



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 182 OF 2009

TITUS KIONDO MUYAAPPLICANT

AND

PETER NJOROGE BAIYA 1ST RESPONDENT

ROBERT K. MUNGAI2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA3RD RESPONDENT

(Application for stay of execution pending hearing and determination of an appeal from a ruling and order of the High Court of Kenya at Nairobi (Waweru, J)

dated 12th June, 2009

In

H.C. Election Petition No. 31 of 2008)

RULING OF THE COURT

Following the striking out of Election Petition No. 31 of 2008, in which the applicant herein, Titus Kiondo Muya, was challenging the election of Peter Njoroge Baiya, the 1st respondent herein, as the member of Parliament for Githunguri Constituency in 2007 parliamentary and presidential elections, the 1st respondent filed his bill of costs. In that bill he claims a sum of Kshs. 3,000,000 as instruction fees to defend the petition, and a further sum of Ksh. 300,000 as instruction fees to file an application for an order striking out that petition, which application was successfully argued and hence the striking out of the petition. The bill was taxed by a Deputy Registrar of the superior court who awarded KShs. 1 million, and Ksh. 50,000 respectively, as instruction fees to defend the petition and instruction fees for presenting and prosecuting the aforesaid application. The applicant was aggrieved and referred the taxation to a judge in chambers. Waweru, J heard the reference, and in a reserved ruling affirmed it arguing that in his view although the figures, prima facie, look big, they were in consonant with previous awards for election petitions. Consequently he dismissed the reference.

The applicant was dissatisfied with Waweru's J's decision which was given on 11th June, 2009. He accordingly filed a notice of appeal declaring his intention of appealing against the said decision and

subsequently filed Civil Appeal No. 16 of 2008. His appeal was, however, struck out on 24th November, 2008 as incompetent as it had been filed outside the stipulated 30 days in the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya. He has taken steps to restart the appellate process. In the meantime he has brought this application, expressed to be brought under **Rule 5 (2) (b)** of the Court of Appeal Rules. The application was argued before us by his advocate, Mr. S.M. Mwenesi assisted by Mr. B.M. Kairaria.

The main thrust of Mr. Mwenesi's submission is that in exercise of his discretion, Waweru, J erred in principle, first, by taking into account extraneous matters, notably the political situation in Kenya, and overlooked an important aspect of the matter, namely, that the costs awarded in any litigation must be reasonable so as not to limit access to the courts by the poor. Learned counsel cited the case of **Rogan Kamper V. Grosvenor [1989] KLR P.362** to support his submission in that regard.

Secondly, Mr. Mwenesi submitted that the applicant is unaware of the 1st respondent's sources of income. He alluded to the 1st respondent's replying affidavit, in which first respondent deposed, inter alia, that a part from being a member of Parliament he is an advocate of the High Court of Kenya, and has a legal practice in Nairobi, and that he engages in commercial farming. Mr. Mwenesi submitted that his client is unaware of the nature of commercial farming he 1st respondent is engaged in. in his view if the 1st respondent is allowed to execute the order on costs in his favour, he will most likely be unable to refund the money if the applicant's intended appeal were eventually to succeed.

Mr. Njagi Wanjeru appeared for the 1st respondent. His submission, on the main, was that the applicant is not being particularly candid when he says that he is unaware of the 1st respondent's sources of income. It is a fact, he said, that the 1st respondent is a member of Parliament and for being a member of parliament he gets a salary, a fact the applicant is aware of. Secondly, the 1st respondent is an advocate practicing in Nairobi. This to, he said is a fact in the public domain. Mr. Wanjeru concluded his submission by contending that the applicant had the duty, which according to learned counsel, he failed to discharge, of showing that the 1st respondent's stated sources will not meet fully the amount of money awarded to him in costs of it is paid over to him.

It is now well settled that in an application under **rule 5(2) (b)** of this Court's Rules, the applicant has the duty of showing not only that his appeal or intended appeal is arguable, or put differently, that it is not frivolous, but also that unless he is granted a stay or injunction as the case may be, the success of the appeal or intended appeal will be rendered nugatory. (see **Kabundu Holdings Ltd. Ali K. Mohamed**, Civil Application No. Nai 59 of 2006).

In his intended appeal, the applicant intends to challenge the exercise of judicial discretion by Waweru, J. and the Deputy Registrar before him. This court has repeatedly stated that an appellate court will be slow to interfere with the exercise of judicial discretion unless the decision is either plainly wrong, or that the court from which the appeal arises acted on wrong principle and as a result arrived at a wrong decision (**Shah v. Mbogo [1968] EA 93.**) What is before us is not the applicant's appeal. The appeal will be heard at the appropriate time if the applicant overcomes the various hurdles on his way. We are not unmindful of the fact that we should abstain from expressing concluded views on the merits of the intended appeal as doing so will either prejudice one of the parties in the appeal or embarrass the bench which will eventually hear the appeal. On the facts and circumstances of this case, weighing one thing against another, we are prepared to hold that the applicant's intended appeal is arguable. Having come to that conclusion, we proceed to consider the nugatory aspect.

As we stated earlier the basis for the applicant saying that unless he is granted a stay, his intended appeal if successful will be rendered nugatory, is that he does not know the 1st respondent's sources of income, and for those sources the 1st respondent has disclosed in his replying affidavit that he is unable to verify the truth thereof. We have considered the affidavit evidence before us. Clearly the applicant is not being particularly candid on the issue of the 1st respondent's sources of income. The applicant is certainly aware the 1st respondent is a member of parliament. His intended appeal is meant to unseat him. Before

he succeeds in that endeavour, the 1st respondent will continue enjoying the benefits of being a member of parliament. It cannot be gainsaid that parliamentarians get substantial remuneration.

It is also pertinent to note that the 1st respondent has deponed in his replying affidavit that he is an advocate of the High Court of Kenya, with a thriving practice in Nairobi. The applicant did not adduce any evidence or swear to the effect that the 1st respondent is not a successful advocate so as to conclude that he is so impecunious as not to be able to reimburse the costs awarded to him if he were to receive and use it and eventually he were to be asked to refund it.

The applicant, with due respect to his counsel, has not satisfied the second condition for the grant of an order in his favour under rule **5(2) (b)**, aforesaid. As stated earlier, for an applicant to succeed in an application under that rule he has to satisfy both conditions we set out earlier. He must show his appeal is arguable. At the same time and in addition, he must show that unless he is granted the order sought his appeal or intended appeal if successful, will be rendered nugatory. The applicant having failed to satisfy the second condition, his application fails, and accordingly, it is dismissed with costs to the 1st respondent. Order accordingly.

Dated and delivered at Nairobi this 25th day of September, 2009.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR