



James Lusweti Mukwe v Independent Electoral And Boundaries Commission (IEBC), Benson Esuza Lumwagi & Edward Tale Nabangi [2018] eKLR (Civil Application 24 of 2018) [2018] KESC 57 (KLR) (7 September 2018) (Ruling)

James Lusweti Mukwe v Independent Electoral And Boundaries Commission (IEBC) & 2 others [2018] eKLR

Neutral citation: [2018] KESC 57 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 24 OF 2018
DK MARAGA, CJ, PM MWILU, DCJ & VP, MK
IBRAHIM, SC WANJALA & I LENAOLA, SCJJ
SEPTEMBER 7, 2018**

BETWEEN

JAMES LUSWETI MUKWE APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

BENSON ESUZA LUMWAGI 2ND RESPONDENT

EDWARD TALE NABANGI 3RD RESPONDENT

RULING

1. Before the Court is an Application dated 30th July 2018, seeking the following orders reproduced verbatim:
 1. That this application be certified urgent and that the same be heard ex-parte in the first instance.
 2. That there be a stay of execution against the Judgment and Decree of the Court of Appeal (Hon. E. M. Githinji, H.M. Okwengu & J. Mohammed JJA) delivered on 26th July 2018 pending the inter-partes hearing and final determination of this application.
 3. That there be a stay of execution against the Judgment and Decree of the Court of Appeal (Hon. E. M. Githinji, H.M. Okwengu & J. Mohammed JJA) delivered on 26th July 2018 pending the inter-partes hearing and final determination of this Petition of Appeal.



4. That a Conservatory Order be issued barring the 1st Respondent from certifying the seat of Member of National Assembly, Kabuchai Constituency vacant and proceeding to organize and or conduct a fresh election for Member of National Assembly, Kabuchai Constituency pending the hearing and determination of the instant application.
 5. That a Conservatory Order be issued barring the 1st Respondent from certifying the seat of Member of National Assembly, Kabuchai Constituency vacant and proceeding to organize and or conduct a fresh election for Member of National Assembly, Kabuchai Constituency pending the hearing and determination of the Petition of Appeal.
 6. That costs of this application be in the cause.
2. The application springs from the following summarised factual background:
- a. That following the General Elections of 8th August, 2017, the 1st Respondent, IEBC, declared the Applicant the duly elected Member of the National Assembly, Kabuchai Constituency, having garnered 18,485 votes against the 3rd Respondent's 18, 062 votes.
 - b. The 3rd Respondent was aggrieved by that declaration of results and filed an Election Petition in the High Court at Bungoma seeking to invalidate the election results.
 - c. In its judgment delivered on 28th February 2018, the High Court, (Lady Justice Abida Aroni)?, dismissed the Petition with costs, holding that the election was principally conducted in accordance with the principles in *the Constitution*, the Election Laws and Regulations; and that if there was any non-compliance with the laws and Regulations, or if there were any irregularities, the same did not materially affect the results.
 - d. The 3rd Respondent was further aggrieved with the High Court decision and preferred an appeal to the Court of Appeal.
 - e. In its decision delivered on 26th July 2018, the Court of Appeal, Githinji, Okwengu & J. Mohammed, JJA, allowed the appeal granting the following orders:
 - i. The appeal is allowed and the judgment of the Election Court dated 28th February, 2018 is set aside with costs to the appellant against the respondents.
 - ii. The Petition of the appellant dated 4th September, 2017 is allowed with costs to the appellant against the respondents.
 - iii. A declaration is issued that the election for Member of National Assembly, Kubuchai Constituency held on 8th August, 2017 was not conducted in accordance with the principles laid out in *the Constitution* of Kenya 2010 and the *Elections Act* and Regulations, rendering the results declared on 10th August, 2017 and gazetted on 22nd August, 2017 invalid, null and void.
 - iv. A declaration is issued that James Lusweti Mukwe was not validly elected as the member of National Assembly of Kubuchai Constituency during the 8th August, 2017 election and a certificate to that effect to issue to the Speaker of the National Assembly.
 - v. A fresh election to be held for election of a member of National Assembly for Kubuchai Constituency within the time stipulated by law.
 - vi. The costs of the petition and of the appeal to be shared equally by the 1st Respondent on one part and the 2nd and 3rd Respondents on the other part.



- f. That Court of Appeal judgement forms the basis of the application now before the Court.
3. The application is supported by an affidavit sworn by the Applicant on 30th July, 2018 which affidavit buttresses the grounds in the body of the application, to wit, that: the Applicant has a right of appeal under Article 163(4)(a) of *the Constitution*, section 15 of the *Supreme court Act* and Rules 9 and 33 of the Court Rules; the Supreme Court has jurisdiction to hear and determine the application. Further, that the Applicant has an arguable appeal and that if a stay is not granted, a certificate will issue declaring his election as Member of National Assembly Kabuchai Constituency null and void and the 1st respondent will proceed to hold fresh elections, which acts will render the intended appeal nugatory if successful. Finally, that it is in the public interest that the stay orders be granted to avoid the prospects of wastage of public funds on an election that might not be necessary.
 4. The Applicant's case is further amplified in his written submissions dated 3rd August 2018 and filed together with a List of Authorities and Case Digest. The crux of his submissions is that he has met the conditions for grant of stay as set by the Court in the cases of Nathif Jama Adavu vs Abdilham Osman Mohammed & 3 others [2014] eKLR and Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR.
 5. The 1st and 2nd Respondents filed a Replying Affidavit sworn by the 2nd Respondent, Written submissions and a List of Authorities in which they support the application. They submit that the conditions for grant of stay as stated by this Court have been met by the Applicant.
 6. The 3rd Respondent filed an affidavit in reply to the application sworn on 7th August 2018. In the affidavit, he opposes the application deposing that it has not met the threshold for grant of the orders sought. Particularly, he faults the Applicant of material non-disclosure of some facts and reasons why the execution of the judgment should be stayed. He submits that it has not been demonstrated, what interest the public has in the intended appeal, and that the intended appeal is frivolous and has no chance of success. Further, that the same will not be rendered nugatory. These arguments are amplified in his written submissions filed on 8th August 2018 together with the List of Authorities.
 7. Having considered the application and the contending submissions of the parties before the Court, and drawing from this Court's jurisprudence, particularly in the cases of Gatirau Peter Munya v Dickson Mwenda Kithinji and two others [2014] eKLR; and Nathif Jama Adam v Abdikhalim Osman Mohamed and three others [2014] eKLR we are of a unanimous opinion that the application meets the threshold for grant of the stay orders sought.
 8. Consequently, we make the following orders:
 - a. The Notice of Motion dated 30th July 2018 is allowed.
 - b. The judgment and decree of the Court of Appeal (Githinji, Okwengu & J. Mohammed, JJA) delivered on 26th July 2018 is hereby stayed pending the hearing and determination of the appeal.
 - c. A Conservatory Order do issue forth, barring the 1st Respondent, IEBC, from certifying the seat of Member of National Assembly, Kabuchai Constituency vacant and proceeding to organize and or conduct a fresh election for Member of National Assembly, Kabuchai Constituency pending the hearing and determination of the Petition of Appeal.
 - d. The costs of this application shall be subsumed in the appeal cause.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF SEPTEMBER, 2018.



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D.K. MARAGA

CHIEF JUSTICE/PRESIDENT OF THE SUPREME COURT

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P.M. MWILU

DEPUTY CHIEF JUSTICE/VICE PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. WANJALA

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

