



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 34 OF 2017**

**EMILY MKALUMA MBASAU.....APPEALANT**

**-VERSUS-**

**GODFREY FUNDI MWAMBI ..... 1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY .....2<sup>ND</sup> RESPONDENT**

*Appeal from the judgment and Decree of the Political Parties Dispute Resolution Tribunal in PPDR T Case No. 107 of 2017 delivered by Hon. Kyalo Mbobu, Mr. James Atema and Mr. Hassan Abdi on 9<sup>th</sup> day of May, 2017 at Nairobi,*

**R U L I N G**

**1.** The 1<sup>st</sup> Respondent/Applicant filed a Notice of Motion under **Section 41(2)** of the **Political Parties Act No. 11 of 2011; Section 78(1) (d)** of the **Civil Procedure Act, Order 42 rules 27 and 28** of the **Civil Procedure Rules, 2010**. It is his prayer that the court do admit in evidence in the Appeal against the decision of the Political Parties Dispute Tribunal (hereinafter the PPDT) delivered on 8<sup>th</sup> May 2017, the Applicant's Supplementary Record of Appeal dated 22<sup>nd</sup> day of May, 2017 adducing the documents referred to below.

- i. Affidavit of Elkana S. O. Mwalukuku sworn on 19<sup>th</sup> May, 2017, the 2<sup>nd</sup> Respondent's electoral panelist supervising Ngolia Mbololo Ward;
- ii. Affidavit of Joseph Ndomasi Mbede sworn on 19<sup>th</sup> May, 2017, the Presiding Officer at Tausa Youth Polytechnic Polling Station;
- iii. Affidavit of Duncan Mwanyalo Mwaino sworn on 19<sup>th</sup> May, 2017, the Applicant's agent at Mkwachunyi primary School Polling Station;
- iv. Affidavit of John Mgaulu Mwanjulu sworn on 19<sup>th</sup> May, 2017, the Applicant's agent at Ikanga Polling Station;
- v. The Applicant's Skeleton Submissions dated and filed on 9<sup>th</sup> May, 2017 before Political parties Disputes Tribunal but which omits from the record of Appeal.

**2.** The grounds of the application as may be seen on the face thereof are that, the said evidence could not have been obtained with the exercise of reasonable diligence for use at the trial of the Complaint appealed from, owing to the urgency with which the Complaint was heard and determined by the PPDT.

3. That the Appellant made bare unsupported and deleterious allegations against the Applicant's integrity bordering on electoral offence and it is only fair and just that the Applicant be availed reasonable opportunity to controvert those allegations.
4. The Applicant in his supporting affidavit dated 22<sup>nd</sup> May, 2017 deposed that on 18<sup>th</sup> April, 2017, he participated in the Orange Democratic Movement (ODM) Party Member of County Assembly Nominations for Mbololo Ward and duly emerged the winner, having garnered 1,269 votes against his closest competitor, the Appellant herein who garnered 1,160 votes.
5. The Applicant avers further that he was not served with the appeal documents lodged against his victory and only learnt of the appeal through a phone call from the ODM branch chairman, John Maghanga. That on 2<sup>nd</sup> May 2017 the appeal proceeded before the ODM Special County Appeals Tribunal (hereinafter SCAT).
6. On 23<sup>rd</sup> May 2017 the parties made oral submissions before me. Mr. Okoth learned counsel for the Applicant submitted that the court has powers under **Section 78 1(d) Civil Procedure Act** and **Order 42 Rule 27 (i)(b) Civil Procedure Rules** to allow adduction of additional evidence. He referred the court to the guiding principles in the Court of Appeal decision in **James Mwangi Nganga vs Kenyatta University Council and 4 others – Civil Appeal No. 317 of 2000**.
7. Counsel submitted on the first principle that the Applicant had difficulty in sourcing for the additional evidence during trial at the SCAT and the PPDT. That no notice was given to him of the appeal filed at the SCAT 19<sup>th</sup> April 2017 until 2<sup>nd</sup> May 2017 13 days later which made it impractical for him to source his witnesses in time to respond to the application at the SCAT.
8. Counsel contended that when the judgment of the SCAT was rendered on 4<sup>th</sup> May 2017 the Applicant had only one day to appeal to the PPDT. He filed his complaint at the PPDT on 6<sup>th</sup> May 2017 a Saturday and the PPDT directed the hearing for 8<sup>th</sup> May 2017 the following Monday. He was thus, due to the constraints of time unable to source his witnesses who reside in Taita/Taveta and avail his evidence.
9. On the second principle Counsel stated that the appeal raises integrity issues against the Applicant in the conduct of the nominations and the additional evidence seeks to traverse the various allegations raised by the Appellant.
10. On the third principle counsel stated that the evidence is credible since there are sworn affidavits by the officials of the 2<sup>nd</sup> Respondent who presided over the nominations and have first-hand evidence, which has not been challenged. He urged the court to allow the application so that the evidence can be relied on in the appeal.
11. Mr. Ogutu learned counsel for the Appellant opposed the application and urged that the order sought being discretionary the court should exercise its mind to determine whether the circumstances of this case allow such admission of additional evidence. He admitted that the appeal filed at the SCAT was not served upon the Applicant, because the Appellant was not directed to do so, but when the Applicant summoned appeared before the SCAT, and was served with all the appeal documents. Thereafter he indicated that he was ready to proceed.
12. Counsel argued that the Applicant has not brought proceedings from the SCAT to show that he sought for time to source for witnesses and was denied. That he did not exercise any due diligence to bring in this evidence at the SCAT and at no time did the Applicant seek to bring in this evidence to the SCAT or the PPDT which is the first threshold the Applicant must satisfy.
13. Further that the Applicant has not stated when the PPDT was to stop receiving complaints and it is not true that the Applicant had only one day to file his appeal before the PPDT.
14. Counsel contended that the allegation of the Applicant having encountered difficulty in sourcing his

witness was not proven and in any case, his client's appeal is on points of law only, since the complaint before the PPDT was determined on technicality and not on merit.

15. I have considered the rival arguments in this application and find that the only issue for determination is whether the prayer for leave to adduce additional evidence at the appeal stage is merited.

16. Under **Section 78 (1)(d)** of the **Civil Procedure Act** subject to such conditions and limitations as may be prescribed, an appellate court shall have power to take additional evidence or to require the evidence to be taken. Order 42 Rule 27 & 28 of the Civil Procedure Rules elaborates as follows:-

**“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—**

**(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or**

**(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.**

**(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.”**

17. The Applicant must therefore demonstrate that the SCAT and the PPDT refused to admit evidence which ought to have been admitted. In the **James Mwangi Nganga** case (supra) the Court of Appeal followed the principles in **Ladd Marshall [1954]1 WLR 1489** and **Skone V Skone [1971]KLR pg. 812** which laid out the following principles to guide the court in the admission of additional evidence at the appeal stage:

**a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;**

**b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;**

**c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.**

18. It is important however, to note what else the court of Appeal said in the foregoing case, citing a commentary on a similar provision in **Mulla** on the code of the **Civil Procedure**. The Court said:-

**“.....this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case on appeal. There would be no end to litigation if the rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”** See – **Mzee Wanjie & 93 others vs A. K. Sakwa & 3 others [1982-88] 1 KAR at page 465, 466 per Chesoni Ag. JA (as he then was).”**

19. In the instant case it is not disputed that the Applicant did not at any time seek the leave of any of the two Tribunals to avail witnesses or adduce the evidence he now seeks to produce. He was summoned

before the SCAT, and served with the appeal documents and when parties were asked whether they were ready to proceed and whether they wished to call any witness, the Applicant in particular responded that he was ready to proceed and did not wish to file any witness statements.

**20.** I note that when the parties came to the High Court the Applicant requested for time and was able to avail his witness affidavits within three days. The PPDT was still sitting up to the time of filing this appeal and the application. The court cannot make a finding that the SCAT or PPDT denied him the opportunity to adduce his evidence.

**21.** I have had sight of the grounds of the appeal and they are confined to points of law since the appeal before the PPDT was determined on a technicality and not on merit. The court therefore has no need to evaluate the 1<sup>st</sup> Respondent/Applicant's additional evidence to determine the appeal.

This application therefore fails and is accordingly struck out.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> DAY OF May 2017.**

**L. ACHODE**

**JUDGE**

In the presence of .....for the Appellant

In the presence of .....for the 1<sup>st</sup> Respondent