REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

ELECTION PETITION APPEAL NO. 89 OF 2017

BETWEEN

TOM ODEGE.....APPELLANT

VERSUS

HON. EDICK PETER OMONDI ANYANGA.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT

PARTY……..……2ND RESPONDENT/APPLICANT

FREDRICK OGENGA…….……3RD RESPONDENT

RULING

Introduction

1. On 31st May, 2017 this Court (**Kimaru, J**) delivered a judgement in this appeal in which he issued the following orders:

2. The proceedings that gave rise to the said decision arose from the party primaries carried out by the Orange Democratic Party (hereinafter referred to as “the Party”).

3. It would seem that the said party made a false start as a result of which its own internal dispute resolution forum, the National Appeals Tribunal, nullified its attempt at identifying its flag bearer. The party was accordingly directed to restart the process. The Party however proceeded to nominate the appellant herein, **Tom Mboya Odege** (hereinafter referred to as “the Appellant”), as its flag bearer. Subsequent to the decision of the NAT, the 1st Respondent herein, **Hon. Edick Peter Omondi Anyanga**, challenged the decision of the NAT before the Political Parties Disputes Tribunal which vide its decision of 9th May, 2017, nullified a certificate of nomination issued **Fredrick Ogenga** and compelled the Party to issue a certificate of nomination to the 1st Respondent. It is however alleged that the Appellant herein was never made a party to the said proceedings.

4. Aggrieved by the said decision, the appellant appealed to this Court and vide his decision of 31st May, 2017, **Kimaru, J** issued the following orders:

1. The appeal lodged by the appellant cannot be allowed. It is for dismissal.

2. The nominee for Orange Democratic Movement Party for Nyatike Constituency is the 1st Respondent, Edick Peter Omondi Anyanga and the nomination certificate issued to him by the Orange Democratic Movement Party is the only valid nomination certificate which shall be received by e Independent Elections and Boundaries Commission (IEBZ).

3. The nomination certificate that was issued to the Appellant contrary to the orders of Orange Democratic Party's National Appeals Tribunal and the Political Parties Disputes Tribunal is hereby cancelled and is declared null and void. It shall have no legal effect whatsoever.

5. The Party is aggrieved by the said decision and has filed a Notice of Appeal to the Court of Appeal. In the meantime vide the Notice of Motion dated 2nd June, 2017,the Party seeks that pending the hearing and determination of the intended appeal, this Court should grant a stay of the following of its orders:

a. The order that nominee for the Orange Democratic Party for Nyatike Constituency is the 1st Respondent, Edick Peter Omondi Anyanga.

b. The order that the nomination certificate issued to Edick Peter Omondi Anyanga by the Orange Democratic Movement Party is the only valid nomination certificate which shall be received by the Independent Electoral and Boundaries Commission (IEBC)

c. The nomination certificate that was issued to the Appellant contrary to the orders of Orange Democratic Movement Party's National Appeals Tribunal and the Political Parties Disputed Tribunal is hereby cancelled and is declared null and void and shall have no legal effect whatsoever.

d. The nomination certificate that was issued to the Appellant contrary to the orders of Orange Democratic Movement Party's National Appeals Tribunal and the Political Parties Disputes Tribunal shall have no legal effect whatsoever, pending herein and determination of an intended appeal to the Court of Appeal

Applicant's Case

6. According to the Applicant, on or about the 24th day of April 2017, the Party convened and held the Party Nominations exercise, for all the Counties, National Assembly and Wards and more particularly, for Nyatike Constituency (hereinafter referred to as "the Constituency") pursuant to which the appellant herein was duly nominated as the ODM candidate for the Constituency Assembly Seat. It was averred that upon the nomination process, herein as the duly nominated candidate for Nyatike Constituency, National Assembly Seat, the Party, prepared and issued a nomination certificate to and in favour of the Petitioner and having been lawfully and validly nominated the appellant as the candidate for, the Appellant herein was/is the only lawful and legitimate candidate authorized and mandated to present his Nomination papers to IEBC and had his name was forwarded as the candidate to the IEBC on 16th May 2017 in terms of section 13 of the ***Elections Act*** as read with Regulations 14 of the ***Elections (General) Regulations***.

7. It was averred that in line and in accordance with the Nomination of the Appellant, the Applicant duly prepared pursuant to Regulation 14 of the ***Elections (General) Regulations*** a party list which included the name of the appellant and thereafter forwarded the name to IEBC as the duly nominated candidate to contest at the elections on the Party ticket for Nyatike Constituency.

8. According to the applicant, in issuing the orders sought to be challenged in the intended appeal, , this

court has visited an apparent fraud and occasioned a miscarriage of justice against the Applicant and her nominee, the Appellant. It was averred that the 2nd Respondent has 3 all forged nomination certificates which he alleges to have been issued to him by the applicant. The applicant was therefore apprehensive that courtesy of the said orders, her nominee will miss a slot at the elections as he is likely not to present his papers courtesy of the said orders while it is the lawful and statutory mandate of the applicant to nominate a candidate. To the Party, the Appellant' who is the only valid nominee of the Applicant is likely to be restrained from presenting his nomination credentials and IEBC is likely to accept nomination papers from the 1st Respondent as ODM candidate in Nyatike Constituency using a forged certificate of nomination which the court has without jurisdiction validated.

9. It was averred that the applicant was not aware that anyone has challenged her decision made on 29th April 2017 to nominate the Appellant before any forum and or that any adverse orders against him had been issued except in these proceedings. It was however aware that the 1st Respondent herein had filed proceedings against one **Fredrick Ogenga** who is now an independent candidate and obtained some orders but in proceedings which the appellant was not a party to. It was reiterated that the 1st Respondent holds 3 forged and fraudulent certificates of nomination and had not been validly and duly nominated by the applicant as the Party Nominee for Nyatike Constituency.

10. It was the Party's case that pursuant to the present orders now sought to be stayed, the appellant, who is the applicants only and legitimate nominee, herein risks being barred and/or prohibited from presenting his nomination papers for purposes of clearance and issuance of a certificate of nomination and risks being looked out of the intended elections for Nyatike Constituency National Assembly Seat. On the other hand, the 2nd Respondents even before the said orders had been issued had conspired and/or colluded with the officials at IEBC and manipulated and interfered with the Applicants party list. To the Party, the actions and/or omissions of the 2nd Respondents in collusion with the IEBC, now validated by this court in the orders now sought to be stayed are calculated to deny and/or deprive the applicant of her accrued and legitimate political rights, having been validly nominated the Appellant, to present a candidate for Nyatike Parliamentary Seat. It was contended that the orders now sought to be stayed were issued without jurisdiction and on no evident at all. Besides, the orders of this court condones impunity complained of constitutes an aid to the 1st Respondent to, with flagrant impunity force himself as a candidate.

11. It was therefore the Party's contention that the Applicant herein is likely to be mistreated and/or unfairly treated by and/or at the instance of the orders in aid of the 1st Respondent who have shown and indicated that he can nominate himself and manipulate the entire process.

12. It was contended that unless stay is granted, the Applicant stands to suffer substantial loss which cannot be adequately be compensated in damages and the rights to nominate a candidate shall have been lost permanently in relation to this election and it will be irreversible. To the Party, as a result of the foregoing, it is on the verge of being disfranchised and denied and/or deprived of the Constitutional Rights provided and captured under the provisions of Article 38 of the Constitution 2010 to present a duly nominated candidate for the Constituency National Assembly Seat.

13. The Party asserted that in view of the foregoing, the orders sought to be stayed, have aided the 2nd respondent to corruptly and with impunity take away the applicant's statutory duty and mandate to nominate a candidate and on the other hand has aided and/or abetted the denial of the Party's candidate, the Appellant's constitutional rights under Article 20, 21, 27, 38 & 47 of the Constitutions, 2010 to participate at the elections scheduled for 8th August, 2017.

14. The Party expressed its readiness and willingness to avail security in the manner which this court

shall demand and impose if necessary.

15. In support of the Party's case, **Miss Oduor**, learned counsel, submitted that once a political party nominates its candidate the only circumstances that can lead to the change of the candidate is in case of death, incapacity and violation of the Election Code of Conduct. While reiterating the foregoing it was submitted that where the certificate was issued to the Appellant on 29th May, 2017, the one purportedly issued to the 1st Respondent was issued on 12th May, 2017 hence the latter certificate cannot stand unless the earlier one is nullified.

16. It was averred that the Party had demonstrated through its officials that it did not sign the certificate allegedly issued to the 1st Respondent which ought to have been interrogated by way of evidence from the experts as opposed to the opinion of the Judge. It was further averred that the said evidence was in any case submitted by the 1st Respondent in the absence of the other parties, an action which was irregular and unprocedural.

17. According to the learned counsel since the matter that gave rise to this appeal was an application for review, the Court ought to have considered whether the Political Parties Tribunal addressed its mind to the principles guiding applications for review. This, it was contended the Court failed to do.

18. It was also submitted that the Court ought to have considered the fact that at no point was the certificate issued to the Appellant questioned as the only certificate which was in contention was that of **Fredrick Ogenga**, the 3rd Respondent.

19. In support of the submissions, learned counsel relied on **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** and **Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others [2013] eKLR**.

20. The application was supported by the 3rd Respondent who through his learned counsel, Miss Fundi, associated himself with the position adopted by the Party.

1st Respondnet's Case

21. The Application was opposed by the 1st Respondent.

22. According to the said Respondent, the allegation by **Robert Arunga**, that the Nomination certificate issued to him by applicant on 12th May 201 is a forgery, is false. In his averment, the said nomination certificate was handed over to him by non other than the chairperson of the Applicant's National Election Board, **Hon. Judith Pareno**, and he believed that the requisite signatories, including **Robert Arunga**, signed the Nomination Certificate hence their denial, at this stage is an afterthought and false.

23. It was averred that the only Nomination Certificate known to him is the one dated 12th May, 2017 which was issued to him by the Applicant in compliance with the orders of the Political Parties Disputes Tribunal after his Advocates served the order hence the purported Nomination Certificates dated 7th May, 2017 and 14th May, 2017 annexed to the affidavit of **Robert Arunga** are unknown to him and are a fraudulent creation by the Applicant's Officials with the sole purpose of tarnishing his name and misleading the Court.

24. The 1st Respondent contended that the allegation that the Nomination Certificate issued to him is a forgery came too late in the day and was only meant to deny him his right which has been confirmed by both the Political Parties Disputes Tribunal and this Court.

25. The 1st Respondent disclosed that after this Court made its decision on 31st May, 2017, he presented his Nomination Certificate to the Independent Electoral and Boundaries Commission (IEBC) for clearance and has since been duly nominated by IEBC to the seat for Nyatike Constituency Member of National Assembly seat on the Applicant's ticket. According to him, before being cleared by the IEBC, the specimen signatures that the Applicant supplied to IEBC were considered against the signatures in the Nomination Certificate and had they been forged as alleged, he would not have been cleared.

26. It was therefore contended that the order of stay being sought would, if granted, render his nomination and the orders of both the Political Parties Disputes Tribunal and this court useless, with the result that the people of Nyatike Constituency who are members of ODM Party will be denied a chance to elect a candidate of their choice in the forthcoming general elections. The 1st Respondent insisted that he did not and cannot manipulate IEBC as alleged by the Applicant and the removal of the name of the Appellant from the ODM Party's list forwarded to IEBC must have been done in compliance with the orders of the Political Parties Disputes Tribunal and this Court.

27. It was therefore his position that the application herein is not only lacking in merit but has also been overtaken by events.

28. It was submitted on behalf of the said Respondent by his learned counsel, **Mr Amuga**, that the application is premised on the false impression that it was the appellant who was nominated by the Party. To the 3rd Respondent, the Party's nominee was in fact the 3rd Respondent while the appellant came third in the nominations. It was contended that after the nominations the appellant forgot about the nominations and did not challenge the results and that the results were only challenged by the 3rd Respondent.

29. It was averred that the decision of the National Appeals Tribunal was made on 29th April, 2017 by which the only nominee was deprived of the certificate, the certificate withdraw and fresh nominations ordered. It was therefore submitted that the contention that a proper nomination certificate was issued on 29th April, 2017 cannot be correct. It was submitted that contrary to the allegations by the Party, the Party was duly served and participated in the proceedings before the PPDT through counsel though the 3rd Respondent opted not to participate as he had decided to vie as an independent candidate.

30. It was submitted that it was after the judgement of 9th May, 2017 that the 1st Respondent was issued with the nomination certificate by the Chairperson of the Party's National Elections Board, **Judy Pareno**. It was however submitted that the PPDT to which the application for review was made dismissed the same provoking this appeal.

31. To the 1st Respondent, the Party has never challenged any of the decisions granting the certificate to the 1st Respondent. However in the intended appeal, the Party is now challenging the decision dismissing the appeal by the appellant who is not appealing against the same. To the 1st Respondent, the Party has no capacity to challenge the said decision.

32. It was submitted that the issue of forgery was raised for the first time in the appeal and from the bar.

33. It was the 1st Respondent's case that since the order of the Court has been complied with there is nothing to stay. It was further submitted that since the Independent Electoral and Boundaries Commission is not a party to these proceedings no order can be issued against it. According to the 1st Respondent the mere fact that a stay is granted will not nullify the decision sought to be appealed against hence the appellant will not be entitled to be nominated. The consequence would be that the Party will be left without a candidate and its members will be deprived of the opportunity of electing their

representative. It was therefore submitted that the balance of convenience tilts in favour of dismissing the application.

34. According to the 1st Respondent no substantive loss would be occasioned even if the appeal succeeds since the said success would lead to nullification of the results. It was submitted that a successful party ought not to be deprived of the fruits of his success.

35. In support of his submission **Mr Amuga** relied on **Teachers Service Commission vs. Simon P. Kamau & 19 Others [2015] eKLR** and **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**.

Determination

36. I have considered the foregoing.

37. The 1st Respondent took issue with the fact that since the Party had not challenged any of the decisions in which the 1st Respondent was given the nomination certificate, it had no justification for challenging the decision of this Court. Rule 75(1) of the ***Court of Appeal Rules*** provides as follows:

Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

38. It is therefore clear that the right to file an appeal is given to any person who desires to appeal as opposed to a party who desires to appeal. In this case the Party was a party to the proceedings sought to be appealed against. Therefore even if one was to argue that only parties can lodge appeals, the Party would have been entitled as of right to appeal. I therefore do not see anything wrong with the Party giving a notice of its intention to appeal. Having given that notice, the Party is entitled to move this Court for orders of stay.

39. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions.

40. Therefore the courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

41. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

42. Warsame, J (as he then was) was alive to this issue when in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court… The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant… At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

43. In **IL Nwesi Company Limited & 2 Others vs. Wendy Martin Civil Application No. Nai. 291 of 2010 [2011] eKLR** the Court of Appeal held that:

"Finally, the court has considered the provisions of sections 3A and 3B of the Appellate Jurisdiction Act which the applicants have also invoked. These are fairly recent amendments in the law requiring that the court, in exercise of its powers or in the interpretation of the provisions of the Act, shall facilitate the just, expeditious, proportionate and affordable resolution of the matters before it. Such is the overriding objective of the Act. There has, however, been considerable learning on the application of those provisions. The jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes *inter alia,* reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or

implement the overriding objective, in the court's view, calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases. That, however, is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles."

44. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore…parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."

45. It is therefore my view that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."

46. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

47. Apart from that as the Supreme Court appreciated in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

48. In such matters the law is that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not rendered nugatory. See **Erinford Properties Ltd vs. Cheshire County International Limited [1974] 2 ALL ER 448; Madhupaper International Limited vs. Ken [1985] KLR 840; Butt vs. Rent Restriction Tribunal [1982] KLR 417.**

49. The parties to these proceedings spent a lot of time submitting on the merits of their respective cases. However whereas I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds, under Order 42 rule 6 of the ***Civil Procedure Rules***, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant

to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

"The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question…At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal… There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success."

50. In Mangungu vs. National Bank of Commerce Ltd [2007] 2 EA 285, the Court expressed itself on the issue as follows:

"Generally the merits of a party's case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction."

51. Accordingly, I will avoid the temptation to embark on such a potentially perilous and embarrassing voyage.

52. It was contended that since the 1st Respondent has already been issued with the nomination, there is nothing to be stayed at this stage. In this case, however the general elections which is the culmination of all the processes in the electoral cycle is yet to be conducted. The cycle is still running. In other words the act complained of, which is the process leading to the representation of the Party by either the 1st or the appellant in the general elections is not complete and has not come to an end. Accordingly, this Court is still seized of the jurisdiction to arrest the same from being completed. This was the position adopted by **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the Lord Justice held that:

"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct,

would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review…Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect." [Underlining mine].

53. What I understand the Court to be saying is that stay may include stay of the decision itself where the circumstances permit. However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."

54. The matter before me is not a private dispute between two parties. Rather, it is a matter that revolves around the right of representation. It is a matter in which the residents of Nyatike Constituency have a stake. Therefore it is my view that such a matter cannot be decided merely by considering the strictures of the application for stay. Rather, the Court should be guided by the pronouncement of the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others [2014] eKLR** where the highest Court in the land held:

"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the *inherent merit* of the case, bearing in mind *the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*."

55. That the Court may grant stay was appreciated by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others [2014] eKLR** where it held that:

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

56. The case before this Court is unprecedented both in terms of its ramifications and effects. The subject matter of this decision revolves around interests which are by no means trivial or inconsequential. To the contrary they revolve around the sovereign rights of the people of Nyatike Constituency as decreed in Article 1.Our Constitution is partly crafted based on the *Lockean* social contract theory. This is so when it is appreciated that Article 1(1) of the Constitution, the very first Article, provides that "all sovereign power belongs to the people of Kenya". It is further important to appreciate that according to the same document at Article 1(2), that sovereign power may be exercised directly or through the people's democratically elected representatives. When it comes to the exercise of such power through the said representatives, it is important to note that under Article 1(3) the peoples' representatives only exercise a "delegated" function. In other words, the Members of Parliament only exercise delegated authority. Whereas the people can exercise their sovereign power directly, when it comes to the exercise of legislative power their participation therein directly is limited and highly restricted hence the role of a Member of Parliament cannot be underestimated. The people cannot for example participate in and influence debates in the National Assembly and they cannot vote on matters affecting them.

57. The role of the National Assembly is outlined in Article 95 of the Constitution as follows:

(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(2) The National Assembly deliberates on and resolves issues of concern to the people.

(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.

(4) The National Assembly––

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

(b) appropriates funds for expenditure by the national government and other national State organs; and

(c) exercises oversight over national revenue and its expenditure.

(5) The National Assembly—

(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and

(b) exercises oversight of State organs.

(6) The National Assembly approves declarations of war and extensions of states of emergency.

58. Clearly therefore the role of a Member of the National Assembly are onerous. His or her role transcends own personal interests. Therefore as much as possible the interests of the members of a Constituency ought to be articulated by their chosen representative.

59. In this case it was argued that if the Court does not issue a stay and the 1st Respondent proceeds to the elections as the Party's nominee, in the event that the Court of Appeal reverses the decision being

appealed against the public resources shall have been wasted. I am however of the view that if the effect of granting stay would be that the appellant would thereby be the Party's duly nominated candidate and the elections were to proceed, in the event that the appeal, is dismissed similarly public resources would have been wasted.

60. In that event the most prudent decision would be not to permit either candidate to be nominated. This is in tandem with the purpose of an order of stay as restated in **Erinford Properties vs. Cheshire (1974) 2 ALL ER 448, 449**, that stay of execution pending appeal is meant to preserve the *status quo*. See also **Charterhouse Bank Limited vs. Central Bank Of Kenya & Another Civil Application No. Nai. 200 of 2006** and **Samuel Ndiba Kihara & Another vs. Housing Finance Company Of Kenya Limited & Another Civil Application No. Nai. 11 of 2007.**

61. It was therefore held by the Court of Appeal in **Re: Timothy Riziki Hopkins Civil Application No. Nai. 194 of 2008** that a "stay" does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandate stayed, to preserve a *status quo* pending appeal and that the Court has no jurisdiction at the stage of application for stay of execution pending appeal to grant an order whose effect would be to reverse the decision of the Superior Court and legalise the resolution and the contract already nullified until the determination of the appeal since that can only be nullified upon the hearing of the appeal.

62. One other thing that the Court must bear in mind is that once the elections are conducted such elections can only be challenged in the manner provided under the Constitution. This was the view adopted by the Court of Appeal in **Kipkalya Kiprono Kones Vs. Republic & Others Ex Parte Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226; [2008] 3 KLR (EP) 291** where it held that:

"A seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through the processes set out therein… The jurisprudence underlying the above decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly and those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular since the Law Reform Act and Order 53 of the Civil Procedure Rules are both inferior to and can only apply subject to the provisions of the Constitution…The procedure of judicial review, like that of plaint or any such like procedure, is and was not available to the parties aggrieved by the acts or omissions of the Commission and the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly and Presidential Elections Act by petition."

63. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** the decision to grant a stay involves:

"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the

applicant succeeds…there would be no return to the status quo."

64. I appreciate the position that election is a process as opposed to an event and therefore all steps in the election process may come into scrutiny in determining whether or not the elections met the constitutional threshold of fairness and transparency. It is however my considered view that if the situation can be arrested temporarily without exposing the constituents to a risk that they may be locked out of exercising their rights to elect a person of their choice, such temporary measure is the way to go. I therefore associate myself with the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others** (supra) that:

"The matter before us is similar to that in the Munya case, in that the constitutional timelines for a by election, which is a relatively short period, have already started running. It is apparent, therefore, that this Court runs the risk of an election being held while the appeal is pending, if a stay is not granted. This scenario would present an awkward situation for both the Court and all parties to this application; a situation best avoided. Therefore it is the opinion of this Court that this appeal would be rendered nugatory, if a stay is not granted. As to whether grant of such stay would be in the public interest, we note that the applicant cited the *dictum* in the Munya case in his submission that public funds are at risk of being expended for an election when there is an impending appeal that has a high probability of success. He asked that this Court safeguards this public interest. If this Court had any doubt as to this argument, our anxieties are allayed by the 2nd respondent's submission. The 2nd respondent, IEBC, is a constitutional body charged with conducting elections in this Republic. In so doing, it expends public funds. The Constitution decrees under Article 201(d) of the Constitution that public money shall be used in a prudent and responsible manner. The IEBC has cited cases where it had expended public funds to prepare for elections that finally never materialized, because of the outcome of Court decisions. There can be no better reason for grant of stay than in this case where the IEBC itself is calling out loud for grant of stay so as to safeguard public funds."

65. In this case I am not convinced that the intended appeal cannot possibly be heard and determined by the Court of Appeal in time for the elections particularly taking into account the fact that the proceedings and judgement are ready. Everything depends on the workload of the Court of Appeal and I do not have material on the basis of which I can say that it is impossible for the intended appeal to be disposed of before the intended elections. When directing that this matter be heard before me following the unfortunate events that led **Mr Justice Kimaru** to recuse himself from the matter, the Hon. Chief Justice directed that the matter be heard immediately. It is therefore clear that the judiciary is keenly aware of the need to have the matter expeditiously disposed of.

66. In any case taking into consideration the orders that I am about to give, such eventually may be remedied.

67. It is therefore my view and I find that a conditional stay ought to be granted. Accordingly I hereby grant a stay of execution of the judgement delivered herein on 31st May, 2017 pending the hearing and determination intended appeal or further orders either of this Court or the Court of Appeal on condition that the said appeal be filed within two days excluding the day of delivery of this ruling. For avoidance of doubt, unless these orders are varied either by this Court or the Court of Appeal, the nomination of the Orange Democratic Movement Party's candidate for Nyatike Constituency will await the decision of the Court of Appeal.

68. Thereafter the parties will be at liberty to move the Court of Appeal for appropriate orders and direction with respect to expeditious disposal of the said appeal.

69. The costs of this application are awarded to the 1st Respondent in any event to be borne by the applicant herein, the Orange Democratic Movement Party.

70. It is so ordered.

Dated at Nairobi this 7th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okongo for the applicant

Miss Fundi for Mr Ligunya for the appellant

Mr Madialo for Mr Amuga for the 1st Respondent

CA Mwangi