



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, G.B.M. KARIUKI & OUKO, JJ.A.)**

**CIVIL APPEAL NO. 201 OF 2013**

**BETWEEN**

**PENINAH NANDAKO**

**KILISWA.....APPELLANT**

**AND**

**THE INDEPENDENT ELECTIONS AND BOUNDARIES COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**FORD KENYA .....2<sup>ND</sup> RESPONDENT**

**EDITH WERE SHITANDI.....3<sup>RD</sup> RESPONDENT**

**(An appeal from the Judgment of the High Court of Kenya at Nairobi**

**(Mumbi Ngugi, Majanja & Korir, JJ) delivered on 12<sup>th</sup> July 2013**

**in**

**J.R. NO.223 OF 2013)**

**\*\*\*\*\***

**RULING OF THE COURT**

1. Peninah Nandako Kiliswa, the appellant in this appeal, made an application to this Court on 23.10.2013 by way of notice of motion dated 14.10.2013 seeking an order to be allowed to adduce additional evidence. In the affidavit sworn by the appellant on 14.10.2013 in support of the application, the latter avers that *“through an error of oversight”* she filed and served a copy of *“mixed-up documents as evidence that had been supplied to her by the 2<sup>nd</sup> respondent, Ford Kenya.”*

2. The said document, averred the appellant, on the face of it, related to the appellant’s reinstatement as the 2<sup>nd</sup> respondent’s choice for the gender top-up position in Bungoma County. However:

*“on the back of the said document, unbeknown to her was attached the wrong affidavit signed by the 2<sup>nd</sup> respondent’s Secretary General, relating to Turkana County instead of Bungoma*

**County.”**

The appellant further averred that she was not aware of the mix-up in the document until the 3<sup>rd</sup> respondent, Edith Were Shitandi, along with the 2<sup>nd</sup> respondent's Secretary General, filed their replying affidavits on 03.07.2013 and 04.07.2013 challenging the said document and imputing forgery on the appellant's part. The appellant avers that she was not able to counter these allegations because by the time the matter was brought to her notice, the hearing of Judicial Review application No.223 of 2013 which she had instituted seeking faulting for the proceedings and decision of the Independent Electoral and Boundaries Commission (I.E.B.C.) had been given a date for delivery of judgment.

3. When the appellant's application came up for hearing before us on 10<sup>th</sup> December 2013, Mr. Ndettoh, learned counsel for the appellant, urged us to grant the application and contended that rule 29(1) of the rules of this court on which the application is premised gives the Court jurisdiction to allow adduction of additional evidence. He conceded that he did not apply for review in the High Court before delivery of the judgment after discovering the mishap. However, he did not assign any reason for not doing so but from the facts tendered, it seems clear to us that there was nothing militating against the making of such review application. But no matter. It was Mr. Ndettoh's submission that the appellant's application for adduction of additional evidence was meritorious. He sought orders for issuance of summonses to compel attendance in court of Eseli Simiyu, the deponent of the affidavits sworn on 23.5.2013 and 03.07.2013 and Annie W. Thoronjo, the counsel who administered the oath to the said deponent and E. Wafula, the counsel who drew and filed the said affidavits.

4. On her part, Miss Keya, the learned counsel for I.E.B.C., the 1<sup>st</sup> respondent, did not think the application for adduction of additional evidence had any merit. It was her submission that only in very peculiar circumstances will the Court allow adduction of additional evidence. For starters, she said, the appellant's advocate had admitted that, having filed the wrong documents relating to Turkana County instead of Bungoma County and after discovery of the mistake, there was no effort to correct the same through review. Miss Keya further contended that the applicant was bound by her pleadings. As she had failed to show any peculiar reason for adduction of additional evidence, Miss Keya urged the Court to dismiss the notice of motion with costs.

5. In opposing the application on behalf of Ford Kenya and Edith Were Shitandi, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, learned counsel Mr. Peter Wena placed reliance on the affidavit of the 3<sup>rd</sup> respondent. In his view, rule 29 of this Court's Rules of this Court which is cited in the notice of motion was irrelevant and did not apply in the present circumstances because, he contended, it applies only to appeals and the High Court having sat and determined the matter in its original and supervisory jurisdiction, the rule does not apply. It was Mr. Wena's contention that the High Court did not deal with the merits of the decision of IEBC but rather only examined the propriety of the decision so as to determine whether or not it was proper, or illegal. The issue of forgery was not material, he contended. At any rate, he said, the application was brought late and no sufficient reason had been advanced for the Court to exercise its discretion in favour of the applicant. He submitted that the error by the appellant in not annexing the correct document amounted to negligence and this did not constitute sufficient reason. He urged the Court to dismiss the application.

6. Mr. Ndettoh, in reply, alluded to Section 1 (1) of the Appellate Jurisdiction Act which vests in the Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. He contended that the IEBC had given conflicting documents and we understood him to claim justification on behalf of his client to make the application on account of this.

7. We have perused the application and duly considered the rival submissions made by the parties through their respective counsel.

8. The background to this litigation is that Article 177(1)(b) of the Constitution which was promulgated on 27<sup>th</sup> August 2010, created in Chapter Eleven Devolved Government and in Article 176 (1) County Governments which consist of a County Assembly and a County Executive. In Article 177(1), the

Constitution stipulates that a County Assembly consists of elected members, namely a Speaker, Special-Seat-Members to ensure that not more than 2/3 of the membership of the assembly is of the same gender and members of marginalized groups who include persons with disabilities and the youth. Ford Kenya, the 2<sup>nd</sup> respondent, had a Gender top-up list pursuant to Article 177(1)(b) and the applicant, Penina Nandako Kiliswa, complained that the 3<sup>rd</sup> respondent, Edith Were Shitandi, who was picked as Ford Kenya's nominee was not in its original list submitted to I.E.B.C., the 1<sup>st</sup> respondent. Her complaint to I.E.B.C. was dismissed (in a ruling delivered on 7<sup>th</sup> June 2013) on the ground that no evidence was adduced to prove the allegations made. Aggrieved by that ruling, the applicant filed in the High Court Judicial Review proceedings as aforesaid (JR No. 223 of 2013) in which she faulted the proceedings and the decision of I.E.B.C. mainly on the grounds that the latter did not give written reasons for its decision and further that I.E.B.C. failed to consider the evidence placed before it and as a consequence failed to accord the appellant a fair and impartial hearing. The High Court did not find merit in the complaint and in its decision rendered on 12<sup>th</sup> July 2013 held that I.E.B.C. arrived at its decision after considering the evidence before it and gave its reasons for reaching that decision. It also held that the composition of party lists and the ranking of the names in such party lists is an internal matter to be dealt with by the political parties. Aggrieved by the decision, the appellant lodged notice of appeal on 18<sup>th</sup> July 2013 manifesting its intention to challenge in this Court the High Court decision on judicial review. On 15.08.2013, the appellant lodged the record of appeal and on 22.10.2010 an Amended Record of Appeal in Civil Appeal No.201 of 2013. The appellant's notice of motion (dated 14.10.2013) is made in the appeal. The two issues for determination are (1) whether the application is competent and if so, whether it has been shown to the satisfaction of the Court that there are sufficient grounds for her to be allowed to adduce additional evidence.

9. It is salient that the additional evidence sought to be adduced was for the purpose of articulating the complaint determined by I.E.B.C. and the judicial review proceedings determined by the High Court. The appellant could have applied to the High Court for adduction of the additional evidence before the High Court delivered its judgment on 12.7.2013 but she did not. As it turned out, the High Court determined the proceedings in absence of the evidence now sought to be adduced as additional evidence. The appellant has filed an appeal seeking to challenge the decision of the High Court which was reached in absence of the additional evidence sought to be adduced. The appellant has admitted that it made an error in annexing the wrong document. The appellant's contention that the High Court:

***“premised its judgment dated 12.07.2013 on flawed narrative brought out in the affidavit of Eseli Simiyu, the Secretary General of Ford Kenya, to the detriment of the appellant”***

does not hold good. The appellant had an opportunity before the delivery of the judgment by the High Court to seek to be allowed to adduce additional evidence. Granted, she could not seek to arrest the judgment as the concept of “arresting” judgment is hardly known in our civil jurisprudence. In criminal law, it simply means an act of staying a judgment or refusing to render such judgment after a verdict has been reached in an action at law or a criminal prosecution, because some defect appears on the face of the record, that if a decision is made, would make it erroneous or reversible. The absence of the concept in our rules on civil practice is perhaps explicable on the basis that while before delivery of judgment there is no judgment that can be stopped or “arrested”, on the other hand, once judgment is delivered, the question of “arresting” it cannot not arise because at that stage the Court is *factus officio* and an attempt to “arrest” the judgment would be like trying to lock the stable door after the horse has bolted. But in **USIKARO V. ITSEKIRI LAND TRUSTEES** (1992) 2 N.W.L.R. (Pt. 172) (the Supreme Court of Nigeria) had this to say on inherent power of Court:-

***“it is settled that apart from the rules, a Court of Record has an inherent power to postpone the hearing of any matter set down for hearing before it if the just of the case so demands .....”***

10. In the lead judgment, Musdapher JCA (as he then was) had this to say on the subject:

*“I have, as mentioned above, recounted in great details the conduct of the appellant throughout the trial before the lower Court. In my view, the application to “arrest” the judgment after all the*

*opportunities granted to the appellant which it deliberately refused to take was merely calculated to hinder the due administration of justice. From the records available, the appellant always claimed that they would settle the matter out of court when indeed they merely wanted to delay the due administration of justice. The procedure for arrest of judgment is now hardly known in our Civil jurisprudential system. It is the act of staying a judgment, or refusing to render judgment in an action at law in criminal cases after verdict. It is usually for some intrinsic matter appearing on the face of the record, which would render the judgment if given erroneous or reversible. Under the old Common Law rule the procedure for arrest of judgment is not peculiar to the criminal cases alone, it was available in civil cases under the Old Common Law Rules, but the procedure is alien to the rules of Court and does not apply in civil matters. See Bob-Manuel v. Briggs (1995) 7 NWLR (Pt.409) 537. The application made to arrest the judgment is accordingly misconceived both in law and in fact. The appellant had been given ample opportunity to defend the claims made against them and also to prosecute their Counter-claim. The appellants merely refused to use the opportunity given them. Under the circumstances, the learned trial Judge was fully justified to have (1) closed the defence and (2) concluded that the appellants had no evidence to offer on their pleadings. In the end, reject the complaint under this issue and resolve the same against the appellant.*

In Newswalih Communications Ltd v. Alhaji Aliya Ibrahim Atta (Supreme Court of Nigeria No.101 of 2001) the trial Judge had refused in a libel case an application to arrest the judgment delivered on 9.5.1996. She has not offered any or any sufficient explanation why she did not do so. She waited for judgment to be delivered by the High Court and then proceeded to give notice of appeal on 18.7.2013 and to lodge record of appeal on 15.8.2013. It was not until 23.10.2013 that she filed in this Court the application seeking leave to adduce additional evidence.

11. It was contended by Counsel for the respondent that the application does not lie under rule 29(1) of the rules of this Court because the power of the Court to take additional evidence is confined to cases where appeal before it is from a decision of the High Court acting in the exercise of its original jurisdiction which was not the case here. In counsel's view, the High Court made the decision on judicial review in its appellate and supervisory jurisdiction and not in its original jurisdiction for the simple reason, it was argued, that it examined the decision of I.E.B.C., the first respondent, in exercise of its supervisory and appellate jurisdiction. BLACK'S LAW DICTIONARY (9<sup>th</sup> Edn) defines "**original jurisdiction**" as "**a Court's power to hear and decide a matter before any other Court can review the matter**" and "**appellate jurisdiction**" as "**the power of a Court to review and revise a lower Court's decision.**" In the present context and construction of rule 29 (supra), it cannot be said that the High Court was sitting in exercise of its original jurisdiction when it dealt with the judicial review proceedings not least because it sat to review the decision of IEBC which IEBC had already made. The judicial review proceedings were akin to an appeal and the decision thereof was not made by the Court in exercise of its original jurisdiction. Rule 29 (supra) applies to cases where this Court is dealing with an appeal from a decision of the High Court acting in the exercise of its original jurisdiction. Accordingly, the application for adduction of additional evidence premised as it is on the rule, is flawed. This answers the first issue.

12. As regards the second issue, there are principles that govern determination of applications for adduction of additional evidence in appeals. The policy of the Court is that power to call additional evidence is required to be exercised very sparingly and with great caution. As a general rule an appellate Court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available. However, there is an exception where the grounds on which adduction of additional evidence on appeal is premised on fraud or surprise. In **K. TARMOHAMED V. LAKHANI [1958] EA 367** the predecessor of this Court held that "except on grounds of fraud or surprise, the general rule is that an appellate Court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available." Lord Denning in **LADD versus MARSHALL [1959] I WLR 489, Pg 149**, which was referred to with approval in **K. TARMOHAMED versus LAKHAN (supra)** stipulated the principles upon which an appellate Court will admit fresh evidence where the application is not made on grounds of fraud or surprise. He stated:

***“to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:***

***First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believe, or in other words, it must be apparently credible though it need not be incontrovertible.”***

13. In the instant case, the appellant admits that she made a mistake in annexing the wrong document, (a mistake) that has turned out to be very costly. Clearly the evidence sought to be adduced as additional evidence was at all material time available to the appellant. Under the rules of pleading, the appellant was bound by her pleadings and if she wished to amend or introduce additional evidence, he ought to have done so timeously. She did not. It was Birkett L.J. in **SHEDDEN V. PATRICK AND ATTORNER GENERAL (cited by Scrutton LJ in NASH V. RACHFORD RURAL COUNCIL [1917] I KB393** who stated while dealing with a germane issue that:

***“it was not shown ... that this evidence was not available at the time of the trial or could not by reasonable diligence have been procured.”***

More recently, this court’s decision in **MZEE WANJIE & 93 OTHERS v. SAIKWA & OTHERS [1982-88] I KAR 462** was that before the Court will permit the adduction of additional evidence, it must be shown

1. that the additional evidence sought on appeal could not have been obtained by reasonable diligence during the trial in the High Court; and
2. that such evidence, had it been made available to the trial Court, would have been likely to have affected the result of the suit. This authority was referred to with approval in the decision of this Court (Gicheru, Omolo & Lakha JJ.A.) in **EDGAR OGECHI & 12 OTHERS AND UNIVERSITY OF EASTERN AFRICA, BARATON (C.A. Civil Appeal No.130 of 1997) UR.**

As the decision of the High Court was made in its appellate or supervisory jurisdiction as opposed to its original jurisdiction, rule 29 of the Rules of this Court does not apply to the application before us. Even if we were wrong in so holding, the circumstances of this case show that the appellant has not met the criteria set by this Court in applications for adduction of additional evidence on appeal. For these reasons we dismiss with costs the appellant’s notice of motion dated 14<sup>th</sup> October 2013.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of February 2014.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

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

**REGISTRAR**