

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
CIVIL APPLICATION NO. 6 OF 2014

(Coram: Tunoi & Ibrahim, SCJ)

GEORGE MIKE WANJOHI.....APPLICANT

VERSUS

STEVEN KARIUKI1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION2ND RESPONDENT

MILLIAM WANJIRU GACHIHI3RD RESPONDENT

(Application for stay of execution of the Judgment and Orders of the Court of Appeal of Kenya at Nairobi in Civil Appeal No.272 of 2013 (Maraga, Gatembu, & J. Mohammed JJA) dated March 18th 2014)

RULING

I. INTRODUCTION

[1] This is an application by way of Notice of Motion dated 26th March, 2014 and filed under Certificate of Urgency on 2nd April, 2014 seeking orders from this Court *inter alia*, to stay the execution of the entire judgment and order of the Court of Appeal dated 18th March, 2014 pending the hearing and determination of an appeal of the said judgment. Other prayers are contained in the Notice of Motion.

[2] The genesis of this matter is the Mathare Constituency National Assembly General Elections held on 4th March, 2013. On 6th March, 2013 after the counting and tallying of votes, the Returning Officer, Milliam Wanjiru Gachihi (3rd respondent) announced Steven Kariuki (the 1st respondent) as the duly elected Member of the National Assembly for Mathare Constituency and issued him with a Certificate of Results, contained in Form 38.

[3] The applicant contested this action and filed in the High Court **Election Petition No. 150 of 2013** seeking *inter alia* a reversal of the 3rd respondent's

purported wrongful decision, and that he be declared as the duly elected Member of the National Assembly for Mathare constituency and be issued with a certificate to that effect. This petition was subsequently withdrawn and on even date the 2nd and 3rd respondents via a letter, communicated to the 1st respondent its cancellation and their issuance of a new certificate to the applicant on the basis that it had been issued in error and that the rightful winner of the subject election was the applicant. The applicant was consequently gazetted as the duly elected Member of the National Assembly for Mathare Constituency on 13th March, 2013.

[4] This aggrieved the 1st respondent who then petitioned the High Court in **Petition No. 2 of 2013**, where he contended, *inter alia*, that the 2nd and 3rd respondents became *functus officio* upon declaring him the winner of the elections and issuing thereto a Form 38 in his favour. During trial, Kimondo, J, indeed identified this as the central issue and proceeded to make a determination on that basis.

[5] In his judgment dated 13th September, 2013 Kimondo J, based his decision on Regulation 87(9) of the Elections (General) Regulations, 2012 to determine that the announcement by the Returning Officer, and the Form 38 issued thereto were merely provisional results thus affirming the 2nd and 3rd respondents' cancellation of form 38 previously issued to the 1st respondent.

[6] The Court of Appeal overturned this finding of the High Court, relying mainly on the dictum in the Supreme Court's decision in **Hassan Ali Joho and another v Suleiman Said Shahbal, (The Joho Decision)** Supreme Court Petition No.

10 of 2013, for a categorical principle that a Certificate in Form 38 declares the winner of the election and terminates the mandate of the Returning Officer who acts on behalf of the Independent Electoral & Boundaries Commission. The court also observed that it could not determine the winner of the subject election and thus ordered that fresh elections be held for the Member of the National Assembly for Mathare Constituency.

[7] Aggrieved, the applicant now seeks reprieve from this Court on grounds that the Court of Appeal decision violates several provisions of the Constitution. Pending the hearing and determination of that appeal, the applicant filed this application seeking interalia to stay the Court of Appeal's judgement.

A. SUBMISSIONS

i) *Applicant's submissions*

On arguable aspect of the appeal:

[8] Learned Counsel for the applicant, Mr. Harrison Kinyanjui, submitted that this appeal is arguable as it raises weighty and fundamental constitutional issues that falls for determination under Article 163 (4) (a) of the Constitution.

[9] It was counsel's view that the appeal will allow the Court to determine whether the jurisprudence in the ***Joho decision*** should be reconsidered with regard to a Form 38 erroneously issued in an electoral process. The Court of Appeal's interpretation of the ***Joho decision***, *it was urged*, resulted in a violation of Articles 38 (2), 86 (c) and 88(5) of the Constitution; a basis for intervention by this Court to determine whether the Court of Appeal's decision was *per incuriam*

[10] We were also urged that we need to determine whether a Form 38 erroneously issued without Forms 36 could be lawfully cancelled by the Returning Officer, as was held in **Election Petition No. 150 of 2013**, as a lawful exercise of the IEBC's powers under Article 86 (c) and 88(5) of the Constitution as read together with section 39 of the Elections Act, a fact that counsel for 1st respondent had acceded to. Counsel was emphatic that this is a constitutional issue concerning the scope and application of the Supreme Court's decision by a Court of Appeal pursuant to Article 163 (7) of the Constitution, which calls for clarification.

[11] Counsel contended that this Court should in light of the ***Joho decision*** clarify that it is of consequence that a Form 38 be lawfully and constitutionally obtained for election purposes; and that mere acquisition of a Form 38 through either fraud or illegality is not a *carte blanche* for asserting electoral win. To bolster this contention, counsel sought to rely on the Indian Supreme Court decision in **Krishna Ballah Prasad Singh vs Sub-Divisional Officer, Hilsa-cum-Returning Officer and others** AIR 1985 SC 1746.

[12]. Acknowledging *stare decisis* as an entrenched constitutional principle, counsel urged us to determine whether in applying Article 163 (7) of the Constitution the doctrine of 'restrictive distinguishing' would apply in Kenya as a tool for promoting predictability, reducing arbitrariness and enhancing fairness in precedent law which, when properly applied to the ***Joho decision*** would guide us to uphold the High Court decision. To persuade us, he cited authorities from English decisions in **Peabody Fund v Sir Lindsay Parkinson Ltd** [1984] W.L.R 953 (H.L) and

Practice Statement [Judicial Precedent] 1966 1 WLR 1234 when and why a departure from *stare decisis* may be necessary.

On the nugatory aspect

[13] Counsel urged us to reflect on a likely scenario of disallowing the application but in the final appeal deciding in the applicant's favour, by which time a by-election will have been conducted on the basis of an error perpetrated by the Court of Appeal. This possibility, he stated, will erode both his and Mathare Constituents' rights under Article 38 (2) and (3) of the Constitution.

[14] Counsel also pointed out to the Court that the 1st respondent had conceded in his written submissions that the appeal may be rendered nugatory if the orders sought are not granted.

On public interest

[15] Counsel requested this Court to give effect to Article 38 of the Constitution. Further, he emphasized that it is in the public interest for this Court to interpret the Constitution, strike down erroneous decisions rendered by courts below and that as the apex court it has authority to intervene on the basis of public interest as the matter at hand is a *judgment in rem*.

ii) 2nd and 3rd Respondents' reply

[16] Supporting the application, Counsel for the 2nd and 3rd respondents, Mr Nyamodi, submitted that the intended appeal raises weighty constitutional issues

relating to interpretation and application of the Constitution and thus the appeal was arguable. He made three submissions in this regard: that the Court of Appeal considered extraneous issues not canvassed in the appeal; and secondly that the Court of Appeal failed to discharge its obligation under Article 105 of the Constitution as read with section 75 (3) of the Elections Act for failing to declare a winner of the election in issue. He distinguished between previous electoral laws and the current one. Under the previous regime, he stated, the court had no power to declare a winner of an election. In contrast such a power exists in the current laws, in the Elections Act, 2011 which however must be exercised in recognition of electoral process as a sovereign act of the people.

On public interest

[17] Counsel expressed his belief that the courts would take judicial notice of the fact that elections are organized and conducted with public funds; that the Constitution prescribes efficient expenditure of public funds and; that if the Mathare elections takes place before this appeal is heard, glaring infractions of the Constitution would have been condoned. Noting that the parliamentary seat had already been declared vacant, he implored the Court to accord the 2nd and 3rd respondents, reasonable time to prepare for elections.

iii) Submissions by Counsel for the 1st respondent

[18] Mr. Havi, counsel for the 1st respondent opposed this application. He submitted that the applicant needed to satisfy the Court that the appeal involves interpretation and/or application of the Constitution; that the appeal is arguable; and that in the event that the appeal succeeds it will be rendered nugatory if the order for stay is not granted.

[19] He stated that the appeal concerns the interpretation of Article 86(c) of the Constitution on the role of the 1st and 2nd respondents in openly and accurately collating, promptly announcing results from polling stations, as well as the interpretation of Article 88(4)(e) of the Constitution on the scope of the respondents' electoral dispute settlement powers. However, he added that these were the same issues raised and considered in both the High Court and the Court of Appeal.

[20] He contended that all the issues in the High Court **Election Petition No. 2 of 2013** related to Forms 35, 36 and 38 and were dealt with effectively by the Court of Appeal; therefore the appeal is not arguable since it relates to issues that have been finally settled by this Court, which do not call for further legal inquiry. He relied on the case of **Sir Chunilala V. Mehta and Sons, Ltd. versus The Century Spinning** (1962) AIR 1314, 1962 Sulp. (3) 549 [29].

[21] Counsel disputed Mr Kinyanjui's version that the cancelled Form 38 had been issued to the 1st respondent in error and faulted him for failing in the duty of candour to the Court.

[22] Insistent that the appeal is not arguable, he rejected the High Court's decision as erroneous for holding that Forms 35, 36 & 38 were provisional results which were subject to rectification by the 2nd and 3rd respondents at any time before gazettelement, if they turn out to be inaccurate. He supported, as correct, the contrary Court of Appeal finding that the 2nd & 3rd respondents became *functus officio* and

could not rectify or cancel the said Form 38.

[23] He stated that the question of provisional results raised in the current appeal is one that has been fully settled by this Court in **Raila Odinga & 5 Others versus Independent Electoral and Boundaries Commission and 3 Others (The Raila case)** Petition No. 5 of 2013 as well as by the Court of Appeal and the High Court decisions.

[24] He added that the appeal is frivolous since it was merely inviting this Court to interpret Articles 87 & 88 of the Constitution and section 74 of the Elections Act, 2011 when there is no difficulty in stating the law.

[25] Counsel disagreed with the Applicant's position that the Court of Appeal erred in failing to distinguish the **Joho case** from a case of erroneous issuance of Form 38. He termed as frivolous a request to this Court for a departure from **Joho decision** on that basis.

[26] Counsel conceded that this appeal would be rendered nugatory in the event that stay is not granted; the appeal succeeds, while an election has been held and the applicant has lost. However, he was quick to add that this issue will only fall for consideration if an arguable appeal has been demonstrated which he had submitted there is none.

C. ANALYSIS AND DETERMINATION

[27] The precise issue for determination at this interlocutory stage is whether the

instant application raises sufficient grounds to warrant grant of stay of execution of the Court of Appeal's decision dated 18th March, 2014.

[28] A separate bench of this Court has established elements for consideration that need to be satisfied before the Court exercises a discretionary power of stay of execution, especially in electoral disputes such as this before us. In **Gitarua Peter Munya versus Dickson Mwenda & 2 Others**, Sup. Ct. Application No. 4 of 2014 (*Munya case*) Ojwang and Wanjala, SCJ, have stated that an appellant who intends to move the Court for grant of interlocutory orders of stay must show 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”.

This is the test we apply to this application.

a) Whether this application raises arguable issues

[29] Until now, on only one occasion, in **the Munya case**, has this Court been presented with a request that we certify a matter as raising an arguable appeal. Yet there are numerous authorities from the Court of Appeal that have clarified constitutive elements of arguability of an appeal under rule 5 (2) (b) of that court's rules, which we wish not to rehash here. See **Royal Media Services versus Attorney General & 2 Others, Court of Appeal at Nairobi**, Civil Application

44 of 2013 [UR 28/2013, **Dennis Mogambi Mongare versus Attorney General & 3 Others**, Civil Application No. NAI 265 OF 2011 [UR 175/2011], **Kenya Hotel Properties Limited versus Willisden Investments Limited & 4 Others**, Court of Appeal at Nairobi, Civil Application 24 of 2012, **Kenya Anti-Corruption Commission versus Stanley Mombo Amuti**, Court of Appeal at Nairobi, Civil Application 39 of 2011.

[30] However, it must be clear that an arguable appeal, properly conceived within the meaning of Article 163 (4) (a) of the Constitution must be one that elicits cognizable controversies that purely bear constitutional dimension and effect. To this end, we have asked ourselves whether an examination of the issues put before us, on proper consideration; do raise cognizable constitutional issues that may merit the Court's input on full hearing.

[31] It is discernible from submissions of the parties that this contest is a claim regarding the proper conduct of the Court of Appeal in the exercise of its jurisdiction under Article 164(3) (a) & (b) of the Constitution. It is argued that the Court of Appeal fell into error by granting orders that were not sought, that it waded into factual inquiry outside the remit of its powers provided by the Constitution and section 85A of the Elections Act, 2011.

[32] Also traversed in this contest is a question whether the Court of Appeal under Article 163 (7) misconstrued a finding of this Court on the effect of issuance of Form 38 for declaration of results. Sought to be answered is whether the appellate court did not consider such attendant errors or unlawfulness that may temper the validity

of such a form thus occasioning a violation of articles 38(2), 86 (c) and 88 (5) of the Constitution.

[33] Related to the above, and which is also an integral issue in controversy is whether the Court of Appeal erred by applying in this matter the Supreme Court's decision in the ***Joho case***. The Applicant contends that the Court of Appeal's *per incuriam* interpretation and application of the *dictum* in the ***Joho decision*** regarding a Returning Officer's discharge of powers of declaring results has triggered several constitutional questions that ought to be determined by this Court. In our view these questions relate to the proper ambit of the 2nd respondent's constitutional powers regarding the conduct of elections and declaration of results under multiple provisions of the Constitution, to wit articles 38(2), (3), 81, 86(c), 87 (1)(2), 88(4)(5) and which have been elevated before us by way of appeal.

[34] In our view the issues of contestations that we have sifted from rival submissions of the parties as set out above raise not only cognizable but weighty constitutional questions that we cannot properly determine and come to a conclusive finding at this interlocutory platform. They make manifest how a diverse range of situations brought about by the electoral legal regime implicate and correspond to the Constitution, and require that this Court pronounces with finality clear guidelines. Indeed, the application passes the arguability test. However, not all arguable appeals call for grant of stay orders. Such an arguable appeal, once established, is then considered under the next principle for grant of stay.

b) Whether the Appeal will be rendered nugatory

[35] Counsel for the applicant averred that unless the orders sought are granted, his intended appeal will be rendered nugatory. This appears in ground (9) of the Notice of Motion thus:

That should this Court allow the appeal after a by-election process shall have concluded, the effect would be a travesty of justice of an election process the instigated by an erroneous Court of Appeal's decision.

[36] Mr. Kinyanjui also pointed out the 1st respondent's written submissions at paragraph 28, where he conceded that the appeal may be rendered nugatory thus:

“It cannot be denied that the appeal will be rendered nugatory, should it succeed if stay would not have been granted and an election held and lost by the applicant. However, this issue can only fall for consideration if an arguable appeal has been demonstrated in the first place. In this case, we have shown that the appeal has a snowball chance in hell. It is frivolous. There is no strong case to warrant the grant of an Order for stay or prohibiting the conduct of a fresh election”.

[37] Mr. Havi was however of a divergent view clarifying that the facts of the case have significantly changed and the application is a fruitless exercise given that the 2nd respondent had already declared the seat vacant and a date for by-election set for **3rd June 2014**. He considered this as an invitation to the Court to stop a constitutional process that has already been set in motion as the ninety days

constitutionally provided for the conduct of a by-election had begun running from 28th March and lapses on 28th June 2014.

[38] In the **Munya case**, this Court has stated relevant factors that should weigh on a court's mind in deciding whether or not an election appeal may be rendered nugatory. The Court held as follows:

“There are two possible scenarios that could emerge, if the orders sought by the applicant are not granted. The first is that the election machinery will be set in motion. The applicant will seek re-election by contesting, while at the same time pursuing his appeal before this Court. If, for purposes of argument, the appeal succeeds and the applicant is re-elected, then it could be said that the appeal would have been rendered nugatory. The main objective of the applicant is to forestall a situation where he is forced to go through the rigours of an election when there is a possibility that his earlier election could be upheld by this Court. Secondly, the applicant could participate in the elections and fail to be re-elected, while the appeal eventually succeeds. The effect would be the same from the applicant's point of view. Thirdly, the applicant could participate in the election and fail to be re-elected while the appeal fails, eventually. In this third scenario, it cannot be said that the appeal would have been rendered nugatory.”

[39] Our perception cannot veer so far from these possible scenarios when considering an application such as this one. We have to take cognizance of the tremendous implication that our decision may have on the rights and duties of

either parties. However in a case such as this, an assessment of whether an appeal may be stultified must reflect and put into account **a third factor of public interest.**

c) The Public Interest test

[40] Again we are guided by Ojwang and Wanjala, SCJJ's observation on this point in *the Munya case* at paragraph 96:

“[97] Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.

[98] These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that.”

[41] It is worthy that this present case be distinguished from the **Munya case** in application of the ratio above. While the public interest element cuts through both cases, the public interest consideration in this case ought to take into account that unlike in the **Munya case**, the seat has already been declared vacant and the IEBC has already gazetted a day for the by-election. On the other hand, we must be conscious that while the appeal is pending, it may not be prudent to allow the by-election to take place. There is also a question posed by counsel, Mr. Havi as to whether this Court can stop a constitutionally triggered process now in motion since the delivery of the judgment of the Court of Appeal. Our attention is accordingly drawn to Article 101 (4) of the Constitution which provides thus:

Whenever a vacancy occurs in the office of a member of the National Assembly elected under Article 97 (1) (a) or (b), or of the Senate elected under Article 98 (1) (a) –

...

(b) a by-election shall be held within ninety days of the occurrence of the vacancy, subject to clause (5).

[42] The development since the filing of this application provides a significantly unique scenario that needs to be evaluated. This Court is a creature of and subject to the Constitution. Its mandate is spelt out in article 163 of the Constitution and section 3 of the Supreme Court Act, 2011 which is to, *inter alia*, determine specified categories of appeals and assert the supremacy of the Constitution.

[43] As decreed by Article 2 (1), the Constitution is the supreme law of the Republic

and binds all persons and all state organs at both levels of government: national and county. Any act done in contravention of the Constitution is null and void. The question that we pose to be answered is whether this Court, in granting stay in this matter will be acting *ultra-vires* the Constitution as argued by counsel?

[44] We are of the view that this Court's duty to safeguard the Constitution entails giving effect and meaning to its textual provisions, the underlying principles and ideals embodied in Article 10 of the Constitution. In so doing, this Court should not relent in its duty on the pretext that it might stop a constitutional process. Contrary to Counsel, Mr. Havi's submissions, by granting stay in this matter, the Court will in no way be stopping a constitutional process. The Constitution only decrees that the by-election be held within 90 days of the occurrence of a vacancy. However, the process of a by-election is a statutory process provided for under the Elections Act. Such a process falls squarely under the supervisory mandate of this Court which has a mandate under section 3 of the Supreme Court Act, to assert the supremacy of the Constitution.

[45] Consequently, any statutory process or act done *ultra vires* the provisions of the Constitution, this Court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the Court cannot do is to extend the 90 days period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this Court, a creature of the Constitution, cannot extend it.

D. ORDERS

[46] In conclusion, this application has demonstrated that it has an arguable appeal with an apparent risk of being rendered nugatory if stay of execution is not granted. Further, the scales of public interest tilt towards granting of stay as prayed for in the application.

[47] Consequently the application for stay is allowed. The interim orders are discharged and conservatory orders granted as prayed in the Notice of Motion dated 26th March, 2014 to wit:

- a) A stay of execution of the entire judgement dated 18th March 2014 and consequential Orders of the Court of Appeal sitting at Nairobi in Civil Appeal No. 272 of 2013 is granted pending the hearing and determination of the Appeal herein.
- b) A conservatory order is hereby granted against the 2nd respondent from conducting the Member for the National Assembly elections for the Mathare Constituency, Nairobi County pending the hearing and determination of the Appeal before this Court.
- c) The Deputy Registrar of the High Court is restrained from releasing the deposit of Ksh. 500, 000/= in respect of the 1st Respondent's Election Petition No. 2 of 2013 until the final determination of the Appeal herein.
- d) Costs shall be in the cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 29th day of April, 2014.

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P. TUNOI
JUSTICE OF THE SUPREME COURT
COURT

.....
M. IBRAHIM
JUSTICE OF THE SUPREME

I certify that this is a true copy of the Original.

Hon. L. M. Njora
Deputy Registrar.