



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.461 OF 2018

HON. MARK MUENDO.....1ST APPELLANT/RESPONDENT

HON. TARIQ MULATYA.....2ND APPELLANT/RESPONDENT

-VERSUS-

HON. FRANCIS M. NGUNGA.....RESPONDENT/APPLICANT

RULING

The application before the court for determination is the Notice of Motion dated the 7th day of November, 2018 brought under Sections 3 and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. Spent
2. Spent
3. That the Honourable Court be pleased to grant a stay of judgment delivered by Honourable Justice L. Njuguna in relation to Orders made by the Political Parties Disputes Tribunal Cause No.7 of 2018 and any consequential orders pending the hearing and determination of the appeal.
4. That costs of this application be in the cause.

It is premised on the following grounds which are set out on the body of the application.

- I. That judgment was entered on 30th October, 2018 in favour of the Appellant/Respondent herein against the Respondent/Applicant.
- II. The Respondent being dissatisfied with the said judgment has filed an Appeal against the judgment.
- III. There is eminent threat to the Respondent that he would be removed as the majority leader of the County Assembly of Machakos unless the judgment is stayed.
- IV. Unless a stay is granted, the Applicant shall suffer irreparable loss and damages which cannot be compensated in monetary value.
- V. The applicant has an arguable appeal with chances of success and if a stay is not granted the appeal shall be rendered nugatory.
- VI. The applicant is ready and willing to abide by any condition that may be imposed by the court.
- VII. The application has been made without undue delay and granting the orders will not occasion any prejudice to the Appellant/Respondents.

In the supporting affidavit sworn by Francis Mwaniki Ngunga on the 7th November 2018, he depones that he is a member of the County Assembly of Machakos having been elected on a Wiper Democratic Party ticket and subsequently, he was elected as the House Majority leader, a position he has been holding.

That on or about the 17th day of April, 2018, the 2nd Respondent made communication to the speaker of the County Assembly of Machakos

to the effect that he had been removed as the majority leader in a meeting purportedly held on the 16th April, 2018 and replaced by the 1st Respondent. He averred that on the day of the alleged meeting, he was in Dubai on official duties and he was not and had never been given any notice for his removal and/or to attend the meeting for such deliberations. That there was no notice convening the meeting which purportedly elected the 2nd Respondent as the leader of the majority in the County Assembly.

He contends that he was not satisfied with the resolution and he proceeded to the High Court at Machakos vide Cause No. 134/2018 and the Judge in his ruling dated 17th July, 2018 stated that the High Court had no jurisdiction over the matter and that jurisdiction lay with the Political Parties Disputes Tribunal as the dispute was a political party affair. That he proceeded to the political parties Disputes Tribunal where he was initially granted temporary orders pending the hearing and determination of the complaint by virtue of which orders, he has remained in office as a leader of majority of the County Assembly of Machakos.

He averred that, the Appellants herein being dissatisfied with the said orders preferred an appeal before the High Court and upon hearing the Appeal, the court on the 30th October, 2018 delivered a judgment allowing the Appeal which set aside the ruling of the Political Parties Dispute Tribunal delivered on the 25th September, 2018. That he has been aggrieved by the said judgment and has already lodged a Notice of Appeal and has already applied for certified copies of the proceedings.

He depones that he is apprehensive that if a stay order is not granted he stands to be removed as the majority leader and the intended Appeal shall be rendered an academic exercise. He states that the application has been made without any unreasonable delay and the same will not occasion any prejudice to the Respondent herein.

The Respondents have opposed the application vide a Replying affidavit sworn by 2nd Appellant/Respondent on the 16th November, 2018 in which he avers that the application is unmerited as no sufficient cause has been shown by the applicant why the orders ought to be granted. He avers that the Appeal has no merits in that the court found that the political Parties Dispute Tribunal had no jurisdiction to hear the matter. In the alternative and without prejudice, he contends that the mere fact that the High Court at Machakos stated that the Political Parties Dispute Tribunal had jurisdiction to hear the complaint that did not confer upon the said tribunal jurisdiction to hear the complaint. That the three days stay issued by the court expired and the 1st Appellant consequently resumed his duties as a majority leader and since then, the County Assembly is operating smoothly.

He depones that, he has been advised by his Counsel that the court did not issue a positive order which is capable of being stayed besides the costs awarded, as the status quo before the filing of the case was that he was the majority leader communication having been done to the Assembly by the Speaker as per the Machakos County Assembly Standing Orders.

He contends that the balance of scales weigh in favour of the 1st Respondent who has been elected by the majority members in place of the applicant and granting a stay order would not be in public interest.

He states that he has been advised by his Counsel that the application herein does not meet the conditions for grant of stay of execution as required under the law. He contends that an appeal does not operate as a stay of execution and that the applicant herein will not suffer any prejudice or substantial loss as he does not even perform the duties of the majority leader of the Machakos County Assembly.

In a further affidavit sworn by Francis Mwaniki Ngunga and filed on 29th November, 2018, he avers that contrary to the assertions by the 2nd Respondent/appellant, the first Appellant has never assumed office of the leader of the majority and vide Political Parties Dispute Tribunal order dated 31st July 2018, he was granted temporary orders suspending his removal as the leader of the majority which orders were never vacated and/or set aside till the judgment of the High Court delivered on the 30th October, 2018.

He contended that the 1st Appellant has never assumed or held office of the leader of the majority and since the High Court at Machakos ruled that it did not have jurisdiction to deal with the matter, no appeal has been preferred against that ruling by the High court.

He reiterated that the application herein meets the conditions for grant of a stay and the court has the discretion to grant the same. He has urged the court to grant the orders sought in the application.

The application was canvassed by way of written submissions which the court has duly considered together with the material before it.

The applicant has sought stay of judgment of the Political Parties disputes Tribunal delivered on the 30th day of October 2018. The application has been brought mainly under Order 42 Rule 6(2) of the Civil Procedure Rules which provides that;

No order for stay of execution shall be made unless;

I. The court is satisfied that substantial loss may result to the applicant unless the order is made.

II. The application has been made without unreasonable delay;

and

III. Such security as the court orders or the due performance of such decree or order as my ultimately be binding on him has been given by the applicant.

On whether the application was made without undue delay, the court notes that the judgment was delivered on the 30th October 2018 and the application was filed on the 7th November 2018. The applicant submitted that the delay was caused by the delay in obtaining certified copies of the proceedings. The applicant had sought and obtained a stay of execution for 3 days following an oral application made in court after the delivery of the judgment. The delay of three days is reasonable and it has been explained.

On the issue of security, the court has taken note of the fact that the applicant has not offered any security as required under Order 42, rule 6 (2) of the Civil Procedure Rules.

On substantial loss, the applicant has argued that if the orders are not granted, the Applicant/Respondent herein will be removed as the majority leader of the County Assembly of Machakos and that the Appeal shall be rendered nugatory. On the part of the Respondent it has been argued that, assuming the applicant is likely to suffer substantial loss, the court has powers to order compensation after the Appeal is heard. The Respondents submitted that the applicant is member of Assembly who is on a salary and the office of the majority leader is a privilege and not an entitlement and therefore no substantial loss can arise.

The Respondent has also submitted that there is no order that the applicant is seeking to stay, in that, the effect of the judgment that the applicant is challenging in appeal was set aside the earlier order by the Political Parties Tribunal which order is not capable of execution. They relied on the case of **Catherine Njeri Maranga Vs. Serah Chege & Another 2017 eKLR** where the court stated that an order made merely dismissing the application and did not order the party to do or refrain from doing something was a negative order not capable of execution and therefore not capable of being stayed.

It is trite that substantial loss in its various forms is the cornerstone of best jurisdictions for granting a stay of execution. See the case of **Kenya Shell Limited Vs. Kibiro (1986) eKLR 410**. Similarly, in the case of **United Builders Vs. Standard Chartered Bank Limited HCC NO.41/1995**, the Court of Appeal upheld the Kenya Shell decision and stated.

“The applicant must show that he will suffer substantial loss or that they will have difficulty to recovering the money, security must be offered in the application.

As rightly submitted by counsel for the Respondent, the order given by the court is not a positive order in that it only allowed the Appeal on the ground that the Political Parties Tribunal did not have jurisdiction to hear the matter. The court did not make a positive order that would warrant an order for stay of execution. In any event, it is on record that in her rejoinder submissions, Counsel for the applicant submitted that the only order of stay that the applicant is asking for, is on costs and not on the other limb of the judgment that dismissed the appeal. She clarified that the applicant was seeking a stay of execution on the aspect of costs only.

In view of the foregoing, the court finds that the applicant has not met the threshold required by order 42 Rule 6(2) of the Civil Procedure Rules to warrant a stay of execution on the issue of costs. He has not alleged that the Respondents will not be able to refund the money if he pays them costs and the Appeal succeeds.

In the end, the Application is hereby dismissed but with no orders as to costs.

Dated, signed and delivered at NAIROBI this 14th day of February, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... For Appellant/Respondent

..... Respondent/Applicant