Amani National Congress Party & another v Shimenga; Independent Electoral And Boundaries Commission (Interested Party) (Election Petition Appeal E006 of 2022) [2022] KEHC 11473 (KLR) (2 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

ELECTION PETITION APPEAL E006 OF 2022

PJO OTIENO, J

AUGUST 2, 2022

BETWEEN

AMANI NATIONAL CONGRESS PARTY ..... 1ST APPELLANT

RAMADHAN BUTICHI ..... 2ND APPELLANT

AND

DAVID KUBASI SHIMENGA ..... RESPONDENT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... INTERESTED PARTY

(Being an Appeal from the Ruling of Political Parties Disputes Tribunal at Kakamega delivered on the 26th July 2022 in Complaint No. 002 of 2022)

JUDGMENT

1. It appears that the more we legislate to make the electoral dispute resolution more efficient and expeditious, the more we get into rigmaroles of litigation. In this matter any objective assessment by any bystander must return a verdict that if the tribunal was to appreciate its position in the hierarchy of judicial ladder, appreciate that it bound to comply with the orders by the judicial authorities and to execute its mandate in accordance with the law, a lot of the judicial time already spent on this single matter would have been saved and employed elsewhere more efficiently.

2. In a short span beginning the April 25, 2022 and July 26, 2022, some 90 days, the three parties, the two appellants and the respondent have engaged the judicial system by obtaining a judgment and at least three (3) ruling by the Political Parties Dispute Tribunal, two judgments and an order by the High Court as well as a judgment and ruling by the Court of Appeal. An aggregate of at least nine (9)

decisions. In effect, in every ten (10) days the court has given to them a decision. All the decisions by the superior were centered around whether and how an application for review filed before the Political Parties Tribunal could be handled.

3. This Court, in Kakamega Judicial Review No. E008 of 2022 expressed its disapproval with the manner the Tribunal had dealt with the matter by stating that the way the application was dealt with was clearly injudicious and a manner not expected of a judicial authority*[1]*.

4. Those concerned seemed not to have reached the tribunal and if they reached, it chose to deal with them the way it has dealt with the Court of Appeal Judgment of June 7, 2022 and the Judgment of the High Court dated May 27, 2022.

5. The court considers that no regard was given to its judgment of July 22, 2022, in the cited judicial review matter because in this appeal, it is said that the tribunal in rendering the decision dated July 26, 2022 had this to say:-

> " 3. No stay issued by the superior courts was presented before this tribunal and the only information availed was that parties had moved to the superior courts.
>
> 4. The tribunal in interest of delivering on its public service mandate uploaded the final judgment into the system and proceeded to mark the case as closed at the tribunal level, to allow the legal process to progress to the natural conclusion. The judgment remains available to any party, who may be interested in it, in the usual manner in which requests are made.
>
> 5. These are facts that indeed should have been presented to the superior courts as the parties proceeded to the said superior courts. More particularly as the tribunal exercises its jurisdiction within a legally specified time."

6. Having said so, it then adverted to having looked at the grounds of opposition by the appellant here, and the complaint before it, the respondent denies filing such opposition noted its contents and 'in the light of the circumstances outlined, dismissed the notice of motion with no order as to costs.'

7. The ruling is indeed brief to the hilt devoid of material facts but more of complaint against the parties pointing to having not guided the superior courts appropriately. It also infers that the superior courts acted on insufficient material.

8. That observation may not be accurate in all aspects for the same tribunal had by its decision of May 19, 2022 acknowledge the existence of the order of stay by the High Court. When such is viewed in the light of the concerns and known fact that the tribunal had strict timelines to hear and determine the disputes, one gets the impression that the Tribunal was doing everything to meet the timelines including the available shortest routes. I see that shortcut to have been to insist that its decision of May 14, 2022 was well merited and needed no interference in the manner the High Court, in HCCA No E001/22, HC Misc App No E008/2022 and Court of Appeal Election Petition (Civil appeal) No E001/2022 had sought to do.

9. The decision dated July 26, 2022 in effect says that since the tribunal was led to deal with the matter without notice of the orders by the superior Courts and the superior courts having been led to deal with the matter without being updated on the happenings in the tribunal, it was safe and expedient to let the losses lie where they had fallen. Its Judgment of April 28, 2022 was not about to be disturbed.

10. That I consider to have been an error on the part of the tribunal. The Court of Appeal in its judgment in the dispute between the parties, Election Petition (Civil Appeal) No E001/2022 directed

that the review application be remitted to the Tribunal for expedited hearing. That was equally the determination by this court in Judicial Review No E008/2022. I consider those decisions to have commanded the tribunal to accord to the parties their constitutional rights to a fair hearing which I consider the Tribunal to have born in mind on the May 9, 2022 where it directed that parties file additional affidavits and submissions for the matter to be mentioned on May 16, 2022 to confirm compliance and further directions. No record has been shown to this court that any such directions ever issued.

11. It has been conceded by both parties that the appellant filed both supporting affidavit and submissions but the respondent did not. For any judicial authority, it is expected that what the parties say is considered and at least a reason given for a decision either way. A decision by a judicial authority must have a reason and for an application for review, a litigant expects to be told that his application has failed or succeeded for at least one single reason.

12. For the decisions giving rise to this appeal there is no reason advanced, only the complaint against parties and the superior courts is laid, to dismiss the application. Being an application for review on the alleged ground of discovery of new and important matter or evidence, it was the duty of the tribunal to say whether there was indeed such discovery. In failing to give its reasons for the decision to dismiss the application, the tribunal erred and the error stands for rectification by an order that its decision be set aside. I do set aside the decision dated July 26, 2022 for being based on no reasons.

13. Being a first appellate court proceedings by way of a retrial, the court must now seize the application for review and execute its mandate by way of rehearing. See *Selle v Associated Motor Boat Co Limited* [1968] EA 123.

14. A reading of the notice of motion dated May 7, 2022 and the grounds disclosed on the face and the affidavit in support show that the grounds for review were that;

> "a) The respondent had misled the tribunal on his observance of section 40 *Political Parties Act*.
>
> b) The respondent having lodged the complaint had not paid requisite fees.
>
> c) The respondent was not a paid up member of the 1st appellant.
>
> d) Arising from the above the judgment should be reviewed on account of discovery of important matters or evidence and on account of an error or mistake apparent on the face of the record."

15. A court would not review the decision merely because an important matter or evidence has been discovered. Rather, it would and ought to do so because the new and important matter or evidence, which was not within the appellants' knowledge and could not be availed to his knowledge at the time the decision was made, the exercise of due diligence notwithstanding. The application by the appellant before the tribunal was asserting the three matters highlighted above as the discoveries making the need for review tenable. The question this court has to resolve is whether the three discoveries were in the nature that even if the appellant had exercised due diligent he could not have obtained same to avail to tribunal by the date the decision was made, April 28, 2022.

16. The court considers that whether fees due to the party for internal dispute resolution mechanism was paid was easily available to both the 1st and second appellants because that body is a body within the 1st appellant created by it to serve it and its members including the 2nd appellant. Due diligence would have availed the true fact on payment of the requisite fees before the tribunal seized the matter. When

due diligence was not exercised and the tribunal proceeded as it did, it cannot be argued that a good ground for review has emerged. That finding also addressed and speaks to the question whether or not section 40 was complied with in that the 2nd appellant having been cited as a party to the complainant was all aware of it having been lodged and ought to have exercise due diligent and established before hand how it was dealt with by the committee. Even the standing of the respondent on payment of party membership was not a matter incapable of being ascertained and availed to the tribunal as at the time it rendered its decision.

17. Accordingly, the court finds and holds that there was no discovery of a new and important matter or evidence that the appellant could not have been able to produce before the tribunal, as at the April 28, 2022, when the judgment sought to be reviewed was made.

18. The Court of Appeal in its judgment in *DJ Lowe & Company v Banque Indosuez*, CACA No 217/1998 and reiterating what constitutes a discovery of a new and important matter or evidence found and held:-

> " where an application for review is based on discovery of fresh evidence, the court must exercise greatest care as it is easy for a party who has lost, to see weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

19. The court is equally guided by the decisions in *Rose Kaisa v Angelo Mpanju Kaiza* [2009] where the Court of Appeal cited with approval the author of *Mulla on Civil Procedure Code, 15th Edition* at page 2726, who says:-

> " Applications on this ground must be treated with great caution and as required by r 4(2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

20. Having found that none of the three facts was beyond the reach of the appellant after exercise of due diligent, I do find that the application for review, was destined to failure had the tribunal applied its mind and the law to the facts alleged.

21. Consequently, I do find that the appeal succeeds to the extent that the manner the tribunal dealt with it was injudicious but fails on the merits of the application which the court finds lacked merit and ought to have been dismissed as just the tribunal found.

22. On costs, I do consider that both parties have been disadvantaged by the manner the tribunal handled their matter and therefore I make no order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF AUGUST 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Shikholia for the 1st and 2nd Appellants

Mr. Sore for the Respondent

Miss Odek for the Interested Party

Court Assistant: Kulubi