



**Independent Electoral and Boundaries Commission v Free Kenya Initiative & 22 others  
(Civil Application NAI E241 of 2022) [2022] KECA 975 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KECA 975 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION NAI E241 OF 2022  
HM OKWENGU, MSA MAKHANDIA & HA OMONDI, JJA  
JULY 29, 2022**

**BETWEEN**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... APPLICANT**

**AND**

**FREE KENYA INITIATIVE ..... 1<sup>ST</sup> RESPONDENT  
BOB NJAGI ..... 2<sup>ND</sup> RESPONDENT  
NICHOLUS OYOO ..... 3<sup>RD</sup> RESPONDENT  
MULIALIA OKUMU. .... 4<sup>TH</sup> RESPONDENT  
FELIX WAMBUA. .... 5<sup>TH</sup> RESPONDENT  
JEREMIAH NYAGA ..... 6<sup>TH</sup> RESPONDENT  
JAMES KAMAU ..... 7<sup>TH</sup> RESPONDENT  
BERNARD NETO OBUNGA ..... 8<sup>TH</sup> RESPONDENT  
JOSEPH SIAMBAI YAMOHANGA ..... 9<sup>TH</sup> RESPONDENT  
SHARIFF ABDULKADIR ..... 10<sup>TH</sup> RESPONDENT  
HAIMA. .... 11<sup>TH</sup> RESPONDENT  
NICHOLAS MUTETHIA GITONGA ..... 12<sup>TH</sup> RESPONDENT  
PETER MACHARIA GITONGA. .... 13<sup>TH</sup> RESPONDENT  
LUCY GAKENIA MAKUTHO ..... 14<sup>TH</sup> RESPONDENT  
EKURU EUKOT ..... 15<sup>TH</sup> RESPONDENT  
AUGUSTINE NJERU GATHANGU ..... 16<sup>TH</sup> RESPONDENT**



REUBEN KIGAME .....	17 <sup>TH</sup> RESPONDENT
ANDREW KAMA NJOROGE .....	18 <sup>TH</sup> RESPONDENT
KAIRA NABASENGE .....	19 <sup>TH</sup> RESPONDENT
OFFICE OF THE REGISTRAR OF POLITICAL PARTIES ...	20 <sup>TH</sup> RESPONDENT
NATIONAL ASSEMBLY .....	21 <sup>ST</sup> RESPONDENT
SENATE OF THE REPUBLIC OF KENYA. ....	22 <sup>ND</sup> RESPONDENT
THE ATTORNEY GENERAL .....	23 <sup>RD</sup> RESPONDENT

*(Being an application under Rule 5(2)(b) of the Court of Appeal Rules, for stay of the Judgment of High Court of Kenya at Nairobi (Mrima, J) delivered on 5th July 2022 in Constitutional Petition No. E160 of 2022, Consolidated with Petition No. E219 of 2022, E255 of 2022 and Petition No. 12 of 2022)*

## RULING

- [1] Independent Electoral and Boundaries Commission (IEBC), who is the applicant before us, is a constitutional commission established under Article 88 of the 2010 constitution. Under that Article, it is charged with the responsibility of conducting or supervising elections and referenda to any elective body or office established under the Constitution. It is currently in the process of finalizing arrangements for the National General Elections scheduled to be held on 9<sup>th</sup> August 2022.
- [2] In the process of vetting candidates for the general elections, the applicant applied the *Elections (General) Regulations, 2012* (as amended in 2017) which resulted in some independent candidates for elective offices being disqualified. Four petitions were filed differently by a total of 18 Petitioners who are now the 1<sup>st</sup> to 18<sup>th</sup> respondents before us. The main prayers that the respondents sought in their respective petitions, that were consolidated, were judicial review declaratory orders in the following terms:
- “ (i) that Regulations 18(2)(c), 24(2)(c), 32(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) is inconsistent with akn/ke/act/2010constitution the Constitution}} and therefore void and invalid in terms of Article 2(4) of /akn/ke/act/2010/constitution the Constitution}}.
- (ii) that Regulations 18(2)(c), 24(2)(c), 32(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) is wholly unconstitutional and it accordingly stands to be struck out from the Regulation.”
- [3] The respondents also sought orders for amendment of the *Political Parties Act* to allow for the formation of a coalition of independent candidates in order to further their civic and political rights.
- [4] The grounds upon which the petitions were anchored were generally, that Regulations 18(2)(c), 24(2)(c), 32(2)(c), and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) (herein referred to as the impugned regulations), were discriminatory towards independent candidates, and also violated the right to privacy under Article 31 of *the Constitution* and *Data Protection Act*, as well as political rights under Article 38 of *the Constitution*.



[5] IEBC objected to the petitions contending that they were brought in bad faith, as the impugned Regulations have been in existence since 2012. IEBC maintained that the impugned Regulations were not discriminatory but simply reinforced Articles 99 and 103 of *the Constitution*. The Registrar of Political Parties (19<sup>th</sup> respondent) also objected to the notice of motion as did the Attorney General.

[6] Upon hearing the Judicial Review application, the learned Judge ruled in favour of the petitioners and issued orders as follows:

“(a) A Declaration hereby issues that Regulation 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) are in contravention of Articles 2(4), 10, 27, 38(3), 83(3), 99(1)(c), 137(1)(d) and 193(1)(c) of *the Constitution*.

(b) A Declaration hereby issues that Regulation 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) are in contravention of Article 31 of *the Constitution* and the Data Protection Act.

(c) An Order of Certiorari hereby issues bringing into the High Court and quashing Regulations 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017). The said Regulations are hereby quashed.

(d) Being a public interest litigation, parties shall bear their costs.”

[7] IEBC being aggrieved with the judgment, filed a notice of appeal and has also filed the amended motion before us in which it seeks, inter alia, orders that the decision of the High Court be stayed pending the hearing and determination of the intended appeal.

[8] IEBC has filed written submissions in support of the motion.

These were orally highlighted by learned counsel Mr. Munyua holding brief for Dr. Arua together with Mr. Olendo. In the submissions the applicant maintained: that it has an arguable appeal, because the decision of the learned Judge was erroneous and based on misapprehension of principles of law; that the impugned Regulations do not discriminate against independent candidates; that assuming they do discriminate, discrimination is permitted in certain circumstances in public interest; that the orders made by the learned Judge have created confusion as it is not clear whether all or any of the candidates are to be vetted afresh; that the appeal raises serious constitutional issues which have grave implications to the conduct of the upcoming general elections; and that the requirement for identity cards of those supporting independent candidates was not a violation of the right to privacy, as section 30 of the Data Protection Act allows the processing of personal data with the consent of persons whose data is being processed, and if the same is required in public interest. Further, that this is consistent with Article 81(2) of *the Constitution* that provides for accuracy, transparency and accountability in the electoral system.

[9] In regard to the nugatory aspect, IEBC contended that general elections are a constitutional exercise with specific timelines; that it is already in the process of printing ballot papers outside the country; that if a stay of the orders of the High Court is not granted, it will have to do away with the ballot papers already printed and this will result in waste of a lot of public resources; and that there may be serious consequences for the impending elections as the strict constitutional timelines, would not allow for the verification process to start de novo.



- [10] Mr. Asembo learned counsel appeared for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> to 13<sup>th</sup> respondents and also held brief for Mr. Abdikadir for 24<sup>th</sup> respondent, while Mr. Murimi was present for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, Mr. Kosgei for 14<sup>th</sup> to 17<sup>th</sup> respondents, Ms. Otieno for 20<sup>th</sup> and Ms. Cheruiyot for the 23<sup>rd</sup> respondent,
- [11] In his oral submissions, Mr. Asembo opposed the motion arguing that the requirement for the production of physical IDs of supporters was an unreasonable requirement, and this is what the respondents objected to. He urged the Court to uphold *the Constitution* by declining to grant the orders of stay. Mr. Asembo conceded that the printing of ballot papers is IEBC's responsibility, but maintained that the respondents had raised their concerns in good time but were ignored, and therefore the inconveniences are self-inflicted. He argued that the respondents were likely to suffer irreparable harm if they do not appear on the ballot paper, and that Article 83(3) of *the Constitution* is clear that administrative measures that frustrate the electoral process, ought not to be allowed.
- [12] Mr. Murimi learned counsel associated himself with Mr. Asembo's submissions and also relied on written submissions that had been filed on behalf of 3<sup>rd</sup> and 4<sup>th</sup> respondents. He argued that a litigant should not be denied the fruits of his judgment; that the respondents having succeeded in their petitions, they should be allowed to be on the ballot; that IEBC had conceded during the trial in the High Court that no prejudice would be suffered if conservatory orders were issued in favour of the respondents; and that the Court should consider the interests of the respondents which were their political interests and assertion of the sovereignty of the people as provided under Article 1 of *the Constitution*.
- [13] The 3<sup>rd</sup> and 4<sup>th</sup> respondents relied on several authorities including, *Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63*, in which the Court asserted that it ought not to protect an applicant for orders of stay of execution at the expense of a successful litigant, and added that:
- “The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage .....
- In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”
- [14] Mr. Kosgei learned counsel also strongly opposed the applicant's motion, pointing out that the court only declared unconstitutional Regulation 18(2)(c) that requires hard copies; that the applicant was creating a crisis to ensure that there are no Regulations for vetting; that the intended appeal was not raising any arguable issues as the learned Judge was correct in his findings; that the appeal would not be rendered nugatory as there are candidates who have already been cleared and the orders given by the High Court do not prevent IEBC from conducting the elections; and that if a stay is granted, the respondents would be prejudiced as they will not be able to realize their rights.
- [15] Ms. Otieno learned Counsel also associated with the applicant's position urging that the appeal is arguable as the Regulations were made pursuant to Article 94(5) of *the Constitution* and were adopted about 10 years ago. On the nugatory aspect, Ms. Otieno urged the Court to consider the interest of the people of Kenya and the constitutional crisis that is likely to arise, if the order of stay is not granted. She faulted the independent candidates for failing to comply with the Regulations because they ought to have known the law.



[16] Finally, Ms. Cheruiyot learned Counsel on the instructions of her client, Office of Data Administrator the 23<sup>rd</sup> respondent, opted to take a neutral position, leaving the matter to the Court.

[17] We have considered the application, the affidavits, the written submissions, the oral submissions made by counsel, the authorities cited, and the law. The application before us has been brought under Rule 5(2)(b) of the Court of Appeal Rules. The jurisdiction of this Court under the said Rule is discretionary and guided by the interests of justice. The principles for granting orders under Rule 5(2) (b) of the Court of Appeal Rules are well settled. For instance, in *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR, the Court delineated its jurisdiction as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

[18] It follows, therefore, that in applying these principles the issues for our determination are: whether the applicant has satisfied the twin principles for grant of the order for stay of execution of the decision of the High Court. Thus in exercising our discretion, we must be satisfied that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. But this is not all.

[19] The litigation giving rise to the motion before us being one concerning rights under *the Constitution*, there is a third principle that was introduced by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR (Gatirau Munya decision), where the Court after acknowledging the twin principle regarding arguability and the nugatory aspect of the application, stated inter alia:

“However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.”

This third condition is dictated by the expanded scope of the Bill of Rights, and the public- spiritedness that run through *the Constitution*. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.”

[20] Regarding the arguability of the intended appeal, this Court in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR elaborated as follows:

“vi On whether the appeal is arguable, it is sufficient if a single bonafide 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



- [21] At paragraph 7 of the grounds stated on the face of the motion, the applicant has listed several grounds upon which it intends to challenge the judgment of the trial court. The grounds include; the judgment having been based on a misapprehension of the law, in particular, Article 27, 28 and 31 of *the Constitution* and the provisions of the Data Protection Act; the learned Judge having made an erroneous finding that the impugned Regulations violated Article 83, 99(1)(c), 137(1)(d), and 193(1)(c) of *the Constitution*, without any particulars as to how the said Regulations violated *the Constitution*; and the learned Judge failed to appreciate that the information required, falls under the exemptions provided under section 51 of the *Data Protection Act*.
- [22] It is clear that the listed grounds raise issues that require the interpretation of constitutional provisions. Without saying more, the appeal is arguable. On the nugatory aspect, the learned Judge made orders declaring the impugned Regulations unconstitutional. The effect of the orders issued by the learned Judge, if not stayed, will be far-reaching. As posited by IEBC, which Regulations will they use instead of the impugned Regulations? What will be the fate of those independent candidates who were not cleared because they did not meet the requirement of the impugned Regulations? What would be the fate of the general elections in so far as the printing of ballot papers is concerned? These are difficult questions that cannot be ignored or wished away.
- [23] We were told, and it was not disputed, that IEBC is in the process of printing ballot papers outside the Country, and some of the ballot papers have already been delivered. If orders of stay are not granted, these ballot papers will be useless, meaning huge loss of public resources. On the other hand, there are those independent candidates whose desire to appear on the ballot papers hangs in the balance because they did not meet the requirements of the impugned Regulations. An order staying the decision of the High Court will be a death knell to these candidates’ hope. But there is yet another category of people who will also be affected with the orders that may be issued by this Court. These are the people referred to in the *Gitirau Peter Munya* decision, that is, the public who have a right to vote and elect their preferred candidate.
- [24] While it is appreciated that some of these voters may be supporters of the independent candidates who are affected by the decision of the High Court, the printing of ballot papers cuts across the full spectrum of general elections and there is the larger majority, either vying candidates or voters, who may also be affected because of their interest in the general elections, if the printing of the ballot papers have to be stopped and started afresh. we must therefore balance these interests with our eyes fixed on the interest of justice.
- [25] The impugned Regulations were passed way back in 2012 – 2017. The Regulations were suspended and were not applied in the 2017 elections. The probability that they would be applied in the upcoming 2022 elections, was obvious to any interested party, and if the respondents were truly interested in pursuing their political interests and believed that the impugned Regulations were a hindrance, they ought to have moved the Court in good time. Instead the respondents ignored the impugned regulations and only approached the High Court at the eleventh hour after their vetting was unsuccessful because of the impugned Regulations.
- [26] The following extract from the *Gitirau Munya Supreme Court* decision is instructive:
- “(97) Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious



deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.”

[27] We believe it is in the public interest and within the expanded scope of the Bill of Rights that runs through *the Constitution*, that we protect *the Constitution*, by safeguarding public resources and protecting public interest in this matter. The upshot of the above is that, notwithstanding the prejudice that may be suffered by the respondents, the applicant has satisfied the requirement of Rule 5(2)(b) of the Court of Appeal Rules and it is in the public interest that we grant the applicant’s motion.

[28] Accordingly, we issue orders of stay of execution of the judgment of the High Court delivered on 5<sup>th</sup> July 2022 pending the hearing and determination of the applicant’s appeal. Costs shall be in the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**HELLEN OMONDI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

