



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 88 OF 2008 (UR 51/2008)

JOHN MICHAEL NJENGA MUTUTHO.....APPLICANT

AND

JAYNE NJERI WANJIKU KIHARA.....1ST RESPONDENT

CHRISTOPHER L. AJELE.....2ND RESPONDENT

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

(Application for stay of proceedings and the order of the High Court of Kenya at Nakuru (Martha Koome, J) dated 30th April, 2008

in

H.C.ELECTION PETITION NO. 2 OF 2008)

RULING OF THE COURT

By this Notice of Motion expressed to be brought under rule 5(2)(b) of the Rules of this Court, the applicant, JOHN MICHAEL NJENGA MUTUTHO who is the member of the National Assembly for Naivasha Constituency, seeks the following orders:-

- “1. THAT this matter be certified as urgent and be heard immediately or as this Honourable Court may deem fit.**
- 2. THAT the Honourable Court be pleased to grant a stay of all the proceedings and Orders issued in Election Petition NO. 2 of 2008, on 30th April, 2008 by Honourable Lady Justice Martha Koome pending hearing and determination of the applicants’ intended appeal.**
- 3. THAT the hearing of the Election Petition on the 19th, 20th and 21st of May, 2008 before Honourable Lady Justice Martha Koome in the Election Court of Kenya at Nakuru be stayed pending the hearing and determination of the intended appeal.**
- 4. THAT this Honourable Court be pleased to issue further directions as to the hearing of Election Petition NO. 2 of 2008 at the Election Court of Kenya at Nakuru pending the hearing of the**

intended appeal.

5. ***THAT the applicant be at liberty to apply for further direction and/or orders as the Honourable Court may deem fit to grant.***

6. ***THAT cost of this application be in the cause.***”

During the hearing of the application it became apparent that the 1st, 2nd and 3rd prayers of the motion were no longer tenable, they having been overtaken by events in that a learned single Judge of this Court had certified the application as urgent; and further, the orders issued by the superior court on 30th April, 2008 in the election petition had been complied with and the hearing had continued before that court on 19th, 20th and 21st May, 2008 when four witnesses testified.

Thus, in essence, we are only asked to issue “further directions as to the hearing of the election petition NO. 2 of 2008 at the Election Court at Nakuru pending the hearing and determination of the intended appeal” in view of the allegations leveled against that court in prayers Nos. 1, 2 and 3 of this motion. In our view, however, it is doubtful whether, in the circumstances of this case, we have the mandate to give “directions” on how the election petition should be conducted. But, since this was not made an issue by any of the parties before us we will say nothing further about it. We will, however, consider the whole application as presented by the applicant.

On 18th January, 2008 the 1st respondent presented an election petition to the High Court under **Section 44** of the Constitution of Kenya and under the provision of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya challenging the election of the applicant on the ground that the election was not carried out in accordance with the provisions of the said Act and the regulations thereto. The 1st respondent sought, inter alia, orders that:-

(i) There be a scrutiny of the votes recorded as having been cast in the aforesaid Parliamentary Election in Naivasha Constituency.

(ii) There be a recount of the Parliamentary and Presidential ballot papers cast at the said election.

(iii) The said Parliamentary election held on 27th December, 2007 in the said Constituency be declared null and void.

(iv) It be determined that the applicant has not been validly elected as the Member of the National Assembly for Naivasha Constituency.

On 18th February, 2008 the applicant filed an application to strike out the petition, the main ground being that the petition did not comply with the mandatory provisions of **rule 4(1)(b)** of the National Assembly and Presidential Election (Election Petition) Rules, which the applicant averred require that the results of the election must be pleaded in the petition among other things. However, the learned Judge (*Koome, J*) on 30th April, 2008 dismissed the application. The applicant promptly lodged a notice of appeal and subsequently filed this motion.

Mr. Kilonzo, for the applicant submits before us that there was no cause of action disclosed in the petition and that the Election Court had no jurisdiction to hear it since the results of the elections for Naivasha Constituency had not been pleaded. He further avers that the petition is fatally defective. *Mr. Kilonzo* also argues that the intended appeal raises fundamental issues of law regarding election petitions, and therefore the applicant has an arguable appeal.

However, both *Mr. Kihara* and *Mr. Opande Aswani*, counsel for the respondents, have opposed the application and think that it raises no arguable issues of law. They are of the view that the intended appeal is devoid of merit.

Having heard the rival submissions by the parties, we are prepared to assume in favour of the applicant that he has an arguable appeal. Of course, it must be remembered that an arguable appeal does not necessarily and cannot mean an appeal that is bound to succeed. But, the fact that an appeal or intended appeal is arguable does not, by itself, entitle a party to an order of stay such as is sought in the application now before us. It behoves the applicant to go further and show that apart from his appeal being an arguable one, unless an order of stay or an injunction as the case may be is granted pending the determination of the appeal, if the appeal were to succeed, that success would have been rendered nugatory by the earlier refusal to grant stay.

The applicant, emphatically by this application, is seeking a stay of all the proceedings in the superior court in the Election Petition pending the hearing and determination of his intended appeal before this Court. The established legal position is to be gleaned from a long line of authorities such as **KENYA COMMERCIAL BANK LTD. VS. BENJOH AMALGAMATED LTD. Civil Application No. Nai. 50 of 2001** (unreported) and **SILVERSTEIN VS. CHESONI [2002] KLR 867**. In the **CHESONI** case, the Court acquitted itself thus:-

“----- What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

We reiterate that each case must of course, depend on its own facts but in the present application *Mr. Kilonzo* did not, in our view, point out to us any special factors which would distinguish the application from those in the previous decisions of the court.

We have considered the subject matter in dispute, it being one of the factors to be taken into account, but having done so, we think that our decision herein must follow the principles already laid down by the Court. Accordingly, we order that the notice of motion dated 7th May, 2008 and lodged in the court on 8th May, 2008 must fail and we order that it be and is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI this 6th day of JUNE, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR