



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION APPEAL NO. 14 OF 2018

BISHOP JOHN NDUATI.....APPELLANT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....RESPONDENT

MARGARET WANJIRU MBOTE.....1ST INTERESTED PARTY

ELIZABETH NYAMBURA KURIA.....2ND INTERESTED PARTY

JOYCE MUTHONI KAMAU.....3RD INTERESTED PARTY

KARIUKI WANJIRU.....4TH INTERESTED PARTY

(An Appeal from the Ruling and Order of the Magistrates Court at Nairobi Delivered on 28th June 2018 by Hon. G. A. Mmasi (Mrs) SPM in an application for correction of the Judgement of the Court and Certificate Pursuant to Section 86 (1) of the Election Act, dated 20th February 2018 and filed before the Magistrates Court at Nairobi on 21st February 2018 in Election Petition No. 16 of 2017)

JUDGEMENT

1. The Constitution of Kenya directed for the enactment of Legislation to establish mechanisms for timely settling of Electoral Disputes (Article 87 (1)). In deference, Parliament enacted Legislation that bound the hearing and determination of a dispute in respect to Parliamentary and County Elections to six months of the date of lodging of a Petition. The hearing and determination of the petition is therefore time restricted.
2. This Appeal raises an interesting debate. Bishop John Nduati (the Petitioner) filed a Petition on 8th September 2017 challenging the Nomination of four persons namely Margaret Wanjiru Mbote, Elizabeth Nyambura Kuria, Joyce Muthoni Kamau and Kariuki Wanjiru as Members of the Nairobi County Assembly. The Nominations were made pursuant to Article 177(1) (b) and (c) of the Constitution which requires Nomination of Members to a County Assembly to achieve the 1/3 Gender Rule and cater for marginalized groups (including persons with disability and the youth).
3. It is common ground that the Petition was filed within the time prescribed by law and determined within 6 months. Judgment having been delivered on 16th February 2018, then the time would lapse on 6th March 2018.
4. The Appellant thought some aspects of the decision to be problematic and obviously erroneous and so by a Notice of Motion dated 20th February 2018 and filed a day after on 21st February 2018, sought the following substantive order;
 - (i) That this Honourable Court be pleased to direct and correct an error on the face of the Judgment order and the Certificate issued on the 16th February 2018 to reflect the names of the Interested Parties in the body of the order and certificate.
5. But the path to the hearing of that Motion would be turbulent as the Respondent raised a Preliminary Objection putting forward the proposition that the Court had no jurisdiction to hear the Motion by dint of Section 75 (4) (a) (b) of the Election Act and Rule 34 (3) of the Election (Parliamentary and County Elections) Petition Rules 2017.
6. Ruling on that Objection, the Election Court held as follows:-

“The Petitioner in response to the objection states that he is just urging the Court to clarify and correct the Judgment. In my considered view, I find my hands tied because it will be as if I am sitting as an Appeal Judge on my own Judgment. Once I pronounced the Judgment, this Court became ex-officio – any appeal, correction or clarification sought should be before the High Court.

The upshot of the foregoing is that the objection by the Respondent’s Counsel is viable and has merit. This Court lacks the requisite jurisdiction to hear any application or make any subsequent orders post 8th March 2018 when the lifespan of the petition lapsed.”

7. That Decision is the reason for this Appeal which raises the following five grounds:-

i) The Learned Magistrate committed an error in law by refusing/ or declining to correct an error under the slip rule by declining to state the names of the candidates affected by her decision.

ii) The Learned Magistrate committed an error in law by refusing or declining to correct an error under the slip rule by declining to state the correct date of the gazette notice that nominated members of the Nairobi County Assembly as pleaded in the petition.

iii) The Learned Magistrate committed an error in law by refusing to direct/and or certify the names of nominees affected by her Judgment under Section 86 (1) of the Elections Act.

iv) The Learned Magistrate committed an error in law by issuing a certificate that is not enforceable in law.

v) The Learned Magistrate an erroring law by depriving the Appellant the fruits of his Judgement through a drafting error in terms of the Certificate issued under Section 86 (1) of the Elections Act.

8. At the hearing of the Appeal, Mr. Nyaberi for the Appellant argued that there was an error apparent on the face of the Judgment and the Election Court bore the responsibility of correcting it so that the outcome would be in tandem with the Prayers sought and the spirit of the Decision. In respect to the timelines, the Appellant took a position that the Election Court was still properly seized of the matter as the Application for Review was filed on 21st February 2018, a date before the deadline of 6th March 2018.

9. The Respondents were emphatic that the Petition had to be concluded within 6 months and at the end of that period, the Election Court would be *functus officio*. This Court was asked to give regard to the *sui generis* nature of an Election petition. The Election Court is Gazetted to hear the Petition within 6 months and the Court ceases to exist at the expiry of that period, it was submitted.

10. It was further argued that the Appellant would have achieved the same result by filing an Appeal instead of an Application for review.

11. The grounds of Appeal and arguments does invite this Court to determine two issues:-

(i) Whether the Election Court could review its Decision after the expiry of 6 months from the date of lodging of the Petition.

(ii) And if so, whether the Election Court ought to have allowed the Application for review.

12. As a general Rule, every Court (and an Election Court will not be excluded) has power to recall its Decision to correct an error or Slip so as to give effect to the manifested intention of its Decision. The Slip Rule was explained as follows by Sir Charles Newbold P.in Lakhamshi Brothers Limited –vs- R. Raja & Sons [1966]EA 313 at page 314:

“Indeed there has been a multitude of decisions by this Court on what is known generally as the slip rule, in which the inherent jurisdiction of the Court to recall a Judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the Court is asked in the application subsequent to Judgement to give effect to the intention of the Court when it gave its Judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted. I would here refer to the words of this Court given in the Raniga case (2) [1965] E.A at P. 703) as follows;

“a Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

These are the circumstances in which this Court will exercise its jurisdiction and recall its Judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter”.

The power to apply the Slip Rule inheres in every Court and to refuse to acknowledge it is to refuse to acknowledge that, just as other human beings, Judicial Officers will from time to time commit clerical or arithmetical mistakes, accidental slips or omissions.

13. However, what is of fundamental importance here is whether an Election Court can apply the Slip Rule or Review its Judgment after the expiry of the time line ordained by the law. The Election Court was entertaining a Petition that questions the validity of the election of a

Member of a County Assembly and the timeframe for hearing and determining that question is fixed by Section 75 (2) of the Elections Act in the following terms:-

“A question under subsection (1) shall be heard and determined within six months of the date of lodging the Petition”.

14. The unfortunate reality of the matter herein is that whilst the Appellant filed the Application for Review before the deadline of 6th March 2018, it was not until 11th May 2018 when the Application was heard. A date after the deadline.

15. The people of Kenya by dint of Article 87 (1) expressed a desire that Election Disputes be resolved in a timely fashion. This desire was informed by the sad legacy of Election Disputes which dragged on almost endlessly that it was not uncommon that some disputes were determined after the expiry of the term of office which was the subject of the Dispute. The prescription of a timeframe for the hearing and determination of Election Disputes was therefore deliberate.

16. An argument can be made, but which was not, that when a Court makes an Order under the Slip rule then it is not making a Determination. It can then be pressed that since what is time bound to six months is the Determination of the Petition, an Order pursuant to the Slip Rule made after this period does not infringe on the Rule. So what is a Determination in Law? The Black's Law Dictionary 10th Edition defines it (as is relevant) as follows:-

“The act of deciding something officially; esp, the final decision by a Court or administrative agency < the Court's determination of the issue”.

In so far as the objective of the Slip Rule is to merely give effect to the manifest intention of a Decision and does not change the substance of the Decision a Corrective Order made under the Slip Rule may not be a Determination.

17. So can the making of such Order be exempted from the timeline set out in Section 75(2)? Put differently, can such Order be made after time has expired? This Court has agonized over this question and makes this proposition. Whether or not such a Corrective Order can be made will depend on whether or not the Court seized of the matter is the Court of last instance in the Dispute. I shudder to think that the Supreme Court cannot correct an obvious Slip in its judgement (and which Slip does not affect the substance of its decision) just because the obvious error is discovered one day after the 14 day deadline set in Article 140(2) of The Constitution!

18. But things are obviously different here. The Election Court was sitting as the Court of first instance and its Decision is appealable as a matter of Right. It seems to this Court that for purposes of giving due regard to the wish of the people of Kenya that Election Disputes be determined expeditiously, and which wish has been unequivocally expressed in the Constitution and Statute, an Election Court sitting as a Court of first instance must down its tools and cannot make any Orders in respect to the Determination of the Dispute after the expiry of the 6 months period. If an Election Court has rendered its Determination, then any application in respect to the Court Decision that comes post the date of the Determination must be heard and determined prior to the expiry of the 6 months.

19. But as would sometime happen, the determination of an Election Dispute may come so close to the end of the timeline that it is not humanly possible to seek any meaningful intervention from the Election Court post the Determination. What is the recourse open to a Party who, like the Appellant, seeks to Review or correct an error in the Courts Judgment? I would think that such a person is not without remedy because an error in a decision be it a clerical or arithmetical error or accidental slip or omission, can be corrected through an Appeal. An Appeal from a Resident Magistrate sitting as an Election Court is to the High Court. The High Court in its Appellant Jurisdiction has power to correct an accidental slip or omission committed by the Election Court and if there is ever doubt about such power then Rule 34 (10) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides the following clarity;

“The High Court to which the Appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the Court from which the Appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the Court exercising original Jurisdiction.” (my emphasis)

20. The Appellant placed his bet on the wrong horse and it is regrettable that an Application that had been filed timeously on 21st February 2018 was not heard and determined prior to the end of the 6 months period. Given the uniqueness of an Election Dispute and the short period that remained after the Courts Judgment, the more prudent action for the Appellant would have been to prefer an Appeal in respect to the error that aggrieved him.

21. Unable to fault the decision of the Trial Court that it had no jurisdiction to make a further determination after the expiry of the 6 months period, I have no alternative but to dismiss this Appeal.

22. While costs ordinarily follow the event, the Appellant may not be wholly to blame for the difficulty that beset him because he filed the Application some 12 days before the lapse of time. An Order of costs that commends itself to me is that each Party should bear its own costs of the Appeal.

Dated, Signed and Delivered in Court at Nairobi this 3rd day of October, 2018.

F. TUIYOTT

JUDGE

IN THE PRESENCE OF:

Nyaberi for Appellant

Kinyanjui for 2nd to 5th Respondents

Anyoka for 1st Respondent

Nixon - Court Assistant