



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELECTION APPEAL NO. 94 OF 2013

JENNIFER KOINANTE KITARPEI.....APPELLANT

VERSUS

ALICE WAHITO NDEGWA.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....2ND RESPONDENT

THE NATIONAL ALLIANCE PARTY (TNA).....3RD RESPONDENT

(Appeal arising from the judgment of Hon. V. Kiptoon Senior Resident Magistrate, in Nanyuki Election Petition No. 2 of 2013)

RULING

1. By a Notice of Motion dated 9th December 2013 brought under certificate of urgency pursuant to section 34 of the Election Act No. 24 of 2011 the Appellant herein moved the court for order for a temporary stay of execution of the judgment and all consequential orders of the Nanyuki Senior Resident Magistrate's court in Election Petition No. 2 of 2013 pending the hearing and determination of this application.
2. The Appellant further sought for a temporary stay of execution of the judgment and all consequential orders of the Nanyuki Senior Resident Magistrate's court in election Petition No.2 of 2013 pending the hearing and determination of this appeal.
3. The application was supported by the affidavit of the Appellant JENNIFER KOINANTE KITARPEI in which she deponed that the appeal herein duly filed is arguable and raises very weighty issues of the law and has high chances of success and will be rendered nugatory if an order of staying the execution of the trial magistrate's judgment and consequential orders is not granted.
4. The application was served upon the Respondent and on 20th December 2013 I allowed the said application on the following terms and conditions.
 - i. ***The Appellant to file and serve the record of appeal within the next 21 days.***
 - ii. ***The Respondents to file their responses to the petition of appeal within the next 7 days from the date of service.***
 - iii. ***The appeal to be set down for hearing and determination within the next 30 days from the said date.***

iv. ***The appeal to be mentioned on 20th January 2014.***

1. On 20th January 2014 when the matter came up for mention before me Mr. Nyakundi for the Respondents informed the court that the issue in dispute and the subject matter of this appeal had been determined by the Court of Appeal in Civil Appeal No. 194 of 2013 and that the Respondent had filed an affidavit to that effect on the same date. Mr. Mwangi for the Appellant stated that he needed time to look at the decision of the Court of Appeal. The matter was therefore fixed for mention on 30/1/2014.
2. On 30.1.2014 Mr. Mwangi appeared before court in the absence of the Respondent advocates and submitted that the judgment of the Court of Appeal does not affect the stay order granted since the stay was granted in respect of the lower court and that they had set in motion steps to review the judgment of the Court of Appeal and that the Court of Appeal had ruled that the Respondent be gazetted and not that the Appellant be removed.
3. Before me is a situation where the Court of Appeal has made a determination on a matter that was pending before an election court to the effect that the Respondent was entitled to be gazetted in place of the Appellant and further the Principal Magistrate's court acting as an election court also came to the same conclusion.
4. Faced by the decision of the Court of Appeal I am of the considered opinion that the stay order granted herein might not serve any purposes as this court is bound by the decision of the Court of Appeal as the said court has ordered that the Respondent be gazetted and therefore even if the court stays the judgment of the Principal Magistrate the Respondent will still be gazetted in view of the decision of the Court of Appeal.
5. In this I am guided by order 42 Rule 6 of the Civil Procedure Rules which provides as follow:

42 Rule (2) no order of stay of execution shall be made under sub rule (1) unless

a. The court is satisfied that substantial loss may result to the Appellant unless the order is made and that the application has been made without unreasonable delay.

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

6. I therefore take the view that the judgment of the Court of Appeal has the effect of disposing this appeal as at now as regards the gazettelement of the Respondent as duly nominated and would therefore discharge the order of stay granted herein with no order as to cost.

Dated and signed at Nyeri this 21st day of March 2014.

J. WAKIAGA

JUDGE

Ruling read in open court this 9th day of May 2014 in the presence of the advocates for the appellant and in the absence of the advocates for the respondent. Right of appeal.

J. WAKIAGA

JUDGE

9/5/2014