



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JR APPLICATION NO. 449 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

ERICK ONYANGO2ND RESPONDENT

EX PARTE: NETO ADHOLA

RULING

1. On 27th July 2017, I delivered a judgment wherein I dismissed an application by the *ex parte* applicant which sought judicial review orders against the 1st respondent. The *ex parte* applicant has come back to court by a Motion dated 28th July 2017, seeking:-

- (a) a stay of execution of orders dated 22nd July 2017, press release of 4th July 2017, 14th July 2017 and 27th July 2017;
- (b) an order to vary, rescind or set aside the ruling and order dated 27th July 2017;
- (c) an order directing the first respondent to include his name in the ballot paper as independent candidate in the forthcoming general elections; and
- (d) any other order that I may be pleased to make.

2. The *ex parte* applicant was apparently prompted to bring the application by a judgement that I had delivered in HCJR Application No. 439 of 2017, whereat I held that the 1st respondent's Electoral Code of Conduct Enforcement Committee (hereinafter referred to the Committee) lacked jurisdiction to indict a candidate of the electoral offence defined by section 20 of the Election Offences Act, Act No. 37 of 2016. He now argues that the charges he faced before the Committee were premised on section 20 of the Election Offences Act and therefore invalid on grounds of lack of jurisdiction. The application has been replied to by the respondents, who have filed grounds of opposition and affidavits. They raise various arguments against the said application, which I shall not advert to for they are clearly stated in the respondents' papers.

3. It was argued orally before me on 1st August 2017. Various arguments were articulated by counsel appearing for the various parties. I shall not recite the arguments in this ruling for they are on record.

4. To my understanding, the application before me seeks only one principal order, that framed in prayer 3 thereof, the rest are secondary. Whether I should grant the secondary prayers would depend on how I will rule with respect to prayer 3. Should I dismiss prayer 3, the rest would no longer be tenable.

5. I should state from the outset that the application before me, going by the language of prayer 3, is not for review. It seeks that I set aside or vary the order dated 27th July 2017. That would be so even if the application was purported to be brought under the provisions of the Civil Procedure Rules governing review. The setting aside or variation of orders or decrees is a totally different remedy from review, and grant of either is subject to different principles. The remedy of setting aside or variation of an order would be granted in cases where the order was made as a consequence of some default on the part of the applicant. Say where a judgment is entered in default of defence or a matter proceeds despite non-attendance by the applicant at the hearing. See Order 10 rule 11 and Order 12 rule 7 of the Civil Procedure Rules. Review would apply where there is an error apparent on the face of the record, or discovery of a matter of evidence that was not within the reach of the applicant at the time judgement was delivered, or due to some other sufficient reason analogous to the other two reasons. See Order 45 of the Civil Procedure Rules.

6. I have anxiously gone through application and the affidavit supporting it, as well as the minutes of the arguments presented in its support; I have not come across anything that would suggest that there was a default of any kind by the *ex parte* applicant that would warrant exercise of discretion by the court to set aside the order that I made on 27th July 2017. I am talking of a default in terms of failure or omission by the *ex parte* applicant to comply with a procedural step that was required of him by the law governing Judicial Review, so as to call in aid the well-worn principles stated in *Jesse Kimani vs. McConnell* (1966) EA 547, *Shah vs. Mbogo* (1967) EA 116, and *Patel vs. EA Cargo Handling Services Ltd* (1974) EA 75, among others, on setting aside of orders and decrees.

7. I do note that the application is purported to be brought under Order 45 of the Civil Procedure Rules. I reiterate what I have stated above, and repeat that there is no proper review application before me. It has not been demonstrated that there was an error on the face of the court record, or that the *ex parte* applicant has come by important evidence that he could not possibly place before the court by the time judgment was delivered on 27th July 2017. He has not sought to show that there was an analogous good reason for grant of review.

8. The *ex parte* applicant's sole argument is that in a case with facts similar to his a judgment was made in favour of the applicant. He invites the court to vacate its earlier orders in the circumstances and to replace them with an order akin or similar to that made in the other case. No attempt has been made to disclose the principles that govern such a scenario. No statutory provisions to that effect were pointed at, nor any case law cited.

9. The case in point is HCJR Application No. 439 of 2017. The orders sought in that case were different, and the same turned on different points of law. The principal argument there was that the *ex parte* applicant in that case had been charged before the Committee with an offence founded on section 20 of the Election Offences Act, yet the Committee had no jurisdiction to try a person for offences defined by that statute. The *ex parte* applicant herein did not raise that issue, and the same was therefore not before this court, and was not one of the points for determination in the judgement of 27th July 2017.

10. Can this court revisit this matter in view of the judgement in HCJR Application No. 439 of 2017? The answer to that question should be in the negative. It is a cardinal principle of law that a party is bound by its pleading. The *ex parte* applicant's pleadings in this cause do not raise questions on the jurisdiction of the Committee with respect to section 20 of the Election Offences Act. There is therefore no basis for this court to visit the judgement in HCJR Application No. 439 of 2017 on this matter. The issue of jurisdiction was not before the court then, and it cannot be introduced into the matter post-judgement.

11. Several other issues were raised, but I will not advert to them, for the determination of the instant application should turn on the two questions discussed above. It is my conclusion that a case has not been

made out for grant of prayer 3 of the Motion dated 28th July 2017. It is my finding therefore that there is no merit at all in the entire Motion herein dated 28th July 2017; the same is hereby dismissed, with costs to the 1st and 2nd respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF AUGUST, 2017.

W. MUSYOKA

JUDGE