



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 86 OF 2017**

**CIVIL APPLICATION NO. 99 OF 2017**

**DAVID KIMELI LETING.....APPLICANT/RESPONDENT**

**VERSUS**

**JUBILEE PARTY.....RESPONDENT/APPELLANT**

**HILLARY KIPKEMBOI RONO.....INTERESTED PARTY**

**R U L I N G**

1. David Kimeli Leting, the Applicant herein filed a Notice of Motion dated 12<sup>th</sup> June, 2017 under **Section 1A, 1B & 3A Civil Procedure Act, Cap 21, Order 40 Rule** of the **Civil Procedure Rules 2010, Section 5 Judicature Act Chapter 8** laws of Kenya. He seeks orders of the court that:

a) The corporate veil be lifted to bring the responsible officers of the Respondent to account for contemptuous acts as against the judgment and decree of the court.

b) The Respondent be ordered, in compliance with the Party Constitution and Election Rules and the Political Parties Act, to complete the exercise of nominating a candidate for the post of Member of County Assembly (MCA), Kipkenyo Ward, Kapseret Constituency, Uasin Gishu County on the Jubilee Party ticket within a period of 24 hours according to the judgment and decree of this court dated 6<sup>th</sup> June, 2017.

2. The Respondent has raised a preliminary objection thereto on two issues. The first is that the application is *Res judicata*, and the second is that the order resulting in the institution of the proceedings for contempt of court has been fully complied with.

3. M/s. Njoki Mboshe learned Counsel for the Respondent submitted first that the order of court made on 6<sup>th</sup> June 2017 directed the 2<sup>nd</sup> Respondent, in incompliance with the Party Constitution, Election Rules, and Political Parties Act, to nominate a candidate for the post of MCA Kipkenyo Ward Kapseret Constituency, Uasin Gishu County. Counsel asserted that the Applicant in his own supporting Affidavit averred that the nomination was held in compliance with the court order.

4. Secondly, M/s. Mboshe contended that the Applicant had not applied to set aside the court order or appealed against it and that the issue is *Res judicata* to the extent that the Political Party Dispute Tribunal (hereinafter PPDT) heard and determined the matter. Counsel pointed out that the issue before the PPDT was the allegation that one party had won against the other. In an *ex parte* decision the PPDT determined the question as to who should have the certificate and directed the issuance of a certificate to the

Complainant. The Interested Party herein was not a party to the proceedings which resulted in that decision which was set aside in the Appellate Court.

5. Mr. Ruto Learned Counsel for the Interested Party submitted that the Party complied with the order of the court in Election Appeal No. 86 of 2017 in terms of prayer (c) of the Applicant's application within 24 hours. That in that regard prayer (b) constituting contempt of court is therefore spent. He argued that the Applicant had come to the wrong forum to challenge the decision which had already been fully determined by the court.

6. M/s Kerubo learned counsel for the Applicant in reply, urged that pursuant to **Section 7 of the Civil Procedure Act**, the issue of *Res Judicata* has not been fully executed. She urged that the Applicant is not asking the court, to determine the issues already determined by the Appellate Court, but is directing the court's mind to the issue of execution of those orders in a bid to safe guard the rule of law.

7. M/s. Kerubo admitted that the National Election Board (hereinafter NEB) held a meeting on 5<sup>th</sup> June 2017 and nominated the Applicant herein and that for that reason the matter cannot be *Res judicata* if the Applicant does not have the certificate. According to Counsel the contention is that the reason used by the Board to nominate another was not correct, as to the votes the Applicant obtained. Counsel prayed that the Preliminary Objection be dismissed and the substantive application be allowed to proceed.

8. In a brief rejoinder Ms. Mboshe maintained that the matter is *res judicata* since the same parties were before Ong'udi, J with the same question in respect of who should get the nomination certificate. Secondly, that there was no contempt because the Respondent had complied with the orders of the court.

9. A Preliminary Objection was defined in the case of **Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701** thus;

***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confusion of the issues. This improper practice should stop".***

I have therefore considered the rival arguments to establish whether the Respondent has raised pure points of law, capable of sustaining the Preliminary Objection.

10. On the issue of *Res judicata* **section 7 of the Civil Procedure Act 2010** stipulates that:

***....."No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

11. Considered against the principles in section 7 of the CPA, this matter is not *res judicata* for the reason that when Ong'udi J rendered her decision on 5<sup>th</sup> of June 2017 and revoked the two nomination certificates which had been issued, the initial process of nomination came to an end. What is impugned before the court now is the outcome of the new process and the issues are not the same though the parties are the same.

12. The second issue is whether there was compliance with the court order dated 5<sup>th</sup> June 2017. All the parties agree that there was compliance to the extent that the Respondent's National Elections Board held a meeting on 6<sup>th</sup> June 2017 in which they nominated their preferred candidate for the Party. None of the parties disputes that the method used in the second nomination was available to the Respondent, under the

Party Constitution and Election Rules.

13. The point of divergence is that each party has presented its set of minutes purporting to be the preferred candidate. The Respondent has disowned the minutes presented by the Applicant stating that they did not originate from the NEB. As stated above the decision of the court made on 5<sup>th</sup> of June 2017 terminated the initial process of nomination. The two nomination certificates which had been issued were revoked. The results of the initial process of nomination, therefore have no bearing on the second process of nomination and the reasons for the choice the NEB made are not for this court to interrogate. The process should have been subjected to the Internal Dispute Resolution Mechanism and the Political Parties Dispute Tribunal in accordance with **Section 40** of the **Political Parties Act** before coming to the High Court which only has appellate jurisdiction.

14. From the foregoing I therefore make a finding that the Respondent complied with the decision of court of 5<sup>th</sup> June 2017. For that reason the Preliminary Objection succeeds.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> DAY OF June, 2017.**

.....

**L. A. ACHODE**

**JUDGE**

In the presence of .....for the Applicant

In the presence of .....for the Respondent

In the presence of .....for the Interested Party