



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

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 PAR.....3RD RESPONDENT

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

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

RULING

1. Pursuant to a ruling delivered herein on 23rd day of June 2020, the court ordered the 4th Respondent to swear in the Appellant as a Member of the Nairobi City County Assembly, within fourteen (14) days of the date of the order. That if the Appellant is not sworn in, the 5th Respondent would appear in court, at the expiry of that period to show cause why she could not be committed to civil jail for contempt of the court order made on 30th January 2020.

2. Apparently, the Appellant was not sworn in and consequently, she moved the court to enforce the order requiring the 5th Respondent to show cause why she could not be committed to jail for contempt of the court order. On 30th July 2020, it was confirmed to the court that, the swearing in did not take place, whereupon the 5th Respondent was given an opportunity to explain the reason why.

3. The 5th Respondent informed the court on oath, that, she had invited the Appellant on 1st July 2020, for swearing in on 2nd July 2020. And indeed the Appellant attended the Nairobi City County Assembly for the purpose of being sworn in. As per the requirement of the law, she was supposed to be escorted into the Assembly by 3rd Respondent, which is the sponsoring party.

4. However, the 3rd Respondent disowned her. She then requested the Sergeant at arms to step in whereupon, the members of the sponsoring party caused chaos and she had to call in the security personnel. For the sake of the Appellant safety, she was removed from the Assembly. That indeed the Appellant also reported the matter to the police and she was issued with an P3 form. The 5th Respondent stated that the swearing in, is a political matter and she needed to work with the sponsoring political party. Further she too needed security for herself.

5. The Appellant's counsel sought to cross examine the 5th Respondent and to facilitate the legal process of; cross examination, the court ordered that, the 5th Respondent file an affidavit on the averments made in court before cross examination. Subsequently, the 5th Respondent filed an affidavit dated 15th July 2020, wherein she reiterated what she had stated in court maintaining that, she duly acted upon the court orders of; 30th January 2020 and 23rd June 2020.

6. That she issued directions regarding the swearing in ceremony as aforesaid for 2nd July 2020, and as per the standing orders, she presided over the sitting of the assembly with the intention to swear in the Appellant as required of the first order of the day, pursuant to the provisions of; Order No 4(6) of the Nairobi City County Assembly Standing Orders.

7. However, as the Standing Order No 4(7) of the Standing Orders required the participation of the sponsoring political party as aforesaid. She maintained that, she attempted several times to bring the house to order without success, and the process aborted.

8. In cross examination, she confirmed that she was aware of the procedures applicable in the swearing in process. She maintained that the Orange Democratic Movement Party, that was supposed to give her support did not. Asked as to whether she could identify and tell the court the particular ODM party members who disrupted the swearing in, she said she could not. However, she confirmed that they were not Jubilee party members.

9. She also stated that, she did not receive any formal communication from ODM Party regarding the swearing in of the Appellant. She maintained that, the process requires political support. In re-examination she stated that, there is a process to be followed and agreed that the conduct of the members of the 3rd Respondent is subject to discipline but the Speaker has to be moved by a member for the same.

10. I have considered the explanation offered by the 5th Respondent, and in particular what transpired on the material date. I also take note of the record of the HANSARD of the Assembly where the 5th Respondent states as follows:

“I am not adjourning the House. Hon. Members of the Minority you can walk out but we are not adjourning the House, but you can walk out. I have given you permission. The Sergeant-at-Arms to ensure that, the member is protected. I Order the Sergeant-at-Arms and the police to protect Ms. Perpetua Mbojiwa. For the sake of this institution, I want it go on HANSARD because I will walk with it in court. This is not a joke. I also have children and I cannot go to civil jail because that, and it has to go on the HANSARD that I will walk to court on 8th; that indeed I walked the member into the chamber, it was disrupted and I was unable to swear her in. It should be very clear in the HANSARD. This is my life also; not just the life of one person. And when the Judge orders that I go for civil jail tomorrow, it is not right. I want it to go in the HANSARD that I did my best. For those who will now follow, next I think they will face the Judge, not me. I remove myself from the matter completely and remove the House also from this matter.”

11. It is therefore clear from the above that, the 5th Respondent had all the intention to obey the court order and indeed made attempts to swear in the Appellant, however, the effort was frustrated and the process aborted. This is further supported by the fact that, the Appellant also reported the incident to the Police. The 5th Respondent herein cannot therefore be faulted for her inability to carry out the court orders. Further, it is also clear that she is no longer the Speaker of the assembly. Consequently, committing her to civil jail will not achieve the purpose for which the order was intended.

12. What is clear is that, the members of the sponsoring party by their conduct, purposed with intent to defeat the process and consequently frustrating the enforcement of the court order. It is not proper for persons elected to formulate the law, enforce it and who swore to uphold the law, and protect the constitution of Kenya, to behave in such “contemptuous manner” They should not be allowed to defeat the admission of justice.

13. Indeed, courts do not make orders in vain and the court cannot condone the aforesaid conduct. It is therefore important that the court order herein be obeyed. If the members of the sponsoring party are intentionally frustrating the process, then the Hon Speaker who has the primary responsibility must move the court for the necessary orders to enforce the order.

14. In that regard, I direct that the 4th Respondent complies with the court order issued herein requiring it to swear in the Appellant and within the next fourteen (14) days of the date of this order. I further order that this order be served on the current Hon. speaker of the Nairobi City County Assembly for compliance. In default the Speaker be cited for contempt. No orders are made as to costs at this stage.

15. It is so ordered

Dated, delivered and signed on this 18th day of September, 2020

GRACE L. NZIOKA

JUDGE

In the presence of

Mr. Ogado for the Appellant

No appearance for the 1st Respondent

Mr. Ogado for the 3rd Respondent

Mr. Kokebe for the 4th and 5th Respondent