



Devolution Empowerment Party & another v Chepngeny & 5 others (Civil Application E101 of 2024) [2024] KECA 1856 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KECA 1856 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E101 OF 2024
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
DECEMBER 20, 2024**

BETWEEN

THE DEVOLUTION EMPOWERMENT PARTY 1ST APPLICANT

**THE NATIONAL EXECUTIVE COMMITTEE THE DEVOLUTION
EMPOWERMENT PARTY 2ND APPLICANT**

AND

SOLOMON CHEPNGENY 1ST RESPONDENT

EVERTON WAFULA KHAEMBA 2ND RESPONDENT

POLITICAL PARTIES DISPUTES TRIBUNAL 3RD RESPONDENT

PAMELA GAKII GITOBU 4TH RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES 5TH RESPONDENT

**MILTON MUGAMBI IMANYARA, THE SECRETARY GENERAL
DEVOLUTION EMPOWERMENT PARTY 6TH RESPONDENT**

(Being an application for stay of execution of the Judgment of the High Court of Kenya at Kericho (J. K. Sergon, J.) dated 30th October, 2024 in Constitutional Petition No. E009 of 2024)

RULING

1. A brief history of the litigation which culminated in this application is necessary in order to put the issues urged before us into a proper context. Vide Gazette Notice No. 7487 of July 23, 2024, the Registrar of Political Parties (the 5th respondent herein) endorsed a notice of change of party officials of the 1st applicant and consequently, the 6th respondent herein was gazetted as the 1st applicant’s Secretary-General. This change of particulars triggered discontent among the 1st applicant’s members who maintained that the 1st applicant never held any grassroots elections yet the 5th respondent



purported to issue a notice of change of particulars that had a new list of party officials purported to have been approved by party delegates or the 1st applicant's members.

1. Pursuant to Article 7(1) (4) the 1st applicant's Constitution, the 6th respondent issued a notice for a special session of the National Delegates Convention of the 1st applicant stating that a special session would be held on 20th July 2024 at a venue to be communicated to the members entitled to attend at least 7 days before the scheduled meeting to address the concerns raised.
3. Aggrieved by the notice issued by the 6th respondent, the 4th respondent filed at the 3rd respondent (Political Parties Disputes Tribunal (the PPDT) vide complaint number PPDTC/E007/2024 Pamela Gakii Gitobu vs Milton Mugambi Imanyara, the Secretary-General, Devolution Empowerment Party and Devolution Empowerment Party accusing the 6th respondent of inter alia undermining the democratic principles upon which the 1st applicant was founded, bypassing the constitutionally mandated procedures and excluding or disenfranchising certain members from participating in the 1st applicant's decision making process. Concurrent with the complaint, they also filed an application dated 15th July 2024 seeking interim orders.
4. On 18th July 2024, the PPDT issued an ex-parte order restraining the respondents from holding the Special Session of the National Delegates Convention scheduled for 20th July 2024. The 1st and 2nd respondents were aggrieved by the order which they claimed curtailed their rights under Articles 36 and 38 of *the Constitution* to participate in the activities of the 1st applicant and to form and join an association of their choice. They filed Kericho High Court Constitutional Petition No. E009 of 2024, Solomon Chepngeny & Another vs Political Parties Disputes Tribunal & 3 Others seeking orders:
 - a. A declaration that the proceedings of the 1st Respondent Tribunal in PPDTC/E007 /2024 Pamela Gakii Gitobu vs Milton Mugambi Imanyara, the Secretary-General, Devolution Empowerment Party and Devolution Empowerment Party and, the orders issued therefrom by the 1st Respondent Tribunal on 18 July 2024 are unconstitutional and therefore, null and void.
 - b. A declaration that Gazette Notice No. 5805 of 9th May 2024 issued by the 3rd Respondent herein is unconstitutional and therefore, null and void.
 - c. A declaration that the 4th Respondent, being a body established courtesy of Article 91 and the *Political Parties Act*, and funded, partly, by public funds, is under an obligation to adhere to fair administrative action rules as provided for in Article 47 and 232 (1) (e) of *the Constitution*.
 - d. A declaration that the said expulsion of the 2nd Interested Party as the Secretary-General of the 1st Interested Party is unconstitutional and therefore, null and void.
 - e. A declaration that Gazette Notice No. 5805 of 9th May 2024 issued by the 3rd Respondent herein, is unconstitutional and therefore, null and void.
 - f. A declaration that within the intendment of Articles 47 (2) of *the Constitution*, the 1st Respondent is bound to provide written reasons for an order curtailing the exercise of fundamental rights and freedoms and that such an order cannot be issued ex parte.
 - g. A declaration that within the intendment of Article 10 of *the Constitution* the Respondents are bound by the key national values and principles, to have regard to rule of law, democracy and participation of the people, integrity, transparency and accountability.
 - h. A declaration that within the intendment of Article 24(1), the 1st Respondent cannot limit the exercise of the Petitioners' rights under Article 36 and 38 of *the Constitution* except by Jaw and then only to the extent that the limitation is reasonable and justifiable in an open and



democratic society based on human dignity, equality, and freedom and taking into account all relevant factors.

- i. A declaration that within the intendment of Article 27 (1) of *the Constitution* the Petitioner and indeed, the 2nd Interested Party and other members of the Party have a right to equal protection before the law.
 - j. A declaration that the ex parte injunction by the 1st Respondent is unconstitutional and therefore, illegal, null and void.
 - k. An order of judicial review in the form of certiorari do issue from this Court to terminate and quash the proceedings of the 1st Respondent Tribunal in PPDTTC/E007/2024 Pamela Gakii Gitobu v Milton Mugambi Imanyara, the Secretary-General, Devolution Empowerment Party and Devolution Empowerment Party.
 - l. An order of judicial review in the form of certiorari do issue from this Court to quash the orders issued by the 1st Respondent Tribunal in PPDTTC/E007 /2024 Pamela Gakii Gitobu v Milton Mugambi Imanyara, the Secretary-General, Devolution Empowerment Party and Devolution Empowerment Party on 18th July 2024.
 - m. An order of judicial review in the form of mandamus do issue from this Court directing the 2nd Interested Party to proceed and convene a Special National Delegates Convention of the 1st Interested Party with a view of appointing interim notional party officials to supervise free and fair elections to elect national party officials within thirty (30) days of this order.
 - n. There be on order as to costs.
5. By a judgment delivered on 30th October 2024, Sergon, J. essentially addressed his mind to the issue of jurisdiction which was raised by the 4th respondent. He held that there was no dispute to be decided by the PPDT because the 4th respondent was not a member of the 1st applicant. Also, the learned judge was persuaded that such a dispute could only arise out of the meeting and that the 3rd respondent's jurisdiction only extends to a dispute that arises from the deliberations made in the meeting held by the 1st applicant and not anticipated disputes as alleged by the 4th respondent, because the 1st respondent could no longer exercise his political rights courtesy of the actions of the 4th respondent, whose actions have been given a legal imprimatur by the PPDT. Therefore, he had no other recourse other than the High Court.
6. Having found that he had the jurisdiction to entertain the said petition, Sergon, J. found the petition to be meritorious and allowed it as prayed by the 1st and 2nd respondents. Aggrieved by the said finding, the Devolution Empowerment Party and the National Executive Committee, the Devolution Empowerment Party, (the applicants) moved this Court by their application dated 6th November 2024 brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 5 (2) (b), 44 (1) & (2) and 45 of the Court of Appeal Rules, 2022 seeking stay execution of the said judgment delivered on 30th October 2024 pending the hearing and determination of their appeal to this Court against the said decision.
7. The application is supported by the grounds listed on its body and the supporting affidavit sworn on 6th November 2024, a supplementary affidavit sworn on 10th December 2024 and a further supplementary affidavit sworn on 17th December 2024 all sworn by Haron Mutwiri Abuana, the 1st applicant's Executive Director on behalf of both applicants together with the annexures thereto.



8. The application has been opposed by the 1st respondent vide his replying affidavit sworn on 9th December 2024. It is also opposed by the 6th respondent vide replying affidavit sworn on 11th December 2024. Counsel for the 5th respondent indicated to the court that she would rely on the 5th respondent's grounds of opposition and submissions filed before the High Court. However, the said documents were not been availed to this court.
9. The applicants were represented by learned counsel Mr. Mwereru and Mr. Maya. The 1st and 2nd respondents were represented by learned counsel Dr. Joshua Kembero. The 5th respondent was represented by learned counsel Ms. Elizabeth Ndwiga who held brief for Mr. Wakoko, while the 6th respondent was represented by learned counsel Mr. Issa Mansur and Ms. Mc Kenna.
10. The application was canvassed through rival pleadings, oral and written submissions and legal authorities cited by advocates for the respective parties in support of their respective positions. The applicants' submissions are dated 27th November 2024. However, as at the time of writing this ruling, only the applicants' submissions were available at the e-filing records. Nevertheless, all counsel on record made oral submissions before us which we have considered.
11. The grounds in support their application are that their appeal is not frivolous as demonstrated by their annexed draft memorandum of appeal because: (a) the learned judge erroneously declared as unconstitutional Gazette Notice No. 5805 of 9th May 2024 by which the 5th respondent had gazetted the officials of the 1st applicant, including the 6th respondent herein; (b) by such declaration, the operations of the 1st applicant are greatly hampered as it cannot transact its accounts and even pay salaries or suppliers because there are no party officials in office; (c) the learned judge prematurely invoked the supervisory jurisdiction of the High Court and declared as unconstitutional the ex parte order that was given by the 3rd respondent restraining the 6th respondent from proceeding with an illegal Special National Delegates Convention, yet the proceedings before the 3rd respondent are yet to commence, which amounts to usurpation of the powers and jurisdiction of the 3rd respondent; and, (d) the Learned Judge erred in law by arriving at determinations without giving the reasons thereof.
12. On the nugatory aspect, the applicants averred that the effect of the orders granted by the High Court is that the 6th respondent shall within 30 days of delivery of the Judgment, convene a Special National Delegates Conference without need to obtain authorization from the Supreme Council or the 2nd applicant, and proceed to elect new officials of the 1st applicant unless the stay is granted, their appeal would be rendered nugatory. The applicants averred that the respondents will not suffer any prejudice if stay of execution is granted. In contrast, if the stay is denied, the 6th respondent will unilaterally proceed with the Special National Delegates Convention and appoint new party officials thus rendering the appeal nugatory.
13. In opposition to application, the 1st respondent averred that the 2nd appellant lacked the locus standi to appeal on behalf of the party as they were invalidated by the court order issued on 30th October 2024 and therefore they should have appealed in their personal capacity as members of the party.
14. The 1st respondent further averred that there was nothing to stay as the process the applicants seek to stay is already completed as per the court order. Further the 6th respondent published an advert in the daily newspapers and on the party's website inviting delegates and members of the Supreme Council to attend the Special National Delegates Convention slated for 23rd November 2024 at Maanzoni 680 Hotel in Nairobi and that the party has already filled their positions through a special NDC that elected to office new interim national officials. Additionally, the former NEC members had an opportunity of being elected as interim officials in the special NDC but failed to apply for nomination.



15. On whether the appellants' appeal would be rendered if stay is not granted, the 1st respondent averred that in the unlikely event they are successful, their appeal will not be rendered nugatory because the court can nullify the election of the interim officials, just like the High Court nullified the gazettelement of the applicants. They will have an opportunity to participate in future elections if the appeal is successful. Therefore, the appeal cannot be rendered nugatory if a stay is not granted.
16. The 1st respondent also stated that the appellants herein having been unable to obtain ex parte stay of execution orders as prayed for in this application, have through proxies obtained orders implicitly staying the implementation of the orders of the High Court in Kericho Petition E009 of 2024 by obtaining court orders in PPDTC/E008/2024 Joseph Mwenda Ithili vs. Milton Mugambi Imanyara and the Office of the Registrar of Political Parties which orders effectively stay the execution of the Court Orders in Kericho Petition E009 of 2024, the subject of this application. Effectively, the appellants have acknowledged the existence of the application before this Court but have used a subordinate Court to grant them the same orders they are seeking before this Court in this application. Consequently, if the stay is allowed, this Court would be allowing the appellants to forum shop and abuse the court process which amounts to wasting the Court's precious judicial resources.
17. The 6th respondent averred that the appellants' appeal is not arguable because it is clear from the judgement rendered by the High Court that the applicants' mission was to engage in personal attacks, and as such, they failed to respond to the substantive constitutional questions raised in the Petition before the High Court and therefore, should blame themselves for their indolence rather than abusing the court's process by filing the application before this Court.
18. The 6th respondent further averred that the instant application is an abuse of the court process since the same advocates that have filed this application are the same advocates that have obtained the very orders they are seeking in this application. PPDT was a party to the High Court's proceedings, yet, it issued orders staying the implementation of the resolutions of the Special National Delegates Convention, therefore, it cannot, adjudge the matter before it. Instead, the PPDT has chosen to run amok and act as a Kangaroo Court, by issuing the very orders the applicants are seeking in this application, in total disregard of *the Constitution* the members of the Tribunal swore to protect and ensure that the rule of law is upheld. The 6th respondent maintained that under Article 162 (1), the Court of Appeal and the High Court are superior courts, therefore, a subordinate court cannot challenge orders of a Superior Court.
19. In their rejoinder, the applicants maintained that the application has not been rendered moot notwithstanding the fact that the 6th respondent convened a purported Special National Delegates Convention and appointed interim officials.

They maintained that the said interim party officials are yet to be recognized by the 5th respondent, (the Registrar of Political Parties), and therefore their appointment has not been implemented. Further, no changes of officials of the governing bodies or party organs of the 1st applicant have been effected, therefore, the Judgment has not been executed or implemented. It is only upon such recognition, approval of such changes by the 5th respondent and the gazettelement of the new officials in the Kenya Gazette that the process can be said to be complete or the Judgment can be said to have been executed.
20. The applicants have also averred that the validity or otherwise of the Special National Delegates Convention is a matter that is live before the PPDT in PPDTC/E008/2024, Joseph Mwenda Ithili vs Milton Mugambi Imanyara & the Office of the Registrar of Political Parties. The applicants maintained that Members of County Assemblies and other bona fide delegates of the 1st applicant



upon learning of the irregularities surrounding the impugned Special National Delegates Convention filed the aforementioned suit contesting the validity of the Special National Delegates and the changes.

21. In support of their application, the appellants reiterated the contents of their affidavits and submitted that they have an arguable appeal with high chances of success. They maintained that an arguable appeal is not necessarily one that will succeed but one that warrants consideration or interrogation by the Court and an invitation by the Court to the opposite party to make a response thereto.
22. Regarding the nugatory aspect, the appellants maintained that if the stay is refused, there will be irreversible harm to the governance and operations of the 1st applicant because the judgment removes from office the 1st applicant's party officials as gazetted under Gazette Notice No. 5805 of 9th May 2024, effectively paralyzing the 1st applicant's operations. Without the officials, the 1st applicant is completely hamstrung and cannot hold meetings, meet its statutory obligations with regard to audit and taxes, pay salaries, or meet its financial obligations and other commitments to members and suppliers. The 1st applicant cannot even prepare and submit its financial statements and accounts for purposes of audit of the public funds allocated to it under the Political Parties Fund, which is a public fund. Therefore, the disruption to the management and operations of the 1st applicant will occasion irreparable harm and untold legal and penal consequences upon the applicants that cannot be remedied through damages or subsequent legal redress, if the appeal succeeds.
23. As alluded to earlier, the 1st, 2nd and 6th respondents did not file any written submissions. However, their advocates made oral submissions which were essentially a replica of their respective affidavits in opposition to the application. It will add no value for us to repeat the contents here. As mentioned earlier, counsel for the 5th respondent Ms. Ndwiga stated that she would rely on her grounds of opposition and submissions filed before the trial court. However, those documents are not among the documents filed in this Court. Lastly, the PPDT did not participate in these proceedings nor did they file any papers despite being served.
24. We have given due consideration to the application, the affidavits in support of and those in opposition thereto, as well as the submissions filed and made orally before us and the authorities cited. Our invitation to intervene on behalf of the applicants has been invoked under Rule 5 (2) (b) of the Court of Appeal Rules which provides that this Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just. In *Equity Bank Limited vs. West Link Mbo Limited*, Civil Application 78 of 2011 this Court stated as follows:
 - “[13] It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 C.P. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction (*Githunguri Versus Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838*).
 - (14) From the foregoing, it is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.” (Per Githinji, J.A.)”
25. Regarding the principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules, this Court in *Chris Munga N. Bichage vs. Richard Nyagaka Tongi*,



Independent Electoral & Boundaries Commission & Robert K. Ngeny [2013] KECA 141 (KLR) stated:

“The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

26. As to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court on appeal. In *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal as one which must not necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous, and this court must not make definitive or final findings of either fact or law at this stage because doing so may embarrass the ultimate hearing of the main appeal.
27. In satisfaction of the first prerequisite, applicants have raised 13 grounds in their draft memorandum of appeal. One of the grounds is that the learned Judge erred in law and in fact by usurping the jurisdiction to hear and determine disputes arising from a political party, which is the preserve of the PPDT. Without going into the merits of the intended appeal as this will be the preserve of another bench, we take the view that the question whether the learned judge usurped the jurisdiction of the PPDT to hear and determine disputes arising from a political party is arguable, and it is certainly a matter for resolution by this Court on appeal.
28. On whether the appeal will be rendered nugatory should the impugned judgment and decree not be stayed, we note that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In considering the nugatory aspect, this Court in *Multimedia University & Another vs Professor Gitile N. Naituli* [2014] eKLR stated:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid.”
29. It is noteworthy that pursuant to orders issued on 30th October 2024, the 6th respondent convened a Special National Delegated Convention on 23rd November 2024 which culminated in the election of new party leaders. Nevertheless, it the applicants’ contention that the instant application is not spent since the said interim party officials are yet to be recognized by the 5th respondent, the Registrar of Political Parties and therefore, the appointments have not been implemented and it only upon such recognition, approval and effectuation of such changes by the 5th respondent and gazettelement of the new officials in the Kenya Gazette that the process can be said to be complete or the judgment said to have been executed.
30. It has also been brought to the attention of this Court that the PPDT in PPDT/C/E008/2024, *Joseph Mwenda Ithili vs. Milton Mugambi Manyara & the Office of the Registrar of Political Parties*, has issued orders restraining the 5th Respondent herein from implementing any resolutions or appointments arising from the said Special National Delegates Convention held on 23rd November 2024 and from making, approving, recognizing or otherwise effecting any changes to the officials of



the governing bodies or party organs of the 1st applicant. The 1st, 2nd and 6th respondent seem to have a quarrel on how the said orders were issued bearing in mind that the 3rd respondent is also a party to the instant appeal.

31. Each case depends on its own peculiar circumstances. The contested officials are yet to be registered owing to the stay issued by the PPDT as mentioned earlier. Therefore, we find that the applicants have satisfied the second prerequisite and allow the application dated 6th November 2024 and order a stay of execution of the judgment delivered on 30th October 2024 by Serگون, J. in Kericho High Court Constitutional Petition No. E009 of 2024, Solomon Chepngeny & Another vs Political Parties Disputes Tribunal & 3 Others pending the hearing and determination of their appeal to this Court against the said decision. The costs of this application shall be costs in the appeal.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

