



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 282 of 2009 (UR 196/2009)

JOSEPH SANGANYI OMAMBIA..... APPLICANT

AND

MANSON OYONGO NYAMWEYA.....1ST RESPONDENT

JAMES OMINGO MAGARA.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

(Application for stay of proceedings under rule 5(2) (b) of the Court of Appeal Rules and section 23(2) (4) and (6) of the National Assembly and Presidential Elections Act) the Inherent Powers & Jurisdiction of the Court and all other enabling Provisions of Law) from the ruling of the High Court of Kenya at Kisii (Musinga, J) dated 30th April, 2008

RULING OF THE COURT

By this application expressed to be brought under **rule 5(2) (b)** of the Court of Appeal Rules **Joseph Sanganyi Omambia**, the applicant, who was the Returning Officer for South Mugarango Constituency during the 2007 General Elections, seeks a stay of further proceedings in Kisii H.C. Election Petition No 3 of 2008 pending the hearing and determination of Civil Appeal No 194 of 2009 filed in this Court.

On 26th May, 2009 the applicant filed an interlocutory application seeking two orders, that:-

1 The Interim Independent Electoral Commission of Kenya be substituted as the 3rd respondent in the place of the Electoral Commission of Kenya.

And that:

2. This petition be struck out.

The basis of the first limb of the application was that the then electoral body had been replaced by a new entity and that the resultant changes ought to be reflected in the petition. The second prayer was grounded on the applicant's assertion that he was never served with the petition as is mandated by law; that the petitioner did not exercise due diligence to personally serve him and that there is no valid petition for adjudication by the court as there was no jurisdiction to determine the same.

On 24th July 2009 the learned Judge granted the prayer relating to substitution of the defunct Electoral Commission of Kenya with the Independent Interim Electoral Commission of Kenya but declined to hear the second prayer seeking to strike out the petition. In doing so, the learned Judge gave the following reasons. First, that the 2nd respondent herein, James Omingo Magara, filed a similar application on 11th February 2008 also on the ground that he was not properly served and that though the same was served upon all the interested parties the applicant now before us did not oppose nor support that application. Second, when that application came up for hearing on 22nd February 2009 the applicant showed no interest in it; thirdly, that after the dismissal of the 2nd respondent's application the applicant herein had opposed the oral application for stay of proceedings pending appeal and had urged the Court to hear and determine the petition expeditiously; and finally that the application ought to have been made much earlier since the applicant had participated in the petition since 6th February 2008 when he instructed an advocate to represent him. The learned Judge concluded:-

“In my view, the second respondent’s application is not brought in good faith, is an abuse of the court process and is intended to delay the hearing of this petition. Section 19 (4) of the National Assembly and Presidential Elections Act requires that an election petition be heard and determined on a priority basis, meaning that all due effort should be made to expedite its hearing and determination. For all these reasons I declined to hear the said application and proceeded to fix dates for the main hearing of the petition.”

This is the ruling which triggered the appeal which is now pending hearing and in the meanwhile the applicant is seeking stay of the hearing of the petition which is scheduled for further hearing in the superior court at Kisii on 12th October, 2009.

The applicant in his memorandum of appeal has raised ten grounds of appeal the main one being whether the learned Judge erred in refusing to hear the second prayer of the applicant's motion was acting arbitrarily and had in the process breached the cardinal principles of natural justice. Mr Onyinkwa for the applicant urges us to find and hold that the appeal is arguable and not frivolous. He further contends that the petition would be rendered totally useless unless we grant the orders sought and that the appeal would also be rendered nugatory unless we grant relief sought, if the appeal were to succeed.

Mr Omwanza, counsel for the 1st respondent, opposed the application mainly on the ground that any further delay in the prosecution of the petition would be prejudicial to the 1st respondent. He further submits that election petition as a matter of public policy must be disposed of expeditiously. He contended that the appeal was frivolous.

On the other, Mr. Katwa, counsel for the 2nd respondent, supported the application. He avers that the appeal is arguable. He added that the learned Judge had abdicated his primary duty of hearing the matter before him and that there was no reason at all for him to decline to hear the applicant's motion in full.

On our part, we are satisfied without deciding after considering the submissions made by all counsel and after perusing the grounds of appeal enumerated in the memorandum that the appeal the subject matter of this application is arguable and certainly not frivolous.

Would the success of the appeal be rendered nugatory if we decline to grant a stay of the proceedings? It cannot be gainsaid that election petition hearings have to be conducted in the manner provided under the relevant Act and regulations thereunder which mandate that disputes under the Act be heard expeditiously and in priority to other matters. In this regard, therefore, we would agree with the learned Judge in refusing to permit the parties or any other litigant to frustrate the expeditious disposal of the petition. It was within the province of the learned Judge to reject applications which are baseless and are wantonly brought without a shadow of an excuse or meant to procrastinate proceedings. See **Dyson v Attorney General [1911] KB 418**. However, a party should not be driven from the judgment seat excepting in cases where the cause of action was obviously and almost incontestably bad. See **Dyson** (ibid).

No doubt, it is obvious from the circumstances enumerated in detail by the learned Judge in his ruling that there is evidence of an attempt to buy time and to see that the election petition is rendered meaningless by an effluxion of time.

We would further adopt the decision of this Court in **Hon. Joel Omagwa Onyantha v Simon Ogari & 2 Others Civil Application No. 104 of 2008** (Nai) unreported that:-

“Since the hearing of the petition has commenced, the same will eventually come to an end and a judgment delivered by the High Court at Kisii. But if the applicant succeeds in the appeal then the proceedings in the High Court would be rendered unnecessary but an appropriate order for costs can be made to remedy that.

We think that to allow this particular application would defeat the principle that Election Petitions should be disposed of expeditiously which would in effect forestall quick disposal of Election Petitions.”

The above holding aptly apply to the application before us.

For the foregoing reasons we are satisfied that this application must fail. Accordingly, the same is dismissed with costs to the 1st respondent only.

Dated and delivered at Nairobi this. 9th day of October, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR