



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. ELECTION PETITION APPLICATION NO. 62 OF 2017**

**DAVID KEDENGE DABU..... APPLICANT**

**VERSUS**

**JARED KAUNDA CHOKWE BARNES.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. This application emanates from a judgment delivered by Ong’udi J, on 25<sup>th</sup> May, 2017 in which the judge set aside the judgment delivered by the Political Parties Dispute Resolution (hereinafter PPDT) on 19<sup>th</sup> May 2017 and nullified the Provisional Nomination Certificates dated 23<sup>rd</sup> April 2017 and 29<sup>th</sup> April 2017 issued to the Appellant and the 1<sup>st</sup> Respondent respectively. The court ordered a repeat of the Nominations for Member of County Assembly, Malindi Town Ward, Kilifi County within 48 hours from the date of the said judgment. The orders were to be served upon the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

2. The Applicant in an application dated 12<sup>th</sup> June 2017 seeks orders that the Appellant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be cited for contempt of court for failure to comply with the said judgment of the court.

3. Mrs. Osabwa learned counsel for the 1<sup>st</sup> Respondent submitted that the judgment of 25<sup>th</sup> May 2017 which nullified the nominations ordered a repeat of the nominations for Member of County Assembly for Malindi Township Ward within 48 hours. That when the said 48 hours lapsed the Appellant presented himself before the IEBC with a certificate that had been nullified by the court.

4. Counsel argued that the Appellant, being the person who appealed against the decision of the PPDT which had favoured the Applicant, sat on the judgment of the court with all the intentions of circumventing the law. That the Applicant’s advocate wrote to all parties and notified them about the judgment citing the contempt that was pending and invited all parties to comply with the judgment of the court.

5. That the above orders were served upon the Appellant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with a Penal Notice dated 29<sup>th</sup> May 2017. Counsel asserts that despite service of the said orders the Appellant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their employees and agents have flagrantly disobeyed the said orders hence this application.

6. Mr. Ongeru learned counsel who held brief for Mr. Odera for the Appellant urged the court to note from the affidavit of service was done on 29<sup>th</sup> May, 2017 while the judgment was delivered on 25<sup>th</sup> May, 2017. He stated that the documents purportedly served have not been annexed and neither had the Penal notice been shown. Further that if there was service, which is disputed the repeat of the nomination ought to have been done within 48 hours which lapsed on 27<sup>th</sup> May 2017.

7. Counsel contended that there was no evidence that the certificate of the IEBC annexed by the Applicant was issued pursuant to the nullified certificate. He also argued that the Applicant deliberately failed to attach the ODM rules of nominations for the court to determine whether there was breach of those rules if a second nomination was carried out. That it is not therefore true to say that the IEBC was in contempt of any court order, or committed any offence to warrant their being cited for contempt because there is no material before this court to that effect.

8. Mr. Muyundo learned counsel appearing for the IEBC submitted that service was paramount, and that there is no single affidavit of service presented to court to show that an order of the court was served upon the officers of the IEBC, or the IEBC itself. That the IEBC was not a party at the proceedings before the PPDT, neither was it served with the proceedings before the High Court.

9. Counsel asserted that there was no evidence that the 1<sup>st</sup> Respondent presented a nullified certificate to the 3<sup>rd</sup> Respondent on the strength to which he was cleared. That the court cannot infer those facts as they must be presented with evidence. Counsel pointed out that the Applicant has not asked the court to quash the nomination certificate, or stated that the repeat exercise was not carried out or provided the names of the officers guilty of contempt. He urged the court to dismiss the application with costs to the Respondents.

10. I have considered the rival arguments in the application before me and the judgment delivered by Ong'udi J, on 25<sup>th</sup> May, 2017. The said judgment did not place the burden of service on any particular party in the proceedings. It was open to all parties and especially the one who stood to lose the most a lot, to serve the order of the court as soon as practicably possible. There is no single affidavit of service presented to court to show that an order of the court was served upon the officers of the IEBC, or the IEBC itself in view of the fact that they were not party to the proceedings at the PPDT or the High Court.

11. Secondly, the court has been told that the Respondents were served albeit two days after the deadline provided by the court for the repeat exercise. It is noteworthy that the Applicant who is alleging that the Respondents did not comply with the orders of the court has not placed any material before this court, upon which the court may determine that the repeat nomination was not carried out in accordance with any other method provided in the parties constitution and election rules.

12. Lastly, it was for the Applicant to prove that he is deserving of orders to convict someone of offences of a criminal nature such as contempt of court. From the Applicant's own documents no specific order was directed at the IEBC to carry out a specific act which they failed to do, nor can it be said that the IEBC had knowledge of the court order and failed to comply. There is also no proof that the certificate of nomination presented to the IEBC was the same one which was nullified, since the particulars of the nullified certificates have not been supplied.

13. In the premise this application is found to be lacking in merit and is dismissed accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> DAY OF June, 2017.**

**L. ACHODE**

**JUDGE**

In the presence of .....for the Applicant

In the presence of .....for the Respondent

In the presence of .....for the Respondent