



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NUMBER 13 OF 2017

THE SECRETARY GENERAL.....1ST APPELLANT/RESPONDENT

KENYA AFRICAN NATIONAL UNION (KANU).....2ND APPELLANT/RESPONDENT

VERSUS

HON. SALAH YAKUB FARAHRESPONDENT/APPLICANT

AND

ABDIKHAIM OSMAN MOHAMED.....INTERESTED PARTY

RULING

1. By his application dated 18 May 2017, the Applicant who was the Respondent in the original appeal seeks various reliefs. Substantively, the Applicant seeks orders that the Respondents do show cause why they should not be cited for disobeying orders of the court. In particular, the Applicant sought to have one Nick Salat and Edward Kivuvani committed to civil jail for a period not exceeding six months for having flagrantly disobeyed court orders. The orders in question were issued by the Political Parties Disputes Tribunal (“ the PPDT”) on 9 May 2017.

2. The Applicant also seeks additional orders, that a fresh nomination’s exercise to be conducted in Fafi Constituency and that any nomination certificate already issued be cancelled. Alternatively, the Applicant asks the court to issue an order that the Nomination Certificate for candidate for Fafi Constituency be given to him.

3. The brief background to this matter is that the Applicant and the Interested Party have been entangled in a dispute involving a party’s nominations exercise. Like all political parties, the 2nd Respondent conducted party primaries during the month of April 2007 in readiness for the general elections slated for August 2017. The Applicant and the Interested Party contested the candidature for the Member of the National Assembly for Fafi Constituency.

4. The 2nd Respondent, it was alleged by the Applicant, favoured the Interested Party and awarded him the nomination certificate. The Applicant contested the decision before the PPDT. The PPDT agreed with the Applicant and ordered fresh nominations. When the repeat nominations were allegedly not conducted the Applicant moved the PPDT and accused the Respondent of contempt of court. The PPDT on 9 May 2017 found the Respondent guilty of contempt. The PPDT then ordered a repeat of the nominations exercise be conducted in at least three polling stations in the select five wards, which meant at least 15 polling stations. The PPDT ordered the parties to agree on the polling stations within 12 hours. The PPDT also directed that the repeat exercise be advertised in three newspapers of national circulation within 24

hours. Having convicted two of the 2nd Respondent's officials with contempt of court, the PPDT levied a fine.

5. Dissatisfied, the Respondents appealed on 10 May 2017. On 11 May 2017, I partially allowed the appeal. Whilst the conviction for contempt was set aside, the PPDT's orders regarding repeat nominations were not interfered with. The Respondents were still to comply with the orders of the PPDT made 9 May 2017.

6. The Applicant is again before me. He states that the Respondents are in contempt of court. He states that they have flagrantly and brazenly disobeyed both the PPDT's and this court's orders of 9 May 2017 and 11 May 2017 respectively. He states that for a third time, the Respondents have failed or refused to conduct a free, fair and transparent nomination process. More specifically, the Applicant accuses the Respondent of having only conducted nominations in 8, and not 15 polling stations.

7. The Applicant also states that the nominations were conducted on the 6th day (following the order of the PPDT) and not the 5th day as had been ordered by the PPDT. The Applicant also states that the Respondents did not advertise the repeat exercise or the polling stations, as had been ordered by the PPDT, in three newspapers of national circulation.

8. The Applicant then accused the Respondents of not conducting a free and fair exercise by having the polling stations open late, not having complete registers and breaching both the National as well as the 2nd Respondents Constitutions.

9. To complete his story, the Applicant contended that the Respondents were incapable of conducting a fair nominations exercise, hence the prayer that an order awarding the Applicant the nomination certificate for KANU be granted.

10. Counsel for the Applicant Mr. Mokuia submitted that only two issues could be identified for the court's determination. First, was whether this court had jurisdiction to entertain the application for contempt and, secondly, whether the Respondents were guilty of contempt of court. With regard to the first issue counsel submitted that the court had jurisdiction by dint of the provisions of section 5 of the Contempt of Court Act No 46 of 2016.

11. With regard to the merits of the application, it was counsel's submission that the Respondents had violated the orders of the PPDT of 9 May 2017. Counsel, submitted that the orders had been upheld by this court and that the Respondents were obligated to comply with the same but had failed to observe the same. Mr. Mokuia further submitted that the orders were unambiguous and that the Respondents were aware of the same but had deliberately violated the order by not conducting the nomination exercise in at least 15 polling stations within Fafi constituency as had been ordered.

12. According to counsel, the nominations exercise was conducted in only 8 polling stations, the other 8 were either ignored or polling started very late. Counsel also stated that the second aspect of breach of the court order was that the Respondents did not advertise the nomination exercise in three daily newspapers as had been decreed by the PPDT. The deliberate violation was, according to the Applicant, evident in the Respondents' refusal to entertain the Applicants agents in any polling station.

13. Mr. Mokuia concluded his submissions by stating that the most commendable order in the circumstances was to order the Respondents to issue the Applicant with the nomination certificate and to also forward the Applicant's name to the Independent Electoral and Boundaries Commission ("the IEBC").

14. For the Respondents, Mr. G.Makau submitted that the jurisdiction of the court was not contested but that the Replying Affidavits clearly showed that the Respondents had not deliberately violated the court order. To demonstrate, this Mr. Makau referred the court to the consent order filed in court on 12 May 2017 and stated that is what the parties were now following and not the earlier orders of the PPDT.

Counsel stated that the Applicant had not complained prior to the beginning of the exercise but only waited until after the nominations process had been finalized.

15. Counsel further submitted that the Respondents had in the two Replying affidavits explained why the nominations process had not been successful in some of the polling stations. Even though the Respondents had endeavored to avail all the electoral material, the party register and polling staff the process still collapsed in some of the polling stations as a result of the disturbance by the local youths. Counsel however insisted that there was no willful disobedience of any order issued by a judicial body.

16. Counsel for the Interested Party Ms. V. Maumo together with Mr. Salah on the other hand submitted that whilst the court could entertain the application as far as contempt of court was alleged, the court could not deal with the other limb of the application as it was simply challenging the process of nominations indirectly and this was a matter for either the party or the PPDT. Counsel insisted that the application was an afterthought as the nominations were conducted on 14 May and the Applicant was only moving to court on 18 May, when time was already running out for political parties. Counsel stated that the Applicant was not interested in participating in the process and asked the court to ensure that the will of the people of Fafi Constituency was not tampered with.

17. In a brief rejoinder, Mr Mokuia submitted that the Respondents were evidently guilty of contempt and deserved to be punished and further that the attempted explanations were actually self-contradictory. Counsel stated that the Applicant was ever so ready to return to the nominations.

18. I have listened to the parties. I have also considered the pleadings as filed as well as the submissions made.

19. I need grapple with only one basic question. Are the Respondents guilty of contempt of court? The issue as to the jurisdiction of the court seems to have been conceded by the Respondents save for the Interested Party. While not patently contesting the court's jurisdiction, the Interested Party seemed to suggest that the orders sought were beyond the purview of the court. I believe that this latter issue may be dealt with summarily.

20. Where the court is faced with an application for contempt of court the inherent jurisdiction of the court is pretty heavy and wide. The court, with a view to ensuring that the process of administration of justice is forever held high and that the public confidence and interest in the judicial system is maintained, has powers to make whatever order it may be deemed appropriate in the circumstances. Such orders may be in addition to, though not in substitution of, any punishment for contempt of court as prescribed under Section 28 of the Contempt of Court Act.

21. The orders may range from orders tailored to ensure that the contempt is purged, to ensure that the dignity and authority of the court is upheld as well as to ensure that there is no repeat of the contempt. The court seized with the contempt proceedings must consequently be able to ascertain and determine not only the most appropriate punishment for any contempt of court as may be guided by section 28 of the Contempt of Court Act but also adopt an uncompromising attitude essential for the maintenance of the rule of law. In that regard, the court will be entitled make orders tailored to protect the authority and the dignity of the courts and the public at large.

22. With regard to this court's remit to deal with contempt of court emanating from an order of the PPDT or this court, there should exist no questions. This court exhaustively rendered itself in the judgment read on 15 May 2015 and will say no more save to point to the provisions of sections 5, 6 and 24 of the Contempt of Court Act.

23. On the substantive issue as to whether or not the Respondents are guilty of contempt, the Applicant in support of his case filed not only his affidavit but also various other affidavits. In came two affidavits from the Applicant's agents. They swore an identical affidavit and deponed that the Respondents never got in touch with them despite having been notified that they would be standing in as the Applicant's agents in the repeat polls. Likewise, the Applicant also availed 18 affidavits all sworn by persons

claiming to be eligible and registered voters.

24. The deponents had identical affidavits save for their voting stations. They all stated that voting never took place in their respective polling stations.

25. In opposition, the Respondents caused two affidavits to be sworn and filed. One was by Paul Osogo who was the Returning Officer for the repeat exercise and the other by Edward Kivuvani, one of the alleged contemnors who is also the chairperson of the 2nd Respondent's National Elections Board. Both deposed that the repeat exercise was conducted. Both swore to it that the parties had agreed to 16, not 15 polling stations, but that polling in some of the stations was interrupted by rowdy youths allegedly sponsored by the Applicant. Both also deposed that the advertisements were placed in the KTN TV and also through the radio. Both deposed that the exercise was accordingly free and fair. For completeness, both denied any contempt on the part of the Respondents.

26. On the part of the Interested Party, it was also deposed that the advertisement was through the Star Radio, a popular vernacular FM Radio station. The Interested Party also swore to it that the exercise was free and fair and that the application had simply been brought out of bad faith.

27. It would be important to first point out that contempt of court proceedings are quasi-criminal in nature and the court must always tread with caution in view of the penal consequences that a conviction ordinarily invites. For this reason, the standard of proof to be discharged in contempt proceedings is one of proof beyond reasonable doubt : see **Mutitika v Baharini Farm Ltd [1985] KLR 229** and **Shimmers Plaza Ltd v National Bank of Kenya Ltd [2015] eKLR**. A finding of contempt of court will not be lightly made and it will only be invited where necessary and where there is no other means of achieving the desired objectives of the proceedings :see **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016]eKLR** and **Shital Bandhari v National Land Commission & 4 Others [2017]eKLR**.

28. I must also point out that these proceedings ought to ideally have been commenced by way of an originating motion in a miscellaneous cause. The Applicant was seeking to enforce an order of the PPDT. The appeal herein had been finalized and the file basically closed, with the court *functus officio*. There was no room for a further application unless one was seeking to enforce the orders , if any , of this court.

29. The complaint however seems to have revolved around both some orders allegedly made by this court and also by the PPDT. Ultimately, at the hearing it was clarified that this court did not make any positive order to be complied with and thus the contempt could not be fetched upon an alleged disobedience of this court's order. The twist in the tale was however not over as the parties pointed to a consent allegedly filed in court on 12 May 2017. The court's pragmatic approach should be to focus on substance rather than technicalities and in this particular instance, I am inclined not to strike out the application but hear consider the merits given the allegations of contempt of court.

30. The contempt complained of herein is that a court order was not obeyed. I have reflected on the court order. There were time-lines and that would be the starting point.

31. The Respondent had been ordered to conduct the nominations within five days. The Respondents were also to consult with the Applicant and the Interested Party to agree on the polling stations. They ultimately agreed having spent some time in the court corridors urging and opposing the instant this appeal. I do not deem it that the exercise was conducted outside the prescribed time after the parties themselves consulted and agreed on a specific date. I would not on that score fault the Respondents.

32. It is clear that the parties had been directed by the PPDT to agree on the polling stations and that they did settle for 16 polling stations which was more than the minimum number prescribed by the PPDT. The parties signed a consent note to like effect.

33. The parties also agree that the polling did not take place in all the polling stations. However, the Applicant faults the Respondents and the Respondents in turn fault the Applicant.

34. The order was for the Respondent to conduct repeat nominations in at least fifteen polling stations, they proceeded to organize the repeat in sixteen stations. The organization was well tailored. The Applicant was involved and so too was the Interested Party. The parties even met. There is evidence that the Respondents availed all the necessary material as well as staff to ensure that the repeat nominations took place. However it never happened.

35. I am not ready to accept the submission that when the polling did not take place in seven of the polling stations, then the Respondents must be held to have been in disobedience of a court order. I am also not ready to accept the submission that when polling started so late in the day in one polling station then the Respondents are responsible and are in contempt. The affidavit evidence availed before the points to some inexplicable violence which led to the specified polling stations not have the exercise conducted. The Respondents availed police officers to assist keep the peace but to no avail. The Respondents had also availed ballot papers as well as the relevant staff. I do not see how it may be held or even inferred that the Respondents had deliberately disobeyed a court order.

36. It was also pointed out that the Respondents failed to advertize the repeat nominations as well as the polling stations. True, the PPDT's order of 9 May 2017 had ordered the Respondents to place advertisements in three newspapers of nationwide circulation. Somehow and along the lines after the parties had appeared before this court, they agreed to vary the order. The order was varied through a consent letter filed in this court on 12 May 2017. The advertisement was now to be placed in two, not three, newspapers. This variation of the PPDT's order raises doubts as to which order was to be obeyed and which order may this court thus hold the Respondents to be in contempt of. The consent filed in court on 12 could certainly not rank as a court order as it was filed after the court became *functus officio*.

37. As Mr Mokuia pointed out much earlier in his submissions, a person ought to be only held accountable and in contempt when the order to be obeyed is clear and unambiguous. The circumstances would clearly obtain here. I cannot hold the Respondents to be in contempt in so far as it now became unclear which of the two agreed orders the Respondents were to follow.

38. Finally, I also hold the view that the application was a silhouetted challenge on whether the repeat nominations of 14 May 2017 were free, fair and transparent. There appears to be several questions raised. Some may be valid and some not. Disputes as to the qualitative and quantitative nature of party primaries, by dint of the provisions of section 13 of the Elections Act as well as section 40(1)(fa) of the Political Parties Act, however lie with the party and the PPDT and not this court. The Applicant may have to start all over again and lay his challenge on the quality of the repeat exercise before the right forum. I must otherwise refrain from making any determination which may embarrass or prejudice any such process. That includes declaring the Applicant as the nominee of the 2nd Respondent.

39. In the result , I do not find any reason to hold the Respondents in contempt. The Applicant has failed to discharge the onerous burden cast on him.

40. I dismiss the application dated 18 May 2017 but with no order as to costs.

Signed Dated and delivered at Nairobi this 20th day May of 2017

J. L. ONGUTO

JUDGE