

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

APPLICATION NO. 18 OF 2014

(Coram: Tunoi & Njoki, SCJJ)

-BETWEEN-

NATHIF JAMA ADAM.....APPLICANT

-AND-

ABDIKHAIM OSMAN MOHAMED.....	}	RESPONDENTS
SAHAEL NUNO ABDI.....		
THE INDEPENDENT ELECTORAL AND		
BOUNDARIES COMMISSION.....		
RETURNING OFFICER, GARISSA COUNTY.....		

*(Being an application for stay of execution of the Judgement and order of
the Court of Appeal; at Nairobi in Civil Appeal No. 293 of 2013
(D.K.Maraga, J.W.Mwera & P.M.Mwili JJ.A) dated 23rd April, 2014)*

RULING

A. INTRODUCTION

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

- (i) stay of execution of the whole judgment/orders of the Court of Appeal at Nairobi in Civil Appeal No. 293 of 2013, pending the hearing and determination of the petition of appeal;
- (ii) grant of conservatory orders against the 3rd Respondent from certifying a vacancy in the Garissa County Gubernatorial seat, pending the hearing and determination of the appeal;
- (iii) grant of conservatory orders against the Speaker of the County Assembly of Garissa from assuming the office of Governor, pending the hearing and determination of the appeal; and
- (iv) grant of conservatory orders issue against the 3rd Respondent from announcing and conducting gubernatorial elections for Garissa County, pending the hearing and determination of the Petition before the Court;

[2] The Applicant has filed an appeal seeking to set aside the whole judgment of the Court of Appeal in *Civil Appeal No. 293 of 2013* at Nairobi dated 23rd April, 2014.

B. BACKGROUND

[3] The Applicant, Mr. Nadhif Jama Adam, was declared the duly elected Governor after the Garissa gubernatorial elections held on 4th March, 2013.

[4] Thereafter, the 1st and 2nd Respondents, Abdikhaim Osman Mohamed and Sahael Nuno Abdi, who are registered voters in Garissa County, filed a petition in the High Court citing irregularities and challenging the election results. They sought orders voiding the election of the Applicant and seeking fresh gubernatorial elections for Garissa County.

[5] The High Court (*Mabeya J*), in a judgment dated 24th September 2013, dismissed the petition, finding that although several irregularities had been proven, the effect of these irregularities could not have affected the outcome of the election. Aggrieved by the High Court's decision, the 1st and 2nd Respondents, appealed to the Court of Appeal.

[6] The Court of Appeal (*D.K.Maraga, J.W.Mwera & P.M.Mwilu JJA*) in its decision dated 23rd April 2014, allowed the appeal and set aside the judgement of the High Court, finding that the trial court erred in finding that the irregularities did not affect the outcome of the election, and that the results of the election were *indeterminate*; the consequence of which - the election of Mr. Adam was subsequently nullified. Aggrieved by the judgement of the Court of Appeal, the Applicant filed a Notice of Motion, under certificate of urgency, which precipitated the oral hearing on 30th April, 2014.

[7] On 7th April, 2014, the application was heard *ex parte* by a single Judge (Njoki Ndungu SCJ), and certified urgent. Conservatory orders maintaining status quo were granted until an *inter partes* hearing, before a 2 Judge bench on 30th April, 2014. After hearing submissions on all interlocutory matters, Tunoi and Njoki SCJJ, set the ruling for 8th May 2014. On 8th May 2014, the time for the ruling was extended to 9th May 2014, and all stay orders previously granted were maintained until delivery of ruling.

C. SUBMISSIONS BY THE PARTIES

[8] Senior counsel, Ahmednassir Abdullahi, counsel for the Applicant submitted that the appeal raised substantive issues of law, touching on both statute and constitutional law, and thus was not frivolous. He added that the Applicant was before the court as a matter of right under Article 163(4) (a), and that his appeal satisfied the conditions set out by this Court's decision in ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others***, SC Petition No. 2 of 2014 (***the Munya case***) for interlocutory orders pending the hearing of the substantive matter.

On arguability and nugatory aspects

[9] Counsel enumerated several grounds that were arguable including, that the Court of Appeal had acted beyond its scope under Section 85A of the Elections Act and

considered matters of fact as opposed to matters of law, and it misinterpreted clear provisions of the law, including regulation 66(1)(2) of the Election (General) Regulations, 2012.

[10]He argued that certain conditions must be met before a court can make a finding that an election was compromised, which conditions include, the margin of defeat between the candidates and whether the extent of irregularity had an impact on the result. He stated that the Court of Appeal did not tabulate the qualitative and quantitative nature of the irregularities to show how, in any way, it affected the results.

On public interest

[11]Senior Counsel stated that there was a greater public interest in a Governor not being removed on the basis of a flawed judgment. It was his submission that the errors on the face of the judgment were too serious for any action by any party, to be taken based on that judgment. He therefore asked that a stay be issued on the whole judgment of the Court of Appeal, including a stay on the swearing-in of the Speaker as interim Governor.

[12]Mr. Muganda, counsel for the 3rd and 4th Respondents supported the application. He urged that consideration should not be one sided but rather should

involve a wholesome approach. He stated that a by-election would involve wastage of public funds if the orders of stay were not issued and this Court subsequently overturned the Court of Appeal decision. He cited instances where great losses had been incurred by the 3rd Respondent as a result of elections being stopped by the Appellate Court when the process had already started. In addition, he pointed out that time was already set within which the appeal must be determined and therefore no prejudice would be occasioned to the 1st and 2nd Respondents.

[13] Mr. Muganda reiterated that the Applicant's submission that the appeal raised substantive constitutional issues. He submitted that they were seeking this Court's interpretation on Article 163(7) of the Constitution, in addition to interpretation of statutes that emanate from the Constitution, such as the Elections Act as read with Articles 81(a) (d), 82(e), 85, 86 and 94 of the Constitution. It was his further submission that there was need for the Court to determine whether in exercising their judicial function, courts can derogate from the provisions of Article 25(c) as read with Article 50 on the right to fair hearing.

1st and 2nd Respondents reply

[14] Mr. Macharia, counsel for the 1st and 2nd Respondents, while conceding that there were arguable issues for determination in the appeal, stated that he only opposed prayers 4, 5 and 6 of the Notice of Motion. He agreed with Counsel for the 3rd and 4th Respondents on the issue of saving public expenditure where conduct of another election is stayed pending the hearing and determination of the Appeal.

[15] He however, asked the Court to exercise its jurisdiction under Article 163(7) and reach a different conclusion from its decision in **Zachariah Okoth Obado v Edward Akong'o Oyugi and 2 Others**, SC Application No. 6 of 2014 (**the Obado case**). He particularly referred to the findings at paragraph 68-73 of the **Obado** ruling. He singled out paragraph 70 of the ruling, on the Court's interpretation of what happens when the seat of Governor is declared vacant. It was Counsel's argument that once a vacancy occurs, the electoral body receives the certificate from the Court and hands it to the Speaker of County Assembly who takes up the position of Governor in an acting capacity.

[16] Counsel drew the Court's attention to the fact that although the declaration of the vacancy of the seat of Governor ought to be provided for in Regulation 11 of the Election (General) Regulations, 2012, this was not the case. He therefore urged the Court to vary their finding in the **Obado case** that the Speaker only assumes office after taking the mandatory oath upon which the vacancy is effected. It was his

submission that as per Article 182 (e) of the Constitution the vacancy arises upon the declaration of the Court and not upon the swearing in of the Speaker.

[17] Counsel further submitted that a stay should only issue as to conduct of the by-election, but not the swearing-in of the Speaker as interim Governor. In Counsel's view, the public interest embodied in Article 182 which calls for the Speaker to be Governor in an acting capacity seeks to establish a parity of arms as a constitutional principle. This is to ensure that a person found not validly elected by the courts of law does not continue to exercise authority of State machinery, with all the trappings of the Governor's office. A contrary position, in his view, would give rise to disparity of arms and violates the principles articulated under Articles 38 and 86 of the Constitution.

[18] Counsel, submitted that it was not in the public interest to have an individual, whose process for election had been declared flawed by the Appellate Court, imposed on the electorate. However, he conceded that such a Governor still had a right of appeal and acknowledged that there was no finality until the appeal process was exhausted.

D. ANALYSIS

[19]At the hearing of this application, the Notice of Motion was only partly opposed by the 1st and 2nd Respondents, as regards the extent of the stay that should be granted on the basis of public interest. It was agreed by the parties that the matter was an arguable case, and without a stay the appeal would be rendered nugatory. The only contention, therefore, was as to the scope of the stay. Counsel for the 1st and 2nd Respondents argued that stay should only be issued as to the conduct of the by-election, while counsels for the Applicant and 3rd and 4th Respondents argued that stay should be granted for the entire process, including the issuance of a certificate by the Court of Appeal under Section 86 (2) of the Elections Act, to the swearing-in of the Speaker as interim Governor under Article 182 (4) of the Constitution. Therefore, we shall confine ourselves only to the issue in contention.

[20] The 1st and 2nd Respondents argued that it would be in the public interest to disallow a Governor whose election is impugned by a judgment, from continuing to hold office without restriction, pending an appeal. In their mind, the import of Article 182 (4) & (5) is that the electorate would not want to have a situation where such a Governor continues handling public funds or overseeing the county's operations, when his electoral mandate is still in question.

[21] Article 182 of the Constitution reads as follows:

(1) The office of the county governor shall become vacant if the holder of the office—

(a) dies;

(b) resigns, in writing, addressed to the speaker of the county assembly;

(c) ceases to be eligible to be elected county governor under Article 180(2);

(d) is convicted of an offence punishable by imprisonment for at least twelve months; or

(e) is removed from office under this Constitution...

...

(4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.

(5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.

(6) A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180(1).

[22] Our reading of Article 182 (4) of the Constitution does not give rise to the interpretation proposed by counsel for the 1st and 2nd Respondents. The Article speaks to “If” a vacancy occurs. In our opinion, a vacancy cannot occur merely upon a judgment of the Court of Appeal. Such Judgment may be stayed by this Court for review, with a possibility of reversal of the decision by the Court of Appeal. In ***Board of Governors, Moi High School Kabarak & Anor v Malcolm Bell***, SC Application No. 12 & 13 of 2013, this Court found that the power of *stay* is inextricably linked with the non-finality of the Court of Appeal’s decision once a proper appeal is filed:

In our opinion, the Supreme Court’s jurisdiction in respect of interlocutory orders, such as stay-of-execution orders, firstly emanates directly from the statute law and the rules; and secondly, rests on the rational principle that the appellate power of “review and possible reversal” of the substantive judgment appealed against, is destined to be lost unless a requisite interlocutory order was made.

Once counsel admits that this Court has jurisdiction over the Appeal, he cannot argue against the capacity of this Court to stay that judgment and *all* its consequences. This includes the swearing-in of the Speaker as interim Governor.

[23] Secondly, counsel for the 1st and 2nd Respondents have argued that it is in the public interest for the Governor only to stay in office where no “cloud” hangs over his mandate. However, examining the course of litigation reveals that there is an even greater public policy concern. Suppose a Governor’s election was impugned by the High Court, would this mean, according to counsel, that he should step down and the Speaker assume office in the meantime? What then happens when the Court of Appeal nullifies that finding? It follows that those actions would be immediately reversed, that is, the Speaker resigns and the Governor will resume office. However, what next if the Supreme Court upholds the High Court decision and reverses the Court of Appeal holding? Such uncertainty is inappropriate for such an important public office.

[24] On the balance of public interest, we find that certainty in the running of county governments is key to the stability of this integral part of this country’s administration. Greater certainty and stability is offered when a judgment is stayed and the Governor continues in office, until his election is finally and irrevocably nullified- in essence, until the vacancy in the office of the Governor is *perfected*. In this regard, the Chief Justice Willy Mutunga’s concurring opinion, in ***The Speaker of the Senate and Anor v the Attorney General and 3 Others***, SC Advisory Opinion No. 2 of 2013, gives greater emphasis to our conclusion that contests that

affect counties should not be allowed to destabilize the running of these quintessential structures:

“Fixing the full meaning of devolution, especially in this operational phase, will continue to be characterized by contestation, as is normal with political issues. The competing claims should not, however, descend into institutional anarchy or dysfunctionality, as that would compromise the developmental aspirations invested by the people, in devolution.”

[25] Furthermore, if the Court were inclined not to stay the swearing-in of the Speaker, a constitutional timeline, of 60 days, leading up to the by-election would begin to run. This Court has already held in ***George Mike Wanjohi v Steven Kariuki***, SC Civil Application No. 6 of 2014, that it is unable to extend constitutional timelines. Therefore if stay is not granted during the pendency of the appeal, the 3rd Respondent would be forced to undertake several processes to ensure that the by-election would be held within time, whether or not this Court will eventually uphold the finding of the Court of Appeal. These preparatory processes range from accepting nominations by political parties to printing of ballot papers. Furthermore, parties, some of which are funded by the Political Parties Fund (a public fund) would also be called upon to carry out nominations. Therefore, public

funds would be expended in preparation of a by-election that may be rendered unnecessary. As such, the approach suggested by Counsel for the 1st and 2nd Respondents is inappropriate, as it will still result in the unconscionable waste of public funds.

[26] Counsel for the 1st and 2nd Respondents also took issue with the holding of this Court in **Obado's case**. The holding in question is found in paragraph 72, that the “*swearing-in of the Speaker as acting Governor will **effect** the existence of a vacancy in the office of the Governor.*” It was counsel’s view that this was a wrong position in law; that the vacancy is effected on the pronouncement of the Court of Appeal’s judgment. We note that a 2-judge bench of this Court made this decision and that although Article 163 (7) states that this Court is not bound by its own decisions, we believe that the proper forum for a review of the **Obado** decision would be before a full bench of this Court. We therefore reserve any further consideration of this argument until the full hearing.

[27] Counsel for the 1st and 2nd Respondents also urged that there was a gap in the law on the declaration of a vacancy of the office of Governor. He pointed to the standard forms under Regulation 11 of the Elections (General) Regulations, 2012, most notably Forms 3 and 4, which are the standard forms through which the Speakers of the Senate, National Assembly and County Assembly respectively notify

the 3rd Respondent of a vacancy of a seat as and when it occurs. He asked the Court to inform the Rules Committee of this oversight.

[28] Despite counsel's diligence, we find that this is not necessary. The tenure of office of a County Governor is aptly addressed by Article 182 of the Constitution. Article 182, which unlike Article 101 does not require the issuance of any other notices except for a certificate to issue from the Election Court as provided under Section 80 (5) and 86 of the Elections Act. Upon such issuance of certificate and subsequent assumption of office by the Speaker, a by-election must be held within 60 days. Thus, we find, that in the case of a Governor's seat, the effective act that engages the 3rd Respondent to prepare for a by-election, is the assumption of office of the Speaker, as was held in the ***Obado case***.

[29] In conclusion, this application has demonstrated that an arguable appeal exists with an apparent risk of being rendered nugatory if stay of execution of judgement, is not granted. The public interest tilts towards granting of such stay.

E. ORDERS

[30] The foregoing analysis of representations by counsel lead us to make the following orders:

- (i) *The Applicant's Notice of Motion filed in this Court is allowed.***
- (ii) *Execution of the whole judgment and/or orders of the Court of Appeal dated 23rd April, 2014 is hereby stayed pending hearing and determination of the appeal.***
- (iii) *A conservatory order shall issue against the 3rd respondent certifying the gubernatorial seat of Garissa County vacant pending hearing and determination of the appeal.***
- (iv) *A conservatory order shall issue against the Speaker of Garissa County Assembly assuming the office of Governor, pending hearing and determination of the appeal.***
- (v) *A conservatory order shall issue against the 3rd respondent announcing and conducting gubernatorial elections for Garissa Count, pending hearing and determination of the appeal.***
- (vi) *This matter is to be mentioned on 12th May, 2014 before the Deputy Registrar of the Supreme Court, to confirm compliance and to fix hearing dates.***
- (vii) *The Costs of this application shall abide the determination of the main cause on appeal.***

DATED and DELIVERED at NAIROBI this 9th day of May, 2014.

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P. K. TUNOI
JUDGE SUPREME COURT OF KENYA

.....
N. S. NDUNGU
JUDGE SUPREME COURT OF KENYA

I certify that this is
a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA