



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, SICHALE & KANTAL, J.J.A.]

CIVIL APPLICATION NO. 304 OF 2017

BETWEEN

KALTUMA ABDULAHIM MAALIM.....APPLICANT

VERSUS

SAADIA AHMED MUMIN.....1ST RESPONDENT

POLITICAL PARTIES DISPUTE TRIBUNAL.....2ND RESPONDENT

CLERK WAJIR COUNTY ASSEMBLY.....3RD RESPONDENT

KENYA AFRICAN NATIONAL UNION PARTY.....4TH RESPONDENT

(An Application for stay of proceedings pending the lodging, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Odunga, J) dated 21st November, 2017

In

JUDICIAL REVIEW APPL. No. 576 of 2017)

RULING OF THE COURT

By Notice of Motion dated **20th December 2017**, the Applicant, **Kaltuma Abdulahim Maalim**, has brought under **Rules 5 (2) (b)** and **47** of this **Court's Rules** an application for stay of proceedings pending the lodging, hearing and determination of an intended appeal from the Ruling and Order made by **Odunga, J** at the High Court of Kenya at Nairobi, dated **21st November, 2017**.

The following orders are sought:-

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1. Spent.

2. That the Honourable Court be pleased to grant a stay of any further proceedings in the High Court Judicial Review Application No 576 of 2017 pending the hearing and determination of this application.

3. That the Honourable Court be pleased to grant a stay of any further proceedings in the High Court Judicial Review Application no. 576 of 2017 pending the hearing and determination of the Appeal by the Applicant.

4. That the costs of this application be provided for”.

The background to the motion is that the Applicant, **Kaltuma Abdulahim Maalim**, being a member of the 4th Respondent had applied for nomination for the Gender Special seat provided for under Article 177 (2) of the Constitution having met all the requirements. The 4th

Respondent then submitted shortlisted candidates to the County Assembly of Wajir. The Independent Electoral and Boundaries Commission (IEBC) on diverse dates between 7th and 9th of June 2017 called on political parties to submit their party lists between 10th and 24th of June 2017. The 4th Respondent duly submitted its list. It had the following nominees: **Saadia Ahmed Mumin** (the 1st respondent), **Faiza Hassan Hussein, Biashara Sheikh Kassin** and **Kaltuma Abdulahim Maalim** (the applicant).

The Applicant was of the view that she was more qualified than the other nominees ranked above her and as such she wrote to the 4th respondent on 24th July, 2017 seeking to have the matter addressed through its internal dispute resolution mechanisms. As the same was not addressed, the applicant opted to refer the complaint to the Political Parties and Disputes Tribunal (PPDT) on 28th of July, 2017 (**Complaint No. 500 of 2017, Kaltuma Abdulahim Maalim v Kenya African National Union**). At the hearing of the complaint on 28th August, 2017 before the PPDT, it was agreed by consent that the 4th Respondent's Nominees published on 23rd July, 2017 be amended and the Applicant be ranked No. 1 and a declaration was made that the Applicant (in terms of academic qualification) was the most qualified. The 4th Respondent complied.

The applicant contends that despite the consent order, the IEBC proceeded to publish the name of the 1st Respondent as being validly nominated to the County Assembly of Wajir.

Being aggrieved by the decision, the applicant's advocate wrote to the IEBC demanding an amendment so that the applicant is declared the valid holder of the one slot apportioned to the 4th Respondent. The IEBC complied and Gazette Notice No. 8752 of Vol. CXIX no. 131 which amended Gazette Notice No. 8380 Vol. CXIX No. 124 declared the applicant as the valid holder of the one slot apportioned to the 4th respondent. The applicant presented Gazette Notice No. 8752 of Vol. CXIX No. 131 to the Clerk of the 3rd Respondent on 7th of September, 2017 but the 3rd Respondent failed and/ or refused to abide by its contents and administered the oath of office to the 1st Respondent. On 8th September, 2017, the applicant presented the same Gazette Notice to the Speaker of the 3rd respondent who scheduled the applicant's swearing in on 27th September 2017.

The 1st Respondent filed a judicial review challenging the turn of events.

The Applicant in turn filed a Preliminary Objection challenging the jurisdiction of the Court to entertain the Judicial Review on the grounds that; the matter involved a complaint by one party against the election of another party and the net effect of the orders sought would be to stop her swearing in and affect her position as the duly elected member of the County Assembly of Wajir.

The applicant's second ground was that the issue was sub-judice as the matter was before the Chief Magistrate's Court at Milimani in **Election Petition Number 12 of 2017, Saadia Ahmed Mumin v The Independent Electoral and Boundaries Commission, Clerk of the County Assembly of Wajir, Kenya African National Union and Kaltuma Abdullahi**. The above notwithstanding, **Odunga, J** granted leave to the 1st respondent to file the substantive application thus, precipitating the filing of the motion before us.

As was observed by this Court in *Ishmael Kagunyi Thande vs Housing Finance Kenya Ltd – Civil Application No. Nai 157 of 2006* (unreported):

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

The sum effect of the above is that a litigant has to establish an arguable point as well as demonstrate that the appeal would be rendered nugatory unless a grant of stay is ordered.

In the instant case the applicant has moved this court on the basis that, she filed a Preliminary Objection challenging the jurisdiction of the Court to entertain the **Judicial Review Application No. 576 of 2017** as the issues raised should be resolved through an election petition and should the matter proceed as scheduled on 18th December, 2017 (now past) the intended appeal shall be rendered nugatory. We do not agree.

In our view, we find that the Applicant has not shown that the appeal will be rendered nugatory absent stay, as even if the proceedings at the High Court were to proceed to conclusion, the applicant still has a right of recourse by way of an appeal or otherwise. We find that the second limb for our consideration in a rule 5 (2) (b) application having not been satisfied, we do not deem it necessary to consider whether the appeal is arguable or not.

The upshot of the above is that, the Notice of Motion dated 20th December 2017 is hereby dismissed with no order as to costs.

Dated and delivered at Nairobi this 4th Day of June, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR