



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. CIVIL APPLICATION NO. 360 OF 2017**  
**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY**  
**FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**ARTICLE 50 (1)**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010,**

**ARTICLE 88 AND ARTICLE 159 (2)**

**BETWEEN**

**KINGSLEY WELLINGTON ODIDA OBONYO.....APPLICANT**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**POLITICAL PARTIES DISPUTE TRIBUNAL.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**ORANGE DEMOCRATIC MOVEMENT.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**JOSEPH OUMA NDONJI.....4<sup>TH</sup> RESPONDENT/APPLICANT**

**EXPARTE**

# KINGSLEY WELLINGTON ODIDA

## RULING

The applicant herein, **KINGSLEY WELLINGTON ODIDA OBONYO** has moved the court by way of a Notice of Motion dated 19<sup>th</sup> June, 2017 under Article 159 (2) of the Constitution Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of Laws of Kenya and order 50 Rule 1 of the Civil Procedure Rules and has sought the following orders: -

1. **THAT** this application be certified extremely urgent and heard *ex parte* in the first instance, and service thereof be dispensed with.

2. The Honourable Court be pleased to quash the orders and/ or Decrees made by the 1<sup>st</sup> Respondent's Dispute Resolution committee dated 8/6/2017 and 9<sup>th</sup>/6/2017, 2<sup>nd</sup> Respondent's dated 6/5/2017 and 12/6/2017 and 3<sup>rd</sup> Respondent's special County Appeal Tribunal dated 6/5/2017. The Honourable be pleased to quash the various orders and/or Decrees made by the Political Parties Disputes Tribunal (the 2<sup>nd</sup> Respondent herein) made in case 154/2017 and delivered on 3/5/2017. The Honourable court be pleased to quash the orders and/or Decrees made by the Disputes Resolution Committee at Nairobi (The 1<sup>st</sup> Respondent herein) dated 8/6/2017. The Honourable be pleased to Quash the various orders and /or Decrees made by the Political Parties Disputes Tribunal (Herein the 2<sup>nd</sup> Respondent) made in case no 154/2017 delivered on the 12/6/2017. The Honourable court do quash the nomination certificate issued by the 3<sup>rd</sup> Respondent to the 4<sup>th</sup> Respondent.

3. The Honourable court be pleased to order the 1<sup>st</sup> Respondent to Gazette the applicant herein as the duly nominated candidate for the position of member of county Assembly for Umoja II Ward in Embakasai West Constituency in Nairobi County and to compete in the General Elections for the Member of County Assembly position in the said Ward on the Orange Democratic Movement ticket (Herein the 3<sup>rd</sup> Respondent). The Honourable court to compel the 1<sup>st</sup> Resident not to Gazette the name of the 4<sup>th</sup> Respondent as the nominee of the 3<sup>rd</sup> Respondent in the 8/8//2017 General Elections.

4. The costs of the application be provided for.

The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn by the applicant on the 28<sup>th</sup> day of June, 2017.

The summary of the applicant's case is that he is a member of the Orange Democratic Movement and a registered voter in Umoja II Ward, Embakasi West Constituency in Nairobi. He participated as a contestant on ODM ticket for the County Assembly Seat in the nominations concluded on the 30<sup>th</sup> day of April, 2017 by the 3<sup>rd</sup> Respondent and he was declared the winner in the said nominations. He was issued with a provisional Nomination certificate and a final one on the 3<sup>rd</sup> May, 2017.

That he came to run that the person who had emerged as number 3 in the said nominations, one Thomas Abwao had lodged a case before the 3<sup>rd</sup> Respondent's special county Appeals Tribunal against the person who emerged as No. 12 in the party primaries, Ole Joseph Ouma Ndonji, the 4<sup>th</sup> Respondent challenging the Nomination and issuance of another provisional certificate by the 3<sup>rd</sup> Respondent herein and the complaint was decided on the 6<sup>th</sup> May, 2017.

He stated that he was not aware that another provisional certificate had been issued to the 4<sup>th</sup> Respondent and the grounds upon such issuance. That he was not made a party to the above complaint before the 3<sup>rd</sup> Respondent special County Appeals Tribunal and he was not served with any pleadings in the said

complaint.

He avers that he was also not aware that there was a complaint filed by the 4<sup>th</sup> Respondent being case No. 154/2017 before the 2<sup>nd</sup> Respondent herein, the Political Parties Disputes Tribunal in which he was allegedly made a party and since he was not aware of it, he did not enter appearance to the same.

He contends that the decisions by the 3<sup>rd</sup> Respondent's CAT dated 6/5/2017 and that of PPDT dated 10/5/2017 were concluded and determined *ex parte* and that the said decisions have negatively affected his constitutional right to a fair hearing, representation and his political rights as he was condemned unheard and the said decisions are oppressive to him.

He stated that the complaint filed by the 4<sup>th</sup> Respondent and eventually withdrawn by consent before the IEBC Dispute Resolution Committee at Nairobi on the 8/6/2017 was conducted without his knowledge or service.

That in a complaint that he filed before the said Dispute Resolution Committee to effect his clearance, the committee cited issues of Jurisdiction and failed to substantially deal with the same.

That on the 30<sup>th</sup> May, 2017 he filed an application before the PPDT to review its orders which based its decision on allegations by one Faraji Chipinde a process server who deponed that he served him via a WhatsApp text message on the 10<sup>th</sup> May, 2017 which message he denies was ever sent to him or produced in court as evidence. He contended that the mode of service as stated above was questionable as there was no proof that he was served and that court documents cannot be served by way of a WhatsApp message.

He stated that the PPDT alleged that he did not prove that he won the elections yet he was issued with both the provisional and final certificates of nomination which he presented to the Tribunal together with the photographs that were taken when he was being issued with the said certificates. In addition, he averred that he produced a that was taken at the same time and all that evidence was not disputed by the Respondents.

He contended that the orders issued by the 3<sup>rd</sup> Respondent's CAT and those of PPDT issued on 10/5/2017 were based on proceedings that lacked merits, were frivolous misconceived, incompetent, bad in Law and should be dismissed. The first Respondent has relied on the grounds of opposition dated the 10<sup>th</sup> July, 2017 to oppose the application.

It is averred that the IEBC Dispute Resolution Committee in dealing with complaint no. 272 of 2017 acted in accordance with the Law and its decisions rendered on 8<sup>th</sup> June 2017 and 9/6/2017 are reasonable and justifiable as the Jurisdiction to deal with the complaint as it did is donated by Article 88 (4) (e) of the constitution and Section 74 of the Elections Act No 24. Of 2011 which gives it Jurisdiction to settle any Electoral Disputes including those relating to or arising from nominations but it excludes Election Petitions and Disputes subsequent to the declaration of Election Results.

The 4<sup>th</sup> Respondent has also opposed the application and has sworn a replying affidavit filed in court on the 7<sup>th</sup> July, 2017. The summary of the facts captured in the said affidavit are that:

On both points of Law and facts, the applicant's application is fatally defective and that the same has been brought to advance the applicant's selfish political Agenda to the detriment of the people of Umoja II Ward in Embakasi Constituency, Nairobi County.

That the applicant's application for review was heard and determined and the same was dismissed and though the Tribunal found that he might not have been served with the complaint and pleadings in the party's internal Dispute Resolution mechanism and in the PPDT, further orders were declined.

He avers that the applicant's application dated the 30<sup>th</sup> May, 2017 filed before the PPDT in complaint No. 154/2017 had striking similarities with the present application and therefore, the application herein is res judicata, grossly incompetent, Frivolous and it should be dismissed. That the complaint No. IEBC/DRC/NM/91/2017 was withdrawn by consent of the parties as parties were awaiting the ruling on the applicant's Notice of Motion dated the 30<sup>th</sup> May, 2017 before the PPDT in complaint No 154/2017 which was heard and canvassed by all the parties.

He contended that the 4<sup>th</sup> Respondent in compliance with Section 13 of the Elections Act duly approved him as the ODM party's Nominee for the member of County Assembly for Umoja II Ward, Embakasi West Constituency and Gazetted him as such within the statutory period before the General Election. He deponed that due to the Mandatory nature of the timelines set out in the Elections Act, the court does not have the discretion to expand timelines set out in the Elections Act and has urged the court to dismiss the application.

Parties made oral submissions when the application came up for hearing on the 31<sup>st</sup> July, 2017 which the court has duly considered together with the legal authorities cited. The application seeks to quash the various orders and/or decrees made by the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents as stated in the application and also an order that the court do order the 1<sup>st</sup> Respondent to Gazette the applicant as the duly nominated candidate for the position of the County Assembly for Umoja Constituency on the ODM ticket and that the court do compel the 1<sup>st</sup> Respondent not to Gazette the name of the 4<sup>th</sup> Respondent as a nominee of the 3<sup>rd</sup> Respondent in the 8<sup>th</sup> August, 2017 General Elections.

The main ground in support of the application is that the applicant was not a party to the proceedings that took place before the ODM's CAT, which are the basis of the proceedings pursuant to which the other orders were subsequently issued. However, the applicant on learning of the decision given by the PPDT, applied for a review of the orders and it is submitted that he produced evidence through affidavits before his application for review was dismissed.

The court notes that in the said ruling, the Tribunal observed that there was no sufficient evidence of service upon him but dismissed the other prayers sought in the application.

The applicant has moved the court by way of Judicial Review under order 53 of the Civil Procedure Rules and as rightly submitted by the Counsel for the applicant, though there is no requirement to be heard, the right has been subsumed under the Constitution as it is now a Constitutional requirement for parties to be heard. This position was stated in Civil Appeal number 46/2017 (Suchan Investment Limited Vs the Ministry of NATIONAL Heritage & Culture & 3 others (2016) Eklr.

With regard to the issue of right to be heard, the court has perused the Ruling dated 12<sup>th</sup> June, 2017 by the PPDT and in Paragraph 8, the Tribunal has stated that after it dismissed the prayer for review it proceeded to consider the remaining prayers sought in the application and among such prayers was the one wherein the applicant had sought that the Tribunal determines the rightful nominee for the position in issue. The Tribunal went ahead to state that it analyzed the evidence presented and the submissions by the 1<sup>st</sup> Respondent/applicant and it found that he did not produce any new information, substantive evidence or sufficient cause for the Tribunal to set aside its earlier orders. The Tribunal further noted that applicant did not show that he won the nominations nor did he attach any official tally or supporting statements from the relevant elections officials of the party to support his assertions.

From those extracts of the ruling, it is clear that the applicant was heard and the Tribunal analyzed the evidence that he adduced before it.

The guiding principles on which a Judicial Review Remedy should be given were restated in the Court of Appeal case of **Kenya National Examination Vs The Republic, Exparte Geoffrey Gathinji Njoroge & 9 others C.A 260 of 1996**. As rightly submitted by Counsel for the 4<sup>th</sup> Respondent, an order of prohibition can only prevent the making of a decision, it cannot issue in respect of decision already made

and it does not lie to challenge the merits of the proceedings, it lies to challenge the legality. While the order of mandamus can only command the making of a decision and commands the performance of an act which a Public body is bound to perform, it cannot command the performance of an act in a specific way where a statute imposing a duty leaves the discretion to a public body as to the mode of performing its duty. With regard to prayer 3 of the application herein, this court is not in a position to grant the orders sought as that is purely within the Jurisdiction of IEBC. It would appear that there are two sets of nomination certificates and its only after taking evidence that the court and/or Tribunal would be able to make a finding as to which of the two is valid and as I have rightly observed elsewhere in this ruling, the PPDT analyzed the evidence on that aspect and found that the applicant did not adduce substantive evidence to support his contention that he had won the nomination.

As for the 2<sup>nd</sup> limb of prayer 3 whereby the court is being asked to compel the first Respondent not to Gazette the name of the 4<sup>th</sup> Respondent, it is noted that the 1<sup>st</sup> Respondent has already Gazetted the names of all the nominees in preparation of the General Elections scheduled to take place in the next three days and the same having been due, that prayer has been overtaken by events.

In my considered view, the proper procedure that the applicant ought to have followed, is that of appeal and not by Judicial Review. I also concur with Counsel for the 4<sup>th</sup> Respondent that the orders sought in this application are substantially similar to the ones sought in the application for review before the PPDT and for that reason, the application, herein is Res-Judicata and that its devoid of merits and the same is dismissed with costs to the Respondents.

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.*