



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 36 OF 2017

BETWEEN

KENNEDY ODURU NYARUMBA..... APPELLANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT

CAROLYNE OMEDO.....2ND RESPONDENT

FREDRICK OMONDI OTIENO.....3RD RESPONDENT

RULING

By an amended Notice of Motion dated the 21st day of June, 2017, the applicant Kennedy Oduru Nyarumba moved this court for an order of committal for contempt of court against Ms. Agnes Nzani, Ms. Judith Pareno and Mr. Wafula Chebukati being the Secretary General for Orange Democratic Party and the chairperson of Orange Democratic Party National Elections Board and chairman of Independent Electoral and Boundaries Commission respectively. The orders said to be violated were given on the 19th May, 2017 in the following terms;

- a. The court nullified the nomination certificates issued by the 1st respondent for the seat of the member of County Assembly for Lucky summer in Nairobi Country and ordered the 1st Respondent to conduct fresh nominations;
- b. An order was also issued restraining the 1st respondent from submitting names of either the 2nd or 3rd respondent to Independent Electoral and Boundaries Commission as its nominee for the member of country Assembly for Lucy Summer Ward and further that in the unlikely event that the 1st Respondent had already submitted the names of either the 2nd or 3rd respondent, then such names be expunged from the list.

The application is supported by an affidavit sworn by Kennedy Oduru Nyarumba sworn on the 21st day of June, 2017 and on the grounds listed on the body of the application.

The applicant has deponed that on the 19th May, 2017 the court issued the orders as set out above but todate, the first respondent has arbitrarily declined, failed and/or neglected to conduct fresh, free and fair nominations based on universal suffrage and free expression of the will of the Electorates in Lucky Summer Ward.

That the Independent Electoral and Boundaries Commission failed, refused and/or neglected to expunge from the ODM Party list the name of the 3rd respondent in direct contravention of the orders afore stated and has gone ahead to act on the 3rd respondent's name, and has cleared him for the upcoming general elections when fresh, fair and credible nominations have not been conducted to render any of the contestants a lawful nominee of the respondent.

It is further deponed that the 1st respondent alongside the IEBC have violated the political rights of the Lucky summer electorates which are guaranteed under Article 38 of constitution by denying them a chance to exercise their free will by electing a leader of their own choice through free and fair elections as was directed by the court.

That the officers named above are directly responsible for executing the orders of this honourable court while Wafula Chebukati is directly responsible for implementing court orders directly affecting the activities of the IEBC. That the said officers have blatantly disregarded and violated the orders of the court.

The alleged contemnors i.e. Agnes Zani and Judy Pareno filed grounds of opposition as follows;

- a. The application does not lie and is bad in law.
- b. The applicant has not met the test of the grant of orders sought and neither has he satisfied the basic principles of Natural Justice underlying the exercise and grant of the coercive issuance of orders of contempt.
- c. The application is substantially res-judicata and thus sought to be dismissed.

The chairman of IEBC also filed his grounds of opposition as follows;

1. The application falls short of the threshold for contempt of court under the provisions of the contempt of court Act, 2016.
2. The IEBC was never a party to the proceedings leading to the decree dated 20th May, 2017.
3. There is no order directed at the IEBC in the decree requiring its compliance and in fact no such order has been served.
4. The application offends the provisions of the Elections Act.
5. The application in respect of IEBC is unnecessary, unwarranted and an abuse of the court process.
6. The application lacks merits and should be dismissed with costs.

Parties made their submissions in support of their respective cases.

The submissions by the counsel for the applicant mirrors the averment contained in the supporting affidavit and it would not serve any purpose for the court to reproduce the same.

On the part of the 1st Respondent it was submitted that the application is Res-judicata as the applicant had filed a similar application dated 7th June, 2017. The said application was argued and a ruling delivered by Muchelule J. on the 12th day of June, 2017. She argued that the order was served on the contemnors long after the 72 hours within which the nominations were supposed to be repeated.

The court has considered the arguments by the parties. I will start by considering the issue of Res-Judicata. The principle of Res-Judicata is provided for in section 7 of the Civil Procedure Act. It

provides;

“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

It is not in dispute that the applicant had filed a substantially similar application involving the same parties and seeking similar orders to the ones sought in this application. That fact has indeed been admitted by the counsel for the applicant in her submissions. The application was filed as Misc. No. 24 of 2017 at the High Court at Nairobi.

The court has perused the application filed in the said Misc. cause and the applicant had sought orders to commit officials of Orange Democratic Party and those of IEBC for contempt of court issued on the 19th May, 2017. The application was heard and vide a ruling dated 12th June, 2017, it was dismissed by Justice Muchelule. The application was defended by the respondents and parties were substantively heard.

As submitted by counsel for the 1st respondent, the doctrine of Res- Judicata was designed to prevent multiplicity of suits and to ensure that litigation comes to an end.

The application having been heard by a court of competent jurisdiction and a ruling delivered dismissing the same, it is indeed an abuse of the court process for the applicant to file a similar application. If he felt aggrieved by the decision rendered by the court, he ought to have either appealed or applied for a review of the orders and not to file a similar application. I therefore find and hold that the application is an abuse of the court process and it is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 30th day of June, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... ***for the Appellant.***

..... ***For the 1st Respondent.***

..... ***For the 2nd Respondent.***

..... ***For the 3rd Respondent.***