



REPUBLIC OF KENYA



KENYA LAW
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**Garama v Karisa & 3 others (Application E028 of 2023)
[2023] KESC 83 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KESC 83 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION E028 OF 2023
MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
SEPTEMBER 22, 2023**

BETWEEN

KENGA HARISSION GARAMA APPLICANT

AND

KENGA STANLEY KARISA 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

**AMINA ABUBAKAR SENG (MAGARINI CONSTITUENCY RETURNING
OFFICER) 3RD RESPONDENT**

MICHAEL THOYAH KINGI 4TH RESPONDENT

*(Being an application for stay of execution of the Judgment of the
Court of Appeal at Mombasa in Election Petition Appeal No. E001 of
2023 (Gatembu, Lesiit & Odunga JJ.A. delivered on 28th July, 2023))*

Requirements to be met before the Supreme Court could grant an order for stay of execution

The application sought the stay of execution against the judgment and decree of the Court of Appeal pending the final determination of the appeal and issuance of conservatory orders restraining the 1st respondent from certifying the position of the Member of National Assembly for Magarini Constituency as vacant, pending the hearing and determination of the appeal. The instant court reiterated that before granting an order for stay of execution, the appellant, or intending appellant, must satisfy the court that; the appeal or intended appeal was arguable and not frivolous; that unless the order of stay sought was granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it was in the public interest that the order of stay be granted.

Reported by Kakai Toili



Civil Practice and Procedure – orders – orders of stay of execution - what were the requirements to be met before the Supreme Court could grant an order for stay of execution - , No 7 of 2011, section 23A.

Brief facts

The application sought the stay of execution against the judgment and decree of the Court of Appeal delivered on the July 28, 2023 pending the final determination of the appeal and issuance of conservatory orders restraining the 1st respondent from certifying the position of the Member of National Assembly for Magarini Constituency as vacant, pending the hearing and determination of the appeal. The applicant contended that the Court of Appeal in dismissing his appeal and the 2nd and 3rd respondents' cross appeal misinterpreted the provisions of articles 81 and 86 of the of Kenya, 2010 (the Constitution) by imposing on the 2nd respondent, the Independent Electoral and Boundaries Commission (IEBC) the burden of compliance which was not contemplated by articles 81 and 86.

The applicant further argued that the impugned decision was defective for affirming the nullification of the applicant's victory despite finding that the irregularities were mostly minor and did not affect the outcome of the results. The applicant also urged that the judgment of the Court of Appeal created a vacancy, consequently the Speaker of the National Assembly was required to gazette the vacancy within 21 days of the decision to pave way for fresh elections, and in the event that fresh elections proceeded, there was a likelihood that the outcome of the appeal and the outcome of the fresh elections would be at variance, hence rendering the appeal an exercise in futility. The applicant further argued that should the court fail to grant stay and the IEBC proceed to trigger a by-election, the same would occasion the use of scarce public resources whose use would ultimately be in vain.

Issues

What were the requirements to be met before the Supreme Court could grant an order for stay of execution?

Held

1. The court under section 23A of the had jurisdiction to issue an order for stay of execution, an injunction, a stay of further proceedings or any other conservatory or interim orders, on such terms as the court may deem fit. Before the court granted an order for stay of execution, the appellant, or intending appellant, must satisfy the court that;

1. the appeal or intended appeal was arguable and not frivolous;
2. unless the order of stay sought was granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and
3. that it was in the public interest that the order of stay be granted.

2. The gist of the appeal involved a determination of the proper interpretation of the provisions of articles 81 and 86 of the and section 83 of the on the two-prong test before nullification of elections to determine whether the election for the Member of National Assembly in Magarini Constituency was conducted in accordance with the principles and whether the irregularities by the 2nd and 3rd respondent were sufficient enough to nullify the elections. The applicant's appeal also addressed the principles of the burden of proof to be applied in elections petitions. The appeal was arguable and not frivolous.

3. The impending and imminent execution of the impugned decision of the Court of Appeal would constrain the applicant to seek re-election while at the same time pursuing his appeal with the possible consequence that the outcome of the appeal and the outcome of the fresh elections would be at variance, hence rendering the appeal an exercise in futility and a waste of judicial resources.

4. The competing claims in the matter lay in favour of public interest and good governance both running in tandem with the need to consciously deploy limited public resources. Put another way, the rational sense of balance and proportion lay not in favour of fresh elections for Magarini Constituency while an appeal was pending, rather it lay in favour of an expedited hearing of the appeal.

Application allowed.



Orders

- i. Execution of the judgment and order of the judgment of the Court of Appeal delivered on July 28, was held in abeyance pending the final determination of the appeal.
- ii. A conservatory order was issued against the IEBC from declaring the position of Member of the National Assembly for Magarini Constituency as vacant, pending the hearing and determination of the appeal.
- iii. A conservatory order was issued restraining the IEBC from setting in motion the process of election for the position of Member of the National Assembly for Magarini Constituency pending the hearing and determination of the applicant's appeal.
- iv. The Registrar was to make due arrangements for the hearing and disposal of the appeal, on the basis of priority and of the greatest frequency.
- v. Costs of the application to abide the outcome of the appeal.

Citations

Cases

1. Afam, Nathif Jama v Abdikhaim Osman Mohammed & 3 others (Petition 13 of 2014; [2014] eKLR) — Explained
2. Board of Governors, Moi High School, Kabarak & another v Malcolm Bell (Petition 6 & 7 of 2013; [2013] KESC 12 (KLR)) — Explained
3. Kidero, Evans & 4 others v Ferdinand Waititu & 4 others (Petition 18 & 20 of 2014; [2014] eKLR) — Explained
4. Lisamula vs Independent Electoral and Boundaries Commission & 2 other (Petition 9 of 2014; [2014] eKLR; [2014] 4 KLR 316) — Explained
5. Munya v Kithinji & 2 others (Application 5 of 2014; [2014] eKLR; [2014] 1 KLR 58) — Explained
6. Nduutu & 6000 others v Kenya Breweries Ltd & another (Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804) — Explained
7. Obado, Zacharia Okoth v Edward Akong'o Oyugi & 2 others (Petition 4 of 2014; [2014] eKLR) — Explained
8. Rai & 3 other v Rai & 4 others (Petition 4 of 2012; [2014] eKLR; [2014] 2 KLR 253) — Explained

Statutes

1. Constitution of Kenya (2010) — article 81 (e), 86, 163 (4) (a) — Interpreted
2. Elections Act, 2011 (Act No 24 of 2011) — section 16, 82, 83 — Interpreted
3. Elections (General) (Amendment) Regulations, 2017 (Act No 24 of 2011 Sub Leg) — part 13
4. Supreme Court Act, 2011 (Act No 7 of 2011) — section 23A — Interpreted
5. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 31, 32, 36 (1) — Interpreted

Advocates

Mr. Kevin Wakwaya & Mr. Ometo for Applicant
Mr. Wesley Gichaba & Mr. Mirab Bwire for 1st Respondent
Mr. Anyoka & Ms. Lisa Wanjohi for 2nd and 3rd Respondents
Ms. Nazi holding brief for Mr. Busiega for 4th Respondent

RULING

1. Upon perusing the notice of motion by the applicant dated August 1, 2023 and filed on August 8, 2023 pursuant to article 163(4)(a) of the [Constitution](#) and rule 31 and 32 of the [Supreme Court Rules, 2020](#) seeking the following orders:
 1. Spent



2. Spent.
 3. This court be pleased to issue a stay of execution against the judgment and decree delivered on the July 28, 2023 pending the final determination of the appeal.
 4. This court be pleased to issue conservatory orders restraining the 1st respondent from certifying the position of the Member of National Assembly for Magarini Constituency as vacant, pending the hearing and determination of the appeal.
 5. This court be pleased to issue conservatory orders restraining the 1st respondent from announcing or conducting the elections for Member of National Assembly in Magarini Constituency pending the hearing and determination of the appeal.
 6. Costs of this application be in the cause.
2. Upon perusing the grounds on the face of the application, supporting affidavit sworn on August 1, 2023 by Hon Harrison Garama Kombe and written submissions dated August 1, 2023 and filed on August 8, 2023 wherein the applicant contends that on July 28, 2023, the Court of Appeal sitting in Mombasa delivered its judgment in Election Appeal No E001 of 2023 dismissing both the appeal lodged by the applicant and the cross appeal lodged by the 2nd and 3rd respondents; dissatisfied with the impugned judgment, the applicant has immediately preferred an appeal to this court and seeks stay of execution of the impugned judgment pending determination of his appeal; that the applicant's appeal has been lodged in compliance with the court's jurisdictional mandate under article 163 (4)(a) of the *Constitution* and as enunciated in the cases of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Pet No 3 of 2012 (2012) e KLR and *Evans Kidero & 4 others v Ferdinand Waititu & 4 others*; SC Petition 18 & 20 of 2014 [2014] e KLR as it seeks to challenge the superior court's interpretation of the general principles of the electoral system under article 81(e) of the *Constitution* and the 2nd respondent's obligation during voting under article 86 of the *Constitution*; that the main issue for determination by the two superior courts was centred around whether the election for the Member of National Assembly for Magarini Constituency was conducted in accordance with the principles set out in articles 81 and 86 of the *Constitution*. On whether the appeal is arguable and not frivolous, the applicant contends that the Court of Appeal misinterpreted the provisions of articles 81 and 86 of the *Constitution* by; imposing on the 2nd respondent the burden of compliance which is not contemplated by articles 81 and 86 of the *Constitution* since the court required that there be absolutely no errors, substantive or administrative, in order for an election to be said to have complied with article 81 of the *Constitution* by elevating explained human errors to the pinnacle of opaqueness and non-transparency that warrant the voiding of elections; by introducing a standard and burden of proof unknown in law when it held that the explained irregularities did not affect the results yet a holistic analysis at those irregularities would lead to only one conclusion, that it was a shambolic process; by finding that the explained errors in eight (8) polling stations warranted the nullification of elections in the entire 191 polling stations majority of which were not affected by the explained human errors and/or irregularities; and.
 3. Upon considering the applicant's further argument that the impugned decision is defective; for affirming the nullification of the applicant's victory despite finding that the irregularities were mostly minor and did not affect the outcome of the results and in doing so, abandoned the two part test established by section 83 of the *Elections Act* pursuant to articles 81 and 86 of the *Constitution*; for making findings that were factually inconsistent with the testimony and evidence placed before the High Court; and, the decision seeks to unjustifiably sanction the punishment of candidates who contest an election for any human errors made by the 2nd respondent ,which errors had no impact on



- the outcome of the election. Further, on whether the appeal would be rendered nugatory without the grant of stay, the applicant urges that the 2nd respondent is obliged by law to soon declare the impugned position as vacant, pursuant to section 16 of the *Elections Act*; the judgment of the superior court created a vacancy, consequently the Speaker of the National Assembly is required to gazette the vacancy within 21 days of the decision being July 28, 2023 to pave way for fresh elections, and in the event that fresh elections proceed, there is a likelihood that the outcome of the appeal and the outcome of the fresh elections will be at variance, hence rendering the appeal an exercise in futility and a waste of judicial resources.
4. Finally, on whether it is in the public interest to grant the order of stay, the applicant contends that, should the court fail to grant stay and the 2nd respondent proceeds to trigger a by-election, the same will occasion the use of scarce public resources whose use will ultimately have been in vain. The applicant cites the decisions in *Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 others*; SC Petition 4 of 2014 [2014] e KLR and *Anami Silverse Lisamula vs IEBC & 2 others*; SC Petition 9 of 2014 [2014] e KLR to urge that the prevention of wastage of public resources is sufficient public interest and ground to grant a stay of execution. Furthermore, that it is in the interest of the constituents of Magarini that they continue to have representation in the National Assembly and continue to have the projects so far commenced by the applicant carried out as the apex court determines with finality the question of whether the election carried out on August 9, 2022 was conducted in accordance with the law. The applicant relies on the decision *Nathif Jama Afam v Abdikhaim Osman Mohammed & 3 others*; SC Petition 13 of 2014 [2014] e KLR to argue that the certainty in the representation of the citizens should be maintained until the final determination by the court; and
 5. Upon perusing the 1st respondent's replying affidavit sworn on August 21, 2023 by Stanley Karisa and filed on August 22, 2023 and written submissions of even date opposing the application on the grounds that the court is not properly seized of this matter due to the applicant having filed two notices of appeal, the first dated July 31, 2023 by the firm of Messrs Mutisya Mwanzia & Ondeng Advocates and the second dated August 1, 2023 by the firm of Messrs Rachier & Omollo LLP, and with no application nor request to withdraw or strike out any of the two notices of appeal, the applicant has elected to rely only on the second notice of appeal; the two notices of appeal are in any event not valid notices contemplated under rule 36(1) of the *Supreme Court Rules, 2020*; contrary to the applicant's contentions the constituents of Magarini Constituency would wish to have a Member of National Assembly who they elect by exercising their franchise freely and there is nothing prejudicial to the applicant seeking a fresh mandate in equal footing with other candidates; it would be unfair for the applicant to continue earning a salary and other emoluments if the court were to eventually confirm the superior court's decision to annul the election of the applicant; there is nothing expensive in conducting a fresh election in comparison to denying the constituents of Magarini Constituency their democratic right to exercise and express their sovereign will to elect a person of their own choice as Member of National Assembly; prayers 4 and 5 sought against the 1st respondent are misconceived and unenforceable as he is not mandated by the *Constitution* or the *Elections Act* to conduct any election; the applicant has failed to demonstrate that he has an arguable appeal as there was no interpretation or application of the *Constitution* by either superior court save for mere references to relevant constitutional provisions; and
 6. Upon perusing the 2nd and 3rd respondent's replying affidavit sworn on August 22, 2023 by Chrispine Owiye and filed on August 29, 2023 together with written submissions of even date in support of the application contending that the applicant has satisfied the guiding principles for this court to exercise its discretionary powers; that the applicant's appeal raises issues of constitutional interpretation and application to fall within the ambit of article 163(4)(a) as it concerns interpretation of articles 81 and 86 of the *Constitution* together with section 82 of the *Elections Act* and part XIII of the *Elections*



(General) Regulations, 2017. On whether the appeal before this court is arguable, it is contended that, as elaborated by the applicant, it is challenging the lowering of the threshold of the burden of proof set by the Supreme Court and which the Court of Appeal had not accommodated while interpreting article 81 of the *Constitution*; the test for nullification of an election is stipulated under section 83 of the *Elections Act* read alongside articles 81 and 86 of the *Constitution* that an election cannot be nullified other than on grounds of irregularities that substantially affect the results; that the elections of Magarini Constituency were conducted in accordance with the principles laid down in the *Constitution* and other statutory requirements and that the irregularities occasioned by the 2nd and 3rd respondents' conduct were not of such magnitude to have affected the results of the elections and the will of the people so as to justify annulment of the election results. On whether the appeal would be rendered nugatory, it is argued that, if the orders sought are not granted, the election machinery will be set in motion forcing the applicant to seek re-election while at the same time pursuing his appeal; the applicant's main objective in filing the application is to forestall a situation where he is forced to go through the rigours of an election when there is a possibility that his earlier election could be upheld by this court. On whether it is in the public interest that the orders of stay are granted, it is urged that the matter involves public interest issues which necessitates grant of orders that are for public good and will preserve public resources while also ensuring fidelity to the *Constitution*. It is also submitted that the 1st respondent had the onus of proving all the allegations that were raised before the trial court but has failed to plead with precision or adduce evidence to prove all the allegations before the trial court thus failing to discharge his burden as enshrined in articles 81 and 86 of the *Constitution*.

Having considered the totality of the application, responses and submissions put forth, we now pronounce as follows:

7. Appreciating that the court, under section 23A of the *Supreme Court Act* has jurisdiction to issue an order for stay of execution, an injunction, a stay of further proceedings or any other conservatory or interim orders, on such terms as the court may deem fit.
8. Considering this court's finding on its jurisdiction to grant orders of stay of execution of decrees issued by superior courts in the case of *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell*, Petition Nos 6 & 7 of 2013; [2013] eKLR and restating this court's guiding principles on grant of stay of execution orders in *Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others*, SC Application No 5 of 2014; [2014] eKLR that before this court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that;
 - i. the appeal or intended appeal is arguable and not frivolous; and that
 - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
 - iii. that it is in the public interest that the order of stay be granted.
9. Noting that the gist of the appeal involves a determination of the proper interpretation of the provisions of articles 81 and 86 of the *Constitution* and section 83 of the *Election Act* on the two-prong test before nullification of elections to determine whether the election for the Member of National Assembly in Magarini Constituency was conducted in accordance with the principles and whether the irregularities by the 2nd and 3rd respondent were sufficient enough to nullify the elections. We further take cognizance that the applicant's appeal also addresses the principles of the burden of proof to be applied in elections petitions. In our view, and in light of the facts and arguments here, we find that the appeal is arguable and not frivolous; and



10. Further noting that the impending and imminent execution of the impugned decision of the Court of Appeal would constrain the applicant to seek re-election while at the same time pursuing his appeal with the possible consequence that the outcome of the appeal and the outcome of the fresh elections would be at variance, hence rendering the appeal an exercise in futility and a waste of judicial resources; and
11. Bearing in mind that the competing claims in this matter lie in favour of public interest and good governance both running in tandem with the need to consciously deploy limited public resources. Put another way, our rational sense of balance and proportion lies not in favour of fresh elections for Magarini Constituency while an appeal is pending, rather it lies in favour of an expedited hearing of the appeal.
12. On costs, award of the same is discretionary and follows the principle set out by this court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. On this account, it is only prudent that we defer the costs to await the ultimate outcome of the appeal
13. For the aforesaid reasons we make the following orders:
 - a. The notice of motion dated August 1, 2023 and filed on August 8, 2023 by the applicant be and is hereby allowed.
 - b. Execution of the judgment and order of the judgment of the Court of Appeal delivered on 28th July, be held in abeyance pending the final determination of the appeal.
 - c. A conservatory order shall issue forth against the Independent Electoral and Boundaries Commission from declaring the position of Member of the National Assembly for Magarini Constituency as vacant, pending the hearing and determination of the appeal.
 - d. A conservatory order issue restraining the Independent and Electoral Boundaries Commission from setting in motion the process of election for the position of Member of the National Assembly for Magarini Constituency pending the hearing and determination of the applicant's appeal.
 - e. The Registrar shall make due arrangements for the hearing and disposal of the appeal, on the basis of priority and of the greatest frequency.
 - f. The costs of this application to abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM



JUSTICE OF THE SUPREME COURT

.....

S. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I.LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

