



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

ELECTION PETITION APPEAL NO. 1 OF 2019

ELIZABETH JEBET KIBOR.....APPELLANT

VERSUS

ISAAC SUAARE OSEUR.....1ST RESPONDENT

ARNOLD ODIWUOR OCHIENG.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT (ODM).....3RD RESPONDENT

INDEPENDENT ELECTRAL & BOUNDARIES COMMISSION....4TH RESPONDENT

WAFULA CHEBUKATI.....5TH RESPONDENT

SPEAKER KAJIADO COUNTY ASSEMBLY.....6TH RESPONDENT

RULING

1. This is a Notice of Motion dated 7th November, 2019, brought under section 3A of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules, 2010. It was filed on 14th November, 2018. By this motion, the Applicant seeks stay of execution of the judgment and decree of the Election Court dated 6th November, 2019. In that judgment, the Election court nullified the Applicant's election to the County Assembly of Kajiado.

2. The application is supported by the applicant's affidavit sworn on 7th November, 2019 and her supplementary affidavit sworn on 21st November, 2019 and filed on the same day. The gist of the application is that since the Applicant has lodged an appeal against the decision of the Election court, her appeal will be rendered nugatory if stay is not granted. The Applicant argues that the election petition as filed before the election court was incompetent on various grounds and, therefore, could not found a successful challenge to her election. The Applicant further argues that the election petition violated Section 78 of the Election Act and the regulations made thereunder.

3. According to the Applicant, the petition was incompetent because the Respondents, who were the Petitioners, did not deposit the amount for costs as well as court filing fees as required by law; that issues of standing of other parties, including Orange Democratic Movement were not resolved and that the election court shifted the burden of proof to the Applicant. It is also argued that the Respondents, who were the Petitioners, did not prove that they were members of the Political Party and, therefore, their standing was not proved, and for that reason, they could not file a petition against the Applicant's election.

4. The Applicant goes on to argue that she was joined in the petition as an Interested Party instead of a Respondent as required by rule 2 of the Election (Parliamentary and County Elections) Rules, 2017 which state who the Respondents are in an election petition.

5. According to the Applicant, the Respondents did not also pay the sum required by rule 32 of the Rules. It is argued that whereas the election court was called upon to decide Election Petition No. 1 of 2019 that court introduced Petition No. 1 of 2018 which was not the Petition before it. The Applicant relied on *Mawathe Julius Musili v IEBC & Others* [2018] eKLR, and urged the court to allow the application for stay with costs.

6. Mr. Mungai, learned counsel for the 4th and 5th Respondents supported the application and associated himself with the submissions made on behalf of the Applicant. He also relied on *Shadrack Mutua Kitili v IEBC & 17 Others* [2018] eKLR

7. Regarding the preliminary objection that this court has not been gazetted to hear election petitions, Mr. Mungai argued that there is no such requirement.

8. The Respondents opposed the application though a preliminary objection dated 15th November, 2019 and filed on 18th November, 2019, and a replying affidavit sworn on 2nd November, 2019 and filed on 22nd November, 2019. Mr. Ambala, learned counsel for the 1st and 2nd Respondents, submitted in opposition to the application, first; that this court has no jurisdiction to hear the appeal and application. In his view, this court should have been gazetted as required by Section 75 (4) of the Elections Act, as read with Rule 6(3) of the Election (Parliamentary and County Election Petition) Rules, 2017.

9. Second, regarding the argument that the Respondents had not deposited security for costs and sufficient court fees, Mr. Ambala admitted that there was insufficient security for costs and court filing fees. According to counsel, the Respondents deposited Kshs. 15,000/- for costs and Kshs. 8155 for court fees, instead of Kshs. 100,000 and 15,000/- respectively. He however argued that the court allowed the Respondents to pay the balance of court fees before issuance of the decree, which they paid on 14th November, 2019. On security for costs, he submitted that the court did not pronounce itself on the matter as such, it has not been paid in full as required by law.

10. Counsel argued that it was not true that the Respondents are not members of Orange Democratic Movement Party. According to counsel, the Respondents swore affidavits to confirm that they were members of that Party and gave their constituencies. He argued that the 3rd Respondent, Orange Democratic Movement Party, did not also disown them as its members. He further argued that the Application contains matters of fact such as that regarding section 75(4), yet an appeal is supposed to be on matters of law only. He urged the court to dismiss the application.

11. I have considered the application, depositions for and against, as well as submissions by counsel for the parties. I have also considered the authorities relied on.

12. This is an application for stay of execution of the decision of the Election court handed down on 6th November, 2019, nullifying the election of the Applicant to the County Assembly. The court ordered fresh elections as had been ordered by this court in election No. 1 of 2018.

13. The Applicant is aggrieved by that decision and has lodged an appeal to this court, challenging that decision. The effect of the impugned decision is that the election of the Applicant is to be de-gazetted and, therefore, to obviate this eventuality, the Applicant has sought stay of execution of that decision. It is the Applicant's case that if stay is not granted, her appeal will remain an academic exercise.

14. I have considered the averments in the various affidavits and the submission by counsel. I have also considered the preliminary objection that this court has no jurisdiction to hear and determine this appeal on grounds that it has not been gazetted as an election court.

15. I do not think the argument that this court has no jurisdiction, merits serious attention from this court. The law only requires election courts to be gazetted. An appeal from an election court is not an election to be heard by an election court. It is a normal appeal to be decided by the court exercising appellate jurisdiction. The reading of the law is clear on this. The preliminary objection has no merit and is dismissed.

16. Regarding the application, it is true that the effect of the impugned decision is that the Applicant is no longer a member of the County Assembly. However, the Applicant has lodged an appeal to this court which is yet to be heard.

17. Order 42 of the Civil Procedure Rules, confers on this court wide discretion to grant stay of execution where circumstances permit. There are, however, other considerations that the Court must take into account when considering an application for stay. Order 42 rule 6(1) and (2) provides;

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 of stay 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 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."

18. In ***Butt v Rent Restriction Tribunal*** (Civil App No. NAI 6 of 1979), the Court of Appeal stated **that**;

"i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

19. Bearing the above rule and authority in mind, I have perused the grounds of appeal relied on. In my view, they are not frivolous. They raise substantial points for this court’s consideration and determination. If the court was to decline to grant stay, it would mean the Applicant will be degazetted as elected member of the County Assembly, and cease to be a member of the county legislature before her appeal is determined.

20. The duty of this court at this stage, therefore, is not to determine the appeal, but to consider whether there are sufficient grounds raised by the Applicant to justify grant of stay. Having considered the arguments and the grounds of appeal, I am satisfied that this is one case that this court should exercise its discretion and grant stay of execution to enable the Applicant exercise her right of appeal.

21. If this court does not grant stay, the applicant will be de-gazetted and if she were to eventually succeed on appeal, she would already have suffered irreparable harm. She will not be able to take part in the legislative agenda of the County Assembly, a that loss cannot be compensated even if she were to succeed on appeal and re-gazetted.

22. The Respondents have not shown what prejudice they will suffer if stay is granted, given that if the appeal is eventually dismissed the election will have to take place as was decreed.

23. Consequently, and for the reasons above, I find that it is in the interest of justice to grant stay of execution at this stage, and maintain the substratum of the appeal until the same is finally determined.

24. In the circumstances, the application dated 7th November 2019 is allowed. Execution of the judgment and decree of the Election Court dated 6th November 2019 is hereby stayed pending the hearing and determination of the appeal filed herein. Costs of the application to abide by the result of the appeal.

Dated, signed and delivered at Kajiado this 7th day of February, 2020.

E C MWITA

JUDGE