



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO. 2 OF 2017

BOB MICHENI NJAGI.....APPLICANT

VERSUS

ORANGE DEMOCRATIC MOVEMENTRESPONDENT

RULING

The Applicant has filed a Notice of Motion under Certificate of Urgency. It is dated 11th May 2017 and was filed on the same date. It is supported by an affidavit sworn by the Applicant. The application is brought under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The Application is seeking to review and set aside orders of this court contained in the judgment of this court delivered on 10th May 2017. In that judgment this court upheld the decisions of the Respondent's National Appeals Tribunal and the Political Parties Disputes Tribunal that the Respondent conducts repeat nominations in St. Monica, Solinke, Kitengela Primary School and Noonkopir polling stations in Kajiado East Constituency. The Application also seeks orders of this court that the nomination exercise for Kajiado East Parliamentary Seat and Kitengela and Solinke County Assembly Wards were not conducted in a free and fair process; that this court orders a repeat nomination exercise for the entire Kajiado East Constituency and Kitengela and Solinke County Assembly Wards; that this Application operate as stay of execution of any further action precipitated by the said judgment and such further orders as this court may deem just and expedient to grant.

The grounds raised in this Application are that:

- i. There is an error apparent on the face of the record.
- ii. The court failed to consider the findings by the Respondent's National Appeals Tribunal (NAT) and the Political Parties Disputes Tribunal (PPDT) that 4000 ballot papers were in circulation in Kajiado East Constituency.
- iii. The court failed to consider the finding by NAT that the Constituency Election Board Chairman Mr. Alex Ntasi testified before the NAT that the entire election in Kajiado East Constituency was nullified.
- iv. The court failed to consider the finding of NAT that it would investigate the conduct of the County Elections Board Chairperson owing to the cancellation of the entire nomination exercise in Kajiado East Constituency.

v. The court failed to consider the irrefutable evidence adduced by the Appellant that voters were disenfranchised in various polling stations in Kitengela and Solinke Ward where voters were chased away by security officers because they were not natives of Kajiado or their names were not in the register.

vi. There is discovery of new evidence, captured in video, which the Appellant could not obtain at the time of hearing before the court.

Mr. Moses Owuor for the Appellant made detailed submissions in support of the grounds for review which I have read. I have also read the supporting affidavit of the Appellant which repeats what is contained in the grounds in support of the Application.

Ms Kwambuha for the Respondent submitted in reply to the Applicant's submissions. She referred this court to the Elections Act 2011, Elections (Parliamentary and County) Election Rules and Regulations and Political Parties Act 2011 and submitted that these provisions do not allow review of a decision of an election court; that for this court has to invoke its discretion to determine this application and that Order 45 Rule 1 may not be applicable in all situations in election matters especially review of an election court. She submitted that if this court chooses to invoke its discretion and entertain this application it is only on account of some mistake or error apparent on the face of the record; that there is no error apparent on the face of the record in this matter because all the issues pleaded are matters of appeal. She asked the court to dismiss the application. In response Mr. Owuor submitted that there is an error in the inconsistency in the decisions of this court and the two tribunals.

I have considered submissions by counsel for the Respondent that the determination of this application depends fully on the discretion of this court. Nominations or Party Primaries in my view are not elections per se. They are civil matters of a different kind. Under Section 41 (4) of the Political Parties Act, the Tribunal (PPDT) is allowed to apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 75), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities. By extension this court also applies the same legislation and therefore it is proper for the Applicant to anchor his application under the Civil Procedure Act and Rules.

Section 80 Civil Procedure Code 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.”

Under Order 45 Rule 1 of the Civil Procedure Rules, a review can be sought in respect of a decree or order from which an appeal is allowed, but from which no appeal has been preferred or a decree or order from which no appeal is allowed. Under Order 45 a party can seek review in the following circumstances:

a) 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

b) On account of some mistake or error apparent on the face of the record, or

c) Any other sufficient reason,

d) An application for review is made without unreasonable delay.

I have considered the application and the grounds in support as well as rival submissions. I do not find anything new in the submissions. The Applicant through his counsel argued all the issues now being raised in this Application at the time of arguing the Appeal before me. I considered all the issues afresh and I found no evidence in support of the allegations made. Reading of the judgment can attest to this. I did not find fault with PPDT's decision and I upheld it. In **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR** the court reasoned as follows:

“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. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in 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 had adjudicated upon it.”

To my mind this court considered all the issues placed before it and made a conscious decision on the issues before it. Further, while the Appellant refers to discovery of new evidence that was not in his possession at the time of hearing the Appeal, there was no mention of that evidence during the time of hearing this Application. Counsel for the Applicant did not move the court to consider any such evidence. If it was contained in a video, this court was not moved to view the same to determine its relevance and credibility in this Application.

It is my considered view therefore that this Application lacks merit and the same is hereby dismissed. I make no order as to costs. Orders shall issue accordingly.

Dated, signed and delivered this 18th day of May 2017.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Moses Owuor for the Applicant

Ms Kwambuha for the Respondent