



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT NO. 154 OF 2017

JOSEPH OUMA NDONJI.....COMPLAINANT/APPLICANT

-VERSUS-

KINGSLEY WELLINGTON ODIDA.....1ST RESPONDENT/APPLICANT

THOMAS ABWAO.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

RULING

Summary of the Application

1. Two applications are present before this Tribunal. The first is a Notice of Motion Application dated 30th May 2017 by the 1st Respondent/Applicant seeking review of the orders of this Tribunal issued on 10th May 2017. The second is a Notice of Motion Application also dated 30th May 2017 by the Complainant/Applicant seeking to commit to civil jail and fine the Orange Democratic Movement's (party) Secretary General (Dr. Agnes Zani), Executive Officer (Mr. Oduor Ong'wen) and the Chairperson of the National Elections Board (Ms. Judith Pareno) for contempt of the Tribunal's orders of 10th May 2017
2. Both applications concern the 3rd Respondent's nomination exercise for the position of Member of County Assembly for Umoja II Ward in Embakasi West Constituency, Nairobi County. The two applications were heard concurrently.

The Application for Review

3. This Tribunal will first interrogate the 1st Respondent/Applicant's Notice of Motion dated 30th May 2017 seeking review of the Tribunal orders issued on 10th May 2017. The 1st Respondent/Applicant avers in his Supporting Affidavit dated 30th May 2017 that he is not only a stranger to the proceedings before this Tribunal but also those before the party's internal dispute resolution mechanism (IDRM). It is his main contention that he was not served with the complaint and pleadings that led to the Tribunal's ex-parte judgment delivered on 10th May 2017, nullifying the nomination certificate issued to him for the aforementioned position. He avers in his Supporting Affidavit dated 30th May 2017 that he was the winner of the nomination exercise and was duly issued with a nomination certificate by the 3rd Respondent. He further avers that his name was subsequently forwarded to the Independent Electoral Boundaries Commission (IEBC) by the 3rd Respondent, as its duly elected nominee for the aforementioned position.
4. In support of his averments, the 1st Respondent/Applicant adduced a copy of his provisional nomination certificate dated 30th April 2017 issued to him by the 3rd Respondent. He also purported to adduce photographs and video evidence of the Returning Officer declaring him as winner and issuing him with the interim nomination certificate.
5. The basis of the said review application is founded on the fact that the Complainant alleged service to the Applicant of the proceedings [both before the internal party dispute resolution mechanism and before this Tribunal] but such service was denied. The Applicant seeking review thus felt that no fair opportunity to be heard had been presented to him yet he had a strong response that if presented would have seen the said judgment of 10th May 2017 made in his favour.

Analysis of the Application for Review

6. This Tribunal has considered the affidavits of service on record in this matter. The affidavit of service dated 10th May 2017 sworn by one Faraji Chipinde claims to have served the 1st Respondent/Applicant via Whatsapp text message on 10th May 2017 with a hearing notice for the same date. The affidavit of service dated 18th May 2017 sworn by one Bernard Omulepu Juma avers that he served the 1st Respondent by slipping the documents through his front office door. The affidavit of service sworn by one Kyalo Kamina dated 9th May 2017 avers to having served the 2nd Respondent and the 3rd Respondent but there is no mention of the 1st Respondent. Finally, the affidavit of service dated 15th May 2017 sworn by one Mathew Musotsi makes no reference to having effected service on the 1st Respondent. From the record before us, it is therefore clear that in a majority of the instances where service was meant to be effected upon the 1st Respondent, the same did not occur. Indeed, only the hearing notice for the 10th of May 2017 when judgment was to be delivered could be said to have been effected. It could not be assumed that the Applicant was aware of the issue to which he was being invited to attend.
7. In light of the foregoing, it was proper for the 1st Respondent/Applicant to seek a review of the said order by this Tribunal.
8. We now proceed to analysis of the remaining prayers sought in the said application seeking to have the said 1st Respondent/Applicant determined the rightful nominee for the position in issue. Towards this the Tribunal proceeded to analyse the evidence presented. After careful examination of the evidence adduced and the submissions of the 1st Respondent/Applicant, it is this Tribunal's view that he has not produced any new information, substantive evidence or sufficient cause for this Tribunal to set aside its earlier orders. The applicant has not shown that he won the said nomination process, nor has he attached any official tally results or even supporting statements from the relevant elections officials of the party to support his allegation of win; yet the judgment of this Tribunal allowing the Complainant's

avermment that he was the rightful winner had been supported by information from several party organs mandated to manage the nominations process of the party. All the said information presented by the Complainant had confirmed and supported his averment that he had been awarded the certificate.

9. In light of No. 8 above, we disallow prayers no. 4, 5 and 6 of the 1st Respondent/Applicant's application dated 30th May 2017.

Contempt proceedings

10. The second application is a Notice of Motion Application dated 30th May 2017 by the Complainant/Applicant seeking to commit to civil jail and fine the Orange Democratic Movement's (party) Secretary General (Dr. Agnes Zani), Executive Officer (Mr. Oduor Ong'wen) and the Chairperson of the National Elections Board (Ms. Judith Pareno) for contempt of the Tribunal's orders of 10th May 2017.
11. The Complainant/Applicant adduced an affidavit of service dated 15th May 2017 sworn by one Mathew Musotsi who avers to serving the judgment and decree upon a representative of ODM whom he found at the reception desk, one Mr. Jared who accepted service by stamping and signing his copies in acknowledgment of receipt. The Complainant further adduced a letter dated 29th May 2017 addressed to the IEBC and copied to the ODM officials mentioned herein, accusing them of failing to enforce the Tribunal's orders and asking the IEBC to take into consideration the said orders.
12. From the record before us, it is clear that the Complainant/Applicant has not demonstrated that he served the Tribunal's orders upon any of the alleged contemnors or upon any other officer of the 3rd Respondent capable of enforcing the said orders.
13. In any event, this Tribunal stands guided by the decision of Onguto J in *The Secretary General & Another v Hon Salah Yakub Farah* Election Petition Appeal No.

13 of 2017. It held that the Tribunal is empty of jurisdiction to punish for contempt save contempt on the face of the court which includes (para 27) *'failing to obey an order in the course of a trial to answer questions or failing to observe a subpoena'*.

Orders

14. Consequently, this Tribunal finds that both Notice of Motion applications dated 30th May 2017 filed by the 1st Respondent/Applicant and Complainant/Applicant fail and the same are hereby dismissed with no orders as to costs.

Dated and delivered at NAIROBI on this 12th DAY of JUNE 2017

1. M.O. Lwanga (Presiding Member)

2. Desma Nungo (Member)

3. Paul Ngotho (Member)