



**THE REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 55 OF 2017**

***LESIT, J.***

**PROF. AYIECHO OLWENY.....APPELLANT**

**VERSUS**

**JAMES ONYANGO K'OYOO.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT(ODM)PARTY.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

(Being an appeal against the judgment of the Political Parties Disputes Tribunal dated 9<sup>th</sup> May, 2017 in Tribunal Case number 115 of 2017)

**IN THE MATTER OF AN APPLICATION ON BEHALF OF PROF. AYIECHO OLWENY AGAINST MS JUDITH PARENO BEING THE CHAIRPERSON OF THE ODM NATIONAL ELECTIONS BOARD FOR AN ORDER OF COMMITMENT TO CIVIL JAIL FOR CONTEMPT OF COURT**

**PROF. AYIECHO OLWENY.....APPLICANT**

**VERSUS**

**JUDITH PARENO.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT(ODM)PARTY.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JAMES ONYANGO K'OYOO.....4<sup>TH</sup> RESPONDENT**

**RULING ON NOTICE TO SHOW CAUSE**

**BACKGROUND**

1. The 1<sup>st</sup> Respondent was found guilty and convicted of contempt of court. She was then asked to show cause why this court should not commit her to civil jail.

2. Just to put the record straight, when the 1<sup>st</sup> Respondent was brought under warrant of arrest in answer to the Notice of Motion for Contempt proceedings she claimed that she had not been served with the judgment and order of the court and therefore could not have been in contempt, and the court agreed with her on that. Therefore the 1<sup>st</sup> Respondent was served in court, in the presence of the court with the judgment and decree of this court. That was on the 6<sup>th</sup> June, 2017. The court then gave the 1<sup>st</sup> and 2<sup>nd</sup> Respondents 72 hours from the date of service in court to comply with the court's judgment and decree. The 72 hours were to expire on 9<sup>th</sup> June, 2017 and so the matter was set for a mention to confirm compliance at 3pm of that date.

3. The record speaks for itself. When the parties came before the court, there was controversy whether there had been compliance with the court's judgment and decree and so the parties were urged to argue the application for contempt dated 30<sup>th</sup> May, 2017. The 1<sup>st</sup> Respondent, in this Notice to Show Cause why she should not be committed to civil jail was answering for contempt of court's order to comply with the judgment and decree of this court as from 6<sup>th</sup> June, 2017 when the same was served upon her.

4. The 1<sup>st</sup> Respondent began her address by going over the evidence that was placed before the court by the parties on the appeal, and how the court accessed that evidence. In effect 1<sup>st</sup> Respondent sat on 1<sup>st</sup> Appeal over the judgment passed by this court in this matter.

5. Next the 1<sup>st</sup> Respondent observed that the ODM Party advocate had not filed any papers and had not made any submissions in answer to the appeal. The 1<sup>st</sup> Respondent blamed the counsel for sitting pretty and not representing the matter and then concluded that he was to blame for the turn of events.

6. The next step the 1<sup>st</sup> Respondent took was to explain at length the part she played in compliance to the court order; how she summoned the Returning Officer and the Five Presiding Officers of Muhoroni Constituency, whose results she observed the court had used to tally and finally declare the winner. She then stated that it was not her role under the Party Rules to receive and tally results. Her intention in organizing the meeting of the 8<sup>th</sup> June, 2017 was to have the Party designated Presiding Officers present results to the Party designated Returning Officer so that he could receive the results, tabulate them and declare the winner, as ordered in this court's decree.

7. It was her explanation that only 2 of the Presiding Officers showed up, and she proceeded to name them. The other three did not show up. She then explained that the Returning Officer resorted to the text messages through which results had earlier been sent to him by the three 'missing' Presiding Officers after the Party Primaries. He therefore managed to tabulate the results from the Five Wards in question after which he declared the results. I have said enough about the results. Only thing in conclusion is that whatever results this officer used in both instances were not the same because there was an additional 1000 votes, wholly unexplained.

8. This should have concerned the 1<sup>st</sup> Respondent as Chair of the Party National Election Board why the end result had such a huge variance from the previous results. This speaks of indifference in the process and the manner in which the court's order was being complied with.

9. The 1<sup>st</sup> Respondent did not mince her words when she informed the court that she ought not to have been served with the Order. Her name was not specifically mentioned in that order. She forgot that a party can only act through its officials, and in matters elections she is the chief. The 1<sup>st</sup> Respondent instead explained that under their Party Rules it was not her responsibility to receive results and tabulate them. That was the duty of the Returning Officer. She said that her duty was to put structures in place to ensure the Returning Officer carried out his duty of receiving and tabulating results and declaring the winner.

10. The 1<sup>st</sup> Respondent then passed judgment on her compliance of the court order by stating that in her view she had at least made an attempt to obey the court order and at least had partially complied with it.

11. The 1<sup>st</sup> Respondent was expected to show cause why she should not be committed to civil jail. Unfortunately, she started off on a wrong footing of sitting on appeal as explained above. No one met her expectations. Not the court in its judgment. Not the Appellant. Not the Party's lawyer. Not 3 of the Five Presiding Officers. Only 3 people pleased her, the discredited Returning Officer and 2 of the 5 Presiding Officers.

### **CONTEMPT OF COURT.**

12. The objectives of the **Contempt of Court Act** are stated under **section 3** of the said **Act** as follows:

**“3. The objectives of this Act are to-**

**(a) uphold the dignity and authority of the court;**

**(b) ensure compliance with the directions of court;**

**(c) ensure the observance and respect of due process of law;**

**(d) preserve an effective and impartial system of justice; and**

**(e) maintain public confidence in the administration of justice as administered by court.”**

13. The court has already found the 1<sup>st</sup> Respondent guilty of contempt. In regard to her 'show cause' there is a clear demonstration that the Respondent correctly interpreted the court's order. The structures she put in place to ensure compliance are also commendable. However, there was lack of supervision over the process to ensure it was credible and carried out with integrity, demonstrated by use of results other than those specified in the court's judgment, and which the Respondent was very clear about. That is wilful disobedience.

### **REPRIMAND**

13. In contempt the court has a discretion to determine what punishment to meet out. The options are clear and include imprisonment for six months and imposition of fine and other punishments as known in the law.

14. I have chosen to reprimand the 1<sup>st</sup> Respondent because I perceive that she has two challenges, perception and attitude. Perception has been defined as the process by which people translate sensory impressions into a coherent and unified view of the world around them, based on incomplete and unverified information and equated into reality for most practical purposes and guides human behaviour.

15. Attitude has been defined as a predisposition to respond positively or negatively towards a certain idea, object, person, or situation. Attitude influences an individual's choice of action, and responses to challenges, incentives, and rewards.

16. Attitude refers to the predisposition or tendency to respond positively or negatively towards an idea, object, person or situation. Due to perception and attitude challenges, the 1<sup>st</sup> Respondent took a negative action, sat on a corrupted process and presented same to court as compliance, or is it to put it in her own words partial compliance with the court order.

17. Let me remind the 1<sup>st</sup> Respondent that the Appellant and 4<sup>th</sup> Respondent are respected and honourable members of the ODM Party. The least they expected of the Party was fairness in the entire nomination process. Not equity but fairness. There was no fairness at all at the tail end of the process.

18. Further Muhoroni Constituency under the ODM Party Rules and Regulations was not classified in Zone C for which the Party could give direct nomination. There had to be nomination by universal

suffrage, an actual one, not one that is stage managed as happened in this case.

19. Let me also remind the 1<sup>st</sup> Respondent that she is a very senior person in the ODM Party. The Chair of the NEB. This is no mean position. Of all other positions, this is where integrity is of paramount importance. You are also a woman. A mother. Mothers are nurturers, patient, caring, understanding and deal fairly with all. The other members of the family look up to them to bring the family together not to scatter.

20. As Chair of the NEB, it was your responsibility to ensure the nomination process went on smoothly, fairly, freely and credibly. Corruption should not have been countenanced, least of all by you. It was in your interest and the Party interest to ensure credible processes whose integrity should not be in doubt. And it was your duty to ensure this but you did not. You had duties and responsibilities. You should have led by example.

21. Let me also remind the 1<sup>st</sup> Respondent that you are First and Foremost a Lawyer. An officer of this court. A member of the Legal Profession, the company of Learned Friends. If she met Tudor Jackson at Kenya School of Law, he taught Professional Ethics and Etiquette. How to behave as a professional, with courtesy. To carry oneself with dignity and to honour authority and respect the law.

22. I choose to Reprimand the 1<sup>st</sup> Respondent so that she can take time to consider what I have said to her today in the confines of your office and home, not the four corners of a wall where to leave or enter has to be under another's command. So I reprimand you as above stated.

23. In the result I lift the warrant of arrest issued against you and proceed to cancel it.

24. You are now free to leave.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE, 2017.**

**LESIIT, J.**

**JUDGE**