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| Case Number:                 | Election Petition Appeal 90 of 2017                                     |
| Date Delivered:              | 16 Jun 2017   |
| Case Class:                  | Civil   |
| Court:                       | High Court at Nairobi (Milimani Law Courts)                             |
| Case Action:                 | Ruling  |
| Judge:                       | Enock Chacha Mwita  |
| Citation:                    | Samwel Mathenge Ndiritu v Martha Wangare Wanjira & 2 others [2017] eKLR |
| Advocates:                   | -   |
| Case Summary:                | -   |
| Court Division:              | Civil   |
| History Magistrates:         | Hon. Kyalo Mbobu, James Atemo and Hassan Abdi                           |
| County:                      | Nairobi   |
| Docket Number:               | -   |
| History Docket Number:       | complaint no 180 of 2017  |
| Case Outcome:                | Application dismissed   |
| History County:              | Nairobi   |
| Representation By Advocates: | -   |
| Advocates For:               | -   |
| Advocates Against:           | -   |
| Sum Awarded:                 | -   |

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO. 90 OF 2017**

**SAMWEL MATHENGE NDIRITU.....APPELLANT**

**VERSUS**

**MARTHA WANGARE WANJIRA.....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

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

**(Being an Appeal from the Judgment and Decree of the Political Parties**

**Dispute Tribunal of Kenya at Nairobi delivered on 12<sup>th</sup> May 2017**

**by Hon. Kyalo Mbobu, James Atemo and Hassan Abdi**

**in complaint no 180 of 2017)**

**BETWEEN**

**SAMUEL MATHENGE NDIRITU.....APPLICANT**

**VERSUS**

**MARTHA WANGARE WANJIRA.....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is an Application for Review dated 12<sup>th</sup> June 2017, and filed in Court on the same day. It is brought under Articles 10, 48, 50, 159(2)(d) and 259 of the Constitution, Section 3A of the Civil Procedure Act Order 45 of the Civil Procedure Rules, 2010, and all other enabling procedures of the law. It seeks one Prayer as follows.

**“THAT this Honourable Court do review and set aside its judgment dated 9<sup>th</sup> June 2017 and the appeal dated 2<sup>nd</sup> June 2017 be allowed as prayed.**

2. The Application is premised on the grounds appearing on the face of the motion and the affidavit of the applicant, Samuel Mathenge Ndiritu, sworn on 12<sup>th</sup> June 2017. The main grounds for seeking review as can be discerned from both the motion and the supporting affidavit, are that the Court in dismissing the appeal, made an error apparent on the face of the record, that the evidence that the appellant had

sought to rely on in this appeal, was not on record before the PPDT and therefore, could not form part of the record of the Tribunal as filed before this Court.

3. It was contended that the tallying sheets contained in the record of appeal (pages 121 to 154), were part of the record before PPDT, having been filed as part of the appellant's submission and were referred to by the PPDT. The applicant's averred, therefore, that it was imperative that the Court reviews its judgment with a view to setting aside the dismissal of the appeal and replace it with an order allowing the appeal.

4. The 1<sup>st</sup> respondent filed a replying affidavit sworn and filed in court on 14<sup>th</sup> June 2014, opposing the application. The 1<sup>st</sup> respondent deposed that the tallying sheets referred to by the applicant at paragraphs 121 to 154 and 156 to 173 of the record of appeal were not part of the record before PPDT since they were not introduced before the tribunal by an affidavit, but are said to have been introduced by way of submissions, an unconventional means.

5. The 1<sup>st</sup> respondent contended that the applicant filed a claim and a Notice of Motion before PPDT but the tallying sheets were not attached to the affidavit verifying the claim or that supporting the Notice of Motion. It was also averred that the affidavit of Perminus Githini Mungai in the record of appeal and the attached tallying sheets were not before the PPDT.

6. During the hearing of the application, Prof. Ojienda, Learned Counsel for the applicant urged the court to allow the application, review its judgment dated 9<sup>th</sup> June 2017 and allow the appeal dated 2<sup>nd</sup> May 2017. Learned Counsel submitted that there is an error apparent on the face of the record since the impugned documents (tallying sheets) at pages 123 – 154 and 156 to 173 of the record of appeal were before the PPDT.

7. According to Learned Counsel, had the court considered these tallying sheets, it would probably have come to a different conclusion since the tallying sheets contain results from across Gilgil constituency which show that the applicant had won the nomination. Learned counsel however conceded that a number of documents including the affidavit by Perminus were not before PPDT, but maintained that the tallying sheets were attached to the applicant's submissions filed before PPDT.

8. Mr Kithi, Learned Counsel for the 1<sup>st</sup> respondent, and also holding brief for Mr Omuganda for 2<sup>nd</sup> respondent, opposed the application and submitted that the impugned tallying sheets were not before the PPDT, and that if anything, they were being introduced by way of submissions as opposed to by way of affidavit, which is unconventional.

9. Learned Counsel contended that since submissions are not pleadings, they could not be a means through which evidence could be introduced before Court. Learned Counsel referred to paragraphs 4 and 5 of the affidavit of Perminus to show that the documents were attached in that affidavit yet it had been conceded by the applicant's Counsel that the affidavit by Perminus was not before PPDT.

10. I have considered the application, the response thereto and submissions by Counsel for the parties. What is before Court is an application for review essentially brought under Order 45(1) of the civil procedure Rules which provides as follows:-

***“Any person considering himself aggrieved:-***

***a. By a Decree 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”.**

11. The court while exercising its review jurisdiction, exercises a judicial discretion which, as usual, must exercise judiciously. The applicant has asked the court to review its judgment delivered on 9<sup>th</sup> June 2016. In that judgment, the court dismissed the appeal at paragraph 36, stated as follows;

**“In this appeal, the documents that have been introduced, have been included without leave of the court and without any application, the court was not even alerted by the appellant’s counsel that these documents were not before either the IDR or PPDT and that he would want them formally included in the record for consideration. It would appear they were intended to aid the appellant otherwise there should have been an application for leave. It has not been explained why this new evidence was not before the IDR and PPDT. and as was stated in *K. Tar Mohammed v Lakhani [1958]EA 567:-***

**“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 could not have made it available” (see *Governors Balloon Safaris Limited v Zakaria W. Baraza t/a Sirima Auctioneers[2016]eKLR*”).”**

12. The applicant’s concern is that in holding that the impugned documents were not part of the PPDT’s record, the court made an error because those documents were actually before PPDT. Prof. Ojienda contended that the tallying sheets were before PPDT and the Court should, therefore, have considered them, and if it had done so, it would have come to the conclusion that the applicant had won the nomination.

13. The law on review under Order 45(1) is very clear. A party seeking review must show that there is an error apparent on the face of the record. This must be the factual basis for review and it should not require elaborate arguments to establish. This was held to be the position in the case of **National Bank of Kenya Ltd V Ndungu Njau (Civil Appeal No 211 of 1996)**, where the Court stated;

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error must be self-evident and should not require elaborate arguments to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect position of the law and reached an incorrect conclusion”**

14. In the case of **Benjoh Amalgamated Limited v Kenya Commercial Bank Limited [2014] eKLR** the court of Appeal expressed the view that the ***basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice.*** The court’s review jurisdiction is meant to assist a litigant correct a genuine error but not aid that litigant to achieve any other purpose.

15. In the present application, the applicant has argued that the tallying sheets were before PPDT. Mr Kithi says on behalf of the respondents that they were not and if anything, they were introduced through unconventional means.

16. When the court is considering an application for review on account of error apparent on the face of the record, it does not have to go far in trying to identify the error. It has only to consider the record, and in my view, the record must be that which is agreed by parties to the litigation to have formed the record of the lower court or tribunal. The issue here seems to be what did or did not constitute the record of the PPDT; and it is clear that both counsel are not in agreement on the issue.

17. To show that the tallying sheets were not before PPDT, Mr Kithi referred to paragraphs 4 and 5 of the affidavit of **Perminus Gichini Mungai** sworn on 9<sup>th</sup> May 2017 (at page 156 of the record of appeal). For purposes of this ruling I reproduce the two paragraphs here below.

**4. *THAT the election results for the position of the member of National Assembly for Gilgil Constituency were as follows:***

**a) *Ndiriti Samuel Mathenge - 14,842 votes***

**b) *Wanjiru Martha Wangari - 14,031 votes***

**c) *Wanderi Gabriel - 4,775 votes***

**d) *Kenda Gichuki - 835 votes***

***(Annexed and marked PGM's a copy of the tallying sheets presented to the Jubilee Headquarters)***

**5. *THAT I did a summary Report to the entire nomination exercise and presented it to Miriam Wamaitha Karugi, the Nakuru County election Board member for Gilgil constituency. (Annexed and marked PGM 2 is a copy of the summary report presented to Reverend Miriam and the 2<sup>nd</sup> respondent herein)***

18. This affidavit, it was conceded, was not before PPDT together with a number of documents referred to in it, but the applicant's Counsel maintained that the tallying sheets were before PPBT and were considered.

19. I have perused the complaint, the verifying affidavit and noted that they did not contain annexures in the form of tallying sheets. The affidavit by Perminus refers to annexures admittedly, not before PPDT. It is also not clear which set of tallying sheets the affidavit contained since the tallying sheets appear at different pages. The affidavit is at page 156 of the record, page 158 has a report, while pages 162 – 173 contain tallying sheets. If the affidavit was to be read sequentially, those are the documents Perminus attached to his affidavit. If, as conceded by counsel for the applicant, this affidavit was not before the PPDT, were these tallying sheets before it?"

20. Secondly, Mr Kithi contended that tally sheets could not be introduced through submissions. Written submissions, is another form of addressing the court merely for purposes of saving time. They are not a form of pleadings. Just like oral submissions when one cannot introduce documentary evidence, written cannot and would not form a means of introducing evidence. Prof Ojienda asked the court to call for the PPDT file and ascertain whether the tallying sheets were before PPDT. With respect, that is not the duty

of the court sitting on appeal. The court has power to call for a lower court's record to satisfy itself as to the correctness of the record. However, in my view, the only record this court can call for is with respect to trial court or tribunal's notes purposes of ascertaining the accuracy of the trial court's notes viz a viz the typed notes, but not what parties filed before that court or tribunal since the documents filed by parties are taken to have been served and parties should readily agree on them.

21. I have perused the PPDT's notes and it is clear that the applicant's Notice of motion dated 9<sup>th</sup> May 2017 was certified urgent and was ordered to be served together with the complaint; responses were to be filed by noon 10<sup>th</sup> May 2017 and the complaint was set down for hearing on the same 10<sup>th</sup> May 2017 at 3.00p.m. On the appointed date, Mr Kithi was present, for 1<sup>st</sup> respondent, Mr Munje for Complainant and Mr Madowo for 2<sup>nd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were given up to 9.00a.m the following day, 11<sup>th</sup> May 2017, to file skeleton submissions of up to 2 pages. Judgment was reserved for 2.30p.m the same day 11<sup>th</sup> May 2017. However, the judgment was delivered on 12<sup>th</sup> May 2017. There was no mention of the applicant's submissions.

22. I have deliberately taken time to go over all this to show that there is no clarity of what really constituted the PPDT's record in terms of documentary evidence produced before that tribunal. The record of appeal filed herein contains a certificate by DANSTAN OMARI MOGAKA signed on 8<sup>th</sup> May 2017, certifying that the record of appeal was correct and had been prepared in accordance with the documents provided/supplied by PPDT. This is despite the fact that Prof. Ojienda conceded that the record contained documents that were not before PPDT.

23. This admission, to my mind, demonstrates that the court's finding in its judgment of 9<sup>th</sup> June, 2017 that there were documents introduced without leave of the court, was not erroneous but had factual foundation. I must also emphasize, that it is not the duty of an appellate court to look for information in order to ascertain the completeness or otherwise of the record of the trial court, especially regarding documents filed by parties before that court. That is a duty bestowed on the litigants.

From what I have stated above the conclusion I come to is that the application dated 12<sup>th</sup> June 2017 is declined and is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 16<sup>th</sup> Day of June, 2017

**E C MWITA**

**JUDGE**



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