



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**JUDICIAL REVIEW APPLICATION NO. 7 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF**

**MANDAMUS TO COMPEL THE RESPONDENTS TO PAY**

**THE DECRETAL AMOUNT OWED TO THE EX-PARTE**

**APPLICANT IN NYERI CHIEF MAGISTRATES COURT ELECTION**

**PETITION NO.1 OF 2017 OMARI WANJIKU ESHA VS IEBC & 2 OTHERS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE SECRETARY TO THE IEBC.....1<sup>ST</sup> RESPONDENT**

**THE SECRETARIAT IEBC.....2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**OMARI WANJIKU ESHA.....EX-PARTE APPLICANT**

**RULING**

1. The Notice of Motion is dated the 28/01/2021 and is made under the provisions of Order 45 Rule 1 of the Civil Procedure Rules; the applicant relies on the grounds on the face of the application and the Supporting Affidavit of the same date; the ex-parte applicant is seeking for the following orders:

(a) Spent

(b) This Honorable Court be pleased to review the Ruling dated 3/12/2020 with a view to determining whether the ex-parte applicant is entitled to costs of the Judicial Review application;

(c) The costs be provided for.

2. At the hearing the applicant was represented by learned counsel Mr. Muhoho whereas the respondent was represented by learned counsel Joe Kathungu; the parties were directed to canvass the application by filing and exchanging written submissions; hereunder are their respective submissions;

#### **APPLICANT'S CASE**

3. The applicant seeks a review of the ruling dated 13/12/2020 as the court did not make a determination on the issue of costs; that for the entire legal process of filing for Judicial Review which was strenuously opposed and the ex-parte applicant upon having been successful in her claim it should follow that she is duly entitled to costs;

4. The ex-parte Applicant is fully aware of the provision to Section 27 of the Civil Procedure Act that in as much as costs follow the event the court may for good reason order otherwise; in this instance the ex-parte Applicant has not mis-conducted herself nor omitted or neglected to do anything and was neither vexatious or oppressive and therefore she should not be deprived of her costs.

#### **RESPONDENT'S CASE**

5. The Application was opposed by the Respondents; in response the Respondents submitted that the application lacked merit and it ought to be dismissed with costs; the Respondents had already been condemned to pay costs as a result of an appeal that was instituted by another party and it would be prejudicial to them to be condemned to pay cost in respect of the judicial review Application;

6. The ingredients for a court to review its judgment or ruling is that there is discovery of new evidence that could not be retrieved before; some mistake or error apparent on the face of the record and any other sufficient cause; these principles are set out in the case of **Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019]**

7. The Applicant had failed to demonstrate any of the above principles to warrant the orders sought; the remedy available for the Applicant if not satisfied with the Order is to appeal to the Court of Appeal against the Order and not to seek a review of the same;

8. From the ruling there were no orders concerning costs of the application; there is no discovery of new evidence and it was evident that the Honorable Court did not make a mistake neither was there an error apparent on the face of the record warranting a review of the ruling of 3/12/2020;

9. The Respondents submitted that the Application was misconceived and an abuse of due process and prayed for the dismissal of the Application and costs be awarded to the Respondents.

#### **ISSUES FOR DETERMINATION**

10. After reading the parties' pleadings and written submissions the court has framed only one issue for determination; which is;

(i) Whether the application meets the threshold for an order for review.

#### **ANALYSIS**

11. The order in issue was delivered on the 3/12/2020 and the segment in which the applicant seeks a review relates to costs and reads as follows;

*'a) That an order of Mandamus is granted compelling the Secretary of the IEBC who is the Accounting Officer to pay the sum of Kshs.325,125/- with interest at court rates from 25<sup>th</sup> June, 2018.'*

12. The remedy for review of an order is set out in Order 45 Rule 1 of the Civil Procedure Rules, it is available to an aggrieved party in any of the following circumstances; where there is discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be produced at the time the order was made; or when there is a mistake or error apparent on the face of the record; or for any other sufficient reason.

13. This court reiterates that the issue of review is clearly spelt out under the provisions of Order 45 of the Civil Procedure Code; the first category is that the applicant must furnish the court with material to demonstrate that there has been discovery of new and important material or evidence after the passing of the order sought to be reviewed; and that even after exercising due diligence, the material, facts or evidence were not within her knowledge nor could it have been produced before the court; and that had these circumstances been brought to the attention of the court before it rendered its decision, then most likely it would have caused the court to arrive at a different decision;

14. The Applicant's complaint pertains to the discovery of costs that this Honourable Court had not awarded her when successful in her pursuit for orders of Judicial Review; this court categorically states that it made its decision with reference to the material that had been placed before it; and this court finds that the discovery herein does not fall within the realm of new and important matters or facts or evidence that was not within the Applicant's knowledge which even after exercising due diligence, could not have been produced before the court earlier.

15. The second principle is that there is an error or mistake apparent on the face of the order; a review under this head must be confined to errors or omissions that are apparent and self-evident and ones that do not require elaborate arguments so as to be established; refer to **Paul Mwaniki vs NHIF Board of Management [2020] eKLR**;

16. From the submissions made by the applicant there is a clear indication that she is seeking for the re-appraisal of the evidence on record which she believes this court ought to have considered when applying or interpreting the law when exercising its discretion to award or not to award costs to her;

17. Reference is made to the case of **Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019]** where it was held that an error in *'the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review'*

18. It was further held that *'an erroneous order/decision cannot be corrected in the guise of exercise of power of review.'*

19. This court opines that the applicant has not been able to point out any mistake or error that is *'staring up'* from the face of the record; any re-appraisal of the material placed before this court would be tantamount to the exercising of an appellate jurisdiction which this court is not seized of;

20. The third principle falls in the category of *'any sufficient cause'*; being successful in her application in seeking judicial review orders does not in itself fall within the ambit of Order 45 and this court finds that it is not a ground to warrant the review or setting aside of the order made on the 3/12/2020.

#### **FINDINGS AND DETERMINATION**

21. For the reasons stated above this court makes the following findings and determination;

(i) This court finds that the application does not meet the threshold for an order for Review;

(ii) The application is found to be devoid of merit and it is hereby dismissed;

(iii) Each party shall bear their own costs.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2020.**

**HON.LADY JUSTICE A.MSHILA**

**JUDGE**



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