REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

ELECTION PETITION NO. 7 OF 2013

IN THE MATTER OF THE ELECTION OF THE MEMBER OF NATIONAL ASSEMBLY FOR LUANDA CONSTITUENCY

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF ELECTIONS (PARTLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES

ARTHUR KIBIRA APUNGU.....1ST PETITIONER/APPLICANT

JULIUS ABRAHAM SIKALO OCHIEL .....2ND PETITIONER

VERSUS

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

THE RETURNING OFFICER LUANDA CONSTITUENCY .....2ND RESPONDENT

CHRISTOPHER OMULELE..... 3RD RESPONDENT

RULING

1. The 1st petitioner/applicant has filed a notice of motion dated 20th June 2017 seeking for orders that:-

> **1. THAT this honourable court be pleased to review its orders made on 20th July, 2016 and in particular the order that dismissed the 1st petitioner's prayer for each of the petitioners to bear half of the taxed costs and substituting the same with an order allowing each petitioner to bear half of the taxed costs to the respondents in the main petition.**
>
> **2. THAT the costs of this application be provided for.**

2. The application was based on the grounds that there is discovery of new and important evidence that has arisen which evidence after due diligence was not within the knowledge of the applicant or could not be produced at the time the court made its order of 20th July 2016.

3. The application was opposed by the 3rd respondent vide his grounds of opposition dated 11th July 2017 on the grounds that there is no new or important material that would justify review of the order made on 20th July 2016 and that the application is misconceived.

Background

4. The ruling of 20th July 2016 was in respect to the 1st petitioner/applicant's notice of motion dated 1st April 2016 in which the applicant was seeking that each of the petitioners in Election Petition No. 7 of 2013 who had lost in the petition do bear half of the taxed costs. Upon losing the petition the court had ordered the applicant and his co-petitioner to bear the costs of the petition. In its ruling delivered on 20th July, this court (Mwita, J.) dismissed the application and ordered that the petitioners were jointly and severally liable to settle the costs of the

petition to the respondents and that the respondents could pursue all or any of the petitioners to recover their costs.

The Application

5. The current application is supported by the affidavit of the applicant in which he states, inter alia, that prior to the filing of the application dated 1st April, 2016 he had agreed in principle with the 2nd petitioner that they were to share the costs of the petition on 50:50 basis. That the 2nd petitioner has now made an undertaking that he will pay his 50% portion which is contained in an agreement to that effect dated 12th November, 2016 (the same is annexed to the application). That the said agreement could not have been produced and availed to the court when the order of the court dated 20th July, 2016 was made. Therefore that this is a fit and proper case to allow for review.

Submissions

6. The advocates for the applicant **Odeny, Maube & Company Advocates**, submitted that when the application dated 1st April, 2016 was being urgued there was a verbal agreement between the petitioners that they will share the costs on 50:50 basis. However that the 1st petitioner could not at the time produce the agreement because it had not been reduced into writing. That the agreement was embodied in correspondences between the petitioners which correspondence the 1st petitioner needed time to trace.

7. The advocates for the 3rd respondent, **Omulele & Tollo Advocates**, on the other hand submitted that though the election court can review its orders in an appropriate case, this is not one such case. That the order of the court was made jointly and severally against the petitioners. That such an order means that the petitioners are essentially one. That the applicant had an opportunity to ask the court at the time of making the order to direct that the costs be taxed evenly between the petitioners. Therefore that there is no useful purpose that will be served if the application is allowed.

8. The advocates submitted that there is no new or important evidence that has come into the knowledge of the applicant. That in paragraph 5 of the supporting affidavit the applicant admits that at the time that the application of 1st April, 2016 was filed he and the 2nd petitioner had already agreed in principle with the 2nd Petitioner that they were to share the costs of the petition at 50:50 basis. The same therefore cannot be new evidence to warrant a review.

9. The advocates further submitted that in an application for review an election court can only do so on account of some mistake or error apparent on the fact of the record and not on the ground of new and important evidence as was held by **H. A. Omondi, J.** in **Godfrey Masaba –Vs- IEBC & 2 Others (2013) eKLR**.

10. The advocates submitted that the existence of an agreement between the petitioners on the mode of sharing the costs cannot be the basis of avoiding joint and several liability. On this principle the advocates relied on the holdings in **Kenya Airways Limited –Vs- Mwaniki Gichohi & Another - H.C. (Milimani Commercial Courts) Civil Case No. 423 of 2002** (as cited in) **John Gachanja Mundia –Vs- Francis Muriira Alias Francis Muthika & Another (2016) eKLR)** and **Francis L. Oyatsi –Vs- Manani, Lilan Company Advocates & Another (2016) eKLR**.

Analysis and Determination

11. The questions for determination in this application are:-

1. Whether this Court has power to review its Order dated 20th July, 2016.

2. Whether there was discovery of new evidence or important information by the applicant that could not have been presented and was not within his knowledge or could not be produced by him at the time when the order of 20th July, 2016 was made.

Whether this court has power to review the application dated 20th July, 2016

12. Neither the Elections Act, 2011 nor the Elections Petition Rules have express provisions for review of orders made by an Elections court. The advocates for the 3rd respondent however did concede that there are instances where an elections court can exercise its judicial discretion and allow a review where the review will be able to serve useful purpose. They cited the case of **Godfrey Masaba –Vs- Iebc & 2 Others (2013) eKLR** where **G. V. Odunga, J.** cited with approval the case of **Nuh Nassir Abdi –Vs- Ali Wario & 2 Others (2013) eKLR Election Petition No. 6 of 2013** where it was observed that:-

> **"A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose...."**

I subscribe to this view. In appropriate cases the court can resort to its inherent powers to review its own orders. In **Ahmed Abdullahi Mohamad & Another –Vs- Mohamed Abdi Mohamed & Others (2017) eKLR** Mabeya J. held that:-

> **"Under Section 80 (1) (d) of the Election Act, the Election Court is obligated in the exercise of its jurisdiction, to "decide all matters that come before it without undue regard to technicalities". ..... although the Election Court is a special court that is gazetted for a special purpose, it does not lose its inherent power in the exercise of that special jurisdiction. If that were to be so, the Election Court will lose its character of a court of justice**.

This court therefore has the jurisdiction to consider the application.

New Evidence

13. The application was based on the ground that there is discovery of new and important evidence that has arisen which evidence was not within the applicant's knowledge or could not be produced at the time the court made its order of 20th July, 2016.

14. In an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case. In **D. J. Lowe & Company Ltd –Vs- Bonquo Indosuez, Nairobi Civil Application No. 217 of 1998** the Court of Appeal sounded a caution in such applications and stated that:-

> "**Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the 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**."

15. Though Order 45 of the Civil Procedure Act is not applicable when dealing with election matters, it offers a guide as to what the court has to consider in an application for review on the basis of discovery of new evidence. In the case of **Turbo Highway Eldoret Limited – Vs- Synergy Industrial Credit Limited (2016) eKLR** Sewe J. cited the case of Rose Kaiza –Vs- Angelo Mpanjuiza (2009) eKLR where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

> "**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.**"

16. It is then clear that the discovery ought to be new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made. In the instant case the applicant states that he had a verbal agreement with the 2nd petitioner before the start of the election petition. These were facts that were within his knowledge before the court made its decree of 20th July, 2016. The fact that the agreement was not in writing does not negate the fact that the agreement was within the knowledge of the applicant. The agreement was therefore not something new. The applicant did not mention it in his pleadings. The conclusion is that the applicant was not diligent. The fact that the agreement was later reduced into writing after the delivery of the court's ruling did not make it new evidence. This was in fact evidence procured after the ruling to make a basis for this application. I therefore find that the applicant has not presented any new or important evidence that was not within his knowledge at the time that the orders of 20th July, 2016 were being made.

Joint and several judgement

17. The order of the Election court was that the petitioners were to pay the costs jointly and severally. The implication of such a judgment was stated by **Karanja J.** in **Francis H. Oyatsi –Vs- Manani, Lilan Company Advocates & Another (2015) eKLR** where he stated that:-

> "**Equal responsibility for loss incurred by the plaintiff and/or liability in equal measure simply meant that the first defendant was responsible for the loss just as much as the second defendant. They did not carry shared responsibility. Each carried his own cross. The plaintiff was at liberty to execute the decree against either of them. He could collect the entire judgment from any one of the parties or from any and all the parties in various amounts until the judgment is paid in full. This was not a situation where each party was to blame at the degree of 50:50 (fifty fifty) or at a higher or lesser degree than the other. Each of them was to blame 100% for the plaintiff's loss and therefore the court could not in the circumstances apportion liability and made no error in entering judgment against the defendants jointly and severally**."

18. In **John Gachanja Mundia –Vs- Francis Muriira Alias Francis Mithika & Another (2016) eKLR** Gikonyo J. cited with approval the cases of **Dubai Electorinics –Vs- Total Kenya & 2 Others, High Court (Milimani Commercial And Admiralty Division) Civil Case No. 870 of 1998** and **Republic –Vs- Permanent Secretary In Charge Of Internal Security – Office Of The President & Another Ex-Parte Joshua Mutua Paul (2013) eKLR** where the decision of Ringera J. in **Kenya Airways Ltd –Vs- Mwaniki Gichohi (Milimani Commercial Courts Civil Case No. 423 of 2002** was cited where he held that:-

> "**The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree; However, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendants.**"

19. The judgment of the court having been made jointly and severally against the petitioners, the respondents retained the right to execute the judgment against any of the petitioners. A subsequent agreement between the petitioners on the mode of payment cannot alter the order of the court. Moreover the 2nd petitioner has not made an appearance in this application and the petitioners themselves have not filed a consent to the effect that they will share the costs on 50:50 basis. The application is therefore unmerited.

The upshot is that the application is dismissed with costs to the 3rd respondent.

Delivered, dated and signed in open court at Kakamega this 24th day of April, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for 1st petitioner/applicant

Mr. Otieno holding brief for Mr. Tolo for 3rd respondent

Parties:

1st Petitioner/applicant - absent

3rd Respondent - absent

Court Assistant - George