

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

[Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ]

CIVIL APPLICATION NO. 35 OF 2018

HASSAN JIMAL ABDI APPLICANT

VERSUS

IBRAHIM NOOR HUSSEIN..... 1ST RESPONDENT

RETURNING OFFICER,

WAJIR NORTH CONSTITUENCY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Being an application for stay of execution of the decision of the Court of Appeal at Nairobi delivered on 23rd day of November, 2018 in Election Appeal No. 30 of 2018 Honourable Justice Nambuye, Hon. W. Ouko, and Hon. Warsame JJAs).

RULING

A. INTRODUCTION

[1] The application before the court is a Notice of Motion application brought under certificate of urgency dated 3rd December 2018, and filed on the 5th December 2018, seeking stay of execution of the Court of Appeal orders of 23rd November 2018. The same is supported by the affidavit of Ibrahim Noor Hussein, the 1st Respondent in the heading of the application, stating that he is the applicant in the application. The application is brought under the provisions of Sections 21 and 24 of the Supreme Court Act, 2011 and Rules 23 and 26 of the Supreme Court Rules, 2012.

(i) Litigation History

[2] The genesis of the matter is that in the 8th August 2017 general election, Ibrahim Noor Hussein was declared as the elected Member of County Assembly [MCA] Batalu Ward in Wajir County, after garnering 1099 votes against his closest rival who obtained 946 votes. His election was challenged in a petition filed by Hassan Jimal Abdi before the Wajir Magistrates' Court, and in a judgment delivered on 2nd February 2018, his election was nullified on grounds that it was not conducted in a free and fair manner, and an order was issued for the conducting of a fresh elections and costs to be paid to Ibrahim Noor Hussein and Hassan Jimal Abdi by the 3rd Respondent.

[3] The Applicant [Ibrahim Noor Hussein], filed an appeal before the High Court in Garrisa challenging the election court's decision. The High Court [in its judgment delivered on the 19th July 2018.] upheld the decision of the election Court, He filed a second appeal to the Court of Appeal but it was struck out on grounds that the Court of Appeal lacked jurisdiction to determine such an appeal, which finding he avers was wrong considering that under Article 164[3] [a] of the Constitution, the Appellate Court has jurisdiction to hear all appeals from the High Court, and that such a finding offends his right to fair hearing under Article 50 of the Constitution. After that loss, he instructed his counsel to file an appeal before this Court.

(ii) The Application

[4] The application seeks in summary seeks the following orders;

(i) This application be certified as urgent and be heard ex-parte in the first instance. [Spent]

(ii) Stay of execution of the orders of the court of appeal issued on the 23rd Nov, 2018, pending both interpartes hearing and determination of this application and the intended appeal.

(iii) Conservatory orders do issue restraining the 3rd Respondent from certifying the seat for Member of County Assembly [MCA] in Batalu Ward Wajir County vacant, and restraining orders against conduct of fresh election, pending the hearing and determination of both the application and the intended appeal.

(iv) Costs be in the cause.

[5] The application is premised on grounds that the Court of Appeal struck out the applicant's Notice of Appeal and Memorandum of Appeal on 23rd Nov 2018, which was appealing against the decision of the High Court delivered on the 19th July 2018, which nullified the election of the applicant as an MCA for Batalu Ward, on grounds that it had no jurisdiction to entertain a second appeal under Section 85A of the Elections Act, which finding arose out of a mis-interpretation of the Constitution, the Election Laws and the Regulations. The Court of Appeal, it is averred, failed to consider issues raised in the appeal which conferred that court automatic jurisdiction, all which misinterpretations can be redressed by this Court.

[6] Further, it is averred that there is also conflicting jurisprudence from the Court of Appeal on the interpretation of Section 85A of the Elections Act, on the question whether the Court of Appeal has jurisdiction to entertain an appeal from the High Court in respect of an MCA election. The applicant has thus urged this Court to pronounce itself on the issue to settle the inconsistency once and for all. He also urges that he has an arguable appeal, which would be rendered nugatory if the orders sought are not granted, if the Court of Appeal renders a favourable judgment in his case, in a five judge bench, which has been constituted to settle the law on the right (or leave thereof) of appeals in MCA matters. It is also his case that denial of the stay orders sought is prejudicial to the respondents as it will lead

to expending of public funds unnecessarily incase this Court was to later uphold his election after fresh elections have been conducted as ordered by the Magistrate's Court after nullifying his election.

(iii) Replying Affidavit

[7] In the Replying affidavit of Hassan Jimal Abdi dated 21st February 2019 and filed on 22nd February 2019, while describing himself as the 1st respondent, the deponent opposes the application terming it as an abuse of the Court process, having no chance of success to warrant grant of the orders sought. First that the applicant did not file a substantive appeal within 30 days from the date of filing the Notice of Appeal, as required under Rule 33 and he thus avers that the appeal is deemed to have been withdrawn under Rule 37 of this Court's Rules, because the Court cannot issue stay orders in reference to an intended appeal not yet filed, which is also a waste of this Court's precious time. He also avers that the Court of Appeal had no jurisdiction under Sections 75[4] and 85A of the Elections Act enacted pursuant to Article 87[1] of the Constitution, which limits the Court of Appeal's jurisdiction to matters of law only.

[8] In any event, it is further argued, a five Judge bench of the Court of Appeal in the case of ***Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others, Election Petition Appeal [Application] No. 261 of 2018 [2018] eKLR*** held that there was no legal provision allowing the Court of Appeal to entertain a second appeal in MCA election cases on either matters of law or questions of law, hence the prayers for conservatory orders have been overtaken by events. He has also averred that public loss will be suffered if orders of stay are granted than if denied, since the applicant continues to draw salaries and allowances from public coffers, whereas his election has been nullified. Conversely, if the appeal collapses, he will not be able to refund the public funds he continues to draw irregularly, so the 1st respondent contends.

[9] The deponent lastly states that it is in the interest of justice that the applicant should not continue discharging duties as an MCA for Batalu Ward, as such continuance offends his entitlement to enjoy the fruits of the judgment under Article 48 of the Constitution, because he continues to suffer prejudice by the applicant's continued occupation of the office, urging vehemently that the stay order sought should not be granted.

B. PARTIES' WRITTEN SUBMISSIONS

(i) *The Applicant's Submissions*

[10] The applicant, through his counsel of the firm of M/s. Sagana Biriq Advocates filed written submissions dated 14th February 2019, on 15th February 2019. He urges that elections are matters of general public interest as was held by this Court in the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014]*** and ***Zachary Okoth Obado v Edward Akongo Oyugi & 2 Others [2014]*** *eKLR* urging that stay orders ought to be granted so as to put on hold waste of public finances likely to be expended in the conduct of uncertain fresh elections.

[11] He submits further that the appeal is arguable and raises substantive questions of law and seeks a purposive interpretation of Article 164[3] of the Constitution, Section 85A of the Elections Act viz-a-vis Rule 35 and 36 of the Elections [Parliamentary and County] Petition Rules, 2017 in regard to the absence of an express provision on the Court of Appeal's jurisdiction to deal with MCA election matters in second appeals since jurisdictions flows from the Constitution, statutes or precedent. He relies on the cases of ***Gatirau Peter Munya [supra]*** and ***Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others [2014]*** *eKLR*, in emphasizing that he will suffer prejudice if the orders sought are not granted.

(ii) 1st Respondent's Submissions

[12]. Hassan Jimal Abdi also filed his submissions through the firm of M/s. Bashir Noor Advocates dated 21st February 2019, on 22nd February 2019. He submits that this Court lacks jurisdiction to hear the intended appeal under Section 163[4] of the Constitution. Under Article 163[4a], this Court limits its jurisdiction in matters filed as of right in constitutional interpretation to issues of constitutional controversy, as was stated in the case of **Wavinya Ndeti v Independent Electoral & Boundaries Commission & 4 Others [2015] eKLR**, which condition he submits, this appeal lacks, as supported further by this court's decision in **Moses Mwicigi & 14 Others vs IEBC & 5 Others [2016] eKLR**, in which it was held that general provisions do not apply to jurisdiction of courts, due to the *sui generis* nature of election disputes.

[13]. It is furthermore submitted that since an appeal was not filed within time as mandatorily required under Rule 33 of this Court's Rules, the Notice of Appeal thus filed ought to be deemed as withdrawn in line with the provisions of Rule 37 thereof. It is in addition urged that failure to file an appeal on time offends Article 87, which aims at ensuring expeditious disposal of election matters, since compliance with timelines is very important in election matters as was held in the cases of **Lemanken Aramat v Harun Muitamei Lempaka & 2 Others [2014] eKLR**, **Mary Wambui Munene v Peter Gichuki Kingara & 2 Others and Evans Odhiambo Kidero & 4 Others v Ferdinard Waititu & 4 Others [2014] eKLR**.

[14] As to grant of the orders sought in the application, it is submitted that the applicant has not met the two main conditions for grant of conservatory orders. First, he has not established that he has an arguable and *prima facie* case with likelihood of success as was held by the High Court in **Board of Management of Uhuru Secondary School V City County Director of Education & 2**

Others [2015] eKLR and ***Kevin K Mwiti V Kenya School of Law & Others eKLR***. In any event, the finding by a five judge bench of the Court of Appeal on the Court of Appeal's lack of jurisdiction in MCA election matters extinguished this ground. Second, the applicant has not demonstrated that he will suffer prejudice if the orders sought are not granted as was held in ***Gatirau Peter Munya*** [supra]. It is thus urged that the application be dismissed with costs.

[15] The other parties did not file any responses in respect of the instant application.

C. ANALYSIS AND DETERMINATION

[16] From the pleadings and submissions of the parties, the court deems that two issues arise for determination;

(a) Whether this court has jurisdiction to deal with the matter

(b) Whether the orders for stay sought can issue.

(i) Jurisdiction of the Court

[17] It is the applicant's position that since the Court of Appeal found no provision granting it jurisdiction to determine second appeals in MCA election matters, then it ought to have derived jurisdiction from a purposive interpretation of several provisions of law. However, this Court dealt with a similar issue in the case of ***Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others [2019] eKLR, Election Appeal Application No. 38 of 2018***, where the Court of Appeal had similarly struck out the appeal for lack of jurisdiction.

[18] This Court in the Mohamed Ali Sheikh Case analyzed the circumstances of the case and observed that since the Court of Appeal had not heard the appeal emanating from the High Court substantively, there was nothing before this Court to determine and then proceeded to dismiss the application. We, in this matter,

reiterate that finding and hold that even if we were to enquire on the issue of jurisdiction, there will be nothing to determine for this court, since there is no substantive judgment of the Court of Appeal on the validity of the election challenged by the applicant.

[19] The other jurisdictional angle raised in opposition to the appeal is the fact that the applicant filed a Notice of Appeal on 28th November, 2018, but failed to institute an appeal. Submissions by the 1st Respondent on that point are that under Rule 33[1], the Record of Appeal ought to have been filed within 30 days of the filing of the Notice of Appeal. Rule 33[1] provides:

(1) An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal —

(a) A petition of appeal;

(b) A record of appeal; and

(c) The prescribed fee.

[20] The 1st Respondent thus contends in the above context that the applicant had not complied with the said Rule as at the time of filing the submissions. Our perusal of the Court record confirms that he has not done so to date. The 1st Respondent has thus urged the Court to dismiss the application for the reason that the non-compliance with the mandatory provision of the above Rule is fatal to the application. The 1st Applicant, it is urged, has also not offered any explanation for failure to comply with the said Rule.

[21] We have considered the submissions, the law and precedent in respect of applications filed before filing a substantive appeal. In the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR, Petition of Appeal No. 11 of 2018** this Court found that the record was filed piece-meal but

within time, hence failure to file the appeal accompanying the application for stay was not fatal and in any case, the stay sought was to subsist pending the filing of the appeal. Similarly, in the case of ***Mohamed Ali Sheikh [supra]***, even though the application for stay was filed before the filing of the substantive appeal, the Court observed that the Record of Appeal was nevertheless filed and was considered by the Court when addressing the stay application.

[22] In addressing the circumstances of the present application, The Court is reiterates finding in the case of ***Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 Others SC Petition No. 27 of 2014; [2014] eKLR.***), as cited in the case of ***Mohamed Ali Sheikh [supra]***, when it held:

‘We have stated in the past that an interlocutory application cannot originate proceedings before the Court... Such a stand-alone application will not generally be considered as it is not predicated upon a substantive matter before the Court and remains unknown in law’:

Similarly in the case of ***Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR, Petition No. 14 of 2013***, this Court held, while interpreting Rule 33,

‘[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed this is the gist of Rule 33(1) of the Supreme Court Rules’.

[23] We have considered these findings and hold that our exercise of discretion as sought by the applicant so as to grant the orders sought, has nothing to be based

upon, because we are unable to discern whether there is an arguable appeal in absence of grounds of appeal in a real appeal.

[24] The 1st Respondent has in the alternative urged the Court to strike out the Notice of Appeal in line with the provisions of Rule 37 of this Court's Rules, arguing that once an appeal is not launched within the prescribed time, then the Notice of Appeal is deemed as withdrawn. Rule 37 Provides:

(1)Where a party has lodged a notice of appeal but fails to institute the appeal within the prescribed time, the notice of Appeal shall be deemed to have been withdrawn, and the Court may on its own motion or on application by any party make such orders as may be necessary.

(2) The party in default shall be liable to pay the costs arising therefrom to any person on whom the notice of appeal was served.

[25] This Court considered a similar argument in the case of ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR, Civil Application No. 35 of 2014***, holding that, Rule 37 should be read in conjunction with Rule 53 if an application for extension of time has been filed and not in isolation. However in this case, no such application for extension of time has been filed; making it distinguishable, as a safe case where this Rule can be read in isolation. Reading the Rule in isolation therefore means that the Notice of Appeal so filed is fit for deeming as withdrawn, and without an active appeal before the Court, the application is predicated on nothing.

[26] Finally, we are concerned that in the heading of the pleadings, the applicant presents himself as the 1st respondent, while the 1st respondent is stated as the applicant. This occasions confusion in issuance of final orders, but ultimately we will make orders as follows:

(a) The application dated 3rd December 2018 is hereby dismissed.

(b) Costs of Hassan Jimal Abdi [1st respondent, stated as the Applicant], shall be borne by Ibrahim Noor Hussein [the stated 1st respondent and the actual applicant].

It is so ordered.

DATED and DELIVERED at NAIROBI this 6th Day of August 2019.

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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

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

**REGISTRAR,
SUPREME COURT OF KENYA**