



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE ELECTIONS ACT (2011) AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

AND

IN THE MATTER OF NOMINATION TO THE COUNTY ASSEMBLY OF KISUMU

BETWEEN

VITALIS OJUANG ODEK.....PETITIONER/APPLICANT

Versus

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CLERK OF THE COUNTY ASSEMBLY OF KISUMU.....2ND RESPONDENT

ORANGE DEMOCRATIC PARTY.....3RD RESPONDENT

KISUMU COUNTY DISABILITY FORUM.....4TH RESPONDENT

RULING NUMBER 2

BACKGROUND

1. By an order dated 20th December, 2017, this court struck out the Petitioner's/Applicant's Election Petition for want of jurisdiction and ordered the Petitioner/Applicant to pay costs to the Respondents.

APPLICATION

2. By a Notice of Motion dated 22.5.18 and filed on 23.5.18, brought under Section 80 of the Civil Procedure Act and Order 45 Rule 1, 2 and 3(2) of the Civil Procedure Rules, the Petitioner/Applicant prays for orders THAT:

1. The court be pleased to review and/or set aside the judgment delivered on 20.12.17 in respect to costs of the suit

2. Costs of this application be provided for

3. The application is based on the grounds among others that the Petitioner/Applicant is registered with the National Council for Persons with Disabilities and is thus exempted from paying costs by the Disability Act 2003.

4. The application is supported by the affidavit sworn by the applicant on 22nd May, 2018 in which he annexed the impugned ruling marked VOO-1. The applicant avers that he is exempted from paying court fees and costs by virtue of Annexures VOO-2, VOO-3 and VOO-4 which were not annexed to the supporting affidavit.

5. The 2nd respondent in opposed the application and filed a replying affidavit sworn on 18.7.18 by Winnie Julu, advocate for the 2nd respondent in which she avers that the applicant has not attached the annexures alluded to in his affidavit to substantially prove that he is entitled to exemption. 2nd respondent also filed the grounds of opposition on 10.8.18 in which it is argued that the application is brought in contravention of Section 75 (1A) of the Elections Act and ought to be dismissed.

6. I have considered the application in the light of the supporting and the replying affidavits and the grounds of opposition. Section 75 (1A) of the Elections Act provides that:

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice”.

7. Non-compliance with Section 75 (1A) of the Elections Act by the petitioner/applicant was the reason for which the Petition was struck out. However, this court having made the order for costs is the right forum for which the issue of costs now raised by the petitioner/applicant ought to be adjudicated. The 2nd respondent’s argument that the application offends Section 75 (1A) of the Elections Act is therefore rejected.

8. **Section 80** of the Civil Procedure Act provides that:

Any person who considers himself aggrieved -

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

9. Further, **Order 45** of the Civil Procedure Rules provides

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

10. The petitioner/applicant has not demonstrated the existence of a clerical or arithmetical mistake or error apparent on the face of the decree or any other sufficient cause that would justify review of the orders made on 20.12.17.

DISPOSITION

17. Accordingly, it is apparent to the court that there is no sufficient ground for a review and the application dated 22nd May, 2018 is thus dismissed with costs to the 2nd respondent.

DATED AND DELIVERED KISUMU THIS 25TH DAY OF OCTOBER 2018

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner/Applicant - Mr Mwamu

For the 1st respondent - N/A

For the 2nd respondent - N/A

For the 3rd respondent - N/A

For the 4th respondent - N/A