



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NUMBER 59 OF 2017

JOHN REX OMOLLEH.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

MAURICE GARE OTIENO.....2ND RESPONDENT

(An Appeal from the Decision of the Political Parties Dispute Tribunal in Case No. 179 of 2017 delivered on 12th May, 2017 by Kyalo Mbobu, James Atema and Hassan Abdi)

BETWEEN

REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTE TRIBUNAL

CASE NUMBER 179 OF 2017

MAURICE GARE OTIENO.....COMPLAINANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

JOHN REX OMOLLEH.....2ND RESPONDENT

RULING

The Orange Democratic Movement Party nomination exercise was carried out on 30th April, 017. Following the nomination exercise at Nairobi West Ward, Langata Constituency, a complaint was lodged at the Special County Appeals Tribunal in Nairobi County on 1st May, 2017 by the Applicant/Appellant herein and acknowledged and signed with approval by all the candidates that participated in the impugned process, apart from the 2nd Respondent. A decision inter alia allowing the appeal and ordering that the Interim Nomination Certificate be awarded to the appellant herein was rendered on 6th May, 2017. The 2nd Respondent then appealed before the Political Parties Dispute Tribunal through a Memorandum of Claim dated 8th May, 2017. The tribunal made its determination on 12th May, 2017 effectively ordering, inter alia, that the 1st Respondent issue the 2nd Respondent with a nomination certificate for member of Country Assembly, Nairobi West Ward, Nairobi County within 12 hours of that judgment. An

appeal was filed against the judgment of the tribunal by the Applicant herein, to this Honourable Court. The court delivered a judgment on 24th May, 2017 and is the subject of this application.

The application seeks for orders that: -

1. That the Honourable court do review and/or set aside and/or discharge its judgment delivered on 24th May, 2017 in its entirety.

It's based on the grounds that: -

a) That there is an error apparent on the face of the judgment as it as it enforced an illegality by enforcing the 2nd Respondent's win which relied solely on the provisional certificate issued to the 2nd Respondent by one Titus Tongei who purported to be the Returning Officer of Lang'ata Constituency yet he was a stranger to the nomination process.

b) That the Returning Officer for Langata Constituency for the Nomination process was one Jeremiah Ochiel Ogada and therefore the nomination certificate produced by the 2nd Respondent was a mere forgery which succeeded in misleading this Honourable Court.

c) That, however, from the reading of the judgment, it was apparent that the judgment therein was made on the sole basis of the alleged provisional nomination certificate that was issued by one Titus Tonkei.

d) That the said Provisional Nomination Certificate was a forgery as the same Titus Tonkei was never appointed by the 1st Respondent to be its Returning Officer for Langata constituency.

e) That it is therefore trite that the Honourable court review its judgment its judgment delivered in open court on the 24th day of May 2017 in order to protect its integrity and more importantly to award the Applicant what is rightfully his and to respect the will of the people.

Mr. Arewa, counsel for the Appellants submits that this court has powers to review its orders under order 45 of the Civil Procedure rules provides that a court has power to review its own orders. The Section provides: -

“(45) (1) any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

By a decree or order from which no appeal is hereby allowed, and who form 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 judgment to the court which passed the decree of made the order without unreasonable delay.”

This legal position flows from Section 80 of the Civil Procedure Act which gives a court power to review its own order where an appeal has not been preferred against its order for sufficient cause.

He submitted that the in this application the issue that is in contention is; who was the duly appointed Returning Officer of Langata Constituency for purposes of the nomination processes for the 1st Respondent. If the court finds that whoever supposedly declared the impugned results was not the duly appointed Returning Officer, the declaration was a nullity. He submitted that there are decisions to the effect that an election court has power in exercising its inherent power to review to orders. He referred to the case of **Mohamed Ali Mursal Vs Saadia Mohamed & 2 Others (2013) eKLR**, where S N Mutuku J. held 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.

Mr. Osiemo for the 2nd Respondent filed written submission in which he submits that the Appellant Mr. John Alex Omolleh has filed this review application under Order 45 Rules 1(1) and 3(2) of the Civil Procedure Rules, 201. He alleges that there is an error apparent on the face of the judgment as it enforced an illegality. The illegality in question is that Titus Tonkei, who had declared the 2nd Respondent as the winner of the nomination and issued him with a provisional nomination certificate was not the duly appointed Returning Officer for Langata Constituency.

He submits that the first issue is whether Titus Tonkei erred in issuing the provisional nomination certificate to the 2nd Respondent, he submits that he did not. They attached an affidavit sworn by the Returning Officer explaining the circumstances that led to Mr. Tonkei issuing the certificate to the 2nd Respondent. He submits that when Mr. Ochiel later issued the 2nd Respondent with the nomination certificate, it cured the defects, it at all, the first nomination certificate had.

He further submits that that the general principle in the electoral laws is that non-conformity of the law does not render an election result null and void. This is referred to the principle of materiality which is espoused in the celebrated case of **Morgan & Others Vs Simpson & Another [1974] ALL ER 722** where the court stated that the principle upon which an election could be nullified is as follows: -

“An election court was required to declare an election invalid if irregularities in the conduct of elections had been such that it could not be said the election had been conducted as to be substantially in accordance with the law as to elections or if the irregularities had affected the results.”

In his submission, the issuance of nomination certificate by the Deputy Returning Officer did not affect the outcome of the nomination exercise so as to render a nullification of the results as sought by the Applicant.

On the second limb the 2nd Respondent submits that the Applicant is and was not a Member of the 1st Respondent before, during and after the nomination exercise conducted on the 30th April, 2017. A Simple search at IEBC Website <https://www.iebc.or.ke/resources/?list> of candidates for 2017 General Election confirms that the Applicant is a member and is vying for Nairobi West Ward as a member of County Assembly and has chosen Federal Party of Kenya as its party of choice. He further submits that as far as the Applicant is a Member of a different political party, he cannot accrue benefits that members of the 1st Respondent can obtain.

The grounds upon which a court can review its judgment or orders are stated in Order 45 Rule 1. The Applicant must show

- 1. Discovery of new and important matter or evidence of what would not be produced by him at time of decree.***
- 2. Existence of mistake or error apparent on the face of the record.***
- 3. Any sufficient reason***

The order for review Under Order 45 is a discretionary one. In *National Bank of Kenya Vs Ndungu Njau*, Civil Appeal No. 211/1996, Kwach Akiwumi and Pall JJA held: -

“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.”

The Applicants submission is that both this court and the tribunal relied in arriving at its decision, on the tallying of votes by Mr. Tonkei who was not a Returning Officer. This cannot be correct. The issue as to who tallied the votes and issued the nomination certificate was never canvassed at both the Political Parties Dispute Tribunal and in this court. In fact, this was never an issue at all. The only issues which were up for determination was whether the nominations were conducted in a free and fair manner. This was premised on the complaints made to the Orange Democratic Movement Party by the Appellant and others. These allegations of malpractice were considered and some found to be not supported by evidence. The court stated ***“In the absence of such evidence, it appears to me that the appellant did not discharge his burden of proof to the required standard. These to me seem to be generalized allegations yet for the court to act on them there must be credible and cogent evidence to support them.”***

The Applicant has submitted and tendered evidence to show that Tonkei was not the appointed Returning Officer and that the validly appointed Returning Officer was Jeremiah Ochiel. Counsel submits that the tallying of votes and issuance of Provisional Certificate by Mr. Tonkei was a nullity as he had no powers to do what he purported to do.

Mr. Osiemo conceded that Mr. Tonkei was not the Constituency Returning Officer and that Jeremiah Ochiel was. He submits that due to pressure of work Jeremiah had delegated the same to Tonkei and he later confirmed the issuance of the provisional normality by issuing another one under his hand and, therefore, any defect was cured. He urged the court to invoke the materiality principle to find that if Tonkei’s action did not materially affect the outcome of the nomination exercise. The Affidavit by Mr. Jeremiah Ochiel explains the sequence of events and confirms that he later issued the Respondent with the nomination certificate. Any defect was, therefore, cured.

The Application for review and prayers sought are missed on the submissions that the nomination process was not free and fair. This court in its judgment stated: -

“In the absence of such evidence, it appears to me that the appellant did not discharge his burden of proof to the required standard. These to me seem to be generalized allegations yet for the court to act on them there must be credible and cogent evidence to support them.”

This court made a finding on this issue and nothing new has been shown for this court to review the finding and decision.

The other issue raised by the 2nd Respondent is that the Appellant is no longer a member of the Orange Democratic Movement Party. Counsel for the 2nd Respondent annexed to the Replying affidavit a print out from Independent Electoral and Boundaries Commission Website showing that the Appellant has been nominated for Member of Country Assembly by Federal Party of Kenya. He submits that his name having been published by Independent Electoral and Boundaries Commission that he has been so nominated by the Federal party, the Appellant has no locus to prosecute this application and obtain the orders sought as he is not a member of the party. Counsel for the appellant denies that Appellant has moved to another party and claims that the extract from Independent Electoral and Boundaries Commission is a fraud and not true. I find the evidence adduced cannot conclusively be relied by this court to find that Appellant is a member of another party.

I have considered this application, the submission by both counsels. I am satisfied that there is no basis, upon which this court can review the judgment delivered on 24th May, 2017. This application is hereby dismissed with costs to the Respondent.

Dated, signed and delivered in Nairobi this 2nd day of June, 2017

.....

S N RIECHI

JUDGE