



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO.77 OF 2017

IN THE MATTER OF KITUTU CHACHE NORTH CONSTITUENCY, BONCHARI CONSTITUENCY PARLIAMENTARY SEATS AND GUBERNATORIAL SEAT FOR KISII COUNTY

BETWEEN

HON. CHRIS OBURE & 2 OTHERS APPELLANTS/APPLICANTS

VERSUS

JUBILEE PARTY & 5 OTHERS RESPONDENTS

RULING

Background.

1. The appellants/applicants filed an appeal before this honourable court having been dissatisfied with the ruling of 25th May 2017 by the Political Parties Tribunal (PPDT) at Nairobi. The Tribunal had held that the 1st appellant had committed an act of contempt thereby quashing the elections held by the 1st respondent on 12th May 2017. The appellants/applicants stated that the PPDT does not possess and/or have any powers to punish or enforce orders of contempt of court. The parties appeared before this Honourable court and recorded a consent.

2. The consent that the parties filed was as follows:

That the judgment delivered in PPDT Nairobi Case no. 254 of 2017 in favour of;

i. Dr. Alfred Ndemo Ongera

ii. Kennedy Nyankieya Nyamweya and

iii. Alfred Akunga Nyangweso

Is to be compromised in the following terms and conditions:

1. That the parties not to carry out fresh nominations as ordered by the PPDT due to the timelines set out by the Independent Electoral and Boundaries Commission (IEBC) for presentation of names by the 1st respondent (Jubilee Party)

2. That the 1st respondent (Jubilee Party) is at liberty to present the names of Hon. Christopher Mogere Obure as the gubernatorial candidate for Kitutu Chache North Constituency, Hon. Zebedeo John Opore as its candidate for Bonchari Constituency and Hon. Simon Ogari as its candidate for Bomachoge Constituency.

3. That the 2nd to 6th Respondents in the Appeal have agreed to support the party in its policies and programmes and will participate in the campaign process particularly in the presidential Campaigns in support of Jubilee Party Presidential Candidate; and

4. That the 1st respondent (Jubilee Party) has agreed to support the 2nd to 6th respondents as they should run as independent candidates; and

5. That the 1st respondent (Jubilee Party) agrees to compensate the 2nd to 6th respondents in respect of the expenses and costs incurred individually during the campaign period for nomination and refund the amounts paid by the respondents for registration and nomination fees; and

6. That both parties (i.e Jubilee Party and the 2nd to 6 respondents) hereby do agree to implement all terms and conditions as indicated in a signed agreement marked as appendix “1” herein; and

7. That the 1st respondent (Jubilee Party) and the Appellants herein shall meet the party and party costs (Advocates costs) in the Political parties Tribunal and in the High Court Appeal ; and

8. That both parties undertake to act in good faith.

3. The appellants/applicants herein filed the application dated 26th July 2017 after being granted leave to cite the respondents for contempt. The application sought the following orders:

i. That this matter be certified as urgent and service be dispensed with in the first instance, (spent)

ii. That the 2nd to 6th respondents herein be granted leave to cite the 1st respondent for contempt, (spent)

iii. That this Honourable Court declare that the 1st respondent has breached clause 4, 5, 6 and 8 of the terms and conditions of the consent agreement of 30th May 2017.

iv. That this Honourable Court do issue a declaration to the effect that the nomination certificates issued by the 1st respondent with regard to the gubernatorial in Kisii county, the parliamentary positions in Kitutu Chache north constituency, Bomachoge Chache constituency and Bonchari constituency is null and void.

v. That this Honourable Court do issue a declaration to the (IEBC) stopping it from recognizing the nomination certificates issued by the 1st respondent (Jubilee Party) in favour of the gubernatorial position in Kisii county and the parliamentary position in Kitutu Chache north constituency, Bomachoge Chache Constituency and Bonchari constituency in Kisii county until the 1st respondent issues valid nomination certificates.

vi. That this Honourable Court do issue a declaration requiring the respondents to show cause why they should not be cited for contempt for acting in breach of this Court’s consent agreement dated the 30th day of May 2017.

vii. That the 1st respondent (Jubilee party) to meet the costs of this application.

4. The application was supported by an affidavit sworn by Alfred Akunga Nyangweso. He stated that the parties filed the consent agreement dated 29th May 2017 which the court considered and issued orders on the same on 30th May 2017. That since issuance of the said orders, the 2nd, 3rd, 4th and 5th applicants and himself have faithfully honoured the agreement by supporting the party in its policies and programmes. They also participated in the campaign process particularly in the presidential campaigns in support of 1st respondent’s Presidential candidate.

5. He averred that efforts to have the 1st respondents honour its part of the consent have not yielded fruit. It was their concern that if the 1st respondent is allowed to continue dishonouring the consent agreement, the ends of justice will be defeated and that after the 8th August 2017 elections all the parties will already have gone through the electoral process and there shall be nothing to lose. They prayed that the orders sought be granted as they were sought in the interest of justice.

6. In response the respondents filed a replying affidavit sworn by Mary Karen-Kigen Sorobit dated 31st July 2017. She averred that the contention that the respondent breached clause 4, 5, 6, and 8 of the consent filed in court on 30th May 2017 is not factually correct since the consent was not the primary agreement between the parties. She said they only entered it to give effect to an agreement that the parties had signed on 27th May 2017 which was attached as an annexure to the replying affidavit.

7. She went ahead and quoted clause (g) of page 2 of the agreement which says:

“the aspirants undertake to instruct their advocates to execute a consent order to be filed in the High Court compromising the dispute but in any event, the parties will be at liberty to file this agreement in court as evidence of the fact that the dispute has amicably been settled”

8. She further stated that by the time the consent was being filed the conditions set out in her paragraph 5 had already been fulfilled and the agreements that had been pre negotiated were already settled in full. She attached receipts dated 27th May 2017 at paragraph 5 of the consent filed on 29th May 2017. She deponed that the applicants had been supplementing terms of the agreement by demanding monies that were not agreed upon. She annexed two letters dated 2nd May 2017 and 5th June 2017 respectively in which the applicants were demanding for ksh.127,062,053/= which was not in the agreement signed on 27th May, 2017.

9. It was her contention that such figures were not contemplated in the settlement agreement because the judgment of the PPDT had been appealed against and they had compromised it by the consent filed on 29th May 2017. The various letters from the applicants have been responded to by the respondents as they had met their end of the bargain. The respondents urged the court to dismiss the application with costs to the 1st respondent as it is in bad faith.

10. The applicants filed a further affidavit by Alfred Nyangweso on 3rd August 2017 by. He stated that the annexure “AAN1” is a true copy of the settlement agreement signed on 27th May 2017 and further that clause 4, 5, 6 and 8 of the consent agreement had not been complied with. He deponed that the averments that the consent judgment was settled to the satisfaction of the applicants are dishonest.

11. He stated further that the monies that the applicants received on 27th May 2017 were payments for them to register as independent candidates and not compensation. In addition to that the annexure marked as “AAN4” was a breakdown of nomination campaign costs and expenditure which the respondent ought to compensate. He reiterated and maintained that the consent agreement was breached.

12. Before the application dated 26th July 2017 could be heard the appellants/applicants filed yet another application dated 15th August 2017. Seeking the following orders:

i. The respondents (Jubilee party) to appear before this honourable court to show cause why they have not honoured the consent agreement entered into on the 29th day of May 2017 under the hand and seal of the court, in which they have been cited for contempt.

ii. The court to compel the respondents to honour the consent agreement given by the order of the court on the 29th May 2017.

iii. The 2nd respondents (Raphael Tuju, Secretary general (Jubilee party) be punished for contempt

iv. Costs to be in the cause.

13. The same is supported with the affidavit of one Alfred Akunga Nyangweso which I have read. I have also read through the affidavit in support of the application dated 26th July 2017. The contents of both affidavits are one and the same. The respondent filed a replying affidavit by Mary Karen – Kigen on 18th January 2018 in response to the application dated 15th August 2017. In it she asserts at paragraph 6 that the applicants were paid the amounts indicated therein. She states that the amounts claimed as indicated in her paragraph 9 are exorbitant and with no basis.

14. Dr. Khaminwa based his submissions on the application dated 26th July 2017 while counsel for the respondents based their submissions on the application dated 15th August 2017. Since both applications are seeking similar orders I shall deal with them simultaneously.

15. Both parties filed written submissions. Counsel for the applicants submitted that the Contempt of court Act is in place to make sure that court orders and rulings are complied with. That the applicants came to court so as to enforce a consent agreement that was in place and was specific that the respondents were to compensate the applicants in exchange for the applicants’ surrendering their nomination candidature within the respondent’s party bi-elections. During the time they made a consent agreement it was never indicated that there was compensation that was given to the applicants before the terms of the agreement were agreed on. Counsel cited various cases in support of their case.

16. He stated that this court has jurisdiction by virtue of **Article 169(1) (d)** of the **Constitution of Kenya** as well as **Section 7(1) of the Contempt of Court Act** since the tribunal is defined as a subordinate court in the Constitution and the high court has jurisdiction to punish for contempt of court in subordinate courts. That the powers are further enshrined in Section 5 of the Judicature Act which empowers the high court and the court of appeal to punish contemnors. Under **Section 4(1) of the Contempt of Court Act 2016** contempt is defined as:

a. Civil contempt which means willful disobedience of any judgment, decree, direction order, or other process of a court or willful breach of an undertaking given to a court;

17. Counsel submitted that what the applicants had been paid was money for registration as independent candidates and not compensation. Further that the agreement was pre-dated.

18. He further submitted that the validity of the consent agreement is not in dispute and that the respondents agree that they owe the applicants compensation accordingly. He urged the court to find the advocates jointly in contempt with the respondents as they are responsible for advising their clients to disobey a court order. He also urged the court to consider whether there has been prejudice to the interest of the decree holder so as to make committal the proper remedy.

19. He argued that the applicants suffered dual losses being that they lost out on the opportunity to have been elected as well as lost out on the consideration for compensation as they had provided in the consent agreement. He contended that the punishment by the court is for the protection of the public and in the interest of justice, and prayed that the 1st respondent be punished for contempt and payment of costs.

20. Counsel for the respondents also filed submissions in which they opine that the only issue for determination is whether the respondents are in contempt of the consent order dated 29th May 2017. They submit that before the court can exercise its judicial authority to punish a party for contempt it must first be established by the applicants that there has been willful disobedience of any judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given to a court

21. It therefore means that it must actually be proved that the respondents indeed disobeyed the court order before they are cited for contempt. In their submissions they state that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.

22. In support of this they cited the case of **Katsuri Limited versus Kapurchand Depar Shah (2016) eklr**. They further submitted that the

evidence adduced through the settlement agreement and acknowledgement signed by the parties, the applicants had already been compensated meaning the respondents have complied with the consent order of 29th May, 2017. They urged the court to dismiss the application dated 15th August, 2017 as there had not been any deliberate or wilful disobedience of the consent agreement by the respondents and that they had met their end of the settlement agreement and were not in contempt of court orders whatsoever.

Determination

23. The first issue to be dealt with is that of jurisdiction. The jurisdiction of the court on contempt of court was discussed at length in the case of **Katsuri Limited –vs - Kapurchand Depar Shah [2016] eKLR** where the Learned Judge noted that the **Judicature Act [3]** provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

24. Order 40 Rule 3 of the Civil Procedure Rules provides that:

“1. In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

2. No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. (3) An application under this rule shall be made by notice of motion in the same suit.”

25. Based on the provisions of the law above I find that this court has jurisdiction to hear contempt proceedings arising from the same suit. In **Mutitika -vs- Baharini Farm limited [1985] KLR 229. 234** as cited in **TSC –vs- KNUT**, it was held that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt.

In the case of **Katsuri Limited (supra)** it was stated that:

“Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases.”

26. In the case of **Sam Nyamweya & 3 others –vs- Kenya Premier League Limited & 2 others [2015] eKLR** the Court considered several issues while determining the contempt proceedings that were filed before it. One of the questions that the court asked itself was whether the order that was the basis of contempt before it was clear and unambiguous. The same position was held in the case of **Ochino & Another –vs- Okombo & 4 Others [1989] eKLR** the court stated thus:

“As this court pointed out recently in the case of Mwangi Mangondu v Nairobi City Commission (Civil Appeal no. 95 of 1988): “this requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of terms and that breach of the injunction has been proved beyond reasonable doubt.”

27. The applicants sought the orders of contempt of court from this court and were specific that the clauses that the respondents breached were clauses 4, 5, 6 and 8 of the consent agreement dated 30th May, 2017. The clauses are clearly outlined at paragraph 2 of this Ruling.

28. The orders sought in the notice of motion dated 15th August 2017 are set out in paragraph 12 of this Ruling.

29. Prayers (a) and (c) of the application of 15th August 2017 are specifically seeking to have the respondents appear before this honourable court to show cause why they have not honoured the consent agreement entered into on the 29th day of May, 2017. In the supporting affidavit to the application of the 26th July 2017, the applicants were specific that it was clause 4, 5, 6 and 8 which had been breached. I find the clauses in the agreements are too general from the face of it.

30. The respondents were to support the applicants in the event that they ran as independent candidates. The 1st respondent (Jubilee Party) agreed to compensate the 2nd to 6th respondents in respect of the expenses and costs incurred individually during the campaign period for nomination and refund the amounts paid by the applicants for registration and nomination fees. No figures for the costs, fees and expenses have been stated in the agreement. There are really no figures to work with, and for anyone not privy to the agreement the figures are unknown.

31. They further agreed that both parties (i.e Jubilee Party and the 2nd to 6th respondents) would implement all terms and conditions as indicated in a signed agreement marked as appendix “1” therein; the said appendix “1” was not attached to the consent agreement. Later on after the application for contempt was filed the respondents attached appendix “1” to their replying affidavit dated 31st July 2017 and marked as “MKKS1.” The replying affidavit further explains the contents of the agreement stating that the respondents agreed to refund the applicants Kshs.500,000/= being registration fees for those that vied for the gubernatorial position and Kshs.250,000/= being a refund for those who registered for the parliamentary positions.

32. Clause (f) of the agreement provides:

“it is further stated that the respondents will meet the costs of the court cases relating to this matter and compensate the aspirants as may be agreed between them by separate understanding.”

Further on in clause (g) of the same agreement it is provided:

“It is stated the aspirants undertook to instruct advocates to file a consent order in the High court compromising the dispute but in any event, the party will be at liberty to file this agreement in court as evidence of the fact that this dispute has amicably been settled.”

33. The applicant's in their further indicated affidavit filed on 3rd August 2017 in paragraph 7 (i) confirmed that Annexure “MMKS-1” is a true copy of the settlement agreement. Thereafter they state that the rest of the contents of the Replying affidavit by the Mary Karen – Kigen dated 31st July 2017 are untrue.

34. Looking into paragraph (f) and (g) of the “appendix 1” which is not in dispute, the terms are ambiguous. Parties make mention of costs and in case of any dispute the annexure be filed in court as proof of settlement. Still there are no figures being mentioned. The figures the applicants seek in this application are not specific while the respondents have annexed specific figures allegedly paid to the applicants. They have also annexed receipts as proof of payments. The applicants state that what was paid was not in settlement of the consent order.

35. The applicants are not seeking enforcement of any specified amount as per the consent order that they have based their application for contempt on. In my considered view these contempt proceedings are unclear and ambiguous and they cannot be enforced by this honourable court. That addresses prayers 3 and 6 of the Application dated 26th July 2017. Prayers 1 and 2 are already spent. Prayers 4 and 5 have been overtaken by events as the nominations led to the elections that were already conducted.

36. It therefore follows that prayers 2, 3, and 4 of the application dated 15th August 2017 cannot be enforced because of the ambiguity of the consent agreement. Entertaining the two applications would require the gathering of evidence by this court to satisfy itself as to whether any money is owed and if so by which party and by how much. That is not the duty of the court dealing with contempt proceedings. The orders complained of must be very clear and unambiguous. That is not what is before me. It is however not lost for the appellants/applicants. They still have liberty to file a civil claim where they may lead evidence to establish their claims, against the respondents.

37. I find both applications to have no merit and I dismiss them. Owing to the nature of the matter I will order that each party bears his own costs.

Orders accordingly.

Dated, signed and delivered this 20th day of ***March, 2018*** in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE