



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NUMBER 13 OF 2017

BETWEEN

THE SECRETARY GENERAL.....1st APPELLANT

KENYA AFRICAN NATIONAL UNION PARTY (KANU)....2nd APPELLANT

AND

HON. SALAH YAKUB FARAHRESPONDENT

JUDGMENT

1. In view of the fast approaching statutory deadline of 7 June 2017 being the last day when political parties are expected to submit names of candidates nominated for all electoral positions: see Section 31 (2A) of the Elections Act, I rendered an *ex-tempore* decision at the conclusion of the hearing of this appeal on 11 May 2017. Pursuant to Rule 32(2) of the High Court (Organization and Administration) General Rules 2016, I reserved my reasons for the decisions to be rendered on 12 May 2017. These are my reasons for the decision of 11 May 2017.

2. The decision and orders, I made on 11 May 2017, read as follows:

***“The Appeal partially succeeds and the court hereby sets aside the orders No (f) and (g) contained in the ruling of the Political Parties Disputes Tribunal delivered on 9 May 2017 only. The other reliefs sought in the Memorandum of Appeal in particular prayers (b), (c), (d) and (e) are denied with each party bearing its own costs of the Appeal and of the Application before the Political Parties Disputes Tribunal. The Respondents are to comply with the other undisturbed orders of the Tribunal made on 9 May 2017*”**

3. The brief background to the appeal is that the Respondent who is a member of the Kenya African National Union (KANU) had sought to be nominated for the position of member of the National Assembly Fafi Constituency in Garissa County. The Respondent paid the required party nomination fees. There was another candidate. KANU however decided not to hold any free and fair nominations. Instead KANU awarded a direct nomination to the other candidate. The Respondent protested. The Respondent complained to the KANU’s internal dispute resolution organ. He sought competitive nominations. When the Respondent failed to get any reprieve from KANU, he moved the Political Parties Disputes Tribunal (“the PPDT”) on 3 May 2017.

4. On 5 May 2017, the PPDT nullified the direct nomination process and directed KANU to conduct a competitive nomination exercise for the position of Member of National Assembly for Fafi Constituency within 48 hours. The parties before the PPDT were KANU, KANU’s National Elections Board and the

KANU Secretary General.

5. The Respondents success however turned out to be short lived and on 8 May 2017, the Respondent was back before the PPDT. The Respondent claimed that KANU and its Secretary General had failed to comply with PPDT's orders of 5 May 2017; the Respondent sought an array of reliefs.

6. The Respondent sought to commit one Nick Salat and one Edward Kivuvani to prison for contempt of the PPDT's orders. The Respondent also sought an order that KANU do conduct fresh free fair and transparent nominations within 48 hours for at least half of the 49 polling stations. Alternatively, the Respondent sought to be issued with KANU's Nomination Certificate for Member of Parliament for Fafi Constituency.

7. The PPDT then proceeded to issue a Notice to show cause to KANU's Secretary General and to the chairperson of KANU's National Election Board to show cause why they could not be cited for contempt. A Replying Affidavit was then duly filed in opposition to the Respondent's application of 8 May 2017. The alleged contemnors denied any disobedience of the Tribunal's orders. The alleged contemnors also insisted that they had conducted the nominations and that it was the complainant who tried to disrupt the same. The alleged contemnors stated that the winner of the nomination ticket was one Abdikhaim Osman Mohamed.

8. The PPDT heard the parties and returned the verdict that KANU was in contempt of its orders. In consequence the named contemnors were fined Kshs. 200,000/=. The PPDT then also proceeded to issue an array of orders; to wit:

a) A declaration be and is hereby issued to the effect that the 3rd Respondent failed to conduct free and fair nominations for the position of member of national assembly for Fafi Constituency on 7th May, 2017.

b) A declaration be and is hereby issued to the effect that any certificate of nomination issued to any candidate, arising from the purported nominations of 7 May, 2017 is null and void and of no effect in law.

c) A mandatory injunction be and is hereby issued directing the Respondents to organize and conduct a fresh nominations exercise for member of national assembly, Fafi Constituency in at least three polling stations per each in Bura, Dekahari, Jarajila, Fafi, Nanighi Wards, within the next five days of this order.

d) A mandatory injunction be and is hereby issued directing the Respondent and the candidates herein to agree on their agents and the specific polling stations where the fresh nominations shall be conducted, within the next 12 hours.

e) A mandatory injunction be and is hereby issued directing the Respondents to publish a notice of the fresh nominations and the agreed polling stations in at least three newspapers of national circulation, within 24 hours.

f) The 2nd Respondent through the Hon. Nick Salat and Edward Kivuvani be and are hereby sentenced to pay a fine of two hundred thousand shillings in default, each to serve imprisonment for a term of three months..

g) The 2nd Respondent shall bear the Claimant's costs of this complaint.

9. The PPDT's findings were made notwithstanding protestations by the Appellants that the PPDT lacked the necessary jurisdiction to entertain the application. The decision prompted this appeal.

10. On appeal the Appellants have transubstantiated their arguments before the PPDT. The Appellants

insisted that the PPDT lacked the requisite jurisdiction. The Appellants also insisted that KANU had conducted free and fair nominations as had earlier been directed by the PPDT. The Appellants faulted the PPDT for holding otherwise.

11. Counsel argued the appeal extensively before me on 11 May 2017. The Appellants counsel Mr. Makau faulted the PPDT for invoking jurisdiction it did not have. Counsel stated that Section 6 of the Contempt of Court Act could not be invoked by the PPDT as it did not confer any jurisdiction for contempt not committed on the face of the court.

12. Advocating for the Respondent, Mr. Otieno argued that the Appellants had failed to conduct any nominations. The Respondent's counsel insisted that Section 6 of the Contempt of Court Act conferred jurisdiction to punish for contempt on the PPDT as well.

13. Mr. G. Miyare for the Interested Party also submitted that the PPDT had no jurisdiction to punish for contempt and that only the High Court (or any other superior court) could punish for contempt of any order of the PPDT. Mr. Miyare insisted that the PPDT had exceeded its jurisdiction. Additionally, counsel insisted that the PPDT erred when it nullified the Certificate of Nomination given to the Interested Party by KANU.

14. Clearly, the core question is whether the PPDT has jurisdiction to punish any party who is proven to have disobeyed its orders. I did not hear the Appellants to question or contest the PPDT's jurisdiction to grant or issue the orders that it issued on 9 May 2017, apart from the orders related to the alleged contempt.

15. I will start with the orders which did not expressly relate to the disobedience of the PPDT's orders of 5 May 2017.

16. Apart from a quibble on the PPDT's jurisdiction, the orders made on 9 May 2017 were relatively warranted. The record of the proceedings before the PPDT bears this. There is affidavit evidence that contrary to the orders of the PPDT of 5 May 2017 which decreed that KANU was to conduct nominations for the Fafi Constituency, it did not do so. It only purported to. The order of the PPDT was to have a free, fair, transparent and democratic nominations process. Instead, the affidavit evidence reveals that KANU conducted a limited exercise in just some five (5) wards. The Replying Affidavit does not help either. It simply admits to the fact of scale-down and then seeks to heap blame on the Respondent.

17. The PPDT was spot on when it found and held that the nominations had not been conducted as it had directed.

18. It meant one thing. The PPDT had to act and ensure compliance. It did so by issuing various directives and orders to ensure compliance. Some orders were mandatory whilst others were declaratory. Section 41(3) of the Political Parties Act No. 11 of 2011 stipulates that decisions of the PPDT are to be enforced in the same manner as a decision of a Magistrates Court. Decisions of a Magistrates Court are enforced pursuant to and in accordance with the provisions of the Civil Procedure Rules: see Section 40(4) of the Political Parties Act.

19. I have little hesitation in holding that a magistrate court whilst exercising a judicial oversight role may make various directions and orders to ensure the efficacy of any decree. The orders or directions may be limited. The directions may be forceful. It may entail issuance of warrants of arrest, et al. Order 22 of the Civil Procedure Rules is relatively detailed on this. To ensure compliance with its orders, a magistrates' court may thus within the purview of the law issue clear judicial oversight orders intended to ensure performance. I am unable to fault the PPDT on the manner it adopted to ensure that KANU and the Appellants had no reason to fail to comply with the orders of 5 May 2017 which were never challenged by any party.

20. On the issue of the PPDT's jurisdiction to punish for contempt, there are apparent question marks.

21. The Respondent's arguments which the PPDT seems to have bought was that Section 6 of the Contempt of Court Act 2016 grants the PPDT the necessary authority to punish for any disobedience of its orders. The argument advanced was that Section 6 donates powers to subordinate courts and the PPDT is a tribunal established pursuant to the provisions of Article 169(1)(d) of the Constitution and Section 39 of the Political Parties Act, which makes it a subordinate court.

22. There is no doubt that the PPDT has, pursuant to Article 169(1) (d) of the Constitution, the same status as a subordinate court. There is also no doubt that Section 6 of the Contempt of Court Act donates to subordinate courts the remit to punish for contempt.

23. Section 6 of the Contempt of Court Act stipulates as follows:

6. Jurisdiction of subordinate courts to punish for contempt of court

Every subordinate court shall have power to punish for contempt of court on the face of the court in any case where a person-

(a) assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate;

(b) willfully interrupts or obstructs the proceedings of a subordinate court; or

(c) willfully disobeys an order or direction of a subordinate court.

24. Section 6, apparently limits the contempt for which the Subordinate Court, and thus the PPDT, can punish for to contempt of the court "on the face of the court" and no more.

25. I would state that one needs no reminder that contempt of court comes through four ways. There is contempt in the face of the court outside of the court room and which the judicial officer need not see. There is secondly, contempt for interference with the due administration of justice through disobedience of a court order. The third category is contempt on the face of the court. Fourthly, is contempt through the making of false statements of truth often referred to as perjury: see **Bia Tosha Distributors Limited –v- Kenya Breweries Ltd & 3 Others [2016] eKLR**.

26. Section 6 has limited the contempt to contempt of court on the face of the court. It would be inappropriate to index the instances but quick examples would include the instances stated under Section 6(a) and (b) as well as (c) with the latter including where an order is made to a party and there is non-observance or non-compliance even as the court watches. Disorderly, contemptuous or insolent behavior towards the judicial officer while holding the court which tends to disrupt or interrupt the course of a judicial proceeding is to be prosecuted as direct contempt. It is the court that cites the person in contempt by describing the behavior observed on record. It is to be distinguished from the rather indirect contempt where a party lodges complaint papers that a person has willfully disobeyed or violated court orders.

27. Thus when section 6 itemizes instances of contempt on the face of the court and includes disobedience of court order and direction of the court, the inclusion must be read *ejusdem generis*. It must be read to include only contempt on the face of the court like failing to obey an order in the course of a trial to answer questions or failing to observe a subpoena. The power is necessary for all judicial and quasi-judicial bodies as the judicial officer may need to act quickly.

28. I hold the view that the power to punish for contempt is a special jurisdiction conferred sparingly in view of the very nature of contempt of court itself. It is quasi-criminal. I do not believe that the legislature could have intended to donate more powers to subordinate courts to punish for contempt than it already did under Section 6 of the Contempt of Court Act. If it had willed to, then nothing could have been easier than to enact a provision similar to Section 5 of the same Act. Likewise, if the legislature had intended all subordinate courts to have such powers nothing could have been easier than to adopt the provisions of

Section 10 of the Magistrates Courts Act No 26 of 2015 or even Section 83 of the Cooperatives Societies Act (Cap 490). Both sections donate unlimited powers to the Magistrates court and to the Co-operative Tribunal to punish for contempt.

29. In the end, I am not convinced that the PPDT had any jurisdiction to punish for contempt in the face of the court or any other form of contempt save contempt on the face of the court. The PPDT however in the instant case convicted the two officials of KANU for contempt which falls in the realm of indirect contempt. This is evident on the fact that the court had to be prompted through a motion filed by the Respondent. In proceeding as it did, the PPDT in my humble view obtained its jurisdiction in this respects “through craft”. It overarched. It could not convict the Appellants for want of jurisdiction. The appeal succeeds to that extent.

30. I conclude by stating as I did on 11 May 2017. The appeal was partially successful. Consequently, I see no reason why both parties cannot bear their respective costs.

Dated, signed and delivered at Nairobi this 15th day of May, 2017.

J.L.ONGUTO

JUDGE