



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. ELECTION PETITION APPEAL NO. 24 OF 2017

KENNEDY ODURU NYARUMBA.....COMPLAINANT/APPLICANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT.....RESPONDENT

AND

DR. AGNES ZANI – SECRETARY GENERAL...1ST INTERESTED PARTY

MBADI JOHN NG'ONG'O - CHAIRMAN.....2ND INTERESTED PARTY

RULING

1. On 19th May 2017 the High Court allowed the applicant's appeal against the decision of the Political Parties Disputes Tribunal rendered on 11th May 2017 and made the following orders, among others:-

(a) the nomination certificate, if any, issued to either the 2nd or 3rd respondent is declared null and void;

(b) the 1st respondent is hereby restrained from submitting the names of either the 2nd or 3rd respondents to IEBC as its nominee for the Member of the County Assembly for Lucky Summer Ward and in the unlikely event that the 1st respondent has so submitted, the names of the 2nd and 3rd respondents be expunged from the list; and

(c) a fresh, fair and credible nomination to be carried out by the 1st respondent for the Member of the County Assembly Ward in Ruaraka Constituency within 72 hours from the date of the judgment.

2. On 29th May 2017 the applicant filed the instant application seeking that the respondent and the 1st and 2nd interested parties do show cause why they should not be held in contempt of the above orders which were served on them on 20th May 2017; they be punished and committed to civil jail pursuant to **section 28(1) of the Contempt of Court Act (No. 46 of 2016)**; and they do purge their contempt by implementing the decree of the court dated 20th May 2017.

3. In the affidavit sworn by the applicant to support the application he stated that following the judgment

he had got the decree extracted and served on the respondent and the 1st and 2nd respondents but that none of the orders had been obeyed and/or implemented.

4. The background of the application is that the applicant is a member of the Orange Democratic Movement Party (respondent). On 30th April 2017 he participated in the Party's nomination to get a candidate to vie for the position of Member of County Assembly for Lucky Summer Ward in Ruaraka Constituency in Nairobi County in the forthcoming general elections. The other contestants were Caroline Omedo and Fredrick Omondi Otieno. After the exercise, Fredrick Omondi Otieno was declared the winner and was issued with a nomination certificate. This aggrieved the applicant and Caroline Omedo who complained to the Party's County Appeals Board. The Board heard the complaint and on 6th May 2017 decided to award the nomination certificate to Caroline Omedo. The applicant was unhappy and appealed to the Political Parties Disputes Tribunal. The Tribunal dismissed the appeal. The applicant then came to the High Court which on 19th May 2017 made the orders subject of the present application.

5. Both before the Board and the Tribunal, there was a finding that the nomination exercise was marred with violence and that the tallying process had not been concluded. Therefore, the winner had not been determined. The High Court observed that, in view of the concurrent findings, the Tribunal ought to have dismissed the appeal.

6. It is material that both in the Tribunal and in the High Court the appeal was not challenged. There was service but there was no response.

7. The present application was equally served but received no response. In the application, Dr. Agnes Zani (1st interested party) was indicated as "Secretary General" and Mbadi John Ng'ong'o (2nd interested party) was indicated as "Chairman." In the supporting affidavit there was no averment that the interested parties were officials of the respondent. There was no averment as to which positions they held in the respondent Party. Regarding service, it was deponed that the 1st and 2nd interested parties had been served with the decree but they had disobeyed. There was no return of service that was filed. Instead, there was annexed copy of the decree showing a stamp of the party with a receipt date. There was no indication on whom the orders had been served. It was not indicated that it was either the 1st or 2nd interested party. There was no evidence that the orders were served on a responsible official of the respondent. When the applicant's counsel yesterday appeared before Justice E.C. Mwita he was directed to serve the application on all parties. He served the application on one Oduor Ong'wen who was the Executive Director/C.E.O. of the respondent. He was also served with a hearing notice. The 1st and 2nd interested parties were out of office by the time. It was sworn that the C.E.O. had been authorised to receive documents on behalf of the respondent and the 1st and 2nd interested parties.

8. What is of material significance is the claim that the orders that were extracted on 20th May 2017 were served on the same day on the respondent and the 1st and 2nd interested parties. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question (**Nyamodi Ochieng Nyamogo and Another –v- Kenya Posts and Telecommunications, Civil Appeal No. 264 of 1993; Halisbury's Laws of England (4th Ed.) volume 9 at page 37 paragraph 61**). Where the order is made against a company, the order may only be enforced against the officer of the company if the particular officer has been served personally with a copy of the order. Even if there was proof that the order was served, it was incumbent upon the applicant to show that the said officer was a director or an officer of the said company.

9. In the instant case, there was no evidence that the 1st and 2nd interested parties were personally served with the orders in question. If the respondent was served, it was not indicated on whom in particular the service had been effected. The Party was a corporate entity with known officials. It could be effective service if some undisclosed person at the party was served. It should be added that the respondent and the 1st and 2nd interested parties did not attend the proceedings and judgment during which the orders were made. It could therefore be said that they were aware of the orders.

10. In Black's Law Dictionary (9th Edition) at page 360 contempt is defined as follows:-

“2. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment.”

In **Hadkinson –v- Hadkinson [1952]CA 258** (the case has been cited approval in many local cases including **National Hospital Insurance Fund Board of Management –v- Boya Pural Nursing Home Ltd, Civil Appeal No. 46 of 2005** and **Rose Detho –v- Ratilal Automobiles and Others, Civil Application No. 304 of 2006 (NBO)**, it was held that it was the plain and unqualified obligation of every person against or is in respect of whom an order was made by a court of competent jurisdiction to obey it until that order has been discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment. However, before he can be deemed to be in contempt he has to be shown to have been aware of the order. He has to be personally served with the order (**Jacob Zedekiah Ochino and Another –v- George Aura Okombo and Others, Civil Appeal No. 36 of 1989**).

11. The offence of contempt is quasi-criminal in nature, and therefore the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt (**Mutitika –v- Baharini Farm Ltd [1985]KLR 227**).

12. Without the evidence of personal service on the persons who were responsible for organising a repeat nomination in respondent's Party, and without evidence of personal service on the 1st and 2nd interested parties, I do not find the application merited. The same is therefore dismissed.

DATED, DELIVERED and SIGNED at NAIROBI this 31ST day of MAY 2017.

A.O. MUCHELULE

JUDGE