

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION NO. 12 OF 2014
(Coram: Rawal, DCJ & Ibrahim, SCJ)

MARY WAMBUI MUNENE.....APPLICANT

-VERSUS-

PETER GICHUKI KINGARA.....1STRESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2NDRESPONDENT

JAMES MBAI3RDRESPONDENT

(An Application for stay of execution of the Judgement and order of the Court of Appeal at Nyeri in Civil Appeal No.31 of 2013 (A. Visram, M.K Koome, J. Otieno-Odek JJ.A) dated 13th February 2014)

RULING

A. INTRODUCTION

[1] This is an Application dated 8th April, 2014 by way of a Notice of Motion under certificate of urgency seeking orders from this Court to *inter alia*:

- a) Restrain the 2nd and 3rd Respondents from conducting the By-election for the Member of the National Assembly for Othaya Constituency scheduled to take place on the 29th day of April, 2014 pending the hearing and determination of the intended Appeal;
- b) Grant an order of stay of execution on the whole judgment/orders of the Court of Appeal sitting at Nyeri dated 13th February 2014 in Nyeri Civil Appeal No. 31 of 2013, pending the hearing and determination of an Appeal against the said judgment.

[2] The Applicant has filed a Petition dated 13th February 2014 seeking to set aside the whole judgement of the Court of Appeal in Civil Appeal No. 31 of 2013 at Nyeri.

[3] On 8th April 2014, Ibrahim SCJ, having heard Counsel Mr. Miller for the Applicant, certified the Application as urgent. The Hon. Judge directed the Applicant to serve all the Respondents and ordered the parties to appear before a two-Judge Bench of this Court for an *inter partes* hearing on 21st April 2014. He however, declined to issue the conservatory orders sought.

[4] Upon being served with the Petition and the Notice of Motion Application by the Applicant, the 1st Respondent filed a notice of Preliminary Objection dated 11th April 2014. He gave notice of an objection that the Petition and the Application of the Applicant do not lie in law and should be dismissed on five grounds:

- i) *That the Petition and Notice of Motion Application herein are time barred.*
- ii) *That the prayer for stay of elections cannot be legitimately argued in the absence of joiner of other candidates validly cleared by the Independent Electoral and Boundaries Commission (IEBC) contesting in the 29th April, 2014 By-elections. A fact that was within the knowledge of the Applicant at the time of filing the petition.*
- iii) *That this Honourable Court has no jurisdiction to hear and determine the petition herein as there was no misconstruction of the Constitution by the Court of Appeal being the last electoral Court.*

- iv) *The Application and the petition herein are incurably defective as they offends the mandatory provisions of the Supreme Court Act and the Rules made there under; and*
- v) *That the Application does not meet the criteria set out by the Supreme Court Act and the Constitution.*

B. BACKGROUND

[5] The genesis of this matter is the declaration of the Applicant as the duly elected member of the National Assembly for Othaya Constituency after the general elections held on 4th March 2013. The 1stRespondent then filed a petition in the High Court at Nyeri, Election Petition No. 3 of 2014, seeking nullification of the election results.

[6] The 1stRespondent herein, in the petition sought *inter alia*: a scrutiny and recount of the votes cast in the constituency, a declaration that the Applicant was not duly elected as the Member of the National Assembly for Othaya Constituency, and that the 1stRespondent was the duly elected member of the said constituency.

[7] The election Court neither found any basis to order scrutiny and recount of the votes nor any reason to nullify the election results. The Court (Ngaah J) held that the said election was free and fair and conducted substantially in accordance with the law and the Constitution.

[8] Aggrieved by the said decision, the 1stRespondent appealed to the Court of Appeal in Nyeri (Civil Appeal No. 31 of 2013). In its judgment dated 13th February, 2014 the Court of Appeal allowed the Appeal and declared the election of the

Applicant herein, as the Member of the National Assembly for Othaya Constituency, null and void on the ground that the election was not conducted in accordance with the Constitution and the same was not administered in an efficient, accurate and accountable manner.

[9] Aggrieved by the said judgement, on 8th April 2014, the Applicant filed a Notice of Motion under a certificate of urgency in this Court. On 8th April 2014, Ibrahim SCJ, certified the Notice of Motion as urgent, directing that the matter be set for *inter partes* hearing before a two Judge Bench on 14th April 2014 and that all parties be served with the Application.

[10] On 14th April 2014 in agreement with submissions from Mr. Mbobu, the Counsel for the 1st Respondent, the Court heard submissions only on the preliminary objection from all the Counsel. However, after considering and reflecting on the issues raised, the Court directed on 15th April, 2014 that it shall hear the Notice of Motion fully on merit and thereafter shall give a composite ruling on all the issues, of course determining the preliminary objection upfront

C. SUBMISSIONS BY THE PARTIES IN RESPECT TO THE PRELIMINARY OBJECTION

(a) 1st Respondent's submissions

[11] Mr. Mbobu, Counsel for the 1st Respondent raised an issue of limitation in respect of the Petition of Appeal. Rule 33 of the Court's Rules in mandatory language (by using the word 'shall') stipulates and defines the limitation of filing

of Appeal to be 30 days from the date of filing a Notice of Appeal. This notice was admittedly filed on 18th February 2014. The law envisages strict compliance by using the mandatory provision, which should forbid any bending or circumvention. If the petition of Appeal is incompetent having been filed in contravention of the limitation period, the Application has no ground to stand, so he submitted.

[12] Secondly, Counsel raised an issue on what he deemed as a breach of the principle of natural justice. If we can abbreviate the same, it was contended that after the date of By-election was announced, four candidates from different parties were cleared to contest the By-election. Apart from the Applicant and the 1st Respondent, the other two candidates are getting ready for the By-election. They are not joined as parties before this Court. Inevitably, they will not be present or be heard in opposition or support of this process but the result of this matter shall drastically affect them. This, it is contended, is a clear breach of natural justice

[13] Thirdly, Counsel emphasised that the judgement and orders of the Court of Appeal have been implemented, after annulment of the election of the Applicant by the Court of Appeal. The resultant legal process of certification by Speaker of the National Assembly has also been completed. The Court of Appeal's role has been finalised and thus nothing remains to be stayed.

[14] Lastly, the Counsel contested the validity of the petition and contended that the Applicant has not complied with Rule 33 of the Court's Rules as the petition of Appeal lacks the Record of Appeal. However, it was conceded, in reflection of the further events before the Court that the issue could be argued substantively on merit in the intended Appeal.

(b) 2nd and 3rd Respondents' submissions

[15] Mr. Munge, Counsel for the 2nd and 3rd Respondents highlighted only two issues on this preliminary objection. He submitted that this Court's jurisdiction is provided for by Article 163(4). Hence, the Court should look at that Article in its entirety when deciding this preliminary question. Counsel urged that Rule 33 of the Court's Rules should not be read in isolation of other relevant Rules, i.e. Rule 3(4) and (5) and Rule 53.

[16] Further, Counsel urged that this Court take note of Rule 53 of the Court's Rules. Consequently, should the Court find that there is something in the present case that needed to be done within a particular time frame, that Rule gives the Court the discretion to extend time.

(c) Applicant's submissions

[17] The Applicant, through her Counsel, Mr. Miller, opposed the preliminary objection raised by the 1st Respondent. Counsel submitted that indeed the Notice of Appeal filed on 18th February 2014 was within time. Thereafter, the Applicant

filed an Application in the Court of Appeal for certification as she thought then that her Appeal fell under the provisions of Article 163(4) (b) of the Constitution. This Application was set for hearing on 9th April, 2014, but before that date, this Court on 2nd April, 2014 delivered the decision in the **Gatirau Peter Munya vs Dickson Mwenda Kiting & 2 Others**, SC Application No. 4 of 2014 (referred to as “**The Munya case**”). She further submitted that on perusal of that decision she found assurance that she could come to this Court as of right under Article 163(4) (a) of the Constitution.

[18] In this regard, Counsel submitted that the Applicant consequently moved to the Supreme Court. They further withdrew their Application at the Court of Appeal on 9th April 2014. Hence, Counsel reiterated that they indeed filed this Application within time.

[19] The Applicant further contended that if the Court were to be persuaded that Rule 33 was not complied with, then the Court ought to note that the Rule deals with the process of institution of an Appeal. The substantive provision to consider in this case would then be section 21(3) of the Supreme Court Act. This section provides that the Court may make any order necessary in determining any question in the suit before it. Counsel urged that this section allows the Supreme Court to cure or amend any defect in order to determine a matter before it. Further, Counsel invoked Article 159 of the Constitution and urged the Court not to focus on procedural technicalities. Counsel cited the **Law Society of Kenya**

vs Centre for Human Rights and Democracy and 12 others, *Petition no. 14 of 2013(The Law Society of Kenya case)* arguing that the Court relaxed the strict compliance of Rule 33. Hence, it was the Applicant's prayer that the Court should cure the Appeal if it finds any defects in the process and hear the main Appeal and the Application before it.

[20] With regard to joinder of parties, it was the Applicant's submission that the other two candidates were not parties to the matters before the Court of Appeal hence; they could not have been enjoined. In response to the Court's query whether it was prudent to enjoin them, the Applicant averred that they will not suffer any prejudice at this juncture and since the Appeal was yet to be heard, they could be enjoined later if deemed necessary or fit.

[21] The Applicant opposed the contention that there was nothing before the Court to stay and submitted that what was sought was a stay of By-election pending the hearing of the Appeal. Hence, she prayed that the preliminary objection be dismissed.

[22] On the issue as to when the vacancy occurred, Counsel for the Applicant submitted that the vacancy occurred on 6th March 2014. He further informed the Court that when the Court of Appeal issued its decision, it erroneously cited section 85 instead of section 86 of the Elections Act. The Court had to then rectify that part of the judgment and that is when the seat was declared vacant.

D. ANALYSIS

[23] The question of jurisdiction is a pure question of law. We cite the dictum of Nyarangi J.A in the **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** that it has to be determined outright before delving into the substantive suit and that where the Court finds it has no jurisdiction, it should down its tools. Having heard the main Application for stay together with the preliminary objection, we therefore proceed to determine the question of jurisdiction first.

[24] The 1st Respondent raised several points of law by way of a preliminary objection and the following issues crystallize for determination:

- (i) *Whether the petition and the Notice of Motion was filed out of time.*
- (ii) *Whether there is a breach of Rules of natural justice for lack of joiner of other candidates who have been cleared by the IEBC to contest for the By-election.*
- (iii) *Whether there is a misconstruction of the Constitution by the Court of Appeal.*
- (iv) *Whether the Application for stay and the petition herein offends the mandatory provision of Supreme Court Act and the Rules made thereunder.*

If the above are answered in the negative, the Court shall further proceed to delve into the issues raised in the Notice of Motion dated 8th April 2014.

i) ***Whether the petition and the Notice of Motion was filed out of time***

[25] The 1st Respondent submitted that this Court has no jurisdiction to hear this Application as the Petition and the Notice of Motion were filed out of time. The Court of Appeal delivered its judgment on 13th February 2014. The Applicant filed the Notice of Appeal on 18th February 2014. Mr. Mbobu, Counsel for the 1st Respondent therefore submitted that, the Appeal should have been filed within 30 days from the date of filing the Notice of Appeal.

[26] Counsel referred the Court to Rule 33(1) of the Supreme Court Rules which states that, an Appeal ***shall*** be instituted by lodging in the registry within 30 days of filing the Notice of Appeal. In particular, Rule 33 provides:

33. (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.

Consequently, Counsel submitted that the Petition and the Application herein should have been filed around 30th March 2014.

[27] In response Mr. Miller, Counsel for the Applicant, has however urged the Court to find that the Appeal was filed within time. He submitted that, after filing

the Notice of Appeal, which was within time, the Applicant proceeded to file an Application for certification in the Court of Appeal on 20th February 2014 under Article 163 (4)(b) of the Constitution. Pending the hearing of that Application, the Supreme Court delivered a ruling in the **Munya case** which found that the Supreme Court has jurisdiction on any constitutional issue which has been determined in the Court of Appeal including election matters and has also set down the criteria which the Court would apply when considering an Application for stay.

[28] Following the delivery of that ruling on 2nd April 2014, the Applicant withdrew her Application for certification for leave before the Court of Appeal and filed the present Application together with the Petition for the intended Appeal. He contends therefore, that the Court should consider the chain of events that happened between the date of filing the Notice of Appeal and the present Application together with the petition and hold that both were filed timeously.

[29] Indeed we agree with the 1st Respondents' submissions that the Appeal was not filed within 30 days from the date of filing the Notice of Appeal. The Petition and the Notice of Motion herein were filed on 8th April 2014. We further take cognizance of 2nd and 3rd Respondents' contentions that Rule 33 should not be read in isolation with Article 163(4)(b) of the Constitution.

Article 163(4)(b) provides:

163. (4) Appeals shall lie from the Court of Appeal to the Supreme Court-

(a)...

(b) in any case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)

[30] There is no doubt that the Notice of Appeal was filed within time i.e. within 14 days of the delivery of the Court of Appeal's judgement. We also note that the Applicant having filed her Notice of Appeal, earnestly proceeded to the Court of Appeal to file her Application seeking certification that her intended Appeal raised matters of general public importance. Suffice it to say that the Application having been filed before the Court of Appeal, this Court can and does take judicial notice of those proceedings.

[31] As a matter of fact, the Court of Appeal was to hear the Application for certification on 9th April 2014; however, it was withdrawn on that day. We do note that 30 days within which to file the Appeal after lodging the Notice of Appeal had already expired before that day.

[32] We cite the observations made by this Court in the **Law society of Kenya Case** thus:

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all

procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR”.

[33] We pause here and ponder as to how the balance between the Procedure Rules which are very important for the efficient, fair and even-handed process on one hand and the core principle of imparting substantial justice on the other. Rule 53 of the Court’s Rules does allow the Court to extend time limited by the Rules. The 1st Respondent has submitted that no Application for extension of time has been made. However, we are persuaded to invoke the inherent powers of this Court under Rules 3(5) and 53 of the Court’s Rules, which allow the Court to perform any such act necessary to meet ends of justice. Rule 3(5) provides:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or prevent abuse of the process of the Court.”

[34] We are further inclined to invoke Article 159 of the Constitution and observe that the importance of the Notice of Appeal was by all means appreciated by the Applicant that is why it was filed within time. Hence, while the Applicant was still pursuing certification in the Court of Appeal, the Respondent(s) had been informed of an intended Appeal. Moreover, no prejudice has been shown to

have been occasioned to any party. To that extent and considering all the intervening circumstances that have happened since the filing of the Notice of Appeal, it is our view that those circumstances have been satisfactorily explained and the explanation is not unreasonable. We further find that if there was any delay, it was not inordinate and it is excusable. Consequently, we hold that it will be in the interest of justice to deem this Application and the Petition herein as having been filed within time.

ii) *Whether there is a breach of Rules of natural justice for lack of joinder of other candidates who have been cleared by the IEBC to contest for the By-election.*

[35] It is Mr. Mbobu's submission that, since the Court of Appeal delivered its judgment, the seat for the Member of National Assembly for Othaya Constituency was declared vacant, nomination exercise was conducted, and a date for By-election was set by the IEBC. Other two persons have since become interested in the outcome of this case and hence ought to have been joined as parties. Counsel contends that, the absence of those other interested parties before the Court is tantamount to condemning them unheard contrary to the Rules of natural justice.

[36] In response, Mr. Miller submitted that there are very clear laws on the joinder of parties. He argued that the named persons were never parties in the

superior Court and in any case no prejudice would be suffered by their non-joinder as there is still sufficient time to make a decision without affecting rights of any other person not presently a party to these proceedings.

[37] Indeed we recognize the fact that a date for the By-election has already been set and Political Parties have already nominated their respective candidates. By virtue of this, other persons who are not necessarily parties to these proceedings have in essence become interested in the outcome of this case. However, as regards joinder of parties, it is worth noting that by coming to this Court, the Applicant has invoked the Court's 'appellate' jurisdiction under Article 163(4)(a) of the Constitution. The proceedings in the election Court and the Court of Appeal were prosecuted amongst the parties on record only. It is these parties that have a thread connecting them in these proceedings. Generally, an Appeal will involve parties that were originally before the lower Court. Hence we do not think that the 'non-joinder' (as we do not consider this a mis-joinder in the strict sense of the law) of the other two candidates is fatal to the Appeal.

[38] We hasten to add that even the 2nd Respondent has a right to apply for their joinder if he so wishes. Secondly, whether or not the stay is granted, it will affect all the parties equally and there will be no bigger prejudice to any party. Lastly, once the Appeal is ripe for canvassing, incase this Court hold it has jurisdiction, the two 'interested candidates' have a right to apply to be enjoined in the suit. Consequently, this alone is not a sufficient ground for denying the Applicant her

Constitutional right of appeal where she feels that her rights have been infringed. Hence we dismiss the argument that the Appeal is fatal for mis-joinder of parties.

(iii) Whether there is a misconstruction of the Constitution by the Court of Appeal being the last electoral Court

[39] This ground was framed by the 1st Respondent but we note that no party submitted on it. However, a misconstruction of the Constitution by the Court of Appeal cannot be a ground to challenge the jurisdiction of this Court at a preliminary stage. A holistic look at the submissions before this Court shows that there are various allegations and counter allegations on how the Court of Appeal ‘misconstrued’ or ‘correctly construed’ the various provisions of the Constitution. There is an apparent conflict on interpretation of Articles 81 and 86 of the Constitution as read with section 85A of the Elections Act. Contrary views have been expressed as to the scope of the Court of Appeal’s jurisdiction as the final Court in election matters. It is also worth noting that the 2nd Respondent, IEBC has submitted on the Court’s jurisdiction and raised six (6) issues which raise matters of constitutional interpretation and has urged this Court to determine them with finality for future elections. We further add that the question of misconstruction of the various provisions of the Constitution is one that the parties could take up during the canvassing of the Appeal, if jurisdiction is assumed.

(iv) Whether this Application and the petition herein offends the mandatory provisions of the Supreme Court Act

[40] This issue has been extensively considered in clause (i) above. The argument that there is no record of Appeal is an argument that well falls for determination in the Appeal if the parties desire to revisit it, if and when we assume jurisdiction.

[41] Consequently, in light of the foregoing and considering all the issues, we disallow the preliminary objection and hold that this Court has jurisdiction. We now proceed to consider the substantive Notice of Motion dated 8th April 2014 on its merit.

E. SUBMISSION OF THE PARTIES IN RESPECT OF THE NOTICE OF MOTION

(a) Applicant's Submissions

[42] Mr. Miller, Counsel for the Applicant, submitted that the Court had jurisdiction to determine the intended Appeal under Article 163(4)(a) of the Constitution as the matter raises issues of Constitutional interpretation and Application as found in the pleadings and determination before the Court of Appeal. Relying on this Court's decision in the **Munya case**, Counsel submitted that the Elections Act is interpreted in tandem with Articles 81 and 86 of the Constitution. He submitted that the Court of Appeal erred in interpretation of

Article 81 of the Constitution and in arriving at its determination, it did not adhere to the provisions of Articles 50(1), 25(c) and 38(3)(c) of the Constitution.

[43] It was his submission that Section 21(2) of the Supreme Court Act empowered the Court to make any orders and that provision coupled with Section 24(1) was clear to the extent that the Court had powers to grant any interlocutory orders like the one sought by the Applicant. He proceeded to demonstrate that the Appeal satisfies the three grounds for stay as set out in the **Munya case**. These are whether: the Appeal raised arguable issues; whether the Appeal will be rendered nugatory if stay is not granted; and whether it is in the public interest for stay to be granted.

[44] On the issue of whether the Appeal was arguable, it was Counsel's submission that the Court of Appeal exceeded its jurisdiction conferred by Article 87 of the Constitution as read with Section 85A of the Elections Act by delving into issues of fact as opposed to restricting itself to issues of law and, in so doing, ended up with the wrong conclusion that the election did not reach the threshold envisaged under Articles 81 and 86 of the Constitution. He enunciated many instances in the judgement where the Court of Appeal delved into issues of fact and made erroneous findings without the benefit of seeing the witnesses. For the purpose of this Application, those issues are already on record and we need not specify them.

[45] Counsel further contended that, the Court of Appeal disregarded the doctrine of *stare decisis* and departed from its own previous decisions thereby arriving at the wrong conclusion. He further added that in total disregard of well-established jurisprudence on the powers of an appellate court, the Court of Appeal contradicted those principles. He argued that in the circumstances, it falls on the Supreme Court to re-assert the law. He supported his argument by citing the case of ***Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others Civil Appeal No. 36 of 2013 [2014] eKLR*** as quoted in the ***Munya case*** re-emphasizing the fact that jurisdiction of the Court of Appeal was limited only to issues of law and not fact. He cited another case of ***Independent Elections and Boundaries Commission v Stephen Mutinda Mule*** Civil Appeal No. 129 of 2013, [2014] eKLR wherein the Court of Appeal properly limited itself to look at the issues of law.

[46] Counsel further submitted that the Court of Appeal applied wrongly the principles on standard of proof and shifted the burden to the Applicant. It was his submission that burden of proof in election matters, like in civil matters, lies on the party making the allegations, while the standard of proof was higher than on the balance of probability but lower than beyond reasonable doubt as settled by this Court in ***Raila Odinga v IEBC & 5 others Petition No. 5 of 2013 (Raila case)***. Counsel argued that the Court of Appeal misapplied the said principle and placed the burden of presenting evidence on allegations made by the petitioner (the 1st Respondent herein) on the trial Court. He gave an example

from the record of Appeal where the Court of Appeal quoted the finding of the election Court to the effect that the petitioner had not laid a basis for his claim for scrutiny and recount of votes. However, the Court of Appeal then contrary to that finding delved into issues of fact and came to a contradictory finding of its own.

[47] On whether the Appeal would be rendered nugatory, Counsel presented two possible scenarios that would occur if stay was not granted. First if the By-election is allowed to be held and the Applicant loses the election, and at the same time the Appeal is allowed she would suffer irreparable harm. Her success would be futile in case of someone else being declared as an elected member of National Assembly, hence rendering the Appeal nugatory. In the second scenario, he argued that if the Applicant is re-elected and the Appeal succeeds it would still be an exercise in futility by virtue of the fact that the By-election would have been an unnecessary exercise and sheer waste of public resources contrary to Article 201(1) of the Constitution.

[48] Counsel further submitted that by granting a stay the Court will not be going beyond Constitutional timelines. This is because as per the gazette notice, the seat for Othaya member of National Assembly fell vacant on the 6th of March 2014 and by virtue of Article 101(4) (b) of the Constitution, the latest date within which the By-elections should be held is 6th June 2014.

[49] Counsel also brought to the Court's attention the fact that the 1st Respondent had filed a petition in the High Court, Petition No. 5 of 2014, seeking

a conservatory order to restrain the 2nd Respondent from retaining/employing all the Returning and Presiding Officers who supervised the elections of 4th March 2013 to carry out the By-election. The effect of the orders sought was to remove the Returning Officer and his entire team; consequently, there could not be a By-election on the scheduled date. It was therefore her argument that the 1st Respondent has taken a contradictory stand on the issue of By-election.

(b) 2nd and 3rd Respondents' submissions

[50] Mr. Munge, Counsel for the 2nd and 3rd Respondent in support of the Application opined that the matter before the Court arises from elections and the rights provided under Article 38(2) of the Constitution.

[51] He submitted that the judgement being challenged arises from the decision of the Court of Appeal which is binding on the High Court and other subordinate Courts. It was his submission that there were errors in the Court of Appeal's decision which if not determined by the Supreme Court and corrected, would be catastrophic on future elections and election disputes because the lower Courts would be bound by the decision considering the principle of *satire decisis*.

[52] Counsel reiterated the Applicant's submissions that the Court of Appeal went beyond its jurisdiction by delving into matters of facts contrary to section 85A of the Election Act. He highlighted various findings in the Court of Appeal's judgment, which he stated that they would be challenging, in the Appeal.

[53] He submitted that it is time the Supreme Court determines the issue as to when a vacancy of the Member of National Assembly occurs as provided for under Article 101 of the Constitution as read with section 86 of the Elections Act. He stated that, this clarification would give guidelines to future elections. He elaborated that before the Court were three different possible dates, which could be considered as triggering the occurrence of the vacancy in this case. Namely: 13th February, 2014 being the date when the Court of Appeal gave its judgement; 6th March, 2014 being the date when the Deputy Registrar issued her certificate; and 10th March, 2014 being the date when the Court of Appeal issued its certificate.

[54] He reiterated the fact that it would indeed be prudent to maintain the status quo. He posed the question whether the Constitution envisaged a situation where there are two sitting members of National Assembly for the same constituency. He added that, such a scenario was possible if stay was not granted. On one hand, the By-election would proceed, then the 1st respondent or any other candidate could win the election, and on the other hand, the Appeal succeeds with the Applicant being cleared as a Member of National Assembly for Othaya Constituency.

(b) 1st Respondent's submissions

[55] Counsel for the 1st Respondent, Mr. Mbobu, opposed the Application. He argued that for the Applicant to be granted any orders she must satisfy the three grounds set out in the **Munya case**, namely:

i) Whether the Appeal is arguable

ii) Whether failure to grant the orders would render the Appeal nugatory

iii) Whether the balance of public interest is in favour of granting stay.

[56] On the issue whether the Appeal is arguable, Counsel reiterated the issue, which he had previously raised in the Preliminary Objection, that there was no valid Appeal before the Court as Rule 33 of the Court's Rules was in mandatory terms on the timelines for filing an Appeal. However, on our part this issue was raised in the Preliminary Objection and we have duly determined it. Counsel further added that, although Rule 53 of the Court's Rules allowed for extension of time, it did not apply in the instant case as there was no Application for extension of time before the Court.

[57] Counsel further contended that even if the Court found that there was a valid Appeal, the issues as raised by the Applicant were not arguable. He denied the contention that the Court of Appeal denied either of the parties their fundamental rights under Articles 50, 25 and 38 of the Constitution. He contended that the Court of Appeal did not hear any fresh evidence from either

parties but proceeded on the basis of the record from the Election Court thus it cannot be said that the Court of Appeal denied anybody the right to be heard.

[58] As to whether the Court of Appeal exceeded its jurisdiction under Article 87 of the Constitution as read with Section 85A of the Elections Act, Counsel proffered that the issues identified and determined by the Court of Appeal were legal issues and what the Applicant pointed out as issues of fact delved into by the Court of Appeal, were infact the reasoning of the Court in arriving at its determination on the identified legal issues. In addition a reading of the Court of Appeal judgement shows that the Court was cognizant of the fact that it could not entertain factual issues, however for the Court to arrive at the legal issues it had to navigate through the factual issues.

[59] Counsel contested the events at Kagumo Polling station arguing that the Court delved into factual issues. He stated that the issue with the polling station touched on the fundamental rights of the voters and the Court of Appeal could not be faulted for acknowledging such a serious issue that disenfranchised a whole polling station. That the Court of Appeal in citing the material presented before it, was not necessarily interrogating the factual evidence produced but was referring to what the 1st Respondent had presented as glaring irregularities.

[60] In regard to the issue of scrutiny, it was submitted that the legal issue the Court of Appeal was trying to address was the burden of proof. Counsel highlighted the Court's finding in its judgement that the Election Court placed an

unreasonably higher standard of proof on the 1st Respondent as if the petition was a criminal case. Further, it was contended that Court of Appeal did not delve into factual issues in its analysis but rather it was demonstrating how the Election Court failed in its application of the law.

[61] He submitted that the irregularities pointed out by the Court of Appeal in the conduct of elections should not be simplistically dismissed as being factual issues because an irregularity in an election petition is an issue of law. In support, he cited the case of **Ayub Juma Mwakeshi v Mwakwere Chirau Ali & 2 Others**, *H. C Election Petition No. 1 of 2008* in which the Court, while quoting the English Court's decision in **Morgan v Simpson** [1975] QB 151, accepted and recognized that irregularities in election petitions were indeed issues of law.

[62] Counsel reiterated the fact that there was no valid record of Appeal before the Court. In addressing the nugatory aspect of the Application, the Court must keep this fact in mind. Consequently there was no valid Appeal without a valid record of Appeal hence, nothing for the Court to exercise its discretion on.

[63] Counsel pointed out that there was nothing for the Court to stay and went on to state that there was need to distinguish the **Munya Case** from the instant case. He submitted that the circumstances in the instant case were completely different from those in the **Munya case** such that it was indeed possible to grant stay in that case as no election process had commenced. He submitted that unlike the **Munya case**, the Applicant's election was declared null and void on

13th February 2014 and a certificate was issued. In addition the Applicant acquiesced to that order of the Court by being nominated by a political party to run for the election.

[64] In response to the possibility of having two existing Members of Parliament for Othaya, Counsel submitted that there was need to accept that as a sacrosanct principle of law, should the Appeal be heard to its conclusion, this Court has the power to nullify a process that has gone on in breach of Constitutional rights of a party before it. In addition, it was his contention that there was no valid Appeal and it was highly unlikely that the Court will be called upon to nullify such a process.

[65] As regards public interest, Counsel posed the question, “*whose public interest was being addressed?*” He pointed out that the 2nd Respondent, who was the keeper of public interest did not refer to his replying affidavit, which set out the cost, which the taxpayer would bear with respect to the By-election. He contended that the 2nd Respondent arguing that it was in the public interest to grant a stay was illogical because it had never filed a Notice of Appeal in the first place, expressing its interest to challenge the Court of Appeal’s judgment.

F. ANALYSIS AND DETERMINATION

[66] The question whether this Court has jurisdiction to grant interlocutory orders in the nature of stay of execution was considered in the case of ***Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell*** SC Applications Nos. 12 and 13 of 2013, where the Court stated as follows:

[33]. “It is clear to us that if interlocutory Applications are excluded as a necessary step to preserve the subject-matter of an Appeal, the Supreme Court’s capability to arrive as a just decision on the merits of an Appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act gave granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory relief.”

[67] The **Munya case**, has re-emphasized the concept of ‘stay orders’ as denoting that no party nor interested individual or entity is to take action until the Court has given the green light. Particularly in this case, the question before us is whether the By-election for the seat of Member of National Assembly for Othaya Constituency should be allowed to proceed on 29th April 2014 pending the hearing and determination of this Appeal. Consequently we ought to ask ourselves whether there is a proper case before us to justify grant of the interlocutory relief sought by the Applicant.

[68] In addition the **Munya case** identified the principles that ought to guide this Court before it grants an order of stay of execution. In that regard the Applicant ought to 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 eventually to succeed, would be rendered nugatory; and*
- (iii) *That it is in the public interest that the order of stay be granted.*

i) *Is there an arguable Appeal*

[69] The Applicant identified several issues which she submitted in her opinion are arguable. She argued that the Court of Appeal erred in interpreting several provisions of the Constitution and the statutory law in arriving at its conclusion. These issues are *inter alia* the following:

- (i) *That the Court exceeded its jurisdiction, by delving into issues of fact as opposed to issues of law contrary to the provisions of Article 87(1) of the Constitution as well as section 85A of the Elections Act;*
- (ii) *That the Court disregarded the doctrine of stare decisis;*
- (iii) *That the Court erroneously altered the standard and shifted burden of proof against well-established principles of law.*

Further, the Court was taken into detail on how the Court of Appeal allegedly delved into factual issues and not issues of law.

[70] The above issues were further buttressed by the 2nd and 3rd Respondents' submissions. The 1st Respondent on the other hand repudiated the Applicant's

submissions by stating that indeed the Court of Appeal was cognizant of the fact that it could not delve into factual issues. However, in order for the Court to identify the legal issues it had to navigate through factual issues. In essence, Mr. Mbobu submitted that the portions the Applicant identified in the Court of Appeal judgment as delving into factual issues are the reasoning of the Court in identifying those 'legal' issues. In nutshell, the 1st Respondent's submission on this point was that the Court of Appeal did not misdirect itself in interpreting the Constitution and the relevant Statutes in arriving at its conclusion.

[71] After carefully considering the Notice of Motion, the Pleadings, the submissions of the Counsel and relevant authorities, we find that this Appeal raises complex issues of Constitutional interpretations which ought to be determined. We also recognize the fact that the IEBC which has the Constitutional mandate of conducting elections has asked the Court to settle several fundamental issues some of which it has framed including the issue as to when a vacancy occurs under Article 101 of the Constitution as read with Section 86 of the Elections Act. Indeed, it is paramount that there be certainty in the law. Further, Mr. Munge for the 2nd and 3rd Respondents has conceded that although about Kshs.35 Million has been expended so far in organizing the By-election, the process so far undertaken has reached the stage where printing of ballot papers was being done.

ii) Would the Appeal be rendered nugatory if conservatory orders are not issued?

[72] Mr. Miller, Counsel for the Applicant presented two scenarios if the By-election proceeds and there after the Appeal succeeds. He stated that in all these scenarios, the Appeal would be rendered nugatory and in the process public resources will have been expended. Counsel for the 2nd and 3rd Respondents on the other hand in support of the Applicants' position reiterated the fact that it would indeed be prudent to maintain the status quo but in doing so the Court must take note of the Constitutional timelines under Article 101(4)(b) of the Constitution. To drive the point home Counsel for the 2nd and 3rd Respondents posed a question as to what would happen if the Appeal succeeds but the 1st Respondent or one of the other two candidates emerges the winner in the By-election. He submitted that, the fundamental question would then be whether the Constitution envisages a situation where there are two sitting Members of National Assembly, thereby giving rise to a Constitutional crisis.

[73] The arguments were countered by Mr. Mbobu for the 1st Respondent who stated that in the first instance there was nothing to stay since the judgment of the Court of Appeal had already been complied with and further that the present case was indeed distinguishable from the **Munya case** since in that case the Applicant was still in office and a vacancy had not been declared. Counsel submitted in response to the possibility of having two existing Members of

National Assembly that it was a sacrosanct principle of law that in such scenarios, the Supreme Court would have the power to nullify any process in breach of the Constitutional process.

[74] In **Reliance Bank Ltd V Norlake Investments Ltd**, (2002) 1 EA 227 the Court of Appeal stated that on the nugatory aspect, it is trite law that the Court must weigh and balance the competing claims of both parties and that each case must be determined on its own peculiar facts in the following words.

“In determining the second limb of the test, the Court in ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED, CIVIL APPLICATION NO. NAI 358 OF 1999, had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the Appeal nugatory. The factors that could render the success of an Appeal nugatory thus had to be considered within the circumstances of each particular case.

[75] Further, in the case of **Butt versus Rent Restriction Tribunal** [1982] KLR 417 **Madan, J A** held thus: -

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an

order staying execution. It has been said that the Court as a general Rule ought to exercise its best discretion in a way so as not to prevent the Appeal if successful being nugatory. Per Better L.J. in Wilson versus Church [No. 2) 12 CH D (1879) 454 at Pg .459”.

The Court of Appeal has also in ***Hassan Guyo Wakalo v Straman East Africa Ltd*** Civil Application 160/2013 [2013] elk noted:

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”

[76] The critical question to ask ourselves is whether the Appeal which has already been filed would be rendered nugatory should the By-election be allowed to proceed on 29th April 2014. All things being equal, the electorate of Othaya Constituency should be allowed to exercise their democratic rights by electing a representative of their choice. However, in view of this Appeal, there is an apprehension that if the Appeal succeeds, it may lead to a situation where there would be two members of National Assembly for the same constituency. This would definitely create a constitutional deadlock in that we would not be in a position to rectify as a Court, because that will be a different constitutional process and we would have become *functus officio* in regard to this appeal. At this

point anyway, we would not like to speculate on the ramification of such an occurrence or the likely remedies thereof.

[77] This Court has had occasion to pronounce itself on what would render an Appeal nugatory especially on matters touching on elected representatives of the people as was held in the **Munya case** thus:

“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 rigorous 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.”

[78] The purpose of an Application such as this is to preserve the subject matter in dispute so that the rights of an Appellant who is exercising his/her undoubted right of Appeal under Article 163 (4) (a) of the Constitution are safeguarded and the Appeal, if successful, is not rendered nugatory.

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

[79] This Court has already pronounced itself on “public interest” as one of the factors to consider in granting stay of execution in its Ruling in the *Munya case*. The Court held as follows:

“[96] ...we do not perceive this case as a “private-interest matter”; for the public interest in fairly-conducted elections, and in legitimate office-holding, looms larger still.

[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.”

[80] The *Munya case* is the only one of this nature that this Court has decided so far. However, it is instructive to note that the Court of Appeal in *Kenya Hotel Properties Limited versus Willisden Investments Limited & 4 Others*, Court of Appeal at Nairobi, Civil Application 24 of 2012, dealt with the issue of public interest. We cite it as it aptly held: [paragraph 20]:

“Turning to the issue of whether the Appeal raises an arguable point of “public interest”, we wish to pause (sic) a question as to when public interest is put in motion. In the case of EAST AFRICAN CABLES LIMITED VS. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW & APPEALS BOARD AND ANOTHER [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words: -

‘We think that in the particular circumstances of this case, if we allowed the Application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill,

contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.'

The Court of Appeal further cited the case of **Kenya National Examination Council – v- R exp. Kemunto Regina Ouru** Nairobi Civil Appeal No. 127 of 2009 and **Kenya Power & Lighting Co. –v- NMG Limited & 2 Others**, Nairobi Civil Application No. 27 of 2010, **it was stated that public interest overrides private individual's interest."**

[81] We are of the opinion that the matter before us involves public interest issues. This necessitates grant of orders that are for public good which will not only preserve public resources but also ensure fidelity to the Constitution. Safeguarding public funds and ensuring good governance is indeed a means of preserving public resources and it focuses on public good. We take note of the principle of good governance enshrined in Article 10(2) (c) of the Constitution that this Court, being one of the State organs, is bound to abide by in the discharge of its Constitutional mandate. Article 10 states that:

10. “(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) ...;

(b) ...;

(c) good governance, integrity, transparency and accountability; and

(d)” [Emphasis added

[82] We acknowledge the fact that if a vacancy occurs as envisaged in the Constitution, there has to be an election within 90 days. This case is peculiar because already there are contentions as to when the vacancy occurred. It would be appropriate in our view that this matter be determined in the Appeal since the answer thereof holds the key to the determination of when a By- election should be conducted. This demonstrates the urgency of the hearing of the Appeal, considering time is of the essence in terms of Article 101 of the Constitution.

[83] The Supreme Court Act, 2011 in section 3 sets out the objectives of the Act in the following words:

“The object of this Act is to make further provision with respect to the operation of the Supreme Court as a Court of final judicial authority to, among other things—

- (a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;***
- (b) provide authoritative and impartial interpretation of the Constitution; develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth;***
- (c) enable important Constitutional and other legal matters, including matters relating to the transition from the former to the present Constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;***
- (d) improve access to justice; and***
- (e) provide for the administration of the Supreme Court and related matters.”***

[84] These objectives outlined in the Act are a clear indicator that the powers conferred on this Court are to secure the process of administration of and access to justice and at the same time developing rich jurisprudence respecting Kenya’s history and traditions as it facilitates social, economic and political growth. We are required to have regard to the kind of jurisprudence, which will not only resolve the current conflict but will also be good law applicable in the future to meet ends of Justice.

[85] In light of the foregoing, this Court is inclined to exercise its discretionary powers in favour of the Applicant prayers. In doing so, it is noted that the voters of Othaya Constituency need to be represented in the National Assembly. Further, the same voters needing to fully know what became of their exercise of political right carried out on 4th March, 2013, and also to be assured that there will be no confusion as to who is the proper representative after the By-election, if one is held. Consequently, we are convinced that conservatory orders would be imperative in this matter.

[86] The upshot is, we are of the view that conservatory orders should issue to stay the By-election being undertaken by the IEBC to pave way for the Appeal to be heard on merit.

G. ORDERS

[92] Upon considering the Notice of Preliminary Objection dated 11th April 2014 and the Notice of Motion dated 8th April 2014, and upon hearing the counsel for all parties, we make the following orders:

- (i) *The Notice of Preliminary Objection dated 11th April 2014 is hereby dismissed.***
- (ii) *An order for stay of execution of the Judgement and decree of the Court of Appeal given on the 13th of***

February 2014 in Nyeri Civil Appeal No. 31 of 2013 pending the hearing and determination of the Appeal is hereby granted.

- (iii) An order staying the By-election scheduled for 29th April, 2014 do here by issue.*
- (iv) That the Appeal herein be heard and determined on priority basis on 28th April, 2014 considering the urgency and the constitutional timelines stipulated in Article 101 of the Constitution as read with section 86 of the Elections Act.*
- (v) The costs of this Application shall be in the Appeal.*

Orders Accordingly.

DATED and DELIVERED at NAIROBI this 24th day of April, 2014.

.....
K.H RAWAL
DEPUTY CHIEF JUSTICE
AND VICE-PRESIDENT OF
THE SUPREME COURT

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

I certify that this is a true copy of the original

**LUCY NJORA
DEPUTY REGISTRAR
SUPREME COURT**