IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 104 OF 2008 (UR. 62/2008)

THE HON. JOEL OMAGWA ONYANCHA ……..……..……. APPLICANT

AND

SIMON NYAUNDI OGARI ……..……..….. 1ST RESPONDENT

ZEPHANIA MORARO NYANGWARA ……..……..…. 2ND RESPONDENT

(Application for stay of proceedings on the Ruling of the High Court of Kenya at Kisii (Musinga, J) dated 13th March, 2008

in

Election Petition No. 2 of 2008)

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RULING OF THE COURT

We have before us an application by way of notice of motion brought under ***rule 5 (2) (b)*** of this Court's Rules in which the applicant ***Hon. Joel Omagwa Onyancha*** seeks a stay of proceedings pending an intended appeal. The notice of motion is expressed thus:-

"1. This court be pleased to order for stay of proceedings pending an intended appeal from the ruling of the High Court of Kenya at KisiiI (Musinga, J) dated 13.3.2008 on such terms as this court may think just.

2. And for an order that the costs of and incidental to this application abide the result of the said appeal on the grounds that;

a) The intended appeal if successful will be rendered nugatory.

b) That the Learned Judge has already fixed hearing dates to wit 26th , 27th , 28th , 29th and 30th of May, 2008, 9th, 10th, 11th , 12th and 13th June 2008, 23rd , 24th , 25th , 26th and 27th June 2008.

c) The applicant will be jeopardized in the event that the proceedings take place as scheduled and a decision made by the Learned Judge before the intended appeal is heard and disposed of.

d) The applicant has an arguable appeal with high chances of success.

e) The Respondents will not be prejudiced in any way if this application is allowed.

f) The applicant is ready and willing to take expeditious steps towards filing the record of appeal."

This application arises from Election Petition No. 2 of 2008 filed in the High Court of Kenya at Kisii in which ***Simon Nyaundi Ogari*** is the *1st Petitioner* and ***Zephaniah Moraro Nyangwara*** is the *2nd Petitioner*. ***Hon. Joel Omagwa Onyancha*** (*the applicant herein*) is named as the *1st Respondent*, ***Tobias Gitahi Macharia*** *2nd Respondent* and the ***Electoral Commission of Kenya*** the *3rd Respondent*. On *11th February, 2008* the applicant herein filed an application (in the High Court at Kisii) by way of notice of motion under ***section 21 (3)*** of the *National Assembly and Presidential Elections Act* (Cap. 7 Laws of Kenya), **Rules 13** and **15** of the National Assembly Elections (***Election Petition***) Rules seeking the following orders:-

"1. That this honourable Court be pleased to

strike out and dismiss this petition.

2. That the petitioners be ordered to pay the costs of the petition and that of this application."

That application was made on the following main grounds:-

"(a) The petitioners failed to comply with the mandatory Provisions of section 21 of the National Assembly and Presidential Election Act Cap 7; (*hereinafter referred to as* ***"The Act".***

(b) The first respondent has never been served with the Notice of the presentation of a petition as mandatorily required by the provisions of rule 15 (sic) of the national Assembly Elections (Election Petition) Rules, hereinafter referred to as "Election Petition Rules."

The application was supported by an affidavit sworn by the applicant in which he gave details in support of the application. It was that application that was placed before the High Court at Kisii (Musinga, J) for determination. The learned Judge carefully considered what was urged before him in respect of that application and in the end came to the conclusion that the application lacked merits. He accordingly dismissed it with costs to the petitioners. In the course of his ruling the learned Judge stated:-

"My conclusion on the issue of service is that personal service of the petition was effected upon the first respondent. The petitioners went further to effect substituted service, having exercised due diligence in serving the first respondent with the petition and the latter having refused to acknowledge personal serve."

The applicant intends to appeal against that ruling and before he does so he wants this Court to stay the proceedings in the superior court pending the hearing and the determination of the intended appeal. That is the application that came before us on *10th June, 2008* when Mr. T. O. Nyakeno and Mr. Osoro appeared for the applicant, Mr. K.K. Katwa for the *1st* and *2nd respondents* and Mr. N. Omwanza for *3rd* and *4th respondents*.

As already indicated in the main body of the application the learned Judge fixed hearing dates as from *26th May, 2008*. Indeed when the application came up for hearing on *10th June, 2008,* Mr. Nyakeno informed us that the proceedings in the High Court had started on the *26th May, 2008*. It was Mr. Nyakeno's contention that time would be saved if this matter was heard and determined at this preliminary stage. He told us that he will be raising arguable grounds in the intended appeal.

The application was opposed by Mr. Katwa who started his submissions by drawing our attention to the fact that there was no valid notice of appeal as the notice of appeal filed was out of time. He informed us that there was a pending application for extension of time in which to file a notice of appeal. In fact we were told that there were two applications seeking extension of time – one before ***Omolo, J.A.*** and the

other before ***Tunoi, J.A.***

Mr. Katwa confirmed to us that the proceedings in the superior court continued unabated, that several witnesses had already testified and that the proceedings were adjourned to *23rd June, 2008*. We were also informed that the scrutiny of documents had been scheduled for *16th June, 2008*. It was therefore Mr. Katwa's contention that this application for stay of proceedings had been compromised. He therefore asked us to dismiss it with costs.

Mr. Omwanza associated himself with the submissions of Mr. Katwa.

We have gone over the material placed before us in this application and must express some mild surprise that the applicant would come to this Court to try to stop a process which is almost concluded. It is not in dispute that the hearing of the petition commenced before the High Court at Kisii on *26th May, 2008*. When the application came up for hearing before us on *10th June, 2008* several witnesses had already testified. Then there is the question of notice of appeal not having been filed within the prescribed period. As if to concede this point the applicant herein has filed an application for extension of time in which to file a notice of appeal. It is true that ***rule 5 (2) (b)*** of this Court's Rules does not refer to "*a valid notice of appeal*" but merely "*a notice of appeal*" but even then the applicant would be required to satisfy the two basic and well known requirements, namely:-

(i) that the applicant's intended appeal is an arguable appeal i.e. that it is not a frivolous appeal; and

(ii) that unless we grant the relief sought, if the intended appeal were to succeed that success would have been rendered nugatory.

An applicant must satisfy the Court on both requirements. That is trite law and if any authority is required we would mention only a few – ***J.K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD.*** *[1982 – 85] 1 KAR 1688,* ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD.*** *(NO. 2) [1988] KLR 838,* ***RELIANCE BANK LTD V. NORLAKE INVESTMENT LIMITED*** *[2002] 1 E.A. 128* AND ***EXCLUSIVE ESTATES V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION AND ANOTHER*** *[2005] 1 E.A.*

We have set out briefly the background to this matter and the principles to guide the Court in an application of this nature. The issue in the intended appeal will be whether the applicant was served with the notice of the presentation of the petition as mandatorily required by the National Assembly Elections ***(Election Petition)*** Rules. Assuming for a moment that the applicant has an arguable appeal (if he manages to clear the obstacle of the notice of appeal), would the success of that appeal be rendered nugatory if we refused to grant a stay of proceedings as sought in this application? 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 intended 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.

In ***SILVERSTEIN V. CHESONI*** **[2002] 1 KLR 867** this Court said:-

"On the second limb regarding whether the applicant's intended appeal would be rendered nugatory if it succeeded and we refused to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must follow the decision of this Court in the case of Kenya Commercial Bank Ltd v. Benjoh Amalgamated Ltd & Another, Civil Application No. NAI 50 of 2001 (29/2001 UR). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its

ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:

"…The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."

These remarks aptly apply to the application before us. 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."

In view of the foregoing we are satisfied that this application for stay of proceedings lacks merit and we have no hesitation in ordering that the same be and is hereby dismissed with costs.

Dated and delivered at NAIROBI this 11th day of July, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR