

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

*(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Ojwang & Wanjala,
SCJJ)*

CIVIL APPLICATION NO. 21 OF 2018

HON. ANUAR LOITIPTIP APPLICANT

-VERSUS-

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 1ST RESPONDENT**

MOHAMED DAN ALI 2ND RESPONDENT

ALBEITY HASSAN ABDALLA..... 3RD RESPONDENT

RULING

[1] UPON reading the Application dated 17th July 2018, seeking the following orders: stay of execution of the Court of Appeal judgment delivered on 12th July 2018 which overturned the decision of the High Court, effectively nullifying the election of the Applicant as Senator of Lamu County; a conservatory order restraining the 1st Respondent, Independent Electoral and Boundaries Commission (IEBC) from certifying the senatorial seat of Lamu County vacant pending the hearing and determination of the appeal; and a conservatory order restraining IEBC from announcing or conducting senatorial elections in Lamu County pending the hearing and determination of the appeal; and

[2] HAVING considered the factual background of the matter, to wit:

- (a) That following the General Elections of 8th August 2017, the Applicant was declared the duly elected Senator of Lamu County. That aggrieved by that declaration, the 3rd Respondent filed an *Election Petition No. 8 of 2017*, at Malindi High Court, challenging that declaration; and

- (b) That having lodged the petition, the 3rd Respondent filed upto three applications, namely: a Notice of Motion dated 27th September seeking scrutiny and recount of votes; a Notice of Motion dated 9th October 2017 which sought to introduce more election materials; and a further application on 9th October, 2017, seeking leave to adduce additional evidence. That all these applications were dismissed and no appeal was preferred against them.
- (c) That in a Judgment delivered on 9th February, 2018, the High Court dismissed the 3rd Respondent's petition and held that the Lamu Senatorial election was free and fair thereby affirming the Applicant's election as the Senator for Lamu County.
- (d) That dissatisfied with the High Court's decision, the 3rd Respondent lodged an appeal at the Court of Appeal: *Election Petition Appeal No. 2 of 2018*. Interalia, the grounds of appeal included the failure by the High Court to allow the application that sought scrutiny and recount.
- (e) That in a judgment delivered on 12th July 2018, the Court of Appeal interalia faulted the High Court for not ordering scrutiny and in the ultimate held that there was substantial non-compliance with the law hence the election was not free and fair. It allowed the appeal and set aside the judgment of the High Court and directed IEBC to conduct a fresh senatorial election for Lamu County.
- (f) That the Applicant being aggrieved by that decision of the Court of Appeal has now preferred an appeal to this Court under Article 163(4)(a) of the Constitution.

[3] UPON reading the grounds on the face of the application, the Applicant's Supporting Affidavit sworn on 17th July 2018, the 1st and 2nd Respondents' Affidavit

in Response sworn by one, Mohamed Adan Ali on 23rd July 2018; and the 3rd Respondent's Replying Affidavit sworn on 23rd July 2018; and

[4] UPON considering the Applicant's Written Submissions dated 18th July, 2018 wherein; the Applicant urges that the application meets the threshold for grant of stay, in that the appeal is arguable, that it would be rendered nugatory if the stay orders are not granted; and that it is in the public interest to grant the orders sought. Particularly, it is submitted that the Court of Appeal having found in its view that scrutiny should have been granted, it should have referred the matter back to the High Court for purposes of conducting that scrutiny; and that the Court of Appeal placed reliance on further affidavits which had been struck out by the judge of the Election Court for having been filed out of time; and

[5] UPON considering the 1st and 2nd Respondents Written Submissions and List of Authorities and Digest of Cases dated 23rd July, 2018 wherein; they urge that this Court has jurisdiction to hear the appeal and that the application meets the tests for grant of stay enunciated in cases such as *Gatirau Peter Munya v. Dickson Mwenda & 2 Others*, [2014] eKLR (*Munya 1*) and *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others*, [2014] eKLR. Particularly, it is contended that the Court of Appeal exceeded its jurisdiction and exhibited bias against the 1st and 2nd Respondents; and

[6] UPON considering the 3rd Respondent's Written Submissions dated 23rd July, 2018 and the List of Authorities wherein; it is urged that the appeal does not meet the jurisdictional test of Article 163(4)(a) of the Constitution, hence this Court lacks jurisdiction to entertain the 'appeal', and that the stay application was instituted without first filing the appeal rendering the application incompetent. And that even if the Court has jurisdiction, the intended appeal raises no arguable issues and that there are no prospects of success.

[7] NOW having considered the application, we are of a unanimous decision that the application dated 17th July 2018 is merited and should be granted. The

application has met the threshold for grant of stay on the basis of the principles set by this Court in the *Munya 1* decision; for

[8] REASONS that on the face of it, the appeal prima facie raises arguable constitutional issues that warrant consideration by this Court which includes, but are not limited to:

- (a) Whether the Court of Appeal, having found that the application for scrutiny and recount should have been allowed, ought to have remitted the matter back to the High Court with an order for scrutiny and recount;
- (b) Whether in failing to refer the matter back to the High Court with an order for scrutiny, the Court of Appeal acted ultra vires its jurisdiction;
- (c) Whether in its determination, the Court of Appeal erroneously took into account evidence that was subject of affidavits that had been struck out by the High Court in Ruling(s) on interlocutory applications, which Rulings were not appealed.

[9] THAT we are satisfied that if the orders sought are not granted, the appeal will be rendered nugatory.

[10] CONSEQUENTLY, we make the following orders:

- (1) *The Notice of Motion Application dated 17th July 2018 is hereby allowed.*
- (2) *The execution of the judgement of the Court of Appeal delivered on 12th July, 2018 in Malindi Election Petition Appeal No. 2 of 2018 and the resultant orders be and are hereby stayed pending the hearing and determination of the appeal.*

- (3) *A conservatory order do and is hereby issued restraining the 1st Respondent, Independent Electoral and Boundaries Commission, from certifying the senatorial seat of Lamu County vacant pending the hearing and determination of the appeal.*
- (4) *A conservatory order do and is hereby issued restraining the Independent Electoral and Boundaries Commission from announcing or conducting senatorial elections in Lamu County pending the hearing and determination of the appeal.*
- (5) *Costs of this application to abide the appeal.*

DATED and DELIVERED at NAIROBI this ^{1st} Day of ^{August} 2018.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME

I certify that this is a true
copy of the original



[Handwritten signature] 1/8/2018

REGISTRAR
SUPREME COURT OF KENYA