



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

ELECTION PETITION NO.1 OF 2013

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE NAIROBI COUNTY GOVERNOR
ELECTIONS, 2013**

AND

**IN THE MATTER OF ARTICLE 1 (1), (2); 2(2);3(1); 4(2); 10; 21(1); 22(1); 23; 38;(3)(C); 47 92); 48; 81
(a); & 82 (2) (b); 84;86;87 (2); & (3); 88(5); 165 (3) (a) and (e); & 180 (1)**

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 75 & 80 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTIONS ACT, 2011 (ACT NO.24 OF 2011) AS AMENDED

AND

**IN THE MATTER OF LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF LEGAL NOTICE NO.126 OF 2012(THE ELECTIONS (REGISTARTION OF
VOTERS) REGULATIONS, 2012**

AND

IN THHE MATTER OF LEGAL NOTICE NO.44 OF 2013

AND IN THE PETITION BY

FERDINARD NDUNG'U WAITITU.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

ISAAC HASSAN (RETURNING OFFICER OF

THE NATIONAL TALLYING CENTRE).....2ND RESPONDENT

THE NAIROBI COUNTY RETURNING

OFFICER.....3RD RESPONDENT

EVANS ODHIAMBO KIDERO.....4TH RESPONDENT

JONATHAN MWEKE.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

THE DIVISIONAL COMMANDING OFFICER

(DCIO) GIGIRI POLICE STATION NAIROBI.....7TH RESPONDENT

THE DIVISIONAL COMMANDING OFFICER

(DCIO) KAYOLE POLICE DIVISION NAIROBI.....8TH RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE.....9TH RESPONDENT

RULING ON STAY

1. On 26th June 2013, this court delivered a ruling arising from an objection of the Counsel for the Respondent. The essence of the ruling was to limit the Petitioner in his cross examination based on documents delivered to the Court by the IEBC pursuant to Rule 21 of the Elections Petitions Rules, and which had not been referred to in any witness depositions or annexures thereto.
2. Aggrieved by that decision, the Petitioner filed a Notice of Appeal on the same day to the Court of Appeal. He also made oral submissions thereto through his Counsel, Mr. Kinyanjui. Being an application against this court's earlier decision, he now seeks for stay of the hearing of this Election Petition pending appeal. In his submissions, Mr. Kinyanjui argued that there has been an infringement of the Petitioner's right to access information in accordance with Article 35 of the Constitution. He also contends that the Petitioner cannot now have a fair trial when documents tendered in furtherance of Rule 21 of the Elections (Parliamentary and County Elections) Petition

Rules, 2013 are denied to the Petitioner

3. According to Mr. Kinyanjui, some constitutional questions therefore arise for determination with regard to the infringements of the aforesaid constitutional rights. Counsel framed five constitutional questions as follows:
 - a. ***Whether the import of the Ruling of the election court delivered on 26th June 2013 barring the Petitioner from cross examining the witness on the forms 35 and 36 filed by the 1st Respondent under the Election Petition Rules 2013 is violation of Article 25 (c) of the Constitution.***
 - b. ***Whether the said Ruling of 26th June 2013, amounts whether constructively or directly to a bar to the Petitioner to access justice under Article 48 of the Constitution.***
 - c. ***Whether the denial of the Petitioner to rely upon the forms 35 and 36 filed by the Petitioner (sic 1st Respondent) under Rule 21 (b) of the Petition Rules 2013, amounts to a violation of his right to access information under Article 25 of the Constitution.***
 - d. ***Whether the Petitioner will have a fair trial under Article 25 (c) in the face of his denial to cross-examine the respondents witnesses based on documents filed in furtherance of Rule 21, of the Election Petition Rules 2013 that would amount to this court failing to uphold the principles in Article 10 (2) of the Constitution.***
 - e. ***Whether the Election Petition Rules in any way forbid or bar the Petitioner from referring to the documents filed by the 1st Respondent pursuant to Rule 21(b) of the Election Petition Rules 2013, in a manner that would vitiate the Petitioner's right to access justice under Article 48 of the Constitution".***
4. The gravamen of the matter was so weighty, Mr. Kinyanjui argued, that he implored the court to find and declare that in the pendency of these proceedings, the above constitutional questions arise. He argued that by dint of Rule 12 (sic) of Legal Notice No. 6 of 2006, viz., **The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules**, there is a requirement to stay the proceedings pending the determination of the decision. He sought that those Rules, popularly known as the Gicheru Rules, be invoked for the determination of the framed constitutional questions.
5. In opposition to the application Prof. Ojienda for the 4th and 5th Respondents stated in his submissions that when the ruling was delivered, Mr. Kinyanjui did not intimate that the Petitioner intended to appeal against the decision. He referred the court to Rules 34 and 35 of the Election Petition Rules and also Rule 21 thereof. Professor Ojienda also invoked the provisions of section 75 of the Civil Procedure Act, 2010 that permits the filing of appeals against orders of the court. He contended that there was no decree or judgment issued by this court and further, that at this stage an appeal would only lie with leave from this court. It was Professor Ojienda's submission that Counsel for the Petitioner did not apply for leave and thus the notice of appeal lodged is incompetent.
6. With regard to the applicability of Legal Notice No. 6 of 2006, Professor Ojienda submitted that under **section 84** of the old Constitution, it is instructive to submit that the provisions of Rules 10 & 12 only permit the framing of Constitutional questions where they arise in a trial before the lower court and during a hearing. As such, those Rules are irrelevant in a trial in an election court governed by election rules. According to learned Counsel, this is a court *sui generis*. Further, that there are four corners that guide the Election Court, that is, the Constitution, Election Act, Election Petition Rules and the Election Regulations and Rules. Accordingly, he

submitted, the Petitioners' questions do not lie in the Legal Notice No. 6 of 2006 but in the Constitutional Court. He thus urged the court that until the Petitioner lodges the same in that court, the trial should go on. He also stated that the court's hands are tied to a time-frame vide Rule 22 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. He submitted that there is no automatic stay, and that parties have to apply for such stay.

7. Lastly, on the alleged violation of rights, learned Counsel submitted that the Petitioner had access to justice in accordance with Article 48 of the Constitution and further that it was the 1st -3rd Respondent's witness who was in the stand and that it was their rights that were being violated. In conclusion, Professor Ojienda stated that under Rule 21 Elections (Parliamentary and County Elections) Petition Rules, 2013 the Electoral Commission is required to submit to the court documents which are not evidence for the Petitioner.
8. Mr. Nyamodi for the 1st, 2nd and 3rd Respondents also opposed the application. He submitted that the Petitioner filed his petition and sought the court's leave to introduce affidavits on record that would have the effect of introducing new issues and causes of action after the lapse of the constitutional limitation of time for so doing. Upon that denial, the Petitioner then sought the documents tendered in court vide his letter dated 21st of June 2013. That he only began to seek the said documents on that day, two days before commencement of trial, and instead of going to IEBC, he came to the court. According to Mr. Nyamodi, Counsel for the Petitioner during cross-examination has persistently sought to expand the scope of the Petition. Thus, the supposed appeal and the application to adduce further evidence and the manner of cross-examination are all vain attempts to expand the scope of his Petition which this court should not facilitate at all.
9. Secondly, Mr. Nyamodi submitted that the matters are not matters that can be determined by way of appeal. All the six questions fall under Article 22 of the Constitution and can therefore be properly dealt with under Article 163 (3) (b) of the Constitution.
10. Counsel further stated that the time frame for determination is set out under Article 105 of the Constitution, and that if the court downs its tools, then there is likelihood that the court wouldn't finish the petition. Mr. Nyamodi also made reference to the Civil Appeal No. 12 of 2013, **Ali Hassan Joho vs. Suleiman Said Shahbal**, where the Court of Appeal granted stay of the election petition proceedings *suo moto* which appeal emanated from the decision of Ochieng J in **Suleiman S. Shahbal vs. Independent Electoral and Boundaries Commission & others**.
11. With regard to the reference to Rule 12 (sic) of Legal Notice No. 6 of 2006, Mr. Nyamodi submitted that the Rules relate to a trial in proceedings in a subordinate court and that the Petitioners' submissions are not relevant to these proceedings. He concluded by urging the court not to allow the Petitioner's machinations to disrupt the trial, and prayed that the court disallow the prayers for stay.
12. There are, in my view, only two issues that arise for determination herein:
 - a. Whether the court should stay the trial proceedings pending determination of the appeal, and pending a finding that the framed constitutional questions arise; and
 - b. What is the impact on the proceedings of the notice of appeal.
13. 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.

14. Urging the requirement for stay, Mr. Kinyanjui invoked the Gicheru Rules. It is true, as argued by Mr. Kinyanjui, that the Gicheru Rules are brought into force in the new constitutional dispensation. This is done by virtue of **section 19** of the Sixth Schedule to the Constitution, 2010, and those Rules are subject to conformation to **Article 22** of the Constitution. As such, the Rules are applicable for court proceedings for enforcement of Bill of Rights provisions until the Chief Justice make rules under **Article 22 (3)**.

15. A close reading of the Gicheru Rules shows that the only power of the High Court to stay proceedings under those Rules, is found in **Rule 29** which provides as follows:

"The High Court may on application by a party order that all further proceedings before the Subordinate court shall be stayed pending the hearing and determination of the reference." - (underlining added)

16. Clearly under the Gicheru Rules, stay of proceedings can only be ordered as against a subordinate court upon a constitutional application being made. The present application for stay is not covered by that provision or any other provision in the Gicheru Rules. It is also not expressly covered under any provision of the Constitution.

17. The above notwithstanding, there is no doubt in my mind that this court has inherent powers under **Section 3A** of the CPA and under the general rubric of the court's unlimited jurisdiction under of **Art. 165** of the Constitution to stay the present proceedings. In **Harman Singh & Others v. Mistri [1971] EA 122**, it was held that:

"The High Court has inherent jurisdiction to order a stay of a suit for sufficient reason where the ends of justice so require. It is a discretionary power vested in the court."

18. In making the determination whether or not to stay these election petition proceedings the court must consider and balance several factors. Without being exhaustive, these include:

- The effect of timelines on the proceedings sought to be stayed;
- The status of the proceedings at the point at which stay is sought;
- The prejudice likely to be suffered by the parties if the stay is or is not granted.

19. The first consideration is the now a hackneyed "**tyranny of time**" in respect of determination of election disputes. The law mandates a timeframe of six months. Assuming the timeframe commenced on **13th March, 2013** on publication of the Gazette Notice announcing the winners, six months ends on **13th September, 2013**. This leaves a period of two and a half months for completion of the trial, filing and arguing final submissions, and the writing and delivery of judgment. Counsel did not indicate in his application, for how long he sought a stay or when he expected to take the first steps for redress of the injuries indicated in his application. A stay cannot be granted for an indefinite period.

20. In addition, **Rule 22** of the Election Petition Rules provides:

"(1) The court shall conduct trial proceedings as far as is reasonably practicable, on a day to day basis until trial is concluded."

(2) Despite sub-rule (1) the court in which the trial proceedings have commenced shall not be adjourned for more than five consecutive days.”

In light of the above provision, the court can adjourn the proceedings for only a maximum of five days. That, however is not what the Petitioner seeks. He seeks stay of the proceedings to pursue alternative redress. The court cannot in an election petition keep the proceeding in limbo until the Petitioner has taken concrete steps to secure the alternative redress.

21. It is open to the court under Rule 20 Petition Rules, and in the interests of justice, to extend or enlarge the timeframe for the hearing so that it is concluded over a longer period than that fixed by consent of the parties at the pre-trial hearing. But this is not what the Petitioner has requested. If the court were to exercise this option of adjournment, a date of resumption and a clear indication of timelines for the duration of the steps intended to be taken by the Petitioner prior to resumption of hearing, are necessary. Counsel has not helped the court in coming to a decision on this point.

22. The second consideration I must take into account is the status of the proceedings. It needs no restatement that these are election petition proceedings, which are conducted under special jurisdiction. In EP No. 15/2013 **Clement Kungu Waibara & Another vs. Francis Kigo Njenga & Others**, this court pointed out the unique circumstances of a petition and the strait jacket into which the court is put by the relevant statute. The court cited with approval, **Jyoti Basu & Others v. Debi Bhosal & Others reported in AIR 1982 SC,983**, where the Supreme Court held as follows:

“.....An Election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a straight jacket....” (Underlining added for emphasis).

23. In pursuance of the “straight jacket” or circumscribed environment in which the court operates under the elections statute, the court with the consent of the parties, fixed the trial for three and a

half days (3 1/2) from **25th to 28th June, 2013**. Time allocations for the parties, for the conduct of their cases were agreed. Subsequently, at commencement of the hearing on **25th June**, the parties also agreed on dates for final submissions. The last date agreed by consent was **17th July, 2013** when parties will orally highlight their written submissions. The judgment would be rendered thereafter.

24. The hearing duly commenced, and the Petitioner and one of his witnesses testified. Two other witnesses who the Petitioner intended to offer and whose depositions are on record were unable to attend the hearing to testify. One, Dr. Edward Chege Waweru, was the Petitioner's County Elections Co-ordinator and Co-agent of the TNA party. The other was Ibrahim Ahmed, a voter. The petitioner closed his case in the afternoon on **25th June, 2013**.
25. The 1st to 3rd Respondents then opened their case and offered Fiona Nduku Waithaka for cross-examination. It continued until the cross-examination veered into the documents filed by the 1st Respondent under **Rule 21** of the Petition Rules. An objection was raised resulting in the Ruling which is the subject of the notice of appeal.
26. As counsel for the 4th and 5th Respondent pointed out after the impugned Ruling was delivered, there was no indication of intent to appeal by the Petitioner. Indeed his counsel proceeded with the cross-examination of RW1 pursuant to the directions in the impugned Ruling. Of course, there is nothing to bar a party exercising its right of appeal at any stage, and nothing untoward may be construed against the Petitioner on that count.
27. What is noteworthy, however, is that although the parties were directed in the Ruling to identify which of the documents in the bundle filed under **Rule 21** they wished to rely on for cross examination, this did not happen. Yet the Petitioner's counsel continued with his cross-examination. This left the court with the impression that counsel was proceeding in compliance with the said Ruling.

These circumstances and the status of the proceedings are important in assisting the court exercise its discretion as to grant of a stay. I need say no more about this point.

28. The final consideration I need to take into account is whether there will be irredeemable prejudice likely to be suffered by the Petitioner if the stay is or is not granted. I have used the word "**irredeemable**" with due consideration, because of the straight jacket nature of election petition proceedings. The overarching constitutional principle for determination of election petitions is expeditious disposal. This is contained in **Article 87 (1)** pursuant to which Parliament is obliged to make regulations to establish mechanisms for "**timely settling of election disputes**."
29. This principle impacts on the question of prejudice when a party seeks an order so serious as to stay or arrest election proceedings. In this case the Petitioner has already made out his case. He put his best foot forward, called some of his witnesses, and did not avail others. He does not complain that he was not able to fully ventilate his case. It is in his intent to cross-examine the Respondents witnesses on documents which this court ruled were not part of the evidence in court as part of the trial record, that his complaint of prejudice arises. For the Respondents, it is their case that is being disrupted at this stage of the hearing, and this too I must bear in mind.
30. The court has to balance the prejudice which will be suffered by the Petitioner as against that which will be suffered by the Respondents if the proceedings are or are not stayed, pending the appeal or the determination of the constitutional questions framed by him.

31. If the proceedings are stayed and the court of appeal upholds this court's decision, precious time will have lapsed. If the Court of Appeal however, upsets this court's ruling, the Petitioner will have a right for a rehearing of the Respondent's case and, specifically, for cross-examination using the filed **Rule 21** documents. In the latter case, the parties will have incurred no hearing expenses, but precious time will have been lost.
32. If the present proceedings are not stayed and the Court of Appeal upholds this court's ruling, both time and expense will have been saved by all parties. If the Court of Appeal upsets this court's ruling the parties will have incurred hearing expenses, and will have to re-hear the Respondent's case.
33. On balance therefore, I prefer to err on the side of redeeming precious hearing time in the event that the Court of Appeal were to uphold the Ruling. I am therefore not satisfied that this is a proper case in which to order stay.

Impact of Notice of Appeal

34. The Notice of Appeal is the other point which I must deal with. The effect of a notice of appeal is to alert the court and parties of an intention to lodge an appeal. Under the Petition Rules there is no express provision for appeals against interlocutory proceedings in election petitions.
35. In the case of **Gogawala Nelson Wambuzi v. Kenneth Lubogo**, EP No. 10 of 2011, Court of Appeal Uganda, the Court there discussed the spirit of the provisions of the Ugandan Elections Act on appeals. These provisions are not materially different from those in our Rules. The court there held that:

“The Respondent has no right of appeal against the interlocutory orders of the High Court Judgment.”

36. This position does not appear to be extant in Kenya as the Court of Appeal in Malindi in Civil Appeal No. 12 of 2012, **Ali Hassan Joho vs. Suleiman Shahbal**, the Court of Appeal, **Suo moto** stayed the proceedings in EP No. 8/2013 – **Suleiman Shahbal vs. Ali Hassan Joho**. The court therefore assumed a stance that it had jurisdiction in respect of an interlocutory ruling in an election petition. I am guided by the position of the Kenyan Court of Appeal.
37. It may, however, be noted that the Petitioner's notice of appeal herein was filed without leave of this court. During the hearing of the Petitioner's application for stay of the proceedings, he did not seek leave to appeal. Counsel to the 4th and 5th Respondent pointed this out referring to **Section 75** of the Civil Procedure Act. The requirement of that section is that appeals lie as of right from all orders not specified therein or in the statute. All other orders are subject to the grant of leave by the court which made the order.
38. In the absence of leave, I consider that this court is not properly seized of a notice of appeal. As such, the basis for staying the proceedings is not properly laid, resulting in the courts inability to exercise its discretion favourably towards the Petitioner in this regard. There is, however, nothing to prevent the Petitioner from applying to the Court of Appeal for stay of the proceedings and serving such order on this court.
39. Taking into account all the foregoing matters, this court is unable to grant a stay of the proceedings. Accordingly, the Petitioner's application for stay is hereby dismissed with costs.

40. As the court was not asked to make a determination on the five constitutional questions framed by the Petitioner, I have said nothing about them herein.

41. The petition shall therefore proceed as previously scheduled.

Orders accordingly.

Dated at Nairobi this 27th day of June, 2013

R. MWONGO

JUDGE.



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