



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 28 OF 2016

[FORMERLY NAKURU ELRC PETITION NO. 12 OF 2016]

ROBERT NYABUTO NYABWOCHA.....PETITIONER

VERSUS

RONALD KIPROTICH TONU.....1ST RESPONDENT

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS.....2ND RESPONDENT

RULING

Introduction

1. On 2nd September 2016, I delivered judgment in which I barred the 1st Respondent, Ronald Kiprotich Tonui from contesting in the elections for the position of Assistant National Treasurer of the 2nd Respondent, Kenya Union of Post Primary Education Teachers, as long as he holds the position of Member of Parliament.

2. I also directed the 2nd Respondent to conduct the said elections within the next sixty (60) days from the date of judgment.

The 1st Respondent's Notice of Motion

3. The 1st Respondent subsequently moved the Court by Notice of Motion dated 23rd September 2016 seeking orders to stay execution of the judgment and decree pending the hearing and determination of an appeal in the Court of Appeal.

4. The application which is supported by the 1st Respondent's affidavit sworn on 23rd September 2016, is premised on the following grounds:

- a) That the 1st Respondent has lodged an appeal before the Court of Appeal against the decree dated 2nd September 2016;
- b) That a notice of appeal has been filed and served on the Petitioner;
- c) That the 1st Respondent has applied for certified copies of the proceedings, judgment and decree;
- d) That the court decree being appealed against directs that the 2nd Respondent conducts the

elections within 60 days from 2nd September 2016;

e) That if the orders sought are not granted, the intended appeal will be rendered nugatory;

f) That gross injustice will be occasioned to the 1st Respondent if stay pending appeal is not granted ;

g) That the Petitioner will not suffer any prejudice if the orders sought are granted.

5. The application went before my brother **Abuodha J** on 6th October 2016 and he granted temporary stay orders which he variously extended until 3rd May 2017 when he referred the matter to me. Noting that the parties had already filed their respective submissions I reserved a ruling date.

6. In the submissions filed on behalf of the 1st Respondent on 24th October 2016, it is submitted that the application has been brought without delay. The 1st Respondent urges the Court to issue the orders sought in order to preserve the substratum of the appeal which will otherwise be rendered nugatory.

Support by the 2nd Respondent

7. Having filed its own Notice of Appeal on 16th September 2016, the 2nd Respondent supports the application for stay of execution. In its submission filed on 22nd November 2016, the 2nd Respondent referred the Court to the decision in ***Charles Ngatia Nguyo v Ekira Gathoni Kariithi & another [2014] eKLR*** where the Court restated the conditions under which a stay of execution pending appeal may be granted as follows:

a) That substantial loss will be occasioned to the applicant if the orders sought are not granted;

b) That the applicant has an arguable appeal which would be rendered nugatory unless the orders sought are granted;

c) That the application has been made without unreasonable delay.

The Petitioner's Opposition

8. In opposition to the application, the Petitioner's Counsel, Dorothy Alwala swore an affidavit on 3rd October 2016 pointing out that the 2nd Respondent held elections for the rest of the positions on 19th March 2016 and that any further delay in filling the position of Assistant National Treasurer would hamper the activities of the 2nd Respondent.

9. Counsel adds that the 1st Respondent would not suffer substantial loss if the decree is executed as a by-election would be permissible. She also takes issue with the fact that Counsel for the 1st Respondent came on record after judgment without leave of the Court.

10. In his submissions filed on 22nd November 2016, the Petitioner submits that the 1st Respondent has no arguable appeal and has not demonstrated the irredeemable loss he will suffer if the orders sought are not granted. The Petitioner submits that it would be unfair and unjust to halt the operations of the 2nd Respondent for the benefit of the 1st Respondent.

11. In this regard, the Court was referred to the decision in ***Benson M. Kibui & 2 others v Francis Maina Kanumbi & 2 others (suing as officials of Mwanzo Self Help Group [2014]eKLR*** where the Court held that an applicant seeking stay of execution must demonstrate the actual loss they will suffer if the orders sought are not granted.

12. On the question whether Counsel for the 1st Respondent is properly on record, the Petitioner submits that since the Procedure Rules of this Court are silent on the matter, recourse should be had to the Civil Procedure Rules.

Determination

13. The conditions under which an order of stay pending appeal may be granted are well settled. In *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR* the Court of Appeal restated them as follows:

- a) That the appeal or intended appeal is arguable and not frivolous;
- b) That if an order of stay is not granted, the appeal or intended appeal will be rendered nugatory.

14. It is also now well settled that in considering whether an applicant has an arguable appeal, the court is not expected to determine whether the appeal is likely to succeed. It is enough that for the applicant to raise one issue that merits a second look by the appellate court (see *Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union (Civil Application Nai. No. 72 of 2001)*).

15. On the face of this application, the 1st Respondent would appear to have satisfied the conditions for stay pending appeal. There is however another twist to this application. The Advocate who filed it brought himself on record without leave of the Court and in his submissions filed before the Court the 1st Respondent trivialized this issue by simply stating that the requirement for leave to come on record post judgment is a rule in the Civil Procedure Rules which are not applicable in this Court.

16. In advancing this point, the Petitioner relied on the case of *Kazungu Ngari Yaa V. Mistry v Naran Mulji & Co [2014] eKLR* where my brother **Radido J** presiding over an employment matter in Mombasa held that change of Advocates after judgment must be sanctioned by an order of the Court. I think this is the correct legal position. As observed in *Shariff Abdulkadir Abderman v Abdalla Chikope & 2 others [2014] eKLR* the mischief which this rule seeks to cure is the avoidance of responsibility by litigants to their Advocates after judgment. I agree with Counsel for the Petitioner that this protection must extend to this Court as well.

17. For this reason, I find that the firm of Mariaria & Company Advocates is not properly on record in this matter and the application filed by the said law firm is therefore incompetent and is struck out with costs to the Petitioner.

18. The interim orders granted on 6th October 2016 are vacated and the 2nd Respondent is directed to conduct the elections for the position of Assistant National Treasurer within the next thirty (30) days from the date of this ruling in terms of the judgment of the Court delivered on 2nd September 2016.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JUNE 2017

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JUDGE

Appearance:

Ms. Alwala for the Petitioner

Mr. Mariaria for 1st Respondent

Mr. Okweh Achiando for the 2nd Respondent