



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
MISCELEIOUS APPLICATION NO. 408 OF 2017

IN THE MATTER OF: AN APPLICATION BY KELVIN ODHIAMBO OKOTH, A MEMBER OF THE ORANGE DEMOCRATIC MOVEMENT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANANDAMUS AND CERTIORARI.

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA, THE CIVIL PROCEDURE RULES 2010 & THE LAW REFORM ACT (CAP 26).

BETWEEN

REPUBLIC.....APPLICANT

AND

THE POLITICAL PARTIES DISPUTES TRIBUNAL.....1ST RESPONDENT

THE ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

ODM NATIONAL ELECTION BOARD.....2ND RESPONDENT

IEBC.....2ND RESPONDENT

OLWAL GEORGE OMONDI.....INTERESTED PARTY 1ST RESPONDENT

AGNES AKECH NYAGOL.....2ND INTERESTED PARTY

RULING

Before the court for determination is the application dated the 11th day of July, 2017 and amended on 18/7/2017 by way of Notice of Motion brought under order 53 Rules (1) (2) (3) and (4) of the Civil Procedure Rules, Sections 8 (2) and 9 of the Law Reform Act Cap 26 Laws of Kenya.

The applicant has sought the following orders: -

1. **THAT** this application be certified as urgent and it be heard and determined instantly.

2. **THAT** an order of CERTIORARI do issue removing into this honourable court and quashing the decision of the first Respondent delivered on 2nd June 2017 which held the application dated 5/6/2017 in abeyance

3. THAT an order of MANDAMUS do issue compelling the first Respondent (Political Parties Disputes Tribunal) to enforce its Judgments delivered on 16th of May, 2017.

4. THAT an order of MANDAMUS do issue compelling the first Respondent to determine the contempt application dated 5th of June, 2017

5. THAT the cost of this application be in favour of the applicant.

The application is supported by the affidavit in verification of the statement and the annexed statement of facts.

The summary of the facts as captured in the verifying affidavit and the statement are that:

The applicant filed application dated the 5/6/2017 in the Political Parties Dispute Tribunal case No. 205/2017 seeking orders against the 2nd Respondent for being in contempt of the Tribunal orders issued on 16/5/2017. The application was heard before panel 1 which was presided over by Kyalo Mbobu, James Atema and Hassan Abdi of the Political Parties Disputes Tribunal.

The Tribunal refused to hear the application and stood it over generally stating that there were two conflicting decisions by the High Court on the question as to whether it had Jurisdiction to punish the 2nd Respondent for being in contempt of Tribunal orders dated the 16th May, 2017.

That in a separate matter, regarding the same issue before panel 2 of the Political Parties Disputes Tribunal, the panel pronounced itself to the effect that indeed it had appropriate Jurisdiction to punish for contempt. The ex parte applicant avers that he is being discriminated upon by the Tribunal by its failure to determine the said application and that a lot of injustice has been occasioned to him since the 4th Respondent has gone ahead to gazetted the name of the 1st interested party as the duly nominated member of the parliamentary for Kolwa Central, Kisumu East Constituency.

The 4th Respondent has opposed the application by way of grounds of opposition dated the 31st July, 2017 as follows:

1. The application is incompetent, misconceived and founded on misinterpretation of the Law.
2. The orders sought by the applicant have been overtaken by events in that the 4th Respondent has received and gazetted the nomination of the first interested party as a duly nominated ODM candidate for member of County Assembly for Kolwa Ward, Kisumu County.
3. That there was no decision made by the first Respondent on 2/6/2017 regarding the applicant's application dated 5/6/2017.
4. The 1st applicant has not pronounced itself on the application dated the 5/6/2017 and the same is still pending determination.
5. The orders sought will create a constitutional crisis as the General Elections are to be held in a week's time and the timelines cannot allow for fresh nomination and gazettement of candidates and printing of ballot papers.
6. The applicant is guilty of inordinate delay as he took over a month to file the present application.

7. The public interest is against granting of the orders as the orders will disfranchise the people of Kolwa of their Constitutional right to elect their leaders on 8/8/2017 as stipulated by the constitution.

The learned Counsels made oral submissions in support of their respective positions.

The court has considered the application, the affidavits and the submissions by the parties in support of their respective positions. Counsel for the first interested party supported the submissions made by Counsel for the 4th Respondent but the 2nd and 3rd Respondents did not participate and they were not present on the material day when the application was argued.

In his submissions, Counsel for the 4th Respondent told the court that there was no decision made on 2/6/2017 which the applicant is challenging. That the ruling delivered on 9/6/2017 was meant for the panelists to determine whether they have Jurisdiction to hear the application for contempt of court. He also told the court that the applicant opted not to fix his application for hearing and to date the same is still pending before court.

Counsel for the applicant in her rejoinder submitted that it was an error on her part to refer to the decision made on the 2/6/2017 as there was no such a decision. She meant to refer to the decision made on 22/6/2016. With regard to the delay in filing the application, the same was caused by delay in receiving instructions from her client and therefore the same was not intended.

The court has taken serious consideration of the application and all the material before it including the submissions by the learned Counsels.

In my considered opinion, the issues revolve around the Jurisdiction of the Political Parties Dispute Tribunal a party for contempt of its orders.

The PPDT gave orders directed to the first Respondent to conduct fresh nominations for the position of member of County Assembly Kolwa Central Ward, Kisumu East Constituency, Kisumu County, within 24 hours of its orders. These orders were not complied with as a result of which the applicant filed an application before the PPDT for contempt of court. The application was listed before panel 1 which could not hear the matter because of the two conflicting decisions by the High Court on the issue of its Jurisdiction.

Let me start by appreciating that Jurisdiction of a court or a Tribunal can only be donated by the constitution or an act of parliament. If a court has no Jurisdiction it should not make any further step but should down its tools. This was the holding in the case of owners of the **Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Limited (1989) eKLR** where **Nyarangi JA** expressed himself as follows:

By Jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or Commission under the court is constituted and may be extended or restricted by the like means....."

Similarly, the Supreme court in the case of **Samuel Kamau Macharia and another Vs Kenya Commercial Bank Limited and two others 2012 eKLR** expressed itself as follows:

"A court's Jurisdiction flows from either the constitution or legislation or both. Thus, a court of Law can only exercise Jurisdiction as conferred by the Constitution or written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by Law..."

Article 169(1) defines subordinate courts. clause (d) provides as hereunder.

Subordinate courts are;

Any other court or local Tribunal as may be established by an Act of parliament other than the courts established as provided by Article 162(2) of the Constitution.

While Article 169 (2) provides

“Parliament shall enact Legislation conferring Jurisdiction, functions and powers of the courts established under clause 1”.

My understanding of clause 2 is that the Jurisdiction of the Tribunals has to be conferred by parliament through an Act of parliament that creates such Tribunals.

I have carefully perused the relevant Act and it has not conferred Jurisdiction on PPDT to punish for contempt. This would therefore mean it has no such Jurisdiction and the only avenue that such a party can use is the High Court.

Having made that observation I find and hold that the application herein has no merits and dismiss the same with no orders as to costs.

Dated, signed and delivered at Nairobi this 4th day of August, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... *for the Appellant.*

..... *For the Respondent.*