



**Konchellah v Sunkuli & 2 others (Civil Application 26 of 2018)
[2018] KESC 58 (KLR) (7 September 2018) (Ruling)**

Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR

Neutral citation: [2018] KESC 58 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 26 OF 2018
JB OJWANG, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
SEPTEMBER 7, 2018**

BETWEEN

GIDEON SITELU KONCHELLAH APPLICANT

AND

JULIUS LEKAKENY OLE SUNKULI 1ST RESPONDENT

ELIJAH MBOGO 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

Supreme Court grants stay of execution of the judgment nullifying the Kilgoris Member of National Assembly elections pending hearing and determination of an appeal challenging the said judgment

Reported by Kakai Toili

Civil Practice and Procedure – affidavits - essentials of a valid affidavit - dating, signing and commissioning of an affidavit - failure to date, sign and commission an affidavit - what was the effect of failing to date, sign and commission an affidavit - Oaths and Statutory Declarations Act, sections 5 & 8.

Civil Practice and Procedure - applications - unopposed applications - effect of - duty of a court in determining an unopposed application - whether a court could automatically grant orders sought where an application was unopposed.

Brief facts

Following the General Elections of August 8, 2017, the applicant was declared duly elected Member of the National Assembly for Kilgoris Constituency. Aggrieved by the declaration, the 1st respondent filed an Election Petition at the High Court challenging it. Upon consideration of the Petition, the High Court, dismissed it in its entirety and condemned the 3rd respondent to pay costs for both the petitioner and 1st respondent.

The 1st respondent aggrieved by the High Court decision preferred an appeal to the Court of Appeal while the 2nd and 3rd respondents filed a cross-appeal against the High Court's decision condemning the 3rd respondent,



IEBC, to pay costs. The Court of Appeal allowed the appeal and dismissed the cross-appeal. Aggrieved by the Court of Appeal's decision the applicant filed an appeal challenging the decision and the instant application seeking orders that the Court of Appeal's orders be stayed pending the determination of the appeal.

Issues

- i. What was the effect of failing to date, sign and commission an affidavit?
- ii. What was the duty of a court in determining an unopposed application?
- iii. Whether a court could automatically grant orders sought where an application was unopposed.

Relevant provisions of the Law

Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya.

Section 5

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

Section 8

A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.

Held

1. The making of affidavits was governed by the Oaths and Statutory Declarations Act. An Affidavit had to clearly state the place and date where it was made and it had to be made before a Magistrate or a Commissioner for oaths. The Replying Affidavit filed by the 1st Respondent was fatally defective as the same contravened all the legal requirements for the making of an affidavit, hence it had no legal value in the instant matter. All the eight copies of the Replying Affidavit as filed in the Court Registry were not signed, commissioned and dated. Consequently, as the same were defective, it was deemed that there was no Replying Affidavit on record filed by the 1st respondent.
2. A Replying Affidavit was the principal document wherein a respondent's reply was set and the basis of any submissions and/or List of Authorities that could be subsequently filed. In the absence of the Replying Affidavit, the Written Submissions filed by the 1st respondent on August 17, 2018 were of no effect. Curiously, even the said Written Submissions were not dated, though that possibly could not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it was clear that they were substantially based and relied on the undated and unsworn Replying Affidavit.
3. There were no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. As the 2nd and 3rd Respondents had categorically stated that they did not oppose the application, the court would be excused for therefore deeming the Application as being unopposed entirely.
4. The court had a duty in principle to look at what the application was about and what it sought. It was not automatic that for any unopposed application, the court would as a matter of course grant the sought orders. It behooved the court to be satisfied that *prima facie*, with no objection, the application was meritorious and the prayers sought could be granted. The court was under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which could render the application a non-starter. There was no such jurisdictional issue in the instant application. Hence the court proceeded to consider the facts as against the jurisprudence for grant of stay orders set by the court.
5. The applicant demonstrated that he had an arguable case, particularly whether his election could be nullified on a singular ground that there was a violation of article 86(a) of the Constitution by virtue of criminal diversion of ballot boxes from one polling station, when those votes were not factored in in the final declaration of results.



6. If the orders sought were not granted the appeal would be rendered nugatory. The workload of the court was not a legal basis for grant of any conservatory orders. The instant application met the threshold for grant of stay orders.

Application allowed

Orders

- i. *Notice of motion application dated August 8, 2018 allowed.*
- ii. *Execution of the judgment of the Court of Appeal delivered on July 31, 2018 in Election Petition Appeal No. 11 of 2018 at Nairobi and the Order derived therefrom stayed pending the hearing and determination of the Appeal.*
- iii. *A conservatory order issued restraining the 3rd respondent, Independent Electoral and Boundaries Commission, from announcing, gazetting or conducting fresh elections in Kilgoris Constituency for a Member of the National Assembly pending the hearing and determination of the appeal.*
- iv. *A conservatory order issued restraining the Speaker of the National Assembly from giving notice to the 3rd respondent, Independent Electoral and Boundaries Commission, of the occurrence of the vacancy in Kilgoris Constituency for Member of the National Assembly pending the hearing and determination of the appeal.*
- v. *Costs of the application to abide the appeal.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Elections Act
3. Oaths And Statutory Declarations Act

Advocates

None mentioned

RULING

1. Before the Court is a Notice of Motion Application dated 8th August 2018 which seeks the following Orders, re-produced verbatim:
 - (1) This application be certified urgent, and heard ex-parte in the first instance or in such manner as the Court may direct.
 - (2) Pending the inter partes hearing and final determination of this application, there be a stay of execution and/or suspension of the Court of Appeal Judgment and the Order derived therefrom dated 31st July, 2018.
 - (3) Pending the inter partes hearing and final determination of the Petition, there be a stay of execution and/or suspension of the Court of Appeal Judgment and the Order derived therefrom dated 31st July, 2018.
 - (4) Pending the hearing and determination of this application, a conservatory order does issue restraining the 3rd Respondent from certifying the seat for the Member of the National Assembly for Kilgoris Constituency vacant.
 - (5) Pending the hearing and determination of the Petition, a conservatory order does issue restraining the 3rd Respondent from certifying the seat for the Member of the National Assembly for Kilgoris Constituency vacant.



- (6) Pending the hearing and determination of the application, a conservatory order do issue restraining the 3rd Respondent from announcing, gazetting, or conducting fresh elections in Kilgoris Constituency for a Member of the National Assembly.
- (7) Pending the hearing and determination of the Petition, a conservatory order do issue restraining the 3rd Respondent from announcing, gazetting, or conducting fresh elections in Kilgoris Constituency for a Member of the National Assembly.
- (8) Pending the hearing and determination of the application, a conservatory order do issue restraining the Speaker of the National Assembly from giving notice to the 3rd Respondent of the occurrence of the vacancy in the Kilgoris Constituency.
- (9) Pending the hearing and determination of the Petition, a conservatory order do issue restraining the Speaker of the National Assembly from giving notice to the 3rd Respondent of the occurrence of the vacancy in the Kilgoris Constituency.
- (10) Any other or further order that this Honourable court may consider appropriate and just to grant in the circumstances.
- (11) Costs occasioned by this application be costs in the cause.

2. The application emanates from the following factual background, to wit:

- (a) That following the General Elections of 8th August, 2017, the Applicant was declared duly elected Member of the National Assembly for Kilgoris Constituency, having garnered a total of 23,812 votes against the 1st Respondent who garnered 17, 160 votes, among other contestants.
- (b) This declaration aggrieved the 1st Respondent who filed an Election Petition in the High Court at Narok challenging it.
- (c) Upon consideration of the Petition, the High Court, Muya, J, in a judgement delivered on 27th February, 2018 dismissed it in its entirety holding that the Petitioner (1st Respondent herein) had failed to prove his case on either of the two limbs stated in section 83 of the [Elections Act](#). The 3rd Respondent, IEBC, was condemned to pay costs for both the Petitioner and 1st Respondent capped at Kshs. 2.5 million for each.
- (d) The 1st Respondent was further aggrieved by the High Court decision dismissing his Petition and preferred an appeal to the Court of Appeal advancing 29 grounds of appeal which grounds the Court of Appeal narrowed into eleven (11) only. On their part, the 2nd and 3rd Respondents filed a Cross-Appeal against the High Court's decision condemning the 3rd Respondent, IEBC, to pay costs.
- (e) In a Judgment delivered on 31st July, 2018, the Court of Appeal (Makhandia, Musinga & Kairu) allowed the Appeal and dismissed the Cross-appeal, giving the following particular orders:
 1. That the appeal is allowed.
 2. Save for the order on costs, we have found were rightly awarded, the judgment of the High Court rendered on 27th February 2018 is otherwise set aside.
 3. In substitution we declare that the 1st Respondent was invalidly elected to the position of Member of National Assembly for Kilgoris Constituency and the declaration of the results was invalid, null and void.



4. The 3rd Respondent is hereby directed to organize and conduct a fresh parliamentary election in Kilgoris Constituency in strict conformity with the Constitution and the Elections Act.
 5. The Certificate issued by the election court pursuant to section 86 of the Elections Act is hereby recalled and set aside and substituted with a certificate that the said 1st Respondent was not validly declared as having been elected member of the National Assembly for Kilgoris Constituency on the 8th August 2017.
 6. The Cross -appeal fails and is dismissed with costs
 7. The 1st Respondent shall pay the appellant costs of this appeal to be taxed, but shall not exceed Kshs. 1,000,000. Similarly the 2nd and 3rd Respondents shall pay the Appellant costs of this appeal and cross-appeal, to be taxed, but not to exceed Kshs. 1,000,000.
- (f) It is this Court of Appeal Judgment that has aggrieved the Applicant and forms the basis of this Application now before the Court.
3. The application is premised on the grounds in support of the application, in the body of the application, which are amplified in the Applicant's Supporting Affidavit sworn on 8th August 2018, to wit, inter alia: that under Article 101(4) of the Constitution, whenever a vacancy occurs in the office of a Member of the National Assembly, a by-election must be held within ninety (90) days of the occurrence of the vacancy; that it is impossible for this Court to hear and determine the Applicant's Appeal within 90 days unless this Court stays the nullification order of the Court of Appeal; that the Speaker of the National Assembly is required to notify the Independent Electoral and Boundaries Commission that a vacancy has arisen in Kilgoris Constituency within 21 days from 31st July, 2018; that the constitutional timelines are inflexible and cannot be extended by this Court, hence the need to preserve the subject matter by issuing appropriate conservatory orders; that the applicant has lodged a Notice of Appeal, petition of appeal and the Record of Appeal in the Supreme Court; that IEBC (3rd Respondent) is under legal obligation to commence by-elections at Kilgoris Constituency, unless stopped by the Court; and that if a by-election is conducted it will render the applicant's appeal nugatory should he succeed in the appeal.
 4. Directions were given in this matter and the Applicant filed his Written Submissions and List of Authorities and Case Digest dated 8th August, 2018. On his part, upon being served with the application, the 1st Respondent filed a 'Replying Affidavit' by Julius Lekakeny Ole Sunkuli, the 1st Respondent, and Written Submissions on 17th August, 2018. On their part, during the mention before the Deputy Registrar of the Court on 17th August, 2018, the 2nd and 3rd Respondents indicated that they were not opposing the application; hence they filed no document in Court.
 5. In his submissions, the Applicant urges that his application has met the legal criterion set in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR for grant of preservative orders in electoral disputes, that is, the applicant must satisfy the Court that: he has an arguable appeal, the appeal will be rendered nugatory in the absence of the stay orders; and public interest favours the grant of stay orders.
 6. As regards the 1st Respondent, upon embarking on consideration of his 'Replying Affidavit', it came to the notice of the Court that the said affidavit is not signed, dated or commissioned. This posed the question to the Court: what is the effect of an affidavit that is not signed by the person who is said to be the deponent, not dated and/or commissioned by a Commissioner for Oaths/or magistrate?



7. The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

Further, Section 8 states:

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”

Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.

8. We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.
9. A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely.
10. Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court.
11. This Court's jurisprudence for grant of stay orders is well stated 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, which Munya case, the applicant referred to. We are satisfied that the Applicant has demonstrated that he has an arguable case, particularly whether his election could be nullified on a singular ground that there was a violation of Article 86(a) of *the Constitution* by virtue of criminal diversion of ballot boxes from one (1) polling station, when those votes were not factored in in the final declaration of results.



12. While we also agree with the Applicant that if the orders sought are not granted the appeal will be rendered nugatory, we hasten to add that we disabuse the Applicant's contention at paragraph 33 of his submissions that "given the case backlog in the Supreme Court, it is reasonably foreseeable that the fresh election will be conducted before the Court renders its final verdict on the pending appeal." The workload of the Court is not a legal basis for grant of any conservatory orders. We also wonder the authority and basis of the Applicant's assertion that the Supreme Court has a backlog! Be that as it may, we are of a unanimous decision that the Application meets the threshold for grant of stay orders.
13. Consequently, we make the following orders:
- (1) The Notice of motion application dated 8th August, 2018 is allowed.
 - (2) The execution of the judgement of the Court of Appeal delivered on 31 July, 2018 in Election Petition Appeal No. 11 of 2018 at Nairobi, and the Order derived therefrom be and are hereby stayed pending the hearing and determination of the appeal.
 - (3) A conservatory order do and is hereby issued restraining the 3rd Respondent, Independent Electoral and Boundaries Commission, from announcing, gazetting, or conducting fresh elections in Kilgoris Constituency for a Member of the National Assembly pending the hearing and determination of the appeal.
 - (4) A conservatory order do and is hereby issued restraining the Speaker of the National Assembly from giving notice to the 3rd Respondent, Independent Electoral and Boundaries Commission, of the occurrence of the vacancy in Kilgoris Constituency for Member of the National Assembly pending the hearing and determination of the appeal.
 - (5) Costs of this application to abide the appeal.

Orders accordingly

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

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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

.....

N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA



JUSTICE OF THE SUPREME COURT

