Kibor v IEBC & 2 others (Election Petition Appeal 1 of 2018)
[2023] KEHC 27309 (KLR) (1 August 2023) (Ruling)

Neutral citation: [2023] KEHC 27309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

ELECTION PETITION APPEAL 1 OF 2018

SN MUTUKU, J

AUGUST 1, 2023

BETWEEN

ELIZABETH JEBET KIBOR ..... APPELLANT

AND

ORANGE DEMOCRATIC MOVEMENT ..... 1ST RESPONDENT

IEBC ..... 2ND RESPONDENT

SANDRA MARIO ..... 3RD RESPONDENT

RULING

1. The IEBC, the Applicant, has brought this application through a Notice of Motion dated 14th June, 2021 anchored on sections 1A & B, 3A, 63(e), and 80 of the *Civil procedure Act* and Order 45 of the *Civil Procedure Rules* seeking orders that:

    i. That the application be certified as urgent and heard exparte in the first instance.

    ii. Pending the inter partes hearing of this application, this Honourable court be pleased to stay the Taxation of the Appellant's Bill of Costs dated 19th August, 2019 scheduled for 21st June, 2021.

    iii. This Honourable Court be pleased to review that part of its judgement on costs dated and delivered in this appeal on 28th June, 2018 by the Hon. Justice R. Nyakundi.

    iv. Further to prayer No.3 above, this Honourable court be pleased to find and hold that the costs of the Appeal ought to be borne by each party as read out in open court on 28th June, 2018.

    v. Costs of this Application be provided for.

2. The application was supported by an affidavit sworn by Dennis C. Mungai on 14th June, 2021 in which he has deposed that the matter is scheduled for taxation of the Appellant's Bill of Costs at Kshs.

4,199,590/; that the judgement was delivered in open court on 28th June, 2018, where it was stated that costs were to be borne by each party; that what was reflected in the typed copy of the judgement was different as it condemned the 1st and 2nd Respondents to bear the cost of the appeal and that a review is necessary as this was a clear case of mistake or error apparent on the face of the record.

3. They averred that as a result of this there is need to stay the Appellant's Bill of Costs pending hearing and determination of the application. They argued that they shall suffer substantial loss as the costs claimed in the Bill of Costs are significant should the application not be granted.

4. This application was opposed through a Replying Affidavit sworn by Emily Osiemo on 2nd July, 2021. She averred that though she was not in court on 28th June, 2018 when judgement was delivered but that her colleagues Mr.Ayieko and Mr. Lumumba attended; that she requested for certified copies of the judgement, decree and certificate of the court pursuant to section 86(1) of the *Election Act*; that the said documents clearly indicated that the 1st Respondent and the 2nd Respondent were condemned to pay the costs. It is her case that the application lacks merit and that it should be dismissed with costs.

Submissions

5. The matter was canvassed by way of written submissions. The Applicant filed its submissions on 27th July, 2022. It is the submissions of the Applicant that there is a mistake or an error apparent on the face of the record; that when the judgement was read in open court in the presence of the Applicant's advocates, Mr. Lumumba and Mr. Ayieko, there was no award as to cost; that when the copy of judgement was furnished to them it was realized that the 1st and 2nd Respondent had been condemned to pay the costs of the Appeal. The Applicant argued that they filed this application without undue delay after they were served with the Notice of Taxation by the Appellants, a year after the delivery of judgement.

6. The Applicant relied on *Republic v Cabinet Secretary for Interior and Co-ordination of National government ex-parte Abulahi Said Salad* [2019] eKLR, where the court held that:

> "It has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.
>
> In *Attorney General & O'rs v Boniface Byanyima*, the court citing Levi *Outa v Uganda Transport Company*, held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

7. The Appellant/Respondent filed their submissions dated 7th April, 2023 in which it is submitted that the Applicant has not met the threshold for granting of review under Order 45 Rule 1; that the allegation that there was a mistake or an error apparent on the face of the record was not demonstrated and that the error is neither self-evident and that no evidence has been furnished to prove this.

8. The Respondent/Appellant relied on the Court of Appeal case of *National Bank of Kenya Ltdv Ndungu Njau* [1997] eKLR, where it was held that:

> "A review may be granted whenever 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 law. Misconstruing a statute or other provision of law cannot be a ground for review."

9. They argued that the Applicant's application ignores the inherent powers of the court under section 99 of the *Civil Procedure Act* which gives the court powers to suo moto amend its judgement on limited grounds to correct a defect to reflect the intention of the court, as addressed by the Court of Appeal in *Republic v Attorney General & 15 others, Ex parte Kenya Seed Company Limited & 5 others* [2010] eKLR. They argued that the slip rule allows the court to amend the judgement after reading it in open court to give intention of the court. That therefore there was no mistake in awarding cost to the 1st and 2nd Respondent.

Analysis and Determination

10. The applicable law on review is provided for under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* as follows:

Section 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order 45 Rule 1(1) of the *Civil Procedure Rules* states as follows:

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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

12. The Applicants have brought this application on the ground that there was a mistake or an error apparent on the face of the record. It was their case that when judgement was read in open court costs each party was ordered to bear own costs but when they received a copy of the judgement they found that the court condemned the 1st and 2nd Respondent pay costs.

13. The Supreme Court of Uganda in *Edison Kanyabwera versus Pastori Tumwebaze* (2005) UGSC 1, pronounced itself on what constitutes an error apparent on the face of the record in the following manner:

"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."

14. Similarly, in *Nyamogo & Nyamogo v Kogo* {2001} E.A , it was held that:

> " The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/ tribunal on a point of fact or law. In any case, while exercising the power of review, the court/ tribunal concerned cannot sit in appeal over its judgment/decision."

15. I have read the judgement of the court dated 28th June 2018. It is clear to me that the 1st Respondent, now the Applicant, and the 2nd Respondent, were condemned to pay costs of the Appeal. This judgment is signed. That is the record this court must go by in determining this matter. From the provisions of the law and the authorities cited above, it is clear that for review to be granted, the threshold for granting of the review must be met. The error needs to be self-evident.

16. It is trite that he who alleges must prove. Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya) is clear on that point. It provides:

> " 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

17. For review to issue, the Applicant must satisfy the following criteria:

    i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made, or

    ii. On account of some mistake or error apparent on the face of the record, or

    iii. Any other sufficient reason, and

    iv. The application for review of judgement to the court which passed the decree or the order was brought without unreasonable delay.

18. After careful analysis of this matter, it is my finding, and I so hold, that the Applicant has not satisfied the criteria for granting of the orders it is seeking. For this reason, this application must fail. It is hereby dismissed with costs to the Appellant/Respondent.

19. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF AUGUST 2023.

S. N. MUTUKU

JUDGE