



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION
IEBC NOMINATION APPEAL NO. 2 OF 2017

LESIT, J.

SHEM ODONGO OCHUODHO.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MICHAEL KOSGEI (HOMABAY COUNTY

RETURNING OFFICER IEBC).....2ND RESPONDENT

RULING

Background

1. The Applicant was the Appellant in the appeal filed in this matter. He approached the court with a Notice of Motion under Articles 19,20,21,22 and 38 of the Constitution of Kenya, Order 42 rule 6 of the Civil Procedure Rules 2010, the inherent powers of the court and all enabling provisions of the law.
2. The Applicant/Appellant had also filed a Memorandum of Appeal based on the following grounds:
 - 1) That the Respondent erred in dismissing the Appellant’s complaint without having due regard to the evidence adduced in his supporting affidavit that accompanied the complaint.
 - 2) That the 1st Respondent erred in law and facts by only considering the evidence of the 2nd respondent.
 - 3) That the 1st Respondent erred in law and facts by allowing the 2nd Respondent to deceive the appellant herein which information the Appellant relied on.
 - 4) That the 1st Respondent fell in error in disregarding the affidavit and oral submissions on facts showing the chronology of events in compliance with the requirements of the 1st Respondent.
3. In the Memo of appeal, the Appellant sought these prayers:

a) That the appeal be allowed and the entire judgement and decree of the 1st Respondent in nomination dispute resolution complaint no 1 of 2017 delivered on 5th May be set aside.

b) That a decree be issued that the 1st Respondent to accept the nomination papers of the Appellant and allow the Appellant to contest in the upcoming General Elections scheduled for 8th August 2017.

c) That the cost of the appeal and Nomination Dispute Complaint No. 1 of 2017 be awarded to the appellant.

4. Attached to the Applicant / Appellant affidavit was a Certificate of complaint which was incomplete with no evidence it was before the Respondent as it had no number and no stamp of the Respondent.

5. Accompanying the complaint was a Statutory Declaration, photocopy of Applicant's passport, a letter addressed to the Chairman IEBC and a Bankers Cheque payable to the IEBC. Having perused all these documents, I noticed that the only document bearing IEBC stamp was letter to the Chairman dated 31st May 2017.

6. The Court struck out the appeal on three grounds:

(1) That the Judgement and Decree sought to be set aside was not annexed to the appeal or the supporting affidavit.

(2) That the complaint which the applicant / appellant presented to the 1st respondent was not annexed to the appeal. This rendered the Record incomplete.

(3) That the Jurisdiction invoked under Article 23 of Constitution clothed the court with jurisdiction to issue judicial review orders was not buttressed with any judicial review reliefs under the orders sought on the appeal.

7. The Applicant has now come seeking review of this court's orders of 13th day of June 2017.

8. In the Notice of Motion the Applicant has invoked this court's jurisdiction under **Article 20(3)(b), 22(3)(b) and (d), 23(3), 47, 165(3)(a) and (d)(ii), (6), and (7) of the Constitution; Order 45 Rule 1, 2 and 5 of the Civil Procedure Rules, section 80, 63(e) and 3A of the Civil Procedure Act.**

9. The grounds upon which the application is sought are cited on the face of application as follows:

(1) That the Honourable Justice Lesiit delivered a ruling on the 13 June 2017 striking out the appeal for being incompetent.

(2) That at the time of filling the appeal, the Appellant had not received a copy of the judgement and decree of the 1st Respondent.

(3) That the said copy of the judgment in Nomination Dispute Resolution Complaint No 1 of 2017 was issued on the 14th June 2017 by the 1st Respondent, at 3:00pm, way after the suit was filed on 9th June 2017. The decision by the 1st Respondents was delivered on 5th June 2017.

(4) That the Appellant herein filed the complaint form electronically.

(5) That Article 165(6) of Constitution of Kenya gives the high court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial functions, but not over supervisory bodies.

(6) That Article 22 of the Constitution of Kenya gives right to any person to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.

(7) That Article 23 of the Constitution of Kenya gives the high court the powers in any proceedings brought under Article 22 to grant appropriate reliefs including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the bill of rights and is not justified under Article 24, an order for compensation or an order for judicial review.

(8) That Article 88 of the Constitution of Kenya and Section 74(1) of the Election Act does not confer jurisdiction to the High Court neither does it deny the High Court the same.

(9) That Article 165(3) gives the High Court unlimited jurisdiction to hear civil and criminal matters.

(10) That this application is made promptly and in good faith.

(11) That no party will be prejudiced if the orders sought are granted.

10. The Respondents did not file any reply or grounds of opposition. They, through their counsel therefore sought to argue the appeal on grounds of law only.

11. Mr. Amolo for the Applicant urged that whereas the **Constitution** does not state if the court can hear appeals from the IEBC, the same did not expressly decline the same. Counsel made reference to **Article 165(3)** of the **Constitution** which gives the court jurisdiction over criminal and civil matters. Counsel urged that under **Article 165(6)** the High Court had supervisory jurisdiction over the 1st Respondent's committee which was hearing complaints emanating from the nomination process of political parties. Counsel urged that this court had powers to overturn the decision of the 1st Respondent's committee.

12. Counsel urged that on the issue of review, the Applicant at the time he filed the appeal had not been issued with the ruling delivered by the 1st Respondent. Counsel urged that due to the constraints of time set by the 1st Respondent, the Applicant moved to file the appeal before this court under **Articles 22 and 23** of the **Constitution**. Counsel urged that on the issue of the failure to avail the complaint filed with the 1st Respondent, it was an oversight on the part of the advocate who failed to annex page 2 of the complaint. Counsel urged that the same had now been annexed.

13. Counsel further urged that the Applicant was misinformed by the 1st Respondent that he could pay for registration by cash due to the shortness of time to file his papers. Counsel urged that notwithstanding, the Applicant's representatives were sent away and asked to provide Bankers cheque, and that the Applicant made quick plans to get the said Bankers cheque. Counsel urged that the representatives of the Applicant were locked out despite having acquired the Bankers' cheque on behalf of the Applicant. Counsel urged that the prayers sought in the review and appeal should be allowed for justice to be done to the Applicant as it was not his fault that the ruling was not availed on time.

14. Mr. Obondi for the Respondents urged that the jurisdiction of the court on decisions of IEBC can only lie in this court's Judicial Review jurisdiction and not as appellate jurisdiction. Counsel urged that jurisdiction must be expressly provided for by the **Constitution** or statute and there was no such jurisdiction given to this court.

15. Counsel urged that on application for review, no single ground for review known to law was set out in the application. Counsel further urged that the judgement which was being alluded to by the Applicant cannot be said to be new evidence. Counsel urged that the Applicant had not demonstrated why he could not wait to obtain the judgement so as to file a proper appeal. Counsel urged that if there was any delay in issuance of that judgement, the Applicant could have moved the court under **Article 35** for the relevant

orders.

16. Counsel urged that the decision sought to be reviewed was not on record in the application. Counsel submitted that the application for review was incompetent on that ground. Counsel urged that prayer 2 of the application seeking that the court sets aside its own ruling was a final prayer that in essence was asking the court to sit on appeal of its own decision. Counsel urged the application be dismissed with costs.

17. An application for review is a special jurisdiction provided under **Order 45 Rule 6** of the **Civil Procedure Rules** which provides:

“ **Order 45 Rule 1** principles

(1) Any person considering himself aggrieved

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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 on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

18. The Respondents have urged that the Applicant has not cited any of the grounds for review in his application. The Applicant's counsel, Mr Amolo contested that point and submitted that the appeal was struck out on account of missing Complaint and Ruling of the IEBC, documents that were critical to aid court make a decision on the appeal. Mr. Amolo urged that both documents were now annexed to the application for review.

19. Order 45 Rule 1 sets out the principles the court should apply in order to determine an application for review. The very first test is the new evidence test. The Applicant must show that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge. The new matter annexed to this application which was not annexed to the appeal is the Complaint and the Ruling of the IEBC. The two documents are marked ‘**SOO2**’ and ‘**SOO1**’, respectively to the Applicant's supporting affidavit. They are dated 7th June, 2017 and 1st June, 2017 respectively.

20. In the Applicant's affidavit he deposes that the Ruling of the IEBC was not availed until 14th June, 2017, five days after he filed his appeal to this court. In respect to the Complaint, it was contended that the Applicant's advocate by some oversight failed to annexe the Complaint.

21. Mr. Wakoko for the Respondents urged that the reasons advanced by the Applicant were not reasonable or plausible and should be dismissed.

22. The new evidence test fails because for the Complaint it originated from the Applicant. He cannot say that the document was new. For the Ruling, the document was read to the Applicant before the IEBC. He could therefore have been able to obtain it with exercise of due diligence.

23. Order 45 provides an alternative the Applicant must show that the evidence could not be produced by him at the time when the decree was passed or the order made. What he has shown is that the Ruling was not made available until five days later. He does not explain why he could not wait until he obtained the Ruling.

24. There is the further test of mistake or error apparent on the face of the record. The Applicant has stated that his advocate by some oversight did not annexe the Complaint. That oversight does not cover the failure to annexe the Ruling. It does not aid the Applicant either.

25. The final test requires that the Applicant gives any other sufficient reason why he desires to obtain a review of the decree or order of judgment by the court which passed the decree or made the order. None has been urged by the Applicant.

26. The application should be made without unreasonable delay. The application was brought on the 16th June, 2017 three days after the ruling of the court sought to be review. It has therefore been brought without unreasonable delay.

27. On the issue of the review, I find that the principles that apply to this kind of an application was neither pleaded in the grounds in support of the application. They were not given any prominence in the submission of the Counsel for the Applicant. In that regard therefore the court's jurisdiction to review its order of 13th June, 2017 has not been met or satisfied.

28. Before I end the ruling I must address one more point which is the issue of this court's jurisdiction to hear appeals from the IEBC. I revisit this issue again because from the onset, when the Applicant appeared before me on his appeal, I directed that he should address the court on that issue. It was not appreciated. In any event the submissions made on that point did not adequately address that point.

29. The Committee of IEBC which heard the Applicant's complaint must have proceeded to hear the Complaint by virtue of **Article 88 (4)** of the **Constitution** which defines the responsibilities of IEBC including the responsibility under (4)(e) **"the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results"**.

30. **Section 74** of the **Elections Act** also gives IEBC jurisdiction to hear disputes and it is worded as follows:

(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) At electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

31. These two provisions of the law do not clothe this court with jurisdiction to hear appeals from the IEBC Dispute Committee. They are completely silent on that issue. The only conclusion to be drawn from the silence of the Constitution and the statutes on the matters of appeals to the High Court from this body is that such jurisdiction does not exist.

32. Looking elsewhere in the Constitution to see whether there is some relief in that respect this court has turned to Article 165 of the Constitution. It creates jurisdiction of the High Court to hear and determine matters specified in that Article. Again, that Article is silent on the jurisdiction of this court to hear and determine appeals from the IEBC Dispute Committee. **Article 165(3)(e)** of the **Constitution** confers jurisdiction to this court in the following terms: **"any other jurisdiction, original or appellate, conferred on it by legislation."**

33. The constitution under **Article 165** creates Jurisdiction of the High Court to hear and determine matters specified in that Article. Again, that article is silent on the jurisdiction of this court to hear and

determine appeals from the IEBC Disputes Committee.

34. Jurisdiction is conferred by the constitution or by statute whether that jurisdiction is to determine a matter first instance or on appeal. In **Owners of the motor vessel “Lillian S” v Caltex Oil (kenya) Ltd (1989) KLR1**, Nyarangi, JA held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

35. That leaves the jurisdiction of Judicial Review. Under **Article 165 (6)** of the **Constitution** which stipulates:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

36. **Section 74 of Elections Act** gives jurisdiction to IEBC to hear disputes and it is worded as follows:

“ Pursuant to Article 88(4)(e) of the Constitution, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from the nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(1) At electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the commission.

(2) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

37. **Article 23(3)** gives court jurisdiction to issue judicial review orders. It stipulates :

“In any proceedings brought under Article 22, a court may grant appropriate relief, including: (f) an order of judicial review.”

38. The Applicant was not without a remedy. He had the option to challenge the decision of the IEBC under Article 23 (3) of the Constitution, or Civil Procedure Rules through judicial review proceedings. There was no jurisdiction to this court in its appellate jurisdiction. The court was very clear on this point in the ruling of 13th June, 2017. I repeat it here for emphasis and for the Applicant to note.

FINAL ORDERS

39. In the result I make the following orders:

i) Application for review lacks in merit and is hereby dismissed.

ii) I make no order as to costs.

DATED AT NAIROBI THIS 19TH DAY OF JUNE, 2017.

LESIIT, J.

JUDGE