



Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested Party) (Constitutional Petition E160 of 2022)
[2022] KEHC 11066 (KLR) (Constitutional and Human Rights) (30 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11066 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E160 OF 2022

AC MRIMA, J

MAY 30, 2022

BETWEEN

FREE KENYA INITIATIVE 1ST PETITIONER
BOB NJAGI 2ND PETITIONER
NICHOLAS OYOO 3RD PETITIONER
MULIALIA OKUMU 4TH PETITIONER
FELIX WAMBUA 5TH PETITIONER
JEREMIAH NYAGAH 6TH PETITIONER
JAMES KAMAU 7TH PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST RESPONDENT
OFFICE OF THE REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT
NATIONAL ASSEMBLY 3RD RESPONDENT
SENATE OF THE REPUBLIC OF KENYA ATTORNEY GENERAL 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

AND



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED PARTY

RULING

Introduction:

1. On April 28, 2022, this Court delivered Ruling No. 1.
2. This court declined to issue any conservatory orders to suspend some provisions of the *Election (General) Regulations*, 2012 (hereinafter referred to as ‘the impugned Regulations’) requiring those intending to vie in various elective positions as independent candidates to avail varying numbers of copies of the national identity cards of their supporters.
3. That decision is yet to be appealed against. However, the 3rd and 4th petitioners herein, Nicholas Oyoo and Mulialia Okumu, (hereinafter referred to as ‘the applicants’) filed a Notice of Motion dated May 16, 2022 seeking to review the dismissal order made on April 28, 2022. I will hereinafter refer to the Notice of Motion as ‘the application’).
4. The application was opposed by the 1st and 5th respondents. The rest of the parties did not take part in the hearing of the application.

The application:

5. The application sought the following orders: -
 1. That this matter be certified urgent and be heard *ex-parte* in the first instance.
 2. That Pending the hearing and determination of this application, the respondents be and are hereby restrained from enforcing the provisions of the Impugned Election (General) Regulations in so far as they seek to have independent candidates deliver duly filled forms of supporters accompanied by corresponding copies of the identification documents of the voters.
 3. That the Honourable court be pleased to review and/or set aside its ruling and orders issued on May 28, 2022 and in its place there be an order maintaining status quo from previous elections pending hearing and determination of the petition.
 4. That the hearing of the petition be moved to a date before May 23, 2022.
 5. That any other, further or alternative orders be made as the court may deem just and expedient.
 6. That the costs of this application be borne by the respondents.
6. The application was premised on 19 grounds which appear on the body of the application.
7. Further, the application was supported by the affidavit sworn by Nichols Oyoo, the 1st applicant, on May 16, 2021. In further support to the application, the applicants filed written submissions.
8. The 1st and 5th respondents filed separate Grounds of Opposition to the application. The 1st applicant further filed written submissions.



9. The application was heard on May 24, 2022, hence, this ruling.

The Parties' cases:

10. In the interest of time, I will not reproduce the respective parties' cases verbatim, but will take into consideration the same as well the written submissions and the decisions referred to in the analysis.

Analysis:

11. Review entails a Court making a departure from its earlier finding on an issue. A court may do so on its own motion or upon application by a party. Review is discretionary.

12. In exercising such discretion, the Court must abide by the principles established for the exercise of such powers either by the law or settled judicial precedents.

13. The power of review in the High Court is anchored in the [Civil Procedure Act](#), cap. 21 of the Laws of Kenya and the [Civil Procedure Rules](#), 2010.

14. Section 80 of the [Civil Procedure Act](#) provides as follows: -

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

15. Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) further provides for review in the following manner:

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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.
(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,

16. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and another v Shah* [1968] EA, upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly *Mbogo and another v Shah*, we lay down the following as guiding principles for



application(s) for review of a decision of the court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a) as a result, a wrong decision was arrived at; or
 - b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

17. The Court of Appeal in Civil Appeal No 2111 of 1996, *National Bank of Kenya v Ndungu Njau* observed as follows in respect of reviews applications: -

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 or omission must be self-evident and should not require an elaborate argument to be established. It will not be 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 proceeds on an incorrect expansion of the law.

18. The import of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* was considered by the High Court in Miscellaneous Application 317 of 2018, *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.



- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

- 19. Returning to the case at hand, the applicants relied mainly on two grounds. They are the discovery of new and important matter or evidence and an error on the face of the record.
- 20. According to the applicants, the new and important matter and evidence had two limbs. The first limb was the position taken by this court on when the impugned regulations came into force and whether those who vied as independent candidates in the previous elections were subjected to the requirement to avail copies of their supporters' identity cards.
- 21. The second limb was that the process of verification of the Voters Register began after Ruling No. 1 was delivered where it became apparent that the need to avail the copies aforesaid was unnecessary.
- 22. On the ground of an error on the face of the record, the applicants reiterated that the error was on the Court's finding on when the requirement to avail copies of identity cards came into being.



23. According to Order 45 of the Rules, for an Applicant to succeed on the ground of discovery of new evidence, the applicant must demonstrate ‘... 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...’
24. The above requirement can be equated to the evidence referred to as ‘new and compelling evidence’ in article 50(6) of *the Constitution*. Speaking of such evidence, the Supreme Court in *Col. Tom Martins Kibisu v Republic* Petition No. 3 of 2014 [2014] eKLR presented itself thus: -
 - (42) We are in agreement with the Court of Appeal that under article 50(6), "new and compelling evidence" means "evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A court considering whether evidence is new and compelling for a given case, must ascertain that it is, a prima facie, material to, or capable of affecting or varying the subject charges; the criminal trial process, the conviction entered; or the sentence passed against the accused person.
25. In this case, the new evidence is that the applicants came to learn during the verification of the Voters Register that the need to avail copies of the identity cards was unnecessary since one could even electronically confirm his or her voter registration status with the Commission through the identity card number only.
26. The question which now begs for an answer is whether the applicants’ revelation will satisfy the test of new and important matter or evidence. I do not think so, and, for some reasons.
27. First, the verification of the Voters Register has no relation to the constitutional and statutory requirements for qualification of persons intending to vie in elections. In fact, the Voters Register is not a preserve of the persons intending to vie in elections, but is open to all registered voters.
28. Second, the new evidence ought to be admissible in law, of high probative value and capable of belief, and which, if adduced would probably have led to a different verdict. In the context of the first reason, there is no way the issue of the Voters Register, even if admissible, would persuade this Court to reach a different verdict. Indeed, it would have been a non-issue in the context of the application for conservatory orders.
29. Third, the verification of the Voters Register is not a foreseeable reason for suspending a legislation.
30. This Court does not, therefore, find favour with the applicants’ assertion on the aspect of discovery of new and important matter and evidence. The first ground, hence, fails.
31. The second ground relates to the alleged error on the face of the record. As said, the error was that the Court made a wrong finding on when the requirement for supply of copies of supporters’ identity cards came into effect.
32. There are some two observations which I must make. First, it is settled in law that an erroneous order/ decision cannot be corrected in the guise of exercise of power of review. Such is only open to appeal.
33. Two, the aspect of when the requirement for supply of copies of supporters’ identity cards by those intending to vie as independent candidates came into effect was put into the correct perspective by



this Court in Nairobi High Court Constitutional Petition No. E219 of 2022 *Bernard Neto Obunga & others v Independent Electoral & Boundaries Commission & others* (unreported).

34. In a ruling rendered on 24th day of May, 2022, this court addressed the issue as follows: -
82. The *Elections Act* was then enacted in 2011 as one of the legislations under articles 82 and 88 of *the Constitution*. With it came the impugned regulations in 2012 which regulations were amended in 2017 vide Legal Notice No. 72 of 2017.
83. The amendments in 2017 included the requirement for submission of copies of identity cards as part of the eligibility documents by candidates to an election. The amendments, however, were to be effective from the General elections of 2022. Therefore, it is now around 5 years since the passing of the contested provisions of the impugned regulations.
35. From the foregoing, it seems that nothing turns on the ground of the alleged error on the face of the record.
36. The upshot is, therefore, that none of the grounds in support of the application is merited.

Disposition:

37. Flowing from the above discussion and the findings, this Court now makes the following final orders: -
- (a) The Notice of Motion dated May 28, 2022 is hereby dismissed.
- (b) The Applicants to bear the costs of the application.
- (c) As earlier ordered, this matter shall come up for directions on June 16, 2022.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MAY, 2022

A. C. MRIMA

JUDGE

Ruling No. 2 virtually delivered in the presence of:

Mr. Murimi Karani, Counsel for the Applicants.**

Mr. Munyua Ezekiel, Counsel holding brief for Dr. Arwa for the 1st Respondent.**

Miss. Wamuyu, Counsel for the 5th Respondent.**

Jared Otieno – Court Assistant**

