

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Wanjala & Njoki SCJJ)

Petition No. 9 of 2014

-BETWEEN-

ANAMI SILVERSE LISAMULAAPPLICANT

-AND-

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION.....1st RESPONDENT**

**RETURNING OFFICER,
NYANDO CONSTITUENCY – DANIEL LEN.....2ND RESPONDENT**

JUSTUS GESITO MUGALI M'MBAYA.....3RD RESPONDENT

*(Being an application for stay of execution of the Judgment and orders of the
Court of Appeal at Kisumu Civil Appeal No. 51 of 2013 (J.W Onyango Otieno,
P.O Kiage & A.K Murgor JJ.A) dated 11th April, 2014)*

RULING

A. INTRODUCTION

[1] This is an application by way of Notice of Motion dated 16th April, 2014 under certificate of urgency seeking orders *inter alia* for:

- (a) Stay of execution of the whole judgment/orders of the Court of Appeal in Kisumu Civil Appeal No. 51 of 2013 dated 11th April, 2014, pending the hearing and determination of this application;*
- (b) Stay of execution of the whole judgment/orders of the Court of Appeal in Kisumu Civil Appeal No. 51 of 2013, dated 11th April, 2014, pending the hearing and determination of this appeal;*
- (c) Grant of conservatory orders against the 1st respondent from certifying the seat of Member of National Assembly for Shinyalu Constituency vacant pending the hearing and determination of the appeal before this Court;*
- (d) Grant of conservatory orders against the Speaker of the National Assembly of the Republic of Kenya or any other person from issuing writs to the 1st respondent, pending the hearing and determination of the appeal before this Court; and*
- (e) Grant of conservatory orders be issued against the 1st respondent herein from announcing and/or conducting elections for Member of National Assembly for Shinyalu Constituency, pending the hearing and determination of the appeal before this Court.*

[2] The applicant has filed an appeal seeking to set aside the whole judgment of the Court of Appeal in *Civil Appeal No. 51 of 2013* at Kisumu, dated 11th April, 2014.

B. BACKGROUND

[3] The origin of the application is the declaration, by the 1st respondent, of the applicant as the duly elected member of the National Assembly for Shinyalu Constituency in the general elections held on 4th March, 2013. The 3rd respondent filed a petition in the High Court at Kakamega, Election Petition No.6 of 2013 challenging the election results for the member of National Assembly of Shinyalu Constituency seeking a nullification of the election results. He alleged that the election was not conducted in a free, fair and credible manner as contemplated by the Constitution.

[4] The petitioner sought, *inter alia* (i) a declaration that the 1st and 2nd respondents were in breach of their constitutional obligations under Articles 10, 75, 81(e), 86, 88 and 101 of the Constitution and under Sections 59, 60, 61, 62, 74, 79, and 82 of the Elections Act, 2011; (ii) a declaration that the 1st and 2nd respondents were guilty of offences under the Elections Act; (iii) invalidation of the declaration of the applicant herein as the Member of the National Assembly for Shinyalu Constituency; (iv) an order that the applicant herein be disqualified due to contravention of the Elections Act; and (v) a declaration that the 3rd respondent herein duly won and was elected as Member of the National Assembly for Shinyalu Constituency; in the alternative an order for fresh elections for the Member of the National Assembly for Shinyalu Constituency.

[5] the parties identified three issues for determination: (i) whether the tallying exercise was properly and validly done; (ii) whether IEBC and the Shinyalu Constituency Returning Officer conducted the elections in contravention of the Constitution and the Electoral Laws; and (iii) if the elections were not conducted in accordance with the principles of the Constitution and written law, whether the said non-compliance disclosed malpractices and serious flaws in the process.

[6] The High Court (Ogola J) in a judgment dated 4th October, 2013 dismissed the petition in its entirety with costs to the respondents. It held that the elections were conducted in a free, fair and credible manner in compliance with the provisions of the Constitution and the Elections Act and the applicant was validly elected.

[7] The 3rd respondent herein aggrieved by the judgment of the trial Court, appealed at the Court of Appeal in Kisumu *Civil Appeal No. 51 of 2013*. He sought to persuade the Court that the decision of the Trial Court was erroneous and it ought to have found that the elections were not conducted in a free, fair and credible manner as contemplated by the Constitution.

[8] The Court of Appeal (Onyango-Otieno, Kiage and Murgor JJA) identified three issues which it considered central to the appeal: (i) the violence witnessed in Shinyalu Constituency, its extent and legal effect; (ii) the errors, irregularities, and malpractices alleged and whether they affected the results; and (iii) the legal correctness of the learned judge's reliance on a unilateral reconciliation of votes during the hearing in lieu of the requested scrutiny and recount.

[9] In its judgment dated 11th April, 2014 the Court of Appeal held that the applicant was not validly elected as Member of National Assembly for Shinyalu Constituency as the irregularities that attended the process leading to and the event of the election itself were such that it could not be said that the election was conducted in accordance with the law. It further issued a certificate to the 1st respondent pursuant to Section 86(1) of the Elections Act and ordered the applicant to pay the costs of the appeal and the petition in the High Court.

[10] Aggrieved by this decision the applicant filed a Petition together with a Notice of Motion under a certificate of urgency dated 16th April, 2014 in

this Court. Wanjala SCJ, having heard counsel for the applicant, Mr. Lubulellah, *ex parte*, certified the application as urgent. He issued conservatory orders to maintain the status quo until an *inter partes* hearing, before a 2-Judge bench on 8th May, 2014. The application was heard on 8th May, 2014 and after hearing the submissions by all parties on the application, Wanjala and Ndungu SCJJ, set the ruling to be delivered on notice. The stay orders previously granted were extended until delivery of this ruling.

C. THE CASES OF THE PARTIES

(i) *The Applicant*

[11] Mr. Lubulellah, Counsel for the applicant submitted that the appeal was arguable and that it was in the interest of justice to grant the conservatory orders as the applicant would suffer irreparable loss if they are not granted.

[12] Counsel submitted that the learned counsel for the 3rd respondent, Dr. John Mugalasinga Khaminwa, had no valid practicing certificate as at 14th April, 2014 for the year 2014 and as such, the proceedings in the Court of Appeal were a nullity for want of proper legal representation. He urged that there was need for the Court to clarify the law for the purpose of streamlining the legal profession in order not to allow strangers to stand and pose as advocates. He cited the case of ***Wilson Ndolo Ayah v National Bank of Kenya*** (2012) eKLR where the Court of Appeal observed that:

“Besides, the Law Society of this country publishes annually, a list of advocates who hold a practicing certificate, for general information. This is a fact we take judicial notice of as Courts are also provided with such a list for purposes of denying

audience to advocates who do not appear on the list. For that reason the public is deemed to have notice of advocates who are unqualified to offer legal service at a fee...

It is a public policy that Courts should not aid in the perpetuation of illegalities invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality..."

[13] Counsel also submitted that the petition at the High court was filed out of time in contravention of Article 87 of the Constitution which provides that:

“(1) Parliament shall enact legislation to establish, mechanism for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

[14] Counsel submitted that the election results were declared on 5th March, 2013 and the 3rd respondent filed his petition in the election court on the 9th of April 2013 which was way beyond the 28 days timeline allowed by the Constitution. As a result no Court had jurisdiction to hear the petition as no court of law could hear and determine petitions filed in contravention of the law. It was his further submission that this issue could be raised and brought before the Court in any manner; at any stage and even by the Court itself when exercising its jurisdiction *suo motu*. He urged the Court to apply the case of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*** SC Petition No. 10 of 2013 (the Joho case)

[15] Counsel submitted that the Court of Appeal exhibited bias against the applicant by addressing issues not pleaded by the 3rd respondent. He stated that the appellate Court faulted the High Court judge for failing to grant scrutiny and recount yet it was not a ground pleaded in the Memorandum of Appeal and by so doing, counsel argued, the applicant was condemned unheard. In addition the Court of Appeal exceeded its jurisdiction under Article 87(1) of the Constitution as read together with Section 85A of the Elections Act by making many factual errors. For instance he submitted, the Court made statements of and concerning evidence of violence, heavily relied on the evidence of PW1, a supporter of the 3rd respondent, which showed bias against the applicant thus denying the him a fair hearing.

[16] Counsel urged that it was in the interest of justice for this Court to grant conservatory orders as the applicant was still the Member of the National Assembly for Shinyalu constituency and if the orders were not granted action for commencement of a by-election would be put in place by the 1st respondent. He urged further, that it was a constitutional office and losing it was a substantial loss as one would be subjected to the rigorous process of campaign and election.

(ii) The 1st and 2nd Respondents Submissions

[17] Mr. Mukele counsel, for the 2nd and 3rd respondents, supported the application and filed a replying affidavit dated 6th May, 2014.

[18] Counsel urged that the Supreme Court has jurisdiction to determine the appeal as it was anchored upon the Constitution and related to constitutional issues. To support his argument counsel relied on the case of ***Gatirau Peter Munya v. Dickson Kithinji & 2 Others***, SC Application No. 5 of 2014 (the Peter Munya case).

[19] On the question of whether or not the appeal was arguable, counsel submitted that the appeal raised valid and arguable issues on the interpretation and application of the Constitution which include; whether the petition before the election Court and the appeal thereof in the Court of Appeal were in breach of the provisions of Article 87 of the Constitution and therefore a nullity; whether the election Court and the Court of Appeal had the requisite jurisdiction to hear and determine the petition and the appeal; and whether failure of the 3rd respondent's advocate to take out a valid practicing certificate during the hearing of the appeal is in contravention of the rights of the applicant and the 1st and 2nd respondents under the provisions of Article 50 of the Constitution of Kenya.

[20] With regard to the issue of the effect of the unconstitutionality of Section 76 of the Elections Act counsel referred to the cases of ***Joho Case supra***, and ***Mary Wambui Munene v Gichuki Kingara Peter SC Petition No. 7 of 2012*** (Mary Wambui Case).

[21] Counsel submitted that it was in the public interest that stay be granted as failing to grant it will result in the 2nd respondent setting a date for a by-election and roll out plans for the same. He stated that the preparation of an election involves massive expenditure of the tax payers' money

iii. The 3rd Respondent's Submission

[22] Learned counsel, for the 3rd respondent, Dr. Khaminwa, in response, filed a replying affidavit dated 18th April, 2014 together with written submissions dated 6th May 2014 opposing the application.

[23] Counsel submitted that this Court lacked jurisdiction to hear and determine the petition as it did not involve the interpretation and application of the Constitution and therefore did not lie to the Court as of right. He relied upon the case of ***Lawrence Nduttu & 6000 others V Kenya Breweries Ltd &***

Another SC Petition No. 3 of 2012 where this Court pronounced itself on the circumstances when a case can be said to involve the interpretation or application of the Constitution so as to bring it within the ambit of Article 163(4)(a) of the Constitution.

[24] Counsel implored the Court to find that the applicant did not frame his case with reasonable precision as was held in the case of ***Anarita Karimi Njeru V republic (1976-1980) 1 KLR 1272*** where the Court of Appeal was emphatic that an application citing constitutional infringements must state with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they were infringed.

[25] In response to whether the appeal raised an arguable appeal, counsel submitted that; the appeal raised mere allegations on the errors of constitutional matters made by the Court of Appeal; that the petitioner had invoked fundamental rights provisions in vain as a basis of initiating an appeal claiming that his rights had been violated by the Court of Appeal; and that the applicant was basically impugning the Courts interpretation of Section 87 of the Elections Act. Thus, stay should not be granted as it would deprive the 3rd respondent the fruits of his successful litigation.

[26] Counsel urged the Court to consider the competing rights of the parties and the rights of the constituents of Shinyalu to rightful and legitimate representation. Counsel relied upon the case of ***Peter Oduor Ngoge V Hon. Francis Ole Kaparo & others SC Petition No. 2 of 2012*** in which this Court observed that:

“In the petitioners whole argument, we think he has not rationalized the transmutation of the issue from an ordinary subject of leave-to appeal to a meritorious theme involving the interpretation or application of the Constitution such that it

becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court.”

[27] Counsel submitted that the issue of a practicing certificate was not a constitutional matter and was never an issue for determination before the Court of Appeal and a determination of the same would entail evidence being adduced by the Registrar of the High Court and the secretary of the Law Society of Kenya.

[28] Counsel urged the Court to assert the supremacy of the Constitution and the sovereignty of the people of Kenya by providing an authoritative and impartial interpretation of the Constitution and dismiss the applicant’s application in its entirety.

D. ISSUES FOR DETERMINATION

[29] The following issues present themselves for determination by this Court:

- (i) *Does the Court have jurisdiction to hear the intended petition?*
- (ii) *If yes, should the Court grant the interlocutory orders sought?*

E. ANALYSIS

- (i) ***Whether this Court has Jurisdiction to hear the intended appeal***

[30] Counsels have correctly perceived the extent of the Supreme Court’s appellate jurisdiction as prescribed in Article 163(4) of the Constitution: such appeal may lie –

- a) as of right in any case involving the interpretation or application of this Constitution; and***

b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to sub-Article 5.”

[31] This Court has already pronounced itself on the question of its jurisdiction in election petitions. In ***Peter Munya***, the Court observed that, not every election petition decision is appealable to the Supreme Court under Article 163 (4) (a) of the Constitution. This holding was reiterated in ***Fredrick Otieno Outa v Independent Electoral Boundaries & others*** SC Civil Application No. 10 of 2014 (the Outa case) where this Court observed that on the basis of Article 163(4)(a), the issues decided in the Court of Appeal, which are then brought up on further appeal, should have rested on *constitutional interpretation*. The Court proceeded to observe at paragraph 34 that:

“The Elections Act and the Regulations thereunder, are normative derivatives of Articles 81 and 86 of the Constitution; and thus, in their interpretation, a Court of law will probably be intimately involved in the interpretation of the Constitution.”

[32] Looking at the issues raised before this Court, the applicant contends that the Court of Appeal exceeded its jurisdiction under Articles 87(2) and 163(4) of the Constitution, as it did not have jurisdiction to hear the appeal. That the proceedings were a nullity as the petition in the High Court was filed outside the time limit allowed by the Constitution. On the other hand the 3rd respondent submits that the appeal raises mere allegations on the errors of constitutional matters made by the Court of Appeal. Based on this controversy, we are of the view that that the applicant is raising a constitutional issue; that this petition contravened the provisions of Article 87(2) of the Constitution. In order to address this, the Court will have to delve into the application of the Constitution hence, it can outrightly be stated that this is a constitutional matter.

[33] In our view, the issue of jurisdiction goes to the backbone of this Court's authority to hear and determine the petition and which if determined has the effect of either disposing off the entire appeal or setting down the appeal for full hearing.

[34] This Court derives its jurisdiction from the Constitution. Thus, where an argument questioning its jurisdiction is or has been raised by way of an objection and we are called upon to make a determination, we consider it as a valid constitutional question involving application of the Constitution and which ought to be disposed of *in limine*.

[35] Further, upon a reading of the decision of the Court of Appeal, the Court observed that at page 31:

“The elections did not conform to the high standards of probity and integrity set out in the Constitution. That non conformity and non- compliance with the law doubtless affected the result of the election. The co-existence of non -compliance with effect on the result must lead to such election being declared void, and we so declare.”

[36] Therefore, it is clear that the Court of Appeal finding explicitly shows that the Court appreciated the constitutional nature of election petitions. With such a finding this Court will engage its jurisdiction to hear the appeal under Article 163 (4) (a) of the Constitution.

(ii) Should Orders of Stay be granted?

[37] The second issue to be determined is whether there should be a stay of the by-election of Shinyalu Constituency pending the hearing and determination of

this appeal. In the ***Munya case***, the following three conditions were outlined, as a basis for granting stay orders in a case such as this one:

- (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 eventually to succeed, would be rendered nugatory;*
- (iii) it is in the public interest that the order of stay be granted.*

We will, in this instance, take into account the three conditions.

(a) Whether the appeal is arguable and not frivolous

[38] The applicant herein, with the support of the 1st and 2nd respondents, sets out several issues for determination in his Petition of Appeal. They may be summarized as follows:

- (a) Whether the Court of Appeal exceeded its jurisdiction under Article 87(1), 164 (3) of the Constitution and Section 85A of the Elections Act, by delving into issues of fact as opposed to issues of law;*
- (b) Whether the Court of Appeal exhibited bias against the appellant contrary to articles 25(c), 27(1) and 50(1) of the Constitution.*
- (c) Whether the Court of Appeal erred in law by demonizing the high voter turnout contrary to Article 88(4) of the Constitution.*
- (d) Whether the Court of Appeal erred in punishing the appellant in costs for matters which were solely within the control of the 1st and 2nd respondents.*
- (e) Whether the Court of Appeal erred in disregarding a nolle prosequi issued by the director of public prosecution under his constitutional mandate under Article 157 of the Constitution.*

(f) *Whether the proceedings taken at the Court of Appeal were a nullity for want of proper legal representation.*

[39] Counsel for the 3rd respondent submitted that the allegations by the applicant were of a general nature and lacked specificity as he was impugning the Courts interpretation of Section 87 of the Elections Act and it has nothing to do with the interpretation or application of the Constitution. Counsel for the applicant on the other hand reiterated the constitutional undertones that flow in the appeal. He cited various Articles of the Constitution *inter alia* Articles 10, 20(1), 38(2), 73, 81, 86(1), 88, 138(4), and 163(7) which he argued the Court of Appeal contravened.

[40] As to whether a party has formed a base for his appeal to have met the arguability test this Court in the ***Peter Munya*** case stated that the least that a party needs to show is that his appeal has taken a trajectory of constitutional interpretation or application.

[41] From the foregoing the applicant cites what he deems to be constitutional violations which were controverted by the 3rd respondent. These issues in our view are merited constitutional questions that cannot be wished away without the benefit of a hearing. They are by no means frivolous.

[42] We are of the opinion that the issues raised by the petition are, *prima facie*, arguable; and it is equally clear to us that the relevant questions have constitutional dimensions as was determined in ***George Mike Wanjohi v Steven Kariuki***, SC Civil Application No. 6 of 2014.

(b) Would the Appeal be rendered nugatory, if Orders of Stay

were not granted?

[43] Counsel for the applicant submitted that if the stay orders are not granted and the appeal succeeds the matter would be rendered nugatory as the 1st respondent would have proceeded with the preparation and conduct of a by-election in Shinyalu Constituency to the irreversible prejudice of the applicant. This proposition was supported by the 1st and 2nd respondents who urged the Court to grant conservatory orders.

[44] We hereby hold that if stay is not granted the appeal will be rendered nugatory. We wish to refer to the ***Outa case*** at paragraph 49 where this Court held that:

“it cannot be affirmed at this stage that the success of one or other of the grounds of appeal would result in an overturning of the Court of Appeal’s decision, it is foreseeable that the applicant’s success on some part of his petition could lead to an overturning of the decision, as regards the nullification of the election. Thus, it would be judicious to issue an Order of stay, to preserve the substratum of the appeal.”

(i) Is it in the Public Interest that Orders of Stay should be granted?

[45] Learned Counsel for the 1st and 2nd respondents submitted that it was in the interest of the tax payer that the order for stay be granted. As has been established by this Court an order of stay will issue in any case entailing the prospect of expenditure of public funds in an electoral exercise the outcome of which may be rendered unnecessary.

F. ORDERS

[46] Upon considering the relevant issues at this interlocutory stage, we make the following Orders as follows:

- (a) *The applicant's Notice of Motion dated 16th April, 2014 filed in Petition No. 9 of 2014 is allowed.***
- (b) *Execution of the whole judgment and/or orders of the Court of Appeal dated 11th April, 2014 is hereby stayed pending the hearing and determination of the appeal.***
- (iii) *A conservatory Order is hereby issued against the Speaker of the National Assembly or any other person, from issuing a writ to the 2nd respondent regarding the conduct of fresh election, pending the hearing and determination of the appeal.***
- (iv) *A conservatory Order is hereby issued against the 2nd respondent from announcing and/or conducting elections for Shinyalu Constituency, pending the hearing and determination of the appeal.***
- (v) *The matter shall be placed before the Registrar to allocate the earliest available dates for a hearing before a full Bench.***
- (d) *The costs of the application shall be in the cause of the appeal.***

DATED and DELIVERED at NAIROBI this 3rd June, 2014.

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT