



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. ELECTION PETITION APPEAL NO. 10 OF 2017**

**JOHN ORWA.....APPLICANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT PARTY.....1<sup>ST</sup> RESPONDENT**

**NATIONAL ELECTIONS BOARD OF ODM PARTY.....2<sup>ND</sup> RESPONDENT**

**SECRETARY GENERAL, ODM PARTY, AGNES ZANI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Application before the court is a Notice of Motion dated 24<sup>th</sup> May of 2017. It has been brought under **Section 3A Civil Procedure Act Cap 21, Sections 4(10(c), 5(b) and (c), 24, 27(b), 28(1) and 29 Contempt of Court Act 2016** and all enabling provisions of law).

2. The Applicant seeks prayer 2, 3, 4, 5 and 6 which state as follows:

**(1) That this application be certified urgent and heard ex parte in the 1<sup>st</sup> instance.**

**(2) That leave be and is granted to the applicant to institute contempt proceedings against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, for wilful disobedience of the Order dated 12<sup>th</sup> May 2017, the Judgement and Decree dated 18<sup>th</sup> May 2017 of the Political Parties Disputes Tribunal in NBI PPDT COMPLAINT NO. 241 OF 2017.**

**(3) That subsequent to allowing prayer 1 above, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby cited for contempt and committed to civil jail for 6 months and or as may be deemed by this court, for wilfully disobeying Order dated 12<sup>th</sup> May 2017, the Judgement and Decree dated 18<sup>th</sup> May 2017 of the Political Parties Disputes Tribunal in NBI PPDT COMPLAINT NO. 241 OF 2017.**

**(4) That the applicant be and is exempted from serving a Notice To Institute Contempt proceedings to the Honourable Attorney General prior to filing this application owing to urgency**

on this election matter.

(5) That the respondents be and are ordered to purge their contempt prior to being heard in their defence to this application.

(6) That costs be for the applicant.

3 The application is premised on the grounds on the face of the application namely:

(1) That the applicant instituted Complaint No.241 of 2017 at the Political Parties Disputes Tribunal whereupon he was issued with an interim order barring the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein from forwarding any person's name other than the applicant's to the Independent Elections and Boundaries Commission (IEBC) respecting the impugned political party primaries for the North Kanyamkago Ward. The respondents, however, disobeyed that Order despite being served on the 13<sup>th</sup> May 2017.

(2) That thereafter, the Complaint proceeded to trial and judgement and decree issued revoking any nomination to any person other than the applicant and compelling the respondents to forward the applicant's name to the IEBC for the material Ward. Again, the same was served on 19<sup>th</sup> May 2017 but the respondents refused to follow the same.

(3) That the respondents have wilfully disobeyed the Order and judgement and decree mentioned above and have shown no respect to the rule of Law.

(4) That it is therefore imperative that the application filed herewith be allowed otherwise the respondents shall continue to disobey the Court's orders with impunity.

4. The application is further supported by a supporting and verifying affidavit sworn by John Orwa dated 24<sup>th</sup> May, 2017.

## FINDINGS

### Law on service of court process

5. Considering the above Rules of Civil Procedure which are applicable to the petition herein the manner in which service on a party should be effected is clear. **Section 20 Civil Procedure Act** requires that upon the institution of a suit, the defendant should be served in the prescribed manner in order to enter appearance and answer the claim. **Order 5** provides the details regarding service. **Rule 1(1)** requires that '*When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.*' The mode of service, in line with **Rule 6** is *by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.*

**6. Rule 8** requires that service be made in person where it is practicable unless the defendant has empowered an agent to accept service on his behalf. Service upon an advocate with instructions to accept service and enter appearance would suffice. Further, in line with **Rules 13 and 15** a person who has been served is required to sign acknowledgment of service on the original summons, and an Affidavit of Service must be consequently filed as proof that service has been effected. The Affidavit of Service should show the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of

summons.

7. Under **Rule 12**, where the defendant cannot be found service may be effected through an agent or adult member of the family. Any other mode of service, by substituted means must be, as **Rule 17** prescribes, with the leave of the Court. This is allowed where service cannot be effected through the ordinary means of service.

8. Procedure for service cannot be sacrificed as mere technicalities. That was what the court concluded in the case of **Law Society of Kenya v Martin Day & 3 others [2015] eKLR** thus:

**‘33. The question is whether failure to adhere to such clear elaborate procedural requirements of the Civil Procedure rules on the validity of and service of summons outside the jurisdiction of this court are mere procedural technicalities that can be sacrificed at the altar of substantive justice.**

**34. In my humble view, those rules of engagement that prompt the hearing and disposal of a suit cannot be mere procedural technicalities contemplated by Article 159(2)(d) of the Constitution of Kenya, 2010 and or the overriding objectives espoused in sections 1A and 1B of the Civil Procedure Act.**

**35. As was held in the case of Nicholas Kiptoo Arap Korir Salat Vs IEBC & 6 Others [2013] eKLR by Kiage JA, Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even-handed....” The Supreme Court in the case of Raila Odinga & 5 Others Vs IEBC & 3 Others Petition 5/2013 SC [2013] eKLR, also held that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls, ...it is plain to us that Article 159(2) (d) is applicable on a case to case basis.”**

**38. A summons is a judicial document calling upon the defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim, how else would that party submit to the jurisdiction of the court particularly when that defendant is a foreigner residing outside the jurisdiction of the court.”**

9. In the court of appeal case of **Shimmers Plaza Limited Vs. National Bank Of Kenya Civil Appeal No. 33 Of 2012** while considering the issue of Contempt of Court had this to say about service under the English law from which our law is based:

**“As a general rule under rule 81.6 all service under this breach should be personal service unless the court dispenses with the personal service under rule 81.8. Rule 81.6 provides as follows:**

**“81.6 subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.”**

10. Essence of service is to notify a party of a case against him in order to respond appropriately and defend himself; or of an order demanding that that party does or refrains from doing a certain thing. It is premised on the right of every person to be heard. Personal service remains the best form of service. In **Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR**

**“The decision clearly recognized that if personal service which is the best form of service in all**

areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the Court have expected to be given reason or reasons why personal service was not effected" Why would the High Court and this Court have expected that some attempt at personal service be tried on the President and be shown to have been repelled" Lady Justice Khaminwa clearly recognized this aspect of the decision for she stated in her judgment at page 135 of the record of appeal:-

*'In the Kibaki – Moi case the Respondent stated on oath that he was not personally served with the Notice of Petition either within 28 days after the date of publication of the result of the petitions (sic) as required by section 20 (1) (a) of the Act at all. However it was shown that the petition was served through the Gazette Notice as provided under Rule 14 (2). The facts are different in that case (sic) made no effort to personally serve the Respondent. In this case alternative methods were made to bring the notice to (sic) of the petition (sic) of the respondent knowledge but personal service proved impossible.'*

11. The truth of the matter is that personal service remains the best form of service in all areas of litigation. In England the court seems to allow other modes of service where there are time constraints. In the case of The Board Of Education Vs Rice [1911] AC 179 at page 182 Lord Loreburn LC stated:

**"In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those parties in the controversy for correcting or contradicting any relevant statement.**

**It is therefore my view that the information via short messages was enough considering the time restriction. The commission did not have to follow the strict court procedure and they could obtain information and proceed in any way they thought best. The applicant can therefore not argue that he was not allowed a chance to be heard.'**

12. It is trite law that a party seeking to institute contempt proceedings against another party must prove that they served that other party with the order it is alleged they have failed to comply with or execute. In this case the Applicant has filed an Affidavit of Service dated 22<sup>nd</sup> May, 2017. It deposes that the judgement and decree were served upon a receptionist/secretary who received and even stamped them. For purposes of contempt service must be personal not through servant as evidently happened in this case. The Applicant has not proved that he is deserving of the orders sought. The same cannot succeed.

13. Accordingly, the Applicant's application dated 24<sup>th</sup> May, 2017 is hereby dismissed.

14. Costs in the cause.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2017.**

**LESIT, J.**

**JUDGE**



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