



**Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling)**

*Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR*

Neutral citation: [2015] KESC 2 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
CIVIL APPLICATION 36 OF 2014**

**WM MUTUNGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & NS NDUNGU, SCJJ**

**DECEMBER 15, 2015**

**BETWEEN**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ... APPLICANT**

**AND**

**JANE CHEPERENGER ..... 1<sup>ST</sup> RESPONDENT**

**UNITED REPUBLICAN PARTY ..... 2<sup>ND</sup> RESPONDENT**

**IRINE KIMUTAI CHESANG ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to file Notice of Appeal, stay of contempt of Court proceedings filed against the Chairman of the Applicant, and stay of execution of the Judgement and Orders of the Court of Appeal, pending hearing and determination of an intended appeal to the Supreme Court, against the Judgement and Orders of the Court of Appeal at Nairobi (Nambuye, Mwilu and Ouko, JJA) issued in Civil Appeal No. 200 of 2013, on 20th December, 2013)*

**Supreme Court rules on the rationale of preliminary objections**

*The applicant filed an application for extension of time to file notice of appeal, stay of contempt of court proceedings filed against the chairman of the applicant among other orders. The 1st respondent subsequently raised objection on point of law that the application was incompetent; bad in law; vexatious and an abuse of court process and should be struck out with costs. The Supreme Court ruled on the rationale of preliminary objections.*

Reported by Kipkemoi Sang

**Civil Practice and Procedure** - preliminary objection - rationale of preliminary objections-what was the rationale of preliminary objections.



**Civil Practice and Procedure** - intended appeals - arguments negating an intended appeal at the preliminary stage - whether the argument seeking to render the intended appeal nugatory could be argued at the preliminary stage.

**Civil Practice and Procedure** - extension of time - extension of time to file a notice of appeal out of time - issues of law and/or facts - whether the question at the preliminary objection stage as to the extension of time to file a notice of appeal out of time raised a pure question of law-what law related to the issue of an application seeking an order of extension of time to file a notice of appeal, and to the question of such an order being overtaken by events.

### **Brief facts**

The applicant filed an application for extension of time to file notice of appeal, stay of contempt of court proceedings filed against the chairman of the applicant, and stay of execution of the judgment and orders of the Court of Appeal, pending hearing and determination of an intended appeal to the Supreme Court, against the judgment and orders of the Court of Appeal at Nairobi. The 1<sup>st</sup> respondent subsequently raised objection on point of law that the application was incompetent; bad in law; vexatious and an abuse of court process and should be struck out with costs. The respondent *inter alia* relied on the grounds that: the application was already overtaken by events and the intended appeal had been rendered nugatory. She further accused the applicant of being indolent and guilty of laches.

### **Issues**

- i. Whether the question at the preliminary objection stage as to the extension of time to file a notice of appeal out of time raised a pure question of law.
- ii. What law related to the issue of an application seeking an order of extension of time to file a notice of appeal, and to the question of such an order being overtaken by events?
- iii. Whether the accusation of indolence and guilt of laches directed to a party could be resolved at the preliminary stage.
- iv. Whether the argument seeking to render the intended appeal nugatory could be argued at the preliminary stage.
- v. What was the rationale of preliminary objections?

### **Held**

1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were *prima facie* presented in the pleadings on record.
2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. In the instant case the prayer for consideration of extension of time to file a notice of appeal out of time tied with a claim that the issue had been overtaken by events was a factual issue, to be established by evidence from both parties. Therefore, the court was unable to dispose of the question, without first evaluating evidence from the parties. It raised no pure point of law on its own.
3. The blame of indolence and guilt of laches could only be resolved while hearing the application itself for the extension of time. It made no valid ground for raising a preliminary objection. Without the filing of a notice of appeal, there can be no expressed intention to appeal. To invite the court to rule that the intended appeal would be rendered nugatory at that juncture, had the effect of precluding a possible-appellant from the process of appellate justice, even before he or she reaches the decision to appeal. The instant case did not raise any reasonable grounds of appeal, and/or had no constitutional dimensions, or any matters of general importance devolving to the Supreme Court's jurisdiction.



4. The true preliminary objection served two purposes of merit:
  - a. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
  - b. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.

*Preliminary objection disallowed. 1<sup>st</sup> Respondent to bear all costs*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

*Mr Makokha*

*Mr Ndettoh*

*Mr Terer*

## **RULING**

DIVISION -I Background

PARA 1

The applicant, the Independent Electoral and Boundaries Commission (IEBC), filed an application to this Court on 16<sup>th</sup> September, 2014 seeking the following Orders:

SUBPARA (i)

that this application be certified as urgent for purposes of granting prayers 2 and 3 herein;

SUBPARA (ii)

that a conservatory Order of stay of the Judgement and Orders of the Court of Appeal issued in Civil Appeal No. 200 of 2013, on 20<sup>th</sup> December, 2013 do issue pending the hearing and determination of the application herein inter partes;

SUBPARA (iii)

that a conservatory Order of stay of the proceedings in the Court of Appeal in Civil Application No. NAI 140 of 2014 (UR 113 of 2014) do issue pending the hearing and determination of the application herein inter partes;

SUBPARA (iv)

that the Court be pleased to extend time and to grant leave to the applicant to lodge its notice of appeal, and serve the same upon the respondents within 7 days;

SUBPARA (v)

that there be stay of execution of the entire Judgement and Orders of the Court of Appeal in Civil Appeal No. 200 of 2013, of 20<sup>th</sup> December, 2013 pending the hearing and determination of the applicant's intended appeal to this Court;

SUBPARA (vi)



that there be a stay of the proceedings in the Court of Appeal in Civil Application No. NAI 140 of 2014 (UR 113 of 2014 pending the hearing and determination of the applicant's intended appeal to this Court;

SUBPARA (vii)

that the costs of, and incidental to this application abide the result of the said appeal;

SUBPARA (viii)

any other Order that this Court may deem fit to grant.

PARA 2.

This application came up for hearing on 19<sup>th</sup> February, 2015, before a two- Judge Bench of this Court: Tunoi & Ibrahim, SCJJ. On this day though, it emerged that most of the prayers in the application were spent, save for one: the prayer for extension of time to file a notice of appeal. However, the 1<sup>st</sup> respondent signalled her desire to file a preliminary objection to the application, particularly on the prayer for extension of time to file a notice of appeal. Leave was granted for the filing of such a preliminary objection.

## **II The Preliminary Objection**

3. The preliminary objection was filed on 20<sup>th</sup> March, 2015, and it is the subject of this Ruling. The 1<sup>st</sup> respondent raised objection on points of law: that the application was incompetent; bad in law; vexatious; and an abuse of Court process, and so should be struck out with costs. Her grounds were as follows:

the Orders sought by the applicant having already been overtaken by events, are spent, and therefore the motion and the intended appeal have been rendered nugatory, and are purely academic, as the Court is not in a position to grant them; the applicant is indolent and guilty of laches, as shown by the inordinate delay in moving the Court – which delay has not sufficiently been explained, so as to warrant favourable discretion from the Court; the intended petition of appeal, annexed to the application, is devoid of merit, as it seeks to question the jurisdiction of the Court of Appeal— a point not raised or canvassed during the hearing of Appeal No. 200 of 2013, in that Court; the applicant's intended appeal is a misapprehension of the Constitutional provisions, and the derivative statute law— such as the IEBC Act; the Elections Act; the Election (General) regulations 2012; and the Political Parties Act; the applicant's intended appeal raises no constitutional issue meriting interpretation or application.

## **III Submissions**

### **1<sup>st</sup> Respondent-Objector**

4. The preliminary objection was canvassed before this Court on 22<sup>nd</sup> September, 2015. Learned counsel Mr. Ndettoh, for the 1<sup>st</sup> respondent, made submissions on the grounds enumerated in the notice of preliminary objection. He relied on the written submissions filed on 23<sup>rd</sup> March, 2015.
5. Counsel urged that the notice of motion was fatally defective, bad in law, and an abuse of Court process, especially as it came more than 10 months after the date of the Judgement.
6. Counsel submitted that appeals to the Supreme Court from the Court of Appeal are either, appeals as of right, or appeals upon certification as involving matters of general public importance. However, the intended appeal (annexed at page 301 of the application), counsel urged, though expressed as falling under Article 163(4)(a) of the Constitution, ill-fits the design of that provision.



7. Counsel urged that the application lacks merit, as the intended appeal raises no issues of constitutional interpretation and/or application; and it was his contention that the Orders sought have been overtaken by events, as gazetteement has already taken place.

### **Applicant—in Response**

8. In response to the preliminary objection, IEBC filed its submissions on 19<sup>th</sup> April, 2015. It was the applicant's contention that under Rule 53 of the Supreme Court Rules, the Court has a discretion to extend time; and the applicant invoked *Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others*, Sup. Ct Application No. 16 of 2014, [2014] eKLR, on the principles for extension of time, by this Court's discretion.
9. The applicant urged that this matter (the intended appeal) raises issues of general public importance, as it bears questions of law that merit attention regarding party-list, and the proper mandate of the applicant. The applicant submitted, besides, that no prejudice will be occasioned to any of the respondents, were an extension of time to be granted.
10. On the propriety of the appeal, the applicant denied that it had been overtaken by events. It was submitted that this was not a hypothetical case, as there existed a dispute that is live, between the 1<sup>st</sup> respondent and the applicant. Counsel urged that even were the matter to be held to be essentially academic, the Courts have determined in the past, that a hypothetical matter is nonetheless capable of raising issues of general public importance (*R v. Secretary of State for the Home Department, ex parte Salem* [1999] 1 All ER 42). Learned counsel urged that the issues in this matter involve public authority and public law, as they relate to the electoral processes, and the role of IEBC in the nomination of candidates to special county seats; that the intended appeal raises triable issues, which should be resolved by the judicial process.
11. Learned counsel Mr. Makokha, for the applicant, acknowledged that the remaining prayers in the application were indeed now spent, and the only prayer remaining is that for extension of time to file a notice of appeal.

### **3<sup>rd</sup> Respondent**

12. The 3<sup>rd</sup> respondent expressed agreement with the submissions of the applicant, IEBC. Represented by learned counsel Mr. Terer, she submitted that the preliminary objection should be disallowed, and the application allowed. She contested the priority of raising the jurisdictional question at this early stage, as the objector had done.

### **IV Analysis**

13. The single issue for determination is whether the preliminary objection by the 1<sup>st</sup> respondent has merit, and should be allowed.
14. As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v.*



West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

15. The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).
17. On that basis, two questions emerge for this Court’s consideration: what pure point of law has the 1<sup>st</sup> respondent raised in her preliminary objection? Are the facts in issue, settled?
18. It is to be recalled that only one prayer remains, for consideration by this Court: for extension of time to file a notice of appeal out of time. The preliminary objection targets this single prayer. The first ground in the preliminary objection is that the Orders sought have been overtaken by events. Prima facie, this is a factual issue, to be established by evidence from both parties. The Court is unable to dispose of the question, without first evaluating evidence from the parties. It is relevant, at the same time, that this ground raises no pure point of law, on its own. One is left asking: what law relates to the issue of an application seeking an Order of extension of time to file a notice of appeal, and to the question of such an Order being overtaken by events? Hardly any normative prescription exists, in that regard.
19. The objector casts blame at the applicant for being indolent, and guilty of laches. Such a charge comes at an inapposite moment, as the Court can only resolve it while hearing the application itself, for extension of time. Thus, such a charge makes no valid ground for raising a preliminary objection. It is to be noted, besides, that delay is a factual issue, that calls for a tendering of evidence. The same is true as to the question whether or not the intended appeal will be rendered nugatory—and such are matters for consideration during the hearing of an application for extension of time. If it is argued at this stage, that the intended appeal will be rendered nugatory, then a question arises: which intended appeal? Without the filing of a notice of appeal, there can be no expressed intention to appeal. Consequently, to invite this Court to rule that the intended appeal will be rendered nugatory at this juncture, has



the effect of precluding a possible-appellant from the process of appellate justice, even before he or she reaches the decision to appeal.

20. The foregoing line of analysis attenuates the burden of the objector's submission, that the intended petition of appeal is devoid of merit—as it does not raise any reasonable grounds of appeal, and/or has no constitutional dimensions, or any matters of general importance devolving to this Court's jurisdiction. We are in agreement with the 3<sup>rd</sup> respondent's submission, that whether or not the intended appeal raises constitutional issues, is a question which can only be properly raised and determined once the appeal itself is filed, after filing of a notice of appeal— if and when leave is granted for that purpose.
21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.

#### **V. Determination, And Orders**

22. In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest.
23. We would make the following Orders:
  - (a) The 1<sup>st</sup> respondent's preliminary objection of 20<sup>th</sup> March, 2015 is disallowed.
  - (b) The 1<sup>st</sup> respondent shall bear the costs of the applicant and the third respondent.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of December, 2015.**

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**W. MUTUNGA**

**CHIEF JUSTICE & PRESIDENT JUSTICE 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**

.....

**S. 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

**DEPUTY REGISTRAR**

**SUPREME COURT OF KENYA**

