



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. E021 OF 2023

COUNTY ASSEMBLY OF MIGORIAPPLICANT

-VERSUS-

ISAAC ALUOCH ALUOCHIER1ST RESPONDENT

VINCENCIA AWINO KIONGE.....2ND RESPONDENT

CHARLES OWINO LIKOWA.....3RD RESPONDENT

(Being an application for a conservatory order and stay of execution of the judgment of the Court of Appeal at Kisumu (Kiage, M. Ngugi & J. Ngugi JJ. A) in Civil Appeal No. E037 of 2023 as consolidated with Civil Appeal No. E038 of 2023 delivered on 26th May 2023)

Representation

Mr. Okongo Kennedy Odhiambo for the Applicant
(Okongo, Wandago & Company Advocates)

Mr. Isaac Aluoch Alouchier Polo for the 1st Respondent.
(Acting in person)

Miss Aron for the 2nd Respondent
(Agnes Awuor, Advocate)

Mr. M. Omondi for the 3rd Respondent
(Omondi Abande & Company Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the Applicant dated 12th June, 2023 and filed on 14th June 2023, anchored on Article 163(4)(a) of the Constitution, Sections 3, 3A, 21(1)(a), 23A and 24 of the Supreme Court Act as read together with Rules 31 and 32 of the Supreme Court Rules, 2020 seeking the following orders:

- a) *The Honourable Court be pleased to issue a conservatory order staying the implementation of the orders of the High Court dated 21st February 2023, issued in **Migori High Court Constitutional Petition No. E006 of 2022**, quashing the election of the 3rd Respondent, Charles Owino Likowa and requiring the applicant, pursuant to Article 178 (1) as read with Section 21 (1) of the Elections Act, to elect its Speaker afresh within 21 days, as affirmed by the judgment of the Court of Appeal dated 26th May 2023, pending the hearing and determination of the Petition of Appeal.*
- b) *A conservatory order does issue declaring and affirming that the 3rd Respondent, Charles Owino Likowa, Speaker, County Assembly of Migori, do remain in office and continue serving and exercising functions, powers, duties and responsibilities as contemplated by Article 178 (1) of the Constitution and Section 7 (1) (b) and 9A of the County Governments Act, pending the hearing and determination of the Appeal.*
- c) *The Court be pleased to issue such further conservatory orders with respect to the position of the Speaker, County Assembly of Migori, as to ensure continuity of ordered functions at the County Assembly of Migori pending the hearing and determination of the Petition of Appeal.*
- d) *Cost of the application be provided for; and*

[2] UPON considering the grounds on the face of the application and the supporting affidavit sworn by **Edward Ouma Osoro**, a member of the County Assembly of Migori and leader of the majority party, Orange Democratic Party (ODM), where it is contended that; the ODM party sponsored the 3rd Respondent to be Speaker of the County Assembly of Migori; the 3rd Respondent garnered 51 votes out of the 59 cast and was elected Speaker of the County Assembly of Migori pursuant to the provisions of Article 178 of the Constitution and within the meaning of the provisions of the Elections Act, the County Government Act and the standing orders of the County Assembly of Migori County. However, by a judgment delivered by the High Court in **Migori High Court Petition No. E006 of 2022** and affirmed by the Court of Appeal, the superior courts quashed the election of the said Speaker and fresh elections were directed to be conducted for the position within 21 days from 21st February 2023, in effect removing the Speaker in a manner not provided for and or contemplated by the Constitution; that unless the order aforesaid is stayed, ordered functions at the County Assembly of Migori would be disrupted since the Standing Orders do not allow transaction of business following a vacancy in the office of the Speaker; public interest dictates that ordered functions at the County Assembly of Migori must continue as this appeal awaits determination; and it will serve the public interest to allow the Speaker who was elected to remain in office and to perform his duties and roles, as opposed to electing a new one, who may not be willing to leave office in the likely event the appeal succeeds and the decision of the superior courts is reversed; and

[3] UPON perusing the applicant's written submissions dated 12th June, 2023 and filed on 14th June, 2023 wherein he contended that the orders of the superior courts have the effect of reopening a constitutional process undertaken pursuant to a clear constitutional mandate; and that the court ought to pronounce itself on the issue as to whether or not a speaker is a member the County Assembly as expressed in Article 177 (1) (d) of the Constitution and Section 7 (1) (b) of the County Government Act.

[4] The applicant further submitted that the orders sought to be stayed contravened Articles 178 (1) and 196 of the Constitution, and Section 11 of the County Governments Act by allowing an electoral dispute to be transmuted into a constitutional petition and that the Court of Appeal has opened up a parallel electoral dispute resolution regime and in effect defeating the *sui generis* character of electoral dispute resolution mechanism. Similarly, the Court of Appeal failed as a first appellate court, to appreciate that no definitive findings of fact existed on record, which could be relied on to uphold the findings of the High Court; that consequently there has been a failure to defer to the principle of separation of powers and the constitutional and legislative enactments on powers, privileges and immunities of legislative assemblies as enshrined in Sections 10 and 11 of the County Assemblies Power and Privileges Act.

[5] Lastly, it is was applicant's submission that, the above issues when considered, would lend credence to the contention that the appeal is arguable and requires further input of this court; the appeal shall be rendered nugatory since conduct of a fresh Speaker's election shall be irreversible irrespective of the outcome; it is in the public interest to issue conservatory orders as the matter concerns validity of an election to an office created by the Constitution and ordered functions of a public entity and constitutional body; the respondent will not suffer prejudice if the application is allowed as prayed. The applicant has, in addition, sought to rely on the principles for the grant of conservatory orders as set out in ***Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others*** SC. Appl. No. 5 of 2014 [2014] eKLR. The applicant also cites our decisions in ***Kampala International University v Housing Finance Company Limited*** SC. Pet. (Appl.) 34 (E035) of 2022 [2023] KESC 5 (KLR) ***Praxidis Namoni Saisi v Director of Public Prosecutions & 2 Others*** SC. Civ. Appl. No. 2 of 2020 [2020] eKLR, ***Gideon Sitelu Konchellah v Julius Ole Sunkuli*** SC. Appl. No. 26 of 2018 [2018] eKLR and ***Mawathe Julius Musili v Independent Electoral & Boundaries Commission & another*** SC. Appl. No. 22 of

2018 [2018] eKLR which provide instances where this Court has issued conservatory orders staying decisions of the Court of Appeal; and

[6] **UPON** considering the 1st Respondent's replying affidavit dated 23rd June 2023 and filed on 27th June 2023 sworn by **Isaac Aluoch Polo Aluochier** wherein he contends that on account of paralysis that would be occasioned by execution of the High Court's decision as per the County's standing order number 4 (2) which provides that if the office of the Speaker falls vacant at any time before expiry of the term of the County Assembly, no business shall be transacted by the County Assembly until the election of a new Speaker, the respondent agrees that the appeal is arguable and the same may be rendered nugatory if the conservatory orders and stay of execution sought in the application is not granted. The 1st Respondent however points out that there exists a stay of execution order issued by the High Court on its judgment dated 21st February 2023, valid until the review of the judgement applications, by the 2nd and 3rd Respondents, have been heard and determined; and

[7] **UPON** considering the 2nd Respondent's Replying Affidavit dated 3rd July 2023 and filed on 3rd July 2023 sworn by **Vincencia Awino Kionge**, Clerk, County Assembly of Migori, the 3rd Respondent's replying affidavit dated 3rd July 2023 and filed on similar date sworn by **Charles Owino Likowa**, the current Speaker of the County Assembly of Migori, and their respective submissions both supporting the application and predicated on the same premise as the averments and submissions made by the applicant.

[8] **ACKNOWLEDGING** our jurisdiction to stay execution or issue any conservatory orders as enshrined under Section 23 A of the Supreme Court Act, 2011 and Rule 31 of the Supreme Court Rules, 2020.

[9] **NOTING** the principles set out in the **Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell** SC Petition No. 6 & 7 of 2013, [2013] eKLR as affirmed in **Gatirau Peter Munya v. Dickson**

Mwenda Kithinji & 2 Others, (supra) on the threshold for grant of stay of execution where this court held:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes....”

[10] FURTHER NOTING that, for an applicant to be granted conservatory he/she must satisfy to the court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that*
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.*
- (iii) that it is in the public interest that the order of stay be granted.*

[11] BEARING IN MIND that the reasons for the Court of Appeal’s decision have not been rendered and further acknowledging our decision in ***Jimi Richard Wanjigi versus Wafula Chebukati & 2 Others*** SC Appl. No. 6 (E012) of 2022 where this Court held:

*“We have already stated that what is on record is a brief judgment without reasons from the Court of Appeal. An appeal must of necessity be against the outcome of a case based on the reasons for such outcome. In the instant case, the reasons for the judgment are awaited. **There can be no basis, we think, upon which the petition as***

currently drawn can be jurisprudentially determined in the absence of reasons for judgment. This then renders any hearing of the petition before the 29th July 2022 and/or in the absence of the reasons for the judgment untenable...” [Emphasis ours]

[12] **TAKING INTO ACCOUNT** the averment made by the 1st Respondent to the effect that there exist stay orders issued by the High Court in the review proceedings of the High Court judgement, it would have been useful for the 1st Respondent to annex a copy of the order by the High Court for the Court to peruse, but we have nonetheless perused the High Court record and note as follows: the High Court (*R. Wendoh J*) on 14th March 2023 issued orders staying execution of the High Court judgement pending the hearing and determination of the applicant’s application for review dated 27th February 2023, which orders subsist until 27th September 2023, awaiting the reasons from the Court of appeal and/or this Courts directions in relation to this application.

[13] **WE OPINE** that an appeal is predicated on the reasons made by the superior courts and in the absence of reasons from the Court of Appeal, this court cannot determine the arguability of the appeal before it. We must, in the circumstances, find that the application is premature and cannot be properly canvassed as framed. Further, there being subsisting stay orders issued in the High Court, the prayers sought herein will duplicate the orders already issued at the High Court and/or in the alternative invariably have the same effect. We decline the invitation to do so.

[14] As regards costs, they follow the event and this is based on the binding decision in of ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*** Petition No. 4 of 2012; [2014] eKLR. In our view therefore, each party should bear its costs of the present application.

[15] Consequently, we make the following orders:

