



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
MISC. ELECTION PETITION APPLICATION NO 19 OF 2017
IN THE MATTER OF ENDEBES CONSTITUENCY TRANS-NZOIA COUNTY

BETWEEN

MOSES WANJALA AINEAH.....APPLICANT

VERSUS

THE RETURNING OFFICER ODM ENDEBES CONSTITUENCY1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 2ND RESPONDENT

PETER WEKESA.....3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...4TH RESPONDENT

(Being an appeal from the entire Judgment & Decree of the Political Parties Disputes Tribunal Dated and delivered on the 19th May 2017 at Nairobi in complaint No.244 of 2017)

RULING

This application is purported to be brought under Order 53 Rule 1 Civil Procedure Rules within regulations application for Judicial Review. The body of the application seeks for orders in nature of contempt of court proceedings which ought to be brought under the Contempt of Court Act 2017, Section 63(c) of the Civil Procedure Act.

Though wrongly premised the Applicant's application dated 7/6/2017 seeks the following orders:-

1. Spent

2. That the Honourable Court find in contempt the actions of the 1st Respondent failing to hold repeat nominations for the Endebes Constituency member of Parliament seat as per the court's ruling.

3. THAT the ODM Party be barred from presenting the name of the 3rd Respondent or any

other person to the IEBC having already submitted the name of the Applicant as the winner.

4. THAT the IEBC be barred from receiving the name of the 3rd Respondent or any other person from the ODM Party since the party has already submitted the name of the Applicant as the winner.

5. THAT Dr, Agnes Zani, Mr. Oduor Ong'wen and Ms Judith Pareno be committed to prison for a period of Six months or such other period as this honorable Court may decide for deliberately violating clear, unequivocal orders of the Orange Democratic Movement Tribunal.

6. THAT this Honorable Tribunal fines Dr. Agnes Zani, Mr. Oduor Ong'wen and Ms Judith Pareno the sum of Kenya shillings Five Hundred Thousand and each or such other sum as this Honourable court may decide for deliberately violating clear, unequivocal orders of the Tribunal and in default of payment of such fine all movable and immovable assets of the contemnors including land and buildings be attached and sold in execution of this order to satisfy the penalty of contempt.

The order, subject of this application was rendered by this court on 31st May, 2017 at 5 p.m. directing-

1. The 2nd Respondent Orange Democratic Movement party do comply with the orders of the Orange Democratic Movement Appeals Tribunal dated 21st April, 2017.

2. The 2nd Respondent Orange Democratic Movement, National Elections Board to conduct repeat nomination for Member of Parliament for Endebes Constituency within 48 hours in accordance with the party's Constitution and nomination rules.

3. Pending the conduct of the repeat nomination the 2nd Respondent is restrained from submitting any name of nominee to the Independent Electoral Boundaries Commission for gazetement.

4. I make no orders as to costs.

The Applicant has now approached this court for contempt proceedings against the contemnors Dr. Agnes Zani, Mr. Mr. Oduor Ong'wen and Ms Judith Pareno who are all officers of the Orange Democratic Movement party. Mr. Mombo for the Applicant submitted that despite the court order dated 31st May, 2017 directing the ODM Party to conduct repeat nominations for Endebes Constituency within 48 hours, the contemnors have refused to conduct the nomination in total defiance of the court order. He prays to this court to cite them for being in contempt of court and should suffer penal consequences.

The requirements which an Applicant intending to cite a person for contempt of court were well stated in **OCHINO & ANOTHER vs OKOMBO & 4 OTHERS (1989) KLR** where the Court of Appeal Gakuhi, Masime and Kwach JJA held:-

"1. As a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

2. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

3. The court will only punish as contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous

4. The defendants had proper notice of the terms and the breach of the injunction must be

proved beyond reasonable doubt.

5. The proper procedure for bringing the application for contempt.

The Applicant therefore who seeks citing for contempt must establish to the satisfaction of the court:-

- 1) That there was a court order requiring a person to do or to abstain from doing the act.**
- 2) That the order was clear and unambiguous.**
- 3) That the order was served personally on the person required to act or abstain from acting.**
- 4) That the order served contained a penal notice that if he disobeys the order he is liable to suffer penal consequences.**
- 5) The disobedience or breach of the injunction must be proved beyond reasonable doubt.**

There is no doubt that the orders of 31st May, 2017 was one requiring the contemnors to do a specific act; which was to conduct the repeat nominations within 48 hours. The order was clear and unambiguous. The issue for determination is whether the contemnors were served personally with the order of 31st May, 2017. The Applicant in the Supporting Affidavit sworn on 7th June, 2017 depones:-

4.) That I applied to this Honourable Court under Misc. Election Petition No. 19 of 2017 where a ruling was given. (Annexed hereto and marked "MWA001" is a copy of the Ruling)

5.) THAT a letter dated 01/06/2017 was written to the 2nd Respondent, attached to it was a copy of the ruling by this Honourable Court (annexed hereto and marked "MWA002" is a copy of the letter)

6.) THAT the 2nd Respondent has failed to conduct the repeat nomination within the timeline that had been set and has taken no step to enforce the said ruling.

It is a requirement that for a court to find a person in contempt, the Applicant must show that the person who is required to act or abstain from acting must be personally served with the court order. This is to enable them to know what the court directs them to do or abstain from doing.

These Contempt of court proceedings are though civil are in nature of criminal proceedings, mainly because they attract penal consequences including imprisonment. It must be shown that the person cited for contempt was served personally with the order. While personal service is appropriate the court can accept electronic transmission to an email address of the contemnor with evidence that the same was sent and received; or by sending by Whatsapp technology to the contemnor's registered or known telephone number and evidence of such sending. In the present application, there is no affidavit of service to show that Judy Pareno was served with the Tribunal's order.

In this application the only evidence of service is the deposition by the Applicant that he sent a letter on 1/6/17. This with respect cannot be said to be effective service upon which penal sanctions can flow in case of non-compliance.

In **Woburn Estate Ltd Vs Margaret Bashforth (2016) eKLR** the Court of Appeal Makhandia, Ouko, M'noti JJA while addressing the issue of service stated:-

"This Court in two recent successive decisions in Christine Wangari Wachege (supra) and Shimmers Plaza Limited (supra) explained in extenso the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act

may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this Court in Ochino & Another v Okombo & others [1989] KLR 165. The court may also make an order in respect of service by alternative method or at an alternative place.

In the matter before us, the appellant has alleged that the order was not served personally on it nor was there dispensation with such service. The respondent's answer to this was that, as a lay person she is not versed in legal procedures. It is therefore uncontroverted that the judgment of 16th April 2013 and the order of 31st March 2014 were not served on the appellant.

We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;

‘A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.’

In this application there is no evidence on record that the contemnors were personally served with the order that the Applicant submits they have disobeyed.

The other issue I must mention is that the order was issued on 31/5/17 at 5.00 p.m. The Respondent was required to comply within 48 hours of the order. This was in view of the timelines in the electoral process. Despite this urgency the Applicant did not endeavour to serve the order with the urgency it deserved. The Applicant then took 7 days to file this application for enforcement. In my view the Applicant was indolent and did not appear to appreciate the urgency of the matter.

In the result I find the application is without merit and dismiss it with costs.

DATED, SIGNED and DELIVERED at Nairobi this 9th day of June, 2017.

.....

S.N. RIECHI

JUDGE