



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GITHINJI, AGANYANYA & VISRAM, JJ.A)
CIVIL APPLICATION NO. NAI. 295 OF 2010 (UR. 206/2010)

BETWEEN

CLEMENT KUNGU WAIBARA APPLICANT

AND

BENARD CHEGE MBURU 1ST RESPONDENT
CHARLES MARARO NJOROGE 2ND RESPONDENT
ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

(An application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Ochieng, J) dated 8th December, 2010

in

Election Petition No. 24 of 2008)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules for stay of proceedings before the superior court pending the hearing and determination of an intended appeal.

The appeal intended herein arises from the decision of the superior court (Ochieng, J) dated 8th December, 2010 whereby the superior court disallowed an application to substitute the petitioner in an election petition pending before it. By an application dated and filed in the superior court on 23rd September, 2010, one Patrick Muiruri applied to the superior court to be substituted as the petitioner, in place of Benard Chege Mburu, in Election Petition No. 24 of 2008 on several grounds including the petitioner’s alleged lack of interest in the petition, and the possibility that he was “compromised” and could deliberately cause the petition to be dismissed. After hearing all the parties, the learned Judge came to the conclusion that the current petitioner, Bernard Chege Mburu, had made no application to withdraw; that he had actually expressed the desire to prosecute the petition; and that there was no basis to substitute him. The learned Judge accordingly rejected the application for substitution. In the course of the hearing of that application for substitution, the 1st respondent, Clement Kungu Waibara, who is the applicant before us in this application, had raised a preliminary objection along the following lines:

“1. The instant Petitioner, Bernard Chege has neither withdrawn nor sought the leave of this Honorable court to withdraw the instant Petition under rules 23 and 24 of the National Assembly Election (Election Petition) Rules. Consequently, the application is incompetent and an abuse of the court process in view of the clear provisions of Rules 23 as read together with Rule 26 of the Rules.

2. In the absence of Security of Costs given by the substituted petitioner, Bernard Chege, pursuant to Rule 28 (3) of the National Assembly Election (Election Petition) Rules, there is no legitimate Petition pending before this Honorable Court. Accordingly, the instant petition should be dismissed pursuant to the provision of Section 21 (3) of the National Assembly and Presidential Elections Act.

3. The Application constitutes a gross abuse of the Court process.”

Clearly, by the decision that the superior court finally made, it upheld the first part of the preliminary objection, and held that the second limb which related to the security for costs, did not meet the test of a proper preliminary objection, and overruled the same.

It is against that decision, presumably relating only to the issue of security for costs, that the applicant intends to appeal. However, in this application before us, the applicant wants the election proceedings before the superior court stayed on the grounds, among others, that there is no security for costs in place for the petition to proceed.

In his submissions before us, Mr. O. K. Odera, learned counsel for the applicant, argued that when the current petitioner was substituted from the original petitioner, the security for costs was not properly transferred to the current petitioner and accordingly there was no proper petition in place, and that the petition ought to have been struck out.

Mr. Odera, however, acknowledged before us that his client had at no time made a substantive application before the superior court to strike out the petition on the ground that there was no security for costs in place. He acknowledged also that the substitution of the petitioner was done some two years ago, but that he had taken no steps to complain about the security for costs, except by way of a preliminary objection, in an application for further substitution. Clearly, this Court has not had the benefit of the superior court’s findings on that issue, as indeed, it has not been canvassed fully in a substantive application, and on that ground alone, we are highly skeptical that the intended appeal is an arguable appeal. As, indeed, the principles applicable for the determination of applications under **rule 5 (2) (b)** of the Court’s Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006 in Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd** (unreported) in these terms:

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” {See Githunguri vs Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-88)}. ”

Mr. Muthomi and Mr. Mukuria, learned counsel respectively for the 1st respondent, and 2nd and 3rd respondents, argued with equal force that the intended appeal is not arguable as the security for costs is indeed in place; that the issue of costs had never been raised in the previous appeal (C. A. No. 100 of 2009); that the same was now *res judicata*; and that this was now an after-thought intended only to delay the hearing of the main petition.

With regard to the nugatory aspect, counsel argued that the appeal would not be rendered nugatory in the event a stay is not granted as the applicant would still have the right of final appeal once the petition is determined.

So, then, is this appeal arguable? Although it would not be appropriate for us at this interim stage to make

any definitive statements as to the merits of this appeal, we are highly skeptical about its success. As we have pointed out earlier, we have not had the benefit of the superior court's findings on the issue of the security for costs, as the same was never raised before it in a substantive application, as opposed to being raised by way of a preliminary objection in an unrelated application. We are also of the view that the intended appeal will not be rendered nugatory in the event a stay is not granted – as this is only an interlocutory matter, and the applicant's right of final appeal has not been extinguished. Finally, we are also of the view that it is in the public interest that this election petition should proceed expeditiously before the superior court.

In the result, we dismiss the motion dated 17th December, 2010 with costs to the three respondents.

Dated and delivered at Nairobi this 8th day of April, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR