



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E354 OF 2020**

**DR. EKURU AUKOT.....APPELLANT/APPLICANT**

**-VERSUS-**

**DR. ANGELA MWIKALI.....1<sup>ST</sup> RESPONDENT**

**FREDRICK OKANGO.....2<sup>ND</sup> RESPONDENT**

**MIRURI WAWERU.....3<sup>RD</sup> RESPONDENT**

**ANDREW NJOROGE.....4<sup>TH</sup> RESPONDENT**

**CHRISTINE MWEBIA.....5<sup>TH</sup> RESPONDENT**

**PHELISTER WAKESHO.....6<sup>TH</sup> RESPONDENT**

**FELIX APIYO.....7<sup>TH</sup> RESPONDENT**

**ANITA NKIROTE.....8<sup>TH</sup> RESPONDENT**

**THIRD WAY ALLIANCE.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellant/applicant herein has lodged the Notice of Motion dated 20<sup>th</sup> April, 2021. The Motion is supported by both the grounds laid out on the body thereof and the facts stated in the sworn affidavit of the applicant. The applicant sought for the orders hereunder:

**a) Spent.**

**b) Spent.**

**c) THAT this Honourable Court be pleased to summon ANDREW NJOROGE, FREDRICK OKANGO, CHRISTINE MWEBIA, PHELISTER WAKESHO, ANITA NKIROTE & FELIX APIYO to show cause why they should not be cited for contempt of the orders of this Honourable Court issued on the 9<sup>th</sup> of February, 2021 staying the implementation of the decree and final orders of the Political Parties Dispute Tribunal (“the Tribunal”).**

**d) THAT upon citation for contempt, the aforesaid ANDREW NJOROGE, FREDRICK OKANGO, CHRISTINE MWEBIA, PHELISTER WAKESHO, ANITA NKIROTE & FELIX APIYO be sanctioned by committal to civil jail, sequestration of property, payment of a fine and/or any further orders.**

**e) THAT in the alternative to prayers c) and d), there be and is hereby issued an order of injunction barring the six respondents herein, by themselves, their servants and/or agents from continuing to run party affairs by nominating party candidates, operating the party account, holding meetings and/or making any resolution touching on the running of the party pending the hearing and determination of the appeal.**

**f) THAT the costs of the application be provided for.**

2. The application stands opposed by way of the replying affidavit sworn by the 4<sup>th</sup> respondent on 17<sup>th</sup> May, 2021, to which the applicant rejoined with the supplementary affidavit he swore on 10<sup>th</sup> June, 2021.
3. The parties were directed to file written submissions on the instant Motion. At the time of writing this ruling, only the submissions filed on behalf of the applicant were on record.
4. I have considered the grounds laid out on the face of the Motion; the facts deponed in the affidavits in support of and in opposition thereto; and the submissions by the applicant.
5. A background of the matter in brief is that following a dispute, the 9<sup>th</sup> respondent lodged a complaint at the Tribunal vide Complaint Nos. 16 and 17 of 2020 and sought for various injunctive reliefs against the applicant. The 1<sup>st</sup> to 8<sup>th</sup> respondents were enjoined in the proceedings as interested parties.
6. Upon hearing the parties, the Tribunal in the judgment delivered on 30<sup>th</sup> November, 2020 granted an injunctive order against the applicant restraining him or his agent from intimidating or otherwise unlawfully dealing with members of the National Executive Committee (NEC) and the 9<sup>th</sup> respondent; and further ordered that the disciplinary matter relating to the applicant be referred back to the 9<sup>th</sup> respondent for the purpose of undertaking the relevant disciplinary process.
7. The aforementioned judgment had precipitated the present appeal.
8. Before I touch on the merits of the Motion, I note that the 4<sup>th</sup> respondent by way of his replying affidavit raised two (2) preliminary issues.
9. The first preliminary issue is that the instant Motion is *sub judice* by virtue of the fact that the applicant has filed High Court Petition No. E267 OF 2020 involving the same parties herein and seeking similar orders as those now being sought before this court.
10. The applicant retorts by stating and submitting that the aforementioned matter which is before the Constitutional Division of the High Court raises distinct issues from those being raised here.
11. Upon my perusal of the record, I observed that the applicant instituted the above-cited Constitutional Petition and sought for various declaratory orders and orders of certiorari against the respondents herein pursuant to a resolution passed on 26<sup>th</sup> August, 2020.
12. There is nothing to indicate that the orders sought therein are a replication of those being sought in the instant Motion or on appeal, and hence the *sub judice* rule cannot be said to apply to the present circumstances.
13. The second preliminary issue concerns competency of the Motion and the appeal. On the part of the 4<sup>th</sup> respondent, it is stated that both the Motion and the appeal are not ripe for the reason that the applicant has not first submitted himself to the internal dispute resolution pursuant to the Constitution of the 9<sup>th</sup> respondent.
14. On his part, the applicant submits that it is likely that the respondents may apply internal mechanisms to implement the decision by the Tribunal and yet he is aggrieved by the said decision.
15. Upon my perusal of the memorandum of appeal on record, I note that among the grounds set out on appeal is the ground challenging the finding by the Tribunal that the applicant ought to have first exhausted internal dispute mechanisms before filing PPDT No. 17 of 2020.
16. From the foregoing, it is apparent that the subject of internal dispute mechanisms constitutes an issue requiring consideration and determination on appeal.
17. Consequently, I am of the view that the respondents have not made any credible arguments to convince me that the Motion and the appeal are incompetent for not being ripe.
18. On the merits of the Motion, upon my perusal of the record, it is apparent that the applicant has chosen not to pursue orders c) and d) of the instant Motion, which leaves the order for a stay of execution in the form of injunctive orders against the respondents.
19. The relevant provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be met when it comes to an application seeking an order for a stay of execution, as follows:
  - a) **The application must be brought without unreasonable delay;**
  - b) **The applicant must demonstrate that substantial loss may result; and**
  - c) **Provision should be made for security.**
20. I will begin with the first condition on whether the application has been timeously filed. As earlier mentioned, the decision sought to be

stayed was delivered on 30<sup>th</sup> November, 2020 whereas the instant Motion was filed on 21<sup>st</sup> April, 2021. In my view, while there has been a delay in bringing the Motion, I do not find the same to be inordinate.

21. This brings me to the second condition of substantial loss. The applicant states and submits that unless the order for a stay of execution is granted, the respondents will continue to run the affairs of the 9<sup>th</sup> respondent on account of unlawful sittings by expelled and/or suspended members of the 9<sup>th</sup> respondent's NEC while purporting to remove the applicant from being a signatory to the accounts of the 9<sup>th</sup> respondent without first following the due process.

22. The applicant is also apprehensive that the respondents may purport to perform other unlawful actions which may turn out to be prejudicial to the functioning of the 9<sup>th</sup> respondent, thereby rendering the appeal nugatory.

23. In retort, the 4<sup>th</sup> respondent states in his replying affidavit that the argument of threat of execution is moot since no execution was issued against the applicant, and that the order for a stay of execution; if granted; will have the impact of paralyzing the operations of the 9<sup>th</sup> respondent.

24. The importance of substantial loss in any application seeking an order for a stay of execution was aptly addressed in the Court of Appeal case, namely *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* thus:

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”***

25. To echo the above, I will borrow from the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* cited in the applicant's submissions, where the court held that an applicant ought to establish other factors to demonstrate substantial/irreparable loss.

26. Upon considering the unique circumstances of the matter at hand, I am of the view that while the operations of the 9<sup>th</sup> respondent need to be taken into consideration, it is noteworthy the applicant has brought forward reasonable arguments to show that unless an order for a stay is granted, the appeal if successful will be rendered nugatory thereby resulting in substantial loss. As a court of law, I am therefore required to balance the competing interest of the parties and it is clear that this is a matter that would require expeditious determination in the circumstances.

27. On the third condition, given that the order made by the Tribunal is non-monetary in nature, the condition for the provision of security would not arise here.

28. Consequently, the Motion dated 20<sup>th</sup> April, 2021 is allowed thus giving rise to issuance of the following orders:

a) **An order of injunction is issued barring ANDREW NJOROGE, FREDRICK OKANGO, CHRISTINE MWEBIA, PHELISTER WAKESHO, ANITA NKIROTE & FELIX APIYO, by themselves, their servants and/or agents from continuing to run party affairs by nominating party candidates, operating the party account, holding meetings and/or making any resolution touching on the running of the party pending the hearing and determination of the appeal.**

b) **For the purpose of ensuring the expeditious determination of the appeal, the applicant shall have 21 days within which to file and serve written submissions on the appeal, following which the respondents shall have 21 days upon service to put in written submissions.**

c) **Mention on 22.2.2022 to confirm compliance.**

d) **Costs of the application to abide the outcome of the appeal.**

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 8<sup>th</sup> day of December, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

.....for the Respondents