



**Independent Electoral & Boundaries Commission & another v Lichete & another
(Civil Application E253 of 2022) [2022] KECA 956 (KLR) (29 July 2022) (Reasons)**

Neutral citation: [2022] KECA 956 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E253 OF 2022
W KARANJA, HA OMONDI & F TUIYOTT, JJA
JULY 29, 2022**

BETWEEN

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
APPELLANT**

WAFULA WANYONYI CHEBUKATI 2ND APPELLANT

AND

REUBEN KIGAME LICHETE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Being an application for stay of execution of the decision and the resulting
decree arising from the judgment delivered on 18th July, 2022 (Anthony
Mrima, J) in HIGH COURT CONSTITUTION PETITION NO. E 275 OF 2022)*

REASONS

1. We now give the reasons for the Ruling of this Court rendered in this matter, extempore, on 25th July, 2022. That decision was given and these reasons now delivered pursuant to rule 34(7) of the Court of Appeal Rules, 2022.
2. There is before us a Notice of Motion dated 19th July, 2022 by the Independent Electoral and Boundaries Commission (IEBC) and Wafula Wanyonyi Chebukati (jointly the applicants) in which they seek stay of execution of the decree from the judgment delivered on 18th July, 2022 by Hon. Anthony Mrima, J in Nairobi High Court Constitution Petition No. E275 of 2022 Reuben Kigame Lichete vs Independent Electoral and Boundaries Commission & Wafula Wanyonyi Chebukati pending the hearing and determination of an intended appeal. The application is said to be brought pursuant to the provisions of sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5 (2) (b) and



- 44 of the Court of Appeal Rules, 2010. Never mind that the current Rules of this Court are the Court of Appeal Rules, 2022 and although rule 5(2)(b) remains unchanged, the former rule 44 is now rule 46.
3. Reuben Kigame (the 1st respondent), a man of admirable credentials, is a person living with disability. He sought to offer himself as a presidential candidate in the forthcoming elections. His attempt was not to be as the 1st applicant (IEBC) rejected his nomination, and in an email of 29th May, 2022, advised him that he had not complied with the requirements set out in the Elections (General) Regulations, 2012. Unhappy about that rejection, the 1st respondent lodged a complaint before the IEBC’s Dispute Resolution Committee (DRC). In a decision rendered on 18th June, 2022, the DRC dismissed the said complaint .
 4. The 1st respondent then moved the High Court through Constitutional Petition No. E275 of 2022 challenging the decision of the DRC. In that petition the respondent complained about the violation of *the Constitution* and the law, details of which we need not set out at these interlocutory proceedings. For now, it is enough to say that a running theme of the petition was that the respondent is a person living with disability and IEBC and the 2nd Applicant failed to uphold *the Constitution* and the law in not according him an opportunity to stand for the election.
 5. After hearing the petition, the High Court in its judgment of 18th July, 2022 made the following orders:
 - a. The notice of preliminary objection dated 14th June, 2022 is hereby dismissed.
 - b. A declaration hereby issues that he decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee in complaint No. 038 of 2022 Reuben Kigame Lichete vs Independent Electoral and Boundaries Commission & Wafula Chebukati dated 18th June, 2022 violated the petitioner’s rights under Article 54 of *the Constitution* and the *persons with Disabilities Act*, No. 14 of 2003.
 - c. An order of certiorari do hereby issues removing into the High Court and quashing the decision of the Independent Electoral & Boundaries Commission Dispute Resolution Committee in complaint No. 038 of 2022 Reuben Kigame Lichete vs Independent Electoral & Boundaries Commission vs Wafula Chebukati dated 18th June, 2022. The said decision is hereby quashed.
 - d. An order of mandamus hereby issues directing the Respondents herein to accept the petitioner’s nomination papers and to consider them in line with this judgment, *the Constitution* and the law.
 - e. The Hon. Deputy Registrar of this Court shall transmit copies of this judgment to the clerks of the National Assembly and the Senate.
 - f. The Respondents shall shoulder the costs of the petition.”
 6. The applicants are aggrieved by that decision and lodged a Notice of Appeal on 18th July, 2022 evincing their intention to appeal against the whole of the said decision. At present, the applicants seek a stay of the said judgment. In an affidavit sworn on 19th July 2022 in support of the motion, Mr. Chrispine Owiye, the Director in Charge of Legal Services at the IEBC, deposes as to why the applicants think that the orders sought are deserved. It is stated that the intended appeal is arguable; the High Court judgment was rendered way too late as the list of supporters envisaged in the Court decision was due to be received by the applicants on or before 23rd May, 2022, but which was extended to 25th May, 2022; the names of registered candidates were published in the Kenya Gazette on 1st July, 2022, and



- the names of those candidates were submitted to the ballot paper printers for printing of the ballots; the presidential ballots were printed as from 15th July, 2022; the printers have communicated to IEBC that if printing of ballots is stopped or new specifications added then they would be unable to deliver the materials on time for the election.
7. The 2nd respondent, the Attorney General, supports the motion.
 8. The 1st respondent opposes the motion and swore an affidavit on 22nd July, 2022. In it he states that immediately after the judgment was delivered, the advocates for the applicants sought for stay orally but it was not granted. Instead, the learned Judge directed that the applicants could approach this Court for stay in which event the 2nd applicant would be able to demonstrate the extent to which it could comply with the orders of the High Court and specifically the order of mandamus directing it to accept the 1st respondent's nomination papers and to consider them in line with the judgment, Constitution and the Law.
 9. We are told, by the respondent, that on 19th July, 2022, through a news bulletin aired at 10.00 pm on Citizen TV, the 2nd applicant stated that IEBC would respect the Court's decision and was willing to give the 1st respondent a chance to present his papers. The 2nd applicant is quoted as saying;

“The Court has made a judgment, we respect the judgment of the court and if he presents himself we shall listen to him. So I am not saying anything beyond that, so it is up to him to present his papers and we shall process him.”
 10. The 1st respondent further deposes that the 2nd applicant scheduled a meeting with him on 22nd July, 2022 at 11.00 am, and it would be unlikely that he would be arranging a meeting for that day and at the same time seeking to stay the judgment on 19th July, 2022. He thinks the application is premature and filed without proper instructions from the 2nd applicant.
 11. On the prospects of the intended appeal, the 1st respondent does not see it as raising anything arguable. The 1st respondent contends it to be frivolous as it does not factor his unique state as a person living with disability and the need for IEBC to initiate conversation on affirmative action on persons living with disability who intend to vie for elective posts. The decision is lauded as highlighting serious constitutional issues on Articles 27 and 54 of *the Constitution*, the Disability Act of 2003, election laws and requiring Parliament to enact laws to govern persons living with disability who seek to stand for the elective position of the president of Kenya. He states that the judgment is not just a victory for him but for all persons living with disability and the country as a whole in its goal towards implementing our progressive Constitution.
 12. Not without significance, the 1st respondent avers that he has now fulfilled the constitutional requirements of Article 137 (1) (d) by being nominated by not fewer than two thousand votes from each of the majority of the counties.
 13. The 1st respondent also complains that this litigation, the proceedings before the DRC and the petition have consumed a lot of his time and distracted him from campaigning. We are also asked to note that the main Appeal is unlikely to be heard before the election date of 9th August, 2022 as the last date for filing of submissions has been set for 4th August, 2022.
 14. We have considered the written submissions filed by the parties and highlighted respectively by learned counsel, Mr. Gumbo for the applicants, Dr. Khaminwa for the 1st respondent and Mr. Weche for the 2nd respondent.



15. The principles applicable when this Court considers an application for stay of execution are old hat. For example in *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR this Court summarized those principles as follows:-

- “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - viii. In considering an application brought under Rule 5
- (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
- ii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - iii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - iv. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniness, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”



16. Yet as Dr. Khaminwa emphasized, in considering whether or not to grant stay, there is also a place for the rights of a respondent who will be deprived of the fruits of his/her judgement. Cited to us in this regard is the decision of *RWW -vs- EKW* [2019] eKLR where this Court observed;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. In the impugned decision Mrima, J made the following holding:

“73. Given that this Court voided the requirement to supply copies of identity cards of the supporters of an aspirant in Constitutional Petition No. E160 of 2022 (As consolidated) Free Kenya Initiative & Others vs. Independent Electoral and Boundaries Commission & Others (unreported) and the fact that the Petitioner has demonstrated exemplary effort in complying with the requirements despite his disability and without any special treatment as is so required in *the Constitution* and the law, this Court is satisfied that, on account of the disability and the effort demonstrated, the signatures of the supporters collected by the Petitioner which are already in the possession together with those which the Petitioner had collected, but were not received by the IEBC suffice the requirement for the signatures. The Petitioner shall, therefore, not be disqualified on account of insufficient number of signatures of his supporters.”

18. It is argued by the applicants that the evidence before the High Court was that as at 25th May, 2022, being the deadline for the submissions of the list of nominating supporters, the applicants received a list containing only 1,013 nominating supporters from the 1st respondent, falling short of the constitutional threshold of Article 137 (1) on qualifications for election as President which provides:

1. A person qualifies for nomination as a presidential candidate if the person—
 - a. is a citizen by birth;
 - b. is qualified to stand for election as a member of Parliament;
 - c. is nominated by a political party, or is an independent candidate; and
 - d. is nominated by not fewer than two thousand voters from each of a majority of the counties.

19. While we are told by the 1st respondent that he now has the requisite number of nominating supporters as contemplated by *the Constitution*, we are not told that he had achieved this threshold (of 48,000 nominating supporters) as of 25th May, 2022, that date being important as it was the deadline set by IEBC for submitting of the list of supporters.



20. The applicants argue that one effect of the judgment of the High Court is that decreeing that IEBC should accept the nomination of the 1st Respondent when he had not fulfilled the requirements of Article 137(1) would amount to amending the constitutional qualifications as a presidential candidate by judicial edict or fiat. While, at the hearing of the appeal, this Court will no doubt receive rival arguments on this question, we do not think that the debate it raises is frivolous. It is in fact deserving of further interrogation and the appeal is in our view arguable.
21. On the second limb, we are keenly aware that if we were to grant stay then the 1st respondent's candidature in the forthcoming presidential election will come to an end. The call to grant stay is therefore a call to weigh between the political rights of the 1st respondent guaranteed by Article 38 of *the Constitution* and issues of public interest raised by the applicants. To strike a balance between the two is an intractable task.
22. But first we comment on the 1st respondent's argument that having made a public declaration that IEBC will obey the High Court decision, the current motion by the applicants is to blow hot and cold. In effect to approbate and reprobate.
23. On our part we do not discern an inconsistency between the two positions. It may well be that the Chairman of IEBC stated that the commission will respect the judgment of the court and that the commission would process the 1st respondent's nomination if presented but, as submitted by Mr. Gumbo for the applicants, that would not bar the applicants from coming to this Court on an application for stay. Moreover, we are unable to hold that the statement by the 2nd applicant that he would attend to 1st respondent's application for nomination if presented contradicts the position now taken by IEBC that to do so will cause a delay in printing of the presidential ballots with the resultant peril that they will not be ready for delivery in time for the election scheduled for 9th August, 2022. And it is to that substantive concern we turn to consider.
24. Placed before us is a communication dated 18th July, 2022 from the printers of the presidential ballots in which they state that if the schedule of the printing of ballots is changed, then they would be unable to deliver the materials on time for the election. For its importance we reproduce the entire letter: -

Monday, 18th of July 2022 REF: Tender No. IEBC/OIT/002/21/2021/2022

Subject: Printing of Presidential Ballot papers

Dear Sir,

We acknowledge receipt of your letter dated 18th July 2022 on the above matter.

We have noted with concern this new development. Please note that any change in the printing schedule at this moment in time will have a corresponding significant delay on the agreed timelines and will certainly effect the readiness of the IEBC for the general elections of 9th August 2022.

Please note that any such delay will not be attributed to our company. In addition to any such changes, please note that the Commission will also bear the cost of the additional printing and the attendant logistics.

As such we regret to inform you that we cannot accommodate such a change without affecting the readiness for the General elections of the 9th August 2022.

Yours sincerely,

Chief Executive Officer



- 25. We do not have any evidence which is at odds with the following; that printing of presidential ballots began on 15th July, 2022; that the inclusion of the candidature of the 1st respondent would mean introduction of new specifications into the ballots or a redesign of them; that would cause a delay in printing of the ballots with a consequence that the printers would be unable to deliver the materials on time for the election. This is information which we cannot ignore as to postpone the date of the election is unfathomable and a recipe for a constitutional crisis or chaos. When we put the potential outcome of not granting the stay on a scale with the political rights of the 1st respondent, we come to a quick decision that the public interest in holding the election on the date ordained by the Constitution far overawes the political rights of Mr. Reuben Kigame Lichete.
- 26. We reach this decision notwithstanding that counsel for the 1st respondent was emphatic that what the 1st respondent desired is to be a presidential candidate and compensation by way of damages, a prayer which he had sought before the High Court but was not granted, is not an adequate remedy. It seems to us that this is an occasion where if the appeal failed, then the successful party may have to make do with what he considers to be a less than satisfactory relief. The overwhelming public interest in this matter dictates that we reach this result.
- 27. In the end we allow the application dated 19th July, 2022. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

