



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
ELECTION PETITION APPEAL NO. 30 OF 2017

PERPUTUA MPONJIWAAPPELLANT

VERSUS

ELIUS OKUMU OTIENO.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT (ODM)

SPECIAL COUNTY APPEAL TRIBUNAL..... 2ND RESPONDENT

MARY VICTORIA3RD RESPONDENT

THE RETURNING OFFICER KILELESHWA WARD4THRESPONDENT

RULING

On 16th May 2017, this court in its Judgment on appeal lodged by the Appellant held thus at page 8:

“It is clear from the foregoing that the PPDT did not err when it set aside the decision of the ODM party’s IDRМ in respect of the nomination of Kileleshwa Ward for the ODM party. The 1st Respondent is the rightful nominee having been popularly nominated by the members of the party registered in Kileleshwa Ward of the Nairobi County. The appeal is for dismissal. It was dismissed on 15th May 2017. These are the reasons for dismissal. There shall be no orders as to cost.”

The Appellant was aggrieved by the decision. In an application dated 23rd May 2017, the Appellant moved this court by a notice of motion pursuant to **Article 159(2)(d)** of the **Constitution**, **Sections 1A, 1B, 3A** and **63(e)** and **80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** seeking an order from this court to review, vary or set aside the said judgment of this court on the grounds that there were errors apparent on the face of the record that justifies this court to review its decision.

The Appellant set out several grounds in support of her application for review. She contends that the court erroneously failed to consider the evidence that the Appellant had placed before the ODM party’s IDRМ, the Political Parties Disputes Tribunal and this court. In particular, she stated that the court erroneously ruled that nominations were conducted and further that the results emanating from the same nominations were tallied and therefore the 1st Respondent was duly nominated as the ODM party’s nominee for the Member of County Assembly for Kileleshwa Ward. It was the Appellant’s assertion that no nomination

actually took place. The one that was purported to have taken place was undertaken in the absence of the legal authority from the party. The Appellant contends that the malpractices witnessed in the said nomination exercise precluded this court from making a determination in favour of upholding the nomination. It was in that regard that the Appellant sought to review the judgment of this court. The application is supported by the annexed affidavit of the Appellant.

The Respondents were duly served. They did not file any papers in opposition to the application. However, this court being cognizant of the fact that in appeals such as the present one, time being of essence, it was important that the hearing of the application proceeds expeditiously. The court allowed the Respondents' counsel to make presentation to the court notwithstanding that they had not filed any papers in opposition to the application.

During the hearing of the application, Mr. Ogado for the Appellant essentially reiterated the contents of the Appellant's application and the supporting affidavit. Learned counsel submitted that there was no basis upon which this court could have reached the verdict that it did noting that the decision was erroneous and contrary to the facts that were placed before the court. In particular, learned counsel argued that the evidence presented by the Appellant before the ODM party's IDRM, the PPDT and this court clearly showed that there were no valid nominations which were held at Kileleshwa Ward and neither were any results tallied nor was a declaration made of who the winner of the nomination exercise was. He submitted that due to malpractices perpetrated by the 1st Respondent, the 2nd Respondent was justified in issuing a direct nomination to the Appellant. It was this nomination that the Appellant was seeking this court's determination to uphold. Although the 2nd Respondent did not participate in the proceedings before the PPDT and before this court on appeal (though in both instances the 2nd Respondent had been properly served), during the hearing of this application Mr. Oloo for the 2nd Respondent supported the position of the Appellant. He urged the court to review its decision and uphold the decision of the 2nd Respondent to nominate the Appellant as its party's nominee for the said Kileleshwa Ward.

The application was opposed. Mr. Muthomi for the 1st Respondent submitted that this court did not have jurisdiction to hear and determine the present application. This was on account of the fact that the issues raised by the Appellant in support of the application did not fall within the ambit of an application for review but rather was an issue that the Appellant should have filed an appeal to the Court of Appeal. Learned counsel submitted that the Appellant was seeking to re-litigate and re-argue his appeal before the same court that had considered the merits of the appeal and correctly dismissed it. Mr. Muthomi urged the court to dismiss the application with costs.

This court has read the application for review and the supporting affidavit sworn by the Appellant. It has also considered the rival submission made by the respective counsel for the parties to this application. The issue for determination by this court is whether the Appellant made a case for this court to review its judgment on the basis that there was an error apparent on the face of the record. The jurisdiction of this court to hear appeals emanating from nomination disputes arising out of party primaries is donated by **Section 41(2)** of the **Political Parties Act** which provides that:

“An appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and points of law to both the Court of Appeal and the Supreme Court.”

The Appellant was therefore properly before the court when she lodged her appeal. An appeal of this nature is a civil appeal. Therefore, the provisions of the **Civil Procedure Act** and the rules made thereunder are applicable. **Order 42** of the **Civil Procedure Rules** sets out the procedure the court should follow when hearing an appeal from a decision of a subordinate court or in this case from the Political Parties Dispute Tribunal. From the submission made by the Appellant, it was clear that the Appellant was seeking to introduce new evidence during the hearing of the application for review. **Order 42 Rule 27(1)** of the **Civil Procedure Rules** bars the Appellant from adducing new evidence during the hearing of the appeal unless the leave of the appellate court is sought. That was not the case in this application and therefore this court holds that the additional evidence was irregularly and unprocedurally introduced into the record of this court.

On the application for review, under **Order 45 Rule 1(1)** of the **Civil Procedure Rules**, such applications can only be entertained by the court, where the Appellant is alleging, *inter alia*, that there is error apparent on the face of the record. Such error must be stark that it faces the court. It will not require such Applicant to adduce voluminous documents or evidence to prove that indeed there was an error on the face of the record. As was held by the Court of Appeal in **National Bank of Kenya –vs- Ndungu Njau Civil Appeal No.211 of 1996 [1995-98] 2 EA 249:**

“In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court’s view, a fatal omission, yet the court in the broad interest of justice, asked counsel of the Appellant on which ground under Order 44 he had argued the said notice of motion in the superior court and replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the superior court... A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law... Misconstruing a statute or other provision of the law is not a ground for review... In the instance case, the matters in dispute had been canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercise his discretion in favour of the respondent. If he had reached a wrong conclusion of the law, it would be a good ground for appeal but not for review. Otherwise the Learned Judge would be sitting on appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which adjudicated upon it.”

In the present application, it was clear to this court that the issues which the Appellant brought forth in the notice of motion for review were actually issues which this court had carefully considered and rendered its opinion on the matter. The Appellant is of the view that this court fell in error when it evaluated the facts that were placed before it by the Appellant. That is an issue that the Appellant ought to canvass on appeal to the Court of Appeal and not before this court on an application for review. This court is of the considered view that the Appellant failed to establish to the satisfaction of this court that there was an error which was apparent to the face of the court that did not require extensive elaboration as the Appellant’s counsel did when arguing the application before this court. As held by the Court of Appeal in the above decision, an error apparent on the face of the record is an error that does not require voluminous documentation or evidence to establish. In the present application, this court agrees with the 1st Respondent that the issues presented before this court are issues which in actual fact the Appellant is seeking to re-litigate or re-argue her appeal before this court. This court has no competence to hear an appeal against its own decision. The right forum is the Court of Appeal.

The upshot of the above reasons is that the application for review lacks merit is hereby dismissed. There shall be no orders as to cost.

DATED AT NAIROBI THIS 30TH DAY OF MAY 2017

L. KIMARU

JUDGE