



**Sheikh v Hathe & 3 others (Election Petition Appeal (Application)  
38 of 2018) [2019] KESC 31 (KLR) (29 March 2019) (Ruling)**

*Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others [2019] eKLR*

Neutral citation: [2019] KESC 31 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
ELECTION PETITION APPEAL (APPLICATION) 38 OF 2018  
MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ  
MARCH 29, 2019**

**BETWEEN**

**MOHAMED ALI SHEIKH ..... APPLICANT**

**AND**

**ABDIWAHAB SHEIKH OSMAN HATHE ..... 1<sup>ST</sup> RESPONDENT**

**ABDULLAHI MOHAMED OLOW ..... 2<sup>ND</sup> RESPONDENT**

**ISAACK MUHUMED MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 4<sup>TH</sup>  
RESPONDENT**

*(Being an Application for stay of execution of the Ruling of the Court of Appeal  
at Nairobi (Visram, Nambuye, Musinga, Gatembu & Odek JJ. A) delivered  
on 19th December, 2018, in Election Appeal (Application) No. 261 of 2018)*

**A stay order cannot be granted on an issue that cannot be legitimately solved by a court**

*Before the appeal was heard on merits at the Court of Appeal, the 1st respondent filed an application seeking to strike out the applicant's notice of appeal and a preliminary objection challenging the jurisdiction of the Court of Appeal to hear the appeal. The Court of Appeal upheld the preliminary objection and struck out the notice of appeal for want of jurisdiction. Aggrieved, the applicant filed the instant application seeking stay orders against both the High Court and the Court of Appeal decisions. The court held that a stay order cannot be granted on an issue that cannot be legitimately solved by a court.*

Reported by Kakai Toili

**Civil Practice and Procedure** – suits – institution of suits – institution of suits through interlocutory applications - whether an interlocutory application could originate proceedings before the Supreme Court.



*Civil Practice and Procedure – orders – stay orders – nature of - whether a stay order can be granted on an issue that can be legitimately solved by a court.*

### **Brief facts**

Following the general election held in August 2017, the applicant was declared as the duly elected Member of the County Assembly for Abakaile ward in Daadab constituency. Aggrieved by that declaration, the 1<sup>st</sup> respondent challenged the declaration at the Chief Magistrate’s Court in Garissa. The Chief Magistrate’s Court dismissed the petition and held that the declared results reflected the will of the people. Aggrieved by that decision, the 1<sup>st</sup> respondent filed an appeal at the High Court which allowed the appeal and set aside the judgment of the Chief Magistrate’s Court and ordered the 4<sup>th</sup> respondent (IEBC) conduct a fresh election in accordance with the law.

Aggrieved by the High Court’s decision, the applicant filed an appeal at the Court of Appeal challenging the said decision. However, before the appeal was heard on merits, the 1<sup>st</sup> respondent filed an application seeking to strike out the applicant’s notice of appeal and a preliminary objection challenging the jurisdiction of the Court of Appeal to hear the appeal. The Court of Appeal upheld the preliminary objection and struck out the notice of appeal for want of jurisdiction. Aggrieved by the decision the applicant filed the instant application seeking stay orders against both the High Court and the Court of Appeal decisions.

### **Issues**

- i. Whether an interlocutory application could originate proceedings before the Supreme Court.
- ii. What was the nature of stay orders and whether a stay order could be granted on an issue that could be legitimately solved by a court?

### **Held**

1. The applicant filed the instant application without first filing a substantive appeal. The appeal was in fact a month after the filing of the application. An interlocutory application could not originate proceedings before the Court. A stand-alone application would not generally be considered as it was not predicated upon a substantive matter before the Court and remained unknown in law.
2. In the instant case, the applicant subsequently filed his petition of appeal enumerating the grounds in which the intended appeal stood and the consequential orders that he sought. The Court would not ordinarily consider the applicant’s application which was unprocedurally filed. Nonetheless, at the time the Chief Justice constituted the instant Bench, the applicant had already filed his appeal. In the interests of justice therefore, the application was deemed as properly filed in order to avoid unnecessary delay in determining it, especially considering the nature of elections petitions which were regulated by time bound procedures.
3. A stay order denoted that neither party nor interested individual nor entity was to take action until the Court had given the green light. The Court had jurisdiction to grant stay orders for the purpose of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues. Stay orders were generally temporary measures meant to preserve the subject matter of an appeal, pending the final determination of the case.
4. If the Court found that the Court of Appeal had jurisdiction to hear appeals arising from the election of a Member of a County Assembly, it would mean that the Court of Appeal wrongly struck out the applicant’s notice and record of appeal and certain consequential orders would have to be issued. Even if the appeal could be arguable, staying the Court of Appeal’s ruling was unnecessary and would serve no purpose as there was no subject matter which was required to be preserved. The Court of Appeal only struck out the notice and record of appeal without more. There was nothing to be stayed.
5. The High Court decision which nullified the applicant’s election was not the subject of instant appeal. Since the Court of Appeal found that it had no jurisdiction to hear appeals arising from the elections of the Member of County Assemblies, it did not determine the question of the validity of the election for the Member of County Assembly for Abakaile ward. As a result, the High Court decision was never



determined on appeal. Indeed, in his petition of appeal, the applicant appreciated that when he sought the prayer for the remittal of the matter to the Court of Appeal for hearing on merit. Therefore, since the question of the validity of the election of the Member of County Assembly of Abakaile ward was not before the Court, a stay order could not be granted on an issue that could not be legitimately solved by the Court.

*Application dismissed, applicant to bear the costs.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned

## **RULING**

### **A. INTRODUCTION**

1. The Application before us emanates from the Ruling of the Court of Appeal—**Election Appeal (Application) No. 261 of 2018**—in which the said Court struck out the Applicant’s Notice and Record of Appeal on grounds that the Court of Appeal had no jurisdiction to hear election petition appeals concerning membership to a County Assembly.
2. The Application, dated 20<sup>th</sup> December, 2018 and filed under a certificate of urgency is seeking the following orders:
  - (a) This application be certified urgent and allocated an early hearing date.
  - (b) Pending the hearing and determination of the Application and the intended appeal, there be a stay of execution against the Ruling of the Court of Appeal in Election Appeal No. 32 of 2018; Mohamed Ali Sheikh v. Adbiwahab Osman Hathe & 3 Others delivered on 19<sup>th</sup> December, 2018.
  - (c) Pending the hearing and determination of the Application herein and the intended appeal, a conservatory order do issue against the Speaker of the County Assembly of Garissa restraining him from declaring the seat of the Applicant vacant. (sic)
  - (d) Pending the hearing and determination of the Application herein, a conservatory order do issue restraining the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from announcing or conducting elections for Member of the County Assembly, Abakaile Ward, Garissa County.
  - (e) Pending the hearing and determination of the Application herein and the Intended appeal, this Honourable Court be pleased to issue a conservatory order to stay the execution of the judgment and decree of the High Court at Garissa delivered on 29<sup>th</sup> August, 2018 in Garissa Election Petition No. 6 of 2017; Adbiwahab Osman Hathe v. Mohamed Ali Sheikh & 3 Others.
  - (f) The Applicant be at liberty to apply for further orders and or directions as the Honourable Court may deem fit and just to grant.
  - (g) The costs of this Application be costs in the cause.



3. On 21<sup>st</sup> December, 2018, the Application was certified urgent by a single Judge of this Court (*Wanjala SCJ*) who directed the Deputy Registrar to conduct a pre-trial conference. Pursuant to those directions, the Applicant filed submissions dated 17<sup>th</sup> January, 2019, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 25<sup>th</sup> January, 2019, while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed submissions dated 24<sup>th</sup> January, 2019. On 29<sup>th</sup> January, 2019, the Chief Justice constituted this 5 Judge bench of the Court to determine the Application.
4. The Application is premised on the following summarised grounds:
  - (a) The Court of Appeal struck out the Applicant’s Record and Notice of Appeal thereby activating the execution of the judgment of the High Court dated 29<sup>th</sup> August, 2018 which had annulled the election of the Applicant and further directed the 3<sup>rd</sup> and 4<sup>th</sup> Respondent to conduct a fresh election for the position of member of County Assembly, Abakaile Ward, Daadab Constituency, Garissa County.
  - (b) The Court of Appeal declared that it had no jurisdiction to hear and determine appeals relating to members of a County Assembly arising from decisions of the High Court.
  - (c) By operation of the law, once served with the Order and decree of the High Court, the Speaker of the County Assembly of Garissa will declare the Applicant’s seat vacant.
  - (d) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents will also be obliged to commence the process of conducting a fresh election for the position of Member of County Assembly, Abakaile Ward, Daadab Constituency, Garissa County.
  - (e) In the event that the election is conducted as ordered by the Court of Appeal and in the event that the intended appeal herein succeeds, the decision of this Court will be rendered nugatory, an academic exercise and overtaken by events.
  - (f) The orders sought will not prejudice the Respondents and are in the public interest.
  - (g) The appeal is arguable and has overwhelming chances of success.

## **B. BACKGROUND**

5. Following the General Election held on 8<sup>th</sup> August, 2017, the Applicant was declared as the duly elected member of the County Assembly for Abakaile Ward in Daadab Constituency. Aggrieved by that declaration, the 1<sup>st</sup> Respondent filed an election petition—**No. 1 of 2017**—at the Chief Magistrate’s Court in Garissa. Upon hearing the matter, the Chief Magistrate (*Maundu CM*) dismissed the petition and held that the declared results reflected the will of the people of Abakaile Ward.
6. Aggrieved, the 1<sup>st</sup> Respondent filed an appeal at the High Court in Garissa—**Election Petition No. 6 of 2018**—seeking to overturn the decision of the Chief Magistrate. The High Court, (*Dulu J*) allowed the appeal, set aside the Judgment of the Chief Magistrate’s Court and ordered the Independent Electoral and Boundaries Commission to conduct a fresh election in accordance with the law.
7. Following the High Court decision, the Applicant filed an appeal at the Court of Appeal in Nairobi—**Election Petition No. 32 of 2018**—challenging the decision of the High Court to nullify the election and order a fresh election. Before the appeal was heard on merits, the 1<sup>st</sup> Respondent filed an application seeking to strike out the Applicant’s Notice of Appeal and also a Preliminary Objection challenging the jurisdiction of the Court of Appeal to hear the appeal. In a Ruling delivered on 19<sup>th</sup> December, 2018 and indicated as **Election Petition Appeal (Application) No. 261 of 2018**, the Court of Appeal (*Visram, Nambuye, Musinga, Gatembu & Odek, JJA*) upheld the Preliminary



Objection and struck out the Notice of Appeal for want of jurisdiction. As a consequence, the record of appeal filed in **Election Petition Appeal No. 32 of 2018** was also struck out.

8. Upon delivery of the Court of Appeal decision, on 21<sup>st</sup> December, 2018, the Applicant filed the present Application seeking stay Orders against both the High Court and the Court of Appeal decision. Subsequently, on 21<sup>st</sup> January, 2019, the Applicant filed a Petition of Appeal before this Court dated 18<sup>th</sup> January, 2019 seeking a reversal of the Court of Appeal decision. It is the stay application which is the subject of this Ruling.

### C. SUBMISSIONS BY THE PARTIES

9. The Applicant urges that his Application meets the conditions necessary for grant of stay. He submits that, like in gubernatorial and parliamentary elections, members of a County Assembly also have a right to a second appeal at the Court of Appeal. He thus urges that if the stay is not granted, the intended appeal will be rendered nugatory. Further, he submits that the grant of stay orders will ensure that there is proper and efficient use of public finances and hence it is in the best interest of the residents of Abakaile Ward that a stay order be granted until the present controversy is resolved.
10. On his part, the 1<sup>st</sup> Respondent opposes the Application and urges that it does not raise issues of great constitutional controversy and hence it does not meet the threshold for an appeal before this Court. He also submits that the Applicant has not identified any Articles of the Constitution that were the subject of interpretation by the Chief Magistrate's Court, the High Court or the Court of Appeal. He thus urges that the intended appeal is not arguable nor is it in the public interest to grant the orders sought.
11. On their part, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents support the Application and agree with the Applicant that the intended appeal is arguable and not frivolous. They also submit that the appeal will be rendered nugatory if a fresh election is conducted and thereafter the appeal succeeds.

### D. Analysis and Determination

12. At the outset, we note that the Applicant filed the present application without first filing a substantive appeal before the Court. The Application was in fact filed on 21<sup>st</sup> December 2018 while the appeal was filed on 21<sup>st</sup> January 2019, a month after the filing of the Application. In that regard, we have stated in the past that an interlocutory application cannot originate proceedings before the Court. (See the case of *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 Others* SC Petition No. 27 of 2014; [2014] eKLR.) Such a stand-alone application will not generally be considered as it is not predicated upon a substantive matter before the Court and remains unknown in law. In this case however, the Applicant subsequently filed his Petition of Appeal, dated 18<sup>th</sup> January, 2019 enumerating the grounds in which the intended appeal stands and the consequential orders that he seeks. We would not ordinarily consider the Applicant's Application which was unprocedurally filed. Nonetheless, we find that at the time the Chief Justice constituted this Bench, on 29<sup>th</sup> January, 2019, the Applicant had already filed his appeal before the Court. In the interests of justice therefore, we deem this Application as properly filed in order to avoid unnecessary delay in determining it, especially considering the nature of elections petitions which are regulated by time bound procedures.
13. Moving on to the merits of the Application therefore, the Applicant has urged us to grant stay of execution against the Ruling of the Court of Appeal and the Judgment of the High Court delivered on 19<sup>th</sup> December, 2018 and 29<sup>th</sup> August, 2018, respectively. In our previous decisions, we have considered the purpose of a stay order and particularly in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* SC Application No. 5 of 2014; [2014] eKLR, we held that a stay order "*denotes that no party nor interested individual or entity is to take action until the Court has given the green light.*"



Further, in the case of *Board of Governors, Moi High School, Kabarak & another v. Malcolm Bell SC Petition No. 6& 7 of 2013; [2013] eKLR* we held that we had jurisdiction to grant stay orders for the purpose of “*safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues.*”

14. It is therefore the law that stay orders are generally temporary measures meant to preserve the subject matter of an appeal, pending the final determination of the case before the Court. In this case, as is evident in the Petition of Appeal now before us—**Petition 1 of 2019**—the Petitioner (the Applicant herein) seeks to appeal the Ruling of the Court of Appeal that struck out his Notice and Record of Appeal on ground that it had no jurisdiction to hear appeals arising from the election of a member of a County Assembly. Consequently, the question for determination in the intended appeal, is whether the Court of Appeal has such jurisdiction. If we find that the Court of Appeal has jurisdiction to hear appeals arising from the election of a member of a County Assembly, it would then mean that the Court of Appeal wrongly struck out the Applicant’s Notice and Record of Appeal and certain consequential orders would have to be issued.
15. In the above context and on considering the matter, we have difficulties in granting the Applicant’s prayer for stay against the Ruling of the Court of Appeal. We say so because, even if the appeal may be arguable, which we do not dispute, staying the Court of Appeal’s Ruling is unnecessary and would serve no purpose as there is no subject matter which is required to be preserved. The Court of Appeal only struck out the Notice and Record of Appeal without more. What then is to be stayed? We submit, nothing.
16. We also note that the Applicant seeks a conservatory order against the Speaker of the County Assembly of Garissa to restrain him from declaring a vacancy in the seat of the member of County Assembly for Abakaile Ward. Further, the Applicant also seeks to restrain the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from conducting fresh elections in that Ward. More particularly, the Applicant seeks a stay of execution against the Judgment and Order of the High Court if we are to grant those orders.
17. In that regard, we are certain that, the High Court decision which nullified the Applicant’s election is not the subject of appeal before us. Since the Court of Appeal found that it had no jurisdiction to hear appeals arising from the elections of the member of County Assemblies, it did not determine the question of the validity of the election for the member of County Assembly for Abakaile Ward. As a result, the High Court decision was never determined on appeal. Indeed, in his Petition of Appeal, the Applicant appreciates the limited issue before us, when he seeks the prayer for the remittal of the matter to the Court of Appeal for hearing on merit. Therefore, since the question of the validity of the election of the member of County Assembly of Abakaile Ward is not before us, we cannot grant a stay order on an issue that cannot be legitimately solved by this Court. Accordingly, we find no basis for granting the stay orders or indeed any other orders sought.
18. The Application, on merit is therefore one for dismissal which we hereby do. As for costs, the Applicant must bear the same.

#### **E. Orders**

- (a) The Notice of Motion dated 20<sup>th</sup> December, 2018 is hereby dismissed.
  - (b) The Applicant shall bear the costs of this Application.
19. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of March, 2019.**



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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**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

*I certify that this is a true copy of the original*

Registrar, Supreme Court of Kenya

