



REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
ELECTION PETITION APPEAL NO 56 OF 2017

FREDRICK OKOLLA OJWANG.....APPELLANT/APPLICANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT1ST RESPONDENT

FADHILI MWALIMU MAKARANI.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. This is the third time this matter is finding its way back into court, but this time for an application to committal for contempt of court. By Notice of Motion taken out on behalf of Fredrick Okoth Ojwang, dated 8th June 2017 and filed in court on 9th June 2017, brought under Articles 10, 27(1) &(2), 47, 48, 159, 165 of the Constitution of Kenya 2010, sections 4, 5 and 28 of the Contempt of Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act, (Cap 21), Order 51 of the Civil Procedure Rules, Section 4, 5, and 6 Fair Administrative Action Act and all other enabling provisions of the law) the applicant has sought to cite Judy Pareno and Dr Robert Arunga for contempt of court for disregard of court orders. There is also a prayer that the court restrains IEBC from acting upon any nomination certificate, processing or gazetting a nominee by ODM, the 1st respondent herein.

2. The application is supported by an affidavit of the applicant sworn on 8th June 2017 and filed together with the Motion. The applicant deposed that by the ruling of 2nd June 2017, this court ordered the 1st respondent ODM to conduct MCA nomination for Port Reitz Ward in Chagamwe Constituency within 36 hours after the 1st respondent had failed to comply with the judgement and decree issued by the court on 24th May 2017.

3. The applicant further deposed that during delivery of the ruling, the 1st respondent and interested party were represented in court by counsel and were later served with the order, and on 5th June 2017 a letter was written to the 1st respondent on behalf of the applicant seeking the party position on the nomination as directed by the court. The applicant stated that despite service and knowledge of the court order, there has not been compliance of that order. The applicant now beseeches the court to hold the 1st respondents and the contemnors in contempt because they have disobeyed the court order.

4. The 1st respondent filed a replying affidavit to the motion sworn by Dr. Robert Arunga Secretary to

National Election Board(NEB) of the 1st respondent on 12th June 2017, and filed in court on the same day. The deponent stated that the 1st respondent, (ODM), in exercise of its mandate under Article 91 of the constitution, the Political parties Act and the Elections Act, undertook nominations which accorded participants their constitutional rights.

5. He further deposed that in order to implement the court order, National Executive Council (NEC) acted pursuant to Article 7.5.3(i) of the party constitution and directed that there be direct nomination for Port Reitz ward, a method that would not prejudice the party from submitting a candidate to IEBC for election due to the strict timelines.

6. Dr Arunga deposed that the Central Committee acting in accordance with the directive of NEC, nominated Fadhili Mwalimu Makarani, the 2nd respondent herein as the nominee for Port Reitz Ward. He stated that the decision was reasonable, legal and justified in the circumstances due to the time constraint and is consistent with section 31 of the Elections Act.

7. Before dealing with submissions by counsel for the parties, It is necessary to set out brief facts of this case. ODM, the 1st respondent, held its nomination for Port Reitz ward on 29th April 2017. Fredrick Okolla Ojwang, was handed a provisional certificate although there was a dispute about the results and a complaint lodged. According to the record, the difference in votes between Fredrick Okola and Fadhili Mwalimu Makarani the two leading candidates was 7 votes. The dispute escalated to the PPDT and in its decision of 16th May 2017, the complaint was dismissed.

8. An appeal was filed in this court which was heard by Mwongo, PJ and in his judgment given 24th May 2017, the nomination result was nullified and ODM ordered to repeat Port Reitz MCA nominations, within 72 hours. Immediately after delivery of the judgment, the 2nd respondent's counsel applied for stay of that decision for 3 days to enable them file an appeal to the court of appeal. The court acceded to their request and granted stay until Monday 29th May 2017, 12.00Noon.

9. In the meantime, it would appear, the 2nd respondent presented his nomination documents including the nomination certificate that had been nullified to IEBC, and was cleared to stand for MCA Port Retiz Ward. No appeal was lodged. Stang by the turn of events, the applicant moved the court by an application dated 29th May 2017 for review and other orders. including an order restraining IEBC from processing the 2nd respondent's papers or gazetting his name as dully cleared to stand for the general election on the 1st respondent's ticket.

10. After hearing the application, the court allowed it and directed the 1st respondent to comply with the decree of 24th May 2017 and hold nominations within 36 hours. IEBC was also restrained from gazzeting the 2nd respondent as a nominee for MCA Port Retiz ward. The applicant has now said that order was not complied with and has, therefore, filed the present application seeking the orders mentioned above.

11. During the hearing of this application, Mr Kanjama, learned counsel for the applicant, submitted that the respondents are in breach of the court order and urged that the alleged contemnors Judy Pareno and Dr Robert Arunga be punished for contempt of court. Learned counsel submitted that once the order for repeat nominations was made, it was served and the 1st respondent was aware of it. Counsel submitted that there was also no question about the knowledge of the court order since it was made in the presence of counsel for 1st and 2nd respondents.

12. Counsel reiterated that even the replying affidavit sworn on behalf of the 1st respondent acknowledges that they aware of the order. On the allegations in the replying affidavit that the order was complied with, learned counsel submitted that the import of the order was that there be repeat nomination and any suggestion that there was direct nomination could not have been in compliance with the court order. Counsel cited various rules of the 1st respondent to show that in this particular case there could not have been direct nomination because rules required notice to issue 21 days before such nomination, and no

such Notice was issued. In learned counsel's view, once the party opted to do primaries, it could not hand a direct certificate when it had been ordered to do repeat nomination.

13. The rules counsel referred to included rules 18.1, 18:2 and 3:3, 18:1A and 2nd schedule to demonstrate that direct nomination was a process that could not have easily applied in the circumstances of this case, given that Port Reitz did not fall under the zone where direct nomination was contemplated.

14. Learned Counsel further submitted that if any direct nomination was done, it violated the applicant's rights and breached the Fair Administrative Actions Act and violated the applicant's rights under Article 38 of the constitution. Learned Counsel urged the court to grant the orders and preserve its dignity and authority.

15. Miss Momanyi, learned counsel for the 1st respondent, opposed the application and submitted that indeed the 1st respondent was aware of the order, but due to strict timelines, it opted to do a direct nomination. Counsel also admitted that counsel for the 1st respondent was in court when the order was made which means knowledge of the court was not an issue in this application.

16. According to learned counsel, NEC met and directed that a direct nomination be given to Fadhili Mwalimu Makarani in justifying the decision to go for direct nomination, learned counsel submitted that the strict timelines could not allow repeat nomination to be carried out hence the only possible method was through direct nomination. Counsel argued that the Fair Administrative Actions Act did not apply and the party could not have used any other method to pick a candidate. Counsel submitted that the court could only punish for contempt if there was willful disobedience of the court order. to hold fresh nomination which is not the case here. In counsel's view, the court order was followed and argued that where a party exercises discretion in complying with a court order, like in this case where direct nomination was given, the aggrieved party could only move the PPDT to challenge that nomination. She prayed that the application be dismissed contending that granting prayer 5 would mean the 1st respondent would end up not presenting a candidate for MCA for Port Reitz ward in the general election.

17. Mr Cohen, learned counsel for the 2nd respondent, submitted in opposition to the application that the order of the court talked of nomination and not fresh nomination. According to counsel, the party used one of its available methods and granted direct nomination to the 2nd respondent. Counsel contended that since there was already nomination, the dispute could only have been referred to PPDT under section 41 of the Political Parties Act.

18. Learned Counsel contended that contempt of court is about willful disobedience of an order and argued that the 1st respondent's constitution and nomination rules were followed hence there was no contempt. Counsel referred to rules 18:1, 18:2 and 3:3 to support his argument. He urged that the application be dismissed to bring this matter to a close since litigation has to finally come to an end.

19. I have considered the application, the response there to and submission by counsel for the parties. What is before court is contempt proceedings initiated by the applicant to enforce the orders of the court directing the 1st respondent to repeat nomination for MCA, Port Reitz Ward, Changamwe Constituency in Mombasa County.

20. Contempt is the willful disobedience or disregard of a court order, judgment decree or direction and courts punish for contemptuous actions in order to maintain its dignity, authority, the rule of law and administration of justice. And because contempt proceedings are *quasi criminal* in nature, where a proved contemnor may lose liberty, courts require that contempt be proved satisfactorily and at a higher degree than that of balance of probabilities. Courts will not hesitate to punish for contempt where it is proven that there was willful disobedience of a court order. Moreover, court orders should be obeyed without qualification unless reviewed or set aside – **Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya & Another [2005]KLR 828.**

21. It is also the position held by courts that the power to punish for contempt should be used cautiously

and with great restraint and only as a last resort to enforce its orders – **Carey v Laiken [2015]SCC17.**

22. The judgment of the court directed the 1st respondent to hold repeat nomination within 72 hours which was not done. The applicant's counsel submitted that the court order was disobeyed in that no nomination was carried out as directed. Mr Kanjama submitted that this was deliberate disobedience of the court order since the 1st respondent never conducted repeat nomination. The 1st and 2nd respondents have held the position that there was no breach of the court order because the party complied and handed a direct nomination to the 2nd respondent.

23. First and foremost, there is issue of knowledge of the existence of the court order. The judgment of the court was made on 24th May 2017 when the court ordered the 1st respondent to carry out repeat nomination for Port Reitz ward. Although stay was granted up to Monday 29th May 2017, no nomination was held. Instead, the 2nd respondent presented his documents to IEBC in clear breach of the order of the court. The 2nd respondent had applied for stay to allow him appeal but no appeal was filed, and that judgment and decree remain in force. The 1st respondent though bound by that judgment, did not do anything about it.

24. The applicant still moved the court again on 29th May 2017 and in its ruling of 2nd June 2017, the court directed the 1st respondent to comply with the judgment of 24th May 2017 and hold nomination within 36 hours, which the applicant says was not again done despite the fact that the 1st respondent and its officers were aware of the order.

25. I have perused the affidavit of Dr Robert Arunga sworn on 12th June 2017, and it is clear from that affidavit that the 1st respondent and its officers were indeed aware of the court's decisions, and that is why he deposes that there was compliance by issuance of direct nomination. Counsel for the 1st and 2nd respondent have also supported the position of the 1st respondent that there was compliance which means knowledge of existence of the court order is not in dispute.

26. The question that arises for determination is whether there was compliance with the court's judgment and decree directing that there be repeat nomination. The court's judgment made on 24th May was not complied with. An order directing the 1st respondent to comply with that judgment within 36 hours was again made on 2nd June 2017. The 1st and 2nd respondents' counsel submitted that due to strict timelines, nomination was not be possible hence a direct ticket was given to the 2nd respondent, and according to counsel for the respondents, that amounted to compliance with the court's judgment. The 1st respondent's counsel went as far as arguing that the order only talked of nomination as opposed to fresh nomination.

27. The judgment of 24th May 2017 ordered repeat nomination. the court had said in the judgment.

“I order the ODM party to repeat the Port Reitz MCA nominations exercise within 72 hours of the delivery of this judgment in accordance with the law and party rules...”

28. Repeat nomination could not mean anything else other than to do the nomination a second time in the same way it had done in the first nomination. The 1st respondent had chosen to conduct primaries to pick its candidate for Port Reitz ward, and repeat of nomination could only mean going through the same process the 1st responded had attempted to do. **Concise Oxford English Dictionary, Twelfth Edition**, defines the word “repeat” to mean “say or do the something again” or do again or more than once.” That means the party could only do what it had done earlier and in the same manner it had done it. Moreover, the applicant had prepared himself to contest for nomination, and had possibly employed both human and financial resources, including contesting nomination in court. The 1st respondent cannot argue that handing a direct nomination is the same as holding repeat nomination.

29. Secondly, the 1st and 2nd respondents have argued that the 1st respondent's rules were followed.

However, it was submitted by counsel for the applicant that Port Reitz ward falls in the category of counties where direct nomination is not permissible, and that a notice of 21 days for the method of nomination to be used, had to issue. The 1st respondent did not submit evidence that there was compliance with party rules, that a notice was issued and that there was a meeting to sanction direct nomination. There are no minutes or resolutions of any meeting, names of people in attendance and what rules were applied. There is not even a mention of the date of such a meeting. The rules the 1st and 2nd respondents are relying on could not be summoned to excuse the 1st respondent from complying with a valid judgment and decree of the court. There is simply no evidence that indeed there was compliance with the decree.

30. Political parties are obliged to observe the constitution and the law including their own internal rules. The 1st respondent's rules required it to hold free, fair and democratic nominations. Where there is an allegation that the party complied with its rules, it has an obligation to show by evidence that it indeed did comply. It is not enough to merely state that it did.

31. Article 4(2) of the constitution declares Kenya as a multiparty democratic state founded on the national values and principles of governance. For Kenya to be a true multiparty democracy, democracy must germinate and grow in individuals, flower through political parties and fruition in the republic. The country cannot be a democratic if political parties do not embrace democracy. When political parties that form the core of the democratic state are not democratic themselves, and do not cherish democratic principles, there cannot be democracy in a country.

32. Article 159 grants judicial authority to courts to be exercised on behalf of the people of Kenya, and therefore, decisions made by courts are made on behalf of the people and must be obeyed by all in order to enhance democracy, the rule of law and administration of justice. The importance of this was aptly captured in the case of Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another CCT 19/11(75/2015). Justice Nkabinde, writing for the Constitutional Court of South Africa, stated:-

“The Rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

33. Judge O'leary of Canada Stated in the case of Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2 [1975] 48D.LR(3d) that;

To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society”.

34. The Supreme Court of Nigeria emphasized on why the court should protect its authority and dignity and punish for contempt in the case of Louis Ezekiel Hart v Chief George 1 Ezekiel Hart Sc 52/2983 (2nd February 1990) thus;

“Where an individual is enjoined by an order of the court to do or to refrain from doing a particular act, he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders.”

35. Cramwell J, speaking for the Supreme Court of Canada in Carey v Laiken(supra) stated that;

“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect... the purpose of contempt is first and foremost a declaration that a party has acted in defiance of a court order.

36. And **Justice Nkabinde** made it clear that Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also more importantly, by acting as guardians of the constitution, asserting their authority in the public interest. (**Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another**) (supra)

37. Back home, the case of **Commercial Bank of Africa v Ndungu (1990 – 1994) EA 64** contains the principle that it is a fundamental rule of law, that court orders be obeyed.

38. In **Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another [2014]eKLR** the Court of Appeal stated:

“The duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and due administration of justice.

39. The Court of Appeal went on to cite its own decision in the case of **Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another (Civil application No 39 of 1990)** which held that:

“It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

40. From the long line of decisions above the court’s singular duty is to ensure that its orders are obeyed for the maintenance of the rule of law administration of justice, good order and development of society. What is in question in this application is the conduct of the 1st respondent and its officers with regard to the judgment and decree of the court. It is clear that there was a deliberate intent from the very beginning not to comply with the court’s judgment. That is why a party whose nomination certificate had been nullified and applied for stay to go on appeal, took advantage and presented his documents.

41. After that act was challenged and the court ordered that the judgment be complied with, the 1st respondent did not conduct repeat nomination as ordered and when challenged through these proceedings, the answer given was that it handed the same person who had tried to circumvent the judgment of the court, a direct nomination without showing that it complied with its own rules. Rule 18.1 stipulates how nominations should be conducted while Rule 18:2 is clear that there be a notice of method of nomination in an electoral area and NEB is obliged to publish resolutions by NEC on such methods, twenty one (21) days prior to nominations. As pointed out earlier, Port Reitz falls outside zone C where direct nomination may be done. Once the party decided to hold primaries, it could not change to direct nomination without notification since it would be against its own rules. The applicant as a member of the 1st respondent had legitimate expectation that the party would follow its own rules in complying with the judgment and decree of the court which it did not.

42. Counsel for the 1st respondent submitted that the 1st respondent exercised its discretion in complying with the court order and that due to shortage of time, it had to use direct nomination. I am afraid that submission cannot be correct. There is no discretion when it comes to compliance with court orders. There is only one duty – to comply and not to decide how to comply. on time, again this is neither here nor there. The judgment was made on 24th May, 2017, it was stayed to 29th May 2017 at 12noon to allow the dissatisfied party to appeal.

43. On 29th May 2017 at 12.01 there being no appeal, the 1st respondent had an obligation to comply with the courts judgment. On 2nd June 2017 it was given 36 hours to comply and again if there was shortage

of time, it could have approached the court for extension of time or variation of the order. It did not do so.

44. As stated in the case of *Re: Vinay Chandra Mishra* [(1995) 2 SCC 584];

“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.”

I fully agree with the above observations, and on that, I am satisfied that the 1st respondent and its officers are in contempt of court.

45. Regarding the appropriate orders to make in this matter, the applicant has asked that IEBC, the 1st interested party, be restrained from acting upon the impugned nomination certificate and exclude any other MCA nominee for Port Reitz Ward except himself. This prayer has twin effects; one excludes the 2nd respondent and in his place, allows the applicant to stand as nominated.

46. The 1st respondent has argued that if the order is granted excluding the 2nd respondent, the party will suffer because it may not present a candidate. First, the court cannot order that the applicant be granted a certificate because that is not the mandate of this court. It is the responsibility of a political party to nominate candidates while the duty of the court is to resolve disputes and make appropriate orders.

47. Second, on the 1st respondent’s concern that if the order is made barring 2nd respondent’s inclusion, the party will not have a candidate, I wish to state that the courts mandate is to determine whether a party, complied with the law or not. It is not to tell the party how to do its business but it must act in accordance with the law and comply with court orders. If not the court will say so and nullify any purported action done in contravention of the law or court orders.

48. The people of Port Reitz ward deserved no less than democratic nomination in accordance with party nomination rules. It is not too late, the 1st respondent can still do that. But for now, I am satisfied, that for the ends of justice and to make court orders have meaning, I am persuaded that prayer 5 is for granting though with variation. The orders that the Court makes are as follows:

“1. The application dated 12th June 2017 is hereby allowed.

2. Judy Pareno and Dr Ronert Arunga Chairperson and Secretary, National Election Board (NEB) of the 1st respondent (ODM) respectively, are hereby formerly cited for Contempt of Court for disobedience of the Judgment and Decree of Court dated 24th May 2017, and are hereby called upon to Show Cause Why they should not be punished.

3. The Independent Electoral and Boundaries Commission, (IEBC), the 1st Interested Party herein, is hereby restrained from gazetting the name of FADHILI MWALIMU MAKARANI the 2nd Respondent herein as the 1st Respondent ODM’s Nominee for Port Reitz Ward, Changamwe Constituency, Mombasa County pursuant to a Nomination Certificate issued by the 1st Respondent in violation of the Judgment and Decree of the Court dated 24th May 2017 and the subsequent Order of 2nd June 2017, until full compliance.

4. Judy Pareno and Dr Robert Aruya, do attend Court on 16th June 2017 at 3.00p.m to show cause why they should not be punished for contempt of court. Summons do issue accordingly.

5. The 1st Respondent do pay costs of the applications.

Dated, Signed and Delivered at Nairobi this 14th Day of June, 2017

E C MWITA

JUDGE