



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 47 OF 2017

OSMAN KHALIF ABDI.....APPELLANT/RESPONDENT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

KIPTANUI VINTON SIMANTOI.....2ND RESPONDENT

JUDY PARENO (NEB CHAIR).....3RD RESPONDENT

MOHAMMED MAHAMUD ABDI.....4TH RESPONDENT

SAMWEL OMONDI ONYANGO.....5TH RESPONDENT

TABITHA WOTHAYA NGIGIRIGI.....6TH RESPONDENT

ELAM MIMO BANDI.....7TH RESPONDENT

ROBBERT MATANO.....8TH RESPONDENT

AHMED JAMA MOHAMMED.....9TH RESPONDENT

WINIFRED AWOUR MALOMBO.....10TH RESPONDENT

MATHEW OCHIENG ONDORO.....11TH RESPONDENT

JOHN OKOTH OPIYO.....12TH RESPONDENT

ABDIRAHMAN ABDI RASHID.....13TH RESPONDENT

JIMAL IBRAHIM HASSAN.....14TH RESPONDENT

JOHN OCHIENG OCHOLLA.....15TH RESPONDENT

DISHON PETER MULINGE.....16TH RESPONDENT

VITALIS ODUOR OKWARO.....17TH RESPONDENT
MUSIARA CYRUS NYAKUNDI.....18TH RESPONDENT
KASSIM OKOME NAMBANDE.....19TH RESPONDENT
WALTER MAGOMBA OTIENO.....20TH RESPONDENT
AKETCH CLEMENT OTIENO.....21ST RESPONDENT
THE INDEPENDENT BOUNDARIES COMMISSION...22ND RESPONDENT

(being an application for stay of execution of the judgment and

order of the Political Parties Dispute Tribunal of Kenya

at Nairobi delivered on 17th May 2017 by Hon. Kyalo

Mbobu, Hon James Atema and Hon. Hassan Abdi

in complaint No 225 of 2017)

BETWEEN

OSMAN KHALIF ABDI.....COMPLAINANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT APTY.....1ST RESPONDENT

KIPTANUI VINTON SIMANTOI.....2ND RESPONDENT

JUDY PARENO (NEB CHAIR).....3RD RESPONDENT

AND

MOHAMMED MAHAMUD ABDI.....1ST INTERESTED PARTY

SAMWEL OMONDI ONYANGO.....2ND INTERESTED PARTY

TABITHA WOTHAYA NGIGIRIGI.....3RD INTERESTED PARTY

ELAM MIMO BANDI.....4TH INTERESTED PARTY

ROBBERT MATANO.....5TH INTERESTED PARTY

AHMED JAMA MOHAMMED.....6TH INTERESTED PARTY

WINIFRED AWOUR MALOMBO.....7TH INTERESTED PARTY

MATHEW OCHIENG ONDORO.....8TH INTERESTED PARTY

JOHN OKOTH OPIYO.....9TH INTERESTED PARTY

ABDIRAHMAN ABDI RASHID.....	10TH INTERESTED PARTY
JIMAL IBRAHIM HASSAN.....	11TH INTERESTED PARTY
JOHN OCHIENG OCHOLLA.....	12TH INTERESTED PARTY
DISHON PETER MULINGE.....	13TH INTERESTED PARTY
VITALIS ODUOR OKWARO.....	14TH INTERESTED PARTY
MUSIARA CYRUS NYAKUNDI.....	15TH INTERESTED PARTY
KASSIM OKOME NAMBANDE.....	16TH INTERESTED PARTY
WALTER MAGOMBA OTIENO.....	17TH INTERESTED PARTY
AKETCH CLEMENT OTIENO.....	18th INTERESTED PARTY

RULING

1. By Notice of Motion dated 31st May 2017 and filed in court on the same day, brought under Order 45 rule 1 of the Civil Procedure Rules, 2010, **Jimal Ibrahim Hassan** has applied for review of this court's Judgment and decree given on 22nd may 2017. In that Judgment, the court allowed the appeal and declared the respondent herein **Osman Khalif Abdi** to have won **ODM** Nomination for **South C Ward, in Lang'ata, Constituency, Nairobi County.**

2. The application is supported by an affidavit sworn on the same day and is based on grounds that the applicant has discovered new evidence that was not in his possession at the time the appeal was heard and on the basis of that evidence, he wants the court to review that judgment and decree. The nature of the information and evidence relied on is that the appellant/respondent had resigned from **ODM** Party at the time the judgment was given and had submitted his documents to **IEBC** as an Independent Candidate. To support this contention, the applicant attached a copy of letter dated **22nd May 2017** from the **Registrar of Political Parties** to show that the appellant was not a member of a political party. He also attached a Special issue of **Kenya Gazette for 19th May 2017** which contained the applicant's same as a duly cleared independent candidate for the same **South C Ward, Langata Constituency.**

3. The appellant/respondent has opposed the application through a replying affidavit sworn on 2nd June 2017 and filed on the same day. The respondent denies having resigned from the party or presented his documents as an independent, that he reported the fact that his name had been gazette as an independent to police and attached a letter from the registrar of Political parties dated 31ST May, 2017 to confirm his status as a member of **ODM** The respondent averred that the Registrar of Political Parties confirmed that he was a member of **ODM**, and contended that his name was included in the Kenya gazette as an independent without his knowledge and maintained that he did not resign from the party.

4. At the hearing of the application **Mr Osiemo**, Learned Counsel for the applicant, urged the court to grant the orders submitting that it was clear from the documents annexed to the applicant's affidavit that the respondent had resigned from the **ODM** and presented his documents to **IEBC** as an Independent Candidate. Counsel further pointed out at the anomaly in the spelling of the respondent's name **Osman** which was spelt as **Osmar** in the letter dated **31st May 2017** as well the ID Number which was indicated as **26499257**. **Mr Osiemo** urged the court to find that the respondent had indeed resigned as a member of **ODM** and could not therefore be nominated to stand on the party's ticket.

5. **Professor Ojienda**, learned counsel for the respondent, submitted that the application was not

meritorious because the respondent was a member of the party; had not resigned and had not handed in his document as an Independent candidate. Learned Counsel reiterated the facts contained in the respondent's replying affidavit and the letter dated 31st May 2017 to show that the respondent had not resigned from the party to stand as an independent.

6. Learned Counsel contended that there was mischief in the attempt to make the respondent appear as though he was an independent candidate who had resigned from his party when this was not the case. Counsel pointed to the fact that the **Registrar** of Political Parties had confirmed that the respondent was a member of **ODM** and even attached a computer membership print out to her affidavit sworn 5th June, 2017 and prayed that the application be dismissed with costs.

7. I have considered the application, responses there to and submissions by counsel for the parties. The applicant has sought a review of the judgment and decree of this court on grounds that he has discovered new and important evidence to warrant a review. Order 45, Rule 1 provides;

“Any person who considers 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”

8. For a party to successfully seek review, he/must satisfy the court of existence of three conditions namely:- that there is new and important matter or evidence that he/she could not have produced in court at the time the decree or order was made despite exercise of due diligence; that there is an **error apparent on the face of the record**; or that there are sufficient reasons. There are enough decisions on when a court may allow an application for review on any of the grounds under Order 45 rule 1. In the case of **National Bank of Kenya Ltd V Ndungu Njau (Civil Appeal No 211 of 1996)**, the Court of Appeal stated as follows with regard to review on account of error on the face of the record;

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 must be self-evident and should not require elaborate arguments 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 position of the law and reached an incorrect conclusion”

9. The court was clear that the error must be clear and not one requiring a lot of arguments to demonstrate. The error must be obvious on the face of the record. Regarding review sought on account of any sufficient reason, the Court of Appeal addressed the applicability of this ground in the case of **Board of Trustees, National Social Security Fund v Michael Mwalo [2015]eKLR** thus:-

“It is now settled law that “any other reason” in Order 45 rule 1 of the Civil Procedure Rules need not be analogous with the other grounds in the Order because clearly Section 80 of the Civil Procedure Act confers an unfettered right for review and so the words “for any other sufficient reason” need not be analogous with the other grounds specified in the order”.

10. The applicant has not come to court for review based on the above grounds. His application is based on discovery of new and important evidence which is the factual basis of this application. In the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** the court of Appeal stated that;

“The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in Rule 1 of Order 44(now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in Rule 1 refers to discovery of facts...”

11. In the case of **Benjoh Amalgamated Limited v Kenya Commercial Bank Limited [2014] eKLR** the court of Appeal stated that the ***basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice.*** Review jurisdiction is therefore available to correct errors and meet the ends of justice.

12. The applicant has stated that he has come across new and important evidence which should enable the court to review its judgment of 22nd May 2017. The nature of the discovery is that the applicant has now found out that the appellant/respondent herein is not a member of the political party ODM, but is an independent candidate. This discovery is contained in a letter date **22nd May 2017** from the **Registrar** of Political Parties which shows that **Osman Khalif Abdi** is not a member of any political party. The letter is dated the same day the Judgment was delivered. The applicant had made inquiry on the status of the respondent by a letter said to have been dated **22nd May 2017 (a copy of which has not been produced)** and he received a response the same day. The applicant has also relied on the **Gazette Notice of 19th May 2017** showing that the respondent is an independent candidate.

13. First and foremost, in the words of **Order 45 1(i)**, it must be shown that the new and important matter or evidence could not have been obtained despite diligence, and it is the duty of the applicant to satisfy the court that he made effort and applied necessary diligence but could not get that evidence.

14. The information, said to be new evidence was available at the **Registrar** of Political Parties’ Office, which is a public office and that information is available and could be obtained at any time on request. Moreover, the **Gazette Notice** relied on is also a public document, it was published on 19th May 2017 before the hearing of the appeal and delivery of judgment. Parties were in court on 21th May 2017 and the issue was never raised despite the fact that the **Gazette Notice** was already out. The applicant has not said how and when he came across the **Gazette Notice**, and in my view, he has not demonstrated that he used all effort and diligence but could not get that information or evidence.

15. I say so because to **Black’s Law Dictionary 9th Edition** defines diligence to mean.

“A continual effort to accomplish something; care caution, the attention and care required from a person in a given situation.”

The same Dictionary defines the word “**due diligent**” to mean.

“The diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation..”

16. From the above definition, the applicant has not satisfied the court that he made effort to get the information but could not. The applicant did not take any steps to seek that information prior to the hearing of the appeal and for that reason it he did not act diligently.

17. This court has been asked to review its judgment and decree primarily because the respondent is said to have resigned from his party and was no longer a member of **ODM**. The respondent swore an affidavit stating that he did not resign from the party and that he did not submit his documents as an independent candidate as alleged by the applicant. In a bid to ascertain the truth, the court directed the **Registrar** of Political Parties to attend court and clarify the position of the respondent, either a member of a political party or independent; or if unable to attend court, file an affidavit to that effect. A similar order was directed at the Secretary General of **ODM**. This was informed by the fact that there were two letters from

the office of **Registrar** of Political Parties stating different positions regarding the respondent's political affiliation status.

18. **The Registrar of Political Parties obliged and** filed an affidavit sworn on 5th June, 2017t in which she stated that a resignation letter was received on 8th May 2017, and acted upon. Then on 22nd May 2017 the office issued the confirmation letter that the respondent was not a member of a political party. Shortly after, the office again received a complaint from the respondent dated 24th May 2017 refuting resignation from ODM and an affidavit on the same issue, following which the appellatant/respondent was reinstated as a member of ODM, and he remains a member of ODM to date.

19. The Secretary General of ODM Party neither sent a representative, nor filed an affidavit as directed by the court. It was not therefore possible for the court to ascertain the party's position regarding the respondent's membership. The issue whether or not the appellatant/respondent had resigned as a member of **ODM** to go as an independent candidate remains unclarified and therefore unresolved.

20. The applicant has maintained his position that the appellatant had decamped while the respondent contends that he has not, and each side has relied on documents from the **Registrar** of Political Parties to support their contention. The law relating to resignation from political parties is clear. **Section 14(1)** of the political parties Act, 2011 provides that:-

“A member of a Political Party who intends to resign from the political party shall give a written notice prior to his resignation to:-

a. The political party;

b. The clerk of the relevant house of parliament, if the member is a member of parliament, or

c. The clerk of a county assembly if the member is a member of a county assembly.

21. **Section 14(2)** requires that the party, clerk of the assembly, or member **should notify the registrar of such resignation**. This requirement is in mandatory terms. No evidence was tendered before this court that the respondent notified the political party and the court would be hesitant at this stage to decide on the issue whether or not the respondent had resigned from his party given the contradictory positions from the two parties which remain unclear. I hold the view, that the issue of whether or not the appellatant/respondent was or was not a member of ODM is a matter for the **PPDT** to decide. This will give the aggrieved party the right to pursue his appeal to this court rather than deny such a party the right to pursue an appeal to this court if not satisfied to the Court of Appeal. I also note that a complaint was reported to the police who have a right to investigate and come up with a finding.

22. When called upon to exercise its review jurisdiction, the court is exercising a judicial discretion which should be exercised judiciously. I am not satisfied that I should exercise this discretion in favour of the applicant given the reasons above. Consequently, the application dated 31st May, 2017 is declined and dismissed. Each party will however bear their own costs.

Signed, Dated and Delivered at Nairobi this 8th day of June 2017

E C MWITA

JUDGE