



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

MISC. ELECTION PETITION APPEAL NO. 24 OF 2017

KENNEDY ODURU NYARUMBA.....COMPLAINANT/APPLICANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT PARTY1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

HON. JUDITH PARENO –

CHAIRPERSON, NEB.....1ST INTERESTED PARTY

ODUOR ONG’WEN –

EXECUTIVE DIRECTOR.....2ND INTERESTED PARTY

PRAXIDES TOROREI –

LEGAL DIRECTOR, IEBC.....3RD INTERESTED PARTY

RULING

1. It is the unqualified obligation of every person against or in respect of whom an order has been made by a court of competent jurisdiction to obey it unless and until the order is discharged (**Hadkinson –v- Hadkinson [1952]AC 285**). The defendant must be shown to have been aware of the order, and there has to be proof of disobedience or violation of the order (**William Sapuro Kimanaa –v- National Bank of Kenya Limited & Another, HC (Milimani) CC No. 1933 1999**). The court has jurisdiction to commit for contempt a person, though not a defendant to the action or against whom the order has been issued, who, knowing of the order, abets, aids and assists in committing a breach of it by the person against whom the order has been made (**Dorothy K. Kwonyike t/a Luguyan Enterprises –v- Victoria Commercial Bank Ltd, [2000]LLR 6307**).

2. Applications for contempt are quasi-criminal in nature as the defendant risks going to jail, and this is why the standard of proof is higher than the balance of probabilities, and almost, but not exactly, beyond

reasonable doubt (**Mutitika –v- Baharini Farm Ltd [1985]KLR 227**). Because of the serious implication of disobedience of court orders, recourse ought not be had to the process of contempt in aid of civil remedy where there is any other method of doing justice.

3. For the jurisdiction of the court to be properly invoked the order complained of must be clear and the exact date of the contempt shown especially where there is no evidence of personal service and the affidavit of service is not part of the application (**Margaret Ogweno Okoth –v- Gabriel Onyango Wade & Another [2005]1KLR 399**). The application must state exactly what the alleged contemnor did or omitted to do which constituted a contempt of court with sufficient particularity to enable him meet the charge (**Republic –v- Commissioner of Lands & Others ex parte James Kiniya Wachira Alias James Kiniya Gachiri, HC Misc. No. 149 of 2002 NBI**). Lastly, the slightest ambiguity to the order can invalidate an application for contempt.

4. It is against these legal principles that the court has to consider the facts of this motion to determine whether the respondents and the interested parties have been proved to be guilty of contempt of the orders in the decree in question.

5. There is no dispute that on 20th May 2017 the applicant Kennedy Oduru Nyarumba obtained a decree in which were the following orders:

(a) the order of PPDT dismissing the applicant’s complaint be and is hereby set aside;

(b) the nomination certificate, if any, issued either to Caroline Omedo or Fredrick Omondi Otieno is hereby declared null and void;

(c) the 1st respondent is restrained from submitting either of the two names in (b) to the 2nd respondent as its nominee for the position of member of County Assembly for Lucky Summer Ward, and in the unlikely event that the 1st respondent has so submitted the names of the two persons in (b) be expunged from the list; and

(d) fresh, fair and credible nomination be carried out by the 1st respondent within 72 hours.

6. The applicant was a member of the Orange Democratic Movement Party (1st respondent). On 30th April 2017 he took part in the Party’s primaries to get its candidate to vie for the position of member of County Assembly for Lucky Summer Ward in Ruaraka Constituency in Nairobi County in the general elections to be held on 8th August 2017. Following the exercise, one Fredrick Omondi Otieno was declared the winner and was issued with a nomination certificate. This aggrieved the applicant and the third contestant (Caroline Omedo) who complained to the Party’s County Appeals Board. The Board heard the complaint and on 6th May 2017 decided to award the nomination certificate to Caroline Omedo. The applicant was aggrieved and appealed to the Political Parties Disputes Tribunal. The Tribunal dismissed the appeal. The applicant further appealed to the High Court which on 19th May 2017 found in his favour and issued the orders above.

7. On 29th May 2017 the applicant filed an application for contempt against the 1st respondent, Dr Agnes Zani and Mbadi John Ng’ong’o. The application was dismissed.

8. On 7th June 2017 he filed the present application against the 1st respondent and the Independent Electoral and Boundaries Commission (2nd respondent). In the application he joined Judith Pareno, Chairperson National Elections Board of 1st respondent (1st interested party); Oduor Ong’wen, Executive Director of 1st respondent (2nd interested party); and Praxides Tororei (Legal Director of 2nd respondent) (3rd interested party). The complaint against all these parties was that they had been served with the orders above but had disobeyed them and/or had not carried them out. An order was sought that each be held to be in contempt and be punished by being sent to jail pursuant to **section 28(1) of the Contempt of Court Act No. 46 of 2016**.

9. In the supporting affidavit sworn by the applicant he stated that on 20th May 2017 a decree was extracted and served on the respondents, and on the 1st and 2nd interested parties; that the respondents and the interested parties refused, neglected and/or were not ready to implement the orders in the decree. He asked that they should be punished. He annexed a copy of the decree which had the stamp of the 1st respondent with the date of 20th May 2017 and with a signature.

10. Judy Pareno was the Chairperson of the National Elections Board of the 1st respondent. The Board's mandate was to plan, organise and coordinate all the Party elections. The Board supervised the Party nominations, including the one for Lucky Summer Ward. She stated that the Party, herself and the 2nd interested party were not parties to the appeal leading to the decree, and were unaware of the decree. Further, that neither the 2nd interested party nor herself was personally served with the decree; and that the Board submitted the names of its candidates to the 2nd respondent on 14th May 2017. On 30th May 2017 they became aware of the decree. On the same day the Board together with the Party's Executive Committee consulted and, in accordance with the Party's Election and Nomination Rules, nominated Fredrick Omondi Otieno as their candidate for the Ward and on the following day wrote to the 2nd respondent presenting the name for clearance.

11. The 3rd interested party was the Director of Legal and Public Affairs of the 2nd respondent. She stated that neither of them was a party to the proceedings leading to the decree, and complained that they had been joined into the proceedings without leave or court order.

12. The applicant was represented by Mr. Ashioya, the respondent, 1st interested party and the 2nd interested party by Mr. Makori and the 2nd respondent and the 3rd interested party by Mr. Mukele. Each counsel addressed the court and also filed skeletal submissions. I considered them.

13. It was clear that the applicant did not produce an affidavit of service to show that the decree was served on the respondents and interested parties. Against the 1st respondent was a stamp of the Party on the decree with date of 20th May 2017 and a signature. The owner of the signature was not known. It was not shown who had affixed the stamp, and therefore who had received the decree, if at all. It was not shown that the decree was received by either the 1st or the 2nd interested party. As for the 2nd respondent and the 3rd interested party, there was a stamp dated 26th May 2017. That was way beyond the 72 hours of the orders in the decree. But, again, it was not shown to whom the decree had been served. The applicant was required to prove to the satisfaction of the court that the respondents and the interested parties were aware of the orders in the decree. The court was not satisfied that the applicant discharged the burden.

14. The 1st respondent and the 1st and 2nd interested parties said that they first saw the orders on 30th May 2017. That was not challenged. By then the time ordered for the repeat nomination had long lapsed. The orders in the decree could not be implemented at that stage.

15. When on 31st May 2017 the 1st respondent gave a direct nomination to Fredrick Omondi Otieno, the remedy that was available to the applicant was not to come to court citing the parties for contempt. What was open to him was to either take advantage of the Party's internal dispute resolution mechanism, or file a complaint with the 2nd respondent. A civil remedy was available to him, and therefore the choice of the coercive mechanism of contempt of court was not called for.

16. Further, the respondents were each a corporate entity. The 2nd respondent did not participate in the proceedings leading to the decree subject of this application. Neither did the interested parties who had individual capacities and against whom it had not been shown that they had personal knowledge of the orders in the decree.

17. Lastly, a complaint was raised that the 2nd respondent and the interested parties had been improperly joined in the motion, now that they did not participate in the proceedings leading to the decree; that leave

was required for the joinder. Mr. Ashioya did not think so, but the complaint was valid.

18. In short, the application was not merited and is hereby dismissed.

DATED, DELIVERED and SIGNED at NAIROBI this 12TH day of JUNE 2017.

A.O. MUCHELULE

JUDGE