



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 42 OF 2017

PETER OLUOCH OWERA..... APPELLANT

- V E R S U S -

DAVID RUONGO OKELLO.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT/APPLICANT

RULING

1. The subject matter of this ruling is the motion dated 14th June 2017 taken out by the Orange Democratic Movement, the 2nd respondent herein. In the aforesaid motion, the 2nd respondent sought for the following orders *inter alia*:

1. THAT this application be certified as urgent and heard ex-parte in the first instance.

2. THAT pending the hearing of this application inter partes and its subsequent determination this honourable court be pleased to stay the gazettment of any candidate for the member of County Assembly Huruma Ward on the 2nd respondent party's ticket by the Independent Electoral and Boundaries Commission.

3. THAT supplemental to the grant of prayer 2 supra and further pending the hearing of this application inter partes and its subsequent determination this honourable court be pleased to stay its judgment delivered on the 29th of May 2017.

4. THAT consequent to the grant of prayers (2) and (3) above this honourable tribunal be pleased to set aside the decision of the Political Parties Dispute Tribunal delivered on the 13th day of May, 2017 along with the decision of this honourable court delivered on the 29th May, 2017 and all consequential orders arising there-from on the basis of new and important mater and/or evidence as shall be tendered by the parties herein and a judgment do thereafter issue on the rendered facts.

5. THAT in the alternative to the grant of prayer (4) supra the honourable court be pleased to review its orders of the 29th May, 2017 on the basis of new and important matter and/or evidence and sufficient reason and thereby substitute the finding and holding dated and issued on the 29th May, 2017 with an order referring the nomination of the Member of County Assembly, Huruma Ward to the 2nd respondent party for determination of such nominee in accordance with the 2nd respondent's Party Constitution and Election and Nomination Rules.

6. THAT costs of this application be provided for.

2. The motion is supported by the affidavits of Hellen Katangie and the supplementary affidavit of Anthony Moturi. When served with the motion, Peter Oluoch Owera, the appellant herein, filed a replying affidavit he swore to support the application. David Ruongo Okello, the 1st respondent herein, filed the replying affidavit he swore and grounds of opposition to resist the motion. Learned counsels appearing in the matter were invited to make oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the grounds of opposition and the oral submissions of learned counsels plus the authorities cited. I have already outlined the sort of prayers the 2nd respondent is seeking. Basically, the 2nd respondent/ applicant is beseeching this court to review its decision of 29th May 2017 on the basis of discovery of new and important and or evidence and for sufficient reason. It is the submission of Mr. Awale learned advocate for the 2nd respondent that this court's decision was predicated upon the affidavit evidence of Jared Owade Odhiambo who swore a replying affidavit claiming to be the Mathare Constituency Returning Officer of the 2nd respondent. It is the averment of the 2nd respondent that Jared Owade Odhiambo was not its Constituency Returning Officer for Mathare Constituency. The 2nd respondent further pointed out that the advocate who purported to represent it before the Political Parties Disputes Tribunal was not instructed by it and that it has since then emerged that the aforesaid advocate a Mr. Eddie Waswa was not a qualified advocate under the Advocates Act. It is therefore the argument of the 2nd respondent that the replying affidavit of Mr. Jared Owande Odhiambo that was purported filed and relied by the 2nd respondent was a sham document that grossly misrepresented the facts and one deponed to and filed without the authority of the 2nd respondent. In short, Mr. Awale was of the strong view that since this court's decision and that of PPDT stood on affidavit evidence obtained fraudulently, the decisions should be set aside and vacated by way of review. It was pointed out that the duly appointed returning officer for Mathare Constituency was one Thomas Odoyo Omune. It is also stated that the duly appointed presiding officer of Huruma Ward was Sophie Owuor Ogweno. It is said the duo who were bonafide officials of the party were not aware of the existence of the proceedings leading to this appeal. Mr. Ndubi, learned advocate who appeared together with Mr. Wanyanga on behalf of the appellant argued in support of the motion. He pointed out that Mr. Jared Owande swore a false affidavit whose contents was used to detriment of the 2nd respondent's interest and that of the appellant. The learned advocate stated that since fraud has been committed throughout these proceedings then this court is entitled to review its decision and consequently set aside the same.

4. Mr. Aduda, learned advocate for the 1st respondent strenuously opposed the application arguing that motion does not meet the requirements for an application for review. The learned advocate pointed out that as early as 9th May 2017, the 2nd respondent was made aware of the existence of these proceedings. He pointed out that various orders were served upon the 2nd respondent which acknowledged receipt by stamping on the face of the documents and the party chose not to file a single document before the PPDT and before this court. The learned advocate stated that the 2nd respondent was served on 10th May 2017, 13.05.2017 and on 18th May 2017 and the party did not exercise due diligence to inquire about this matter hence the court should not exercise its discretion in favour of the 2nd respondent. It was further pointed out that in the affidavit of Hellen Katangie, it is deponed that the party was aware of the complaints arising from the party primaries held at Huruma Ward. It was pointed out that the issue touching on forgery was heard and determined by the political Parties Disputes Tribunal whereof the fraudulent affidavit was ordered expunged from record, therefore the issue cannot be revisited before this court.

5. This court was urged to find that the 2nd respondent's application is more of an appeal than an application for review. Mr. Awele beseeched this court to appreciate the fact that the 2nd respondent was overwhelmed by many suits which were filed to challenge the outcome of its primaries hence it may have been served and it failed to attend to this matter.

6. The principles to be considered in determining an application for review are well settled. In the case of **Kithoi –vs= Kioko (1982)K.L.R 177** the Court of Appeal restated those principles when it held *inter alia*

“The Civil Procedure Rules Order XLIV (now Order 45)demands , *inter alia*, that an application for review must be based on the discovery of new and important evidence which was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The applicant for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, failing which the application will not be granted.”

7. The 2nd respondent specifically stated that it is relying on the ground of discovery of new and important matters and sufficient cause. I have already outlined what the 2nd respondent has enumerated as new important and sufficient cause. It is apparent and it is not in dispute that the 2nd respondent was served on 10.5.2017 with the order issued vide complaint no. 132 of 2017. The aforesaid order restrained the party from submitting any nomination certificate to I.E.B.C pending the hearing and determination of the complaint. It is also on record that on 13.5.2017 PPDT delivered its judgment in which it directed the 2nd respondent to issue the 1st respondent with a nomination certificate to vie for the position of M.C.A Huruma Ward within Mathare Constituency. The decree was served upon the 2nd respondent on 17.5.2017. The party stamped to acknowledge receipt. The 2nd respondent did not comply with the decision neither did it proceed to PPDT to challenge it, prompting the 1st respondent’s advocate to write to the party to complain of its inertia in the matter.

8. With respect, I agree with the submissions of the 1st respondent that the 2nd respondent did not act with due diligence in this matter. It is not therefore correct to aver that the 2nd respondent discovered new and important matter. In my humble view, the facts now being laid bare before this court as evidence of forgery or fraud were all along within the knowledge of the 2nd respondent. The truth of the matter is that the 2nd respondent was overwhelmed by the huge number of complaints filed against it arising from its primaries to the extent that it did not give attention to this dispute. It cannot therefore lie in the mouth of the 2nd respondent to claim that it was not aware of the existence of these proceedings. The 1st respondent in his replying affidavit has stated in detail several steps to effect service upon the 2nd respondent. There is evidence of service of summons upon Judith Pareno to attend court on 7.6.2017 but despite service being effected the party officials did not deem it fit to attend court to explain the party position on this dispute. It is curious to also note that the 2nd respondent’s special County Appeals Tribunal clearly stated that Jared Owade was its returning officer of Mathare Constituency in the complaint between Herbert Muganda =vs= Wilfred Odaro it cannot now come back before this court and deny what it admitted elsewhere. It is not also in dispute that Anthony Moturi, the legal officer of the 2nd respondent swore an affidavit on 8th May, 2017 in PPDT case no. 127 of 2017 Wilfred Odalo =vs= Herbert Muganda confirming that Jared Owade was duly appointed the returning officer for Mathare Constituency. In the same affidavit the deponent denounced Thomas Odoyo as a fraudster and an imposter. I think, I have said enough to show that the motion lacks merit. The same is dismissed with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 23rd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent