



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 266 OF 2008 (UR.171/2008)

MARGARET WANJIRU KARIUKI APPLICANT

AND

WILLIAM MAINA KAMANDA1ST RESPONDENT

MANASSEH MUGASIA 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA3RD RESPONDENT

(Application for stay of execution of the order dated 22nd September, 2008 pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi (Kihara Kariuki, J.) dated 22nd September, 2008

in

ELECTION PETITION NO. 5 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 **MARGARET WANJIRU KARIUKI**, who is the Member of Parliament for Starehe Constituency in Nairobi seeks the following orders:-

“(a) THAT the execution of the decision and order of the High Court in Election Petition 5 of 2008 at Nairobi and dated 22nd September, 2008 be stayed until the applicant’s intended appeal is lodged, heard and determined.

(b) THAT the costs of this application be provided for.”

This application was brought on the following grounds:-

“1. The applicant has an arguable appeal with good prospects of success as follows:-

(a) The learned Judge of the superior court erred in law and in fact in granting the application dated 3rd July, 2008 seeking an order of scrutiny and recount in the face of the obvious compromise of the fidelity of the contents of ballot boxes occasioned by broken seals and ballot boxes.

- (b) The learned Judge of the superior court erred in law and in fact in ordering scrutiny and recount relying on the partial evidence of the petitioner without giving the appellant in this appeal an opportunity to call evidence on the Forms 16A and 17A, the basis upon which the order appealed against was granted.**
- (c) The learned Judge of the superior court erred in law and in fact in failing to investigate further the circumstances upon which the ballot boxes and their seals were broken, the time when they were broken and the nature and extent of security provided to safeguard the fidelity of their contents before granting the application dated 3rd July, 2008.**
- (d) The learned Judge erred and misdirected himself when he held that there was no evidence to suggest that the petitioner had tampered with the ballot boxes when the respondents in the petition had not yet tendered their evidence and the trial of the petition had not been concluded.**
- (e) The learned Judge further misdirected himself in holding that the petitioner had not tampered with the ballot boxes when the question before him for determination at the material time was whether any useful purpose could be served by an order of scrutiny and recount when it was obvious that the seals of many of ballot boxes had been broken and some of the said boxes broken. The question before the superior court at the arguments of the application dated 3rd July, 2008 was not who had tampered with the ballot boxes.**
- (f) The learned Judge misapprehended the mandatory requirement, purpose and effect of rule 7(1) of the National Assembly (Election Petition) Rules 1993 by terming the requirement of the said Rule as a mere technicality.**
- (g) By the petitioner claiming the Starehe Constituency Seat in his petition, it was mandatory that the petitioner complied with Regulation 7(1) of the National Assembly (Election Petition) Rules the learned Judge erred in failing to appreciate this mandatory legal requirement.**
- (h) The learned Judge misapprehended the requirement and purpose and effect of Rule 42 of the Presidential and Parliamentary Elections Regulations.**
- (i) The learned Judge erred in making what amounted to final determination of facts when only the Petitioner's witnesses had been heard.**
- (j) The learned Judge erred in law and in fact in failing to appreciate the significance of the Petitioner having in his custody copies of all Form 16A which he testified that he had obtained from the Electoral Commission of Kenya.**
- (k) The learned Judge misdirected himself by finding that the 2nd and 3rd respondents had not made any attempt to explain by affidavit evidence of apparent anomalies in Forms 16A and 17A when the respondent's evidence was yet to be taken.**
- (l) The learned Judge erred in prematurely holding that the election results were announced when tallying had not been completed when this was an issue for determination at the trial of the petition and witnesses were still being cross examined on the said allegation. In holding thus before hearing the appellant's case, the Judge closed the door to the appellant to lead evidence on the tallying and announcement of results.**
- (m) The learned Judge erred in failing to appreciate that in view of the nature and contents of the application dated 3rd July, 2008 it was premature to grant the prayers sought in the said application.**
- (n) The ruling by the learned Judge went against the weight of evidence and requirements of law.**
- (o) The Judge failed to recognize that the grounds upon which the petitioner prayed for an order of**

scrutiny and recount in his petition were different from the grounds advanced in the application dated 3rd July, 2008.

2. *The intended appeal against the ruling of P. Kihara Kariuki, J. dated 22nd September, 2008 will be rendered nugatory if this application is not granted in that;*

(a) The implementation of the order dated 22nd September, 2008 will destroy the substratum of the appeal.

(b) The implementation of the order dated 22nd September, 2008 may determine the petition before the applicant's evidence is heard."

We have deliberately set out the foregoing grounds in full since they capture the gist of the application before us. Indeed, Mr. Chacha Odera, the learned counsel for the applicant, expounded the foregoing grounds during his submissions and buttressed the same by citing a number of authorities.

This application arises from the ***Election Petition No. 5 of 2008*** filed at the High Court in Nairobi. In that petition ***WILLIAM MAINA KAMANDA (the Petitioner)*** filed the petition on 14th January, 2008 to contest the validity of the election of ***HON. BISHOP MARGARET WANJIRU KARIUKI*** (the 1st Respondent) as the Member of Parliament for Starehe Constituency at the General Elections held on the 27th December, 2007. The petitioner (***William Maina Kamanda***) was one of the seventeen candidates that contested in that constituency.

On 11th February, 2008 the petition was placed before the superior court (Kihara Kariuki, J.) when advocates for the parties made various requests and applications. These preliminary matters were dealt with by the superior court and the hearing of the petition commenced on the 27th May, 2008 when the petitioner took the witness stand. On the 3rd July, 2008 in the course of the trial while the petitioner's fifth witness (***Patrick Allan Weru***) was giving evidence, the petitioner took out a Notice of Motion under ***sections 44 and 60 (1)*** of the Constitution of Kenya, ***section 23(2)*** of the ***National Assembly and Presidential Elections Act (Cap. 7 Laws of Kenya)***; ***Regulation 40(4)*** of the ***Presidential and Parliamentary Elections Regulations*** and the inherent jurisdiction of the court seeking the following main order:-

“(1) This Honourable Court be pleased to order that before closure of the Petitioner's case, there be a scrutiny and recount of all the votes recorded as having been cast in the Parliamentary elections held on 27th December, 2007 in Starehe Constituency to ascertain the valid votes garnered by each of the Parliamentary candidates.”

That application in the superior court was based on eleven grounds the principal ones being that the declaration of the Parliamentary results for the Starehe Constituency as contained in Forms 16A's and Form 17A had been falsified through obvious unauthorized alterations made without any signed declarations by respective presiding officers vouching for the accuracy and truthfulness of the results; that it was not possible from the available Forms 16A and Form 17A for the court to ascertain the number of valid votes garnered by each candidate; that the difference in votes between the Petitioner and the First Respondent was a very thin margin of some ***895 votes***; that the official results were announced before completion of tallying results from all polling stations.

In her replying affidavit, the 1st respondent opposed the application on the ground that the motion was premature and lacked merit as the respondents had not given evidence; that the petitioner had not pleaded any ground in his petition upon which the court would have jurisdiction to consider a request for scrutiny; that no evidence had been led so far to establish the basis or foundation, for granting of the orders sought; that the ballot boxes having been broken and opened, the fidelity of their contents was questionable and no useful purpose would be served by allowing the application; and that no evidence had been provided with respect to measures taken to ensure that the contents of the ballot boxes were not interfered with

particularly given that the Petitioner was at the material time a Government Minister in charge of administration and management of Nyayo Stadium where the ballot boxes were at one time stored.

The learned Judge of the superior court considered the submissions for and against that application and finally came to the conclusion that it was for allowing. In his ruling delivered on 22nd September, 2008 the learned Judge concluded thus:-

“For the reasons I have given I am persuaded that the Petitioner has laid a basis for an order of scrutiny and that it would therefore be in the interests of justice that I allow this application. Consequently, orders in terms of prayer No. 1 in the Notice of Motion filed on the 3rd July, 2008 be and are hereby granted.”

Being aggrieved by the foregoing the applicant herein filed a Notice of Appeal on 24th September, 2008. A draft Memorandum of Appeal was also included in the record of this application. But before that appeal is heard and determined, the applicant seeks a stay of the order of the superior court made on 22nd September, 2008. This is the application that came up for hearing before us on 22nd October, 2008 when Mr. Chacha Odera appeared for the applicant while Mr. Kioko Kilukumi appeared for the 1st respondent and Mr. Dan Kasina appeared for the 2nd and 3rd respondents.

As already stated at the commencement of this ruling, Mr. Chacha Odera expounded the grounds in support of this application in a bid to show that the intended appeal was arguable and that if the stay is not granted the success of the appeal would be rendered nugatory. He pointed out that the application for scrutiny was made mid-stream when the petitioner’s witnesses were still giving evidence. He particularly took issue with the fact that no evidence was led as to the scrutiny of the ballot boxes which were alleged to have been broken. It was Mr. Odera’s submission that scrutiny can only be granted if it is shown that the ballot boxes were intact. Finally, Mr. Odera contended that implementation of the order of 22nd September, 2008 would shut out the applicant and her witnesses who are yet to testify in the petition.

In his submissions, Mr. Kilukumi stated that although the applicant raised arguable points, yet the 1st respondent had an answer to every point. He went on to argue that the intended appeal would not be rendered nugatory if the application was refused. He drew our attention to the fact that as at 22nd October, 2008 the applicant had not filed an appeal against the order of 22nd September, 2008 and by virtue of the provisions of the *National Assembly and Presidential Elections Act (Cap 7 Laws of Kenya)* the applicant’s intended appeal would be out of time. He contended that the scrutiny and recount of votes would not bring the petition to an end as the 1st respondent and her witnesses will be allowed to testify. He further contended that if a stay was granted we do not know how long the petition will take to be completed. He reminded us that petitions should be dealt with expeditiously and that the scrutiny ought to have commenced on 17th November, 2008.

Mr. Kasina had no objection to scrutiny and recount.

We have heard the rival submissions in this matter and we have endeavoured to give the background to what is before us. What is sought is a stay of the order of the superior court made on 22nd September, 2008. It is important to emphasize here that nobody is suggesting that the proceedings in the superior court be stayed.

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/her 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/she has to demonstrate that were the appeal or the intended appeal to succeed, such success would be rendered nugatory by our refusal to grant the application. In ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (No. 2) [1988] KLR 838*** 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.”

As already stated, the applicant intends to appeal against the order of the superior court made on the 22nd September, 2008. That order was limited to scrutiny and recount of votes. The order did not stop the hearing of the petition. Mr. Chacha Odera emphasized this aspect of the application to demonstrate that the other witnesses can continue giving evidence.

Our view of this matter is that as the petition in the superior court is still proceeding and as the order of stay sought would only affect scrutiny and recount, the order of stay would not affect the progress of the petition in the superior court. We agree that scrutiny and recount can be made at any stage of the proceedings before final judgment but for such exercise to be undertaken a basis must be laid. In the present case, the Petitioner who had indicated that he would be calling 15 witnesses had called his fifth witness when suddenly there was an application for a recount. This is what the applicant intends to challenge in the intended appeal. It is to be observed that the respondents had not been called upon to testify. It has to be noted that there were allegations that the ballot boxes had been broken or tampered with.

In view of the foregoing we think that the intended appeal cannot be described as frivolous. Hence on the first limb of the twin principles under **rule 5(2)(b)** of the Rules, we are satisfied that the intended appeal is arguable. We were addressed by Mr. Kilukumi on the issue of the intended appeal being filed out of time. Our answer to that submission is that an application under **rule 5(2)(b)** of this Court’s Rules is made pursuant to a notice of appeal. **Rule 5(2)(b)** of the Court’s Rules provides:-

“(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution; or an injunction or stay of further proceedings on such terms as the Court may think just.”

It therefore follows that it is the notice of appeal pursuant to **rule 74** of this Court’s Rules that gives this Court the jurisdiction to entertain applications under **rule 5(2)(b)** of the Court’s Rules. If the applicant herein fails to file the intended appeal that would be a matter for another day.

What of the nugatory aspect of the intended appeal? The way we see this matter is that if we granted a stay the order of 22nd September, 2008 would not be implemented but the petition would still proceed to hearing. On the other hand, if we refused to grant the stay the hearing of the petition would proceed together with scrutiny and recount of the votes. Depending on the outcome of that exercise and how long it would take it is very likely that the petition would be determined before the intended appeal is determined in which event its success would be rendered nugatory because the substratum of the intended appeal would have been eroded.

In view of the foregoing the order that commends itself to us is that the application for the stay of the superior court’s order made on 22nd September, 2008 should be stayed pending the intended appeal. Consequently the application by way of Notice of Motion dated 2nd October, 2008 brought by the applicant herein **Margaret Wanjiru Kariuki**, is hereby granted as prayed but the costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at NAIROBI this 21st day of November, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR