



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPLICATION NO. 39 OF 2013 (UR NO. 17/2013)

BETWEEN

CHRIS MUNGA N. BICHAGE APPLICANT

AND

1. RICHARD NYAGAKA TONGI)

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION) RESPONDENTS

3. ROBERT K. NGENY)

(Application for stay of execution Pending Appeal from the Judgment and Order of

the High Court of Kenya at Kisii (Murithi,J) dated 7th October, 2013

in

ELECTION PETITION NO. 5 OF 2013)

RULING OF ONYANGO OTIENO, JA.

On 4th March, 2013, Presidential, Gubernatorial, Senatorial, Parliamentary elections together with elections to fill other elective posts such as Women representatives and Ward representatives were held in Kenya. The applicant in the Notice of Motion before us dated 10th October, 2013, and filed on 15th October, 2013, **Chris Munga Nyamaratandi Bichage** (hereafter, *the applicant*) was one of the candidates for Parliamentary Elections for Nyaribari Chache Constituency in Kisii County. The first respondent **Richard Nyagaka Tongi** (hereinafter *first respondent*), was also one of the candidates for the same parliamentary elections for the same Nyaribari Chache Constituency. There were other candidates. The second respondent **The Independent Electoral & Boundaries Commission** (hereinafter *the second respondent*) was the body mandated under the law to conduct and manage the same elections and to do so effectively it appointed the third respondent **Robert K. Ngeny** (referred to as *third respondent*), as the Returning Officer for Nyaribari Chache Constituency which was Constituency No. 267.

After the Elections, he remained the Elections Co-ordinator for the same constituency. At the end

of the elections, the records show that the votes were tallied at Keumbu Social Hall which was the tallying centre and at the end of the tallying of votes, the third respondent and the second respondent pronounced the applicant herein as the winner of the Parliamentary elections in that constituency. That did not amuse the first respondent in this application Richard Nyagaka Tongi who moved to the High Court vide *Election Petition Number 5 of 2013* dated 5th April, 2013. In that Petition, the first respondent raised many complaints, almost all against the second and third respondents in the way they conducted the elections. He ended up praying for several orders mainly that:-

- “(a) declaration that the election was not fair and free,
- (b) A declaration that the election was fundamentally flawed, and thus null and void ab initio.
- c. the election result be nullified and the Election of Chris Munga Nyamaratandi Bichange be reversed as he was not validly and/or lawfully elected.”

He also prayed in the alternative for opening of all ballot boxes in the entire constituency, in respect of the National Assembly (Parliamentary) and thorough scrutiny and counting of the ballot papers for all polling stations be carried out for purposes of determining the accuracy and number of votes each candidate scored so as to verify the valid and rejected votes in form 35 from various stations handed to the Petitioner's agents and annexed to the supporting affidavit of the Petitioner; form 35 from various polling stations submitted by the second respondent to the first respondent; form 35 deposited in the ballot boxes of each polling station and the revised form 36 and that upon the result and re-tallying, a declaration be made that the candidate with the overall highest number of votes is the one validly elected as the member of the National Assembly for the Nyaribari Chache Constituency. In a further alternative, the first respondent prayed in that Petition that the election be undertaken *de novo* in Nyaribari Chache Constituency. That Petition was supported by an elaborate and detailed affidavit sworn by the first respondent. The applicant, the second and third respondents opposed that Petition and the petition was fully heard before *Murithi J.* who in a lengthy judgment dated and delivered on 7th October, 2013, allowed the Petition stating in so doing as follows inter alia:-

“78 Accordingly, I return a determination under Article 105 of the Constitution that the incumbent Member of National Assembly for Nyaribari Chache Dr. Chris Bichage, was not validly elected at the General Election of the 4th March, 2012. A certificate of the determination pursuant to Section 86 of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and Speaker of the National Assembly forthwith.

79 As the acts and omissions giving rise to the instance of this petition were committed by the Independent Electoral and Boundaries Commission and its officers, the party costs of the petition will be paid by the 1st Respondent to the Petitioner and the 3rd Respondent and such costs to be agreed or taxed by the taxing master of the court to a maximum of Kenya Shilling Two Million (Ksh.2M).”

As would be expected, the applicant who was the third respondent in the High Court and who, by that Judgment lost his seat, felt aggrieved. He moved to this Court vide *Notice of Appeal dated 9th October, 2013*, and filed in the High Court Registry on the same date. In that Notice of Appeal he indicated that he intended to appeal against the whole decision and its orders. As the hearing of this application was proceeding, the court was informed that the appeal has already been filed and is *Civil Appeal No. 48 of 2013*. We were further informed that the Registry has fixed the appeal for hearing on 9th December, 2013. In the meanwhile, the applicant has filed this application by way of Notice of Motion seeking on the main two orders, together with an order that costs be provided for. I say on the main because the other three orders sought are already spent. The two orders he is seeking are that:-

- “(c) Pending the hearing and determination of the intended appeal, there be a stay of the decision, requiring the Speaker of the National Assembly to declare the seat of Member of

Nyaribari Chache vacant, and there be maintained the status quo before judgment, in respect of the applicant's status as member of the National Assembly for Nyaribari Chache together with all attendant privileges, emoluments and entitlements.

- d. *Pending the hearing and determination of the intended Appeal, an order do issue restraining the Independent Electoral & Boundaries Commission, its servants, agents or otherwise however from proceeding to carry out a by election or taking any steps whatsoever in connection with the process of a Bye Election or a Repeat such as appointing, nominations for candidates for election of the member of the National Assembly for Nyaribari Chache subsequent to the Judgment of 7th October, 2013."*

The reasons advanced in support of the application are set out and are that: the intended appeal, (which I have stated is now Civil Appeal No. 48 of 2013), raises several seriously arguable issues of law which are among others that:-

"2(a) Having found that the Elections under inquiry were free, fair and in compliance with the Constitution and statute, an Electoral court can in the same Judgment, turn around and vitiate, impugn or nullify an election result.

(b) An Electoral Court can found its substantive Judgment on issues not pleaded.

(c) An Electoral Court can base a substantive finding of irregularity affecting the result on the basis of conjecture, hypothesis or even hyperbole or in the absence of facts underpinning its findings.

(d) The Superior Court misdirected itself on the principle of Judicial Restraint as regards the balance between preserving the will of the people as expressed by the majority of voters and recorded in the Electoral Result of Form 35s on the one hand and the effect of the alleged irregularities on the legitimacy and integrity of the Electoral Process on the other hand.

(e) The Superior Court could make a monumental finding of irregularity in the manner of the dicta at Notice 63 page 57 of the Judgment.

(f) The Superior Court ignoring to make a specific finding on the ambivalence in the petition and the remedies sought therein being mutually exclusive.

(3) Proceeding with the nomination process, campaign and by election will render the intended appeal nugatory.

The applicant also swore a lengthy affidavit in support of the application.

The Notice of Motion was opposed by the respondents. The first respondent in a replying affidavit sworn on 29th October, 2013, stated in brief that the application is belated and has been overtaken by events as the certificate of nullification of the Elections of Member of Parliament for Nyaribari Chache had been issued to the chair of the second respondent, who has in turn transmitted the same to the Speaker of the National Assembly, who has in response to the same certificate issued a notification of vacancy in respect of Nyaribari Chache Constituency, and following that notification of vacancy, by Speaker, a gazette Notice confirming the same was published on 25th October, 2013. He stated further that the applicant would not suffer any irreparable loss and damages as he was never barred from contesting for the seat and so he is legible to contest and compete for the same seat; that being apprehensive of the outcome of the envisaged election and loosing status as a member of the National Assembly and the accompanying privileges are not grounds for seeking stay orders as granting stay would disenfranchise the people of Nyaribari Chache as the Election date is already set for 19th December, 2013, and lastly that in any event, the appeal already filed is not arguable as a scrutiny undertaken shows that serious anomalies were established in twelve (12) polling stations and the court was further right in impugning form 35s that could not be verified and of which integrity were questionable, and thus was right in

returning the exercise back to the people of Nyaribari Chache as the validity of the same elections could not be verified and as this was justified by the results margin in the Elections in the Constituency. On their part, the second and third respondents supported the applicant, claiming in their joint affidavit sworn by the third respondent Robert K. Ngeny, that this Court needs to pronounce itself on the standard of proof required in election petitions generally as the High Court has changed the standard of proof to the deterrent of public and constitution, and this needs to be corrected by a pronouncement of this Court, which will guide future elections; that the trial court shifted the burden of proof to the respondents in the petition instead of the burden being on the Petitioner; that a finding made by the trial court at paragraph 32 of the Judgment was not based on the evidence on record; that having made a finding on fact at the interlocutory stage, the court prevaricated on the same at the Judgment level (and the deponent set out four instances in support of that allegation); that the court based its Judgment on principle it had rejected at the scrutiny level; (and again he cited four instances in support thereof) and that the court made several contradictory findings in its judgment and several of these were set out in the same affidavit one of which was that after finding that form 35 was genuine the court proceeded at paragraph 19 of the Judgment and made a pronouncement that was inconsistent with his earlier findings. He ended that affidavit by saying at paragraph 18 as follows:-

“18 that this Court has jurisdiction to issue the orders sought and we shall not in any way be prejudiced.”

Before us, Mr Wasilwa, the learned counsel for the applicant submitted that we have jurisdiction to hear and determine the application as under **Article 159 (2)** of the Constitution of Kenya 2010, justice should be done to all. He conceded that Speaker has given Notice under **Section 86 (1) and (2)** of the Election Act. He stated further that the learned Judge of the High Court based part of his judgment on matters that were not pleaded and cited findings at paragraphs 72 and 73 of the judgment as evidence of that allegation and he referred us to several other parts of the judgment on that issue. He further submitted that there is also the issue of the value of scrutiny report as all there was in the matter was issue of counterfoils in respect of one box only. Mr. Magare, the learned counsel for the second and third respondent addressed us at length, maintaining that the appeal already filed has several arguable issues some of which were that the learned Judge made several contradictory decisions in the judgment which are irreconcilable. He also referred us to several parts of the judgment of the learned Judge in demonstrating that aspect and further stated that pursuant to **Rule 35** of the Elections Rules as read with **Rule 5 (2) (b)** of this Court's Rules, this Court has jurisdiction to stop the time set out by the Elections Act and Rules from running, and that first respondent was also aggrieved and has filed Cross Appeal.

Mr. Gachugi, the learned counsel who held brief for Mr. Omogeni, the learned counsel for the first respondent invited us to accept that before the applicant can succeed, he has to demonstrate first that the appeal already filed raises arguable points and second that should we fail to grant the orders sought, the success of the appeal should it succeed, would be rendered nugatory. In his view, the main ground in the entire saga was the scrutiny. He submitted that under **Section 85** of the Elections Act, only matters of law should be canvassed in this Court and not matters of fact. According to him, the applicant in this application will not be prejudiced in any way as he was awarded costs to the tune of Ksh.2,000,000/=. Time of By-Election is set under **Article 87** of the Constitution and this cannot be stopped because of equity, that no objection was raised on the scrutiny report. Lastly, Mr Gachugi asked us to dismiss the application.

I have anxiously considered the entire record which is voluminous and runs into 2248 pages. I have also considered the affidavit filed by the applicant, those filed by the respondents, together with the able submissions by the three learned counsel and the law.

In the case of **Ferdinand Ndungu Waititu vs Independent Electoral and Boundaries Commission, IEBC and 9 Others** – Civil Application No. 137 of 2013, this Court stated:-

“The Election Act and the Rules made thereunder constitute a complete code that govern the filing, prosecution and

determination of Election Petitions in Kenya. That being the case, any statutory provisions or rule of procedure that contradicts or detracts from the expressed spirit of Article 87 (1) and 105 (2) and (3) of the Constitution is null and void. The Constitution is the Supreme Law of the land and all Statutes, Rules and Regulations must conform to the dictates of the Constitution.”

In my view, this pronouncement is meant to guide the courts when dealing with Election matters in the subordinate and/or High Court on the main. I say so because once the High Court reaches a verdict in an Election Petition, **Section 85A** of the Elections Act states:-

“85A An appeal from the High Court in an election petition concerning membership of the National Assembly, Senator or the office of the county governor shall lie to the Court of Appeal on matters of law only and shall be

(a) filed within thirty days of the decision of the High Court and

(b) heard and determined within six months of the filing of the appeal,”

and **Rule 35** of The Elections (Parliamentary and County Elections)

Petition Rules, 2013 states:-

“35. An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules.”

Thus, in my mind, even though the applicant has not for some reasons asserted the Rule under which the Notice of Motion is brought, it is clear to me that once a party intends to appeal against a judgment of the High Court to this Court, he would have to comply with the rules of this Court in so far as the same are applicable. I say so because some rules such as the period within which to file the appeal and the period within which the appeal is to be heard would still be guided by the Elections Act and rules thereunder, and not by the Rules of this Court. However, other matters such as filing and serving Notice of Appeal would proceed under the guidance of the Rules of this Court. Thus I have no hesitation in concluding that this application, though not stated, was brought pursuant to **Rule 5 (2) (b)** of this Court's Rules. Indeed in this matter a Notice of Appeal has been lodged pursuant to **Rule 75** of this Court's Rules. In short, I have no doubt that this Court has jurisdiction to entertain this application in law. I was also urged by Mr. Gachugi to consider that date of by election is set under **Article 87** of the Constitution 2010, and Elections Petitions need to be expeditiously dispensed of and cannot be stopped because of equity. With respect, my reading of **Article 87** of the Constitution 2010 does not reveal time limits as stated by Mr. Gachugi. All it says is that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes and that Elections Petitions other than Presidential election shall be filed within twenty eight days after the declaration of the election results by Independent Electoral and Boundaries Commission and lastly that service of the petitions may be by direct or by advertisement in a newspaper with national circulation. It does not stop this Court from hearing applications such as the one before us which has been filed after the full hearing of the Election Petition and is filed to seek preservation of the subject matter till the appeal already filed is fully heard and determined.

In my view, once the appeal has been filed in compliance with the law, this Court has a duty to hear the appeal expeditiously and have it finalised within six months as stipulated in **Section 85A (b)**

reproduced above. In hearing the appeal, the court is in my view, in law bound to hear applications such as this one, necessitated by the very existence of that appeal or the intended appeal. In my mind, it would serve no useful purpose hearing the appeal which is an arguable appeal long after the by-election results from the judgment appealed from has been carried out for in such a case whether the appeal succeeds or not the substratum of the entire matter will have disappeared. I do feel that the period of six months within which an appeal from Election Petition Judgment is to be heard by this Court includes this Court hearing all applications directly connected to the appeal and if it becomes necessary after hearing an application such as the one before us which is for stay of execution, that the by-election is stayed then let that be so, for that is the consequence of the Elections Act allowing an appeal from the Elections Court to be heard by this Court. Such a stay however cannot be granted to exceed the six months set for completing the appeal.

Having said the above, I now turn to the Notice of Motion. The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.

In this application, I have no hesitation in saying that the issue as to whether in a judgment two conflicting findings on the core issues of the dispute as alleged to have happened in the judgment before me would be proper is an arguable point. Secondly, the legal value to be attached to scrutiny report is another arguable point. Thirdly, whether in law, judgment or part of it can be based on unpleaded matters in an Election Petition is another arguable point.

I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law one arguable point suffices for that finding.

The next issue I need to consider is whether were the appeal to succeed, such success would be rendered nugatory. In considering this aspect, I must consider the two prayers before the court. These, as I had stated, are prayers (c) and (d) in the Notice of Motion. Prayer (c) seeks an order to stay the decision, requiring the Speaker of the National Assembly to declare the seat of member for Nyaribari Chache vacant, and that there be maintained the status quo before judgment in respect of the applicant's status as member of the National Assembly for Nyaribari Chache together with all attendant privileges, emoluments and entitlements. The applicant on his own states at paragraph 5 of his affidavit as follows:-

“5. *I am personally aware from pronouncements made in the media that IEBC has set 19th December 2013 (sic) as the date for the ByElection for Nyaribari Chache.*

That which he deposed to as above could only have happened after Speaker of the National Assembly had declared the seat vacant and the Speaker could only have declared the seat vacant after the IEBC had acted on the certificate issued by the court nullifying the Elections of the applicant as Member of Parliament for Nyaribari Chache Constituency and transmitted such a certificate from the court to the Speaker. The first respondent makes it clear in his affidavit at paragraph 3 and sums it up by saying that the action sought by the applicant had been overtaken by events. As far as prayer (c) of the Notice of Motion is concerned, I agree with the first respondent. That prayer is in law no longer available to the applicant as what he is seeking to stay has been accomplished.

However, prayer (d) is seeking a different order altogether. It is seeking as I have set out hereinabove that the Independent Electoral and Boundaries Commission, its servants, agents or otherwise be restrained from proceeding to carry out a by election or taking any step in connection with the process of a by election or “*a repeat*” such as carrying out, nominations for candidates for election of the member of National Assembly for Nyaribari Chache subsequent to the Judgment of 7th October, 2013. It is obvious from the fact that Independent Electoral and Boundaries Commission has already gazetted by election date, that it has taken certain actions towards a by election. But it is also a fact that these actions

have not moved to finality and as the second and third respondents state in the only replying affidavit sworn by the third respondent with the concurrence of the second respondent at paragraph 18, they would not in any way be prejudiced by any orders allowing the prayer. In short they also want stay orders, notwithstanding their having gazetted election date. In my view, the main parts of that prayer can still be enforced as the by election is set for 19th December, 2013, about a full month from the date of this ruling.

Having found and held that the already filed appeal is arguable, I will now, in respect of prayer (d) proceed to consider whether if I do not restrain the second and third respondents from proceeding with their arrangements for a by election, till the appeal is heard and determined, the success of the appeal, if it succeeds will be rendered nugatory.

In my view, the reasons advanced by the applicant in his supporting affidavit to wit that he will lose his current privileges which accrued to him as a member of Parliament cannot carry the day, simply because as the first respondent rightly says at paragraph 6 of his replying affidavit:-

“6. That loosing status of a member of National Assembly and its accompanying privileges is an expected consequence of an Election Petition which in itself cannot be said to be grounds for a stay of appeal.”

That is correct and I agree. I will therefore not put much weight on to those allegations by the applicant. However, there is a matter I cannot ignore when considering the nugatory aspect of this application in particular. That is that, if I refuse this application as regards prayer (d) the effect is that the second and third respondents will proceed with the arrangements for by elections which will include directing party nominations, nominations for the seat and eventually by elections on 19th December, 2013.

As I have stated, the appeal is set for hearing on 9th December, 2013, that is ten days before the by elections. At the by election, a third party who is not a party to these proceedings may very well be declared the winner. Thereafter, this Court may also after hearing the appeal find that the appellant's elections should not have been nullified and may set aside the nullification and declare the appellant the legally elected Member of Parliament for the same seat. That, in my view may result into a serious constitutional crisis. Such a crisis would only be avoided by an order of this Court delaying the by elections till the appeal is heard and determined. That I believe will not be long after 19th December, 2013.

Thus, having been persuaded that the appeal filed raises arguable points, and I must add here for what it is worth that arguable points need not be points that will succeed. All I am saying is that it raises points worth ventilation by the court, and that the success if it were to succeed would be rendered nugatory. I would exercise my discretionary powers in favour of the applicant as far as prayer (d) is concerned. In doing so, I am fully conscious of the voters needs and the need to have the constituency represented at all times. But having considered these aspects, I still hold the view that the same voters will also need to know fully what became of their exercise carried out on 4th March, 2013, and also to be assured that there will be no confusion as to who is the proper representative after the by election if one is held. In any case, as I have stated above, I do not foresee long delay for the appeal will be heard on 9th December, 2013, and if all parties are prepared to proceed, then the voters will not be kept waiting to know the fate of their constituency for a long time. In any case, in a case of this nature some interests must be sacrificed for the good of all, in my mind preservatory orders are necessary in this matter.

I allow the application and grant orders in terms of prayer (d) such that save for what has already been done the second and third respondents are hereby restrained from taking any further action till *Civil Appeal No. 48 of 2013* is heard and determined. Prayer (c) is dismissed. As no party has succeeded fully, I order costs to be in the appeal. As Azangalala and Kantai, JJA. also agree, these shall be the orders of the court.

Dated and Delivered at Kisumu, this 22nd day of November, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI J.J.A)

CIVIL APPLICATION NO. 39 OF 2013 (UR NO. 17/2013)

BETWEEN

CHRIS MUNGA N. BICHAGE APPLICANT

AND

1. RICHARD NYAGAKA TONGI)

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION) RESPONDENTS

3. ROBERT K. NGENY)

***(Application for stay of execution Pending Appeal from the Judgment and Order of
the High Court of Kenya at Kisii (Murithi,J) dated 7th October, 2013***

in

ELECTION PETITION NO. 5 OF 2013)

RULING OF AZANGALALA JA.

I have had the advantage of reading, in draft, the ruling of Onyango Otieno JA. and I agree with his conclusion that this application be allowed in terms of prayer (d) of the application such that save for what has already been done the 2nd and 3rd respondents are restrained from taking any further action until Civil Appeal No. 48 of 2013 is heard and determined.

I also agree that costs of the application be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 22D DAY OF NOVEMBER, 2013.

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPLICATION NO. 39 OF 2013 (UR NO. 17/2013)

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BOUNDARIES COMMISSION.....2nd RESPONDENT

ROBERT K. NGENY3rd RESPONDENT

(Application for stay of execution Pending Appeal from the Judgment and Order of the High Court of Kenya at Kisii (Murithi, J) dated 7th October, 2013

in

ELECTION PETITION NO. 5 OF 2013)

RULING OF KANTAI, JA.

I have had the benefit of reading in draft the Ruling of Onyango Otieno, JA and I entirely agree with the findings of the learned judge. I also entirely agree with the narration of the facts which I need not repeat in this Ruling.

The Applicant, Chris M. N. Bichage was declared elected as Member of Parliament for Nyaribari Chache Constituency in the elections for various national and local seats undertaken by the Independent Electoral and Boundaries Commission on 4th March, 2013. One of the contestants for that seat, Richard Nyagaka Tongi was dissatisfied with that declaration and filed at the High Court of Kenya, Kisii, Election Petition No. 5 of 2013. That petition was heard by Muriithi, J, who in a judgement delivered on 7th October, 2013 nullified the election of the applicant as Member of Parliament for that constituency and ordered inter alia that another election be held for the said Constituency.

The Applicant was aggrieved by the said findings and after filing a Notice of Appeal against the whole decision, has filed Civil Appeal No. 48 of 2013 which we are told is fixed for hearing on 9th December, 2013.

The Applicant also filed an application which states on its heading to be an application for stay of execution pending appeal from the said judgement.

The prayers in the Motion are set out in the Ruling of the Hon. Onyango Otieno, JA. Like the learned judge I accept that although not explicitly stated the application is for stay of execution under Rule 5 (2) (b) of the Rules of this Court.

The principles upon which this court is to entertain applications for stay pending appeal or intended appeal are now well settled. An applicant must satisfy the court that his intended appeal or appeal is arguable which is the same as saying that the appeal or intended appeal is not frivolous, and also satisfy the court that unless the order for stay is granted the intended appeal, or appeal, if successful, would be rendered nugatory. Both requirements must be proved before an order for stay can be granted – See, for instance, the holdings of this court in Silverstein v Chesoni [2002] 1 EA 296 and Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227.

To demonstrate that the applicant was entitled to an order of stay pending appeal Mr. Wasilwa, the learned counsel for the applicant submitted that the learned judge of the High Court based his findings on matters that were not pleaded. Counsel referred to various parts of the judgement to demonstrate that point and also questioned the place or value of scrutiny of votes report in respect of only part of ballot boxes. This position was supported by Mr. Magare, learned counsel for the second and third respondents who argued that the appeal had high chances of success.

The application was opposed by Mr. Gachugi, the learned counsel holding brief for Mr. Omogeni, counsel for the first respondent.

I have considered the material before me and I am satisfied that the issues raised by Mr. Wasilwa, and supported by Mr. Magare are not idle at all. These are arguable points of law which the applicant is entitled to ventilate and have findings made. This therefore satisfies the first limb of the principles I set out on an application like this one.

On the second limb- whether the appeal which has already been filed would be rendered nugatory – Mr. Gachugi reminded us that the people of Nyaribachi Chache Constituency whose Member of Parliaments' election has been nullified are entitled to representation in Parliament and that the people should be allowed to exercise their democratic rights by electing a representative of their choice on the date of the by-election already set for 19th December, 2013. That, I agree, is a correct proposition. But it cannot end there. I say this because I entertain a real fear that should a stay not be granted then the people of the said constituency in exercise of the said rights may elect a representative at the by-election after which the appeal filed by the applicant succeeds leading to a situation where two representatives, instead of the only one allowed in law, would hold valid certificates as Members of Parliament of the same constituency. That would to my mind create a development that would not promote democracy but would lead to crisis and possible chaos.

I am satisfied that failure to grant a stay of the proceedings would likely lead to the appeal being rendered nugatory.

I would therefore exercise my discretion in favour of the applicant.

For the reasons given by Hon. Onyango Otieno, JA, and the orders proposed by my brother I would allow the application on the terms proposed therein.

Dated and delivered at Kisumu this 22nd day of November, 2013

S. ole KANTAI

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JUDGE OF APPEAL