



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 274 OF 2008 (UR 179/2008)

CLEMENT KUNGU WAIBARA APPLICANT

AND

PETER KAMAU NJERI 1ST RESPONDENT

CHARLES MARARO NJOROGE 2ND RESPONDENT

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

(Application for stay of proceedings and execution of the ruling and/orders of the High Court of Kenya at Nairobi (Wendo, J.) dated 26th day of September, 2008 pending the hearing and determination of an intended appeal

in

ELECTION PETITION NO. 24 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 **CLEMENT KUNGU WAIBARA** seeks the following main reliefs:-

- 1. THAT in the first instance this Application be heard ex-parte and Orders sought in paragraph 2 hereof be made pending the hearing and determination of this application.**
- 2. THAT this Honourable Court be pleased to issue an Order of stay of the proceedings pending before the superior court and/or the execution of the Ruling/Orders of the superior court, Wendoh, J. pending the hearing and determination of the applicant's intended appeal against the said rulings and/or orders.**
- 3. THAT the cost of this application be provided for."**

This application is brought on the following grounds:-

"a) The applicant's intended appeal raises serious issues of substantive and procedural law and is an arguable appeal with high chances of success in that:-

i The learned judge erred in failing to appreciate sufficiently or at all that the application to substitute the Petitioner was time barred having been made after the lapse of the mandatory 28 days stipulated by the provisions of section 20 of the National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya.

ii The learned judge failed to consider sufficiently or at all the far reaching implications of the Legal Notice 8 of 1974 which repealed section 27 of the Act which provided for the substantive Rules relating to substitution of a Petitioner.

iii In light of Legal Notice No. 8 of 1974, there is legally no room for substitution of a Petitioner.

iv The learned Judge erred in failing to appreciate sufficiently or at all that the Honourable Court lacked jurisdiction to substitute the Petitioner with Bernard Mburu Chege in the absence of a substantive provision in the Act allowing for substitution of the Petitioner.

v In failing to appreciate that the Rules and the Regulations made pursuant to the Act must themselves conform to the provisions of the Act the learned judge with respect erred.

vi The superior court with respect based its decision on extraneous principles and/or considerations.

“b) The intended appeal shall be rendered nugatory if an Order of stay of proceedings is not granted in that:-

i The proceedings in the superior court shall proceed, witnesses will testify and a decision reached on fundamentally flawed proceedings.

ii According to the Act and the Honourable Chief Justice’s directions on hearing of election petitions expeditiously, the applicant’s intended appeal shall be stultified.

We have deliberately set out the grounds in support of the application as we think they set out the applicant’s complaints in this matter. Indeed, Mr. O.K. Odera the learned counsel for the applicant, expounded the foregoing grounds during his submissions and buttressed the same by citing a number of decided cases.

This application raises a very interesting point in respect of substitution of a petitioner in an election petition.

In an **Election Petition No. 24 of 2008** filed in the High Court of Kenya at Nairobi on 24th January, 2008, one, **PETER KAMAU NJERI** (the Petitioner) challenged the election of **CLEMENT KUNGU WAIBARA** as a Member of Parliament for Gatundu North Constituency. The said **CLEMENT KUNGU WAIBARA** was named as the 1st respondent in the petition while one, **Charles Mararo Njoroge** was named the 2nd Respondent and the **Electoral Commission of Kenya** named the 3rd Respondent. Before the petition could be set down for hearing the Petitioner took out a Chamber Summons application expressed as brought under **“Rule 23 and 24 (sic) of the National Assembly Elections (Election Petition) Rules.”** In that application, the petitioner sought the following orders from the superior court:-

“1. THAT this Honourable Court be pleased to grant leave to the Petitioner (applicant) to withdraw the petition herein filed by himself.

2. THAT the costs be in the cause.”

That application was brought on the following grounds:-

“a. THAT the petitioner/applicant is no longer interested in pursuing the petition herein.

b. THAT the petitioner has not entered into any agreements or terms of any kind whatsoever or made any undertaking with the respondents in relation to the withdrawal of the petition herein.

c. THAT it is therefore fair that the petitioner/applicant be granted leave to withdraw the petition.”

That was the application that was placed before the superior court (Wendoh, J.) for determination. During the hearing of this application, an oral application was made to substitute the original Petitioner with one, **Bernard Chege Mburu**. Having considered the submissions by counsel, an application for withdrawal and substitution, the learned Judge was of the view that the superior court had the jurisdiction to grant an order for substitution of the petitioner. In concluding her ruling which is stated to have been delivered on 26th September, 2008 the learned Judge rendered herself thus:-

“However, if the court allows substitution then Rule 28 (4) provides that the substituted petitioner stands in the same position, as nearly as may be, and will be subject to the same liabilities as the original petitioner. Section 44 of the Constitution gives the petitioner the right to challenge validity of the elections as a voter in Gatundu constituency and I believe that right can not be defeated by mere oversight or a defect in the rules regarding substitution. It seems Section 23(3) of the Act is what has been operative and I believe the Rules have been made pursuant to that section and this court has the jurisdiction to substitute the petitioner under that section. The 1st respondent has not demonstrated what prejudice that substitution will cause him. The substituted petitioner has not shown that he will not be confined to the facts in the petition as filed and even if he attempted to, the court is there to give direction. As earlier noted, the substitution of the petitioner does not affect the cause of action and it does not mean enlargement of time for bringing the petition. I believe substitution of the petitioner was meant to avoid multiplicity of petitions, saving of time and costs and avoiding the mischief of collusion.

I will find that this court has the jurisdiction to allow substitution of the petitioner under the section 23(3), Rule 28 of Cap 7 Laws of Kenya and section 44 of the Constitution. I therefore allow Peter Kamau Njeri to be removed as petitioner and Benard Chege Mburu be substituted as Petitioner. Costs to abide the petition.”

Being aggrieved by the foregoing, the applicant herein filed a notice of appeal on 8th October, 2008 being an indication that he intended to appeal against that decision of the superior court. But before that appeal is heard and determined the applicant seeks a stay of execution and proceedings as already indicated at the commencement of this ruling. This is the application that came up for hearing before us on 4th November, 2008 when Mr. O.K. Odera appeared for the applicant and Mr. E. Wetangula appeared for the 1st Respondent. The 2nd and 3rd Respondents were represented by Mr. B.K. Mukuria.

In his submissions, Mr. Odera argued three grounds in a bid to show that the intended appeal was arguable. In the first place, Mr. Odera contended that the learned Judge allowed substitution of the petitioner when there was no substantive application for substitution. It was Mr. Odera’s submission that the applicant will be raising a fundamental issue in the intended appeal on the issue of whether the High Court has the power to allow substitution. The second point taken by Mr. Odera was that the learned Judge determined the application before her on extraneous principle of prejudice to the applicant. The last point was that the party substituted was coming to court outside the 28 days prescribed by the law.

Mr. Odera reminded us that the applicant was the Member of Parliament for Gatundu North and that if the petition proceeded and finally determined pursuant to the substitution of the petitioner and the intended appeal eventually succeeded that would render such success nugatory.

Mr. Wetangula on his part submitted that there was no arguable appeal since, in his view, the Election Petition Rules provide for substitution. He referred us to **rule 28(4)** of the National Assembly Elections (Election Petition) Rules 1993 which provides:-

“Subject as aforesaid, a substituted petition shall stand in the same position as nearly as may be, and be subject to the same liabilities as the original petition”.

It was therefore, *Mr. Wetangula's* contention that in view of the foregoing the intended appeal is not arguable.

Mr. Mukuria was of the view that the issue raised as regards substitution of a petitioner was a matter of public importance which should be subjected to scrutiny by this Court in the intended appeal.

We have considered the submissions by counsel appearing for the parties. This being an application under **rule 5(2)(b)** of this Court's Rules it is incumbent upon the applicant to satisfy us that his intended appeal is arguable and that unless the stay order is granted the intended appeal would be rendered nugatory. The law as to the principles that guide this Court in deciding an application under **rule 5(2)(b)** of this Court's Rules is now well settled. The applicant seeking orders under that rule has to satisfy the Court, first, that his appeal or intended appeal as the case may be is arguable, that is to say the appeal or intended appeal is not frivolous. Secondly, he has to demonstrate that were the appeal or intended appeal to succeed, such success would be rendered nugatory by our refusal to grant the application. In **GITHUNGURI V. JIMBA CREDIT COORPORATION (NO.2) [1988] KLR 83** this Court stated inter alia:-

“The general principles on which the court would base its unfettered discretion were first that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the court should ensure that the appeal if successful, should not be rendered nugatory”.

These principles have been pronounced in other decisions of this Court e.g. **J.K. INDUSTRIES LTD VS. KENYA COMMERCIAL BANK LTD (1987-88) I KAR 1688, RELIANCE BANK LIMITED (in liquidation) VS. NORLAKE INVESTMENTS LTD** – Civil Application No. Nai. 98 of 2008 (unreported) and **AL-MAHRA LIMITED V. PREMIER FOODS INDUSTRIES LIMITED** - Civil Application No. Nai. 163 of 2006 (unreported).

In this Notice of Motion guided by the above principles, it is our view that the main issue raised here and to be raised in greater detail in the intended appeal is whether the High Court had jurisdiction to grant the orders of substitution. The application in the High Court was stated to have been brought under **Rules 23 and 24** of the National Assembly Elections (Election Petition) Rules. What do these Rules provide? **Rule 23** of these Rules provides:-

“(1) An election petition shall not be withdrawn without the leave of the election court, and leave may be given upon terms as to the payment of costs and otherwise as the election court may think fit.

(2) Before leave for the withdrawal of an election petition is granted, there shall be produced affidavits, as required by this rule, by all the parties to the petition and their advocates:

Provided that an election court may, on cause shown dispense with the affidavit of any particular person if it seems to the election court on special grounds to be just so to do.

(3) each affidavit shall state that, to the best of the deponent's knowledge and belief, no agreement or terms of any kind whatsoever has or have been made, and no under taking has been entered into, in relation to the withdrawal of the petition; but, if any lawful agreement has been made with respect to the withdrawal of the petition, the affidavit shall set forth that agreement, and shall make the foregoing statement subject to what appears from the affidavit.

(4) The affidavits of the applicant and his advocate shall further state the ground on which the petition is sought to be withdrawn.”

Then **Rule 24(1)** provides:-

“An application for leave to withdraw a petition shall be in writing signed by the petitioner or petitioners, his or their advocate or advocates, and shall state the grounds on which the application is supported”

The above should be read together with rule 28 which provides:-

- “(1) On the hearing of the application for withdrawal any person who might have been a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted, as petitioner, for the petitioner desirous of withdrawing the petition.**
- (2) the election court may substitute any such applicant as petitioner; and may further, if the proposed withdrawal is in the opinion of the election court, induced by any corrupt bargain or consideration, by order direct that the security given on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum named in the security the original petitioner shall be liable to pay the costs of the substituted petitioner.**
- (3) If no order is made under sub-rule (2) in respect of security given on behalf of the original petitioner, security to the same amount as would be required in the case of a new petitioner, subject to the same conditions shall be given on behalf of the substituted petitioner before he proceeds with his petition and within three days after the order of substitution.**
- (4) Subject as aforesaid, a substituted petitioner shall stand in the same position, as nearly as may be, and be subject to the same liabilities, as the original petitioner.**
- (5) If the petition is withdrawn, the petitioner shall be liable to pay the costs of the respondent.**
- (6) Where there are more petitioners than one, no application to withdraw a petition shall be made except with the consent of all the petitioners.”**

Mr. Odera took us through the history of legislation governing election petitions from 1963 to 2007 and it was his view that there were amendments which affected these Rules to the extent that there was no room for substitution of a petitioner in an election petition.

Being mindful of the guiding principles, in an application of this nature and especially in view of the fact that we are not dealing with the appeal, all we can say is that Mr. Odera has satisfied us that the intended appeal is arguable. For example it is arguable that substitution of the petitioner might have been made without any application since what was before the court was an application to withdraw the petition. Further it is not clear from the record whether the party substituted (**Bernard Chege Mburu**) was able to comply with **Rule 28(3)** of the **National Assembly Elections (Election Petition) Rules** as to the provision of security within the time stipulated. On the nugatory aspect we think that if the intended appeal succeeded when the petition had been concluded to the detriment of the applicant who is the Member of Parliament for Gatundu North surely the success of that appeal would have been rendered nugatory.

In view of the foregoing we allow this application and order that there be a stay of the proceedings pending before the superior court and the orders made by that court pending the hearing and determination of the intended appeal. Since election petitions are to be dealt with expeditiously we further direct that the intended appeal be filed expeditiously subject to provision of **section 23(4)** of the **National Assembly and Presidential Elections Act** and once filed it be set down for hearing immediately so that the matter may be concluded without undue delay.

The costs of the application shall abide the outcome of the intended appeal. Those shall be our orders.

Dated and delivered at NAIROBI this 28TH day of November, 2008.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR