IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MARAGA & MOHAMMED, JJA)

CIVIL APPLICATION NO. 169 OF 2013 (UR 117/2013)

BETWEEN

OKIYA OMTATAH OKOITI……APPLICANT

AND

THE HON. ATTORNEY GENERAL…….1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION……..2ND RESPONDENT

(Application for stay of the July 26, 2013, Makueni Senatorial By-election pending the hearing and determination of an intended Appeal from a Ruling of the High Court at Nairobi (Honourable Majanja, J.) delivered on the 8th day of July 2013 In

H.C.C. PETITION NO.354 OF 2013

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RULING OF THE COURT

1. This is an application by **OKIYA OMTATAH OKOITI** (the Applicant) seeking a stay of the Makueni Senatorial by-election (the by-election) scheduled for the 26th July, 2013 pending the hearing and determination of his intended appeal against the ruling of the High Court (Majanja, J) delivered on 8th July 2013 in Constitutional Petition No. 354 of 2013 (the Petition). The application is brought under **Sections 3, 3A, 3B** and **7** of the **Appellate Jurisdictions Act** and **Rule 4** of the **Court of Appeal Rules.** It seeks, *inter alia*, orders:-

1. That the July 26th Makueni Senatorial By-election be stayed pending the hearing and determination of the Application herein *inter-partes*.
2. **That the July 26th Makueni Senatorial By-election be stayed pending the hearing and determination of the Appeal herein *inter-partes.* In the alternative, that Diana Kethi Kilonzo's name be included in the ballot as damage for not doing so is irreversible where (sic) it turns out that the 2nd Respondent's Nominations Dispute Resolution Committee's**

decision is set aside.

3. **That the Honourable Court be pleased to issue any such further orders it may deem fit and convenient.**

The application is based on the grounds that the Applicant has an arguable appeal with overwhelming chances of success because:-

"**the decision of the 2nd Respondent's Nominations Dispute Resolution Committee to be the investigator, prosecutor, jury, judge and executioner in its own case that resulted in the disqualification of Diana Kethi Kilonzo from the Makueni Senatorial by-election breached and/or violated both the rules of natural justice and the principles and values of the Constitution of Kenya, 2010, [and]**

[t]hat the decision of the Superior Court at Nairobi to summarily dismiss at the *ex parte* stage, without hearing on merit, both the Application and the Petition in the Constitutional Petition No. 354 of 2013, which sought to remedy the violations … aforementioned, was a further breach and/or violation of both the rules of natural justice and the principles and values of the Constitution of Kenya, 2010."

2. The application is supported by the Applicant's affidavit sworn on 16th July 2013 to which he has annexed copies of the Petition and its annexes as well as his proposed memorandum of appeal.
3. The Applicant's case as set out in the Petition and his written and oral submissions before us is that pursuant to **Article 88(4)(e)** of the Constitution read together with **Section 74** of the **Elections Act, 2011** and **Regulation 99(1)** of the **Elections (General) Regulations, 2012** (the Regulations) the Independent Electoral and Boundaries Commission (the IEBC) is mandated to resolve all electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. There is, however, nothing in that Article authorizing the IEBC to be a judge in its own cause. Legally, no person, and in particular a public officer, can preside over and adjudicate on disputes to which he is a party. If any public officer does that, he will consciously or unconsciously be biased and thus violate **Article 73** of the **Constitution** which states that the authority assigned to a public officer is a public trust to be exercised in a manner that, *inter alia*, brings honour to the nation and dignity to the office and promotes public confidence in the integrity of the office. Such an action will also undermine the guiding principles of leadership and integrity, which include objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favouritism, or self-interest.
4. The IEBC having been authorized by law to adjudicate over election related disputes before the declaration of election results, the Applicant contended that it is required to set up a tribunal exercising quasi-judicial authority, which, *"must of necessity be an independent entity with the capacity to oversee the fair administration of justice."* By authorizing the IEBC to determine such disputes without providing for the establishment of a separate and independent tribunal to adjudicate over disputes to which the IEBC is a party, **Section 74** of the **Elections Act 2011** is unconstitutional for being vague, unreasonable and running counter to **Article 2(4)** of the Constitution.

5. In this case, taking advantage of the lacuna in Section 74 of the Elections Act, the IEBC set up the Nomination Disputes Resolution Committee (the IEBC DR Committee) composed of its own commissioners thus constituting itself a judge in its own cause. He said that violated **Article 249** of the Constitution, which obliges the IEBC and other Constitutional Commissions to promote constitutionalism.

6. In the complaints filed before the IEBC DR Committee, the IEBC had been accused of grave criminal activities such as theft, fraud, and falsification of official records and documents. Under the Constitution, the Applicant asserted, such accusations can only be adjudicated upon by an independent tribunal that can guarantee a fair trial and ensure that there is no cover-up.
7. In the affidavit in support of the Petition, the Applicant had averred that having read the three complaints placed before the IEBC DR Committee, he had no doubt that the complaints raised weighty issues that required determination by an independent body. To the contrary, however, having sat through the IEBC DR Committee's deliberations, he had noted that its proceedings were shambolic and openly biased in favour of the position taken by the IEBC hence his Petition.

8. In the complaints placed before the IEBC DR Committee, copies of which are exhibited in this application, **Agnes Mutindi Ndetei, Rodah Ndumi Maende** and **Philes Nthenya Muinde,** as well as **John Kuria Kihiko** and **Joseph Kitiku Mwanza** challenged the nomination of Diana Kethi Kilonzo (Kethi) to vie in the by-election on the ground that she is not registered as a voter. It was claimed that in the absence of any credible evidence from either the manual register or the biometric data, the Returning Officer knew or should have known that Kethi was not validly registered as a voter to entitle her to vie in the by-election. This is because both the Elector's Number 0007331121411256 under which Kethi claimed to have been registered and the acknowledgement slip No. 0002058624 allegedly issued to her after registration, do not exist in either the Voters Register or Biometric Data. As a matter of fact, Karen Registration Centre in Langata Constituency in which Kethi claimed to have registered did not exist and Kethi's said acknowledgement slip No. 0002058624 is from the booklet used exclusively for the registration of the former President, H.E. Mwai Kibaki as a voter in Monaine Primary School in Othaya Constituency, Nyeri County.

9. Despite all these irregularities, the Returning Officer went ahead to clear Kethi to vie in the by-election. In the circumstances, the complainants prayed for, inter alia, a declaration that IEBC contravened the Constitution and **Section 24(1)(a)** of the **Elections Act** and sought an order to rescind, revoke and withdraw the clearance certificate that the IEBC's Returning Officer had issued to Kethi to vie in the by-election.
10. The applicant further submitted that **Article 88(5)** of the Constitution obliges the IEBC to perform its functions in accordance with the Constitution and national legislation. The IEBC was therefore supposed to defend the Constitution as required by Article 3 thereof, uphold the national values set out in **Article 10** as well as the Bill of Rights in **Articles 19, 20** and **21.** Instead of doing that, purporting to act under **Section 74** of the **Elections Act**, it set up the IEBC DR Committee composed of three members all of whom are its own Commissioners. In the Applicant's view, that is a violation of the constitutional right to a fair trial under **Articles 25(c)** and **50**, the right to equal protection under **Article 27**, and the right to a fair administration of justice under **Article 47** all of which, as stated in **Article 24(1)** of the Constitution, cannot be limited.

11. In conclusion the Applicant had sought in the Petition several declarations to the effect that denying Diana Kethi Kilonzo the right to vie for the Makueni Senatorial seat was unconstitutional and requested the High Court, in exercise of its supervisory jurisdiction under **Article 165(7)** of the **Constitution**, to call for the file relating to the complaint lodged with the IEBC DR Committee against the nomination of Diana Kethi Kilonzo and give appropriate directions. Besides costs, he had also sought an order directing the Attorney General to commence the process of amending **Section 74** of the **Elections Act, 2011** to establish an independent tribunal to determine disputes to which IEBC is a party.
12. The Applicant faulted the learned Judge for ignoring all the above violations of the Constitution and, in total disregard of **Articles 22(2)(c)** and **258(1)** stating that the Applicant had no business

of defending the rights of Kethi who is able to defend herself. On those submissions, the Applicant urged us to allow this application with costs.

13. In response to those submissions, Mr. Kimani Muhoro, learned counsel for the 2nd Respondent, submitted that this application has been overtaken by events. He said in Constitutional Petition No. 359 of 2013, the High Court considered, inter alia, the contention that in determining Kethi's nomination dispute to which the IEBC was a party, the IEBC was a judge in its own case and dismissed it holding that, by virtue of **Article 88(4)(e)** of the Constitution, the people of Kenya bestowed that responsibility on the IEBC which it could not shirk from. As this is not an appeal from that decision, this Court cannot do anything about it in this application.
14. Mr. Muhoro further argued that the application has also no merit. Even if it had, he said this Court cannot stay the Makueni Senatorial by-election beyond the 27th July 2013 as, pursuant to **Article 101(4)(b)** of the Constitution, that is the last day on which it should be held, the late Senator Mutula Kilonzo having died on 27th April, 2013. In the circumstances, he urged us to dismiss this application with costs.
15. Mr. Kakoi, learned counsel teaming up with Ms Mwangi for the 1st Respondent concurred with and adopted the submissions made by counsel for the 2nd Respondent and added that Article 101(4)(b) cannot be ignored as the Applicant suggests. To do so would be tantamount unlawfully amending the Constitution. With that, he also urged us to dismiss this application with costs.
16. In his reposite, the Applicant submitted that he is not asking the court to disregard any constitutional provision. Instead his submission is that the Constitution is not a flat plain. It is like a mountainous country with hills and valleys. According to him, under **Article 255** of the Constitution which requires referenda to sanction the amendment of some of its provisions, the right to a fair trial which requires such sanction to amend is more important than the right to representation which does not. In his view therefore, in upholding the right to a fair trial, this Court has authority to stay the Makueni by-election beyond the 90 days in Article 101(4)(b). He concluded that to dismiss this application will be tantamount to authorizing the IEBC to defraud Kenyans. He therefore urged us to allow it with costs.
17. We have considered these rival submissions and the entire matter. As this court stated in **Bob Morgan Systems Ltd vs. Jones [2004] 1 KLR 194** and has repeatedly in subsequent cases, it is now an established practice of this Court that for one to succeed in an application for stay or injunction under **Rule 5(2)(b)** of the **Court of Appeal Rules**, one needs to satisfy this Court on the twin criteria of one's appeal being arguable and that if the orders sought are not granted, one's appeal or intended appeal shall be rendered nugatory.
18. This being an interlocutory application, we are constrained not to make any definitive findings lest we prejudice the hearing of the intended appeal. All that is required of us at this stage is to establish whether or not the Applicant has met the above stated twin criteria, and determine the application either way. The question then is whether or not the Applicant in this case has met these criteria.
19. On the first criterion, an arguable appeal is not necessarily one that will succeed-**Dennis Mogambi Mongare v. the AG & 3 Others, Civil Application No. NAI 265 of 2011 [UR 175/2011] (Unreported).** It is enough if the applicant demonstrates that his or her appeal is not frivolous-**Safaricom Limited v. Ocean view Beach Hotel Ltd. & 2 Others [2010] eKLR.** In this case, as we have already pointed out, the Applicant's contention is that by the IEBC appointing a committee to determine the nomination dispute to which it was a party, it constituted itself a judge in its own cause. The other argument is that Kethi, according to the Applicant, is a registered voter as evidenced by the acknowledgement slip issued to her but has been bundled out of the Makueni Senatorial by-election. On these grounds, the Applicant contends that his intended appeal is arguable.
20. From these submissions, two aspects arise for consideration in the first criterion of the intended appeal being arguable. They are whether or not the IEBC DR Committee had jurisdiction to

determine the complaints presented to it and whether or not Kethi was unlawfully denied an opportunity to contest in the by-election.

21. To determine the first aspect, we need to consider **Article 88(4)(b)** which mandates the IEBC to determine nomination disputes before the declaration of the election results. It provides that:

"(4) The Commission [IEBC] is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results…"

22. Section 74 of the Elections Act and Regulation 99 of the Regulations; merely reproduce this provision without much ado. In opposing this point, counsel for the 2nd Respondent referred us to the High Court recent decision in **Diana Kethi Kilonzo & Another v. IEBC & Others, Constitutional Petition No. 359 of 2013** in which it was held that under Article 101(4)(b), the IEBC is constitutionally mandated to decide all election disputes before the declaration of the election results. On his part the Applicant was of the view that we should not even look at that decision as this is not an appeal from it and that it failed to consider some salient issues that the petitioners raised therein.
23. We cannot accept the Applicant's said contention. That decision having been cited to us and as it dealt with, inter alia, Kethi's right to contest in the by-election, we are obliged to consider it. What we are not obliged to do is to agree with it if we think it is not a correct decision or give it the interpretation of either party to this application. We have to independently determine its soundness before we apply it to this application.
24. Given the sacrosanct constitutional principle that no man shall be a judge in his own cause or in a matter that he has an interest in, we are of the view that the issue needs to be investigated further to determine whether or not by reposing the responsibility of determining electoral disputes before the declaration of election results upon the IEBC, the framers of our Constitution and indeed the people of Kenya intended to authorize the IEBC to also determine disputes to which it is a party or has an interest in. On that basis, we find that the Applicant has an arguable appeal.
25. That being our view of this aspect of the matter, we wish to leave undecided the second aspect as to whether Kethi was unlawfully denied the opportunity to contest in the by-election. This is because we foresee the status of her registration as a voter being the central issue in the appeals we are told have or are likely to be preferred against the High Court decision in the said Constitutional Petition and do not therefore wish to express any view that may prejudice their hearing.
26. That brings us to the second criterion of whether a dismissal of this application will render the Applicant's appeal nugatory. In determining this criterion, we should never lose focus on the issues in this matter. Counsel for the Respondents argued that the Applicant is, in a disguised manner, urging Kethi's right to contest in the by-election when Kethi herself has not authorized that and may even be unaware of this application. At any rate, counsel further contended, that issue has been decided in the said Constitutional Petition No. 359 of 2013, and as long as that decision stands and this not being an appeal from it, we should find that this application is an abuse of the court process.
27. The Applicant's response to that submission is that we should look beyond Kethi's interest in this matter and consider the wider public interest that the IEBC should not be allowed to contravene anybody's constitutional right to contest in any election and that if Kethi is shut out of the Makueni by-election, besides her, the people of Makueni will have also irredeemably lost

their right to elect a representative of their own choice.

28. Even with that argument, the Applicant is cognizant of the provisions of **Article 101(4)(b)** which requires that a vacancy like the one in this case caused by the death of the late Senator Mutula Kilonzo should be filed within 90 days and that the 90 days expire on 26th or 27th July 2013. He has, however, a "solution" for that. In his view, by virtue of **Article 255(1)** of the Constitution which requires approval by a referendum to amend certain Articles of the Constitution, we should consider the Articles requiring such approval as more important than the others. In this regard, he argued that as all the Articles in the Bill of Rights cannot be amended without approval by a referendum, we should regard the right to a fair trial, which is in the Bill of Rights as more important that the right to representation which is not among the ones listed in Article 255(1). In the circumstances, he concluded, our hands should not be tied by Article 101(4)(e) and we should therefore grant his prayer for stay even if that postpones the by-election beyond the period 90 days stipulated in that Article.
29. We are unable to accept the Applicant's said submissions on the second criterion of his intended appeal being rendered nugatory if stay is not granted for two reasons. The first one relates to the hierarchy of primacy that the Applicant wants us to ascribe to the provisions in our Constitution. We find no warrant for that categorization. As the US Supreme Court stated in **Smith Dakota v. North Carolina, (1940) 192 US 268**,

"It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument." [Emphasis supplied].

We therefore find that the Articles in the Constitution which relate to a fair hearing and the right to political representation, have to be put on the same pedestal and be harmoniously interpreted.

30. Moreover, as was stated in the Ugandan case of **Tinyefuza v. The Attorney General, Const'l Appeal No. 1 of 1977**,

"the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other."

And to accept the Applicant's invitation to set aside the timelines in Article 101(4)(b) will whittle down all timeline provisions in the Constitution. There is no provision in the Constitution granting to us that jurisdiction and as was stated by the Supreme Court **In The Matter of the Interim Independent Electoral Commission, [2011] eKLR** no court can by interpretational fiat arrogate to itself the jurisdiction it does not have.

31. The second reason why we cannot accept the Applicant's argument relates to the alleged denial of Kethi's political right to contest in the Makueni Senatorial by-election. For a party to be entitled to a finding that his or her intended appeal will be rendered nugatory he or she must first of all show that he has an arguable appeal. You will recall that we avoided commenting on the appeal being arguable on the ground of denial of Kethi's right to contest in the by-election because the status of her registration as a voter is uncertain. As we cannot tell if the issue will be resolved in her favour, we are, in the circumstances, unable to find that the Applicant's appeal will be rendered nugatory.
32. For these reasons, we dismiss this application with no order as to costs, this being a public interest litigation.

DATED and delivered at Nairobi this 25th day of July, 2013

R. N. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR