

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 114/2010**

**APPLICATION NO. 178/2010**

**BETWEEN NORMAN WASHINGTON MANLEY BOWEN APPLICANT**

**AND SHAHINE ROBINSON 1<sup>st</sup> RESPONDENT**

**AND NEVILLE WILLIAMS 2<sup>nd</sup> RESPONDENT**

**Abraham J. Dabdoub, instructed by Clough, Long & Co, for the applicant**

**Ransford Braham and Mrs Nesta-Claire Smith-Hunter, instructed by Ernest A. Smith & Co, for the 1<sup>st</sup> respondent**

**9 and 16 November 2010**

**IN CHAMBERS**

**MORRISON JA**

**Ruling made on Preliminary Objection**

[1] Before the court is an application for a stay of execution of the judgment of Jones J delivered on 8 October 2010, pending the hearing of this appeal. When the application came on for hearing before me on 9 November 2010, Mr Dabdoub for the applicant took a preliminary objection to the 1<sup>st</sup> respondent appearing or taking part as a party in the proceedings. I therefore heard submissions from Mr Dabdoub and from

Mr Braham, who appears for the 1<sup>st</sup> respondent on the objection and promised the parties a decision on the objection as a preliminary matter.

[2] The brief background to the matter is that, arising out of general elections held on 3 September 2007, the applicant filed an election petition challenging the election of the 1<sup>st</sup> respondent to the House of Representatives ('the House') as the Member of Parliament for the constituency of Saint Ann North Eastern. The ground of the challenge was that the 1<sup>st</sup> respondent was at the material time a citizen of the United States of America and had accordingly not been qualified to be nominated or elected to the House, by virtue of the provisions of sections 39 and 40(2)(a) of the Constitution of Jamaica.

[3] The petition was vigorously opposed by the 1<sup>st</sup> respondent until 15 September 2010 when, at a pre-trial hearing before Jones J, she indicated to the court through her counsel that she no longer opposed the petition. On 17 September 2010, she gave notice to this effect pursuant to section 15 of the Election Petitions Act ('the Act') and on 22 September 2010 her defence (which had been amended as recently as 25 June 2010) was struck out as an abuse of the process of the court. That notice was published in the Gazette on 23 September 2010 and on 1 October 2010 an application was filed on behalf of the 2<sup>nd</sup> respondent for an order that he be substituted as a respondent, again pursuant to section 15 of the Act. This application is still outstanding. Finally, on 8 October 2010, Jones J made an order that the 1<sup>st</sup> respondent was not qualified to be elected as a member of the House and that the election of 3 September 2007 for the constituency of Saint Ann North Eastern was therefore null and

void and of no effect. The seat was accordingly declared vacant and the judge so certified it to the Speaker of the House.

[4] However, the learned judge did not make the further order which had been sought by the applicant in the election petition in the following terms:

“...that Mr. Oswest Senior-Smith be the only duly and regularly nominated candidate for the election in the constituency of Saint Ann North Eastern be forthwith returned by acclamation as duly elected for the said constituency of Saint Ann North Eastern.”

[5] By notice and grounds of appeal filed on 8 October 2010, the applicant appealed to this court on the basis that the judge had erred in declaring the seat vacant without having allowed the applicant to address him on the question whether by law and on the evidence before him Mr Senior-Smith, who had been the opposing candidate in the in the constituency in the general elections, should have been declared the duly elected member of the House. By counter-notice of appeal filed on 20 October 2010, the 1<sup>st</sup> respondent gave notice of her intention to contend on the hearing of the appeal that the decision of Jones J should be affirmed on the additional ground that on the basis of the decision of this court in the matter of ***Abraham Dabdoub v Daryl Vaz*** (SCCA Nos. 25 & 47 of 2008) he had come to the correct decision in not declaring Mr Senior-Smith the duly elected Member of Parliament for the constituency.

[6] It is against this background that, on 11 October 2010, the applicant filed this application seeking a stay of the judgment of Jones J. As indicated, Mr Dabdoub for

the applicant has objected to the 1<sup>st</sup> respondent appearing or taking part as a party to the proceedings. He submitted that, the 1<sup>st</sup> respondent having given notice to the Registrar of the Supreme Court (pursuant to section 15 of the Act) that she does not intend to oppose the applicant's election petition and the requisite notice having been given in the Gazette, the 1<sup>st</sup> respondent is thereby "estopped by law from appearing or acting as a party against the petition".

[7] Section 15 of the Act provides that that if a party to an election petition gives notice to the Registrar of the Supreme Court and to the petitioner that he does not intend to oppose the petition, notice of this event must be given in the Gazette. Within 14 days of the giving of such notice, "...any person who might have been a petitioner in respect of the election to which the petition relates may apply to the Court or a Judge in Chambers to be admitted as a respondent to oppose the petition, and such person shall on such application be admitted accordingly..." There is no question that the notice referred to in section 15 was in this case given to the Registrar and to the applicant, and that the requisite notice was in fact published in the Gazette. In these circumstances, Mr Dabdoub submitted, section 16 of the Act applies. Section 16 provides as follows:

"16. A respondent who has given the prescribed notice that he does not intend to oppose the petition shall not be allowed to appear or act as a party against any such proceedings thereon and shall not sit or vote in the House of Representatives until the Speaker or Deputy Speaker of the House of Representatives has been informed of the report on the petition or in a Parish Council or the Council of the Kingston and St. Andrew Corporation until the chairman or vice-chairman of that Parish Council or the Mayor or Deputy

Mayor of the Kingston and St. Andrew Corporation has been so informed; and the Court or Judge shall in all cases in which such notice has been given forthwith report the same to the Speaker or Deputy Speaker of the House of Representatives in the case relating to the House of Representatives, or to the chairman or vice chairman of the Council in a case relating to a Parish Council or to the Mayor or the Deputy Mayor of Kingston and St. Andrew Corporation in a case relating to the Kingston and St. Andrew Corporation in accordance with the provisions hereinafter contained."

[8] It is on this basis that Mr Dabdoub accordingly submitted that, the requirements of section 15 having been satisfied, the 1<sup>st</sup> respondent is therefore not allowed, "according to the mandatory requirements of section 16", to act or appear in this matter relating to the election petition. Mr Braham for the 1<sup>st</sup> respondent disagreed on two bases. In the first place, he submitted that the 1<sup>st</sup> respondent continues to be a respondent, notwithstanding the service of a notice under section 15 and that it was for the court to decide as a discretionary matter whether to hear any party to the proceedings. As regards this submission, Mr Braham referred me to Halsbury's Laws of England, 4<sup>th</sup> edn, paras. 771 and 775, drawing my attention in particular to ***Yates v Leach*** (1874) LR 9 CP 605, a case cited by the learned editors of Halsbury's. But secondly, Mr Braham submitted, the prohibition in section 16 is against a respondent in the particular circumstances acting "against [the] petition in any proceedings thereon", and the 1<sup>st</sup> respondent (having withdrawn her opposition to the petition) could not now be said to be acting "against" the petition. In a brief reply, Mr Dabdoub, although also seeming to find some support for his position in ***Yates v Leach***, nevertheless pointed out that it was an old case and that the law in this area had moved on considerably

since that time. In any event, he submitted, the 1<sup>st</sup> respondent was, by her continued opposition to that aspect of the petition that asked for an order declaring the applicant to be the duly elected parliamentary representative for St Ann North East, acting against the petition.

[9] In para. 771 of Halsbury's, the editors deal with the subject of "withdrawal and substitution of respondents", in terms which are, as Mr Braham observed, similar to section 15 of the Act. Para. 775, under the rubric "Notice by respondent of non-opposition", says this:

**"Notice by respondent of non-opposition.** Not less than seven days before the day fixed for the trial, a respondent who does not intend to oppose the petition must serve notice to that effect on the petitioner and the Director of Public Prosecutions. The giving of such notice by the respondent does not of itself cause him to cease to be a respondent, but a respondent who has given such notice is not allowed to appear or act as a party against the petition in any proceedings upon it."

[10] Mr Braham also pointed out the similarity of this passage to section 16 of the Act and on this basis placed great reliance on *Yates v Leach*, in which Lord Coleridge CJ made the following pointed observation (at page 608) on the effect of the relevant section of the English legislation:

"That section, however, does not enact that the person giving notice that he does not intend to oppose the petition shall cease to be a respondent, but only that he shall not be allowed to appear or act as a party. It assumes that the petition will go on and the proceedings take place, the respondent still continuing to be such, but

that, having given the notice, he will not be able to take an active part in them."

[11] On the basis of this material, it seems to me that in this case the 1<sup>st</sup> respondent, who has given the prescribed notice that she does not intend to oppose the petition (or more accurately in this case, I suppose, to continue to oppose the petition) is plainly barred by section 16 from appearing or acting as a party in any further proceedings on the petition.

[12] But this conclusion still leaves unanswered Mr Braham's further point that the prohibition in section 16 relates to the respondent appearing or acting as a party against the petition, and that the respondent no longer opposes the petition. However, despite a certain superficial allure, I consider that in the circumstances of the instant case this argument is unsound. The fact is that the appellant's petition sought orders from the court that (i) the respondent was not qualified to be elected as a member of the House and (ii) that Mr Senior-Smith be declared to be the only duly and regularly nominated candidate and that he be declared duly elected. Jones J made the first order, but not the second and this is indeed what the appeal is about. The 1<sup>st</sup> respondent has now filed a counter-notice of appeal in which she intends to contend that the judge was right to decline to declare Mr Senior-Smith duly elected and it seems to me to be clear that in these circumstances she will effectively be seeking to appear and to act as a party against the petition.

[13] However, I accept, as *Yates v Leach* decides, that in these circumstances a respondent, although not allowed to appear or act as a party against the petition, does not cease to be a respondent, as one can readily see that there will nevertheless remain issues in the case (such as, for instance, the question of costs) in which the respondent will obviously continue to have an interest.

[14] On the basis of the foregoing, therefore, my conclusion is that the preliminary objection succeeds and that the 1<sup>st</sup> respondent is not permitted to continue to appear or act as a party against the petition. I will accordingly proceed to hear the applicant only on the application for a stay and I will reserve the question of costs for consideration at the end of this aspect of that matter.