



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 18 OF 2017**

**OMAR SHALLO.....APPLICANT**

**VERSUS**

**JUBILEE PARTY OF KENYA .....1<sup>ST</sup> RESPONDENT**

**MOHAMMED SALIM MOHAMMED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. I have considered the Notice of Motion dated 30<sup>th</sup> May, 2017. It has been brought under **section 3A** of the **Civil Procedure Act** and **Order 42 Rule 6** of **Civil Procedure Rule**. It seeks order (iii). The prayers sought in the claim are:

**“(iii) That this Honourable Court be pleased to stay the execution of the Decree in respect to the Judgment entered herein on the 26<sup>th</sup> day of May 2017 and any other Order that may be pursuant thereto, pending the hearing of the main Appeal.”**

2. The application is premised on five grounds:

- (1) That the Applicant has an arguable appeal with a high probability of success;**
- (2) That if the stay of execution is not granted, the Applicant’s Appeal will be rendered nugatory and the Applicants will suffer irreparable loss;**
- (3) That substantial loss will result unless the orders sought herein are not granted;**
- (4) That this application has been made without unreasonable delay; and**
- (5) That the application ought to be granted in the interests of equity and justice.**

3. There is a supporting affidavit to this application which I have considered.

4. The application is opposed. The 1<sup>st</sup> Respondent has filed Grounds of Opposition while the 2<sup>nd</sup> Respondent has filed a replying affidavit sworn by his advocate.

5. The court has considered the submissions by the parties together with the motion the supporting and replying affidavits and the grounds of opposition.

6. The very first issue which dominated submissions by counsels is whether the Nomination Certificate

sought to be stayed had already been issued to the 2<sup>nd</sup> Respondent to this application. Listening to the Applicant's Counsel and Counsel for both Respondents, it is clear that the nomination certificate has already been issued. That was a common ground.

7. What the Applicant's Counsel maintained is that the certificate should be brought before the court in order to ascertain the date of issue. Date of issue is neither here nor there for purposes of this application it being an application to stay issuance of the same, if, as the Applicant's Counsel appears to be intimating, the Certificate was issued before 26<sup>th</sup> May 2017 when this court's judgement was delivered, then that would be a ground to challenge the certificate. It cannot be the ground for order of stay.

8. It is trite law that a court cannot act in vain. From the evidence presented before this court, the Applicant has not shown to court's satisfaction that no certificate has been issued and therefore that stay can be issued in the case.

9. The application seeks stay pending appeal. **Order 42 Rule (6)(2)** is very clear and provides the grounds upon which stay of execution shall be made. They include where the Applicant can show that substantial loss will result to him/her unless order for stay is made; and where the application provides security for due performance of decree if appeal fails.

10. It was the Applicant's duty to demonstrate the loss he stands to suffer if order sought is not granted. No such an attempt was made both in the affidavit in support of the application and the submissions by the Applicant. The court cannot be left to guess what loss the Applicant may suffer.

11. On the grounds there is lack of clear proof that order sought is not in vain, and for lack of a demonstration of loss the Applicant stands to suffer if order is not granted. I find no merit in this application.

12. Accordingly the Notice of Motion application dated 30<sup>th</sup> May 2017 is dismissed with no order as to costs.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE, 2017.**

**LESIIT, J.**

**JUDGE**