REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO. 53 OF 2013

MICHAEL MUNGAI.....PETITIONER/APPLICANT

VERSUS

FORD KENYA ELECTIONS & NOMINATIONS

BOARD & OTHERS.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

JEFREY M MALOBA .....INTERESTED PARTY

RULING

1. Mr. Michael Mungai, the Applicant before us, was in the run-up to the General Election held on 4th March, 2013, desirous of contesting the Embakasi Central Parliamentary seat. His vehicle of choice was the Ford-Kenya party. As is the law, party nominations were conducted to pick the party's flag bearer for the contest. Jefrey M. Maloba, the Interested Party herein, was picked by the Ford-Kenya Elections and Nominations Board (the 1st Respondent) to contest the said Parliamentary seat on the party's ticket. The Applicant was not happy with the said decision. He filed a complaint against his party before the Independent Electoral & Boundaries Commission (the 2nd Respondent). According to the Initiation of Complaint form filed with the 2nd Respondent, the Applicant had listed three grounds in support of his complaint. The complaints were:

1.) That the Applicant was not informed of the nomination exercise;

2.) There was breach of the party's nomination rules; and

3.) The party's Elections and Nomination Board had not given its decision.

2. The 2nd Respondent placed the dispute, being NDRC Case No. 188 of 2013, before its Nomination Disputes Resolution Committee (the Committee) that had been specifically set up to hear disputes arising from party nominations. After hearing the dispute, the Committee dismissed the same for lack of merit.

3. The Applicant being aggrieved by the 2nd Respondent's decision moved to this Court by way of these

judicial review proceedings challenging the 2nd Respondent's decision. The Court (D. S. Majanja, W. K. Korir and G. V. Odunga, JJ) dismissed the application and gave its reasons for the decision on 5th February, 2013. The basis of the Court's decision is captured in the 4th paragraph of its ruling where it rendered itself as follows:

> **"The application before us is in the nature of an appeal and having considered the material before us and the proceedings before the Committee, we are satisfied that the Committee addressed itself to the facts and determined the matter according to the law. We do not detect any departure from legal principles hence there is no reason to interfere with the decision of the Committee."**

4. The Applicant is now before us with an application dated 15th February, 2013 and filed on 19th February, 2013. This bench was specifically empanelled by the Honourable Chief Justice to hear the said application. In the application which is said to be brought under articles 38, 91, 92 and 165 of the Constitution, the Elections Act, the Political Parties Act and Regulations thereto, the Applicant prays for orders as follows:-

> **"(a) That the Hon. Court grant leave and certify this application urgent for disposal in the first instance.**
>
> **(b) The Hon. Court review and correct the ruling and orders that were delivered on the 5th February, 2013.**
>
> **(c) That the Hon. Court grant the prayers that were in the application dated 30th January, 2013 or alternatively order Ford Kenya and IEBC to refund to the applicant his nomination fee and all expenses relative to this election/nomination.**
>
> **(d) The Hon. Court order Ford Kenya and IEBC to compensate the Applicant for all the losses, costs and damages that will be caused by the actions of locking the applicant from the ongoing elections.**
>
> **(e) The costs of this application and any other relief that the Hon. Court may deem fit to grant the applicant against the respondents."**

5. The application is supported by grounds on its face, a verifying affidavit sworn by the Applicant, a statement of facts and annexures thereto. The 1st Respondent and the Interested Party, though duly served, did not respond to the application and neither did they attend the hearing. The 2nd Respondent opposed the application through a replying affidavit sworn on 25th February, 2013 by its Legal Services Manager, Mr. Mohamud Mohamed Jabane.

6. The gist of the Applicant's application is that the ruling delivered by the Court on 5th February, 2013 has errors, mistakes and omissions in that it did not address the Applicant's main complaint, namely that the respondents and their agents were careless and negligent by allowing the Interested Party to conduct a Ford Kenya party meeting without following the Constitution, statute, rules, regulations and proper procedures.

7. In summary, the 2nd Respondent's answer to the application is that the same does not disclose any grounds to warrant a review of the Court's ruling of 5th February, 2013.

8. We will start by noting that this Court is not sitting on appeal over the ruling delivered on 5th February, 2013. This Court's mandate is to only determine if the Applicant has established grounds for the review of the decision of 5th February, 2013. Consequently, this Court can only deal with Prayer (b) and the 1st part of Prayer (c) of the application.

9. Prayer (d) and the 2nd part of Prayer (c) are new prayers which were not in the Applicant's original motion of 30th January, 2013. In those prayers the Applicant seeks compensation against the Respondents. We are therefore unable to deal with the new prayers since they do not form part of the decision which the Applicant is asking us to review.

10. What remains for us to address is the part of the application that seeks the review of the Court's decision made on 5th February, 2013. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 provides the grounds for review of a decree or order as follows:-

> **"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."**

11. The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason.

12. We now proceed to consider whether the Applicant has met all or any of the grounds for allowing a review of an order. What is the meaning of new and important evidence which was not available at the time the order was passed? The evidence must not have been within the reach of an applicant by the time the ruling was delivered. In the case before us, the Applicant has not argued that he has now discovered new and important evidence which was not available to him at the time he filed his initial application. He has not placed before us anything to support a review of the decision on this ground. There is therefore no need to further expound on this particular ground of review.

13. The Applicant's application is also anchored on the ground of mistake or error apparent on the face of the record. The Court of Appeal in the case of **MUYODI V INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER E.A.L.R [2006] 1 EA 243 at pages 246-247** described an error or mistake apparent on face of the record thus:-

> **"In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."**

14. We agree with this opinion. For one to succeed in having an order reviewed for mistake or error

apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The Applicant before us has not established that there is an error or mistake in the decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the Court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground.

15. A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of **NGORORO v NDUTHA & ANOTHER [1994] KLR 402** the Court of Appeal held that any person, though not party to a suit, whose direct interest is affected by a judgement is entitled to apply for review. Such a reason can be 'sufficient reason' for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision. In this case, the Applicant has not given any reason to warrant the review of the impugned decision on the ground of 'sufficient reason'.

16. Having carefully gone through the application and the material in support placed before us, we have come to the conclusion that the Applicant has not established any ground for review of the decision in question. We therefore find that the application lacks merit and dismiss the same. As regards costs, we are of the view that this matter touches on the expansion of democratic space in our country. We therefore make no order as to costs.

Dated, signed and delivered at Nairobi this 27th day of June,2013

I. LENAOLA

JUDGE

MUMBI NGUGI

JUDGE

P. NYAMWEYA

JUDGE

D.S. MAJANJA

JUDGE

W.K KORIR

JUDGE