REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(*Coram: Maraga, CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ)*

PETITION 7 OF 2018

Consolidated with PETITION 9 OF 2018

–BETWEEN–

MOHAMED ABDI MAHAMUD…… PETITIONER

–AND–

AHMED ABDULLAHI MOHAMAD……1ST RESPONDENT/APPLICANT

AHMED MUHUMED ABDI……2ND RESPONDENT/APPLICANT

GICHOHI GATUMA PATRICK……3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……4TH RESPONDENT

(*Appeal from the judgment and decree of the Court of Appeal at Nairobi (Waki, Kiage & Makhandia JJ.A) in Election Petition Appeal No.2 of 2018, dated 20th April, 2018*)

RULING

A. THE APPLICATION

[1] The Notice of Motion before the Court is dated 4th October 2018 and anchored on Articles 22, 25, 27, 48, 50 and 159 of the Constitution 2010, Rules 18 and 26 of the Supreme Court Rules, 2012 and this Court's Ruling herein dated 28th

September 2018. It is supported by an affidavit sworn by Ahmed Abdullahi Mohamad on even date.

[2] The Application seeks the following Orders:

1. *That this Application be certified as urgent and that the same be heard expeditiously before the Petitions of Appeal are heard.*
2. *That the additional evidence that the Petitioner intends to adduce be taken viva voce and by affidavit; expeditiously before the trial Court, in accordance with Rule 18 (4) & (5) of the Supreme Court Rules, 2012.*
3. *That the Court do issue a specific timeframe within which the taking of additional evidence, and subsequent certification by the trial Court is done;*
4. *That Costs be in the cause.*

[3] The Motion is supported by eighteen grounds summarised as follows:

a) *The Court in its ruling delivered on 28th September 2018 granted the Petitioner leave to adduce additional evidence.*
b) *The Court held that the Petitioner's fair trial rights would be deprived if the Application was disallowed.*
c) *The Court faulted the Petitioner for absconding the trial before the Election Court where he was to be examined in chief and cross-examined.*
d) *The Applicants, the 3rd Respondent and their respective witnesses were cross-examined at length on the allegations made in the Applicants' election petition before the Superior Court.*
e) *That Rule 18 (5) of this Court's Rules permits the taking of additional evidence by the trial Court.*
f) *The trial Court heard the whole witness testimony and would be best placed to take additional evidence to gauge the credibility and demeanor of witnesses unlike this Court.*

g) *That the Applicants have an inalienable right to a fair trial, access to justice, are entitled to equal protection and equal benefit of the law that they should not be deprived of.*

h) *Just as the Applicants were cross-examined before the trial Court, the Petitioner should also be cross-examined to establish the veracity of their statements and to ensure that the principle of equality of arms is accorded to all parties.*

i) *That Articles 10, 20,25, 159 and 259 of the Constitution obligate this Court to apply the law in a manner that justice is achieved and it is in the interests of fairness, justice and equality that the orders sought are granted.*

Applicants' submissions

[4] The Applicants filed written submissions dated 12th October 2018. They urge that by dint of Rule 2 of the Election (Parliamentary & County Elections) Petitions Rules, 2017, the Election Court has the jurisdiction and mandate to take evidence. As such, since in the present dispute it heard the entire witness testimony, then it would be best placed to take the additional evidence ordered by this court.

[5] The Applicants further submit that as this Court did not direct the manner in which the additional evidence would be taken, then it ought to order that it be taken by the trial Court in accordance with Rule 18 (5) of the Supreme Court Rules, 2012 within a defined time frame.

[6] The Applicants in addition, urge that the right to cross-examine opposing witnesses is a fundamental element of due process in both civil and criminal proceedings. They therefore submit in that context that Article 50 of the Constitution grants every person the right to adduce and challenge evidence and denying a litigant the right to cross-examine/ challenge evidence adduced against him is a violation of his non-derogable right to a fair trial.

[7] They buttress the above assertion by citing the following persuasive authorities: the decision of the Supreme Court of Philippines in ***Renato S.***

Martinez v Jose Maria V. Ongsiako G.R. No. 188467 (March 29, 2017; ***Republic v. Sandiganbayan*** 678 Phil. 358 (2011), ***Luncheonette v. Lakas ng Manggaggawang*** [G.R. No. 104768. July 21, 2003; ***Oniah v. Onyia*** (1989) 1 NWLR (pt.99) and ***Chief Raphael Onwuka v. Lukuman Owolewa***, CA/10/99 all which address the issue at hand.

Appellant's submissions

[8] In ***response*** to the Application, the Appellant filed a replying affidavit dated 18th October 2018 in opposition to the Motion. He depones that subsequent to this Court's Ruling of 28th September 2018, he filed an affidavit dated 8th October, 2018 and that the 1st and 2nd Respondents, on their part, filed five affidavits on 12th October 2018 in answer to the issues raised in his affidavit.

[9] It is the Appellant's further deposition that Kampala University, which allegedly conferred the disputed degree on him, has also filed an affidavit and necessary documents that adequately respond to and rebut all the matters set out in the five affidavits filed by the 1st and 2nd Respondents.

[10] The Appellant also filed ***written submissions dated 22nd October, 2018*** and submits that the Applicants' motion is a prohibited attempt at both reviewing this Court's Ruling of 28th September 2018 and to re-open the hearing of his Motion which was the forum at which the Orders sought in the instant Motion ought to have been canvassed for consideration by the Court. As such, he further submits, this application ought not be allowed as it is barred by the doctrine of *res judicata* by dint of Section 7 of the Civil Procedure Act.

[11] The Appellant further submits that the Applicants, in the said attempt at seeking a review of the Ruling delivered on 28th September 2018 have not met the conditions precedent set out by this Court in ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others*** (2017) eKLR ***(Outa)*** on circumstances in which this Court can vary any of its Judgments, Rulings or Orders. That therefore the Application is misguided and ought to be dismissed with costs.

B. ISSUES FOR DETERMINATION

[12] The following issues fall for determination in this Motion:

(i) Whether this Court should direct the trial Court to take the additional evidence viva voce and by affidavit in accordance with Rule 18 (4) and (5) of the Supreme Court Rules, 2012;

(ii) Whether the Applicants should be allowed to cross-examine all the deponent(s) of the affidavit(s) to be filed by the Petitioner bearing additional evidence.

C. ANALYSIS

(i) Whether this Court should allow the trial Court to take the additional evidence viva voce and by affidavit in accordance with Rule 18 (4) and (5) of the Supreme Court Rules, 2012;

[13] It is imperative, in a bid for clarity, for us to reproduce the Orders in our Ruling dated 28th September, 2018. We delivered ourselves thus at paragraph 91:

> **[91]** Consequently, we make the following Orders:
>
> ***(i) The Application by the Appellant is allowed;***
>
> ***(ii) The Appellant will serve the Respondents with the additional evidence by way of affidavit;***
>
> ***(iii) The Respondents will respond to the additional evidence by way of affidavit;***
>
> ***(iv) The Petition will be set down for hearing on a priority basis;***
>
> ***(iv) Parties shall bear their own respective costs***.

[14] In the aforementioned Ruling, we thus allowed the Petitioner to adduce additional evidence and we were categorical that this additional evidence was to be by way of affidavit evidence. In addition, the Respondents/Applicants herein were to respond to any such additional evidence by way of affidavit as well.

[15] It seems to us, that by filing an Application seeking orders of this court to direct the trial Court to take the additional evidence *viva voce* and by affidavit, the Applicant is in essence asking us to review or vary our Orders of 28th September, 2018 which we cannot help but frown upon for reasons to be shortly stated.

[16] In that regard, the provisions of Rule 18 (4) and (5) of the Supreme Court Rules, 2012 also bear re-stating. They provide:

> ***18. Evidence before the Court***
>
> **.....**
>
> ***(4) Where additional evidence is taken by the Court, it may be oral or by affidavit, and the Court may allow cross-examination of any witness.***
>
> ***(5) Where additional evidence is taken by the trial court, the trial court shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness giving the additional evidence.***

[17] We must in addition state that with regard to Election Petitions, the High Court has obligation to hear and determine election disputes within six months of the date of lodging the Petition in accordance with Article 105 (2) of the Constitution and Section 75 (2) of the Election Act. This is a mandatory prescription.

[18] To this end, the Chief Justice exercises powers conferred upon him under Section 75 of the Election Act and Rule 6(3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and publishes the names of designated judges in the Kenya Gazette to form the Election Courts to hear election disputes.

[19] Once the designated Election Courts have heard and determined the election disputes, they become *functus officio*. As such, Rule 18 (5) of the Supreme Court Rules 2012, cannot possibly apply to election disputes that begin at the High Court and end up in this Court because of the strictures of time embedded in the

Constitution and statute but may well apply to regular appeals before this Court. As a logical consequence therefore, we cannot direct the trial Court to take the additional evidence in any manner lest of all as suggested by the Applicants.

(ii) Whether the Applicants should be allowed to cross-examine all the deponent(s) of the affidavit(s) to be filed by the Petitioner bearing additional evidence.

[20] Having addressed our minds to Issue no (i) above**,** we are not convinced in the circumstances that there is any need to allow cross-examination by or of any party in this Court and in any event, no party will be prejudiced by such an action as all necessary material to enable us hear and determine the appeal is already on the record. It must in that regard be remembered that the grant of an order to adduce evidence is not a routine procedure of this Court and we therefore underscore our holding in the Ruling of 28th September, 2018, that this Court '*will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.'* To allow cross-examination at this stage would stretch that holding to unreasonable levels.

[21] We are also persuaded by the Appellant that this Motion is an attempt to review our earlier Ruling and we have said why we cannot allow such a review. In that context, in ***Robert Tom Martins Kibisu v Republic***, Supreme Court Application No. 3 of 2014 [2018] eKLR (***Kibisu***), this Court was called upon to review a decision it had earlier made in a matter involving the same parties, on the basis that there were errors apparent on the face of the Judgment. However, although the Application was framed as one seeking review for correction of errors apparent on the face of the record, it in essence expressed discontentment with the Court's findings and /or appreciation of legal principles and their interpretation thereof. The Applicant in doing so relied on our decision in ***Outa.***

In dismissing his application we found that he had failed to meet any of the exceptional circumstances under which a review may lie to this Court as elaborated in the ***Outa*** case.

[22] In ***Outa***, for avoidance of doubt, we were categorical that this Court, in exercise of its inherent powers, on its own motion or upon application by a party, may review any of its Judgments, Ruling or Orders in exceptional circumstances so as to meet the ends of justice. We limited those circumstances to situations where:

> ***(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;***
>
> ***(ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;***
>
> ***(iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;***
>
> ***(iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision***.

[23] Like we found in ***Kibisu***, the Applicants in the instant matter have not met the conditions precedent set out in ***Outa*** to persuade us that we ought to review or vary our Ruling of 28th September, 2018 or what value there would be in a second appeal, principally on matters of constitutional interpretation or application, for further evidence to be adduced in cross-examination when all necessary affidavits have already been filed by the parties. In addition, the Applicants have not sought to review our decision in ***Outa***: and/or distinguish its applicability to an application such as the present one.

[24] In a nutshell, the Applicants have not demonstrated that the Ruling of 28th September 2018 was: obtained fraudulently or deceitfully, a nullity, made under a mistaken belief that the parties had consented thereto, was rendered on the basis of a repealed law or as a result of a deliberately concealed statutory provision.

[25] We must also emphasize that we directed that all parties ought to adduce their additional evidence by way of affidavits and responses to any such evidence to be by way of affidavit too. We see no basis to review or vary that Order which in fact is precisely what the Applicants are asking us to do. The Application is thus one fit for dismissal.

D. ORDERS

[26] Consequently upon the above findings, we make the following Orders:

(i) The Application by the Applicants that the additional evidence be taken viva voce and by affidavit expeditiously before the trial Court is hereby dismissed.

(ii) The Application by the Applicants to cross-examine all the deponent (s) of the affidavit (s) bearing additional evidence is hereby disallowed.

(iii) Costs shall abide the determination of the appeal.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 12th Day of November 2018.

.....	.....
D.K. MARAGA	**M.K IBRAHIM**
CHIEF JUSTICE/PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	.....
J.B. OJWANG	**S.C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA