



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 76 OF 2017

ZABLON RASHID MINYONGA.....APPLICANT

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

VINCENT AMENYA MARUBE2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. The Applicant herein **ZABLON RASHID MINYONGA**, was the 2nd Respondent in this appeal while the 2nd Respondent in this application **VINCENT AMENYA MARUBE** was the Appellant. The 1st Respondent is the Jubilee Party while the 3rd Respondent is the IEBC.

2. The application is a Notice of Motion dated 5th June 2017. It is brought under **sections 3 and 3B** of the **Appellate Jurisdiction Act Cap 9** and **Rules 5(2)(b) and 47** of the **Court of Appeal Rules**. It seeks prayers as follows:

“(1) That pending the hearing and determination of this Application inter parties, this Honourable court be pleased to grant a stay of execution of the judgement of the High Court of Kenya at Nairobi by honourable Lady Justice Lesiit, dated and delivered on 31st May 2017.

(2) That pending hearing of the intended appeal, this honourable court be pleased to grant stay of execution of the judgement of the high court of Kenya at Nairobi by this court dated 31st May 2017.

(3) That the honourable Court be pleased to issue conservatory order to the 1st Respondent from issuing nomination certificate to the 2nd Respondent pending the lodging, hearing and determination of the Applicant’s intended appeal to the Court of Appeal against the said judgement.

(4) that the costs of this application be provided for.”

3. The application is supported by six grounds which are cited on the face of the application. It is further supported by an affidavit sworn by the Applicant.

4. The 2nd Respondent has filed Grounds of Objection to the Notice of Motion application dated 5th June, 2017 which are filed herein and are dated 6th June 2017. Eight (8) grounds of objection are cited.

5. The Applicant's contention is that this court erred in the determinations it made in its judgement of 31st May 2017, among them ordering that the issue of the representation of the 1st Respondent to the South Mugirango Parliamentary seat reverts back to it to decide whereas there had been a valid nomination process carried out and a winner declared; that the 2nd Respondent had been given a fair hearing and the finding to the contrary was erroneous.

6. The 2nd Respondent's contention is that pursuant to the order of this court dated 31st May, 2017 the Applicant and 2nd Respondent attended interviews conducted by the 1st Respondent and that until the report, decision and/or directions are given by the 1st Respondent the current application ought not to be entertained as same is premature. Further that no evidence has been brought to support the application and prayers sought, and that the application falls short of the requirements set under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

7. The parties in this application participated in the appeal before me in which the 2nd Respondent was the Appellant and the Applicant the 2nd Respondent in the appeal. The 1st Respondent did not attend the proceedings. The appeal was challenging the decision of the PPDT of admitting evidence in contravention of the **Evidence Act** and of the requirements of **Order 45** of the **Civil Procedure Rules**.

8. The court in its judgment agreed with the Appellant/2nd Respondent and that there was a dispute which needed to be heard and resolved and therefore directed the 1st Respondent to hear the disputes and resolve the issue of its representation to the South Mugirango Constituency Parliamentary Elections. That is the order that the Applicant intends to appeal against and for which he now seeks stay pending the intended appeal.

9. Order 42 Rule 6(1) & (2) of the **Civil Procedure Rules** sets out the guiding principles in determining where an order of stay ought to be granted. **Order 6(2)** stipulates:

“No order of stay shall be made under sub rule (1) unless –

(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree of order as may ultimately be binding on him has been given by the applicant.”

10. Under **Order 6(1)** it is very clear that:

“1. No appeal or second appeal shall operate as a stay...”

11. The Applicant has made it very clear in the Notice of Motion, supporting affidavit and the submissions that he intends to file an appeal. There is a 'Notice of Appeal' filed in this court together with the Motion. It states clearly that the 2nd Respondent (Applicant) '*intends to appeal to the Court of Appeal against the whole of the judgment of this court.*'

12. The Applicant filed the Notice of Appeal in the High Court Judicial Review Division on 5th June 2017. Clearly the Applicant has not filed any appeal from this court's decision of 31st May 2017 to the Court of Appeal. The Application for stay can only be made where Notice of Appeal has been filed in the Court of Appeal with or without the Memorandum of Appeal. That is what the law recognizes as an appeal. Unless of course the Applicant seeks on interim stay of execution soon after the pronouncement of the judgment and order intended to be appealed against, pending filing of a substantive application for stay pending appeal. That was not the case here. The Applicant has come five days after the court

judgment was delivered and therefore ought to have filed the Notice of Appeal at the Court of Appeal by now.

13. Order **42 Rule 6(2)** requires that no stay “**shall**” be made under that rule unless three conditions are met. The first requires the Applicant to satisfy the court that he stands to suffer substantial loss unless the order of stay is made.

14. In the case quoted by the 2nd Respondent’s advocate, the court held in the case of **James Wangalwa & Another Vs. Agnes Naliaka Cheseto** *inter alia* that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here.

15. The court has perused the supporting affidavit sworn by the Applicant together with the grounds on the face of the Motion. The court has also considered submissions by the Applicant’s counsel. In none of these documents filed herein and submissions by counsel was any contention made that the Applicant stands to suffer any loss substantial or otherwise. He needed to demonstrate the loss he stands to suffer if order of stay is not made. That ground was therefore not satisfied.

16. The other requirement is that the application is made without unreasonable delay. That is a non-issue as this application was brought with speed. Indeed the 2nd Respondent in his submission and grounds of objection contends that the Applicant came in such great speed that the application is premature. Reason the 2nd Respondent advanced is that the 1st Respondent has partially satisfied the court’s decree and only the results were being awaited for without which, the 2nd Respondent contends, the application should not be entertained. The 2nd Respondent’s submission is not quite correct since the intended appeal is against this court’s judgment and decree not the subsequent processes before the 1st Respondent.

17. The third tenet under which the application should be brought as prescribed under **Order 42 Rule 6(2)** is an offer of security for costs. It is a mandatory requirement without which an application for stay cannot be granted. The court has duty to do justice to all the parties before it and prevent the abuse of its process. It would not be justice to prevent one party from enjoying the fruits of judgment without securing the due performance of the same judgment. That has been found by the Court of Appeal to be a misdirection which entitles the appellate court to interfere with the order of stay. See **Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others.**

18. In the case of **Equity Bank Ltd vs. Taiga Adams Company Ltd (15)** it was held that: “.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is broughtlet me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay” which principle was also emphasized in **Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others. (16).** The Applicant has not even mentioned security for costs leave alone mentioning it anywhere in the application.

19. The court has power to grant or refuse an application for stay of execution. This is a discretionary power. It is imperative that the power is exercised judicially in order not to prevent a party from enjoying the fruits of judgement on the one hand and on the other hand in order not to prevent a party from enjoying its/his right of appeal. The court is conscious of that fact

20. Having carefully considered this application I find that the same lacks in merit.

21. Accordingly it is dismissed with no order as to costs.

DATED AT NAIROBI THIS 6TH DAY OF JUNE, 2017.

LESIT, J.

JUDGE