IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 72 OF 2018

BETWEEN

HON. NDIRITU MURIITHI.....APPELLANT/APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

PETER NGUGI NDONYO.....3RD RESPONDENT

(An application for stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules

pending the hearing of an appeal from the Judgment/Decree of the High Court of

Kenya at Nairobi (Richard Mwongo, J) dated 1st *August, 2017* ***in Judicial***

Review Appl. No. 133 of 2017 Formerly EPA No. 133 of 2017)

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RULING

The applicant, **Hon. Ndiritu Muriithi** filed a notice of motion dated 21st March, 2018. Independent Electoral Boundaries Commission (IEBC) was named as the 1st respondent, the Director of Public Prosecutions (DPP) was named as the 2nd respondent, whilst **Peter Ngugi Ndonyo** was named as the 3rd respondent. In the motion, the applicant sought orders that:

> **"(1)This Honourable Court be pleased to stay execution of the Judgment/Decree of the Honourable Court delivered on 1*st* August, 2017 (Honourable Justice Richard Mwongo) at Nairobi in Nairobi Judicial Review Application No. 133 of 2017 HON. NDIRITU MURIITHI VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS pending the hearing of an intended appeal from the said judgment/decree;**
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> **2. This Court be pleased to stay the Proclamation of Attachment of Moveable Property against the Appellant herein and further issue an order of injunction restraining the 3*rd* *respondent whether by himself or his servants or agents, or advocates or auctioneers or any of them or otherwise from attaching the properties of the appellant pending the filing, hearing and determination of an appeal from the judgment/decree of the Honourable Court delivered on 1st* August, 2017 (Honourable Justice Richard Mwongo) at Nairobi in Nairobi Judicial Review Application NO. 133 of 2017 HON. NDIRITU MURIITHI VS INDEPENDENT ELECTORAL AND BOUNDRIES COMMISSION & 2 OTHERS;**
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> **3. The applicant be at liberty to apply for further orders and /or directions as the Honourable Court may deem fit and just to grant,**

4. The costs of and incidental to this application do abide the outcome of the intended appeal."

The motion was supported by the affidavit of the applicant dated 21st March, 2018 in which he deposed that he sought orders for *certiorari*, *mandamus* and *prohibition* in respect of the 1st respondent's judgment of 20th July, 2017; that on 1st August, 2017 **Mwongo, J** dismissed his application; that consequently the 3rd respondent's bill of costs was taxed at Kshs.5 million; that he has since filed a reference against the said taxation in the High Court which has given him a conditional stay of execution subject to depositing Kshs.2.5 million in the joint names of respective counsel; that on 19th September, 2017 the 1st respondent also filed their party to party bill of costs; that the learned Judge erred in law in concluding that the 1st respondent could prosecute and arbitrate over charges of electoral offences in the enforcement of the code of conduct; that the learned Judge erred in limiting the appellant's freedom of association and his political choice/s for other positions in which he was not vying. Finally, the applicant contended that his intended appeal would be rendered nugatory, absent stay.

The motion was resisted by the 1st and 2nd respondents who filed what is unknown in our rules, "***grounds of opposition***" dated 4th July, 2018. They stated that:-

"(1) The applicant does not have an arguable appeal against the decision of the High Court and in any event, the same shall not be rendered nugatory if the orders sought are not granted;

2. The application is misconceived as the orders sought by the appellants have already been overtaken by events;

3. The applicant currently enjoys a conditional stay of execution granted by the High Court pursuant to the filing of a reference in respect of the decision of the taxing master on the 14*th* *February, 2018 and as such the present application is an abuse of the Court process;*

4. There has been inordinate or unreasonable delay in the filing of this application;

5. The appellant is already the sitting governor for Laikipia County and he shall suffer no substantial loss if the orders are not granted;

6. No sufficient reasons or evidence have been adduced to warrant the grant of the orders sought;

7. There is no imminent threat of execution on the part of the 1*st* *and 2nd* *respondents as their bill of costs is yet to be taxed."*

On behalf of the 3rd respondent, **Karimi David**, an Advocate of the High Court of Kenya, swore an affidavit dated 24th April, 2018 in which he deposed that the 3rd respondent's bill of costs was taxed at Kshs.5,081,150.00 and that a conditional order of stay was made on 6th March, 2018 upon which the applicant was to deposit a sum of Kshs.2.5 million in a joint account of the applicant's and 3rd respondent's counsel. It was counsel's assertion that the motion before us is overtaken by events and that the intended appeal has no chances of success.

On 5th July, 2018 the motion came before us for hearing. **Mr. Muchemi**, learned counsel for the applicant whilst relying on the written submissions dated 27th June, 2018, urged us to find that the memorandum of appeal dated February, 2018 raises arguable points with chances of success. It was counsel's contention that the learned Judge misapprehended ***Articles 50*** and ***157*** of the Constitution by finding that the 1st respondent could prosecute and arbitrate over charges of electoral offences or the enforcement of the code of conduct; erred by limiting the applicant's freedom of right of choice and in finding that prohibited plagiarism includes the use of a photograph of the presidential candidate for the Jubilee Party, the applicant having offered himself to run as an independent candidate. Further, that the 3rd respondent's bill of costs had been taxed and the 1st and 2nd respondents are yet to tax their bills of costs. On the nugatory aspect, counsel contended that the 3rd respondent is not likely to repay the costs awarded to him and that although the 1st and 2nd respondents have the ability to pay, recovering costs from them can be a tall order.

In their addresses, both **Mr. Muyundo** and **Mr. Okello,** learned counsel for the 1st and 2nd respondents respectively undertook not to execute until the intended appeal is heard and determined.

Mr. Kirimi, learned counsel for the 3rd respondent contended that there is in existence an order of stay pending the determination of the reference filed by the applicant. It was his further contention that the applicant has no arguable appeal.

The principles governing grant of an application made under ***Rule 5 (2) (b)*** of this Court's rules are now well settled. Firstly, an applicant has to demonstrate that he has an arguable appeal. Secondly, an applicant has to demonstrate that the appeal (or an intended appeal, as the case may be) will not be rendered nugatory, absent stay. In the often cited case of ***Stanley Kangethe Kinyanjui vs Tony Ketter & 2 Others [2013] eKLR,*** this Court held:

"*(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.

v. The discretion of this Court under Rule 5 (2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii. In considering whether the appeal will be rendered nugatory, the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. 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.

xi. 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 that stage as doing so may embarrass the ultimate hearing of the main appeal.

xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

We have considered the record, the applicant's written submissions, the rival oral arguments made before us and the law. As stated above, an arguable appeal is not necessarily one that has to succeed. In the instant matter, it may well be that the applicant's intended appeal is not be frivolous as the issue of the rights of an independent candidate *vis-a-vis* a presidential candidate of another political party may not have been defined. To this extent, one may argue that the applicant has an arguable point. Again as stated above, one need not have a plethora of arguable points as one arguable point is sufficient for purposes of satisfying the 1st limb of arguability.

On the nugatory aspect, we note that the supporting affidavit of the applicant was completely silent on the 3rd respondent's inability to repay the sum of Kshs.5 million awarded as costs. Had the applicant raised the issue of the 3rd respondent's inability to pay, then this would have given the 3rd respondent an opportunity to counter or admit his inability to pay the sum awarded as costs. We were not for instance told, whether the 3rd respondent is a man of straw. In his address to us, the applicant's counsel contended that the 3rd respondent does not have the ability to repay any sums paid to him. No reason was advanced as to why the appellant had come to this conclusion and having failed to state as much in the supporting affidavit, it is our view that the 3rd respondent was denied an opportunity to respond to the appellant's assertion of his impecuniosity. As for the 1st and 2nd respondents, it was the applicant's counsel's view that whereas they have the ability to pay, recovering costs from them is a herculean task. In our view, this is not the same as saying they are not able to pay.

The upshot of the above is that we find that the applicant has not satisfied both the two principles being conditions precedent before this Court exercises its discretion in granting an order for stay.

Accordingly, the motion is hereby dismissed with costs.

Dated and delivered at Nairobi this 26th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR