



Langat v Independent Electoral and Boundaries Commission & 5 others (Civil Application E574 of 2022) [2022] KECA 1329 (KLR) (2 December 2022) (Reasons)

Neutral citation: [2022] KECA 1329 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E574 OF 2022
AK MURGOR, S OLE KANTAI & JM MATIVO, JJA
DECEMBER 2, 2022**

BETWEEN

PHILIP K. LANGAT APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

NATIONAL ASSEMBLY 3RD RESPONDENT

SENATE 4TH RESPONDENT

COUNTY ASSEMBLIES FORUM 5TH RESPONDENT

VICTOR KIPNG'ENO TUM 6TH RESPONDENT

(An application for stay of execution of the Judgment of the High Court of Kenya at Nairobi (Ong'udi, J.) dated 17th August, 2022 in Petition No. E317 of 2022)

REASONS

REASONS FOR THE DECISION MADE ON 5TH SEPTEMBER, 2022

1. We heard the Motion dated 22nd August, 2022 on 5th September, 2022 and dismissed it. These are our reasons.
2. The applicant, Philip K. Langat, prayed in the main that we stay the Judgment of the High Court of Kenya at Nairobi in Petition No. E317 of 2022 where it was declared that Section 43(5) of the [Elections Act](#) applies equally to a public officer seeking to be elected as Speaker of the County Assembly. The applicant also asked for an injunction restraining the respondents (Independent Electoral and Boundaries Commission – 1st respondent; the Hon. Attorney General – 2nd respondent; The National



- Assembly – 3rd respondent; The Senate – 4th respondent; The County Assemblies Forum – 5th respondent; and Victor Kipngeno Tum – 6th respondent) from preventing, stopping or in any manner barring any public officer from contesting in an election for the position of County Assembly, National Assembly and Senate on grounds that the public officer had not resigned from public office 6 months prior to the date of the general election.
3. In grounds in support of the Motion and in a supporting affidavit by the applicant it was stated inter alia that Ongudi, J. in the Judgment delivered on 17th August, 2022 had declared that the said Section 43(5) of the *Elections Act* equally applied to a public officer seeking to be elected as a Speaker of a County Assembly; that the effect of the Judgment was to unconstitutionally lock out the applicant and other members of the public wishing to contest for the position of Speaker of County Assembly; that the learned Judge had misconstrued or misinterpreted the said Section of the *Elections Act* in relation to election of Speaker of a County Assembly. The applicant said that he had an arguable appeal with good prospects of success because, in his view, election of Speaker of a County Assembly takes place after (national) general elections and that
 4. under Article 177 of *the Constitution* of Kenya, 2010, county assemblies consist of members elected by voters of wards on the same day as a general election of Member of Parliament being the second Tuesday in August in every 5th year which is not the same date as the date of election of County Speaker. The applicant thought that the term “election” in Section 2 of the *Elections Act* is limited to a presidential, parliamentary or county election and includes a by- election; that election of Speaker of County Assembly is not an election as contemplated in the said *Elections Act*. Further, that, unlike the date of the General Election which is constitutionally set, the date of election of Speaker of County Assembly is not known but is triggered by activities of the Clerk of the County Assembly in accordance with Standing Orders after a County Assembly has been constituted.
 5. When the Motion came up for hearing before us on a virtual platform on 5th September, 2022 the applicant was represented by learned counsel Mr. Eric Theuri assisted by learned counsel Mr. Felix Kiprono and Mr. Macdonald Joseph. Learned counsel Mr. Olendo appeared for the 1st respondent; learned counsel Miss Akama held brief for Mr. Mwendwa for the 3rd respondent; learned counsel Mr. Ken Ochieng appeared for the 5th respondent while the 6th respondent Mr. Victor Kipngeno Tum appeared in person. The 4th respondent (the Senate) was not represented and we were satisfied that it had been served with a hearing notice by the Registrar of the Court.
 6. Mr. Theuri, in an oral highlight of written submissions stated that the petition at the High Court had been dismissed but that it had been declared that Section 43(5) of the *Elections Act* applied to the election of a Speaker of County Assembly. According to counsel the said Section was meant to prevent public servants from misusing public funds which did not apply to county assemblies as the electorate in an election for such a Speaker is the county assembly. According to counsel the High Court ended up giving an advisory opinion in the petition, a preserve of the Supreme Court of Kenya under *the Constitution* of Kenya, 2010. Counsel completed his address by submitting that the Judgment affected all public servants; that election of County Assembly Speakers in all the counties should be conducted 30 days after general elections which had taken place on 9th August, 2022.
 7. Mr. Olendo, for the 1st respondent, supported the application and submitted that elections for Speaker of county assemblies were conducted by Clerks in accordance with Standing Orders.
 8. In opposing the application, Miss Akama referred to various provisions of *the Constitution* and the *Elections Act* and submitted that it was the intention of the law that candidates for the position of Speaker of County Assembly meet various qualifications and were bound by law. According to counsel the petition in the High Court did not state concisely, as required, what the applicant was seeking



or praying for and as a consequence, the intended appeal was not arguable; the High Court had not ordered anything to be done which this Court could stop under rule 5 (2) (b) of the Court of Appeal Rules.

9. Mr. Ochieng, in opposing the Motion, relied on a replying affidavit of Ndegwa Wahome, Chairman of County Assemblies Forum where he depones that the petition at the High Court was dismissed for being incompetent and for failure to provide the facts on which the petition was premised; that the applicant was not a public servant; that it was not in the public interest to stay the Judgment and orders, as this would occasion greater harm to the public interest; that the applicant was an indolent litigant who waited until late in the day to prefer the petition.
10. Mr. Tum opposed the application and referred to a replying affidavit and written submissions which he highlighted by submitting that the applicant had not satisfied known principles on which stay of execution is granted by this Court.
11. Mr. Theuri had the last word. According to him the applicant sought to stay the specific finding that Section 43(5) of the Elections Act applied to election of Speaker of a County Assembly.
12. When we considered the application we were alive to the principles which govern application to this Court for stay of execution pending an appeal. 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 appeal is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR where those principles are well summarized.
13. The petition at the High Court was dismissed. The High Court did not make a positive declaration that was capable of execution. It has been held by this Court in various cases such as Co-operative Bank of Kenya Limited v Banking Insurance and Finance Union Kenya [2015] eKLR; Mbarak Said Ali & Anor v Sultan Palace Development Limited [2015] eKLR that stay can only be granted where a positive order capable of execution has been made.
14. In the case before the High Court the applicant did not say that he was a public servant. We should not say more on this but must leave the issue to be finally determined in the intended appeal; saying more could embarrass the bench that will hear the appeal. There was no positive order made capable of execution and orders of stay of execution could not issue in those circumstances.
15. Those are the reasons why we dismissed the Motion. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

A.K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

