



**Mbago v Oluoch & 4 others (Civil Application E094 of 2022)
[2022] KECA 935 (KLR) (19 August 2022) (Reasons)**

Neutral citation: [2022] KECA 935 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E094 OF 2022
S OLE KANTAI, M NGUGI & KI LAIBUTA, JJA
AUGUST 19, 2022**

BETWEEN

NICHOLAS OUMA MBAGO APPLICANT

AND

NELSON ONYANGO OLUOCH 1ST RESPONDENT

DISPUTE RESOLUTION COMMITTEE 2ND RESPONDENT

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

RETURNING OFFICER, RONGO CONSTITUENCY 4TH RESPONDENT

REGISTRAR OF POLITICAL PARTIES 5TH RESPONDENT

((Being an application for stay of execution of the Judgment of the High Court of Kenya at Migori (Wendoh, J.) dated 15th July, 2022 in Constitutional Petition No. 4A of 2022))

REASONS

REASONS OF THE COURT FOR THE DECISION MADE ON 29TH JULY, 2022

1. The Motion was brought by the applicant Nicholas Ouma Mbago under Article 159 (2) (d) of *the Constitution* of Kenya, 2010; Rule 18 of the Court of Appeal (Election Petition) Rules 2017; Rule 5 (2) (b), 43, 49 and 51 of the Court of Appeal Rules, 2022 and all other enabling provisions of law. It is prayed in the main that pending the hearing of the application and of an intended appeal, we be pleased to issue an order stopping the 3rd respondent (Independent Electoral & Boundaries Commission “IEBC”) from publishing a gazette notice and/or revoking such a gazette notice naming the 1st respondent (Nelson Onyango Oluoch) as the Jubilee Party candidate in the forthcoming elections for member of National Assembly for Rongo constituency. We are also asked to stay the execution of the judgment and decree of the High Court of Kenya at Migori (Wendoh, J.) delivered



on 15th July, 2022 in Migori Constitutional Petition No. 4A of 2022. In the grounds advanced in support of the Motion, and in the supporting affidavit of the applicant, it is said amongst other things that the applicant instituted an electoral complaint on 6th July, 2022 in IEBC DRC Complaint No. 97 of 2022 with the 2nd respondent (Independent Electoral & Boundaries Commission Dispute Resolution Committee “IEBCDRC”) against the 1st respondent on various grounds including that until March, 2022 the 1st respondent was a member of the Orange Democratic Movement (ODM) before joining the Jubilee Party; and that he (the 1st respondent) had on 26th April, 2022 deregistered himself from Jubilee Party and registered himself with the 5th respondent (Registrar of Political Parties) as an independent candidate; that on 29th May, 2022 during the exercise of clearing candidates vying for the seat of Member of the National Assembly for Rongo constituency the 1st respondent had presented himself as a member of the Jubilee Party; that the 4th respondent (Returning Officer, Rongo constituency) had rejected the application but had eventually accepted it on 31st May, 2022; that the 1st respondent had breached Section 28 of the [Elections Act](#) 2011, and that there was danger that the IEBC would gazette the 1st respondent as a candidate for the seat of National Assembly for the said constituency. Further, that the IEBC Dispute Resolution Committee had on 14th June, 2022 heard the complaint where it was informed by counsel for the 1st respondent that the applicant had filed a matter before the High Court at Migori (Case No. CO1 of 2022), which was pending; and that the Committee had revoked the 1st respondent’s clearance by the Returning Officer. Following those findings, the 1st respondent had filed a constitutional petition before the High Court at Migori asking for various declarations and other prayers, including orders of mandamus, and the court delivered a Judgment where it allowed the petition. The applicant thus feared that the 3rd respondent would gazette the name of the 1st respondent as a candidate for the Jubilee Party for Member of National Assembly for the said constituency.

2. When the Motion came up before us for hearing on a virtual platform on 26th July, 2022, learned counsel Mr. Philip Omoiti appeared for the applicant; learned counsel Mr. Adawo appeared for the 1st respondent while learned counsel Miss Jerotich appeared or held brief for other counsel for the 2nd, 3rd, 4th and 5th respondents. None of the respondents had filed replying affidavits to the Motion but they (and the applicant) had filed detailed written submissions which we have considered, and for which we are grateful to counsel.
3. Conscious of the fact that general elections, in Kenya are scheduled to be held on 9th August, 2022, we asked counsel for the applicant why an appeal had not been filed considering that the Motion relates to an election related matter. The practice in such matters has been that interlocutory applications are shelved or withdrawn, and the Court is engaged in hearing an appeal for a final determination of the matter. In the instant matter we gave our decision on 29th July, 2022 dismissing the Motion, and now proceed to state the reasons why we reached that decision.
4. The principles that govern the determination of an application of this nature are well known and have been the subject of many judicial pronouncements of this Court in such cases as [Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others](#) [2013] eKLR. For an applicant to succeed, he must, firstly, demonstrate that the appeal or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. A single arguable point on appeal will suffice – [Damji Pragji Mandaria v Sara Lee Household and Body Care \(K\) Limited](#), Civil Application No. NAI 345 of 2004 (ur). Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay.
5. The major complaint by the 1st respondent in High Court of Kenya at Migori Constitutional Petition No. 4A of 2022 was that he had been condemned unheard by the 2nd respondent. The Judge found that the 2nd respondent was established under Article 88 of [the Constitution](#) and was duty bound in its



activities to be guided and be bound by the national values and principles of governance enunciated by Article 10 of *the Constitution*. Further, that Article 159 of the said Constitution demanded that justice be done without undue regard to procedural technicalities. The Judge found that the 1st respondent had been treated unfairly by the 2nd respondent in breach of Articles 27 and 50 of *the Constitution* and against the provisions of the Fair Administrative Actions Act. In the end, the Judge issued a declaration that the 2nd respondent's decision revoking the 1st respondent's nomination was unlawful; that it was declared that the 1st respondent was validly cleared and duly nominated to contest for the position of member of National Assembly for Rongo constituency on a Jubilee party ticket, amongst other orders. A judicial review order of mandamus was granted to remove to and to quash the decision and ruling of the 2nd respondent delivered on 16th June, 2022 revoking the clearance and nomination of the 1st respondent to contest the said seat, and a similar order was issued against the 3rd respondent directing it to include the 1st respondent's name in a gazette notice for the forthcoming elections, and include his name as such candidate.

6. The applicant filed a Notice of Appeal against the entire Judgment.
7. We saw the draft Memorandum of Appeal drawn for the applicant by his lawyers Omoiti & Partners, Advocates, where 11 grounds of appeal are set out. It is intended to be argued on appeal, for instance, that the Judge erred in law and fact in faulting the Chairman of the 2nd respondent in the way he had treated the 1st respondent; that the Judge erred in law and fact in finding that the 1st respondent was denied an opportunity to address the 2nd respondent; and that the Judge erred in appreciating the proceedings that had been conducted by the 2nd respondent. We find, upon evaluation, that these are arguable grounds on appeal and, as we have seen, an applicant may raise a single arguable point as there is no requirement to show a multiplicity of arguable points.
8. What about the nugatory aspect which an applicant, to succeed, must also show?
9. The applicant did not establish before the High Court or before us that he is a registered voter in Rongo constituency, or that he was or intended to contest as a candidate for the seat of Member of National Assembly for the said constituency. He has not shown which right is likely to be breached. We are of the respectful opinion that, in the circumstances, the applicant did not satisfy the second limb of an application of this nature that the appeal would be rendered nugatory if we did not allow the application for stay.
10. These are the reasons why we declined the Motion in the decision rendered on 29th July, 2022.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

Dr. K.I. LAIBUTA

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

