IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G. B. M. KARIUKI & SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI 140 OF 2016 (UR 110/2016)

BETWEEN

HON. FERDINARD NDUNG'U WAITITU .....1ST APPLICANT

HON. MOSES KURIA ..... 2ND APPLICANT

HON. DENNIS WAWERU.....3RD APPLICANT

HON. KIMANI ICHUNG'WA .....4TH APPLICANT

HON. ALICE NG'ANG'A .....5TH APPLICANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

ODINGA RAILA OMOLO.....2ND RESPONDENT

MUSYOKA KALONZO STEPHEN.....3RD RESPONDENT

MASIKA MOSES WETANGULA..... 4TH RESPONDENT

COALITION FOR REFORMS AND DEMOCRACY .....5TH RESPONDENT

ORANGE DEMOCRATIC PARTY.....6TH RESPONDENT

WIPER DEMOCRATIC PARTY .....7TH RESPONDENT

FORD KENYA PARTY.....8TH RESPONDENT

INSPECTOR GENERAL OF POLICE.....9TH RESPONDENT

ORENGO JAMES AGGREY BOB.....10TH RESPONDENT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

THE COMMISSION FOR INTERGRATION

& NATIONAL COHESION ..... 2ND INTERESTED PARTY

THE REGISTRATION OF POLITICAL PARTIES .....3RD INTERESTED PARTY

(An application for an injunction pending the hearing and determination of the intended appeal against the Ruling of the High Court of Kenya at Nairobi (Onguto, J.) dated 6th June, 2016

in

Constitutional Petition No. 169 of 2016)

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RULING OF THE COURT

1. Before us is an application brought pursuant to ***section 3A (1) & (2)*** of the ***Appellate Jurisdiction Act*** and ***Rules 5 (2) (b), 41 & 47*** of the Court of Appeal Rules wherein the applicants who are Members of the National Assembly seek *inter alia*-

> ***(i) Pending the hearing and determination of the applicants intended appeal, a conservatory order do issue by way of an injunction to restrain the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents from intimidating any and all of the serving Commissioners of the 1st interested party in any form or style.***
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> ***(ii) Pending the hearing and determination of the applicants intended appeal, a conservatory order do issue by way of an injunction to restrain the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents by themselves, their members, servants, or agents or otherwise howsoever from breaking into, storming, forcibly opening the doors or blocking such access to the 1st interested party's Commissioners and its staff to its offices or any such place it operates an office or otherwise howsoever interfering with the constitutional mandate of the 1st interested party.***

2. The genesis of the application is that on 26th April, 2016 the 5th respondent, a coalition party comprising, among others, the 6th, 7th and 8th respondents/political parties, released a press statement calling on members of the public to assemble at the 1st respondent's offices country wide on 2nd May, 2016 and thereafter, on every consecutive Monday for purposes of demonstrating and picketing for the removal and/or resignation of the 1st respondent's Commissioners. The members of the 5th respondent perceive the said Commissioners as lacking autonomy, hence incapable of spearheading the upcoming 2017 general elections.

3. Apprehensive that the foregoing would violate the Constitution and peace of the nation, the applicants' filed a constitutional petition on 28th April, 2016 in the High Court seeking various declaratory orders against the respondents. The applicants' contention was that the respondents' were adamant in employing unorthodox means of removing the said Commissioners contrary to the prescribed constitutional procedure; their actions were aimed at turning the public against the Commissioners and intimidating them out of office; they were bent on causing chaos and destruction to both property and life under the guise of the right to assemble; they were preventing the 1st interested party from carrying out its mandate;

and further they had threatened to boycott the upcoming general elections in the event the Commissioners were not removed, escalating tension in the country.

4. Simultaneously, the applicants' also filed an interlocutory application seeking various conservatory orders. On 29th April, 2016 Justice Lenaola issued an *exparte* order in the following terms;

> ***(a) A conservatory order be and is hereby issued by way of an injunction restraining the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents herein, by themselves, their members, servants, or agents, or otherwise howsoever, from breaking into, storming, forcibly opening the doors or blocking such access to the IEBC Commissioners and staff, or otherwise howsoever interfering with the constitutional mandate of the IEBC, and to abide by the prescribed law in lodging any complaint regarding any of the IEBC Commissioners current in office until hearing interpartes.***

5. According to the applicants, the 2nd to the 8th respondents ignored the said order despite having notice of the same by organizing demonstrations around the 1st interested party's offices countrywide. Consequently, the applicants' commenced contempt proceedings against the said respondents, which proceedings, to our knowledge, are still pending. At the interpartes hearing of the interlocutory application, the 2nd to the 8th respondents neither filed a response, nor appeared. By a ruling dated 6th June, 2016 Justice Onguto found that save for the 9th respondent, the applicants' had not established a prima facie case against the other respondents to warrant the issuance of the conservatory orders sought against them. The learned Judge vacated the interim order and issued the following order against the 9th respondent;

> ***(i) Pending the hearing and determination of the petition herein, a conservatory order do issue by way of a mandatory order compelling the 9th respondent to ensure security, public safety and observance of the law and order by the 2nd, 3rd, and 4th respondents and such of the members of the 5th, 6th, 7th and 8th respondents affiliated with them, whenever and wherever the said respondents and their members picket or demonstrate pursuant to any notification given to the 9th respondent under the Public Order Act.***

It is that decision that is the subject of the intended appeal.

6. Turning back to the application, the grounds in support of the application are that the rule of law and constitutional order is under threat because of the learned Judge's decision; the 2nd - 8th respondents, under the guise of exercising their rights to picket and demonstrate, are causing chaos and destroying property; the respondents' actions are inciting members of the public against the 1st respondent and escalating tension akin to the one which preceded the 2007-2008 post-election violence; unless the orders sought are granted the intended appeal would be rendered academic. On the arguability of the intended appeal, the applicants faulted the learned Judge for not exercising his discretion properly.

7. At the hearing of the application before us, Mr. J. Harrison Kinyanjui appeared for the applicants while Miss N. Wambui appeared for the 1st and 9th respondents. There was no appearance for the 2nd to 8th and 10th respondents despite being served with the hearing notice.

8. Elaborating on the arguability of the intended appeal, Mr. Kinyanjui submitted that the learned Judge exercised his discretion wrongly by disregarding the evidence before him, that is, that there had been deaths and destruction of property following the demonstrations. In his view, the learned Judge issued a restricted order and failed to address himself on the issue of intimidation of the Commissioners which was contrary to the Constitution. He argued that the learned Judge did not properly balance the competing rights. Mr. Kinyanjui submitted that unless the orders sought are granted law and order would break down, and the Constitution would be violated. He urged us to invoke ***Article 24 (1) (d)*** of the Constitution, and grant the orders which would ensure maintenance of peace and order, and the protection of the 1st interested party.

9. In Miss Wambui's submissions, the right to demonstrate is not absolute and is limited by ***Article 37*** of the Constitution; demonstrations ought to be peaceful and conducted without the use of arms; there is a corresponding obligation on the demonstrators to respect the rights of others. Consequently, the courts must balance the two rights by looking at public safety and security.

10. We have considered the application, affidavits on record, submissions and the law. In ***Stanley Kangethe Kinyanjui -vs- Tony Keter & Others [2013] eKLR*** this Court expressed itself on an application under ***Rule 5 (2) (b)*** as follows:

> ***(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 or 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.***
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> ***(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.***
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> ***(viii) An applicant must satisfy the Court on both the twin principles.***
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> ***(ix) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.***
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> ***(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.***
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> ***(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.***
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> ***(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.***

11. Having perused the draft memorandum of appeal annexed to the application and being careful not to make final findings on the intended appeal, we are of the considered view that whether the learned Judge failed to take into account the evidence on record; whether he was biased and transcended into the litigation arena; whether he erred by not awarding costs of the application to the applicants and whether by extension he failed to exercise his discretion properly are some of the arguable points which warrant the consideration of this Court in the main appeal.

12. We are alive to the fact that in a democracy like ours, there are bound to be differences in ideologies and opinions, and as such our Constitution has protected the right of individuals to express such differences in a peaceful manner. One such way is under ***Article 37*** which provides;

> ***"Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities."***

The said right is a universal and inalienable human right which can only be limited pursuant to ***Article 24*** of the Constitution. Furthermore, the said right is not granted by the State as was succinctly put by

Nyamu J. (as he then was) in ***Kenya Bus Services Ltd. & 2 Others -vs- Attorney General*** ***(2005) 1 KLR 787***;

> ***"The only difference between the rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the world."***

We are also cognizant that pursuant to ***Article 21 (1)*** of the Constitution the State and every State organ is bound to observe, respect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

13. The applicants' main argument is that the 2nd to the 8th respondents' were perpetrating illegalities under the guise of the freedom to demonstrate. In our considered view the apprehensions by the applicants' are not sufficient to warrant the limitation of the said fundamental freedom. Moreover, there is no indication from either the applicants or the 9th respondent that the police force would be unable to enforce law and order during such demonstrations as mandated under the Constitution and the Public Order Act. However, this is not to say that organizers of such demonstrations have no duty to ensure that they are conducted in a lawful and orderly manner. They must appreciate that their freedoms do not violate the freedoms of others or result in civil unrest, incitement to violence, hate speech or advocacy of hatred along ethnic lines. We find that the applicants' have not satisfied us on the nugatory aspect.

14. Having expressed ourselves as herein above we find that the application lacks merit and is hereby dismissed with no orders as to costs as there was no appearance for the 2nd to the 8th and 10th respondents.

Dated and delivered at Nairobi this 29th day of July, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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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