REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS APPLICATION NO 304 OF 2017

IN THE MATTER OF AN APPLICATION BY HON PETER EDICK OMONDI ANYANGA

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF NOMINATION DISPUTES RESOLUTION CASE NOS 100 & 168 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....RESPONDENT

AND

TOM MBOYA ODEGE.....1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....2ND INTERESTED PARTY

EX PARTE: HON EDICK PETER OMONDI ANYANGA

JUDGEMENT

1. Save for the comments which this Court intends to make in this decision so as to clarify the position of the decision of the Respondent dated 7th June 2017 and delivered on 8th June, 2017 in Nomination Dispute Case No. 100 of 2017 and Case No. 168 of 2017, the dispute has largely been overtaken by events.

2. By its decision dated 7th June, 2017 in Milimani High Court Election Petition Appeal No. 89 of 2017, this Court after hearing an application for stay of execution of the decision made by **Kimaru, J** pending appeal to the Court of Appeal in the said appeal granted a conditional stay of execution pending in the following terms:-

"i. Accordingly, I hereby grant a stay of execution of the judgment delivered herein on 31st May 2017 pending the hearing and determination of intend appeal or further orders either of this court or the Court of Appeal on condition that the intended appeal is filed within 2 days excluding the date of delivery of this ruling.

ii. Unless these orders are varied either by this court or the Court of Appeal, the nomination of the Orange Democratic Movement Party's candidate for Nyatike Constituency will await the decision of the Court of Appeal.

3. It is clear that during the existence of the said orders both the Interested Parties filed new complaints before the Respondent's Nominations Dispute Resolution Committee, being cases Nos. 100 of 2017 and 168 of 2017 and after hearing the said complaints the said Committee on 8th June 2017, allowed the complaints by the interested parties, with the consequence that the ex parte applicant's nomination, which was upheld by the High Court, the subject of which was pending before the Court of Appeal was revoked by the Respondent.

4. It is now clear that by its decision the Court of Appeal directed that fresh nominations be conducted by the Party.

5. In its decision in **Republic vs. Independent Electoral and Boundaries Commission & 3 Others Exparte Wavinya Ndeti [2017] eKLR**, this Court expressed itself *inter alia* as hereunder:

"It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent. If it were so, the legislative intent would have been devoid of concept of purpose."

6. It would seem that the interested parties herein did exactly what the Court frowned upon in the above cited case when after this Court had issued orders barring the nomination of the Orange Democratic Movement Party's candidate for Nyatike Constituency pending the decision of the Court of Appeal, the said interested parties went ahead to invoke the jurisdiction of the Respondents Dispute Resolution Committee to seek orders whose effect would be to nullify the decision of the High Court which had only been stayed, the conditions upon which the stay was issued as well as the possible outcome of the decision of the Court of Appeal. The said Committee seems to have fell into the said interested parties' traps and machinations when it acceded to the said prayers.

7. The interested parties were or must have been aware of the import of the stay orders and it is clearly mischievous on their part to allege that by granting the said orders the Court directed that no other person apart from the 1st interested party be nominated by the Party. In fact in granting stay this Court expressed itself as hereunder:

"It was therefore held by the Court of Appeal in Re: Timothy Riziki Hopkins Civil Application No. Nai. 194 of 2008 that a "stay" does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandate stayed, to preserve a *status quo* pending appeal and that the Court has no jurisdiction at the stage of application for stay of execution pending appeal to grant an order whose effect would

be to reverse the decision of the Superior Court and legalise the resolution and the contract already nullified until the determination of the appeal since that can only be nullified upon the hearing of the appeal."

8. It is therefore clear that there was no question of this Court paving way for the nomination of the 1st interested party in light of the express order barring the ODM Party from conducting its nomination for the said Constituency. By moving the Respondent's Committee for the said order, the interested parties were clearly and with impunity abusing the due process. This is what the Court had in mind in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** where it was held with respect to invocation of the Court's inherent jurisdiction where there is an allegation of abuse of Court process that:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. *It can be used properly but can also be used improperly, and so abused*. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

9. In this case the parties herein had subjected themselves to the jurisdiction of the Superior Courts. Having done so they had no justification to resort to the jurisdiction of inferior tribunals such as the Respondent's Dispute Resolution Committee in order to in effect undo the decision of a superior court and in effect render proceedings pending before a superior court superfluous. As was held by this court in granting stay, parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. A situation where parties take action that destroy the subject matter of pending proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order that may be made therein was frowned upon by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005].**

10. Therefore the interested parties' action of invoking the jurisdiction of the Respondents' Dispute Resolution Committee was clearly in bad taste and was not expected of either a political party of the stature of the 2nd interested party herein or the 1st interested party who aspires to be a lawmaker. Such conduct must be detested in the strongest terms possible. Similarly, if the Respondent was made aware of this Court's orders and the fact of the pendency of the proceedings before the Court of Appeal and proceeded to entertain the said proceedings, it was clearly violating the national values and principles of governance in Article 10 which bind the Respondent in its decisions and which include the rule of law. Deference to decisions and orders of the Superior Courts by Courts and Tribunals subordinate thereto is one of the tenets of the rule of law.

11. As I have stated hereinabove, the said decision has now been overtaken by the delivery of the decision of the Court of Appeal. However to set the record straight and to avoid further confusion, the decision of the Respondent's Dispute Resolution Committee given on 8th June, 2017 is removed into this Court and is hereby quashed for both abuse of the due process and want of jurisdiction. This decision is for avoidance of doubt issued without prejudice to the decision of the Court of Appeal.

12. The ex parte applicant is awarded the costs of these proceedings to be borne by the interested parties equally.

13. It is so ordered.

Dated at Nairobi this 27th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okongo for the 2nd interested party

Mr Nderitu for Miss Oduor for the 1st interested party

CA Mwangi