



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MUSINGA, JJA

CIVIL APPEAL NO. 216 OF 2017

BETWEEN

ORANGE DEMOCRATIC MOVEMENT.....APPELLANT

VERSUS

FREDRICK OKOLLA OJWANG.....1ST RESPONDENT

FADHILI MWALIMU MAKARANI.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (E.C. Mwita, J.) Dated 14th June, 2017

in

H.C.C.ELC. NO. 56 OF 2017)

JUDGEMENT OF THE COURT

This is an appeal arising from the Ruling of **E.C. Mwita, J.** dated the 14th day of June 2017, in which the learned Judge directed **Judy Pareno** and **Dr. Robert Arunga** as the then officials of ODM National Elections Board (NEB) to attend court on the 16th day of June, 2017 at 3.00pm to show cause why they should not be punished for contempt of court.

The background to the appeal is that, the 1st respondent, **Fredrick Okolla Ojwang**, participated in the Orange Democratic Movement (ODM) Party’s Nomination primaries exercise conducted on the 29th day of April. 2017 for the position of Member of County Assembly, Port Reitz Ward, Changamwe Constituency, hereinafter referred to as “the MCA” position. He claimed to have emerged victorious in what he described as a nomination exercise that was fair, transparent and verifiable, pursuant to which he was issued with a provisional nomination certificate by the Returning Officer, who then referred him to ODMs’ Nation Elections Board (NEB) to issue him with the Nomination certificate. To his dismay and despite several attempts, he was unsuccessful, triggering the suit he filed before the Political Parties Dispute Tribunal (the PPDT) as claim Number 247 of 2017, dated the 12th day of May, 2017, directed against ODM only, and which proceedings ODM did not contest but the 2nd respondent did. The PPDT identified only one issue for determination, namely; who between the 1st and 2nd respondents, was the lawful nominee for the MCA position. The PPDT ultimately dismissed the 1st respondent’s claim vide its orders of 16th May, 2017. The 1st respondent was aggrieved. He moved to the High Court and filed

Election Petition number 56 of 2017. After a merit disposal, the following orders were granted by Mwongo, P.J:

“(1) That the Application dated 29th May, 2017 be and is hereby allowed as follows:-

(i) Due to the legal requirements that nomination process be concluded at least sixty days to the date of elections, the time for holding fresh nomination for Port Reitz Ward is hereby reviewed from 72 hours to 36hours.

(ii) ODM shall comply with the Judgment and decree of 24th May, 2017 and hold nomination for MCA for Port Reitz Ward within 36 hours from the date of this Ruling.

(iii) The Nomination certificate issued by ODM to the 2nd respondent on 29th April, 2017 and the IEBC clearance certificate issued to the 2nd respondent, Fadhili Mwalimu Makarani on 28th May, 2017 be and is hereby cancelled.

(iv) IEBC, the interested party herein, be and is hereby restrained from gazetting Fadhili Mwalimu Makarani as the ODM candidate for Port Reitz Ward Changamwe Constituency based on the nomination certificate issued to him despite the Judgment and decree of the court nullifying the nomination results of Port Reitz Ward held on the 19th April, 2007.

(v) The 2nd respondent will pay costs of the application to the applicant.”

At the pronouncement of the above orders, counsel for the second respondent sought a stay of execution for three days, with a view to filing an appeal. The court acceded to that request and granted stay for three days until the Monday next of 29th May, 2017 at 12.00noon. Instead of filing the appeal as requested for, the 2nd respondent took advantage of the stay order and presented his nomination documents to IEBC for processing inclusive of the certificate that had been nullified by the court, and was cleared to stand for the MCA position.

Confronted with the turn of events, the 1st respondent successfully moved the court by way of an application dated the 29th day of May, 2017 for review, directed at ODM, requiring it to comply with the judgment and the decree issued on the 24th May, 2017 and hold the nomination exercise as directed within 36 hours. IEBC was also restrained from gazetting the 2nd respondent as a nominee for the MCA. These subsequent directives too, were not also complied with.

Unrelenting, the 1st respondent filed an application dated the 8th day of June, 2017 on the 9th day of June, 2017, brought under Article **10, 27 (17&(2), 47, 48,159,165** of the Constitution of Kenya 2010, section **4,5** and **28** of the Contempt of Court Act, section **1A,1B** and **3A** of the Civil Procedure Act, (Cap 21), **Order 51** of the Civil Procedure Rules, sections **4,5** and **6** of the Fair Administrative Action Act and all other enabling provisions of the law; substantively seeking to cite **Judy Pareno** and **Dr. Robert Arunga** for contempt of court for disregarding the court orders, issued on the 24th day of May, 2017. That application was supported by the affidavit of the 1st respondent sworn on 8th June, 2017 and filed together with the motion, basically rehashing the history of the litigation as already highlighted above, and on the basis of which he contended that he had made out a case for the court to hold both ODM and the named contemnors in contempt of the court orders issued on 24th May, 2011 and as reviewed on the 29th day of May, 2017.

ODM responded vide a replying affidavit deposed by **Dr. Arunga** and filed on the 12th day of June, 2017, contending, *inter alia*, that in compliance with the said court order, ODMs’ National Executive Council (NEC) acted pursuant to Article **7.5.3(j)** of the party constitution and directed that there be direct nomination for the MCAs’ position, a method that would not have prejudiced the party from submitting a candidate to the IEBC in compliance with the strict time lines set by the Elections laws and Rules; that the Central Committee acting in accordance with the directive of NEC nominated the 2nd respondent as the nominee for the MCA position. According to **Dr. Arunga**, the decision taken by the NEC was

therefore reasonable, legal and justified in the circumstances due to the time constraints involved and was therefore consistent with section **31** of the Elections Act.

The Judge evaluated the supportive documents filed by the respective parties and made observations, *inter alia*, that what the court was confronted with and in respect of which its intervention had been sought was a request from the 1st respondent to cite **Judy Pareno** and **Dr. Robert Arunga** for contempt of Court, that contempt is the willful disobedience or disregard of a court order, judgment, decree or directions; that Courts punish for contempt of court in order to maintain the dignity and authority of the Court, the rule of law and administration of justice; that contempt proceedings are quasi criminal in nature where a person or the contemnor may lose liberty and for this reason, courts require that contempt be proved satisfactorily and at a higher degree than that of a balance of probability and that a Court will not hesitate to punish for contempt where it is proven that there was willful disobedience of a court order; that court orders should be obeyed without qualification unless reviewed or set aside, but bearing in mind that this policing power to punish for contempt should be used cautiously and sparingly by the Courts.

Turning to the orders allegedly disobeyed, the Judge made observation that the judgment of 24th May, 2017 was explicit that ODM was directed to hold a repeat nomination exercise for the of MCA position within 36 hours; that when orders were made, the 2nd respondent applied for stay of those orders for three days within which to appeal; that at the close of the three days' stay, instead of holding a repeat nomination exercise or filing an appeal, the 2nd respondent with the approval of ODM submitted his papers to IEBC for processing which in the Judge's view, was a clear disobedience of the court orders issued on the 24th May, 2017; that the 2nd respondent's action was taken during the pendency and subsistence of the said court orders; that ODM, though bound by the said orders, did nothing to ensure that these were obeyed by its officials. Further, that **Dr. Arunga's** explanation for their failure to execute the court orders as directed, was a clear indication that ODM and its officials were aware of the subsistence of the said orders. That is why **Dr. Arunga** had deposed that there was compliance with the said orders.

Bearing the above observations in mind, the Judge took note of the fact that the order stated in no uncertain terms that ODM was to repeat the MCA position nomination exercise within 36 hours of the delivery of the judgment in accordance with the law and the rules; that a repeat nomination as directed by the court could not mean anything else other than for ODM to do the nomination a second time, in the same way it had done in the first instance. Referring to the concise Oxford English Dictionary, Twentieth Edition, on the definition of the word "repeat", the Judge observed that the word "repeat" means "say" or "do" the same thing again, or do again more than once. In the light of that definition, the Judge held the view that what the court order required of ODM was for it to repeat what it had done earlier, namely; to carry out the nomination exercise in the same manner it had carried out the said exercise in the first instance on the 29th day of April, 2017 but follow the law.

After reviewing case law on principles on contempt of court, and applying them to the record before him, the Judge made findings, *inter alia*, as follows: That the Court's singular duty when confronted with allegations of disobedience to court orders was to ensure that its orders are obeyed for the maintenance of the rule of law in the administration of justice, good order and development of society; that from the conduct of ODM and its officials as displayed on the record before him, there was a deliberate intention from the very beginning by ODM and its officials not to comply with the court's judgment and decree, and on that account, rejected ODM's explanation, because had ODM genuinely identified time constraints as a challenge, then the most prudent action it should have taken should have been for it to go back to court for review of the court orders and further directions on the way forward and not for it to choose how to obey those orders; that the cardinal and guiding principle on contempt of court orders is that a party who is the addressee of a court order has a duty to obey it as directed and that there is no room left for such a party to choose how to comply; that the judgment and decree of 24/5/2017 was only stayed upto 29th day of May, 2017 for appeal purpose and since no appeal was filed, ODM had a duty to execute it as directed, and since ODM and its officials did not comply with the judgment and the decree of the court issued on the 24th May, 2017, they were in contempt. On that account the Judge issued orders requiring **Judy Pareno** and **Dr. Robert Arunga**, in their capacity as **ODMs' NEB** officials to appear before court and show cause why they should not be punished for the contempt of the court orders.

ODM was aggrieved and filed the appeal under review raising seven (7) grounds of appeal which were subsequently compressed into three in the written submissions dated and filed by the appellant on the 31st day of July, 2017. These may be paraphrased as follows: That the learned Judge erred in law and infact when:-

(1) He failed to take into account the appellant's constitution.

(2) He failed to hold that by conducting the nomination exercise on the 18th of June, 2017 the contempt had been purged.

(3) He failed to find that he was functus officio after the making of his Judgment and decree dated the 24th of May, 2017.

On the date fixed for the hearing of the appeal on 5th February, 2018, only **Mr. Odhiambo Isaac**, learned counsel for IEBC attended Court. Being satisfied that all the respective parties had due notice of the hearing date, we allowed IEBC to proceed to make its representations with regard to the appeal before us. IEBC simply mentioned that it was a neutral party in the litigation. Since the appellant had filed written submissions, we proceeded to consider the appeal on merit.

In support of ground 1, the appellant contended, *inter alia*, that in citing the two officials for contempt, the Judge failed to appreciate that ODM's Constitution provided for nomination either directly or by universal suffrage; and that in the instant appeal ODM correctly interpreted the learned Judge's order "to conduct MCA nomination exercise, within 36 hours", when it opted for direct nomination.

In support of ground 2, the appellant submitted that Article 159 of the Kenya Constitution of Kenya 2010, provides for alternative dispute resolution mechanisms which ODM employed when it tried to resolve the dispute between the 1st and 2nd respondent out of court and was in the process of resolving the matter when the 1st respondent rushed to court; and that it was only after the internal dispute resolution mechanisms failed that NEC decided to conduct fresh nomination exercise for the MCA position through universal suffrage on the 18th day of June, 2017, thereby purging the contempt.

Turning to the 3rd ground, the appellant submitted that the party constitution allowed for two methods of nomination namely; by universal suffrage or by direct nomination; and that according to it after the court made its orders on the 24th day of May, 2017 any dispute arising thereafter could only be entertained by ODM's dispute resolution mechanisms or the PPDT, and not the Court. It therefore followed that the orders made by the Judge on the 14th day of June, 2017 purporting to cite ODM's officials for contempt of court were made without jurisdiction and therefore null and void as the court was by then *functus officio*.

This is a first appeal. Our mandate as restated by the Court in **PIL Kenya Ltd Vs.Oppong [2009] KLR 442** is as follows:

"It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that."

We have given due consideration to the above mandate in light of the record of appeal and the scanty written submissions on the appeal by the appellant as already highlighted above. It is common ground that ODM conducted its Nomination exercise primaries through universal suffrage on the 29th day of April, 2017. A dispute arose as who between the 1st and 2nd respondent was the successful nominee for the MCA position. That dispute was processed through ODM's Internal Dispute Resolution Mechanism (IDRM), then to the PPDT before it eventually landed before the High Court, whose determination resulted in the orders of 24th May, 2017. It is also common ground that the addressee of the said orders was ODM, which was required to carry out a repeat nomination exercise for the said MCA position. The trial Judge in the impugned ruling was categorical that the said Orders required of ODM to repeat the

nomination exercise in the same way it had been carried out on the 29th of April, 2017, that is by way of universal suffrage. Instead, ODM handed the 2nd respondent direct nomination after the 2nd respondent had sought stay of the orders of 24th May, 2017 pending appeal, which appeal was never filed. The 2nd respondent simply took advantage of the stay orders to present his documents to IEBC for gazettment, thereby triggering the application to cite the NEC officials for contempt of court orders.

Contrary to the appellant's submission that there was nothing to show that the said NEC officials had due notice of the said court orders as there was no proof of personal service of those orders on them, the content of **Dr. Arunga's** replying affidavit was explicit, as correctly observed by the Judge, that they were aware of those orders; that they elected to use direct nomination due to the time constraints; that according to them ODM had a discretion to choose the best mode of compliance with the court orders; and that direct nomination was the most ideal mode of compliance with the said court orders.

The position in law as was correctly put by the Judge after reviewing case law on contempt of court orders, stated by **Romer L.J** in **Hadkinson versus Hadkinson [1952] ALLER 567** thus:-

"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void. Lord Cottenham L.C. said in Chuck Vs. Cremer (1) 1coop.temp.con342): 'A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it....It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the cause of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed, it must be obeyed."

See also **Commercial Bank of Africa Limited versus Isaac Kamau Ndirangu [1992] eKLR** where **Muli JA** stated:-

"It is imperative that orders of the court must be obeyed as a cardinal basis for endorsement of judicial authority and dignity. To do otherwise would erode the dignity and authority of the courts. The blatant disobedience of the courts' consent order in this case renders any transaction in breach of the order to be void."

Applying the above threshold to the circumstances of this appeal, we find no error in the Judge's findings that the orders of 24th May, 2017 obligated ODM to carry out a repeat of the nomination exercise for the MCAs' position, in the same manner the exercise had been carried out on the 29th day of April, 2017, and that by ODM opting for a direct nomination as admitted by **Dr. Robert Arunga** in his replying affidavit, was tantamount to a flagrant disobedience of the said court orders. We also agree that a reading of the said orders left no room for the exercise of any discretion in the execution of the said orders, and that if ODM had any doubts as to how best to comply with the said orders, it ought to have applied for variation. The Judge was therefore in order when he issued orders to NEB officials namely; **Judy Pareno** and **Dr. Robert Arunga**, to appear before court to show cause why they should not be punished for contempt of court orders.

There is mention in the appellant's submissions that ODM complied with those orders on 18th of June, 2017 when they carried out a repeat nomination exercise by way of universal suffrage. We note that 18th of June, 2017 was subsequent to the 14th day of June, 2017, when directions to appear were given. The proper forum for interrogation of the nature and extend of that supposed compliance was the court that issued the orders for appearance and not an appellate court. On our part it is therefore sufficient for us to hold, based on the reasoning we have given above that there was a proper basis for the court orders issued on the 14th day of June, 2017. We find no reason to interfere.

There was also mention of the court being *functus officio* after issuing the orders of 24th May, 2017 and that the orders issued on the 14th day of June, 2017 were therefore null and void. On our part, we find no substance in the said argument. All the case law reviewed by the Judge and by this Court indicates that it

is the court that issued orders allegedly disobeyed that is better placed to gauge the veracity of the explanation given for any alleged disobedience of the orders and either accept or reject it as the case may be. We therefore find that the Judge was properly seized of the contempt proceedings and that the orders issued by the court with respect thereto were valid and not null and void as alleged by the appellants.

The upshot of all the above is that we find no merit in this appeal. The same is dismissed with costs to the 3rd respondent as it is the only party that attended Court on the hearing date.

Dated and Delivered at Nairobi this 4th day of May, 2018.

P.N.WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar