



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO. 21 OF 2017**

**ISAYA OYOO OPAP ..... APPELLANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> RESPONDENT**

**JOHN MATUNGA MIRERI .....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTIONS & BOUNDARIES**

**COMMISSION .....INTERESTED PARTY**

**(Being an appeal from the entire judgment & decree delivered by the Political Parties Dispute Tribunal on 10<sup>th</sup> May, 2017 at Nairobi in Complaint No. 83 of 2017)**

**RULING**

The application before the court for determination is the Notice of Motion dated the 12<sup>th</sup> May, 2017 by the appellant/applicant. The same seeks seven (7) prayers but when it came up for hearing, the parties agreed to canvass only prayer 2 of the said application which seeks for orders that the court do admit additional and compelling evidence of the applicant/appellant.

It is presumed on the grounds set out on the body of the same and supported by the affidavit of the appellant sworn on the 11<sup>th</sup> day of May 2017.

In his submissions counsel for the appellant/applicant submitted that the additional evidence that the appellant seeks to include will enable the court to reach a fair and just decision. The documents that he is asking the court to admit include tally forms and provisional certificate. The said forms capture the various returns for all the aspirants who participated in the nomination exercise. The returns are for seven polling stations to wit Nyandiwa Primary School, Oyugis Primary School, Rawinji Primary School, Obisa Primary School, Ranyenya Primary School, Agoro Sare Primary School and Wire Primary School.

In addition to the above, the appellant has also sought to introduce the Election and Nomination Rules for the Orange Democratic Movement. Counsel for the appellant submitted that the returns from all the above polling stations are duly signed by the parties and their agents and since elections are based on the returns, a party cannot compel the court to issue a nomination certificate without clear results as to the outcome of the process. He argued that, the only way for the Tribunal to determine a winner is by looking at the returns from all the polling stations.

The court was told that the appellant did not have an opportunity to present those documents to the Political Parties Disputes Tribunal [*herein referred to as PPDT*] as the same were not available to him. He relied on **section 78 of the Civil Procedure Act** which donates powers to an appellate court to admit additional evidence or to require additional evidence to be taken. He also cited the provisions of **order 42 rule 27 of the Civil Procedure Rules** which allows the court to accept additional evidence if the applicant satisfies certain conditions. To support his contention, he relied on the following authorities **GOVERNOR BALLOON SAFARIS LIMITED V ZACHARIA W. BARAZA T/A SIRMA AUCTIONEERS, CA NO. 484 OF 2015** which cited the case of **LADD V MARSHALL, (1954) W/R 489** in which the court stated that except on grounds of fraud or surprise, the appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available.

He contended that the proceedings before the PPDT were by surprise and the appellant was not accorded an opportunity to produce evidence. He also referred to the case of **FIBER LINK LIMITED V STAR TELEVISION PRODUCTION LIMITED, CA No. 172 of 2012** in which the case of **WALTER MBURU – BS – ABDUL SHAKOOR & 3 OTHERS, CA No. 195 of 2002 (2015) eKLR** was quoted in which the learned judge stated that taking of additional evidence is at the discretion of the court and that there has to be exceptional circumstances to justify the introduction of additional evidence.

To further buttress the appellant's case, he relied on the provisions of **section 4(3)** which provides for fair administration action which includes prior and adequate notice of the nature of administrative action. He urged that the report by the National Election Tribunal was done without reliance to any evidence by the appellant. On this point, several authorities were relied on.

On her part, counsel for the respondent relied on the replying affidavit sworn on 16/5/2017 to oppose the application. She submitted that the power to allow additional evidence is not available to a litigant who was unsuccessful and who would like to patch up his evidence with a view to making a fresh case on appeal.

She urged that for one to succeed, a party must show that the evidence was not available at the trial and if it had been produced, it would have affected the outcome of the case. That it must also be shown that, the evidence could not have been obtained with diligence. According to her, the evidence sought to be introduced by the appellant was available and was within reach of the appellant before the PPDT.

She contended that it was the duty of the Tribunal to summon the appellant. She averred that the evidence sought to be introduced would not have influenced the outcome of the dispute before the PPDT, and that it is not relevant to the appeal before the court as the appeal questions the procedure used before the Tribunal.

The court has considered the application and the submissions by the learned counsels together with the authorities submitted.

The powers of the courts to take additional evidence on appeal is donated by **section 78 (1) (d) of the Civil Procedure Act** which provides:

***“Subject to such conditions and limitations as may be prescribed, an Appellate court shall have power -***

***(d) to take additional evidence or to require the evidence to be taken.***

***But under order 42 rule 27 of Civil Procedure Rules parties shall not be entitled to produce such evidence whether oral or documentations, in the court to which the Appeal is preferred unless certain conditions are met.”***

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

*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.*

In the case of **LADD V MARSHALL, (1954) WLR 489** at page 491, Lord Denning stated (and as approved in **K V TARMOHAMMED V LAKHANI, (1958) EA 567**) that:

***“to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled;***

***First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.***

***Secondly, the evidence must be such that if given, it would probably have been important influence on the result of the case, though it need not be decisive.***

***Thirdly, 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.”***

In the same case, the court further stated that:

***“..... except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available .....***

Those same principles have been articulated in the case of **GOVERNORS BALLOON SAFARIS LIMITED V ZACHARIA W. BARAZA T/A SIUMA AUCTIONEERS, CA NO. 484 OF 2015.**

It is also important to note that it is in the discretion of the court to allow or to refuse additional evidence. The appellant herein has submitted that he was not given a chance to be heard before both the county executive Tribunal and the PPDT and that the evidence now sought to be adduced was not within his reach. Though counsel for the respondent has argued that the evidence was available to the appellant, she did not tender any evidence before the court to support that contention. It was just a mere assertion.

The court has perused the documents sought to be adduced and has taken into account the provisions of **section 78 (1) (d) of the Civil Procedure Act**. The contents of these documents have also been noted.

It is the finding by this court that, the appellant has made a good case on the basis of which the court can exercise its discretion to allow the production of additional documents. In the result, prayer 2 of the application dated is allowed as prayed.

**Dated, signed and delivered on 17<sup>th</sup> day of May, 2017.**

L. NJUGUNA

JUDGE