



**Waiguru & another v Karua & 2 others (Application
5 of 2018) [2018] KESC 50 (KLR) (28 March 2018) (Ruling)**

Ann Waiguru & another v Martha Wangari Karua & 2 others [2018] eKLR

Neutral citation: [2018] KESC 50 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION 5 OF 2018

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

MARCH 28, 2018

BETWEEN

HON ANN WAIGURU 1ST APPLICANT

HON PETER NDAMBIRI 2ND APPLICANT

AND

HON MARTHA WANGARI KARUA 1ST RESPONDENT

**THE INDEPENDENT AND ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

MR SEKI LEMPAKA 3RD RESPONDENT

*(Being an application for stay of execution of the Judgment and Orders
of the Court of Appeal at Nairobi (Warsame, Musinga & Ouko, JJA)
dated 2nd March, 2018 in Election Petition Appeal No. 1 of 2017)*

A Party That Sought to Challenge the Jurisdiction of a Court Before Which Were Pending Proceedings, Had To Ideally Do So Before That Court

Reported by Felix Okiri

Jurisdiction – *jurisdiction of courts – jurisdiction of the Supreme Court- whether the Supreme Court could bear matters pending before the High Court - claim challenging the jurisdiction of the High Court in the Supreme Court - whether the Supreme Court could make a determination on whether the High Court had jurisdiction to bear a matter*

Brief facts

The Applicant sought a stay of execution of the Court of Appeal’s order of March 2, 2018 allowing the Respondents’ appeal and remitting the petition to the High Court for hearing and determination on merit.



The application was based on the ground that the petition to the High Court having been filed on September 5, 2017, the six months period prescribed by article 87 (1) of the Constitution and section 75(2) of the Elections Act had expired on March 5, 2018. Consequently, the Applicant averred that, the High Court had now no jurisdiction to entertain the petition. The Applicants prayed that the instant Court be pleased to issue an *ex-parte* order of stay.

It was the Applicant's contention that the Court of Appeal had made an error in remitting the petition for hearing and determination to the High Court, when the latter had no jurisdiction to effect such an order.

Issues

1. Whether the High Court had jurisdiction to entertain a petition after the lapse of six months period prescribed by article 87 (1) of the Constitution and section 75(2) of the Elections Act
2. Whether the instant Court had jurisdiction to hear the matter

Held

1. The application before the instant Court was a unique one in that the Applicants sought to impugn the jurisdiction of the High Court during the pendency of proceedings in that Court. A party that sought to challenge the jurisdiction of a court before which were pending proceedings, had to ideally do so before that court.
2. Every superior court, when faced with a jurisdictional challenge, had the competence to determine whether it was seized with jurisdiction or not. Yet, in the instant case, the Court was faced with a situation, where the jurisdiction of the High Court was being questioned in the Supreme Court, while the same issue was live before the High Court.
3. The question before the Court was also awaiting determination by the High Court; it would have been premature for the Court to make a pronouncement in terms of the prayers in the notice of motion. Consequently, making a determination on the question of jurisdiction would have amounted to a usurpation of the jurisdiction of the High Court.
4. Any party that was to be aggrieved by the High Court's decision would not in any way be deprived of redress as he or she had recourse through the normal appellate process.
5. In view of the fact that that was an election petition, the proceedings before the High Court and appeal(s), if any, that could be preferred from its decision were to be disposed of expeditiously.

The application dismissed with no order as to costs.

Citations

Statutes

1. Constitution of Kenya, 2010
2. Elections Act

Advocates

None mentioned

RULING

A. Introduction

1. The Notice of Motion dated 9th March, 2018 seeks a stay of execution of the Court of Appeal's Order of 2nd March, 2018 allowing the respondents' appeal and remitting the petition to the High Court for hearing and determination on merit.
2. The application is based on the ground that the petition to the High Court having been filed on 5th September, 2017, the six months period prescribed by Article 87 (1) of *the Constitution* and Section 75(2) of the *Elections Act* expired on 5th March, 2018. Consequently, the applicant avers that, the High



Court has now no jurisdiction to entertain the petition. Pending the hearing of the application inter-partes, the applicants pray that this Court be pleased to issue an ex-parte Order of stay. This prayer is based on the averments in the affidavit in support of the application to the effect that, the High Court has already embarked on hearing the petition and that if an ex-parte Order of stay is not granted, the applicants' appeal would be rendered nugatory.

3. On 13th March, 2018, the application was certified urgent by Wanjala SCJ who also directed that, the file be placed before the Chief Justice for further directions. On 16th March, 2018, the Chief Justice directed the respondents to file and serve their responses to the application by Monday 19th March, 2018. The application was set down for hearing on 20th March, 2018 at 11.00 a.m.

B. The Applicants' Case

4. At the hearing, Mr. Nyamodi, counsel for the applicants, urged the Court to grant a stay of execution of the Judgment of the Court of Appeal, pending the hearing and determination of an intended appeal, Notice of which had already issued. Counsel submitted that, the High Court's jurisdiction to hear and determine the petition, had already been spent, in view of the express provisions of Section 75(2) of the *Elections Act*, as read with Article 87(1) of *the Constitution*. It was his contention that the Court of Appeal, had made an error in remitting the petition for hearing and determination to the High Court, when the latter had no jurisdiction to effect such an Order.
5. In response to a question as to whether he had raised the issue of jurisdiction, either in response to the appeal from the High Court, or, during oral submissions at the Appellate Court, Mr. Nyamodi contended that, the Court of Appeal was duty bound to bear in mind the jurisdictional question, in view of the provisions of the *Elections Act* and *the Constitution*. However, in response to a further question as to whether the issue of jurisdiction had been raised at the High Court, after the matter had been remitted by the Court of Appeal, Mr. Karani, appearing with Mr. Nyamodi for the applicants, stated that the issue had only been mentioned tangentially, and that what stood for determination on 6th of April, 2018 by the trial Judge, was the application for her recusal.
6. Mr. Nyamodi urged the Court to grant a stay of execution so as to determine the question of jurisdiction with finality. Counsel submitted that the intended appeal lay to the Court as of right under Article 163(4) (a) of *the Constitution*. Counsel further submitted that the intended appeal was not only arguable, but had met all the conditions to support a stay, as enunciated by this Court in *Munya 1*.

C. The Respondents' Case

7. Mr. Imanyara, counsel for the respondent, appearing with Hon. Karua (the 1st respondent herein) submitted that, contrary to the assertion by Mr. Karani to the effect that the jurisdictional question had only been mentioned tangentially at the High Court, the issue had not only been raised frontally by the applicants, but had been comprehensively argued and was awaiting determination by the trial Judge on 6th April, 2018. It was counsel's contention that having been canvassed fully at the High Court, it was only proper that the question of jurisdiction be determined at that forum on 6th April, 2018. Counsel further contended that the application for stay had been overtaken by events as the High Court had already assumed jurisdiction. At any rate, argued counsel, there was already a de-facto stay by the High Court until the 6th of April, 2018.
8. In response to Mr Nyamodi's argument regarding constitutional timelines, Hon. Karua submitted that the original petition she had filed at the High Court at Kerugoya had already been heard and determined, and as such, new timelines would come into play, hence, there would be no breach of the constitutional limitation.



D. Determination

9. The application before us is a unique one, in that the applicants seek to impugn the jurisdiction of the High Court, during the pendency of proceedings in that Court. It is a trite procedural principle that a party that seeks to challenge the jurisdiction of a Court before which are pending proceedings, should ideally do so before that Court. Every superior Court, when faced with such a challenge, has the competence to determine whether it is seized with jurisdiction or not. Yet, here we are faced with a situation, where the jurisdiction of the High Court is being questioned in the Supreme Court, while the same issue is live before the former.
10. Having taken into consideration the submissions of counsel for the parties, we are of the considered opinion that, as the question before us is also awaiting determination by the High Court, it would be premature for us to make a pronouncement in terms of the prayers in the Notice of Motion. Consequently, we decline to make a determination on the question of jurisdiction, as doing so would amount to a usurpation of the jurisdiction of the High Court. It goes without saying that any party that may be aggrieved by the High Court's decision, would not in any way be deprived of redress as he or she has recourse through the normal appellate process.
11. We hasten to add that, in view of the fact that this is an election petition, the proceedings before the High Court and appeal(s), if any, that may be preferred from its decision ought to be disposed of expeditiously.

E. Orders

- (i) The application for stay is hereby dismissed.
- (ii) No Order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2018.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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N. S. NDUNGU

JUSTICE OF THE SUPREME COURT



I certify that this is a true copy of the original

Registrar

Supreme Court

