



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**ELECTION PETITION NO. 124 OF 2017**

**IN THE MATTER OF: SECTION 5 OF THE JUDICATURE ACT, CHAPTER 8 OF THE LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION BY ERICK ONYANGO FOR LEAVE TO  
INSTITUTE CONTEMPT OF COURT PROCEEDINGS AGAINST NETO ADHOLA**

**BETWEEN**

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

**VERSUS**

**ERICK ONYANGO.....RESPONDENT/APPLICANT**

**-EX PARTE- INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION...INTEREST PARTY**

**RULING**

What is before the court for determination is the Application dated the 13<sup>th</sup> July, 2017 brought under Section 5(1) of the Judicature Act Cap 8 Laws of Kenya. The applicant has sought the following orders: -

- 1. THAT** this application be certified extremely urgent and heard exparte in the 1<sup>st</sup> instance, service thereof being dispensed with;
- 2. THAT** the Honourable court be pleased to find that the Petitioner/Appellant herein, Neto Adhola, is in contempt of the orders issued by the IEBC Code of Conduct and Ethics Enforcement Committee on the 22<sup>nd</sup> of June, 2017 and later confirmed on the 30<sup>th</sup> of June, 2017 by Hon. Lady Justice L. Njuguna.
- 3. THAT** the Contemnor should bear the cost of this application.

The application is premised on the grounds set out on the body of the same and its supported but the affidavit sworn by **ERICK ONYANGO** on the 13<sup>th</sup> July, 2017.

The applicant avers that on the 22<sup>nd</sup> June, 2017 the IEBC Code of Conduct & Ethics Enforcement Committee delivered a Judgement directing the petitioner /appellant herein to pay a fine of Ksh. 250,000 within 48 hours from the date of the Judgement. He was also ordered to remove all posters and campaign materials bearing the colours of Orange Democratic Party and the image of ODM Party leader Raila Odinga.

The Applicant did not comply with the orders enumerated in the Judgement but he instead appealed to the High Court which upheld the decision by the

IEBC Code of conduct and Ethics Enforcement Committee.

It is contended that the appellant is still in breach of the said orders as he is still using the colours of the Orange Democratic Party coupled with the image of the ODM party leader, RT. Hon. Raila Amollo Odinga. It is further averred that the appellant made comments to the effect that he had failed and will not pay the fine of ksh. 250,000 because he feels that the charges against him were trumped up. That he has blatantly refused to desist from using the image of ODM Party leader Raila Odinga claiming that the image of the ODM party leader is being used all over and as such Rarieda Constituency should not be an exception. The applicant contends that it is an open act of defiance of the IEBC Code of Conduct & Ethics Enforcement Committee orders issued on the 22<sup>nd</sup> June, 2017 and upheld by the High Court on the 30<sup>th</sup> June, 2017.

The application is opposed vide a replying affidavit sworn by the appellant on 2<sup>nd</sup> August, 2017. He avers that the interested party herein, Independent Electoral & Boundaries Commission, did not have Jurisdiction to determine matters commenced pursuant to Section 20 of Election Offence Act and the 2<sup>nd</sup> schedule of the Elections Act 2016. To support this contention he relied on the decision made in J/R application no. 439/2017 by Justice Musyoka.

He averred that the blanket order to disqualify him from participating in all political and campaign activities in preparation of the of 8<sup>th</sup> August, 2017 General Elections are too drastic and the assertions that he is campaigning are far fetched, Malicious and false. He stated that there is no video evidence or still photos produced to show that he is campaigning for any seat and that the authenticity of the campaign materials as produced is questionable since anybody can print the same and lay blame on him.

That in addition, the newspaper cutting bears no date and the same ought to be disregarded.

He further averred that the charge sheet as tendered is at variance with the narrative of the decision of the committee in terms of the image, the colours and symbols in question in that he had obtained permission from the registrar of Political Parties to use the same and the ODM had not demonstrated an exclusive right in the use of the colour Orange.

He stated that he has substantially complied with the directives by the committee in terms of payments of Ksh. 250,000 by way of Bankers cheque no. 131866 and removal of the offensive campaign materials.

The application proceeded by way of oral submissions.

On his part, Mr Munyua for the applicant submitted that despite the decision of the IEBC committee, the appellant has continued to use the colours and symbols of the ODM party which prejudices the ODM candidate in Rarieda Constituency and that his posters continue to carry the image of ODM party leader Raila Odinga. He has asked the court to consider the materials that they have been annexed to the affidavit and the press release and find that the petitioner is not in contempt of court.

The applicant submitted that the appellant's continued use of the ODM colours and symbols was prejudicial to the ODM candidate because the majority of the people in Rarieda Constituency are illiterate and they are likely to be misled.

Counsel for the interested party supported the application and submitted that this is the only forum for the applicant to ensure that the decision of the committee is complied with.

On his part Counsel for the petitioner submitted that in matters of contempt, the courts have held that a higher degree of proof is required than that of balance of probability but slightly below that of reasonable doubt. He averred that the photographs annexed to the supporting affidavit do not show when they were taken.

With regard to the annexed press release, it was submitted that the same was down loaded and the source is not known. That though the statement is to the effect that the appellant said he is not bound to obey the order of IEBC Committee, he has annexed a copy of bankers cheque of ksh. 250,000, in compliance with the said orders and therefore the contents cannot be true. The court was asked to note that the interested party has not denied that the payment was done in compliance with the decision by IEBC and court orders by the Hight Court.

He contended that the petitioner having been barred by the IEBC committee, is no longer a candidate in the forthcoming General Elections and he would have no business putting the posters complained of and that the posters must have been put by somebody who stands to benefit from the woes of the appellant/petitioner. He submitted that in matters of contempt the applicant has to prove service of the order upon the alleged contemnor and that there is willful disobedience of the court order.

In a quick rejoinder, counsel for the applicant submitted that knowledge of the court order supersedes service and in support of that contention he relied on the case of **Basil Criticos Vs A. G & 8 others and that of Justus Kariuki Mate Vs Martin Wambora & another**". The court was told that the petitioner was all along aware of the matters before the court and he was at all material times represented by Counsels. With regard to the cheque of Ksh. 250,000, he told the court that no evidence was availed to court to prove that the money was paid to the interested party.

The court has considered the material before it. The applicant seeks orders that the petitioner is in contempt of the orders made by IEBC Code of Ethics and Enforcement Committee on 22/6/2017 in that he has continued to use the colours of the ODM party and the image of ODM party leader Raila Odinga.

The applicant has annexed photos showing the petitioner's campaign materials. The court has keenly perused the said photographs and it's true that looking at the same, the Orange colour used by the ODM party has been used and in one of them, the image of Raila Odinga has been used and it can be clearly seen. What is not clear to the court is whether the photographs were taken before or after the orders were given by the IEBC committee as there is no indication when they were taken.

On the issue of the press release, I agree with the Counsel for the petitioner that the same has been downloaded and the court would not know the source and/ the authenticity of the same.

Courts have held on several occasions that the degree of proof in matters of contempt of court is higher than balance of probability but slightly lower than that of beyond reasonable doubt. With the evidence on record and the material before the court, I have no doubt that the applicant has not satisfied the court to the required degree of proof that the petitioner is in contempt of court.

In the premises, I find no merit in the application dated 13<sup>th</sup> July, 2017 and I dismiss the same with no orders as to costs.

**Dated, signed and delivered at Nairobi this 4<sup>th</sup> day of August, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Appellant.*

..... *For the Respondent.*