Musimba v Independent Electoral & Boundaries Commission & 2 others (Election Petition 001 of 2022) [2023] KEHC 534 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KEHC 534 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

ELECTION PETITION 001 OF 2022

JN ONYIEGO, J

FEBRUARY 3, 2023

BETWEEN

PATRICK MWEU MUSIMBA ..... PETITIONER

AND

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

MAKUENI COUNTY ..... 2ND RESPONDENT

MUTULA KILONZO JUNIOR ..... 3RD RESPONDENT

RULING

1. The petitioner /applicant moved this court vide the petition dated 8th September, 2022, in relation to the Makueni Gubernatorial election exercise held on 9th August, 2022, seeking various orders which if allowed would lead to the nullification of the Makueni County Gubernatorial election.The petitioner simultaneously filed a Notice of Motion application dated 8th September, 2022 seeking orders for scrutiny. The same was canvassed by way of written submissions which were highlighted on 23rd November, 2022.This honourable court then delivered its ruling on 21st December, 2022, dismissing the said application.

2. Dissatisfied with the ruling of the court, the petitioner filed a Notice of Motion application dated 6th January, 2023 under Certificate of Urgency seeking the following orders;

    a. Spent

    b. That pending the hearing and determination of this application, and subsequent the petition this honourable court be pleased to review paragraphs 81, 82, and 83 of the ruling delivered on 21st December, 2022.

c. That the honourable court do proceed and order the 1st and 2nd respondent to supply with the court all Forms 32A prepared in respect to Sekeleni polling station.

d. That any other orders that meets the end of justice be issued.

3. The application is premised on the grounds therein and the supporting affidavit of the petitioner sworn on 6th January, 2023.

4. It is the applicant's case that during the hearing of the scrutiny application, the issue of Form 32A was seriously canvassed after his confirmation that he and others who voted in the same polling centre were not issued with the said form to fill nor sign. That the same was supported by the averments of Brian Kioko Mutisya(3rd respondent's witness) in his affidavit where he allegedly stated that the issue of Form 32A was a serious issue as the County Returning Officer confirmed that if any single form was missing, then it would be an issue of concern.

5. The petitioner averred that this honourable court erroneously in its ruling of 21st December,2022 at paragraphs 81,82 and 83 found that a scrutiny of Forms 32A for Makueni County was undertaken which was not the case as Makueni was not one of the areas in which the supreme court in Raila petition of 2022 ordered for scrutiny of the Forms 32A. That during a brief interlude of the presidential petition hearing, the supreme court verbally issued some directions in respect to the scrutiny orders;

6. He further averred that he had applied and obtained the affidavit of Celestine Onyango from the Supreme Court which confirms that the areas she had issues with were 41 polling stations and none was in Makueni County. That a report was generated and filed by the registrar of the Supreme Court which also confirmed that there was no scrutiny of the forms from Makueni County.

7. The petitioner urged the court to reconsider its position anchored on the application dated 8th September,2022, the pre-trial directions dated 17th October,2022 and the powers of the court under section 82 of the *Elections Act*.

The 1st and 2nd respondents'Response

8. In response, the 1st and 2nd respondent filed a replying affidavit sworn on 18th January 2023 by Maurice Kepoi Raria Mparo the County Returning Officer Makueni County.

9. It is Mparo's averment that the application is fatally defective the same having been brought under wrong provisions of the law which do not confer the right of review on the applicant. It was deposed that the *Civil Procedure Act* and Rules are not applicable to Election Petitions and cannot give the court power to review its decision

10. He further stated that prayer 3 of the application herein is a new prayer as it was not in the applicant's original application dated 8th September, 2022 hence a new application for scrutiny. That the application for review is not an opportunity for the applicant to add or seek new prayers as the question of scrutiny is in any event res judicata the same having been dealt with substantively. Further, that the powers of the court can only be invoked to correct a mistake or apparent error on the face of the record which must be clear, self –evident and should not require examination or arguments to establish them. That an error cannot be apparent on the face of the ruling when it requires evidence to be adduced to enable the court to discern it.

11. He stated that the Supreme Court finding alluded to had not changed, reviewed or set aside and by virtue of Article 163 (7) of *the Constitution*, this court is bound by the decision of the Supreme Court, including on its finding that it was satisfied that Form 32As were duly filled in Kibwezi West

Constituency. That it's not the place of this court to guess how the Supreme Court arrived at the decision it did and should not allow the invitation to do so.

12. He averred that the issues raised by the applicant relate to contested matters of facts, not self-evident and which require a merit review of the pleadings and evidence produced both before this court and the supreme court in the Presidential Election Petition Raila 2022.That the applicant is asking the court to sit on appeal over its own decision which is not permissible. He went further to state that the application herein does not meet the stringent test for review.

13. He further averred that the finding by the Supreme Court that the Kiems Kit failed in 235 polling stations in Kibwezi West Constituency and parts of Kakamega County and that 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled, is clear and unambiguous hence binding on this honourable court.

14. He stated that the petitioner had provided selective documents namely orders for scrutiny, newspaper articles, the affidavit of Celestine Anyango and scrutiny report prepared in respect of the presidential election petition instead of all the pleadings and documents filed and produced before the supreme court resulting to the court's decision on whether the Forms 32As were signed by voters who used manual registers in Makueni County.

15. He further stated that the assertion that this honourable court made its decision under erroneous presumption that a scrutiny of Forms 32A for Makueni County was undertaken is false and has not been substantiated.

3rd Respondent's response

16. The third respondent also filed a replying affidavit in response to the application sworn on 16th January, 2023 by himself. He stated that the *Elections Act*, 2011 and the Rules made thereunder are a complete code on matters of elections and the Civil Procedure Rules,2010 is not applicable to these proceedings. That neither the *Elections Act*, 2011 nor the Elections (Parliamentary and County) Petition Rules have conferred the election court with jurisdiction to review its orders for obvious reasons.

17. He went further to state that the applicant failed to inform this honourable court of his intention to have Form 32As for Sekeleni Primary School polling station within Kibwezi West Constituency produced during the pre-trial conference. That it was the applicant's duty to request for the materials during the hearing of the petition and not after the closure of the matter and filing of submissions.

18. He averred that the fact that Brian Kioko Mutisya did not mention Forms 32A as having been used in Sekeleni polling station, it was not an admission that the forms were not used at the said polling station. That the scrutiny of the Forms 32As in Sekeleni polling station will not make any difference on the outcome of the elections held in Makueni County on 9th August, 2022 hence a waste of judicial time.

19. He further averred that the applicant has selectively quoted portions of the Supreme Court proceedings that favour his application hence a waste of judicial time.

Rejoinder

20. In his rejoinder, the petitioner filed a supplementary affidavit sworn on 23rd January,2023 claiming that procedural technicalities and want of form should not bar the primary object of dispensing substantive justice to the parties. That the parameters and issues to be addressed in respect to the hearing and determination of the application for scrutiny were addressed during the pre-trial conference whereby the court directed that the matter do proceed for hearing in order to narrow down the focus of the prayers sought.

21. On the grounds for review namely error apparent on the face of the record and new evidence, the petitioner stated that he was served with the 1st and 2nd respondents' submissions and authorities in respect to the application for scrutiny on the morning of highlighting submissions whilst he was already in court as well as his counsel. That the court would have noted that in respect to Raila 2022 case no scrutiny exercise was conducted in respect to the Makueni elections. That the information could not have been obtained prior to the highlighting of submissions owing to the obvious constraints of time. That the court therefore can order for scrutiny exercise with the new facts on its own motion.

Submissions

Petitioner's submissions

22. The petitioner through the firm of Andrew & Steve Advocates filed his written submissions dated 22nd January, 2023. Mr. Kimathi learned counsel submitted that they had demonstrated that there was sufficient ground to order for scrutiny. In counsel's view, this court is not bound by the decision of the Supreme Court particularly on issues in respect to the makueni elections. That the court has jurisdiction and power to arrive at an independent decision based on the merits of the case.

23. It was counsel's contention that the Supreme Court did not interrogate or scrutinize the evidence in respect to the Makueni elections, neither did it have the benefit of hearing the witnesses that testified in respect to the elections, and therefore it cannot be stated that the decision is binding.

24. Counsel further submitted that the evidence produced by the petitioner is factual and proves that the reliance of the relevant provisions of the supreme court was a misconstruction of the relevant paragraphs of the supreme court decision without the benefit of the knowledge of the material facts behind the said decision which could not have been obtained at the time the issue was raised.

25. That if the court was made aware of the circumstances behind the scrutiny exercise behind the supreme Court, it would have probably reached a different decision. That the decision of the Supreme Court falls within the exceptions to the rule of stare decisis and the issues in question are easily distinguishable. To support his argument, counsel relied on the case of Bakari v Mohamed & 2 Others [2003] eKLR where the court agreed with the observations of author FAR Benson– A Code of Statutory Interpretation 2nd Edition in which overruling decisions arrived at per incuriam is discussed at page 97 and 98 thus:

> "a court decision as to the legal meaning of an enactment which is arrived at per incuriam is not a binding precedent". An example is given in the case of Rakhit v Carty [1990[2 All ER 202 in which case is shown that although the court appreciated and emphasized the importance of the doctrine of stare decisis (precedent) the Court declined to follow a decision reached per incuriam, saying that it was an exception to the doctrine of stare decisis. Another authority is the case of Henry J Garnet & Co v Ewing [1991] 4 All ER 891. In that case the Court of Appeal was urged to find that a previous decision of a differently constituted division of the court in A.G vs Jones [1990] 2 All ER 636 as regards the construction of section 42 of the *Supreme Court Act* 1981 was given per incuriam as the decision was given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court as per Lord Donaldson MR at page 894-895. The doctrine of stare decisis was discussed at length in the Kibaki – Moi decision. The Judges of Appeal went to great lengths to examine the relevant authorities and I totally agree with their conclusion on that issue."

26. Counsel submitted that the petitioner did confirm in his testimony that he was never issued with a Form 32A neither did he witness any other person being issued with one. He contended that the 3rd respondent's witness' evidence that he did not indicate whether he witnessed the filling and signing of Form 32A is by itself an affirmation to the petitioner's position.

27. Learned counsel went further to state that, the court having heard the petitioner's evidence and in appreciating the decisions of other courts and the testimony of RW-3 on the importance of Form 32A, it can uphold substantive justice by reviewing its decision, or ordering on its own motion, for scrutiny of Forms 32A in any station, even the sole Form 32A of the petitioner as a sample.

28. Counsel further submitted that the overriding objective of the court is to dispense justice expeditiously. That as stated in the report "Balancing the Scales of Electoral Justice" this court's mandate is to ensure that it balances the scales of justice and dispenses the same expeditiously and in a people focused manner. That no prejudice will be occasioned on either of the parties.

29. On review, counsel submitted that the new and important matter of evidence was not available at the time when the ruling was passed. That the evidence does not require elaborate argument as the scrutiny report shows no scrutiny exercise was conducted in makueni. That the decision of the court was based on material non-disclosure on the part of the 1st and 2nd respondent and also reliance on a statement that facts and evidence have proved otherwise and the error or omission alluded to is self-evident and does not require an elaborate argument to be established.

30. Counsel relied on several authorities to show that this court has jurisdiction to entertain the application for review interalia; MOHAMED ALI MURSAL v SAADIA MOHAMED & 2 others [2013] eKLR and Ahmed Abdullahi Mohamad & v Mohamed Abdi Mohamed & 2 others [2017] eKLR.

1st and 2nd respondents' submissions

31. The 1st and 2nd respondent through their advocates filed written submissions dated 18th January, 2023. Mr. Nyaburi submitted on two issues namely; jurisdiction and principles guiding the court in review application.

32. On the aspect of jurisdiction, counsel submitted that the application has been brought under the wrong provisions of the law thus this court does not have jurisdiction to review its ruling pursuant to the *Civil Procedure Act* and Rules. To buttress this position, counsel relied on the case of Japhet Muroko & Another V Independent Electoral And Boundaries Commissioner (IEBC)& 3 Others [2017]eKLR where the court held that;

> "...In particular, Sections 1A, 1B and 1C of the *Civil Procedure Act*, and Order 51 of the Civil Procedure Rules have been cited. To this, there is no more voice to add, other than to restate the well-settled observations that election petitions are sui generis and are guided by the specialized regime of law. As such, the Civil Procedure Rules are not applicable unless expressly provided for..."

33. Counsel further submitted that prayer No.3 of the application is a new prayer thus translating to a new application for scrutiny to which this court has no jurisdiction to entertain. To support his position, counsel relied on the case of Robert Tom Martins Kibisu v Republic [2018] eKLR.

34. On the principles guiding a court in determining a review application, counsel submitted that the applicant must establish that there is an error apparent on the face of the record. To support this

position, counsel relied on the case of Godfrey Masaba v Iebc & 2 Others [2013]eKLR where the court stated;

> " 29. Owing to the special nature of election disputes not all the tests under Order 45(1) may be applicable in an application for review of the orders of an Election Court, I hold the view that an Election court should readily review its orders on account of some mistake or error apparent on the face of the record."

35. Counsel contended that the alleged error by the applicant is not an error on the face of the record as the applicant has produced documents annexed to his affidavit in form of further evidence, which evidence was not before the court at the time the application for scrutiny was canvassed.

36. Counsel further contended that the Supreme Court's finding has neither changed nor been reviewed nor set aside. That by virtue of Article 163(7) of *the Constitution*, this court is bound by the decision and findings of the supreme court, including the findings that it was satisfied that Forms 32As were duly filled in Kibwezi West Constituency.

37. According to learned counsel, the findings and conclusions of this court whether right or wrong in law, were based on appreciation of the evidence presented by the parties. That the court not only relied on the supreme court findings but also on the testimony of the 1st and 2nd respondent.

38. Mr. Nyaburi opined that by requiring the court to re-consider issues and evidence by the parties, the applicant was essentially asking the court to sit on appeal over its own decision with a view of reaching a different finding which is not permissible in law. To express that, counsel relied on the case of Wairicu Francis V Robert Gikonyo Ngige [2020] e KLR . Finally, the court was urged to find that the applicant is guilty of material non-disclosure as he has selectively provided the court with documents.

3rd respondent's submissions

39. The third respondent through his advocates Kyalo Mbobu Associates filed his written submissions dated 18th January, 2023, thus submitting on three issues;

    a. Whether this honourable court has the jurisdiction to review its orders.

    b. Whether the petitioner is estopped by the responses made on record.

    c. Whether the application before this court is an abuse of court process.

40. On jurisdiction, counsel argued that this court has no jurisdiction to entertain the application in question. To support that assertion, reliance was placed on the case of Owners of the Motor Vessel "Lillian S" v Caltex oil (Kenya) Ltd [1989] KLR1 where the court held;

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

41. It was submitted that the Civil Procedure Rules do not apply to election proceedings. To solidify this position counsel relied on holding in the case of Joho v Nyage & another Election Petition No.8 Reported In (2006) eKLR where the court stated that;

> "It is, in my view, now well established that the jurisdiction conferred upon the High Court by section 44 of *the Constitution* to hear and determine election petitions is a special

jurisdiction. The National Assembly and Presidential *Elections Act* Cap 7 of the Laws of Kenya (the Act) and the rules made thereunder form a complete legal regime with its elaborate procedure concerning the filing, serving, hearing and determination of election petitions. Save where the regime expressly admits and incorporates the provisions of other law it is a complete code of its own.

The *Civil Procedure Act* and the Rules made thereunder do not therefore apply to election petitions save where they are expressly incorporated...It follows therefore that the bringing of this application under the provisions of the *Civil Procedure Act* and Rules, though not fatal, was irregular."

42. In Mr. Mbobu's view, neither the *Elections Act*, 2011 nor the Elections (Parliamentary and County) Petition Rules 2017 have clothed the election court with jurisdiction to review its orders. Thus, this court has no jurisdiction to grant the order of review sought by the petitioner herein. Counsel went further to state that the petitioner has not placed any evidence before this court to show that the decision of the Supreme Court in Raila 2022 was varied and or set aside. Thus, this court has no power to review or depart from the said decision.

43. On the issue of the doctrine of estoppel, counsel relied on Section 120 of the *Evidence Act* which provides;

> " When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

44. Counsel went further to submit that during the pre-trial conference, the petitioner's advocate told the court that he did not wish to have any election material for Makueni County brought to court. That the petitioner failed to request for the same during the hearing of the petition and was now asking for the same after closure of the case and filing of submissions. Thus, the applicant is estopped, precluded and debarred by the representation made by his advocate in court.

45. Counsel also relied on the case of Serah Njeri Mwobi v John Kimani Njoroge Civil Appeal No.314 Of 2009(Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR) where the court stated;

> " The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person...
>
> It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."

46. That the request for scrutiny of Form 32As for Sekeleni polling station is an afterthought and an attempt to re-open the application for scrutiny which is already spent.

47. On whether the application herein is an abuse of court process, counsel submitted that the application is meant to delay the hearing and determination of the election petition. That as stated in the case of

Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others Nairobi (Milimani)HCC No.363 of 2009 this court has the inherent power to prevent an abuse of its process.

Determination

48. I have considered the application herein, parties' respective responses and rival submissions by counsel. Issues that emerge for determination are;

    a. Whether this court has jurisdiction to hear and determine the application herein.

    b. Whether the petitioner/applicant has met the threshold for review.

49. Whereas the applicant is of the view that this court has jurisdiction to entertain the review application herein, the respondents are of a contrary opinion. According to the applicant, this court is enjoined to uphold the overriding objective with a view to promoting delivery of substantive justice based on the material placed before it without resorting to technicalities.

50. The respondents on the other hand submitted that this court lacks jurisdiction on the grounds that the application has been brought under the wrong provisions of the law to wit, the *Civil Procedure Act* and rules which are not applicable to election petitions hence this court lacks the power or capacity to review its orders. They further stated that prayer No.3 is a new prayer which was not pleaded in the original application for scrutiny.

51. The application herein has been brought under Sections 1A, 1B, 3A, 3B, 63(e), 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules, Rule 4 and 17 of the Elections (Parliamentary and County Elections) Petition Rules and Section 82 of the *Elections Act*. It is these provisions which the respondents claim are not applicable as they do not provide for review in election petitions. A quick look at the quoted provisions will reveal that none of the election related laws provides for review in election disputes.

52. It is trite law that where a court has no jurisdiction, it cannot craftily arrogate the same to itself. See the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR in which the supreme court stated;

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

53. This court being an election court, it derives its power from the *Elections Act* 2011 and Section 80 and Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules,2017 which provide;

    Section 80

    1. An election court may, in the exercise of its jurisdiction—

        a. summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;

        b. compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;

c. examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

d. decide all matters that come before it without undue regard to technicalities.

2. ...

3. ...

4. ...

5. ...

54. Rule 4 of the 2017 parliamentary and county elections rules does provide as follows;

1. The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.

2. An election court shall, in the exercise of its powers under *the Constitution* and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).

55. My understanding of the above quoted provisions is that, a court of law which is expected to dispense substantive justice does not operate in a vacuum even when there is no express nor clear provision in law governing a certain subject. In such a scenario, it will assume and exercise inherent power or mandate under article 165(3) of *the Constitution* which confers it with unlimited jurisdiction over civil and criminal matters to dispense justice in an expeditious, proportionate and affordable manner without undue regard to technicalities. This position emanates from Article 159 (2)(d) of *the Constitution* which provides;

> " Justice shall be administered without undue regard to procedural technicalities; and"

56. As already stated, It's evident that the electoral laws do not provide for review of a court's order or decision and in my view, that does not bar a court from exercising its inherent powers in dispensation of justice when faced with an application for review like it is in this case. In that regard, I seek guidance from the holding in the case of Godfrey Masaba v IEBC & 2 others (supra)where the court stated;

> " ...For this reason notwithstanding lack of any express provisions for review in the Election Act and the Rules made thereunder, I hold the view that an election court would, in the appropriate circumstances, review its orders if in so doing, it would give effect to a right or fundamental freedom that the law in question had failed to recognize or give effect to.
>
> There are decisions to the effect that an election court has power, in exercise of its inherent power, to review its orders. For instance in Mohamed Ali Mursal v.Saadia Mohamed & 2 others (2013) e KLR S.N Mutuku J., conceded that An Election Court has power to review its orders and invoked Order 45 of the Civil Procedure Rules in resolving the matter before her. Similarly, in Nuh Nassir Abdi v. Ali Wario & 2 others (2013) e KLR EP No.6 of 2013 G.V. Odunga J., observed:-

"A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose..."

It is apparent that an election court has power to review its order if doing so would serve a useful purpose in the just determination of the issue before it".

57. Accordingly, it's my finding that this court has jurisdiction to hear and determine this application on merit for the ends of justice to be met. The parameters applicable therefore to determine whether the application has met the requisite conditions can as far as applicable borrow from those set out under order 45 of the civil procedure rules. To that extent, the argument that the application is incompetent and bad in law for being brought under the civil procedure rules is not sustainable.

58. On whether the applicant has met the threshold for review, the court in the case of Godfrey Masaba v IEBC & 2 others (supra) stated as follows;

" Owing to the special nature of election disputes not all the tests under Order 45(1) may be applicable in an application for review of the orders of an Election Court, I hold the view that an Election court should readily review its orders on account of some mistake or error apparent on the face of the record. The court would fail in its mandate of administering justice to parties, if, because the Rules of Procedure don't clothe it with power to correct its mistake or error, it allows wrong or misleading record to stand."

59. In the instatant case, the petitioner/applicant's claim is that this court made a mistake in its ruling delivered on 21st December, 2022 by presuming that a scrutiny of Forms 32A for Makueni County was undertaken as per the Supreme Court decision in the presidential election petition referred to as Raila 2022.The applicant's argument is in respect to paragraph 81, 82 and 83 of the impugned ruling which I wish to reproduce as hereunder;

" 81. The applicant claimed that voters who voted using manual register did not fill form 32A nor did the aided voters fill form 41. He gave himself as an example of a person who never filled nor signed Form 32A yet he was allowed to vote. According to the 1st and 2nd respondent, Form 32A was filled and signed by every voter who voted through manual register identification. The 1st respondent relied on the holding in the supreme court's holding in the Raila Odinga & 16 Others; Law Society of Kenya & 4 Others(Amicus Curiae)Presidential Election Petition E005,E001,E002,E003,E004,E007 & E008 Of 2022(Consolidated)(2022)KESC 56(KLR)(Election Petitions)(26th September 2022)(Judgement)Neutral Citation(2022)KESC56(KLR) where the court confirmed that it had ordered for the scrutiny of votes in Kibwezi West Constituency together with other places and was satisfied that forms 32A were filled where manual voting was applied.

82. For avoidance of doubt, the supreme court at pages 13 of its final judgement delivered on 26th September, 2022 held as follows;

"whereas, it is not in dispute that the KIEMs kits failed in 235 polling stations in Kibwezi West Constituency and parts of Kakamega County,86,889 voters were granted the right to vote manually and the requisite forms 32A duly filled.As such, the

failure of the KIEMS kits in the identified polling stations cannot be taken as a yardstick of the performance of KIEMS kits in the whole country.In any case, all affected voters who could have complained were not disenfranchised as they were able to exercise their democratic right to vote manually."

83. In view of the Supreme Court finding and the testimony by the 1st and 2nd respondent, I do not have any basis upon which to order another scrutiny. For those reasons, that prayer is disallowed."

60. The applicant submitted that out of the 41 polling stations identified for scrutiny in the affidavit of Celestine Anyango who participated in the supreme court scrutiny, none was from Makueni County. Further, that the court is not bound by the Supreme Court decision. That the evidence produced was factual hence on the Supreme Court decision was a misconstruction of the relevant paragraphs of the Supreme Court decision without the benefit of the knowledge of material facts behind the said decision.

61. It is incumbent upon the applicant to prove that there was discovery of new evidence or matter or existence of mistake or error apparent on the face of the record. The Court of Appeal in the case of National Bank of Kenya Ltd v Njau (1995-98) 2 EA 249 held thus:

> "A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters on controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it."

62. My understanding of the petitioner/applicant's case is that this court misconstrued the Supreme Court's decision in Raila 2022 on scrutiny in respect to Makueni County elections. Consequently, it's my view that the petitioner's application can only be construed to mean that the court improperly applied and misinterpreted the supreme court's decision hence aground of appeal and not review. There is no doubt from the averments made by the applicant and submissions by his counsel that they want the court to reconsider its reasoning and set aside the same in the applicant's favour. In any event, I did not misquote nor misconstrue nor misinterpret the supreme court's finding on manual voting in Makueni County and that form 32A was filled and nobody was disenfranchised by voting manually. Unfortunately, this court cannot sit on an appellate capacity over its own decision.

63. It is trite that an appeal cannot be substituted with a review application. See Pancras T.Swai vs kenya Breweries limited (2014) e KLR and Joseph Kamenju Mwaura v Sammy Ngure Muthinji(2019) e KLR where both courts held that a review is not a substitute for an appeal. For those reasons, I do not find anything new that will persuade this court to reconsider its decision. Equally, I do not see any mistake nor error apparent on the face of the record.

64. Regarding the question that prayer No.3 of the application amounts to introducing a new prayer, I concur with the respondents on the ground that it was not pleaded in the application for scrutiny dated 8th September, 2022.The same cannot be dealt with in an application for review. To do so will amount to reopening the case a fresh yet pleadings and hearing have since closed.

65. The upshot of the above is that, the petitioner /applicant's application herein lacks merit and it's hereby dismissed. Costs in the cause.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 3RD DAY OF FEBRUARY, 2023

J.N. ONYIEGO

JUDGE