



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI JJ.A.)

CIVIL APPLICATION NO. NAI. 258 OF 2017 (UR 199/2017)

BETWEEN

ATTORNEY GENERAL.....APPLICANT

AND

APOLLO MBOYA.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JACK MUKHONGO MUNIALO.....4TH RESPONDENT

MOSES MUNYENDO.....5TH RESPONDENT

BENJAMIN AKWERA WALUBIRI.....6TH RESPONDENT

CHARLES B. IKWARASI.....7TH RESPONDENT

CONSOLATA NAKIBUKA OWARU.....8TH RESPONDENT

DAVID MAKOKHA.....9TH RESPONDENT

JAMES OKUTOYI ATEYA.....10TH RESPONDENT

MOSES WANDERA NYAMWESO.....11TH RESPONDENT

SACKARIA OKUMU ASIKE.....12TH RESPONDENT

CORNEL WAWIRE.....13TH RESPONDENT

ELIAS MACHIO MAKARI.....14TH RESPONDENT

EMILY NAWIRE WAWIRE.....15TH RESPONDENT

EUNICE NALIAKA WASIKE.....16TH RESPONDENT

(Application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Mwita, J.) dated 19th October 2017 in HC Const. Petition No. 162 of 2017)

RULING OF THE COURT

On 20th April 2017, **the 1st respondent, Apollo Mboya**, an advocate of the High Court of Kenya, filed in the High Court of Kenya at Nairobi **Constitutional Petition No. 162 of 2017** against **the applicant, the Attorney General, the Independent Electoral and Boundaries Commission (IEBC)** and **the Director of Public Prosecutions (DPP)**, seeking declarations that a web portal set up by the Government of Kenya called **Kenya Government Delivery** (www.delivery.go.ke) to advertise its achievements over the previous four years was in violation of the **Constitution** and **section 14** of the **Election Offences Act**, and a permanent injunction to restrain the Government from advertising its achievements in the said portal or any other media, during the election period. He also sought as against the DPP a declaration that he was in dereliction of constitutional duty for failure, or undue delay, in investigating with a view to prosecution, possible commission of criminal offences arising from the advertisements in the portal.

The above reliefs were sought on the basis of averments that the portal was launched during the election period leading to the general election that was held on 8th August 2017; that its purposes was to advertise the achievements of the Government; that such advertisement was intended to unduly influence voters in violation of the principle of free and fair elections guaranteed by the Constitution and the prohibition of such conduct in **section 14** of the Election Offences Act; and that the advertisement was undertaken by use of public resources contrary to section 14 of the Election Offences Act. As regards the DPP, it was averred that on 12th April 2017, the 1st respondent formally demanded that he undertakes or causes to be undertaken investigations pertaining to possible commission of election offences arising from the use of the portal, which demand the DPP had ignored.

Opposing the petition, the applicant denied that the establishment of the portal was in violation of the Constitution or the Election Offences Act. He maintained that contrary to the 1st respondent's averments, the portal was established in furtherance of the requirements of **Article 10** of the Constitution and was intended to ensure Government transparency and accountability. It was also contended that the purpose of the portal was to ensure citizen access to information and to discharge the obligation of the State to publish and publicize any important information affecting the nation under **Article 35** of the Constitution. On its part, the IEBC argued that the petition, as it related to it, was misconceived because it did not have an investigative function or mandate and that the 1st respondent had neither alleged any violation of the law by it, nor sought any relief against it. For the DPP, it was contended that the 1st respondent had not filed a complaint with the police, who are responsible for investigating alleged commission of election offences; that no investigation report had been submitted to him to enable him decide whether or not to undertake a prosecution for alleged election offences; that under the Election Offences Act he had twelve months to prosecute alleged election offences; and that the petition was therefore premature and misconceived.

Mwita, J. heard the petition and by a decree dated 19th October 2017, which has aggrieved the applicant, granted reliefs in the following terms:

“1. A declaration is hereby issued that the Kenya Government Delivery Portal/website www.delivery.go.ke to advertise achievements by the National Government on various programmes and project undertaken across the country in the last four (4) years is unlawful as it was made in violation of section 14(2) of the Election Offences Act No 37 of 2016 and against Articles 10, and 81(e) of the Constitution of Kenya and therefore is null and void.

2. A declaration is hereby issued that the purported use of public resources to launch and maintain Kenya Government delivery portal/website – www.delivery.go.ke to advertise achievements by the National government on various programmes and projects undertaken across the country in the last four(4) years contravenes section 14(2) of the Elections offences Act hence is irregular, illegal, and unlawful

3. An order of permanent injunction is hereby issued restraining the national Government whether by itself, Agents, servants proxies and/or any other person acting under its or their authority or direction from advertising achievements by the national government of any programmes and or projects undertaken across the country in the last four (4) years in the Kenya government, delivery portal/website [www. Delivery.go.ke](http://www.Delivery.go.ke) or in any other print media electronic media or by way of banners or hoardings in Public places during the election period.

4. Costs being discretionary, the order I make is that each party do bear their own costs.”

After lodging a notice of appeal on 23rd October 2017, the applicant took out a motion on notice under **rule 5(2)(b)** of the rules of this Court on 8th November 2017 seeking stay of execution of the judgment and decree of the High Court pending the hearing and determination of its intended appeal.

The substance of the arguments by **Mr. Mutinda** and **Ms. Wawira**, learned counsel for the applicant, in a bid to demonstrate that the intended appeal is arguable, is that the learned judge erred by holding that the portal was a source of advertisement rather than a platform for accountability and provision of information to the public as required by Articles 10, 35 and 232 of the Constitution; by issuing orders against the National Government when it was not a party to the elections; by failing to hold that section 14 of the Election Offences Act does not limit Articles 10, 35 and 232 of the Constitution; by disabling the functioning of the President's Delivery Unit, an office in the public service responsible for dissemination of information to the public; and by ignoring the fact that the Office of the Deputy Chief of Staff in the Executive Office of the President, which is responsible for the delivery portal, was established on 9th March 2016, long before the election period with the mandate, among others, of ensuring delivery of key flagship projects and reporting thereon to the public.

Regarding whether the intended appeal would be rendered nugatory if it were to succeed absent an order of stay of execution, the applicant submitted that it would, because the President's Delivery Unit will have been disabled in the performance and discharge of its legal and constitutional mandates; that the right of the public to receive information under Article 10, 35 and 232 of the Constitution will have been totally violated; that the decree exposes public servants working in the President's Delivery Unit to potential criminal prosecution; that the 1st respondent had already set in motion such prosecution by writing a demand letter to the DPP on 23rd October 2017; and that the execution of the decree would render the intended appeal academic.

Ms. Kaburu, learned counsel, represented the 4th to the 16th respondents, who joined the proceedings in the High Court as interested parties. She supported the application and adopted the submissions made by the applicant.

The 1st respondent opposed the application vide a replying affidavit sworn on an undisclosed day in November 2017. Although he conceded that the orders granted by the High Court were, or should have been restricted only to the election period, he nevertheless urged us to dismiss the application for the applicant's failure to disclose material facts.

The material facts that were, in the 1st respondent's view, not disclosed included the fact that section 14(2) of the ***Election Offences Act was repealed by Election Laws (Amendment) Act 2017*** of 2nd November 2017; that the Election Laws (Amendment) Act was currently under legal challenge in the High Court; that the applicant had supported a challenge of section 14(2) of the Election Offences Act in ***High Court Petition. No. 182 of 2017*** which did not succeed; that the applicant did not appeal against that decision of the High Court; that the parties in that petition were the same as the parties in the petition that gave rise to this application; that in ***High Court Petition No. 468 of 2017*** the court had restrained the publishing of any achievements of the Government in any media; and that the deponent of the applicant's affidavit in support of this application, ***Mr. Andrew Wakahiu*** and others had been found by the High Court in Petition No. 468 of 2017 to have violated various provisions of the Constitution. Relying on ***Andrew Ouko v. Kenya Commercial Bank, HCCC No. 55 of 2000*** and ***Brinks Mat Ltd v. Elcombe [1988] 3 All ER 188***, the 1st respondent urged us to refuse the orders of stay on grounds of non disclosure of material facts.

Lastly the 1st respondent submitted that the applicant's intended appeal was not arguable and that the applicant had not demonstrated that if it were to succeed, it would be rendered nugatory. In his view, the whole purpose of the application was to curtail the powers of the DPP to undertake prosecutions under Article 157 of the Constitution.

For the IEBC, ***Mr. Muchemi***, learned counsel, submitted that it was neutral in the dispute, noting that the High Court had not made any orders against the IEBC.

Lastly we heard ***Mr. Ashimosi***, learned counsel for the DPP. He submitted that the High Court had declined to grant the order that the 1st respondent had sought against the DPP and that under the Election Offences Act the DPP had 12 months to prosecute an offence under the Act. In doing so, it was urged, ***Article 157 (11)*** of the constitution obliges the DPP to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. However the DPP observed that as regards the use of public resources, the High Court had already purported to make a final determination on an issue that properly falls for determination by the trial court in a prosecution for election offences.

We have anxiously considered the judgment of the High Court, the notice of motion, the replying affidavits and the submissions as well as the authorities cited by learned counsel for the respective parties. It is common ground that to entitle the applicant to an order of stay of execution under rule 5(2)(b) of the rules of this Court, he must satisfy us first that he has an arguable appeal and secondly that unless we grant stay of execution and the appeal succeeds, it will be rendered nugatory. (See ***Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA No 314 of 2007***). It is not for us at this stage to determine the merits or demerits of the intended appeal; that is the remit of the bench that shall ultimately hear that appeal. (See ***Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA No. 95 of 1999***). For now, all that is required of us is to satisfy ourselves that the intended appeal is not an exercise in frivolity or futility and that it presents at least one *bona fide* arguable point deserving of consideration by the Court. (See ***Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001***). Indeed, an arguable appeal is not necessarily one that must succeed upon the hearing of the appeal. (See ***Kenya Railways Corporation v. Edermann Properties Ltd, CA. No. Nai. 176 of 2012***).

Section 14(2) of the Elections Act, which the 1st respondent relied upon to obtain the declarations and permanent injunction provides as follows:

“(2) No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.”

We are satisfied that there is a *bona fide* arguable point whether the prohibition is only during “*the election period*” or during any other time or indeed whether the Government portal or the information published therein is advertisement for purposes of that prohibition. The relationship between the prohibition in section 14(2) and the obligations of the Government under Article 10 and 35 of the Constitution are also *bona fide* issues deserving consideration by this Court, as is the question whether the High Court could determine with finality commission of a criminal offence relating to use of public resources whilst ***section 23*** of the Election Offences Act vests jurisdiction to try election offences in special magistrates appointed by the Chief Justice.

As to whether the intended appeal will be rendered nugatory, the concern of the Court is to ensure that a meritorious appeal, if ultimately successful, will not be rendered a pyrrhic victory, a purely academic undertaking, in the sense that what the appeal intended to stop will have happened irreversibly. (See ***Kenya Airports Authority v Mitu-Bell Welfare Society & Another, CA. No. 114 of 2013 (UR 77/2013)***).

Having carefully considered the application, the decree of the High Court is, *prima facie*, not clear in paragraphs 1 and 2 whether it is restricted only to an election period, which is now past, or it applies to all times. The 1st respondent urges us to read the decree as restricted to the election period only, whilst the applicant contends that it is capable of being read to apply to all times. That uncertainty or unclarity, in our view is sufficient to justify an order of stay of execution. If the appeal succeeds while the decree had been executed outside an election period, it will render the intended appeal nugatory to the extent that the operation of the portal will be completely disabled and possible criminal prosecutions may be initiated.

In the premises the order that best commends itself to us in the circumstances is to stay execution of the decree of the High Court to the extent that it purports to apply to any period outside the election period, now past. This order does not in any way affect the discharge of the DPP's mandate under Article 157 of the Constitution. Due to the nature of the dispute involved, we direct the appellant to file and serve the record of appeal within the next 30 days from the date of this ruling. Costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 9th day of February, 2018

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR