REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 18 OF 2015

IN THE MATTER OF ARTICLES 22, 23, 27, 159, 232 AND 234 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

PAUL KIPKORIR KIBET.....PETITIONER

VERSUS

DEPUTY COUNTY COMMISSION

MARAKWET WEST SUB COUNTY.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSIONER.....2ND RESPONDENT

PRINCIPAL SECRETARY MINSTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT....3RD RESPONDENT

ANDREW KIPLAGAT CHEMARINGO.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

There are 2 sets of applications triggered by this courts judgment dated 31/10/2016. The first application by the Respondents is dated 14/11/16 which prays that there be stay of decree pursuant to the above judgment pending the hearing and determination of the appeal at the Court of Appeal. The same is supported by the annexed affidavits of Mohammed W. Odongo .

The second application is by the applicant and is dated 29/11/2016 which prays that the notice of appeal lodged by the respondents on 15/11/2016 be struck out as it was filed out of time. According to the supporting affidavit by Paul Kipkorir Kibet the judgement was delivered on 31/10/2016 and the Notice of Appeal lodged on 15/11/2016 which was hopelessly out of time and in that regard Rule 84 of the Court of Appeal Rules 2010 ought to apply.

I propose to start with the second application as this would determine the fate of the respondents application. It is not in dispute that judgement was delivered herein on 31/10/2016 and that within 14 days therefrom any party dissatisfied ought to have lodged his Notice of Appeal to the Court of Appeal. In the instant case the respondent did lodge the same on 15/11/2016 which according to the applicant was out of time.

Vide the grounds of opposition dated 14/12/2016 the respondents contents that this court lacks jurisdiction to entertain such an application and that it is only the Court of Appeal which is seized of such jurisdiction. That this court is *functus officio.*

Rule 84 of the Court of Appeal Rules which the application has come under states as follows

> **"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice of the appeal, as the case maybe, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken with the prescribed time.**
>
> **Provided that an application to struck out a Notice of Appeal or an appeal shall Not be brought after the expiry of thirty days from the date of service of the Notice of Appeal or record of appeal as the case may be."**

Rule 2 of the Court of Appeal Rules 2010 defines the court as ;

> **"Court" means the court of Appeal and includes a decision thereof and a single Judge exercising any power vested in him sitting alone**."

Based on the above quotation I agree with the respondent that this court lacks the necessary jurisdiction to determine the validity or otherwise of the said notice of appeal. This court in essence is *functus officio.* It is therefore necessary for the applicant to go ahead and argue before the said Court of Appeal whether the notice was filed out of time or not. The application is dismissed with costs to the respondent.

Turning now to the respondents motion, the same is premised under Order 42 (6) of the Civil Procedure Rules. I have perused both written submissions of the applicant and the respondent. That three critical grounds to be satisfied by a party in such an application is whether the appeal shall be rendered nugatory should stay not be granted and whether it has been brought without any undue delay and whether there shall be substantial loss unless the order is granted.

The facts as clearly captured in the impugned judgment are clear and straight forward. The applicant/respondent was denied an opportunity of becoming the Chief of Segwer Location as it appeared that things were schewed in his favour. This being the position what is the effect of not granting stay? Does it mean that the Sengwer location will come to stand still? I do not think so. Infact as found in the judgement he did not qualify. Infact there were other deserving Kenyans.

In my view, the Local provincial administration can still execute its mandate in the absence of the area chief. The applicant stands to suffer no harm as the government being its employer could still pay him his dues in the event that the appeal succeeds. It would have been different if the employer was different. However one takes judicial notice of the fact that a government is always perpetual. I do not think there would be any substantial loss and therefore that ground fails.

Neither would I subscribe to the argument by the respondent that there is need to offer any security. This is a state agency and thus the ground of providing security pending appeal does not lie.

I would not equally venture into whether the appeal is meritorious or not. That is the province of the Court of Appeal.

The applicant has also argued that the Sengwer Location will suffer as it would remain vacant. I disagree

on that ground. It is common knowledge that in the absence of the area chief, there are other sub-chiefs who should be able to act on his behalf. Needless to say the state could go ahead and have other deserving Kenyans to fill that position.

Consequently I do not think that the application is meritorious. The same is hereby disallowed with costs to the respondent.

Pursuant to the above findings both applications dated 29/11/2016 and 14/11/2016 are dismissed with costs respectively.

Delivered this 14th day of February 2017.

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H.K. CHEMITEI

JUDGE

In the presence of;

Waweru holding brief for Nyamu for Applicant

No appearance for Respondent

Court Assassinate - Kirong