



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION APPEAL NO.3 OF 2018

ROSE MOTURI MWENE.....APPELLANT

=VERSUS=

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE JUBILEE PARTY.....2ND RESPONDENT

HARRIET KERUBO ONGERA.....3RD RESPONDENT

KISII COUNTY ASSEMBLY.....4TH RESPONDENT

RULING

1. Rose Moturi Mwene hereinafter referred to as the Applicant has filed a Notice of Motion dated the 25th of June 2018. It is brought under Rule 34 of the Election Petition Rules, 2017, Section 85A of the Elections Act, Article 1 and 3 of the Constitution, Article 23 and 27 of the seeking the following for orders:-

- i. Spent.
- ii. The Honorable court be pleased to issue a stay of execution of the judgment of the Deputy Registrar issued on 12th February, 2018, that is the subject of the appeal herein, pending the hearing determination of the application herein.
- iii. The Honorable court be pleased to review its decision and ruling delivered on 22nd June, 2018 by setting it aside and allowing the applicant's application dated 15th February, 2018.
- iv. The Honorable court to order that Section 85A[2] of the elections act does apply to appeals to the High Court from petitions challenging members of the County Assembly in the interest of article 3 and 27 of constitution.

The application is based on the following grounds:

1. That there is an error apparent on the record
2. That the decision of the court presents constitutional challenges bordering on the interpretation of Section 85A [2] of the Elections Act as read specifically alongside article 27 of the constitution.
3. The decision of the court renders the appeal herein a pure academic discourse.
4. That it will serve the interests of justice that the orders sought herein be granted

2. The application is supported by the affidavit of the applicant. She deposes as follows that the Court delivered a ruling on 22nd June, 2018 finding no merit in my application dated 15th February, 2018. That the ground that the court relied on to impeach her application was that she did not demonstrate that she would suffer substantial loss. That there is a serious error apparent on the court's ruling and record because under Article 27 of the Constitution, her rights to equal to protection and equal benefit and treatment before the law are guaranteed. That she was nominated as a member of the County Assembly of Kisii in the general election last year, 2017. That she has been advised by her advocates that parliament enacted section 85(9) of the Elections Act, that presents that an appeal to the court of appeal from the decision of

the High Court on petitions challenging the MPs, Senators acts as an automatic stay of the decision of the trial court. That parliament did not address the issue of appeals to the High Court from decisions of deputy registrars of court from petitions against members of the county assembly. That she is advised by her advocates on record, that an interpretation of the Act alongside the Constitution presents the spirit of Parliament and the Constitution that the section also applies mutatis mutandis [in like manner] to petitions and positions of members of the County Assembly. That indeed, if that interpretation does not obtain above, then her rights to equal protection before the law and to protection against discrimination are threatened and there lies the substantial loss that she stand to suffer as a member of County Assembly. That the failure by the court to interpret the law purposefully presents a serious error apparent on the face of the record. That she knows of her own knowledge that the decision on of the court renders the appeal herein a pure academic discourse. That it will serve the interests of justice that the orders of review that she is seeking herein be granted.

3. The Respondents were dully served. The 3rd Respondent is the only Respondent who responded to the applicant's application. The 3rd Respondent filed grounds of opposition as follows;

- a. The Instant Notice of Motion Application, is, pre-mature, misconceived, Incompetent and otherwise legally untenable.
- ii. The Honorable Court having addressed and thereby rendered itself on the issue of Stay of Execution vide Ruling rendered on the 22nd day of June 2018, the Honorable Court is therefore *Functus officio*.
- iii. The Honorable Court is devoid of jurisdiction to entertain and/or adjudicate upon the subject Application either as presented at all. Consequently, the Application is bad in law.
- iv. The Appellant/Applicant herein has not laid out and/or mistake apparent on the face of record to warrant Review of the Ruling and/or Order of this Honorable Court. If anything, any error and/ or mistake exists in the fertile imagination of the Appellant.
- v. On the other hand, the issue of Section 85(2) of the Election Act, 2011, having not been canvassed before the Honorable Court, same therefore does not lie to anchor and/or warrant a Review.
- vi. In any event, the Instant Application is tantamount to inviting the Honorable court to handle an Appeal against own Decision and thereby arrive at a contradictory position. Consequently, the instant Application amounts to an Absurdity.
- vii. Notwithstanding the foregoing, the provisions of Section 85A (2) of the Election Act, 2011, do not relate and/or suffice to the subject matter.
- viii. On the other hand, the Notice of Motion Application, filled and/or mounted by the Appellant/Applicant, does not disclose and/or capture any reasonable cause of action.
- ix. Nevertheless, the Instant Application constitutes and/or amounts to an abuse of the Due process of Court and same is calculated to defile the cause of justice.
- x. In the premises, the Notice of Motion Application dated 25th June 2018 herein is Devoid of merits, whatsoever and/or howsoever.

4. The motion was canvassed by way of oral submission in court. I have carefully considered the said submissions, the law and the orders sought. The applicant seeks a review of my orders under Order 45 of the Civil Procedure Rules. The said Order provides as follows that;

Application for review of decree or order.

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.

(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.

[Order 45, rule 2.] To whom applications for review may be made.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the

decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

[Order 45, rule 3.] When court may grant or reject application.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

5. The applicant contends that there was an error in my ruling dated the 22nd of June 2018. It was submitted that the error was that the court disallowed the applicant's request for a stay for reasons that she had failed to demonstrate the substantial loss she would suffer and that the court further stated that she could be compensated. That this is where the error apparent on the face of the record. It was argued that what the court was saying was that the loss to be demonstrated was one of irreparable loss. The latter in my view is counsel's interpretation of this court's ruling. The court clearly stated that the applicant had failed to demonstrate the substantial loss she would suffer. The applicant is relying on the limb of Order 45 which states that a court can review its order if the applicant can show that there was an error on the face of the record. In Civil Appeal No. 211 of 1996 (unreported) the Court of Appeal 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 (emphasis mine..... More 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 ground for review."***

The applicant's reason for review does not show that there was no error apparent on the face of the record. She is dissatisfied with the reasons given by the court in declining to grant a stay order. I canvassed the matter in the said application and gave a ruling based on the law. I cannot sit on appeal on my own decision. The applicant has a right to appeal if she feels that this court reached a wrong decision. I find that she has failed to demonstrate the error apparent on the face of the record. I further find that the ruling does not present any constitutional challenges bordering on the presentation of Section 85A [2] of the Elections Act. The Applicant failed to demonstrate how the decision of the court will render the appeal as a pure academic discourse.

6. Section 85A (2) of the Election Act provides for appeals to the Court of Appeal. Section 85 (1) provides that an appeal from the High Court in an Election Petition concerning the Membership of the National Assembly, Senate or office of the county governor shall lie to the Court of Appeal only on matters of law. Section 85A (2) provides that an appeal under sub-section 1 shall act as a stay of the certificate of the election court until the appeal is heard and determined. The applicant was not seeking to be a member of the National Assembly nor Senate nor Office of the County Governor. the applicant's appeal falls within the Section 75 (4) of Elections Act. The two sections are very distinct and this court cannot import the provisions of Sections 85A into Section 75. Parliament thought through the appeal processes and clearly provided for the modes of appeal as stated in the said sections.

7. On the various constitution issues raised I agree with the submission of Mr. Oguttu that the Applicant should file a constitution reference for determination if her right have been infringed. I therefore find no merit in the application dated 25th June 2018. It is dismissed with costs to the 3rd Respondent. It is so ordered.

Dated signed and delivered this 6th day of July 2018.

R.E. OUGO

JUDGE

In the presence of:

Miss Gogi holding brief Mr. Momanyi For the APPELLANT

Absent For the 1ST RESPONDENT

Absent For the 2ND RESPONDENT

Mr. Oguttu For the 3RD RESPONDENT

Absent For the 4TH RESPONDENT