**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**MISC APPLICATION NO.25 OF 2017**

**IN THE MATTER OF AN APPLICATION BY ELPHAS ODIWOUR OMONDI**

**AND**

**IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST THE ORANGE DEMOCRATIC MOVEMENT**

**AND**

**IN THE MATTER OF SEC. 5 OF THE JUDICATURE ACT, CAP 8 LAWS OF KENYA, PART 81.4 OF THE CIVIL PROCEDURE RULES OF ENGLAND**

**BETWEEN**

**ELPHAS ODIWOUR OMONDI…..……. ……..APPLICANT**

**AND**

**ORANGE DEMOCRATIC PARTY MOVEMENT…….....…….…1ST RESPONDENT**

**JOHN MBADI……..2ND RESPONDENT**

**AGNES ZANI…….....……..…..3RD RESPONDENT**

**JUNET MOHAMMED……..……...……...….4TH RESPONDENT**

**JOAN MINSARI OGADA…….……1ST INTERESTED PARTY**

**BENARD OGODO……...……...…..2ND INTERESTED PARTY**

**RULING**

By an application dated 29th May 2017 and filed in court on 31st May, 2017, the applicant, Elphas Odiwour Omondi, moved the court with a request to issue an order of committal for contempt of court against three people namely; John Mbadi, Agnes Zani and Junet Mohammed, for breach of a court order. The order said to have been violated was given by this court on 22nd May, 2017 and issued on 23rd May, 2017 directing the 1st respondent, ODM, to hold fresh nomination for MCA for Kojwach ward, Kabando Kapul, in Homabay County, in compliance with the decree of the court issued earlier in this matter.

The application is supported by an affidavit of the applicant sworn on the same day, 29th May 2017. The applicant has deposed that the order directing the 1st respondent to conduct fresh nomination was served on the 1st respondent on 24th May 2017. The applicant further deposed that the order was issued in the presence of counsel for the 1st respondent and interested parties but the 1st respondent failed to conduct nomination as directed by the court.

The applicant further deposed that the 2nd, 3rd and 4th respondents who are members of the Central Management Committee of the 1st respondent, had mandate to deal with disputes relating to nominations and for that reason, the applicant concluded, the respondents deliberately violated the court order and should be committed to contempt.

The respondents filed a replying affidavit through the 2nd respondent, John Mbadi, sworn on 6th June 2017. It was the respondents' position that although the applicant has sought to commit the 2nd to 4th respondents to civil jail as officials of the 1st respondent, these officials have only been identified by name without stating their capacity and positions they hold in the party. It has also been stated in the said affidavit, that the 2nd to 4th respondents never handled the disputes in court and could not therefore be aware of the outcome of those disputes since there were numerous disputes in various courts and tribunals.

The 2nd respondent also states that neither he nor the 3rd and 4th respondents were personally served with the court order and had no personal knowledge of the same. It was stated that the 1st respondent having been sued in its corporate capacity, the 2nd to 4th respondents did not participate in the case hence had no personal knowledge of the matter, and that principal officers of the party were not served with the order.

The 1st interested party, Joan Minsari Ogada filed a replying affidavit worn on 5th June, 2017 in which she stated that she was given a direct nomination certificate on 24/6/2017 to stand for MCA in Kojwach Ward, Homabay County.

The 2nd interested party also filed a replying affidavit sworn 7th June, 2017 stating that after nullification of the nomination results by the court, the order was served on 23rd May 2017, and that in compliance with the order, he was given a nomination certificate.

Brief facts of this case are necessary. The 1st respondent, ODM Party, conducted nomination for MCA, for Kojwach Ward, Kabondo Kaspul Constituency, in Homabay County on 24th April, 2017.whose result was not conclusive. There were disputes filed in different party IDRMs which made different decisions, one agreeing with Ogada, while the other agreed with Odiwour. A complaint was filed before the PPDT which ruled in favour of Ogada. Odiwour appealed to this court and the court allowed the appeal and ordered fresh nomination within 48 hours which the applicant says did not take place giving rise to the present application.

During the hearing of the application, Miss Karani holding brief for Mr Anzale, moved the application and urged the court to commit the respondents for contempt of court. Learned counsel submitted that although the order of the court directing the 1st respondent to conduct fresh nomination was served, it was

not complied with. It was submitted that at the time the order was made, the 1st respondent was represented in court, and although the order was subsequently served on the 1st respondent on 23rd May, 2017 it was ignored and no fresh nomination was conducted. In response to the reply by 1st to 4th respondents that the order was not personally served, counsel submitted that the 1st respondent's counsel was in court when the order was made and, therefore, there was knowledge of the order. Counsel referred to minutes (for 22/2/2017) that she said empowered the 2nd to 4th respondents to deal with nomination disputes. Counsel relied on the case of **Shimmers Plaza Ltd v National Bank of Kenya Ltd [215]eKLR** and emphasized that knowledge of existence of a court order superceded personal service. Learned counsel argued that where a party is represented in court, that party is presumed to have had knowledge of the court order.

Mr. Makori, learned counsel for the respondents submitted that although knowledge of a court order supercedes service, an applicant has to show that there was such knowledge of the existence of the order. Counsel referred to the 2nd respondent's affidavit and submitted that there was neither service nor knowledge of that order on the part of the 2nd to 4th respondents. Counsel referred to the affidavit of service which he submitted, was clear that the 2nd to 4th respondents were not served. With regard to the 1st respondent, Mr. Makori submitted that a principal officer of the 1st respondent was not served hence there was no service at all.

Learned counsel further submitted that contempt being a serious charge, proof required is higher, and referred to the decision in ***Republic v Justus Kizito Musali Exparte Hon. Silvester Lesamula Anami Misc EPA No. 3 of 2017*** to support his contention.. Counsel again submitted that there was no evidence that the respondents willfully disobeyed the court order in order to be held liable for contempt.

Mr. Onyango, learned counsel the 1st interested party supported Mr. Makori's submission that the order was not served, but also added that the order was complied with since the 1st interested party had been issued with a nomination certificate. He prayed that the application be dismissed.

Miss Chege, learned counsel for the 2nd interested party at first opposed the application submitting that her client, 2nd interested, party had been issued with a nomination certificate. However, mid-stream her submissions, counsel said that she would leave the matter to court on realizing that even the 1st interested party had also been issued with a nomination certificate..

I have considered the application, the responses thereto and submissions by counsel. I have also considered the authorities cited. The applicant wants this court to commit the cited persons for contempt for ignoring a court order directing the 1st respondent to hold fresh nomination for the position of MCA Kojwach Ward, Kabondo Kapsul Constituency in Homabay County. The order was made by this court on 22nd May, 2017 and nomination was to be carried out within 48 hours.

Contempt is a serious charge. It is usually directed at a person who is accused of disobeying a judgment, decree, order or direction of a court, and it takes the form of quasi criminal proceedings. Any person who is found guilty of contempt stands to lose his/her liberty. Contempt is conduct that despises, defies or disobeys authority. It is the willful disobedience of judgment, decree order or direction of the court. (**See section 4 of the Contempt of Court Act, 2016).** Such conduct is punishable because ***it impairs fair administration of justice, the rule of law and development of society and good order.***

For one to be found guilty of contempt, there must be willful and deliberate disobedience of the court order. One must have been served or must have had actual or constructive knowledge of the court order. Courts take contempt of court seriously and, **Ibrahim J** (as he then was) was clear on this while deciding in the case **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005]KLR 828,** when he stated:-

> ***"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its***

***orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void". (emphasis)***

Disobedience to court orders has negative consequences and courts frown upon such conduct. The Supreme Court of India had the following to say in the case of ***T.N. Gadavarman Thiromulpad [(2006 )5SCC 1]***

> ***Disobedience of orders of the court strikes at the very root of rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs"***

It is for the above reasons that courts view contempt as a transgression that must be rooted from society because it jeopardizes the rule of law, democracy and good order. It therefore has to be punished in order to discourage those who would want to take court orders lightly by simply disobeying them with little regard. And because of the seriousness of contempt, such charge takes the nature of ***quasi criminal*** proceedings and is required to be proved at a light degree than that of balance of probability. In the case of **Gatharia K.Mutikika v Baharini Farm Limited [1985] KLR,** the court stated as follows;….

> ***"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily… it must be higher than proof on a balance of probability, almost but not exactly beyond reasonable doubt…the guilty has to be proved with such strictness of proof as is consistent with the gravity of the charge…."***

It is because of the consequences that follow the contemnor that makes it a requirement that it be proved at a higher degree, and in some jurisdictions it is said to be beyond reasonable doubt, that the alleged contemnor was aware of the court order and had an opportunity to obey it.

In this case, it has been submitted that the alleged contemnors were served. Counsel for the applicant has relied on the affidavit of service by Joseph H. Otieno Odundo, sworn on 26th May 2017. In that affidavit, the process server deposed that he received a copy of the order on 24th May 2017, to serve the 1st interested party (now 1st respondent) and served Moses Oteka, an employee of the 1st respondent herein at 9:00 o'clock in the morning. The process server did not disclose who told him that the person he served, Moses Oteka, was an employee of the 1st respondent. He did not say who pointed out the said Oteko to him for purposes of service. It is also not clear what position Moses Oteka held in the 1st respondent.

The respondents' counsel submitted that the 2nd to 4th respondents were not served with the order and had no personal knowledge of the existence of that order. The 1st respondent is a corporation, **a juristic person**, who acts through principle officers. It was therefore necessary that at least a Principle officer of the 1st respondent be served if one were to successfully pursue contempt proceedings against the corporate entity and its officers.

This is the position in law order 5 rule 3 of the Civil Procedure Rules is clear on this. The decision in the case of **African Management Communication International v Joseph Mathenge Mugo & another [2013] eKLR** confirms this where it was held that in order to hold a corporation with liability for contempt, it is necessary to show that the corporation was properly served or that service had been dispensed with on the basis that an appropriate officer of the company had knowledge of the order.

The affidavit by the process server is short on particulars. It is not candid that any of the principal officers of the 1st respondent were served, and therefore, as far as service is concerned, I am not satisfied

that there was proper service on the respondents.

Contempt proceedings are an inquiry on whether the alleged contemnor(s) breached the court order and whether is liable to be punished. In this regard, the supreme Court of India addressing the issue in the case of **Mahinderjit Singh Bitta v Union of India & others I A no. 10 of 2010 (13th October 2011)** ***stated….***

> ***" In exercise of its contempt jurisdiction, the courts are primarily concerned with whether the contemnor is guilty of intentional and willful violation of the orders of the court, even to constitute a civil contempt. Every party is lis before the court, and even otherwise, is expected obey the orders of the court in its true spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution."***

Where it is; clear, like in this case, that there is no proof of service, the court must the inquire whether the alleged contemnor had knowledge of the order and whether the breach was willful. The applicant's counsel submitted that the 1st respondent was represented in court by counsel when the order was made and was therefore aware of the court order. Mr. Makori, on his part, maintained that the order should have been served personally.

The jurisprudence now favours knowledge of the existence of court orders as opposed to strict personal service. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** the Court of Appeal quoted the statement by **Lord Justice Thesinger** in the case of **Exparte Lantey 1879,13 Ch D 110 (CA)** where the Lord Justice stated;

> ***"… the question in each case and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which has been made. And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such notice ought to prove it beyond reasonable doubt,"***

Knowledge of existence of a court order is much more important than anything else. That is why the Court of Appeal in the case of **Shimmers Plaza Limited (supra)**, stated;-

> ***"Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings, for instance, Lenaola J in the case of Basil Criticos v Attorney General and 8 Others [2012]eKLR pronounced himself as follows:***
>
> ***'..the law has changed and as it stands today knowledge supersedes personal service… where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."***

The Court of Appeal in the ***Shimmers case*** (supra)posed the question whether knowledge of a court order or judgment by an advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and it answered the question in the affirmatives stating:-

> ***"We hold the view that it does. This is more so in a case as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him to report back to the client all that transpired in court that has a bearing on the clients' case…"(emphasis)***

The court referred to the decision in the **Canadian case of Bhatnager v Canada Minister of Employment and Immigration [1990]2 SCR.217,** where the Canadian Supreme Court held that a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that

the solicitor was informed.

Just like in the present case, the 1st respondent had a counsel in Court who was aware of the judgment of the court and the direction that nomination be repeated within 48 hours. It is my finding, therefore, that the 1st respondent having been duly represented in court, there was constructive knowledge of the order on its part. Its officers behooved counsel for the 1st respondent to inform his client on the outcome of their case.

Contempt of court is a very serious indictment and attracts severe consequences because it tends to interfere with the administration of justice. In the case of **Kalyaneshwari v Union of India & others (No 260 of 2004, Swatanker Kumar J**, of the S**upreme Court** of **India** stated:-

> ***"The rule of law has to be maintained whatever be the consequences. The 'welfare of people' is the supreme law and this enunciates adequately the ideal of 'law'. This could only be achieved when justice is administered lawfully, judiciously, without any fear and without being hampered or throttled by unscrupulous elements. The administration of justice is dependent upon obedience or execution of the orders of the Court. The contemptuous act which interfered with administration of justice on one hand and impinge upon the dignity of institution of justice on the other, bringing down its respect in the eye of the commoner, are acts which may not fall in the category of cases where the Court can accept the apology of the contemnor even if it is tendered at the threshold of the proceedings."***

In the present application, the applicant has cited three people namely John Mbadi, Agness Zani and Junet Mohamed. According to the statutory statement they are Chairman, Secretary General and the 4th respondent is merely described as the person in charge of elections. The applicant has also stated that they are members of the National Executive Committee, and the central management committee of the 1st respondent. Counsel relied on a document "E004" attached to the applicant's affidavit and submitted that by virtue of that documents (minutes from NEC meeting held on 22nd February 2017) the 2nd to 4th respondents were mandated to handle disputes arising from party nominations.

I note from that document that the 2nd, 3rd and 4th respondents' names are not mentioned. The document refers to a report received from Jude Pareno – Chair of National Elections Board.(NEB). The document is clear that **NEB** should conduct free, fair and democratic nominations. The document indicates that the Central Committee would make decisions pertaining to nominations including resolving nomination disputes, appointing National Appeals Tribunal and even giving direct tickets. It does not however mention the names of members of this committee.

The applicant has not attached the ODM Party constitution to enable the court ascertain who members this committee are for proposes of these proceedings. What the court notes, however, is that the minutes implored the NEB which is charred by **Judy Pareno** to conduct free, fair and democratic nominations. That would imply that the organ responsible for holding nominations is NEB under Judy Pareno.

I have also seen the replying affidavit which state that the order was complied with. In fact the two interested parties herein have also claimed that they have been given nomination certificates. The certificates are signed by **Judy Pareno** and **Dr Robert Aruga** in their capability as Chair and Secretary of NEB respectively. These, in my view, would have been the people to be cited for contempt of court. They have mandate from the party to conduct nominations, and if there was any court order they were the people to implement it. They however have not been cited, in these proceedings yet it is clear from their communication (letter to IEBC dated 24th May, 2017 and signed by both) that they were aware of the court order, I will say no more.

In the absence of these people in these proceedings, the court should not engage further in determining whether or not the alleged issuance of direct nomination certificates amounted to fresh nomination as ordered by the court. I will only conclude with the words from the Supreme Court of India in the case of *Re: Vinay Chandra Mishra* [(1995) 2 SCC 584], where the court said;

> ***"… 'judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. Dignity and authority of the Courts have to be respected and protected at all costs"***

And then the court rendered these words of advice, which I adopt for purpose of this case;

> ***"Whenever there are obstructions or difficulties in compliance with the orders of the court, least that is expected …is to approach the court for extension of time or clarifications, if called for. But, where the party neither obeys the orders of the court nor approaches the court making appropriate prayers for extension of time or variation of order, the only possible inference in law is that such party disobeys the orders of the court. In other words, it is intentionally not carrying out the orders of the court. Flagrant violation of the court's orders would reflect the attitude of the concerned party to undermine the authority of the courts, its dignity and the administration of justice."***

Following what I have stated herein above this application cannot succeed; It is declined and dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 12th Day of June, 2017

E C MWITA

JUDGE