



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 4 OF 2013
AND IN THE MATTER OF THE
COUNTY GOVERNOR ELECTION FOR
MACHAKOS COUNTY

BETWEEN

WAVINYA NDETI..... PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC)1ST RESPONDENT

ISAAC HASSAN (RETURNING OFFICER OF THE

NATIONAL TALLYING CENTRE) 2ND RESPONDENT

THE MACHAKOS

COUNTY RETURNING OFFICER 3RD RESPONDENT

ALFRED NGANGA MUTUA 4TH RESPONDENT

MUTUA KATIKU 5TH RESPONDENT

RULING NO. 4

1. Whether or not to order scrutiny of the vote is a matter within the discretion of the election court. On 2nd July 2013, upon considering the petitioner's Notice of Motion dated 26th March 2013, I declined to order scrutiny. As trial of the matter had been completed, I directed the parties to render their final submissions today, 9th July 2013.
2. The petitioner has now filed a Notice of Motion dated 5th July 2013 under **rules 4, 5, 17(1)(k) and 20** of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* and the inherent power of the court in which she seeks the following orders;

1. *This application be certified as urgent, and service thereon on the Respondents be dispensed with in the first instance, owing to its urgency.*
 2. *Leave be granted to the Petitioner to appeal to the Court of Appeal against the Ruling and Order of the Election Court made and dated on July 2nd 2013.*
 3. *There be a stay of further proceedings herein pending the determination of this Notice of Motion.*
 4. *There be a stay of execution of these proceedings pending the Petitioner's appeal filed upon the grant of leave under Prayer 2 above.*
 5. *The Order directing the Submissions on the Petition to be rendered on July 9th 2013 be suspended pending the determination of this motion or until further orders.*
 6. *Costs of this Motion be in the cause.*
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3. The petitioner's application is supported by her own deposition sworn on 5th July 2013 which sets out the reasons why she wishes to appeal against my decision. She contends that the proposed appeal is not frivolous and that she will suffer prejudice if the appeal is not granted. Mr Kinyanjui, learned counsel for the petitioner, reiterated the grounds therein in his oral submissions.
 4. Learned Counsels for the respondents, Mr Muhoro and Mr Kilonzo Junior, opposed the application on the grounds that there is no prejudice to be suffered if the stay is not granted and that the time for hearing the petition is limited. Mr Muhoro further submitted that leave is not automatic and that no notice of appeal having been filed, the application is speculative.
 5. I have considered the application and the submissions and I take the view that a party who wishes to lodge an appeal must evince such an intention by filing a Notice of Appeal under **rule 74(1)** of the **Court of Appeal Rules**. **Rule 74(4)** of the **Rules** states that, "*Where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the Notice of Appeal.*" According to the rule it is not necessary to seek and obtain leave before lodging the Notice of Appeal. But whether leave is required is a question that need not occupy my mind, although I entertain grave doubt as to whether there exists a right of appeal on interlocutory matters in election petitions, this matter may be dealt with in another forum.
 6. What is before me is in substance an application for stay of proceedings pending appeal from my ruling of 2nd July 2013. A party who seeks a stay of proceedings must evince an intention to appeal and although the petitioner has fourteen days from the date of the decision to lodge the Notice of Appeal, the application before the Court is a formal application. It is not an informal application made orally after delivery of the decision but a formal one constructed upon clear instructions to lodge an appeal. In my view there being no Notice of Appeal and any letter bespeaking proceedings in terms of the **Court of Appeal Rules** makes this application speculative at best and a non-starter.
 7. I therefore find and hold that the intention to lodge an appeal has not been established as a preliminary fact. In the absence of such a demonstrated intention the court lacks jurisdiction to grant and order of stay of proceedings pending appeal.
 8. In view of my findings above, I hereby orders as follows;
 - a. Leave to appeal be and is hereby granted to the petitioner to appeal against the orders and ruling of 2nd July 2013.
 - b. Save for (a) above, the petitioner's Notice of Motion dated 5th July 2013 be and is hereby dismissed.
 - c. Costs of the application shall be borne by the petitioner.

DATED and DELIVERED at MACHAKOS this 9th day of July 2013.

D.S. MAJANJA

JUDGE

Mr Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the petitioner.

Mr Muhoro instructed by Kimani Muhoro and Company Advocates for the 1st, 2nd and 3rd respondents.

Mr Mutula Kilonzo Junior instructed by Kilonzo and Company Advocates for the 4th and 5th respondents.