



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.116 OF 2013

BETWEEN

JANET NDAGO EKUMBO MBETEPETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER, MOMBASA COUNTY.....2ND RESPONDENT

HON. HASSAN ALI JOHO.....3RD RESPONDENT

RULING

Introduction

1. On 15th March 2013, I delivered a judgment dismissing this Petition and in doing so, I also awarded costs to the Respondents. Subsequently, on 16th October 2013, the Deputy Registrar of this Division, as Taxing Officer, delivered a Ruling in which she awarded costs as follows;

(i) Kshs.417,310/- to the 1st and 2nd Respondents.

(ii) Kshs.422,293/- to the 3rd Respondent.

2. The matter should have come to an end thereafter but by an Application dated 12th February 2014, the Petitioner sought orders that the Judgment aforesaid be reviewed on the basis of alleged discovery of new evidence that was not available at the time of the Judgment.

3. Other grounds relied upon were that there was an error apparent on the face of the record and/or that the Judgment was obtained by the Respondent, Ali Hassan Joho, by perjury.

4. Before the said Application could be heard however, the Respondents raised an objection and sought that the Application should be stayed until the costs awarded to them were fully paid. This Ruling is limited to that issue only.

5. In that regard, Counsel for the 1st and 2nd Respondents submitted that the Petitioner's Application for review of the Judgment aforesaid should be stayed until she has satisfied the Certificate of Taxation dated 7th March 2014 issued by the Deputy Registrar of this Court. That failure to do so would amount to contempt of Court and a party that has disobeyed explicit Court orders should not be given a hearing. In making submission, he relied on Hadkinson vs Hadkinson [1952] All E.R. 567 and X Ltd & Anor vs Morgan-Gramphton (Publishers) Ltd & Others [1990] 2 All E.R. 1 and in addition, Counsel stated that refusal to hear a Party which has acted in contempt of Court is a matter of discretion and in the present case, that discretion should favour the Respondents.

6. On his part, Counsel for the 3rd Respondent submitted that costs follow the event and that costs can only be appealed against by way of a reference to the High Court and that an order for payment of costs cannot be stayed. His Submissions were therefore made as if what the Petitioner seeks in the Application dated 14th March 2014 is an order of stay of costs only. In that regard, it was his further submission that it would be contrary to the interests of justice to delay the payment of costs to the Respondents.

7. Counsel relied on the decisions in Anode vs Kenya Red Cross Society [2013] eKLR, Orbit Chemicals Industries Ltd vs Otieno Odek & Co. Advocates (2006) eKLR, HFCK vs Embakasi Youth Development Project [2005] eKLR as well as Ahmednassir, Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2006) eKLR to articulate the above point.

8. In response to the above contentions, Counsel for the Petitioner submitted that the Petitioner had sought a review of the Judgment in this Petition pursuant to **Section 80** of the **Civil Procedure Act** as well as **Order 45 Rule 1(1)** of the **Civil Procedure Rules** because the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) **Practice and Procedure Rules, 2013** made by the **Chief Justice** pursuant to **Article 22(3)** of the **Constitution** do not make provision for a review of a judgment in a Constitutional Petition. That from a casual reading of **Orders 42 Rule 6(1)**, and **6(2)** of the **Civil Procedure Rules**, there are no conditions imposed on a Party seeking the review of a Judgment. That this is different, say for a Party seeking to appeal against any decision, because in that case, there is the added requirement that deposit of a security for costs may be ordered before an application for stay of execution may be granted.

9. In addition, Counsel stated that the submission made by the Respondent, the Petitioner is in contempt of Court is neither here nor there as in fact there is no order in place capable of being disobeyed.

10. Lastly, that the issue of costs is still live because a review of the Judgment necessarily entails a review of the order for payment costs to the Respondents. That therefore the issue of costs should be addressed at the hearing of the Application filed on 12th February 2014 by the Petitioner for a review of the Judgment.

11. Having read the Submissions by all Counsel appearing, it would appear that Counsel for the 3rd Respondent was under a misapprehension of what I am required to determine by this Ruling. I say so, with respect, because I have not seen any prayer that payment of costs should be stayed. The undated Application filed on 12th February 2014 has only two prayers viz;

(i) **That of a review of the Judgment for reasons given elsewhere above.**

(ii) **That “the Respondents be ordered to pay the costs of both the Petition and this Application”**

12. It is clear therefore that all the authorities cited by Counsel for the 3rd Respondent are irrelevant to the issue at hand and Counsel for the 1st and 2nd Respondent was on the right track

because the issue before me is simply whether the Petitioner should be heard on the Application for review before paying the costs to the Respondents.

13. Having heard the response by the Petitioner and noting the two prayers in her Application, I agree with the Counsel for the 1st and 2nd Respondent's that in appropriate circumstances, a Court can refuse to hear a party if that Party has continued to disobey Court orders. That is why the Statement, "*first purge the contempt then you shall be heard*" is often used in such situation. But that is a matter of discretion and each case must be looked at in its own circumstances. In the present case, the right of a party to seek a review of a judgment is as unfettered as the right of appeal, subject to the right procedure being followed. I have seen no law and no precedent where a Court can blindly demand payment of costs ordered in a Judgment that is the subject of an application for review.

14. Granted, the issue whether Ali Hassan Joho has a University degree or not has been the subject of proceedings in this and other Courts and certainly he and Counsel may be fatigued but that is no reason to shut out the Petitioner from pursuing a known procedure in law.

15. I am also aware that in fact prayer No.2 in the Petitioner's Application for review seeks an order of costs in "*the Petition and [the] Application*". That issue is therefore live and if per chance I decide to review the Judgment, the order on costs may also be reviewed.

16. In the end, I see no merit in the objections raised and they are overruled. Costs thereof shall abide the Application for review.

17. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Salum holding brief for Mr. Nyamodi for 1st and 2nd Respondents

Mr. Ahmednassir for 3rd Respondent

No appearance for Petitioner

Order

Ruling duly delivered.

Further Order

Application dated 12/2/2014 is stood over for hearing on 9/3/2015. Notice to issue.

ISAAC LENAOLA

JUDGE