**Said v Maitha**

**Division:** Court of Appeal of Kenya at Mombasa

**Date of judgment:** 17 March 2000

**Case Number:** 237/99

**Before:** Gicheru, Akiwumi and Shah JJA

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Election petition – Submissions – Matter of vote counting closed in court – Advocate observing that presiding officer not presenting certain statement on votes to court as required under rule 19 of National Assembly Elections (Election Petition) Rules – Court ruling that advocate to submit on rule 19 only – Whether the ruling appropriate.*

*[2] Practice – Review – Court making non-conforming rulings – Whether court has power to review the rulings to conform with court’s intention.*

*[3] Practice – Ruling – Court proceedings – Whether ruling part of the court proceedings.*

*[4] Practice – Submissions – Whether desirable to restrict a party’s submissions on certain point.*

**Editor’s Summary**

The Appellant and the Respondent both contested for the seat of the Member of Parliament, Kisauni constituency, in 1997 general elections. The results indicated that the Respondent had won by a margin of 534 votes against the Appellant. The Appellant alleged irregularities and improper vote counting and filed a petition. The Appellant then made an application for scrutiny and recount, which was allowed on 18 March 1999. The recount was carried out in the presence of, among others, a deputy registrar of the High Court. The margin of the votes was then reduced to only 52. On 17 May 1999 the Appellant’s advocate sought to make submissions, not on the recounted number of votes, but on some aspects of the scrutiny particularly that the presiding officer ought to explain whether the number of voting papers issued coincided with the number of votes cast added to the number of papers spoilt or remaining. The counsel further stated that the presiding officer had not given statement of the votes issued, cast and returned as required under regulation 34 and rule 19 of the National Assembly Elections (Election Petition) Rules. Counsel for the Respondents objected to this submission and stated that the Appellant’s counsel was submitting on matters of evidence from the Bar. The court on 20 May 1999 ruled on the objection to the submissions of 17 May and ordered that the Appellant’s counsel ought to file a written application touching on the ground of non-compliance with Rule 19. Counsel for the Appellant applied for review of the decision of 20 May on the ground that his right to submit on 17 May was curtailed by the order of 20 May which restricted his right to fully submit on the issues arising out of the absence of the presiding officer’s statements. Counsel wanted to submit generally and not on rule 19 only. The High Court ruled on the application for review that the court did not have inherent power to consider its orders unless there was a power of review. The court also said that the rulings of 17 May and 20 May did not form part of the proceedings. The Appellant appealed against the orders of 17 and 20 May 1999.

**Held** – Whilst it is desirable to end any litigation it is equally desirable to allow a party to canvass fully any relevant point he may have on the issues (per Shah JA). The court has inherent power to recall an order before it is perfected to amend the same to rhyme with the intentions of the court*. Raichand Lakhanshi v Assanand and sons* 1957EA 82 followed. The court ought not to reject an application for review merely because the Applicant may appeal instead (per Akiwumi JA). Rulings form part of the court proceedings that is, application and arguments and must therefore be part of the proceedings. The Appellant was allowed to file an application in the High court without restriction to rule 19. **Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Lakhamshi v Assanand and Sons* [1957] EA 82 – **F**

***United Kingdom***

*Re Harrison’s Share Under a Settlement* [1955] 1 All ER 185

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