



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS

ELECTION PETITION NO. 4 OF 2013

SAMUEL KAGO MUNGAI KIMARI 1ST PETITIONER
TITUS BWEYA OMUKA 2ND PETITIONER

VERSUS

MILIAM WANJIRU 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

DANIEL KITHAMA MUTISO 3RD RESPONDENT

RULING

By an application dated 28th May 2013 brought under certificate of urgency, the 3rd respondent seeks orders under section 79(a) of the Elections Act 2011, Rules 2, 4, 5(1)(a)(b), 5(2); Rule 12(6); Rule 17(1) (d) of the Elections (Parliamentary and County Elections) Petitions Rules 2013, Order 19 rule (3); Rule 6 of the Civil Procedure Rules 2010 and the inherent power of the court. The application seeks the following orders;

1. (Dispensed with)
2. That leave be granted to the applicant to file an appeal
3. That there be a temporary stay of execution of the ruling and orders made by this court on the 17th May, 2013 in the suit herein, the resultant order pending the hearing and the determination of this application inter-parties.
4. That there be a temporary stay of execution of the ruling and orders made by this court on the 17th May, 2013 in this suit herein, the resultant order pending the hearing and the determination of an appeal from the ruling and the resultant orders made on the 17th May 2013.
5. That, this honourable court be pleased to grant any other relief it may deem fit and expedient to grant in the circumstances.
6. That costs of this application do abide with the appeal

The application is based on eight grounds which I will hereby replicate in this ruling. Thus;

1. That the applicant has preferred to file an appeal from the ruling delivered on the 17th May 2013 herein to the High Court and which appeal is competent and has appreciable chances of success.

2. That if execution of the said ruling and consequential order is not stayed, the aforesaid appeal will be rendered nugatory and will be merely an academic exercise.
3. That, this matter is slated for mention on the 28th May 2013 (date past) when subsequent direction on hearing and date of the petition will be issued.
4. That in the premises it is only fair and just that there be a stay of execution of the ruling dated 17th May 2013 and consequential order subject herein pending the interparties hearing and determination of the instant application and/or the hearing and determination of the preferred appeal, as the case would be;
5. That an order for the commencement of the trial pursuant to rule 19 of the legal notice No. 44 of 2013 has not issued yet, and it is imperative that the issues raised by the applicant and the proffered appeal herein be first determined.
6. That the proffered appeal is not frivolous and has merit with high chances of success.
7. That if the petitioner proceeds to the hearing of the petition the 3rd respondent/applicant will be greatly prejudiced and its proffered appeal shall be rendered nugatory.
8. That it is in the interest of justice that this application is granted.

Further on, the application which is mainly for stay of execution of this court's ruling of 17th May 2013, is supported by the affidavit of the 3rd respondent DANIEL KITHAMBA MUTISO sworn on the same date as is the application and it is containing thirteen paragraphs.

On the other hand the application is opposed by the petitioners/respondents, in that application, through a replying affidavit of one Samuel Kago Mungai, who is the first petitioner herein. It contains seventeen paragraphs and he swears it on his own behalf and on behalf of the 2nd petitioner, citing at paragraph 2 thereof, that he has the 2nd petitioner's authority to do so.

Mr. Muchoki for the 1st and 2nd respondents reported that they received the amended petition as served on them by the petitioners pursuant to the court's directions as made on 17th May 2013, among other directions. They did not however file any response to the instant application under determination but at the commencement of the oral arguments by applicant's counsel and petitioners' counsel, Mr. Muchoki told this court that he was not opposing the application in question. That, in simple terms, means he is associating himself with it in its entirety.

I have considered the application as made. It is vital to note here that it is a reactive application in nature. I say so because it flows from the directions that this court made at the pre-trial conference on the 17th May 2013. It is the 3rd respondent/applicant's contention that whatever directions the court made and its resultant orders ought not be allowed to be complied with because the Election Act at section 76(4) does not allow amendment, unless for the purposes of questioning a return or an election upon an allegation of an election offence, there is a small window to amend with the leave of the election court within the time within which the petition questioning the return or the election offence has to be filed.

Learned counsel for the 3rd respondent further argued that the time to file this petition had since lapsed when this court made directions for the amendment in question regarding the general manner in which the relief sought was framed in the petition and the court directed that it be specified to refer to the related elections of County Ward Representative of Ngei Ward under contest.

On 17th May 2013, this court had also directed that the two witnesses who had only recorded statements do format them into affidavits by having them attested to by a commissioner for oaths. This direction also aggrieved the 3rd respondent who seeks leave to appeal against it.

It is the learned advocate's position that under rule 12(1) of the Election Petition Rules, a petitioner is mandated to file both his petition alongside the supporting affidavits of his/her witnesses. Therefore that because petitioner's two witnesses having filed statements only and not affidavits those witnesses be locked out and their statements be disregarded. Again, counsel submits that the court's directions were beyond the mandate given by the Act and by the rules.

Mrs. Owino for the petitioners submitted that this application for leave to appeal and for stay of execution of the court's ruling under attack, is mischievous, misconceived and an abuse of the due process of the law. That the applicant in the memorandum of appeal is questioning the court's discretion yet the court did exercise the same within the law as is donated to it under rules 4 and 5 of the election petition rules.

In the cited case of AMINA HASSAN AHMED –VS- RETURNING OFFICER MANDERA COUNTY & 2 OTHERS, EP NO. 4 OF 2013 in the High Court at Garissa but decided in Nairobi by Justice D. A. Onyancha on 22nd May 2013, leave was sought for by the petitioner therein to amend the petition, so as to include vital information as is required under rule 10(1) of the Election Petition Rules, 2013. I will distinguish that case with the instant case at hand, where at the pre-trial conference stage no application had been made by either party but preliminaries reared their heads touching on the general manner in which the reliefs sought for were framed and also that two witnesses' statements had not been made under oath hence a prayer was orally made by the lead counsel for the 3rd respondent herein to have them expunged from the record. This court being aware of the strict timelines involved in handling election petitions, decided to exercise its discretion towards the ends of justice and gave the directions that have now aggrieved the applicant herein. As to whether the applicant has an arguable case, that I will leave for High Court to determine.

Regarding the affidavits herein, this court had directed that the named two witnesses who had not recorded statements under oath, do so for them to participate in the hearing for the petitioners' case. In the cited case of Amina (supra) leave was sought by petitioners to file and reply by way of further affidavits, to bring on record more and further election voting and results date. It is vital to distinguish the circumstances. In this case, the court on its own motion directed that the statements be formatted without changing the contents thereof. Therefore without being prejudicial and the same was a judicious function under rule 4(1) of the Election Petitions Rules by legal notice No. 54 of 15th March 2013.

In any event, I find at rule 12(4) of the said rules that a witness who fails to file an affidavit as is required under rule 12(1) thereof, can still be allowed to give evidence, if the leave of the court is sought. This implies that failure to file an affidavit by a witness is not an incurable procedural defect as the 3rd respondent/applicant would want it to appear such that when the court gave directions on the cure, I find, I acted judiciously and within the provisions of the rules. However the 3rd respondent is free to litigate that issue up to the highest appellate ladder as this court is not final in the decisions it makes.

As to whether stay of the ruling ought to be granted, learned counsel for the petitioners submitted that if the court is mindful in granting leave to appeal then the proceedings herein ought not to stall but that both the appeal and these proceedings can be handled simultaneously. On this issue counsel for applicant argued that he believed the appeal would be given first priority over other matters hence not likely to interfere with the timelines provided for in the constitution and in the Act.

Under Article 105(2) of the constitution of Kenya and under section 75(2) of the Election Act of 2011, the time to hear and determine an election petition is prescribed as six months of the date of lodging the petition. Mrs. Owino urged me to take note of the motions and procedures involved in filing and hearing of appeals generally. It is her submission that by the time this appeal will be dealt with time to hear and determine this petition will have lapsed and that it is her clients who will have suffered prejudice. She further argued that this being a subordinate court, any orders made by the higher appellate court will be binding on it hence there will be no prejudice suffered by the applicant if no stay is granted.

The principles of stay of execution in ordinary civil matters are to be found in Order 42 rule 6 of Civil Procedure Rules 2010 where generally sufficient cause has to be shown by the applicant. The latter must also demonstrate substantial loss likely to be suffered and the application for stay pending appeal must be made without undue delay. Finally security for the due performance of the decree sought to be stayed must be given.

The 3rd respondent's counsel cited principles as enunciated in the case of Balala and others –Vs- Githere and others (2005) 2 E.A. 25 (CAK). The advocate for the petitioners urged me to distinguish those

principles as being applicable only under rules 5(2)(b) of the court of Appeal Rules for stay of execution. I am persuaded by that argument and also drawing from the cited case of *Amina* (supra) and from the strict constitutional timelines and statutory timelines already referred to before, I find that this petition is not like any ordinary case at common law nor in equity. So being a statutory proceeding, neither the common law nor the principles of equity shall apply except the rules which the Election Act makes to be applicable.

I have gone through the rules with a tooth comb and nowhere is it provided for that proceedings in this court can be stayed while applicant prefers an appeal against any of its rulings. A reading of rules 34 sub-rules 1-10 thereof gives no such provision. It is my considered view that given the nature of what election petitions are, the drafters of the constitution of Kenya and of the Election Act of 2011 intended that electoral disputes be determined in a timely manner.

In the case of HON. CLEMENT KUNGU WAIBARA & ANOTHER –VS- HON. FRANCIS KIGO NJENGA & THREE OTHERS EP NO. 15 OF 2013 at H.C MILIMANI NAIROBI Justice Mwongo, R.M discussed the constitutional principles that guide parliamentary legislation with regard to electoral disputes. He summarized the principles thus;

- The principle of timely settlement of electoral disputes
- The principle of time-bound dispute initiation; and
- The principle of ease of service of petitions.

Flowing from this summary is the essence of timelines. I therefore find that if I am to stay the ruling of this court which gave pre-trial directions in this matter then chances are high that this petition which is time bound to be concluded within since its filing date of 19th March, 2013 may be beaten. I will remain faithful to the letter of the constitution and of the Election Act regarding when this petition ought to be heard and determined.

Reasons wherefore the application by the 3rd respondent is hereby granted to the extent that leave is granted, within the next 14 days of this ruling, to file an appeal against this court's ruling delivered on the 17th May, 2013. However the prayer for stay of execution of the aforesaid ruling is hereby declined and costs of the application will be in the cause herein.

The court will therefore move on to set a time table for the hearing of the petition herein. Orders accordingly. Right of appeal 14 days.

R. A. OGANYO (MRS.)

SENIOR PRINCIPAL MAGISTRATE

30.5.13

Court – Ruling delivered this 30th May, 2013.

Court clerk Obare

Mrs. Owino for petitioners

Mr. Muchoki for 1st & 2nd respondents

Mr. Kariuki for 3rd respondent

R. A. OGANYO (MRS.)

SENIOR PRINCIPAL MAGISTRATE

30.5.13

Kariuki

I request for a copy of the ruling of the court.

Order

Granted upon payment of the requisite typing fees

R. A. OGANYO (MRS.)

SENIOR PRINCIPAL MAGISTRATE

30.5.13

Further orders

Hearing is fixed from the 24th June 2013 up till the 28th June 2013. A notice will issue appropriately under rule 19 of the Election Petition Rules, a week prior to the dates as a reminder.

R. A. OGANYO (MRS.)

SENIOR PRINCIPAL MAGISTRATE

30.5.13