IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 222 OF 2010 (UR 159/2010)

BETWEEN

WALTER ENOCK NYAMBATI OSEBE ……...…… APPELLANT

AND

JUSTUS MONGUMBU OMITI ……..…..…… 1ST RESPONDENT
LAWRENCE OLE SEMPELE ……..…….…….. 2ND RESPONDENT
THE ELECTORAL COMMISSION OF KENYA ……....……. 3RD RESPONDENT

(Application for stay of execution of the order of the High Court of Kenya at Kisii (Musinga, J.) dated 16th September, 2010

in

ELECTION PETITION NO.1 OF 2008)
****

RULING OF THE COURT

The application dated 28th September, 2010 seeks to stay the proceedings in ***Election Petition 1 of 2009*** whose hearing has already commenced in the Kisii High Court and which we are informed is set down to proceed on a day to day basis commencing 9th March 2010.

In the application the applicant is represented by learned counsel ***Mogikoyo*** assisted by ***Mr Omwenga*** while the first respondents are represented by learned counsel ***Mr Nowrojee*** assisted by ***Mr Kerongo*** and learned counsel, ***Mr Orora*** represents the 2nd and 3rd respondents.

The background to the application is that by a ruling and order of the Election Court ***(Ibrahim, J.)*** dated 11th day of July 2008 the learned Judge struck out the Election Petition filed by the 1st respondent on the ground that there was no due diligence to effect service on the applicant herein before serving him through publication in the Kenya Gazette of 25th January 2008 and in the Standard Newspaper. Aggrieved by the ruling of the superior court, the 1st respondent appealed to this Court. A panel of this Court differently constituted allowed the appeal on 7th May 2010.

Subsequent to the above ruling by the Court of Appeal referred to the applicant brought an application dated 9th July 2010 based on ***section 20 1 (a) iv*** of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya in which he sought the following substantive order:-

"That the petition dated and filed in Court on 11th January 2008 herein be struck out with costs for want of personal service."

By a ruling dated 16th September, 2010, the superior court ***(Musinga, J.)*** held inter-alia that the applicant's application was res judicata and further constituted an abuse of Court process. It is this particular ruling which is the subject matter of pending appeal and also (upon which the application) before us is grounded.

In his submissions the leading counsel for the applicant, Mr Mogikoyo stated that the application to strike out the petition was not res judicata because the competence of the process server was highly doubtful yet it was the substratum of the alternative mode of service; that the judge erred in holding that there was due diligence yet the process server had no current licence and that this was allegedly not disclosed by the applicant; that the issue of the competence of the process server was not the subject matter of the decision either in the High Court or the Court of Appeal hence res judicata did not apply and finally that the learned Judge erred in law when he failed to strike out the Election Petition on grounds of non competence of the process server in effecting service. He submitted that the above grounds were arguable grounds capable of satisfying the first requirement of ***Rule 5(2)(b)*** of this Court's Rules. Concerning the second requirement of ***Rule 5(2)(b)*** the learned counsel submitted that if the hearing in the Election Petition continues as planned the intended appeal which is pegged on the issue of service could be rendered nugatory especially if the applicant does not succeed after the hearing of the appeal.

In his brief submissions in support of the application, Mr Orora, learned counsel for the 2nd and 3rd respondents supported the arguments of Mr Mogikoyo as set out above.

The leading counsel for the 1st respondent, Mr Nowrojee in opposing the application, stated that the application lacked any foundation at all because in the applicant's own affidavit paragraphs 6 and 7 sworn on 9th July 2010 he deponed concerning the letter from the Process Server's Committee and stated that the process server was not authorized to serve court documents at the time he allegedly attempted to serve the applicant and consequently the issue of the letter did form part of the ruling of the Judge; that the application was itself founded on misrepresentations of fact and law and was an abuse of the court process; that the whole of the decision of Ibrahim, J. went before Court of Appeal and that the Court of Appeal re-evaluated the evidence including the questionable letter before reaching its conclusion, hence the matter was res judicata; that there was neither a cross appeal nor a notice affirming the decision by the applicants; that the setting aside of Ibrahim, J.'s ruling dealt with all aspects of his ruling; and finally courts cannot allow parties to litigate serially and for a party to isolate one issue for a future determination on its own because litigation has to come to an end as a matter of policy. On the nugatory aspect Mr Nowrojee submitted that the applicant had not demonstrated how the intended appeal would be rendered nugatory since the appeal itself is set down for hearing on 31st March 2011 and that mere belief by his counsel was not sufficient and that even greater prejudice would be suffered by the respondent if the hearing of Election Petition were to be delayed further as the applicant continues to serve for the remaining portion of the life of the current Parliament. Mr Nowrojee further submitted that the applicant had failed to disclose that a contemporaneous application for stay had been filed in the superior court and dismissed and therefore the court was being asked to cover the same ground as was done by the superior court. In this regard, Mr Nowrojee referred to two past decisions of the Court on the point namely – ***Romanus Okeno v Bank of Baroda (K) Ltd … CA No Nai 1 of 2010*** (unreported) and ***Kenya Hotel Properties Ltd vs Willesden Investments Ltd CA Nai 131 of 2010*** (unreported.)

We have considered the affidavits filed on behalf of the parties including submissions and authorities in support.

In the ruling of the superior court (Musinga, J.) had stated as follows:-

"The 1st respondent's advocate addressed Ibrahim J. on the issue of lack of licence on the part of the Court Process Server and drew his attention to the letter that had allegedly been signed for and on behalf of the Process Server's Committee. The Judge having struck out the affidavit of service did not

deem it appropriate to consider whether the Process Server held a current licence. The proceedings before the High Court as well as its ruling were before the Court of Appeal …"

The learned Judge further held:-
*"**As was held in** Henderson v Henderson **(supra) the plea of res judicata applies not only to points upon which the court was actually enjoined by the parties to form an opinion on and pronounce judgment upon but also to every point that could have been brought up if the parties exercising reasonable, diligence, could have brought forward**."*

In the appeal from the judgment of ***Ibrahim J.*** this Court in the judgment of Waki, JA stated:-

"I have considered those submissions and the various authorities cited by counsel including the ruling of the superior court** EP No.4 of 2008**, (supra), the superior court made no finding on the contents of the affidavit of service and it is therefore my duty to evaluate it afresh as this is a first appeal. Having done so, I think the factual deposition of the Process Server which were not challenged in cross examination do establish on a balance of probability that the appellant discharged the onus of showing diligence in serving the petition."

On our part we think that in view of the two holdings as set out above the arguability of the intended appeal is, prima facie, not discernible to us. Consequently the applicant has not satisfied the first limb of the ***rule 5(2)(b)***.

Concerning whether the appeal might be rendered nugatory if a stay was not granted we consider that in exercising our power under any rule or provision empowering us to exercise that power we are required to be broad minded about issues of justice. In the circumstances before us, the hearing of the petition is expected to start in a day or so and the hearing` of the actual appeal on 31st March 2011. Taking these factors into account the demands of justice will be met by having both the petition and the appeal finally determined and not in having a stay. A stay would in the circumstances violate one of the principal aims of the overriding objective namely the expeditious disposal of proceedings. In any case we have held that the applicant has shown to us that he has no arguable appeal and that should be the end of the matter.

With the advent of the overriding objective and ***Article 159(2)(d)*** of the Constitution the exercise of judicial power or authority by the courts has acquired a higher dimension. ***Article 159 2(d)*** demands that the courts be guided in such a way that they administer justice without undue regard to procedural technicalities. In the situation before us we are dealing with an interlocutory application filed in an election Petition filed in 2009, and we think that justice can only be promoted and attained by facilitating the hearing of the actual petition on merit. Finalisation of the matter, we are told, is only weeks away. For this reason any other temporary intervention from this Court would constitute unnecessary sideshows which derogate from the above ideals. Under the regulating statute, election petitions are accorded priority of hearing so as to achieve electoral justice. This objective tallies with the provision of ***Article 159(2)(b)*** of the Constitution which demands that justice shall not be delayed.

In the result, the application is dismissed.

Costs in the intended appeal.

DATED and delivered at Nairobi this 8th day of March, 2011.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR