



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 218 OF 2008 (UR 138/2008)

IBRAHIM AHMEDAPPLICANT

VERSUS

THE RETURNING OFFICER KAMUKUNJI

CONSTITUENCY, NAIROBI1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA2ND RESPONDENT

SIMON NG'ANG'A MBUGUA3RD RESPONDENT

MWAURE WAIHIGA.....1ST INTERESTED PARTY

P.L.O. LUMUMBA.....2ND INTERESTED PARTY

(Application for stay of execution of the orders pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Nyamu & Wendoh, JJ) dated 29th July 2008

in

H.C. Misc. Civil Application No. 13 of 2008)

RULING OF THE COURT

The applicant, Ibrahim Ahmed, was one of the candidates in the parliamentary elections held on 27th December, 2007. He was a candidate in Kamukunji Constituency. By 17th January, 2008, results of the elections in respect of that constituency had neither been announced nor gazetted. The third respondent, Simon Ng'ang'a Mbugua, filed chamber summons in the superior court seeking leave to apply for prerogative orders against the first and second respondents – Returning Officer, Kamukunji Constituency and Electoral Commission of Kenya respectively, on 17th January 2008. That application was successful and he proceeded to file the substantive notice of motion for the three orders. That application was heard by two judges of the superior court (Nyamu and Wendoh JJ.) who, in a judgment delivered on 29th July 2004, allowed the application for Judicial Review stating, *inter alia*:

“In the result, the 2nd respondent decision/order/ direction announced at KICC on 29th December is

hereby immediately brought into this court and forthwith quashed. In addition, orders of mandamus and prohibition shall immediately issue in terms of prayers 1, 2, 4 and 5 in the application dated 17th January 2008. Costs of the application to be born by the respondent and all participating interested parties.”

The applicant was one of the interested parties as he was a candidate and the outcome of that election and of the application for judicial review orders were bound to affect him. The effect of the judgment delivered part of which is reproduced above was that the second respondent, namely, Electoral Commission of Kenya was ordered to discharge its duty under Regulation 40 of the National Assembly and Presidential Elections Regulations and to publish a notice in the Gazette showing the name of the person elected as a Member of Parliament for Kamukunji Constituency. The applicant felt aggrieved by that judgment and intends to appeal against the decision which includes the decision that he, together with others, meet the cost of the case. In the meantime, he brought this notice of motion dated 5th August 2008 in which he is seeking orders:

“1. That this Honourable Court be pleased to grant a stay of execution of the order of the High Court of Kenya at Nairobi dated 29th July 2008 granted by the High Court in Miscellaneous Civil Case No. 13 of 2008 pending the final hearing and determination of the intended appeal.

2. That the costs of an (sic) incidental to this application abide the results of the said appeal.”

Several grounds were set out in the notice of motion in support of the application. We will summarize them all in few words and that is that the applicant contends that the intended appeal is arguable on several points and that if the prayer sought herein is not granted, the success of the intended appeal, were it to succeed, would be rendered nugatory.

When the notice of motion came up for hearing before us on 30th September 2008, Mr. Owino, learned counsel for the applicant, informed us, and it was confirmed by Mr. Kipkoge, learned counsel for the first and second respondents and holding brief for Mr. Kibe Mungai for the third respondent, that the application was overtaken by events as the substantive order which it sought to stay had been executed. Indeed, Samuel Mutua Kivuitu, the Chairman of the second respondent, the Electoral Commission of Kenya, says so in a replying affidavit sworn by him on 24th September 2008 in response to the application. However, that notwithstanding, Mr. Owino, while abandoning the prayers seeking stay of the substantive orders made on 29th July 2008, nonetheless addressed us on stay of execution for costs that was ordered in the same judgment of 29th July 2008 and urged us to stay the order of costs on the basis that the intended appeal is arguable and if the applicant pays costs as ordered by the superior court, and eventually his intended appeal succeeds, that success will have been rendered nugatory. This ruling is therefore only confined to the question of costs that was ordered by the superior court and not with the other orders as those have already been executed and thus the application seeking stay of those orders is already overtaken by events and any order staying them will serve no purpose.

In urging us to stay the order for costs, Mr. Owino argued that the intended appeal is not frivolous. It is arguable. He cited several arguable points but we feel two will suffice. These were first, that the superior court made an order allowing prayer 4 of the notice of motion before the superior court, which prayer sought an order of prohibition to be issued to restrain the second respondent from directing or ordering repeat of parliamentary elections for Kamukunji Constituency pursuant to the decision/directive/ order of the second respondent cancelling or nullifying the parliamentary election for Kamukunji Constituency held on 27th December 2007, whereas there was no such order made by the second respondent upon which the court could deliberate and against which such order could be made, as in any case, the second respondent was emphatic that it never called for any repeat elections. Secondly, reasons were given as to why results for 22 polling stations were missing and could not be incorporated in the tallying of votes for that constituency but the superior court ignored those reasons and on the contrary, made a finding that there was no explanation as to why the results of the same 22 polling stations were missing thus leading to the erroneous conclusion.

We have anxiously considered the arguable points raised by Mr. Owino, and, we do, with respect, agree

with him that the intended appeal is indeed arguable and we dare say it is arguable on several points and not only on the two points we have cited hereinabove.

The next principle Mr. Owino needed to satisfy us on is as to whether, if we decline to grant the order sought, i.e. order staying the execution on costs, the intended appeal as pertains to payment of costs would be rendered nugatory were it to succeed. On that point, Mr. Owino's submission was that we need to look at the entire matter in totality and appreciate that the Kamukunji voters have been disenfranchised and that if costs are paid by the applicant, the same may not be recovered. He has not been able to demonstrate as required by law why the costs, once paid to the third respondent, may not be recovered. When challenged on that aspect, Mr. Owino readily admitted that he had considered filing an affidavit of means to show that the third respondent is a man of straw but the same is not on record. We can however, take judicial notice that the third respondent is now a Member of Parliament and may not be a man of straw from whom no recovery of costs would be made once such costs are paid to him. We are thus not persuaded that if we do not grant the order sought, the success of the intended appeal would be rendered nugatory as far as the order of payment of costs is concerned.

The notice of motion was brought under rule 5(2) (b) of this Court's Rules. It is trite law that whoever seeks orders under that rule must satisfy the court on two principles, namely, that, the appeal or the intended appeal is arguable i.e. that it is not frivolous and, secondly, that if the application is not allowed, the success of the appeal or intended appeal as the case may be, if it succeeds, will be rendered nugatory. Both principles must be satisfied for the order to be issued. In this application, whereas we agree the intended appeal is arguable, we are far from being persuaded that its success will be rendered nugatory in as far as the payment for costs ordered by the superior court is considered. That being our view of the matter, the application must be dismissed. However, we are aware that the delay that resulted into the substantive prayers in this application being overtaken by events cannot be blamed on the applicant. We will not penalize the applicant in costs in respect of this application.

In the result, the notice of motion dated 5th August, 2008 is dismissed with no order as to costs.

Dated and delivered at Nairobi this 17th day of October, 2008.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR