



Obuon v Dispute Resolution Committee & 2 others (Civil Appeal E504 of 2022) [2022] KECA 970 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KECA 970 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E504 OF 2022
FA OCHIENG, LK KIMARU & PM GACHOKA, JJA
AUGUST 26, 2022**

BETWEEN

DUNCAN OCHIENG OBUON APPELLANT

AND

DISPUTE RESOLUTION COMMITTEE 1ST RESPONDENT

**RETURNING OFFICER EMBAKASI WEST CONSTITUENCY 2ND
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

(Being an application for stay pending an appeal from the Judgment of the High Court of Kenya at Nairobi (Antony Ndungu, J.) delivered on 22nd July 2022 in High Court Judicial Review Application No. E106 of 2022)

RULING

A. Background

1. On August 4, 2022 the Appellant/Applicant filed an application under certificate of urgency seeking the following orders:
 - i. THAT this application be certified urgent.
 - ii. THAT the election for the position of Member of Parliament for Embakasi West Constituency in the coming general elections scheduled for the 9th August 2022 be and is hereby stayed and or suspended pending the hearing and determination of this application inter parties and or till further orders of this Court.



- iii. THAT the election for the position of member of Parliament for Embakasi West Constituency Nairobi in the coming general elections scheduled for the 9th August 2022 be and is hereby stayed and or suspended pending the hearing and determination of this appeal and or till further orders of this Court.
 - iv. THAT the costs of the application be to the Appellant.
 - v. THAT this court shall deem just (sic).
2. The Application was certified urgent and placed before us for hearing on August 8, 2022 at 12.00 pm. Upon hearing the parties' arguments, we dismissed the application and reserved the reasons for a later day pursuant to Rule 34(7) of the Court of Appeal Rules. We now give our reasons for dismissing the Notice of Motion dated 22nd July 2022.
 3. By way of background, it is important to set out the facts of this case in order to have a broad picture of what transpired at the Dispute Resolution Committee and in the High Court.
 4. This matter relates to the General Elections that were held on the 9th of August 2022. It is important to note that the date of the General Election is set pursuant to the provisions of article 101 ofn [Constitution](#) which provides as follows:
 - “(1) A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.
 - 2. Whenever a vacancy occurs in the office of a member of the National Assembly under Articles 97(1)(c), or of the Senate under Article 98(1)(b),(c) or (d) , the respective speaker shall, within twenty-one days of the occurrence of the vacancy, give notice in writing of the vacancy to-
 - a. the Independent Electoral and Boundaries Commission; and
 - b. the political party on whose party the member was elected or nominated.
 - 3. A vacancy referred to in clause (2) shall, subject to clause (5), be filled in the manner prescribed by an Act of Parliament within twenty-one days of the notification by the respective speaker.
 - 4. Whenever a vacancy occurs in the officer of a member of the National Assembly elected under Article 97 (1) (a) and (b), or of the Senate elected under Article 98(1) (a)
 - a. the respective Speaker shall, within twenty -one days after the occurrence of the vacancy, give notice in writing of the vacancy to the Independent Electoral and Boundaries Commission; and
 - b. A by-election shall be held within ninety days of the occurrence of the vacancy, subject to clause (5)
 - 5. A vacancy referred to in clause (4) shall not be filled within the three months immediately before a general election.”
 5. Pursuant to the said article of the Constitution , the 3rd Respondent that is, the Independent Electoral and Boundaries Commission set the 9th of August 2022 as the date for the General Elections.



6. The Appellant/ Applicant offered himself as an independent candidate pursuant to Article 85 of the Constitution. His main grievance is that the 2nd Respondent denied him a clearance to vie for the position of Member of National Assembly, Embakasi West Constituency as an independent candidate. He stated that he had complied with the necessary requirements and that he was unfairly locked out by the 2nd Respondent on the basis that he did not submit passport photographs in the right format and that such refusal was draconian and violated his political and other constitutional rights.
7. The Applicant being aggrieved with the decision of the 2nd Respondent filed complaint no. 322 of 2022 before the 1st Respondent. Upon hearing the parties, the 1st Respondent rendered itself in the following terms;

- “(i) Gazette Notice No. 431 published on the 22nd January 2022 at paragraph (k) provided that the days of nomination of political party candidates and independent candidates for the National Assembly elections shall be between Sunday 29th May 2022 and Tuesday, 31st May, 2022. The nomination papers shall be delivered by candidate to the respective Returning Officers between the hours of eight O’clock in the morning and one o’clock in the afternoon and between the hours of two O’clock and four O’clock in the forenoon at the place designated by the Commission.
- ii. The complainant alleged that he was turned away on 30th May, 2022 for failing to provide a passport photograph of the required size and that he was subsequently denied audience when he returned.
- iii. The Respondent produced screenshots of a WhatsApp message indicating that the Complainant communicated on 1st June, 2022 alleging that he had appeared on 31st May 2022 at 18.00 hours. According to the WhatsApp message sent to the Respondent, the Complainant was still looking for a proposer and a seconder hence his delay in attending before the Respondent. It is clear that the Complainant did not subsequently turn up (sic) for clearance within the scheduled timelines.
- iv. The High Court’s decision in *Edward Ilandi Itheka -vs- Independent Electrol and Boundaries Commission & another 2017 eKRL Judicial Review 4 of 2017* is instructive that where the timelines to be complied with by aspirants had been published in advance, It is upon the aspirants to comply with the published timelines.
- v. In light of the foregoing, the Committee hereby dismisses the Complaint.”

8. The Applicant being aggrieved by this decision filed Judicial Review Application No. E106 of 2022 on June 30, 2022. The High Court upon hearing the parties rendered its Judgment on July 15, 2022 and the learned Judge in dismissing the applicant’s case held as follows.

“Confronted by evidence presented before it, the record shows that the 1st respondent considered the same as well as the relevant law and reached the finding it did. The 1st Respondent made a finding that the Ex parte Applicant had in essence breached the timelines set for presentation of nomination papers. The belated attempt by the Ex Parte Applicant to introduce new evidence in these judicial review proceedings by stating that he complied with the timelines but was denied an opportunity to present his papers comes a



cropper for the reasons that his own communication to the Returning officer via WhatsApp clearly shows he was unable to meet the timelines due to unavailability of his proposer and seconder.

The Exparte Applicant has alleged breach of the constitution, specifically Articles 10, 47 and 48. He states that he has approached this court within the provisions of Articles 22 and 50 on enforcement of the Bill of Rights. He, in my view fails to demonstrate such breaches before the 1st Respondent and before this Court. The 1st Respondent cannot be faulted for following the Law. There is no breach of the constitution when established statutory provisions are followed by a sitting over a dispute. In approaching the court under judicial review, a party must demonstrate the specific infractions the body or tribunal engaged in.
.....

The case in *Harun Mwandali Mwaeni v IEBC & Another* [2017]eKLR relied on by the Respondent in its decision illuminates the question of timelines further and buttresses the significance of electoral timelines. The court stated that timetables and cut-off dates/times whether imposed by the IEBC or by law is to facilitate the smooth running of the electoral process.”

9. Again, the Applicant was aggrieved by the High Court’s decision and he therefore filed the instant Application and lodged a Notice of Appeal on the 26th of July 2022 and the Record of Appeal on the August 4, 2022.
10. It was important for us to set out the facts of this case to have a broad view of what transpired before the 1st Respondent and in the High Court and the reason why the Applicant was locked out of the general elections held on August 9, 2022.

B. Submissions

11. All the Parties filed written submission and highlighted them during the hearing.
12. At the core of their submissions were the applicable principles in an application brought under Section 5 (2) (b) of the rules of this Court.

C. Determination

13. We have considered the Application, the grounds in support thereof, the Replying Affidavit, the submissions, the authorities cited and the law. The Parties in this case are walking in a path that is well trodden. The jurisdiction under Rule 5(2) (b) of this Court Rules is discretionary and guided by the interest of justice as held in Civil Appeal Application No. E041 of 2020 (*Dickson Sinkeet Mapi (suing as the personal representatives of Benjamin Mapi Ole Partimo) vs Naisegu Pargana Mutunkei*).
14. In the exercise of this discretion, the court must be satisfied on the twin principles which are that the Appeal is arguable and that if orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. The jurisdiction is original and discretionary as stated by this court in *Stanley Kangethe Kinjanjui -vs- Tony Keter & 5 other* [2013] eKLR in which this court stated inter alia:

“That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground is not one which must succeed but it



should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

15. It is now settled law that an arguable appeal is not one that must necessarily succeed but which ought to be argued fully before the court. As held in the case of *Trust Bank Limited and Another -vs- Investech Bank Limited and 3 Others* [2000] eKLR.

“....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” (emphasis ours.”

16. We have carefully considered the grounds set in the motion and the Memorandum of Appeal. Although an arguable appeal is one that will not necessarily succeed, our analysis of the proceedings and the decisions of the 1st Respondent and the High Court cast doubt on the arguability of the appeal. It is apparent that the Applicant appears to concede in the WhatsApp messages to the 2nd Respondent that he had challenges meeting the statutory deadlines that all contestants in the general election had to comply with. In view of this concession, the Applicant fails at this stage to demonstrate that the intended appeal is arguable. We further observe that the orders being sought by the Applicant, if granted, will adversely affect candidates for the said parliamentary seat who either by default or oversight were not made parties to these proceedings thus will end up being condemned without being heard. Taking in account the admission by the Applicant that he was unable to comply with the timelines and the fatal flaw of not joining all the parties that will be affected by this Appeal, the chances of its success is doubtful. In *Seventh Day Adventist Church E.A Ltd (Nairobi East S.D.A. Church) vs Strathmore Educational Trust Registered Trustees Kenya & 2 Others* (2020) eKLR, this court found an intended appeal as one that is not arguable following a concession by the Applicant therein that there was no written agreement for the alleged purchase of a parcel of land.

17. Having found that the application has failed to meet the threshold in the first principle of arguability of the appeal it is not necessary for us then to delve into the consideration of the nugatory aspect of the application.

18. We find that this application has no merit, and we order that it be and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

FRED A. OCHIENG

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JUDGE OF APPEAL

LUKA KIMARU

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JUDGE OF APPEAL

MWANIKI GACHOKA

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

