Kipkorir v Langat & another (No 2)

High Court, at Nakuru June 29, 2007

Koome J

Election Petition No 4 of 2003

Practice and Procedure-review-application to review the ruling of the court on grounds of error apparent on the face of the record-where the applicant alleged discovery of new and important matter of evidencewhether information within the public domain could be said to have been discovered as new and important matter of evidence

Practice and Procedure-review versus appeal-where an appeal was filed and review sought thereafter-whether a court had powers to entertain the review-whether an Election Court had jurisdiction to review its own decision-whether the provisions of the Civil Procedure Act (Cap.2 1) and the Civil Procedure Rules could be imported into the National Assembly and Presidential Elections Act (Cap. 7) and the Rules made there under

The petition had been struck out as being incurably defective for failing to comply with rule 4(1) (b) of the National Assembly Elections (Election Petition) Rules and errors in the name of the 2nd respondent used therein. The petitioner consequently sought a review of the ruling on grounds that there was error apparent on the face of the record. The 1 st respondent then argued that the application for review was defective for failure to include the order or decree sought to be reviewed whereas the 2nd respondent contended that the application for review relating to national election petitions as not allowed by law. The 2nd respondent contended that the only remedy available to the petitioner was an appeal.

Held:

1. It was trite law that the power to review was a statutory provision that was conferred under Section 80 of the Civil Procedure Act (Cap.21) and Order 44 of the Civil Procedure Rules.

2. For a court to exercise its power of review there must be new and important evidence which was not within the applicant's reach, which new evidence was distinct in character.

3. There was no discovery of a new matter and the applicant should have put forward the whole case at once. The information the petitioner sought to introduce as discovery of a new and important matter was public information which was all along within the public domain since the petition was filed.

4. The remedy for the petitioner lay in the appeal as review was not allowed under the National Assembly and Presidential Elections Act (Cap.7) and also because he had chosen to file an appeal first.

Application dismissed.

Cases

1. Kibaki v Moi & another (2008) 2 KLR (EP) 351; [2000] 1 EA 115

2. Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1998] KLR

3. Gulamhusein Mulla Jivanji & Taibaki Mulla Jivanji v Ebrahim Mulla Jivanji & Dambhai [1929-30] 12 KLR 41

4. Balinda v Kangwamu & another [1963] EA 557

5. Mutunga v Nguli & another (2008) 1 KLR (EP) 31

6. Yat Tung Investment Co Ltd v Duo Heng Bank Ltd [1975] AC 581

7. Pop In (Kenya) Ltd & 3 others vs Habib BankAG Zurich [1990] KLR 609

Texts

Paul SS; Srivastava SA (2002) Mulla on the Code of Civil Procedure New Delhi: Lexis Nexis 16" Edn

Statutes

1. Constitution of Kenya Sections 44, 44A, 44(2), 45(3)B, 60

2. Presidential and Parliamentary Elections Regulations (cap 7 Sub Leg) regulation 33(1)

3. National Assembly Elections [Registration of Voters] Regulations (cap 7 Sub Leg)

4. National Assembly and Presidential Elections Act (cap 7) 2, 3, 4A, 15,

19(1), 20(l)(a), 21(1), 23(a)(d)

5. Civil Procedure Act (cap 21) Section 3A, 80

6. National Assembly Elections (Election Petition) Rules, 1993 (cap 7 Sub Leg) rule 4(1)b, 14(1)

7. Civil Procedure Rules (cap 21 sub leg) order XLIV Advocates

Mr Nowrojee for the 2”d Respondent

June 29, 2007, Koome J delivered the following Ruling of the Court.

The petition by Kigen Luka Kipkorir in which he challenged the National Assembly Elections held on 27" December 2002 in respect of Rongai parliamentary constituency was struck off by a ruling of this Court delivered on 281" July 2005. In that ruling, the court found that the provisions of rule 4(l b) which is in mandatory terms was not complied with by the petitioner when he filed the petition. Secondly, the Court found that the name of the 2" respondent is Alicen Jematia Ronoh Chelaite as was published in the Kenya Gazette of 3rd January 2003 which was different as the petition described the 2"d respondent as Chelaite Alicen Ronoh which was different from the name of the person who was declared and certified the Member of Parliament for Rongai Constituency. For those reasons the Court found that the petition was incurably defective and the same was struck off.

On 7`" October 2005 the petitioner filed a notice of motion under section

44 of the Constitution of Kenya, 44A, 44 sub clause 2 and 45(3)B section

60 of the Constitution of Kenya, regulation 33(1) of the Presidential and Parliamentary Regulations, regulation 26 of the National Assembly Elections [Registration of voters registration], section 4A, 2 and 3 of the National Assembly and Presidential Elections Act, section 15 of the National Assembly and

Presidential Elections Act and all other enabling provisions of the law.

This application is also supported by the petitioner's affidavit sworn on 61' October 2005. The application is premised on the grounds that the ruling of 28" July 2005 has an error apparent on the face of the record. The petitioner has filed documents that he avers were not in his possession when the application to strike out the petition was argued. Those documents are pertinent to determine the names of the 2"d respondent. The petitioner annexed a copy of the election results which shows the name of the 2"d respondent as Chelaite Alicen Jematia Ronoh. He also annexed a certified copy of the certificate of results of Rongai Parliamentary Election 2002 which shows the name of the 2"a respondent as Chelaite Alicen Jematia Rono. There is also the declaration of results of the same constituency which describe the 2"d respondent as Chelaite Alicen Jematia Ronoh and so is the register of voters which showed that the 2"d respondent was registered as a voter at Rongai Constituency under the name Chelaite Alicen Jematia Ronoh.

Counsel for the petitioner argued that the information from the Electoral Commission of Kenya was not available and after they were able to secure those documents it became apparent from the names describing the 2"d respondent under the Electoral Commission of Kenya records differ from the description of the 2' respondent as described in her identity card. Had the trial judge been presented with the voter's card he would have arrived at a decision that the petition referred to the same person. This information was within the knowledge of the 1 1[1] respondent who was also in possession of the registers and willfully neglected to bring this information before the attention of the judge.

The 2"d argument why the ruling should be reviewed was for reasons that the petitioner had not shown in his petition that he was entitled to vote as required under the law. Counsel for the petitioner submitted that under paragraph 2 of the petition, the petitioner, clearly stated that he is entitled to vote and to petition under the provisions of section 44 of the Constitution.

As regards the issue of jurisdiction, counsel for the petitioner submitted that under the provisions of section 44(l) of the Constitution as read with section 60 this Court has powers to determine all matters. In particular section 19(1), 23(a) and (d) of the National Assembly and Presidential Elections Act the Election Court is given powers to deal with all matters without undue technicalities. Although the law does not specifically provide for review of an order, the reading of the above provisions which gives this Court unlimited jurisdiction can be construed to confer to this court jurisdiction to review its own orders. In any event, nothing stops this Court from referring to the Civil Procedure Rules in order to appreciate its mandate. The Court of Appeal in the case of Mwai Kibaki vs Daniel Toroitich arap Moi, Civil Appeal No 172 of 1999 made reference to the Civil Procedure Rules while trying to determine the mode of service of an election petition which is envisaged under section 20(1)(a) of the National Assembly and Presidential Elections Act. In the same manner section 23(d) just like section 3A of the Civil Procedure Act gives the High Court inherent powers to review its own orders where a review is called for.

This application was opposed by counsel for both the P1 and the 2"d respondent. Counsel for the 151 respondent relied on a replying affidavit by Joel Langat sworn on 141h December 2005. Counsel further argued that the application before the Court for review is defective for failure to include an order or a decree which is sought to be reviewed. While relying on the case of Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others Nairobi Milimani Commercial Court HCCC No 29 of 1995 where the Court held that section 80 of the Civil Procedure Act a party applying for review ought to extract the relevant order as was held in the case of G M Jivanjee vs N Jivanjee & another [1929-30] 12 KLR

44 where the Court of Appeal for Eastern African held:

"Apart from any consideration whether the course adapted by the learned judge in relation to the ex parte order of the 81' July, 1930, was or was not well founded, the question emerges as the precise character of the grievance which must be experienced by a person applying for a review under order XLII. A person applying for a review under that Order must be `aggrieved by a decree or order'. The words "decree" and "order" are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at

the decree his application should be for a review of the judgment upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under order XLII appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless that order or decree is a source of legitimate grievance to party to a suit. In these proceedings no resultant decree on the 29" August, 1930, had yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of, a decree or order to move the Court to draw up and issue the formal decree or order."

The applicant having failed to extract the order and to annex it to this application for review the jurisdiction of this Court is not properly invoked.

The second argument which was raised by the V respondent was that the petitioner seems to introduce a new matter which was not before the Court and that is regarding the order of the names of the 2,d respondent which seems to question the order of the names as Alicen Jematia Ronoh Chelaite or Chelaite Alicen Jematia Ronoh. The issue which was before the trial Court, and the subject of the ruling, was that the name Jematia was not included in the petition. The petition therefore was not against the person who was gazetted as the Member of Parliament for Rongai in the Gazette Notice of 3rd January 2003. That Gazette Notice which has been in circulation even before the petitioner filed the petition shows the area Member of Parliament. Moreover all the information contained in the register of voters, the declaration of the election results, the certificate of results were all documents within the public domain which the petitioner could have accessed with due diligence if he had sought for them. These documents under the Electoral Commission of Kenya are all public documents which are prepared under strict procedure and there is no justification why the petitioner did not apply for them and therefore these were not new issues to warrant a review. All this information having been available when the application to strike out was argued, the petitioner should not be allowed to bring in information which was within his knowledge to open a matter which is already res judicata. A party is supposed to bring all the information and not litigate in installments.

On the part of the 2"d respondent, counsel Mr Nowrojee presented a preliminary objection on the issue of jurisdiction. However this Court directed that both issues of jurisdiction and the other grounds, that are contained in the 2,d respondent's replying affidavit be argued together in the interest of time. It was Mr Nowrojee's view that the application for review relating to the National Elections Petitions is not allowed by law. The remedy available to the petitioner is an appeal which he as already pursued in Civil Appeal No 205 of 2005 in Nakuru and filed on 18" August 2005. However that appeal is still pending and the petitioner cannot now file an application for review of the same ruling which is a subject of the appeal. In the case of Abasi Balinda vs F Kangwanu [1963] EA 557 the High Court of Uganda while determining an Election Petition held that:

"(i) A point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an appeal; (ii) s 83 of the Civil Procedure Ordinance and Order 42 of the Civil Procedure Rules do not apply to election petitions and the Court had no jurisdiction to review its order for costs."

Review like an appeal is a statutory provision and not an inherent power except in limited circumstances. The Civil Procedure Rules cannot be invoked as all matters relating to the National Assembly and Presidential Elections are governed by its own Act of Parliament complete with its own rules and as was held in the case of Wilson Mutunga vs David Nguli & Anor E P No 35 of 1993 the Court held that:

"(2) The Election Court has limited jurisdiction where it can review its decisions. This is so because it is the Court of last resort where further appeal is denied expressly by the Constitution. It is also in accordance with public policy and interest that litigation should come to an end particularly election petitions so those constituents can be sure who represents them.

(3) The limited area where the Election Court may review its decisions are where proceedings are a nullity or a party is denied an opportunity to present its case before any order is made or where by a slip in the order/ruling, the same is not capable of being put into effect. The ruling made by the same Court in EP No 73/79 Joseph Munyao vs Munuve and others were cited with approval."

The grounds of review set out in this application does not include such issues as nullity, breach of the rules of natural justice or fraud which would entitle this Court to invoke the jurisdiction of the Civil Procedure for the ends of justice. In any case the petitioner did not invoke the provisions of the Civil Procedure Act or Rules when he filed the present application. He relied on the Constitution and the National Assembly and Presidential Elections Act which does not confer jurisdiction for review and if Parliament intended to confer the jurisdiction of review to the Election Court nothing would have been easier than to so provide.

In determining the issues that fall for determination in this application, I wish to address the issue of jurisdiction. Whether this Court can review the orders of 28" July 2005. It is trite law that the power to review is a statutory provision that is conferred under section 80 of the Civil Procedure Act and order 44 of the Civil Procedure Rules and the wording of the provision is that:

"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 of 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."

Taking into account the above provisions of the law it is clear that there must be new and important evidence which was not within the applicant's reach. The new evidence must be so distinct in character, but perhaps before examining this aspect firstly it is pertinent to establish whether an order of review is available within the Election Court. In other words, can the provisions of the Civil Procedure Act and the Rules be imported to the National Assembly and Presidential Elections Act and confer jurisdiction to an Election Court power to review a matter that has been determined. From the several authorities that were quoted, from the Election Court, there is consensus that election petitions are to be governed by the National Assembly and Presidential Elections Act which is a complete statute with its own rules of procedure and if Parliament intended to confer additional jurisdiction on review nothing would have been easier than to do so. Counsel for the applicant drew a parallel between this case and the case of Mwai Kibaki vs Daniel Toroitich arap Moi where the Court of Appeal made reference to the Civil Procedure Rules while interpreting the mode of service that is envisaged under section 21 (1) of the National Assembly and Presidential Elections Act. The Court of Appeal found that rule 14(1) of the rules is in sharp contrast with section 21(1) of the Act. In the circumstances section 21(1) would prevail and the provisions of rule 14(1) were not applicable. The matter in dispute in this petition has nothing to do with the service of the petition. The above authority therefore is distinguishable from the present case.

Assuming for a moment that this application could be made under the National Assembly and Presidential Elections Act the issue that falls for determination is whether there is new discovery of evidence which was not available to the applicants. The applicant states that the documents namely the voter's card, the voters register and the certificate of results of Rongai Parliamentary Election were not available when the application to strike out the petition was argued. What has transpired is that all these are public documents which were available to the applicant if he had applied for the same before filing the petition. He would have applied the same method, the same diligence that he applied when he accessed them. That is the payment for the documents. I agree with Counsel for the respondent that there was no discovery of new matter and the applicant should have put all their case at once. As it was held in the case of Yat Tung Investment Co Ltd vs Dao Heng Bank Ltd [1975] AC 581 which was adopted the Court of Appeal in the

case of Pop In (Kenya) Ltd & 3 others vs Habib Bank A G Zurich C A No 80 of 1988 where it was held:

"Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to point upon which the Court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward."

Bearing in mind the above principles of law there is no justification why the applicant did not present his case and all the documents when the application to strike out the petition was argued. What the applicant has done in this application for review is tantamount to litigation in installments.

While still dealing with the issue of review it is important to remark that the information the petitioner seeks to introduce as discovery of new and important matter which could not be obtained or was not within his knowledge was public information which was all along within the public domain since the petition was filed. If the applicant was diligent he could have obtained the same information before the filing the petition the same way he obtained it when he filed this application. The other reason why this application is a non starter is to be found under section 80 of the Civil Procedure Act by the wording of the said provisions an applicant must show the Court the decree or order which has aggrieved him. The matter was elaborated in the ancient case of Jivanjee vs Jivanjee.

The other issue is whether in a situation where the petitioner has filed an appeal, the appeal was filed on 18" August 2005 and the appeal is still pending whether the petitioner can now apply for review.

I have read the text submitted by Counsel for the petitioner Mulla the code of Civil Procedure Act Vol 5 of 190816'" Edition where the learned author has elaborated on the scope of review and inherent powers of the court. With respect I disagree with counsel for the petitioner that a party can pursue both the appeal and a review. What is expressed on page1191 is that:

"The review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of o 47, r l CPC. If, before the making of an application for review, an appeal from the judgment for review has already been filed and is pending, then, the Court has no jurisdiction to entertain the review application. Where the application for review is made first and thereafter, an appeal is preferred, the review application can be disposed of provided the Appellate Court has not disposed of the appeal before the review application is taken up for disposal. It is no doubt true that power of review should either be conferred expressly or it should be taken to be implied."

In the case the application for review was made after the appeal was lodged. I am of the view that the remedy for the petitioner lies in the appeal for reasons that review is not allowed under the National Assembly and the Presidential Elections Act and the fact that the applicant chose to file an appeal first. The remedy provided for is an appeal which the petitioner has already filed but taken no action for the last over two years.

The other issue is regarding the ruling of 18" July 2005 which the applicant is seeking to review. It is clear that the petition was struck out for failure to comply with the set requirements in the law. The petitioner failed to give the proper description of the 2`1 respondent by omitting the name Jematia and failed to state that he was entitled to vote as provided for in the Constitution. What the applicant is now arguing is regarding the order of the names whether the names of the 2"d respondent is Chelaite Alicen Jamatia Ronoh or Alicen Jamatia Ronoh or Alicen Jamatia Ronoh Chelaite which was not the issue before the trial Court. If the applicant is dissatisfied with the decision of the Court regarding the determination of the issue, that paragraph 2 of the petition does describe the petitioner as a person entitled to vote. The trial Court appreciated the provisions of the law and if there was an error in the way the

Court interpreted the law, this is not an appropriate matter for review as the Court cannot sit on its own decision. This is a matter for appeal.

I think I need not say more, for the above reasons this application should fail with costs to the respondents.