REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Election Petition 15 of 2003

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, CAP 7, LAWS OF KENYA

N THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTION REGULATIONS AND THE NATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION RULES)

AND

IN THE MATTER OF A PARLIAMENTARY ELECTION FOR THE NAMBALE CONSTITUENCY

BETWEEN

PATRICK OLASA WABIDONGE……..... PETITIONER

VERSUS

CHRYSANTHUS OKEMO …… 1ST RESPONDENT

GEORGE WATILA ……..…….…… 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA..... 3RD RESPONDENT

RULING

By a Ruling handed down on the 27th June, 2007, I struck out this Election Petition on the ground that it had not been served within the time required by law. As I observed in that Ruling, the onus was on the Petitioner to demonstrate that he had indeed complied with the mandatory service requirements stipulated in Section 20(1) (a) of the National Assembly and Presidential Elections Act, Cap. 7 of the Laws of Kenya (hereinafter "the Act").

Barely two days after my aforesaid Ruling, on 29th June, 2007, the Petitioner filed an application under a Certificate of Urgency, through his newly appointed Advocates, seeking a "**Review**" of my Ruling, under Sections 3A and 80 of the Civil Procedure Act, and O.44 of the Civil Procedure Rules. The main ground cited in the review application is that there indeed exists evidence of the fact that the Respondent had been "**served**" with the Petition on time, but that such evidence had not been presented to the Court because of the negligence or inadvertence of the Petitioner's previous advocates.

With regard to his inability or failure to present the "evidence" relating to "service", the Applicant states

as follows in his application : -

"*2. However, the Petitioner had filed a Return of service through his previous advocate; and had a copy of the same in his personal file; these materials together with requested Particulars were in the possession of his previous Advocate and the Petitioner cannot comprehend whether the lack of response to the first Respondents Preliminary objection was through inadvertence, error, mistake, negligence or flagrant incompetence of advocacy by his previous Advocate. The actions by his previous Advocate caused the Petitioner to suffer grievous prejudice and harm and loose the Petition on a mere technicality.*

3. That the inadvertence, error, mistake, negligence of the Advocate should not be visited upon the petitioner."

So, the Applicant here wants this Court's Ruling of 27th June, 2007, striking out the Election Petition on the ground that it had not been served within the required time "**reviewed**" under O.44 of the Civil Procedure Rules and other enabling provisions of the law.

In his affidavit in support of the application, the Petitioner says that he cannot "**comprehend**" why his advocate did not produce the evidence, or whether it was through the advocate's "inadvertence, error, mistake, negligence or flagrant incompetence" that this happened, and pleads that the advocate's mistake should not be visited upon him. It is noteworthy, however, that the Petitioner has not obtained depositions from either of his two previous advocates to explain what happened. In fact, his advocates and he were aware as far back as 5th May, 2003 of the First Respondent's claim that the Petition had not been served on him, and that he had filed an appearance in this Petition based on information received from other sources. Indeed, on 5th May, 2003, the First Respondent filed a Notice of Motion application praying that the Petition be struck out on grounds of non-service. The issue of non-service is not new. It is in fact as old as the Petition itself, and yet the Petitioner did absolutely nothing to answer those claims, or to provide proof of service. Now he says he cannot "comprehend" what happened, and wants a second bite of the same cherry. He says his advocate's mistake should not be visited upon him. Presumably, he means to say that it should be visited upon the First Respondent, instead!

Given these facts, is the Petitioner entitled to the "review" he seeks? Let us examine the law relating to "Review" of Judgments of Courts, and the circumstances under which it can be done.

The power of this court to review its judgment is provided for under Order XLIV Rule 1(1) of the Civil Procedure Rules. That rule provides as follows:

"*Order XLIV 1(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."

The applicant in his application and on oral submission by Mr. Omwanza relied on two grounds namely:

(a) the discovery of new and important matter or evidence,

(b) any other sufficient reason.

MULLA Code of Civil Procedure Vol. III 14th Ed. At pp. 2333 discusses the above two issues in detail. I will start with the discovery of new and important matter or evidence. When review is sought on the ground of the discovery of new evidence the evidence must be (1) new and relevant and (2) of such a character that if it had been given in the suit it might possibly have altered the judgment.

As stated by Lord Loreburn, L.C. in ***Brown v. Dean*** (1910) A.C. 373, at p.374,

"***When a litigant has obtained a judgment in a Court of Justice …. he is in law entitled not to be deprived of that judgment without very solid grounds; and where the ground is the alleged discovery of new evidence, it (new evidence) must at least be such as is presumably to be believed, and if believed would be conclusive."***

Applications on this ground must be treated with great caution. Review cannot be sought to ***supplement*** the evidence **or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial.**

The Learned Authors of **A.I.R. Commentaries, The Code of Civil Procedure** (1951) Edition Vol. 111 on pp. 3534 state as follows:

"***It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that part and put a different complexion upon that part of the case must be very strong. The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations and the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial …."***

Review cannot be used to supplement evidence or to produce new evidence. Here, the evidence **was indeed** available all along. To succeed, the applicant has to show due diligence; that the evidence was not within his knowledge or could not be produced at the time of the trial. This is not the case here.

Finally, let me consider Counsel's argument on the question of review for "**any other sufficient reason."** Mr. Omwanza submitted that the court had discretion under Order XLIV to grant review for any other sufficient reason. This is a term that requires careful analysis. In my ruling in ***Francis Origo v. Jacob Mungala*** Civil Appeal No. 10 of 1980, I had the opportunity to consider this matter and was guided by several authorities starting with ***Wangechi Kimita v. Mutahi Wakibiru*** Civil Appeal No. 80 of 1985 where Nyarangi, J.A. on p.6 said:

"***I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the Order."***

In ***Nairobi City Council v. Thabiti Enterprises Ltd***. Civil Appeal No. 264 of 1996, Tunoi J.A., said on pg.7:

"***But the recent judgment of this Court, Wangechi Kimata & Another v. Mutahi Wakabiru Civil Appeal No. 80 of 1985 (unreported) it was held that 'any other sufficient reason' need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil procedure Act. The court further went on to hold that the other grounds set out in the rule do not in themselves form a genus or class of things with which the third general head could be said to be analogous. The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason."***

Thus the reason must be one sufficient to the court to which the application is made and it cannot be held to be limited to the discovery of important matters of evidence or the occurring of a mistake or error

apparent on the record. Accordingly, Ms. Aulo, Counsel for the First Respondent's argument that the words "for any sufficient reason" are to be construed ejusdem generis with the other grounds stipulated in the Order, is untenable and completely outdated.

Although the Court has unfettered discretion to review its judgments, there are now established some principles upon which that discretion may be exercised. For example, a party who not only had an opportunity of raising a question but who did raise it and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate the question in review. Nor is it a sufficient reason for granting a review that if another opportunity was given to the applicant, he would satisfy the court that its previous order was wrong. This would be equivalent to a court sitting on its own appeal. See **MULLA** supra pp.2337 and **A.I.R. commentaries** supra pp.3545. The grounds of review under any other sufficient reason must be something which existed at the date of the decree and the rule does not authorize the review of a decree which was right when it was made, on the ground of the happening of some subsequent event.

In ***Phosphate Sewage Company v. Molleson*** (1879) H.L. (Sc.) 801, EARL CAIRNS, L.C., on pp.814 stated:

"***Now my Lords, these being the facts of the case, my first observation is this. As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that 'since the former litigation there is another fact going exactly in the same direction with the fact stated before, leading upto the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact'. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, 'I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before'…But it is unnecessary to dwell upon that, because it is perfectly clear upon the statement of the present appellants themselves that this fact was within their knowledge before their proof was led in the former action and they were just as free to have had the record opened and to have had it stated, as if it had come to their knowledge before the record was closed."***

In conclusion, I would like to quote the following words of wisdom by Sir Charles Newbold, P. in ***Lakhamshi Bros. Ltd. v. Raja & Sons*** (1966) E.A. 313 at p.314:

"***There is a principle which is of the very greatest importance in the administration of justice and that principle is this: It is the interest of all persons that there should be an end to litigation."***

In fact, this principle is even more appropriate to **election petitions**. Given the nature of election petitions, and the fact that they affect huge segments of the population, and the need for people to be represented in Parliament by their lawfully elected representatives, it is important that election petitions should be concluded with speed and efficiency. I am satisfied that this Petition has now reached its final determination.

Accordingly, and for reasons outlined here, I dismiss the application for review with costs to the First Respondent.

Dated and delivered at Nairobi this 28th September, 2007.

ALNASHIR VISRAM

JUDGE