



**Wiper Democratic Movement Secretary General & 3 others v Talib & another;
Speaker, National Assembly & another (Interested Parties) (Civil Appeal E325,
E329 & E330 of 2022 (Consolidated)) [2022] KECA 1077 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1077 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E325, E329 & E330 OF 2022 (CONSOLIDATED)
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
OCTOBER 7, 2022**

BETWEEN

**WIPER DEMOCRATIC MOVEMENT SECRETARY GENERAL 1ST
APPLICANT**

**WIPER DEMOCRATIC MOVEMENT CHAIRMAN, NATIONAL ELECTIONS
BOARD 2ND APPLICANT**

WIPER DEMOCRATIC MOVEMENT 3RD APPLICANT

LUCAS MULINGE WAMBUA 4TH APPLICANT

AND

ABUBAKAR AHMED TALIB 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

AND

SPEAKER, NATIONAL ASSEMBLY INTERESTED PARTY

CLERK, NATIONAL ASSEMBLY INTERESTED PARTY

(Being an application for stay of execution pending hearing and determination of an intended appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Joseph Serگون, J.) delivered on 9th September 2022 in High Court Election Petition Appeal No. 605 of 2022)



RULING

REASONED RULING PURSUANT TO RULE 34(7) OF THE COURT OF APPEAL RULES

1. The 3 Motions came for hearing before us under certificates of urgency on September 19, 2022 and, in view of the fact that they relate to the same election dispute between the same parties, they were consolidated and heard together by consent of the parties.
2. The brief background is that the three applications were filed under certificate of urgency, and relate to the nomination slot in the National Assembly that had been allocated to the 1st applicant (Wiper Democratic Party). The parties are in dispute as to who, as between the 4th applicant and the 1st respondent, was the validly nominated candidate to represent special interest groups and, in particular, persons with disabilities.
3. Due to the urgency of the matter, and as a matter of convenience, we heard the three applications together and reserved our reasoned ruling pursuant to rule 34(7) of the *Court of Appeal Rules*. For ease of reference, the orders given in summary were as follows:

“...When the 3 applications came up for hearing on the go to Meeting virtual platform this morning, the 1st -3rd Applicants were represented by Ms Lumallas, the 4th Applicant by Ms Mwanzia, the 1st Respondent by Mr Harrison Kinyanjui, but the 2nd Respondent and the Interested parties were not represented despite confirmation by the Court that they had been duly served. At the hearing, counsel for the applicants and for the respondents present made oral highlights of their respective written submissions filed on diverse dates.

Having considered the pleadings on record, the written and oral submissions of learned counsel for the parties, and having further considered statute and case law cited, and the strict timelines prescribed for the determination of matters relating to general elections, we hereby order and direct that, pending delivery of the Court’s reasoned Ruling:

- (a) execution of the judgement and orders of the High Court of Kenya at Nairobi (Sergon, J.) given on 9th September, 2022 in HCCA NO. 605 OF 2022 together with all consequential orders be and are hereby stayed pending the hearing and determination of the intended appeal;
- (b) for the avoidance of doubt, the status quo holding as of this day, to wit, the 19th day of September 2022 be maintained to the effect that the 1st and 2nd Interested Parties are, in the meantime, restrained from swearing in to the office of Member of the National Assembly representing special interest groups either the 4th applicant (Lucas Mulinge Wambua) or the 1st respondent (Abubakar Ahmed Talib), pending the hearing and determination of the intended appeal or further orders of the Court;
- (c) the Court reserves its reasons for the Ruling and Orders pursuant to Rule 34(5) of the Court of Appeal Rules;
- (d) a reasoned Ruling of the Court on the 3 applications as hereby consolidated shall be delivered on 7th October 2022; and
- (e) the costs of the respective applications shall be costs in the intended appeal.



Orders accordingly.”

4. As already observed, this dispute revolves around the question of the nomination seat that has been allocated to the 1st applicant pursuant to Article 90 of the Constitution, which provides as follows:

- “90(1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98(1) (b), (c) and (d), and for the members of county assemblies under article 177(1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
- (2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—
- (a) Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1) within the time prescribed by the national legislation.
- (b) Except in the case of the seats provided for under Article 98(1) (b) each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and
- (c) Except the case of county assembly seats, each party reflects the regional and ethnic diversity of the people of Kenya.
- (3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by the candidates of the political party at the general election.”

5. On August 9, 2022, Kenya held the general elections and Wiper Democratic Party the 1st applicant was one of the parties that fielded candidates for various seats, including the National Assembly.

6. It is common ground that the 1st applicant was allocated one seat in the National assembly, which is the subject of the applications and the instant Ruling. The dispute revolves on the question as to who between the 4th applicant and the 1st respondent was the validly nominated candidate to represent special interest groups.

7. The dispute prompted the filing by the 1st respondent of a complaint to the Political Parties Dispute Tribunal (the PPDT) seeking the following reliefs:

- “(i) A declaration do issue that the National Assembly Party List submitted to and received by the Independent Electoral and Boundaries Commission, IEBC, from the 1st and 2nd Respondents on 21st July, 2022 by the 2nd respondent vide the letter dated 21st July 2022 bearing the name of the complainant as nominee for the National Assembly nomination post in the August 2022 general election is the legal and valid National Assembly Party list for the 1st respondent, Wiper Democratic Movement-Kenya Party.
- (ii) A declaration do issue that the National Assembly party list submitted to and received by the Independent Electrol and Boundaries Commission, IEBC,



on 22nd July 2022 purporting to revise the National Assembly party list for the 1st respondent vide letter dated 22nd July, 2022 purporting to revise the National Assembly party list for the 1st respondent and omitting the name of the complainant as the National Assembly nominee of the 1st respondent is illegal, null and void.

- (iii) An order directed at the 2nd Interest Party IEBC to publish in the Kenya Gazette the National Assembly party list for the Wiper Democratic Movement Kenya as submitted and received on 21st July, 2022 and to forthwith cancel any published Kenya Gazette omitting the name of the claimant Abubakar Ahmed Tarib as the Wiper Democratic Movement Kenya nominee for The National Assembly Party Lists.”

8. The Political Parties Dispute Tribunal dismissed the 1st respondent’s complaint vide its judgement delivered on August 3, 2022. Aggrieved by the decision of the PPDT, the 1st respondent moved to the High Court by way of an appeal in Civil Appeal Number E605 of 2022. Upon hearing the parties, the High Court overturned the Judgment of the PPDT in its ruling delivered on September 9, 2022 where it held as follows:

“...In the end, the appellant’s appeal is found to be meritorious, it is allowed. Consequently, the PPDT’s decision of 3/08/2022 dismissing the appellant’s complaint is set aside and is substituted with an order allowing the complaint dated 25th July 2022 filed before the PPDT as PPDT E099 of 2022.

As a consequence, the following orders are issued;

- (i) A declaration is issued that the National Assembly party list submitted to and received by IEBC from the 1st and 2nd respondent on 21st July, 2022 by the 2nd respondent vide the letter dated 21st July 2022 which bearing the name of the appellant/complainant as a nominee for the National Assembly nomination post in the August 2022 General election is legal and valid National Assembly Party list for the 1st respondent, Wiper Democratic Movement Party.
- (ii) A declaration that the National Assembly party lists submitted to and received by the IEBC on 22nd July 2022 by the 2nd respondent vide the letter dated 22nd July, 2022 purporting to revise the National Assembly party list for the 1st respondent and omitting the name of the appellant/complainant as the National Assembly nominee of the 1st respondent is illegal, null and void.
- (iii) The Independent Electoral Boundaries Commission, the 5th respondent herein, is hereby ordered and directed to publish in the Kenya Gazette the National Assembly party list for the Wiper Democratic Movement-Kenya as submitted and received on 21st July, 2022 and to forthwith cancel any published Kenya gazette omitting the name of the appellant namely Abubakar Ahmed Taib as the Wiper Democratic Movement.”

9. It was common ground that, upon delivery of the judgement by the High Court on September 9, 2022, the 1st respondent, the Electoral and Boundaries Commission (the IEBC) gazetted the 1st respondent as the duly nominated candidate for the Wiper Democratic party vide gazette No. 10710 of 9th September 2022.



10. The parties, through their respective advocates, filed supporting affidavits, replying affidavits and written submissions, which were highlighted orally during the hearing.
11. To succeed in an application under Rule 5(2) (b) of this Court's Rules, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court, namely:
 - (i) An applicant must demonstrate that they have an arguable appeal with the probability of success.
 - (ii) That the intended appeal (or appeal if already filed) will be rendered nugatory if execution of the decree, order of proceedings is not stayed.
12. These principles are well articulated in the case of *Stanley Kangethe Kinyanjui vs. Tony Keter and others* Civil Appeal No. 31 of 2012 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. (see *Halai & Another – Thornton & Turpin* (1963) Ltd. 1990 KLR 365).
 - (iv) In consideration 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 twin principles.
 - (vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable grounds of appeal is raised. (*Damji Pragji Mandavia – Sara Lee Households & 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 Gitabi Gachau & Another -Vs Pioneer Holdings (A) Ltd and 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 the stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji*(supra).
 - (ix) 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 Limited -vs- Norlake Investment Limited* [2002] 1 EA 227 at page 232.
 - (x) Whether or not an appeal will be rendered nugatory depends on whether 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.
 - (xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, (1990) KLR 403.”



13. The applicants in civil appeal number E329 of 2022 filed their notice of appeal and have raised the following grounds of appeal as set out in their memorandum of appeal of even date:
 - (i) That the 1st Respondent only had two lists of nomination dated 25th June 2022 and 22nd July 2022 and, therefore, the learned Judge erred in law and fact in holding that the 1st Respondent was validly nominated vide a list of nomination dated 21st July 2022.
 - (ii) The Learned Judge erred in law and fact in holding that the list submitted on 22nd July 2022 was illegal, null and void, yet the party list was reviewed and approved by the IEBC in line with Section 31 (6) of the [Elections Act](#) and Regulation 55 of the [Elections \(general regulations 2012\)](#).
 - (iii) The learned Judge erred by holding that the 4th respondent was lawfully and procedurally nominated in the list dated July 21, 2022.
14. The respondents submitted that the applicants have not raised any arguable grounds and that, in any event, the intended appeal is a nonstarter as notices of appeal were not filed and served in accordance with the rules of this Court.
15. We have carefully considered the applications, rival affidavits and the written as well as the oral submissions by the parties. At this stage, the Court is only required to satisfy itself that the applicants have an arguable appeal. It is trite law that even one ground, which must not necessarily succeed in the hearing, will suffice. We are persuaded that the grounds set out in the memorandum of appeals are arguable. Whether they will succeed or not is left to the Bench that will hear the appeal. That satisfies this first limb of the twin principles for grant of orders under Rule 5(2) (b) of this Court's rules subject, however, to satisfaction of the second limb of the twin principle.
16. This brings us to the second limb of the twin principle as to whether the appeal if successful would be rendered nugatory in the event that stay of execution is not granted. It is not in doubt that the main issue for determination in the intended appeal is whether the 1st respondent has been validly nominated to the National Assembly.
17. As already observed, the 1st respondent has already been gazetted by the 3rd respondent and all that is remaining is his swearing in by the 4th and 5th respondents.
18. This Court takes to account that the nominations slots under Article 90 of the [Constitution](#) are meant to represent special interest groups and that, therefore, this question goes beyond the interest of the 4th applicant and the 1st respondent in view of the fact that it is also a matter of substantial public interest. Accordingly, it is important that this question be left to the bench that will hear the intended appeal and determine whether it was the 4th applicant (Lucas Mulinge Wambua) or the 1st respondent (Abubakar Ahamed Talib) who was validly nominated to represent the special interest group of persons with disabilities.
19. We take to mind the fact that if the 1st applicant is sworn in, and it later turns out that he was not validly nominated, such an outcome would result in loss of the nature that cannot be compensated by an award of damages. The issue is about representation in the National Assembly that has constitutional underpinnings and, therefore, it is in the interest of justice that the status quo be maintained. In the circumstances, it is our considered view that this appeal will be rendered nugatory unless the order for stay is granted in terms of our orders given in summary on 19th September 2022. Further, and in view of the urgency of the matter, we hereby order and direct the applicants or any of them to file the intended appeal or appeals (if not already filed) within the next 14 days. Thereafter, the same shall be placed before the President of this Court to empanel a bench to hear them on priority basis.



DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA , CIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

