the same is not liquidated. By vacating the interim orders of 30/3/2023, the Tribunal failed to recognize and/or consider the irreparable harm occasioned to the Applicants having been presented with facts of privileges incumbent of a majority leader and/or House Committee members and having been variously made aware of the breaches of rules of process in arriving at the decision of the 1st Respondent. It is only fair and just that the execution of the ruling of the PPDT court of 3/5/2023 discharging the orders granted on 30/3/2023, is reversed, stayed, set aside, varied and/or discharged to conserve the legitimate and constitutional rights of the Appellants to a fair trial. He cites

*Colgate Palmolive (India) Ltd v Hindustan Level Ltd AIR* 1999 SC 3105, on the conditions for grant of injunctions.

3. The 2nd Respondent has opposed the application vide his replying affidavit sworn on 8/5/2023. He has been counseled by his advocates that the grounds of appeal are too remote and the issuance of the instant orders sought herein will summarily determine the complaint pending for hearing in PPDT No. E001 of 2023. He likens the issuance of the orders sought herein to depriving the Political Parties Disputes Tribunal jurisdiction to hear and determine the complaint in PPDT No. E001 of 2023, and since the application does not seek to stay the proceedings in the said Tribunal, he is bound to suffer prosecution twice on the account of same facts in gross violation of the principle against double jeopardy and Article 27 of *the Constitution*. In his view, the orders seeking to stop him from assuming the office of the majority leader have been overtaken by events as he is in office having taken oath of office on 28/3/2023. Further, the application is prematurely before this court and this court lacks the jurisdiction to reinstate the injunctive orders, and if prayers 3 and 4 are granted, he will be denied the right to a fair hearing since he will not have the right to appeal to this or any other court should the Tribunal issue adverse orders against him in the complaint pending before it. He accuses the Applicants of forum shopping by filing multiple other applications/suits in various other courts and/or tribunal, which is an outright abuse of the judicial process. He is confident that the ruling of the Tribunal was arrived upon proper considerations of the material facts and the law availed to the court, thus there would be no justification to interfere with it. He accuses the Applicants of material non-disclosure through concealment of facts and inviting the court to usurp otherwise legitimate powers vested on the members of the 1st Respondent by Statute, Standing Orders of the County Assembly and *the Constitution*. He verily believes that the established principles for grant of injunction in *Giella v Cassman Brown* (1963) E.A 358 are not only conjunctive but also consequential and courts must treat them as such. According to him, the Applicants are on a fishing expedition to challenge an otherwise lawful and legitimate exercise of political parties by the membership of the 1st Respondent by way of misuse and abuse of the criminal justice instruments. The orders sought are properly before the Tribunal and due process demands of this court to allow the Tribunal to consider the issues in controversy as a court of first instance and not unnecessarily interfere with the exercise of its jurisdiction as expressly provided under Section 40 of the *Political Parties Act*. There is no harm occasioned to the Applicants and the purported privileges only accrue to the holder of the office of leader of majority (or even minority) only to the extent that the electing party or coalition decides to confer such office to an individual, and it is not to be conferred either by the court or tribunal, as that would amount to abuse of the principle of separation of powers which inheres in the architecture and design of *the Constitution*. Since the ruling of the Tribunal of 3/5/2023 did not give any orders capable of being executed, the prayer for setting aside in conservation of legitimate and constitutional right of the Appellants is misplaced and irrational.

4. The Applicants and the 2nd Respondent reiterated the averments made in their pleadings in their oral submissions and relied on lists of authorities filed on 8/5/2023. No submissions were made for the 1st Respondent.

5. The Interested Party orally urged that the jurisdiction of the court had not been properly invoked because the application sought orders of stay of execution. He urged that prayers 2 and 3 were spent and only prayer 4 remained. He faulted the Applicants for failing to submit on all the grounds of stay pending appeal, and cited paragraph 88 of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2003) eKLR and urged that the tests set out therein had not been met. He urged that the intended appeal was frivolous and it was not open to the court at this interlocutory stage to grant orders which can only be granted after the intended appeal has been determined. It was urged that the appeal will not be rendered nugatory is stay is denied because the complaint filed before the Tribunal had

not been determined, and if the Tribunal found that the 1st Applicant had been wrongly removed, he could be reinstated. He urged that if prayer 4 is granted, it would determine the complaint pending before the Tribunal. He relied on *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2014] eKLR, *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR and *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (1985) KLR to support his submissions.

**Analysis and Determination**

6. From the pleadings affidavits and submissions by counsel for the parties, the issue for determination is whether the orders of stay of execution sought by the Applicants should issue in the circumstances of this case.

**Stay of Execution**

7. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -

> "6
>
> (1). No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> 2. No order for stay of execution shall be made under sub rule (1) unless:
>
> a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay.
>
> b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

**Substantial loss**

8. The cornerstone consideration for granting stay of execution or proceedings is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru Another* (1986) eKLR as follows: -

> " .....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money."

9. It is generally accepted that where there is no positive order capable of being executed, a stay of execution ought not to be issued. As this court said in *Trident Insurance Company v Dennis Mutwiri* [2021] eKLR "there is in legal acceptation of the term nothing to stay in a negative order which does not compel or require the doing or the taking of any action."

10. I also respectfully note the decision in *Titus Kiema v North Eastern Welfare Society* [2016] eKLR the Court (P.J Otieno J) where the learned judge said:

> " I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed? I have been unable to see any such threat.....The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn. This to me is the obligation on every applicant in an application for stay of execution pending appeal. I have demonstrated above that there is no order of the trial court compelling or expecting an action or obligation upon the Applicant to merit an order for stay pending appeal and I hold that the application does not lie and cannot succeed."

11. The Court of Appeal in *AG v James Hoseah Gitau Mwara* [2014] eKLR remarked that in order for a Court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the impugned ruling or decision.

12. The Applicants filed an application dated 29/3/2023 before the Tribunal seeking stay of the Respondents' decision of 28/3/2023 purporting to remove the 1st Applicant from the position of leader of majority and stay of the Respondents' and interested party's decision suspending the 2nd, 3rd and 4th Applicants from the House sittings for 21 sittings of the County Assembly of Isiolo. The Applicants were granted interim injunction orders, but when the application was finally heard, the Tribunal found that:

> " On the issue of irreparable harm, the Tribunal notes that the Complainants have not submitted on the irreparable loss that they are likely to suffer if they are not granted the injunctive relief that they seek. Indeed, none of the parties submitted on this crucial issue. The Tribunal is not able to identify any irreparable harm that the Complainants will suffer that cannot be compensated by way of damages if injunctions sought are not granted...Whether or not there was a sitting of the County Assembly of Isiolo on 28th

March 2023 is contested. The Complainants are of the position that house business for the said day was summarily adjourned without transacting any business. On the other hand, the 2nd Respondent and the Interested Party are of the position that the Interested Party communicated to the County Assembly of Isiolo on the change in the leadership of the majority party and the 2nd Respondent proceeded to take oath of office as the Leader of Majority...Guided by the foregoing authorities and taking into account the circumstances of the case, the Tribunal finds that there is prima facie evidence that the Interested Party communicated to the County Assembly of Isiolo that the 2nd Respondent had been elected as the Leader of Majority this evidence is subject to rebuttal at the hearing of the Complaint and the Tribunal is well aware that it cannot and will not make any definitive conclusion on facts at this stage...However, in the circumstances of this case and all factors considered, the balance of convenience does not tilt towards granting of an injunction to the Complainants. The Complainants Notice of Motion application dated 29th March 2023 is therefore dismissed. The consequence thereof is that the interim orders issued on 30th March 2023 stand discharged and set aside."

13. That is the decision that the Applicants seeks to stay pending appeal. This court finds that the order of the Tribunal was a negative one incapable of being executed and therefore there is nothing to stay.

14. The court has looked at the Complaint which is still pending determination before the Tribunal. The Complainants seek, "a finding that the process of impeaching or removal of the leader of majority of Isiolo County Assembly was unprocedural and null and void; a finding that the respondent's decision against the applicants made on 28th of March 2023 is irregular, unlawful and bull and void ab initio to the extent that it has no basis in law, party constitution or the County Assembly Standing Orders; an order setting aside and vacating the entire decision (s) made by the respondents and the Interested Party on the 28th of March 2023 and contained in its "internal memo" to the effect that the 2nd, 3rd and 4th Applicants, be de-whipped from all House Committees and suspended for 21 days."

15. Those orders are principally the same reliefs sought in the instant application, and are in their nature final, which essentially means that issuing them at this interlocutory stage will eventually ad summarily determine the complaint still pending before the Tribunal, and the Tribunal will be left with nothing to hear. In line with the principle of separation of powers and in order to avert a situation where the court will issue orders whose effect will ultimately determine the complaint still pending before the Tribunal, this court declines to issue the orders sought.

**Usurpation of the jurisdiction of the trial court/ tribunal**

16. The jurisdiction to determine the dispute herein lies in the first instance with the tribunal in accordance with section 40 of the *Political Parties Act*. Under Section 40 of the *Political Parties Act*, the Tribunal, as the court of the first instance, has jurisdiction to determine disputes between the members of a political party, disputes between a member of a political party and the political party, disputes between political parties, disputes between an independent candidate and a political party, disputes between coalition partners, appeals from decisions of the Registrar under this Act and disputes arising out of party nominations. Here, the Tribunal duly heard and properly determined the interlocutory application between the Applicants and the 2nd Respondent.

17. The decision to elect a majority leader falls squarely within the realms of the 1st Respondent. The Standing Orders provide that members of the largest political party or coalition may vote to remove the leader of Majority from office. Once the leader of the said Majority has been so removed, the Whip of the largest party or coalition of parties in the County Assembly is forthwith required to communicate

to the Speaker, in writing, the decision together with the minutes of the meeting at which the decision was made. Without belaboring the point, the court finds that the Tribunal correctly addressed its mind to that issue in reaching the impugned decision.

18. This court finds that the Applicants have failed to prove that they will suffer substantial loss if stay is not granted. In any event, the Applicants will still get an opportunity adduce evidence and be heard by the Tribunal during the hearing of the complaint pending before it. The said proceedings are time-lined to conclude within 90 days under the *Act*, and the applicants cannot be heard to say that the dispute cannot being dealt with expeditiously.

**Interference with discretion of trial court**

19. The guidance of *Mbogo v. Shah* (1968) EA 93 is important in considering the request by the applicants that this court, the appellate court for purposes of the tribunal proceedings sets aside the order made by the tribunal in exercise of its discretion;

> " [A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice".

20. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (1985) KLR, the Court of Appeal (Madan, Kneller & Hancox JJA) held that:

> " The Court of Appeal will interfere with a discretionary decision of a judge appealed from, where it is established that the judge misdirected himself in law, misapprehended the facts, took account of considerations of which he should have not taken account, failed to take account of considerations of which he should have taken account and his decision, albeit a discretionary one, is plainly wrong."

21. It has not been demonstrated that the tribunal arrived at a wrong decision made without discretion, in consideration of irrelevant matters that it ought not to have taken into account or in failure to consider relevant factors which it ought to have taken into account, or that the decision was plainly wrong.

**Interlocutory appeal**

22. The analogy of the Supreme Court's jurisdiction in interlocutory appeals is useful. The Supreme Court in *Waititu v Republic* (Petition 2 of 2020) [2021] KESC 11 (KLR) (22 October 2021) (Judgment) cited *Joseph Lendrix Waswa v Republic* Petition no.23 of 2019 (2020) eKLR and held:

> " The position of this court on interlocutory appeals is that it generally lacks jurisdiction to entertain appeals from interlocutory decisions. So then, what happens, as it did in this case, when a party is aggrieved by a decision of the trial court during the trial on a legal or constitutional issue that arises within a criminal trial? This question was well answered by this court in the case of *Joseph Lendrix Waswa v Republic* Sup Ct Petition No 23 of 2019; [2020] eKLR where we stated thus on interlocutory appeals arising from criminal trials:"
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> 94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional

circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;

b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;

c. Where the decision entails the recusal of the trial court to hear the cause." [Emphasis ours]"

23. The decision sought to be appealed from is an interlocutory one where hearing of an interlocutory application for stay, the tribunal discharged injunction orders previously granted pending the inter partes hearing of application. To grant the application for the reversal of the order of the tribunal discharging previous interim order would have the effect of not only determining finally an issue in dispute at this appeal but also embarrass the tribunal in the continued hearing of the petition against the removal of the applicants. By the order of this court reversing the tribunal, this court will have ruled finally both on the issue in the intended appeal before it and the issue pending determination before the tribunal. The proceedings before the tribunal and in this appeal would be rendered useless, unnecessary and nugatory.

24. The determination of the issue whether the applicants were properly removed from their offices is the primary jurisdiction of the tribunal. The tribunal must be allowed to conclude its determination before an appeal process may be undertaken.

25. The issue of the alleged forgery of the minutes is a matter for determination by the Tribunal. While the Applicants may have an arguable case on the issue of the falsified minutes, the removal of the substratum and the election, that is a matter for determination by the Tribunal and this court cannot take it up before a final decision has been made by the Tribunal. Having considered the memorandum of appeal, it appears as if the appeal is from the final determination of the complaint pending before the Tribunal which is not the case here. While the appeal may be arguable, the matter for determination before the court at this stage is stay of execution from the exercise of discretion and there are clear instances on when an appellate court can interfere.

**Delay**

26. The court finds that the application was filed timeously without any delay on 4/5/2023 while the decision sought to be appealed against was delivered on 3/5/2023.

**Security**

27. The parties herein have not addressed the court on the condition for the provision of security for the due performance of the decree, and whether the circumstances of the case are amenable to the requirement of security. Nonetheless, that issue becomes moot in view of the court's observation that the order herein is incapable of execution, and there is therefore no occasion for stay of execution.

**Pending Constitutional application**

28. The court is aware of a constitutional application Meru HC Const. Pet. No. E009 of 2023 by the applicants seeking orders similar in effect to the reliefs sought herein, by way of prayers that "an order of certiorari to bring into this court and quash the internal memo dated 28th March 2023 [and] a perpetual

order do issue directing the petitioners to resume their roles and functions as members of County Assembly of Isiolo with the privileges accruing thereto ante 27th of March 2023".

29. The court may not grant orders in this application which amount to grant of conservatory orders sought in the constitutional application as that would be tantamount to condemning the respondents unheard because the issue before this court is only the stay of execution of the order of the tribunal discharging the interim order it had granted pending the hearing and determination of the Notice of Motion and the Petition.

30. A world of difference lies between the factors to be considered for the grant of an application for stay of execution/proceedings pending appeal and for conservatory order pending hearing of original motion or petition. The former is a relief under the civil suit process while the latter is a public law interim order for preservation of the status quo pending determination of constitutional application. While both may be geared to protecting or maintaining the substratum of the litigation, the former looks into the matter upon or after the trial court's decision on the point and before hearing the appeal therefrom and the latter has, in the words of Ojwang and Wanjala, SCJJ, in the Supreme Court decision in *Gatirau Peter Munya v. Dickson Mwenda Githinji & 2 Ors.* SC K Petition No. 2 of 2013, (2014) eKLR, a decidedly public law character as follows:

> " 186. "Conservatory orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospect of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes."

31. The prayer for conservatory order is the subject of the unheard application in the constitutional application due for hearing/directions on hearing on 16/5/2023 at 2.30pm, after the ruling in this matter. No valid decision for conservatory order ought to be made without hearing the respondent parties.

**Conclusion**

32. On the basis of the evidence before the court and the submissions made by counsel for the parties in this application, the court must return a verdict that the matter in dispute relating to the holding of the leader of majority by the 1st applicant and the suspension of the 2nd, 3rd and 4th Applicants from house committees and sittings is pending determination before the Political Parties Disputes Tribunal; the order of that Tribunal discharging orders previously granted in the suit pending hearing and determination of the claim is an exercise of judicial discretion, with which an appellate court may only interfere on clear principles settled in *Mbogo v. Shah* (1968) EA 93.

33. In addition, the intervention of this court at this stage of interlocutory appeal on a matter which may come up on final appeal before it, embarrasses both the Tribunal, which has to conduct full hearing of the dispute now pending before it, as well as this court, should an appeal from the final decision be filed.

34. As elected members of county assembly - a public office - I doubt the applicants can show substantial loss in their removal because as held by the Supreme Court decision (*The County Assemblies Forum*

*v. Hon. Attorney General & 4 Others* Petition No. 22 of 2017 (Koome, CJ.& P., Mwilu, DCJ & V-P, Ibrahim, Wanjala & Njoki, SCJJ. )), which binds all courts inferior to it, upholding the Court of Appeal in *Attorney General & another v. Andrew Kiplimo Sang Muge & 2 others*, Civil Appeal No. 247 of 2017 [2017] eKLR, (the MCAs' Security of Tenure case), there is no private property in a public office:

> " [110] It is therefore our considered opinion that public office to which a portion of the sovereignty of the people, either legislative, executive or judicial, attaches for the time being and which is exercised for the benefit of the public, does not vest in the holder of the office the right to property of the office. The holders of elective office vie and hold office, not for their private benefit but for the benefit of their constituents on whose behalf they act. Be that as it may, the holders of such office still retain their rights to fair administrative actions, access to justice and fair hearing as enshrined in Articles 47, 48 and 50. They cannot be removed from office, other than by operation of the law. In the present suit, it was the interpretation and application of the constitutional requirement to hold elections on the second Tuesday in August, in every fifth year, that imposed the need to hold the second General Elections on 8th August, 2017 thereby occasioning the gap of eight (8) months."

In the emphatic view of the Court of Appeal, which the Supreme Court affirmed:

> "To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See South African *Veterinary Council V Szymanski* 2003 ZASCA 11. See also Justice *Kalpana H. Rawal V. Judicial Service Commission & 3 others* (supra)."

The applicants have no property rights over their elected or appointed public offices and the determination whether the applicants have been removed in accordance with the law is the subject of the pending complaint before the Tribunal and in the constitutional petition both which have not been heard. The applicants cannot, therefore, show substantial loss by way of removal from their respective public offices to warrant stay. And this not being proceedings in the constitutional petition for alleged infringement of rights, the issue of conservatory orders does not arise. Again, if the applicants succeed in the claim before the Tribunal, they shall be reinstated with full benefits and privileges.

35. Moreover, the impugned order is in the nature of a negative order discharging interim injunctive relief previously granted pending inter partes hearing, which not being positive and executive is not capable of being stayed as prayed.

**Orders**

36. Accordingly, for the reasons set out above, the Court does not find merit in the application dated 3rd May 2023, and it is declined.

37. The Costs of the Application shall abide the outcome of the Appeal.

Order accordingly.

**DATED AND DELIVERED THIS 16TH DAY OF MAY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Mwendani F. Advocate for Appellants.

Mr. Wanyonyi for Mr. Oburu for the 1st Respondent.

Mr. Aluku with Mr. Lesaigor, Advocates for 2nd Respondent.

Mr. Theuri, Advocate for the Interested Party.