



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 19 OF 2017

JOSEPH OBIERO NDIEGE.....APPELLANT

VERSUS

ORANGE DEMOCRATIC PARTY.....1ST RESPONDENT

PHILIP O. MWABE.....2ND RESPONDENT

RULING

1. Through a Notice of Motion dated 23rd May, 2017 filed under certificate of urgency pursuant to Sections 1A, 1B, 3A, 80 of the Civil Procedure Act, Order 22 rule 1 and 3, Order 45 Rule 1 and Order 51 rule 1 of the Civil Procedure Rules 2010, the applicant/2nd respondent is seeking the court to grant the following orders:

1. That the application be certified urgent and service be dispensed with in the first instance.
2. That this honourable court be pleased to review its judgment/order dated 18th May, 2017 and affirm the 2nd respondent as the lawful nominee of the 1st respondent as member of National Assembly for Suna West Constituency.
3. That there be a stay of execution of judgment and order dated 18th May, 2017 pending hearing and determination of this application.
4. That a permanent injunction order be issued restraining the 1st respondent and/or any of its agents from submitting the name of the appellant, Joseph Obiero Ndiege or any other name to the IEBC as its nominee for the member of the National Assembly of Suna West Constituency.
5. That there be stay of all proceedings in this matter pending the hearing and determination of this application.
6. That this honourable court be pleased to declare the 1st respondent herein functus officio for the simple reason that the 1st respondent has already complied with orders of the 1st respondent's National Appeals Tribunal issued on 5th May, 2017.
7. That the costs of this application be provided for.

2. Application is supported by grounds on the face of it and supporting affidavit deponed by Philip O. Mwabe the applicant herein.

3. In response, the respondent/appellant filed a replying affidavit sworn by himself on the 24th May, 2017 in which he denied entirely the claim and allegations contained in the applicant's supporting affidavit arguing that he was issued with a final nomination certificate by ODM party on 19th May, 2017 pursuant to the court's order dated 18/5/2017 and that the purported certificate issued to the applicant on 6th May, 2017 before the court delivered its judgment is null and void.

4. Before determining the application herein, a brief background on this matter would suffice. The appellant/respondent herein Joseph Ndiege Obiero and the 2nd respondent/applicant Philip Mwabe took part in an ODM party primary nomination exercise

for the position of member of National Assembly Suna West on the 24th April, 2017.

5. Upon conclusion of the exercise, each of the two candidates got a provisional nomination certificate issued by two different returning officers. However, on 29th April, 2017, the appellant was issued with a final nomination certificate. Aggrieved by this new development, the 2nd respondent filed a complaint with the party National Appeals Tribunal (NAT) on 2/5/2017, who upheld his complaint on 5/5/2017 hence nullifying the election exercise held on the 24th April, 2017 on grounds that it was marred with gross electoral malpractices. Subsequently, the tribunal nullified both provisional certificates.

6. Instead of ordering for the repeat nomination exercise by universal suffrage, the tribunal directed the party to proceed and carry out a fresh process of determining the party nomination for Suna West Constituency National Assembly seat in a manner that is compatible with the party constitution and election and nomination rules.

7. Dissatisfied with that decision, the appellant moved to the Political Parties Disputes Tribunal (PPDT) on 5th May, 2017 seeking to be declared as the winner.

Unfortunately his complaint was dismissed by the PPDT who upheld the decision of the ODM National Appeals Tribunal (NAT). Undeterred with this finding, the appellant again moved to the high court vide a memorandum of appeal dated 11/5/2017 seeking to have PPDT's decision set aside and orders declaring him as the winner issued on grounds that the party had taken too long to nominate a nominee as directed by NAT and PPDT.

8. During the hearing, Professor Ojienda urged the court to dismiss the appeal on grounds that the orders could not apply as the party had not acted by appointing a fresh nominee as directed hence there was no cause of action upon which the appellant was seeking the orders sought.

9. On 18th May, 2017, this court dismissed the appeal on grounds that, the appellant had come to court prematurely given the fact that the party had not acted upon the orders of the NAT and PPDT by nominating a fresh nominee hence a cause of action had not crystallized.

10. The court therefore dismissed the appeal and effectively upheld the 2nd respondent's (applicant's) arguments and made the following orders:

“(a) That the first respondent through its national elections Board (officials) and national executive committee ODM are hereby directed to initiate or undertake a process of nominating a fresh nominee as directed by NAT on 5th May, 2017 and PPDT on 10/5/2017 within 48 hours from today in default the National Elections Board (NEB ODM) to initiate, call for or conduct nomination election exercise for member of National Assembly Suna West on ODM Ticket within 48 hours from the time the 48 hours granted to NEC and NEB to address fresh nomination lapses.

(b) For avoidance of doubt, the National Executive Committee in conjunction with NEB to initiate the process of nominating a party nominee on ODM ticket for Suna West Constituency not later than 6.00pm of the 20th May, 2017 and in default, initiate, call for and conduct fresh nomination election exercise latest by 6.00pm of 22nd May, 2017 being 48 hours calculated from 6.00pm of 20th May, 2017”.

11. On 23rd May, 2017, when the application herein was filed, the court ordered applicant to serve the respondent and appear for interpartes hearing on 24/5/2017. On 24/5/2017, the firm of Mogaka and Musyoki appearing for the appellant withdrew from acting and instead Mr. Midenga from the firm of Abdullahi and Co. Associates came on record.

12. The applicant's application is premised on the conviction that, the 1st respondent having been issued with a nomination certificate on 6/5/2017 as the ODM candidate Suna West, this court could not properly order a fresh nomination exercise hence sufficient reason under Order 45 of the Civil Procedure rules to review its orders and declare the appellant as the nominee on ODM Ticket. Counsel averred that, the party having acted on 6th May, 2017 it became functus officio and therefore could not issue any other certificate thereafter.

13. In support of that averment, Mr. Jamal holding brief for Professor Ojienda for the applicant contended that, the party (ODM) having complied with NAT and PPDT's orders and having issued a certificate to the applicant on 6/5/2017, this court ought not to have exercised its appellate jurisdiction hence orders made on 18th May, 2017 should not have been made. Counsel relied on several authorities explaining circumstances under which a court can review its orders. Among the cases quoted is **Ajit Kumar Rath vs State of Orisa and Others Supreme Court cases 596 and 608** in which the court held

“....the power of review can be exercised only for correction of apparent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be said that, any other sufficient reason”....means a reason sufficiently analogous to those specified in the rule.

In the case of **Tekesi Mambili and Others vs Simion Litsanga as cited in the case of Stephen Gathua Kimani vs Nancy Wanjira Wangui t/a Providence Auctioneers (2016) eKRL** the court held thus:

“(i) in order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

(ii) where the application is based on sufficient reason it is for the court to exercise its discretion.

14. In a nut shell, Mr. Jamal urged the court to disregard a nomination certificate dated 19th May, 2017 issued to the appellant/respondent terming it a forgery.

15. On the other hand, the respondent/appellant contended that by the time this court made its orders on 18th May, 2017, the party (ODM) had not acted implying that there was no nominee in place hence the orders of 18th May, 2017 by the court for the party to nominate a fresh nominee directly or through universal suffrage. He therefore requested the court to uphold the nomination certificate issued on 19th May, 2017, supported by minutes of NEC and a letter of the Executive director Mr. Ongwen dated 19th May, 2017 addressed to the deputy registrar high court confirming that the party had complied with the order of the court by a nominating the appellant.

16. Mr. Midenga further submitted that, nomination certificate that did not exist by the time the court made its orders cannot be genuine hence should be disregarded. Learned counsel further submitted that the applicant has not proved the requirements for review under Order 45 Civil Procedure Rules.

17. I have considered the application herein, supporting affidavit, replying affidavit and submissions by both counsels. There is no dispute that by 18/5/2017 when the court made its orders directing ODM to nominate a fresh candidate for Suna West Constituency either directly or by universal suffrage, there was no valid certificate in place. Equally between 7th – 10th May, 2017 when both parties appeared before PPDT, none had a nomination certificate. By the time the appeal was being lodged (12/5/2017), heard and determined by this court on 18th May, 2017, nobody produced a nomination certificate and in particular the one dated 6th May, 2017. The question is, why was it kept as a secret and not even the applicant’s counsel had knowledge of it?

18. In any event, if there was any certificate purported to have been issued before 18th May, 2017 when this court made its orders, the same is null and void as it could not have been issued retrospectively. To uphold such conduct will amount to promoting illegalities. The orders of the court were clear and the same could not be implemented retrospectively.

19. Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules are clear on issuance of review orders. A court can review its orders, if there is discovery of new evidence or material facts that were not within the knowledge of the party or reasonably expected with due diligence to have been within his knowledge or error apparent on the face of the record or mistake or for any other sufficient cause.

20. In this case, there is no discovery of any new evidence or material facts that were not within the knowledge of the applicant. There is no claim of any mistake neither apparent error on the face of the record nor sufficient cause to warrant disturbance of the court’s orders of 18th May, 2017.

21. The respondent/appellant attached a copy of a nomination certificate issued on 19th May, 2017 in compliance with the court order. He attached minutes of the meeting held on 16th May, 2017 in which a resolution was made to give the appellant a certificate which they did on 19th May, 2017.

22. The Chief Executive Officer of ODM wrote to the Deputy Registrar of the court on 19th May, 2017 confirming compliance with the court order. This is sufficient proof that the court order was complied with and in Professor Ojienda’s own words, a fresh cause of action has crystallized calling for a fresh dispute from scratch again in accordance with Section 40 of the Political Parties Act.

23. The allegation that the nomination certificate issued to the appellant was fake and a forgery by Mr. Jamal amounts to giving evidence from the bar. Counsel should have sought leave from the court to cross examine the appellant on the sworn affidavit together with the annexures attached thereto and even submit evidence from the party (ODM) confirming that the said certificate did not emanate from their office. No further affidavit was sworn to challenge averments contained in the replying affidavit hence the evidence contained in the replying affidavit is not controverted.

24. Litigation must come to an end. The appellant has failed to prove that he deserves review orders. He has failed to prove each and every ingredient as contained in Section 80 of the Civil Procedure Act and Order 45(1) of Civil Procedure Rules.

25. Accordingly, it is my finding that the application herein lacks merit and the same is dismissed. Consequently, the nomination certificate issued to the appellant on the 19th May, 2017 is hereby declared as the valid nomination certificate pursuant to the orders of this court dated 18th May, 2017. Considering the nature and circumstances of this matter, I will not make any order as to costs and therefore each shall bear its own costs.

DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF MAY, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of

.....counsel for the applicant

.....counsel for the respondent