



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, M'INOTI & GATEMBU, J.J.A)

CIVIL APPLICATION NO. E359 OF 2020

BETWEEN

DAVID ESELI SIMIYU.....1ST APPLICANT

WAFULA WAMUNYINYI.....2ND APPLICANT

AND

FORUM FOR THE RESTORATION OF

DEMOCRACY-KENYA.....1ST RESPONDENT

OFFICE OF THE REGISTRAR OF

POLITICAL PARTIES.....2ND RESPONDENT

ANN N. NDERITU, REGISTRAR OF

POLITICAL PARTIES.....3RD RESPONDENT

(An Application for stay of proceedings pending the hearing and determination

of an intended appeal against the Order of the High Court of Kenya at Nairobi

(James A. Makau, J.) delivered on 24th September, 2020 in Petition No. 197 of 2020

REASONS FOR DISMISSAL OF APPLICATION

1. On 24th November, 2020 this Court heard and dismissed the Notice of Motion dated 16th November, 2020 which was brought under certificate of urgency. In dismissing the application, the Court found that although the intended appeal would appear to raise some arguable issues, the nugatory aspect had not been demonstrated. Here are the reasons for dismissal of the said application.

2. Forum for the Restoration of Democracy–Kenya (Ford–Kenya) (1st respondent herein) was the petitioner in the High Court of Kenya, Constitutional and Human Rights Division **Constitutional Petition No. 197 of 2020**. The respondents in that Petition were the Registrar and the Office of the Registrar of Political Parties (2nd and 3rd respondents herein), while David Eseli Simiyu and Wafula Wamunyinyi (the applicants herein) were named as Interested Parties. Contemporaneously, the 1st respondent filed an application dated 2nd November, 2020 seeking *inter alia* an *ex-parte* order that pending the hearing and determination of the application *inter partes*, the court grants an order that the notice issued by David Eseli Simiyu (the 1st Interested Party) as published on 31st October, 2020 in the Daily Nation Newspaper or any other media and data convening the National Delegates Congress of the petitioner scheduled for 21st November, 2020 be stayed. The petitioner was alleging that the said notice had been issued in contravention of court orders which had been issued earlier on, where the court had on 15th June, 2020 issued conservatory orders restraining the respondents in the petition from transacting with the interested parties.

3. The learned Judge after certifying the application urgent declined to issue *ex-parte* orders and directed that matter be mentioned on 10th November, 2020 to confirm compliance with his orders directing service of the application on the respondents and filing of responses to the application. When the parties appeared before the learned Judge for mention on 10th November, 2020 and after confirming that the

respondents had filed their responses and all the parties were in court, he decided to hear the application, though not fixed for hearing on that date. The application was canvassed and in the end, the learned Judge delivered the Ruling now impugned, the same afternoon. In the Ruling, the learned Judge granted conservatory orders on an interim basis and directed the parties to file written submissions, and further that the matter be mentioned on 25th November, 2020 for further directions.

4. Aggrieved by the said Ruling, the applicants filed a Notice of Appeal and the instant application under **Rule 5(2)b** of the Rules of this Court seeking in the main an order staying the said Ruling pending the hearing and determination of the intended appeal, saying that the orders issued in that ruling had been made *per incuriam*.

5. From the grounds on the face of the application and the deposition in the affidavit in support of the application sworn by Dr. Eseli Simiyu (1st applicant) the problem they have with the conservatory order was that it was issued on a mention date and not on a day the matter had been scheduled for hearing. As stated earlier, we were reluctant to conclude that the appeal is frivolous as there may be issues which this Court would need to address its mind to in the appeal. We say so because as has been restated time without number, an arguable appeal is not necessarily one that will succeed.

6. We have considered the application along with the rival affidavits and submissions of the parties. We hold the view that the nugatory aspect has not been demonstrated because the Ruling challenged on appeal was issued following *ex-parte* hearing in the sense that although parties were present before the Judge, they had not filed their responses. If the matter is heard *inter-partes* by the court as directed, all the parties will have an unfettered opportunity to be heard on the application and the learned Judge may either set aside or confirm the impugned orders.

7. If the appeal succeeds the parties will just go back to the High Court for hearing *inter-partes*. Nothing will have been lost and no party will be inconvenienced. The parties will still be at liberty to challenge the Gazette Notice they wish to challenge at the hearing of the Petition. The appeal will not therefore be rendered useless or otiose.

8. If the appeal is heard and the Court hearing the appeal determines that the learned Judge had no jurisdiction to grant the orders in question and set them aside, the parties will just go back to the High Court for hearing of the application *inter-partes*. Whichever way one looks at this matter, it is clear as night follows day that what the parties need is for the application to be heard *inter-partes* and for the Petition itself to be heard to enable the court determine the issues pleaded therein, which not even this Court sitting on the intended appeal will determine.

9. As ordered earlier, the application is hereby dismissed with no order as to costs. We also order this Ruling to apply *mutatis mutandis* to **Civil Application No. E361 of 2020** where the subject matter and parties are the same and the Ruling giving rise to the appeal is the same.

Dated and delivered at Nairobi this 5th day of March, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR