



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO 124 OF 2017**

**IN THE MATTER OF ARTICLE 22, 24, 25, 27, 32, 36, 38, 47, 48 & 50 OF THE CONSTITUTION  
OF KENYA 2010**

**AND**

**HIGH COURT PRACTICE & PROCEDURE RULES**

**AND**

**IN THE MATTER OF S. 1A, 1B, 3(a) & 63 (e) & ORDER 40 RULE 1, 2, & 3, 42 RULE 6 OF THE  
CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT (2011)**

**BETWEEN**

**NETO ADHOLA.....PETITIONER/APPELLANT**

**VERSUS**

**ERICK ONYANGO.....RESPONDENT**

**EX-PARTE**

**INDEPENDENT ELECTORAL & BOUNDARIES  
COMMISSION.....INTERESTE PARTY**

**RULING**

The petitioner/applicant has approached this honourable court by a Notice of Motion dated the 23<sup>rd</sup> day of June, 2017 seeking the following orders;

1. That this application be certified urgent and heard ex-parte at the 1<sup>st</sup> instance.
2. That this honourable court be pleased to grant orders of stay of execution of the Ruling/Decision/Judgement of the IEBC Code of Conduct & Ethics Enforcement Committee in complaint No. 4/2017 issued and delivered on 22<sup>nd</sup> June, 2017 pending the inter-partes hearing of

this application.

3. That this honourable court does extend the time for compliance with the said Ruling/Judgment and exhaustion of the appeal process to Thirty (30) days.
4. That this honourable court does allow the appeal by setting aside, rescinding and/or vacating Ruling/Decision/Judgment of the IEBC Code of Conduct & Ethics Enforcement Committee in complaint No. 4/2017 issued and delivered on 22<sup>nd</sup> June, 2017.
5. That this honourable court does issue status quo orders.
6. That this honourable court be pleased to issue any other orders as it may deem fit and just to grant in the interest of justice and expediency.
7. That costs of this application be in the cause.

The application is premised on the following grounds;

- (a) The Petitioner/Appellant was nominated as an independent candidate to contest for a member of National Assembly seat, Rarienda Constituency.
- (b) That he has green, blue and orange as his dominant, approved campaign colours while his symbol is a flower
- (c) The IEBC Code of Conduct & Ethics Committee fined the Petitioner/Appellant Kshs. 250,000/= payable within 48hrs or in alternative he stands disqualified.
- (d) The said committee's findings were based on the fact that the Petitioner/Appellant as an independent candidate ought not to use the face of the Rt. Honourable Raila Amollo Odinga in his posters and in his campaigns.
- (e) The said decision is an abrogation of the constitution of Kenya in relation to Bill of Rights, right of appeal, fair administrative justice and a fair hearing.
- (f) That due to the foregoing, the upshot being that no prejudice shall be occasioned if this honourable court issues the appropriate orders as prayed for and in the interest of justice, truth, equaity and fairness

And supported by the annexed affidavit sworn by Augustine Neto Adho on the 23<sup>rd</sup> June, 2017.

The respondent has opposed the application vide a replying affidavit sworn by Erick Onyango and filed in court on the 28<sup>th</sup> day of June, 2017. In addition, the respondent has also filed a notice of preliminary objection dated the 28<sup>th</sup> day of June, 2017.

On its part, the interested party has filed a replying affidavit sworn by Chrispine O. Owiye on the 24<sup>th</sup> June, 2017.

When the application came up for hearing, the court gave directions that both the preliminary objection and the application be heard together.

Parties made oral submissions which mirrors the contents of their respective affidavits in support and in opposition to the application.

Submitting on behalf of the applicant, Mr. Ogonga advocate told the court that he moved to court on the 23<sup>rd</sup> June, 2017 to challenge the decision of Independent Electoral and Boundaries Commission (code of

Conduct Committee) which decision was rendered on the 22<sup>nd</sup> June, 2017. He averred that the applicant feels that the decision was unfair, illegal and unprocedural thereby activating the need to have the High court intervene on behalf of the applicant with the goal of having it rescinded.

He has sought a stay of execution and extension of time within which to comply with the decision of the IEBC Committee and exhaustion of the Appeal process to Thirty (30) days.

It was submitted that the application is based on the ground that the applicant is an independent candidate for the position of member of parliament for Rarieda Constituency in Siaya County. That he appeared before the IEBC in response to a complaint that was filed by Erick Onyango (the Respondent) herein which complaint formed the basis of proceedings before the IEBC Committee which thereafter made a decision. The appellant was barred from using the image of the party leader of ODM Party and for use of that image, he was fined Kshs. 250,000/= to be paid within 48 hours and in the alternative, he would stand disqualified.

The grounds of the said complaint are set out in the respondents complaint dated the 5<sup>th</sup> day of June, 2017, which are that, the independent candidate for member of National assembly for Rarieda Constituency used colours resembling those of ODM and posted images of the ODM party leader alongside his own in a bid to cause confusion and give himself undue advantage.

It was submitted that the applicant is not an ODM nominee for any position in Rarieda and that the complainant did not purport to be a member of ODM party. That the committee assumed that the ODM as a party was aggrieved by the actions of the Appellant.

The court was told that the complainant before the IEBC committee did not tender any evidence to proof that he is a party member and that he is duly aggrieved in any form. That the complaint did not show that he was a concerned citizen of Rarieda Constituency of Siaya County and to that extent, the committee was acting per in curium.

It was submitted that the complainant did not deny that during the nomination, the applicant had vied for the position of member of National Assembly for Rarieda on an ODM ticket and during the campaigns he had his motor vehicle painted orange the purported colour of ODM, but after the nomination he changed the colours to blue, green and orange which were his colours and which had been approved by the registrar of political parties. That in the decision of the IEBC committee, it noted that the symbols and colours was not an issue.

The applicant avers that he did not use the image of Raila as the ODM leader but as a head of a coalition. The court was asked to quash the decision of the committee.

In support of the applicant's case, counsel relied on the cases of Geothermal Development Company Limited Vs. Attorney General & Another Petition 352/2012 and that of **Leonard Sitamze Vs. the Minister for Home Affairs & 2 others Misc. Civil App No. 1652 of 2004.**

When it was his turn to submit, counsel for the respondent told the court that the letter of complaint only set out part of the complaint but was not exhaustive. That the key complains were on the issue of the image of Raila Odinga, the colour and the slogan. The court heard that the applicant was still using the same colours notwithstanding the warning by the IEBC Committee not to use them and that by using the symbols of the ODM Party when he was no longer a member, he was gaining undue advantage. That the complainant hails from Rarieda Constituency and is a member of ODM Party.

It was further submitted that the court was not shown how the decision of the committee is unfair and unprocedural. That the committee reached the decision after considering all the matters before it and it was arrived at after hearing all the parties and it took into account many factors, colours being one of them.

It was averred that the applicant has not yet obeyed the orders by the IEBC committee and he has not

come to court with clean hands. On the preliminary objection, counsel contended that the court has no jurisdiction to hear the matter for the reason that the order was supposed to be complied with within 48 hours which have since lapsed and that prayer 3 of the application has been spent and there is nothing to extend. That the applicant has no locus to bring the application herein because he is not a contender until the order is quashed.

Counsel averred that the applicant has not exhausted all the mechanisms open to him within IEBC by way of Review and if the High Court were to grant an extension of the orders or stay it would be tantamount to reviewing the orders of IEBC Committee which can only be done by IEBC.

It was submitted that any person who contravenes section 6 (g) of the Electoral Code commits a misconduct and one does not have to commit more than one misconduct to be found guilty. The court heard that the applicant has not shown that he has changed his colours after nomination and by his own admission, he is still using the image of Raila Odinga only that it's a small image and is using orange as his dominant colour. He concluded by submitting that the Appeal has no chances of success.

On this part, counsel for the interested party associated himself with the submissions by the counsel for the respondent. He averred that the applicant had come to court with unclean hands as he has failed to obey the court order and he is still continuing with what the committee ordered him to stop.

Submitting on prayer 3 of the application, that is for extension of time to pay the Kshs. 250,000/=, and to remove the offensive materials, he told the court that the applicant does not wish to appeal against the decision of the committee. That the court was not told why the applicant is unable to pay the money or why he is unable to remove the offensive materials and what steps he is taking and that he had not told the court what part of the decision they do not agree with yet he has sought to quash the same.

On the issue of coalition, the court was told that coalitions are between two political parties and it cannot be that there is a coalition between a party and an independent candidate and more so the applicant and ODM. That though the applicant told the court that his colours are Blue and Green, he has insisted on using Orange colour which is the colour for ODM.

On the submission by the counsel for the applicant that the applicant is not a member of ODM, it was submitted that under regulation 8 (3), a complaint can be filed by any person aggrieved by an electoral activity or a voter can also complain. The court was asked to dismiss the application.

In a brief rejoinder, counsel for the applicant submitted that under Rule 8(3) of the Regulations, a complaint can only be lodged by a voter in the electoral area.

It was his contention that the issue of jurisdiction does not arise as the applicant is not seeking stay. He averred that the moment a party moves to court to quash a decision, the court is obliged to consider the application.

The court has considered the application together with submissions. It is noted that prayer 2 of the application was abandoned and this court is left with prayers 3, 4, and 5 to consider. This court has been asked to extend time for compliance with the decision rendered by the IEBC Committee by 30 days to enable the applicant comply. Counsels for the respondent and the interested party have argued that the court cannot grant the said order as the same has already been spent, their argument being that when he failed to comply with the order within the time given by the committee the orders lapsed.

In support of the application, counsel for the applicant has relied on the provisions of section 9 and 24 of the elections Act. This court has had a chance to peruse Section 9 and it relates to postponement of disqualification to enable appeal in a case where a person has been adjudged or declared to be of unsound mind, adjudged bankrupt or convicted of an election offence and disqualified from being registered as a voter. It does not relate to a person disqualified from contesting for a seat in a general election.

On the other hand, section 24 (2) to extent that it is relevant to the case herein applies only to a person

sentenced to imprisonment for at least six months as at the date of registration as a candidate or at the date of election.

In this case, the applicant was fined Kshs. 250,000/= among other orders and he was warned that should he fail to adhere to any of the orders as issued, he shall be disqualified from participation in the 8<sup>th</sup> August, 2017 General Elections.

With regard to the prayer for extension of time, I wish to make the following observations;

- (1) There is a valid decision by the IEBC committee which is still in force and which has not yet been set aside and/ or reviewed.
- (2) It is clear that the applicant has not yet complied with the said decision to-date.
- (3) Though he has appealed against the same, there are no orders staying the said decision.
- (4) Though the applicant has sought orders extending time to comply, no reasons at all have been given why he did not comply with the decision.

From the evidence available to the court, the applicant has continued to use the image of the ODM Party leader Raila Odinga with impunity. Counsel for the applicant in justifying the use of the same, submitted that, Raila Odinga is a leader of a coalition party. To this I say, the political party's Act is very clear on coalitions and unless a party belong to a coalition, it has no right to enjoy any privileges enjoyed by member parties in that coalition. As rightly submitted by counsel for the respondent, there cannot be any coalition between a party and an independent candidate.

The IEBC committee is an quasi -judicial body and its decision once rendered have to be complied with for good order in the society and for the rule of law.

Quoting Ibrahim J (as he then was) in the case of ***Econet Wireless Kenya Limited Vs. Minister for Information and Communication of Kenya & Another (2005) Klr 828,***

*“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is main and unqualified obligation of every person against whom an order is made by court of competent jurisdiction to obey it unless and until the order is discharged. The uncompromising nature of this obligation is showed by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. The same reasoning was adopted by the supreme court of India in the case of **T. N. Gadaavarma Thiru Mulpad (2006) 5 SCC** thus disobedience of orders of the court stikes at the very root of the rule of law on which the judicial system rests”.*

The rule of law is the foundation of a democratic society and the judiciary is the guardian of the rule of law. If judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs”.

In my considered view, this also applies to quasi judicial Tribunals in equal measure.

I am alive to the fact that the application before me is not one for contempt of court, but the applicant in the application before the court has failed to comply with the decision of the IEBC committee and he has not given any reasons for the failure to do so yet he has sought extension of time to comply.

With regard to prayer 4, the orders sought therein are final in nature and cannot be granted at this stage.

In the result, this court finds that the application dated 23<sup>rd</sup> June, 2017 has no merits and the same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of June, 2017.

.....

**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Appellant.*

..... *For the Respondent.*