IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & SHAH. JJ.A.)

CIVIL APPLICATION NO. NAI 213 OF 1995 (96/95 UR)

BETWEEN

KIMANI WANYOIKE……...……..APPLICANT

AND

THE ELECTORAL COMMISSION

MORRIS KASHERO……RESPONDENTS

(Application for an injunction pending an intended appeal from the ruling and order of the High Court of Kenya at Nakuru (Rimita, J) dated 28th August, 1995

In

NKR H.C. MISC. MISC.C. SUIT NO. 111 OF 1995)

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RULING OF THE COURT

Mr. Kimani Wanyoike, the applicant herein, asks us under Rule 5(2)(b) of the Court's Rules to grant to him three basic orders and these are that:-

……

2. The Respondents, the Electoral Commission of Kenya (hereinafter the 1st respondent) and Morris Kashero (hereinafter the 2nd respondent), Returning Officer for Kipipiri Parlimentary Election currently Scheduled for Monday 4th September, 1995, by Themselves servants or agents or any of them or Otherwise howsoever BE RESTRAINED from further refusal to accept the Applicant's nomination papers for the Kipipiri parliamentary Election aforesaid pending the hearing and determination of the intended appeal.

3. The Respondent Electoral Commission be ordered to forthwith include the Applicant's name and other necessary particulars in the ballot paper to be issued in respect of the parliamentary election in respect of Kipipiri Constituency.

4. Any further orders consequential upon the above As will enable compliance with the National

Assembly and Presidential Elections Act and Regulations thereunder in respect of the campaign Period prior to the election date."

There is also the usual prayer regarding costs. There can be no doubt from the first two prayers set out above that the Applicant is asking the court for mandatory injunctions to compel the Respondents into doing the matters set out in the application. The 1st Respondent is a creature of Section 41(1) of the Constitution of Kenya and under Section 42 A of the same Constitution, one of the responsibilities the 1st Respondent is charged with is -

"directing and supervising the Presidential, National Assembly and Local Government elections."

Kipipiri is one of the 188 electoral constituencies into which Kenya is divided in accordance with Section 42(1) of the Constitution. The immediate Member of Parliament for that constituency died and following that event, the 1st Respondent is now directing and supervising National Assembly election to fill the vacancy. The election is to be held on Monday 4th September, 1995 and the 1st Respondent appointed the 2nd Respondent to be the returning officer for the election. Nominations for the election were held on 17th August, 1995 between the hours of 8.00a.m. and 1.00p.m. The Applicant was nominated by Ford-Asili Political Party to be its candidate in the election. The nomination was done on 15th August, 1995. Some members of the Applicant's political party were, for one reason or the other, unhappy with the Applicant's nomination and so on 15th August, 1995, two of them, Peter Njuguna and James Githinji filed a suit in the Court of the Chief Magistrate, Nakuru and among the orders sought in their plaints was one:-

"…….. restraining the Ford-Asili Secretary General and/or National Official of the party from declaring the Defendant, KIMANI WANYOIKE as the party nominee for Kipipiri Constituency Parliamentary elections."

Simultaneously with the plaint, they also filed an application by way of a chamber summons seeking an injunction to restrain the Secretary General and/or National Official of the party in the terms we have set out above. That application came up for hearing before the Chief Magistrate on 16th August, 1995; it was heard ex-parte and an injunction was granted in the terms sought. The order of injunctions was served on the Applicant in the late hours of the same day. On this aspect of the matter, we would straight away say this. The procedure adopted by Peter Njuguna and James Githinji in going by way of a plaint to the Chief Magistrate was wholly contrary to law. It is clear to us that the nominations which were conducted by Ford-Asili on 15th August, 1995 were carried out pursuant to the provisions of Section 17 of the National Assembly and Presidential Elections Act. Accordingly, the nominations were matters covered squarely by that Act. The only court recognized by that Act in an "election court" and Section 2 of the Act defines an election court as meaning:-

"the High Court in the exercise of the jurisdiction conferred upon it by Section 44(1) of the Constitution."

Clearly a subordinate court has no jurisdiction at all to entertain any matter pertaining to National Assembly elections and the Chief Magistrate of Nakuru was wrong in granting the orders which he did to Peter Njuguna and James Githinji.

Having been served with the orders, the Applicant, through his advocate, Mr. Imanyara, sought to have them set aside. Instead of going to the Magistrate under Order 39 Rule 3(4) of the Civil Procedure Rules and asking the Magistrate to set aside the ex parte order, the Applicant went to the High Court at Nyeri and there he filed what was headed "EX PARTE ORIGINATING SUMMONS" and it was said to have been filed pursuant to Section 65(2) of the Constitution. We decline to comment on the propriety of the procedure but what was sought was clear. They were:-

1. A declaration that the order by the Chief Magistrate Nakuru…….is a nullity

2. An alternative order that the said Chief Magistrate's Order be stayed pending the hearing and final determination of the application or until further Order of the court."

The learned Judge at Nyeri High Court (Angawa, J) ordered the matter transferred to Nakuru but at the same time granted a stay of the Magistrate's order to 3p.m. by which time she hoped the High Court at Nakuru would start hearing the matter. This was on 17th August, 1985, the very day of the nominations.

Having obtained the order in Nyeri, the Applicant and Mr. Imanyara started their race against time to the nomination centre for Kipipiri Constituency. They arrived there two or so minutes before 1 p.m. but for some reason the Applicant was not able to present his papers to the 2nd Respondent until about 1.15 p.m. The 2nd Respondent rejected the papers as having been presented outside the stipulated times, namely between 8 a.m. and 1 p.m. The Applicant then filed the present suit by way of a plaint before the High Court at Nairobi and pending the hearing and determination of that suit, he sought mandatory injunctions against the respondents - in terms similar to those before us. The Judge in Nakuru, Rimita, J. rejected that application and hence the present application before us.

The juridical basis upon which this court exercise its jurisdiction when called upon to do so under Rule 5(2)(b) is now trite law. The court will grant an injunction or a stay if it is shown that the intended appeal is an arguable one, i.e. that it is not frivolous, and that unless an injunction or stay is granted, the eventual success of the appeal would be rendered nugatory.

To show us that the Applicant has an arguable appeal, Mr. Imanyara first referred us to Regulation 15(1)(b) of the Presidential and Parliamentary Elections Regulations which provides:-

> "For the purposes of nomination of candidates at a parliamentary elections every candidate shall be -
>
> a. …….
>
> b. nominated by the delivery by the candidate or his duly appointed agent to the returning officer of the consituency between hours of eight o'clock in the morning and one o'clock in the afternoon of the nomination day for election of a nomination paper in Form 9."

Mr Imanyara has argued before us, as he did before the superior court, that as the Act itself does not set any time or times within which nomination papers are to be presented to a returning officer on the nomination day, an to the extent that Regulation 15(b) purports to set such times the regulation is ultra vires the Act and the Constitution. If we understood Mr Imanyara correctly, his contention was that a nomination paper can be presented to a returning officer at any time from sun-rise upto any time before sun-set. The Superior court rejected this contention. In this application, we are not called upon at this stage to finally determine the issue. That must await the hearing of the appeal itself. But we do not think that it is really such a weight point. As Mr Kivuitu for the respondents pointed out, various Acts of Parliament stipulate that certain things must be done within so many days. Mr. Kivuitu pointed out to us section 79G of the Civil Procedure Act which provides that an appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against. The Civil Procedure Act does not define what a "day" is. Nor does The Interpretation and General Provisions Act. If the word "day" or "day-time" is defined to mean the hours between sun-rise and sun-set, would a party who comes to file an appeal at 6.00p.m. on the last day and finds the court premises closed be heard to say that he would have filed his appeal in time? Would such a party be entitled to say that Rule 5(1)(2) and (3)of the High Court (Practice and Procedure) Rules which set the times for opening the courts at between 8 a.m. and 3 p.m. are ultra vires the Acts? We have said we are not bound to conclusively answer this point, but we do not think much of the argument.

Mr. Imanyara then referred us to this Court's decision in RICHARD CHIRCHIR & ANOTHER V HENRY R. CHEBOIWO & ANOTHER, Civil Application No. 253 of 1992 (unreported) wherein the court granted an injunction restraining a returning officer from publishing in the Kenya Gazette the purported results of an election. Mr. Imanyara relied heavily on this decision both before us and in the

superior court. That was a case instituted by way of a plaint, or so we believe. The point was taken that the only way to come to court in regard to matters arising under Cap 7 of the Laws of Kenya was through an election petition. The court composed of Gachuhi, Kwach & Cockar, JJ.A. were apparently not much impressed by that argument and they proceeded to grant an injunction. It is, however, right to point out that the court did not in any way attempt to determine the question of whether it was possible to come to the High Court by means other than through a petition. This decision was made on the 24th December, 1992, just a few days prior to the multi-party elections on 29th December, 1992.

We do not know whether in granting an injunction in the CHEBOIWO case, the attention of the court was drawn to the case of THE SPEAKER OF THE NATIONAL V THE HON JAMES NJENGA KARUME, Civil Application No. 92 of 1992 (unreported) which had been decided by the court on the 29th May, 1992, barely some six or so months back. Both Kwach & Cockar, JJ.A who sat in CHEBOIWO's case had sat on KARUME's case and there the court had delivered itself as follows in granting to the Speaker an order of stay:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions."

We are unable to find what had occurred between May when KARUME's case was decided and December when CHEBOIWO's case came up for decision which would warrant the court making such a drastic turn-about. We think the procedure for addressing grievances arising from elections is through an election petition and that is exactly what the court was saying in KARUME's case. That view had full support in authority, both local and foreign. In RAPHAEL SAMSON KITHIKA MBONDO V LUKA DAUDI GALGALO AND PAUL JOSEPH NGEI, Election Petition No. 16 of 1974 (unreported) it was alleged that Mr. Ngei and his supported had in effect physically prevented Mr. Mbondo from presenting his nomination papers. Mr. Mbondo, however, did not go to the High Court by way of a plaint to compel the returning officer or anyone else to accept his paper. He waited until the results were published and then he filed an election petition. The election of Mr. Ngei was nullified and Mr. Ngei was found guilty of an election offence.

In the same way, the matters which Mr. Cheboiwo had alleged in his plaint and in the application for an injunction if they were proved, would constitute an election offence. But in a plaint, the court would have no power to find a person guilty of an election offence and hence disqualify him or her from participating in the next election, of course subject to any pardon that may be granted. What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in KARUME's case. We would unhesitatingly prefer to base our decision on the KARUME case rather than the CHEBOIWO case. The case of THE QUEEN V THE COUNTY JUDGE OF ESSEX AND CLARK (1887) 18 qb 704 which was cited to us is also to similar effect.

The Applicant has not shown to us that the procedure he has adopted in coming to the Court is correct and on that score we are also not satisfied that his appeal is arguable. Nor are we satisfied that in the end the Applicant will be without a remedy. As we have said, he can always file a petition after the election is concluded. The fact that election petitions take long to determine cannot be a legal justification for not following the clear provisions contained in the Constitution and the National Assembly and Presidential Elections Act. That being our view of the matter, we refuse to grant the orders sought and we order that this application be dismissed with costs to the Respondents. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 1st day of September, 1995.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.