



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO. 48 OF 2017

BETWEEN

DAVID KIBITOK BUNGEI.....APPELLANT

VERSUS

KENYA AFRICAN NATIONAL RESPONDENT

KENNETH KIPLIMO KOSGEI.....INTERESTED PARTY

(Appeal from the Judgment of the Political Parties Disputes Resolution Tribunal (Hon. Kyalo Mbobu, James Atemi & Hassan Abdi Dei) Delivered on 14th May, 2017 at Political Parties Dispute Resolution Tribunal Case. No. 156 of 2017)

RULING

1. By an application dated 5/6/2017 the Interested Party **KENNETH KIPLIMO KOSGEI** moved the court by way of Notice of Motion under Section 1A, 1B, 3 & 3A Section 63(e) and Section 8 of the Civil Procedure Act Cap 21 Order 51 Rules 1, 3, 4, 6 10 & 13 of Civil Procedure Rules and Article 159 of the Constitution of Kenya 2010 for orders:-

1. THAT the application be certified urgent.

2. THAT there be an order of the Honourable Court compelling the Respondent to comply with the Hon. Court order of 24th May, 2017 to conduct nominations for candidate for the position of Member of Parliament for Chesumei Constituency in Nandi County.

3. THAT the alternative but on without prejudice to the prayer for compliance of the court order the Respondent be directed to submit the Interested Party's name as the duly nominated candidate and the Appellant's name be removed accordingly.

4. THAT CostS be provided for.

2. The application was supported by an annexed affidavit sworn by the applicant in which he deposed

that he had been awarded a certificate of nomination by KANU and his name gazetted by IEBC to that effect and that on 24th May, 2017 this court ordered the party to conduct its nomination within 48 hours which it failed, ignored or deliberately refused to comply with and went ahead and submitted the name of the Appellant/Respondent as its candidate without going through the Nomination as ordered by the court and in contravention of the order which is illegal, greatly unjust, unfair and repugnant to justice.

3. It was deponed further that the Respondent without any justifiable cause or reason directly nominated the Appellant as its candidate and that failure to heed and or comply with the order of court is contemptuous of the court and a case of injustice to the party.

4. The application was certified urgent and fixed for hearing wherein it was submitted by the Applicant that he was not involved in the method used by the party to nominate the Appellant having failed to comply with the court order and that since the party failed to comply with the court order, the status quo to the effect that he was the nominee should be maintained.

5. On behalf of the Appellant/Respondent it was submitted that the party complied with the court order and that since the court has pronounced itself on the matter, any complaint that the applicant has can only be directed to the PPDT or the IEBC Tribunal.

6. On behalf of the party it was submitted that the Interested Party was not properly before the court since he was not a party before PPDT or the appeal therefrom. It was submitted that since the matter is not for Review of the Judgment or contempt the court remains *functus officio*. It was submitted that since the party had complied with the court order, what was brought by the interested party is a fresh complaint.

ANALYSIS AND DETERMINATION

7. From the submissions and pleadings herein it is clear that what the Interested Party seeks to do is to enforce the order of the court which was issued on 24th May, 2017 in which the court ordered the 2nd Respondent (KANU) to conduct fresh nominations for the candidate for the position of Member of Parliament for Chesumei Constituency within 48 hours.

8. There are therefore two issues for determination; that is whether the interested party can be enjoined as a party to the proceeding herein after the Judgment of the court delivered on 24th May, 2017 and whether the party complied with the said judgment.

9. Order 1 Rule 10 of Civil Procedure Rules 2010 permits an intervener whose proprietary rights could be affected to be enjoined in proceedings at any stage of the proceedings to enable the court effectively and completely adjudicate and settle all questions involved in the suit. This therefore means that a party will be enjoined to proceedings which is pending determination. In this I find support in **LILIAN WAIRIMU NGOTHO & Another Vs MOKI SAVING CO-OPERATIVE SOCIETY LTD & Another (2014) eKLR** where Nyamweya J held as follows:-

“The provision of Order 1 Rule 10(2) states that joinder of a party can be made at any state of the proceedings. Proceedings are defined in Blacks Law Dictionary Ninth Edition at page 1324 as ‘the regular and orderly progression of a law suit including all acts and events between the time of commencement and the entry of judgment.’ A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court to effectively and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no

use if a party seeks to be joined when the court has already made its finding on the issue arising (Emphasis added)

10. Since the applicant is only seeking enforcement of the Judgment of the court herein, I am of the considered view that the same can lawfully be enjoined as an Interested Party.

11. Once the party had carried out a nomination exercise in which the Appellant/Respondent was nominated in place of the Interested Party then it follows that a new cause of action arose out of the said exercise which entitled the applicant to file a fresh complaint with the PPDT for determination and not to seek enforcement of the said judgment through the application filed herein.

12. No material has been placed before the court by the Interested Party applicant to confirm that the party did not comply with the court order herein for which it can be held in contempt as he has admitted that the appellant was nominated by the party as a result of the said court order. In the final analysis I find no merit on the application herein which I hereby dismiss with no order as to costs.

DATED, SIGNED and DELIVERED at Nairobi this 12th day of **June, 2017**.

J. WAKIAGA

JUDGE



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