

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Maraga, CJ & P; Mwilu, DCJ & VP; Ibrahim, Wanjala & Lenaola, SCJJ)

CIVIL APPLICATION NO. 22 OF 2018

—BETWEEN—

MAWATHE JULIUS MUSILI.....APPLICANT

—AND—

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

SUMRA IRSHADALI MOHAMED.....2ND RESPONDENT

(Being and application for stay of the judgment and orders of the Court of Appeal sitting at Nairobi in Election Petition Appeal No.22 of 2018 (M. Warsame, Prof. O. Odek & M. Makhandia, JJA) delivered on 6th July, 2018)

RULING OF THE COURT

[1] For determination is the Notice of Motion Application brought under Certificate of Urgency dated 19th July, 2018 and lodged on 20th July, 2018. In the Application brought under the aegis of Article 163(4)(a) of the Constitution and Rules 23 & 26 of the Supreme Court Rules, 2012, and which application was certified as urgent by Ojwang, SCJ on 20th July, 2018, the Applicant seeks the following prayers;

- (a)
- (b) *That there be a stay of execution against the judgment and decree delivered on 6th July, 2018 pending inter-partes hearing and final determination of this Application;*
- (c) *That conservatory orders be issued restraining the 1st Respondent from certifying the position of the Member of Parliament for Embakasi South Constituency as vacant, pending the hearing and determination of the Appeal;*
- (d) *That a conservatory order do issue restraining the 1st Respondent from announcing or conducting Member of National Assembly elections in Embakasi South Constituency pending the hearing and determination of the Appeal; and*
- (e) *That the costs of this application be in the cause.*

[2] The Application is premised on the following summarized grounds, *inter alia*;

- (a) *Aggrieved by the decision of the Court of Appeal (Warsame, Odek & Makhandia, JJA) delivered on 6th July, 2018, the Applicant seeks a stay of execution of the said judgment;*
- (b) *That if the instant Application is not certified as urgent and heard expeditiously, the Petition of Appeal would be rendered nugatory,*

purely academic and overtaken by events as the Court of Appeal has issued a certificate declaring the Applicant's election invalid pursuant to Section 86 of the Elections Act;

- (c) That the learned Judges of the Court of Appeal erred in law and misinterpreted and misapplied the Constitutional threshold of a free, fair and verifiable election as contemplated under Articles 81 & 86 of the Constitution of Kenya; that the Court of Appeal exceeded its mandate and jurisdiction under Articles 87(1) & 164(3) of the Constitution and thereby depriving the Applicant of his right to fair trial, equal protection and benefit of the law as pronounced in Articles 25, 27 & 50 of the Constitution; and*
- (d) Further that the Court of Appeal has in its judgment issued an order directing the 1st Respondent to commence the process of conducting fresh elections, and should the said elections proceed but the Petition of Appeal is successful, the decision of this Court would be rendered nugatory.*

[3] The Applicant urges that the instant Application satisfies and meets the threshold set out by this Court in ***Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eKLR*** in that the intended appeal is arguable and not frivolous; that the appeal or intended appeal were it to eventually succeed, would be rendered nugatory and that it is in the public interest that the order of stay be granted.

[4] Further, and on the issue of public interest, the Applicant relied on this Court's case of ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others (2014) eKLR*** where the Court established the principle of certainty and attendant economy, and stated that it would grant orders such as those sought by the Applicant to put a hold on any waste of public resources through the process of conducting a fresh election by the 1st Respondent.

[5] The 1st Respondent filed its Replying Affidavit and Submissions dated 30th July, 2018 on even date in support of the Application, and argued that the public interest as pronounced in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** (supra) would form the basis for this Court's consideration in allowing the instant Application; they also averred that the intended appeal raises issues of interpretation and application of the Constitution as the learned Judges of the Court of Appeal in rendering their decision departed from this Court's decision in ***Hassan Ali Joho & Another v Suleiman Said Shabhal & 2 Others (2014) eKLR*** and exceeded their jurisdiction contrary to Articles 87(1) & 164(3) of the Constitution as read with Section 85A of the Elections Act.

[6] On its part, the 2nd Respondent in his Replying affidavit and submissions dated 27th July, 2018 and filed on 30th July, 2018 argued that the Application is frivolous, improper and that this Court does not have the jurisdiction to hear and determine the same. They also relied on this Court's decision in ***Re the Matter of the Interim Electoral Commission (2011) eKLR*** to argue that the Applicant does not have an arguable appeal. It was their contention that the orders sought are not in the public interest, and that the instant Application is an abuse of the process of this Court and an attempt to fetter the rights of the

constituents of Embakasi South to elect the 2nd Respondent in a free, fair and verifiable election conducted by the 1st Respondent.

[7] **UPON** considering the pleadings, arguments and submissions made by the respective parties, we have come to the unanimous conclusion that the Applicant's Notice of Motion Application dated 19th July, 2018 and lodged on 20th July, 2018 has merit, and allow the Applicant's prayers. We consequently make the following orders;

- (a) A conservatory order hereby issues restraining the 1st Respondent from certifying the position of the Member of National Assembly for Embakasi South Constituency as vacant, pending the hearing and determination of the appeal;*
- (b) A conservatory order hereby issues restraining the 1st Respondent from announcing or conducting Member of National Assembly elections in Embakasi South Constituency pending the hearing and determination of the Appeal;*
- (c) The costs of this application shall be in the cause.*

[8] Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of September, 2018

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D.K. MARAGA
CHIEF JUSTICE/PRESIDENT OF
THE SUPREME COURT

.....
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

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

**I certify that this is a
true copy of the original**

REGISTRAR,
SUPREME COURT OF KENYA