



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 539 OF 2016

IN THE MATTER OF ARTICLES 2, 3, 50, 91, 92, 101 AND 103 OF THE CONSTITUTION

AND

**IN THE MATTER OF SECTIONS 6, 7, 9, 10, 14, 40, 41 AND 46 OF THE POLITICAL PARTIES
ACT**

AND

**IN THE MATTER OF SECTION 3 OF THE INTERPRETATION AND GENERAL PROVISIONS
ACT**

AND

**IN THE MATTER OF SECTIONS 7 AND 8 OF THE FAIR ADMINISTRATIVE ACTION ACT,
2015**

AND

IN THE MATTER OF ARTICLES 4 & 21 OF THE KANU CONSTITUTION

AND

ISAAC ALUOCH POLO ALUOCHIER -APPELLANT

VERSUS

HON. GIDEON MOI. 1ST RESPONDENT

HON. JOHN LONYANG'APUO.1ST RESPONDENT

HON. ZIPPORAH KITTONY.3RD RESPONDENT

HON. NICK SALAT. 4TH RESPONDENT

RULING

The ruling herein relates to an objection that was raised by the counsel for the Respondent on the 26th October, 2016 when the appeal came up for hearing. The basis of the objection was the leave sought by the Appellant to produce new evidence in the form of a video compact Disc which he sought to have

played in court.

The Respondent objected to the application and the court had to hear the parties on the objection. On his part, the Appellant asked the court to have the video played, in the interest of justice. He submitted that the court has powers to admit new evidence in the appeal even if it was not played before the Tribunal. He conceded that he did not ask the tribunal to allow him to play the video during the hearing. He also admitted that the evidence was within his possession at the time the matter was heard before the Tribunal. He told the court that the C. D. was available to the tribunal only that it was played in open court as he did not apply to the tribunal to have it played.

In objecting to the application, counsel for the Respondents submitted that the appeal herein is on both points of law and facts and that this being an appeal, the court can only rely on the evidence presented to it. He further submitted that for the Appellant to say that the tribunal had the video but did not play it, it is doubtful, and that it was the duty of the Appellant to apply to the Tribunal to play the C.D which he did not do. He submitted that the burden of proof lies on the person who wishes that the evidence be adopted. He urged the court to dismiss the application.

Just by way of a brief history, the appeal herein arose from the judgment of the Political Parties Disputes Tribunal delivered on the 18th July, 2016 in the Political Parties Disputes Tribunal Complaint No. 11 of 2016. The Appellant herein had sought the removal of the Respondents from the party Kenya African National Union (KANU) for allegedly campaigning for a candidate of another political party without a registered coalition agreement between the two parties. I will not go into details of the evidence at this point as I would prefer to analyse the same after the appeal has been heard substantively.

This court has considered the oral application made by the Appellant and the submissions by both parties in support and in opposition to the same.

With regard to the Appellant's application, I wish to be guided by the Court of Appeal decision in the case of **Administrator, T/a The Aga Khan Platinum Jubilee Hospital Vs Munyambu (1985) KLR 127** where it was held inter alia that: -

“In exercising its discretion to grant leave to adduce additional evidence under Rule 29(1) (b) of the Court of Appeal Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not with reasonable diligence have been obtained for use at the trial if it will probably have an important influence on the result of the appeal and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would afford common sense or a sense of justice.”

The court has taken the liberty to peruse and study the proceedings that went on before the tribunal and from therein, it is noted that at no time did the Appellant apply to the Tribunal to have the C.D. played. In fact, the Appellant did not even bring to the attention of the Tribunal the issue of the C.D and the evidence contained therein and he admits as much in his submissions before this court. This is notwithstanding the fact that the evidence was in his possession all through.

The power of the court to take additional evidence is provided for under Section 78 (1) of the Civil Procedure Act which provides: -

“Subject to such conditions and limitations as may be prescribed an appellate court shall have power: -

- a. To determine a case finally,***
- b. To remand a case;***
- c. To frame issues and refer them for trial;***

d. To take additional evidence or to require the evidence to be taken,

e. To order a new trial.”

The provisions of Order 42 Rule 27 (1) of the Civil Procedure Rules are also relevant when a court is considering an application for production of additional evidence.

Order 42 Rule 27 (1) provides: -

“The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the court to which the appeal is preferred but if,

a. The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or

b. The court which the appeal is preferred requires any document to be produced or any witness to be examined to enable it pronounce judgment or for any other substantial cause in the court to which the appeal is preferred may allow such evidence or document to be produced or witnesses to be examined.

2. Whenever additional evidence, is allowed to be produced by the court to which the appeal is preferred, the court shall record the reasons for its admission.”

This court’s understanding of Section 78 (1) and Order 42 Rule 27(1) is that though the Appellate court has jurisdiction to admit additional evidence, some certain conditions have to be met which are: -

1. That the lower court refused to admit the evidence sought to be introduced.
2. The appellate court need the said evidence.
3. For any other sufficient cause.

And when such evidence is adduced, the court has to record the reasons for allowing the additional evidence.

This court has applied its mind to the aforesaid prerequisites in relation to the matter at hand and the court proceeds to make the following findings.

- a. The additional evidence sought to be introduced was at all material times in the possession of the Appellant.
- b. No application was made before the Tribunal for the production of that evidence and in fact it was not brought to its attention.
- c. The Appellant has not given its reason to the court why the evidence was not adduced before the Tribunal.
- d. The Appellant has also not given any sufficient cause why he is seeking to have the evidence adduced at this stage.
- e. It is not this court that requires the additional evidence.

In view of the above findings, it is very clear to me that the prerequisites for receiving additional evidence have not been satisfied by the Appellant herein and in the premises, the application to adduce additional evidence in the form of the C.D. is hereby dismissed. The objection by the counsel for the Respondents is upheld.

Dated, signed and delivered at Nairobi this 7th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Appellant*

..... *for the Respondents*