

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
HIGH COURT ELECTION PETITION APPEAL NO. 1 OF 2018
IN THE MATTER OF AN APPEAL FROM THE JUDGEMENT AND
DETERMINATION ARISING FROM ELECTION PETITION
NO. 3 OF 2017 AT KILGORIS RESIDENT
MAGISTRATE’S COURT
AND
IN THE MATTER OF ELECTION ACT 2011, LAWS OF KENYA
AND
IN THE MATTER OF ELECTION (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITIONS RULES 2017
IN THE MATTER OF AN APPEAL FOR MEMBER OF
COUNTY ASSEMBLY SHANKOE WARD
AND
IN THE MATTER OF AN APPEAL ARISING FROM AN ELECTION PETITION
CONTESTING THE ELECTION HELD ON 8TH DAY OF AUGUST 2017
BETWEEN
PATRICK LEKAKENY.....APPLICANT
-VERSUS-
TOMITO ALEX TAMPUSHI AND OTHERS.....DEFENDANTS
RULING

1. This application was brought under certificate of urgency and was certified as such and thereafter it was fixed for inter-parties hearing on 31/1/2018. The application is premised on section 8(1)(d), 80(3) of the Elections Act No. 24 of 2011. It is also based on rules 3 and 37 of the Elections [Parliamentary and County Elections] of the Petitions Rules of 2017, Order 42 rule 6 and 7 of the Civil Procedure Rules, sections 1A, 1B and 3A of Civil Procedure Act and article 50 (1) and 159 of the 2010 Constitution of Kenya. The applicant seeks interim orders of stay of execution of the magisterial court judgement, decree or certificate of determination of the petition that was issued on 18th January, 2018 pursuant to section 86 of the Elections Act No. 24 of 2012. The applicant also seeks maintenance of the status quo, that was in place before the delivery of the judgement in respect of the applicant’s status as a member of the County

Assembly of Shankoe Ward within Narok County, together with all attendant privileges, emoluments and entitlements. He also seeks additional orders, which are similar to the main order as set out in his notice of motion.

2. The applicant has supported his application with 11 grounds as set out on the face of notice of motion and a 21 paragraphs supporting affidavit dated 23/1/2018. The major grounds are as follows. First, the magisterial court declared the applicant as having not been validly elected as a member of the County Assembly by virtue of its judgement dated 18/1/2018. 2nd, he was aggrieved by that judgement and as a result he has filed an appeal in this court, being Civil Appeal No. 1 of 2018. 3rd, He has stated that the trial court has prepared a certificate of determination under section 86(1) of the Elections Act with a view to notify the speaker of the Narok County Assembly to declare the seat as vacant and to pave the way for calling for fresh elections. 4th, he has also stated that his appeal raises weighty, arguable and cogent issues which ought to be heard on the merits and unless stay of execution is granted, the appeal may be rendered nugatory. 5th he has also stated that unless stay is granted he stands to suffer grave injury in the event that his appeal is ultimately successful.

3. Furthermore, the applicant in his supporting affidavit, has deponed to the following major matters. First, he has deponed that the magisterial court by virtue of its judgement declared that he was not validly elected as representative of Shankoe Ward within the Narok County. 2nd, he has also deponed that he has filed an appeal against the said judgement and that unless stay is granted his appeal may be rendered nugatory. He has also deponed that unless stay is granted he stands to suffer grave and substantial injury which is not capable of being remedied by way of monetary compensation. Furthermore, he has also deponed that he is ready and willing to comply with any direction, which this court may make on security or administrative directions to expedite the hearing of the appeal. Finally, he has deponed that he has made this application timeously and that the respondents will not suffer any prejudice if the orders sought are granted.

4. The first respondent has filed a 14 paragraphs affidavit in opposition to the application. In that affidavit, he has deponed to the following major matters. First, he has deponed that the appeal has no chances of success. Second, he has deponed that the applicant has not provided for any security for costs in the event that the appeal is not successful. Third, he has also deponed that the omission of one polling station affected the result in which the applicant was declared the winner. Finally, he has deponed that this application is meant to deny the voters of Shankoe Ward, an opportunity to have a member of a County Assembly elected as soon as possible and that the applicant has not demonstrated that he will suffer substantial injury, if the application is not granted.

5. The 2nd and 4th respondents are not opposed to the applicant's application.

6. Mr. Otieno counsel for the applicant cited 4 authorities in support of his application for stay of execution, which I have considered. Mr. Morintat, counsel for the 1st respondent cited 3 authorities which I have also considered.

7. In view of the rival affidavit evidence and the authorities cited by both counsel, I find the following to be the issues for determination.

1. Whether or not the applicant stands to suffer substantial damage unless stay of execution is granted
2. Whether or not the applicant's appeal will be rendered nugatory unless stay of execution is granted.
3. Whether or not the respondents will suffer prejudice if stay of execution is granted.
4. Who bears the costs of this application?

There is credible affidavit evidence of the applicant that the trial court has caused a certificate of determination to be served upon the speaker of the Narok County Assembly and the Independent Electoral and Boundaries Commission (IEBC) to have the seat declared vacant and then call for fresh elections. This evidence has not been controverted. There is also credible affidavit evidence of the applicant that he has filed an appeal against the judgement of the magisterial court, which evidence has also not been controverted. I therefore find that unless an order of stay of execution is granted, the applicant stands to suffer substantial damage. Additionally, this will render his appeal nugatory. I therefore answer issues No. 1 and 2 in favour of the applicant.

9. Issue No. 3

I find from the affidavit evidence of the applicant in paragraph 11 that he is ready and willing to comply with any direction of the court including an order to provide security for costs. In the circumstances, I hereby order the applicant to deposit Sh. 20,000/= into court as security for costs within 45 days of this ruling.

10. In the light of the foregoing considerations, I hereby grant prayers 2, 3, 4, 5 and 6 of the applicant's notice of motion dated 23/1/2018.

11. Costs of this application will be costs in cause.

Ruling delivered in open court this 5th day of February, 2018 in the presence of Mr. Otieno for the applicant and Mr. Morintet for 1st respondent and in the absence of the 2nd , 3rd and 4th respondents.

J. M. Bwonwonga

Judge

5/2/2018