



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION APPEAL NO 4 OF 2018

PERPETUA MPONJIWA.....APPELLANT/APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

EVE MALENYA.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY.....3RD RESPONDENT

THE SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY...4TH RESPONDENT

HON. BEATRICE ELACHI.....5TH RESPONDENT

RULING

1. The ruling herein relates to a notice of motion application dated 25th February 2020, filed by the Appellant (herein “the Applicant”), under the provisions of; section 5 of the Judicature Act, the Election Act, Article 159 of the Constitution of Kenya 2010 and all other enabling provisions of the law.

2. The Applicant is seeking the following orders: -

a) The Honourable court be pleased to summon the 4th Respondent; the Speaker of the Nairobi County Assembly, Hon Beatrice Elachi, to show cause why she should not be cited for contempt of court;

b) The Honourable court be pleased to cite the 4th Respondent; Hon. Beatrice Elachi, the speaker of the Nairobi City County Assembly for contempt of court and be committed to civil jail for six months for deliberately disobeying the order of the court made on the 30th January 2020;

c) The Honourable court be pleased to make such other order that it may deem necessary in the interest of justice; and

d) That the costs of the application be provided for.

3. The application is supported by the grounds thereto and an affidavit of the even date filed in court on the 26th February 2020. She avers that, pursuant to the judgment and decree of the Honourable court dated 17th July 2019, the parties have filed

various applications; being application dated 5th July 2019, filed by the Applicant, an application dated 29th May 2019, filed by the 1st Respondent and the application dated 4th June 2019 filed by the by the 3rd Respondent, which the Honourable court has heard and determined, vide ruling delivered on the 30th January 2020.

4. The Honourable court by the said ruling ordered the 4th Respondent to swearing the Applicant as a member of Nairobi City County Assembly, within 7 days of the order and/or with effect from the 11th February 2020 and the order brought to the attention of the 4th

Respondent. However, from the date of the service of the order, the 4th Respondent has failed; to comply with the order despite a letter served by the Applicant's lawyers dated 13th February 2020 requiring the 4th Respondent to comply with the court order. The Applicant avers by failing to comply with a court order the 4th Respondent is in contempt thereof and is infringing on her right to participate in legitimate political process.'

5. The application was served upon the 4th Respondent, but it has not filed any response thereto; as at the date of this ruling. The 4th Respondent told the court on 3rd March 2020, when the matter was fixed for directions inter parties that, prior to filing and service of the application, the lawyers of the 4th Respondent wrote to the Applicant's lawyer, Mr Ogado on 21st February, 2020, copied the letter to the Hon Deputy Registrar, informing the lawyer that, the Speaker was informed of; a criminal case number 284 of 2020; Republic vs Perputua Mponjiwa whereby the Applicant is charged with forging document. The 4th Respondent was thus seeking for the direction of the court and the 4th Respondent shall comply.

6. I have considered the application, the grounds and the affidavit in support thereof. I have considered the fact that the application is basically unopposed. I have also considered the 4th Respondent's address to the court that all that it is seeking for is direction following the alleged criminal case. I find that, first and foremost there is no iota of evidence before the court that; the criminal case exists, this court has not been served with at least a copy of the charge sheet, and even more that, the 4th Respondent was served with the same. Secondly, there is no evidence that, there is a lawful order issued by any court of competent jurisdiction staying the order of this court that, the Applicant should be sworn as ordered. At most the 4th Respondent should have responded to the averments in the affidavit in support of the application through a formal documents and not address the court from the bar.

7. The law is settled that, under section 5 of the Judicature Act, the court is empowered to punish any person for contempt of its order. There is plethora of authorities on the need to respect court orders and in the case of; Kenya Human Rights Commission vs Attorney General and another (2018) e KLR, the court stated that: -

"Article 159 of the constitution recognizes the judicial authority of courts and tribunals established under the constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people for that reasons, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the constitution and the law and exercises its judicial authority through its judgements, decrees, orders and or directions to check government power and keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate"

8. In the same vein, it was held in; Republic vs Returning Officer of Kamkunji Constituency and the Electoral Commission of Kenya HCMCA No 13 of 2008, that the court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law and in the case of; Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another CCT 19/11/ (75/2015) Nkabinde J observed;

"the rule of law as a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of the state to which they apply, and no person or organ of the state may interfere in any matter, with the functioning of the court. It follows from this that; disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced"

9. Similarly, in the case of; Republic v Principal Secretary Ministry of Defence EX parte George Kariuki Waithaka [2019] e KLR the court stated that; -

"it is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders."

10. It is therefore clear that, unless there is a valid reason not to obey a valid court order the order must be obeyed. I find no valid reason advanced herein. The provisions of Article 193 of the Constitution of Kenya stipulates the qualifications of a member of the County Assembly and states;

"(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

(2) A person is disqualified from being elected a member of a county assembly if the person—

(a) is a State officer or other public officer, other than a member of the county assembly;

(b) has, at any time within the five years immediately before the date of election, held office as a member of the Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is of unsound mind;

(e) is an undischarged bankrupt;

(f) is serving a sentence of imprisonment of at least six months; or

(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution.

(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has of the relevant sentence or decision has been exhausted.

11. Indeed, these provisions are provided for in the same manner under section 25 of the Elections Act N0.24 of 2011, which provides the qualifications of nomination as a member of the County Assembly.

12. It is clear herein that, the Applicant has not been convicted of any criminal offence and/or is disqualification under the aforesaid provisions. Therefore, even if the Applicant has been charged as alleged she has not been convicted and sentenced to an imprisonment of at least six months. She is presumed innocent until proved guilty.

13. In that regard I direct that, the 4th Respondent complies with the court order within fourteen (14) days of the date of this order or appear in court at the expiry of that period to show cause why prayer (3) of the application cannot be granted.

14. It is so ordered

Dated, delivered and signed in an open court this 23rd day of June 2020

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Ogado for the Applicant

No appearance for the 1st Respondent

Mr. Oregio for the 2nd Respondent

Mr. Oregio for the 3rd Respondent

Mr. Kokebe for the 4th Respondent

No appearance for the 5th Respondent

Robert.....Court Assistant