



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 3 OF 2017

CAROLI OMONDI.....APPELLANT/APPLICANT

VERSUS

HON. JOHN MBADI.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

(Being an appeal from the entire judgment & decree delivered by the Political Parties Dispute Tribunal on 5th May, 2017 at Nairobi IN Complaint No. 42 of 2017)

RULING

The appellant/applicant has made an oral application before the court seeking stay of execution pending the filing of a formal application for stay of execution pending an appeal to the Court of Appeal against the decision by this court delivered on 9th May, 2017 [today].

He has submitted that if the stay orders are not granted, the intended appeal shall be rendered nugatory as the 2nd respondent is likely to proceed with the repeat of the nomination, to the detriment of the appellant. He has urged the court to grant him a stay as there is still a remainder of 60 hours within which the 2nd respondent can carry out the repeat of the nominations. He argued that if a stay of execution is not granted, the intended appeal shall be rendered nugatory.

Mr. Kajwang, advocate for the 1st Respondent has opposed the application on the ground that the same is misconceived. He submitted that since the PPDT gave 72 hours to carry out the repeat of the nomination, there is still a balance of 60 hours within which to do so and within the time remaining, no reasonable repeat can happen. That counsel for the appellant should make a formal application. He submitted that the appellant has not met the threshold for grant of an oral application for stay of execution and asked the court to consider that other parties too have rights that should be protected. He urged the court to consider the interest of all the parties herein including the voters of Suba South Constituency. He stated that the issue here is not only whether the appeal will be rendered nugatory but there are also issues of constitutionalism that the court should consider.

On his part, Hon Kaluma for the 2nd Respondent submitted that the court has made an order dismissing the appeal which is not a positive order to be stayed pending appeal or pending filing a formal application for stay.

He told the court that the time given to the political parties for submission of the party list is ending tomorrow and considering the application herein, the court should take that into account. That the applicant has not made an offer for security for costs and they have not demonstrated to the court the grounds upon which they intend to appeal, for this court to determine whether there is a *prima facie* Appeal. That the court having rendered its decision is *functus officio* and cannot grant any other orders.

Mr. Omwanza, in a brief response, submitted that a stay of execution is provided for in the law and though the court dismissed the appeal, it gave binding orders on time. That the appellant is ready and willing to abide by whatever security the court shall order.

The court has considered the application made by the counsel for the appellant and the submissions made by the counsels for the respondents in opposition to the application. Counsel for the appellant has sought a stay of execution pending the filing of a formal application for stay and he has given reasons in support of his application one of which is that the appeal shall be rendered nugatory and that the 2nd respondent is likely to carry out a repeat nomination which will prejudice his interest.

Both counsels for the respondents in their submissions in opposition have argued that the wider interest of the people of Suba South Constituency should be taken into account and that there is still time within which to carry out a repeat of nominations. The court noted that the orders that were issued dismissed the Appeal and in the circumstances, there is nothing to stay. The court relies on the case of **RAYMOND OMBUGA V AUSTIN MORANGE, KISII HC NO. 15/2016 [unreported]**, where Majanja, Judge stated that an order for stay pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed. A similar position was taken by the court in the case of **WESTERN COLLEGE OF ARTS & SCIENCES V OLANGA, [1976] KAR 63 at page 66.**

In the premises, I associate myself with the above two decisions and find that the stay sought is not against the orders of this court but those of the PPDT. I therefore decline to grant a stay of execution as sought.

Dated, Signed and Delivered at Nairobi this 9th Day of May, 2017.

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L. NJUGUNA

JUDGE

In the presence of

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent