

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Wanjala, Lenaola, SCJJ)

APPLICATION NO. 14 OF 2017

PROF. AYIECHO OLWENY.....APPLICANT/APELLANT

–AND–

JAMES ONYANGO K'OYOO	}	1 ST RESPONDENT
ORANGE DEMOCRATIC MOVEMENT	}	2 ND RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION	}	3 RD RESPONDENT

(Being an application seeking stay of execution of the entire judgment and decree of the Court of Appeal (E.M. Githinji, W. Ouko and J. Mohammed JJA) in Civil Appeal Nos. 180 of 2017, 181 of 2017 and 182 of 2017 delivered on 10th July, 2017)

–BETWEEN–

JAMES ONYANGO K'OYOO.....APPELLANT

–AND–

PROF. AYIECHO OLWENY	}	1 ST RESPONDENT
ORANGE DEMOCRATIC MOVEMENT	}	2 ND RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION	}	3 RD RESPONDENT

RULING

BACKGROUND

[1] Prof. Ayiecho Olweny (*the Applicant*), James Onyango K'Oyoo (*the 1st Respondent*) and others vied for the Orange Democratic Movement's (ODM) nomination to contest the Muhoroni Constituency Parliamentary

seat. The Applicant and the others lost. Aggrieved by ODM's declaration of the 1st Respondent as its nominee, the Applicant filed an appeal before ODM's National Appeals Tribunal (NAT). According to ODM's internal dispute resolution rules, such an appeal is supposed to be determined within 48 hours. It was not determined within that timeframe and on 6th May, 2017, six days after NAT had heard the Applicant's appeal but had not determined it, and fearing that ODM's nomination of the 1st Respondent might stand, the Applicant filed another appeal before the Political Parties Disputes Tribunal (PPDT).

[2] In an interlocutory application by the Applicant before the PPDT, ODM's Legal Officer, Mr. Anthony Muturi, swore an affidavit on 7th May, 2017 in which he deposed that due to pressure of work, NAT had not delivered its determination of the Applicant's appeal and that it would file it "soon". In response to that averment, the 1st Respondent swore an affidavit on 8th May, 2017 and annexed a copy of NAT's decision dated 5th May, 2017 dismissing the Applicant's appeal. After hearing the matter PPDT dismissed that appeal.

[3] On 19th May, 2017, the Applicant filed an appeal against that decision at the High Court. After hearing the matter, the High Court allowed the Applicant's Appeal on the ground that ODM's Returning Officer for Muhoroni Constituency had failed to take into account results from five wards in that constituency and directed ODM to include those results and declare the winner within 72 hours. Upon failure to comply with that order, the Applicant applied to have ODM's National Election Board's Chairperson cited for contempt of court. After hearing that application,

the High Court found ODM's National Election Board's Chairperson guilty of contempt and reprimanded her for that misconduct. In its ruling on that application, due to the time constraints in the matters of nominations, the High Court decided to finalize the dispute and therefore tabulated the results from the said five wards and found that the Applicant had garnered a total of 23,578 votes as against the 1st Respondent who had garnered a total of 13,754. On the basis of those results, the High Court declared the Applicant the winner of ODM's nomination to contest the Muhoroni Parliamentary seat and directed IEBC to declare him ODM's candidate for that seat.

[4] Aggrieved by the High Court's said decisions, the 1st Respondent filed Civil Appeal No. 180 of 2017 and challenged the High Court's determination that ODM had not taken into account results from five wards of Muhoroni Constituency before declaring him as its nominee. He also filed Appeal No. 181 of 2017 challenging the High Court's ruling on the Applicant's application for contempt in which it had found that the Applicant was the winner of ODM's nomination to contest that seat. ODM and its National Election Board's Chairperson, Ms. Judith Pareno, were also dissatisfied with the High Court's determination of the contempt of court application and cross appealed.

[5] The Court of Appeal heard Civil Appeal No. 180 of 2017 and delivered its decision on it on 10th July, 2017 allowing the 1st Respondent's Appeal. It consolidated Appeal Nos. 181 and 182 of 2017 and delivered a joint judgment on the two of them on 10th July, 2017 allowing the two Appeals but dismissing the cross appeal.

[6] The Applicant was dissatisfied with those decisions of the Court of Appeal. On 26th July 2017, he filed before this Court Petition No. 12 of 2017 challenging the Court of Appeal decision and Petition No. 13 of 2017 challenging the Court of Appeal's decision on the contempt of court issue.

[7] The application, which is the subject matter of this ruling, was filed on the 13th July, 2017 long before the two appeals were filed on 26th of July, 2017. It seeks:

- “(1) That this application be heard ex-parte in the first instance and be certified as urgent.*
- (2) That pending the hearing and determination of this application/appeal, this Honourable Court be pleased to grant an order of stay against the Judgments and consequential orders delivered by the Court of Appeal on 10th July, 2017 in Nairobi Civil Appeal No. 180 of 2017 and Nairobi Civil Appeal No. 181 of 2017 as consolidated with 182 of 2017 James Onyango K'oyoo –vs- Prof. Ayiecho Olweny & Others.*
- (3) That pending the hearing and determination of this application/Appeal this Honourable Court be pleased to issue a temporary order of injunction prohibiting the Independent Electoral & Boundaries Commission (IEBC), the 3rd Respondent herein, from removing, de-gazetting and/or in any manner interfering with the name of Prof. Ayiecho Olweny as gazetted in Gazette Notice dated 27th June, 2017.*
- (4) That this Honorable Court be pleased to make such orders as it deems necessary to safe guard the ends of justice.*
- (5) That the costs of and incidentals to this application abide the result of the intended appeal.”*

SUBMISSIONS

[8] Presenting the Application before us this morning Mr. Mwamu, learned Counsel for the Applicant, submitted that the applicant has a strong appeal. He argued that like the PPDT, the Court of Appeal did not interrogate the manner in which NAT's purported judgment was obtained. ODM's legal officer had sworn an affidavit on 7th May, 2017 and asserted that NAT had not delivered its decision and that it would deliver it "soon". In effect therefore ODM had disowned that decision. In counsel's view, NAT's decision, placed on record vide the 1st Respondent's affidavit of 8th May 2017, offended the provisions of Article 50 (4) of the Constitution which provides that:

“evidence obtained in a manner that violates any right or fundamental freedom in the Bill of rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of Justice.”

[9] Mr. Mwamu further submitted that contrary to **Section 41(2)** of the Political Parties Act, the Court of Appeal had delved into matters of fact and relied wholly on NAT's decision in arriving at its determination.

[10] Opposing the application, Mr. Sagana, learned counsel for the 1st Respondent, submitted that this application is incompetent and has no leg to stand on, having been filed without a substantive appeal. The two appeals were filed on 26th July 2017, long after the application had. He further submitted that the application itself has no merit as there is no issue of constitutional interpretation or application raised in the appeals.

[11] Mr. Kajwang learned counsel for the 2nd Respondent echoed Mr. Sagana's submissions and urged us to dismiss this application.

[12] Mr. Nyamodi learned counsel for the 3rd Respondent submitted that the IEBC, the 3rd Respondent, has already printed the ballot papers which would be delivered to Muhoroni Constituency tomorrow. It would therefore be impossible for the IEBC to comply with any order that this Court may issue in favour of the Applicant.

[13] In response thereto, Mr. Mwamu argued that the filing of the Notice of Appeal was a sufficient substitute for the substantive appeal so as to trigger this court's jurisdiction.

ANALYSIS AND DETERMINATION

[14] We have taken into account the pleadings and submissions by all counsel. In our view the issue as to whether this application is properly before us has to be determined in *limine*. For this court to entertain any matter on appeal, it must satisfy itself that the conditions laid down in **Article 163 (4)(a) & (b)** of the Constitution pertaining to its jurisdiction have been met. The only way this court can make that determination is by interrogating the contents of the Appeal itself.

[15] Where a party files an application such as the one before us, seeking stay or injunctive relief, such a party must demonstrate that the application is based on an appeal as contemplated by Article 163(4) (a) or (b) of the

Constitution. It follows therefore that such an application must be based on an already filed appeal.

[16] In our view, a mere Notice of Appeal is not enough to enable the Court determine whether or not it has jurisdiction. Such a Notice cannot operate as a substitute for the substantive Appeal. In the circumstances, we find and hold that an application which is filed before the filing of an appeal or one which is not accompanied by a Memorandum of Appeal is fatally defective. Having so held, we find no reason to determine any other issues raised in the 1st Respondent's preliminary objection.

CONCLUSION

[17] Prayer No. 2 in the Notice of Motion seeks orders of stay against the judgments and consequential orders delivered by the Court of Appeal on 10th July, 2017 in Nairobi Civil Appeal No. 180 of 2017 and Nairobi Civil Appeal No. 181 of 2017 as consolidated with Civil Appeal No. 182 of 2017, James Onyango K'oyoo –vs- Prof. Ayiecho Olweny & Others. The said prayer is not only unwieldy but also purports to be predicated on two different Appeals, Supreme Court Appeals Nos. 12 and 13 of 2017, which, as we have stated, were filed long after this application had. Furthermore, the two appeals have not been consolidated before this Court. That notwithstanding, we have shown why the order for stay cannot be granted on account of the incompetency of the entire motion. Consequently, prayer 2 of the Notice of Motion is hereby declined.

[18] Regarding Prayer No. 3 of the Motion, it seems to us that an injunction as sought by the Applicant cannot be granted in circumstances where the 1st Respondent has already been gazetted as the 2nd Respondent's nominee for the position of Member of Parliament for Muhoroni Constituency and is already on the ballot paper, a fact confirmed by Counsel for the 3rd Respondent, Mr. Nyamodi. In the circumstances, that prayer is also declined.

[19] It follows that the Notice of Motion dated 13th July, 2017 is incompetent and is hereby struck out. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of August, 2017.

.....
D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF THE
SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME
COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME
COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

Dated at Nairobi this day of August, 2017

**REGISTRAR
SUPREME COURT OF KENYA**