REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CONSTITUTION AND HUMAN RIGHTS DIVISION

ELECTION PETITION APPEAL NO. E002 OF 2023

AS CONSOLIDATED WITH ELECTION PETITION APPEAL NO. E005 OF 2023

JOSIAH OBEGI MANGERA----------APPELLANT/RESPONDENT

=VRS=

JOSEPH NYARANGO ONDARI----------1ST RESPONDENT/APPLICANT

RETURNING OFFICER BORABU CONSTITUENCY-----2ND RESPONDENT

INDEPENDENT, ELECTORAL AND

BOUNDARIES COMMISSION---------- 3RD RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 27th June 2024 wherein the Applicant seeks the following Orders: -

    (1) SPENT

    (2) SPENT

    (3) THAT the Honourable Court may be pleased to review the judgment delivered on 6th July 2023 upon such terms as it deems fit.

(4) The Appellant and the 2nd and 3rd Respondents be ordered to pay the costs of the Appeal.

(5) *Costs be provided for or in the alternative each party to bear its own costs.*

2. The Application is premised on the grounds listed on the face of the Notice of Motion and is supported by the Applicant's Affidavit wherein he avers that he has been served with warrants of attachment and sale of his properties before service with the notice of intention to execute the warrants of attachments. He further avers that it was established, on a balance of probabilities, that there were irregularities committed by the 2nd and 3rd Respondents which irregularities went to the root of the election and affected the integrity of the election results thus requiring a nullification and a repeat election so as to restore the integrity.
3. The 2nd and 3rd Respondents opposed the Application through the Replying Affidavit of the 3rd Respondent's Director of Legal Services Mr. Chrispine Owiye. The Respondents' deponent avers that the Application lacks merit as all the issues raised in the Application were determined in the judgment delivered by Chemitei J. on 6th July 2023. He states that the Application does not meet the threshold for review as provided under ***Order 45 Rule 1 of the Civil Procedure Rules***.
4. The Application was canvassed by way of written submissions which I have considered.

The Applicant's Submissions

5. The Applicant submitted that this Court has jurisdiction to determine the Application based on its wide jurisdiction to review its own decisions. It was also submitted that there was an error in the Court's impugned judgment, at paragraph 58 thereof, where it was held that the margin of 174 votes was so wide that the lost or misplaced counterfoils could not aid the 1st Respondent even after the recounting and re-tallying as ordered by the court changed the overall results. It was submitted that the irregularities committed in Ensoko and Nyansakia polling stations were so gross that they violated all the known legal principles of elections and that the 2nd and 3rd Respondents violated ***Article 81(e) and Regulation 81 of the Election (General) Regulation 2012*** by failing to provide counterfoils which were material in the election.
6. It was the Applicant's case the error in the impugned judgment could not be considered to be minor or be ignored. The Applicant urged the court to reconsider the determination on costs because the 2nd and the 3rd Respondents were found to have committed election irregularities and should therefore shoulder the costs or in the alternative make an order that each party bears its own costs.

The 2nd and 3rd Respondent's Submissions

7. The 2nd and 3rd Respondent submitted that the Applicant has not satisfied the conditions set for review under ***Order***

45 Rule 1 of the Civil Procedure Rules. They argued that an error apparent on the face of the record should be self-evident and should not require an elaborate argument to be established as was the case with the present Application. it was their view that the alleged errors and irregularities were fully and conclusively addressed in the impugned judgment. Reference was made to the decisions in ***National Bank of Kenya Limited vs. Ndung'u Njau,*** **Nairobi Court of Appeal Civil Appeal No. 211 of 1996** and ***Herbert Mbogo Josiah vs. Joho Njue Nyaga,*** **Embu High Court Civil Appeal No. 34 of 2021** where what amounts to an error apparent on the face of the record was explained.

8. It was submitted that the issues raised by the Applicant such as the absence of counterfoils are matters that fall under grounds for appeal and not grounds for review. In this regard, reference was made to the case of ***National Bank of Kenya Limited vs. Ndung'u Njau, Nairobi (supra)*** and ***Herbert Mbogo (supra).*** It was the Respondents' case that Applicant should pay the costs of the Appeal in line with the principle that costs follow the event.

Analysis and Determination

9. I have considered the pleadings filed herein and the parties' rival submissions. I find that the main issue for determination is whether the Applicant has made out a case for the review of the impugned judgment.

10. The principles governing Review are codified under **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** as follows: -

80. Any person who considers himself aggrieved—

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

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Order 45

"(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

11. In ***Republic vs. Director of Public Prosecution ex-parte Josphat Sirma & 2 others*** **[2017] eKLR**, held thus: -

"Order 45 Rule 1 (1) (b) Civil Procedure Rules sets out the parameters for an Application for Review. This is for purposes of avoiding a scenario where the Review Court turns into an Appeal Court over its own Ruling or Judgment. The Court may only hear a new and important matter or evidence which was not within the knowledge of an Applicant or could not be produced by him at the time when the Order was passed.

12. Secondly, the Court may only consider a mistake or error apparent on the face of the record. On this, the record must speak for itself or by itself without much explanation.

13. Thirdly, the court may consider any other sufficient reason.

12. This Application matter emanates from an election dispute that commenced before the Lower Court before an appeal was filed before this court which appeal was heard and determined by this court, differently constituted. It is trite Election Petitions are time-bound under the Constitution and Statute and that there is no room for the adjustment of set timelines. The Supreme Court emphasized the importance of complying with the timelines in election disputes in the case of ***Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others*** **[2014] eKLR**. where it held thus: -

"(69) We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the court. This recognition is already well recorded in this court's decisions in the Joho case and the Mary Wambui case.

(70) ……. This is particularly true in the context of Kenya's special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, the Constitution emphasizes the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed electoral justice, that has plagued this country in the past."

13. My understanding of the principle espoused in the above cited authority is that the expeditious disposal of electoral disputes forms the bedrock of our electoral laws. The jurisdiction of the court to hear and determine electoral disputes is tied to the fixed timelines which means that delay in the settlement of such disputes is a matter that the court cannot countenance. Applying the principles of efficiency and timely determination of electoral disputes to this case, it is clear that the present Application was filed way more than one year after this court, differently rendered, had determined the appeal. It is instructive to note that the Applicant has not offered any explanation whatsoever for the delay in filing the Application. My understanding of the grounds advanced in support of the Application is that the Applicant has been prompted by the action taken by the Respondents to execute for the costs awarded by the court. Indeed, one of the prayers sought in this Application is for the review of orders made on costs.

14. My finding is that the delay in presenting this application is inordinate and does not favour the granting of the orders sought bearing in mind the fact that electoral disputes ought to be determined with finality. My take is that allowing this application will be akin to reopening an electoral dispute that had gone its full cycle and the chapter closed by the judgment of this court.
15. My above finding on the timelines notwithstanding, I am still minded to determine the merits of the Application. The Applicant contended that there is an error apparent on the face of the impugned in respect to the margin of votes between the Applicant and the Appellant. According to the Applicant, the margin of votes was so wide that it could not be resolved by fresh tallying of the votes that were registered in the lost counterfoils. He also averred that since the 2nd and 3rd Respondents acknowledged that there were some irregularities, the Court erred in failing to consider this as material to the determination of the validity of the election.
16. In ***Edison Kanyabwera vs. Pastori Tumwebaze*** **(2005) UGSC 1**, he Supreme Court of Uganda had this to say on the issue of what constitutes an error apparent on the face of the record: -

> ***"It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest***

and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."

17. From the holding in the above cited case, it is clear that a party seeking a review on the basis of an error apparent on the face of the record must satisfy the court that the error they seek to rectify does not require further inquiry, on appeal, or is an issue of erroneous conclusion or wrong application of the law or evidence. In other words, an error apparent on the face of the record must be straightforward such that it does not require an elaborate argument in order to establish it.
18. There must be a clear distinction between questions of law and fact which constitute grounds of appeal and questions of apparent errors which constitute grounds for review. I find **Chittaley & Rao** on the **Code of Civil Procedure (4th Edn), Vol. 3, Pg 3227** relevant in this regard as follows:-

"A point which may be a good ground of appeal may not be a good ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

19. My view of the issue raised by the Applicant over the effect of the missing counterfoils on the overall votes margin does not constitute an error apparent on the face of the record as it is a matter that may require further elaboration. The

issue of the margin of votes will require this court to determine whether it did a correct analysis of the law and facts before arriving at its verdict on the appeal. To my mind, that is a matter that falls within the purview of an appeal before the Court of Appeal, assuming such an avenue was open to the Applicant, and not before this Court on review.

20. I will now turn to consider the other grounds for review, which are the discovery of any new facts or evidence that were not within the knowledge at the time of hearing the Appeal or for any other sufficient reason. I note that the Applicant did not state that he had discovered any new evidence that was not within his knowledge at the time the appeal was heard and neither did he state that there was any other sufficient reason for the review besides the issue of votes margin.
21. It did not escape this court's attention that the Applicant also challenged the award of costs to the Respondents. It is trite that the award of costs is a matter that falls at the discretion of the court that rendered the judgment or the ruling. It is not a matter of course. This means that the exercise of discretion to award will depend on the circumstances of each case.
22. Circumstances may differ from case to case. In this regard, the work of **Kuloba (J)** in **Judicial Hints of Civil Procedure** is useful as he posited that;

"Furthermore a successful party cannot be deprived of his costs merely because the suit

proceeded ex parte or uncontested. This is to say, the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists.

The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.

23. In **ORIX OIL (KENYA) LIMITED v PAUL KABEU & 2 OTHER [2014] eKLR** the court stated:

> ***''…the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.***

24. **Section 27** of the **Civil Procedure Act**, **Chapter 21 Laws of Kenya**, which provides as follows with regard to costs:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of**

and incidental to all suits shall be in the discretion of the court or judge, and the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

25. In ***Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another*** **[2016] eKLR,** Mativo J (as he then was) while deciding on whether or not to award costs to a party; stated as hereunder.

"…I find useful guidance in the following passage from the Halsbury's Laws of England;

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must

not be exercised arbitrarily but in accordance with reason and justice".

26. In the case of ***Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others,*** **[2013]eKLR** it was held: -

> ***"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ……But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

27. Guided by the above cited authorities and having noted that costs are awarded at the discretion of the court making the order, I find that it is not within this court's mandate to overturn this court's decision on costs as doing so will be tantamount to sitting on appeal on this court's own decision under the guise of a review.
28. In conclusion, I find that the instant application does not meet the threshold for the granting of the orders for review and I therefore dismiss it with no orders as to costs.
29. It is so ordered.

Ruling dated, signed and delivered virtually at Nyamira via Microsoft Teams this 20th day of February 2025.

W. A. OKWANY

JUDGE