



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO. 55 OF 2017**

**LESIT, J.**

**PROF. AYIECHO OLWENY.....APPELLANT**

**VERSUS**

**JAMES ONYANGO K'OYOO.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT(ODM)PARTY.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....3<sup>RD</sup> RESPONDENT**

(Being an appeal against the judgment of the Political Parties Disputes Tribunal dated 9<sup>th</sup> May, 2017 in Tribunal Case number 115 of 2017)

**IN THE MATTER OF AN APPLICATION ON BEHALF OF PROF. AYIECHO OLWENY  
AGAINST MS JUDITH PARENO BEING THE CHAIRPERSON OF THE ODM NATIONAL  
ELECTIONS BOARD FOR AN ORDER OF COMMITMENT TO CIVIL JAIL FOR CONTEMPT  
OF COURT**

**PROF. AYIECHO OLWENY.....APPLICANT**

**VERSUS**

**JUDITH PARENO.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT(ODM)PARTY.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....3<sup>RD</sup> RESPONDENT**

**JAMES ONYANGO K'OYOO.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application before the court is a Notice of Motion brought under sections 4, 5, 28 and 30 of the Contempt of Court Act No. 46 of 2016. It is dated 30<sup>th</sup> May 2017. The Motion seeks ten prayers. In prayers 3 and 4 the Applicant seeks to have the 1<sup>st</sup> Respondent to this application, Ms. Judith Pareno who is the Chairperson of the 2<sup>nd</sup> Respondent's National Election Board summoned by court to show cause why contempt of court proceedings should not be commenced against them; and, be cited for contempt of this court for disobeying the court order of 29<sup>th</sup> May, 2017.

2. The Motion seeks in prayers 5 to 10 the following prayers:

**5. That the 1<sup>st</sup> respondent be arrested and committed to civil jail for 6 months or any other period the court deems fit.**

**6. That the court be pleased to adopt the results presented in court by the 5 ward presiding officers as the final nomination results of the 5 wards comprising Muhoroni constituency.**

**7. That upon granting prayer 6, the tabulation, tallying and declaration of the winner of the nomination exercise be done under the supervision of the court and in presence of the contestants.**

**8. That in the alternative, tabulation, tallying and declaration of the winner of the nomination exercise be conducted under the supervision of the Honourable court.**

**9. That the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents be compelled to pay costs suffered by the applicant**

**10. That the court issue other or further consequential orders as may seem just and expedient.**

3. The application is premised on ten grounds on the face of the application and further supported by the affidavit sworn by the Applicant, all which I have considered.

4. The judgment of this court and the decree thereof addressed just one issue, the receipt of results from Presiding Officers of the Five Wards which comprise Muhoroni Constituency by the Constituency Returning Officer; the tabulation of those results and the declaration of the winner as per the results of that exercise. The 2<sup>nd</sup> Respondent was at the end of that exercise to declare the winner of the nomination and issue their nominee with the requisite certificate for the Parliamentary seat in question in the upcoming elections.

5. This judgment was informed by the evidence placed before the court in their affidavits sworn before it, the proceedings and decisions of the PPDT and the IDR and NAT of the 2<sup>nd</sup> Respondent.

6. It was very clear to the court that the issue which was before court had to do with the failure of the Constituency Returning Officer of Muhoroni Constituency to receive results of the nomination exercises from the Presiding Officers of the Five Wards comprising Muhoroni Constituency, and the attendant declaration of said unknown results. Paragraphs 19, 20, 23 and 27 of the judgment were crystal clear. All the parties in their submissions have referred to most of these paragraphs.

7. It was clear that the Returning Officer concerned had failed in his duty as prescribed under the Party Election and Nomination Rules, Rule 18.7 in particular. He had failed to receive results from Presiding officers who had themselves received the results from each Polling Station within the Ward under them, had counted and tallied the votes cast at each Polling Station. The Presiding Officers had then sought the Returning Officer in order to present the results from each of the Wards under them only to find that the Returning Officer had announced some results and thereafter could not be found or reached.

8. Three things were very clear at the appeal and were a common ground:

**(i) That the nomination process including the casting of votes, counting, tallying and declaration of results at the Polling Stations level and the Ward level was free, fair and credible, and this was not in contention.**

**(ii) There were no other results of the nomination of Muhoroni Constituency except the results that were in the possession of the Five Presiding Officers in question, which results were annexed to the affidavit of one of the Presiding Officers, Peter Oyuka. These Presiding Officers continued to hold the results even up to the time this appeal was heard.**

**(iii) The ODM party was represented by counsel during the hearing of the appeal. He made it clear that he was not minded to make any submissions. The party's Legal officer had filed an affidavit in which he in effect sought more time to enable the party conclude the dispute**

**between the Applicant/Appellant herein and the 4<sup>th</sup> Respondent/1<sup>st</sup> Respondent herein.**

9. When the Applicant filed the Notice of Motion seeking leave to institute contempt of court proceedings, the 1<sup>st</sup> Respondent to the Motion was heard to challenge the Motion terming it premature as the 72 hours the court granted the 2<sup>nd</sup> Respondent to comply with the order had not expired. The 1<sup>st</sup> Respondent to the Motion also challenged service. She however made it clear that the party was ready and willing to comply with the court order given time. The challenge on the application being premature and the 1<sup>st</sup> Respondent having not been served was correct and thus the court ensured the 1<sup>st</sup> Respondent was served with the decree of this court, and the application and all annexure, including a copy of this court's judgment. The party was then given 72 hours from the date of service in court with these documents to study and comply as required. Not to mention that counsel for the ODM party was present when judgment of the court was delivered, thus there was knowledge that such judgment had been delivered even before service became an issue.

10. When the court resumed on 9<sup>th</sup> June 2017 to confirm compliance with the court judgment, order and decree, the parties had not filed any papers except the Applicant. The 1<sup>st</sup> Respondent's advocate kept saying that they had a Report which was in the process of being filed which proved compliance to the court order. The 4<sup>th</sup> Respondent had not filed any papers but purported to adduce facts from the bar. That is how the court directed the parties to file their papers to address two issues, whether the 2<sup>nd</sup> Respondent through its official the 1<sup>st</sup> Respondent had received the results from the Five Presiding Officers, had tabulated them and declared the results and thereby its nominee for the Muhoroni Parliamentary seat.

11. The 1<sup>st</sup> Respondent was put on notice that the court will also require her to show cause why she should not be committed to civil jail for contempt of court.

12. The matter was adjourned for hearing at 10 a.m. on 12<sup>th</sup> June 2017. Eventually the court heard the parties after further delay by the Respondents.

13. I have heard the submissions by all parties to this application that were present, and have considered the affidavits and annexure thereto. The record speaks for itself.

14. Mr. Kajwang in his submission on behalf of the 1<sup>st</sup> Respondent urged that the only issue before the court was whether his client proceeded to comply with the judgment and decree of this court and whether she honestly, wilfully and sincerely addressed herself to the judgment of the court. Counsel urged that the 1<sup>st</sup> Respondent had done everything in her means to comply with the order of this court.

15. Counsel urged that the 1<sup>st</sup> Respondent contacted the Constituency Returning Officer Muhoroni Constituency and the Presiding Officers as contained in the NEB database asking them to avail the results and attend the tallying of the same at orange house. Counsel urged the court to find that the 1<sup>st</sup> Respondent had complied and to proceed to dismiss the application.

16. Mr. Kajwang submitted that the 1<sup>st</sup> Respondent in obeying the court order, invited the Returning Officer one Mr. Peter Otiang Midega to take charge of paragraphs (ii) (a), (b) and (c) of court's decision who went ahead to receive the results, tabulated them and declared the winner. He urged that the exercise took place in the presence of all the parties and their Agents except the Applicant who walked out of the meeting before it ended.

17. Counsel referred the court to the affidavit of Peter Midega and Kennedy Osando which I have considered. Counsel further urged that any disagreement that may have occurred during the tallying process should not be interpreted to mean will full disobedience of the court order on her part. Counsel urged that the 1<sup>st</sup> Respondent was willing to further formulate implementation of the court order in the manner, style and any directions given by the court.

18. Mr. Mwamu for the Applicant in his submissions urged that there had been no compliance because the Presiding Officers from whom the results of the nomination exercise were to be received from were denied the opportunity to present the results and have filed affidavits to that effect. I have seen the affidavits. Counsel further urged that the Returning Officer having denied the three Presiding Officers from submitting their results went ahead to rely on unsubstantiated results from all the 81 polling stations in Muhoroni Constituency. Counsel urged that the mere fact the results which were relied upon by the Returning Officer at Orange House were not countersigned by any of the agents of the contestants from each polling station as required by law rendered them inadmissible.

19. Counsel urged that there were glaring contradictions in the Report annexed to the affidavit of Peter Otiang Midega. Counsel urged that it was not in dispute that the Returning Officer had handed over the ODM provisional certificate to the 4<sup>th</sup> Respondent indicating that the 4<sup>th</sup> Respondent garnered 18,669 votes. In his report dated 9<sup>th</sup> June, 2017 same Returning Officer deposes that he received results on the 27<sup>th</sup> April 2017.

20. Counsel urged the question that begged for an answer was on what basis the said Returning Officer declared the 4<sup>th</sup> Respondent winner on 26<sup>th</sup> April 2017. Counsel further pointed out that the results submitted on the report indicated that the 4<sup>th</sup> Respondent garnered 19,852 results yet on the provisional nomination certificate it was indicated 18,669. Counsel urged that there was an unexplained difference of over 1000 votes.

21. Counsel further urged that the bare assertions by the Returning Officer that he appointed and reshuffled the Presiding Officers was not only inconsistent but also flew in the face of the express provisions of the ODM nomination rules. Counsel urged that the Returning Officer had no powers to appoint or reshuffle the Presiding Officers. That notwithstanding, counsel urged that the affidavit of one James Obera Wamba who was the Secretary of Muhoroni Constituency Election Panel dated 6<sup>th</sup> May 2017 in which he produced the list of all the Electoral Officials for Muhoroni Constituency was not challenged.

22. Counsel urged that it was the applicant's submission that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deliberately elected to conveniently misinterpret the terms of the court order dated 29<sup>th</sup> May 2017 with the sole aim of arriving at a pre-determined and mischievous outcome. Counsel urged that the ruling of the court was clear and unambiguous from its plain reading.

23. Mr. Sagana for the 4<sup>th</sup> Respondent went into great length to show how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents went to the Presiding Officers of the 81 Polling Stations to get the raw results which they now used to tabulate and declare the winner. Counsel referred the court to the affidavits of one Peter Midega, Jacob Otura Ojwala, Lilian Atieno Owino, Sospeter Otieno Lango and Aloyce Owaa Sombe. I have had a look at the affidavits and in essence they all state that the Returning Officer one Mr Peter Midega had reshuffled the Presiding officers of the 5 Wards comprising Muhoroni Constituency and that the results availed by the affidavit of one Peter Oyuko were a forgery as the results indicated in the affidavit annexure did not tally with the results they had, neither did the form availed conform with the form that had been supplied to them.

24. The affidavit of Peter Midega avers that only Aloyce Sombe and Jacob Ojwala attended the tallying at orange house despite the rest of the ward returning officers being invited for the same exercise.

25. Counsel urged that the objective of the report by the Applicant /Appellant and his request to have the tabulation of results as strictly produced by him is untenable as the court was 'functus officio'. Counsel further urged that the Appellant/ Applicant sought to review the courts judgement through the back door by seeking tabulation of his results. Counsel urged that the decree of this court was not tabulation of the results as presented by the Applicant/Appellant.

26. Counsel further urged that the Constituency Returning Officer had confirmed that the Presiding Officers had transmitted results from the 5 Ward Returning officers to him. This, counsel urged, rendered

the court functus officio as the decree had been complied with.

27. The arguments by the 4<sup>th</sup> Respondent contradicts even the affidavit evidence by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. Nowhere did they aver that there was a reshuffle of Presiding Officers affecting the Five Wards the subject matter of this case. Further there was no averment controverting the Results already before court, as per the filed affidavit of Peter Ayuko at the appeal. The allegations being fronted by the 4<sup>th</sup> Respondent is new evidence, and with respect to the 4<sup>th</sup> Respondent and his counsel, cannot be presented at this stage. I would go further and say that the allegations cannot be true. This is the same party who annexed a judgment alleging it was the decision of the 2<sup>nd</sup> Respondent, while the 2<sup>nd</sup> Respondent was on record through the affidavit sworn by its Legal Officer saying they needed time to make their decision.

28. The very first order of the court stated:

**“The matter of the nomination of the member of parliament representative for the Muhoroni Constituency for the 2<sup>nd</sup> Respondent reverts back to the 2<sup>nd</sup> Respondent...**

**a. to receive the results of the nomination from the five Wards comprising Muhoroni Constituency;**

**b. tabulate the results ; and**

**c. declare the winner who will then represent the party...”**

29. The court is being told that the Chair of the ODM NEB, the 1<sup>st</sup> Respondent herein invited the Returning Officer to receive results, tabulate them and declare the winner. That is the same Officer the court found had failed in his duty by purporting to declare results other than those from the Five Presiding Officers who had received them from the Polling Stations of Wards under them after votes were cast and counted. He announced results before the actual results were delivered to him.

30. In addition to delegating to an incredible person to carry out the court order, results other than the uncontroverted results before the court were used for the tabulation. To justify their action the Respondents have brought new and fresh evidence of what drove them to use these other results. That is a failed attempt to hoodwink the court. It is very clear what the happened here. There is clear evidence that the aim was to circumvent the court judgment and evade the order and decree of this court.

31. In effect the 1<sup>st</sup> Respondent has demonstrated that she has no intention of complying with the court order, first by delegating her responsibility to a person the court found was negligent, floppy in his work and incredible.

32. The Respondents have gone to great length to demonstrate to the court beyond any doubt that the results adopted for use in compliance of courts judgment and order were new ones totally foreign to this case. The court in its judgement clearly stated that the results which were before the court, were credible, had not been challenged by any of the parties and came out of a process which all the parties had agreed was free, fair and credible. The court was given affidavit after affidavit challenging the findings of the court through the back door, by declaring other Officers than the five who presented themselves in court as the recognized Presiding Officers of the five Wards comprising the Muhoroni Constituency were the recognized Presiding Officers, and therefore the results the five presented to court were not the correct results.

33. That is in bad taste. The Respondents were represented by renowned lawyers, both at the appeal and in this application. Safe of course for the 1<sup>st</sup> Respondent who is coming in at this stage of the proceedings. They had opportunity to canvass all these information before hand. Having chosen not to, this was not the stage to bring new evidence. It is too late to challenge the uncontroverted evidence placed before the court, under their watch, and which evidence formed the basis, not only of this court’s judgment but also

that of the PPDT.

34. I find that the 2<sup>nd</sup> Respondent wilfully disobeyed the court order through its official the 1<sup>st</sup> Respondent in order to defeat what the court has said. The responsibility of the 1<sup>st</sup> Respondent as Chair of the part's National Election Board was to ensure that the nomination process was carried out with integrity, and that the process was free, fair and credible. There is clear demonstration that there was intention to evade the order of the court and to defeat the judgment of this court. I find the 1<sup>st</sup> Respondent guilty of contempt of court and convict her accordingly.

35. The time is of great essence in matters of this nature. The clock is running, yet the Respondents were not in a hurry to have the application before court heard expeditiously, and kept delaying it as shown earlier.

36. The court has to bring this matter to a close. Since there is a risk of contempt being repeated, having seen reluctance to comply with the court order, judgment and decree, by the 2<sup>nd</sup> Respondent through its official the 1<sup>st</sup> Respondent, the court will enforce its own order under the inherent powers bestowed upon this court under section 3A of the Civil Procedure Act and the interest of justice. I proceed as follows.

37. I have tabulated the results of the nomination exercise for the Five wards which comprise Muhoroni Constituency as per the record before the court and found it was as follows:

	<b>PROF. AYIECHO OLWENY</b>	<b>JAMES ONYANGO K'OYOO</b>	<b>OKOTH OBORA</b>
<b>MIWANI WARD</b>	<b>3,624</b>	<b>2,604</b>	<b>149</b>
<b>OMBEYI WARD</b>	<b>5,504</b>	<b>2,585</b>	<b>144</b>
<b>CHEMELIL WARD</b>	<b>3,537</b>	<b>3,283</b>	<b>105</b>
<b>MUHORONI / KORU WARD</b>	<b>6,791</b>	<b>3,071</b>	<b>120</b>
<b>MASOGO – NYANGOMA WARD</b>	<b>4,122</b>	<b>2,191</b>	<b>297</b>
<b>TOTALS</b>	<b>23,578</b>	<b>13,734</b>	<b>815</b>

38. The result is that the Applicant /Appellant garnered 23, 578 votes against his nearest rival the 4<sup>th</sup> Respondent who garnered 13, 734 votes. In the result I make the following orders:

**i). The nomination of the 4<sup>th</sup> Respondent by the 2<sup>nd</sup> Respondent as the nominee for the Muhoroni Constituency Seat and his name as forwarded to the IEBC if at all, in the purported compliance of this court's order be and is hereby set aside.**

**ii). The Applicant/ Appellant be and is hereby declared the nominee of the 2<sup>nd</sup> Respondent for the Muhoroni Constituency Parliamentary seat.**

**iii). The 2<sup>nd</sup> Respondent should issue the Applicant/Appellant with the Nomination Certificate as its nominee for the Muhoroni Constituency Parliamentary Seat.**

**iv). Failure of (iii) above this order be extracted and served upon the 3<sup>rd</sup> Respondent to serve as a Nomination Certificate for the Applicant/Appellant as ordered in (iii) above.**

v). the 1<sup>st</sup> Respondent to show cause why the court should not commit her to civil jail for contempt.

vi). The 2<sup>nd</sup> Respondent to meet the cost of the Applicant/Appellant to this application.

DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE, 2017.

LESIT, J.

JUDGE