



IN THE HIGH COURT OF KENYA AT KISUMU

SIAYA ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION FOR

UGENYA CONSTITUENCY

IN THE MATTER OF RULE 18 OF THE COURT OF APPEAL (ELECTION PETITION) RULES, 2017

BETWEEN

DAVID OUMA OCHIENG.....PETITIONER

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

ISAIAH NABWAYO, THE RETURNING OFFICER UGENYA CONSTITUENCY.....2ND RESPONDENT

CHRISTOPHER ODHIAMBO KARANI.....3RD RESPONDENT

RULING

Background

1. This is a ruling arising out of an application made under the provisions of Rule 18 of the Court of Appeal (Election Petition) Rules, 2017

3rd respondent's application

2. When this matter came up today for hearing this morning, Mr. Wakla, learned counsel for the 3rd respondent informed the court that the 3rd respondent had on 23rd and 27th November 2017 filed notices of appeal challenging this court's orders issued on 16th and 23rd November, 2017 respectively.

3. He submitted that the filing of the notices of appeal automatically stayed the proceedings before this court until the appeals are heard and determined.

1st and 2nd respondent's submission

4. Mr. Olendo, learned counsel for the 1st and 2nd respondents buttressed the 3rd respondent's application and reiterated that rule 18 should not be confined to judgment and decree of

the court but should also apply to proceedings before the election court that made the impugned decision.

3rd respondent's submission

5. Mr. (Rtd justice) R.O.Kwach, learned counsel for the petitioner urged the court to reject the application for stay of proceedings on the grounds that the 3rd respondent was ingeniously applying for an adjournment of the election petition and a review of this court's orders issued on 16th and 23rd November, 2017.

6. It was further submitted that the Court of Appeal could not entertain appeals on decisions arising from interlocutory applications in election petitions.

7. The 3rd respondent's advocates were faulted for not informing the parties well in advance that they would make an application that might have the effect of adjourning this matter that is listed for hearing from today.

8. Mr. Sagana, also acting for the petitioner submitted that a reading of Rule 18 the Court of Appeal (Election Petition) Rules, 2017 as a whole will show that an appeal can only arise from the final decision of this court and not against an interlocutory ruling.

3rd respondent's application

9. Mr. Wakla, learned counsel for the 3rd respondent submitted that Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 arrests all actions by this court once a notice of appeal has been filed and served, against its judgment, decree, order or directions.

10. I have considered the oral submissions by counsels for the petitioner, for the 1st and 2nd respondents and for the 3rd respondent and I the issue for determination is whether the court should stay the trial proceedings pending determination of the appeals.

11. A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black's Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion.

12. In my view, the key question in this matter is whether Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 applies to decisions made on interlocutory applications, which do not lead to the conclusion of the petition by an election court.

13. Rule 18 creates new jurisprudence and no case law is available on the provision. As such, this court will adopt the "ordinary" interpretation rule, the language contained in the law and the Rule itself and the context of the entire Legal Notice to interpret and properly utilize the said Rule. This court will also be guided by pre-Court of Appeal (Election Petition) Rules, 2017 case law regarding the issue of stay pending appeal on interlocutory decisions which in my considered view are still good law.

14. Before answering the main question in this application, it would be important to appreciate the provisions regarding stay of decisions contained in the Elections Act, 2011 as amended in 2016. Section 85A of the Elections Act provides as follows:-

(2) “Appeal under subsection (1) shall act as stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.”

15. The certificate referred to in Section 85A (2) is explained in Section 86(1) as follows:

“An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission and notify the relevant Speaker.”

16. It is therefore apparent that a certificate determining the questions raised in a petition can only be issued at the conclusion of the trial.

17. Rule 18 of the Court of Appeal (Election Petition) Rules, 2017, which rules are made on the authority of the Elections Act, purports to expand the applicability of Section 85A(2) to include stay of proceedings before an election court.

18. Subsidiary legislation cannot expand the territory of a statute. Subsidiary legislation is meant to effectuate the mother law but not to create rights not envisaged by the Act or take away rights given by the Act. Subsidiary legislation must therefore strictly adhere to the provisions of the statute that creates it. The statute should, as a matter of course, be in consonance with the Constitution. (See **Samwel Kazungu Kambi v Nelly Ilongo Returning Officer, Kilifi County & 2 others [2017] eKLR**)

19. On case law, the Court of Appeal in the case of **Cornel Rasanga Amoth v William Odhiambo Oduol & 2 others [2013] eKLR**, provided the meaning of the term “decision”, and stated that:

“We must not also forget that appeals to this Court must be heard and determined within six months of filing the same. In the premises the term “decision” in Section 85(A) of the Elections Act must be construed to mean the final decision on the electoral dispute at the High Court.”

20. In the same case, the Court of Appeal stated thus on appeals from interlocutory decisions:

“In our view appeals from interlocutory rulings, orders or directions during the electoral disputes would clog our justice system with the result that there would be no end to resolution of electoral disputes, the very mischief the Constitution 2010 sought to redress. We must guard, and protect the ideals and aspirations of Kenyans. That is the express demand made of us in Article 159(1), 2(b) and (e) of the Constitution 2010....”

21. In the circumstances I prefer to err on the side of relying on the answer provided by Elections Act instead of the Court of Appeal (Election Petition) Rules, 2017 and hold that the rules are inconsistent with the parent act in so far as they purport to expand the applicability of Section 85A (2) to include stay of proceedings before an election court.

22. To hold in favor of the 3rd respondent would be a contravention of the constitutional and legal principles attendant to strict timelines provided in the determination of election disputes.

23. To read Rule 18 in the manner proposed by the respondents would by operation of sub-rule (2) thereof result in the automatic deduction of thirty days from the six months given to this court to hear an election petition. The thirty days given to a party by sub-rule (2) to file a record of appeal does not include the time for the actual hearing of the appeal. This court has no control over the Court of Appeal’s diary and so the time that the Court would take to hear and determine the appeal cannot be

predicted.

24. As was stated by the Supreme Court in **Harun Meitamei Lempaka v Lemanken Aramat vs. Lempaka & 2 Others [2014] eKLR**, the timelines provided by the Constitution and electoral law cannot be suspended. On the same issue, the Court of Appeal in the **Cornel Rasanga Amoth** case (Supra) stated that “**once a petition has been lodged the clock starts ticking and within six months of lodging the petition a resolution must be made.**” An appeal to the Court of Appeal does not stop the constitutional clock from ticking. The constitutional clock plods on irrespective of the activities of the court and or the parties in an election dispute.

ORDERS

25. From what is stated herein above, this court makes the following orders:

i. The 3rd respondent’s oral application for stay of proceedings is declined

ii. Costs of the application shall be borne by the 3rd respondent

DATED AND DELIVERED THIS 4th DAY OF December 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Mr. R.O.Kwach; Mr. Sagana and Mr. Achach instructed by the firm of Sagana, Biriq & Co Advocates
1st & 2nd Respondents - Mr. Olengo instructed by the firm of Ogenjo, Olendo & Co. Advocates
3rd respondent - Mr. Wakla and Mr. Mugoye instructed by the firm of Mugoye & Associates Advocates



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