REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & GATEMBU , JJA)

CIVIL APPEAL NO.150 OF 2017

BETWEEN

PHYLIP O. MWABE.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

JOSEPH OBIERO NDIEGE.....2ND RESPONDENT

(*Appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Onyiego, J) Dated 25th May, 2017* in Election Petition No. 19 of 2017)

****

REASONS FOR THE JUDGMENT OF THE COURT

(Rule 32 (5) of the Court of Appeal Rules)

The appeal was exhaustively argued before us on the 14th day of June, 2017 by learned counsel **M/s Awuor** holding brief for **Prof. Ojienda S.C** for the appellant; **Odiya Jane** holding brief for **Mr. Owuor** for the 1st respondent and **Mr. Charles Midenga** for the 2nd respondent. In a judgment dated the 16th day of June, 2017, we dismissed the appeal. We now proceed to give reasons for the said dismissal.

The background to the appeal is that the appellant **Philip Mwabe** (the appellant) and the 2nd respondent **Joseph Obiero Ndiege** (the 2nd respondent) took part in the first respondent's (Orange Democratic Movement **(ODM)** party nomination exercise for the position of member of National Assembly, Suna West Constituency on the 24th day of April, 2017. At the conclusion of the exercise, each of them was issued with a provisional nomination certificate. The one for the appellant was issued by a **Mr. Obell Ochino**, while that for the 2nd respondent was issued by a **Mr. Geoffrey Odhiambo Magak** both of whom claimed to be the legitimate appointed **ODM** returning officer for the area. The 2nd respondent was ultimately issued with a final nomination certificate on the 29th April, 2017.

The appellant was aggrieved by the said action and lodged a complaint with the **ODM National Appeals Tribunal** (**NAT),** seeking a recall and revocation of the nomination certificate issued to the 2nd

respondent, and in its place confer it upon him. In the alternative, to order a repeat of the said nomination exercise for Suna West Constituency. In a judgment dated the 5th day of May, 2017, the **ODM NAT** ordered both the withdrawal of the two of the above mentioned provisional nomination certificates and a repeat of the nomination exercise.

The 2nd respondent was aggrieved by the said order, and moved to the **Political Parties Disputes Tribunal (PPDT**) and presented a Notice of Motion seeking among others a declaration that the decision of the ODM **NAT** dated the 5th day of May, 2017 was anullity and unconstitutional; that he should be declared as the lawfully nominated contestant for member of National Assembly for Suna West Constituency; that **ODM** be compelled to issue him with a nomination certificate as the **ODM** candidate for member of National Assembly for the Suna West Constituency.

The Notice of Motion was resisted by the appellant's replying and supplementary replying affidavits both deposed on the 8th day of May, 2017 and a replying affidavit by one **Antony Muturi** also deposed on the 8th day of May, 2017 on behalf of **ODM**. After a merit hearing deliberation, the **PPDT** dismissed the 2nd respondent's appeal and affirmed the **NATs'** decision.

The 2nd respondent, undeterred, moved to the High Court of Kenya at Nairobi, vide Election Petition No. 19 of 2017,seeking to have the **PPDT's** decision set aside and an order declaring him as the winner of the Suna West Constituency **ODM** primary nomination exercise, held on the 24thApril, 2017. The 2ndappellant resisted the said appeal on the ground that it was premature given the fact that **ODM** had not acted upon the order of the **ODM NAT** and the **PPDT** to conduct fresh nominations, hence the cause of action had not crystallized.

After a merit hearing, the High Court (**J.M. Onyiego, J)** delivered its verdict on the 18th day of May, 2017 directing **ODM,** through its National Election Board and its National Executive Committee to initiate or undertake the process of nominating a fresh, a nominee as directed by the **NAT** on the 5th of May, 2017 and the **PPD**T on the 10th May, 2017 within forty eighty (48) hours from the date of the said judgment. In default, **ODM's** National Elections Board **(NEB)** was mandated to initiate, call or conduct the nomination exercise within forty eight (48) hours from the time the forty eight (48) hours granted to **NEC** and **NEB** to address fresh Nominations lapsed. Further that for the avoidance of doubt, the National Executive Committee in conjunction with the **NEB** to proceed to initiate the process of nominating a party nominee on an **ODM** ticket for Suna West Constituency not later than 6.00pm of the 20th May, 2017 and in default, initiate, call for and conduct fresh nomination election exercise latest by 6.00pm of 22nd May, 2017 being 48 hours calculated from 6.00pm of 20th May, 2017.

In obedience to the above directive, **ODM** held a meeting on the 19th May, 2017, and passed a resolution to issue and did in fact issue to the 2nd respondenta nomination certificate.

It is the above action by ODM of 19th May, 2017 that triggered the appellant's application for review dated the 23rd day of May, 2017, seeking orders *inter alia* that as the appellant had allegedly been issued with a nomination certificate on the 6th of May, 2017 as the **ODM** candidate for Suna West Constituency, the High Court could not properly direct ODM to conduct a fresh nomination exercise. In this regard, there was "sufficient reason" for the High Court to review its orders of the 18th day of May, 2017, set them aside and declare the appellant as the **ODM** National Assembly nominee candidate for Suna West Constituency. In the appellant's view, **ODM** having nominated him for the said position on the 6th day of May, 2017, it became *functus officio* and could not therefore discharge the mandate as directed by the Court on the 18th day of May, 2017.

The application for review was resisted by the 2nd respondent and canvased by way of written submissions. It was dismissed by the learned judge vide the impugned ruling of the 25th May, 2017. The appellant is now before us on appeal raising ten (10) grounds of appeal, complaining that the learned Judge failed *to appreciate the ground of any other sufficient reason as provided for under order 45 rule 1*

of the Civil Procedure Rules, 2010; misdirected himself by holding that the 1st respondent herein was not functus officio with respect to the function of nomination; misdirected himself by making a finding that allowed the 1st respondent to approbate and reprobate on an issue of great public interest and National Security; erroneously dismissed the appellants submissions terming them as evidence from the bar, and proceeded to make a decision on the strength of documents that were a sham, fake and a forgery; failed to properly address the violation of the appellant's constitutional right to a legitimate expectation; errorneously assumed the role of the 1st respondent in deciding which of the final nomination certificates presented to the Honourable Court was valid; erroneously issued orders that were never sought by the 2nd respondent herein; misdirected himself by condemning an innocent litigant for the mistake of counsel; erred and misdirected himself by applying wrong principles regarding the burden of proof; and, lastly he occasioned a failure of justice by failing to consider the evidence and submissions of the appellant.

The appeal was canvased by way of written submissions, followed by oral highlighting and as buttressed by case law cited by either side. In her oral highlights, learned counsel **M/s Awuor** drew out three issues for our determination, namely:

i. Whether the learned judge erred and misdirected himself by holding that the 1st respondent herein was not functus officio with respect to the function of nomination.

ii. Whether mistakes of an advocate can be visited on his client; and, lastly

iii. Whether the 1st Respondent approbated and reprobated.

In support of issue number (i), learned counsel **M/S Awuor** submitted that both the appellant and the 2nd respondent in obedience to the procedures laid down both in the **ODM** Constitution and the nomination rules submitted themselves to and exhausted the **ODM NAT** and the **PPDT** dispute resolution procedures, as was required of them by the provisions of **section 40** of the **Political Party's Act Chapter 7B** of the laws of Kenya. Both forums directed **ODM** to repeat the nomination exercise, which it did resulting in the nomination of the appellant as the **ODM** candidate for the position of Member of National Assembly Suna West Constituency on the 6th day of May, 2017 and issued him with a final nomination certificate. It therefore followed that by the time the learned Judge ordered a repeat of the exercise vide his orders of 18th May, 2017, ODM had already become *functus officio* by reason of the action it had allegedly taken as above, on the 6th May, 2017 which action the appellant sought to bring to the attention of the learned Judge through the further replying affidavit in the application for review, but which was discounted for the reason that no leave of Court had been sought and obtained to introduce the said further replying affidavit to which the said evidentiary proof had been annexed.

In **M/s Awuor's** view, although it is to be appreciated that rules of procedure should be respected, the learned Judge ought to have appreciated that election disputes by their very nature call for the Court's exercise of caution in deciding whether to discount any evidence tendered or otherwise, more so when it was not disputed that the failure to seek leave to admit such evidence for the courts consideration lay with the appellant's advocate, and should therefore not have been visited on him resulting in the discounting of the said evidence. On that account, **Ms. Awuor** urged us to interfere with the learned Judge's exercise of his discretion in discounting the said further replying affidavit, admit it, and on the basis of its contents affirm their contention that **ODM** was *functus officio* and could not discharge the mandate as directed by the Court on 18th May, 2017 as it had already exercised its mandate by nominating the appellant as its flag bearer on 6th May, 2017.

To buttress her arguments on this issue, learned counsel cited the case of **Raila Odinga & 2 Others versus Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** for the exposition of the doctrine of "*functus officio*". **Ferdinand Ndungu Waititu versus Independent Electoral & Boundaries Commission (IEBC) and 8 others [2014] eKLR per the dissenting judgment of the Hon. Mr. Warsame, JA** for the principle that an appeal from the High Court on Electoral disputes lies to the

Court of Appeal on matters of law only. The persuasive decision of **Francis Mutuku versus Wiper Democratic Movement-Kenya and 2 Others [2015] eKLR** for the proposition that where there are specialized procedures provided for either by the Constitution or a statute for dispute resolution, these should be adhered to.

In support of the second issue, learned counsel invoked the provisions of Article 159 (d) of the Constitution and submitted that the Superior Court below should not have adhered to procedural technicalities at the expense of substantive justice to the appellant as the failure to procedurally introduce the said crucial evidence lay with his advocate. He therefore ought not to have been penalized for his advocates default.

To buttress the above submissions, learned counsel cited the case of **Savings & Loans Kenya Limited versus Onyancha Bwomote [2014] eKLR**; the persuasive case of **Esther Atieno Ababu versus Samwel Githegi Kinyanjui & another [2016] eKLR;** and **Republic versus Public Procurement Administrative Review Board Ex-Parte Syner-Chie Limited [2016] eKLR**; **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR as per Ouko, JA,** all for the principles and propositions that mistakes of counsel should not be used as an excuse to slam doors of justice in the face of litigants as courts of law exist for purposes of determining the rights of parties who come before them and not for purposes of imposing discipline on them; that deviations from and lapses in procedure which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting penal consequences; that where a procedural infraction causes no injustice, injury or prejudice to the opposite party, such infraction should not have an invalidating effect; and lastly that justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times creates hardship and unfairness.

Turning to the last issue, learned counsel urged us to find that the 1st respondent trampled on the appellant's right of a legitimate expectation of fair administrative action by purporting to give a final nomination certificate to the 2nd respondent while fully aware that all along the appellant had always been the victorious party in the previous processes until the High Courts' decision reversed that trend.

M/s Odiya Jane in a brief response submitted that **ODM,** issued a certificate to the 2nd respondent in obedience to the decision of the Superior Court below which had affirmed the decisions of both the **ODM NAT** and the **PPDT;** that there were no stay orders against the execution of the courts' orders of 18th May, 2017. As such, **ODM** cannot legitimately be accused of any wrong doing as it did not transgress on the Constitution, its own governing primary nomination procedures or any law. Further that the learned judge of the superior court below his discretion judiciously when he declined the appellant's request for review as the same had not met the threshold for the invocation of the rubric of "or any other sufficient reason".

Learned counsel **Mr. Charles Midenga** for the concurred with the submissions of **M/s Odiya** that the learned Judge exercised his discretion judiciously and correctly when he found the ground " or for any other sufficient reason" advanced by the appellant in his request for review wanting and dismissed the application for review. This Court is therefore urged to ignore the appellant's current move to try and sneak in, the ingredient of "mistake" as a basis for seeking to fault the learned Judge's decision on account of an alleged existence of a nomination certificate issued to the appellant way back on 6th May, 2017 and which he had failed to disclose either to the **PPDT** or to the High Court in the first instance. The introduction of the said purported final nomination certificate at the review stage in **Mr. Midenga's** view, was nothing but an afterthought if not mischievous. To buttress his submission, learned counsel cited the case of **Vijay Kumar Saidha & Another versus Trubhuvan Gordan Barkrania and 2 Others [2015] eKLR**on the standard for proof of forgery of a document and the persuasive case of **Indian Council for Enviro-legal Action versus Union of India and others, Supreme Court of India, IA No. 36 and IA No. 44** in Civil Petition (C) **No. 967 of 1987** on 18th July, 2011, for the reiteration of the principle that litigation has to come to an end.

This is a first appeal arising from the exercise of judicial discretion of the trial court in declining to accede to the appellant's request for the review of the orders issued on the 18th day of May, 2017. The principles governing the exercise of judicial discretion were well set out by Ringera, J (as he then was) in the case of **Githiaka versus Nduriri [2004] 2KLR 67**. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is, to do justice to the parties before it. The parameters for interference with the exercise of such a discretion were well put by the predecessor of this Court in the decision in the case of **Mbogo and Another versus Shah** [1968] EA 93, that for the appellate Court to do so, it must be satisfied that the judge misdirected himself in some matter, and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been misjustice.

Seealsothecase of**United India Insurance Co. Ltd versus East Africa Underwriters (Kenya) Ltd [1988] KLR 898** for the holding *inter alia* that:-

> ***"The court of Appeal will interfere with a discretionary decision of a Judge appealed from, where it is established that the judge:-***
>
> ***(a) Misdirected himself in law;***
>
> ***(b) Misapprehended the facts.***
>
> ***(c) Took account of considerations of which he should not have taken account.***
>
> ***(d) Failed to take account of considerations of which he should have taken account.***
>
> ***(e) His decision albeit a discretionary one is plainly wrong."***

In declining to exercise his discretion to allow the application for review, the learned Judge had this to say:-

> "17. ***I have considered the application herein, supporting affidavit, replying affidavit and submissions by both counsels. There is no dispute that by 18/5/2017 when the Court made its orders directing ODM to nominate a fresh candidate for Suna West Constituency either directly or by universal suffrage, there was no valid certificate in place. Equally between 7th – 10th May, 2017 when both parties appeared before the PPDT, none had a nomination certificate. By the time the appeal was being lodged (12/5/2017), heard and determined by this Court on 18th May, 2017, nobody produced a nomination certificate and in particular the one dated 6th May, 2017. The question is why was it kept as a secret and not even the applicant's counsel had knowledge of it.?***
>
> ***18. In any event, if there was any certificate purported to have been issued before 18th May, 2017 when this Court made its orders, the same is null and void as it could not have been issued retrospectively. To uphold such conduct will amount to promoting allegations. The orders of the Court were clear and the same could not be implemented retrospectively."***

We have given due consideration to the above reasoning of the learned Judge, in the light of the rival submissions set out above, as well as case law cited by either side. In our view, only one issue falls for our determination, namely whether the learned Judge exercised his discretion unjudiciously when he withheld the relief for review from the appellant.

It is not disputed as correctly observed by the learned Judge that the power to review is enshrined in order 45 (1) (1) of the Civil Procedure rules. It provides:-

> 1. (1) ***Any person considering himself aggrieved-***

(a) by a degree 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."

In this instance, the appellant relied on the ingredient of "or for any other sufficient reason**",** when he sought the Court's intervention. In **Pancras S.T. Swai versus Kenya Breweries limited [2014] eKLR**, the Court made the following observations on the parameters for the applicability of this ingredient:-

"……As repeatedly pointed out in various decisions of this

Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed V. Charana Singh Nand Sing and Another [1959] 793, the High Court correctly held that section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such orders as it thinks fit on review and that the omission of any qualifying words in the section was deliberate. In Shanzu Investments Limited V. Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata & Another Vs. Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that the omission of any qualifying words in the section was deliberate.

Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

In light of the principle in **Pancras S.T. Swai case** (supra), it is our finding, first, that the learned Judge was correct in his finding that if a nomination certificate issued by **ODM** in favour of the appellant was in existence as at the 6th of May, 2017 as the appellant wanted the High Court, and now this Court to believe, then, nothing prevented him from exhibiting it at the earliest opportunity, that is before the **PPDT** in the first instance, and the High Court at the appellate stage. The only reasonable inference that can be drawn from the appellant's failure to so exhibit the certificate is that, no such nomination certificate had been originated by **ODM** and could not have been in existence at the time. It therefore follows that **ODM** was not *functus officio* when it discharged its mandate as directed by the superior court below vide the orders issued on the 18th day of May, 2017. In the same vein, **ODM** did not trample on the rights of the appellant when it acted on the directions of the High court below to carry out a repeat of the nomination exercise and subsequently issued a nomination certificate to the 2nd respondent on the 19th day of May, 2017, for the same reason that the appellant's allegation that **ODM** had originated and issued him with a nomination certificate on the 6th of May, 2017 stood and shall stand unsubstantiated to date. Further, **ODM'**s deliberations resulting in the issuance of the nomination certificate to the 2nd respondent on the 19th day of May, 2017 have not been shown to have been conducted contrary to its own Constitution and the attendant Nomination Rules. We also find that from the record, appellant's submission on alleged **ODM's** approbation and reprobation on the same issue is also wanting as the action undertaken by **ODM** on the 19th day of May, 2017 was in tandem with the concurrent directions given first by its **NAT,** and second by the **PPDT,** which were subsequently affirmed by the learned Judge. **ODM** also did not trample

on the appellant's legitimate expectation as the potential Member of National Assembly Suna West Constituency, as the alleged legitimate expectation was erroneously founded on the unsubstantiated allegation that **ODM** was the originator of the nomination certificate purportedly issued to the appellant on the 6th day of May, 2017; which assertion both the High Court below and this Court have found unsubstantiated.

We agree with **M/s Awuor's** submission that severally, mistakes of counsel should not be visited on a litigant. Herein, evidence of existence of a mistake of counsel visited on a client is wanting as non attaches to the discounting of the further replying affidavit that sought to introduce the nomination certificate purportedly originated by **ODM** on the 6th day of May, 2017 in respect of which we have already made findings that **ODM** was not the originator of the alleged nomination certificate and its existence as at 6th May, 2017 had not been substantiated. **Article 159(2) (d)** of the Constitution cannot therefore be invoked to breath life in the said purported nomination certificate of 6th May, 2017 as the attack on its validity is not a matter of procedural technicality, but a matter of substance, for the reasons already stated above.

It is for the foregoing reasons that we dismissed the appellant's appeal in terms of the judgment of the court delivered on the 6th day of June, 2017.

REASONS DATED AND GIVEN AT NAIROBI THIS 21ST DAY OF JULY, 2017.

R.N. NAMBUYE

……..……

JUDGE OF APPEAL

W.OUKO

……..……

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.