



Baloo v Returning Officer, Mvita Constituency the Independent Electoral & Boundaries Commission & another (Election Petition Appeal E002 & E003 of 2023 (Consolidated)) [2023] KEHC 22225 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 22225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ELECTION PETITION APPEAL E002 & E003 OF 2023 (CONSOLIDATED)**

F WANGARI, J

JUNE 16, 2023

BETWEEN

SAMIR GULAM ABBAS BALOO APPELLANT

AND

**RETURNING OFFICER, MVITA CONSTITUENCY THE INDEPENDENT
ELECTORAL & BOUNDARIES COMMISSION 1ST RESPONDENT**

TOBIAS OTIENO SAMBA 2ND RESPONDENT

RULING

1. The Appellant/Applicant vide an application dated March 23, 2023 and filed on the same date sought for the following orders: -
 - a. Spent;
 - b. Spent;
 - c. Pending the hearing and determination of this application there be and is hereby issued an order to restrain the 1st and 2nd Respondents from calling for, scheduling and conducting fresh elections for the position of Member of County Assembly for Tudor Ward in Mombasa County;
 - d. Pending the hearing and determination of this appeal there be and is hereby issued an order to stay the execution of the judgement delivered by Honourable VO Adet (Principal Magistrate) on February 28, 2023 including the declaration of the position and seat of Member of County Assembly for Tudor Ward in Mombasa County as vacant;
 - e. Pending the hearing and determination of this appeal, there be and is hereby issued an order to restrain the 1st and 2nd Respondents from calling for, scheduling and conducting and



conducting fresh elections for the position of Member of County Assembly for Tudor Ward in Mombasa County;

- f. Costs of this application to abide the outcome of the appeal.
2. The application is opposed by the 3rd Respondent. He filed a replying affidavit dated March 28, 2023 on even date. Among other reasons, the 3rd Respondent contended that the Applicant is not legally eligible to file the present application and appeal since he did not participate in the lower Court proceedings and thus the court should not grant him audience. The 1st and 2nd Respondents equally filed a replying affidavit dated March 28, 2023 in support of the application.
3. When the application came up for hearing, the 1st and 2nd Respondents' Counsel informed the court that they had equally lodged an appeal the same being Mombasa High Court Election Appeal No E003 of 2023 relating to the same parties. As such, they sought for consolidation of that appeal with the present matter and by consent of parties, consolidation was done. This ruling therefore equally relates to Election Appeal E003 of 2023.
4. Directions were taken that the application be disposed off by way of written submissions. The Applicant's submissions are dated April 12, 2023. The 1st and 2nd Respondents' submissions are dated April 25, 2023 while the 3rd Respondent's submissions are dated April 19, 2023.

Analysis and Determination

5. I have considered the application, the responses, the parties' submissions and various authorities cited as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the orders of stay of execution pending appeal are merited;
 - b. What is the order as to costs?
6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

' No order for stay of execution shall be made under subrule (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; and
 - (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.
7. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
8. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned namely;
 - (a) That substantial loss may result to the applicant unless the order is made
 - (b) That the application has been made without unreasonable delay, and



- (c) That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

9. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, that: -

' No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

10. These are the applicable standards in ordinary appeals. However, in election petitions, the test for grant of stay of execution was set by the apex court in the case of *Gatirau Peter Munya v Dickson Mwenda & 2 Others [2014] eKLR*. It was held as follows: -

' The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that: (i) the appeal or intended appeal is arguable and not frivolous; and that (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely (iii) that it is in the public interest that the order of stay be granted.'

11. It is not in doubt that the application at hand elicits public interest as the people of Tudor woke up on August 9, 2022 to exercise their rights under Article 38 of the *Constitution*. In *Baridi Felix Mbevo v Musee Mati & 2 Others [2018] eKLR*, the court had an opportunity to consider a similar application as this one.

12. The court considered the provisions of Section 85A (2) of the *Elections Act*, 2011 which provides that an appeal to the Court of Appeal acts as an automatic stay until an appeal is heard and determined. However, the court identified a gap in the law as an appeal from the Magistrates' Court's decision does not act as stay unless an application for the same is made.

13. In the said case, the court while considering whether to grant stay or not had the following to say: -

' An Election Petition is a matter of public interest. In this case the people of Mutonguni Ward elected their representative, the results were challenged in an Election Court. The determination by the Court ultimately affect the people therefore such circumstances cannot be overlooked.'

14. It is not in doubt that the Applicant has filed an appeal. Though the 3rd Respondent posits that the Applicant should not be given audience by virtue of having not participated in the Lower Court



matter, it is my view that the said arguments goes to the merits of the appeal and I caution myself at this juncture that I should not delve into the merits of the appeal.

15. In Baridi Felix Mbevo (above), the court while allowing the application for stay had the following to say: -

' What is not in doubt is that if the order sought is not granted and the Appeal succeeds then the Appeal shall be rendered nugatory.'

16. I am of the same view that in the event the if stay is not granted and the appeal preferred by the Applicant succeeds, it will be academic as what was sought to be stayed might have been overtaken by events. I thus return a positive finding on the first issue.

17. On the second issue of costs, the same follows the event. This is what Section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. Though the Applicant is successful, it would be onerous to require the Respondents or any of them to bear the costs of the application and I thus exercise my discretion to direct that the costs abide the outcome of the appeal.

18. Flowing from the foregoing, I proceed to make the following orders: -

a. The application dated March 23, 2023 is merited and is thereby allowed in terms of prayers 3, 4 and 5;

b. The costs to abide the outcome of the appeal.

Orders accordingly

Dated, signed and delivered at Mombasa, this 16th day of June, 2023.

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F. WANGARI

JUDGE

In the presence of:

Angina Advocate for the Applicant

Mohamoud Advocate for the 1st and 2nd Respondent

Wambani Advocate h/b for Obonyo Advocate for the 3rd Respondent

Barile, Court Assistant

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