



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram: Mwilu, DCJ & VP, Ibrahim, Njoki, Lenaola, Ouko SCJJ)

PRESIDENTIAL ELECTION PETITION NO. E001 OF 2023

BENJAMIN BARASA WAFULA.....APPLICANT

VERSUS

**NATIONAL RAINBOW COALITION
PARTY OF KENYA & 93 OTHERS..... RESPONDENTS**

(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)

Representation

Mr. Benjamin Barasa Wafula acting in person

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 13th March 2023 seeking leave to prosecute an Originating Motion dated 19th December 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 9th August 2022; and

[2] UPON reading the Supporting Affidavit of Benjamin Barasa Wafula sworn on 13th March 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 9th August 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 (E.A) Company Ltd from 3rd January 1983 to 23rd September 2003 when his employment was terminated after he allegedly supported a government proposal to raise the Pan African Paper Mills E. A 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 19th December 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 Kithinji & 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 13th March 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

