IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KIAGE & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 231 OF 2013 (UR 166/2013)

BETWEEN

PATRICK MWEU MUSIMBA……..……..……..….. APPLICANT

AND

RICHARD N. KALEMBE NDILE.....1ST RESPONDENT

CAROLINE MWELU MWANDIKU……..…..…2ND RESPONDENT

GEDI ARALE NOOR…….3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……....4TH RESPONDENT

(***An application for stay of execution of the Judgment of the High Court of Kenya at Nairobi by (Majanja, J.) dated 15th August, 2013***

in

ELECTION PETITION NO. 1 OF 2013 & 7 OF 2013 (CONSOLIDATED)

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RULING OF THE COURT

1. Following the 4th March 2013 National Assembly Election for Kibwezi West Constituency, **Patrick Mweu Musimba** (Applicant) was said to have garnered a total of 17,174 votes. He was closely followed by **Richard Kalembe Ndile** (1st respondent) with 16,975 votes and by **Caroline Mwelu Mwandiku** (2nd respondent) in the 3rd position with a modest figure 4,111 votes. The applicant herein was thus declared the winner of the election and the duly elected Member of Parliament for Kibwezi West Constituency. He had contested as an Independent Candidate.

2. Both the 1st and 2nd respondents were dissatisfied with the declared results and moved to the High Court sitting as an Election Court in Machakos and filed two petitions. The first respondent's petition was **Election Petition No. 1 of 2013** while that of the 2nd Respondent was

Election Petition No. 7 of 2013.

The two petitions were consolidated and heard together with the Court (Majanja, J) rendering the judgment on 15th August 2013. In allowing the petition, the learned Judge made the following orders, inter alia:-

> ***"That the applicant herein was not validly elected as the Member of National Assembly for the Kibwezi West Constituency; that fresh elections be held for the Kibwezi West Constituency; and that the certificate in accordance with Section 86 of the Elections Act, 2011 be issued."***

3. Aggrieved by the said judgment and consequent decree, the applicant filed a Notice of Appeal to this Court pursuant to **Rule 75 of this Court's Rules** on 27th of August 2013. He then filed the notice of motion dated 29th August 2013 under **Rule 5(2)(b)** of the **Court of Appeal Rules** seeking several orders. As at the time this application came up for hearing before us, several of the orders sought had already been spent and so Mr. Mari, the learned counsel for the applicant informed us that he was only pursuing the prayer for injunction to restrain the 4th respondent, **Independent Electoral and Boundaries Commission (IEBC)** from conducting fresh elections in Kibwezi Constituency pending the hearing and determination of the applicant's appeal.

4. The grounds on the face of the application only state that the applicant's appeal has "*substantial merit and has good chances of success";* and that "*if the orders of stay of execution or injunction sought are not granted, then the appeal shall be rendered nugatory and the applicant would suffer substantial loss"*. These are the same grounds that have been expounded in the applicant's supporting affidavit sworn on 30th August 2013.

5. The respondents have filed affidavits in opposition to the application. In his replying affidavit sworn on 16th September 2013, Kalembe Ndile (1st respondent) in the relevant part depones that the application has already been overtaken by events as the seat has already been declared vacant. He also confirms that he has already offered himself for nomination as a candidate in the by-elections which have already been set to take place on 17th October, 2013.

He depones further that a lot of time and expense has gone into the preparations for the forthcoming by-election and any injunctive orders issued at this time would occasion injustice to the candidates. He maintains that the intended appeal is frivolous and not arguable at all and so this application ought to be dismissed.

6. On her part, Caroline Mwelu, (2nd respondent) in her replying affidavit sworn on 12th September 2013, implores this Court to dismiss this application.

Her depositions are similar in content and purport to those of the 1st respondent and we do not find it necessary to repeat them. She has nonetheless pointed out that if the by-election is stopped, ***"there will be a breach of constitutional provisions since the same should be held within sixty days from the date the writ was issued."***

We wish to observe however, that by dint of **Article 101(4)(b)** of the **Constitution of Kenya 2010,** the by-election is supposed to be conducted within ninety (90) days of the occurrence of the vacancy and not sixty days as deposed by the 2nd respondent.

7. The replying affidavit sworn by the 3rd respondent on his behalf and on behalf of the 4th respondent also seeks the dismissal of this application saying that the date for the by-election has already been gazetted. According to the annexed gazette notice No. 12382 of 28th August, 2013 the said by-election is supposed to be held on 17th October 2013.

8. In his oral submission before us, Mr. Mari, learned counsel for the applicant, urged that whereas the learned Judge dismissed all allegations made by the petitioners in their petitions, he erroneously went ahead and allowed the same solely on the basis of the scrutiny of votes which had been conducted. It was learned counsel's contention that in ordering scrutiny in areas where no irregularities has been alleged, the learned Judge contravened **Rule 33(4)** of the **Election Petition Rules**. This, according to learned counsel, is an arguable point that should be allowed to be ventilated on appeal. This appears to be the fulcrum of his appeal.

Rule 33(4) of the **Elections Petitions Rules** provides that,

> ***"the scrutiny shall be confined to the polling stations in which the results are disputed…"***

9. It was learned counsel's submission that since the learned Judge ordered scrutiny in areas where the votes were seemingly not disputed, that should be sufficient ground for appeal. He did not nonetheless pinpoint the areas in which these results were not disputed but where the court unnecessarily and on its own motion ordered scrutiny.

10. In answer to these submissions, Mr. Makundi, learned counsel for the 1st respondent referred the Court to **Section 80(1)(d)** of the **Elections Act** which mandates the court to

> ***"decide ALL matters that come before it without undue regard to technicalities"*** (emphasis supplied)

According to Mr. Makundi, this rule allows the Court to hear and determine all relevant matters placed before it by the parties.

11. Mr. Musyoka, learned counsel for the 2nd respondent, on the other hand submitted that there was no breach of **Rule 33(4)** of the **Elections Act** by the court as the petitioner had laid proper basis for scrutiny of the votes in question before scrutiny was ordered. It was his view that the question as to whether there was sufficient evidence to warrant a recount is actually a question of fact which by dint of **section 85 A of the Elections Act** is outside the jurisdiction of this court which is only supposed to deal with appeals on points of Law. It was Mr. Musyoka's contention that the intended Appeal raises no points of law and that this application is therefore for dismissal.

12. This position was supported by Mr. Abuya, learned counsel for the 3rd and 4th respondents who termed the applicants appeal frivolous and urged us to dismiss this application in order to allow the people of Kibwezi go to the polls on 17th October, 2013 to determine who it is they want to represent them in Parliament.

13. We have considered the application before us, the rival affidavits of all the parties and oral submissions of all counsel. We have also benefitted from the list of authorities filed by counsel for the applicant.

14. The law applicable in respect of applications under **Rule 5(2)(b)** of the **Court of Appeal Rules** is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective. See **Githunguri vs Simba Credit Corporation Ltd 2 [1988] KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982-88] 1088,** and **Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd [2006] eKLR 1.**

15. So, then, has the applicant satisfied these twin principles? On the arguability part, we note that the applicant's main thrust is on the fact that the Judge ordered scrutiny in areas where there was no dispute and thus made a grave error of law.

We have pointed out earlier on and as rightly submitted by learned counsel for the applicant that **Rule 33(4)** of the **Election Petition Rules** permits the court to order scrutiny in polling stations where results are disputed. Learned counsel's contention was that the Judge was wrong in ordering scrutiny of votes in areas where there were no disputes.

16. Our attention was nonetheless drawn to a part of the impugned Judgment at page 16 thereof where the Judge observed:-

> ***"…Mwelu (2nd respondent) requested the court to declare that Musimba was not validly elected. She also seeks orders that there be a recount, re-tally and scrutiny of votes cast in Kibwezi West Constituency."***

Clearly therefore, the 2nd Respondent herein had requested for a scrutiny and recount of votes in the entire constituency.

It cannot therefore, be true that it was the learned Judge who ordered the said scrutiny *suo moto*. We hasten however to state that even if the learned Judge had done so, he was still clearly within the law – both under **Sections 80(1)(d)** and **82(1) of the Elections Act**.

17. Even if no party had requested for scrutiny of votes in some of the polling stations as claimed, the court would still be in order if it ordered for scrutiny *suo moto.* Moreover, the parties signed consent before the scrutiny and recount exercise and thus acceded to the entire process. The applicant cannot therefore denounce the process only because the results were not favourable to him. Evidently therefore, nothing much turns on that point which, as observed earlier appears to be the main point advanced by the applicant as arguable.

18. The other pertinent issue which was raised by learned counsel for the 2nd respondent is whether indeed there is a valid appeal before the court. According to Mr. Musyoka, the intended appeal from what can be gleaned from the draft memorandum of appeal raises no points of law whatsoever and dwells on matters of fact. He urged us to find that the intended appeal contravened **Section 85A** of the **Elections Act** which states unequivocally that such an appeal from the High Court shall lie to this Court on matters of law only.

19. Whereas we must eschew making definitive findings that may affect the appeal or embarrass the bench that will hear the intended appeal, we must say that we are not persuaded that the applicant herein has an arguable appeal.

Having so found, and bearing in mind that the twin principles are adjunctive and not disjunctive, we do not even need to go into the nugatory aspect of the appeal.

20. We also wish to point out that several other persons who are not party to the intended appeal have been cleared to contest in the forthcoming by-election and they have expended time and other resources preparing for the same. They would be grossly prejudiced if the said by-election was to be postponed. So too, would be the thousands of Kibwezi voters who are prepared to vote for their candidate of choice come the by-election. The balance of convenience in our considered view tilts heavily against the applicant herein.

21. For the foregoing reasons, we find that this application falls way short of the threshold required for an application of this nature to succeed. We find the same devoid of merit and dismiss it accordingly with costs to the respondents.

Dated at and delivered at Nairobi this 4th day of October, 2013.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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