



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2017

IN THE MATTER OF PPDT NO. 219 OF 2017

KASAMANI CHARLES LUTTA

NASEBE EVANS ASOMBA

MATHIAS OMONDI

BISHOP BENEAH SALALA

STANSLAUS KUBENDE.....COMPLAINANTS

VERSUS

AMANI NATIONAL CONGRESS.....1ST RESPONDENT

JUSTUS MAKOKHA MURUNGA.....2ND RESPONDENT

AND

GODFREY OSOTSI – SECRETARY GENERAL.....1ST INTERESTED PARTY

PETRONILA WERE– EXECUTIVE OFFICER.....2ND INTERESTED PARTY

RULING

1. This is an application for contempt of Court by **Kasamani Charles Lutta**, the Applicant. It is brought against **Amani National Congress and Justus Makokha Murunga**, (Respondents) and intended to cite **Godfrey Isotsi** and **Petronila Were** who are named as Secretary General and Executive officer respectively. The genesis of the application is the order made by **PPDT** on 12th May 2017. In that judgment and decree, **PPDT** upheld the decision of **IDRM** made on 10th May 2017, cancelling the nomination certificate issued to the 2nd respondent and ordered repeat nomination for **MNA** for Matungu Constituency, excluding the 2nd respondent unless he would have been cleared by relevant party organs and relevant investigative agencies.

2. According to the applicant’s affidavit, that judgment and decree has not been complied with and for that reason, the 1st respondent and interested parties are in contempt of court and should therefore be cited. That is the basis of the application before court.

3. **Godfrey Osotsi**, the 1st interested party, filed a replying affidavit sworn on 24th May 2017 and filed in court on the same day. He deposed that after the decision of the **PPDT**, the 1st respondent called out the parties for a meeting which was held on 18th May 2017 at the 1st respondent's offices where parties signed a resolution on the way forward. The minutes of that meeting show that parties agreed that investigations against the 2nd respondent continue and that the party's **NEB** would conduct fresh nomination or use other legal means to identify a suitable candidate. Those minutes were signed by all the aspirants, including the applicant. It was deposed that the 1st respondent was cleared by the police and that the 1st respondent requires time to complete nomination process.

4. The 2nd respondent filed a replying affidavit sworn on 23rd May 2017 and filed in court on 24th May 2017. The 2nd respondent stated that the applicant is not fit to practice as an advocate of the High Court of Kenya and any documents filed by him are invalid, the 2nd respondent further stated that the **PPDT** failed in its judgment to give timelines within which nomination was to be conducted, and finally, that there was no contempt of court. The 2nd respondent referred to the meeting held between the 1st respondent and all aspirants, where it was agreed that apart from repeat nomination, the party could use any other legal means to come up with a candidate.

5. The 2nd respondent also filed a notice of preliminary objection stating that the applicant was not an advocate in terms of the **Advocates Act (Cap 16)** because he had been struck off the roll of Advocates. In that regard, it was contended, the pleadings filed by the applicant as an advocate were invalid.

6. During the hearing, Mr. **Mukoya**, learned counsel for the applicant, submitted that the respondents were in contempt of court for not complying with the order of **PPDT** to carry out fresh nomination although the order has been served. In counsel's view, the dignity and authority of the court was under challenge due to that breach and it must be protected and safeguarded.

7. **Mr. Ngome**, learned Counsel for the 1st respondent, opposed the application and submitted that parties had attended a meeting with the 1st respondent's officers and agreed that fresh nomination could be conducted or the party could use any other legal means to come up with a candidate. They also agreed that the 2nd respondent be investigated and cleared, if not, he be excluded from the nomination. Learned Counsel argued that there was no contempt since there was no timeline given by **PPDT** that was breached. He also supported the objection by the 2nd respondent that the applicant was not qualified to practice and therefore, the pleadings drawn and filed in court were invalid.

8. **Mr. Ashioya**, Learned Counsel for the 2nd respondent, argued that the 2nd respondent took steps to comply with **PPDT's** order, that a meeting was held by all parties and agreed on the way forward including the party using any other lawful means to come up with a candidate hence there was no breach. Counsel submitted that the application is incompetent and invalid on account of having been drawn and filed by a person who is not qualified to practice. Counsel referred to the **Supreme Court's** decision in the case of **National Bank of Kenya Ltd v Anaj Warehousing Limited [2015]eKLR** to support his submission. Counsel was of the view that pleading filed by an unqualified person were invalid.

9. I have considered this application and the responses thereto. I have also considered submissions by counsel and the authorities cited. The application raises two questions for determination. **First**, whether the respondents, more so the 1st respondent, is in contempt of court, and **second**, whether the pleadings filed herein are invalid. 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*. A party can only be cited and punished for contempt of court where he has willfully and flagrantly, disobeyed a court order.

10. **Ibrahim J** (as he then was) dealing with the issue of contempt in the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005]KLR 828**, underscored

the importance of obeying court order 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)**

11. In the present application, **PPDT** made a decision on 12th May 2017 for repeat of nomination for **Matungu Constituency** in Kakamega County. There was no time limit given. The nomination was to exclude the 2nd respondent unless he would have been cleared by party organs and relevant investigative agencies. It would appear the 2nd respondent was cleared by the police and had a clearance letter dated 19th May 2017. A Court order must be clear and capable of being understood and implemented so that it can attract appropriate sanctions in the event of disobedience.

12. In the case of **Katsuri Limited v Kapurchand Depor Shah [2016] eKLR**, **Mativo J** cited the **South African** case of **Kristen Carla Burchell v Barry Grant Burchell Eastern Cape Division case No 364 of 2005**, where it was stated that ***in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.*** In the case of **Carey v Laiken, 2015 SCC 17 (16th April 2015)** the Supreme Court of Canada expounded on the three elements of **civil contempt** of court which must be established to the satisfaction of the court, that is; ***the order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.***

13. The order and direction of **PPDT** did not state when nomination would be carried out and it depended on certain other factors including the 2nd respondent being cleared by the party organs and investigative agencies. Secondly, it would appear parties met and agreed on how the process would move. The meeting that took place on 18th May 2017, and resolutions passed have been annexed to the replying affidavit, and have not been controverted. That means the applicant was to be bound by those resolutions. What this means is that the judgment and decree was compromised to the extent of those minutes, hence the order of **PPDT** cannot form the basis for contempt now. Going by the definition of contempt and the decisions above, I am unable to find that there was contempt.

14. Having resolved the issue of contempt, the next issue for determination is whether the pleadings herein are valid. The respondents put a spirited argument that the applicant drew and signed pleadings after he had been struck off the roll of Advocates and could not therefore, take instructions and act for clients. Learned Counsel referred to the **Supreme Court** decision in **National Bank of Kenya Limited v Anaj Warehousing Limited (supra)** to support their submission that pleadings drawn, signed and filed by an unqualified persons are invalid and of no consequence.

15. To support his submission that the applicant is unqualified, the 2nd respondent attached a print out from the Law Society of Kenya’s web portal which showed that **Mr. Kasamani Charles Lutta** had been struck off the roll of Advocates during the year 2017. That assertion was not controverted by the applicant or his advocate. Out of extreme caution, the court directed the 2nd respondent to file a supplementary affidavit attaching a letter from the Law Society of Kenya to confirm the status of the applicant as an advocate of the High Court of Kenya. A supplementary affidavit was filed confirming that indeed that position is correct and that Mr. Kasamani was struck off on 10th April 2017.

16. Mr. Kasamani swore a further affidavit, although not denying the facts as stated in the preliminary objection, he deposed that he has a dispute with the Law Society of Kenya, and that the fact of being

struck out cannot take away rights of a party to litigate in court. He also deposed that **Kasamani & Co. Advocates** is a firm of advocates and has an advocate practicing in that firm.

17. In the **National Bank of Kenya Limited v Anaj Warehousing Limited case (supra)**, the **Supreme Court** dealt with the issue of someone acting without a practicing certificate, and referred to the decision of the Court of Appeal at paragraph 45 of its judgment. The Supreme Court made a distinction between unqualified persons by virtue of not holding current practicing certificates, and those unqualified persons not being advocates. The Supreme Court was of the view that documents drawn by Advocates without practicing certificates cannot be invalidated by reason of not having a current a practicing certificate alone, since that could be contrary to **Article 40** of the constitution. The court was however, clear that documents by other categories of unqualified people would be void. The court stated at paragraph 68;

“the facts of this case, and its clear merits, lead us to a finding and the proper direction in the law, that no instrument or document of conveyance becomes invalid under section 34(1) (a) of the Advocates Act only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates or advocates whose names have been struck off the roll of advocates shall be void for all purposes” Emphasis)

18. Following that judgment, the national Assembly amended the Advocates Act through the **Statute Miscellaneous Act No. 11 of 2017**. The definition of unqualified person in section 2 was amended to read.

“Unqualified person” means a person who is not qualified under section 9 and includes an advocate who:-

- (a) Is not qualified under section 9;
- (b) Is not exempt under section 10; and
- (c) Fails to take out a practicing certificate;-

19. Another important amendment was to section 34 which introduced section 34A and B. Section 34A provides:-

“subject to section 10, an Advocate who holds a current practicing certificate shall not file any legal documents in any registry under any law which requires filing of such document by an advocate, or issue such document for any other professional purpose, unless there is affixed on each such document the stamp or Seal issued by the society under section 23(2A).

20. Section 34B provides that:-

- 1. “A Practicing Advocate who is not exempt under section 10 and who fails to take out a practicing certificate in any year commits an act of professional misconduct.***
- 2. notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.***
- 3. For purposes of this section, “legal document” includes pleadings, affidavits, depositions, applications, deed, and other related documents, filed in any registry under any law requiring filing by an advocate.”***

21. The position in law now is that an advocate without a practicing certificate can draw and file documents but even as he does so, he commits a professional misconduct. This amendment was necessitated by the judgment of the Supreme Court referred to above. What remains clear though as held by the Supreme Court, is that other categories of unqualified persons such as an advocate whose name has

been struck off the roll of advocates cannot draw or sign legal documents since those documents are void for all purposes.

22. According to the letter from the Law Society of Kenya dated 26th May 2017, and signed by **Florence Muturi**, Deputy Secretary (compliance and Ethics) and addressed to M/s Ashioya Mogire & Nkatha Advocates, Kasamani Charles Lutta, was struck off the roll of Advocates on 10th April 2017 in **Disciplinary Cause No DTO 271 of 2007**. The effect of this is that Mr. Kasamani ceased to be a qualified advocate to practice law and draw or sign legal documents.

23. That brings us to the question whether pleadings filed herein are valid or not. The pleadings are drawn by the firm of Kasamani & Co. Advocates and signed on behalf of that firm. The affidavit in support of the Notice of Motion is sworn by Charles Lutta Kasamani as the 1st complainant/applicant. He is the applicant herein. The certificate of urgency is in the name of Charles Lutta Kasamani and he says he is an advocate of the High court and the complainant. It is dated 22nd May 2017. Mr. Kasamani can sign the certificate as the complainant but not as an advocate of the High court. According to the certificate he says he is both an advocate and 1st complainant. To the extent that he is the 1st complainant, there is no problem but as an advocate, that document would be invalid.

24. The motion is signed on behalf of the firm. In his further affidavit, Mr. Kasamani has stated that there is an advocate in the firm which would mean there is another advocate other than himself. If that be the case, the firm can continue as long as documents are signed by a different advocate, but he cannot sign documents as such an advocate because that would make the documents invalid.

25. Given the position of Mr. Kasamani in this matter, and the fact that he did not state in the certificate of urgency that he was acting on behalf of the other applicants, the court takes the view that he was signing the certificate as the applicant. For that reason, the court would be hesitant to strike out these pleadings as invalid.

26. The respondents have also not shown that Mr. Kasamani is the only advocate in the firm such that with his current positions, the firm becomes redundant.

27. Ultimately the conclusion I come to is that the applicant has not proved that the respondents committed contempt of court. Consequently the application dated 22nd May 2017 is declined and dismissed with costs.

Dated, Signed and Delivered at Nairobi this 2nd Day of June 2017

E C MWITA

JUDGE