IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, G.B.M. KARIUKI & OUKO, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 80 OF 2014

BETWEEN

POLITICAL PARTIES FORUM COALITION ……. 1ST APPELLANT

MUUNGANO PARTY …… 2ND APPELLANT

KENYA NATIONAL CONGRESS …….. 3RD APPELLANT

JULIUS MWANGI MURIUKI ……. 4TH APPELLANT

AND

THE OFFICE OF THE REGISTRAR

OF POLITICAL PARTIES…….. 1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION…….. 2ND RESPONDENT

THE ATTORNEY GENERAL …….. 3RD RESPONDENT

(An appeal from the Judgment of the High Court (Majanja, J.) given at Nairobi on the 4th day of February 2014

in

CONSTITUTIONAL PETITION NO. 436 OF 2013)

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RULING OF THE COURT

The applicants, Political Parties Forum Coalition, Muungano Party, the Kenya National Congress and Julius Mwangi Muriuki, a registered voter and a member of Mwangaza Party petitioned the High Court for:-

"A. A declaration that the Political Parties Act is unconstitutional, null and void in Section 25 (2) (a), to the extent that it purports to establish a high and discriminatory threshold for political party

funding, and is applied to deny about 35% of voters of contribution in determining allocation of the Political Parties Fund.

Further and in particular:

a. **A declaration that section 25 (2) (a) of the Political Parties Act is unconstitutional, null and void to the extent that it has been or is intended to be applied only to individual political parties and/or only to pre-election coalitions, contrary to the constitutional and statutory recognition of political party coalitions.**

b. **A declaration that the 1st, 2nd and 3rd petitioners are entitled to fair access to the Political Parties Fund and to a reasonable notice to scrutinize the full electoral results of the March 4th General Elections and to enter into any necessary post-election coalitions thereafter.**

c. **A declaration that the 4th petitioner, and other Kenyan citizens, taxpayers and voters, are entitled to have fair and reasonable distribution of the Political Party Fund to all parties that obtained votes in the March 4th General Elections.**

d. **A declaration that the 3rd respondent is obliged to ensure that the Political Parties Fund has an adequate share of the projected ordinary revenue of the government, and not less than the statutory threshold of 0.3%.**

B. A conservatory order restraining the respondents, by themselves or through their agents or representatives, or any persons claiming through them, from disbursing any portion of the Political Parties Fund, without giving full, fair and reasonable notice to all political parties of the electoral results and enabling all parties a reasonable opportunity to enter into post-election coalitions so as to access the funding.

C. A conservatory order to stay the operation of section 25 (2) (a) of the

Political Parties Act.

D. An order directing the 2nd respondent to release and publish in full the electoral results of the March 4th General Elections, including for all six electoral contests therein.

…….”

It was the contention of the applicants that the threshold of 5% of the total number of votes cast set by **section 25 (2) (a)** required before a political party could participate in the Political Parties Fund is too high, unreasonable, discriminatory and is therefore a violation of the Constitution; that that provision favours only the three interested parties which garnered 29.8%, 26.1% and 9.4%, respectively but locked out the applicants and several minority parties numbering 58 whose combined vote constituted 4.3%; of the total votes cast; that since coalitions of political parties are recognized under the Constitution and under the Act, these small parties ought to be treated as a coalition of political parties for purposes of public funding.

The respondents, namely, the Registrar of Political Parties, the Independence Electoral and Boundaries Commission, the Attorney General and the interested parties, comprising, The National Alliance (TNA) party, the Orange Democratic Movement (ODM) Party and United Republican Party (URP) opposed the petition. They argued, *inter alia,* that the court was ill-equipped to be drawn into the philosophical and policy debate that informed the threshold set in **section 25 (2) (a)** aforesaid; that that question ought to be left to the legislative branch of Government; that the funding formula contained in **section 25 (2) (a)** is not discriminatory hence constitutional; that the formula was arrived after a wide consultation with political parties and other actors; and that a coalition of parties is not an entity recognized or eligible for funding.

In determining the petition, the learned Judge (Majanja, J.) after considering comparable provisions in other jurisdictions and the principles applicable in deciding whether a statute is unconstitutional found that the court proceeds on the premise that the laws enacted by Parliament are constitutional unless otherwise declared; that the burden of proving that the law is unconstitutional lies on the petitioner; that in addressing the question of unconstitutionality of a statute the court will have regard to its purpose and effect. In conclusion, the learned Judge held that:-

"In my view, the effect of the statutory threshold would not result in undermining multi-party democracy. In light of these facts, I hold that the threshold for eligibility of public funding based on the percentage of total votes received is not unreasonable and on the contrary, it serves a legitimate purpose.

…….

I therefore reject the petitioners' argument that the result of the formula adopted for funding political parties effectively disenfranchises 35% of the voters. I think this is gilding the lily. Funding of political parties is not the sole means of promoting democracy but one of the many mechanisms provided by the law. The Constitution does not require Parliament to provide funding for all political parties and the adoption of a reasonable threshold by Parliament, that meets constitutional muster, is aimed at promoting the franchise rather than diminishing it.

…….

I therefore find and hold that Section 25 (2) (a) of the Political parties Act is neither discriminatory nor unconstitutional in either its purpose or effect.

The petitioners expressed concern that the threshold adopted to fund political parties would exclude minorities and the marginalized from participation in the political process. Under Article 91 of the Constitution all political parties are obliged to promote the objects and principles of the Constitution which include promoting and protecting the interests of women, the youth, persons with disabilities, minorities and the marginalized hence political party funding is not the only and exclusive means of promoting these groups. The *First Schedule* to the Act under the banner, Code of Conduct for political parties also serves to underline these constitutional values and principles."

Aggrieved by this, the applicants have presented this appeal being Civil Appeal No. 80 of 2014 to challenge the above decision. Two months after bringing the appeal, the applicant under a certificate of urgency instituted a motion on notice under **Rule 5 (2) (b)** of the Court of Appeal Rules for an order of injunction to restrain the Registrar of Political Parties from disbursing any portion of the

Political Parties Fund to selected parties or otherwise committing the funds until the hearing and determination of this appeal. The certificate states that the applicants are apprehensive that the Registrar of Political Parties may receive the funds in the 2013/2014 financial year and is likely to proceed to disburse them before the appeal is heard. If this was to happen, the applicants and over 50 minority parties constituting about 35% of the total vote would be prejudiced; that they will be deprived of a chance to challenge the High Court decision yet the appeal is meritorious, raising several arguable points and as a result the appeal will be rendered nugatory.

Once more, all the respondents and interested parties opposed the application arguing that it has not met the requirements for the grant of an injunction under **Rule 5 (2) (b).**

At the hearing of this application, it was initially unanimously agreed by all counsel that since the appeal has been filed, it would be expedient to have it listed and heard on priority basis instead of hearing the application. But the suggestion by Mr. Kanjama, learned counsel representing the applicants that there be, in the interim, conservatory order pending the hearing and determination of the appeal changed the mood with learned counsel for the other parties insisting on the hearing of the application. They were however in agreement that the appeal clearly raises arguable points for determination on

appeal, leaving only the nugatory aspect of **Rule 5 (2) (b)** to be canvassed.

This ruling is therefore confined to that narrow consideration of **Rule 5 (2) (b).** We ourselves are satisfied that the appeal raises serious arguable points, one of which being whether **section 25 (2) (a)** of the Political Parties Act is unconstitutional.

Rule 5(2) (b) is a well-trodden legal path and we only rehash it as a matter of tradition. From the decisions cited by counsel in this application, and many others, it is apparent that under **Rule 5 (2) (b)** the court exercises an independent and discretionary jurisdiction which does not amount to an appeal from the decision of the trial court. Consequently, no definitive determination of contested facts is permitted. Both limbs of arguability of the appeal and its nugatory aspect must be satisfied. The same principles apply whether the application be one for stay of execution, stay of further proceedings or for an injunction, like the one before us. See **Damji Pragji Mandavia V. Sara Lee Household Body Care Ltd**

Civil Application No. 345 of 2004.

In considering whether an appeal will be rendered nugatory, the court must bear in mind that its decision in each case must turn on the peculiar facts and circumstances of the case. It must carefully weigh the competing claims of all the

arties. See **Nairobi Metropolitan PSV Sacco Union Ltd and others Vs.**

County Government of Nairobi & 3 Others, Civil Application No. Nai. 16 of 2014. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be prevented if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party. See **Stanley Kangethe V. Tony Ketter,** Civil Application No. 31 of 2012.

Guided by these principles, we ask - should the application for injunction fail and in the event the appeal were to succeed, would that success be pyrrhic?

Before we consider this question, which is at the heart of this application, there are two sets of principles that will guide our consideration of the question. One, the court in granting a temporary injunction must see that there is a *bona fide* contention between the parties, a serious question to be tried at the hearing. Another principle in this first set of principles is that where a party applies for a temporary injunction pending determination of a suit the court ought to grant it if the effect of not granting it will be to deprive the application forever of the right claimed in the suit.

The other two traditional principles which guide the court in matters of stay of execution, stay of further execution and injunction pending appeal are, one, that a successful litigant should not be deprived of the fruits of his judgment; and secondly that the court ought to see that a party exercising his right of appeal does not have his appeal, if successful, rendered nugatory. The effect of these principles is to ensure that the decision of the court does not occasion miscarriage of justice to any of the parties before it.

Section 25 (2) (a) of the Political Parties Act stipulates that:-

"25. 1) The Fund shall be distributed as follows:-

a) **…….**

b) **…….**

2) Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund if-

a) **The party does not secure at least five per cent of the total number of votes at the**

preceding general elections; or

b) **……**

3) For purposes of subsection (1) (a) and (2) (a), the total number of votes secured by a political party shall be computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President, members of Parliament, county governors and members of county assemblies."

Under that provision, only three parties (TNA, ODM and URP) qualify and have benefited once from it in the disbursement of 2013/2014 financial year funds. The applicants' petition challenging constitutionality of the threshold for disbursement was dismissed. While their appeal is pending determination in this court, the next tranche of disbursement is due any time and they are apprehensive that without a restraining order, they will once again be left out. Pending the delivery of this ruling, the Court had made an order that this tranche should not be disbursed.

From their pleadings, the applicants are only claiming a fraction of the fund. They have never, since the enactment of the Political Parties Act, participated in the fund.

Applying the general presumption of the law that a statue (or its provision) is constitutional until declared unconstitutional, we think that granting an injunction at this stage will be unconscionable and will occasion miscarriage of justice to qualified parties. In any event should the court find that **section 25 (2) (a)** is unconstitutional, the Registrar of Political Parties has deposed that the Government will, in its next budget circle and in accordance with the law make provision for the applicants if they are found to be qualified. If the three qualified political parties are found to have unduly and wrongly benefited under an unconstitutional provision, they too may be ordered to refund part of the funds received or lose it to the applicants in the future budgetary allocation.

In other words, from the facts of this dispute, weighing the competing claims of both sides, bearing in mind all the principles enunciated by the authorities cited to us, it has not been demonstrated that the success of intended appeal shall be rendered nugatory. We do not see how this appeal will be rendered nugatory when it has not been demonstrated that the Government will be incapable of availing

35% of the funds claimed by the appellants.

In the result, we find no merit in this application. It is accordingly dismissed with orders that costs be in the appeal, which must now be listed for hearing on priority basis.

Dated and delivered at Nairobi this 17th day of October 2014.

P. N. WAKI

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JUDGE OF APPEAL

G.B.M. KARIUKI

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

/mgkm