



Case Number:	Election Petition 56 of 2017
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Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Enock Chacha Mwita
Citation:	Fredrick Okolla Ojwang v Orange Democratic Movement & 2 others [2017] eKLR
Advocates:	Mr. Kanjama, learned counsel for the applicant Mr. Colen Miss Mogire
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

ELECTION PETITION NO. 56 OF 2017

BETWEEN

FREDRICK OKOLLA OJWANG.....APPELLANT/APPLICANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

FADHILI MWALIMU MAKARANIA & ANOTHER.....2ND RESPONDENT

RULING

1. This is a Notice of Motion dated 29th May, 2017 brought under Articles 75, 159 and 193(1)(b) of the Constitution, section 40 of the Political Parties Act, section 28 of the Contempt of Court Act, sections 1A, 1B, 3A and 80 of the Civil Procedure Act and rule 45(1) of the Civil Procedure Rules.

2. The applicant seeks a review of the court's decree and order of stay made on 24/5/2017 to correct discrepancy therein on timelines; cancellation of nomination certificate issued by ODM and IEBC to Fadhili Mwalimu Makarani, the 2nd respondent herein, and dated 29/4/2017 and 28/5/2017 respectively, as the ODM nominated MCA candidate for Port Reitz Ward in Changamwe Constituency, for the forthcoming election.

3. There is are also prayers for a restraining order against IEBC so that it does not receive process nomination papers from the 2nd respondent, or gazette that 2nd respondent's (ODM) MCA candidate for Port Reitz Ward, Changamwe constituency pending conduct of fresh nomination as decreed on 24/5/2017. The applicant has also sought to have the 2nd respondent cited for contempt of the court's decree of 24/5/2017 and punish him appropriately. The applicant further prays that upon disqualification of the 2nd respondent, the applicant be declared the candidate for that Ward.

4. The motion is purported by the applicant's affidavit sworn on the same date, 29/5/2017, which contains averments in support of the motion on why the prayers sought in the motion should be granted.

5. The genesis of the motion is the decree made by this court, **Mwongo PJ** on 24/5/2017. According to the judgment and decree, the court allowed the appeal and ordered the 1st respondent, ODM, to hold fresh nomination for the MCA position in Port Reitz Ward, Changamwe Constituency, within 72 hours, and the result to be announced not later than Saturday 27th May 2017 at midnight.

6. After delivery of the judgment, Mr. Cohen, counsel for the 2nd respondent, made an oral application for stay for three days to enable them appeal. He also applied for copies of proceedings for that purpose. The application was opposed by the appellant's counsel, but the court granted stay of the court's decision up to 12 noon, Monday 29/5/2017. The court also allowed the applicant to take photocopies of handwritten notes to enable them appeal.

7. It would appear however, that subsequent to the judgment and decree, the 2nd respondent presented his nomination documents to IEBC and was cleared as the ODM MCA candidate for Port Reitz Ward Changamwe constituency. This fact has been captured in the applicant's affidavit at paragraph 7 as follows;

“That the 2nd respondent was granted stay of judgment delivered on 24/5/2017 for purposes of lodging an appeal against the said judgment but mischievously used the opportunity to present their nomination papers to Independent Electoral and Boundaries Commission.”

8. It is for that reason that the applicant has now come to court seeking justice to have clearance of the 2nd respondent revoked and the nomination certificates cancelled.

9. Both respondents filed grounds of opposition dated and filed in court on the same day, 30th May, 2017. For the 1st respondent, it was contended that the applicant cannot be declared the candidate for Port Reitz Ward, that the function of nominating party candidates for elective posts lies with the party, that there are strict timelines set by IEBC and if ODM is not allowed to nominate a candidate it will suffer prejudice, and that the complaint by the applicant should have been pursued with section 74 of the Elections Act, 2011. The 1st respondent further contended that the application did not disclose a cause of action.

10. For the 2nd respondent, it was contended that the court lacks jurisdiction to grant the orders sought; that the application is not clear on what constitutional rights have been violated; that there is no evidence in the application to support the various issues raised; and that the court is *functus officio* and cannot sit on appeal of the same matter. The 2nd respondent faulted the applicant for seeking outlandish prayers with ulterior motives.

11. At the hearing of the motion, Mr. Kanjama, learned counsel for the applicant asked the court to harmonize the timelines in the decree and order, which were affected by the order of stay. He urged the court to exercise its prayers to correct that error. According to counsel, the order stayed the decision until 29/5/2017 at mid-day. This, Mr. Kanjama submitted, affected the timelines of 72 hours and for that reason, time should run from the date the court decides the application. Learned counsel further urged the court to cancel the nomination certificate issued to the 2nd respondent by ODM and the clearance issued by IEBC to the 2nd respondent on 28th May, 2017. According to counsel, the stay granted following an oral application under order 42, was only limited to enabling the 2nd respondent appeal, but was not meant to assist the 2nd respondent present his nomination papers.

12. Learned Counsel argued that in the absence of an appeal, the decree remains the valid order of the court that nomination be carried a fresh. Mr. Wanjama invoked Article 193(1)(c) of the constitution and section 31 of the Elections Act to argue that a party cannot be nominated by IEBC if not nominated in accordance with party rules.

13. Mr. Kanjama urged the court to cancel that certificate since the order of stay was used to defeat a decree of the court. He also asked that IEBC be restrained from gazetting the 2nd respondent as the nominated MCA candidate for the 1st respondent for Port Reitz Ward in Changamwe constituency.

14. Regarding prayers 5 and 6 in the motion, learned counsel submitted that the applicant was invoking the contempt jurisdiction of the court and heavily relied on the decision in the case of **Kenya County Government Workers Union v County Government of Bomet and 3 others [2016] eKLR**, **Julius Gekonde v Ouru Power Limited [2016] eKLR** and **Shimmers Plaza Limited v National Bank of Kenya Ltd [2015] eKLR** to support his prayers to cite the 2nd respondent for contempt.

15. Learned counsel contended that there was direct disobedience of a court order thus interfering with the administration of justice. In counsel's view, a party has knowledge of the court order through its agents. He urged the court to find that the 2nd respondent's conduct brought administration of justice into disrepute in that they misled the court that they intended to file an appeal, presented papers to IEBC instead and failed to notify IEBC of the existing proceedings and order or decree, and therefore there was clear breach of a decree of the court.

16. Miss Mogire who appeared on behalf of the 1st respondent, (ODM), opposed the application and urged the court to let the 1st respondent conduct its affairs since it had conducted nominations and any dispute now should have been handled under section 74 of Elections Act.

17. Mr. Colen, learned counsel for the 2nd respondent, on his part submitted that the application though grounded on the jurisdiction for review introduced matters that were not before the court. He argued that the court was *functus officio* having rendered a decree, and according to counsel, the applicant should have filed a dispute with IEBC under section 74 of the Elections Act.

18. Regarding prayers for contempt, counsel contended that the court has to consider which orders were in place, and whether they were violated. In counsel's view, the order in place was that of PPDT and not the decree hence there was no violation of any court order. Counsel urged the court not to grant the prayer disqualifying the 2nd respondent and should not declare the applicant the candidate for Port Reitz Ward as prayed in the motion.

19. This motion raises three main points for determination, namely; whether the court should cancel the nomination certificate issued to the 2nd respondent by both ODM and IEBC; restrain IEBC from gazetting the 2nd respondent as nominated MCA ODM candidate for Port Reitz Ward; and whether to cite the 2nd respondent for contempt of court.

20. On the first issue, it is clear that the court nullified the nomination result for Port Reitz Ward in its judgment and decree of 24/5/2017. The court ordered the Party (ODM) to conduct fresh nominations within 72 hours and gave time by which results should have been announced being midnight of Saturday, 27th May 2017.

21. The 2nd respondent's counsel who is the same counsel representing the 2nd respondent in this application, exercised their right under order 42 and made an oral application for stay of the court's decision to enable him file an appeal in the Court of Appeal. Recognizing that the right of appeal is statutory, the court granted stay up to mid-day Monday the 29th May 2017, to enable the 2nd respondent access the Court of Appeal. 24th May 2017 was on a Wednesday.

22. It would appear and the 2nd respondent has not denied it, that the 2nd respondent took advantage of the interim stay to present the impugned and nullified nomination certificate to the IEBC and it is said, he got a clearance certificate from IEBC to stand for election as ODM MCA candidate for Port Reitz Ward IN Changamwe constituency. This was done despite the fact that the court had nullified that nomination certificate.

23. The respondents' counsel have opposed the prayer for cancellation of this certificate arguing that the applicant could only have challenged this nomination under section 74 of the Elections Act. It must be clear that on pronouncing itself on the issue of the ODM nomination certificate, the certificate ceased to exist as a valid document and was not available for presentation. The interim stay granted was only for purposes of enabling the dissatisfied party move to the court of Appeal, and in my view, only stayed the process of nomination. It was expected that after filing a notice of appeal, the 2nd respondent would

formerly apply for substantive stay of execution of the judgment and decree either in the High Court or in the Court of Appeal.

24. I have perused the record and I note that no Notice of Appeal was filed. That means the stay granted having expired at 12 noon 29th May 2017, the 1st respondent is required to have put in place mechanisms for holding fresh nomination in accordance with the judgment and decree of the court. The 2nd respondent has argued that the court is *functus officio* and has no jurisdiction to hear this application and grant the orders sought. With respect to learned counsel, I don't agree. This court's jurisdiction is donated by the constitution. It also has inherent powers under section 3A of the Civil Procedure Act to grant any order to prevent abuse of court process. The 2nd respondent having lost before this court and applied for stay to go to the Court of Appeal, could not have used that window instead to present an already nullified certificate to IEBC, and when challenged, argues that this court has no jurisdiction.

25. In my respectful view, the 2nd respondent acted in a manner that cannot be condoned. Everyone is bound to abide by a decision of the court and his only option was to appeal and that was why stay was granted. There was no valid nomination certificate to present to IEBC and any clearance certificate issued to the 2nd respondent after the judgment and decree was issued in error and the court cannot fold its hand on the argument that it is *functus officio*.

26. The second question is whether the IEBC should be restrained from gazetting the 2nd respondent's name as the ODM MCA candidate for Port Reitz Ward in Changamwe constituency. As I have stated above, the court had nullified the ODM MCA nomination for Port Reitz Ward and ordered a repeat. The certificate presented to the IEBC on the basis of which the 2nd respondent was cleared to stand for election on 8th August, 2017 was not a certified in law which could be used for purposes of securing clearance from IEBC. The 2nd respondent employed mischief to get clearance. He played mischief not only to the IEBC but also to party members of Port Reitz Ward. The first respondent was bound by the judgment and decree of the court and was under duty to give effect to the decree of this court and to ensure that 2nd respondent did not present the nullified certificate and for that reason IEBC cannot gazette the 2nd respondent as the ODM MCA nominee for Port Reitz Ward, so that the Party can conduct fresh nomination in compliance with this court's judgment and decree of 24th May 2017.

27. By restraining IEBC from gazetting the 2nd respondent as duly nominated ODM MCA candidate for Port Reitz would stop the 2nd respondent from stealing a march on the applicant thereby upholding democracy and the rule of law.

28. The last question for determination is whether the 2nd respondent should be cited for contempt of court. Mr Kanjama submitted that the 2nd respondent violated the judgment and decree of this court dated 24th May 2017. Learned Counsel argued that the 2nd respondent was aware of the judgment and decree because he was duly represented in court; and for that reason, he had knowledge through his agent.

29. Contempt is the ***willful disobedience*** of judgment, decree order or direction of a court. Everyone without exception has a duty to obey court orders unless they are set aside or varied. There is sufficient case law on this and the court need not re harsh them, save to state that the exercise of contempt jurisdiction is a discretionary power that should exercise sparingly. In the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005]KLR 828, the court** underscored the importance of obeying court order when it 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)

30. The Supreme Court of India frowned upon disobedience of court orders and stated in **T.N. Gadavarman Thiru Mulpad [(2006) 5 SCC]** thus;

"Disobedience of orders of the court, strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs."

31. In **Carey v Laiken 2015 SCC 17** (16th April, 2015) the Supreme Court of Canada also cautioned that courts not find contempt too easily since ***a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect. The court's contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.***

32. Mr Kanjama relied on the decisions in **Wetangula v Musikari Kombo & Another Julius Mogaka Gakonde v Ouru Power Limited**, and **Shimmers Plaza v National Bank of Kenya Limited** to persuade the court to cite the 2nd respondent for contempt. The shimmers' case dealt at length with the procedure on contempt and when the court should commit for contempt. In that case he court stated at page 10 of the judgment:-

"this court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved..... Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings..."

33. The Court then went on to state:-

"it is important however that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court for bidding it. This standard has not changed since the celebrated case of Ex parte Langley 1979, 13 Ch D, 110(CA) where Theisgier L J stated as follows at p. 119:

.....the question in each case and depending upon the particular circumstance of the case, must be, was these or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice intact of the order which has been made. And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was a notice ought to prove it beyond reasonable doubt.

34. Cromwell J writing for the **Supreme Court of Canada** in the case of **Carey v Laiken(supra)** expounded on the elements of civil contempt that must be established beyond reasonable doubt that **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.

35. In the present application, there is no doubt that the court had ordered that ODM carries fresh nomination for the MCA candidates for Port Reitz Ward within 72 hours. That decision was however stayed upto 29th May 2017 at 12noon. The 2nd respondent was represented in court and for that matter his counsel knew of the court’s decision and must have discussed it with him. The 2nd respondent did not file a notice of appeal and has not done so to date. He however presented his documents to IEBC, was cleared and given a green right to stand for election for position of MCA Port Reitz ward as the ODM’s candidate.

36. At the hearing of this application it was not clearly stated at what time the 2nd respondent presented his documents whether it was before or after 12 o’clock. But it was stated that IEBC cleared him on 28th May, 2017. There is no doubt that the 2nd respondent intended to steal a march on his opponent, the applicant and indeed took advantage of the stay, though wrongly in my view.

37. This court has power to punish for contempt and this is clear from the contempt of court Act, 2016. However, taking into account the fact that there was a stay o, and there being no sufficient evidence the 2nd respondent presented his documents after the lapse of stay, and taking guide from the observation in **Carey v Laiken** (supra) that courts be cautious when called upon to punish for contempt, and because the stay granted obscured the judgment and decree herein which would require interpretation in order to ascertain whether or not there was contempt, and the court being alive to the fact that the jurisdiction to punish for contempt is a discretionary one and is used as a last resort, this court will exercise caution and decline to hold the 2nd respondent in contempt.

38. Ultimately, I find that the 2nd respondent’s conduct and actions are inexcusable and the court should not allow him to get away with it. The court must ensure that the judgment and decree of 24th May 2017 is followed. The application dated 29th May 2017 is therefore allowed as follows:-

i. Due to the legal requirement that nomination processes conclude at least sixty days to the date of election, the time for holding fresh nomination for port Reitz ward is hereby reviewed from 72 hours to 36 hours.

ii. ODM shall therefore 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 are hereby cancelled.

iv. IEBC, the interested party herein, is hereby restrained from gazetting Fadhili Mwalimu Makarani as the ODM. MCA candidate for PartReitz Ward, Changamwe Constituency based on the nomination certificates issued to him despite the judgment and decree of the court nullifying the nomination results to port Reitz ward held 29th April 2017.

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

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

E C MWITA

JUDGE



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