REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

E. P. A NUMBER 28 OF 2017

SAMUEL MATHENGE NDIRITU……..APPLICANT

VERSUS

MARTHA WANGARE WANJIRA……..….1ST RESPONDENT

JUBILEE PARTY…….…….....…...2ND RESPONDENT

RULING

Background

Samuel Mathenge Ndiritu, hereinafter "the Applicant", filed the Appeal giving rise to this application on 13th May 2017. At the time of filing that Appeal he also filed a Notice of Motion seeking stay of the execution of the decision of the Political Parties Disputes Tribunal (the Tribunal) delivered on 12th May 2017. This court heard the parties to that Appeal and in the judgment delivered on 18th May 2017 dismissed the Appeal for the reason that it was incompetent. The Appeal was filed without attaching the proceedings from the Tribunal and this court felt that this omission went to the substance of the matter because this court, sitting on first appeal, lacked jurisdiction to entertain and determine the Appeal without a proper record of appeal. It is against that background that this application has been filed.

The Applicant has, through the firm of Prof. Tom Ojienda & Associates, brought this application by way of Notice of Motion under Articles 10, 48, 159 (2) (d) and 259 of the Constitution of Kenya 2010 and Section 3A of the Civil Procedure Act, 2010, Order 22 Rule (1) and (3), Order 45 of the Civil Procedure Rules 2010, and all other enabling Procedures of the Law. I was not able to understand the reason for citing Order 22 Rules 1 and 3 in this matter.

The Applicant is seeking the following orders:

> (i) That this matter be certified urgent and service be dispensed with at first instance and heard exparte.
>
> (ii) That this Honourable Court do review and set aside its judgment dated 18th May 2017.
>
> (iii) That the Honourable Court do reinstate this appeal.
>
> (iv) That the record of Appeal annexed and marked A herein be deemed to be properly filed.

The application is supported by grounds found on the face of it and on the supporting affidavit sworn by the Applicant on 23rd May 2017. The grounds in summary are that this court dismissed the Applicant's

Appeal on 18th May 2017 and this action grossly injured the Applicant given that the Appeal was not heard on merit and further that the political will of the people of Gilgil, who nominated the Applicant Member of National Assembly, has been jeopardized; that the judgment of this court violated the constitutional principle that justice shall be administered without undue regard to procedural technicalities; that the file in Complaint No. 180 of 2017 before the Political Parties Disputes Tribunal had gone missing during the filing of the Appeal but has since been found; that failure to have a proper record of Appeal filed was entirely the failure of the Applicant's Advocate and it is trite that mistakes of counsel should not be visited upon the client; that the Respondents will not suffer prejudice if this Appeal is reinstated.

The Applicant in his affidavit supporting the application repeats the grounds found on the face of the application and in addition deposes that he is the current sitting Member of the National Assembly for Gilgil Constituency, with ties to the community and a respected member of his constituency; that the Appeal was dismissed because he did not submit before this court the proceedings or handwritten notes from the Political Parties Disputes Tribunal and that this has caused him gross injury and jeopardized the political will of the people of Gilgil. The Appellant urges that this court in the interest of justice to review or set aside its judgment delivered on 18th May 2017, admit the Record of Appeal and determine the same on merit.

Submissions by the Applicant

Professor Ojienda argued the application by stating that the file before the Tribunal went missing and therefore proceedings could not be obtained. He submitted that there is sufficient reason to bring this application under the ambit of Order 45 Rule 1. The submissions were broken down into the following headings:

This court has jurisdiction of the court to review its judgment

Relying on Order 45 Rule 1, counsel submitted that this court has powers to review its judgment on account of sufficient reason being shown. He submitted that this court dismissed the Appeal solely for failure to have a proper record of appeal as required and that this court ought to have struck out the appeal as opposed to dismissing it because the appeal had not been heard on merit. It was submitted that this court has inherent jurisdiction to ensure that ends of justice are met. Counsel referred to, *inter alia*, **Republic v. Public Procurement Administrative Review Board Ex parte Syner-Chemie Limited in Judicial Review No. 371 of 2015 reported in [2016] eKLR** to put emphasis on the issue of the inherent jurisdiction of the court to ensure that justice is served.

Counsel further submitted that courts have inherent powers to set aside their orders dismissing a suit for whatever reason. He cited **John Nahashon Mwangi v. Kenya Finance Bank Limited (in Liquidation) Civil Case No. 212 of 2009 reported in [2015] eKLR** where the court expressed itself as follows:

> ***"There are two matters of preliminary importance which emerge herein. The first one is on the absence of the express provision under Order 17 on the setting aside or variation of an order dismissing a suit; I say that does not deny the court the power to set aside or vary such order as it deems fit. And, more so, given the draconian nature of dismissal of suit, the absence of express provision on the setting aside or varying of the dismissal order only makes this a perfect case for the court to invoke its inherent jurisdiction in order to do justice-this jurisdiction is always retained and is in the court as a court of justice once so established under the Constitution."***

Counsel submitted that this court has powers to invoke its inherent jurisdiction and review its orders dismissing the Appeal; that the Appeal was not heard on merit since it was dismissed and therefore what the Applicant is seeking is for this court hear and determine this matter because it is not *res judicata.*

This court ought to have struck out the appeal and not dismiss it

It was submitted that this court ought to have struck out the Appeal instead of dismissing it since failure

by the Applicant to file proper record of Appeal was a procedural issue. It was submitted that since the appeal was not heard on merit, this application ought to be allowed as prayed.

Violation of Constitution

It was submitted that the decision to dismiss the Appeal violated Article 159 of the Constitution which calls upon the courts not to pay undue regard to procedural technicalities but strive to ensure that substantive justice is administered. It was submitted that failure to file proceedings from the Political Parties Disputes Tribunal was a procedural aspect that could be cured by simply directing the Applicant to file the proper record of Appeal to enable the court determine the appeal on merit. Counsel cited **Richard Ncharpi Leiyagu v Independent Electoral & Boundaries Commission & 2 others Civil Appeal No. 18 of 2013** where the Court of Appeal stated that:

> ***"Whereas we underscore the importance of a party filing a complete Record of Appeal, we are of the view that the respondents too could have filed the documents that were left out; but more importantly the respondents could have applied to strike out the appeal. Raising the issue at the hearing cannot aid the respondents because nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities."***

Counsel further cited **Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others in Miscellaneous Application No. 699 of 2007 reported in [2013] eKLR** where the court in citing with approval the case of **Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22** stated that:

> ***"The administration of justice should normally require that the substance of all disputes should be investigated on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."***

Mistakes of an advocate should not be visited on a client

It was submitted that the Applicant ought not to be made to suffer as a result of the failure by his advocate to file a proper record of appeal. Counsel cited, *inter alia*, **Lucy Bosire case** (supra) where the court expressed itself thus:

> ***"……In this case the blame is placed at the doorsteps of the applicant's erstwhile advocates. It is true that where justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits…."***

Submissions by the 1st Respondent

The application is opposed. Mr. Kithi, counsel for the 1st Respondent, identified the following issues as arising from this matter:

> (i) Whether this Honourable Court has jurisdiction to entertain the instant application seeking to admit a record of appeal when it had earlier on declined to entertain the appeal for lack of a record of appeal.
>
> (ii) Whether the firm of Prof. Tom Ojienda is properly on record and whether it has audience before this court.

On the first issue, it was submitted that this court pronounced itself that it lacked jurisdiction to entertain

the appeal in the absence of the record of appeal; that failure to file the record of appeal raises serious jurisdictional issues which deny this Honourable Court another chance to re-hear an issue on the same matter. Counsel cited **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR** where the learned judges of the Supreme Court observed that:

> ***"Without a record of appeal a Court cannot determine the appeal before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by the law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court Case, Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 others, SC. 11/2012, Judge Bode Rhodes-Vivour JSC highlighted the pertinent issues of jurisdiction:***
>
> ***'A court is competent, that is to say, it has jurisdiction when –***
>
> > ***1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and***
> >
> > ***2. The subject matter of the case is within its jurisdiction, and no feature in the case ….. prevents the court from exercising its jurisdiction; and***
> >
> > ***3. The case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction'"***

It was submitted that this court lacks jurisdiction to entertain a matter that was null and void *ab initio* as a court of law cannot legitimately consider an issue in which it has already declared that it has no jurisdiction. Mr. Kithi also referred this court to the dictum of Nyarangi, JA, in the **Owners of Motor Vessel "Lillian S" v Calte Oil (Kenya) Ltd [1989] KLR 1** that jurisdiction is everything and where a court of law holds that it has no jurisdiction, it should down its tools.

It was further submitted that the consequences of orders sought is to vacate what this court decided and revert to the previous state; that there is nothing to revert to as there was no appeal in the first place; that it has been conceded that the review sought is not pegged on discovery of new matter or on account of some mistake or error apparent on the face of the record; that the application is pegged on other sufficient reason being that the case is peculiar; that there is nothing peculiar in this case and that once a party cites provisions of the law, that party is bound by that law. In respect to missing court file, it was submitted that there is no evidence that the file went missing and who caused it to go missing and that the reason given earlier for failure to bring proceedings from the Tribunal was that the proceedings were not available. It was submitted that there is no appeal to reinstate; that the order to deem the record of appeal as duly filed cannot issue because the record of appeal prepared by Prof. Ojienda is different from the previous record prepared by Mr. Omari and includes parties who were not in the impugned record of appeal. Allowing this record, it was argued, is to give the Applicant an advantage. Mr. Kithi also took issue with the affidavits in the intended record of appeal and urged the court not to admit them because admitting this record will amount to introduction of new evidence.

On the second issue it was submitted that the application before this court is incompetent because it has been filed by an Advocate who has taken over the matter after judgment had been delivered, but has not filed a Notice of Change of Advocates and has also failed to obtain leave of the Court as mandatorily required by Order 9 Rule 9 of the Civil Procedure Rules. This court was referred to **John Langat v Kipkemboi Terer & 2 others (2013) eKLR** and **Simon Baraza Obiero v Onyango Obiero (2016) eKLR.**

Mr. Kithi, after confirming that the firm of Prof. Ojienda & Associates had filed a Notice of Change of Advocates, submitted that the firm of Kogo & Munje Advocates appeared for the Applicant before the Tribunal while the firm of Musyoki Mogaka & Co. Advocates lodged the appeal before this court on

behalf of the Applicant, therefore the firm of Prof. Ojienda & Associates are not properly before this court and that the Notice of Change ought to have been served on all the parties as demanded by the law. On the issue that authority has been granted by the firm of Musyoki Mogaka & Co. Advocates, Mr. Kithi submitted that the pleadings bear the name of Prof. Ojienda & Associates and do not indicate that the pleadings were drawn together with Mr. Omari.

Mr. Ombasa holding brief for Mr. Omuganda for the 2nd Respondent associated himself with the submissions made by Mr. Kithi for the 1st Respondent and told the court that he had nothing useful to add.

In response to the issues raised by Mr. Kithi, Prof. Ojienda submitted that the firms of Musyoki Mogaka & Co. Advocates and Kogo & Munje Advocates were working together before the Tribunal. Counsel urged this court to read Order 9 Rule 9 into Article 159 (2) (d) of the Constitution and give effect to the representation of parties. On the issue of dismissal of the appeal *vis a vis* striking out, Counsel submitted that the Court of Appeal in **Richard Ncharpi case** (supra) held that an incomplete record of appeal can only lead to striking out of the same not dismissal. It was submitted that there is sufficient reason for this court to grants the prayers sought because the previous counsel for the Applicant filed incomplete record of appeal because he was not able to file the proceedings due to the missing file.

Determination

To my mind the main issue for determination in this application is whether this court has jurisdiction to grant the prayers sought. But first, there is the issue of representation of parties. The issue of representation, especially on the Applicant's side, has not been handled well. When the matter came before me on appeal, the firm of Musyoki Mogaka & Co. Advocates appeared for the Appellant who is the Applicant in this matter. Mr. Kithi raised the issue at that time that a Notice of Change of Advocates had not been filed in respect of Mr. Omari who was representing the Applicant. This court made a determination on the matter that failure to file Notice of Change of Advocates was not fatal to the Appellant for reasons that this court considered the Appeal to be a distinct pleading from the matter before the Tribunal. In the event that this court misapprehended the law in respect of this issue, the cure lies with taking the matter up the hierarchy of courts for resolution on appeal since the law does not allow this court to sit on its own appeal.

In the current application the firm of Prof. Tom Ojienda & Associates has filed a Notice of Change of Advocates but the change sought is not from the firm of Musyoki Mogaka & Co. Advocates but from the firm of Kogo & Munje Advocates. The latter firm of advocates appeared for the Applicant before the Tribunal. There is on record a consent filed by Musyoki Mogaka & Co. Advocates to work with the firm of Prof. Tom Ojienda of Prof. Tom Ojienda & Associates as the lead counsel. In my view there has been some compliance with Order 9 Rule 9 of the Civil Procedure Rules and I will let the matter rest.

I now wish to turn to the main issue for determination. I have painstakingly read the rival written submissions and the oral highlights made by counsels in court. Prayer (i) of this application has been overtaken by events. Prayer (ii) seeks review and setting aside of the judgment of this court dated 18th May 2017; prayer (iii) seeks reinstatement of the appeal and prayer (iv) seeks an order to deem the annexed record of Appeal and marked "A" to be properly filed. On prayer (ii) I have considered all the submissions before me. The provisions of the law under which this application is brought are from the Constitution and the Civil Procedure Act and Rules. Article 10 of the Constitution is about National Values and principles of governance that ought to bind all State Organs, State Officers, public officers and all persons whenever they are applying, and interpreting the Constitution; enacting, applying or interpreting any law or making or implementing public policy decisions. Article 38 is about political rights guaranteed to every citizen of this Republic; Article 159 (2) (d) requires courts to administer justice without undue regard to procedural technicalities and Article 259 guides in the manner the Constitution should be interpreted. This court, like any other organ is bound by these provisions.

Section 3A recognizes the inherent jurisdiction of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This court has been urged to invoke this

jurisdiction and grant certain orders for ends of justice to be met.

Review of the Court's orders is provided for under Order 45 of the Civil Procedure Rules. Rule 1(1) provides that:

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.***

Any party who comes to court seeking review, he/she must satisfy at least any one of the following:

> (i) There is 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
>
> (ii) On account of some mistake or error apparent on the face of the record; or
>
> (iii) For any other sufficient reason.

The application must be brought without unreasonable delay.

It has been conceded that the Applicant is not seeking review based on discovery of new and important matter or evidence or on account of some mistake or error apparent on the face of the record. Prof. Ojienda informed the court that he is relying on the last limb, "for any other sufficient reason". The sufficient reason(s) referred to, going by his submissions, are that the proceedings in the Tribunal could not be found because the file had gone missing; secondly, this is not an ordinary dispute and thirdly failure to prepare a proper record of appeal is a mistake of the counsel representing the Appellant at the time the appeal was dismissed and that this should not be visited on the Applicant. To my mind this is what I understood him to be saying.

Has the Applicant proved existence of sufficient reasons in terms of Order 45 to persuade this court to grant the prayers he is seeking? It has been submitted by counsel for the 1st Respondent, and I agree with him on this one because the record bears him right, the reason given to this court during the hearing of the appeal as to why the proceedings were not available was not that the file at the Tribunal was missing but that the proceedings were not available. This is the reason this court commented that there was no exhibition of the efforts made by counsel to get the proceedings or copies of handwritten notes from the Tribunal. It cannot be that the file had gone missing and again that the proceedings were not available. It is either the first or the second. In my view this court was not given good reason as to why the proceedings were not part of the record of appeal and I am concerned that perhaps this court may not have been told the truth on this issue.

It was submitted that this case is peculiar. In response to this it was submitted that this is an ordinary case like any other and that by invoking the provisions of Order 45 the Applicant has submitted his application to that provision of the law and therefore there is nothing peculiar about the case. This matter is not an election petition. It arises from Party Primaries and is subject to Civil Procedure and not election laws. The only difference between this matter and any other ordinary civil matters is that the timelines within

which these disputes must be heard and determined are stringent, hence the relaxing of the time of hearing the disputes outside normal working hours. Is this sufficient reason to persuade the court to grant the prayers sought? In my view, the fact that timelines are very stringent is the very reason that parties and their advocates must work extra hard to ensure that pleadings are well prepared and leave nothing to chance to facilitate the court to expeditiously determine the dispute. In my view this case is not peculiar or special in any way and should be treated like any other ordinary dispute save for the strict timelines that has necessitated courts to sit beyond their normal hours of operation.

I agree with Prof. Ojienda that this court has inherent jurisdiction in line with Section 3A of the Civil Procedure Act. The authorities cited to this court in support of this issue, *to wit*, **Republic v. Public Procurement Administrative Review Board Ex-parte Syner-Chemie Limited [2016] eKLR**; **Richard Ncharpi case** (supra), among others, are of persuasive value where the decision is by a court of concurrent jurisdiction or are binding to this court where the decision is by a court of a higher hierarchy. This court dismissed the Appeal. The reason for this action is that in the court's view it was incompetent for lack of proceedings or incomplete record of appeal. Counsel for the Applicant has raised issue with this court's action of dismissing the appeal and in his submissions sought to have this court substitute the word dismiss with strike out. I agree with counsel that the appeal was not heard on merit and I agree with the decision of the **East African Court of Appeal in Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimahomed Osman (1959) EA 577** where it was held, *inter alia*, that "***when an appeal is not properly constituted the court ought strictly to strike it out rather than dismiss it."*** In the orbiter of that case the court had this to say on the issue of dismissing versus striking out an appeal:

> ***"In the present case, therefore, as in Bhogal's case (1), when the appeal came before this court, it was incompetent for lack of the necessary decree, as in Bhogal's case (1) for lack of the necessary order. This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to 'strike out' the appeal as being incompetent, rather than to have 'dismissed it'; for the latter phrase implies that that a competent appeal had been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since neither the appeal in Bhogal's case (1), nor the present appeal was in fact capable of being dismissed, that is to say of being treated as something properly before the court, each must be treated as if it had been struck out, which in effect it was."***

It has been the view of this court that the appeal as presented to it was incompetent for lack of complete record of appeal. This court dismissed it and as stated in the **Ngoni-Matengo** case, above, it is the substance of the matter that must be looked at rather than the words used, that is, whether the matter was dismissed or struck out. The view of this court has been that the appeal before it was in fact incompetent. In the words of the **Ngoni-Matengo** case the appeal was not capable of being dismissed or in other words the appeal was not capable of being treated as something properly before the court and therefore it must be treated as if it had been struck out. The import of this finding is that this court lacked jurisdiction to entertain the appeal that was filed by Musyoki Mogaka & Co. Advocates.

Does this court then have jurisdiction to entertain this matter? As submitted jurisdiction is everything and where it does not exist, the court has no alternative but to lay down its tools. I have read the authorities cited on this issue, including **Owners of Motor Vessel "Lillian S"** and **Bwana Mohamed Bwana** case. In the latter case the Appellant's Petition had been dismissed by the High Court and on appeal to the Court of Appeal the Appellant presented a record of appeal that did not comply with mandatory provisions of the rules of that court. It was dismissed. He moved to the Supreme Court and on determining the matter, Supreme Court stated that ***"Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law……."***

To counter submissions by the 1st Respondent, Prof. Ojieanda referred this court to the decision of the Court of Appeal **Richard Ncharpi Leiyagu** (supra) that ***"Whereas we underscore the importance of a party filing a complete Record of Appeal, we are of the view that the respondents too could have filed***

the documents that were left out; but more importantly the respondents could have applied to strike out the appeal…"

I have considered both decisions. In the Supreme Court matter the record of appeal was faulty and this made the appeal incompetent. In the Court of Appeal matter, the documents in issue were affidavits which had been filed out of time. The distinction in my view is that without the proper record of appeal a court lacks jurisdiction to entertain the appeal. This is not the case with the Court of Appeal matter. In that case the advocate for the Petition came late and lost one day of his allocated two days for the hearing of the petition and the affidavits in question were filed out of time. The circumstances in the two cases are not similar.

Even assuming that this court has jurisdiction to entertain this matter, which it did not have, what would be the effect of reviewing and setting aside the judgment of this court dated 18th May 2017? This court was asked to reinstate the appeal. A record purported to be the record of appeal filed by Prof. Ojienda is annexed to this application. It contains six (6) grounds of appeal and other documents including affidavits and a record of proceedings from the Tribunal. It also has an additional party that was not part of the earlier appeal. I have compared this record with the one prepared by Mr. Omari who was on record earlier. The grounds in the new intended record of appeal are a departure from the earlier grounds. In other words it is totally a new appeal with new grounds and evidence. Prof. Ojienda told the court that they wanted to file a new appeal but they were advised by the Registry that the instructions are that all matters pertaining to the same matter must be filed in the same file. Be that as it may, the intended appeal is a different appeal from the one this court is being urged to reinstate. It this court was to vacate its earlier orders and reinstate the intended appeal this would mean reinstating the record of appeal prepared by Mr. Omari. That record has been declared as incompetent. But again this is not what the Applicant is seeking. He is asking that this court deems the annexed record of appeal marked "A" as duly filed. This record as stated above is totally different from what was brought before this court and by admitting it, even assuming I have that jurisdiction, is tantamount to admitting a new appeal.

The situation facing this court is that it has no jurisdiction to review its judgment because the appeal presented before it was incompetent and therefore the court lacked jurisdiction in the first instance. I addressed myself to the issue of procedural technicalities and made a conscious decision that failure to provide proceedings in the record of appeal is not a procedural technicality because without such proceedings this court was not able to sit on appeal and re-consider and re-evaluate the evidence before the Tribunal to guide it in arriving at an independent finding. Looking at the issue afresh, it is my view that invoking the inherent jurisdiction of this court will not come to the aid of this court because this will not cure the ills bedeviling the appeal filed in this case for reason of its incompetency as a result of which this court was deprived of jurisdiction to entertain it.

In conclusion and having considered all the issues canvassed before me, it is my view that I lack jurisdiction to grant the prayers sought. In **National Bank of Kenya Ltd v Njau (1995-98) 2 EA 249** the Court of Appeal held thus:

> ***"A review may be granted wherever 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 the law. Misconstruing a statute or other provision of law cannot be a ground for review.***
>
> ***In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters on controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it."***

I need not say more on the matter. In my view the remedy may lie in the Applicant taking appropriate measures to seek redress elsewhere. For the reasons I have advanced in this ruling, I hereby decline the orders sought and dismiss the Applicant's application dated 23rd May 2017 and filed on 24th May 2017. I am constrained to order costs against the Applicant. I am aware that these disputes are rather emotive and although costs follow the event, it is my order that each party shall bear its own costs of this litigation. The Applicant and the 1st Respondent are after all members of the same political party, the 2nd Respondent. They should learn to behave as it is done in other jurisdiction like India and actually shake hands and go home to advance the interests of their political party. Orders shall issue accordingly.

Dated, signed and delivered this 1st day of June 2017.

S. N. MUTUKU

JUDGE

In the presence of:

Prof. Tom Ojienda instructed by Prof. Tom Ojienda & Associates for the Applicant

Mr. Kithi instructed by Kithi & Company Advocates for the 1st Respondent

Mr. Omuganda for the 2nd Respondent