



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 411 OF 2017
PERPETUA MPONJIWA.....PETITIONER
VERSUS
INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....1STRESPONDENT
ORANGE DEMOCRATIC MOVEMENT PARTY.....2NDRESPONDENT

JUDGEMENT

1. The petitioner participated in the second Respondents nominations for the Kileleshwa Ward within Nairobi County which she claims were marred by irregularities. She contested the outcome of the nominations at the Political Parties Dispute Tribunal which ordered a repeat of the exercise. Owing to the fact that the second Respondent was not in a position to repeat the exercise, the petitioner was by consent guaranteed a nomination slot as a member of the Nairobi City County Assembly. The consent terms are contained in a letter dated 24th June 2017 which was adopted by the Court of Appeal Civil Appeal No. 176 of 2017 and a consent order dated 12th July 2017 was issued.
2. The petitioner complains that the second Respondent submitted a list of names for nomination in which her name appears as number 23, hence she was not accorded priority and also the said list was rejected by the first Respondent for want of regional balance.
3. The petitioner accuses the second Respondent of disobeying the said consent, hence, denying her right to political participation and accuses the respondents of collusion. She seeks orders compelling the second Respondent to nominate and gazette her accordingly, alternatively, an order for compensation for salaries and benefits she could have earned as a member of the county assembly.
4. With regard to the prayer for compensation, no material was placed before the court to demonstrate the basis upon which the court can calculate and arrive at the claimed compensation nor are there averments in the petition relating to the alleged compensation. The issue of salaries/compensation appears for the first time in the reliefs and no factual or legal basis has been pleaded.
5. The first Respondent avers that it was not a party to the alleged consent and denied the alleged collusion. It avers that as per the Party List Regulations, 2017, the names in party lists are to be in order

of party preference and that it does not dictate to the party the names to be in the list.

6. The second Respondents Response is that upon receiving names from the counties, it deliberated on the same guided by the law and the list was submitted as the law provides. However, subsequently, the first Respondent notified the second Respondent that the petitioner appeared in their database as an independent candidate. The second Respondent also stated that the facts raised in this case were determined in Political Parties Dispute Tribunal in number 485 of 2017.

7. Counsel for the petitioner admitted that the issues before the court were determined in the said case as evidenced by a copy of judgment dated 29th July 2017 annexed to the amended petition and a decree dated 1st August 2017. H also admitted that the matter was resolved by the court of appeal in civil Appeal Number 176 of 2017 by way consent as per the consent order appearing at page 10 of the record dated 12th July 2017 and the consent letter dated 24th June 2017.

8. The above position raises a fundamental issue, namely, whether this petition is properly before this court. This is not an appeal against the decision rendered by the Political Parties Disputes Tribunal. It is a petition based on the same facts but this time framed as a constitutional question in the form of alleged violation of constitutional rights to political participation.

9. The Political Parties Disputes Tribunal ordered the re-constitution of the second Respondents list of nominees for its members of County Assembly, Nairobi County in line with the Court of Appeal decision within 48 hours from the date of the judgment. No appeal was preferred against the said decision. No attempt was been made to enforce the said judgment. Instead, the petitioner opted to file this petition premised on issues already determined by a court of competent jurisdiction.

10. Enforcement is the last stage of the judicial process after the legal right, claim or interest has ended in a judgment or order which remains to be enforced. It is the process whereby a judgment or order is enforced or to which it is made effective according to law. When a [court](#) or a Tribunal renders a judgment, it will not enforce the decision on behalf of the successful party without further action. In [common law](#) legal systems, judgment enforcement is regulated in [civil law](#) legal systems through the Code of Civil Procedure.

11. It is trite that every successful litigant is entitled to the fruits of his judgment. It is also a truism that the overriding function of the judicial process of enforcement is to enable the judgment creditor reap the fruits of his judgment with a view to obtaining for him due satisfaction, compensation, restitution, performance or compliance with what the court has granted by way of remedy or relief. The process of enforcement is broadly referred to as execution. Lord Denning aptly summarized the process thus:-

"Execution means quite simply the process for enforcing or giving effect to the judgment of the court....."[\[1\]](#)

12. Clearly, the petitioner did not take cognizance of the clear provisions of section **41 (3)** of the *Political Party's Act*[\[2\]](#) which provides that:-

(3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.

13. Instead of enforcing the said decision, the petitioner filed this petition citing alleged violation of his constitutional rights and asks this court to compel the second Respondent to nominate her as per the said consent. To me, this amounts to asking this court to enforce the orders referred to above, yet the law is clear on how decisions of the PPDT ought to be enforced.

14. Counsel for the second Respondent raised the issue of jurisdiction citing the said decisions. To me, the objection is merited. Parties cannot be allowed to litigate and use the constitutional court to get reliefs that would amount to enforcing the decisions they have obtained in other forums instead of using the legal mechanism to enforce the decisions in their favour. In my view, the petitioner ought to have utilized the

mechanism provided under the above provisions and only approach the High court by way of appeal. On this ground alone, this petition fails.

15. In *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others*[3] it was held that to convert every issue into a constitutional issue is to undermine the importance of the process. Also relevant is the decision rendered in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others*[4] where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned.

16. I am not persuaded that this petition raises any justiciable constitutional issues. It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[5] The petitioners rights were determined by a court of competent jurisdiction. It was for the petitioner to utilize available legal mechanism to enforce the decision in his favour.

17. This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. The petitioner had the option of enforcing the decree in her favour instead of filing this petition. In *John Harun Mwau vs Peter Gastrol & 3 Others*[6] the court made the following observation:-

"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it.....It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."

18. A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.[7] The petitioners rights were determined by court as stated above. He should have pursued the legally available remedy.

19. On the alleged claim for compensation, it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.[8] As stated above, this issue was not pleaded in the petition and only appears in the reliefs sought. Certainly, the relief hangs in the air and is not grounded on the pleadings and it cannot stand.

20. From the material before me, there is absolutely nothing to demonstrate that the petitioner has discharged her burden of prove to the required standard on the question of compensation.

21. Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.[9]

22. In view of my conclusions stated above, I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 31st day of August 2017

John M. Mativo

Judge

[1]An Enforcement Of Judgements And Court Orders In The Nigerian Legal System By [tallp](https://topeadebayollp.wordpress.com/2011/06/09/an-enforcement-of-judgments-and-court-orders-in-the-nigerian-legal-system/), <https://topeadebayollp.wordpress.com/2011/06/09/an-enforcement-of-judgments-and-court-orders-in-the-nigerian-legal-system/>

[2] Act No. 11 of 2011

[3] {2015}eKLR

[4] {2011}eKLR

[5]<http://www.yourdictionary.com/constitutional-question>

[6]{2014}eKLR

[7] [Board of Optometry vs. Colet](#), 260 SCRA 88, July 30, 1996; [Gozun vs. Liangco](#); citing [Galarosa vs. Valencia](#), 227 SCRA 728, 737, November 11, 1993; [Office of the Ombudsman v. Judge Ibay](#), 364 SCRA 281, September 3, 2001.

[8] [Koinange and 13 others vs Koinange](#) {1968} KLR 23

[9] [Mbogo & Another vs Shah](#){1968} EA 93