



Wafula v National Rainbow Coalition Party Of Kenya & 93 others (Presidential Election Petition E001 of 2023) [2023] KESC 46 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KESC 46 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PRESIDENTIAL ELECTION PETITION E001 OF 2023
PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
JUNE 16, 2023**

BETWEEN

BARASA WAFULA APPLICANT

AND

**NATIONAL RAINBOW COALITION PARTY OF KENYA & 93
OTHERS RESPONDENT**

(Being an application for Orders to prosecute an Originating Motion dated 19th December 2022 as a pauper and stay from participating in demonstrations and picketing.)

The Supreme Court lacks jurisdiction to entertain any presidential election petition filed outside the stipulated time-frame.

In a presidential election petition filed out of time, the Supreme Court held that the Supreme Court could only possess the requisite jurisdiction if a presidential election petition was filed within the fixed timeframe. The Supreme Court lacked jurisdiction to entertain any presidential election petition filed outside the stipulated timeframe

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to entertain pauper briefs – jurisdiction in presidential election petitions – where an election petition had been filed after the stipulated time - whether the Supreme Court had the jurisdiction to entertain a prayer for leave to approach the court as a pauper in the first instance - whether the Supreme Court had the jurisdiction to determine a presidential election petition that was filed out of time – article 140; rule 63(2).

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to determine applications – where an application was before the court but the originating motion was not before the court - whether the Supreme Court could determine an application based on an originating motion which was not filed before the court.

Brief facts

The instant application sought leave to prosecute an Originating Motion dated December 19, 2022 as a pauper due to lack of funds for payment of court fees, and orders staying the *Azimio la Umoja* One Kenya Alliance and



all its affiliated Parties or any organization claiming through the said coalition from organizing demonstrations and picketing in any part of the country until they have proved their purported victory of 8.1 million votes as at August 9, 2022. The applicant contended that *Azimio la Umoja* had new and compelling evidence, regarding its loss in the August 9, 2022 presidential election, it should have taken that evidence to court because the demonstrations held by them were in contempt of the Supreme Court decision which upheld the result of the said election.

Issues

- i. Whether the Supreme Court could determine an application based on an originating motion which had not been presented to the court.
- ii. Whether the Supreme Court had the jurisdiction to entertain a prayer for leave to approach the court as a pauper in the first instance.
- iii. Whether the Supreme Court had the jurisdiction to determine a presidential election petition that was filed out of time.

Held

1. The Originating Motion which the applicant sought to prosecute as a pauper was not availed to court. The Supreme Court was unable to determine the objective merit of the instant application in that context. The motion would be determined separately if need be.
2. Rule 63 (2) of the, 2020 bestowed upon the Registrar the power to consider a request for waiver of fees at the first instance. The decision of the Registrar was reviewable by a single judge whose decision was final. The Supreme Court was not clothed with jurisdiction to entertain the prayer for leave to approach the Court as a pauper in the first instance.
3. Three principles guided a court in deciding an application for stay. The principles required an applicant to demonstrate, first that the appeal was arguable and not frivolous; that if the order of stay was not granted the appeal would be rendered nugatory; and finally, that it was in the public interest to grant an order of stay.
4. The instant application was filed together with Presidential Election Petition No. E001 of 2023 which was arguable. Article 140 of the vested the Supreme Court with the mandate to determine questions relating to the validity of a presidential election. The instant Presidential Election Petition was filed seven months after the declaration of the results of the presidential election. The question of timelines in the electoral process was addressed in (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 1 (KLR) (26 March 2013) (Ruling). Parties had a duty to ensure they complied with their respective timelines, and the Supreme Court had to adhere to its own. It was important to adhere to electoral timelines. The set clear timelines as to when a person could file a presidential election petition, the court was also bound by the same provisions to admit a presidential election petition within the stipulated time-frame.
5. The Supreme Court could only possess the requisite jurisdiction if a presidential election petition was filed within that fixed time-frame. The Supreme Court lacked jurisdiction to entertain any presidential election petition filed outside the stipulated time -frame.

Petition dismissed and struck out for want of jurisdiction.

Orders

No order as to costs.

Citations

Cases

1. Mbugua, George Boniface alias George Boniface Nyanja v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) (Miscellaneous Application 7 (E011) of 2021; [2021] KESC 41 (KLR)) — Explained



2. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (SC Petition No 2B of 2014 [2014] eKLR) — Explained
3. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Application 5 of 2014; [2014] eKLR) — Explained
4. Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 1 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 (Const2010) — Article 140 — Interpreted
2. Supreme Court Rules, 2011 (Act No 7 of 2011 Sub Leg) — Rule 63(2) — Interpreted

Advocates

None mentioned

RULING

Representation

Mr Benjamin Barasa Wafula acting in person

1. Upon perusing the notice of motion dated March 13, 2023 seeking leave to prosecute an originating motion dated December 19, 2022 as a pauper due to lack of funds for payment of court fees, and orders staying the Azimio la Umoja One Kenya Alliance and all its affiliated Parties or any organization claiming through the said coalition from organizing demonstrations and picketing in any part of the country until they have proved their purported victory of 8.1 million votes as at August 9, 2022; and
2. Upon reading the supporting affidavit of Benjamin Barasa Wafula sworn on March 13, 2023 wherein he contends that, if at all the Azimio la Umoja One Kenya Coalition had new and compelling evidence, regarding its loss in the August 9, 2022 presidential election, it should have taken that evidence to court because the demonstrations held by them are in contempt of the Supreme Court decision which upheld the result of the said election; and
3. Upon perusing the grounds adduced by the applicant in support of the orders sought wherein he contends that; he was employed by *Pan African Paper Mills (EA) Company Ltd* from January 3, 1983 to September 23, 2003 when his employment was terminated after he allegedly supported a government proposal to raise the Pan African Paper Mills EA Company Ltd employees' salary, who were underpaid by 32.9%, and after his termination as a Quality Control Checker and Trade Unionist, his capacity to secure employment was crippled thus affecting his financial status; and that an order of stay of the holding of any political rallies pending the determination of this Petition should be issued to stop any scandal that may occasion a state of emergency; and
4. Having considered the application before us, we opine as follows:
 1. Noting that the originating motion dated December 19, 2022 which the applicant seeks to prosecute as a pauper was not availed to court, we are unable to determine the objective merit of the present application in that context. That motion in any event will be determined separately if need be. Furthermore, rule 63(2) of the [Supreme Court Rules, 2020](#) bestows Upon the Registrar the power to consider a request for waiver of fees at the first instance. The decision of the Registrar is reviewable by a single judge whose decision



is final. Therefore, this court is not clothed with jurisdiction to entertain the prayer for leave to approach the court as a pauper in the first instance. Consequently, this prayer must fail.

2. In *Gatirau Peter Munya v Dickson Mwenda Kitthinji & 2 others* SC Application No 5 of 2014; [2014] eKLR we reiterated three principles that guide a court in deciding an application for stay. The principles require an applicant to demonstrate, first that the appeal is arguable and not frivolous; that if the order of stay is not granted the appeal will be rendered nugatory; and finally, that it is in the public interest to grant an order of stay.

3. This court in *George Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed)* Misc Application No 7 (E011) of 2021 [2021] eKLR also stated:

“It must be remembered that the question whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the court, at this stage must not make any definitive findings of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully by the court.”

4. In the above context, the application herein was filed together with Presidential Election Petition No E001 of 2023 which we have taken time to peruse and to satisfy ourselves that it is arguable.

5. Article 140 of the *Constitution* vests this court with the mandate to determine questions relating to the validity of a presidential election. It provides as follows:

“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.”

6. A perusal of the Presidential Election Petition above reveals that it was filed seven months after the declaration of the results of the presidential election.

7. The question of timelines in the electoral process was addressed in *Raila Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 1 (KLR) (26 March 2013) (ruling) where we stated:

“...The parties have a duty to ensure they comply with their respective timelines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.”



8. We also emphasized the importance of adhering to electoral timelines in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* SC Petition No 2B of 2014; [2014] eKLR where we noted:

“...The constitutional sensitivity about “timelines and timeliness”, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.”

9. Noting that the *Constitution* sets clear timelines as to when a person can file a presidential election petition, the court is also bound by the same provisions to admit a presidential election petition within the stipulated timeframe. The court can only, therefore, possess the requisite jurisdiction if a presidential election petition is filed within that fixed timeframe. As a consequence, if any presidential election petition is filed outside the stipulated time frame as is in the instant case, then it only follows that the court lacks jurisdiction to entertain the same.
10. For the foregoing reasons, we must find that we have no jurisdiction to determine the application before us well as the presidential election on which it is predicated, and therefore even as we down our judicial tools, the same must be dismissed and struck out, respectively.

5. Accordingly, we make the following orders:

- a. The application dated March 13, 2023 is hereby dismissed.
- b. The Presidential Election Petition No E001 of 2023 is hereby struck out for want of jurisdiction.
- c. There shall be no orders as to costs.

6. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023

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P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT
.....

M.K IBRAHIM

JUSTICE OF THE SUPREME COURT
.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT



.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

