



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**MISCELLANEOUS CIVIL APPEAL NO. 13 OF 2019**

**ROBINSON SIMIYU MWANGA & ANOTHER.....APPLICANTS**

**VERSES**

**IEBC & ANOTHER.....1<sup>ST</sup> RESPONDENT**

**KHAEMBA PATRICK SIMIYU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On the 11<sup>th</sup> June, 2019 this court in its ruling upheld the preliminary objection raised by the 3<sup>rd</sup> Respondent and dismissed the Applicant's reference with costs. The Applicants have filed the notice of motion dated 24<sup>th</sup> June, 2019 in which they have sought the following prayers;

- (a) This court be pleased to grant stay of execution of the ruling dated 11th June, 2019**
- (b) This court do grant leave to the applicants to appeal from the decision and the ruling of 11th June, 2019**
- (c) This court grants stay of execution of fresh warrant against the applicants pending the intended appeal.**
- (d) This court does issue a certificate that a point of law of general public importance is involved in the taxation proceedings arising out of Kitale High Court Election Petition No.1 of 2017.**

2. The application is supported by the affidavit of **Robinson Mwangi Simiyu** sworn on 24<sup>th</sup> June, 2019. In a nutshell they are dissatisfied with the decision of this court of 11<sup>th</sup> June, 2019 which dismissed their reference. In that ruling the court upheld the preliminary objection raised by the 3<sup>rd</sup> Respondent that the reference was way out of time and it was filed without the leave of the court.

3. The current application as I understand it desires to appeal against the said decision and thus they are seeking the leave of this court. The respondents have vehemently opposed the same. The 1<sup>st</sup> and second Respondent through the replying affidavit of **Bilal Kiptugen** have argued that the application lacks merit since the reference was dismissed and this court essentially is *functus officio*. That at any rate they did not prefer any appeal to the decision of the electoral court which ordered the payment of kshs. 5 million as costs.

4. The said Respondent argued that the applicants have not paid the ordered sum or deposited in court. They have not explained any substantial loss they shall suffer. On the question of this court's ruling that the issue at hand raises substantial question of law, she stated that that was the preserve of the Court of Appeal and the Supreme Court.

5. On his part the 3<sup>rd</sup> Respondent filed grounds of opposition which essentially mirrored the grounds raised by the correspondent. Ideally according to him all that the applicant is doing is calling for the rehearing afresh of the dismissed application. The best option was for the applicants to pursue the direction proposed by the court in its ruling of complying with rule 11(4) of the Advocates Remuneration Order. He proposed that should this court be inclined to grant the orders sought then the applicants should deposit kshs. 2 million as security.

6. The court has perused the lengthy submissions by the parties and the attendant authorities cited. In the considered opinion of this court, the question of whether the intended appeal raises constitutional issue of great public significance is a preserve of the Court of Appeal and the Supreme Court and not this court. **See Article 163 of the Constitution.**

7. Regardless of that prayer, the applicants have not demonstrated to this court whether they have appealed the decision of the Election court which ordered for the payment of costs to the respondents. If that is the case this court respectfully cannot sit as an appellate court over that decision. At the same time, I doubt whether it can form part of the grounds in the intended appeal as it was never argued before the taxing

master and this court.

8. As regards leave of this court to file an appeal to the court of appeal ,the provisions of Rule **11(3) of the Advocates Remuneration Order** are clear namely,

***“Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.”***

9. This leave should not be denied by this court considering that the application has not been made inordinately. I also note that they need to ventilate this courtsdecision on the ruling allowing the preliminary point of law by the Respondent.

10. This permission is however not without conditions as was stated in the now famous case of **BUTT VS. RENT RESTRICTION TRIBUNAL (1982) KLR 417**. The Applicants have not fulfilled the orders by the taxing master and by extension the Election Court. They have not demonstrated any payment of the decretal sum save the kshs. 1 million paid to the 3<sup>rd</sup> respondent. Neither have they proposed any security while their appeal is pending.

11. In the premises ,and using the discretion of this court ,it is ordered that ;

**(a) Leave is hereby granted to the applicants to file an appeal to the court of appeal within the next 30 days.**

**(b) The applicants do pay kshs. 1 million to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents andkshs. 1 million to the 3<sup>rd</sup> Respondent respectively within the next 30 days from the date herein.**

**(c) While complying with the above order (b), let there be stay of execution but in default execution do issue appropriately.**

**(d) Cost of this application to the Respondents.**

**Dated,signed and delivered in open court at Kitale this 5<sup>th</sup> day of November 2019.**

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**H K CHEMITEI**

**JUDGE**

**5/11/2019**