REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: GICHERU, AKIWUMI & SHAH, JJ.A.)
CIVIL APPEAL 237 OF 1999

BETWEEN
SAID HEMED SAID .....APPELLANT
AND
EMMANUEL KARISA MAITHA
HOTHAM NYANGE .....RESPONDENT

JUDGMENT OF AKIWUMI, J.A.

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 re-count 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.
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> 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 aluded to, the two Rulings of 17th and 20th May, 1999, are conflicting and there seems therefore to be an error on the face 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 Nairobi this 17th day of March, 2000.

A. M. AKIWUMI

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JUDGE OF APPEAL