IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 26 OF 2010

ALI HASSAN ABDIRAHMAN ..... APPELLANT

AND

MAHAMUD MUHUMED SIRAT.....1ST RESPONDENT

IBRAHIM HISH ADAN (RETURNING OFFICER) ..... 2ND RESPONDENT

THE INTERIM INDEPENDENT ELECTORAL COMMISSION .....3RD RESPONDENT

(An appeal from the ruling and order made by the superior court at Nairobi (Kimaru,J.) dated 22nd January, 2010

in

H.C. ELECTION PETITION NO. 15 OF 2008)

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JUDGEMENT OF THE COURT

This is an interlocutory appeal. It arises from the ruling of the superior court (Kimaru. J.) made on 22nd January, 2010, dismissing an interlocutory application seeking the "dismissal" of an election petition filed in relation to Wajir South Constituency *("the constituency")*.

The Petitioner, ***Mahamud Muhumed Sirat*** (Sirat) was one of eleven candidates in the Parliamentary elections that took place in the constituency on 27th December, 2007. In the results announced by the returning officer (2nd respondent) on behalf of the Electoral Commission of Kenya (ECK – 3rd Respondent, subsequently substituted with IIEC), Sirat came second to the winner, ***Ali Hassan Abdirahman*** (1st respondent) (Ali) who became the new member of Parliament. Sirat subsequently complained that there were numerous irregularities in the election, bribery and commission of election offences and he sought, not only the scrutiny of the votes and ballot papers, but also for orders:

"(c) THAT the said Parliamentary elections in Wajir South be determined (sic) and declared null and void.

(d) THAT the election and subsequent Gazette notice of the 1st Respondent as the duly elected Member of Parliament be revoked.

(e) THAT upon declaring the said elections null and void this Honorable Court be pleased to order a recount of the ballot papers validly cast, tally the same and announce the results thereof."

Soon after service of the petition, Ali through his advocates on record, M/S. Ahmednasir, Abdikadir & Co. raised the issue of Sirat's citizenship through a request for particulars and also orally in court. The court, on 11th February, 2008 made an order that a formal application be filed for determination of the issue within 30 days but none was filed. Sirat took to the witness box on 12th May, 2008 and testified for two days after which he was cross-examined extensively. The court then made an order for scrutiny of the votes and ballot boxes on 15th May, 2008 but the process was interrupted by information that Sirat had been arrested and deported from Kenya on orders of the Minister for Immigration and Registration of Persons ("*the Minister"*). Sirat, through his advocates on record, M/S. Kilonzo & Co, immediately took out a Judicial Review application to challenge the deportation order and for determination of his citizenship issue. On 9th October, 2009, the superior court (Dulu, J.) held that the minister had no powers to determine a contested citizenship and therefore his actions were *"unlawful, unreasonable and contravened the principles of natural justice."* An order of *certiorari* was issued to quash the Minister's deportation order. The court also found that it was ill-equipped to decide the issue of citizenship in a Judicial Review application since it required evidence tested in cross-examination.

The reaction by Ali to that decision was not to file an appeal but to take out an interlocutory notice of motion within the petition for determination of the issue of citizenship *in limine* since, in his view, the petition was on record in fact, but in law it was non-existent, having been made by a person who had no legal right to do so. The motion was filed on 5th November, 2009 and was argued at length before Kimaru J. In his ruling delivered on 22nd January, 2010, the learned Judge found, *inter alia*, that the documents relied on to question the citizenship of Sirat did not stand up to legal scrutiny; that Sirat was a Kenya citizen and a holder of a valid national identity card and passport which an election court could not invalidate; that Sirat had not renounced his citizenship; and that Sirat was not in breach of the law in filing the election petition. The application was dismissed with costs with an observation, *obiter*, that it was filed in abuse of the court process.

That is the ruling which Ali sought to challenge in the appeal before us. Through his new advocates, M/S. Mohamed Muigai, he laid out 14 grounds of appeal and in the end sought the following orders: -

"(a) The decision and Orders of the Superior Court in the Election Petitioner Number 15 of 2008 made on the 22nd day of January 2010 are hereby reversed;

(b) The Election Petition Number 15 of 2008 currently pending before the Superior Court is hereby dismissed;

(c) The costs of and incidental to this Appeal and the proceedings in the Superior Court are hereby awarded to the Appellant; and

(d) Such other or further reliefs, orders and or remedies as the Honourable Court may deem just and expedient."

The appeal was fixed for hearing before us on 16th September, 2010 after an attempt to have it struck out on a technicality, which failed. Mr. E. Wetangula represented Ali, Ms. Kethi Kilonzo represented Sirat, while Mr. A. Ong'anda appeared for the returning officer and IIEC. All learned counsel informed us that there were new developments which may affect the substance of the appeal, and as far as we could gather, the following matters were common ground: -

a) *That there was no order made for stay of further proceedings in the superior court.*

b) That the election court proceeded to hear the petition and ultimately delivered a judgment allowing the petition with the result that the elections held on 27th December, 2007 in the constituency were nullified.

c) That the election court subsequently issued a certificate to the speaker of the National Assembly under section 30 of the National Assembly and Presidential Elections Act (Cap 7) (the Act)

d) That the speaker had acted on the certificate and declared the Wajir south constituency seat vacant through the Kenya Gazette under Section 18 of the Act.

e) That the IIEC had set the dates for nomination of candidates by political parties and a date for the by-election.

f) That both Sirat and Ali had presented their papers for nomination the same morning the appeal was being heard.

and

g) That the by-elections were scheduled to take place on 13th October, 2010, hence the necessity to deliver this judgment before then.

In all those circumstances, it appeared to us that the efficacy of the appeal before us was called to question and we called on learned counsel to address us on that issue even as they make their submissions in relation to the main appeal.

It was Mr. Wetangula's view that the issues raised in the interlocutory appeal were still live and the decision of this Court would reverse the final judgment and consequential orders of the election court. That is because, according to him, the Speaker acted on a certificate issued by the election court even when the Act makes provision for an appeal against the decision of that court. The law presupposes, in his view, that for so long as the parliamentary seat remains vacant, the process can be reversed by a successful appeal and since the parliamentary seat was still vacant, the court is not precluded from granting the prayers sought in the memorandum of appeal. Mr. Wetangula did not cite any local decision in support of those submissions but referred us to a decision of the Queens Bench Division of the High Court in England made on 30th April, 1999 in **Attorney General vs. Jones [2000] QB 66**. The case went before the court as an originating summons taken out by the Attorney General and it sought interpretation of the **Representation of the People Act 1983**. The circumstances were set out by Kennedy LJ who delivered the judgment of the two judge bench as follows: -

"(1) the defendant was elected Member of Parliament for Newark on 1 May 1997; (2) the defendant was convicted at first instance on 19 March 1999 of the offence of knowingly making a false declaration as to election expenses (section 82 (6) of the Representation of the People Act 1983) in the course of her election campaign; (3) on 15 April 1999 the defendant's conviction was quashed by the Court of Appeal, Criminal Division; (4) no writ has been moved for a by-election for Newark, and the parliamentary seat for that constituency remained unfilled by any other person as at the date when the defendant's conviction was quashed – is the defendant now entitled, according to the proper construction of the Representation of the People Act 1983, to resume her seat in Parliament as Member of Parliament for Newark?"

The court held in the end that if the conviction were overturned, the capacity to sit would be restored, and the seat if not already filled, would cease to be vacant allowing the candidate to return to it. So too in this case, according to Mr. Wetangula, so long as the parliamentary seat is vacant, and this Court allows the appeal thus resulting in the dismissal of Sirat's petition, Ali would remain as the Member of Parliament, thus saving the people of Wajir South constituency an expensive by-election.

In those submissions, Mr. Wetangula was supported by Mr. Ong'anda that the appeal was still viable and could reverse the events which have already taken place. He was however unable to confirm whether his clients, IIEC, had resolved the issue of citizenship when they were clearing Sirat for the by-

election.

For her part, Ms. Kilonzo was of the view that the appeal was an academic exercise once the supervening events are accepted as correct. Ms. Kilonzo further submitted that once the court issues a certificate under the Act and the Speaker acts on it, the principle of separation of powers kicks in and the court cannot undo what the Speaker has done in accordance with the law. She distinguished the decision in the ***Jones*** case as inapplicable because it was based on UK election legislations which were neither before this court nor similar to our Act. In the UK legislation, for example, there was no appeal against the decision of the election court unlike our legislation; a member of parliament in the UK can be removed through a criminal trial unlike the election petitions under the Act; no writ had been issued in the ***Jones*** case while there was one here; the nomination process had been carried out in this case while none had been done in the ***Jones*** case and therefore a decision of this court on the merits of the appeal would conflict with the IIEC which carried out the nominations.

We have carefully considered the submissions of all counsel on this issue and we think, with respect, that this interlocutory appeal has been overtaken by events. We have particularly considered the orders we are invited to make in the interlocutory appeal and it is clear to us that they would be made in vain. That is an eventuality any court would not countenance. The plain fact is that the interlocutory application made before the superior court, sitting as an election court, was predicated on an election petition. The petition was the substratum of the application. For so long as that petition remained undetermined, this Court could make orders which would bind the superior court in the main petition. But that position is no more and the appellant concedes it. The argument is rather that a final decision of the superior court can be undone by a decision of this Court in an interlocutory appeal. We do not see the logic in that argument. Nor do we accept the analogy drawn by the appellant from the decision of the English court in the ***Jones*** case.

Our reading of the ***Jones*** case is that it was not an election petition case, but a case seeking interpretation of a specific provision of the relevant English law relating to the conviction of a member of parliament for a criminal offence which conviction was subsequently overturned on appeal. As correctly surmised by that court the conviction did not render the election of the Member of Parliament invalid, and no writ would be issued until the appellate process was over. As the learned Judges stated in that case:

“The first reason is that justice requires that when a conviction is set aside on appeal, all penalties imposed at the time of conviction should also, so far as possible, be set aside. It would require very clear statutory language to suggest otherwise and that is not to be found in section 160 (4) or elsewhere in the Act of 1983. Where there is a conviction of the type with which we are concerned in this case, there is only a need to do justice to the individual, but also to the electors she represents, and a need if possible to avoid the trauma and expense of a fresh election if there is no justification for that course.”

The Judges also observed that there were three different ways in which allegations of malpractice can be considered, thus:

“(1) by an election court established under the Act of 1983 to which a parliamentary election petition is referred by the High Court; (2) by the High Court itself if the case raised by the petition can conveniently be stated as a special case (see section 146); or (3) by a criminal court, as happened in this case.”

In more ways than one, therefore, the matter before us is distinguishable and the authority cited does not avail the appellant. An election court has already declared the elections held in Wajir South constituency in December 2007 as null and void and has proceeded to issue a certificate to that effect in accordance with the law. To quote the Judges in the ***Jones*** case:

“Whereas the adverse report of an election court will, in many if not in all cases, render an election void [see sect,ion 159 (1)], a conviction does not have that effect. That is probably because section 120 (1) of the Act of 1983 makes it clear that “No parliamentary election and no return to

Parliament shall be questioned except by a petition." But in any event the result is that, even after the defendant in these proceedings was convicted on 19 March 1999, her election on 1 May 1997 remained a valid election. If the defendant had been the subject of a report from an election court, not only would the election have been rendered void, but it would also have been incumbent upon the House of Commons to issue a writ for a new election."

In this case the Speaker has also issued a writ and we are told that nominations were completed and a by-election is imminent. The law, in ***section 23 (4)*** of the Act allows for an appeal against the decision of the election court but it is not clear whether such an appeal would still be efficacious once the writ has been issued by the Speaker. It is not a matter we are called upon to decide in this appeal. What is clear in our minds is that this interlocutory appeal serves no purpose as it hangs in the air after the conclusion of the election petition on which it was predicated.

We would reject it and say nothing about the grounds of appeal placed before us. Perhaps this is a result Mr. Wetangula did not discount despite his spirited arguments to the contrary. That is why he pleaded that the appellant should not be condemned in costs since he had no control over the events which led to his appeal being rendered ineffectual. Ms. Kilonzo, however, submitted that the costs should follow the event as usual.

We have considered the appellant's plea but we find no special circumstances to depart from the usual order on costs. Accordingly, and for the reasons advanced in this judgment, we dismiss the appeal with costs to be paid by the respondents 1, 2 and 3.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of October, 2010.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that thisis a

true copy of the original.

DEPUTY REGISTRAR