



**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

*(Coram; Koome (CJ & P), Mwilu (DCJ & VP), Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)*

**PETITION (APPLICATION) NO. E014 OF 2024**

**– BETWEEN –**

**JOSEPHINE WAIRIMU KINYANJUI ..... 1<sup>ST</sup> APPLICANT**  
**FARTUN MOHAMED MUSA ..... 2<sup>ND</sup> APPLICANT**  
**AUGUSTINE NDEGWA..... 3<sup>RD</sup> APPLICANT**  
**MULKI ABDULLAHI ADAN..... 4<sup>TH</sup> APPLICANT**  
**RACHAEL KATUMBI MUTISYA ..... 5<sup>TH</sup> APPLICANT**

**– AND –**

**MARY CHARLES KALINGA..... 1<sup>ST</sup> RESPONDENT**  
**INDEPENDENT ELECTORAL & BOUNDARIES**  
**COMMISSION (IEBC) ..... 2<sup>ND</sup> RESPONDENT**  
**KHADIJA NGALA ..... 3<sup>RD</sup> RESPONDENT**  
**MELDER J NYAKITI ..... 4<sup>TH</sup> RESPONDENT**  
**KENGO JUDY CHIZI ..... 5<sup>TH</sup> RESPONDENT**  
**RUWA ELIZABETH MWANGOLA ..... 6<sup>TH</sup> RESPONDENT**  
**TERESIA B. MUOKI ..... 7<sup>TH</sup> RESPONDENT**

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*(Being an application for conservatory and stay orders against the Judgment and Order of the Court of Appeal in Mombasa (**Murgor, Laibuta & Odunga JJA**) in Election Petition Appeal No. E002 of 2023, delivered on 22<sup>nd</sup> March, 2024)*

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**Representation:**

Mr. Nyamodi for the Applicants  
(*V.A Nyamodi & Company Advocates*)

Ms. Kagori for the 1<sup>st</sup> Respondent  
(*Kagori & Kagori Advocates*)

Mr. Muyundo for the 2<sup>nd</sup> Respondent  
(*D.W Muyundo & Associates Advocates*)

**RULING OF THE COURT**

[1] UPON reading the Notice of Motion dated 28<sup>th</sup> March, 2024 and filed on 2<sup>nd</sup> April, 2024 brought pursuant to Sections 23A and 24 of the Supreme Court Act and Rules 31 the Supreme Court Rules, 2020 seeking *conservatory orders staying execution of the judgment and order of the Court of Appeal delivered on 22<sup>nd</sup> March, 2024 in Election Petition Appeal No. E002 of 2023 (Mombasa) Josephine Wairimu Kinyanjui & 4 others vs. Mary Charles Kalinga & others*, pending the hearing and determination of the intended appeal; and that costs of the application abide the result of the appeal; and

[2] UPON considering the grounds on the face of the application, supporting affidavit sworn by *Rachael Katumbi Mutisya* on 28<sup>th</sup> March, 2024 and submissions of even date filed on 2<sup>nd</sup> April, 2024, wherein it is contended that the Court of Appeal decision striking out the appeal for want of jurisdiction and declining to determine the substantive questions therein was contrary to Article 164(3)(a) of the Constitution; and the application satisfies the test for grant of conservatory orders settled in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*, Application No. 5 of 2014; [2014] eKLR (*Munya 1 Case*). Specifically, it is urged that the appeal is arguable with a high likelihood of success as it raises substantial questions of constitutional interpretation, *to wit*, whether

the Court of Appeal, in declining to hear and determine the said questions amounts to a limitation of the applicant's constitutional right of appeal under Article 164(3) of the Constitution; whether the said decision was in deliberate disregard of Articles 38(3) and 193(1) of the Constitution as read with Section 25 of the Elections Act; whether it erroneously upheld the High Court's finding thus usurping the 1<sup>st</sup> respondent's constitutional mandate under Article 88(4)(e); and whether the decision failed to adjudicate on whether a court can grant reliefs not specifically pleaded.

**[3] FURTHER**, the applicants contend that unless conservatory orders are granted, the appeal will be rendered nugatory to the applicants' prejudice. They add that, unless the orders sought are granted, the 2<sup>nd</sup> respondent will declare the seats currently held by nominated Members of the County Assembly of Kwale vacant, to their detriment. To support this assertion, they cite this Court's decision in ***George Mike Wanjohi vs. Stephen Karuiki & 2 others***, SC Application No. 6 of 2014; [2014] eKLR. The applicants also urge that it is in public interest for this Court to substantially pronounce itself on the Court of Appeal's jurisdiction to hear appeals from the High Court, emanating from the election of Members of a County Assembly pursuant to Article 164(3)(a) as read with Section 85A of the Elections Act. In support of that plea, they rely on this Court's decision in the ***Munya case [supra]***; and

**[4] HAVING** read and considered the 1<sup>st</sup> respondent's replying Affidavit sworn by *Mary Charles Kalinga* on 9<sup>th</sup> April, 2024 and submissions dated 15<sup>th</sup> April, 2014 and filed on 17<sup>th</sup> April, 2024, to the effect that that the application has failed to meet the yardstick for grant of conservatory orders, is unmeritorious, and ought to be struck out. To support this assertion, the 1<sup>st</sup> respondent urges that this Court has pronounced itself on the only issue for determination in the appeal before it, and that there are no new circumstances in law, to warrant the Court to depart from its findings. To buttress that submission, the 1<sup>st</sup> respondent cites this Court's

decision in *Hamdia Yaroï Tumaini Kombe & 2 others vs. Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission*, SC Petition No. 38 of 2018; [2019] eKLR where the issue of appeals from the election of members of County Assemblies was settled and it is therefore urged that by virtue of this pronouncement, both the Court of Appeal and the Supreme Court lack the jurisdiction to hear appeals emanating from the said election; and

[5] **UPON** reading and considering the applicants' further affidavit, rejoinder affidavit both sworn by *Rachael Katumbi Mutisya* on 22<sup>nd</sup> April, 2024 and 15<sup>th</sup> May, 2024 respectively, and submissions dated 22<sup>nd</sup> April, 2024, wherein they reiterate their grounds in support of the application, and additionally urge that there are exceptional circumstances to warrant this Court's intervention. To this end, the applicants submit that, unlike other appeals before the Court of Appeal where the appellate court had declined to assume jurisdiction, the court in this matter heard the appeal on substantive issues and having done so, ought to have decided all of them. It is also contended that the issue of application of the doctrine of *stare decisis* to defeat the instant application or appeal cannot be determined at a preliminary stage without interrogating the facts and circumstances in the appeal; and

[6] **CONSIDERING** that before the Court of Appeal, the 1<sup>st</sup> respondent had raised a preliminary objection, that is, whether the Court of Appeal had jurisdiction to hear the appeal and while upholding the preliminary objection, the appellate court struck out the appeal without delving in the determination of the substantive issue raised therein; and

[7] **COGNISANT** of the provisions of Section 23A of the Supreme Court Act, granting this Court jurisdiction to issue an order for stay of execution, an

injunction, a stay of further proceedings or any other conservatory or interim orders, on such terms as the court may deem fit; and

**[8] FURTHER CONSIDERING** this Court's guiding principles for grant of stay of execution and conservatory orders in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others***, SC Application No. 5 of 2014 [2014] eKLR; and restated in ***Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell***, Petition Nos 6 & 7 of 2013; [2013] eKLR, to the effect that before this Court grants an order for stay of execution, an appellant, or intending appellant, must satisfy the court that;

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

**[9] APPRECIATING** that in the case of ***Hamdia Yaroi Tumaini Kombe & 2 others vs. Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission***, SC Petition No. 38 of 2018; [2019] eKLR, we determined as follows:

***'[33] The foregoing analysis leads us to the conclusion that, in agreement with the Court of Appeal, that in the absence of an express statutory provision, no second appeals lie to the Court of Appeal, from the High Court, emanating from an election petition concerning the validity of the election of a member of the County Assembly. As this determination conclusively disposes of the appeal before us, we shall not consider the second issue.'***

**[10] WE NOW OPINE** as follows:

- i. Having considered the pleadings and submissions by the parties herein, it is evident that the 1<sup>st</sup> respondent's challenge on the Court's jurisdiction goes to the competency of the Motion as well as the appeal before us. It is therefore apposite to deal with this issue before delving into the merit of the Motion;
- ii. It is common ground that the Court of appeal struck out the appeal before it for want of jurisdiction, guided by our pronouncement in ***Hamdia Yaroï Tumaini Kombe & 2 others vs. Faith Tumaini Kombe [supra]***, wherein this Court determined that the Court of Appeal lacked jurisdiction to hear an appeal from the High Court, emanating from an election petition concerning the validity of the election of a member of a County Assembly;
- iii. The present Motion and appeal relate to the nomination of members of a County Assembly and it is our categorical finding that, the holding in ***Hamdia Yaroï Tumaini Kombe*** applies with equal force to disputes relating to election by nomination to County Assemblies as the process of resolving such disputes start at the magistrates' court like that of directly elected members.
- iv. Having so pronounced, it goes without saying that this Court cannot have the jurisdiction to hear the instant Motion or appeal. To sustain the Petition of Appeal having made this finding would also not be a useful venture on the part of the Court or parties, and it would be in the interest of justice and expeditious disposal of cases that we do not extend the life of such a petition which is obviously premised on a misapprehension of our jurisdiction. Consequently, we find that this Court has no jurisdiction to hear and determine ***Petition No. E014 of 2024*** or the instant application;
- v. In any event, even if this Court were to determine the merits of the instant application, it is uncontested that the Court of Appeal simply

struck out the appeal before it on grounds that it lacked jurisdiction to entertain the matter. Accordingly, the appellate court did not issue a positive order capable of execution, to warrant grant of stay or conservatory orders. The Motion would have therefore failed to satisfy the principles established in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [supra]*** and was one for dismissal.

**[11] ON COSTS**, in the case of ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate of & 4 others***, SC. Petition No. 4 of 2012; [2013] eKLR, we settled that costs follow the event and that the Court may in appropriate cases exercise discretion and decide otherwise. In the circumstances, having found that we have no jurisdiction to address any of the issues raised in both the Petition of Appeal and the Motion before us, we shall exercise discretion and order that there shall be no order as to costs.

**[12] CONSEQUENTLY**, and for reasons aforesaid, we make the following orders:

- i. The Petition of Appeal No. E014 of 2024 dated 28<sup>th</sup> March 2024 and filed on 2<sup>nd</sup> April 2024, be and is hereby struck out for want of jurisdiction;***
- ii. The Notice of Motion dated 28<sup>th</sup> March 2024 and filed on 2<sup>nd</sup> April 2024, be and is hereby struck out;***
- iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs in the appeal herein be refunded to the applicants; and***
- iv. There shall be no order as to costs.***

**[13]** It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of June, 2024**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

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

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

.....  
**S. C. WANJALA**  
**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**  
**SUPREME COURT OF KENYA**