



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:GICHERU, AKIWUMI & SHAH JJ .A.)

CIVIL APPEAL NO. 237 OF 1999

BETWEEN

SAID HEMED SAID.....APPELLANT

AND

EMMANUEL KARISA MAITHA & ANOTHERRESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Mombasa (Hayanga J) dated 15th October, 1999

in

Election Petition No 1 of 1998)

JUDGMENT

Shah JA. On 18th March, 1999 the superior court (Hayanga, J) allowed the appellant’s application for scrutiny and recount of votes cast at the parliamentary election held in the Kisauni constituency on 29th December, 1997. The appellant was the unsuccessful candidate whilst the first respondent was declared to be the successful candidate at the said election by the Returning Officer, Mr Hotham Nyange, who is the second respondent before this Court. The appellant is Said Hemed Said whilst the first respondent is Emmanuel Karisa Maitha. The said election was held under the provisions of the National Assembly and Presidential Elections Act (cap 7) (the Act) to elect a person to the seat in the National Assembly for the said constituency.

The appellant, according to the declared result, obtained 9,540 votes whereas the first respondent garnered 10,074 votes, a difference of 534 votes in favour of the first respondent.

The re-count and scrutiny was carried out by the parties in the presence of (amongst others) the Deputy Registrar of the superior court Mrs Lydia Achode.

The differences between the parties as regards re-count of votes properly cast was the subject of arguments before the learned judge who after hearing all parties and scrutinizing the disputed votes ruled that the vote margin of 534 in favour of the first respondent stood reduced to 52, which reduction, however, by itself, did not affect the election result.

Having given a considered ruling on the re-count and scrutiny the learned judge directed the parties to re-assess their position otherwise the hearing of the petition would go on. That was on 7th May, 1999.

On 17th May, 1999 Mr Ishan Kapila for the appellant sought leave to make submissions, not on the recounted number of votes but on some aspects of the scrutiny. Counsel for the two respondents opposed the application saying that the oral application would touch on matters already ruled on and may as well be matters *res judicata*. The learned judge ruled as follows:

“I agree with Mr Mukele and Mr Gikandi (counsel for second and first respondents, respectively, here) particularly because there is no end to which the submission is aimed at. However, I recognise that there may be aspects of scrutiny that are not necessarily on vote count and have [emerged] out of re-count finding and therefore in so far as we have focussed only on votes there may be something to be said on those aspects of the exercise.

While therefore I accept that Mr Kapila can submit on those aspects, it will be clear to Mr Kapila that he cannot discuss the vote re-count and further he ought to have brought this matter together with the re-count result and finalization of votes instead of treating this aspect from vote result and it is this piecemeal approach that is improper. The result is that Mr Kapila and that means everyone also will now submit on the matter, but there will be no reference to the votes and the vote-recount. So I allow the application to that extent.”

During the course of his submissions on 17th May, 1999 Mr Kapila conceded that the Court having adjudicated on the number of votes in dispute, that issue was over. He went on further, however, to say that the number of ballot papers originally issued and the number of votes cast ought not to differ except for an inconsequential number and that it was incumbent upon the Court to examine whether what was counted by the Deputy Registrar tallied with those counted by the Returning Officer and were all the votes cast by the electorate and that no voting paper had been added or subtracted. What was important, he said, was that the number of valid papers issued by the Returning Officer to each Presiding Officer of each area ought to be compared with those used and those returned so as to arrive at a conclusion whether or not ballot papers were added or taken away in the interim. As I understood Mr Kapila’s submission he was attempting to say that unless those figures tallied the election itself stood unsatisfactory, more so as the difference of votes was only 52.

Such information, Mr Kapila urged, could only be available from the Presiding Officer and not the Returning Officer.

Regulation 34 of the Presidential and Parliamentary Elections Regulations (the Regulations) made under the Act provides as follows:

“34(1) Immediately after the close of the poll at his polling station the Presiding Officer shall make a written statement of:-

- (a) the number of ballot papers issued to him under regulation 22(1) (i);
- (b) the number of ballot papers, other than spoilt ballot papers, issued.
- (c) the number of spoilt ballot papers;
- (d) the number of ballot papers remaining unused.

(2) Immediately after the completion of the statement under paragraph (1), the Presiding Officer, in the presence of those candidates or their agents as are then present with him, shall make up into separate packets-

- (a) the spoilt papers, if any;
- (b) the marked copy register;
- (c) the counterfoils of the used ballot papers; and
- (d) the aforesaid statement and statement recorded under regulation 33(2)”.

Regulation 22 of the Regulations mandates the Returning Officer to provide to the Presiding Officer such number of ballot papers as may be required and necessary for the conduct of a particular election.

The combined effect of those two regulations, as I see it, is that at the end of the whole exercise the ballot papers issued are duly accounted for. That is, those used, plus spoilt ones and those returned unused ought to tally with those originally issued so that no one can be accused of adding or subtracting ballot papers. It is for this reason that rule 19 of the National Assembly Elections (Election Petition) Rules (the Rules) provides that amongst the documents the Returning Officer delivers to the Registrar of the superior court not less than forty-eight hours before the hearing of an election petition, there ought to be statements by the Presiding Officers made under the provisions of regulation 33(2) of the Regulations.

Mr Kapila went on to submit that statements made by the Presiding Officers are essential to enable an Election Court to verify whether ballot papers used in the count match the number of ballot papers issued by a Returning Officer to each Presiding Officer. That must be so if the Court is to be satisfied that ballot papers have not been added or deducted.

Mr Mukele objected to Mr Kapila’s oral submissions that rejected ballot papers were required under regulations 34 (1) (c) and 38 of the Regulations to be shown on the grounds that this could not be canvassed orally. Mr Gikandi objected to Mr Kapila’s submissions pointing out that Mr Kapila was asking for a further scrutiny by the back door. Mr Kapila stated that he wished to look at the papers (documents) in the possession of the Deputy Registrar. With the permission of the learned judge all counsel went into the well of the court and after viewing the documents, Mr Kapila pointed out that the statements by the Presiding Officers as required by regulation 34 of the Regulations and rule 19 of the Rules were not there and stated that the breach went to the root of the election. At that stage, Messrs Gikandi and Mukele objected to Mr Kapila referring to the result of the scrutiny and stated that he ought to file a substantive application to canvass this point. Mr Kapila stated, in response, that he was not bringing forth any new matter. He was drawing the court’s attention to the fact that the statements by the Presiding Officers were not before the Court as mandated by rule 19 of the Rules.

I have noted that the learned judge had allowed Mr Kapila to submit on aspects of the scrutiny which were not necessarily on vote re-count. “Scrutiny” as correctly pointed out by the learned judge means “a reviewing of the ballot papers following a court order”. The learned judge also correctly pointed out that scrutiny would necessarily involve re-count of votes.

I come back to the hearing before the learned judge on 17th May, 1999. Mr Kapila urged that it was incumbent upon the Court in pursuance of the order for scrutiny, to examine what was counted by the Deputy Registrar and to examine what purports to be the material used at the original count, to ensure that the result is a safe one. Mr Mukele objected to Mr Kapila's right to show as a matter of evidence that the papers required under regulation 38 of the Regulations are missing. He said that was a matter of evidence and not a matter to be canvassed from the bar.

Mr Gikandi also objected to Mr Kapila's oral application to enable him (Mr Kapila) to demonstrate from the bar that the lack of the Presiding Officers' statements could affect the election. Mr Kapila's answer thereto was to the effect that he was asking to know whether a mandatory provision has been complied with, that is, whether or not the Presiding Officers' statements made under regulation 34 of the Regulations were in Court pursuant to rule 19 of the Rules which is as follows:

“19. The Returning Officer shall deliver to the Registrar not less than forty eight hours before the date fixed by the Election Court for the trial the following documents

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(a) -

(b) -

(c) -

(d) -

(e) -

(f) -

(g) -

(h) -

(i) - any statements of the Presiding Officer made under the provisions of regulations 33(2) of the Presidential and Parliamentary Election Regulations.”

The learned judge after hearing the arguments as regards the absence of the Presiding Officers' statements, ruled on 20th day of May, 1999, that Mr Kapila ought to file a written application “to avoid the election on ground of non-compliance with rule 19 of the Election Petition Rules”.

In this appeal, Mr Kapila takes issue with the learned judge's rulings of 17th May, 1999 and 20th May, 1999. By the ruling of 17th May, 1999 the learned judge allowed Mr Kapila to submit on aspects of scrutiny that were not necessarily on vote count but may have emerged out of the recount findings. The learned judge appreciated that “there may be something to be said on those aspects of the exercise”. The learned judge at that time, allowed oral submissions.

By his ruling of 20th May, 1999 the learned judge (as pointed out) confined Mr Kapila to an application (not oral but written) to avoid the election on ground of non-compliance with rule 19 of the Rules.

Mr Kapila says that his right on submissions as granted by the order of 17th May, 1999 was curtailed by the order of 20th May, 1999. I see some justification in Mr Kapila's complaint that the order of 20/5/1999 curtails his right to fully submit on the issues arising out of the absence of the Presiding Officers' statements from the documents produced in Court. At the risk of repetition, I say that the procedure laid down in regulation 34 of the Regulations is of importance when the Court considers the efficacy of the election and that is the reason why rule 19 of the Rules mandates the Returning Officer to include the Presiding Officers' statements amongst the documents delivered to an Election Court.

Faced with the two rulings not quite consonant with each other Mr Kapila decided to seek a review and/or corrections of errors apparent on the face of those orders. He sought permission to submit generally and not to be restricted to submissions on rule 19 of the Rules.

The learned judge in regard to the two rulings said:-

“From these rulings it is evident that the Court's intent is to restrict new application and discussion on the result of re-count and scrutiny which had already been proceeded with so as not to revisit the matters already discussed. The intent of the Court would appear to be to avoid a *res judicata* situation and to limit if any repetitive interlocutory applications and to secure an expeditious disposal of this petition.”

That response of the learned judge was in response to Mr Kapila's sworn statement which reads:

“That theruling of 17.5.99 allowed me to make substantive submissions on the matters discovered during scrutiny. I undertook not to challenge the result of the re-count conducted by this honourable Court, but the said ruling instead forbids me from “making reference” to the re-count. It will be impossible for me to submit on the scrutiny conducted without referring to the re-count and I therefore seek a review of the ruling to reflect the true intent of the learned judge as disclosed by him after the ruling was delivered upon my bringing this matter to his attention.”

The learned judge held that he had no inherent power to reconsider his orders once made unless there is a power of review. Primarily that is a correct statement of law; but there is power to recall an order before it is perfected to amend the same as to rhyme with the intention of the Court. There is inherent power of the Court to recall a judgment before it is perfected. See *Raichand Lakhamsi v Assanand & Sons* [1957] EA 82 Sir Newham Worley then President of that Court said after referring with approval the English case of *Re Harrison's Share Under a Settlement* [1955] 1 All ER 185:

“It is evident that the power to recall a judgment is one of the inherent powers of a Court. In Kenya, as regards both the Supreme Court and the subordinate courts, inherent powers are saved by s 97 of the Civil Procedure Code. We think therefore that the Courts in Kenya have the same inherent power as Courts in England to recall a judgment before it is perfected by a formal decree or order. Such a power is beneficial because, as was pointed out in *Harrison's* case, it avoids the absurdity and consequential expense of the Court having to pass a decree which it knows to be wrong, but which could only be upset by means of an appeal, or, in Kenya by the alternative procedure of an application for review.”

The learned judge held that rulings do not form part of the proceedings. I think the learned judge erred there. Any ruling comes as a result of proceedings, that is, application and arguments and must therefore be a part of the proceedings. It would be erroneous to say that a ruling is not part of the proceedings when it emanates from the proceedings.

Mr Gikandi, whilst opposing the appeal, urged that what was before us was already *res judicata*. He urged that the review application before the learned judge was *res judicata*. But that cannot be. The issue of *res judicata* was argued as a preliminary point before the learned judge. The respondents had lodged, in opposition to the appellant's application for review, a notice of preliminary objection setting out amongst others the following point:

“3. That the matter being canvassed has already been heard and determined through the scrutiny and recount of votes and the matter is therefore *res-judicata* and the Court cannot revisit that matter. The Court is already *functus officios (sic)*”.

The learned judge disallowed that preliminary point and directed Mr Kapila to argue his application forthwith, unless there was to be an appeal against his ruling delivered, on the preliminary point, on 21st July, 1999. Mr Gikandi is now precluded from arguing the same point here, as the learned judge had decided the same and there was no appeal lodged against that ruling.

The substance of Mr Gikandi's opposition to this appeal turned on the issue as to whether or not Mr Kapila could revisit the issue of scrutiny and recount when the superior court had already ruled on it. What the Court ruled on was on the recount which reduced the first respondent's lead on votes to a considerable extent but that could not, as Mr Kapila was seeking to argue, stop a party from drawing the attention of the court to irregularities, if any, in the voting process if that could be established by arguments based on Presiding Officers' statements or if it could be established that the number of ballot papers issued do not tally with the final election result.

Mr Gikandi pointed out that section 28 of the Act declares that noncompliance with written law does not avoid an election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election. This point will of course be a matter of arguments before the superior court if and when Mr Kapila is allowed to put forward his arguments, there, fully, rather than being restricted only to rule 19 of the Rules.

Mr Gikandi also urged that the learned judge had not in his ruling of 20th May, 1999, departed from the substance of his ruling of 17th May, 1999, but I have already pointed out that this was not so. Mr Gikandi also took issue with Mr Kapila on the latter's argument that what he (Mr Kapila) argued was not properly recorded by the learned judge. The record speaks for itself. I have no difficulty in understanding what Mr Kapila's real problem was. That is, that his client's right to make comprehensive submissions on the want or lack of the Presiding Officers' statements was being curtailed, when he was by the ruling of 20th May, 1999 confined to submit only on rule 19 of the Rules.

Whilst it is always desirable to wish to end any litigation it is equally desirable that a party ought to be allowed to canvass fully any relevant germane point he may have. That is a matter of course in our adversarial system. Mr Mukele adopted Mr Gikandi's submissions and added that Mr Kapila could not just submit generally on any matter he liked. He stated that Mr Kapila ought to have brought to his opponents' notice the missing statements. Mr Kapila did so, as I see it, at the earliest opportunity.

It seems to me that there was some amount of confusion in the superior court with regard to regulations 34 and 41 of the Regulations and rule 19 of the Rules. At times a regulation was being referred to as a rule and vice-versa.

What I have said so far takes care of all the grounds of appeal argued by Mr Kapila. I do not see any need to go into each ground separately. What I have said so far disposes of this appeal.

I would therefore allow this appeal with costs. I would also award costs of the review application in the superior court to the appellant. To leave no room for doubt I would direct that Mr Kapila files within the next 30 days a comprehensive application in the superior court which application may not be confined only to provisions in rule 19 of the Rules and in which application Mr Kapila can argue all matters relating to scrutiny with such documentary analysis as Mr Kapila may wish to put forward. The respondents must be given sufficient time to oppose such an application.

Gicheru JA. I have had the advantage of reading in draft what has fallen out of the lips of my learned brother, Shah, JA and have nothing useful to add save that I too would allow this appeal in the terms proposed in his judgment. As Akiwumi JA also agrees, the judgment of the Court shall be in the terms proposed by Shah, JA.

Akiwumi JA. I have had the advantage of perusing the draft judgment of my Lord Shah which sets out fully, the background to this appeal.

The two rulings involved in this appeal are the one made by the learned judge (Hayanga, J) on 17th May, 1999, and that made by him on 20th May, 1999. The former was made upon the application of Mr Kapila, counsel for the appellant, the petitioner, to address the Court not on the findings of the scrutiny and recount of the votes cast, but on other aspects of the scrutiny which do not relate to the physical scrutiny and recount of the votes cast. The learned judge, realising that there could be such aspects of the scrutiny and recount of votes, granted Mr Kapila leave to informally make oral submissions purely on those aspects. The learned judge also, expressed his displeasure at what he referred to as the piecemeal approach being adopted by Mr Kapila whom he thought, should have made submission on all matters related to the scrutiny and recount, and not merely as to the result of the valid votes found to have been cast for the petitioner and the 1st respondent and which of them had more votes than the other and by how much. This is how the learned judge expressed himself:

“However, I recognise that there may be aspects of scrutiny that are not necessarily on vote count and have emerged out of recount finding and therefore in so far as we have focused only on votes there may be something to be said on those aspects of the exercise.

While therefore I accept that Mr Kapila can submit on those aspects, it will be clear to Mr Kapila that he cannot discuss the vote recount and further he ought to have brought up this matter together with the re-count result and finalization of votes instead of treating this from vote-result ... It is this piecemeal approach that is improper.

The result is that Mr Kapila and that means everyone also will now submit on the matter but there will be no reference to the vote and vote-recount.

So I allow the application to that extent.”

The second ruling of 20th May, 1999, appears to have arisen in this way. The learned judge had albeit, rather reluctantly, in his ruling of 17th May, 1999, granted leave to Mr Kapila to make oral submissions on other aspects of the scrutiny and recount of the votes cast. Subsequent to this, and in conformity with the learned judge’s ruling of 17th May, 1999, Mr Kapila’s attempt to orally raise issues, not on the votes actually cast, but on another aspect of the scrutiny, namely, the absence of written statements which the Presiding Officers are required by regulation 34 of the Presidential and Parliamentary Elections Regulations to make, and which had not been included in the documents which the Returning Officer should, in accordance with rule 19 of the National Assembly Elections (Election Petition Rules), deliver to the Registrar of the Election Court “not less than 48 hours before the date fixed” for the trial of the election petition, was thwarted by the learned judge. The learned judge as if he had forgotten what he had reluctantly, but boldly, ordered in his ruling of 17th May, 1999, and indeed, he made no mention of it, refused to hear Mr Kapila, *inter alia*, on the grounds: and this having regard to the background of the ruling of 17th May, 1999, would not seem to be so, that his oral submissions would take the respondents by surprise; strangely, that the issue that Mr Kapila wished to submit upon did not originate from the ruling of 17th May, 1999; that Mr Kapila could not make submissions on the absence of the statements of the Presiding Officers without first giving evidence; that the learned judge should discountenance proceedings that would ambush, embarrass and prejudice the respondents, and delay the proceedings; and that the petitioner should file a written application.

It was not therefore surprising that the ruling of 20th May, 1999, being in conflict as it is, with that of 17th May, 1999, the petitioner sought the review arising out of the two conflicting rulings. The 1st respondent’s preliminary ground of objection that the matter was *res judicata*, was rightly, dismissed by the learned judge who then proceeded to hear the application for review. As I have already alluded to, the two rulings of 17th and 20th May, 1999, are conflicting and there seems therefore to be an error on the face of the record of which the rulings form part. The first ruling clearly permitted the petitioner to be heard informally on issues that arise out of scrutiny but which do not relate to the physical counting, examination and consideration of the votes cast. The petitioner was attempting to exercise this right which was then thwarted by the second ruling for the inept reasons already referred to, such as, the respondent’s being ambushed; and the need to terminate the election petition expeditiously - which could also be achieved by simply asking the Deputy Registrar if the Presiding Officers’ statements were contained, as required by rule 19 of the National Assembly Elections (Election Rules), in the documents submitted by the Returning Officer.

In his ruling of 15th October, 1999, which is the subject matter of the present appeal, the learned judge, and having earlier ruled against matters being *res judicata*, made the following rather confusing observation:

“From these rulings it is evident that the Courts (sic) intent is to restrict new application and discussion on the result of re-count and scrutiny which had already been proceeded with so as not to revisit the matters already discussed. The intent of the Court would appear to be to avoid a *res judicata* situation and to limit if any repetitive interlocutory applications and to ensure an expeditious disposal of this petition.”.

With respect to the learned judge’s holding as to there being an error on the face of the record, he said, and I think that this does not answer the criticism of an error being on the face of the record that:

“There is no mistake apparent on the face of the record where the Court has rightly or wrongly come to a conclusion that may be restrictive or unfavourable to a party in the suit.”

But this was not the issue involved; what was involved was not inconvenience or restrictiveness to parties to a suit or error of law, but the apparent conflict on the face of the record, between the two rulings on the issue whether the petitioner’s counsel could make informal submissions on matters arising out of the scrutiny and recount which did not relate to the physical inspection and counting of the votes cast

and which is an error on the face of the record. The learned judge's observation also seemed to imply that his ruling apparently the one of 20th May, 1999, if anything, should be appealed against. He put this more clearly in the following excerpt from his ruling appealed against:

“... Where a Court is aware of what it is doing, a review does not lie if that decision is erroneous. A Court, and this Court is no exception has jurisdiction to decide wrongly. And it is the Court of Appeal which has the right to correct that, and not for that Court to sit on appeal on its judgment.”.

With respect, the right of review given by section 80 of the Civil Procedure Act and order 44 (1)(b) of the Civil Procedure Rules, requires the learned judge to consider a review application where an appeal lies but as in this case, no appeal has been filed, and it was wrong for this reason, for him to refuse to do so.

In my view, the appeal succeeds and the ruling of the learned judge of 15th October, 1999, is hereby set aside and would further order that the petitioner's counsel should be allowed to file a formal application and to submit on matters discovered during the scrutiny. Costs of the review application and of the appeal to the appellant.

Dated and Delivered at Mombasa this 17th day of March 2000.

J.E.GICHERU

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JUDGE OF APPEAL

A.M.AKIWUMI

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR