POLITICAL PARTIES DISPUTES TRIBUNAL

"expedicious adjudicate political parties' disputes"

CASE DIGEST

EMERGING JURISPRUDENCE OF THE POLITICAL PARTIES DISPUTES TRIBUNAL 2022 ELECTORAL CYCLE

THE JUDICIARY

Justice be our Shield and Defender

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USAID FROM THE AMERICAN PEOPLE

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FOREWORD

Political parties are the means to democratize and constitutionalize governance; they play a crucial role in organizing the highly diverse public by selecting candidates for office and popularizing the ideas that form the basis of governmental programmes. These parties serve as the means through which individuals and groups strive to attain political power.

What sets political parties apart from interest or pressure groups is the extensive and diverse support they attract and the focus of their programmes on issues of national significance. Political parties occupy a central and vital role in the governance landscape, and the Office of the Registrar plays a vital role in holding parties accountable to that role.

The Political Parties Disputes Tribunal plays a crucial role in improving access to electoral justice. It provides parties with a mechanism to review decisions made by the Registrar and holds parties accountable for fulfilling their constitutional mandate of fostering a democratic culture within their ranks. The level of democracy in society is closely tied to the democratic practices within political parties.

This Digest represents the culmination of a comprehensive review of decisions made by the Political Parties Disputes Tribunal (PPDT) since 2017. It aims to revisit the outcomes of the PPDT decisions since the release of the initial edition in 2017, with a particular focus on changes brought about by amendments introduced through the Political Parties (Amendment) Act 2022. Notably, these amendments have modified the legal framework governing nominations. The release of this second edition serves as an opportunity to inform Tribunal users and other stakeholders on how the Tribunal has interpreted the law and resolved disputes within its jurisdiction.

Aligned with the vision of Social Transformation through Access to Justice (STAJ) and the PPDT 2019-2023 Strategic Plan, the PPDT implemented a decentralization initiative, extending its services to eight regions across the country: Kakamega, Kisumu, Eldoret, Mombasa, Nyeri, Meru, and Nairobi A & B, thereby enhancing access to justice. This decentralization followed the successful recruitment of 18 ad hoc members of the Tribunal by the Judicial Service Commission, following the amendment of the Political Parties Act in 2022. Since the Judiciary has identified the use of technology as an enabler for efficient service delivery, an e-filing system for the PPDT was also activated.

The expanded operations of the Tribunal facilitated the resolution of 314 disputes nationwide. Beyond efficiently resolving complaints, this increased capacity contributed to the development of jurisprudence regarding the management and operations of political parties, which, as recipients of public funds, are deemed public trusts obliged to serve the interests and common benefit of all their members.

This Digest not only highlights the successes and challenges overcome by the Tribunal but also goes beyond the first edition by analyzing a broader range of disputes throughout the entire electoral cycle. These encompass disputes related to party disciplinary processes, appeals from decisions of the Registrar of Political Parties, party nominations, and party list disputes. The timely resolution of these disputes demonstrates the Tribunal's concerted effort, cautious ingenuity, and effective management. It underscores the capacity building initiatives of the Tribunal and its competence in fostering a culture of democratic governance and accountability within political parties.

Special appreciation is extended to the Electoral Law and Governance Institute for Africa (ELGIA) for their technical and financial support in the development of this Digest. The regional sensitization meetings, supported by the International Foundation for Electoral Systems (IFES), were instrumental. Furthermore, the backing of the United Nations Development Programme (UNDP) in providing laptops significantly supported e-filing and virtual hearings, enabling the PPDT to leverage technology as a facilitator of justice.

Commendations are due to the Office of the Chief Registrar of Judiciary, the Judiciary Committee on Elections, the Chairperson PPDT for her leadership, the entire PPDT Secretariat, and the Office of Registrar, Tribunals for their tireless efforts in ensuring the Tribunal's readiness to address disputes arising during the 2022 elections cycle.

Hon. Justice Martha Koome, EGH

Chief Justice and President of the Supreme Court of Kenya

PREFACE

Political parties are important stakeholders in Kenya's democratisation process. The entrenchment of political parties in the Constitution embeds political parties as important constitutional actors. Political parties are the means through which the citizen seeks to attain democracy. They, therefore, need to be democratic themselves. It is for this reason that our Constitution mandates them to not only abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party but to also respect the rights of all to participate in the political process, including minorities and marginalised groups. Moreover, the courts have asserted the public nature of political parties, which receive funding from public coffers, as a basis for their complying with constitutional dictates.

James Madison asserted that political parties should be driven by a commitment to act in the best interest of the entire community, rather than solely focusing on their narrow, partisan concerns. He emphasized the importance of leadership and membership possessing the wisdom necessary to bear the responsibilities of a Republic for the benefit of the entire nation, without discriminating against those who do not belong to their party. The basic requirements of political parties, as encapsulated in Article 91 of the Constitution, capture this ideal. But because Kenya's constitutional architecture, with its values and structures, imposes itself on a state and society with a different political culture, the Constitution's internal logic and dynamics face competition from broader social forces, some of which may not strongly adhere to its values.

As Ghai noted about the adoption of the 2010 Constitution, various factors, including personalities, elites, political parties, organizations, social structures, economic changes, traditions of constitutionalism, and constitutional rules and institutions, shape the fate of a constitution. He noted that this Constitution was thrust upon

politicians and bureaucrats by the people, representing a revolutionary approach without an actual revolution, unlike previous constitutions imposed by politicians on the people. The Constitution's intent was to revolutionize both the state and society. The critical question remains whether advocates for state reform can effectively instil constitutional discipline upon the ruling class.

The Political Parties Disputes Tribunal (PPDT) carries the huge responsibility of holding political parties accountable to their constitutional obligation of bringing about and maintaining good governance and democratisation within political parties as a means of ensuring the welfare of the people in Kenya. The PPDT continues to carry out its role of promoting the strengthening of internal democracy within parties and the conduct of party activities within the dictates of the Constitution.

The publication of this Digest is a recognition of the important role that the PPDT continues to play in holding political parties accountable to the constitutional ideal and their indispensability to the effective operation of a democratic system. With the help our strategic partners, we have put together a tome that captures our work through the electoral cycle approach, by highlighting decisions on party disciplinary processes, appeals from the decisions of the Registrar, party nominations and party list disputes. The Digest now allows members of the Tribunal, practitioners, researchers, students and other stakeholders to have a one-stop shop for understanding the mandate of the Tribunal, and how this mandate has been interpreted in its decisions. Tracking of the appeals through the court system allows practitioners to synthesise the evolution of the jurisprudence, with the end result that they can isolate areas where the jurisprudence is settled and where it is still evolving.

The Digest ends with a summary of law reform proposals, which we hope will guide our engagement with the relevant stakeholders in the 2027 elections cycle.

We remain grateful to the Chief Justice for her unwavering support towards ensuring that social transformation through access to justice is achieved. The decentralisation of the PPDT's work had the effect of alleviating pressure from the centre and also facilitating access to justice. We are also grateful for the technical and financial support of the Electoral Law and Governance Institute for Africa (ELGIA), without whose support the development of this Digest would have been hampered.

Finally, I wish to extend my gratitude to our consultants, Lucianna Thuo and Moses Owuor, for their technical assistance in the development of this Digest.

Hon Desma Nungo, HSC

Chairperson, Political Parties Disputes Tribunal

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The development and publication of this Case Digest of the Political Parties Disputes Tribunal (PPDT) 2022 Pre-Election Disputes Resolution is worth reckoning that it is an opportunity to grow electoral jurisprudence in Kenya. And thus, this Case Digest would not have been possible without the support of many players.

First and foremost, our profound appreciation to the Hon. Lady Chief Justice and the Deputy Chief Justice of the Judiciary of Kenya for their strategic leadership and continued support to the PPDT, particularly during the Pre-Election Dispute Resolution period in 2022.

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I acknowledge the tremendous efforts of the PPDT Honourable Members and the Secretariat in ensuring that this Case Digest captured the Jurisprudential milestones and landmark cases with lessons learnt from the 2022 General Election cycle.

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Mwaura Kamwati
Chief Executive Officer/Secretary
Political Parties Disputes Tribunal

ABBREVIATIONS

ADR Alternative Dispute Resolution

DRC Dispute Resolution Committee

EDR Electoral Dispute Resolution

IDRM Internal Dispute Resolution Mechanisms

IEBC Independent Electoral and Boundaries Commission

IPPMS Integrated Political Parties Management System

MCA Member of County Assembly

NEAB National Elections Appeals Board

NEB National Elections Board

ODM Orange Democratic Movement

ORPP Office of the Registrar of Political Parties

PNR Party Nomination Rules

PPA Political Parties Act

PPDT Political Parties Disputes Tribunal

PPF Political Parties Fund

UDA United Democratic Alliance

UPA United Progressive Alliance

WDM Wiper Democratic Movement

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Introduction and Overview

This Case Digest provides a synopsis of the decisions of the Political Parties Disputes Tribunal (PPDT) in the 2022 General Election Cycle, including determinations of the appellate courts emanating from those decisions. The decisions of the PPDT in the 2022 general election cycle took account of the developments in the law, decisions of the Tribunal in the 2013 & 2017 election cycles and the emerging jurisprudence from the appellate courts. The 2022 cycle was altered by certain occurrences, the most prominent being the amendments introduced by the Political Parties (Amendment) Act 2022 which substantially recast the framework for nominations. The cases in the 2022 cycle highlight the key themes in the pre-election dispute resolution and areas which remain problematic. These include jurisdiction of the PPDT, the functional and administrative arrangements between the PPDT and the IEBC in the exercise of pre-election EDR jurisdiction, substantive issues relating to the choice of nomination methods and process, enforcement powers of the PPDT and the appellate jurisdiction of the High Court and Court of Appeal.

Since elections are a process, this edition also analyses decisions of the PPDT relating to party processes and expulsion of members, as well as appeals from the decision of the Registrar of Political Parties.

The Political Parties (Amendment) Act 2022 introduced significant amendments to the Political Parties Act 2011 (PPA). The amendments introduced personality to registered coalition political parties. The amendments also introduced stricter rules on obligations to maintain a register of members of political parties and timeframes for closure of the party membership register before commencement of nominations. Under the amended Act, the Office of the Registrar of Political Parties has an enhanced role in the regulation of political parties, establishment and maintenance of an Integrated Electronic Membership Registration System and the nomination process.

Part IV of the Act is dedicated to the methods and process of nomination by political parties. This part is a substantial amendment which removes the main elements of political party nomination from the Elections Act. The amendments attempted to bring clarity to the meaning of nomination as understood as a two-phase process entailing the process for selection of candidates by political parties and ultimate registration by the IEBC. Thus, the confusion introduced by using party primaries interchangeably with party nomination is removed. However, as discussed under the thematic analysis, many party constitutions remained unchanged in the run-up

to the 2022 elections. This created dissonance between the nomination methods contained in party nomination rules and those stipulated by the Political Parties Act.

According to the PPA, political parties have a choice of conducting their nominations through direct party nomination method or indirect party nomination method. The direct party nomination method provides for an election by all the registered members of the party, while indirect nomination involves the use of delegates, who conduct interviews and polling to settle on a party candidate. The difference between the two methods is that while the former is an *election*, the latter is a *selection* method.

Only registered members of a political party, whose names appear in the certified copy of the register of its members, can participate in a political party's nominations whether in determining candidates or contesting the party ticket (***Moses Muratha Kamau v United Democratic Alliance National Elections Board & 2 Others*** **Nairobi Complaint No E027 of 2022).** While a party is at liberty to select the method of nominating candidates for the general elections, it cannot equivocate between methods, thereby violating the legitimate expectations of those intending to contest on the party ticket (***Ted Marvin Odhiambo v Orange Democratic Movement National Elections Board & 2 Others; Independent Electoral and Boundaries Board (Interested Party)*** **(Kisumu Complaint No. E029 of 2022**).

The constitutionality of the Political Parties Amendment Act No 2 of 2022 was tested in ***Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties)*** **(Petition E043, E057 & E109 of 2022**), where the three Judge Bench of the High Court largely found the amendments constitutional.

The amendments to the PPA introduced specific changes in the resolution of political parties' disputes. The amendments introduced clarity in the timeframes, the roles of the IDRMs and capped appeals at the Court of Appeal. Under the Act, once political parties have conducted party nominations, they have 30 days to resolve all disputes arising out of their nomination processes through their IDRM processes (s 38I of the Political Parties Act; and ***Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others*** Civil Appeal No E326 of 2022.) Section 40 (2) was amended to include disputes arising from party nominations among the categories of disputes requiring IDRM before the jurisdiction of the PPDT can be invoked. This amendment aligned the statute with the jurisprudence in the the 2013 and 2017 electoral cycles.

The requirement of IDRM extends to coalition political parties. Members of a coalition political party cannot approach either the PPDT (***Josephine Wairimu Kinyanjui***

v Pamoja African Alliance Party & Another*, PPDT Complaint E006 of 2022** (unreported); ***Amani National Congress vs Orange Democratic Movement & Other* PPDT Complaint No. 12 of 2018,** or the High Court (Martin Maina Mugo v Registrar of Political Parties, Azimio la Umoja One Kenya Coalition & Maendeleo Chap Chap (Interested Party)*, Civil Appeal E303 of 2022** (unreported); and ***Republic v The Registrar of Political Parties & 3 Others Ex Parte Mahat Rashid Hassan*, Miscellaneous Application E048 of 2022** (unreported) without exhausting IDRM.

Section 39A of the Act provides for the appointment of *ad hoc members* thereby making it possible for the Tribunal to sit in regions outside Nairobi. This decentralisation is a crucial avenue for improving access to justice, and is a realisation of a proposal made in this regard in 2017.

Appeals from decisions of the PPDT can be lodged at the High Court on matters of law and fact, and at the Court of Appeal on matters of law only.[1] With amendments to the PPA introduced in 2022, there is no longer a further right of appeal to the Supreme Court. The Tribunal now has the powers of the High Court 'to punish for any acts or omissions amounting to contempt of the Tribunal' (s 41 (3) PPA).

From a reading of the decisions, there is increasing recognition of the PPDT as an electoral tribunal with an essential role in the resolution of pre-election disputes. The enhanced roles of the ORPP, clarity of the timeframes, the roles of the IDRMs, bringing the nomination processes under the ambit of the PPA have enhanced the harmony in the exercise of jurisdiction by the IEBC and the PPDT.

1 *S 41 (2) Political Parties Act 2011.*

Highlights of the Key Themes in PPDT Decisions and Appeals

1. Jurisdiction and Attempts at Exhaustion of the IDRM

The PPDT has jurisdiction over matters arising from decisions of party IDRMs concerning party nominations, disputes between party members and a political party, disputes between members of a political party, disputes between political parties, and disputes between coalition partners (Section 40(2) of the Political Parties Act.

While it was unclear whether the IDRM was required in respect of party nominations during the 2017 elections, amendments to the Political Parties Act 2022 have clarified that in respect of party nominations, IDRM is mandatory ***(section 40(2) Political Parties Act as amended by Political Parties (Amendment) Act 2 of 2022).***

The requirement to attempt to exhaust IDRM applies to disputes between members and political parties as well as to coalition partners within a coalition (s 40 (1) (e); (***Maendeleo Chap Chap v Registrar of Political Parties & Another*** **Coalition Party PPDT Complaint E60 consolidated with Complaint E16 of 2022;** ***Kenya Council of Employment and Migration Agencies & Another v Hon. Hussein Dado & 3 Others*** **Mombasa Miscellaneous No E001 of 2022;** ***Republic v Registrar of Political Parties & 3 others; Hassan (Ex parte)*** **(Miscellaneous Application E048 of 2022) [2022] KEHC 572;** ***Namunyu & 3 others v Ndonji & 3 others; Namunyu & 2 others (Interested Parties)*** **(Civil (Election) Appeal E413, E414, E430 & E433 of 2022 (Consolidated)) [2022])**. Coalition political parties are also required to make provision for IDRM in their coalition agreements. ***(Section 40 (3) Political Parties Act).***

The amendments introduce some clarity in the effort required to evidence exhaustion of political party IDRMs in order to trigger the PPDT jurisdiction. Section 40 (2) as amended provides:

> *(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless a party to the dispute adduces evidence of an attempt to subject to the internal political party dispute resolution mechanisms.*

The distinction was captured by the Tribunal in ***John Mworia Nchebere & Others vs The National Chairman Orange Democratic Movement & Others*** **(Nairobi PPDT**

Complaint No. E002 of 2022), where the Tribunal clarified that the amendment does not extinguish IDRM jurisdiction. The rationale of the provision as amended was to restate that IDRM is the first port of call. This the Tribunal framed as 'the need to underwrite party harmony and cohesion, while ensuring strong structures of democratisation within political parties remain critical'. The provision is intended to protect parties by providing a remedy where a political party frustrates a party. In finding that IDRM was not properly attempted, the Tribunal cautioned, at para 51, that 'IDRM is neither a dress rehearsal, pit stop nor an ornamental provision' in the Political Parties Act, but serves 'a functional utility under Articles 38 and 159 of the Constitution'.

The effect of the amendment is that a political party cannot frustrate a member's attempts to resolve a dispute internally and then claim that the member is precluded from approaching the Tribunal for failure to exhaust IDRM (***David Kubasu Shimenga v Amani National Congress & 2 Others*** **Kakamega Complaint No E002 of 2022;** ***Booker Ngesa Omolo v Benedict Wachira*** **Nairobi A Complaint No E051 of 2022;** ***Hon Musdaf Hussein Abdullahi v National Elections Board Orange Democratic Movement & 3 Others*** **Nairobi A Complaint No E078 of 2022)**.

However, in some decisions, the Tribunal ruled that lodging a protest letter which was unaccompanied by filing fees as required by the PNR stripped the complaint of the *bona fides* element described in ***John Mworia Nchebere*** case, and therefore the jurisdiction of the Tribunal was not properly invoked (***Mohammed Ibrahim Elmi v Jubilee Party*** **Nairobi A Complaint E039 of 2022**).

In ***Maendeleo Chap Chap v Registrar of Political Parties & Another*** **Coalition Party PPDT Complaint E60 consolidated with Complaint E16 of 2022,** the PPDT declined to allow the complainant to circumvent IDRM on the basis that the Complaint revealed a claim both against a political party and against the decision of the Registrar of Political Parties. In such cases, the complainant cannot rely on impugning the decision of the Registrar as a basis for side-stepping the requirement of IDRM in relation to the complaint against their political party.

However, expulsion from a political party does not exempt one from the obligation to exhaust IDRM. (***Zachary Nyayiemi Moturi v Wiper Democratic Movement & Anor*** **Kisumu Complaint No E032 of 2022 as consolidated with Kisumu Complaint E033 of 2022**)**.**

Neither will a lack of awareness of dispute resolution clauses or claims of irregularity in coalition agreement be permitted as an excuse for not attempting IDRM-***Maendeleo Chap Chap v Registrar of Political Parties & Another*** **(Nairobi A Complaint No. E060 of 2022 consolidated with Nairobi B PPDT Complaint No. E016 of 2022).**

Where a nomination exercise is nullified and a fresh nomination ordered, a party challenging the outcome of the fresh nomination exercise must first exhaust IDRM before approaching the Tribunal (***Agnes Nailentei Shonko Wachira v John Njoroge Chege & Another*** **Nairobi A Complaint No. E020 of 2022;** ***Peter Migwi Gichohi & 3 Others vs. UDA & 3 Others*** **Nairobi A Complaint No. E022 of 2022;** ***Morris Okiwi Obong'o v Orange Democratic Movement & Another; David Ruongo Okello v Peter Owera & Others*** **(Nairobi A Complaint No. E059 & E065 of 2022 (consolidated)).**

2. Exceptions to IDRM

The requirement to exhaust internal dispute resolution mechanisms is a principle with exceptions. (See ***Hon. Elisha Ochieng Odhiambo v Dr. George Jalango Midiwo & 3 others*** **Complaint Number 003 of 2022**). As the Tribunal asserted in ***Oscar Kambona v Schola Nyenze and Others*** **Complaint No. E020 of 2021:**

> *The exceptions are founded on good reason. At times, the internal mechanisms prescribed in party constitutions and other governing instruments are either non-existent, inoperative, fraught with conflict of interest, obstructive, in perpetual paralysis or subject to inordinate delays which may compromise the subject matter of the dispute.*

See also ***Musalia Mudavadi & 4 others v Angela Gathoni Wambura & 2 others*** **Civil Appeal 177 of 2018** where the Tribunal found that it was seized of a matter where a political party had failed to set in motion the IDRM process when called upon to do so.

For IDRM to be exhausted, it must be 'available, operative, without conflicts of interest, not obstructive and not delaying matters in dispute'. See ***Wambugu Nyamu & 2 Others v Justin B. Muturi & 4 Others*** **Nairobi B Complaint No. E010 of 2022**, para 34.

Where the party processes are not satisfactory due to their delay which may end up compromising the subject matter, a party cannot be faulted for approaching the

Tribunal (***Elizabeth Waithera Njue v Susan Mukanga & another*** **(Nairobi Complaint No. E049 of 2022**; ***Peter Odhiambo Agoro v The National Election Board & 2 others; Independent Electoral and Boundaries Commission (Interested Party)*** **(Kisumu Complaint No. E020 of 2022)**.

Therefore, a person will be excused from the requirement to exhaust IDRM if it can be demonstrated that the IDRM is either unavailable or ineffective. See ***Clement Wasike v ODM & 2 Others*** **Nairobi B Complaint E017 of 2022,** para 27.

Having assessed the impact of the 2022 amendment on the requirement of IDRM, the Tribunal found it necessary to provide guidance as to what is considered an attempt to invoke IDRM. At paras 46-47 of the ***John Mworia Nchebere*** case, the Tribunal stated:

> *46. Our pre-amendment position that a party must demonstrate bona fides (an honest attempt) in pursuing IDRM remains good law. Furthermore, the party to a dispute should also show that, among others:*
>
> *a. The unavailability of the organ to resolve disputes;*
>
> *b. If the same is available; it is inoperative, fraught with conflict of interest, obstructive, in perpetual paralysis or subject to inordinate delays which may compromise the subject matter of the dispute;*
>
> *c. Reasonable time is afforded to the party to respond, constitute or activate an IDRM organ and deal or determine the dispute;*
>
> *d. Due consideration should be given to the urgency and public interest in the subject matter of the dispute; and*
>
> *e. The reliefs sought should be proportionate, and if alternative remedies suffice to mitigate the harm likely to be suffered, the same should be considered. In essence, the utilitarian or proportionality of the process and remedies should be considered so as to achieve an equilibrium.*
>
> *47. The foregoing list is by no means exhaustive, but is a useful compass for navigating the frontiers delimited by section 40 (2) of the Political Parties Act, 2011.*

Therefore, a complainant does not demonstrate a *bona fide* attempt where the party is not afforded a reasonable time to respond, constitute or activate the IDRM to determine the dispute. (***Marnanwahto Mary Sarehe v Jubilee Party*** **Meru Complaint No E005 of 2022**, para 31; ***Sankei Noonyuat v United Democratic Alliance & Another*** **Nairobi B Complaint No E003 of 2022**, para 24). For a contrary position, see ***Abubakar Ahmed Talib v Wiper Democratic Movement & 5 Others*** **Nairobi A Complaint No E099 of 2022.**

A Complainant also cannot cite urgency as an excuse for not circumventing IDRM ***Fatuma Ahmed Sheikh v Jubilee Party*** **Nairobi A Complaint No 117 of 2022;** ***Beking Ahmed Issa v ODM*** **Nairobi A Complaint No 118 of 2022** and ***Ayan Ahmed Mohamed v Jubilee Party*** **Nairobi A No 119 of 2022.**

Conversely, parties are not to allow disputes to pend indefinitely before the IDRM; and the PPDT may, while declining jurisdiction where IDRM has not been exhausted because the matter is still pending before the IDRM, direct that it be disposed of within a specific time (***Marnanwahto Mary Sarehe v Jubilee Party*** **Meru Complaint No E005 of 2022**, ***Johnson Oduk Oginga v Orange Democratic Movement National Elections Board & 3 Others*** **Nairobi A Complaint No. E097 of 2022**).

Moreover, the High Court in ***National Elections Board, ODM v Kepher Ojil Odongo & Another Civil Appeal E317 of 2022*** has asserted that IDRM is not demonstrated to have been attempted where the complainant does not follow the laid-down procedure for resolving the dispute under the party constitution and rules. Here, the High Court faulted the PPDT for assuming jurisdiction where a complainant adduced letters complaining about a nomination exercise without evaluating whether the complainant had followed the dispute resolution procedure laid down in the rules.

This is contrary to the position taken by the Court of Appeal in 2017 in ***Samuel Kalii Kiminza v Jubilee Party & another*** **(2017) eKLR,** para 25-26.

The predominant position nevertheless appears to be that a letter/complaint which does not comply with the prescribed format or follow the laid-down procedure for IDRM will be accepted by the Tribunal as proof of attempting IDRM where the letter/complaint contains the statement of facts as well as the prayers sought, sufficient to allow a body to make a decision on the complaint. Upholding the position in

Samuel Kalii Kiminza, the Tribunal has indicated that parties are obligated to advise members of the correct dispute resolution procedure. (See ***Sankei Noonyuat v United Democratic Alliance & Another*** **Nairobi B Complaint No E003 of 2022**, para 19; ***Jubilee Party of Kenya v. Paul Bwire Ouma*** **Nairobi Election Appeal E327 of 2022; *Paul Tapukai Ole Mebarne v United Democratic Alliance* Nairobi B Complaint E023 of 2022; *Abdi Osman Khalif v ODM & Another* Nairobi A Complaint No E037 of 2022; *Hon. Musdaf Hussein Abdullahi v National Elections Board Orange Democratic Movement & 3 Others* Nairobi A Complaint No E078 of 2022; *Beatrice Mugeni Odiele v The Chairperson Elections Board, Ford-Kenya Party & Another* Nairobi A Complaint No 106 of 2022; *Nasra Mohamed Ibrahim v Jubilee Party* Nairobi A Complaint No E126 of 2022; *Michelle Kemuma Omwoyo v Jubilee Party & Another* Nairobi A Complaint No 136 of 2022; *Abdullahi Bashir Maalim v United Democratic Alliance* Nairobi A Complaint No E137 of 2022; *Njelekela Ashura Michael v ODRM & Another* Nairobi A Complaint No 130 of 2022).**

This jurisprudence aligns with the position taken by the Court of Appeal in 2017 to the effect that as far as possible, there should be no undue regard to technicalities in determining whether IDRM had been exhausted, and where one did not follow the laid down procedure to activate IDRM, the party was under an obligation to notify such a member of the proper procedure and invite them to follow it to resolve their dispute.

The Court of Appeal confirmed its earlier position in ***Moturi v Geni & another*** **(Election Petition Appeal E002 of 2022)** where it was asserted that a letter written to the political party expressing dissatisfaction is sufficient to demonstrate exhaustion of IDRM.

However, where a complainant uses a letter to trigger the IDRM but makes no good faith attempt to pursue the matter and seek a resolution of the dispute, the Tribunal will not be seized of jurisdiction (***Josephine Wairimu Kinyanjui v Pamoja African Alliance Party & Another*** **Mombasa Complaint No E006 of 2022; *Sankei Noonyuat v United Democratic Alliance & Another* Nairobi B Complaint No E003 of 2022; *Njelekela Ashura Michael v ODRM & Another* Nairobi A Complaint No 130 of 2022)**. Similarly, visiting the offices of the party without lodging a formal complaint does not amount to a bona fide attempt to exhaust IDRM (***Monica Iyayo Girma v Jubilee Party*** **(Meru Complaint No. E007 of 2022**).

3. Appellate Jurisdiction

In ***Njau Peter Wahinya vs UDA Electoral and Nomination Disputes Resolution Committee & Another*** **Nairobi A PPDT Appeal No. E003 of 2022;** ***John Karanja Kihagi v Hon. Jayne Wanjiru Kihara & 3 Others*** **Nairobi B Complaint E002 of 2022** and ***Benson Ochola & 6 Others v Orange Democratic Movement & Another*** **Nairobi A Complaint E050 of 2022,** the Tribunal asserted that jurisdiction under section 40 is both original and appellate.

In relation to appeals from the decision of the Registrar, the jurisdiction of the PPDT is appellate.

However, with regard to decisions from the IDRM, the jurisdiction of PPDT is not *stricto sensu* appellate. In ***Benson Ochola & 6 Others v Orange Democratic Movement & Another; Independent Electoral and Boundaries Commission (Interested Party*****) Nairobi A Complaint E050 of 2022,** the Tribunal clarified that it does not exercise appellate jurisdiction over IDRMs.

> *A reading of s. 40 (2) of the Act does not bestow appellate jurisdiction upon this tribunal but it rather makes it mandatory that before a party approaches the tribunal has to adduce evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanism. It is therefore erroneous to hold that a matter that has been subjected to IDRM is escalated to the tribunal on appeal.*

In ***Agnes Nailentei Shonko Wachira v John Njoroge Chege & Another*** **Nairobi A Complaint No. E020 of 2022**, the Tribunal elaborated on why its jurisdiction in respect of party disputes could not be appellate:

> *41. The 1st Respondent has further submitted that the Complaint herein ought to have been filed as an appeal against the decision of the EDRC. It is noteworthy that Section 40(1) of the PPA expressly refers to 'disputes' or 'appeal' that the Tribunal is mandated to determine. The disputes include those listed under Section 40(1) sub-sections (a), (b), (c), (d), (e) and (fa) of the PPA. Section 40(1)(f) of the PPA on the other hand refers to 'appeals' arising out of decisions of the Registrar of Political Parties. Our interpretation of these provisions is that the Tribunal's mandate to determine disputes categorised thereunder is one that is original. Even though the*

> *IDRM decisions are oftentimes subjected to the Tribunal to establish legal compliance, the Tribunal does not exercise an appellate jurisdiction over them within the strict legal context of what an appeal is understood to mean. Had the legislature intended that the Tribunal sit as an appellate organ against IDRM decisions, nothing would have been easier than to state so. Suffice it to note that different political parties have provided for diverse methods of dispute resolution within their constitution including mediation, negotiation, establishment of dispute resolution organs, amongst others and it would therefore be impracticable to confine the parties to a strictly appellate Tribunal mandate. The law is however express that the appellate jurisdiction of the Tribunal lies with respect to appeals from the decisions of the Registrar of Political parties.*

Parties are therefore not limited in the material they can adduce in support of their claim before the Tribunal. See ***Hussein Mohamed Osman v Orange Democratic Movement & Another*** **Nairobi B Complaint E015 of 2022,** para 39; ***John Karanja Kihagi v Hon. Jayne Wanjiru Kihara & 3 Others*** **Nairobi B Complaint E002 of 2022**, para 36; ***John Kariuki Kaniaru v Hon. Charity Kathambi Chepkwony & 3 Others*** **Nairobi B Complaint E007 of 2022,** para 42:

> *Parties are therefore at liberty to adduce all forms of evidence necessary to prove their Complaint at the Tribunal including but not limited to evidence that had not been introduced at the point of invoking the political party's internal dispute resolution mechanism.*

See also ***Hon Omar Haji Salat v. National Elections Board United Democratic Alliance & 2 Others*** **PPDT Appeal No E008 of 2022**, para 47, where the Tribunal found that irrespective of the designation given to a matter, a dispute arising from the decision of the IDRM is a matter in respect of which the PPDT has original jurisdiction.

The appellate jurisdiction does not require IDRM before the Tribunal can be seized of the matter.

Where a party is concerned with the manner in which the Registrar has exercised her mandate, they have a right to appeal the decision to the Tribunal. In ***Party of National Unity & Another v The Registrar of Political Parties & 2 Others*** **Political**

Parties Disputes Tribunal Appeal No. 5 of 2016, the Tribunal ruled that Registrar is not simply a conduit but a critical player in determining whether parties seeking to merge have complied with the law. Where the law is not adhered to therefore, those aggrieved by the decision are at liberty to invoke the jurisdiction of the Tribunal to resolve their grievances. The same was confirmed in ***David Murathe & Others v Office of the Registrar of Political Parties; Hon. Joshua Kutuny (Interested Party)*** **Appeal No 1 of 2023.**

4. Whether Other Political Party Organs can Circumvent IDRM Decisions

One of the questions that emerged was the scope of latitude that the political parties have to outrightly overturn or circumvent the decision of its own IDRM by employing a different nomination method.

The Tribunal has taken the position that decisions of the IDRM are insulated from interference by other organs of the party in violation of the party constitution (***Ted Marvin Odhiambo v Orange Democratic Movement National Elections Board & 2 Others; Independent Electoral and Boundaries Board (Interested Party)*** **(Kisumu Complaint No. E029 of 2022**).

Where one is dissatisfied with the outcome of the IDRM, the right approach is to appeal against the decision or to seek a review of the same (***Lawrence Otieno Odhiambo v ODM & 3 Others*** **PPDT Nairobi A Complaint No. E052 of 2022)**. In ***Damaris Njuguna & 3 Others v United Democratic Alliance & 3 Others*** **Nairobi A Complaint No E048 of 2022**, the Tribunal ruled that so long as the decision of the IDRM was unchallenged, there was no justification for non-compliance with the same by the party. The understanding here is that party organs must work in harmony to achieve party goals but to do so, all organs must exercise restraint and respect the roles and boundaries of each organ. This means that no organ of the party should lord it over the others, contrary to the provisions of the party constitution.

In ***David Ayoi v ODM & 2 Others*** **Nairobi A Complaint E047 of 2022,** the Tribunal nullified the decision of the ODM National Elections Board granting a nomination certificate contrary to the findings of its Appeals Tribunal:

38. The ODM Appeals Tribunal after considering the evidence that had been adduced before it came to the conclusion that the integrity of the elections had been interfered with. They proceeded to nullify the nomination exercise and the certificate of nomination that had been issued to the 3rd Respondent. Any person who would have been aggrieved and/or dissatisfied with the decision would have appealed or made an application for review of the decision and in the instant case none was made. The NEB proceeded to illegally and unlawfully hand the certificate of nomination to the 3rd Respondent in a clear violation of the judgement of their own Tribunal. This Tribunal therefore holds the view that the decisions of ODM Tribunal must be complied with and the utter disregard of it reeks impunity from the NEB. This tribunal is supposed to promote political parties' internal democracy and autonomy and since the decision of the ODM Tribunal was not challenged and the 1st and 2ndRespondent did not file any response as to why they disregarded the decision of their Tribunal we hereby affirm the decision of the ODM Tribunal and direct that a fresh nomination exercise be conducted.

In ***Lawrence Otieno Odhiambo v ODM &3 Others*** **PPDT Nairobi A Complaint No. E052 of 2022**, the PPDT asserted:

52. No organ inside the Party has the authority to overturn the Tribunal's decisions. To entertain such a line of argument would be opening a Pandora's box, encouraging the undermining of the party's own tribunal's and, by extension, the courts' judicial power. The court judgments will be rendered meaningless within the party's organs, which will choose which parts of decisions to follow and which to ignore, replacing them with their own conclusions.

53. This tribunal holds that if any party within the party hierarchy was dissatisfied with its own IDRM's decision, it should have appealed or applied for review rather than attempting to circumvent the decision by bringing in organs within the party structure to exercise judicial powers that they do not have.

The Tribunal cited the earlier decision in ***Hon. Elisha Ochieng Odhiambo v Dr. George Jalango Midiwo & 3 others*** **Complaint Number 003 of 2022**, where it was observed as follows:

57… there is no doubt that the 3rd Respondent is the sole judicial organ of the party established under Rule 19 of the ODM Party Primaries and Nomination Rules, and charged with the responsibility of resolving disputes that arise out of the party's primaries and nominations. It is an organ specifically recognised under section 40 (2) of the Political Parties Act, 2011. Disputants are required to first settle their grievances with respect to party primaries through the 3rd Respondent. If dissatisfied, a disputant, including the political party, can escalate the dispute to this Tribunal and, thereafter to the High Court, and Court of Appeal, if need be.

58. There is no role for any other organ of the party to exercise the judicial function of the 3rd Respondent. If a party organ is aggrieved with the decision of the 3rd Respondent, an Appeal mechanism is provided. No party organ can usurp, countermand or even supplant the decisions of lawfully established judicial organs. To entertain the alternative argument would be a recipe for chaos and undermine the judicial authority of tribunals and courts. Court decisions would amount to nothing as executive organs would willy-nilly set them aside and replace them with their own findings. We dare add that the rule of law would also be under acute threat…

62. We also find that the central committee's usurpation of the 3rd Respondent's duties and those of the party's disciplinary committee is an act that violates at least two principles of good governance of political parties: separation of powers; and fair trial.

63.Political party organs mimic or approximate state organs in the fashion of Montesquieu's hallowed doctrine of separation of powers. The party constitution creates, allocates, disperses powers, while creating checks and balances to the powers allocated. Judicial organs play a critical role in this framework of checks and balances. It is the vanguard and bulwark of the rights of members against potential excesses of the executive's organs.

In concurring with this finding, the High Court in ***Midiwo v Odhiambo & 2 others*** **(Civil Appeal 26 of 2022) [2022] KEHC 10679)** stated:

110. I am therefore in agreement with the PPDT findings that if the party was aggrieved by the decision of the Appeals Tribunal, it had the opportunity to move to the PPDT to challenge that decision and not to sit on appeal of the Appeals Tribunal's decision through the Central Committee. I find that the Central Committee acted ultra vires and in excess of jurisdiction when

> *it purported to review the decision of the Appeals Tribunal and made a decision that suited the interests of the appellant and the Party. I further find that the Central Committee acted in vain and therefore its resolutions if any are all in vain and void ab initio.*

And once a party sets out to employ one nomination method it cannot change the method merely to circumvent the determination of its IDRM. It is the expectation of the members who participate in the nomination process that the rules will be predictable, determinate and apply without undue favour or arbitrariness.

On appeal, the High Court in ***John Millar Otieno v Lawrence Otieno Odhiambo & 3 Others*** **Civil Appeal E328 of 2022** cited the 2017 decision in ***Samuel Owino Wakiaga vs ODM & 2 others*** **[2017] e KLR**, where Achode J stated:

> *It is my considered view that from that moment on, the first process of nomination ended and the second process of identifying a nominee began pursuant to the orders of the NAT. The Central Committee which deliberated and identified a nominee is created under Article 7.5.3(f) of the 1st Respondent's Constitution and does have powers under Article 7.5 A.2 of its Constitution where its functions are outlined.*
>
> *It is not the duty of the court to micromanage parties and direct them on such mundane matters such as how to communicate with its organs, themselves or in law in their constitution and rules.*

Similarly, in ***John Millar Otieno v Lawrence Otieno Odhiambo & 3 Others*** **Civil Appeal E328 of 2022**, the High Court cited the 2017 decision in ***Samuel Owino Wakiaga vs ODM & 2 others*** **[2017] e KLR** for the position that even the PPDT cannot direct a party on the nomination method to be employed, so long as the party nomination rules are complied with.

5. Meaning of Direct Nomination

While previously direct nomination had the meaning of the issuance of a direct ticket to a party candidate, the meaning of this term under section 38F PPA now is that direct nomination involves the exercise of universal suffrage by registered party members. It provides as follows:

38F. Conduct of direct party nominations

(1) A political party that intends to conduct direct party nominations shall-

(a) post in a conspicuous place within each venue where the nominations will be held the list of members of the party who are eligible to participate in the nominations at that venue; and

(b) provide at each polling venue essential election materials including-

(i) ballot papers;

(ii) ballot boxes;

(iii) a copy of the register of the members of the party;

(iv) pens; and

(v) nomination results slips.

(2) A political party that intends to use direct nomination method shall submit to the Registrar and publish in the party's official website the—

(a) particulars of the body within the party that shall conduct the nominations; and

(b) procedure intended to be used in direct nomination

This means that the idea of issuance of a direct party ticket is not recognised by the PPA. Yet, due to the late amendments to the PPA, direct ticketing (used here to distinguish issuance of a direct ticket from direct nomination as defined by the PPA) remains one of the methods available within party constitutions for arriving at a party candidate.

The confusion ushered in by the late amendments to the PPA reflected both in the party nominations as well as the decisions of the Tribunal (see for example ***Kilonzo v Wiper Democratic Movement & 3 others*** **Nairobi A PPDT Complaint E026 of 2022;** ***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **Nairobi A Complaint E053 of 2022**).

In ***Ntabo v Maranga & 2 others*** **Kisii High Court Civil Appeal 26 of 2022,** the High Court noted as follows:

> *23. At the onset, I note that the parties including the tribunal could not differentiate the methods of nomination available to a political party. The Political Parties Act provides for two methods of conducting nominations, i.e. direct party nominations and indirect party nominations (see section 38A of the Political Parties Act). Section 2 of the Act defines direct party nomination as the process by which a political party, through its registered members, elects its candidates for an election, while indirect party nomination is the process by which a political party, through the use of delegates selected from registered members of the political party and interviews, selects its candidates for an election.*

While acknowledging the incongruence between most party constitutions and the PPA occasioned by the late amendments, the PPDT has upheld the position that a political party has the right to issue a direct ticket to a candidate for elections as per its constitution or where there are justifiable reasons. See Abdi Osman Khalif v ODM & Another Nairobi Complaint No E037 of 2022, para 57.

However, this entitlement does not apply where there are two or more aspirants anticipating competitive nominations or where the political party receives nomination fees from contestants. This is a violation of the legitimate expectation of the members.

See ***Charles O Okwemba v United Democratic Party*** **(Complaint No 192 of 2017)**; also, ***Samuel Kalii Kiminza v Jubilee Party & Another*** **(Complainant No 279 of 2017)**, paras 12, 13, and 17, where the PPDT ruled:

> *We also take great exception to the fact that the 1st Respondent proceeded to take the complainant's nomination fees while aware that no primaries would be forthcoming. Having taken his application fees and not informed him otherwise, the Respondents created in the Claimant, a legitimate expectation that party primaries would be conducted. They violated that legitimate expectation by undertaking a direct nomination without informing the complainant of that decision.*

See also ***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **Nairobi A Complaint E053 of 2022,** where the party was found non-compliant with its own rules on direct ticketing:

43. *There is no evidence that a scientific survey was conducted. Further, no evidence was presented before us that the Party Central Committee met, considered and approved the list of persons to be issued with the direct party nomination certificates after considering the report compiled by NEB, if there was any, in accordance with the rules…*

48. *We … further state that it is a blatant violation of the political rights of the members of a party when a political party acts unilaterally without involving the members and without following the laid-out procedure in dishing out a direct nomination. The ODM NEB acted in clear violation of its own nomination rules, Political Party Act and their own Appeal Tribunal directions.*

Therefore, even though a party is at liberty to select the method of nominating candidates for the general elections, it cannot equivocate between methods, before settling on direct ticketing and thereby violating the legitimate expectations of those intending to contest on the party ticket (***Ted Marvin Odhiambo v Orange Democratic Movement National Elections Board & 2 Others; Independent Electoral and Boundaries Board (Interested Party)*** **(Kisumu Complaint No. E029 of 2022**). In ***Hon. Elisha Ochieng Odhiambo v Dr. George Jalango Midiwo and Others***, **Nairobi Complaint E003 of 2022,** the PPDT asserted:

> *Once a party invites candidates to put in their applications for party nominations, collects fees from them, and sets dates for nomination, it creates in the candidates/aspirants a legitimate expectation that there will be a level playing field to compete for the positions. It guarantees that it has the ability to hold free and fair nomination processes and to respect the outcome of elections and subsequent decisions of party election and judicial organs, notwithstanding the desires of a few of those who occupy top echelons of its leadership. It also assures candidates of the independence, objectivity and impartiality of its judicial and other decision-making organs. The will of the majority is always the essence of democracy. A usurpation thereof by a few in a committee cannot be allowed to stand.*

6. Meaning of Free and Fair Nominations

For an election exercise to be said to have been free and fair, the following conditions must be met, namely: i) nomination through secret ballot; ii) nominations must be free from violence, intimidation and improper influence or corruption; iii) nominations must be conducted by an independent and transparent body, and administered in an impartial, neutral, efficient, accurate and accountable manner.

See, Article 38 of the Constitution of Kenya, which provides

(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Where a party does not use the certified membership register, thereby disenfranchising party members and allowing non-members to participate in the nominations, and the nomination exercise is marred by violence, the nominations cannot be considered free and fair (***Moses Muratha Kamau v United Democratic Alliance National Elections***

Board & 2 Others **Nairobi Complaint No E027 of 2022; *Peris Wangui Gachomo v Samora Mwaura Wachira* (Nairobi Complaint No. E046 of 2022).** In ***Francis Oduor Amolo v Orange Democratic Movement & Another*** **Mombasa Complaint E001 of 2022,** the Tribunal found:

> *65. The claims by the Complainant that there were no polling clerks to assist the Presiding Officer who is the Interested Party herein thus putting a question on the credibility of the process and the allegations that a lorry Number KBB 115K white in colour that was ferrying foreigners to Magongo polling station and it brought tension at that polling station whereby chaos erupted and the voting was stopped were not rebutted. Additionally, on the IPAD gadgets being faulty was not also rebutted a fact which seems to have been tacitly agreed by the 2nd Respondent but who continued to say that the problem was solved by hot spotting via mobile phones. The complainant has discharged his burden of proof and due to the said illegalities and irregularities it is not easy to determine who won the election as it was marred with chaos, faulty technological systems that did not determine to the required threshold that the election was free, fair, transparent, accurate, verifiable, secure and accountable.*

In ***Damaris Njuguna & 3 Others v United Democratic Alliance & 3 Others*** **Nairobi A Complaint No E048 of 2022***,* the Tribunal declined to nullify a nomination carried out using the IEBC register, rather than a certified party register, asserting:

> *88. The register to be used was supposed to be a certified party register and not the IEBC register. However, there is no evidence on record from the witness, supporters and or agents of the complainants that they were not allowed to vote. As it has been noted in a number of authorities, elections being human activities, they are fraught with imperfections. The Complainants have not established to the required standard that the small infractions of non-compliance with the law substantially affected the outcome of the elections.*

In ***Elizabeth Waithera Njue v Susan Mukanga & UDA*** **Nairobi A Complaint E049 of 2022,** the Tribunal found that violence meted against the Complainant prevented her agents from witnessing the nomination process and collation of results and was substantial enough to affect the outcome. Such a nomination exercise could therefore not be a reflection of the will of the people as the nomination exercise was not free, fair, transparent, accountable and verifiable, thereby falling short of the standard set in Articles 38 and 81 of the Constitution.

A nomination exercise that culminates into two sets of results, one of which was not signed by a candidate or their agent cannot be said to be credible and verifiable and in line with Article 81 of the Constitution. See ***John Karanja Kihagi v Hon. Jayne Wanjiru Kihara & 3 Others*** **Nairobi B Complaint E002 of 2022**.

See also ***Hussein Mohamed Osman v Orange Democratic Movement & Another*** **Nairobi B Complaint E015 of 2022**.

> 49 *…This process of nomination through issuance of a direct ticket to the 2nd Respondent when another nomination ticket has already been issued to another party by the 1st respondent cannot be said to have been transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.*

A nomination process which is carried out by consensus but which does not involve the party officials and omits some candidates cannot be said to comply with Article 81 of the Constitution. See ***Hussein Mohamed Osman v Orange Democratic Movement & Another*** **Nairobi B Complaint E015 of 2022**.

If there is non-compliance with the PPA and the PNR and democratic values, an indirect nomination process cannot be upheld. In ***Kilonzo v Wiper Democratic Movement & 3 Others*** **(Civil Appeal E132 of 2022) [2022] KEHC 11332**, the High Court declined to find that the nominations were properly conducted, overruling the Tribunal's finding:

> 63. *Despite finding the 1st Respondent's manner of carrying out its mandate to be greatly wanting in light of the principles in article 35, 10 and 91 of the Constitution, and dismissing the notion that non-compliance with section 38G was of no consequence, emphasising that the provision existed to regulate the conduct of indirect party nominations, the Tribunal found that there was "substantial compliance by the respondent to the party rules and Act so far as the indirect nomination by poll and interview was conducted". With respect, these findings are against the weight of evidence.*
>
> 64. *The 1st Respondent's conduct of the so-called indirect party nomination was grossly marred by substantial non-compliance with its own rules and the PPA as outlined herein and appeared a poor reflection of democratic practice in the party affairs.*

7. Nominations and the Principle of Legitimate Expectation

The principle of legitimate expectation applies to political party nominations. Where a political party collects nomination fees from a candidate, it creates a legitimate expectation that nominations will be held. Similarly, in the absence of any pending dispute, a contestant that wins party nominations has legitimate reasons to expect their political party to issue them with a certificate of nomination; and to forward their name to the IEBC.

See, ***David Odhiambo Ofuo v Orange Democratic Movement Party & Another*** **(Complaint No 240 of 2017)**, para 11; also, ***John Orwa v Orange Democratic Movement Party & Another*** **(Complaint No 241 of 2017);** also, ***Roy Ochieng Samo v Orange Democratic Movement & 3 Others*** **(Complaint No 204 of 2017)**, paras 10 to 12; also, ***Samuel Kalii Kiminza v Jubilee Party & Another*** **(Complainant No 279 of 2017),** para 17, where the PPDT stated:

> *We also take great exception to the fact that the 1st Respondent proceeded to take the complainant's nomination fees while aware that no primaries would be forthcoming. Having taken his application fees and not informed him otherwise, the Respondents created in the Claimant, a legitimate expectation that party primaries would be conducted. They violated that legitimate expectation by undertaking a direct nomination without informing the complainant of that decision.*

While a party is at liberty to select the method of nominating candidates for the general elections, it cannot equivocate between methods, thereby violating the legitimate expectations of those intending to contest on the party ticket. In ***Hon. Elisha Ochieng Odhiambo v Dr. George Jalango Midiwo and Others***, **Nairobi Complaint E003 of 2022,** the PPDT asserted:

> *Once a party invites candidates to put in their applications for party nominations, collects fees from them, and sets dates for nomination, it creates in the candidates/aspirants a legitimate expectation that there will be a level playing field to compete for the positions. It guarantees that it has the ability to hold free and fair nomination processes and to respect the outcome of elections and subsequent decisions of party election and judicial organs, notwithstanding the desires of a few of those who occupy top echelons of its leadership. It also assures candidates of the independence, objectivity and impartiality of its judicial and other decision-making organs. The will of the majority is always the essence of democracy. A usurpation thereof by a few in a committee cannot be allowed to stand.*

The High Court confirmed this in the case of ***Kilonzo v Wiper Democratic Movement & 3 Others*** **(Civil Appeal E132 of 2022) [2022] KEHC 11332,** where it found equivocation between nomination methods inconsistent with the Party Nomination Rules (PNR) and PPA:

> *36. This court agrees with the appellant's contention that the IEBC form 11, revised nomination dates notice and attached schedule (pp 025 -37 ROA) suggest in the absence of a contrary notice that the direct method of nomination would be applied for the seat of governor Kitui County, in the event that the consensus building process failed. The two letters by the aspirants to the party earlier adverted to in this judgement in my view appear to confirm this view. The angst exhibited in the two aspirants' letters is primarily due to the conduct of the party, as the tribunal properly observed, that despite the notices issued for direct nominations, by its conduct but without any formal notification, the party continued to lean towards indirect nominations. Further, it is apparent that this continued until April 17, 2022. It is the court's view that until the decision for indirect nomination was made on April 18, 2022, merely 3 days to the actual primaries, the candidates did not know what direction the matter would eventually take.*
>
> *37. I accept that the court ought to defer to the political party on the manner in which it runs its affairs and especially in furthering the objects of rule 2.1.8. I do not however accept that the party ought by its mixed signals and conduct to engender such uncertainty not only among the candidates but also among its members on an important matter such as the precise method of nomination concerning the equally important position of governor.*

In ***ODM National Elections Board & another v Gare & 2 others*** **(Civil Appeal 44 & 45 of 2022 (Consolidated)),** Ochieng J (as he then was) asserted:

> *43. The party and its Elections Board had chosen universal suffrage, in the first instance. Therefore, when the PPDT told them to conduct a repeat of the process, that could only be done using the process which they had initially chosen and utilised.*
>
> *44. By giving the order for a repeat of the process and making it clear that it be done through universal suffrage, the PPDT did not usurp the mandate of either the party or the party's elections board.*

Where a party nomination process is nullified by the IDRM and a fresh process directed to be carried out, it is a breach of legitimate expectation to proceed with issuing a direct ticket to a candidate rather than repeating the nomination exercise whose result was cancelled and a fresh exercise ordered (***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **Nairobi A Complaint E053 of 2022).**

In addition, where a candidate has participated in a party nomination process and won, the party cannot proceed to forward the name of another candidate to the IEBC for clearance without availing an opportunity for fair hearing to the candidate whose nomination certificate is cancelled (***Mohamed Adan Mohamed v Wiper Democratic Movement & 2*** **Nairobi A Complaint E085 of 2022*; Midiwo v Odhiambo & 2 others*** **PPDT Complaint E085 of 2022;** ***Midiwo v Odhiambo & 2 others*** **(Civil Appeal 26 of 2022) [2022] KEHC 10679)**. This is so even where it is alleged that a candidate violated the party constitution and PNR.

In ***David Kubasu Shimenga v Amani National Congress & 2 Others*** **Kakamega Complaint No E002 of 2022,** the Tribunal asserted:

> *34) Indeed we note that the Complainant was not invited to any party resolution process and indeed the Respondents have not even made an attempt to show that he was so invited to such process.*
>
> *35) In addition, the 1st and 2nd Respondents have not shown why they decided to award the ticket to the 3rd Respondent. It cannot be that a process that was meant to express the will of the membership and that has concluded inexplicably culminates in an arbitrary declaration.*

8. Nominations and the Culture of Justification

Political parties are obligated to provide reasons for their decisions to persons to be affected by their actions. Explanations of this nature enable assessment of whether political party decisions are justifiable in an open and democratic society such as Kenya.

See, ***Bulle Amina Shalle v Wiper Democratic Movement*** **(Complaint No 562 of 2017),** para 3**;** ***Zahara Noor Ismail Duale v Orange Democratic Movement Party*** **(Complaint No 456 of 2017),** para 11, where the PPDT held that:

… political parties are under an obligation to supply affected persons with reasons for their decisions, in order to assess whether these reasons are justifiable in an open and democratic society such as ours.

Also, ***Zaituni Abdallah Kabocho v Jubilee Party*** **(Complaint No 545 of 2017)**, para 12.

Where following a nomination process a nomination certificate given to a candidate is cancelled and a direct ticket issued to a different candidate, an opportunity should be granted to affected candidates to be heard on the decision. See ***Hussein Mohamed Osman v Orange Democratic Movement & Another*** **Nairobi B Complaint E015 of 2022**, para 49; ***Nicholas Ouma Ounda & 3 Others v Orange Democratic Movement & 2 Others*** **(Nairobi Complaint No. E053 of 2022).**

Where a party member applies for nomination through the party list, they must be accorded a fair chance to participate and where they do not meet the selection criteria, the party ought to give them reasons for their non-inclusion in the final list or alteration of their position on the list.

See ***Lydia Chelimo Kiboi v Forum for the Restoration of Democracy-Kenya*** **Eldoret Complaint No 10 of 2022;** ***Said Kuri Godana v United Democratic Alliance*** **Mombasa Complaint No. E011 of 2022;** ***Abadada Fatuma Diramo v United Democratic Alliance*** **Mombasa Complaint E012 of 2022;** ***Abdullahi Bashir Maalim v United Democratic Alliance*** **Nairobi A Complaint No E137 of 2022.**

In ***Alice Wairimu Mbere v Amani National Congress*** **Nairobi B Complaint E009 of 2022,** the Tribunal found that this culture of justification was necessary where party lists are concerned to demonstrate that special interests under the Constitution are properly taken into account in preparing the list.

18. *While the prevailing culture of justification requires every political party to justify its decision to include or exclude any person from its party lists, the failure to give reasons by the Respondent political party in this complaint do not speak at all to the special interests taken into account by the political party. We therefore hold that the Respondent has not supplied the Tribunal with the special interests taken into account in compiling its party list under Article 177(1)(c) of the Constitution in line with the Court of Appeal's verdict in Commissioner for the Implementation of the Constitution v Attorney General [2013] eKLR requiring the list to contain purely special interests in*

the sense of those who have suffered marginalisation and disadvantage and have been kept away from the Centre of the political process.

19. *Furthermore, the Constitution recognizes Political Parties as fundamental instruments of governance with the public role of providing citizens with an avenue of realising their constitutionally guaranteed political rights. The Complainant having applied to be nominated it was important that she be given reasons for any decision reached. To decide without giving her reasons reeks of bad faith and opaqueness. The manner the Respondent conducts its affairs is fundamental to the health of the country's democracy and a critical contributor to the conduct of credible elections.*

In ***Mwalimu Ali Mwabwanga & 2 Others v Orange Democratic Movement & Another*** **Mombasa Complaint No E008 of 2022**, the Tribunal asserted:

16) *It is apparent from the information placed before us that the Petitioners did successfully apply for nomination to the ODM party nomination list for Kwale County Assembly.*

17) *As such the alleged removal and or change in the positioning in the said party nominations list should have been procedurally done, involved them and/or explained to them.*

9. Effect of an Order for Fresh Nominations

When a nomination exercise carried out by the party is nullified by the PPDT and a fresh nomination ordered, is it open to the party to use a different method to arrive at its candidate? On one hand, parties have argued that a fresh nomination does not mean a repeat nomination. Therefore, their discretion in choosing the method of nomination means that parties can choose a different method of nomination where the first exercise is nullified. This position was upheld by the Tribunal in ***David Ayoi v ODM & 2 Others*** **Nairobi A Complaint E047 of 2022,** where in the Tribunal's ruling on an application for contempt, the Tribunal ruled that the decision to issue a direct ticket, following a nullification of the first nomination exercise, was in consonance with the party nomination rules. This was because in the view of the Tribunal, upon the nullification of the first exercise, the said nomination ceased to exist in law. A fresh nomination could therefore proceed by issuance of a direct ticket. This position was upheld by the High Court on appeal in ***David Ayoi v Orange Democratic Movement & 4 others*** **(Nairobi High Court Civil Appeal E014 of 2022,** ***Jacob Ochieng***

Ogutu v Orange Democratic Movement & 2 others **Nairobi High Court Election Petition Appeal E274 of 2022** and in ***Oscar Oluoch Ouma v Independent Electoral & Boundaries Commission & 3 others*** **Homa Bay High Court Constitutional Petition 1 of 2022**.

On the contrary, in other decisions, the Tribunal deprecated parties for issuance of a direct ticket after the IDRM hearing a dispute and directing that a fresh nomination exercise be conducted. This was the position in ***Abrari Mohamed Omar v Kelvin Ondieki & 2 others*** **(Mombasa Misc. Application No. E002 of 2022**), ***Allan Ojuki Gordon v Moses J. Odhiambo Ochele & 2 Others*** **(Kisumu Complaint No. E021 of 2022**, ***John Andiwo Mwai v The National Election Board (ODM) & 2 Others*** **Nairobi A Complaint Number E019 of 2022 (Ruling)** & ***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **Nairobi A Complaint E053 of 2022.** In ***Geoffrey Otieno Opiyo &Orange Democratic Movement Party v IEBC*** **(Nairobi Complaint No. E012 of 2022)**, the Tribunal asserted that a decision to issue a direct ticket after nullification of the first exercise required that candidates be consulted and given a chance to be heard.

In fortifying this latter position, the High Court and Court of Appeal have asserted that a strict reading of s 38E of the PPA, which requires notification of the method to be used to both the Registrar of Political Parties and the members, means that when the exercise is nullified and a fresh nomination ordered, the party is mandated to use the same method to arrive at its candidate.

The High Court in ***Edwin Otieno Odhiambo v ODM National Elections Board & 3 others*** **Kisumu High Court Civil Appeal E043 of 2022** ruled that if the PPDT or the Court were to determine that a nomination process had to be repeated, the members would have a legitimate expectation that they would, once again, be empowered to choose the candidate who would then fly the party flag in the elections. Popularity of a candidate and strict timelines were therefore no excuse for issuance of a direct ticket rather than repeating the universal suffrage exercise (***Moses Odhiambo Ochele v Achan Ojuki Gordon & 2 others*** **Kisumu Civil Appeal No. E037 of 2022;** ***Zakayo Ongondo Oguma v Geoffery Otieno Opiyo & 3 others*** **Kisumu High Court Civil Appeal E034 of 2022).**

In ***ODM National Election Board & another v Gare & 2 others*** **(Civil (Election) Appeal E003 of 2022,** the Court of Appeal, while endorsing the High Court's finding in ***Moses***

Odhiambo Ochele v Achan Ojuki Gordon & 2 others **Kisumu Civil Appeal No. E037 of 2022,** ruled:

> 39. *In the end, it [PPDT] made an order directing the Elections Board of the party to conduct fresh nominations. Learned Senior Counsel Ojienda passionately urged us to find that there is a distinction between a repeat nomination and a fresh nomination and that the party would have only been obliged to conduct another nomination through universal suffrage had the Party Tribunal ordered for a repeat nomination.*
>
> 40. *We, however, think, with respect, that this is a distinction without a difference. The nomination exercise held on 13th April, 2022 for the Party's candidate for the position of member of county assembly for West Sakwa Ward was in regard to the forthcoming August 2022 election. Once it was found to have been botched, another nomination needed to be undertaken. As this would be a second exercise then it would at the same time be a fresh nomination because the nomination of 13th April, 2022 had been nullified by the Appeals Tribunal. …*
>
> 41. *We reach the conclusion that the exercise contemplated by the Party Tribunal was a repeat of the nomination exercise and we are unable to fault the learned Judge's holding that when the PPDT ordered for a fresh nomination by way of universal suffrage, it was in effect ordering a repeat election…*
>
> 44 *… The party had chosen that it would conduct party primaries in respect to the position for MCA for Sakwa West by way of universal suffrage. It was a promise to the Party members that it was the chosen method in respect to that position for the 2022 cycle of elections and the Party needed to keep the promise. The first exercise having been nullified, then it would be expected that the repeat exercise would be by the same method unless the Party demonstrated that it was impossible to do a repeat in the same manner because of some intervening circumstances and the notification required by section 38E had been made, something the appellants did not succeed in demonstrating even in the application for review.*
>
> 46 *… Rule 6(m) in the Code of Conduct for Political Parties made pursuant to section 6(2)(e) of the Act commands political parties to respect, uphold and promote democratic practices through free, fair and credible party nominations. To change the rules of the game in a repeat nomination without good reason and without roping in or even notifying the membership is inimical to this commandment…*

See also ***Loice Akoth Kawaka & another v Oscar Oluoch & 3 others*** **(Kisumu Court of Appeal Election Petition Appeal 168 of 2022.**

However, where a candidate who had participated in direct nomination by universal suffrage and thereafter resigns from the party to contest as an independent candidate, the party may use whatever method is consistent with its PNR and constitution to select its flagbearer (***National Elections Board, ODM v Kepher Ojil Odongo & Another*** **Civil Appeal E317 of 2022).**

Where the Tribunal nullifies nominations and makes an order for a fresh or repeat nomination exercise, a party cannot challenge the fresh or repeat nomination exercise by way of instituting contempt proceedings in the same cause that nullified the nomination (***Agnes Nailentei Shonko Wachira v John Njoroge Chege & Another*** **Nairobi A Complaint No. E020 of 2022;** ***Peter Migwi Gichohi & 3 Others vs. UDA & 3 Others*** **Nairobi A Complaint No. E022 of 2022)**. The correct procedure in such cases is to approach the IDRM of the party.

10. Appeal and Review Jurisdiction

Initially it was unclear whether a party's decision to engage the review mechanism under the PPDT of necessity ousts the right of appeal to the High Court. In ***Zachary Nyayiemi Moturi v Wiper Democratic Movement & Anor*** **Kisumu Complaint No E022 of 2022**, the Tribunal asserted

> *19. Although the 1st Respondent did not file an appeal against our Judgement, the 2nd Respondent did. The 1st Respondent has filed with us an application for Review. Review and appeal are inimical, hence the need for one to cede to the other. The jurisdictions, considerations and fora are also different, for good reason. Appeals revisit the merit of our decision, while review relooks the decision on the basis of new compelling information not available at the hearing. Consequently, it is our decision not to deal with the Application for Review in this matter until the High Court pronounces itself on the Appeal.*

The High Court in ***Edwin Otieno Odhiambo v ODM National Elections Board & 3 others*** **Kisumu High Court Civil Appeal E043 of 2022** asserted that once the 1st and 2nd Respondents had opted to seek review, it was not thereafter open to them to appeal against the decision.

However, from the Court of Appeal cases reviewed, it appears that there is still conflicting jurisprudence on whether a party that elects the review mechanism under the PPDT waives the right to appeal to the High Court. For the position that exploring an opportunity for review does not extinguish a party's right to appeal, see, ***Amani National Congress Party & 2 others v Shimenga & another*** **(Election Petition Appeal E001 of 2022) [2022] KECA 920,** (per Kiage, Mumbi Ngugi and Tuiyott JJA), and ***Multichoice (Kenya) Ltd vs. Wananchi Group (Kenya) Limited & 2 others*** **[2020] eKLR.**

However, the Court of Appeal had made a contrary finding in ***Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited*** **[2020] eKLR** (per Makhandia, Kiage & Otieno-Odek JJA), where a differently constituted bench asserted that once an appellant has demonstrated an intention to appeal by filing a notice of appeal, there was no room for review. The rationale for this finding was that the notice of appeal is treated as the appeal itself **(*Agnes Nailentei Shonko Wachira v John Njoroge Chege & Another* Nairobi A Complaint No. E020 of 2022)**.

11. Allocation of Pre-Election EDR Jurisdiction between the PPDT and IEBC

The PPDT and IEBC have concurrent jurisdiction relating to adjudication of pre-electoral disputes. The two institutions, through administrative arrangements, refinements in the statutory framework and judicial deference attempted to distribute this adjudicative mandate. The 2022 amendments to the PPA redefined the nomination framework and timeframes, making it more practicable for the two institutions to discharge their respective mandates.

The jurisdictional competence of the two institutions is also informed by the timeframes set out in the Elections Act. In practice, the PPDT's jurisdiction relates to disputes concerning party nominations and party list nominations, while the IEBC has jurisdiction over disputes that relate to or directly impact on the rights and abilities of party members and citizens to participate as candidates in the elections.

In delimiting the adjudicative mandate of the IEBC and PPDT in nomination disputes, two decisions are instructive. The position of the statutory provisions introduced by the 2022 amendments aligns with the decision in ***Moses Mwicigi v IEBC & 5 Others*** **Supreme Court Petition 1 of 2015.** In the ***Moses Mwicigi*** case, the Supreme Court asserted that the Constitutional mandate of the IEBC in relation to nominations only

extended to the settling of disputes relating to or arising from nominations. As such, the IEBC cannot adjudicate over election disputes and disputes subsequent to the declaration of election results. Neither can the IEBC adjudicate upon the nomination processes of a political party, as that is strictly within the province of a political party. In relation to the party list, the IEBC is only mandated to ensure that the list complies with the relevant laws and regulations. In ***Party of National Unity v Dennis Mugendi & 3 Others Nairobi High Court Election Appeal 1 of 2017,*** the High Court, citing the ***Moses Mwicigi*** case, found that the Constitution's intention was that only the IEBC would have jurisdiction to resolve disputes arising out of the IEBC level processes, and political parties were responsible for their own internal governance issues, with possible appeal to the PPDT and thereafter to the High Court.

The current position of the law is plausible since it clarifies the jurisdiction of the PPDT without ousting the constitutional provisions under Article 88(4)(e). The Tribunal upheld this delineation of roles in ***Victoria Zilla Ung'ai & another v Democratic Action Party-Kenya*** **Kakamega Complaint No. E021 of 2022.**

12. When Is PPDT Jurisdiction to Determine Nomination Disputes Extinguished?

While the PPDT may adjudicate disputes relating to party nominations and party list nominations, that jurisdiction stops once IEBC has cleared a political party nominee. There is however conflicting interpretation on whether the timeframes set out under Section 13 of the Elections Act effectively oust the jurisdiction of the PPDT. To best understand the evolution of the jurisprudence, we trace the decisions from the 2017 cycle to present.

See ***Gabriel Bukachi Chapia v Orange Democratic Movement & another*** **(Election Petition Appeal No 64 of 2017**); ***Eric Kyalo Mutua v Wiper Democratic Movement Kenya & another*** **(Election Petition Appeal No 93 of 2017**), para 10, where the High Court clarified that after the IEBC clears a nominee,

> *… there can be no change to that candidature. The only way there can be change is if there is death, resignation or incapacity of the nominated candidate, or if the nominated candidate has violated the electoral code of conduct.*

Also, ***Robert Oruko Otege v Orange Democratic Movement & 2 others*** **(Complaint** No 203 of 2017), para 9, where it is stated:

> *It is clear that once the Interested Party was cleared by the IEBC, jurisdiction over the present dispute passed over to the IEBC as stipulated under Article 88(4)(e) of the Constitution. It is therefore the view of this Tribunal that it is devoid of jurisdiction in the application before it.*

This position was endorsed in ***Joseph Ibrahim Musyoki v Wiper Democratic Movement- Kenya & Another,*** **Civil Appeal 203 of 2017,** where the Court of Appeal asserted that once a candidate's nomination has been accepted, the dispute shifts from a party dispute to a nomination dispute, falling within the jurisdiction of the IEBC.

However, a differently constituted bench made a contrary finding in ***Eric Kyalo Mutua v Wiper Democratic Movement-Kenya & another*** **Civil Appeal No.173 of 2017** (Nambuye, Musinga, Gatembu JJA), where the Court of Appeal asserted:

> 24. *Section 13 of the Elections Act on which the learned Judge relied provides for timelines within which a political party should nominate its candidates and the circumstances under which a political party may change the candidate nominated after the nomination of that person has been received by the IEBC. It does not, with respect, oust the jurisdiction of the PPDT or the court under Sections 40 and 41 respectively of the Political Parties Act to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked.*
>
> 25. *The decisions of the High Court in* ***Billy Elias Nyonje vs. National Alliance Party of Kenya and another (above) and John Pesa Dache vs. IEBC & another [2013] eKLR*** *to which we were referred do not, in our view, support the proposition advanced that the jurisdiction of the PPDT and the High Court to hear and determine disputes arising from nominations is ousted by Section 13 of the Elections Act. To that extent, the learned Judge of the High Court erred in concluding that the PPDT did not have jurisdiction over the matter by dint of Section 13 of the Elections Act.*
>
> 26. *That said, there is, undoubtedly, an urgent need for law reform with a view to providing a clear and orderly framework for resolution of disputes arising from or relating to nominations so as to avoid a conflict or clash of jurisdictions between the IEBC under Article 88(4)(e) of the Constitution and that of the PPDT under Section 40 of the Political Parties Act. To avoid parallel streams of adjudication of disputes arising from nominations that*

might lead to confusion and conflicting approaches and decisions, and for good order, perhaps the legislators might consider undertaking the necessary reforms.

In 2022, the PPDT upheld this position. See ***Kenya Council of Employment and Migration Agencies & Another v Hon. Hussein Dado & 3 Others*** **(Mombasa Complaint No. E001 of 2022,** ***Edwin Odhiambo v ODM National Elections Board & 2 Others*** **(Kisumu Complaint No E016 of 2022).**

However, in some cases, its interpretation of when their mandate ends was not the submission of the names to the IEBC, but rather whether the persons whose nomination is impugned have been cleared and gazetted to contest the said election. Until that has happened, the PPDT still has power to determine the dispute and have its orders complied with.

In ***Peter Kipkorir Lang'at v Zadock Kibet Kulel & 2 Others*** **Nairobi B Complaint E012 of 2022,** the Tribunal also asserted that its jurisdiction was not ousted by the submission of a candidate's name to the IEBC. While section 13(2) of the Elections Act bars a political party from changing the names of candidates once they have been submitted to the IEBC, the Tribunal found that the section does not bar the Tribunal from directing a political party to change a name after hearing a dispute and arriving at a determination requiring such orders.

In ***Samuel Kagwanja Muchunga v Nevil Chemuku Napwori & Tijubebe Wakenya Party*** **Nairobi A Complaint E061 of 2022,** the PPDT asserted as follows:

> 15. *Regulation 8(1) (supra) provides in part that a* ***complaint against the decision of an internal political party dispute resolution mechanism arising out of party primaries shall be filed with the Tribunal not more than fourteen days from the date of the decision , and in any case, at least one day before the day set aside by the Commission, for the submission of names of the party candidates who have been selected to participate in the general election pursuant to section 31 (2A) of the Elections Act.*** [Emphasis added]. *The important bit to note here is that the Regulation talks of filing a complaint at least one day before the deadline for submission of names to the IEBC. This dispute then takes its life before the Tribunal before it is eventually determined and a decision is delivered.*

16. *Though it is prudent and only right for a party to seek interim orders to safeguard his/her interests in a ticket, the unspoken inference of requiring that a complaint be filed at least a day before the names are submitted is that this filing of a dispute puts the challenged party's name in abeyance until the dispute is determined by the Tribunal. Otherwise, if the law was that a name cannot be changed after submission even by an order of this Tribunal, then Parliament would have expressly worded Regulation 8 (1) to require the* ***Tribunal to hear and determine a dispute at least a day before names are submitted to the IEBC.***

17. *On the face of the provisions, addressed hereinabove we have no doubt that the PPDT is clothed with the power to deal with disputes arising from nomination…*

18. *In the instant case, this is a dispute arising out of nominations and the case at hand is certain that names have been submitted to the IEBC. However, the said names are yet to be cleared and gazette [sic], and as such we make a finding that we have jurisdiction to handle this particular matter.*

See also ***David Ayoi v ODM & 2 Others*** **Nairobi A Complaint E047 of 2022,** para 43.

The finding of the High Court in ***Jubilee Party of Kenya v Ouma; Gichangi & another (Interested Parties)*** **(Election Petition Appeal E327 of 2022) [2022] KEHC 10490 (KLR),** ***Nick Evance Okoth Ochola v Ted Marvin Odhiambo & 3 others*** **Nairobi High Court Civil Appeal E384 of 2022** and ***Odongo v Murimi & another*** **(Civil Appeal 72 of 2022) [2022] KEHC 10742** appear to support this position as it was to the effect that until the IEBC has gazetted a candidate, the orders of the PPDT were still valid.

27 *…No evidence was tendered that IEBC has since gazetted the 1stInterested Party to contest for the MCA seat for Umoja 1 Ward following the submission of his name by the Appellant. As such, the court orders and directs the Appellant to comply with the PPDT orders and decree with immediate effect…*

Moreover, the High Court in ***Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 others; Independent Electoral & Boundaries Commission (Interested Party)*** **(Civil Appeal E314 of 2022**) found an inconsistency between the Political Parties Disputes Tribunal (Procedure) Regulations 2017 and the Elections Act. While Rule 8 provides that a dispute arising out of a party nomination must be determined no later than a day before the day determined by the IEBC for submission

of names of party candidates (nomination), s 31 (2A) of the Elections Act allows for dispute resolution to run up until 60 days before the elections. The Tribunal could thus not be divested of jurisdiction under Rule 8 of the Procedure Rules.

However, the position in the ***Joseph Ibrahim Munywoki*** case was adopted by the Court of Appeal in 2022 in ***Ochola v Odhiambo & 2 Others; IEBC (Interested Party)*** **Civil Appeal E389 of 2022** and ***Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others*****, Civil Appeal No E326 of 2022**. The preponderance of the jurisprudence now appears to be that the PPDT jurisdiction is ousted upon acceptance of a candidate's nomination papers by the IEBC.

See also ***Edwin Odhiambo v ODM National Elections Board & 2 Others*** **Nairobi Complaint No E016 of 2022,** para 42; ***Johnson Oduk Oginga v Orange Democratic Movement National Elections Board & 2 Others*** **(Nairobi A Complaint No. E097 of 2022)**

However, the Tribunal retains the jurisdiction to entertain applications for contempt of its orders even after the submission of the names of party candidates to the IEBC. In John Andiwo v The National Elections Board of the ODM and Others Nairobi A PPDTC E019 of 2022, the Tribunal held that:

> *… our view is that the timelines set out there in [in Regulation 8(4) PPDT (Procedure) Regulations] refer to the filing of the complaint or original action and not enforcement or post judgement applications. In other words, an application is a continuum of the suit filed, and cannot, therefore, be time barred when the originating action has been timeously commenced.*

See also ***John Ombawa Gare v ODM National Elections Board & 2 Others Kisumu Complaint E017 of 2022.***

13. Due Process in Disciplinary Processes/Expulsion of Party Members

While party leadership retains the right to discipline errant members for violations of party rules, it is imperative that fair trial guarantees be complied with in the processes employed by the party in disciplining, suspending or expelling a member. A

member of a political party can only be suspended or expelled from its membership after he/she has been afforded a fair hearing in accordance with the political party's Constitution or Rules (Section 14B, Political Parties Act; (***Hon. Aisha Jumwa Katana v ODM*, PPDT Complaint No. 1 of 2019**; ***Hon. Ann Muthoni Thumbi & 2 Others v Jubilee Party; Raphael Tuju, Acting Secretary General Jubilee Party & 2 Others (Interested Party)* Complaint No E004 of 2020** and ***Hon Isaac Mwaura Maigua v Jubilee Party & 3 Others*, Nairobi High Court Civil Appeal No. E248 of 2021**). This includes the right to be furnished with reasons for the decision of the disciplinary body (***Godfrey Osotsi v Amani National Congress* Complaint No E004 of 2021; *Hon. Jeremiah Nguyu Kioni v Jubilee Party & Another* Complaint No. E009 of 2023).**

A disciplinary process must commence via a clearly laid out process which leaves no doubt in the mind of the participants as to what is going on (***Senator Mary Yiane & 4 Others v Jubilee Party & Another* PPDT Complaint No E003 of 2021**). Parties must also be accorded all the information relating to the charges against them and sufficient time to mount a defence (***Hon. Aisha Jumwa Katana v ODM*, PPDT Complaint No. 1 of 2019**; ***Hon. Ann Muthoni Thumbi & 2 Others v Jubilee Party; Raphael Tuju, Acting Secretary General Jubilee Party & 2 Others (Interested Party)* Complaint No E004 of 2020; *Hon. Jeremiah Nguyu Kioni v Jubilee Party & Another* Complaint No. E009 of 2023).**

In determining whether disciplinary processes were conducted in accordance with the law, the Tribunal will assess whether the processes required to be carried out in the party constitution are adhered to. In ***Senator Mary Yiane & 4 Others v Jubilee Party & Another* PPDT Complaint No E003 of 2021,** the Tribunal found it instrumental to the validity of the proceedings that a proper charge sheet and summons be issued prior to the decision of the National Delegates Conference. Since the expulsion of a person from a party has serious implications, where an entity such as a political party outlines a clear process, more so the manner in which its membership will become aware that such a serious process has been initiated against them, then such a process needs to be clearly initiated. Where there is no proper initiation of the disciplinary process, it cannot be adopted or ratified.

Changes in the leadership of the political party will also not be effected where due process is not followed. (***Alexander Gitonga Nyaga & 6 Others v Registrar of***

Political Parties; Chama Cha Uzalendo (Interested Party) **PPDT Appeal Number 4 of 2019**; ***Chrispinus Barasa v Moses Masika Wetangula & 3 Others; Forum for the Restoration of Democracy – Kenya (Interested Party)*** **Complaint No. 19 of 2020**). In considering whether there were changes in the leadership of a party, the Tribunal will have recourse both to the minutes of party meetings and resolutions as well as a record of change of particulars as held with the ORPP as initiated through a Notice of Change of Party Officials (Form PP7).

Where the decision-making body is not properly constituted as per the party constitution, its resolutions cannot be upheld (***Hon. Aisha Jumwa Katana v ODM*****, PPDT Complaint No. 1 of 2019;** ***Hon. Jeremiah Nguyu Kioni v Jubilee Party & Another*** **Complaint No. E009 of 2023**).

PART 1:

PPDT DECISIONS

A. DISPUTES RELATING TO PARTY DISCIPLINARY PROCESSES/EXPULSION FROM A PARTY

A. Annastercia Mukhoya Munyendo v The Party of National Unity & 4 Others; The Registrar of Political Parties & Another (Interested Parties) Complaint No. 6 of 2019 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Desma Nungo, Hon. Dr Adelaide Mbithi

8th October 2019

Summary of Facts

The Claimant was aggrieved by the procedure adopted by the Respondents and 2nd Interested Party and overseen by the 1st Interested Party claiming that it was done contrary to party laws and procedures. The Claimant contended that no election of national officials was actually conducted. She asserted that what happened was a boardroom selection process and that it was impossible to determine whether the persons who participated in the said impugned process were actually party members as the delegates list was not updated. Thus, there was no process of verification of attendees, given that the 4th Respondent, a stranger, was in attendance. The Claimant submitted that it had sought to resolve the matter internally in line with the provisions of the PPA and presented:

1. Letters addressed to the Registrar of Political Parties objecting the Gazette Notice assigning various positions in the National Executive Committee.

2. The Claimant's handwritten communication addressed to the Chairperson NEB PNU declining appointment of the position of Secretary for Health, Housing and Social Services.

The 1st, 2nd and 5th Respondents argued that the claim was premature since party rules required that such a dispute be referred to arbitration first. The 3rd and 4th Respondents supported the objection raised and added that the letters the Claimants relied on were addressed to the 1st Interested Party and not to the party leadership or officials. The Respondents also argued that the 4th Respondent was not a member of the 1st Respondent and thus could not be included in the complaint. Further, it was contended that the 5th Respondent (PNU NEB) was not a recognized legal entity capable of being sued.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine the matter.
2. Which counsel was properly on record for the 1st Respondent.
3. Whether the affidavit sworn by Joy Onyango ought to be expunged.
4. Whether the election of 24th May 2019 was conducted in accordance with the law and orders of the Tribunal in Complaint 3 of 2018.
5. What were the appropriate reliefs to grant.

Held:

1. On jurisdiction, the Tribunal noted that Section 40 (1) of the Political Parties Act is to the effect that the Tribunal is a specialised organ with limited jurisdiction over clearly defined persons. The Tribunal noted that there was no objection to the fact that the 4th Respondent was not a member of the political party in issue. The 5th Respondent on the other hand was an organ of the party with no capacity to sue or be sued; a fact that was not objected to either. In the circumstances, the Tribunal held that it had no jurisdiction to determine the complaint against the 4th and 5th Respondents.

2. Further on the issue of jurisdiction, the Tribunal noted that section 40 (2) of the PPA barred it from handling a dispute that was yet to be subjected to IDRM. Also, the 1st Respondent's Constitution required a discontented member to invoke an arbitration process. The Tribunal noted that the letters and communication the Complainants relied on did not make any request for arbitration or any such invocation. The letter only made an objection to the Gazette Notice and the communication only declined an appointment. Accordingly, the Tribunal had no jurisdiction to hear and determine the complaint.

Orders

1. The complaint was dismissed for want of prosecution
2. In the interest of party unity, no order as to costs.

Caleb Kositany & 3 Others v Raphael Tuju, Acting Secretary General, Jubilee Party & Another; Jubilee Party & Another (Interested Parties) Complaint No. 8 of 2020 (Ruling)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

15th May 2020

Summary of Facts

The Respondents and the Interested Parties had filed notices objecting to the jurisdiction of this Tribunal to hear and determine the Complaint. The 2nd Respondent submitted that the dispute had not been referred to IDRM pursuant to Section 40 (2) of the Political Parties Act (PPA) and thus the Tribunal had no jurisdiction to hear and determine the same. Further, it was urged that the complaint was premature and speculative as the processes under section 20 of the PPA on change of party officials had not been concluded and as such the complaint was pre-empting the outcome of a decision.

The Complainants submitted that the preliminary objections raised were not proper as facts in the instant case had to be ascertained and the factual issues expressed could not be dealt with in a preliminary objection. Further, it was argued that the dispute at hand had been brought to the attention of the 2nd Interested Party who, vide a letter dated 16th April 2020, recognized the existence of a dispute and referred the matter back to the party to undertake IDRM. The Complainants wrote a letter to the party calling on it to address their grievances in vain and that the Respondents could not benefit from the failure to undertake IDRM which failure had been occasioned by them. With respect to Section 20 of the PPA, the Complainants submitted that the same presupposes change of officials commenced by the party. It was submitted that the complaint was very express on content, that no organ of the party had sanctioned the process before it moved to the 2nd Interested Party. Further, it was contended that there has never been a meeting of the organ of the party since 2017. It was further submitted that section 20 did not prohibit judicial interventions to forestall blatant violations of the law and the party constitution.

Issues for determination

The sole issue for determination was whether the Tribunal had jurisdiction to hear and determine the matter.

Held:

1. The Tribunal noted that the preliminary objection contained factual issues that had to be ascertained and therefore did not consist of pure points of law. In the circumstances, therefore, the preliminary objection in respect of section 40 (2) of the PPA failed on this account.

2. On whether the complaint was premature, the Tribunal noted that it was uncontested that the procedure relating to change of officials of the 1st Interested Party was under the stage provided for under section 20 (3) of the PPA and the prerequisite 14 days period prescribed therein was yet to lapse. Further, the 1st Interested Party was yet to notify the 2nd Interested Party of its decision under Section 20 (3A).

3. The Tribunal's interpretation of Section 20 (3) of PPA was to the effect that prior to effecting changes, which changes had to be in accordance with the constitution and rules, the 2nd Respondent was required to first take into account representations and/or objections received. In essence, the processes under section 20 (3) of the PPA afforded the complainants an opportunity to raise their grievances, subject of this dispute, for the party's consideration. Therefore, the party still had time to consider the grievances of the complainants prior to making a notification of its decision to the 2nd Interested Party.

4. Accordingly, the Tribunal was not properly placed at that stage to conclude that the party should not address the complainants' grievances prior to communicating its final decision to the 2nd Respondent. In the absence of exceptional circumstances, parties could not proceed to the court system until the administrative process has run its course. [see ***Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 31, [2011] 2 FCR 332**]. Similarly in the case of ***Northern Cross (Yukon) Limited v Canada* (Attorney General), 2017 FC 622, 2017 CarswellNat 2962 [Northern Cross]**], the general principle is that courts will be hesitant to intervene where an administrative decision is not yet finalised.

Orders

1. The Complaint was premature and was thus struck out.
2. Each party to bear its own costs in the interest of party unity.

Chrispinus Barasa v Moses Masika Wetangula & 3 Others; Forum for the Restoration of Democracy – Kenya (Interested Party) Complaint No. 19 of 2020 (Judgement)

Hon. Desma Nungo, Hon. Paul Ngotho, Hon. Dr Adelaide Mbithi, Hon. Milly Lwanga Odongo

12th November 2020

Summary of Facts

The Complainant was a member of the Interested Party (Ford Kenya) and was concerned with the manner in which party business was being conducted. The Claimant contended that in contravention to the party constitution, the 1st Respondent purported to convene a National Executive Committee Meeting with no proper notice being issued by the substantial Secretary General of the Interested Party. That, the alleged meeting proceeded without the requisite quorum and un-procedurally purported to convert itself into a process for the replacement of party officials. The Complainant further contended that while he tried to invoke the party IDRM, the Respondent made it impractical for IDRM to be operationalized in the face of the prevailing circumstances giving rise to confusion within the Interested Party.

The Respondent and the Interested Party contended that the Tribunal did not have jurisdiction to hear and determine the Complaint as no party IDRM had been invoked. Further, that the complaint was baseless, misconceived and ought not to be entertained since the substantive orders sought related to actions and decisions of the Interested Party who should have been cited as the Respondent in the proceedings. That there was no order sought against the Respondents who only acted on behalf of the Interested Party. The Respondents argued that the Complaint was premature since the General Council was yet to be instituted to deliberate on the expulsion of some members of the interested party.

Issues for determination

1. Whether the matter ought to be subjected to IDRM.
2. Whether the purported NEC meeting and all the consequential decisions emanating therefrom ought to be declared null and void.

Held:

1. On the first issue, the Tribunal found that there were contested facts that required to be ascertained and it accordingly held that there were not proper preliminary objections in law. The Tribunal noted that on the one hand the Complainant claimed that it would have been impractical to constitute a proper NEC meeting to constitute IDRM holding that the party organs had not been fully functional given the issues the leadership had been facing. On the other hand, the Respondents maintained that there was a proper NEC in place. It was thus evident from the Party's pleadings that there was confusion within the party leadership. The Tribunal held that to remove the matter from itself and refer it to the party IDRM would presuppose that the current position of the party would have allowed for such a process to proceed procedurally and in the interest of justice to all parties.

2. As regards the prematurity of the Complaint, the Tribunal held that the Complaint was challenging the illegality of a meeting that had already happened and the Respondents argument that the complaint was premature for the reason that the general council was yet to be constituted to sanction any expulsion discussed in the said meeting was beside the point.

3. The Tribunal thus found on a balance of probabilities that the Complainant invoked IDRM prior to filing the action and that it was the party that failed and/or was unable to operationalize its IDRM. Therefore, the Complainant could not be faulted for moving the Tribunal in pursuit of justice.

4. On issue (b), the Tribunal noted that the notice of the NEC meeting was improper as it was signed by persons who did not have the delegated authority to do so under the party constitution. As regards the quorum of the meeting, the Respondents and Interested Party produced the subject list of attendees but strangely did not produce the minutes of the said meeting. Further, the Claimant made factual averments in its Affidavit that the quorum requirement was not met; which averments were not challenged or controverted by either the Respondent or the Interested Party. In the circumstances, the Tribunal held that on a balance of probabilities, the requisite quorum requirement was not met thus rendering the meeting void.

Orders

1. The Complaint had merit.
2. The purported NEC meeting and resultant resolutions were null and void.
3. Costs awarded to the Complainant against the Respondents and Interested Party jointly and severally.

David Eseli Simiyu v Moses Masika Wetangula & 3 Others; Forum for the Restoration of Democracy-Kenya [Ford Kenya] (Interested Party) Complaint No E008 of 2021 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

10th June 2021

Summary of Facts

The Complainant was aggrieved by an article in the Star newspaper of 15th February 2021 which stated that the Interested Party's 'Management Committee' held a meeting and allegedly appointed interim officials to positions of National Youth League Leader and member for county co-ordination in the National Executive Committee until a National Delegates Conference (NDC) could be held. The Claimant, although noting that the Respondents and the Interested Party had made it clear that the purported appointments it contested had actually not happened, sought that a determination be issued by the Tribunal that the roles were never assumed.

The Respondents and the Interested Party averred that there was no proper claim before the Tribunal in the first place and that the Complainant should have demanded information from the party before filing the complaint. Further, that the Complainant had not in the first instance explored the party IDRM.

Issues for determination

1. Whether the Tribunal had jurisdiction.
2. Whether the Tribunal ought to make a declaration when no appointments had been made as adduced in the complaint.
3. Whether costs should be awarded to the Respondents and the Interested Party.

Held:

1. On jurisdiction, the Tribunal noted that the Complainant was silent on IDRM. There were no depositions that any attempts at IDRM were made, or any frustrations or challenges encountered or likely to be encountered in invoking IDRM pursuant to the party constitution. Therefore, the Tribunal held it could only assume jurisdiction where it is demonstrated that efforts at invoking IDRM were frustrated and thus jurisdiction could not vest in the tribunal.

2. Each party was directed to bear its own costs.

Dr. Angela Mwikali Nyalita v Miruru Waweru & 2 Others
Complaint No. 3 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

8th June 2020

Summary of Facts

The Claimant averred that she was the duly elected Deputy Party Leader of the Thirdway Alliance Kenya (the 3rd Respondent). The Claimant averred that the 3rd Respondent was engaged in a popular constitutional amendment initiative dubbed 'Punguza Mizigo initiative' that passed the first stage of securing signatures from valid voters, but failed to secure the requisite support at the county assemblies' level. This failure forced the party members to retreat and re-strategize on the way forward, particularly following the instigation of the Building Bridges Initiative (BBI); an initiative that was deemed to precede a constitutional amendment process.

The Claimant requested a meeting to discuss among others the Punguza Mizigo Kenya new launch. During this meeting the 3rd Respondent refused to respond to issues and instead became arrogant, dismissive and insulting. She found offence and walked out of the said meeting. She was later removed from the 3rd Respondent's WhatsApp groups effectively cutting out her link to any communication on the 3rd Respondent's affairs. Upon making a call complaining to the 2nd Respondent, she was assured that the said removal was an emotional act by the 1st Respondent and was not an act in his official capacity and it was on this call she was informed of an NEC meeting that had been convened through the WhatsApp group to discuss the 3rd Respondent's conduct.

The Claimant, being dissatisfied with the manner in which some party affairs were being conducted, filed a constitutional petition. On 25th February 2020, her advocates on record in the constitutional petition received a letter from the Office of the Registrar of Political Parties, forwarding communication from the 3rd Respondent purporting to remove her from office. The Claimant contended that there had neither been any communication from the Respondents on her expulsion nor reasons given to her in relation to the expulsion. Further, she had neither been informed of any complaint

against her nor did she appear before any disciplinary bodies created as prescribed under the 3rd Respondent's constitution.

The Respondents submitted that though they had suspended and subsequently dismissed the Claimant from the party for gross misconduct and for publicly contravening the party's position on national issues, she had been reinstated back into her position in the interests of forging party unity and prosperity. Therefore, they prayed that the Tribunal mark the claim as settled with no orders as to costs

Issues for determination

1. Whether the alleged dismissal of the Claimant was unlawful.
2. Whether the legality of the alleged dismissal was rendered moot by the subsequent reinstatement.
3. What relief, if any, should be granted.

Held:

1. The Tribunal noted that there was an administrative action which the Claimant submitted was tainted with illegality. Subsequently, a second action was taken purporting to reinstate the Claimant as a member and official of the political party. The Tribunal, placing reliance on Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, held it had jurisdiction to grant relevant review orders.

2. The Tribunal noted that the 3rd Respondent's constitution provided at Section 14.1 that all party members were to be treated equally before the law and be disciplined in accordance with the provisions of the 3rd Respondent's constitution. At section 6.6, it provided that notice of a special NEC meeting, such as the one that purported to expel the Complainant, had to be issued at least 7 days prior; which was never done. Further, at Article 25, it set out the IDRM mechanism which provided room for participation by a person against whom a complaint has been lodged. It was clear that the rules and processes outlined by the political party were not adhered to.

Orders

1. The purported process, expulsion and removal of the Claimant from the party vide a special NEC meeting was illegal, null and void.

2. That the Respondents actions did not adhere to the laws, rules and regulations of the party as is required of it by law

3. In the interests of party unity, each party to bear its own costs.

Hon. Michael Njeru & 2 Others v Jubilee Party Complaint No. 10 of 2019 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga, Hon. Paul Ngotho, Hon. Dr Adelaide Mbithi

21st February 2020

Summary of Facts

The Complainants pleaded that on 13th November 2019, the Respondent made adverse decisions against the Complainants to the effect that the 1st Complainant be removed from the position of Leader of Majority, County Assembly of Embu and that the 2nd and 3rd Complainants be de-whipped from all House Committees for a period of three months.

The Complainants challenged the disciplinary process on the grounds that they were members of the County Assembly and that they were acting in exercise of their constitutional and statutory mandate of oversight under Article 185 of the Constitution. The Respondents on the other hand argued that it had powers to discipline the Complainants provided for under the party Constitution, Articles 91 and 92 of the Constitution and the Political Parties Act ("the PPA").

The Complainants further argued that the decisions were made by a Dispute Resolution Committee, (DRC) which purported to sit as a disciplinary committee, contrary to the Party's constitution. Further, the decisions were made without any evidence in support of the complaint that the Embu County Revenue Collection System had been shut down as a result of the Complainants' actions yet the resolution on revenue collection issue was made by the County Assembly. Moreover, it was asserted that the decisions were a direct affront to the independent statutory mandate of the Complainants as constitutional office holders.

The Respondent maintained that the decisions made against the Complainants were arrived at lawfully and in accordance with the provisions of the Respondent's constitution. According to the Respondent, the Complainants were accorded an opportunity for a fair hearing, and the Complainants submitted themselves willingly before the committee and participated without raising any queries. The Respondent

further stated that the position of leader of majority is a political position based on nomination through party ticket and that the 1st Complainant falls under the disciplinary jurisdiction of the party.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine the Complaint.
2. Whether the Complainants could be subjected to disciplinary action by the Respondent.
3. Whether the Complainants were subjected to a disciplinary organ recognized by the Party Constitution.
4. Whether the disciplinary proceedings were conducted in accordance with the party's constitution and the rules of natural justice.

Held:

On the first issue, the Tribunal noted that it was neither disputed that the instant dispute was between members of a political party and a political party nor that an internal dispute resolution mechanism was resorted to prior to the filing of these proceedings in accordance with Section 40 (2) of the Political Parties Act ("the PPA"). The Tribunal thus found that it had the jurisdiction to hear the matter.

1. On the second issue, the Tribunal quoted Article 185 and 91 (1) of the Constitution and opined that the constitutional and statutory underpinnings therein exist to promote national values and principles of good governance and that all parties are enjoined by the Constitution to uphold the same. The Tribunal thus disagreed with the Complainants position that the disciplinary processes amounted to an affront to the oversight constitutional mandate of members of the county assembly. The Tribunal stated that it was not convinced the constitutional or statutory offices that the Complainants held shielded them from the political party disciplinary mechanism, provided that the same were conducted in adherence to the law.

2. On the third issue, the Tribunal noted that the disciplinary organs established under the Respondent's Constitution were the County Disciplinary Committee (CDC) and the National Disciplinary Committee (NDC), with the CDC having the jurisdiction to hear and determine matters relating to or concerning discipline in

the party within the county. The Tribunal quoted the case of ***Republic vs Chuka University ex-parte Kennedy Omondi Waringa & 16 Others*** **[2018] eKLR**, where it was held that a tribunal or administrative body that makes its own rules must be prepared to adhere to those rules regulating the execution of its business and where it failed to do so, then the Court would not hesitate to intervene to declare the actions or failure to adhere to those rules ultra vires.

3. The Court further placed reliance on the case of ***Hon. Aisha Jumwa Katana vs ODM & Another*** **PPDT Complaint No. 1 of 2019** where it was held that while the Tribunal appreciated the right of political parties to discipline their members as protected under the provisions of the PPA, the process must be procedurally fair and according to the constitutional and statutory enactments,` especially where the results of the process would adversely affect the rights and fundamental freedoms of the person against whom administrative actions and decisions are taken.

4. The Tribunal thus held that the Complainants' disciplinary cases were not subjected to a constitutional disciplinary organ within the meaning of Article 13 of the Respondent's constitution. Accordingly, the DRC proceedings and consequential decisions were declared a nullity.

5. Having found that the decisions of the Respondent were a nullity, the Tribunal found no need to proceed with analysis and determination of the rest of the issues as framed.

Orders

1. An order setting aside and vacating the entire decision(s) made by the Respondent that the 1st Complainant be removed from the position of leader of Majority, County Assembly of Embu and further that the 2nd and 3rd Complainants, be de-whipped from all House Committees for three (3) months.

2. That the disciplinary matter relating to the Complainants' conduct be referred back to the Respondent to undertake a fresh disciplinary process in accordance with the Party Constitution and as guided by the judgement of the Tribunal

3. Each party to bear its own costs.

Francis Kaindi Kaesha v Hon. Paul Matuyia & 10 Others; The County Assembly of Kajiado & Another (Interested Parties) Complaint No. 9 of 2019 (Ruling)

Hon. Kyalo Mbobu, Hon. Desma Nungo, Hon. Paul Ngotho

19th November 2019

Summary of Facts

It was the Respondent's submission that the Tribunal had no jurisdiction for non-compliance with Section 40 (2), the requirement for Internal Dispute Resolution Mechanism (IDRM). In order to meet the jurisdictional objection, the Complainant alluded to a letter dated 1st August 2019 written by the ODM Secretary General complaining that there were manoeuvres to remove him from office as the minority leader. He was eventually replaced on 5th September 2019.

Held:

1. The Tribunal held that the Complaint made on 1st August 2019 was a different matter from what came to pass on 5th September 2019. There was a need to challenge his removal after 5th September 2019 through the ODM IDRM process. The Complainant was put to task on the omission. He had no answer for the challenge, save to say that he had been pursuing the matter with ODM informally.

2. Accordingly, the Tribunal held that the Complainant had not satisfied the IDRM requirement of Section 40 (2) of the Political Parties Act. That being the case, the Tribunal lacked jurisdiction.

Orders

1. The notice of motion and complaint were dismissed.
2. No orders as to costs.

Fredrick Tsombe Okango v Miruru Waweru & 2 Others
Complaint No. 4 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

9th June 2020

Summary of facts

The Claimant averred that on 22th September 2018, he was duly elected as the Secretary-General of Thirdway Alliance Kenya (the 3rd Respondent). The Claimant averred that the 3rd Respondent was engaged in a popular constitutional amendment initiative dubbed 'Punguza Mizigo initiative' that passed the first stage of securing signatures from valid voters but failed to secure the requisite support at the county assemblies' level. This failure forced the party members to retreat and re-strategize on the way forward particularly following the instigation of the Building Bridges Initiative (BBI).

The Claimant contended that it was brought to his attention, by third parties on social media platforms, that there were minutes of a purported disciplinary National Executive Council (NEC) meeting held on 28th January 2020 and a letter dated 28th January 2020 suspending him as the 3rd Respondent's Secretary-General and that the purported notice of suspension had been executed by the 1st Respondent.

Later, on 25th February 2020, his advocates received a letter dated 24th February 2020 from the Office of the Registrar of Political Parties forwarding communication from the 3rd Respondent of the purported expulsion of the Claimant by the 3rd Respondent. The Claimant contended that there had neither been communication from the Respondents on his expulsion nor reasons given to him in relation to the expulsion. Further, he had neither been informed of any complaint against him nor did he appear before any disciplinary bodies created as prescribed under the 3rd Respondent's constitution.

The Respondents submitted that though they had suspended and subsequently dismissed the Claimant from the party for gross misconduct and for publicly contravening the party's position on national issues, he had been reinstated back to his position as a party member and Secretary-General of the party in the interests of forging party unity and prosperity. Therefore, they prayed that the Tribunal mark the claim as settled with no orders as to costs.

Issues for determination

1. Whether the alleged dismissal of the Claimant was unlawful.
2. Whether the legality of the alleged dismissal had been rendered moot by the subsequent reinstatement.
3. What relief, if any, should be granted.

Held:

1. The Tribunal noted that there was an administrative action which the Claimant submitted was tainted with illegality. Subsequently, a second action was taken purporting to reinstate the Claimant as a member and official of the political party. The Tribunal, placing reliance on Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, held it had jurisdiction to grant relevant review orders.

2. The Tribunal noted that the 3rd Respondent's constitution provided, at Section 14.1, that all party members were to be treated equally before the law and be disciplined in accordance with the provisions of the 3rd Respondent's constitution. At section 6.6, it provided that notice of a special NEC meeting, such as the one that purported to expel the Complainant, was to be at least 7 days; which was never done. Further, at Article 25, the constitution set out the IDRM mechanism which provided room for participation by a person against whom a complaint has been lodged.

3. The Tribunal held that in the circumstances, the reinstatement, though noted, did not overshadow the illegal, irrational and procedurally improper disciplinary process that resulted in the removal of the Claimant from a position he rightly held.

Orders

1. The purported procedure and resultant suspension of the Claimant as the Secretary General and subsequent dismissal of the Claimant from the party vide a special NEC meeting held on 28th January 2020 and 3rd February 2020 respectively was illegal, null and void.

2. Each party to bear its own costs in the interest of party unity.

Godfrey Osotsi v Amani National Congress Complaint No 4 of 2019 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Dr Adelaide Mbithi

16th August 2019

Summary of facts

The Respondent, through its Acting Secretary-General, wrote to the Speaker of the National Assembly on 19th March 2019, advising him that the Complainant had been expelled from the Respondent. That information was simultaneously relayed to the Registrar of Political Parties and media houses and on 13th May 2019, the Registrar of Political Parties proceeded to remove the complainant from the Register of the Respondent's members.

The Complainant challenged the Respondent's decision to expel him from the Respondent political party for failure to comply with the principles of fair administrative action and fair trial as prescribed by the Constitution and the Fair Administrative Action Act. He asserted that the audit report, which the Respondent alluded to as the basis for the impugned disciplinary proceedings and his consequential expulsion, were not only fraudulently obtained, but they also violated his right. He contended that since the Auditor-General had since disowned the audit report, the decision to expel him was actuated by an illegality or fraud and was accordingly null and void. The Complainant further contended that there was actual and perceived bias, seeing as the disciplinary committee and National Executive Council were conflicted in the matter and predisposed to make adverse findings against the Complainant.

The Complainant contended that he was not supplied with a complaint signed by the National Executive Committee (NEC) before the decision was taken. Further, it was his assertion that he was not supplied with a copy of the ruling setting out the reasons for his expulsion. As a result, he was deprived of his right to meet his accusers before the impugned decision was taken and of his right to promptly challenge the same.

The Respondents contended that the Complainant had mishandled the party finances and caused the Auditor-General to raise concerns with the Respondent's accounts. When they called this to the attention of the Complainant, he refused and/or failed

to avail himself at the IDRM despite numerous opportunities being presented to him to do so.

It was their position that the decision to expel and the reasons were communicated to the Complainant in a letter dated 19th March 2019, whereafter the Respondent commenced the process to have the Complainant deregistered at the Office of the Registrar of Political Parties. The Respondent maintained that the NEC decision was arrived at judiciously and legally, having given the Complainant sufficient opportunity to avail himself to NEC and offer his side of the story. It was their position that the Complainant was not in any event expelled on the grounds of financial misappropriation, but that the Disciplinary Committee expelled him on the ground of indiscipline and misconduct under Articles 50 and 51 of the Respondent's constitution for disobeying the summons and engaging in what the Respondent deemed utterly disruptive and disrespectful ways.

Issues for determination

1. Whether the Respondent's impugned decision was based on procedural impropriety and an abuse of the process and therefore an illegality.

2. Whether there was actual and perceived bias on the part of the Respondent in rendering its impugned decision.

Held:

1. From a scrutiny of the party constitution, minutes of the disciplinary committee proceedings of 6th March 2019 and correspondence tabled before the Tribunal, several things could be deduced: that the party laws did not expressly state that were no written response was received from a member facing disciplinary proceedings, that the member was to be excluded from the rest of the process; that the spirit of the Respondent's constitution inferred that the right to a fair hearing would be upheld; and the letters inviting the Complainant to meetings merely made reference to party meetings, not the disciplinary proceedings and were mostly dated in 2018, which was before the institution of the disciplinary process. The communication calling attention to the disciplinary committee was dated January 2019. Nothing was tabled to show that the Complainant was ever

invited to be a part of that process. In the circumstances, there was no reason why the Complainant was not invited to attend the Disciplinary Committee proceedings, notwithstanding that he did not present his written response to the allegations made against him.

2. On the right to a fair hearing, the Tribunal found that from the record, there seemed to be no reasoned decision, but only a record of the purported disciplinary proceedings and verdict dated 19th March 2019 signed by the Disciplinary Committee. The Tribunal agreed with the Complainant that the right to be supplied with a decision under section 5 (1) (d) and 6 (1) of the Fair Administrative Action Act was a substantive right intended to determine whether the decision was made in compliance with the law and to facilitate the right to review or appeal.

3. The Respondent had submitted that the Complainant was expelled on the grounds of indiscipline and misconduct for disobeying summons. However, in the Respondent's decision, none of these reasons were listed as reasons for expulsion of the Complainant. The Respondent therefore appeared to be coming up with reasons post the impugned decision. Citing the decision in ***R v Firearms Licensing Board and 3 Others ex parte Julius Okeyo Owidi*** **[2018] eKLR** which cited with approval ***South Bucks District Council & Another v Porter*** **[2004] UK HL 33,** the Tribunal found that the Respondent's impugned decision was based on procedural impropriety and abuse of process.

4. On the question of whether there was bias in the decision of the Respondent, the Tribunal found that an allegation of bias must resonate with good reason and logic. The mere fact that litigation was ongoing between the Complainant and some members of NEC could not be sufficient evidence that the proceedings of the National Delegates Conference (NDC) and NEC were biased.

5. While the Complainant had claimed that his accuser was the same person who tried him and subsequently rendered a decision against him, the record of the disciplinary proceedings indicated that persons who heard and determined the matter were not the same ones the Complainant had previously litigated against. The Tribunal found no evidence on record suggestive of bias. From the record, the Complainant, in any event, had the desire to institute review proceedings against

the impugned decision before the same NEC. The Tribunal therefore found that there was not sufficient evidence on the record to warrant a finding of bias on the part of the Respondent in rendering its impugned decision.

Orders

1. The decision of the Respondent dated 19th May 2019 expelling the Complainant from the ANC was illegal and unreasonable, disproportionate to the allegations made against the Complainant and otherwise unlawful and invalid.

2. Proceedings of the Disciplinary Committee giving rise to the expulsion decision dated 19th March 2019 was made in abuse of process, misrepresentation of material facts and otherwise procedurally unfair.

3. An order was issued quashing and/or setting aside the decision of the Respondent dated 19th March 2019 expelling the Complainant from ANC political party.

4. Costs awarded to the Complainant.

Patrick Mukiri Kabundu v Jubilee Party: Office of the Registrar of Political Parties (Interested Party) Complaint Number 7 of 2019 (Ruling)

Hon. Kyalo Mbobu, Hon. Dr Adelaide Mbithi

1st March 2019

Summary of Facts

The Respondent and the Interested Party both sought to challenge the jurisdiction of the Tribunal. The Respondent urged an objection on the grounds of want of compliance with Section 40 (2) of the Political Parties Act and lack of a justiciable issue before the Tribunal. The Interested Party took the position that jurisdiction of the Tribunal against the Office of the Registrar of Political Parties (ORPP) was appellate, following a decision made by that office. There being no decision on the part of the ORPP, there was nothing to challenge before the Tribunal.

Issues for determination:

1. Whether the Tribunal had jurisdiction to hear and determine the matter.
2. Whether the complaint/notice of motion raised a justiciable issue before the Tribunal.

Held:

1. On the first issue, the Tribunal held that the dispute between the Complainant and the Respondent fell within the ambit of Section 40 (1) (b) of the Political Parties Act since it was between a member and the Jubilee Party. Further, it was not in dispute that the Complainant had not invoked the party IDRM mechanisms prior to lodging the complaint.

2. The Tribunal noted that in an attempt at amicable settlement of the dispute, a meeting was held between parties at Dari Restaurant, Karen, which ended without an agreement on settlement. The Tribunal held that that meeting could not be termed the Respondent's IDRM since it was an informal without prejudice settlement negotiation between parties seeking an amicable settlement. In

any event, for the jurisdiction of the Tribunal to kick in, the IDRM process must have been held prior to inception of proceedings and not during the course of proceedings. Accordingly, the Tribunal downed its tools and found no need to consider any of the other issues.

3. The Tribunal further held that its jurisdiction in respect of the Interested Party was appellate as provided in Section 40 (1) (f) of the Political Parties Act. The Claimant had produced a litany of complaints against the office of the ORPP, but for purposes of the case, had not pin-pointed a particular decision of the ORPP he took issue with. Accordingly, the complaint against the Interested Party called for dismissal of the suit on that score as well.

Orders:

1. The suit was dismissed.
2. No orders as to costs.

Patrick Mukiri Kabundu v Jubilee Party; Office of the Registrar of Political Parties (Interested Party) PPDT Complaint Number 7 of 2019 (Ruling)

Hon. Kyalo Mbobu, Hon. Desma Nungo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

12th March 2020

Summary of Facts:

The Respondent and the Interested Party had raised objections on the jurisdiction of the Tribunal. The Respondent based their objection on want of compliance with Section 40 (2) of the Political Parties Act (PPA) and lack of justiciable issue before the Tribunal. The Interested Party took the position that the jurisdiction of the Tribunal against the Office of the Registrar of Political Parties (ORPP) was appellate, following a decision made by that office. There being no decision on the part of the ORPP, there was nothing to be challenged before the Tribunal.

In furtherance of the provisions of Article 159 (2) of the Constitution which enjoins the Tribunal to promote alternative dispute resolution, the Tribunal gave the parties time to try and resolve the dispute out of the Tribunal process. The parties recorded a consent in Court to negotiate an out of court settlement, failing which the matter would proceed to hearing. No settlement materialised and in the circumstances, the matter proceeded to hearing commencing with the preliminary objection that was allowed and the Appellant's complaint was dismissed.

The Appellant subsequently filed the instant application for review under the provisions of section 40 (1) (2) and Section 41 (1) (4) of the PPA; section 3A, 63 €, 67 (2) and 80 of the Civil Procedure Act; Order 45 and 51 of the Civil Procedure Rules; and Article 38 and 159 of the Constitution.

Issues for determination:

The Tribunal found that there was only one issue for determination: whether the review application was merited.

Held:

From the onset, the Tribunal noted that the only applicable provisions relied on by

the Applicant dealing with review were Sections 63 (3) and 80 of the Civil Procedure Act; and Order 45 and 51 of the Civil Procedure Rules. Further, the Tribunal would be guided by its procedure regulations.

1. The Tribunal held that pursuant to Section 80 of the Regulations of the Tribunal and Order 45 Rule 1 of the Civil Procedure Rules, 2010, it was clear that review only arises in instances where:

    a. There was discovery of new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made:

    b. There was a mistake or error apparent on the face of the record;

    c. There were other sufficient reasons; and

    d. The application was made without undue delay.

2. The Tribunal held that its prior ruling on jurisdiction had determined the complaint, thus rendering the Tribunal functus officio. Further, the appellant had not convinced the Tribunal that there was any error on the face of the record or new and important evidence that would warrant a review. In essence, the principles for grant of review had not been met by the Appellant.

3. The Tribunal observed that most orders as sought by the Applicant were incompatible, with some being not of the nature of prayers sought in a review application. The Applicant was in the opinion of the Tribunal either attempting to re-open matters already litigated upon or attempting to build a new case from an already concluded one. The Tribunal was of the opinion that the application as framed was at best confused and bad in law.

4. Quoting the Supreme Court in Zimbabwe in **Yanus Ahmed vs Docking Station Safariz Ltd Case No. SC 70/18 Civil Application No. SC 177/18,** the Tribunal found that where an application was so confused and bad in law, it would be deemed not to have been in the first instance and must be thrown out.

Orders:

1. The notice of motion application unmerited and was dismissed with no orders as to costs.

Hilda Agnes Nduta Gachahi v Miruru Waweru & 2 Others
Complaint No 2 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

5th June 2020

Summary of Facts

The Claimant averred that she was the duly elected Chairperson of the Women League of the Thirdway Alliance Kenya (the 3rd Respondent). The said political party was engaged in a popular constitutional amendment initiative dubbed 'Punguza Mizigo Initiative' that passed the first stage of securing signatures from valid voters but failed to secure the requisite support at the county assemblies' level. This failure forced the party members to retreat and re-strategize on the way forward particularly following the instigation of the Building Bridges Initiative (BBI); an initiative that was deemed to precede a constitutional amendment process.

In a surprising turn of events, the Claimant stated that a NEC meeting that was intended to forge this way forward for the party resulted in her being subsequently served, through the Registrar of Political Parties, with a letter and minutes alleging her dismissal from her position. The alleged dismissal was in contravention of the party constitution and all relevant laws and rules.

The Respondents submitted that though they had suspended and subsequently dismissed the Claimant from the party for gross misconduct, she had been reinstated back into her position in the interests of forging party unity and prosperity. Therefore, they prayed that the Tribunal mark the claim as settled with no orders as to costs.

Issues for determination

1. Whether the alleged dismissal of the Claimant was unlawful.
2. Whether the legality of the alleged dismissal had been rendered moot by the subsequent reinstatement.
3. What relief, if any, should be granted.

Held

1. The Tribunal noted that there was an administrative action taken by the 3rd Respondents, an action that gave rise to the proceedings. The Tribunal, placing reliance on Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, held it had jurisdiction to grant relevant review orders.

2. The Tribunal noted that the 3rd Respondent's constitution provided at Section 14.1 that all party members were to be treated equally before the law and be disciplined in accordance with the provisions of the 3rd Respondent's constitution. At section 6.6, it provided that notice of a special NEC meeting such as the one that purported to expel the Complainant was to be at least 7 days; which notice was never done. Further, at Article 25, it set out the IDRM mechanism which provided room for participation by a person against whom a complaint has been lodged. It was clear that the rules and processes outlined by the political party were not adhered to.

Orders

1. The purported process, expulsion and removal of the Claimant from her position vide a special NEC meeting held on 3rd February 2020 was illegal, null and void.
2. The decision dismissing the Claimant from her office was quashed.
3. That the Respondents actions did not adhere to the laws, rules and regulations of the party as is required of it by law
4. In the interests of party unity, each party to bear its own costs.

Hon. Aisha Jumwa Katana v Orange Democratic Movement
Complaint No 1 of 2019 (Judgement)

Hon. Kyalo Mbobu, Hon. Dr. Adelaide Mbithi, Hon. Desma Nungo

31st May 2019

Summary of Facts

The Complaint was premised on the Respondent's letter dated 4th March 2019 informing the Interested Party (the Registrar of Political Parties) that the Complainant had been expelled from the Respondent party. The Complainant alleged that the decision to expel was a nullity for want of legal and statutory compliance. According to the Complainant, no complaint was properly placed before the Respondent, contrary to Article 8.4.1 of the Respondent's constitution. No complaint was signed by any complainant from the party; the show cause letter dated 24th July 2018 originated from the party's national chairman. While the letter alluded to complaints, the Complainant was not aware of any complaint against her and none was brought to her attention.

The Complainant also contended that no Disciplinary Committee was properly constituted within the meaning of Article 8.3 of the Respondent's constitution, which provides that the Disciplinary Committee should comprise of at least 5 members. The Complainant's position was that she was not accorded a fair hearing as she appeared before only one person on 19th October 2018, the Disciplinary Committee's chair. There were also no minutes of the alleged Disciplinary Committee hearing and therefore, there was no proper hearing. In the absence of a properly constituted Disciplinary Committee, decisions therefrom were null and void.

The Respondent contended that the Complainant was given an opportunity to be heard and made representations vide written submissions. Further, the show cause letter dated 24th July 2018 complied with article 8 of the party's constitution and the Complainant was aware of the charges against her when she appeared before the Disciplinary Committee. The Complainant was accordingly granted a fair hearing and there was compliance with the principles of natural justice. Further, the Respondent argued that their decision was based on logical proof and evidential material, including

recordings which showed breach of section 14 of the Political Parties Act and the party was within its right to discipline its members under section 9 of the Political Parties Act and Rule 13, Schedule 2 which allows political parties to formulate rules and criteria for registration and cessation of party membership.

The Interested Party submitted that when they received the Respondent's letter dated 14th March 2019, they exercised the mandate under section 14 (7) Political Parties Act and requested the relevant IDRM proceedings. According to the Interested Party, a reading of the Respondent's findings and recommendations together with the letter to show cause indicated that the Respondent took the line of a member who had resigned. It was therefore unclear which mode of termination under Article 5.4 of the Respondent's constitution had been applied.

The Interested Party submitted that there was a difference between deeming a member to have resigned and disciplining a member and the Tribunal was called upon to determine whether the Respondent acted within the provisions of deeming resignation (section 14(5) Political Parties Act) or expulsion (s 14(7) Political Parties Act).

Issues for determination

1. Whether the Disciplinary Committee was properly constituted in accordance with the provisions of Art 8.3 of the Respondent's constitution.
2. Whether the Respondent breached the Complainant's right to fair administrative action and fair hearing.
3. Whether the Complainant violated the provisions of section 14 (5)(e) of the Political Parties Act and the party constitution.
4. What were the appropriate reliefs to grant.

Held:

1. While the Respondent contended that the Disciplinary Committee was properly constituted and sat as a team to deliberate on the matter, save for the Disciplinary Committee Chairman, Mr Fred Athuok, other members of the Disciplinary Committee were not in the parties' pleadings, no documentation was produced detailing the Committee's membership details, neither were there adduced any

attendance records or minutes of the Disciplinary Committee hearing held on 19th October 2018.

2. The Tribunal rejected the Respondent's argument that the Complainant affirmed that the Disciplinary Committee was validly constituted by electing to proceed before the sole member or two members for that matter. It was instead guided by Article 8.5 of the party constitution. In the absence of any express provision on quorum in the party constitution or any rules, there was no basis for finding in favour of the Respondent.

3. Citing the decision in ***Kenya Commercial Bank v Kenya National Commission on Human Rights*** **[2018] eKLR** and ***R v Kirinyaga University College & 2 Others ex parte Isaya Kamau Kagwima*** **[2015] eKLR** declaring a nullity improperly constituted disciplinary hearings, the Tribunal found that the Complainant did not appear before a duly constituted Disciplinary Committee within the meaning of Article 8.3 of the Respondent's constitution. The findings and recommendations against the Complainant contained in part E of the Disciplinary Committee report dated 20th November 2018 arising from the impugned Disciplinary Committee hearing of 19th October 2018 and all consequential ratifications by the Respondent's NEC and NGC are invalid and a nullity in law.

4. Since the right to hear administrative action is codified in Article 47 of the Constitution, section 4 of the Fair Administrative Action Act as well as Articles 8.3.2 and 8.4.2 of the Respondent's constitution, the Respondent was bound to apply the principles of natural justice.

5. While the Respondent contended that the principles of natural justice were applied to the letter, it was notable that the subject letter was not from the Disciplinary Committee but from the party's national chairman. The Tribunal could not find any written complaint by the chair of any other person to the Disciplinary Committee, even though the letter indicated that the office of the chairman had received complaints regarding the Complainant's conduct and utterances allegedly published by media houses on 15th July 2018. There was also no evidence that the Complainant was notified of and accorded the right to challenge evidence adduced against her by way of cross-examination.

6. The Tribunal formed the view that the letter shown as originating from the party chair to the Complainant did not amount to a written complaint to the

Disciplinary Committee within the meaning of Article 8.4.1. of the Respondent's constitution. Further, the Complainant's right to cross-examine her accuser under Article 47 of the Constitution and s 4(3)(f) and 4(4) (c) of the Fair Administrative Action Act were breached. Further, Articles 8.3.2 and Article 8.4.2 which enjoined the Respondent to respect the rule of law and natural justice in the conduct of disciplinary proceedings were breached. The Respondent therefore breached the Complainant's right to fair administrative action and fair hearing.

7. On the issue of whether the Complainant breached section 14(5)(e) of the Political Parties Act and the party constitution, the Tribunal noted that the right of political parties to discipline members was protected under the Political Parties Act. The process must, however, be procedurally fair and according to the constitutional and statutory enactments, since results of the process would adversely affect the rights and fundamental freedoms of the person against whom administrative actions and decisions are taken. The Tribunal referred the unresolved disciplinary matter back to the Respondent to undertake a fresh disciplinary process against the Complainant, if it so wished, before a duly constituted Disciplinary Committee in accordance with the rule of law, natural justice and the party's constitution.

Orders

1. A declaration that the disciplinary proceedings by the Respondent against the Complainant violated Article 47 of the Constitution.

2. A declaration that the disciplinary proceedings by the Respondent against the Complainant were unprocedural and violated the provisions of the Political Parties Act, the Fair Administrative Action Act and Article 8.4.2 of the Respondent's constitution.

3. A declaration that the Disciplinary Committee of the Respondent convened on 19th October 2018 was not properly constituted to hear and determine the disciplinary case against the Complainant and thus the report arising therefrom against the Complainant was invalid and had no legal effect in law.

4. A declaration that the ratification of the decision of the Disciplinary Committee by the Respondent to expel the Complainant was unlawful and had no legal effect.

5. An order that the Interested Party be barred from removing the name of the Complainant from the membership of the Respondent political party on the basis of the invalidated disciplinary proceedings subject hereof and the Respondent's letter dated 4th March 2019.

6. An order that the disciplinary matter relating to the Complainant's conduct be referred back to the Respondent to undertake a fresh disciplinary process against the Complainant before a duly constituted Disciplinary Committee if they so wished in accordance with the rule of law, natural justice and the party's Constitution.

7. Each party to bear its own costs.

Hon. Ann Muthoni Thumbi & 2 Others v Jubilee Party; Raphael Tuju, Acting Secretary General Jubilee Party & 2 Others (Interested Party)

Complaint No E004 of 2020 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho

9th March 2021

Summary of Facts

All the Complainants were MCAs of Nairobi and members of the Respondent. They were aggrieved by the Respondent's decision to suspend them all from the Respondent party for three months and from all County Assembly Committees for a period of six months. The Complainants contended that their purported disciplinary process was tainted with irregularities relating to defective charge sheets, lack of sufficient notice to adequately prepare for the hearing and/or lack of a fair hearing, malice and utter discrimination, lack of a reasoned ruling amongst other allegations. Further, that the preliminary objection they raised was not addressed and instead, upon presenting themselves, the internal mechanism proceeded directly to hearing and determining the allegations against them. This was despite the fact that their objection was in relation to their need to obtain further information so as to determine the actual charges they were to face and respond to.

The Respondents and Interested Parties had adequate notice to attend but neither entered appearance nor attended the proceedings. The Tribunal proceeded to hear the complaint quoting the decision of the Court in **Mungai v Gachuhi & Another [2005] eKLR** that:

> *A decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity.*

Issues for determination

The Complainant had asserted that their right to fair hearing had been infringed, as they had not been afforded an adequate opportunity to prepare for their defence, their Preliminary Objection was not addressed and instead, when they appeared be-

fore the internal mechanism, it proceeded to directly hearing and determining the allegations against them. This was despite the fact that their objection was in relation to their need to obtain further information so as to determine the actual charges they were to face and respond to.

Held:

1. The Tribunal noted that the information on the particulars of the charge they were to face would have been key to the process given that the alleged offending action against the Complainants was their supposed non-adherence to the party position, a position which they asserted was never relayed at their party caucus as would be anticipated. The decision of the Respondents delivered on 27 November 2022 did not outline whether the Preliminary Objection was considered and in deed, did not specifically refer to any such PO as having been raised.

2. The Tribunal quoted the case of ***Geothermal Development Company Limited v Attorney General & 3 Others*** **[2013] eKLR** where it was stated that:

> *As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given a reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well…. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry will be…*

3. Since the facts against the Respondents remained uncontroverted, the Tribunal held that the Complainants were not accorded a fair hearing as required by law.

Orders

1. The disciplinary proceedings by the Respondent against the Complainants were unprocedural and violated the laws and the Respondent's constitution.
2. The decision to suspend the Complainants from Jubilee Party and all committees of the County Assembly of Nairobi was unlawful and had no legal effect.
3. An order restricting the Respondent and the Interested Parties by themselves and/or through their agents, servants or employees from implementing the decision by the Respondent's Disciplinary Committee.
4. Costs of the application to be borne by the Respondent and the Interested Parties.

Hon Hassan Abdi Guyo v Jubilee Party of Kenya; Hon Mark Ndungu Ng'ang'a (Interested Party) Complaint No 11 of 2019 (Judgement)

Hon. M. O. Lwanga, Hon. Paul Ngotho, Hon. Dr Adelaide Mbithi

27th February 2020

Summary of Facts

The Claimant contended that the Respondent had on 27th September 2017 appointed him as its representative to the Nairobi City County Assembly Service Board and that he had since been executing his mandate as such. The Respondent vide a letter dated 22th October 2019 communicated to the Speaker Nairobi County Assembly its decision purporting to appoint the Interested Party as its representative to the Nairobi City County Assembly Service Board. The Claimant contended that the change in representation by the Respondent in the said Board was done without due regard to process and the law as he was never afforded an opportunity to be heard before a decision was made. Further, that the removal was contrary to set law as the issue of appointment and term of office as well as removal from a Board had been determined by the Employment and Labour Relations Court in Nairobi in Petition 194 of 2019.

The Respondent contended that it was well within its mandate to remove and replace its representative to the said board. Further, it was argued that the change was necessitated by wrangles and a leadership crisis in the Nairobi County Assembly and that the Complainant, being aggrieved by the Respondent's action, had not exhausted the party dispute resolution mechanisms.

The Interested Party argued that the Claimant had not engaged the party machinery to try and resolve the dispute and that as such the Tribunal could not be seized of the matter.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear the Complaint.
2. Whether there was due process in the decision to effect the removal of the Complainant from the Nairobi City County Assembly Service Board.
3. What orders were reasonable in the circumstances.

Held:

1. On the issue of jurisdiction, the Tribunal noted that from the evidence submitted, the Claimant did through his advocates, write an elaborate letter to the Respondent expressing dissatisfaction with the decision of the Respondent to replace him in the said Board and sought reconsideration of the same. The Respondent replied to the said demand letter denying any knowledge of having nominated the Complainant as its representative to the said Board. The Tribunal held that before a Complainant presented before it, a reasonable attempt needed to have been made to invoke the internal party processes and to the Tribunal, the elaborate letter by the Claimant's advocates to the Respondent displayed such attempt.

2. The Tribunal held that Section 40 (2) of the Political Parties Act is to the effect that the Tribunal will not hear or determine a dispute unless and until such dispute has been heard and determined by the party IDRM. More particularly, the logical interpretation is that attempting or being subjected to IDRM must precede the filing of a complaint before the Tribunal.

3. On due process, the Tribunal noted that the Respondent's constitution required that every person appearing for a hearing shall be entitled to a fair hearing and be accorded an opportunity to defend themselves and may be presented by an advocate or any other party member. No evidence was presented to show that the Claimant was summoned or heard before an IDRM process or even before a disciplinary committee or any other organ that would indicate that due process applied.

4. The Tribunal held that the Respondent was well aware of its constitution and laws that govern its action and this need have instituted an internal process in accordance with its own laws. Accordingly, the Tribunal held it would be unjust to allow the Respondent's arbitrary action of the purported removal of the Claimant to stand.

Orders

1. An order setting aside and vacating the decision by the Respondent nominating the Interested Party to the Nairobi City County Assembly Service Board as its representative therein.

2. The Respondents actions relating to the alleged wrangles within the Nairobi County Assembly that led to the impugned decision by the Respondent be and is hereby referred back to the Respondent to undertake an internal process in accordance with the party constitution

3. Each party to bear its own costs.

Hon Isaac Mwaura Maigua v Jubilee Party & Another, Complaint No E002 of 2021 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Dr Adelaide Mbithi

7th May 2021

Summary of Facts

The Complainant was aggrieved by the decision of the 1st Respondent dated 8th February 2021 to expel him from the political party. The Complainant averred that the decision was made without following due process and in contravention of the law. He further asserted that the charges against him were based on a vague show cause letter, without any written and signed complaint and therefore the process was unprocedural, illegal and unlawful contrary to Art 13.11 of the 1st Respondent's constitution, sections 4, 6 and 7 of the Fair Administrative Action, the Constitution and section 14 of the Political Parties Act. The Complainant also impugned the disciplinary process asserting that he was not allowed adequate time to prepare an adequate defence, that the party disciplinary organ neglected to take into account his affidavit in response to the allegations, that the disciplinary proceedings were devoid of any legal mandate under the Jubilee party laws and that there was blatant discrimination in the application of the party's legal provisions on its members.

The 1st Respondent maintained that the charges against the Complainant were properly laid out in the charge sheet served on the Complainant, that the disciplinary process was carried out in accordance with Article 13.3.3 of the party constitution, that the Complainant was accorded a fair hearing, given notice of the hearing and a chance to present evidence as well as to be represented by advocates. The 1st Respondent also challenged the jurisdiction of the Tribunal on the basis that the Complainant had not engaged IDRM.

The 2nd Respondent contended that the right of a political party to discipline members was an analogous right as per the party laws and that the 1st Respondent had provided a procedure for expulsion of party members. Since the party constitution and laws governed the right of political parties to expel a member and the right of a member to be granted a fair hearing, the 2nd Respondent invited the Tribunal to assess whether the party had complied with its own laws.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine this matter.
2. Whether the Complainant's disciplinary proceedings were conducted in accordance with the party laws/Whether the Complainant was granted a fair hearing.
3. What were the appropriate reliefs to grant.

Held:

1. On the issue of jurisdiction, the Complainant asserted that the National Management Committee (NMC) acted on behalf of the National Executive Committee (NEC) and accordingly, IDRM had been exhausted. From the evidence on record, the Tribunal was satisfied that the National Disciplinary Committee (NDC) was the party's apex disciplinary organ. As per the party constitution, the decisions of the NDC were transmitted to the NEC for further action. It was not disputed that the NDC decision was transmitted to the NMC for action on behalf of NEC. The NEC decision being final, the Tribunal agreed with the Complainant that he had exhausted IDRM within the party and the complaint was therefore properly before the Tribunal.

2. On the question of whether disciplinary proceedings were carried out in accordance with party laws and whether the Complainant received a fair hearing, the Tribunal noted that under Article 9 of the 1st Respondent's constitution, the party chair was mandated to ensure party discipline. In exercise of this mandate, the chair referred this matter to the National Disciplinary Committee (NDC).

3. The NDC disciplinary process was required to be commenced with a charge against a party member. The charge sheet would detail all the particulars and summons or notice of hearing was to be served upon the concerned member facing disciplinary proceedings. The Complainant did not contest the service of summons and charge sheet upon him. However, he contested whether the charges were clearly particularised and whether the notice period was sufficient. He also argued that the allegations against him were vague and indeterminate.

4. The Tribunal noted that according to the NDC minutes of the disciplinary proceedings of 4th February 2021, the charges and particulars were read to the Complainant and he pleaded not guilty, whereafter evidence was tendered before the NDC in support of the charges. There was no record of any objection raised by the Complainant in relation to the alleged vagueness or request for further particulars of the charges prior to commencement of hearing. The only objection related to service of the Complainant with evidence at the beginning of the session. However, the Complainant was granted an opportunity to have proceedings adjourned due to the late service of evidence, but his defence team refused to adjourn.

5. On the conduct of the hearing, the Tribunal noted that the NDC minutes detailed how the Complainant tendered evidence in support of the charges and there was cross-examination by the Complainant's advocate. The Complainant also adduced evidence in response to the charges levelled against him. The Complainant also outlined alleged grounds of perceived discriminatory action and tendencies against him as seen in the actions of party organs. However, the Tribunal failed to see how the charges levelled against the Complainant were vague as alleged. There was also no evidence in the NDC proceedings that this issue was ever raised as a preliminary issue prior to commencement of the NDC hearing. The Tribunal considered that the Complainant made comprehensive submissions and tendered evidence in response to all the charges levelled against him. The Complainant was also represented by advocates.

6. On sufficiency of the notice and service of evidence, the Tribunal noted that the NDC regulations were express that summons were to be served 48 hours prior to hearing. The Regulations also provided for service of evidence. If the Complainant felt that the notice period was insufficient, he ought to have sought an adjournment or more time prior to commencement of the NDC hearing. No evidence was availed that the Complainant sought and was declined an adjournment of the proceedings to allow him sufficient time to prepare.

7. On whether the Complainant's submissions before the party disciplinary process were taken into consideration, the Tribunal was satisfied that the 1st Respondent had demonstrated that concerns and sentiments of the Complainant were addressed by the party organ. From the reasoned decision supplied, the Tribunal found that it had no basis to fault the NDC's exercise of its discretion.

8. Further, the 1st Respondent's constitution mandated the NMC to perform the functions of the NEC in circumstances where NEC could not be urgently convened. The party Secretary-General testified to the challenges constituting NEC and the Tribunal was satisfied that a matter concerning party discipline such as this one provided the necessary justification for urgently constituting NMC. The Tribunal therefore found that the disciplinary process and the consequential decisions were in line with the Jubilee party laws.

9. Having found the process to have been conducted in accordance with the party laws, the Tribunal found it difficult to sustain the allegations of bias and/or discrimination raised by the Complainant. The Complainant also failed to present other similar cases which would point to bias or discrimination. The Tribunal was therefore of the considered opinion that the Complainant had been granted a fair hearing.

Orders

1. The Complaint dated 9 February dismissed.

2. Costs awarded to the 1st Respondent.

Hon Isaac Mwaura Maigua v Jubilee Party & 3 Others Civil Appeal No. E248 of 2021(Judgment)

Hon. Justice Joseph K Sergon

24th November 2021

The appellant, being a member of the 1st Respondent, was nominated as a member of the Senate, representing persons with disabilities in the 12th Parliament. On 1st February 2021, the 1st Respondent commenced disciplinary proceedings against the appellant on various grounds, namely: that he had violated the party constitution and for contravening the code of conduct. After hearing the parties, the National Disciplinary Committee (NDC) resolved to have the appellant suspended for six months from the 1st Respondent's membership. However, the National Management Committee (NMC), acting on behalf of the National Executive Committee (NEC) reviewed the decision and substituted the suspension with an expulsion. The appellant challenged the decision of the NMC at the Political Parties Disputes Tribunal, but his complaint was dismissed vide a decision dated 7th May 2021.

The appellant, aggrieved by the decision of the Tribunal, lodged an appeal at the High Court. He grounded his appeal on the denial of fair hearing, arguing that the 1st Respondent's Disciplinary Committee purported to hear and determine the allegations levelled against him without availing responses to the Preliminary Objections he raised. He also impugned the disciplinary hearing on the basis that the evidence was produced during the hearing, rather than during service of the charge sheet as required by the party regulations. The appellant also asserted that the 1st Respondent violated the constitutional and statutory provisions and its own Disciplinary Committee Regulations on fair administrative action and accused the 1st Respondent of prematurely implementing the impugned decision. He contended that he had the right to challenge this decision through all available forums and the appellate process before it was implemented. He maintained that he had been discriminated against in the entire disciplinary process and alleged that the 1st Respondent contravened Article 27 of the Constitution by selectively and discriminately subjecting him to a disciplinary process without any explanation or reasons at all, which showed that they were actuated by illegalities, malice and utter discrimination.

The appellant denied violating section 14(5) of the Political Parties Act that would be used to deem a member to have resigned from a political party and denied participation in the formation of any other political party or promotion of the interests of another political party. He also considered the penalty meted out on him unfair, unreasonable, malicious and unwarranted in the circumstances and that the Tribunal had failed to take into account that there existed a coalition agreement between PDR (now UDA) and Jubilee Party which the Disciplinary Committee ought to have taken judicial notice of.

The 1st Respondent maintained that the PPDT properly exercised its discretion judicially and judiciously in reaching the impugned decision and that the PPDT decision was properly anchored in law. It was their case that the PPDT conducted a fair hearing before dismissing the appellant's complaint; that service of the charges and its particulars were effected upon the appellant on 1st February 2021 and that this fact was admitted. The 1st Respondent also maintained that the appellant was given sufficient time to prepare and present his defence where he personally and physically participated.

The 1st Respondent also stated that the NMC had discretion under the party constitution to vary the NDC's orders of suspension against the appellant from suspension to expulsion. While the appellant decried not being informed of the reasons for the ruling and sanction, the 1st Respondent asserted that there was no prescribed time frame nor form required for this information, and that the information was provided to the appellant. The 1st Respondent also supported the Tribunal's finding that the appellant had not substantiated his claim of bias or discrimination and deprecated the appellant for accusing the Tribunal of considering extraneous matters, yet it was the appellant who had raised the issues, thus inviting the Tribunal to determine the issues in question. The 1st Respondent also considered it improper for the appellant to introduce new issues in relation to his replacement as a nominated member to the Senate, asserting that the High Court lacked jurisdiction to hear and determine matters not placed before the Tribunal. Since the removal of the appellant by gazette notice had already crystallised, the 1st Respondent maintained that it could only be reversed through an election petition and not vide an appeal.

The 3rd Respondent also opposed the appeal, submitting that he performed his constitutional duty under Article 101 (2) of the Constitution to declare a vacancy when one occurred under Article 98 of the Constitution. The 3rd Respondent further

argued that the orders sought violated the principle of separation of powers since they sought to interfere with the internal management of Parliament and the political parties that constituted the members of Parliament. The court was urged to refrain from determining political questions and instead leave them to political parties.

The 3rd Respondent implored the court to not entertain proceedings against the speaker for actions done in the performance of mandatory constitutional and statutory duties. He also stated that the appeal had been overtaken by events since the appellant's removal as a member of Parliament under Article 98 (a) (d) of the Constitution of Kenya had already been effected and that the court would be engaging in an academic exercise by entertaining the present appeal.

The 4th Respondent opposed the appeal, arguing that the dispute could only be resolved by an election court, hence the court lacked jurisdiction to entertain the appeal whose outcome was intended to nullify the election by way of nomination of Sammy Prisa Leshore to the Senate to represent persons with disabilities. It was the 4th Respondent's position that it was joined to the appeal without the leave of the court and they were therefore improperly before the court and the appeal against the 4th Respondent incompetent and fatally defective.

The 4th Respondent contended that the appellant was granted a fair hearing before the PPDT and that though the charge document was not produced, the pleadings and evidence presented before the Tribunal showed that the appellant understood the charges. It was further argued that though the charge document was not produced before the Tribunal, the appellant's replying affidavit contained details of the charge. The 4th Respondent also disputed the appellant's allegation that he had not been given sufficient time to prepare his defence because it was on record that he was given time to prepare his defence but declined the offer.

It was also contended that the failure to provide the appellant with the decision by the 1st Respondent did not violate the appellant's right to a fair trial, since the decision of the 1st Respondent's NMC was made public on 8th February 2021 as required by the regulations, and the appellant got the opportunity to interrogate and challenge the reasoning by the NDC.

On the question of discrimination, the 4th Respondent's argument was that the appellant did not tender credible evidence that he was discriminated against by the 1st Respondent. The appellant also failed to produce a coalition agreement between

the two parties in order for the Tribunal to consider the terms; neither was there any evidence that PDR was the same as UDA on account of change of names. The extract of the coalition agreement produced by the 1st Respondent did not grant members of the 1st Respondent the right to pledge allegiance to the other coalition party or to be disloyal to one's party or breach a party's code of conduct.

Issues for determination:

1. Whether the appellant was granted a fair hearing by the 1st respondent's national disciplinary committee.
2. Whether the appellant was discriminated against in the entire disciplinary process.
3. Whether the charges preferred against the appellant were justified.

Held:

1. On the issue of fair hearing, the court noted that there was no dispute that the appellant was served with evidence at the beginning of the 1st Respondent's disciplinary proceedings. The court disagreed with the Tribunal that the fact that the appellant did not seek an adjournment to enable him to prepare his defence meant that he was given a fair hearing. It was the opinion of the court that the conduct of providing evidence to the appellant at the time of hearing the complaint was an outright ambush, which put the appellant at a disadvantaged position, in that he was at a loss as to how to answer the charges and accusations levelled against him.

2. It was a cardinal rule of natural justice that the right to fair hearing could only be exercised upon a party being granted more time to prepare his evidence to respond and controvert evidence produced during the disciplinary hearing. Notwithstanding the fact that the appellant did not apply for an adjournment, the court was satisfied that the appellant was not accorded a fair hearing. The Tribunal therefore erred when it held that the appellant was granted a fair hearing, as it was apparent that the 1st Respondent breached its Constitutional and its Disciplinary Regulations, Articles 47 and 50 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015.

3. On the question of whether the appellant was discriminated against, the court noted from the proceedings at the Tribunal that the 1st Respondent's Secretary-General admitted that the 1st Respondent had a coalition agreement with PDR, which later changed to UDA. It was also evident other members of the 1st Respondent, namely Johnson Sakaja and Maina Kamanda, supported the ODM candidate in the Kibra by-election, yet they were not summoned to undergo any disciplinary process like the appellant. The court was therefore persuaded that the 1st Respondent selectively conducted disciplinary proceedings against him for associating himself with another political party just like the other named parties. The Tribunal, therefore, fell in error when it held that the appellant was not discriminated against in the entire disciplinary process, as the evidence of the 1st Respondent's Secretary-General was sufficient to establish the allegation of discrimination.

4. On whether the charges against the appellant were justified, the proceedings before the Tribunal clearly showed that the 1st Respondent's Secretary-General admitted to the existence of a coalition agreement between Jubilee Party and UDA. It was therefore clear that the appellant did not advance the policies of another political party as concluded by the disciplinary committee.

5. A careful perusal of the tribunal proceedings showed that the 1st Respondent had failed to establish the manner in which the appellant was disloyal to the party. The tribunal therefore fell into error when it held that the 1st Respondent was justified in disciplining the appellant.

6. To the court's mind, the 1st Respondent's disciplinary proceedings which led to the expulsion of the appellant from the Jubilee Party were not conducted in accordance with the law. Therefore, the Jubilee Party's National Disciplinary Committee processes and decisions that followed were unlawful. The court further found that the decision of the NDC, which was varied by the NMC from a suspension for six months to an expulsion from the 1st Respondent party, which was then transmitted to the national organ, including the subsequent decision of 8th February 2021 and the decision of the 2nd Respondent dated 29th March 2021 to deregister the appellant from the 1st Respondent party and any gazette notices issued by the 3rd and 4th respondents could not stand.

Orders

1. The decision of the PPDT was set aside and substituted with an order allowing the Complainant's (now appellant) complaint.

2. The deregistration of the appellant by the 2nd Respondent made on 29 March 2021 and gazette notice no 4597 vol CXXII-102 dated 10 May 2021 and the gazette notice no. 4598 vol CXXII-103 dated 11 May 2021 issued by the 3rd and 4th Respondents respectively quested and set aside, declared of no effect and therefore could not confer any rights.

3. Costs of appeal awarded to the appellant.

Hon. Jeremiah Nguyu Kioni v Jubilee Party & Another
Complaint No. E009 of 2023 (Dissenting Judgement)

Hon. Desma Nungo, Hon. Gad Gathu, Hon. Stephen Musau

10th July 2023

The Complainant was subjected to disciplinary proceedings at the party level vide the 1st Respondent's National Disciplinary Committee (TNDC). Consequently, the TNDC rendered its judgement dated 10th May 2023, which was adopted and/or ratified by the 1st Respondent's National Executive Committee (NEC) on 19th May 2023. Pursuant to the subject TNDC judgement, the Complainant was found guilty of some charges and was consequently expelled from the party.

The Complainant raised five main grounds of challenge of the TNDC judgement; namely, lack of jurisdiction by the TNDC to hear and determine disputes relating to party officials; lack of procedural fairness in the proceedings leading up to the impugned judgement of the TNDC; lack of capacity of the 2nd, 3rd and 4th Interested Parties to sit in the TNDC; incorrectness of the findings of the TNDC; and lack of legality by the 7th to 13th Interested Parties to ratify the decision of the disciplinary committee. The Complainant contended that the party organ with jurisdiction to hear the complaint, which related to an official of the party, was the Internal Dispute Resolution Committee (IDRC) not the TNDC.

With regard to the fairness of the proceedings, the Complainant contended that the complaint, charge and summons were not procedurally issued, that he was not given sufficient time to prepare his defence and that the environment in which the hearing was held was one of intimidation. The Complaint also contested the presence of the 2nd to 4th Interested Parties in the TNDC, asserting that they had been removed from the TNDC by NEC resolutions of 28th April 2023 and the TNDC reconstituted. On the incorrectness of the findings of the TNDC, the Complainant contended that despite no evidence or witness statements being adduced in support of the charges, the TNDC placed the burden of proof on him and reached an adverse finding. The ratification of the decision of the TNDC was challenged on the basis that the accuser sat as judges in their own cause, with NEC recommending disciplinary action and then convening again to ratify the decision of the TNDC.

There was a contest as to the representation of the 1st Respondent, with two different counsel entering appearance for the 1st Respondent. The Tribunal acknowledged that the contest on representation was occasioned by different factions within the party and made a conscious decision to consider all the evidence and pleadings filed by all law firms claiming instructions from the different factions within the party.

Issues for determination

1. Whether the TNDC was duly constituted in accordance with the provisions of the party Constitution/Whether the TNDC had jurisdiction to hear and determine disputes relating to party officials /Whether the Complainant was discriminated against.
2. Whether the Complainant's disciplinary proceedings were conducted in accordance with the party laws/Whether the Complainant was granted a fair hearing before an independent and impartial TNDC.
3. Whether the findings of the TNDC were in accordance with the law.
4. Whether the 7th to 13th Interested Parties had the legal capacity to ratify the decision of the TNDC / Whether the 7th to 13th Interested Parties were conflicted.
5. What were the appropriate reliefs to grant.

Held:

1. On the first issue, the Tribunal reviewed Article 14 of the party constitution which granted the TNDC both original and appellate jurisdiction. It found that the discipline of party officials was not removed from the jurisdiction of the TNDC and that all matters of party discipline, including that of party officials, were within TNDC's jurisdiction. The Tribunal was therefore not persuaded that the TNDC did not have jurisdiction over the charges against the complaint. It was also instructive that Article 16B excluded party discipline from the jurisdiction of the IDRC.
2. In relation to the challenge to the TNDC's composition, the Tribunal while acknowledging the allegation that there were changes to the TNDC composition, noted that it had not been furnished with any particulars filed with the ORPP on the same. The ORPP confirmed that as per its record on 6th June 2023, the interested parties were still members of the TNDC.

3. On the question of composition of the TNDC, the Tribunal considered the role of the ORPP in keeping a register of political parties, which ought to include an accurate and updated list of party officials. The Tribunal further considered the powers of the ORPP in making changes in political party records under section 34 (c) of the PPA and that the law provided an elaborate process for effecting changes in the office holders of a political party. While it was alleged that there were changes to the TNDC composition, no particulars of this were filed with the ORPP. The Tribunal therefore relied on the letter from the ORPP dated 6 June 2023, in so far as it confirmed the TNDC membership as at the date of the subject letter. The Tribunal accordingly found that the TNDC was duly constituted.

4. On the question of whether the Complainant was discriminated against, the Tribunal was referred to the charges derived from the complaint dated 26th April 2023 and the particulars thereof with the complaints that the complainant herein referred to the TNDC vide his letter dated 20th April 2023, which the TNDC Chairperson referred to the IDRC without notice to him. The Tribunal noted that they both related to violations of the party constitution by party officials. Both complaints related to acts of commission or omission by party officials. With respect to the complaint dated 20th April 2023, TNDC noted that it had no jurisdiction. With respect to the complaint against the Complainants, TNDC assumed jurisdiction and delivered its findings. The Tribunal therefore agreed with the Complainant that there was some form of discrimination meted against him by the TNDC, which rendered the TNDC biased and/or impartial in the manner in which they handed the disciplinary proceedings against the Complainant as compared to the complaint by the Complainant to the TNDC as per the complaint of 20th April 2023. Accordingly, the Tribunal found that the Complainant was discriminated against.

5. On the question of whether the Complainant's disciplinary proceedings were conducted in accordance with the party laws and whether the Complainant was granted a fair hearing, the Tribunal observed that there was lack of procedural fairness in various ways. First, service of the charge and summons was not procedural in accordance with TNDC Regulations. Second, the reasoned ruling on the dismissal of the preliminary objection was not delivered to the parties until after judgement. Third, the complainant and his advocate were not given sufficient

time to prepare for the complainant's defence bearing in mind that service was done in the afternoon on Friday 5th May 2023 for hearing on Monday 8th May 2023, and the Complainant's counsel's requests for adjournment was declined, hearing was conducted without allowing the Complainant opportunity to present his written arguments/submissions in accordance with TNDC Regulations despite his request.

6. The Tribunal observed that the right to fair hearing and fair administrative action and application of the rules of natural justice before the TNDC had been codified in Article 14.1.11 of the Jubilee Party Constitution as read together with the Jubilee Party National Disciplinary Committee Regulations, 2022 (TNDC Regulations). A review of the Complainant's disciplinary process showed that the charge sheet as drawn, the summons and hearing notice were in the circumstances defective as they related to a different complaint before the TNDC. There was also a contest as to the date of service of the charge sheet, summons and hearing notice for 5th May 2023, with the Complainant claiming that he was served by way of WhatsApp on 4th May 2023, and the TNDC on the other hand claiming that the complainant was served via WhatsApp on 2nd May 2023.

7. The Tribunal also noted that despite the TNDC Regulations stipulating that personal service was the preferred mode of service and other modes were to be resorted to if it failed, the Regulations were not complied with, as the Complainant was served on WhatsApp. There also appeared to be contradictory reports on the time when the formal session was held and the directions issued in the proceedings of 5th May 2023. Further, the Complainant was served at 5pm on Friday 5th May for a hearing to be held on Monday 8th May 2023, but when the Complainant's counsel sought an adjournment, the same was denied because counsel had not 'sufficiently explained why he is not ready to proceed.'

8. Moreover, since the Complainant was not present at the hearing of 8th May but was represented by counsel, it was not shown how the procedure of reading the charges and taking plea was complied with. Counsel's request to file an affidavit and written submissions was also turned down by the TNDC and the matter directed to proceed. By virtue of these procedural irregularities touching on service, adequacy and sufficiency of notice, the Tribunal found that the Complainant's right to fair hearing was breached.

9. The Tribunal also faulted the TNDC for failing to issue its decision to the Complainant on time, While the decision was signed in his presence on 10th May 2023, it was not availed to him on the same day. Failure to avail the decisions and reasonings of the THDC in relation to the proceedings on 8th and 10th May 2023 caused the disciplinary process to be tainted with procedural irregularities, and was a violation of Articles 47 and 50 of the Constitution, Section 4 and 7 of the Fair Administrative Action Act, the Jubilee party Constitution and the TNDC Regulations, and the principles of natural justice.

10. Having found that the TNDC disciplinary proceedings were conducted in breach of the law, the finding of the Tribunal on whether the findings of the TNDC were in accordance with the law were inconsequential.

11. On the question of whether the 7th to 13th Interested Parties had the legal capacity to ratify the decision of the TNDC, the Tribunal noted that there was a contest as to the legitimate members of NEC that should have sat in the NEC meeting of 19th May 2023. Both parties had agreed that the NEC members as at 10 February 2023 were those ratified at the NDC meeting of 22th March 2022, but both parties also submitted that there were changes to NEC. However, none of the parties furnished the tribunal with any evidence of change of particulars with the ORPP.

12. The ORPP had sworn an affidavit annexing only confirmation of membership of TNDC and not NEC. In the circumstances, the Tribunal was left with no option but to rely on the undisputed list ORPP record of Jubilee Party NEC members as at 10th February 2023 in the absence of any conclusive evidence of change of the subject particulars. Accordingly, noting that the list of attendees who attended the meeting of 19th May 2023 did not tally with list of NEC members as at 10th February 2023, and also considering that many persons who attended NEC meeting of 19th May 2023 were not listed in the earlier list, the Tribunal found that the NEC meeting of 19th May 2023 was not properly constituted. Applying the same reasoning, it found that the notice convening the subject meeting of 19th May 2023 was irregular and in breach of Article 8.2(5) of the party constitution, as it was not convened by the legitimate Secretary-General as per the ORPP record at the material time.

13. There were also instances of conflict of interest that could be deciphered from the record. The Complainant's accusers attended the NEC meeting of 10th February 2023 that recommended disciplinary action against him. That NEC convened

again on 19th May 2023 to adopt, confirm and ratify the judgement of TNDC. The party Chairperson was conflicted as he sat in the meeting of 10th February 2023, wrote the complaint to TNDC, participated in the appointment of the chairperson of TNDC, was the sole witness before TNDC and sat in the NEC meeting to receive and ratify the decision of the TNDC. Fatuma Dullo and Wambui Gichuru also sat in NEC meeting of 19th May 2023 yet were also conflicted having been cited as aggrieved parties in the charges that were framed against the Complainant herein.

14. The Tribunal therefore found that the 7th to 13th Interested Parties had no legal capacity to ratify the decision of TNDC, and further that the said interested parties were in any event conflicted.

15. Having found that the disciplinary process against the Complainant was conducted in breach of Articles 47 and 50 of the Constitution, section 4 and 7 of the Fair Administrative Action Act, the Jubilee party Constitution and the TNDC Regulations, and the principles of natural justice, and further having found that the 7th to 13th Interested Parties had no legal capacity to ratify the decision of the TNDC, and further that the said interested parties were in any event conflicted, it followed that the TNDC decision of 10th May 2023 was an illegality and could not stand. Similarly, the purported ratification of the TNDC decision by NEC on 19th May 2023 could not also stand.

16. Costs follow the event. The Complainant was awarded costs as against the 1st respondent and the Interested parties.

Hon Josephine Cheptum Cheprum & 3 Others v Kenya African National Union; Registrar of Political Parties & Another (Interested Parties) Complaint No 18 of 2020 (Judgement)

Hon. Desma Nungo, Hon. Dr Adelaide Mbithi, Hon. Milly Lwanga Odongo

11th November 2020

Summary of Facts

The Complainants were members of the Respondent and all MCAs of West Pokot. They received letters titled 'breaching of the party constitution and code of conduct' from the Respondent requiring the Complainants to show cause why disciplinary action should not be taken against them. They responded and were later asked to appear before the party disciplinary committee within 2 days. Their advocate sought details of the alleged offences, names of members of the disciplinary committee and an adjournment but the request was never responded to. They later received a letter expelling them from the party. The Complainants contend that the expulsion was unlawful as the purported disciplinary process did not adhere to the Respondent's own constitution and that the disciplinary committee consisted of a sole individual contrary to the Respondent's laws.

The Respondents argued that the Complainants case was filed outside the timelines set with the PPDT (Procedure) Rules without leave having been sought and granted. Further that the disciplinary process was proper and fully within their laws. That there was no response to the Claimants requests as the information sought should have already been in the knowledge of the Complainants.

Issues for determination

1. Whether the claim falls by dint of Regulation 7 of the PPDT (Procedure) Regulations, 2017;
2. Whether the alleged expulsion was lawful;
3. What relief should be granted.

Held:

1. On issue (a), the Tribunal noted that the Claimants learned of their alleged decision about a month after the fact. Further, it was evident that the Complainants did not sit

in the NEC meeting; as such, they could only learn of the decision via the letter they received about a month after the said meeting. The Tribunal, in holding that it would amount to a travesty of justice to apply the dismissal clause in Regulation 7, stated that Regulation 7 ought to be interpreted within the context of the circumstances of a case and in the interests of justice. Further that courts should endeavour to sustain a petition so that the issues in dispute are determined on merits noting that Regulation 7 it is a draconian measure which ought to be employed only as a last resort and even then, only:

a. In the clearest of cases

b. Where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action

c. Where the procedural infraction goes to the root of the dispute

2. On issue (b) The Tribunal noted that the notices to appear did not give the particulars of the charges against the complainants. They only referred to unspecified accusations of gross misconduct. The Complainants' request for time, specification of charges and documentation to help ascertain veracity of the disciplinary process was most unfortunately not responded to either. The Tribunal after evaluating the entire process determined that there was inadequate notice and lack of and/or insufficient particularization of the alleged breaches against the Complainants; and, the Complainants were not accorded a fair hearing as required by law.

Orders

1. A declaration was issued that the disciplinary proceedings were unprocedural, and violated the PPA, the Fair Administrative Action Act and Article 28 of the Respondent's constitution

2. A declaration that the Complainants were denied the right to a fair hearing and the resultant decision was unlawful and had no effect in law.

3. A declaration that the ratification of the decision of the disciplinary committee was unlawful and had no legal effect

4. An order restraining the 1st Interested party by themselves, their agents and/or servants or employees from removing the names of the Complainants from the membership list of the Respondent on the basis of the impugned disciplinary proceedings

5. Each party to bear its own costs.

Hon. Kieru John Wambui & Another v Jubilee Party; Raphael Tuju Secretary General, Jubilee Party & 2 Others (Interested Parties) Complaint No. E005 of 2021 (Ruling)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

13th April 2021

Summary of Facts

The Complainants contended that their membership in the County Assembly of Nyandarua's (the 2nd Interested Party) Service Board had been altered and/or varied in an unprocedural manner.

The Respondent and the 1st Interested Party filed a preliminary objection on the ground that the IDRM mechanism as anticipated in law under the Political Parties Act (PPA) and the Jubilee Party Constitution had not been exhausted before the Complaint was filed before the Tribunal. The Complainants argued that the Respondent and the 1st Interested Party's actions were outrightly against the law and the dispute could not be subjected to IDRM as IDRM had no jurisdiction to quash the decision made by the party.

Issues for determination

1. The Tribunal noted that the dispute at hand was between a member of a political party and a political party and pursuant to Section 40 (2) of the PPA, for the Tribunal to assume jurisdiction, there was need for there to have been an internal dispute resolution mechanism or an attempt at the same.

2. Further noting that the Jubilee Party Constitution clearly laid out invocation of IDRM within the party at Article 15 and that there was neither evidence to demonstrate efforts to institute IDRM as outlined nor frustration of such procedures, the Tribunal was not convinced that a mere allegation of an outright illegality against the party granted the Complainants a blanket exemption from the IDRM requirement. Such an interpretation would, in the opinion of the Tribunal, defeat the purpose and spirit of Section 40 (2) of the PPA noting that

most if not all disputes involving political party affairs are usually grounded on some allegation of illegality by either party to the dispute against the other. The Tribunal in determining that it had no jurisdiction quoted the case of ***Gabriel Bukachi Chapia v ODM & Another*** **[2017] eKLR** where the Court of Appeal held that:

> *In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.*

Orders

1. The complaint was struck out for want of jurisdiction.
2. Each party to bear its own costs.

Hon. Mohamed Abdi Farah v Wiper Democratic Party & 2 Others; The Speaker, Garissa County Assembly & Another (Interested Parties) Complaint No. 13 of 2020 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho,

Hon. Dr. Adelaide Mbithi

13th October 2020

Summary of Facts

The Complainant is an elected Member of County Assembly of Garissa. He pleaded that he had served as minority leader in Garissa County Assembly until 4th June 2020 when he was removed from the subject position after conducting elections. It was submitted that the Complainant had subjected the dispute to IDRM by writing a letter to the party which was not responded to. Further, that he had not been given any explanation or evidence prior to his ousting. The Complainant further argued that the 3rd Respondent and the 1st and 2nd Interested Parties had not filed a response in the form prescribed under Regulation 12 of the PPDT Procedure Regulations.

The 3rd Respondent submitted that there had been no substantive holder of the position of leader of minority Garissa County Assembly thus necessitating the subject elections that were conducted on 4th June 2020 to fill the position. According to the 3rd Respondent and the Interested Parties, the Complainant had not been elected but held office in an acting capacity with no security of tenure. On the response the 3rd Respondent and the Interested Parties submitted that the omission was curable as reliance could still be placed on the Replying Affidavit and that the Complainant had not demonstrated any prejudice suffered as a consequence of the omission.

Issues for determination

3. Whether the Tribunal had jurisdiction to hear and determine the matter.
4. Whether the complaint was opposed.
5. Whether the complainant's removal from position of leader of minority was in breach of the law.
6. What were the appropriate reliefs to grant.

Held:

1. On jurisdiction, the Tribunal noted that the Complainant sent a letter of concern to the party which was duly received but there was no evidence of the party responding to and/or acting on the subject of the complaint letter. The Tribunal reiterated that where an individual attempts to invoke IDRM and the political party ignores, neglects and/or refuses to activate the same, the Tribunal can assume jurisdiction in the interests of justice. Accordingly, the Tribunal held that it had jurisdiction to determine the matter.

2. On the second issue, the Tribunal stated that the provisions of Regulation 4 of the PPDT Procedure Regulations are intended to set out the procedure for just, expeditious and impartial determination of disputes affecting political parties. Further, that the Tribunal was enjoined by Article 159 of the Constitution as read together with Regulation 4 of the PPDT Procedure Regulations to exercise its authority and administer justice without undue regard to procedural technicalities. That being a Tribunal, it was not bound by the strict rules of evidence and civil procedure. In the circumstances, the Complainant would likely not suffer any prejudice if the Replying Affidavit was relied upon and none was demonstrated. Therefore, the Tribunal held that the Complaint was properly opposed by virtue of the Replying Affidavit and Written Submissions on record.

3. On the third issue, the Tribunal noted that the 3rd Respondent's Affidavit expressly deposed that the Complaint was not elected as leader of minority in the assembly, but served in an acting capacity. Further, the Complainant had not furnished any documentation to demonstrate his election as a substantive holder of the subject position. In the circumstances the Tribunal found on a balance of probabilities that the Complainant only served in an acting capacity. The Tribunal was thus not persuaded that the Complainant's ouster was in breach of law.

Orders

1. The Complainant has failed to prove his case on a balance of probabilities and the Complaint was accordingly dismissed

2. Costs to the 3rd Respondent and the 1st and 2nd Interested Parties.

Hon Muchiri Godfrey Murithi & 4 Others v Jubilee Party; Peterson Mwirigi Kathenya & 4 Others (Interested Parties) Complaint No 6 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

12th June 2020

Summary of Facts

The 1st, 2nd, 3rd, and 5th Complainants claimed to be members of Tharaka Nithi County Assembly who served as Majority Party Leader, Deputy Majority Party Leader, Majority Whip and the County Assembly Service Board Representative respectively at all material times. They further contended that they had each retained their positions after elections were conducted for party leadership positions on 23rd February 2020 save for the 4th Complainant being the only new addition by virtue of being elected Deputy Majority Whip.

The Complainants forwarded their official communication of the said elections to the Speaker on 24th February 2020 in a letter copied to the party. The Complainants later learnt that a second letter dated 24th February 2020 emanating from the Interested Parties was sent to the Speaker declaring a different outcome of an election that had been allegedly held on 24th February 2020. According to the other letter, the 1st, 2nd, 3rd, 4th and 5th Interested Parties herein were allegedly elected as Majority Party Leader, Deputy Majority Party Leader, Majority Whip, Deputy Majority Whip and the County Assembly Service Board Representative respectively.

The Respondent, despite having in its possession two alleged lists of the Assembly leadership, failed and refused to resolve the matter internally and their inaction led to the Speaker of the said Assembly reading the list with the erroneous names (of the Interested Parties) as the new leaders.

The Respondent claimed that vide a meeting held on 24th February, 2020, the contested seats were declared vacant and communication of the outcome of the said meeting was duly communicated. Further, the Complainants had indeed lodged a complaint with the political party but even before the relevant organs could be constituted, they lodged this claim and thus the tribunal did not have jurisdiction to handle the matter.

The Interested Parties averred that the outcome of the said elections on 24th February 2020 were duly adopted by the Respondent and duly submitted to the party headquarters; including the signed attendance register. Further, that no IDRM had been sought by the Complainants.

Issues for determination

1. Whether the Tribunal had jurisdiction.
2. Who the lawfully elected party officials were.

Held:

1. On jurisdiction, the Tribunal held that it was clear that the Complainants had indeed lodged a complaint with the Respondent which was not dealt with promptly before the County Assembly Sitting wherein the Speaker read the list with the allegedly erroneous names of elected party officials. The Tribunal held that the Complainant had shown that there had been efforts at IDRM which were unsuccessful and thus it had jurisdiction to hear and determine the matter.

2. On the second issue, the Tribunal held that there was too much controversy relating to the outcome of the said elections with neither party presenting cogent evidence to support their positions. The Tribunal stated that the Respondent had the mandate and the authority to conduct and have proper records of any election that takes place within its membership and indeed has the authority and ability to summon persons and collate information that would help in determining the likely outcome of the election. Considering there was not any cogent evidence in support of the contentions of either of the parties, the Tribunal held that the integrity of the elections and the consequential party processes remained in question and thus neither party should benefit from therefrom.

Orders

1. The matter be and is hereby referred back to the Respondent to conduct fresh elections for all the contested positions within 30 days from the date of the judgement in accordance with the party laws.
2. Notice to issue to the Speaker, Tharaka Nithi County Assembly for effect.
3. Each party to bear its own costs in the interests of party unity.

Hon Patrick Musili v Orange Democratic Party; Wiper Democratic Movement & 5 Others (Interested Parties) Complaint No. 15 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

10th November 2020

Summary of Facts

The Complainant averred that he was an elected Member of the County Assembly (MCA) of Nairobi for Hospital Ward. He contended that he was nominated on 6th September 2017 by members of his coalition on the minority side [NASA coalition] to serve as Deputy Minority Leader in Nairobi County Assembly. This position subsisted until 18th August 2020 when the Respondent, vide a letter, purported to make changes to the House Leadership thereby effectively removing him from office while replacing him with another MCA who is a member of the Respondent. The Complainant submitted that the unique aspect of his claim is that it arises from the discontent of a member with decisions taken within a coalition, and that there was no clearly laid out procedure for redress in such a process. Therefore, his claim was warranted. Further that the 1st Interested Party had admitted that attempts to resolve the issue had flopped.

The Respondent and the 4th, 5th and 6th Interested Parties' case was that the Complainant had no locus to bring the case since the Complainant was not a party to the coalition agreement. Further, the Complainant was not a member of the Respondent. They averred that the claim was not one contemplated under Section 40 of the Political Parties Act and in any case, it was never submitted to IDRM. The Tribunal was also advised to take judicial notice that the NASA coalition had ceased to exist.

The 1st Interested Party (Wiper Party) argued that the need to subject the dispute to IDRM was frustrated by the non-existence of organisational systemization that would allow for and provide for dispute resolution. As such approaching the Tribunal was the only course left. Further, that the procedure laid down in law was not followed in the purported removal of the Complainant and in any event was never processed as required along the laid-out organs under the coalition. The 1st Interested Party made a concession that the Complainant was their member.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine the matter.
2. Whether the Complainant's removal from the subject position was procedural and proper in law.

Held:

1. On jurisdiction, the Tribunal looked at the NASA coalition agreement and noted that the agreement at article 12 provided for dispute resolution. The Tribunal noted that while the 1st Interested Party (Wiper Party) had submitted that there were issues in the running of the coalition affairs, it did not show how, if at all, the said Wiper Party had attempted to resolve those issues within the agreement.

2. The Tribunal noted that there existed clear provisions under the NASA agreement on how disagreements and indeed decisions can be handled. As already outlined, the Complainant's political party (Wiper Party) had not shown how, if at all they had attempted to address their concerns. The Tribunal thus held that it would be an unfavourable approach to fail to sort out party issues, which were largely negotiation issues, within the context provided for (such as the coalition documents) and instead ask the Tribunal to act in futility.

3. Further, the Complainant did not fit the description of parties over which the Tribunal could exercise jurisdiction as outlined in Section 40 (1) of the Political Parties Act, since the Complainant was not and could not be described as a partner in the said coalition. Therefore the Tribunal held that it had no jurisdiction and downed its tools.

Orders

1. The Complaint was dismissed.

Omondi Owuocha & Another v Orange Democratic Movement & Another; The Speaker of the County Assembly of Homa Bay & 2 Others (Interested Parties) Complaint No 7 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

10th June 2020

Summary of Facts

The Claimants contention was that they, together with the 2nd Respondent were all members of the Orange Democratic Party (ODM) [the 1st Respondent herein] which party had majority elected and nominated membership of the Homabay County Assembly. The 2nd Respondent had at the cycle of the end County Assembly been confirmed as Majority leader in the said Assembly. The Claimants raised issue with the 2nd Respondent assuming the position of the representative of the Minority in the Homa Bay County Assembly Service Board (the 2nd Interested Party) and the 1st Interested Party had failed to admonish him.

The 1st Respondent argued that it was not privy to the process that led to the nomination of the 2nd Respondent and agreed with the Claimant that the 2nd Respondent was not qualified for nomination to represent the interests of the Minority side by virtue of being a member of the 1st Respondent. The 1st Respondent averred that it had advised its membership on the unconstitutionality and unlawfulness of a Majority Party member in the assembly assuming representation of the Minority but had no ability to control action taken within the assembly. Therefore, the Tribunal was best placed to address the matter since the 1st Respondent could not effect action within the assembly.

The 2nd Respondent though served did not appear.

Issues for determination

1. Whether the Tribunal had jurisdiction.
2. Whether the 2nd Respondent could sit within the membership of the 2nd Interested Party allegedly as a representative of the Minority side of the Assembly.

Held:

1. On jurisdiction, the Tribunal noted that the Claimants had stated that before approaching the Tribunal, they had lodged a complaint with the 1st Respondent. The 1st Respondent had also confirmed that it had on a number of occasions advised their members on the unlawfulness of the purported presentation as representatives of the minority, to no avail. The party also averred that their ability to act was limited as they had no control over the actions of the members within the Assembly. This was in the view of the Tribunal as IDRM and as such it had jurisdiction.

2. On the second issue, the Tribunal noted that the 1st Respondent (ODM) and the Interested Parties (the Speaker and/or the Homa Bay County Assembly) posited that there was no specific provision they could apply to remedy the obvious anomaly. The Tribunal held that since it had the mandate to address the anomaly it must thus act, so as to promote the culture of promoting and upholding the rule of law. The Tribunal held that the decision by the members of the said Assembly to purport to nominate a member of the majority to purport to sit in space of a position reserved for the minority was irrational, unlawful and unreasonable.

3. The Tribunal quoted ***Pastoli vs Kabale District Local Government Council and Others***, where it was held:

> In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety…Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards…Procedural impropriety is where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

Orders

1. The purported nomination of the 2nd Respondent as a representative of the minority party in the Homa Bay County Assembly Service Board was unlawful, null and void.

2. The notification of the decision of the Tribunal to issue to the Interested Party for effect.

3. The 2nd Respondent to meet the costs of the Claimants in the case.

Rodgers A. Tindi & 2 Others v Jonathan Chacha Weche & Another; Kenya African National Union [KANU] (Interested Party) Complaint No. 5 of 2020 (Judgement)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

3th June 2020

Summary of Facts

The 1st, 2nd, and 3rd Complainants contended that they were the current interim officials of KANU Lurambi Branch namely Chairman, Treasurer and Secretary respectively. The Complainants aver that they were nominated at branch level whereafter their list was verified and approved by the Secretary General of the Interested Party. Their election being as a result of the Respondent's unsatisfactory leadership and misappropriation of party resources. They alleged that despite being bona fide interim officials of the party, the Respondents have refused to vacate the KANU Lurambi branch offices with a view to allowing them to perform their mandate.

The 1st Respondent opposed the claim and averred that by an executive meeting held by the party on 1st December 2014, he was proposed as incoming chairman of the Interested Party's Lurambi sub branch. According to the Respondents the Claimants were not bona fide branch officials and that their purported nomination was contrary to the party's constitution as the Secretary General lacks the power to nominate branch officials. The 1st Respondent further submitted that no complaint or disciplinary action had been taken against the alleged misconduct. The Respondent maintained there existed a pending court case being Kakamega CMCC Number 162 of 2019 touching on the same subject matter therefore making the instant suit sub judice.

The Complainants nomination as interim officials was founded on a meeting held in September 2018 and ratified by the Interested Party by a letter dated 24th October, 2018. The Respondents claim was founded on the party's executive meeting held on 1st December 2014 and a letter dated 11th February 2015 from the Interested Party's Secretary General addressed to the Manager Kenya Commercial Bank Kakamega Branch to change bank signatories to reflect his office.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine this matter.
2. Who were the bona fide interim officials for the KANU branch in Lurambi.

Held:

1. On jurisdiction, the Tribunal noted that there was evidence of communication between the Complainants and the Interested Party concerning the Respondent's actions or omissions. The Interested Party, however, did not constitute the relevant party organs to hear and determine the complaints despite being aware of the same. The Tribunal held that where an individual's effort to invoke IDRM is frustrated by a political party, the Tribunal has found in favour of such an individual. In the circumstances, the Tribunal was thus properly seized of the matter.

2. On the Respondent's claim of sub judice, the Tribunal noted that the Complainants had denied the existence of the case, submitting that it was withdrawn; which withdrawal was challenged by the Respondents. Since there were no pleadings in the material suit before the Chief Magistrates Court, the Tribunal was unable to tell whether the matter in issue in the Tribunal was substantially in issue in CMCC No. 162 of 2020. In the circumstances, the claim on sub judice was unsubstantiated and therefore failed.

3. On the second issue, the Tribunal noted that neither party challenged the occurrence of either meeting the opposing party relied on to prove their positions. In the circumstances, the Tribunal posited that the deliberations and resolutions of the meeting held in September 2018 took precedence over the resolutions of the meeting held in December 2014. Further, the letter from the Interested Party dated 24th October 2018 expressly approved the Complainants' nomination.

4. On the Respondents' challenge that the Secretary General did not have power to nominate officials, the Tribunal stated that it was clear that the Complainants, according to the subject letter dated 24th October 2018, were nominated at the branch and not by the Secretary General as claimed. Further the oral submission that the Secretary General's signature was forged was neither pleaded nor was evidence produced and was thus unsubstantiated. The Tribunal thus found on a

balance of probabilities that the Complainants were the bona fide interim officials of KANU Kakamega Lurambi Branch.

Orders

The Complainants were the bona fide office bearers

1. The Complainants do forthwith take over the management and/or control of Kakamega Lurambi sub branch party affairs including its assets and liabilities in accordance with the party Constitution

2. A permanent injunction restraining the Respondents from in any manner whatsoever interfering with and/or frustrating the Claimants' management and/or control of KANU Kakamega Lurambi sub branch party affairs, assets and liabilities

3. Notice to issue to the Secretary General, KANU to oversee and ensure the implementation of the orders of the Tribunal

4. Costs of the proceedings be awarded to the Complainants.

Senator Mary Yiane & 4 Others v Jubilee Party & Another
Complaint No E003 of 2021

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr Adelaide Mbithi

5th May 2021

The Complainants were all members of the Senate, holding the said offices by virtue of their nomination as such by Jubilee Party, the 1st Respondent herein. On or about 15th May 2020, they received letters dated 13th May 2020 calling on them to show cause why they should not be subjected to disciplinary proceedings for, inter alia, their alleged failure to attend a parliamentary group meeting organised by the party and held on Sunday May 10, 2020 at State House. Subsequently the Jubilee Party National Disciplinary Committee (NDC) allegedly commenced a disciplinary hearing against them which process culminated in their expulsion from the party. The Complainants' case was premised on the assertion that even before they presented themselves before the party disciplinary committee, the Senate Majority Whip, one Senator Irungu Kangata, had advised them that the charges against them were to be withdrawn, and that their appearance before the disciplinary organ would be merely consultative. However, much to their consternation, when they presented before the said party disciplinary process, they were bombarded with vague charges and forced to proceed with the disciplinary process.

They contended that they were not the only Jubilee Party members who failed to attend the subject parliamentary group meeting. Thus, the decision to proceed with their disciplinary process was discriminatory. Further, the 5th Complainant, Sen. Iman Falhada Dekow, submitted that she had tendered her apologies to the said parliamentary group meeting, which she called to the attention of the party disciplinary committee, and therefore did not anticipate that the disciplinary process against her would proceed.

The Complainant's impugned the disciplinary process against them for being unfair and a contravention of the party constitution, the NDC Regulations 2017, sections 4, 6 and 7 of the Fair Administrative Action Act and Articles 27, 47 and 50 of the Constitution of Kenya. They also contended that there was no properly convened

National Executive Committee (NEC) that ratified the decisions of the said disciplinary organ, making any alleged ratification unlawful. In addition, they challenged the move by the National Management Committee (NMC) to vary the decision allegedly on behalf of the NEC. They averred that the allegations made against them did not meet the criteria set in law and particularly section 14 (5) of the Political Parties Act, under which one would be deemed to have resigned from their party and that would allow for their expulsion.

The 1st Respondent maintained that notices to show cause were issued as against each of the Complainants, detailing the particulars of their alleged breaches of party laws. The 1st Respondent denied that the disciplinary process was an ambush and maintained that the Complainants were invited to attend the disciplinary proceedings and that they each individually confirmed attendance as they acknowledged receipt of the said notices. The 1st Respondent's position was that the Complainants were given sufficient opportunity to respond to the charges against them before a determination was reached. The ratification of the decision was, according to the Secretary-General, done in line with Article 13.12 of the Jubilee Party constitution, which requires such decisions to be channelled to NEC for adoption, ratification, variation or substitution. The decision was said to have been subjected to the ratification process through the NMC, which is authorised by Article 7.1 of the party constitution to act on behalf of the NEC.

The 2nd Respondent averred that she had read and understood the party process of expulsion of its errant members. In addition, the said 2nd Respondent recognised that the 2nd schedule of the Political Parties Act requires each party to provide in their laws for a disciplinary process. The 2nd Respondent invited the Tribunal to determine whether the 1st Respondent complied with the law. The Tribunal was referred to Section 14(7) of the Political Parties Act.

Issues for determination

1. Whether the 1st Respondent's disciplinary proceedings leading to the expulsion of the Complainants were conducted in accordance with the law.

2. Whether the 1st Respondent's decision to expel the Complainants was arrived at justly and fairly / whether the Complainants were discriminated against by the 1st Respondent.

3. What were the appropriate reliefs to grant.

Held:

1. The Tribunal noted that the notices to show cause dated 13th May 2020 expressly stated that the Complainants were called upon to show cause why disciplinary proceedings should not be commenced against them for violating the party constitution. They were signed by the National Chairperson of the Party and not the NDC. The Complainants responded to the said notices to show cause on 15th May 2020. The Complainants sought further details in reference to the alleged violations as outlined in the said notices, and in some instances; as in that of Sen. Victor Prengei (4th Complainant), proceeded to detail the level and extent to which they have been loyal and supportive of the party.

2. The Tribunal noted that the NDC regulations did not make mention of a notice to show cause, only to charge sheets. The Tribunal considered it fundamental to evaluate whether the NDC charge sheets were issued and served upon the complainants prior to the disciplinary hearing. While the Secretary General of the 1st Respondent stated during cross examination that he believed that the charge sheets and summonses were served and the party constitution complied with, no evidence of the charge sheets or summons or service of the same was made available.

3. From the Tribunal's analysis, a disciplinary process would commence, as per the laws of the party, by way of a clearly laid out process that would leave no doubt of question in the mind of those engaged as to what was going on. Undoubtedly expulsion of a person from a party has serious implications. Thus when an entity such as a political party outlines a clear process, more so the manner in which its membership will become aware that such a serious process has been initiated against them, then such process needs to be clearly initiated.

4. Taking into consideration the totality of the facts and circumstances of this case, the Tribunal found that the 1st Respondent's alleged disciplinary proceedings and the NDC decision of 29th May 2020 leading to the expulsion of the Complainants were not conducted in accordance with the law.

5. Having found the NDC processes and decision unlawful, the decision by the 1st Respondent to then proceed to transmit the outcome of that impugned process

to the national organ, including the subsequent decision of 8th February 2021, could not stand. There was no proper initiation of the process that could elicit an outcome that would be adopted or ratified by the national organ.

6. This did not preclude the 1st Respondent from commencing fresh disciplinary proceedings against the Complainants if they so wished, provided that the disciplinary process was conducted in adherence to the 1st Respondent's laws.

7. On the question of costs, the general principle is that costs follow the event. The Complainants were therefore entitled to costs. Having considered the 2nd Respondent's plea and the circumstances of this case, the Tribunal accordingly issued an order for costs of the Complainants as against the 1st Respondent.

Orders

1. A declaration be and is hereby issued that the disciplinary proceedings and the consequential decisions by the 1st Respondent against the Complainants were unprocedural and violated the provisions of Articles 13.1.10 and 13.1.11 of the party Constitution, Regulations 5,8,9,10,12,13,20 and 52 of the National Disciplinary Committee Regulations 2017, Sections 4 of the Fair Administrative Action Act and Articles 47 and 50 of the Constitution of Kenya and are thus a nullity and of no consequence in law.

2. An order restraining the 2nd Respondents by themselves, their agents, and/or servants or employees from removing the names of the Complainants from the membership list of the 1st Respondent Political Party on the basis of the disciplinary proceedings subject hereof.

3. The costs of the Complaint be and are hereby awarded to the Complainants as against the 1st Respondent.

Thirdway Alliance v Dr Ekuru Aukot PPDT Complaint No 16 and 17 of 2020

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho

30th November 2020

Summary of Facts

Complaint No. 16 of 2020 was filed by the Thirdway Alliance Kenya (TAKE), together with Certificate of Urgency Notice of Motion application dated 31st August 2020 and the Supporting Affidavit sworn by one Andrew Njoroge, the Executive Director of the Complainant, against Dr Ekuru Aukot. Eight persons were cited as Interested Parties. Meanwhile, on 2nd September 2020, the Respondent in Complaint No. 16 of 2020 filed Complaint No. 17 of 2020 with all the Interested Parties in Complaint No. 16 of 2020, being cited as Respondents, and the Respondent in Complaint No. 16 of 2020 being cited an Interested Party. Pursuant to the Tribunal's Orders made on the 22nd September 2020, PPDT Complaint No. 16 of 2020 was consolidated with PPDT Complaint No. 17 of 2020. The parties agreed that PPDT Complaint No. 16 of 2020 be the lead file.

The Complaints were based on strife within the leadership levels of the party. On 14th August 2020, a meeting was scheduled to be held at the party headquarters. The meeting was allegedly meant to provide an opportunity to the party leader Dr. Ekuru Aukot to respond to accusations levelled against him. Amongst these were that, he had written to Dr. Angela Mwikali an offensive and insulting address that was subsequently published in social media thus causing her mental anguish; that he had used his position in the party to fundraise about half a billion Kenya Shillings which he did not submit to the party; and that he continues to disobey court orders in respect to a Children Case No. 1591/2019 in contravention to Chapter 6 of the Constitution of Kenya. The said meeting started off with a confrontation that led to Dr. Ekuru Aukot walking out of the meeting but returning while accompanied by 2 police officers. It took the intervention of the Executive Officer of the party one Mr. Andrew Njoroge through the OCS to restore calm and order.

Notices were issued and sent out on the same date of 14th August 2020 for another meeting to be held on 26th August 2020 to afford Dr. Ekuru Aukot another opportunity to respond to the issues that had been raised against him. On 26th August 2020, the meeting proceeded and resolutions in respect of Dr. Ekuru Aukot were passed. The resolutions were to the effect that the issues raised be referred to the party's disciplinary committee immediately; that the party leader be suspended from the position of party leader immediately pending hearing and determination of the matter by the disciplinary committee in accordance with Article 14.1 and Article 25; that the party leader appear before the disciplinary committee on 4th September 2020; and that the party leader be stopped from speaking for and or transacting any business on behalf of the party pending hearing and determination of the matter by the disciplinary committee. The disciplinary committee was directed to fast track the hearing and determination of the matter and advise NEC as soon as is practically possible. According to TAKE, Dr. Ekuru Aukot failed to adhere to the said resolutions.

Dr Aukot averred that the meeting of 26th August 2020 was not procedurally convened and that he only got to learn of its outcome through media. It was contended that some of the convenors of the impugned meeting of 26th August 2020 could not procedurally convene such a meeting. He also contended that no notice was issued for convening such meeting in contravention of Article 6.6 (d) of the party constitution; that no notice was issued to the Party Leader that his conduct was to be the issue in discussion at the said meeting of 26th August 2020; and that he was denied a right to fair action. TAKE wanted the matter dismissed for want of exhaustion of IDRM.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine the Complaints.

2. Whether 5 of the named persons were discredited office holders of the political party.

3. If the answer to (b) above was in the affirmative, whether the position of the said discredited office holders impacted their ability to have participated in the impugned disciplinary process against the party leader.

4. Whether the meeting of 26 August 2020 was properly and procedurally convened.

5. Whether the final resolutions emanating from the party process of 26th August 2020 were just in the circumstances.

6. What orders the Tribunal should issue.

Held

1. On the question of jurisdiction, the Tribunal perused the record and nowhere in the said Complaint did Dr. Ekuru Aukot demonstrate that he attempted or evoked IDRM in accordance with Article 25 of the party constitution. This Tribunal had often held that an attempt at IDRM was a basic requirement before she could be seized of a matter. None was shown herein, and thus the Tribunal had to down its tools in so far as Complaint No. 17 of 2020 was concerned.

2. With respect to Complaint No. 16 of 2020, the record showed that IDRM had been invoked, and was in process at the time of filing the subject Complaint. This was vide invitation to meetings of 14th August 2020, 26th August 2020, amongst other meetings that Dr. Ekuru Aukot allegedly refused to attend. Indeed, the fear of the Complainant in the subject Complaint was that the continued actions of Dr. Ekuru Aukot would render the process futile. The Tribunal had on many occasions expressed itself on grasp of jurisdiction when IDRM had been initiated and/or frustrated by action or inaction of key party organs. The Tribunal therefore found that we are properly seized of Complaint No. 16 of 2020.

3. The second issue was whether the persons who convened the impugned meeting of 26th August 2020 had capacity to do so. Looking at the list of the persons who convened and attended the meeting of 26th August 2020, the party laws and the stated record of officials as held by the Registrar of Political Parties, the Tribunal found, on a balance of probabilities, that the persons who convened and attended the meeting of 26th August 2020 were the right officers to institute and sit in such meetings. The notice to the party leader was therefore proper and in line with the party laws and the Tribunal could not find fault with the party processes up until 26th August 2020.

4. However, the party processes after the meeting of 26th August 2020 were wanting. From the Report of the Disciplinary Committee dated 4th September

2020 annexed to the Supplementary Affidavit sworn by Andrew Njoroge on 11th November 2020, it appeared that the disciplinary hearing against Dr Ekuru Aukot proceeded in his absence. At the material time, Complaint No. 16 of 2020 was pending before the Tribunal. It was curious how the hearing would have proceeded given that the party leader, who was the subject of the said disciplinary process, had filed papers before the Tribunal refusing the *locus* and standing of the said process. Just action would have dictated that parties would have awaited the outcome of the disputed locus before proceeding with the process.

5. Therefore, any alleged progression of the disciplinary process against Dr. Ekuru Aukot, in the life and pendency of this matter could not have been procedural.

6. Given the history of this matter and in the interest of bringing sanity to Thirdway Alliance Kenya party processes, the Tribunal was persuaded to allow prayer number 4, though with modifications. The Tribunal appreciated that it played a principal role in strengthening the capacity of political parties to democratically govern themselves. Political parties have a right to discipline their members. The Tribunal had not delved into the merits of the allegations brought against Dr. Ekuru Aukot, as it believed that the internal party disciplinary processes should first be concluded in accordance with the party laws.

Orders

1. That the disciplinary matter relating to the conduct of Dr. Ekuru Aukot be and is hereby referred back to Thirdway Alliance Party Kenya to undertake disciplinary process against the said Dr. Ekuru Aukot before a duly constituted Disciplinary Committee in accordance with party Constitution, the rule of law and natural justice.

2. That an injunction be and is hereby issued restraining Dr. Ekuru Aukot by himself, his servants, agents or employees from intimidating, threatening, abusing, arresting or dealing in any unlawful manner with the members of the National Executive Committee and the activities of the Thirdway Alliance Kenya Party.

3. That each party shall bear its own costs of these proceedings.

Thirdway Alliance Kenya v Frederick Okango Complaint No E010 of 2021 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

6th July 2021

Summary of Facts

The Complainant contended that the Respondent had consistently been in violation of party laws and had been conducting himself as though he was not expected, under the party framework, to work in consultation and unison with the Chairman, NEC and other party organs. An attempt was subsequently made to institute disciplinary process against him but he continued to frustrate the process hence the Complaint.

The Respondent contended that the party laws and structures sufficed in addressing the issues the Complainant was raising and it was in fact the party Chairman's consistent failure to adhere to party processes that had seen the party Chairman institute the suit in a most unprocedural manner.

Issues for determination

1. Whether the complaint was premature
2. Whether the complaint was bad in law for want of authorization to institute action on behalf of the party
3. Whether the Respondent acted in breach of the party Constitution and the law
4. Whether the complainant was entitled to the remedies sought.

Held:

1. On the first issue, the Tribunal noted that the dispute as framed was essentially between a political party and its members and/or between members of a political party. Thus, pursuant to Section 40 (1)(a) and (b) of the PPA, there was need to have been an IDRM process or even an attempt at the same in the first instance.
2. The Tribunal further noted that an IDRM process had begun but not concluded and thus held that it would not address the matter any further until the conclusion of the IDRM process.

Orders

1. The Complaint was struck out and parties were referred back to the party IDRM.
2. Each party to bear its own costs in the interests of party unity.

B. APPEALS FROM DECISIONS OF THE REGISTRAR OF POLITICAL PARTIES

Alexander Gitonga Nyaga & 6 Others v Registrar of Political Parties; Chama Cha Uzalendo (Interested Party) PPDT Appeal Number 4 of 2019 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga, Hon. Paul Ngotho,

Hon. Dr. Adelaide Mbithi

6th March 2020

Summary of Facts

The Interested Party sought to make changes in the names of its office holders and wrote several letters to the Respondent instructing it on changes to be made. On 29th July 2019, the Respondent prepared the notification of change of officials, the subject matter of this appeal. The said notice appeared in the official Gazette as Notice No. 8652 Vol. CXXI-No. 122 on 13th September 2019. The Respondent published the notice even though the Interested Party had not published names of nominees to offices within the Party in two newspapers of national circulation.

It was the appellants case that the decision to publish change of names in the official Gazette was unlawful and irregular, as it was done contrary to the provisions of Section 20 of the Political Parties Act (hereinafter "the PPA") and therefore filed this appeal as provided under Section 40 (1) (f) of the PPA. The Respondents contended that the issue in question was an act of omission by the Interested Party and not essentially an objection to a decision made by the Respondent; and therefore the appeal did not fall within the provisions anticipated under Subsection 40 (1) (f) of the PPA. The Respondent further argued, similar to the Interested Party, that the Internal Dispute Resolution Mechanism (IDRM) had not been undertaken and as such, the Tribunal should allow the parties to do so. Further, that the Tribunal lacked jurisdiction to determine the appeal.

Issues for determination

The Tribunal held that there only two issues for determination:

1. Whether the impugned action of the Respondent amounted to a decision that could be appealed against under Section 40 (1) (f) of the PPA.

2. If (a) above was in the affirmative, whether the Registrar's action was lawful.

Held:

1. On the first issue, the Tribunal noted that prior to publishing the notice in the official Gazette, the Respondent had sent minutes mooting further change of officials through a NEC meeting via a letter dated 18th June 2019 to the person who had been the acting Party Chairman/Leader. This was, in the Tribunal's opinion, in line with the Respondent's verification role under Section 34 of the PPA and was done in order to allow the Respondent to make an informed decision.

2. In determining what amounted to a decision, the Tribunal quoted the case of ***Republic v Registrar of Political Parties & 6 Others ex-parte Edward Kings Onyancha Maina & 7 Others*** **[2017] eKLR** and adopted the position that a decision means a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. Applying this analysis and the above finding by the Court, the Tribunal held that the Respondent had made a decision, and that that decision was appealable as anticipated in law.

3. On the second issue, the Tribunal held that the Respondent did not check whether the Interested Party had complied with Sections 20 (2) and (3) of the PPA in publishing the notification in at least two daily newspapers having nationwide circulation prior to forwarding the notification of change of names to the Government Printers. The Tribunal quoted the decision of the Court in ***Republic v Registrar of Political Parties & 6 Others ex-parte Edward Kings Onyancha Maina & 7 Others*** **(**supra) where the Court stated that one of the functions of the Registrar under Section 34 (1) of the PPA to ensure political parties' compliance with the act and that where the law was not adhered to, those aggrieved by the decision were at liberty to invoke the jurisdiction of the Tribunal to resolve their grievances. Therefore, before the Registrar took the course of gazettement, she had to be satisfied that certain legal provisions were adhered to. In other words, he was expected to generate a commitment on his part towards an envisaged course of action of some specificity. The Tribunal thus found that the Registrar's action was in breach of the provisions of Section 20 of the PPA and therefore unlawful.

Orders

1. That the Gazette Notice No. 8652 in official Kenya Gazette Vol. CXXI-No. 122 of 13 September 2019 be and is hereby revoked in its entirety.

2. That each party bear its own costs of these proceedings.

Alphonce Mbinda Musyoki & 2 Others v Registrar of Political Parties; Party of National Unity & Another (Interested Parties) Appeal No. 3 of 2019 (Ruling)

Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

20th August 2019

Summary of Facts:

The Appeal herein lay against the decision of the Office of the Registrar of Political Parties (ORPP) to issue a Gazette Notice in the Kenya Gazette of 14th June 2019 listing the officials of the Interested Party. The Appellants raised a Preliminary Objection (PO) against the representation of the 2nd Interested Party. The Appellants sought to have the 2nd Interested Party's Counsel excluded from such a representative role in the matter.

The Appellants PO found basis in Rule 9 of the Advocates (Practice) Rules. The PO was further grounded on the fact that Walukwe Advocate of Ochieng Walukwe & Associates, who were the 2nd Interested Party's choice of representation, had been adversely mentioned in the substantive statement of appeal. Thus, according to the Appellants, Walukwe Advocate could realistically be summoned as a potential witness in the substantive appeal matter.

Issues for determination:

The issue for determination was clear: whether the said Mr Walukwe Advocate could remain on record as counsel for the 2nd Interested Party.

Held:

1. To begin with, the Tribunal noted that the key issue in the substantive appeal before it was a process undertaken under the guidance and authority of the ORPP and that several named persons, Mr Walukwe Advocate included, were alleged to have un-procedurally participated in the process. The Tribunal, quoting **Delphis Bank Ltd v Chatt & 6 Others [2005] 1 KLR** held that the right to preferred legal representation was not absolute as the right could in some cases, particularly in civil cases, be put to the test where conflict of interest arises.

2. The Tribunal stood guided by the Court in **Kenya Pipeline Co. Ltd vs Corporate Business Forms Ltd (2012) eKLR**, where the Court stated that if the right to representation were to be taken away, there must be full proof justification. Further, that case law in matters regarding taking away of legal representation were not consistent as each case was so particularly peculiar as to warrant distinction from other cases.

3. That said, the Tribunal noted that under Section 41 of the Political Parties Act, evidentiary requirements could dictate summoning of witnesses where need be. In the instant case, the crux of contention was in regard to a meeting deemed to have been unprocedurally called and constituted where Mr Walukwe Advocate was named as one of the participants. Further, the issue giving rise to the Appeal is alleged irregularities in the process of carrying out an order and directive of the Tribunal and the said Mr Walukwe having been an Advocate in the case [PPDT no. 13/2018] could potentially present as a witness if it came to that.

Orders

In light of the above analysis, the Tribunal was inclined to allow the PO. The 2nd Interested Party was at liberty to engage another lawyer to act for them.

Caleb Kositany & 3 Others v Registrar of Political Parties & 2 Others; Jubilee Party & Another (Interested Parties) Appeal No 1 of 2020 (Ruling)

Hon. Desma Nungo, Hon. Paul Ngotho, Hon. Dr Adelaide Mbithi, Hon. Milly Lwanga Odongo

22nd June 2020

Summary of Facts

The 3rd Respondent and 1st Interested Parties raised preliminary objections based on 4 broad grounds, firstly that the dispute at hand was in contravention of Section 40 (2) of the PPA. Secondly, it was alleged that the dispute was sub-judice, thirdly, that the appeal related to political discretion that was not justiciable and fourthly, that the 1st Respondent had not made any decision that could be appealed against.

Issues for determination

Whether the preliminary objections were merited.

Held:

1. The Tribunal noted that pursuant to section 40 of the PPA, a dispute arising from appeals against a decision of the 1st Respondent could not be subjected to IDRM, as it did not fall under the requirements set out under section 40 (2) of the PPA.

2. The Tribunal noted that while the appellant contended that the dispute had been filed pursuant to section 40 (1) (f), the 3rd Respondent and the Interested Party maintained that the dispute was between members and their political party, and that there was no decision of the 1st Respondent that was capable of being appealed. The question that remained and that called for ascertainment was whether or not the actions by the 1st Respondent amounted to a decision. The Tribunal held that it was unable to dispose of the question without first evaluating evidence from the parties.

3. On the issue of sub-judice, it was not properly evinced whether the High Court matter alluded to by the 3rd Respondent and 1st Interested Party was active or still pending and neither was the Tribunal served with an order for its withdrawal. This, too, was a fact that needed to be ascertained. The allegations relating to the dispute arising out of political discretion were also contested by the parties.

4. In the circumstances, the preliminary objections were dismissed.

DAVID MURATHE & OTHERS V OFFICE OF THE REGISTRAR OF POLITICAL PARTIES; HON. JOSHUA KUTUNY (INTERESTED PARTY) APPEAL NO 1 OF 2023 (JUDGEMENT)

Hon. Desma Nungo, Hon. Dr Wilfred Mutubwa, Hon. Stephen Musau

19th April 2023

Summary of Facts:

The 1st, 2nd and 3rd Appellants ha at all material times been the Vice Chairperson, the Secretary General, and the Treasurer of the 4th Appellant respectively. However, following the 4th Appellant's National Executive Committee (NEC) meeting that was held on 10th February 2023, resolutions were passed to inter alia remove/suspend the 1st, 2nd and 3rd Appellants from their positions as party officials. The subject resolutions were subsequently forwarded to the Respondent together with other party documents vide a letter to the Respondent dated 13th February 2023. On the same date, the Respondent wrote a letter stating, inter alia, that the NEC of the 4th Appellant was properly convened as per the party constitution.

The Appellants were aggrieved by the Respondent's subject statement in the said letter dated 13th February 2023. According to them, the Respondent's subject letter had the consequential effect of ratifying the resolutions of the meeting of 10th February 2023. Accordingly, they filed the instant Appeal. They sought a declaration that the purported notice under the hand of the interested party dated 2nd February 2023, the agenda, resolution and letter dated 10th February 2023 and the Registrar's letter dated 13th February 2023 are null and void and an order quashing the notice, agenda, resolution and letters referred to above.

The Respondent submitted that in execution of her mandate, she received a letter dated 10th February 2023 from the Deputy Secretary General (DSG) of the Jubilee Party. The subject letter only required her to acknowledge receipt of certain documents and to confirm that the NEC of the 4th Appellant was compliant with the two thirds gender rule. It was her submission that in response to the interested party's letter, she accordingly acknowledged receipt of the documents submitted but did not ratify any decision of the 4th Appellant's NEC. She further acknowledged that she wrote the contents of her letter dated 13th February 2023.

As regards the prayers touching on the Respondent's letter dated 13th February 2023, the Respondent submitted that the letter did not ratify the meeting of the NEC, and that the mere statement that the meeting was properly convened as per the party constitution did not amount to a decision.

Issues for determination

1. Whether the Tribunal had jurisdiction to nullify the notice dated 2nd February 2023, the agenda, resolution and letter dated 10th February 2023 as sought in the Appeal.

2. Whether the content(s) of the Respondent's letter dated 13th February 2023 constituted a decision, and if so, whether the same was issued in accordance with the law.

3. Who bears the costs of these proceedings.

Held:

1. On the question of jurisdiction, the Tribunal noted that in response to the jurisdictional issue raised by the Respondent and the Interested Party, the Appellants acknowledged that there were pending IDRM proceedings challenging the subject internal party documents and processes. They were in agreement that any prayers concerning the same before the Tribunal were premature, but maintained that the Tribunal nevertheless retained jurisdiction under section 40(1)(f) of the PPA as read with section 7(1)(b) of the FAA to inquire into the procedural and substantive merits of any decision of the Respondent founded on the said underlying internal party issues.

2. Noting that the Appellants did not dispute that the underlying internal party issues required IDRM in the first instance, and that they had in fact invoked IDRM processes that were said to be ongoing, the Tribunal was under an obligation to allow the 4th Appellant deal with the dispute that they were already seized of independently in the first instance. The Tribunal was therefore careful not to make any statements that could prejudice or prejudge the matter, bearing in mind that the dispute could in future find its way back to the Tribunal subject to compliance with the provisions of Section 40 of the PPA.

3. The Tribunal therefore found that it did not at that stage have jurisdiction to consider and grant any prayers for nullification of the notice dated 2nd February 2023, the

agenda, resolution and letter dated 10th February 2023 as sought in the Appeal. The Tribunal therefore declined the invitation to issue a declaration of invalidity of the notice issued by the interested party dated 2nd February 2023, the agenda, resolutions and letter dated 10th February 2023. The Tribunal also declined to order the quashing and/or setting aside the purported notice issued by the interested party dated 2nd February 2023, the agenda, resolution and letter dated 10th February 2023.

4. On the second issue, it was contended by the Respondent and Interested Party that there was no decision to be appealed against. This was because the Respondent's letter of 13th February 2023 simply acknowledged receipt of documentation that was forwarded to her, and none of the parties had invited her to make any finding on legality or otherwise of the NEC meeting or any of the party's internal processes.

5. The Tribunal's observation, however, was that the Respondent's letter dated 13th February 2023 could not in any event be regarded as a mere acknowledgement as purported. The letter obviously went beyond acknowledging the interested party's correspondence. In addition to the acknowledgment, an express statement was made to the effect that the Respondent had taken note of the contents of the submissions and resolutions, and further, that the 4th Appellant's NEC meeting of 10th February 2023 was properly convened in accordance with the party constitution.

6. The Tribunal further observed that the Respondent has expressly acknowledged that she considered the facts as disclosed in the documentation furnished, and various provisions of the party laws/constitution, and it is on that basis that the statement was made. It was instructive to note that the Respondent has in her own pleading referred to her statement as a finding. The Tribunal referred to the Black's Law Dictionary's definition of a decision, which was a determination made after the consideration of facts and law. Accordingly, based on the Respondent's own pleading detailing the considerations that were made prior to making the statement/finding, it found that the impugned statement constituted a decision, within the meaning of Section 40(1)(f) of the PPA.

7. Having found that the Respondent's statement constituted a decision, the Tribunal proceeded to examine whether the same was arrived at in accordance with the law. It noted that the Respondent's functions are administrative duties and fair administrative action is envisaged in the performance of those administrative duties under Article 47 of the Constitution. The Respondent highlighted the considerations she made of various facts and law prior to finding that the NEC meeting was properly convened. The same were highlighted in her response where she has made various factual averments, some of which from the pleadings are contested and may be subject of ongoing IDRM proceedings. It was, however, not in dispute that no person

made representations before her. Neither was it demonstrated that she made any investigations beyond what she claimed was in the documentation furnished.

8. In essence, whereas the Respondent knew that the Appellants were likely to be affected by the exercise of her function under the PPA and her finding, she did not allow them a reasonable opportunity to be heard. Her action or finding was procedurally unfair. Apart from purporting to consider the legality of the meeting in a manner that the Tribunal found to be unfair and violated the legitimate expectation of the Appellants, the Respondent was quiet on all other aspects of compliance with the PPA.

9. The Tribunal therefore found that the Respondent acted in violation of Section 34(1) of the PPA as read together with Article 47 of the Constitution and Sections 7(2)(a)(v) and 7(2)(b)(c)(f)(m) & (n) of the FAA. 58. Consequently, the Respondent's letter dated 13th February 2023 was in breach of the law.

10. While the appeal partly succeeded, and costs ordinarily followed the event, in the interest of fostering party unity, the Tribunal was of the considered opinion that each party should bear its own costs of these proceedings.

Orders

1. A declaration be and is hereby issued that the Respondent's letter dated 13th February 2023 is null and void and of no consequential effect.

2. The prayer for a declaration of invalidity of the notice issued by the interested party dated 2nd February 2023, the agenda, resolutions and letter dated 10th February 2023 is rejected.

3. The prayer for an order quashing and/or setting aside the purported notice issued by the interested party dated 2nd February 2023, the agenda, resolution and letter dated 10th February 2023, is also declined.

4. The Interim Orders issued herein on 16th February 2023 hereby stand discharged.

5. Each party to bear its own costs of the proceedings.

Hezron Awiti Bolo v Registrar of Political Parties Appeal No E001 of 2020 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga, Hon. Paul Ngotho, Hon. Dr Adelaide Mbithi

8th February 2021

Summary of Facts

The Democratic Labor Party, initially duly registered in 2012, changed its name to the Vibrant Democratic Party (VDP). The party operated in compliance with the Political Parties Act (PPA) but was later issued a notice of deregistration (Gazette Notice No. 6171). The party's management team was never informed in writing about the deregistration process.

The Respondent contended that the reason for deregistration was the party's failure to comply with Section 31 (2) of the PPA that required parties, within three months after the end of each financial year, to submit to the Auditor General the accounts of the party in respect to that year. Vide a notice dated 7th September 2017, the Respondents had directed that all fully registered parties, including the then VDP, to comply with the provisions of the aforementioned section. This communication was relayed to the Secretary General of VDP with a further notice on 12th February 2018 requiring the party to remedy the breach within 90 days or show cause why it should not be deregistered. The communication did not elicit any response from VDP. Further a Gazette Notice No. 6171 published on 22nd June 2018 notified VDP that it would stand deregistered after 30 days of the notice for breach of various legal provisions and further invited any person with written submissions concerning the deregistration to submit the same within seven days of the notice. Nothing was forthcoming and as a result the said party stood deregistered.

Issues for determination

1. Whether the Tribunal had jurisdiction to hear and determine the matte

2. Whether the Respondent complied with the law prior to deregistration of VDP

Held:

1. On jurisdiction, the Tribunal noted that it had jurisdiction under Section 40 (2) (f) of the Political Parties Act (PPA) to determine appeals from the decisions of the Registrar of Political Parties.

2. The Respondent noted that the Respondent sought to rely on a letter dated 7th September addressed to the Secretary Generals, of all fully Registered Political Parties reminding political parties to comply with section 31 of the PPA. In the Tribunal's opinion, this letter did not constitute a notice under section 21 (2) of the PPA as it was not addressed to VDP and neither did it make a statement of breach or any particularization thereof as against VDP. Further, there was no notification therein of any intention to deregister VDP.

3. The Tribunal also noted that the 'notice to show cause why VDP should not be deregistered' letter did not state and/or particularise any breaches or contraventions of the law by VDP. Strangely, some of the grounds for deregistration stated in the Gazette Notice were not stated as breached and/or particularised in the notice to show cause letter.In essence, the Respondent did not avail evidence that would support and show the systematic manner, as anticipated under the PPA, in which the breach was addressed. In view of the foregoing, the Tribunal held that the Respondent had failed to demonstrate that they issued the requisite notifications to the registered officials of VDP in consonance with Section 21 (2) of the PPA.

4. The Tribunal held that Respondent failed to provide evidence demonstrating a systematic approach to addressing the alleged breaches, as required by the PPA. The Tribunal noted that due process is crucial before making a decision to deregister a political party, considering the significant consequences and impact on political rights as outlined in the Constitution. Given the meticulous compliance and vetting processes during party registration, it is important that deregistration procedures are well-documented and clearly show adherence to due process.

Orders

1. The Registrar of Political Parties acted in violation of Section 21 of the PPA in deregistering VDP

2. The decision of the Registrar to deregister VDP as communicated by the Gazette Notice and all subsequent processes in furtherance thereof were nullified

3. The deregistration of VDP was lifted

4. Each party to bear its own costs.

Jeremiah Kioni & 3 Others v Office of the Registrar of Political Parties & Another Appeal No 3 of 2023 (Judgement)

Hon. Dr Wilfred Mutubwa, Hon. Theresa Chepkwony, Hon. Abdirahman Adan Abdikadir, Hon. Muzna Mohamed Yusuf Jin

11th July 2023

The appellants challenged the decision of the 2nd Respondent (Registrar of Political Parties) alleging that by the 2nd Respondent's letter dated 19th May 2023, the Appellants' right to fair administrative action had been violated and that the decision was in any event unreasonable. They filed an application under Certificate of Urgency urging that pending the hearing and determination of the application *inter partes,* the Tribunal be pleased to issue conservatory orders staying the Respondents' decision embodied in the latter dated 19th May 2023 and that pending the determination of the appeal, the Tribunal issue conservatory orders staying the Respondents' decision embodied in the said letter.

It was the 1st to 3rd Appellants' submission that the 2nd Respondent bore personal responsibility for her actions which contravened the law and that under Article 74 of the Constitution, the 2nd Respondent as a state officer was bound by her oath of office. Further, Article 75 of the Constitution also binds state officers to put the public above personal interest.

It was asserted that the 2nd Respondent had acted contrary to the Tribunal orders in ***David Murathe & Others v Registrar of Political Parties*** **Appeal No 1 of 2023,** which required the appellants to be given a right to be heard before acting on a resolution of the National Executive Council to expel them. They further asserted that the 2nd Respondent's actions were in violation of Articles 47 and 50 of the Constitution, section 34 of the Political Parties Act and section 4 of the Fair Administrative Action Act 2015.

The Appellants took issue with the fact that the 1st Respondent received the resolution of the party on 19th May 2023, acted on it and wrote a reply confirming the propriety of the resolution. It was their case that this was done without due process and the 2nd

Respondent closed her eyes to the events of 10th February 2023, which were crucial in her consideration of matters presented to her by the two interested parties vide the letter dated 19th May 2023.

The Appellants also took issue with the 1st Respondent who received a letter from the 3rd Interested Party on 23rd February 2023 and responded on the same day, while the 1st Appellant's letter dated 13th May 2023 had not been attended to at the time of the hearing. They considered this to be unfair and selective treatment and asserted that the fact that the 1st Respondent dealt with weighty matters so quickly drew an inference of lack of impartiality.

The 4th Appellant did not support the appeal, urging that the patty had not instructed the filing of an appeal. It was argued that imputing bad faith on the Registrar on the basis of Appeal No 1 of 2023 was misguided and the 2nd Respondent's letter showed no breach of law or statutory duty.

The 1st and 2nd Respondent submitted that the 2nd Respondent could not be a party to the proceedings and the Tribunal had no jurisdiction to deal with the 2nd Respondent in her personal capacity. The 2nd Respondent was aware of the National Executive Council meeting held on 10th February 2023 and the resolutions emanating therefrom and subsequent decision of the PPDT in Appeal No 1 of 2023. The officials of the 4th Appellant remained the same as those elected on 10th February 2022 with the appellants in full participation. Changes made to the party leadership in the NEC meeting of 10th February 2023 had not been effected.

It was the 2nd Respondent's case that section 34 of the Political Parties Act does not require the ORPP to investigate how the expulsion happened and the law did not require the Appellants to be heard by the Registrar.

The 1st Interested Party also asserted that the Tribunal lacked the jurisdiction to deal with the 2nd Respondent in her personal capacity as she did not fall within the scope of section 40 of the Political Parties Act. It was their case that suing the party organs in their separate capacity was a misnomer. The 2nd Interested Party aligned with the submissions of the 4th Appellant, the Respondents and the 1st Interested Party.

Issues of determination

1. Whether the 2nd Respondent could be sued in her personal capacity.
2. Whether the Complaint was merited.
3. Who should bear the costs of the suit.

Held:

1. The impugned letter of 19th May 2023 was written by the 2nd Respondent in her capacity as the 1st Respondent. There was no contention that she was acting otherwise than in her official capacity. The question that arose was whether the Tribunal had the requisite statutory mandate to "admonish" or review the actions of the Registrar in her personal capacity.

2. The jurisdiction of the Tribunal was circumscribed by section 40 of the Political Parties Act. The Tribunal could only examine the acts and/or omissions of the Registrar in the conduct of her statutory functions under the Political Parties Act. The Tribunal had no role to reprimand, admonish, discipline or otherwise address the person of the Registrar.

3. The Tribunal could only punish the Registrar in contempt proceedings under section 41(3) of the Political Parties Act in the event of contravention of the Tribunal's orders. Although the Appellants contended that the 1st and 2nd Respondents breached the Tribunal's orders in Appeal No 1 of 2023, they did not explain why they were yet to invoke the Tribunal's contempt jurisdiction in that matter. The suit against the 2nd Respondent was therefore founded on a misapprehension of jurisdiction.

4. On the question of whether the appeal was merited, the Tribunal noted that the appeal was anchored on a lack of procedural fairness, breach of the Tribunal's edicts in Appeal No 1 of 2023 and breaches of the Fair Administration Act 2015. It was the Appellants' assertion that it was incumbent upon the Registrar to call a hearing and receive, from those likely to be affected by the decision, representations before accepting communication to the National Executive Council of the party. However, the Tribunal did not see any non-compliance with either the Registrar's statutory duty or its decision in Appeal No 1 of 2023. The Registrar was neither in breach of or in contempt of the aforesaid decision.

5. The Registrar was charged with the mandate of maintaining the records of party members and party leadership and ensuring substantive compliance with the party constitution and the Political Parties Act. In doing so, she receives resolutions from the relevant party organs and may also receive and investigate complaints under section 34(g) of the Political Parties Act or protests. The suggestion that the Registrar must always convert herself into a court of law was neither legally and practically tenable nor was it the import or tenor of section 34 Political Parties Act or the Tribunal's decision in Appeal No 1 of 2023. The Registrar must act fairly and accountably in accordance with section 4 of the Fair Administration Act. To do so, she must not only consider material placed before her by the parties but must also satisfy herself that her resolutions comply with the party constitution and other relevant instruments, including the Tribunal's decision in Appeal No 1 of 2023.

6. The Tribunal could not discern any breach or failure on the part of the Registrar-she conducted her statutory function in strict accordance with the law, taking into account the Tribunal's decision, party constitution and other instruments. To find otherwise would be to place an onerous responsibility on the Registrar, and possibly grind the office's function to a halt as the Office of the Registrar of Political Parties would be converted into a courthouse with fully fledged hearings. That could not have been the intention of section 34 of the Political Parties Act.

7. The Office of the Registrar of Political Parties operates under the presumption that decisions of the PPDT and IDRMs are made in good faith and properly. The presumption is underwritten by the right given to any person aggrieved by decisions of the IDRM disciplinary process or Registrar's decision to move the PPDT for recourse or on appeal. While the Registrar is not a conveyor belt of resolutions of political organs, she is also not meant to supplant herself on decisions emanating from party organs especially those exercising judicial or quasi-judicial authority. As the Registrar and keeper of records, her fidelity is to the law and decisions of the party organs properly constituted and their resolutions, notwithstanding that some members may be disgruntled.

8. As for the requirements of sections 4 and 12 of the Fair Administration Act, the Tribunal found that the Appellants ought not to have taken a selective view of the processes resulting in the resolutions of the National Executive Council and the Registrar's acceptance thereof. The resolutions of the NEC and impugned decision of the Registrar were a product of processes, judicial and administrative, which the appellants participated in and were offered opportunity to participate in.

9. One could therefore not violate the end product, the Respondent's letter of 19th May 2023, and fault it without a cursory or in-depth analysis of processes preceding or informing that decision. If one viewed the entirety of the processes that were undertaken prior to the Respondents' decision of the 19th May 2023, then one could, without a doubt, reach the inescapable conclusion that the process was fair and above board.

10. As for costs, the costs follow the event. The Appellants were ordered to pay the costs of the Respondents and the Interested Parties.

Orders:

1. The suit against the 2nd Respondent struck out.

2. The appeal was dismissed in its entirety.

3. Appellants to bear the Respondents and Interested Parties' costs.

Thirdway Alliance Kenya v Daniel Miruru Waweru Appeal No. E011 of 2021 (Judgement)

Hon. Desma Nungo, Hon. Milly Lwanga Odongo, Hon. Paul Ngotho, Hon. Dr. Adelaide Mbithi

7th July 2021

Summary of Facts

The Complaint was brought to the Tribunal after several allegations were made against the Respondent (the Chairperson of the Complainant) by Members of the National Executive Committee which allegations as stated raised serious issues of misconduct, integrity, impropriety and subversion of the rule of law. The Complainant averred that the Respondent owed its members a fiduciary duty of honesty, integrity, transparency and accountability. Further, that disciplinary action was pending against the Respondent but there was a realistic threat that he would have ruined the party by the time the disciplinary process was completed.

The Respondent contended that the Complaint before the Tribunal was an attempt by the Complainant to subvert the wheels of justice availed within the party laws and needed to be treated as such. The Respondent denied the allegations against him holding that his actions have always been in the best interest of the party.

Issues for determination

1. Whether the subject matter of the dispute herein has been referred to the party's IDRM.
2. Whether the complaint was premature.
3. Whether the Respondent acted in breach of the party constitution.
4. What were the appropriate reliefs to grant.

Held:

1. The Tribunal noted that as much as the parties made allegations of foul play in the party processes and breach of the party Constitution against each other, they had not sufficiently demonstrated that there was any need for the Tribunal's intervention via the proceedings before it yet the internal party processes had been acknowledged as ongoing. Further, no pleadings had been submitted that alleged or demonstrated that the internal processes had failed.

2. In the circumstances, the Tribunal held that the ongoing political party processes should be allowed to progress along party procedures for realisation of justice involved. Accordingly, the Tribunal declined to handle the matter any further to allow the party dispute resolution organ to exercise independent and impartial judgement.

Orders

1. The complaint was struck out and the subject matter referred back to the party to explore the party's IDRM in accordance with the party constitution

2. Each party to bear its own costs in the interests of party unity.

United Democratic Alliance v Registrar of Political Parties Nairobi A Appeal No E009 of 2022 (Judgement)

Hon. Desma Nungo, Hon. Kenneth Wyne Mutuma, Hon. Flora M. Maghanga-Mtuweta, Hon. Ruth Wairimu Muhoro

13th January 2023

The appeal arose out of the decision of the Respondent contained in Kenya Gazette Notice published on 4th November 2022 in respect to the allocation of the Political Parties Fund (the PPF) established under the Political Parties Act, 2011 (the PPA). The Appellant submitted that on 16th September 2022, the Respondent invited the Appellant for a meeting scheduled for 21st September 2022. During said meeting, presentations on the distribution of the Political Parties Fund (PPF) by the Respondent's officials were discussed extensively in conjunction with the Secretary Generals of the respective parties. Consequently, the Respondent wrote to the Appellant vide a letter dated 31st October 2022, indicating that the PPF had been allocated Kshs. 1,475,000,000.00 during financial year 2022/2023 and that it would be distributed to the qualifying political parties. Further, the letter indicated that as per the criteria set out under section 25 of the Political Parties Act, 2011, the Appellant was eligible to receive Kshs. 577,162,898.00 for the financial year 2022/2023.

The Appellant further submitted that no computation was provided to show how the said figure was originated, and that the Respondent did not respond to the Appellant's multiple requests and prodding, seeking information and particulars relating to the distribution formula and computational breakdown of how the political parties' funds were allocated, including a request sought vide letter dated 1st November 2022. The Appellant argued that contrary to the provisions of Section 25 of the Political Parties Act, 2011, the Respondent included votes from parties and/or coalitions that did not secure any elective seat in computing the amounts to be allocated to political parties from the PPF thus grossly violating the said provision. The Appellant averred that due to incorrect computation by the Respondent, 28 political parties have been unlawfully underfunded, while 20 parties have been overfunded by the Respondent.

Further, they submitted during the hearing, that only Azimio's constituent political parties were allocated funds based on the presidential election and that the same courtesy was not accorded to other coalition/constituent political parties. Moreover, the Appellant contended that the Respondent's decision was gravely erroneous, devoid of justice, bore no rationale and hence could not stand. They also averred that the Respondent's decision to allocate the political parties funding in a clandestine fashion failed to live by the ideals provided for by Article 10 of the Constitution of Kenya which enjoined the Respondent to uphold the national values and principles of good governance, integrity, transparency and accountability when making or implementing decisions.

Issues for determination

1. Whether the Tribunal has Jurisdiction to hear and determine the Appeal

2. Whether the Respondent distributed the Political Parties Fund in accordance with the law

3. What were the appropriate reliefs to grant

Held:

1. On the question of jurisdiction, the Tribunal noted that this was an appeal against the decision of the Respondent that was made vide Gazette Notice published on 4th November 2022 on the matter of the distribution of the PPF. A reading of Section 40(1)(f) of the PPA expressed that the Tribunal had jurisdiction to hear and determine appeals arising from decisions made by the Respondent under the PPA. The decision communicated vide the Gazette Notice under reference was made by the Respondent in exercise of her powers under the provisions of the PPA. Accordingly, the Tribunal had jurisdiction to hear and determine the Appeal. However, it noted that certain objections were also raised on the Tribunal's powers to read into the Political Parties Act terms or provisions not expressly provided for therein and that the same offended the principles of judicial deference and separation of powers

2. On the question of whether the Respondent distributed the PPF in accordance with the law, it submitted by the Appellant that the issue in contention in these

proceedings related to the Respondent's distribution of 70% of the PPF under Section 25(1)(a) of the PPA. They did not have a problem with the Respondent's distribution of fifteen per cent of the Fund which is based on the number of candidates of the political party from special interest groups elected in the preceding general election. Neither do they have a problem with how the Respondent distributed ten per cent of the PPF to political parties based on the total number of representatives from the political party elected in the preceding general election.

3. The Appellant further contended that the total number of votes secured by qualifying political parties was 68,555,184, which figure they averred could be ascertained from the gazetted figures. The Respondent on the other hand maintained that the total number of votes secured was 75,498,114 which statistics originated from the IEBC following a request that was sent to them vide the letter that they had placed on record addressed to IEBC dated 18th August 2022 and IEBC's response thereto dated 26th September 2022. In that regard, they maintained that all votes secured by qualifying political parties aggregated to 75,498,114 and this was the figure they used to compute. The Appellant did not, however, swear any Further Affidavit in contestation of this allegation. Taking into consideration the Respondent's response and evidence in respect to the Appellant's contention, the burden shifted to the Appellant to prove its claim.

4. The Appellant further contended that The Appellant further contends that they asked the Respondent to supply them with the breakdown of the figures in vain, and that the Respondent erred by failing to disclose the formula employed in calculating or arriving at the amounts allocated to the 48 qualifying parties, and/or that the Respondent erred by arbitrarily allocating political parties funds, without deferring to any known legal formula or logical basis. These allegations were denied by the Respondent and all the Interested parties who maintained that the position that the formula for allocation for funds was not only found in law but was also discussed with political parties in various consultative forums and that the breakdown of the figures was also discussed.

5. The Tribunal considered the parties' evidence and their rival submissions and we noted that all parties have all alluded to the Respondent's letter dated 16th

September 2022 inviting them to a meeting to be held on 21st September 2022 to discuss issues around the distribution of the PPF to qualifying political parties. Parties were asked to come along with lists of all their elected persons for all the positions in the general elections and data of the votes garnered. All parties confirmed that the meeting went on and as per the attendance sheets produced, the Appellant was represented by Mr. Joseph Mulili who swore an Affidavit on record and annexed the programme of the meeting and confirmed that presentations on distribution of the PPF were discussed extensively in conjunction with the Secretary Generals of the respective parties, where-after the Respondent issued communication to eligible political parties their respective allocations vide the Respondent's letter dated 31st October 2022. All the interested parties had confirmed that there was a consultative meeting prior to the distribution of the fund.

6. From the record, the Tribunal noted that even after the fund distribution, the Respondent held subsequent sessions with eligible political parties to discuss and train the political parties on work plan and management of the PPF. The attendance sheets showed that the Appellant was represented by one Marvin Wamukota in the subject training workshop which was held between 12th and 14th October 2022 at Sagana Gateway Resort, Murang'a County.

7. The Tribunal further considered the fact that in response to a letter that the Appellant wrote to the Respondent dated 1st November 2022 objecting to the distribution of the PPF, the Respondent invited the Appellant to a meeting that was held on 3rd November 2022 between them to address and resolve the Appellant's objections which were also subject of this Appeal. The Appellant was represented by the Chairperson of its Elections Board, one Eng. Anthony Mwaura, and Mr. Joseph Mulili, the Appellant's Director Finance.

8. It was clear that there were deliberations over the issues raised by the Appellant in these proceedings. The Appellant and the Respondent held a further meeting on 7th November 2022 and whose main agenda item was to deliberate on the data that was used to distribute the PPF. The Appellant was represented by the above-named Mr. Joseph Mulili and Mr. Marvin Wamukota. From the minutes of the meeting, it was evident that the Appellant was taken through the data used in the distribution of the PPF. The minutes in fact state that "the UDA representatives appreciated the computation by the ORPP on the distribution of the Fund".

9. The Tribunal further noted that the Respondent had, vide its Replying Affidavit, deposed to the summary of the allocation which has been annexed to the subject Affidavit and marked as JO3. The Respondent averred that their breakdown of figures as detailed in the summary of the allocation was based on the response they received from the IEBC. This position had not been controverted by the Appellant who did not file any Further or Supplementary Affidavit challenging the same.

10. In relation to the submission that the Respondent erred by including votes from parties and/or coalitions that did not secure any elective seat to compute the amounts to be allocated to political parties from the PPF, the Tribunal noted that the Appellant did not plead the specific parties and/or coalitions. It, however, appeared, that the Appellant mentioned certain political parties for the first time in its written submissions which annexed a schedule that the Tribunal was referred to when during oral submissions. Since submissions did not constitute pleadings or evidence, evidence ought not to be introduced by way of submissions. The Tribunal therefore had difficulty in relying solely on the submissions and the schedule annexed to the submissions to consider and make a finding as to whether the Respondent included votes from parties and/or coalitions that did not secure any elective seat to compute the amounts to be allocated to political parties from the PPF.

11. Having reviewed the Respondent's engagements with political parties, and more so, with the Appellant, the deliberations and resolutions of the meetings of 3rd November 2022 and 7th November 2022, the Tribunal opined that the issues subject hereof were attended to by the Respondent. Notwithstanding that the Appellant had a right to reply, the Appellant did not controvert the averments in the Respondent's Affidavit and the letters and minutes that the Tribunal have referred to above. The Tribunal was therefore not persuaded by the Appellant's allegations that the Respondent failed to disclose the formula employed in calculating or arriving at the amounts allocated to the 48 qualifying parties, and/or that the Respondent erred by arbitrarily allocating political parties funds, without deferring to any known legal formula or logical basis, and/or that the Respondent was asked to supply the Appellant with the breakdown of the figures in vain.

12. The Tribunal agreed with the Respondent and the Interested Parties that it was not within the powers of the Tribunal to interpret the law in a manner that amounted to rewriting, recasting or reframing the provisions of the PPA on the distribution of the PPF. The Tribunal nevertheless appreciated that there exists a grey area on the question of distribution of the PPF in instances where a political party gains an uncontested electoral seat in respect to an electoral area. This requires legislative intervention and we accordingly recommend that Parliament addresses its mind to the treatment of unopposed elective seat with respect to distribution of the Fund with a view to bringing certainty and/or clarity.

13. Taking into consideration the totality of its analysis of the law, the facts, evidence, and the overall circumstances of this case, together with the cited judicial authorities, the Tribunal was of the considered view that the Appellant has failed to prove its case on a balance of probabilities. The Appellant has not satisfied it that the PPF was distributed in breach of the law. The Tribunal accordingly found that the Respondent distributed the Political Parties Fund in accordance with the law.

Orders:

1. The Appeal herein be and is hereby dismissed.
2. Each party to bear its own costs of these proceedings.

C.PARTY NOMINATIONS AND PARTY LIST DISPUTES

Abdi Osman Khalif v Orange Democratic Party (ODM) & 2 others Nairobi A Complaint No. E037 of 2022 (Judgement)

Hon. G Gathu, Hon.W Ngige & Hon. L Kinyulusi

16th May 2022

Summary of Facts:

The Complainant and the 2nd Respondent were both registered members of the Orange Democratic Party (ODM), the 1st Respondent in this matter. The Complaint related to the issuance of the nomination certificate in the party nominations that were held in South-C Ward for Member of County Assembly position. The Complainant and the 2nd Respondent were both vying for the said position. The nominations were held, and the votes were tallied electronically. However, the 2nd Respondent, who did not win, was declared the winner by the 1st Respondent and was issued a nomination certificate. Being aggrieved, the Complainant proceeded to file an application challenging the nomination process and issuance of the nomination certificate in South-C Ward for Member of County Assembly.

The 1st Respondent contended that it had the mandate to plan nominations, and a communique issued to all aspirants for the positions which would be filled by universal suffrage. It was their case that the MCA elections for South C ward were not included in that communique, and therefore no official results were issued for the said position by NEB. The universal suffrage process had been cancelled, a matter which was within the public domain. The 1st Respondent maintained that the decision to award the 2nd Respondent a direct nomination was made in good faith and in the best interest of the party, having taken into account all relevant circumstances, including the party's evaluation of suitability.

The 2nd Respondent contended that he was duly nominated by the party and that the decision to nominate him was publicised and he was duly issued with a nomination certificate as per the 1st Respondent's constitution and regulations. It was his case that the Complainant had not challenged his decision to award him a direct nomination and neither was it denied that the party was empowered by its constitution to issue a direct nomination.

Issues:

1. Whether the Tribunal had jurisdiction to hear and determine this matter.
2. Whether there was an election by way of universal suffrage for the position of the 1st Respondent's candidate for election of Member of County Assembly in South C Ward.
3. Whether the nomination of the 2nd Respondent for the position of the 1st Respondent's candidate for election of Member of County Assembly in South C Ward was lawful.

Held:

1. Section 40 of the Political Parties Act buttressed the jurisdiction of the Political Parties Dispute Tribunal and as such the Tribunal had jurisdiction to hear and determine the matter.
2. The complainant failed to prove on a balance of probabilities that the elections for MCA for South-C ward took place and as such, the Tribunal ruled that no elections took place.
3. The Complainant had not placed any material before the Tribunal that faulted the process through which the 1st and 2nd Respondent carried out the direct nominations. The issues to do with qualification were only raised in submissions and not the Complainant's pleadings, and the Tribunal therefore held that they were not pleaded at all.
4. The nomination of the 2nd Respondent was declared lawful, and the Complaint dismissed.

Order

1. Complaint dismissed. Each party to bear its costs.

Abrari Mohamed Omar v Kelvin Ondieki & 2 Others
Mombasa Misc. Appl. No. E002 of 2022 (Ruling)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

20th May 2022

Summary of facts

The Tribunal issued orders directed to the 2nd Respondent which declared the 1st Respondent not the bona fide Orange Democratic Movement Party elected candidate to contest the seat of Member of County Assembly representing Kongowea Ward. The Orders further directed the 2nd Respondent to give effect to the orders of its appeals Tribunal in the case of Mombasa Appeals Tribunal No. 8th of 2022 Abrari Mohammed Omar vs Kevin Ondieki & Returning Officer Kongowea Ward. The application sought a declaration that the Complainant was the ODM nominated candidate for Member of County Assembly Kongowea Ward; a temporary injunction against the 3rd Respondent restraining them from gazetting any other as ODM candidate; that IEBC be directed to nominate and subsequently gazette the Complainant as elected candidate to contest the seat of Member of County Assembly representing Kongowea Ward.

The 1st and 2nd Respondents did not respond, and the application was by consent withdrawn as against the intended 3rd Respondent. As such, the application was unopposed.

Issues

1. Whether the applicant's application had merit and whether the 2nd Respondent was in contempt of the Tribunal's Orders.
2. What orders the Tribunal could issue in the circumstances.

Held

1. It was not in dispute that the Tribunal heard and determined the Applicant's Complaint and issued orders to the effect that the 2nd Respondents were expected to comply with. Despite being served with the said orders, the 2nd Respondents refused and ignored the same and did not comply with them but decided to issue the nomination certificate to the 1st Respondent, whereas the Tribunal had

ordered for fresh nomination exercise.

2. It was evident from the acts of the officials of the 2nd Respondent they were not moved by their own tribunal orders nor the orders of this tribunal or the courts. It was not disputed that there were orders that came from their own Appeals Tribunal that they also ignored, and which led the complainant to the Political Parties Disputes Tribunal.

3. The Tribunal took notice of the behaviour of the officials of the 2nd Respondents who, despite not complying with the court's orders, had not even filed any responses to the allegations made both in the complaint and in the application.

4. They had also not sought clarification on the orders made, yet they were aware of the complaint filed and the application filed but they chose to ignore and do as they desired, flouting even their own rules and orders.

5. The Tribunal reiterated that orders of court and tribunals are not issued in vain. Unless reviewed and/or appealed against, the same ought to be obeyed. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issued ex-cathedra, are compulsive, peremptory, and expressly binding.

6. Quasi-judicial bodies could grant any orders that are just and equitable in accordance with Section 11 (1) of the Fair Administrative Action Act 2015. The proper discharge of this Tribunal was to grant effective remedies which meant the most appropriate remedy in the circumstances of the case.

Order

The Independent Electoral and Boundaries Commission (IEBC) be and is hereby directed to gazette ABRARI MOHAMED OMAR as the Orange Democratic Movement Party elected candidate to contest the seat of Member of County Assembly representing Kongowea Ward.

Abubakar Ahmed Talib v Wiper Democratic Movement & 5 Others Nairobi A Complaint No. E099 of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

29th July 2022

Summary of Facts:

The Complainant herein came before this Tribunal vide a certificate of urgency dated 25th July 2022, raising concern that the Respondents had authorised the 2nd Interested Party, who was in turn about to act decisively and implement a decision that had been reached through an unlawful process. The Complainant sought an interim order of injunction restraining the IEBC from publishing in the Kenya Gazette and/or issuing a certificate of compliance to the 1st Respondent on account of the impugned party list for National Assembly nominations submitted to the IEBC by a letter of the 2nd Respondents dated 22nd July 2022.

The Complainant/Applicant challenged the decision to place him 1st on the Mombasa County nomination list rather than retaining his name as first in the National Assembly party nomination list for being unlawful, unprocedural and done unilaterally. He also averred that the Internal Dispute Resolution Mechanism (IDRM) had been invoked but it had been slow to address the issue, even in light of the strict timelines in the electoral cycle.

The 1st, 2nd and 3rd Respondents asserted that the positioning of the Applicant's name in the party nomination lists was justified and in good faith and in the best interest of the political party. It was also their case that the Applicant had not exhausted the party IDRM and did not intend to invoke it within the timelines as he had simultaneously presented his complaint to the party as when he moved to the Tribunal. The 1st Interested Party averred that his inclusion and location of his name in the party nomination list was proper and procedural. The 2nd Interested Party, though served, did not file a response.

The Presiding Member of the Kakamega Bench of this Tribunal certified the matter as urgent.

Issues

1. Whether this Tribunal was properly seized of jurisdiction.

2. Whether the interim orders were warranted and should be granted.

3. Who should bear the costs of the application.

Held

1. From an analysis of the information placed before it, the Tribunal was satisfied that there was an attempt to resolve the matter internally as anticipated under section 40 (2) of the PPA, before the presenting of this complaint before it. Thus, the Tribunal was properly seized of jurisdiction and the Preliminary Objection in respect of section 40(2) of the PPA failed.

2. The principles governing the granting of interim orders are well established by numerous decisions of courts. First, an applicant has to show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated for by an award of damages. Thirdly, if the court is in doubt, it would decide an application on the balance of convenience.

3. All the Tribunal was required to do at this stage was to establish, firstly, whether the Complaint/Applicant vide their said application raised a prima facie case with chances of success, and secondly, whether the Complainant/Applicant stood to suffer prejudice if the subject matter was not preserved by way of conservatory orders.

4. Applying the definition to the presented facts and circumstances of the instant case, the Tribunal was of the considered opinion that the Complainant/Applicant had demonstrated that they had a *prima facie* case with chances of success. On the issue of prejudice, the Applicant pleaded and demonstrated that their position in what they deem the correct nomination list had been threatened as a consequence of the Respondent's allegedly irregular processes.

Order:

Conservatory Order by way of an injunction be and is hereby issued.

Alex Wambua Mwangangi & Another v Wiper Democratic Party & 4 Others Nairobi A Cause No 016 of 2021 (Ruling)

Hon. Gad Gathu, Hon. Dr Adelaide Mbithi, Hon. Dr Wilfred Mutubwa

20th April 2022

Summary of Facts

The Notice of Motion Application before the Tribunal was based on the fact that the Honourable Tribunal ought not to have awarded costs to the Complainants. The Applicant contended that the law allows for exceptions to the general rule that costs should follow the cause (Civil Procedure Rules as read together with the Political Parties Disputes Procedures Regulations of 2017). It was also asserted that the Tribunal ought to have interrogated the conduct of the parties in deciding whether to award costs. Counsel stated that during the hearing, evidence that was adduced by the Respondents showed that the Respondents had openly declared affiliation to a party that was in competition with the 1st Applicant. Counsel further argued that the conduct of parties was a material consideration in deciding whether to award costs. The Respondents, in opposing the application, argued that review provided for by section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules is limited to grounds that there is discovery of new evidence, mistake or error apparent, or any other sufficient reason. Counsel submitted that the Applicants were raising issues that had already been extensively canvassed before the Tribunal and cited the same case for the proposition that the Court could depart from the general rule on costs for good reasons; however, the Applicants had not shown any good reasons.

Issue

1. Whether the award of costs to the Complaints/Respondents as per the Tribunal's judgement ought to be reviewed.

Held

1. The Court, pursuant to Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, held that it indeed does have powers to review its

decisions. Further, it held that such review could only be done if it is brought within the limited grounds provided under Order 45 Rule 1 of the Civil Procedure Rules.

2. The Tribunal found that the Applicants had not satisfied any of the three grounds provided by Order 45 Rule 1 and that no sufficient reason had been availed to review its award of costs to the Respondents.

Order

The application was dismissed and the costs of the application were awarded to the 1st and 2nd Complainants/Respondents.

Allan Ojuki Gordon v Moses J. Odhiambo Ochele & 2 Others Kisumu Complaint No E021 of 2022 (Judgement)

Hon. Dr. Wilfred Mutubwa OGW C.Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

10TH May 2022

Summary of Facts

The ODM Tribunal had made a decision setting aside the nomination exercise in East Kano/Wawidhi due to the Party only providing a photograph of the Complainant but not his name and other details. Contrary to the Tribunal's orders, the party purported to nominate the 1st Respondent, prompting the Complainant to approach the Tribunal. The 1st Respondent challenged the complaint on three grounds: that it was premature, that it violated the Tribunal's regulations and that the 1st Respondent's nomination was in accordance with the law. It was the 1st Respondent's assertion that the complaint did not comply with the format set out in the PPDT (Procedure) Regulations, that the Complainant did not exhaust IDRM and that the 2nd Respondent had properly issued a direct ticket in compliance with Rules 8 and 23 of 3rd Respondent's Party Primaries and Nomination Rules 2011. Since the 1st Respondent was the most popular candidate, there was nothing wrong with issuing him a direct ticket.

The 2nd Respondent asserted that the choice of nomination method was exclusively within the discretion of the party, and this discretion could not be challenged because it was based on political reasons. It was therefore their position that the Complainant was only entitled to a refund of his nomination fees.

Issues

1. Whether this Tribunal has the requisite jurisdiction to hear and determine this matter.

2. Whether the direct nomination was conducted in substantial compliance with the law.

Held

1. The purported nomination of the 1st Respondent was not a new matter and was done purportedly in implementation of its Tribunal's decision. Therefore, the Tribunal had jurisdiction to hear the matter.

2. The direct nominations by the Party, failed the test of a free, fair, transparent and accountable process as provided for under Article 81, Article 86 of the Constitution of Kenya 2010; as well as Rule 4 of the ODM Party Primaries and Nominations Rules, 2021 which provides for the guiding principles aforesaid. These provisions require the Party to conduct Party Primaries and Party Nomination to Party lists in a manner that is democratic, free and fair and provides equal opportunities for all party candidates.

3. The 2nd Respondent had denied the Complainant his legitimate expectation of fair administrative action since his concerns were not taken into account and no consultations between the contestants on how the nomination would be conducted was undertaken. Further, the party issued a Direct Nomination to the 1st Respondent without consensus or even conducting opinion polls as provided for by the ODM Party Primaries and Nominations Rules.

4. While a political party has the right to choose the appropriate method of nomination under Rule 8 of the ODM Election and Nomination Rules, these options are hierarchical. This means that universal suffrage is the last option, if all else has failed. Since the Party had resorted to universal suffrage, it could not purport to go back to Direct Nomination after the elections had been nullified by the Appeals Tribunal and an order to conduct fresh nominations was issued. The same manner of nomination was to be used.

Order:

Complaint allowed. Each party to bear its own costs.

Ambeyi Ligabo v Kizito Mugali & Another Kakamega

Complaint No. E007 of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

15th May 2022

Summary of facts

The Complainant was vying for the Member of Parliament for Shinyalu Constituency in respect of which he applied, paid for and submitted his application. At the point of application, he was guaranteed a free, fair and transparent nomination process. However, the Complainant later learned that the 2nd Respondent, Democratic Action Party of Kenya, had issued a direct nomination ticket to the 1st Respondent without any reason or explanation as to how this was done. Aggrieved by the 2nd Respondents action, the Complainant filed a complaint with the Party National Election Board vide his letters dated 17th April 2022 and 1st May 2022 both of which went unanswered. Due to the urgency of the matter, the Complainant filed an application and a statement of claim dated 5th May 2022 together with his bundle of documents before the Honourable Tribunal.

The 1st Respondent asserted that he had been duly nominated by the party and denied that either he or the 2nd Respondent had acted in contravention of the party nomination rules and party constitution. He also denied knowledge of any dispute filed in relation to his nomination with the party organ. He further denied being served with the letters of complaint attached to the Complainant's claim.

The 2nd Respondent asserted that the claim was res judicata and questioned the authenticity of the nomination application/declaration form adduced by the Complainant and alleged to have been issued by the 2nd Respondent. It was asserted that said form did not bear any name or initials of a receiving officer accompanying the acknowledgement stamp as is the norm adopted by the 2nd Respondent when issuing out nomination/declaration forms.

Issues

1. Whether the Complainant had subjected his claim to IDRM to the required standard.

2. Whether the complaint was merited.

3. What orders the Tribunal ought to make.

Held:

1. PPDT relied on Section 40(1) and (2) of the Political Parties Act, 2011 to be moved on the matter of Jurisdiction of the Tribunal. The statute required that parties had to demonstrate compliance with the provision of the statute before moving the Tribunal. The requirement was also referred to as the *doctrine of exhaustion*.

2. That the Political Parties Act was amended through the Political Parties (Amendment) Act 2021. As a result, there was a significant shift in the wording of section 40(2) of the Act. Due to this, it was clear that the current state of the law did not require that the IDRM was exhausted, but that evidence of an attempt at IDRM was led by a party to the dispute. Political parties' nominations (previously described as primaries) had also been brought into the fold of disputes that would require an attempt at IDRM before invoking the Tribunal's jurisdiction.

3. The Complainant had clearly demonstrated an attempt to raise a concern with his party as evidenced by his letter addressed to the Chairman of the National Elections Board DAP Kenya. The letter had a clear dated receipt stamp of the party on its face. The 2nd Respondent through the Replying Affidavit sworn on its behalf by its Secretary-General questioned the receipt stamp, but did not annex what was otherwise the correct receipt stamp. There had clearly been an attempt to explore IDRM and as such the Tribunal was properly seized of jurisdiction.

4. The Respondents had failed to present documents or information that would dent the Complainant's case. Consequently, the Complainant's case was warranted.

Complainant's prayers allowed. 1st Respondent's nomination revoked. The 2nd Respondent to carry out a fresh nomination process within 72 hours of the date of the judgement. Costs of the Complaint were awarded to the Complainant as against the 2nd Respondent.

Amos Guyo Wako & Another v United Democratic Alliance & 5 Others Meru Complaint No. E008 Of 2022 (Judgement)

Hon. G Gathu & Hon. L Kinyulusi

11th November 2022

Summary of facts

The Complainants and the 1st Interested Party were both members to the 1st Respondents party and members of the Marsabit County Assembly. The Complainants claimed lack of consensus and/or any elections held before the nomination of the 1st Interested Party herein for the position of Minority Leader Marsabit County Assembly. They argued that they were members of the Kenya Kwanza Alliance Coalition and that their rights had been trampled upon by the failure of the Coalition to either build consensus or hold an election to nominate the Leader of the Minority.

The 1st Respondent contended that the members of the county assembly of the parties forming the coalition were best suited to deliberate as to who should be nominated as the Minority Leader of Marsabit County Assembly. The 2nd Respondent did not appear throughout the hearing of the matter.

The 1st Interested Party stated that his nomination arose from a consensus building session on 30th September 2022, and annexed minutes of that meeting. He also asserted that the question of whether the 4th Interested Party was a member of the Azimio Coalition or the Kenya Kwanza Coalition was a matter before the High Court in Constitutional Petition E041 of 2022. He annexed a letter from the Registrar of Political Parties dated 28th September 2022 to the effect that the 4th Interested Party was a member of the Azimio Coalition.

The 2nd and 3rd Interested Parties response to the application was to the effect that the Complaint had been overtaken by events. Their position was that they had no further interest in the matter and they did not file a response to the complaint.

The 4th Interested Party supported the Complainant's position. However, the coalition agreement between the 4th Interested Party and the Kenya Kwanza coalition was not annexed.

Issues

1. Whether the Tribunal had jurisdiction to hear and determine the matter.
2. Whether the 4th Interested Party was a member of the Kenya Kwanza Coalition.
3. Whether the election of the 1st Interested Party as Leader of Minority in the Marsabit County Assembly was lawful.

Held:

1. The Tribunal relied on Section 40 (1) of the Political Parties Act 2011 where it held that it was indeed properly clothed with jurisdiction to hear and determine the Complaint even where a dispute cuts across the various categories of jurisdiction in section 40 (1). Moreover, the Complainant demonstrated that IDRM had been exhausted, thereby complying with section 40 (2).

2. The question as to whether the 4th Interested Party was a member of Kenya Kwanza Coalition was not within the ambit of the Tribunal rather the Speaker of the County Assembly of Marsabit to make a determination on the same.

3. The election of the Interested Party as Leader of Minority was not lawful since the 1st Respondent had expressly indicated that it had not elected a Leader of Minority for Marsabit County Assembly.

Order

The entire process of nomination of the 1st Interested Party to the position of Leader of Minority in the Marsabit County Assembly null and void, Respondents to elect a Leader of Minority with due regard to the law. Each party to bear its costs.

Anastasia Muchiti v Democratic Action Party-Kenya & 3 Others Kakamega Complaint No. E009 Of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

19th May 2022

Summary of Facts

The Complainant was a life member of the 1st Respondent, the Democratic Action Party-Kenya (DAP-K) as shown by his membership number 68007. He was seeking nomination in the DAP-K for the position of Member of County Assembly, Nzoia, within Lukuyani Constituency in Kakamega County. The 1st Respondent herein proposed to conduct its nomination process by way of opinion poll, the outcome of which was shared out on 8th April 2022. The Complainant was the successful candidate in the said party nominations, conducted by way of opinion poll, as she received votes from the majority of the registered voters in Nzoia Ward in which she garnered 74 out of the 160 votes cast and was consequently declared the winner in the DAP-K party primaries. On the other hand, the Interested Party emerged as number two, garnering 60 votes out of 160 votes cast in the opinion poll held by the Party on 8th April 2022.

As a result of winning the primaries, the Complainant was then issued with the nomination certificate as the Nominated Member of County Assembly for Nzoia on a DAP-K ticket in the coming general elections. Immediately after, she was issued with the Candidate's Bonding Form, which she filled and left at the party headquarters.

Later, the Complainant learnt that another nomination certificate dated 19th April 2022 and signed by the Chairman and the Secretary General was issued to the Interested Party who had emerged second place. The Complainant had the legitimate expectation that her name would be forwarded to IEBC for gazettement, seeing as she was not aware of any complaint having been filed at the Electoral and Nomination Dispute Resolution Committee or any order nullifying the Complainant's win and revoking her certificate. Furthermore, the Complainant was never made aware of such proceedings, if any, and/or given an opportunity to be heard in the proceedings. The Complainant was therefore apprehensive that IEBC would proceed and gazette the names without her name in the list, yet she won in the primaries and held a Nomination Certificate to this effect. The 1st and 2nd Respondent did not enter appearance, despite being served.

Issue

1. Whether the Complaint should be allowed.

Held/Orders:

1. The Complaint was allowed. The 1st Respondent was ordered to forward the name of Anastasia Muchiti to the IEBC.

2. The DAP-K nomination certificate issued to Joshua Wekesa Pilasioa was revoked.

3. The cost of the Complaint awarded to the Complainant as against the 1st Respondent.

Asha Hussein Mohammed v Zam Zam Chimba Mohamed & Another Mombasa Complaint No. E004 Of 2022

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

7th May 2022

Summary of Facts

This was a complaint raised against the 2nd Respondent party arising from the 2nd Respondent's party nominations for the position of Woman Representative, Mombasa County held on 22nd April 2022 and which was not heard and determined by the 2nd Respondents Appeals Tribunal on merits but was dismissed on account of the complainant having filed outside the allowed time limits. Additionally, the Claimant herein participated in the 2nd Respondent's nominations held on 22nd April 2022 for the post of Women Representative, Mombasa County, where the 1st Respondent was declared the winner despite allegations of irregularities and election malpractices. Being dissatisfied with the declaration, the claimant filed an Appeal at the 2nd Respondent's Appeals Tribunal, but the same was not heard. Nevertheless, a determination was later made by the Appeals Tribunal who found that the Appeal was filed out of time.

The Complainant therefore sought an order of injunction restraining the Independent Electoral Boundaries Commission from accepting the name of the 1st Respondent as the candidate for Orange Democratic Movement for the seat of Women Representative, Mombasa County. The claimant sought orders to quash the declaration and Party Certificate issued to the 1st Respondent as the winner of the Women Representative Mombasa County in the ODM Party primaries and an order declaring her the winner instead. She further sought an order directing that the 2nd Respondent be directed to issue her with the party certificate to contest for the election of the Mombasa County Woman Representative and/or in the alternative, an order directing the 2nd Respondent to conduct fresh nominations.

The 1st Respondent raised a Preliminary Objection, asserting that the Complainant had not exhausted the internal dispute resolution mechanism of the party. She alleged that the 2nd Respondent had used 4 types of nomination to identify the most preferred candidate: opinion polls, consensus, delegates and universal suffrage. She asserted that opinion polls had been held in March 2022, and that she won both opinion polls against the Complainant. She claimed that after the opinion polls, both she and the Complainant were summoned to Nairobi by the Deputy Party Leader for

a consensus meeting. At that meeting, the Complainant was offered a nominated Senator's position, which she declined and left the meeting. The 1st Respondent further asserted that she was invited to collect her nomination certificate on 19th April 2022, but when she arrived at the agreed venue, she was informed that the party had settled on universal suffrage as the nomination method. She claimed to have won the universal suffrage exercise on 22nd April 2022, and that the exercise went smoothly, save for disruptions caused by the Complainant's supporters who wanted to unduly influence the process. She averred that she was a stranger to the process at the ODM Appeals Tribunal.

The 2nd Respondent neither entered appearance nor filed a response.

Issues:

1. Whether the Tribunal has jurisdiction to determine the Complaint as presented by the Complainant.

2. Whether the Complainant has proved her case to the required standard.

Held:

1. The Complainant had submitted that she could not file the said appeal at the party's tribunal within the stipulated 36 hours from the time the decision was made as she was in the process of consolidating the documents necessary to accompany the said Appeal; hence, she filed on 25th April 2022. She further submitted that the party appeals tribunal never served the 1st Respondent with any appeal from the Appellant.

2. The Tribunal was not satisfied as to the reason provided for filing outside the mandatory 36 hours as the complainant was in full control of the same and no extraneous reason had been provided to excuse the delay. Deadlines are an essential component of any legal and political process, and neglect of the same would have fatal consequences on a claim, unless extraneous circumstances beyond the control of a party are demonstrated to have excusably caused the delay.

3. The Tribunal affirmed that it was alive to Article 22(3)(d) and Article 159(2)(d) of the Constitution of Kenya 2010 which emphasised that justice was to be determined without undue regard to procedural technicalities. Calling for

compliance of party rules and procedures would not amount to giving undue regard to procedural technicalities.

4. The 1st Respondent urged the Tribunal to down its tools on the grounds that the Complainant never exhausted the IDRM of ODM before approaching the Tribunal. However, it was her submission that the Complainant had filed an appeal to the IDRM on 25th April 2022. She further averred that the Tribunal had never issued them any notice or communication that they had received an Appeal. Her position was therefore that the appeal was filed late and that this flew in the face of Rule 12(3) of the ODM Appeals Tribunal Rules, which requires that appeals be filed within 36 hours of the time the decision to issue a certificate of nomination is made. In addition, there was on record a decision of the ODM Appeals Tribunal dated 27th April 2022 where the ODM Appeals Tribunal dismissed the Complainant's appeal for having been filed out of time.

5. Although the Honourable Tribunal did not find merit in interfering with the internal party's appeal decision, the cardinal rule in establishing jurisdiction was whether an attempt at IDRM had been made, with the proceedings and conclusion of the same being of no consequence on the Tribunal's jurisdiction. In the upshot, the Tribunal found that the Preliminary Objection dated 28th April 2022 was not merited and was thereby dismissed with no order as to costs.

6. On the 2nd issue, the Tribunal asserted that it was trite law that he who alleges must prove. It was further pointed out that the threshold of proof should in principle be the same one that is applicable in civil cases, i.e., above a balance of probability though not as high as beyond reasonable doubt in criminal cases.

7. The Complainant alleged that she garnered the highest number of votes in most of the polling stations, and the same was indicated in the acknowledgement forms. Despite this, the 1st Respondent was issued with the nomination certificate. Nevertheless, the Complainant adduced no evidence to support her claims that she was the aspirant who won the elections. In fact, what was on record was a screenshot indicating that the 1st Respondent won the nomination exercise. Therefore, the Complainant had not discharged the burden of proof in respect of this allegation.

8. In her submissions, the Complainant stated that there were massive irregularities which were witnessed in the polling stations: the agents were not allowed to sign the vote acknowledgement forms and all declaration forms affected the outcome of the elections; that the notice of the election was too short, in contravention of the nomination rules; that the party introduced an alien biometric system without sensitization and education of the clerks; that in Mikindani polling station a stranger was aided by the presiding officer and the police officers in walking out with one of the gadgets, which occasioned violence.

9. The issue that the Tribunal had to determine was whether the irregularities exposed during the nomination exercise affected the results. The Tribunal relied on the Nigerian Court of Appeal in the case of *Olusola Adeyeye v Simeon Oduoye (2010)* and Section 83 of the Elections Act, which emphasise that the Claimant is required to show that there were irregularities committed during the elections, but also the irregularities were of such scale that they influenced the outcome of the polls.

10. As a result, the Tribunal concluded that the Claimant had not discharged her burden of proof to show how the alleged irregularities substantially affected the final outcome.

Order

The Claimant's claim was dismissed and there were no orders as to costs.

Benson Ochola & 6 Others v Orange Democratic Movement Party & Another Nairobi A Complaint No E050 Of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

5th May 2022

Summary of Facts

The Complainants were vying for the MCA Kayole South Ward, Embakasi Central Constituency Nairobi County. They claimed that the nomination exercise undertaken by the ODM National Elections Board in Kayole South Ward was unlawful and marred with irregularities and electoral malpractices and that the same were not free, fair or credible. The Complainants claimed that:

a. The ODM nomination was only conducted in two (2) of the three (3) gazette polling stations;

b. Voting started late contrary to provisions of Regulation 32 of the ODM Primaries and Nomination Rules;

c. The 2nd Respondent participated in the nomination exercise without vacating his office as ODM Chairman Embakasi Branch;

d. The 2nd Respondent was the one who recruited both polling clerks and returning officers and forwarded the list to ODM National Elections Board, intercepted electoral materials including an Electoral Tablet which the Complainants contended he used to cast votes in his favour;

e There was rampant voter bribery at the polling centres and incidents of violence;

The Complainants, being dissatisfied with the nomination exercise, lodged an appeal before the ODM Appeals Tribunal which was dismissed. The 1st Respondent replied to each of the allegations, providing explanations for each. The Respondents claimed that the Complainants had introduced new material facts that were never pleaded at the 1st Respondent's Appeals Tribunal, and pointed to the inclusion of the 7th Complainant as a party to the Complaint which they claimed went against the rules of joinder of parties at an appeal stage. The Respondents claimed that new complaints should be disregarded and dismissed in limine.

Issues

1. Whether the matter was an appeal from the 1st Respondent's internal disputes resolution mechanism organs (IDRM).

2. Whether the nomination process was marred with massive irregularities and electoral malpractices

Held:

1. Section 40 of the Political Parties Act provides for both original and appellate jurisdiction of the Tribunal and it is very particular that the appellate jurisdiction is exercisable in respect of appeals from the decisions of the Registrar under the Act. The Act does not bestow appellate jurisdiction upon the Tribunal, but rather, it makes it mandatory that before a party approaches the Tribunal, they have to adduce evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanism (IDRM). It was therefore erroneous to hold that a matter that had been subjected to IDRM escalated to the tribunal on appeal. The IDRM process is a mandatory condition precedent before the Tribunal can assume jurisdiction and the jurisdiction is original except for the specifically provided for appellate jurisdiction.

2. The burden of proof always lies on whoever wants the court to believe a fact. The Tribunal found that the Complainants had not sufficiently discharged their burden of proof and demonstrated to the Tribunal that the nomination process was marred by massive irregularities and electoral malpractices. For instance, there was no evidence that those who presided over the exercise were close relatives of the 2nd Respondent. What the Complainants raised were general statements which were refuted by the Respondents. Cogent evidence was required to prove the allegations. Further, any allegations made were greeted with a plausible response by the Respondents.

Order

Complaint dismissed. Each party to bear its costs.

Bernard Munase Mukhombwa v Jafred Muchesia Ngaira & 2 Others Kakamega Complaint No. E008 OF 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

16th May 2022

Summary of Facts

The complaint filed herein was undefended as the 1st and 3rd Respondents had since supported the Complainant and expressed no interest in proceeding with the nomination process that was the subject issue herein. The Complainant had challenged the qualification of the 1st Respondent to participate in the nomination of Isukha North Ward member of County Assembly on the basis that at the time of the nomination, the 1st Respondent was still an employee of the County Government of Kakamega. During the pendency of the matter, the 2nd Respondent duly complied and forwarded the name of the Complainant as its nominee for the position in issue. This was confirmed through the further affidavit filed by the Complainant which they swore on 13th May 2022. The matter was thus settled in so far as prayers(a) to (c) of the complaint was concerned.

The parties were, however, unable to agree on costs. The Tribunal further stated that it was trite law that costs follow the cause, and the Complainants cause carried the day.

Held/Orders

The Complaint herein be marked settled with costs to the Complainant.

Billiah Bochaberi Maranga v Orange Democratic Movements Party & Orange Democratic Movement Party & Another Kisumu Complaint E011 Of 2022

Hon. Dr. Wilfred Mutubwa, Hon. Fatuma Ali, Hon. Walubengo Sifuna

3rd May 2022

Summary of Facts

The matter concerned the issuance of a direct nomination ticket to the 3rd Respondent as the 1st Respondents candidate for the Member of County Assembly for Gesusu Ward Kisii County without having consensus or an opinion poll. The Complainant and the 3rd Respondent with contestants for the said seat. The Complainant was aggrieved by the outcome and challenged the issuance of the direct ticket to the 3rd Respondent before the 1st Respondent's Appeals Tribunal, sitting in Kisumu on the 12th of April 2022. The ODM Party's Appeals Tribunal dismissed the Complainant's Appeal. The Complainant was still disenchanted and moved the Tribunal by way of Complaint, dated 22nd April 2022, brought under the cover of Certificate of Urgency. The matter came up for hearing on 29th April 2022 when the parties argued the matter orally. The Complainant filed a Return of Service dated 26th April 2022 confirming service upon the Respondents.

The 1st and 2nd Respondents did not enter appearance.

On behalf of the 3rd Respondent, it was argued that the methods of nomination were clearly stipulated in the ODM Party Primaries and Nomination Rules and that under Rule 23, the party was at liberty to issue a direct nomination to a party without conducting polls. It was their case that the party had settled on the use of direct nomination as the preferred method, moreover, the Complaint was impugned for failure by the Complainant to subject herself to the party IDRM; consequently, she was prematurely before the Tribunal.

Issues

1. Whether the Tribunal has the jurisdiction to hear and determine the matter.

2. Whether the direct nomination was conducted in substantial compliance with the law.

Held

1. It was clear that the dispute at hand being a dispute between a member of a political party and a political party and a political party falls within the definition of Section 40(1)(b) of the Act. The issue as to whether the Tribunal had jurisdiction to entertain the matter fell to one question: whether the Complainant had provided sufficient evidence of an attempt at subjecting the dispute to the Party IDRM as provided under Section 40(2) of the Act. The purported nomination of the 3rd Respondent was pursuant to the process impugned before the party tribunal and the subject of the current proceedings.

2. It was the Tribunal's considered opinion that the Complainant had demonstrated an attempt to pursue Internal Dispute Resolution Mechanisms with the party since she had already filed an Appeal with the ODM Appeals Tribunal (Appeals Tribunal No. 2 of 2022) prior to approaching the Tribunal. This met the requirement of a sufficient attempt at IDRM. The Tribunal had the required jurisdiction to hear and determine the matter. As a result, the Preliminary Objection was dismissed.

3. On the 2nd issue, after hearing the parties herein and considering the submissions as well as the pleadings filed, the main issue that arose was whether the 1st and 2nd Respondent made the decision to issue a direct nomination to the 3rd Respondent in a fair and just manner.

4. Fair administrative action gives life to Article 47 of the Constitution of Kenya and Section 4(3) of the Fair Administrative Act and where an administrative act is likely to affect a person, the administrator shall give the affected person notice and an opportunity to be heard.

5. When the 1st and 2nd Respondents decided that they would determine the 1st Respondent's candidate not by universal suffrage but by direct nomination, it became an administrative action and should have therefore been subjected to fair procedure. The fact that the Complainant was not given a chance to state why she thought she was the better person to fly the Party's flag was a breach of her Constitutional right to equal treatment before the law.

   The Tribunal allowed the complaint. The Nomination of the 3rd Respondent was annulled. The 1st and 2nd Respondent shall conduct a fresh nomination exercise for Gesusu Ward, Kisii County within 48 hours of the order; not later than 4th May 2022. The nomination shall be by universal suffrage, unless all the candidates agree to some other method. Each party shall bear their own costs.

Bob Omwenga Okiya v Progressive Party of Kenya & Another Kakamega Complaint No. E010 Of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

19th May 2022

Summary of Facts

The Complainant submitted that he was given life membership by the Respondent, the Progressive Party of Kenya (PPOK) on 10th February 2022 and a direct nomination certificate dated 10th February 2022. He averred that he and PPOK agreed that he would be given a direct nomination to vie for Member of County Assembly for Luanda South Ward seat, in Vihiga County. The agreement was based on his long history of support to the people's cause and was to be effected upon payment of Kshs.5,000, which payment he duly made. He stated that the Respondent had not submitted his name to the Interested Party despite him having been granted the direction Nomination Certificate.

On 25th March 2022, the Complainant averred that he became aware that the Respondent intended to present a different candidate for the position in issue and consequently followed up the matter at the PPOK headquarters in Nairobi, to no avail. As a result of this, he was directed to go to the IEBC offices where the Complainant confirmed that his name was not on the list. The complainant therefore prayed that the Tribunal order the Respondent to submit his name to the Interested Party as the nominee to vie for the Luanda South Ward under PPOK party in the August 2022 general elections.

The matter was undefended.

Issue

Whether the complaint was justified.

Orders:

The Tribunal directed that the complainant's prayers be granted. The Respondent was directed to forward the name of the complainant to the IEBC for gazettement as their nominee candidate for the position of Member of County Assembly Luanda South Ward, in Vihiga County in the August 2022 general election.

Booker Ngesa Omole v Benedict Wachira Nairobi A

Complaint No. E051 of 2022

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

8th May 2022

Summary of Facts

The Complainant was the Vice-Chairperson and the Organising Secretary of the Communist Party of Kenya (CPK) who had been named as the 1st Interested Party in the claim. The Complaint had been brought before the Tribunal by the Complainant because he claimed that the Respondent had failed and/or refused to submit the names of the Complainant to the Independent Electoral Boundaries Commission, the 2nd Interested Party in the claim. The Complainant claimed to have been nominated to contest in the General Elections under the Communist Party of Kenya flagship for the position of Member of Parliament, Gem Constituency. The Complainant therefore sought orders to protect the Interested Party's constitution against the violation by the Respondent.

The Respondent denied failing to submit the names of party aspirants to the IEBC, asserting that the list was submitted on 28th April 2022. It was asserted that the party aspirants were required to clear with the party before contesting, which the Complainant failed to do. He contended that it was the Complainant who withdrew from the contest after the party joined the Kenya Kwanza coalition, arguing that it would be impossible for him to win the Gem seat if he vied under a party in that coalition.

The Respondent asserted that the Complainant was not included in the list of aspirants that was forwarded to the IEBC on 28th April 2022 due to his conduct of abusing the party and party leaders on social media and to ensure that the two-thirds gender rule was complied with.

The 2nd Interested Party neither entered appearance nor filed a response.

Issues:

1. Whether the Tribunal has jurisdiction to hear and determine the complaint.

2. Whether the complaint qualified to be nominated to vie for the position of Member

of Parliament for Gem Constituency under the umbrella of the Communist Party of Kenya.

3. Whether the Respondent was justified to refuse to submit the name of the Complainant to the Independent Electoral Boundaries Commission.

4. What orders the Tribunal could give in the circumstances.

5. Who should bear the costs of the Complaint.

Held:

1. The Tribunal relied on Section 40 of the Political Parties Act to determine the issue of jurisdiction. It further stated that the Complainant had adduced evidence before it that indeed he made honest attempts to resolve the matter through the party IDRM by a sending a letter via email to the Disputes Tribunal, but the same was not responded to, either were any explanations given to him as to why he did not receive responses to his letters. The Tribunal was well seized of the matter.
2. The Complainant who was a member of the 1st Interested Party made efforts to have the IDRM by sending the letter dated 27th April 2022 via email to the Disputes Tribunal but the same was neither responded to nor was there any explanation given to him why his letters were not responded to. Consequently, the Tribunal found that it had jurisdiction to hear the Complaint and could therefore proceed and determine the pending issue.
3. On the 2nd issue, the Tribunal noted that the complainant withdrew his candidature for GEM Constituency and had not settled on a constituency to contest in Nairobi. While the Complainant was a duly qualified candidate, since he withdrew his candidature, he was estopped from turning back and claiming that he did not mean what he said. For that reason, it was affirmed that the Complainant disqualified himself by that one letter to the party.
4. On the 3rd issue, the Respondent did not submit the name of the Complainant, the reason being that he withdrew from the contest. Moreover, the Respondent justified their decision by asserting that the Complainant failed to abide by the code of conduct and ethics of the party.

Order

The Tribunal found no merit in the complaint and the same was dismissed with no orders as to costs.

Calistus Simiyu Wanyonyi v Ford Kenya Party & 2 Others
Kakamega Complaint No. E013 of 2022 (Judgement)

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

27th May 2022

Summary of Facts

The Complainant was a member of the 1st Respondent and aspired to secure the party nomination certificate so as to vie for the Member of County Assembly (MCA) Malakisi South Kulisiru Ward seat in the August 2022 elections. The 1st and 2nd Respondents opted for indirect nominations for the said Malakisi South Kulisiru Ward. The said indirect nomination would involve opinion polling to determine the most popular candidate among the interested aspirants. During the said nomination process, the Complainant was polled as most popular and thus was assured that he would be the recipient of the coveted nomination certificate. He alleged that he was contacted on 22nd April 2022 and invited to collect his nomination certification from the 1st Respondent's office. Unfortunately, several attempts to collect the said nomination certificate failed to bear fruit causing the Complainant to lodge a complaint with the 1st Respondent. However, the complaint did not elicit any response. The Complainant has since learnt that the 3rd Respondent was issued a nomination certificate under unclear circumstances thus spurring the filing of the complaint before the Tribunal.

The 1st and 2nd Respondents asserted that the party nomination rules allow for direct nomination upon the direction of the Management Committee. It was their assertion that in this case, the Management Committee had advised the issuance of a ticket to the 3rd Respondent and not the Complainant.

They also urged the Tribunal to dismiss the Complaint for want of exhaustion of the Party Internal Dispute Resolution Mechanisms (IDRM). It was their submission that the Complainant never submitted to the IDRM as anticipated by party laws and therefore had contravened the provisions of the Political Parties Act. For this reason, the complaint was premature and for dismissal.

The 3rd Respondent did not enter appearance despite being served.

Issues

1. Whether the Tribunal had jurisdiction.
2. Whether issuance of the nomination certificate to the 3rd Respondent was procedural.
3. Whether the Complaint was justified.

Held

1. On the first issue the 1st and 2nd Respondents submitted that the Complainant did not invoke the IDRM and as such, did not properly invoke the jurisdiction of the Tribunal. Further they claimed that the Respondents ran afoul of section 40(2) of the Political Parties Act. The requirement is also known as the doctrine of exhaustion. On the flipside, the Complainant submitted that the political party had hoodwinked him into believing that he would be issued with the certificate until such time as the timeline set by the IEBC for resolution of party disputes internally had run out. This, he asserted, was intended to frustrate his efforts, but this did not deter him from writing to the party to register his complaint in the hope of getting the issue resolved.

2. The Tribunal stated that the doctrine of exhaustion was not absolute. Therefore, the requirement to exhaust internal dispute resolution mechanisms was a principle with exceptions. As a result of the preceding findings, an attempt to engage the political party was made and adequate time allowed to the political party within which to act or even respond, but none was forthcoming. Therefore, in the circumstances, IDRM was attempted and as such the Tribunal was properly seized of the matter.

3. On the 2nd issue, the Tribunal asserted that it was anticipated that all administrative action must be carried out in line with the provisions of the Constitution of Kenya and the Fair Administrative Action Act. The Tribunal noted that the operationalisation of the jurisdiction of the Management Committee advisory had to be rolled out through some procedural rules. However, no rules had been presented by the 1st and 2nd Respondents that spoke to a process to be applied. The Tribunal was only issued upon the advice of the said Committee. The question then was whether the power conferred on the 1st and 2nd Respondents by their enabling statutes was properly exercised.

4. The classic judicial pronouncement on the doctrine of ultra vires was pronounced in the case of *Council of Civil Service Unions v Minister of the Civil Service (1985)* in which Lord Diplock enumerated a threefold classification of grounds for the court to intervene which included: illegality, irrationality and procedural impropriety.

5. Where a decision affected the rights of any member, it had to be executed in a transparent manner. The parameters to be applied had to be capable of standing up to third party scrutiny. None of these had been demonstrated in the case as presented by the 1st and 2nd Respondents.

6. The pronouncement of the Management Committee fit squarely within the ultra vires parameters outlined. Therefore, any certificate issued as a result of the process had to, justifiably, be impugned.

7. On the 3rd issue, the Tribunal noted that the Complainant's submission which had gone uncontroverted, was that there had been a polling process and that polling process is what had been overtly made known to the party membership and to aspirants. He had adduced evidence of payment of the nomination fee and the nomination certificate issued to him which was later, for reasons unknown to him, cancelled. The Tribunal also noted that his demands for re-issuance of the certificate had not elicited a response more than a month later, even in light of the strict timelines applicable to the nomination process.

8. It was therefore the finding of the Tribunal that the Complainant had shown, on a balance of probabilities, that he emerged the front runner for the party ticket for the position in issue. Therefore, the Tribunal was inclined to find that his claim was justified.

Order:

The 1st Respondent to forward the name of the Complainant to the IEBC as the nominee candidate for the position of Member of County Assembly Malakisi South Kulisiru Ward in the August 2022 general election. Further, that the Complainant be issued a nomination certificate with respect to the position. The purported nomination certificate issued to Wafula Francis Eric was revoked. Costs were awarded to the Complainant as against the 1st Respondent.

David Ayoi v Orange Democratic Movement & 2 Others
Nairobi A Complaint No. E047 of 2022

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

6th May 2022

Summary of Facts

The Claimant herein participated in the 1st Respondent's nomination held on the 22nd April 2022 for the post of Member of County Assembly for Gatina Ward where the 3rd Respondent was declared a winner despite allegations of irregularities and elections malpractices. Being dissatisfied with the declarations, the claimant filed an Appeal at the 1st Respondents Appeals Tribunal and succeeded; the nomination of the 3rd Respondent and the nomination certificate issued were nullified. Despite succeeding at the Parties Appeals Tribunal, the 1st Respondent processed and issued the nomination certificate to the 3rd Respondent. The Claimant sought an order of injunction restraining the 1st Respondent from submitting the name of the 3rd Respondent or any other person to the Independent Electoral and Boundaries Commission as the valid nominee of the 1st Respondent for the position of Member of County Assembly for Gatina Ward. The Claimant further sought an order directing the 2nd Respondent to issue the nomination certificate to him and to proceed and present his name to the Independent Electoral and Boundaries Commission as the ODM Member of County Assembly nominee for Gatina Ward. In the alternative, the Tribunal does issue a declaration that the whole nomination process by the 1st Respondents is a nullity and orders a fresh nomination exercise for Member of the County assembly for Gatina Ward.

The 1st and 2nd Respondent neither entered appearance nor filed a response.

The 3rd Respondent confirmed participation in the nomination exercise held on 22nd April 2022. wherein he emerged the winner. He also admitted that the matter had been submitted to the appeals tribunal, where his nomination had been nullified and his certificate had been cancelled.

He contended that the matter was thereafter referred to the National Elections Board (NEB) and upon consideration of the judgement, the final nomination certificate was

awarded to him. It was his case that the 1st and 2nd Respondents were only complying with the recommendations of the ODM Appeals Tribunal of 27th April, where the Appeals Tribunal had directed that the judgement of the NEB be served upon them for appropriate action. He referred to the strict timelines issued by the IEBC as the basis for the soundness of the decision by the 1st and 2nd Respondents to issue him with the certificate, seeing as he was the most popular candidate for the Gatina Ward elections.

Issues:

1. Whether the 1st Respondent issued the nomination certificate to the 3rd Respondent in clear violation of its own appeals tribunal decision.
2. What orders the Tribunal could issue in the circumstances.
3. Who bears the costs of this claim.

Held

1. On the first issue, the Complainant claimed to have moved the 1st Respondent's Appeals Tribunal because he was dissatisfied with the manner in which the nomination process for the post of Member of County Assembly Gatina Ward was carried out.
2. In the *ratio decidendi* of the Appeals Tribunal, it made a finding that the total turnout was below 1200, yet the votes cast for the complainant were 838 votes and 1395 votes for the 3rd Respondent thus exceeding the turnout. The Appeals Tribunal went further to link the anomaly to the conduct of the presiding officer disappearing with the voting kit. The PPDT found that was not sufficiently rebutted by the 3rd Respondent, neither did the 1st and 2nd Respondents, being the ones who conducted the nominations, avail themselves to offer clarity on this anomaly.
3. While the 3rd Respondent criticised the 1st Respondents Appeals Tribunal decision, claiming that it never relied on any evidence to make its findings, he never questioned nor appealed against the said judgement immediately it was rendered; neither did he contest the same in the proper forum. Therefore, the 3rd Respondent could not now be seen to criticise the Appeals Tribunals orders for lack of evidence, yet he had had the chance to give evidence at the Tribunal contrary to the complaint.

4. The orders were served upon the NEB for appropriate action. The 3rd Respondent wanted the Tribunal to believe that the appropriate action was an order granting him the nomination certificate. The Tribunal construed this as a misconception by the 3rd Respondent, because the Appeals Tribunal nullified the elections and the certificate issued to him. After nullification of the election and the certificate, the appropriate action would have been to conduct another nomination exercise.

5. Since the ODM Appeals Tribunal had considered the evidence that had been adduced before it came to the conclusion that the integrity of the elections had been interfered with, the Appeals Tribunal proceeded to nullify the nomination exercise and the certificate of nomination that had been issued to the 3rd Respondent. Any person aggrieved and/or dissatisfied with the decision ought to have appealed or made an application for review of the decision. In the instant case, none was made. Instead, the NEB proceeded to illegally and unlawfully hand the certificate of nomination to the 3rd Respondent in a clear violation of the judgement of their own Tribunal.

6. The Tribunal therefore held that the decisions of the ODM Tribunal had to be complied with and the utter disregard of the ODM Tribunal's decision reeked of impunity from the NEB. The Tribunal further stated that it was mandated to promote political parties' internal democracy and autonomy. Since the decision of the ODM Tribunal was not challenged and neither did the 1st and 2nd Respondent file any response as to why they disregarded the decision of their Tribunal, the decision of the ODM Tribunal was affirmed and the Tribunal directed that a fresh nomination exercise be conducted.

7. Since the 1st Respondent had issued the nomination certificate to the 3rd Respondent in clear violation of its own Appeals Tribunal decision, the Tribunal found that the nomination certificate awarded to the 3rd Respondent was awarded irregularly and illegally. The claim by the Complainant was therefore meritorious.

Orders

That the 1st and 2nd Respondents did not conduct verifiable, free or fair nominations for the Member of County Assembly Gatina Ward. That the nomination certificate issued to the 3rd Respondent by the 1st Respondent be and is hereby nullified. An order be issued directing the 1st Respondent to conduct a fresh nomination for the position within 72 hours from the pronouncement of the judgement. Each party to bear their own costs.

David Ayoi v Orange Democratic Movement & 3 Others
Nairobi A PPDT Misc. Appl. No. E001 of 2022

Hon. Erastus Orina, Hon Theresa Chepkwony, Hon. Daniel Kagacha

7th June 2022

Summary of Facts

On 20th May 2022, the Tribunal found the Officials of the 2nd Respondent in contempt of its orders made in PPDT Complaint E047 of 2022. Further, on 2nd June 2022, the Tribunal found that the officials of the 2nd Respondent were yet to purge their contempt. It also issued further orders to the 1st and 2nd Respondents to purge their contempt by conducting a fresh nomination exercise within 48 hours of the ruling. It also maintained that the nomination of the 3rd Respondent by the 1st Respondent stood nullified and directed that the submit the name of the duly nominated candidate to the IEBC and in the event that the 3rd Respondent's name had already been submitted to the IEBC, the name ought not the be gazetted pending the implementation of the ruling.

The 1st and 2nd Respondents, through an affidavit sworn by the Chairperson of the 2nd Respondent, averred that the ODM NEB held a meeting with the ODM Central Committee on 3rd June 2022, where full compliance with the Tribunal's orders was discussed. Thereafter, a resolution was made and passed on the party's nominee for Gatina Ward in accordance with rules 8 and 23 of the Party's nomination rules. The resolution was to issue a direct nomination to the 3rd Respondent as the candidate best placed to deliver the ticket for the party in the Gatina Ward, Dagoretti North constituency.

It was asserted that there had been compliance with the orders of the Tribunal and a fresh nomination exercise had been undertaken and the same had been concluded. Therefore, the only remaining matter was the issuance of the certificate which would be done after the Tribunal's affirmation that the orders have been complied with and that the contempt had been purged.

The Claimant conceded that rules 8 and 23 provided various nomination methods, but asserted that universal suffrage was the method settled upon for Gatina Ward. It was asserted that there was no logical reason that compelled all the other methods to be ignored to settle for direct ticketing in favour of the 3rd Respondent. The Claimant

asserted that rule 23 (4) of the party nomination rules only sanctioned direct nominations where there was violence that made it impossible to conduct a free and fair exercise. Since there was no record of such violence or intimidation, there was no justification for issuance of a direct ticket to the 3rd Respondent. The decision to issue the direct ticket was therefore ill motivated and violated constitutional principles of democratic, free, fair and transparent elections.

Issues

1. Whether the 1st and 2nd Respondents had purged the contempt by conducting fresh nominations in compliance with the law.

2. What orders could the Tribunal issue in the circumstances.

3. Who would bear the costs of this claim.

Held:

1. On the first issue, the complaint was initiated from the 1st Respondent's appeals tribunal Appeal No. 39 of 2022 where the elections for Member of County Assembly Gatina Ward held on 22nd April 2022 were nullified.

2. Despite succeeding at the Party's Appeals Tribunal, the 1st Respondent proceeded and issued the nomination certificate to the 3rd Respondent, which prompted the complainant to file Complaint No. PPDTC 047 OF 2022.

3. Notwithstanding the above orders the 1st and 2nd Respondents proceeded again to issue a nomination certificate to the 3rd Respondent which prompted the applicant to make an application seeking to cite the 1st and 2nd Respondents for contempt.

4. The Chairperson of the 2nd Respondent appeared before the Tribunal by filing a mitigating affidavit which was opposed by the Claimant. The Tribunal made a finding that the 1st and 2nd Respondent had not yet purged their contempt because the direct nominations as was claimed then had factored the nullified nominations of 22 April 2022 as one of the considerations for direct nominations, and that it had been further conceded that the nomination was not pursuant to the Tribunal's orders.

5. Political parties' organs ought to be given leeway to discharge their respective mandate as provided in the party instruments. The Tribunal relied on the case of *Samuel Owino Wakiaga v Orange Democratic Movement Party & 2 Others* (2017).

Section 38A of the Political Parties Act allows a political party to conduct party primaries using either direct or indirect nominations. The wording in the provision is, however, not couched in mandatory terms, considering that even in rules 8 and 23 of the ODM Party Primaries and Nomination rules, it is the party's prerogative to decide which method of nomination to use.

6. The applicant in his replying affidavit seemed to have challenged the decision of the party to use the direct nomination method, and further the process followed in the direct nomination. The orders of the Tribunal were for the Party to conduct a FRESH nomination. There is a mandatory provision that once a nomination process by way of universal suffrage is nullified, the FRESH nomination must be repeated by way of universal suffrage, unless the court or tribunal pronounces itself otherwise. In the instant case, the Tribunal did not.

7. The bone of contention in the matter was whether a fresh nomination exercise had been carried out as ordered by the Tribunal. Thus, to allow a challenge against the process of the fresh nomination at this stage was akin to allowing a fresh complaint altogether.

8. Guided by previous pronouncements of the High Court and the Tribunal, the Tribunal agreed with the 1st and 2nd Respondents that form the time the 1st nomination process conducted on 22nd April 2022 was nullified, the same ceased to exist in the eyes of the law and that what was ordered by both the ODM appeals tribunal and upheld by the Tribunal was a FRESH nomination exercise which has since been carried out to the Tribunal's satisfaction.

9. The Tribunal therefore found that in the prevailing circumstances, the 1st and 2nd Respondents had purged their contempt by conducting the nomination exercise afresh by way of direct nomination in compliance with the Tribunal's orders. However, nothing stopped the applicant from challenging the fresh nomination under the ODM Constitution and nomination rules and section 40 of the Political Parties Act.

Order

The Honourable Tribunal affirmed that the 1st and 2nd Respondents carried out the fresh nomination exercise in compliance with the orders of the Honourable Tribunal. That the orders of citation of contempt and committal are hereby lifted. Each party bears their own costs.

Damaris Njuguna & 3 Others v United Democratic Alliance Party Chairman & 3 Others Nairobi A Complaint No. E048 Of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

12th May 2022

Summary of Facts

The Complainants and the 1st Respondent were all members of the United Democratic Alliance Party, the 2nd Respondent herein, and were aspirants for the position of Member of County Assembly for Matopeni/Spring Valley Ward in Embakasi Central Constituency. They all participated in the 2nd Respondent's party nomination process held on 14th April 2022, where the 3rd Respondent was declared the winner. Dissatisfied with the nomination process, the Complainant's filed a dispute with the 2nd Respondents Dispute Resolution Committee being EDRC No. 132 of 2022. The 2nd Respondent had since failed to comply with the judgement and the complainants were apprehensive that the name of the 3rd Respondent would be unlawfully submitted to the Independent Electoral and Boundaries Commission and he would be cleared to contest in the August 2022 General Elections.

Issues

1. Whether the Tribunal had jurisdiction to hear and determine the complaint.
2. What orders the Tribunal could issue in the circumstances.
3. Who should bear the costs of the Complaint.

Held:

1. The IEBC issued directions to political parties through the Statutory Timelines towards the 9th August 2022 General Election on 5th April 2022 to submit the names of persons selected to contest in the General Election on or before Thursday 28th April 2022.

2. The jurisdiction of the Tribunal could be limited and as stated in Section 40(2) that the Tribunal can only be seized of a matter after the same has been subjected to IDRM.

3. The Tribunal relied on the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012)* to point out that it could not arrogate to itself jurisdiction which it did not possess, thus it can only exercise its jurisdiction as clearly captured under Section 40 of the Political Parties Act.

4. Rule 8(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 makes reference to section 31(2A) of the Elections Act. Between the Regulations and the Elections Act, there appeared to be some discrepancy. On the one hand, the Regulations state that the deadline for lodging a dispute arising from a party primary is at least one day before the Commission's deadline for submitting party candidate names. The Elections Act, on the other hand, espouses that a dispute can be lodged with the Tribunal at least sixty days before the general election.

5. Where there exists inconsistency between the Political Parties Dispute Tribunal (Procedure) Regulations and the Elections Act, the provisions of the Regulations are void to the extent of that inconsistency. Therefore, in the circumstances of the case, Regulation 8(1) of the Political Parties Dispute Tribunal (Procedure) Regulations, 2017 was void to the extent that it was inconsistent with section 31(2A) of the Elections Act. The Tribunal took judicial notice that there was still more than 60 days away from the general elections, and hence the Tribunal was clothed with jurisdiction to hear and determine the matter.

6. Parties who are aggrieved by a nomination process must first resolve their issues with the party IDRM and any party dissatisfied with the decision of the IDRM may appeal to the Tribunal. No organ within the party has the authority to overturn the Tribunal's decisions, as to do so would be to encourage the undermining of the decisions of the Tribunal and by extension, the judicial power of the courts.

7. The Tribunal noted that the Complainants had approached the Tribunal for enforcement of the decision of UDA election board being EDRC No. 132 of 2022. The decision of the 2nd Respondent, the UDA National Elections Board had never been challenged, and there was no justification for non-compliance with the same.

However, it was noted that the issue raised by the 3rd Respondent to the effect that he had not been served, and the matter had therefore proceeded without him tendering his evidence, had gone uncontroverted by the Complainants. He had therefore been condemned unheard, which was a violation of the basic principles of natural justice.

8. The Complainants had also raised the issue of recount and re-tally which emanated from the IDRM decision. The Tribunal ruled that the decision of the IDRM to order a scrutiny and re-tally was *non sequitur.* Despite finding that no cogent evidence had been adduced to support the allegations and that the actual result had actually not been contested by the applicants before it, the Committee had gone ahead to order a scrutiny, recount and re-tally. For an order of recount or scrutiny to be granted, a complainant has to establish in a well set out affidavit the factual basis on which they rely. The Tribunal ruled that no evidence had been tendered to warrant a recount or scrutiny of the ballot papers.

9. The Tribunal also dismissed the allegations by the Complainants that the election was marred with violence or that there was ballot paper tampering, double voting or that agents of the 2nd Complainant were not allowed into the polling station since no evidence was tendered to substantiate the same.

10. Moreover, while the 2nd Complainant alleged that he had not been allowed to vote and it was alleged that the party nomination exercise was carried out using the IEBC register rather than the party register, the Tribunal found that there was no evidence on record that anyone was precluded from voting. Since elections are human activities fraught with imperfections, it was up to the Complainants to establish to the required standard, which they failed to do, that the small infractions of non-compliance with the law substantially affected the outcome of the elections.

Order

The Complaint was not merited and the same was dismissed. Each party directed to bear its own costs of the Complaint.

David Kubasu Shimenga v Amani National Congress Party (ANC) & 2 Others & IEBC (Interested Party) Kakamega Complaint No. E002 Of 2022 (Ruling)

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

9th May 2022

Summary of Facts

On 26th April 2022, the Complainant filed the complaint, which was heard, and final orders issued on 28th April 2022. The decision of the Tribunal was read in an open virtual session where Advocate for the Complainant as well as the Advocate for the Respondent had recorded their presence. Counsel for the Respondents/ Applicants thereafter filed the Notice of Motion Application dated 28th April 2022 under Certificate of Urgency together with the Supporting Affidavit sworn by Simon Mwangi Kamau seeking a stay of execution of the order in the said judgement. On 30th April 2022, the Tribunal having listened to the parties, dismissed the Notice of Motion application filed by the Respondents/Applicants on 28th April 2022 with costs. The matter could have rested there.

However, the Complainant moved the Tribunal on 30th April 2022 by way of Notice of Motion which sought to cite Simon Mwangi Kamau, the Secretary-General of the 1st Respondent, for contempt of the orders of the Tribunal issued on 27th and 28th April 2022. The said application was brought under Sections 41(3) of the Political Parties Act: Sections 1A,1B &3A of the Civil Procedure Act; Article 159(2)(d) of the Constitution and all other enabling provisions of the law. The application was supported by the Affidavit of David Shimenga Kubasu sworn on 29th April 2022. The Complainant submitted that even before the judgement, the Tribunal had on 27th April 2022 granted orders restraining the 1st and 2nd Respondents from forwarding the name of the 3rd Respondent to the Interested Party as its nominee for said position. By dint of the same judgement, the nomination of the 3rd Respondent by the 1st and 2nd Respondents was found illegal and thus nullified.

The Respondents, though served, did not file any response. The alleged contemnor opposed the application as being fatally defective, urging that the applicant had not

moved court under the appropriate applicable law, i.e., section 5(1) of the Judicature Act and part 81 of the English Civil Procedure Rules 2012. He also argued that the applicant had not provided evidence of personal service of the application as required by part 81.6 of the Civil Procedure Rules. It was also the alleged contemnor's case that his presence in the proceedings during delivery of the judgement was not evidenced or substantiated. It was also alleged that no evidence of the submission of the 3rd Respondent's name to the IEBC had been adduced.

Issues

1. Whether Simon Mwangi Kamau was in contempt of the Tribunal's orders.
2. What orders should issue.

Held

1. On the main issue of contention, the Tribunal relied on the case of ***Fred Matiangí, The Cabinet Secretary, Ministry of Interior and Coordination of National Government v Miguna Miguna & 4 Others (2018)*** to affirm that it is the responsibility of every judicial authority to underwrite the observance of its orders; and to jealously guard the integrity and reputation of its decisions. This obligation, and indeed, power, is immutable, unfettered, non-derogable and non-negotiable.

2. The orders set out in the operative part of the Tribunal's judgement were clear. No request for clarification or review was made to the Tribunal at all. The advocate for the alleged Contemnor was of the view that alleged technicalities in the application, such as exclusion of certain laws in the citation on the face of the application and proof of service should be the focus in determining the application. The alleged contemnor sought to have the affidavit sworn in support of the application or stay be disregarded in determining whether he knew that the Tribunal had issued a judgement that required his action. He therefore could not be found to be in contempt.

3. Breach or contempt or orders of courts and tribunals is depicted through direct acts of violation or omissions. In the judgement, the Tribunal quashed or annulled the ANC party's decision to issue a nomination certificate to the 3rd Respondent in the complaint and directed that a certificate issue to the Complaint, for the position in issue. The orders were succinct.

4. The alleged contemnor, responsible for executing the party mandate and indeed swore affidavits confirming such authority, had not shown how if at all the party has proceeded to execute the Tribunal's directives issued vide the said judgement delivered in the presence of his counsel and in respect of which he swore an affidavit seeking stay. The order of the Tribunal required the party to issue a certificate to the Complainant as its nominee for the position in issue. This according to the Tribunal was an obligation borne by the Contemnor as the Secretary General of the ANC party which was the import of the judgement. Thus, failure to do so was in contravention of the judgement.

5. The alleged contemnor chose not to file an Affidavit in response to the application, instead choosing to file Grounds of Opposition. The facts as advanced by the Applicant were, thus, uncontroverted.

6. The conclusion the Tribunal reached was that the said Simon Mwangi Kamau was in breach and contempt of the Tribunal's orders made in the Judgment of 28 April 2022.

Order

SIMON MWANGI KAMAU, *Secretary General of the 1st Respondent, was found to be in contempt of the Judgment and Orders of the Tribunal made on 28th April 2022. A notice to show cause to issue against the said* **SIMON MWANGI KAMAU** *to appear before the PPDT Kakamega Bench sitting at the Milimani Law Courts on 9th May 2022 at 9 am.*

Derebia Muisrael Nyaga v United Democratic Alliance (UDA) & 4 other Meru Complaint No. E002 of 2022 (Judgement)

Hon. G Gathu, Hon. W Ngige & Hon. L Kinyulusi

27th April 2022

Summary of facts

The Complainant filed a complaint over how the repeat nomination exercise for Muthambi ward was conducted. The Complainant and the 4th Respondent were both members of the 1st Respondent's Political Party and vying for the same position in Muthambi Ward, Maara Constituency. The nomination exercise took place, and the Complainant issued a Provisional Certificate, but the 4th Respondent proceeded to file a complaint with the 1st Respondent's ENDRC claiming the nomination process was marred with many irregularities and illegalities. The ENDRC proceeded to issue a directive for a repeat nomination exercise. The 1st and 3rd Respondent served the Complainant herein with the complaint raised by the 4th Respondent herein, which according to 1st and 3rd Respondent did not attract any response from the Complainant.

Issues

1. Whether the Tribunal has jurisdiction to hear and determine this matter.

Held

1. The Complaint did not comply with Section 40(2) of the Political Parties Act, thus the Tribunal lacked jurisdiction to hear and determine the Complaint.

2. The Tribunal lacked jurisdiction and as such, it could not delve into the merits of the Complaint.

Order

Complaint struck out, each party to bears its cost.

Dorice Atuo Matere v The Chairperson Amani National Congress Party & 3 Others Kakamega Complaint No. E018 of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

14th August 2022

Summary of Facts

On 3rd August 2022, the complaint herein was lodged by the Complainant, who was described as a member of the 3rd Respondent, Amani National Congress Party (ANC). The 1st and 2nd Respondents are national officials of the said ANC party. The Complaint which was filed under Certificate of Urgency and was accompanied by a Notice of Motion application, was certified urgent, after which the matter hung in limbo until 10th August 2022, when an Affidavit showing return of service was lodged in the portal. The matter was subsequently set down for hearing with the directions that a hearing notice, together with the Complainant's written submissions be served upon the Respondents and Interested Party and that an affidavit showing the service be filed.

Issue:

1. Whether the Tribunal properly seized its jurisdiction.
2. Whether the Complaint was justified.
3. What orders the Tribunal should issue.

Held

1. It was clear that the parties before the Tribunal had right of audience having properly been identified as persons over whom the Tribunal can exercise jurisdiction, being members of a political party, the question of jurisdiction turned on Section 40(2) of the Political Parties Act (PPA) and whether IDRM had been attempted.

2. The statement in the Complaint to the effect that there had not been any effort to solve the matter by the Elections Board, since it had not communicated its

finding within the 24 hours allowed for resolution of disputes, ought to have ousted the Tribunal's jurisdiction. This is because the Political Parties Act is clear on what is required before the Tribunal can be seized of jurisdiction.

3. However, the Tribunal considered the fact that the Complainant had deponed that the ANC party had failed to address the concerns of the Complainant, despite her having raised the same internally. It was not controverted that the Complainant sought to resolve the matter internally, as anticipated under section 40(2) of the PPA, before presenting the complaint before the Tribunal. PPDT was therefore properly seized of jurisdiction.

4. On whether the complaint is justified, the Tribunal noted that the complaint bundle included the notice calling for applications for nomination to the Kakamega County Assembly party list, ANC membership certificate in the name of the Complainant, the marking scheme and the list of nominees for Kakamega.

5. In addition to the complaint bundle was a list on an ANC letterhead titled Kakamega County Assembly Gender Top Up List. The Complainants name indicated her ID Number at the top of the said annexure. Therefore, from the bundle of list, it was apparent that the Complainant successfully applied for inclusion in the ANC Kakamega County Assembly Gender Top Up List, with her name being included in the list.

6. The Tribunal did not find that there was sufficient information presented before them that supported the Complainant's allegation that some members included in the impugned list did not qualify.

Orders:

The 3rd Respondent, Amani National Congress (ANC) Party, include the name of the Complainant as number 1(one) in the ANC Kakamega County Assembly Party Nomination List under the Gender Top Up Category.

Edwin Odhiambo v ODM National Election Board & 2 Others; Independent Electoral and Boundaries Commission (Interested Party) Kisumu Complaint No. E016 of 2022 (Ruling)

Hon. Dr. Wilfred Mutubwa, Hon. Fatuma Ali, Hon. Walubengo Sifuna

4th July 2022

Summary of Facts

Despite the Tribunal's ruling nullifying the nomination certificate issued to the 3rd Respondent and ordering fresh nominations, the 1st and 2nd Respondent did not conduct a fresh election. Instead, they proceeded to forward the name of the 3rd Respondent to the IEBC as the candidate for the MCA, South Sakwa Ward for ODM Party. The 1st and 2nd Respondents argued that the Tribunal did not have jurisdiction to determine the application since the matter had since moved from Party nominations to nomination stage, and that as a result, only the IEBC had the exclusive jurisdiction to hear and determine the matter. Further, the issues relating to contempt were res judicata, having been disposed of by the Tribunal. The Interested Party argued that the correct course was for the Complainant to seek a Notice to Show Cause and not to institute the application.

Issues

Whether the Tribunal had the requisite jurisdiction to hear and determine this matter.

Held

1. The name of the 3rd Respondent had already been forwarded to the IEBC and was cleared to run. Once a matter had transitioned from the PPDT to the registration of candidates by the IEBC, the former was bereft of jurisdiction.

2. The Tribunal has jurisdiction to enforce its decisions under Section 41 (3) of the Political Parties Act, 2011. However, the Tribunal has no jurisdiction to deal with matters of nomination and registration of candidates by the IEBC. In other words, this Tribunal cannot set aside or fault the IEBC's decision to clear the 3rd Respondent.

3. Jurisdiction was exclusively the IEBC's under Article 88 (4) (e); and it is a constitutional mandate. In this case, the registration and clearance of the 3rd Respondent by the IEBC was not a matter within the province of the Tribunal. The Tribunal thus decided against encroaching upon the jurisdiction of the IEBC.

Order

Application dismissed for want of jurisdiction. No orders as to costs.

JOHN OMBEWA GARE V ODM NATIONAL ELECTIONS BOARD & 2 OTHERS; INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (INTERESTED PARTY)

KISUMU MISC. APPLICATION NO. E017 OF 2022 (RULING)

HON. DR. WILFRED MUTUBWA OGW C.ARB, HON. FATUMA ALI, HON. WALUBENGO SIFUNA

4TH JULY 2022

Summary of Facts

The Tribunal had delivered judgement in this matter ordering, among others, that the 2nd Respondent conducts fresh nominations by way of universal suffrage within 72 hours. The Respondents failed to comply with the said decree.

Issue

Whether the Tribunal has the requisite jurisdiction to hear and determine this matter.

Held

1. The name of the 3rd Respondent had already been forwarded to the IEBC and was cleared to run. Once a matter had transitioned from the PPDT to the registration of candidates by the IEBC, the former was bereft of jurisdiction.

2. The Tribunal has jurisdiction to enforce its decisions under Section 41 (3) of the Political Parties Act, 2011. However, the tribunal has no jurisdiction to deal with matters of nomination and registration of candidates by the IEBC. In other words, this Tribunal cannot set aside or fault the IEBC's decision to clear the third responded. That Jurisdiction is exclusively the IEBC's under Article 88 (4) (e); and it is a constitutional mandate.

3. In this case, the registration and clearance of the 3rd Respondent by the IEBC was not a matter within the province of the Tribunal. The Tribunal thus decided against encroaching the jurisdiction of the IEBC.

Application dismissed for want of jurisdiction. No orders as to costs.

JOHN OMBEWA GARE V ODM NATIONAL ELECTIONS BOARD & ANOTHER; TRUFOSA OSEWE ODINGA & INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (INTERESTED PARTIES)

KISUMU COMPLAINT E003 OF 2022 (RULING)

HON. DR. WILFRED MUTUBWA OGW C.ARB, HON. FATUMA ALI, HON. WALUBENGO SIFUNA

26TH MAY 2022

Summary of Facts

The Tribunal had delivered judgement on this matter and among others ordered that the 2nd Respondent conducts fresh nominations by way of universal suffrage within 72 hours. The Respondents failed to comply with the said decree. The Respondents argued that the judgement was not served upon them and that there was no evidence to the contrary. As such, they could not be held in contempt.

Issue

Whether the applicant had successfully proved that there was contempt of the orders of this Tribunal.

Held

The Tribunal held that the applicant had not met the required standard of proof required to establish contempt, especially since contempt is quasi criminal in nature and may lead to the deprivation of the liberty of the alleged contemnor. The Respondent did not participate in the trial. The Applicant's Advocate did not furnish sufficient proof of service of the Tribunal's Judgment and Decree on the alleged contemnors. There was thus a finding of some doubt created with regard to service of judgement.

Application was dismissed. Respondents to conduct fresh nominations for West Sakwa Ward Member of County Assembly within Kisii County in accordance with our judgement, within 72 Hours of the order. Each party to bear its own costs.

Eliud Kimari Murimi v Fredrick Odour William Odongo & 2 Others Mombasa Misc. Appl. No. E003 Of 2022 (Ruling)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

20th May 2022

Summary of facts

This Tribunal issued orders on 29th April 2022, directed at the 2nd Respondent, which declared the 1st Respondent not the bona fide Orange Democratic Movement Party elected candidate to contest the seat of Member of County Assembly representing Mkomani Ward. These orders were served upon the 2nd Respondent who chose to disregard and ignore them.

The Applicant therefore sought an order declaring him as the ODM nominated candidate for Member of County Assembly Mkomani Ward, that IEBC be prohibited from gazetting any other candidate and that the IEBC be directed to nominate and gazette him as the ODM elected candidate for MCA Mkomani Ward. The Applicant also sought to have the 2nd Respondent's commissioners cited for contempt of court and for committal to six months of civil jail and/or pay a fine of one million shillings for contempt of court.

The 1st and 2nd Respondents did not respond, and the application was by consent withdrawn as against the intended 3rd Respondent. As such, the application was unopposed.

Issues

1. Whether the applicant's application had merit and whether the 2nd Respondent was in contempt of the Tribunals Orders.

2. What orders the Tribunal could issue in the circumstances.

3. Who bears the costs of the claim.

Held

1. It was not in dispute that the Tribunal heard and determined the Applicant's complaint and issued orders to the effect that the Respondents were expected to comply.

2. Despite being served with the said orders, the Respondent refused and/ or ignored the same and did not comply with them. Instead, it was decided to issue the nomination certificate to the 1st Respondent, whereas the Tribunal had ordered for a certificate to be issued to the Applicant.

3. The Tribunal asserted that orders of court and tribunals were not issued in vain. Unless reviewed and/or appealed against, such orders ought to be obeyed. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issued ex-cathedra, are compulsive, peremptory, and expressly binding.

4. Quasi-judicial bodies can grant any orders that are just and equitable in accordance with Section 11 (1) of the Fair Administrative Action Act 2015.

5. The proper discharge of the Tribunal is to grant effective remedies which means the most appropriate remedy in the circumstances of the case.

6. While ordinarily the Tribunal equates political parties with families and is mostly reluctant to award costs against members of the same party, whereas in the instant case the Respondents have caused unnecessary suffering to the Complainant, the Complainant ought to be compensated for the costs of the application.

Orders

A declaration be and is hereby issued declaring the applicant ELIUD KIMARI MURIMI as the ODM nominated candidate for Member of County Assembly Mkomani Ward. An order be and is hereby issued restraining the (IEBC) from gazetting any other name save for ELIUD KIMARI MURIMI as ODM candidate for member of county assembly Mkomani ward. For the avoidance of doubt, the Independent Electoral and Boundaries Commission (IEBC) be and is hereby directed to gazette ELIUD KIMARI MURIMI as the Orange Democratic Movement Party elected candidate to contest the seat of Member of County Assembly representing Mkomani Ward. That summons be issued to the officials of the 2nd Respondent specifically the National Elections Board to show cause why they should not be committed to civil jail for being in contempt of this Tribunal Orders. That the said summons be extracted and served immediately to the officials of the 2nd Respondent (MR. ABDULAHI DIRIYE, MR. RICHARD TAIRO AND MS. SYNTEI NCHOE) to appear in court on Tuesday 24th May, 2022 at 10.00am for purposes of mitigation and sentencing.

Elizabeth Waithera Njue v Susan Mukanga & Another
Nairobi A Complaint No E049 of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

9th May 2022

Summary of Facts

The Complainant participated in the 2nd Respondent's party nominations for the post of MCA Mlango Kubwa Ward. The Complainant contended that the said party nominations were marred by general violence targeted towards her, irregularities and election malpractices. The Complainant claimed that she was violently denied access to the polling station by a group of men believed to be supporters of the 1st Respondent, was sexually assaulted by a group of 8 men who touched her inappropriately tearing her clothes off leaving her breasts exposed and beating her up. She thus claimed that the intimidating environment created by the 1st Respondent's supporters coupled with the sexual assault made a mockery of the nomination exercise. The Complainant appealed to the 2nd Respondent's Electoral and Nomination Dispute Resolution Committee, Disciplinary Committee and the National Elections Board. The said Committee made a determination that they had no jurisdiction to make a determination on the substance of the matter and they escalated it to the National Elections Board, where she claimed that no determination had been made. The 1st Respondent did not deny the allegations of violence and/or disruption and destruction of party poll materials; she instead blamed the violence on two aspirants for the MP position in their area.

Issues

1. Whether the tribunal had the jurisdiction to hear and determine the matter.

2. Whether the complainant had proved her case to the required standard.

Held

1. On the issue of jurisdiction, the Tribunal determined that it indeed had powers to hear and determine disputes after subjecting the same to an IDRM. The Tribunal

stated that Section 40(2) of the Political Parties Act only provides that there be an attempt to subject the dispute to IDRM. Therefore, what a party needs to establish is that he or she made honest attempts in resolving the same before an IDRM of a party.

2. The Complainant had adduced evidence before the Tribunal that indeed she made honest attempts to resolve the matter through the party IDRM wherein the IDRM held that it was bereft of jurisdiction and referred the matter to NEB. As was stated in the ***Ibrahim Abdi Ali*** **case,** where the party processes are not satisfactory due to their delay which may end up compromising the subject matter, a party cannot be faulted for approaching the Tribunal for a final determination like the case before us.

3. The threshold of proof should in principle be above a balance of probability that is applicable in civil cases though not as high as beyond reasonable doubt that is applicable in criminal cases. The fact that the Complainant had adduced evidence in support of her claims that were not disputed by the 1st Respondent led the Tribunal to determine that the nomination exercise was not free, fair, transparent, accountable and verifiable and did not meet the Constitutional muster as set in Article 38 and 81 of the Constitution of Kenya.

Order

Complaint was allowed. Each party to bear its own costs.

Francis Oduor Amolo v Orange Democratic Movement National Election Board & 2 Others Mombasa PPDT Complaint No. E001 Of 2022 (Judgement)

Hon. Erastus Orina, Hon Theresa Chepkwony, Hon. Daniel Kagacha

3rd May 2022

Summary of Facts

The Complainant was a member of the 1st Respondent Party and had filed a Complaint dated 19th April 2022, accompanied by a Certificate of Urgency and a Notice of Motion Application sworn on the same date. He sought orders to suspend the provisional certificate issued to the 2nd Respondent by the Interested Party. He also sought to set aside the judgement issued by the Internal Disputes Resolution Mechanism of the Orange Democratic Movement party dated 16th April 2022, the nullification of the party nominations held on 9th April 2022 and for fresh nominations to be conducted. The Complaint was opposed by the 2nd Respondent who filed a Notice of Preliminary Objection dated 25th April 2022. The 2nd Respondent maintained that the Appeal was incurably defective as the same was res judicata and it contravened the Civil Procedure Act 2010. This was because the appeal ought to have been filed in the form prescribed under Order 42 Rule 1 of the Civil Procedure Rules. He therefore urged that it should have been struck out. The Interested Party on the other hand had filed a Replying Affidavit, sworn on 25th April 2022, challenging the allegations raised by the Complainant and had equally filed a Preliminary Objection to the effect that the Interested Party was a stranger to the appeal and/or the proceedings, and that the appeal was incompetent, fatally defective, misconceived in law and badly constituted and the same was an abuse of the process of the Tribunal.

Issues:

1. Whether the 2nd Respondent's and Interested Party's Preliminary Objections were merited.
2. Whether the nomination exercise held on 9th April 2022 was conducted in accordance with the provisions of the ODM Party Primary and Nomination Election Rules.

3. Whether the Complainant had discharged the burden of proof to the required standard to demonstrate that the elections were marred with irregularities and illegalities.
4. What orders the Tribunal could give in the circumstances.
5. Who should bear the costs of the Complaint.

Held:

1. On the first issue, the 2nd Respondent and Interested Party had filed Preliminary Objections challenging the appeal as being incurably defective, res judicata and urging that the PPDT is an appellate body.
2. To establish the claim made on the doctrine of res judicata, the Tribunal relied on the case of ***The Estate of James Karanja alias James Kioi (Deceased) (2014 eKLR)***. It was clear from the foregoing case that the doctrine of Res Judicata applied in situations where a current suit was directly and substantially the same as the former suit and the matter was heard and determined by a court or tribunal of competent jurisdiction.
3. The 2nd Respondent herein averred that since the matter was heard and determined by the internal dispute resolution mechanism (IDRM), the same should be ruled as Res Judicata. The Tribunal, however, held a contrary view, stating that the IDRMs had not been established to be a hindrance to a party who may want to approach the Tribunal for Justice. As a result, a party who has been aggrieved by the decision of the National Elections Board was at liberty to approach the Tribunal for recourse and under no circumstance would that amount to Res Judicata. The Tribunal could therefore delve into its finer details and determine it on merit.
4. On the 2nd issue, the Complainant had stated that the Interested Party, whose duty is provided for under Rule 18 and 26 of the ODM Nomination Rules, was expected to provide each polling centre with a hard copy of the party register of voters. He further contended that none of the three polling stations had the hard copies of the register as required by the ODM Nomination Rules. The Interested Party on the other hand contended that they used the IPADs to conduct the said election.
5. On the assertions by the Interested Party that it had used IPADs, the Tribunal ruled that IPADs were not hard copy voter registers; therefore, the nomination

exercise was conducted without hard copy registers. As per rule 25 of the ODM Nomination Rules, failure to have a voter register certified by the Registrar of Political Parties was a grave irregularity that allowed the voters to engage in multiple voting. Since the 1st Respondent has a constitutional duty to ensure that its elections were simple, accurate, verifiable, secure, accountable and transparent, and the nomination exercise conducted did not meet the constitutional standard, the nominations were unfair, unverifiable and unaccountable, contrary to the constitutional and statutory thresholds.

6. The Tribunal was satisfied that the party nominations were unlawfully conducted without reference to the party register. This infraction allowed non-members to vote and party members were disenfranchised by failure to use the party register. Party nominations ought to be exclusive party-member only affairs, with only those whose names appear on the party register being eligible to vote. The 1st Respondent had therefore breached its own rules while conducting the nomination at Changamwe Ward.

7. On the 3rd issue, the Tribunal found that the Complainant had to a large extent discharged the burden of proof to the required standard to show that the elections were marred by irregularities and illegalities. He has demonstrated that the 1st Respondent did not abide and/or comply with the provisions of its own constitution thus allowing glaring irregularities and illegalities to be experienced during the nomination process.

8. The Tribunal held that the election was not accountable and was held in a noxious environment of violence and technological mishaps. The effect of these wrongs was pervasive and substantially permeated the election and hence there was no declaration of a winner on merit.

Order

The Judgement issued by the Internal Dispute Resolution Mechanism Organ of the Orange Democratic Movement party on Appeal No. 3 of 2022 dated 16 April 2022 be set aside. The 1st Respondent conducted a fresh nomination exercise for the position of Member of County Assembly, Changamwe Ward, within 72 hours following the pronouncement of the judgement. The 1st Respondent to submit the name of the duly nominated candidate to the IEBC. Each party had to bear their own costs.

Gasper Mafutu v National Elections Board, Democratic Action-Party-Kenya & Erick Wafula Wanyonyi & Another (Interested Parties) Kakamega Complaint No. E003 Of 2022 (Ruling)

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

8th May 2022

Summary of Facts

On 29th April 2022, the Tribunal issued final orders having heard the Complainant in the absence of the Respondents and Interested Party. On 3rd May 2022, the 1st Interested Party filed a Notice of Motion application seeking to set aside the said judgement. The said application by the 1st Interested Party was based on the grounds that the matter had proceeded ex-parte and as such the Tribunal did not benefit from having all facts relating to the case in issue presented before it upon retiring to deliberate.

Held

1. The Tribunal relied on the case of *Chief Constable of the North Wales Police v Evans (1982*) read together with the provisions of the law which required that for review there needs to be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant, on account of some mistake or error apparent on the face of the record or any other sufficient reason.

2. It was therefore obvious that the Interested Party was included in the case as he had an interest in the outcome of the proceedings, a fact that had not changed. In addition, he acted diligently.

3. The parties, in the course of making oral submissions before the Tribunal, raised issues that touch on the substantive complaint. These issues could only be determined if parties are given an opportunity to be heard. The facts touched on the legality and constitutionality of the party organ whose findings were integral to the judgement in issue and indeed, these facts were not in the knowledge of the Tribunal at the time it retired to decide.

Order

That the judgement of the Tribunal in respect of the complaint issued on 29th April 2022 was set aside. That leave be granted to the 1st Interested Party to file his Reply to the Complaint herein as well as written submission and serve all parties in the case by 11:00 am on 9th May 2022. The Complainant to file his written submissions and any further affidavit, if need be, and serve the same upon all parties, by 3:00pm on 9th May 2022.

Geoffrey Otieno Opiyo & Orange Democratic Movement Party v IEBC Kisumu Complaint E012 Of 2022

Hon. Dr. Wilfred Mutubwa, Hon. Fatuma Ali, Hon. Walubengo Sifuna

3rd May 2022

Summary of Facts

The matter concerned the nomination of the 2nd Respondent as Candidate for the Member of County Assembly for South Kasipul Ward, in Kasipul Constituency under the Orange Democratic Party. The party nominations were held on 14th April 2022. The Complainant and the 2nd Respondent were contestants in the said primaries. The 2nd Respondent was declared the winner of the contest and awarded the 1st Respondent's Interim Nomination Certificate. The Complainant was aggrieved by the outcome and challenged the result of the election before the 1st Respondent's Appeals Tribunal, sitting in Kisumu on 16th April 2022 in (Appeal No. 21 of 2022). The ODM Party's Appeals Tribunal allowed the Complainant's Appeal and nullified the nomination of the 2nd Respondent and the certificate that was issued to him. The said judgement was served upon the National Election Board of the 1st Respondent on the 26th April 2022. Afterwards, the National Elections Board vide a notice dated 27th April 2022 gave a direct nomination to the 2nd Respondent. The NEB claimed that it was doing so pursuant to the orders of the ODM Appeals tribunal which had directed them to conduct fresh nominations, and that after consulting with the Party's Central Committee, they had decided to adopt direct nomination as their preferred method for South Kasipul Ward. The Complainant was aggrieved by the decision and approached the Tribunal for relief.

Issues

1. Whether the Honourable Tribunal has the jurisdiction to entertain the matter.

2. Whether the Direct Nomination was conducted in substantial compliance with the law.

Held

1. The Respondent submitted that the Complainant ought to have gone to the ODM National Appeals Tribunal and that they effectively violated Section 40(2) of the Political Parties Act by coming to the Tribunal.

2. From a reading of the aforementioned sections of the Political Parties Act, as well as cited authorities it is clear that the dispute at hand was a dispute between a Member of a Political Party and a Political and falls within the definition of Section 40(1)(b) of the Act. The issue of whether the Tribunal had jurisdiction to entertain the matter thus fell to the question of whether the Complaint had provided sufficient evidence of an attempt at subjecting the dispute to the Party IDRM, under Section 40 of the Act. It was the opinion of the Tribunal that the Complainant had demonstrated an attempt to pursue Internal Dispute Resolution Mechanisms with the Party by filing an Appeal in the 1st Respondent's Tribunal.

3. The Tribunal affirmed that the purported nomination of the 3rd Respondent was pursuant to the process impugned before the party tribunal and the subject of the current proceedings. Accordingly, the Tribunal dismissed the Preliminary Objection and ruled that it had jurisdiction to hear and determine the matter. The Preliminary Objection was accordingly dismissed.

4. On the second issue, it was the Tribunal's view that when the 1st Respondent decided that it would determine its candidate not by universal suffrage but by direct nomination, it became an administrative action and should have therefore, been subjected to fair procedure. The fact that Complainant was not given a chance to state why he thought he was the better person to fly the Party's flag was a breach of his constitutional rights to equal treatment before the law.

5. As a result of this, the Tribunal found in favour of the Complainant and thereby dismissed the Preliminary Objection and set aside the direct nomination of the 2nd Respondent.

Order

Preliminary Objection dismissed. The direct nomination of the 2nd Respondent nullified and set aside. The Complaint was allowed, and the 1st Respondent conduct nomination by way of universal suffrage within 72 hours of the Judgment, and only employ other forms of nomination with the express consent of all candidates. Each party was to bear their own costs.

Geoffrey Wanda v Sebastian Juma & Another &
Independent Electoral and Boundaries Commission
(Interested Party) Kakamega Complaint No. E004 Of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

19th May 2022

Summary of Facts

The Complainant and the 1st Respondent herein were members of the 2nd Respondent, the Democratic Action Party-Kenya (DAP-K). The Complainant contested the DAP-K nominations for Member of the County Assembly for Bunyala West Ward, Navakholo Constituency, Kakamega County on 16th April 2022. The nomination was conducted through direct nomination by way of vetting at the 2nd Respondents Lurambi Constituency office.

Prior to the said nomination, the aspirants and DAP-K settled on vetting as the preferred method of nomination and only 2 candidates appeared for vetting for the position in issue: the 1st Respondent and the Complainant. At the close of the vetting, the vetting officer, one Kasisi Fred, produced the results, and it was clear that the Complainant scored more marks; that is 243 against the 1st Respondent who scored 222 marks. Although the Complainant had emerged as the winner, he was never issued with the Nomination Certificate for the said position by the 2nd Respondent. Instead, he learnt that the 2nd Respondent had issued the Nomination Certificate to the 1st Respondent under unexplained circumstances. The Complaint lodged a complaint with the 2nd Respondent Internal Dispute Resolution Board, which ruled in his favour and revoked the 1st Respondent's nomination. However, the Complainant had not been granted his Nomination Certificate by the 2nd Respondent.

Issues:

1. Whether the Complaint was justified.

2. What orders should issue.

Held:

1. It was apparent to the Tribunal that the Complaint participated in the DAP-K nominations for Member of County Assembly for Bunyala West Ward, Navakholo Constituency, Kakamega County position, following which he lodged a complaint being with the Internal Dispute Resolution Board.

2. The ruling delivered by the said internal dispute resolution organ confirms that notice of the hearing was served via WhatsApp to both parties, being the Complainant herein and the 1st Respondent and that the said Respondent failed to appear.

3. The 1st Respondent opted not to appear before the party organ and has not disputed the telephone number indicated by the said organ.

4. Be that as it may, the 1st Respondent could not show how the process that identified him as most suitable was conducted while the Complainant had ably shown how he acquired the ticket in issue.

5. The Complainant was awarded a ticket after a process, and this was upheld by the party organ. Consequently, the Tribunal saw no reason why the party IDRM ruling delivered on 22nd April 2022 should not be upheld.

Order

The nomination certificate issued to him was revoked. The nomination certificate for the position to be issued to the Complainant. The cost of the complaint be awarded to the Complainant.

Gitonga Karen Karimi v United Democratic Alliance (UDA) & 4 others Meru Complaint No. E001 OF 2022 (Judgement)

Hon. G Gathu, Hon. W Ngige & Hon. L Kinyulusi

27th April 2022

Summary of facts

The Complainant and the Interested Party were both members to the 1st Respondent's Party and vying for the County Assembly position in Chogoria Ward, Maara Constituency. The nomination exercise was conducted, and the Complainant was declared the winner and thereafter issued with a Provisional Certificate. However, two days after the nomination elections were conducted and the winner declared, the 2nd Respondent nullified the Provisional Certificate issued to the Complaint in a process in which the Complainant did not participate, and declared the Interested Party as the winner of the Nomination process after a second set of results was announced.

The Complainant alleged that the Interested Party did not notify her of the proceedings before the Electoral and Nominations Dispute Committee (No. 56 of 2022) on 17th April 2022. The result of the proceedings was that a consent was recorded between the Interested Party on the one hand and the 2nd and 3rd Respondents on the other hand to the effect that the Provisional Certificate issued to the Complainant be annulled/ revoked and be issued to the Interested Party. Further to that consent (which was adopted by the 1st Respondent's Electoral and Nominations Dispute Committee and issued as an Order), and without hearing the Complainant, the Interested Party was issued with the Nomination Certificate soon after this consent.

The 1st to 4th Respondents did not contest the facts as provided by the Complainant, save to add that the 2nd Respondent's action was in compliance with the consent order.

The Interested Party conceded that there had been two sets of results, the first favouring the Complainant, and the second favouring the Interested Party. The Interested Party admitted that she did not enjoin the Complainant in the dispute before the 1st Respondent's Electoral and Nominations Dispute Committee, since

she had no complaint against her. It was admitted that a consent order had the effect of revoking the certificate issued to the Complainant, but the Complainant was not involved. It was her case that the Tribunal had no jurisdiction because the Complainant did not invoke the party's IDRM.

Issue

1. Whether the Tribunal has jurisdiction to hear and determine this matter.

2. Whether the Complaint was merited

Held

1. The Tribunal lacked jurisdiction to hear and determine the matter beforehand. Although aggrieved, the Complainant provided no evidence of her attempt to engage the 1st Respondent's internal party dispute resolution mechanism. A complaint to the 1st Respondent's Electoral and Nominations Dispute Committee, without any response thereto, would have been enough to demonstrate that she had made a good faith attempt to engage that statutorily mandated dispute resolution mechanism and thus invoke the Tribunal's jurisdiction. Had the Complainant given the Tribunal evidence to demonstrate that she herself had attempted to unsuccessfully engage the 1st Respondent's IDRM, the Tribunal would have had no hesitation in addressing the very serious Complaint she placed before it.

2. Since the Complainant did not, in the first instance, make an attempt to have the 1st Respondent give her a hearing, the Complaint has been filed prematurely, thus it was struck out.

3. The Tribunal having no jurisdiction over the matter, could not delve into the merits of the case.

Order

Complaint struck out, each party to bear its cost.

Hanjira Lutta Amina v Kenya African National Union (KANU) & 3 Others Kakamega Complaint No. E022 of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui Hon. Daniel Kagacha

8th September 2022

Summary of Facts

The Complainant was a life member of the 1st Respondent political party, membership number 60400. The Complainant moved the Tribunal by way of a Notice of Motion application accompanied by a complaint and an affidavit together with annexures. Given the urgency, in the face of the tight election timelines, the said application was subsumed into the Complaint to allow for final orders to issue. Her grievance was that she had been moved from number 1 to number 2 in the recently compiled Respondent's Kakamega County Assembly party nomination list. The Complainant submitted that she applied and was vetted by the Respondent and emerged number one in the gender top up list for Kakamega County Assembly and her name forwarded to the IEBC on 4th July 2022.

The Complainant averred that she had paid Kshs. 22,000 to KANU for nominations. It was her submission that the order of names had been changed to accommodate the 3rd Respondent, contrary to party rules.

The Respondents and Interested Party, though served, chose not to participate in the proceedings.

Issues

1. Whether the Tribunal was properly seized of jurisdiction.

2. Whether the complaint was justified.

Held

1. It was clear that the parties before the Tribunal have a right of audience having properly been identified as persons over whom the Tribunal can exercise

jurisdiction, i.e., a member of a political party and the political party. The question of jurisdiction could turn on Section 40(2) of the Political Parties Act (PPA).

2. The Complainant first sought, unsuccessfully, to resolve the matter internally and it was thus the considered opinion of the Tribunal that IDRM, as anticipated under Section 40(2) of the PPA, was attempted. Therefore, the Tribunal was properly seized of jurisdiction.

3. On the 2nd issue, the annexures in the complaint bundle showed the Complainant at number 2 in the Kakamega County party nomination list as published by the IEBC. The 3rd Respondent was placed first on the said list. The annexures also included letters recommending inclusion of the Complainant in the list. The letters, however, did not specifically place her at number one in any category.

4. Furthermore, the Tribunal did not see any other list from the 1st Respondent to the Interested Party showing a contrary order of the listed nominees or that placed the Complainant at number 1.

5. Therefore, the complaint did not succeed.

Order

The complaint herein dated 4th September 2022 was dismissed. Consequently, there were no orders as to costs.

Harrison Gatabu Gitonga v United Democratic Alliance (UDA) & 2 others Meru Complaint No. E004 of 2022 (Ruling)

Hon. G Gathu, Hon. W Ngige & Hon. L Kinyulusi

7th May 2022

Summary of facts

The Plaintiff in this matter was a member of the 1st Respondents party. The Plaintiff filed an application claiming anomalies during the nomination process in Abogeta West Ward for the position of Member of County Assembly (MCA) leading to the cancellation of the exercise. This was after the results for the MCA position were announced prior to the receiving of results from all polling stations. This led to the Electoral Nomination Dispute Resolution Committee (EDRC) being directed to carry out fresh elections. The 1st and 2nd Respondents did not file a response. The 3rd Respondent confirmed that indeed elections were nullified by EDRC. The 1st Respondents National Election Board carried out interviews for the Plaintiff and the 3rd Respondent, which saw the 3rd Respondent emerging as the preferred candidate for the position MCA of Abogeta West Ward.

Issue

1. Whether the Tribunal could grant the orders sought by way of the Miscellaneous Application.

Held

1. The Tribunal found that prayers sought by the Applicants could not be granted by way of Notice of Motion in the absence of a substantive complaint. The Tribunal relied on Section 40 and 41(4) of Political Parties Act 2011 and Article 159(2) Constitution of Kenya 2010.

2. The application was incapable of being granted and as a result, it was struck out with the 3rd Respondent being awarded costs.

Order

Miscellaneous Notice of Motion Application struck out, cost awarded to the 3rd Respondent.

Hon. Edwin Otieno Odhiambo v ODM National Elections Board & Another Kisumu MISC E.002 of 2022 (Ruling)

Hon. Dr. Wilfred Mutubwa OGW C.Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

5th June 2022

Summary of Facts

The Respondent/Applicant approached the Tribunal seeking a review of the orders issued and substitute the order with one directing that the repeat nominations be conducted in any manner so long as it was compliant with the ODM party constitution. Their reason for the application was that nominations by way of universal suffrage as ordered by the Tribunal were usually conducted in primary schools, and this could not be done since the Ministry of Education had denied use of the schools for nominations. Further, there were decisions of the High Court that stated, on one hand, that one must adhere to the form of nomination that was used at the start of the proceedings, universal suffrage in this case. On the other hand, there were also decisions by the High Court against using the same method as the one that initiated the cause of action. The Complainant/Respondent pointed out that the Application was couched as a review but was in effect an appeal. Further, that there was no mistake or error on the face of the record and that the application did not disclose any sufficient reason warranting review of the orders.

Issues

1. Whether the 1st and 2nd Respondent/ Applicants had successfully made a case for review.

2. Who bears the cost of the application.

Held

1. The Tribunal found that contrary to Order 45 of the Civil Procedure Rules, 2010, there was no new evidence, warranting a review had been submitted. There were only reasons why the Respondents/Applicants had not complied with the orders which in the Tribunals view were only administrative matters.

2. Additionally, there had been an application for contempt where the party was given the opportunity to purge the contempt in no specific way, only that they had to do so.

Order

Application dismissed. Each party shall bear its own costs.

James Omutachi Etable v Orange Democratic Movement (ODM) Party E&2 Others & Independent Electoral and Boundaries Commission (Interested Party) Kakamega Complaint No. E005 of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

14th May 2022

Summary of Facts

The Complainant was previously a member of the 1st Respondent. He intended to contest as an independent candidate in the August 2022 general election, having resigned as member of the ODM party. He sought an order that the 1st and 2nd Respondents refund nomination fees paid to them as well as general damages for lost time and frustration and damages for inconvenience. It was the Complainant's case that while he was a registered member of the 1st Respondent, he had proceeded to pay nomination fees in readiness for party nominations slated for April 2022. However, a day before the nominations, the 1st and 2nd Respondents, through their Kakamega County Elections Committee, 'unilaterally, unfairly, illegally and unjustifiably' informed the Complainant that there would be no nomination exercise. The Complainant and other contestants visited the 1st Respondent's offices in Kakamega to inquire as to the matter, but they were informed that the 1st Respondent would communicate to them regarding the nominations within 24 hours. However, no such communication was forthcoming from the 1st and 2nd Respondents. The Complainant was later shocked to learn that the 1st and 2nd Respondents had issued a provisional nomination certification to the 3rd Respondent. This prompted him to complain via a letter dated 14th April 2022 to the 1st and 2nd Respondents, demanding that a nomination exercise be conducted within 48 hours or that a certificate be issued to him. He decried the actions of the 1st and 2nd Respondent for being a gross violation of the democratic and political rights of the Complainant as well as the residents of Kisa North Ward who had not had an opportunity to choose their candidate at the nomination stage.

Neither the 1st nor the 2nd Respondent entered appearance, despite being served. The 3rd Respondent filed a Preliminary Objection urging that both the affidavit

verifying the claim and the affidavit in support of the application had been sworn by an unqualified person and that the Complainant had not exhausted IDRM. It was also submitted that the Complainant lacked locus, having resigned as a member of ODM, and therefore the claim was incompetent and ought to be struck out.

Issues

1. Whether the Tribunal had jurisdiction.
2. Whether the complaint was merited.
3. What orders the Tribunal should make.

Held

1. The Tribunal relied on section 40 of the Political Parties Act (PPA) which provides its jurisdiction. It was not disputed that the Complainant was no longer a member of the 1st Respondent (ODM party) and was poised to participate in the general elections as an independent candidate. This in effect meant that he fell under section 40 (1)(d), a category that is clearly exempt from the IDRM requirement outlined in Section 40(2). Therefore, the complaint was properly before the Tribunal.
2. The amendments to the Political Parties Act in 2022 brought into effect Part IVA on party nominations, and allow political parties a number of methods that they can adopt in identifying their ticket bearer for the various positions; being either direct or indirect methods.
3. The information provided by the Complainant was scanty and was countered by the 3rd Respondent who stated that the party procedurally applied an indirect method to identify its nominee. Therefore, the Tribunal did not have enough information before it to support the Complainant's claim as to opaqueness in the indirect nomination method that was applied. It further stated that neither does the Tribunal have any information supporting the 3rd Respondent's claim that the procedure was conducted in line with the party rules. However, the burden of proof lies with he who brings the suit and it had certainly not been met by the Complainant in this instance.

Order

The complaint was thereby dismissed with costs.

James Onyango Koyoo v Hezron Otieno Mcobewa & 2 Others Kisumu Complaint No E009 Of 2022 (Judgement)

Hon. Dr. Wilfred Mutubwa, Hon. Fatuma Ali

5th May 2022

Summary of Facts

The matter concerned the nullification of the Complainant's nomination as the 3rd Respondent's nominee for Member of National Assembly for Muhoroni Constituency by the ODM Appeals Tribunal in their Judgement (Tribunal Appeal No. 05 of 2022) delivered on 25th April 2022. Both the Complainant and the 1st Respondent were contesting the ticket. The Complainant was declared the winner of the nomination contest, but the 3rd Respondent's Appeals Tribunal nullified the Complainant's nomination. The Complainant was aggrieved by the outcome of the Appeal Tribunal's decision and challenged the decision before the Tribunal. On 29th April 2022, when the matter came up for hearing, the Complainant sought to withdraw the Complaint. The first Respondent challenged the Application and also filed a Cross-Complaint. It was the 1st Respondent's allegation that the Complainant was attempting to withdraw the case because he had been issued with a direct ticket nomination and that it was an abuse of the court process and a violation of his rights to fair administrative action.

Issues

1. Whether the court has the requisite jurisdiction to hear and determine the matter.

2. Whether the election was conducted in substantial compliance with the law.

Held

1. The issues raised by the Complainant in his Preliminary Objection were on the competency of the proceedings brought by the 1st Respondent before the Tribunal.

2. It was imperative that before any other determination/action is taken, the Political Parties Dispute Tribunal confirmed that it was properly seized of the matter. Thus,

from the reading of Section 40(1)(b) of the Political Parties Act, it was clear that the dispute at hand, being a dispute between a member of a political party and a political party, fell under its jurisdiction.

3. It was the considered view of the Tribunal, that the matter before the ODM Tribunal related to the nomination the subject thereof. That the tribunal made a decision which, to date, stands. The purported direct nomination of the Complaint, according to the ODM circular of 27th April 2022 was in furtherance or in an attempt to give effect to the decision of its tribunal. This was notwithstanding the interim orders issued herein on 26th April 2022 staying the Tribunal's decision.

4. For the above reason, the purported issuance of the direct nomination ticket to the Complaint was neither a new cause of action nor a new matter requiring to go to the ODM tribunal first before coming to the Tribunal. It was the Tribunal's view that the matter before them was a continuation of the previous complaint.

5. The Tribunal had jurisdiction to hear the matter, and the requirements of the provisions of Section 40 of the Political Parties Act had been satisfied. Therefore, in the considered view of the Tribunal, the Complainant had clearly demonstrated an attempt to pursue Internal Dispute Resolution Mechanism within the Party, which was concluded, and a decision rendered. The Preliminary Objection was consequently dismissed.

6. On the 2nd issue, the law clearly states where the burden of proof lies, which is well captured under the Evidence Act, Sections 107,108 and 109. From the reading of the enunciated sections of the Evidence Act and the case of the Supreme Court in Presidential Petition No. 1 of 2017, it was clear that the burden of proof lies with the 1st Respondent, as it is he who would fail if no evidence were to be given on either side.

7. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court followed a two step-approach. Firstly, it asks whether the administrator's actions created a reasonable expectation in the aggrieved party. If the answer is affirmative, the second question is whether that expectation is legitimate. If the answer to the second

question is equally affirmative, then the court would hold the administrator to the representation, that is to enforce the legitimate expectation.

8. Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation. It is our view that the 3rd Respondent had denied the 1st Respondent his legitimate expectation of a fair administrative action since his concerns were not taken into account and no consultations between the parties on how the nomination would be settled. Furthermore, in flagrant violation of the expectation, the 3rd Respondent issued a direct ticket to the Complainant without consensus or even conducting opinion polls as provided for by the ODM Party Primaries and Nomination Rules. Therefore, the Tribunal held that the legitimate expectation was violated.

9. The Tribunal found that the 1st Respondent has demonstrated to the required standard of proof that the issuance of the direct nomination ticket to the Complainant, was not only illegal but contrary to the Rules of Fair Administrative Action and failed to meet the requirements provided by Article 27, Article 38, and Article 81 of the Constitution of Kenya, 2010. Moreover, that the Direct Nomination issued was in contravention of the stay orders issued by the Tribunal.

10. It was worth noting that the Tribunal only exercises appellate jurisdiction under section 40(1)(f) of the Political Parties Act, 2011, on appeals emanating from the decisions of the Registrar of Political Parties. This Tribunal, therefore, exercised a hybrid, sui generis, jurisdiction that is neither, *stricto sensu*, original nor appellate only, under section 40(2) of the said Act.

Order

Cross complaint allowed and the 3rd Respondent directed to conduct a fresh nomination by way of universal suffrage within 72 hours of the order, on or before 8th May 2022. Each party shall bear their own costs.

Jimia Abdallah Fwani v Amani National Congress Party & Another Kakamega Complaint No. E020 OF 2022

Hon. M. Lwanga. Hon. O, T.T. Kipchirchir, Hon. D. Kagacha

8th August 2022

Summary of Facts

The Petitioner herein is a two-star member of the Respondent, Amani National Congress party (herein ANC party) and expressed interest in nomination to the ANC party Kakamega County Assembly nomination list under either the marginalised or minority category. The Petitioner averred that being a Nubian, she represented a minority and/or marginalised community within Kakamega County and thus qualified for inclusion into the party nomination list. The Petitioner further submitted that indeed the ANC party confirmed her credentials and qualifications and placed her number 2 overall and number 1 female in the marginalised party nomination list which was required to be submitted in 'zebra' form. The position, wherein her name was located as first female in the said party nomination list for Kakamega County Assembly in ANC party later changed, as did the spelling of her name and her description. The change resulted in her being placed at number 6. She further alleged that she was wrongly described as Jimia Abdalla Fwami a business lady who was Teso and not correctly as Jimia Abdallah Fwani a teacher who was a Nubian. The Petitioner also annexed a petition filed before the ANC party which had remained pending despite the election timelines, which necessitated the filing of the Complaint before the Tribunal. The Respondent did not respond to the Complaint, despite being served.

Issues

1. Whether the Tribunal was properly seized of jurisdiction.

2. Whether the petition was justified.

3. What orders should issue.

Held

1. On the first issue, the Tribunal relied on Section 40(2) PPA and affirmed that the information before them amounted to an attempt to resolve the matter internally as anticipated in the law. Consequently, they concluded that the dispute was properly before them.

2. On the second issue, the Tribunal confirmed that the petition was not controverted. It was apparent to them from the information placed before them that the Petitioner did apply and was successful in her bid for nomination to the ANC party Nomination list for Kakamega County Assembly under the marginalised category.

3. Therefore, any changes to the said positioning and/or locating of the Petitioner's name in the ANC party nomination list for Kakamega County Assembly should have engaged her participation for due process to be seen. The petition was therefore justified.

Order

That the Respondent, ANC Party, include the name of the Petitioner as the number 1 female in the said list. That the Petitioner be correctly described in the said nomination list as a teacher by profession and a member of the Nubian Community. That the costs be awarded to the Petitioner as against the ANC Party.

Joab Mwamto Amukhale v Amani National Party N.E.B & Another Kakamega Complaint No. E011 Of 2022 (Judgement)

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

26th May 2022

Summary of Facts

The complaint herein is based on the ground that the Complainant having vied for position of Member of County Assembly [MCA] Shieywe Ward and having won after garnering 553 votes, had been denied his rightful nomination slot. This was despite the fact that he had been declared the winner by the party Returning Officer, one Levy Juma. The complaint was further premised on the fact that the political party had since issued a provisional nomination certificate to the 2nd Respondent. Attempts to resolve the matter internally flopped after a complaint that was lodged with the party was never determined. This was because the party Dispute Resolution organ collapsed and since the filing before it, it had failed to deliver its verdict one month after it heard the parties. The Complainant filed the complaint herein and prayed that the political party issue him with the party nomination certificate since he was declared the winner of the nomination exercise and that the party clear him as its nominated candidate for Shieywe Ward and include him in the nomination list.

The Complainant asserted that he had won the nomination exercise conducted on 20 April 2022. When the nomination certification was not issued, he lodged a complaint on the same day with the party's complaints organ. The matter was set down for hearing on 6th May 2022 when the parties were heard and the parties were promised a decision within 2 days. While the 1st Respondent raised a preliminary issue of law on account of Article 88 (4) of the Constitution and section 40 (fa) of the Political Parties Act.

The claim was undefended, even though the Respondents were served.

Issue:

Whether the prayers sought were justified.

Held

1. Although by written law the PPDT and IEBC have concurrent jurisdiction relating to adjudication of electoral disputes, in practice, the Tribunal's jurisdiction relates to disputes concerning party nominations and party list nominations, while the IEBC's jurisdiction was activated after it received names of party candidates and party lists for clearance. While the Tribunal had jurisdiction relating to party nominations and party list nominations, those jurisdictions stopped when the IEBC had cleared a political party nominee.

2. The dispute before the Tribunal concerned the determination of the final party nominee as its candidate for the seat in issue. The Tribunal was therefore properly seized of the matter and the Preliminary Objection was dismissed.

3. Since the suit was undefended, the only issue for determination was whether the prayers sought were justified. The Complainant had attached to his affidavit and bundle of documents a receipt showing payment of membership, vote tallying returns and his various correspondence addressed to the NEB (National Elections Board) of the party seeking issuance of his nomination certificate. The Tribunal was inclined to find the claim was justified.

Orders

Amani National Congress forthwith issue a nomination certificate in respect of the Member of County Assembly position in Shieywe Ward Kakamega County in the name of Joab Mwamto Amukhale the Complainant. Any purported nomination certificate issued by Amani National Congress in respect of the Member of County Assembly seat in the coming August 2022 general elections to Moses Musundi is hereby revoked. Costs are awarded to the Complainant as against the 1st Respondent.

John Andiwo Mwai v The National Election Board (ODM) & 2 Others Nairobi A Complaint Number E019 of 2022 (Ruling)

Hon. Dr. Wilfred Mutubwa OGW C. Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

5th May 2022

Summary of Facts

The Applicant contended that while they had absolutely no issue with the judgement of the Tribunal, they were facing challenges with its implementation. They therefore sought that the Tribunal extend time for nomination and the options of the methods of undertaking the fresh nomination, and not restrict it to universal suffrage. The Applicant, in establishing sufficient grounds, stated that the parties had to be given sufficient time to prepare for the election, including requesting to use schools that were currently in session. Further, they needed to recruit and retrain staff. Moreover, conducting the repeat nominations by way of universal suffrage was not possible, since there was no budget to run repeat elections.

Issues

Whether the applicant had met the threshold for the review of the decree and judgement.

Held

1. The Tribunal found that contrary to Order 45 of the Civil Procedure Rules, 2010, there was no evidence, apart from mere allegations of the financial difficulty in holding the elections since the party is funded by the exchequer and also collected money from aspirants in the contest to finance the nominations.

2. Further, the Tribunal ruled that the officials who had undertaken the nullified elections need not be retrained and that schools remain closed on the weekends. The Tribunal was not convinced that it was impossible to comply with the orders.

   The Tribunal varied its judgement and made orders allowing for extension of time but was still to be done by way of universal suffrage. Each party to bear its own costs.

Johnstone Alusiola Mukabwa v Democratic Action Party Of Kenya & 2 Others Kakamega Complaint No. E012 Of 2022

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

17th July 2022

Summary of Facts

The Complainant averred that he was a member of the Democratic Action Party of Kenya (DAP-K) Party being Member No. 178255. He averred that he was nominated by the Party on 19/4/2022 as its Murhanda Ward nominee, for the position of Member of County Assembly in the general elections scheduled for August 2022. The complaint was that the political party duly forwarded the Complainant's name to the Interested Party for verification pending his official nomination. The Complainant further asserted that the Interested Party thereafter amended without any right, the 1st Respondent's said list, removing the Complainant's name. The said removal was occasioned without any process having been undertaken by the party, or any notice issued to the Complainant and was in contravention of the DAP-K's constitution and election rules.

Issues

1. Whether the Tribunal had jurisdiction.

2. Whether the Tribunal could rely on sections of the 1st Respondents Replying Affidavit which were objected to by the 2nd Respondent.

Held:

1. On the issue of jurisdiction, the Tribunal turned on Section 40(2) of the Political Parties Act (PPA). The Tribunal further averred that the doctrine of exhaustion of remedies was first embodied in the case of *Speaker of National Assembly v Karume* (1992) KLR 21 and was relied upon to determine the Tribunal's jurisdiction.

2. The Tribunal noted that the Complainant had approached the party upon realisation that his name had been omitted, and the party did respond to his complaint by re-confirming and affirming his nomination by the party to the

Interested Party. Copies of the letters by the party in response to the Complainant's complaint were produced before the Tribunal and were not controverted by any party.

3. It was therefore the Tribunal's consideration that the Complainant first raised his concern with the party, as anticipated under Section 40(2) of the PPA, before presenting the complaint before the Tribunal. The Tribunal thus affirmed that it was properly seized of jurisdiction.

4. On the 2nd issue, the 2nd Respondent objected to the averments made on behalf of the 1st Respondent that the party's Director of Elections, who had sworn an affidavit in support of the 2nd Respondent, was subject of a party disciplinary process. The objection was based on the fact that there was no evidence attached to show that such internal process was ongoing and considering that there was no evidence of the proceeding with regards to the internal disciplinary process, the 2nd Respondent's objection was upheld.

5. On who the party nominee for the position was, the Tribunal stated that it was a political party that submitted its list of names of persons the party membership desired to represent it in an election. The list should be a result of a lawful nomination process. It was submitted that the party undertook the process in line with its laws under the direction of the National Elections Board.

6. The pleadings before the Tribunal showed that the Complainant and the 1st Respondent lodged objection with the Interested Party, on 16th May 2022 and 18th May 2022, for reinstatement of the Complainant's name in said party nomination list in support of their contention that the Complainant was the party nominee for the position in issue. This communication was made by the authorised person as per the party laws.

7. The Complainant's name was therefore the official name submitted by the party to the Interested Party.

Complaint allowed. The costs are awarded to the Complainant as against the 2nd Respondent.

Johnson Oginga Oduk & 13 Others v Orange Democratic Movement & 2 Others Nairobi A Cause No. E073 of 2022 (Judgement)

Hon. Gad Gathu, Hon. Wanjiru Ngige, Hon. Dr. Leonard Kinyulusi

14th May 2022

Summary of Facts

The Complainants challenged the eligibility of the 3rd Respondent to vie as an aspirant due to his conviction in an anti-corruption case. The sentence in this conviction included a bar to him holding public office. The 2nd Respondent announced the 3rd Respondent as the winner of the party nominations and awarded him with an interim certificate. The Complainants filed an appeal with the Respondent's National Appeals Tribunal (NAT), which succeeded with the NAT setting aside the interim certificate. Despite such judgement, the Complainants learnt about the nomination of the 3rd Respondent and the submission of his name to the Interested Party. The Complainants, however, did not provide a copy of the Certificate allegedly awarded to the 3rd Respondent. The 1st and 2nd Respondents denied issuing the 3rd Respondent with a nomination certificate or submitting his name to the Interested Party and stated that they were yet to make any decision. The 3rd Respondent argued that he had not, further to the judgement of the 1st Respondent's NAT, received a nomination certificate and thus there was no dispute before the Tribunal. Further, he did not deny his conviction in the anticorruption case or that it barred him from running for office.

Issues:

1. Whether the dispute before the Tribunal was ripe for determination.

2. Whether the orders sought by the Complainant could be granted.

Held:

1. The video clip produced to the Tribunal as evidence of the 3rd Respondent receiving a nomination certificate was undated. Given that it was not disputed

that the 3rd Respondent emerged as the winner of the party nominations, it could not be stated with certainty that the video was taken on a date other than that of the party nominations. Further, the Complainants had not shown the Tribunal any nomination certificate issued after the date of the party nominations. The Tribunal found that there was no dispute between the Complainants and the 1st and 2nd Respondents as the said Respondents had not yet rendered their final decision.

2. The Tribunal directed that it was not the appropriate forum for enforcement of the decisions against the 3rd Respondent in the anticorruption case and the subsequent appeal and that the appropriate action for enforcement of those orders should be undertaken before the appropriate forum.

3. The Tribunal found it appropriate to issue timelines for compliance with the orders of the 1st Respondent's NAT in accordance with the Tribunal's inherent jurisdiction under Section 3A of the Civil Procedure Act that applies by virtue of section 41(4) of the Political Parties Act.

Order

Complaint dismissed; Each party bears its own costs.

JOSEPH NJOROGE NGIGI V THE JUBILEE PARTY & 4 OTHERS NAIROBI B COMPLAINT NO. E008 OF 2022 (JUDGEMENT)

HON. J M'MBETSA, HON. S M. NDERITU, & HON DR. A M. MBITHI

18TH MAY 2022

Summary of facts:

The Complainant was a duly registered Member No. JP7712387 of the 1st Respondent party. The Complainant and the 3rd Respondent were vying for the same seat of Member of National Assembly in Naivasha Constituency. The Complainant alleged that no elections were conducted, and the 3rd Respondent was issued with the nomination Certificate. Earlier, the Complainant was notified by an unknown person on 16th April 2022 that the vetting process would be conducted on Sunday 17th April 2022. The County Secretary General for the Jubilee Party proceeded to declare the vetting process illegitimate. As a result, the Complainant did not attend the consultative meeting held on 17th April, and the 3rd Respondent was issued a Nomination Certificate for Naivasha Constituency. The 1st and the 2nd Respondent argued that enough sensitization was done, and that the Complainant had resigned from the Party.

Issues:

1. Whether the Tribunal had jurisdiction to hear and determine the dispute.

2. Whether the nomination exercise for Member of National Assembly Naivasha Constituency was conducted in substantial compliance with the law.

3. What were the appropriate reliefs available in the instant matter.

Held:

1. The Tribunal had the jurisdiction to hear and determine the Complaint as the Complainant had lodged their dispute with the National Election Appeals Tribunal of the 1st Respondent within the stipulated time. Moreover, no evidence was tabled before the Tribunal to demonstrate that the Complainant had ceased to be a registered member of the 1st Respondent.

2. The nomination exercise for the 1st Respondent was not conducted in an open, free, fair and transparent manner in compliance with the law. The Tribunal faulted the communication on the nomination exercise carried out on 17th April 2022, finding that it was an anomaly for communication concerning such a serious exercise would be sent via a private number, and the meeting dubbed a consultative meeting, when it was in fact a consensus building exercise. The 1st and 2nd Respondents were not able demonstrate that the Complainant was present at the said consensus building exercise. There was therefore no consensus for Jubilee Party Member of National Assembly nominations.

3. The Nomination elections were nullified and the 2nd Respondent on behalf of the 1st Respondent to carry out fresh election for the position of Nakuru County, Naivasha Constituency for the position of Member of National Assembly.

Order

Statement of claim partially succeeded. Each party to bear its own costs.

Josephine Wairimu Kinyanjui v Pamoja African Alliance Party & 2 Others Mombasa Complaint No E006 Of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

25th May 2022

Summary of Facts

The complainant was a duly registered member of the 1st Respondent (Pamoja African Alliance Party- PAA), a political party registered under the Political Parties Act, 2011. The main issue in the Complaint and the Notice of Motion was the manner and process by which the 1st Respondent herein was joined as a party in the Azimio la Umoja One Kenya Coalition Party (the Interested Party herein) and its registration as such by the 2nd Respondent. The Complainant contended that the inclusion of the 1st Respondent as a constituent political party and member of the Interested Party was erroneous and void ab initio and that it was upon the 2nd Respondent to correct the Register of the Interested Party and delist the 1st Respondent. She added that the 1st Respondent could not be compelled to make an application to withdraw from the membership of the Interested Party when the same membership was obtained illegally and/or the coalition was signed without the authority of the 1st Respondent's National Executive Committee (NEC).

It was the Complainant's case that the members of the members of the 1st Respondent's NEC held a meeting where it was resolved that the 1st Respondents could join any other political parties in a coalition whose ideology/ideologies aligned with those of the 1st Respondent's. For the coalition agreement to be binding on the 1st Respondent, the signed agreement would have to be ratified by the relevant decision-making organs of the party for ratification. Therefore, it was urged that the coalition agreement was signed per incuriam without the requisite authority of the 1st Respondent's NEC, making it ultra vires and void.

The 1st Respondent admitted that a NEC meeting had been held where the issue of the coalition had been proposed and seconded and annexed a copy of the 1st Respondent's resolutions. It was reiterated that for the decision to enter a coalition

to be binding, the authorised signatories had to present agreement to NEC for ratification and for the officials to be authorised to sign. It was asserted that on 5th April 2022, the 1st Respondent's Chair and Secretary-General executed a coalition agreement, contrary to the mandate given to them by a resolution of 21st March 2022 which required them to present the proposed coalition agreement to NEC for ratification.

It was contended that despite numerous requests from signatories who had signed the coalition agreement, the Interested Party had persistently refused to supply a copy of the coalition agreement to the 1st Respondent for ratification.

The 1st Respondent also took issue with the 2nd Respondent, who on 14th April 2022 published a gazette notice 4442, giving notice to members of the public of the registration of the Interested Party comprising 26 political parties. It was asserted that in the NEC meeting held on 25th April 2022, it was resolved that the ratification of the agreement signed on 5th April 2022 be declined and consequently, the intended membership of the PAA party in the Interested Party. It was their case that at the time of the Gazette Notice of 14th April 2022, the 1st Respondent vide its party organs had not resolved, considered or ratified PAA membership to the Interested Party. The 1st Respondent also submitted that IDRM was submitted via a letter dated 15th April 2022.

The 2nd Respondent filed Grounds of Opposition asserting that the documents required were not within the exclusive possession of the 2nd Respondent, and that the avenues for access to information and determination of grievances under the Access to Information Act had not been employed. The 2nd Respondent also attached the Form PP19 which had been duly signed by the 1st Respondent, declaration, minutes allowing joining of a coalition, copy of its constitution, copy of an extract of the coalition agreement on exiting and dispute resolution mechanism letter dated 29 April 2022 and 1st Respondent's letter dated 25th April 2022.

The Interested Party's case was that the 1st Respondent knowingly executed Form PP19-Formation of Pre-election and Post-Election Coalition of Political Parties, where it declared that the information and documents submitted were true and correct. It was contended that the 1st Respondent was a member of the Interested Party but had obtained interim orders *ex parte* and joined another coalition, the Kenya Kwanza

Alliance, contrary to section 7 (9) of the Political Parties Act which bars membership of more than one coalition.

The Interested Party questioned the jurisdiction of the Tribunal for having been wrongly and prematurely invoked, contrary to section 40 and section 27(3) Political Parties Amendment Act which require exhaustion of IDRM, including that of a coalition political party. It was asserted that the substratum of the complaint was in regard to alleged actions and decision of the 1st Respondent to join the Interested Party coalition party, and it was a dispute between the Complainant and 1st Respondent and ought to have been dealt with by the 1st Respondent's IDRM.

It was also contended by virtue of belonging to the Interested Party coalition, withdrawal or disputes on membership had to follow procedures in the coalition agreement.

Issues

1. Whether the Tribunal had jurisdiction to hear and determine the Complaint.
2. Whether the 2nd Respondent's decision to gazette the 1st Respondent as a constituent member of the Interested Party was erroneous, illegal and void ab initio.
3. What orders could the Tribunal issue.
4. Who should bear the costs of the Complaint.

Held

1. The PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism. The Tribunal therefore declined jurisdiction as far as the dispute was between the 1st Respondent and the Interested Party.

2. In line with section 10 of the Political Parties Act, the Registrar of Political Parties issued a communique for submission of pre-election coalition agreements, wherein the timeline was highlighted as 8th May 2022. As part of the documents

submitted was Form PP19, which was duly executed on behalf of the 1st Respondent. There were also minutes of a special NEC meeting dated 21st March 2022, where the party members took a unanimous decision to join the Interested Party. Lastly, there was also the 1st Respondent's constitution which authorised the Chairperson and Secretary General to execute the decision of joining a coalition on behalf of the 1st Respondent.

3. The 2nd Respondent, having verified and ascertained that the parties had complied with the law, found that the Interested Party was duly registered as a coalition political party.

4. Having found that the jurisdiction of the Tribunal was prematurely invoked, and that the 2nd Respondent discharged her mandate in accordance with the law, the Tribunal found no merit in the complaint as well as the counterclaim and proceeded to dismiss the same.

5. Being a party dispute and in the spirit of fostering party unity each party shall bear its own costs of the complaint.

Kairu Peter Chege v UDA National Election Board & 2 Others Nairobi A No E079 of 2022 (Ruling)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

28th May 2022

Summary of Facts

The Complainant claimed that his application was not heard due to the determination by the Tribunal that it had no jurisdiction to hear the matter and therefore downed its tools before going into the merits of the case. The Complainant thereafter lodged a complaint with the Elections and Nomination Internal Dispute Resolution Committee and the same was received, payment made and a date to hear the complaint issued. The Complainant argued that the filing of the complaint before the Elections and Nomination Internal Dispute Resolution Committee was sufficient grounds to grant the Tribunal jurisdiction to hear and determine the complaint. The 1st and 2nd Respondents argued that the complaint to the Elections and Nomination Internal Dispute Resolution Committee was pending hearing and determination and therefore the jurisdiction of the Tribunal had been prematurely invoked. They further contended that the Complainant had not met the threshold to warrant a review as provided under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and that the letter to the Elections and Nomination Internal Dispute Resolution Committee does not qualify as new evidence as the same was filed after the issuance of the judgement. The 3rd Respondent shared the views of the 1st and 2nd Respondents as regards to the application for review not meeting the threshold for review, and added that the Applicant ought to have first followed up on the complaint he filed with the 2nd Respondent to have it heard before approaching the Tribunal.

Issues

1. Whether the Notice of Motion Application met the threshold for review of the judgement and whether the Tribunal had the jurisdiction to hear the application.
2. What orders could the Tribunal issue in the circumstances.
3. Who bears the costs of this claim.

Held

1. The Applicant had failed to meet the requirements of Section 8 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The Applicant failed to demonstrate that there was mistake or error apparent on the face of the record and/or any sufficient reason to enable the court to set aside its decision.

2. The Tribunal further noted that the applicant had not demonstrated that it was impracticable to follow the internal IDRM process or the party had refused to set in motion the hearing of his complaint to warrant the exemptions to the doctrine of exhaustion of the IDRM and therefore the Tribunal was unable to assume jurisdiction.

3. The Notice of Motion Application lacked merit and thereby dismissed it.

Order

The Notice of Motion Application dismissed. Costs of the application were awarded to the 1st, 2nd and 3rd Respondent against the complainant/applicant.

Kennedy Onduso Osando v Jubilee Political Party & Dennis Mauti Kisumu Complaint E015 Of 2022(Judgement)

Dr. Wilfred Mutumbwa, Hon. Fatuma Ali, Hon. Walubengo Sifuna

6TH May 2022

Summary of Facts

The matter concerns the issue of a direct nomination ticket, the 2nd Respondent herein as Nominee for the position of Member of County Assembly for Majoge/Bassi Ward. Following consensus discussions, the Complainant and 2nd Respondent consented that the Complainant would be issued with a nomination certificate. The 1st Respondent proceeded to issue a nomination certificate to the 2nd Respondent, despite the fact that consent had been entered. The Complainant was aggrieved by the decision and approached the Jubilee Party by way of a complainant, but he claimed the 1st Respondent failed and/ or refused to give a ruling. He then approached the Tribunal, seeking orders restraining the 1st Respondent from submitting the 1st Respondent from submitting the name of the 2nd Respondent to the Independent Electoral Boundaries Commission (IEBC) pending the hearing and determination of the Complaint. Interim orders were granted restraining the 1st Respondent from submitting the 2nd Respondent's name to the IEBC pending the determination of the matter before the Tribunal.

Held

1. The totality of the evidence pointed to the facts as having been proved to the required standard.
2. The Respondents were the authors of the subject dispute herein, and did not heed notice nor make effort to respond to the allegations herein.

Order

Issue a declaration that the Complainant is the valid nominee for the 1st Respondent's ticket for Member of the County Assembly for Majoge Bassi Ward. The Tribunal declared that the Nomination Certificate issued to the 2nd Respondent by the 1st Respondent, was null and void. The Complaint was allowed, and the 1st Respondent was to name the Complainant as the validly nominated candidate for Member of County Assembly for Majoge Bassi Ward. The Complainant was to bear costs of the proceedings.

Motoa Vera Onkundi Redempta v Jubilee Party; Clare Moraa Obino (Interested Party)

In the Political Parties Disputes Tribunal at Kisumu

Complaint No. E035 of 2022 (Ruling on contempt)

Hon. Dr. Wilfred Mutubwa OGW C.Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna, Hon. Theresa Chepkwony

19th January 2023

Summary of Facts

The Application before the Tribunal was essentially one of contempt. The Respondent's case was that the orders, though served upon them, were not capable of being observed since, in essence, the same were overtaken by events. According to the Respondents, since it was difficult to have the NEB of the 1st Respondent to convene and implement the decision.

Held

1. The entire fabric of our judicial system, law and orders, is anchored on the obedience of orders resulting from peaceful dispute resolution processes. A party aggrieved by the orders cannot explain any disobedience but can either appeal, seek a review or a setting aside of the orders.

2. The Tribunal was satisfied that the Respondents were in contempt of the Tribunal's orders noting that the Tribunal's dignity and that of its orders could only be maintained if the Respondents were made to appreciate the gravity of their actions.

Order

The Respondents to purge contempt within 14 days of the ruling, failing which the Complainant shall be at liberty to take out notice to show cause why sanctions against the Respondents should not issue. Costs of the proceedings to the Complainant/Applicant.

KENYA COUNCIL OF EMPLOYMENT AND MIGRATION AGENCIES & ANOTHER V HON. HUSSEIN DADO & 3 OTHERS MOMBASA MISCELLANEOUS NO. E001 OF 2022 (RULING)

HON. ERASTUS ORINA, HON. THERESA CHEPKWONY, HON. DANIEL KAGACHA

31ST MAY 2022

Summary of Facts

On 13th May 2022, the Applicant, by way of a Notice of Motion Application brought under certificate of urgency, commenced the proceedings herein seeking verification of the 1st Respondents academic certificates by the Tribunal. They also sought orders of injunction to restrain the Respondents and Interested Parties from receiving the 1st Respondent's academic certificates and nomination certificate. In response to the application, the 1st Respondent filed a Notice of Preliminary Objection dated 19th May 2022 and a replying affidavit sworn on 21st May 2022. The 3rd Respondents filed grounds of opposition dated 21st May 2022, while the 4th Respondent filed grounds of opposition dated 19th May 2022 the 2nd Interested Party filed their replying affidavit on 19th May 2022.

Parties were thereafter directed to file written submissions in respect of both the Preliminary Objection and the application.

Issue

Whether the Tribunal has jurisdiction to hear and determine the application as presented.

Held

1. The jurisdiction of the Political Parties Disputes Tribunal (PPDT) flows from Section 40(1) of the Political Parties Act. It was submitted that the Application could only fit under section 40(1) (fa) of the Political Parties Act. A reading of that section presupposes that a dispute under the said paragraph (fa) ought to be between a member of a political party and the political party. From the supporting affidavit by the 1st Applicant, he did not claim to be a member of the United Democratic Party.

2. It was urged that there was no evidence of the dispute having been first subjected to the internal disputes' resolution mechanism within the 2nd Respondent's party. As such, the Tribunal lacked jurisdiction to entertain the dispute.

3. Article 159(1)(d) of the Constitution further clothes the Tribunal with the jurisdiction to hear and determine disputes. Disputes between political parties or coalition parties and disputes between coalition partners require that IDRM be attempted in the first instance.

4. It was submitted that the moment the 1st Respondent's name was forwarded and received by the 3rd Respondent, then a nomination had occurred. Once a nomination had occurred, the Tribunal ceased to have jurisdiction to entertain a dispute over the nomination.

5. The Tribunal found that indeed nomination had already taken place and the 1st Respondent's name was forwarded and received by the 3rd Respondent. Therefore, it ceased to have jurisdiction the moment the name was sent to the 3rd Respondent.

6. In view of the above findings the Tribunal found that the Preliminary Objection on jurisdiction had merit and the same was allowed.

Order

The application was struck out for want of jurisdiction with costs awarded to the Respondents.

Lawrence Otieno Odhiambo v Orange Democratic Movement Party & 3 Others Nairobi A Complaint No E052 of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

9th May 2022

Summary of Facts

The Complainant herein participated in the 3rd Respondent's nomination for the post of Member of County Assembly for Sarang'ombe Ward where he emerged the winner. The 4th Respondent filed an Appeal at the 2nd Respondent's Appeals Tribunal, and the Appeals Tribunal dismissed the Appeal and upheld the Complainant's nomination directing that the Complainant be issued with the nomination certificate and his name be forwarded to the IEBC through the 1st Respondent's mandated officials. Despite the Complainant winning and the 1st Respondent Appeals Tribunal upholding the Complainant's win, the 1st, 2nd and 3rd Respondents failed to issue the requisite Nomination Certificate to the Complainant denying him without any good reason.

The Respondents contention was that during the term of the Complainant as the MCA for Sarang'ombe Ward, his tenure had been characterised by cases of indiscipline, unbecoming conduct and a total disregard and violation of party principles and regulations. On this basis and in accordance with the enabling provisions of the Party's Constitution and rules, the party under Rule 23 of the Party Primary Election Rules, conducted a direct nomination. After due diligence and having conducted credible research providing an evidence-based opinion that a particular candidate, John Miller Otieno (4th Respondent), was best placed to deliver the relevant electoral seat for the party, a direct ticket was issued directly to him. The Respondents averred that it was an error on their part, not a deliberate but an unintentional one, to carry out the election by way of universal suffrage. Further, they claimed that the 1st Respondent was served late and therefore was unable to express this position at the National Appeals Tribunal when the 4th Respondent filed an appeal against the Party.

Issues

1. Whether there were nominations carried out by way of universal suffrage for the position of Member of County Assembly Sarang'ombe Ward on an ODM ticket.

2. What orders the Tribunal could issue in the circumstances.

Held

1. The Tribunal noted that the allegations by the Respondents were unclear, and it seemed that their intention was to deny the Complainant his rights under Article 38 of the Constitution by depriving him of the nomination certificate. The Tribunal held that it was clear that there was a nomination exercise, which upon completion identified the Complainant as the most preferred candidate. The Tribunal held that no organ inside the party had the authority to overturn the tribunal's decisions and that any party aggrieved by the IDRM's decision should have appealed or applied for review rather than attempting to circumvent the decision by bringing in organs within the party structure to exercise judicial powers that they do not have.

2. The Respondents failed to show that the Complainant was subjected to a disciplinary process and given a fair trial under the ODM Rules providing for disciplinary mechanisms and organs. Instead, the Respondents took over the functions of another organ in order to reprimand the Complainant. Such an act goes against political party values of good governance, which include the separation of powers and a right to fair trial.

3. The role of establishing suitable or eligible candidates for elections is reserved for the ODM NEB, and this role is supposed to be carried out to the expected standards of the party's nomination rules, and it will be considered dereliction of duty if the NEB clears a candidate to run and then deny him the nomination certificate on grounds of misconduct after he had been elected.

4. In issuing a direct nomination, there was no evidence that a scientific survey was conducted. No evidence was presented that the Party Central Committee met, considered and approved the list of persons to be issued with the direct party nomination certificates after considering the report compiled by NEB, if there

was any, in accordance with the rules. No evidence had been adduced that the Complainant had been refunded the application fee that he had paid. Therefore, the direct nomination issued to the 4th Respondent failed on the face of their own rules.

Order

The Complaint was allowed. Costs of the proceedings and the Tribunal awarded to the Complainant due to unnecessary suffering caused to the Complainant.

Loice Akoth Kawaka alias Nyasuba & Another v Oscar Oluoch Ouma & 2 Others Kisumu Complaint Number E006 of 2022 (Judgement)

Hon. Dr. Wilfred Mutubwa OGW C. Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

1st May 2022

Summary of Facts

The Complainants and 1st Respondent contested for nomination for MCA, South Kabuoch, Pala Ward where the 1st Respondent was declared the winner. The Appeal to the ODM Party's Appeals Tribunal by the Complainants was dismissed and thus the Complainants approached the Tribunal.

The Complainant argued that the elections were marred by irregularities and violence, including that no voting occurred in some polling stations and no results were declared. The 1st Respondent contended that the Complainants had resigned from the party and had submitted papers to vie as independent candidates after their loss and the Tribunal lacked jurisdiction, since the dispute was brought by non-party members against a life member of the party. Further, that the source of the evidence produced could not be authenticated and thus had no evidentiary value.

Issues

1. Whether the Tribunal had jurisdiction.

2. Whether the election was conducted in substantial compliance with the law.

Held

1. The Tribunal ruled that it had jurisdiction to hear the matter due to the fact that the Complainants had shown that they had made an honest attempt to subject the dispute to IDRM.

2. It was uncontroverted that there was no declaration of elections in the polling centres, and that there were no declaration forms 9A collated at the tallying

centre, and therefore none were available for agents and candidates to compare and ascertain with the final result. The Conduct of the elections not only breached the 2nd and 3rd Respondents' own regulations but also the minimum constitutional standard of a free and fair election.

3. The election was not accountable and was held in a noxious environment of violence. The effect of the wrongs was pervasive and substantially permeated the election. There was no declaration of a winner on merit.

4. The Tribunal's assessment of the facts as a whole drew the Tribunal to the inescapable conclusion that it must set aside the nomination exercise and order a fresh election.

5. The Tribunal made no orders as to costs.

Orders

Appeal allowed. Declaration and nomination by the 2nd and 3rd Respondent of the 1st Respondent set aside. The 2nd and 3rd Respondents ordered to conduct a fresh election for the 2nd Respondent's nominee for Member of County Assembly for South Kabuoch/Pala Ward through a universal suffrage method, within 72 hours. Each party to bear its own costs.

Marnanwahto Mary Sarehe v Jubilee Party & another
Meru Complaint No. E005 of 2022 (Judgement)

Hon. G Gathu, Hon. W Ngige & Hon. L Kinyulusi

8th August 2022

Summary of Facts

The 1st Complainant was a member of the Respondent under the membership number JP93642781. The Respondent, while compiling the party list, omitted the Complainants application for the Marsabit County Assembly. The complainant proceeded to file a complaint dated 30th July 2022 seeking to have the Tribunal compel the Respondent and the Interested Party to amend the Complaint's ethnicity from Borana to Rendille, and thereafter issue an order compelling the Respondents and Interested Party to issue an amended party list with the complainant's name under Marginalised Group and not Gender Top-Up Seats. The Respondent indicated that it had previously complied with all applicable law in devising the party list and submitted two names of interested persons to represent the Marginalised groups, thus making it impossible to substitute them with the Complainant.

Issues:

1. Whether the complaint was defective for failure to file a supporting affidavit.

2. Whether the Tribunal had jurisdiction to hear and determine the matter.

3. Whether the Complaint was merited.

Held:

1. A complaint was not defective for failure to provide a supporting affidavit as it was not mandatory. The Tribunal indicated that if no affidavit were submitted, their inclination would have been different. However, since an affidavit was on record then the Tribunal accorded that benefit to the complainant where they filed a verifying instead of a supporting affidavit.

2. The Tribunal emphasised the need to respect and safeguard the IDRM process based on previous decisions. Exhausting the IDRM process entirely was not mandatory; a genuine attempt to invoke IDRM sufficed.

3. The Tribunal's jurisdiction had not been properly invoked, since the Complainant did not allow sufficient time for the IDRM process to conclude before approaching the Tribunal.

4. Considering the Fair Administrative Actions Act, the Tribunal ordered the Respondent's IDRM organ to determine the complaint within 72 hours. If no determination was made within that time frame, the complainant was at liberty to invoke the Tribunal's jurisdiction. This was done to ensure fairness and justice in the case.

5. The Tribunal refrained from discussing the merits of the case to avoid prejudicing the outcome of the dispute within the Respondent's IDRM.

Michael Omondi Otieno v Kenneth Wellington Ayuyo & 2 Others Kisumu Complaint No. E001 of 2022 (Judgement)

Hon. Dr. Wilfred Mutubwa OGW C.Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

18TH May 2022

Summary of Facts

The Complainant claimed not to have been served with a hearing notice in regard to the matter that was heard by the 2nd Respondent's Appeals Tribunal and that he was thus condemned unheard. The Complainant argued that the Tribunal erred in its decision annulling his win and ordering a repeat nomination. The 1st Respondent's advocates on record confirmed receiving a Notice of Appointment of Advocates and Statement of Response from the Complainant's Advocates. Further, that the Notice of Appeal was served to the Claimant's recognized representatives vide their provided email address.

Issues

1. Whether the Tribunal made the correct decision in annulling his win and ordering a repeat nomination.

2. Who bears the cost of the claim.

Held

1. The Complainant failed to prove that they were not properly served with the hearing notice before the hearing at the appeals tribunal and that service to the Complainant was in order and procedural since electronic means is an effective form of service under the Civil Procedure (Amendment) Rules 2020 and that since the Complainant had an Advocate on Record who was served, that was further evidence of service having been done effectively.

2. The Tribunal noted that Complainant did not effectively challenge the allegation that the election had breached the electoral laws. He did not controvert or rebut the matters laid in upsetting the election and therefore the Tribunal held that it

was correct in finding that the Nomination Certificate issued to the Complainant be nullified and directing the 2nd and 3rd Respondents to conduct fresh nominations for the South Uyoma member of County Assembly.

Order

Complaint was dismissed and the decision of the Appeals tribunal upheld. Each Party shall bear its costs.

Mohammed Ibrahim Elmi v The Jubilee Party & Another Nairobi A Complaint No. E039 Of 2022 (Judgement)

Hon. G Gathu, Hon. W Ngige & Hon. L Kinyulusi

11th May 2022

Summary of facts:

The Complainant and the Interested Party in this matter were both members of the Jubilee Party vying for the gubernatorial position in Wajir County. The issue raised by the Complainant was that no elections were held for this position, thereby denying the members a chance to participate in the party nominations. The Respondent disregarded the endorsement of the Complainant by the members and proceeded to issue the Interested Party with a nomination certificate by way of consensus.

Issues:

1. Whether the Tribunal had jurisdiction to hear and determine the matter.

2. If the Tribunal has jurisdiction, whether the Complaint was merited.

Held:

1. The Tribunal's jurisdiction was not properly invoked, as the complainant failed to exhaust IDRM within the party. The Complainant had failed to pay the requisite IDRM filing fees.

Order

Respondents' application to arrest judgement dismissed. Complaint struck out, each party to bear its cost.

Monica Iyayo Girma v Jubilee Party Meru Complaint No. E007 of 2022 (Judgement)

Hon. Gad Gathu, Hon. Wanjiru Ngige, Hon. Dr. Leonard Kinyulusi

17th August 2022

Summary of Facts

The Complainant sought to be considered for the Respondent's Party list in respect of the slot meant for the marginalised ethnic minority on the basis that she was a member of the Dassanach Community of Isiolo which is a marginalised community. The Complainant argued that her application to be nominated as an MCA under the Ethnic Minority Category was rejected without being given reasons, and that the slots were given to members of the predominant clans of Isiolo, namely the Borana. The Complainant submitted that she had made no attempt to invoke the Respondent's Internal Dispute Resolution Mechanisms (IDRM) on account of the fact that time had already lapsed. She had approached the Respondent's offices but was turned away. The Complaint was unopposed because the Respondents did not appear before the Tribunal despite being duly served.

Issues

1. Whether the Tribunal had jurisdiction to hear and determine this dispute;

2. Whether the Complaint was merited.

Held

1. The Tribunal, even though the Complaint was unopposed, dealt with the question of jurisdiction, noting that it must in the first instance satisfy itself that it had jurisdiction. The Tribunal noted that Section 40 (2) of the Political Parties Act, 2011 provides that the Tribunal shall not hear and determine a dispute unless a party to the dispute adduces evidence of an attempt to subject the dispute to IDRM. The rationale for this was to give the party a good faith chance to resolve any dispute in the first instance.

2. The Tribunal took note that the Complainant had admitted to making no effort to subject the dispute to IDRM, although she stated that she had made a physical visit to the Respondent's offices. She had not demonstrated how such a visit was an "honest attempt" to subject the dispute to IDRM within the meaning of Section 40 (2) of the Political Parties Act, 2011.

3. In those circumstances, the Tribunal found that the Complaint had been filed prematurely before it. Following such determination, the Tribunal found that it could not go into the merits of the Complaint and therefore struck it out.

Orders:

Complaint struck out. No orders as to costs in the interests of party unity; each party to bear its own costs.

Nicholas Ouma Ounda & 3 Others v Orange Democratic Movement & 2 Others Nairobi A Complaint No. E053 of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

8th May 2022

Summary of Facts

The Complainants and the 3rd Respondent participated in the Party's nomination exercise for Member of County Assembly for Nyayo HighRise Ward. The Complainants challenged the nomination of the 3rd Respondent at the 2nd Respondent's Appeals Tribunal which nullified the nomination. The Complainants claimed that in blatant disregard of the ruling by the ODM National Elections Appeals Tribunal and in total disregard of their constitutional rights, the 1st and 2nd Respondent's issued the nomination certificate to the 3rd Respondent. The 3rd Respondent claimed that in compliance with the orders, a fresh nomination process was conducted as outlined in the ODM Primaries Election Rules 2021 and thereafter issued him with a nomination certificate. He contended that the grievance herein arose from the fresh nomination exercise and, as such, should have been determined before the ODM Appeals Tribunal as required by law. As such, the Respondent filed a Preliminary Objection and sought to strike out the complaint, application and all consequential orders on the grounds that the complaint was statute-barred for want of compliance with the mandatory provisions of Section 40 of the Political Parties Act. As such, the Tribunal could not determine the Complaint

Issues

1. Whether the Tribunal had jurisdiction to hear and determine this complaint.

2. Whether the 2nd Respondent issued the nomination certificate to the 3rd Respondent in clear violation of its own appeals tribunal decision.

3. What orders could the Tribunal issue in the circumstances.

Held

1. It was clear that the Complainants had first approached the IDRM of the party, and in breach of the directions of the Tribunal, the 1st and 2nd Respondents awarded the 3rd Respondent a direct nomination. The Tribunal was of the opinion that since the complainants had already subjected themselves to the IDRM process of the party and obtained favourable orders, which orders were disobeyed; their only recourse was approaching the Tribunal. The Tribunal thus held that the argument that they should have moved the IDRM process afresh was untenable, and not legally sound. Having established that the complainants had first attempted to resolve the dispute through the IDRM, the Tribunal had jurisdiction to hear and determine it.
2. There was no evidence that:
3. A scientific survey was conducted to provide an evidence-based opinion that a particular candidate was best placed to deliver the relevant electoral seat for the Party;
4. The Party Central Committee met, considered and approved the list of persons to be issued with the direct party nomination certificates after considering the report compiled by the NEB, if there was any, in accordance with the rules; and
5. The Complainants had been refunded the application fee that they paid.
6. In light of the foregoing, the direct nomination issued to the 3rd Respondent fell short of the rules as provided by Rule 23 of the Orange Democratic Movement Party Primaries and Nomination Rules, 2021 and amounted to breach of legitimate expectations of the Complainants.
7. The Tribunal held that it was a blatant violation of the political rights of the members of a party when a political party acts unilaterally without involving the members and without following the laid-out procedure in dishing out direct nomination. The ODM NEB acted in clear violation of its own nomination rules, Political Party Act and their own Appeal Tribunal directions.

Order

Complaint allowed. Each party to bear its costs.

Patrick Ockochi Obongoya v Orange Democratic Movement & 2 Others Kakamega Complaint No. E015 Of 2022

Hon. M. Lwanga. O, Hon. T.T. Kipchirchir, Hon. Dr. Lydiah Wambui

15th August 2022

Summary of Facts

That subsequent to the delivery of the judgement dated 4th August 2022, a Notice of Motion application dated 5th August 2022 together with an affidavit sworn by the Executive Director of the ODM Party Oduor O'gwen on 8th August 2022 was placed before the Tribunal. The application sought review of the Tribunals orders, specifically with regards to the issue of whether the ODM party adhered to its own laws and processes in preparing their nomination list for the Busia County Assembly.

Issues

Whether ODM Party adhered to its laws and processes in their population of the Busia County Assembly Party nomination list.

Held:

1. The Tribunal found that in the judgement of 4th August 2022, they had considered the party nomination process as provided in the party laws. This is because party nomination is purely a party process, which must be conducted according to the law in line with the rule of law.
2. The new information provided by the Respondents aimed to show that the nomination process was conducted in accordance with the party laws. Therefore, it was apparent from the information provided by the Respondents, which was not specifically controverted by the Complainant, that the ODM party did adhere to its rules and procedures in populating the party nominations list for Busia County Assembly.

Order

Judgement of the Tribunal in the complaint dated 4th August 2022 set aside. Complaint dismissed. Each party to bear its costs.

Paul Bwire Ouma v Jubilee Party Of Kenya & 2 Others
Kakamega Complaint No. E006 Of 2022 (Judgement)

Hon. M.L. Odongo, Hon. T.T. Kipchirchir, Hon. Dr. L. Wambui

17th May 2022

Summary of Facts

The Complainant is a member of the 1st Respondent, Jubilee Party, which is duly registered as a political party. On 24th February 2022, the Complainant paid up to the said Jubilee party the required Nomination Fees in the sum of Kshs. 50,000/- and was issued with a receipt for the same by the said 1st Respondent. The Complainant stated that he and the 2nd Respondent were aspiring to be nominated by the 1st Respondent to vie through its ticket for the seat of Member of County Assembly (MCA), Umoja 1 Ward, Embakasi West Constituency, Nairobi County. He submitted that, despite various demands and follow ups at the 1st Respondent's offices the said 1st Respondent, on the 28th April 2022, forwarded the name of the 2nd Respondent to the Interested Party as its nominee for candidate for MCA seat Umoja 1 ward, Embakasi West Constituency, Nairobi County. Aggrieved, the Complainant on 5th May 2022 filed the complaint herein together with a Notice of Motion application filed under Certificate of Urgency together with a Supporting Affidavit sworn by Paul Bwire Ouma therewith together with annexures seeking the following orders:

b. The nomination certificate issued to the 2nd Respondent by the 1st Respondent be and is hereby declared null and void.

b. The nomination certificate for candidate for Umoja 1 Ward, Embakasi West Constituency on the 1st Respondent's ticket be and is hereby awarded to the Complainant herein.

c. The letter by the 1st Respondent forwarding the name of the 2nd Respondent to the Interested Party nominating him as the Jubilee Party candidate for Member of County Assembly Umoja 1 ward, Embakasi West Constituency, Nairobi County be and is hereby declared null and void.

d. The 1st Respondent be directed to withdraw the name of the 2nd Respondent

as its nominee for candidate for Member of County Assembly Umoja 1 Ward and substitute the same with that of the Complainant herein for the said seat.

e. The Interested Party be restrained from including the name of the 2nd Respondent in the Kenya Gazette as nominee candidate by the 1st Respondent to vie for the seat of Member of County Assembly Umoja 1 Ward, Embakasi West Constituency, Nairobi County.

The 1st Respondent asserted that the party nomination rules and constitution were complied with in the nomination process, whereby the party in consultation with the membership settled on consensus as the method to be employed. It was their position that consensus was provided for in the party nomination rules. In order to build consensus, the 1st Respondent asserts that all candidates, including the Complainant were invited for a consensus building meeting on 18th April 2022. It was agreed that where the candidates failed to agree, the National Elections Board (NEB) would settle on the most suited candidate.

For MCA Umoja 1 Ward, it was stated that a panel appointed by the NEB settled on a candidate and recommended the same to NEB for a final decision. The 2nd Respondent herein challenged the decision of the panel to the National Election Appeals Tribunal (NEAT), where he was informed that indeed the NEB had selected him as the nominee for the MCA Umoja 1 seat. There was therefore no longer need to pursue the complaint. It was the 1st Respondent's case that the nomination process was above board, and the list of nominees forwarded to the IEBC vide a letter dated 28th April 2022.

The 1st Respondent further denied sending communication to the Complainant to collect a nomination certificate. Further, the 1st Respondent asserted that the Complainant had also failed to submit the dispute to the IDRM as required by law and denied that the annexure showing a list of cases before the NEAT did not emanate from the party. It was their case that the 2nd Respondent was validly nominated by the party and urged the Tribunal to dismiss the complaint.

The 2nd Respondent fully associated himself with the submissions of the 1st Respondent.

Issues:

1. Whether the Tribunal had jurisdiction.

2. What orders should issue.

Held:

1. It was not contested that there had been an indirect nomination process. The point of divergence was that on one hand, the Complainant submitted that the said process deemed him the most viable candidate for the party ticket for the seat in issue, while on the other hand, the 1st Respondent submitted that the said process saw the panel make an interim recommendation that was then forwarded to the NEB for ratification.

2. It was the Complainant's case that he had no reason to complain but the 2nd Respondent lodged a complaint with the party NEAT. The Respondents submitted that the internal party organ did not proceed with the hearing of the complaint after receiving communication from another party organ stating that the ticket would be issued to the 2nd Respondent. This communication effectively determined the complaint. They asserted that if the Complainant was dissatisfied, he ought to have filed an appeal in line with the party rules. However, the Tribunal found it odd that the alleged decision by the party organ against which an appeal should have been lodged was not tabled before it by either the 1st or 2nd Respondent who ought to have had access to it.

3. It was not disputed that the Complainant wrote a letter to the party making various demands on 27th April 2022, which letter was received and stamped on the same day by the party. The substance of the letter complained about the seemingly unexplained failure to issue a nomination certificate in his name. The Tribunal was not informed of how, if at all, the complaints raised by the Complainant were addressed.

4. The Tribunal found that the Complainant had clearly demonstrated an attempt to raise a concern with his party. This displayed that there has clearly been an attempt to explore IDRM and as such this Tribunal was properly seized of jurisdiction. He had established a strong case that he had been following up on

the issuance of his nomination certificate, which for some unexplained reason the 1st Respondent had declined to issue to him.

5. The explanation proffered by the 1st Respondent was muddled and confusing, save for that the 1st Respondent would have wanted the opportunity to deal with the matter internally. Unfortunately, the 1st Respondent lost that chance when they failed to respond to the letter of complaint filed by the Complainant, leading the jurisdiction vesting upon the Tribunal.

Orders:

The internal process conducted by the 1st Respondent was unlawful and thus null and void. That the nomination certificate issued to the said 2nd Respondent CHARLES NDERITU GICHANGI as Jubilee Party Member of County Assembly candidate for Umoja 1 Ward, Embakasi West Constituency was revoked. The 1st Respondent directed to issue to the Complainant herein PAUL BWIRE OUMA a nomination certificate as its Member of County Assembly candidate for Umoja 1 Ward, Embakasi West Constituency, Nairobi County in the general elections slotted for August 2022. Costs awarded to the Complainant. Notification issue to the IEBC.

Peris Wangui Gachomo v Samora Mwaura Wachira Nairobi
A Complaint No. E046 Of 2022 (Judgement)

Hon. Erastus Orina, Hon. Theresa Chepkwony, Hon. Daniel Kagacha

4TH May 2022

Summary of Facts:

On 14th April 2022, the 2nd Respondent convened and held the party nomination exercise for Clay City Ward. The Complainant stated that despite there being no formal announcement of the total votes tallied for any of the candidates, the 1st Respondent was irregularly declared the winner and issued with a provisional nomination certificate by the returning officer of the 2nd Respondent. She further stated that the nominations were marred with massive irregularities and electoral malpractices. She further alleged that the 2nd Respondent's officials arbitrarily allowed for voting the use of the IEBC Register and party register interchangeably without consulting the candidates, contrary to section 38C of the Political Parties Act, which requires political parties to use a certified register of members for the nominations and not to allow any person who is not a registered member of the Political Party to participate in the nomination.

She further alleged that the officials selectively started turning away some voters while allowing others. She blames the 2nd Respondent's Electoral and Nomination Disputes Resolution Committee decision that declared the nomination free, fair and verifiable as being bad in law and in fact. She further stated that the counting and tallying of votes were done to the exclusion of the Complainant and her agents, including other candidates being barred from assessing the Tallying Centre except the incumbent MCA and former MCA and that any results obtained could not be said to be genuine.

The 1st Respondent asserted that the appeal was not made in good faith as the Appellant was trying to introduce issues not tabled before the UDA Disputes Resolution Committee. The allegations of coercion to pay a fee for each polling station, late opening of a polling station, multiple voting, use of the IEBC Register and her name missing from the voter's register was an afterthought. It was also asserted

that the Appellant did not table any evidence before the Committee to substantiate her allegations. The 1st Respondent annexed to his affidavit results of the contest in Clay City Ward showing that he garnered 513 votes against the Complainant's 96 and two decisions from the dispute resolution organ, the EDRC, upholding his win.

The 2nd Respondent, although properly served, did not enter appearance or file any response to the claim.

Issues

1. Whether nomination exercise at the Clay City Ward was marred irregularities as alleged by the complainant.

2. Whether the 1st Respondent was irregularly declared the winner of the nominations for the position of MCA Clay City Ward Kasarani Constituency.

3. What orders the Tribunal could grant in the circumstances.

Held

1. The law requires that he who alleges a fact must prove the same. The Complainant had not tendered evidence of the multiple voting by pinpointing the alleged culprits. The complainant ought to have further demonstrated how the use of IEBC and the Party Register affected the voting exercise and her results in the nomination. Sweeping statements cannot be used to confirm that indeed there were irregularities. Cogent evidence is required. The Tribunal was, therefore, unable to reach a finding as to whether, indeed, there was such multiple voting.

2. This Tribunal had carefully considered the alleged breaches to section 38C, 38D, 38E and 38F of the Political Parties Act, 2011 as amended and was of the considered view that the complainant ought to have demonstrated, by way of evidence, how the alleged breaches affected the nomination exercise and/or results.

3. It was an accepted fact that no human activity can be perfect. The conduct of an election was therefore no exception. A court is to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a court will nullify an election.

4. Courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, provided the results of the election were unaffected by those breaches. This is because where possible, the Courts seek to give effect to the will of the people.

5. No election can be termed as perfect as it is prone to a few defects, and it was upon the complainant to prove that the defects were substantial enough to the point of affecting the nomination exercise and/or results. The Complainant had failed to prove that the nomination exercise was marred by irregularities and the Tribunal upheld the finding of the UDA Internal Disputes Resolution Committee.

Order

Complaint dismissed with no order as to costs.

Peter Odhiambo Agoro vs The National Election Board & 2 Others Kisumu Tribunal Appeal No. E020 of 2022 (Ruling)

Hon. Dr. Wilfred Mutubwa OGW C. Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

8TH May 2022

Summary of Facts

The Complainant and the 3rd Respondent were contestants in nominations for MCA, Kabondo East Ward, Homa Bay County. The Complainant was aggrieved by the outcome and lodged an appeal at the ODM Appeals Tribunal. Despite the Appeal being heard, the Party Tribunal was yet to give its verdict on the same despite several enquiries from the Complainant. The 1st Respondent issued the 3rd Respondent with a nomination certificate, prompting the Application before the Tribunal.

Held

1. The Tribunal noted that while it could take jurisdiction if there were inordinate delays or frustration at the party IDRM, in the present case, it wished to give the party Appeals Tribunal an opportunity to render its decision.

2. The Tribunal granted the party IDRM 48 hours from the date of the ruling to pronounce itself on the dispute, failing which it would proceed to determine the matter on merit.

Samuel Muriithi Mwafrika v Lilian Omollo & 3 Others
Meru Complaint No. E003 of 2022 (Judgement)

Hon. Gad Gathu, Hon. Wanjiru Ngige, Hon. Dr. Leonard Kinyulusi

18th May 2022

Summary of Facts

The Complainant and the 1st Respondent were members of the 2nd Respondent. The Complainant and the 1st Respondent were cleared by the 2nd Respondent party to participate as candidates for nomination for the position of Senator Embu County after paying the required nomination fees. The Complainant claimed that the 2nd Respondent did not conduct nominations for the position of Senate Embu County and the 3rd Respondent went ahead and issued a provisional nomination certificate to the 1st Respondent. The Complainant went ahead to draft a Complaint letter with the 4th Respondent wherein he sought a nullification of the nomination of the 1st Respondent and an order for a fresh, proper, and objective nomination process to be conducted.

In a verbal ruling delivered on 22nd April 2022, the 4th Respondent disallowed the complainant's application and proceeded to declare the 1st Respondent as the presumptive nominee for the position of member of Senate Embu County. The Complainant stated that he was not issued with a reasoned determination. The 1st Respondent filed a Preliminary Objection challenging the jurisdiction of the Honourable Tribunal alleging that the Complaint and the Application were filed out of time, contrary to regulation 8(1) and 8(4) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

Issues

1. Whether the Complaint and Application were lodged within the statutory timelines under regulation 8(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

2. Whether the nomination of the 1st Respondent by the 2nd Respondent was lawful and justified.

Held

1. The Tribunal had already made findings as regards to the Tribunal's jurisdiction pursuant to regulation 8(1) Political Parties Disputes Tribunal (Procedure) Regulations, 2017. Noting that there exists an exception to the doctrine of res judicata, whereby it can revisit its decision on review, the Tribunal made a decision not to since there was no application for review before it. The Tribunal therefore restrained itself from addressing the issue.

2. It was not in dispute that the Complainant and the 1st Respondent subjected themselves to a nomination process to be carried out by the 2nd Respondent to identify its candidate for the Embu County Senate seat. Pursuant to section 38A of the Political Parties Act, 2011 ("the Act"), the 2nd Respondent had various options to use in conducting the said nominations as provided in its nomination rules. These options include direct nomination and indirect nomination.

3. The 2nd Respondent's constitution also provided for both methods of nomination, with Article 12 of the constitution providing for consensus. The outcome of a process built on consensus would be candidates and the party unanimously agreeing on one candidate. The consensus process seems to have failed and the 2nd Respondent resorted to interviewing candidates.

4. Having willingly subjected himself to an interview process without raising any objections, the Tribunal held that the Complainant could not have faulted the 3rd Respondents for using interviews as a method of identifying a candidate. Further, the Complainant seemed to have been dissatisfied with the outcome as opposed to the method.

5. Having not proved his case to the required standard, the Tribunal dismissed the Complaint.

Order

Complaint dismissed with no orders as to costs.

Ted Marvin Odhiambo v Orange Democratic Movement National Elections Board & 2 Others Kisumu Complaint No. E029 of 2022 (Judgement)

Hon. Gad Gathu, Hon. Wanjiru Ngige, Hon. Dr. Leonard Kinyulusi

8th June 2022

Summary of Facts

The dispute concerned the nomination of a candidate to vie for the position of County Assembly, North Gem Ward, Siaya County Assembly by the Orange Democratic Movement Party. The Complainant emerged as the winner of the nomination and was issued with an interim nomination certificate. The process was challenged before the 2nd Respondent's appeals tribunal and the outcome of the nomination process was upheld by the said tribunal. The 3rd Respondent's application for review was also dismissed. Thereafter, the Complainant was awarded a final nomination certificate. The Complainant, through the timetable published by the IEBC, realised that the 2nd Respondent forwarded the name of the 3rd Respondent instead of his own. The Complainant tried to invoke the 2nd Respondent's Internal Dispute Resolution Mechanism but was unsuccessful.

The 1st and 2nd Respondents contended that while the Complainant was indeed the winner of the nomination exercise, they made a determination that the 3rd Respondent was best placed to be the 2nd Respondent's candidate in the elections for MCA North Gem ward. Further, they contended that the Complainant was aware of this fresh nomination exercise but did not raise any complaint as regards the same. They also raised an objection to the jurisdiction of the Tribunal on the basis that the Complainant had not exhausted the 2nd Respondent's IDRM and therefore, the Tribunal had no jurisdiction to hear and determine the matter pursuant to section 40(2) of the Political Parties Act, 2011. The 3rd Respondent also raised the issue of the Complainant having been filed out of time.

Issues

1. Whether the Tribunal had jurisdiction to hear and determine this dispute.
2. Who between the Complainant and the 3rd Respondent was the lawfully nominated 2nd Respondent's candidate for MCA.

Held

1. The PPDT is specifically clothed with jurisdiction to deal with disputes concerning party nominations under section 40(1) (fa) of the Political Parties Act. As regards the challenge to the Tribunal's jurisdiction under Section 40 (2) of the Political Parties Act, the Complainant had referred to a decision of the 2nd Respondent's Tribunal in which his win in the primaries was upheld. None of the Respondents sought to challenge the decision of the appeals tribunal that they were parties to. The Complainant demonstrated that he attempted to invoke the 2nd Respondent's IDRM vide a letter via email which was not challenged by the Respondents and thus the challenge on this ground failed.

2. On the challenge to jurisdiction under regulation 8(1) of the Political Parties Disputes (Procedure) Regulations 2017, the Tribunal reiterated its previous determinations on the import of this regulation that the Tribunal would not lock out parties from the Tribunal on that basis alone; the basis of a date which is a moving target.

3. It was not in dispute that the Complainant emerged as the winner of the party nominations that were conducted by way of universal suffrage; that the appeal before the 2nd Respondent's Appeals Tribunal was dismissed; and that the 3rd Respondent's application for review was also dismissed.

4. The Tribunal held that there was no lawful basis for conducting the fresh nomination exercise that the 2nd Respondents carried out in nominating the 3rd Respondent even though they claimed that the Complainant was aware of it. In coming to this decision, the Tribunal noted that it had not been shown what method was used to 'nominate' the 3rd Respondent and whether that method was in keeping with the 2nd Respondent's own constitution, nomination rules and the Political Parties Act.

Orders

Complaint allowed. 1st and 2nd Respondents, within 24 hours from the date of the judgement, forward to the IEBC the name of the Complainant as the 2nd Respondent's nominee for the position of MCA, North Gem Ward. Each party to bear its own costs.

Victoria Zilla Ung'ai & another v Democratic Action Party-Kenya Kakamega Complaint No. E021 OF 2022 (Judgement)

Hon. M O. Lwanga, Hon. T T. Kipchirchir, Hon. L Wambui, Hon. D Kagacha

26TH August 2022

Summary of facts:

The Complainants were members of the Respondent party, Democratic Action Party- Kenya (DAP-Kenya), who applied for nomination through the Kakamega County Assembly party nomination list.

The Complainants proceeded to file a complaint before the Tribunal, stating alleged anomalies of the nomination process. Previously the Complainants were the proposed nominees by the Respondent Party, but upon publishing of the official nomination list, the 1st and the 2nd Complainants had been sidestepped by the party. They impugned the actions of the Respondent's national office in disregarding the list forwarded by the branch and instead coming up with another list without consulting the Party National Executive as required by the party constitution. It was their submission that the list forwarded to the IEBC included nominees who were not registered members of the party, and even some members who had been suspended. They impugned the list for being arrived at arbitrarily and for containing the names of cronies, hirelings, friends and hangers on of the party hierarchy. The Complainants further submitted that they had tried to invoke the internal dispute resolution mechanism without success.

They sought a declaration that the nomination list published by the party was null and void and an order directing the Respondent to reinstate them to the nomination list in priority as proposed by the party's Kakamega branch.

According to the Respondent, the Complainants had not provided any current record or proof to support their allegations or show that the nominated individuals were not party members. The Respondent argued that the burden of proof lay with the Complainants, and they had failed to present material evidence or witnesses to substantiate their claims. The Respondents asserted that the party list was prepared based on competence and member contribution.

Issues:

1. Whether the complaint was justified.

2. What orders should issue.

Held:

1. The law mandates the political party with the primary jurisdiction of compiling its party nomination list for the various positions. The Tribunal noted that the IEBC's role in party list nominations was limited to ensuring compliance with legal requirements regarding category representation, while the placement and order of members within each list was determined by the respective political parties.

2. The Respondent had not controverted the Complainants claim that they qualified for nomination into the party nominations list nor that they applied for consideration to the nomination list. The Respondent had, however, averred that the list contained names of persons from other groups that were equally qualified within Kakamega County. No information was placed before the Tribunal to show how and why the Complainants were relocated from their priority positions on the lists that emanated from the County and that they were compiled in adherence to the party directive and moved to lower positions on the list.

3. The Tribunal reviewed Article 19 of the Respondent's constitution which provided for the party nomination rules with respect to elections of the party and rules governing the preparation of the party lists. It found that the provision was silent on how nominees should be selected. It was therefore probable, as the Complainant's submitted, that the party had selected the Chairperson of the Kakamega County Branch Committee to come up with the nomination list for the County.

4. The Complainants, despite being retained in the party list, should have been given an opportunity to defend themselves against any potential changes in their positioning on the list. Their right to be heard and provide a defence in the face of impending re-positioning should have been upheld. The Tribunal thus found the complaint raised justified.

Orders:

Reinstate the Complainants to the top of the Gender and Marginalised Group lists. IEBC to be issued with the notification. Costs awarded to Complainants.

Zachary Nyayiemi Moturi v Wiper Democratic Movement & Another Kisumu Complaint No. E022 of 2022 (Judgement)

Hon. Dr. Wilfred Mutubwa OGW C.Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

5th June 2022

Summary of Facts

The Complainant had filed a complaint with the Tribunal arising from the nomination of the 2nd Respondent as a candidate for MP North Mugirango Constituency. Judgement was entered against the Respondents and the 1st Respondent had been directed to conduct nominations by way of universal suffrage within 72 hours of the date of the decision. The Respondent did not comply with the orders within the required time. The Respondent brought to the attention of the Tribunal that aside from an application filed by the Respondent to the Tribunal seeking it to set aside its directions, there was an appeal in the High Court at Kisii at the time which was awaiting determination and that would have had an impact on the decision to be undertaken by the Tribunal.

Issue

1. Whether the applicant had successfully proved Contempt to the required standard of proof.

2. Who bears the cost of the case.

Held

1. Reflecting on the matter before the tribunal, the pending appeal for review and the appeal in the High Court, the Tribunal noted that the High Court was a superior court and to which it must defer. There was a real possibility of a multiplicity of decisions from the Tribunal and the court, with conflicting perspectives. That would have been an un-neat and potentially embarrassing situation for the administration of justice, which requires the actors to always act in the public interest and in the interest of observance of the hierarchy of our judicial system.

2. The Tribunal decided against dealing with the Application for Review in the matter until the High Court pronounced itself on the Appeal. The Tribunal found that the application for contempt was properly before it, but it could not determine the same until the appeal or the review application was determined. The Tribunal concluded that the matter was to be held in abeyance until the decision of the High Court was made. The Respondent was, however, still under a duty to ensure compliance with the Tribunal's orders; or to find a consensus among the candidates.

Order

Proceedings stayed pending determination of the matter at the High Court. Each party to bear its own costs.

Zachary Nyayiemi Moturi v Wiper Democratic Movement & Another Kisumu Complaint No E032 of 2022 as Consolidated with Complaint No E033 of 2022 (Judgement)

Hon. Dr. Wilfred Mutubwa OGW C.Arb, Hon. Fatuma Ali, Hon. Walubengo Sifuna

16th July 2022

Summary of Facts

The Complainant was declared the sole candidate for Wiper Party for MP North Mugirango Constituency after a meeting to build consensus through negotiations. Later on, the Complainant was called to attend further negotiations for the nomination for the party ticket. Aggrieved with the decision to reopen negotiations, the Complainant registered his complaint with the 1st Respondent who either ignored or refused to address it and went on to issue a nomination ticket to the 2nd Respondent, without any reasons or how the decision was made. The Complainant proceeded to approach the Tribunal to challenge the decision. The Respondents did not file any response.

Held:

1. The Complainant's legitimate expectation was violated because he had been promised the nomination ticket by the 1st Respondent and had placed reliance on that promise. Despite promising to award the Complainant with the nomination ticket the Party handed the Ticket to the 2nd Respondent without providing any explanation of why they chose to go back on the earlier agreement they had entered into with the Complainant contrary to his fundamental rights under the Fair Administrative Action Act.

2. Furthermore, no other aspirant came to the meeting in which it was resolved that the Complainant would fly the party flag for Member of Parliament North Mugirango seat. Furthermore, in flagrant violation of the expectation, they issued a direct nomination to the 2nd Respondent without any justification to the Complainant. It was therefore held that his legitimate expectation was violated.

3. The Tribunal further held that whatever process is used, had to consider the interests of all of the parties involved and that the Complainant's interests were clearly not considered in issuing the nomination to the 2nd Respondent.

Order

Complaint allowed. No orders as to costs.

PART 2:

HIGH COURT DECISIONS

Alexander Gitonga & 2 others v Registrar of Political Parties & another; Chama Cha Uzalendo (Interested Party)
Machakos High Court Petition 1 of 2022

GV Odunga, J

30th May 2022

Summary of facts

The Petitioners contended that they were members of the Interested Party while the 2nd Respondent was described as a suspended member of the Interested Party. The Interested Party filed a Notice of Preliminary Objection, claiming that the dispute at hand in the petition was strikingly similar to Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo v Registrar of Political Parties & Others which was filed in Mombasa, albeit by different Petitioners, and that the same was dismissed. The Interested Party claimed that the Petitioners were abusing the court process by engaging in forum shopping. The Interested Party further claimed that the court did not have jurisdiction to hear and determine the application and petition therein because the issues raised concern the Political Parties Dispute Tribunal (PPDT).

The Interested Party further asserted that all disputes between members of a political party or a party and its members had to be referred to a party's internal dispute resolution mechanism before a dispute was referred to the PPDT, and thereafter the High Court as an appellate court. The 2nd Respondent also took out a Notice of Preliminary Objection. The 2nd Respondent claimed that the Petitioners had neither exhausted the PPDT nor the internal political party dispute resolution precursor. The 2nd Respondent further contended that the petition was similar to Constitutional Petition No. E013 of 2022, pitting the same parties that had since been dismissed.

Issues

1. Whether a political party could file a dispute involving the management of the party in court before exhausting the statutory dispute resolution mechanisms for political disputes.

2. Whether addition of parties in a subsequent suit rendered the doctrine of *res judicata* inapplicable.

3. The principles to consider in determining the applicability of the doctrine of *res judicata*.

Held

1. A Preliminary Objection was an objection based on law that was argued on the assumption that the facts as pleaded were correct. In other words, a person raising a Preliminary Objection must be prepared to argue the same on the assumption that the facts as they were pleaded were correct. As long as that was done, it was not objectionable for the party raising the objection to refer to the facts on record. What the court did not permit was the attempt to reconcile factual disputes in a Preliminary Objection.

2. In the instant case, there were two levels of disputes. The primary dispute pitted the Petitioners against the 1st Respondent, and it was that dispute that mutated to the secondary dispute which found its way before the Registrar. The primary dispute was the management of the Interested Party. Such a dispute ought to have been placed before the Interested Party and attempts made to resolve the same by invoking the internal party resolution mechanisms. There was no evidence that the said mechanisms were ever invoked.

3. Alternative dispute resolution processes were complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, (Constitution) the court was obligated to promote those modes of alternative dispute resolution. It was not inconsistent with Articles 22 and 23 of the Constitution to insist that statutory processes be followed, particularly where such processes were for the specific purpose of realising, promoting and protecting certain rights. The Court's jurisdiction under Article 165 of the Constitution could be limited and/or restricted by an Act of Parliament.

4. Even in cases where issues relating to fundamental rights were being alleged in the political party processes, as long as the Tribunal was seized of jurisdiction, such matters were better left to be handled by the relevant bodies in the first instance.

5. Bodies which had been established by Parliament especially those tasked with resolution of political disputes ought to be allowed to grow and the courts should only step in to ensure that they carried out their mandate in accordance with the Constitution and the legislation. Those bodies were specialised tribunals set up specifically for the purposes of dealing with political disputes which were not ordinary civil disputes between private parties but were disputes which affected the rights of the members of the party and the exercise of their rights under Article 38 of the Constitution.

6. It would be splitting hairs to hold that the instant dispute did not fall within the ambit of section 40 of the Political Parties Act. Since there was no evidence that the mechanisms contemplated thereunder had been triggered, the petition was not properly before the court.

7. Mere addition of parties in a subsequent suit did not necessarily render the doctrine of res judicata inapplicable since a party could not escape the doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties pegged their claim under the same title as the parties in the earlier suit, the doctrine would be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the Civil Procedure Act, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

8. Parties were not to evade the application of res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. Therefore, for the principle to apply certain conditions precedent must be shown to exist:

    a. The suit or issue was directly and substantially in issue in the former suit.

    b. The former suit was between the same parties or parties under whom they or any of them claimed.

    c. Those parties were litigating under the same title.

    d. The issue was heard and finally determined in the former suit.

The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.

1. The matter in issue in the petition was directly and substantially in issue in Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo versus Registrar of Political Parties & Others. One could not escape the application of res judicata by merely changing the positions of the players in the suit when it was clear that there was no major change in the capacity in which the suit was brought. The three Petitioners therein were also the Petitioners in the earlier suit. The 1st Respondent therein was also the 1st Respondent in the Mombasa petition while the 2nd Respondent therein was named as an Interested Party. The High Court which was properly seized of the matter heard and finally determined the former suit.

2. The petition was caught up by the doctrines of exhaustion of remedies and res judicata.

Order:

1. Petition struck out with costs to the 2nd Respondent only.

Benson Ongeri Ntabo v Billiah Bochaberi Maranga & 2 others Kisii High Court Civil Appeal 26 of 2022

Rea Ougo, J.

2nd June 2022

Summary of facts

The appellant had filed an appeal seeking to set aside the judgement of the Political Parties Disputes Tribunal in PPDT E011 of 2022. The 1st Respondent was the claimant before the Political Parties Disputes Tribunal ('Tribunal') and the appellant was the 3rd Respondent. The 1st Respondent while before PPDT claimed that the 1st and 2nd Respondents selectively nominated the appellant without conducting nominations or a consensus thereby violating the 1st Respondent's right under Article 38 and 47 of the Constitution. The Tribunal found that it had jurisdiction to handle the matter, that the procedure leading to the decision to conduct the elections by way of direct nominations infringed the rights of the 1st Respondent. Thus, it annulled the nomination and ordered for fresh nominations through universal suffrage, unless otherwise agreed by the candidates, within 48 hours. This led to the instant appeal.

Issues:

1. Whether the Political Parties Disputes Tribunal had the requisite jurisdiction to hear the complaint by the 1st Respondent, and if so;

2. Whether the Political Parties Disputes Tribunal failed to confine itself within the pleadings before it.

Held:

1. The cause of action arose when the 2nd Respondent communicated that it would use indirect party nomination to select its candidate. The tribunal was therefore clothed with the requisite jurisdiction to entertain the 1st Respondent's claim touching on the method of nomination used as it was that decision that led to the issuance of a nomination certificate to the appellant.

2. Although the 1st Respondent filed a complaint before the ODM Appeals tribunal, her complaint was not considered for reasons that it was premature. The complaint on the method to be used during the nomination of the 3rd Respondent's candidate was properly presented for internal dispute resolution, although it was dismissed.

3. The 2nd and 3rd Respondent had the power to choose the method the 3rd Respondent should use to nominate its candidate. As stated earlier in this judgement, the methods of nomination were either direct or indirect party nomination. A scrutiny of the judgement of the tribunal and the parties revealed that the word direct party nomination was not understood in the context of the Political Parties Act.

4. Although the 2nd and 3rd Respondents submitted that it had the power to choose whether the 3rd Respondent would conduct direct or indirect party nominations, they must conduct nominations in strict compliance with the provisions of the Political Parties Act in particular Part IVA of the Act.

5. The procedure set out in the Political Parties Act was not followed by the 2nd and 3rd Respondent. The 2nd and 3rd Respondents conducted the indirect party nominations in a manner that was not in compliance with the provisions of the Political Parties Act section 2, 38A and 38G. The process of conducting the indirect party nomination was therefore unlawful as they failed to select delegates, who would then select the 3rd Respondent's candidate for the seat of Member of County Assembly for Gesusu Ward.

6. Despite the Tribunal failing to consider the lawfulness of the procedure to conduct indirect party nominations as per the Political Parties Act, the court could not fault its decision directing the 2nd and 3rd Respondent to conduct fresh party nomination.

Order

> *Appeal partially allowed. Tribunal decision set aside to the extent that the fresh election for the nomination exercise be conducted by the 2nd and 3rd Respondent through direct or indirect party nominations. Each party to bear its own costs.*

Booker Ngesa Omole v Benedict Wachira & 2 others
Nairobi High Court Civil Appeal (Application) E 298 of 2022

JN Mulwa, J

30th June 2022

Summary of facts:

The instant court had previously delivered a judgement allowing the applicant's appeal whereby the PPDT was to be set aside and the complaint referred back to the 1st Respondent for appropriate action in terms of the Parties Constitution and Rules on nominations. Subsequently, the applicant filed a Notice of Motion seeking that the Respondent be compelled to follow and comply with the orders of the court. The Interested Party, through a Notice of Motion, averred that the court, having determined the main appeal with finality, was therefore *functus officio.*

Issue:

1. Whether the applicant's Notice of Motion was incompetent for being based on a wrong provision of the law.

2. Whether the court, having heard and determined the matter was functus officio with regards to the orders sought.

Held:

1. The entire Contempt of Court Act, No. 46 of 2016, was declared unconstitutional on 9th November 2018 in Kenya Human Rights Commission v Attorney General & another [2018] eKLR. Once a statute was declared unconstitutional, it became invalid and ceased to have any legal consequences or force of law. However, the court took the view that since the law governing contempt of court in Kenya reverted to the position before the enactment of the Act thereafter, the applicant's application could still be entertained and considered within the old framework, in case the Preliminary Objection failed. The court would not elevate lapses in form and procedure above substance as the provisions of Article 159(2)

(d) of the Constitution enjoined the court to administer justice without undue regard to procedural technicalities.

2. The court pronounced itself with finality on the orders sought in its judgement of 7th June 2022. Entertaining the applicant's application as drafted would require the court to reopen its decision and reconsider the issues afresh. From the authorities highlighted above as well those cited by both parties in their submissions, it was clear that the law did not allow a merit-based re-engagement by a court in a matter in which it had rendered a final judgement and issued a decree.

3. If the Applicant was dissatisfied by the orders of 7th June 2022, the only avenues available to him were to either prefer an appeal or pursue an application for review, as it would be absurd for the court to issue contradictory orders.

4. Accordingly, the first ground of the 1st Interested Party's Preliminary Objection succeeded as the court was indeed *functus officio* with regard to the orders sought in the applicant's Notice of Motion.

Order

Preliminary Objection allowed. Notice of Motion dismissed. No order as to costs.

Chama cha Uzalendo & 4 others v Registrar of Political Parties & 2 others Mombasa High Court Petition E013 of 2022

JN Mativo, J

17th May 2022

Summary of facts

The instant application determined three Preliminary Objections that had been separately filed, all seeking to upset the proceedings. The common thread between them was that the instant court was divested of jurisdiction to hear and determine the petition on account of the Petitioner's failure to exhaust the dispute resolution mechanisms provided under the applicable statute. The 2nd to 5th Petitioners were aggrieved by a change of office bearers of the party effected vide a Kenya Gazette. They contend that the changes as communicated in the impugned Gazette Notice were done illegally and without approval of the party organs. It is on this basis that the Petitioners pray for the declarations/orders.

Issue:

Whether the court had jurisdiction to hear and determine the issues before it.

Held:

1. A reading of the petition clearly showed that the issues raised in this Petition were an intra-party affair: a concept that had been defined to mean a dispute between members of the party inter se, or between a member on the one hand and the party on the other. As was demonstrated by the sections of the law discussed shortly, the law was trite that courts' jurisdiction was ousted in matters dealing with internal affairs or resolution of a political party regarding nomination or leadership of that political party as in the instant case.

2. Despite the vast jurisdiction vested into the PPDT, the claw back clause was to be found in sub-section (2) which provided that notwithstanding subsection (1), the Tribunal would not hear or determine a dispute under paragraphs (a), (b), (c) or (e)

unless the dispute had been heard and determined by the internal political party dispute resolution mechanisms. The provision underscored the fact that party members should have recourse to civil courts in the event of disputes between the members or between members and the officials, but only after exhausting internal dispute-resolution mechanisms, where such mechanisms exist.

3. The party, like any other corporation, operated within the guidelines, the powers and duties set out in its Constitution. All its members were bound by its provisions and their rights and obligations created by their constitution could be remedied as provided by its constitution if breached by any of its members.

4. The import of the provisions of the Political Parties Act cited above and the above proposition the law attributed to Lord Denning was that a court or a tribunal could not entertain a dispute unless it had been heard and determined by the internal party dispute resolution mechanism. There was nothing to suggest that the 2nd to 5th Petitioners exhausted the intra party dispute resolution mechanism or even approached the PPDT. Instead, they approved the court in total disregard of their party constitution and the law triggering the objections now under consideration.

5. The dispute as disclosed in the petition was between members of a political party. The 2nd to 5th Respondents were simply aggrieved by change of officials of the Party. It mattered not that they had turned their guns against the Registrar of Political parties and in a clever way relegated their targets as interested parties in the proceedings, yet they ought to be the principal Respondents. They simply sought to upset the changes of office bearers by attacking the Registrar.

6. The above being their dispute and core target being contesting change of office bearers, they could not run away from the wrath of the provisions of sections 39 and 40 of the Political Parties Act. Differently put, the suit was incontestably bad in law for offending the doctrine of exhaustion of remedies.

7. Exhaustion of administrative remedies arose when a litigant, aggrieved by an agency's action, filed the dispute in court instead of pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings failed to produce a satisfactory resolution.

8. Two principles were discernible from decided cases. First, while, exceptions to the exhaustion requirement were not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applied.

9. The above cited provisions afforded the 2nd to 5th Petitioners the opportunity to seek redress before the appropriate fora within the political party hierarchy, as a condition precedent to resorting to litigation as instructed by sections 39 and 40 of the same PPA. Resort to court action or litigation on any dispute or on any matter whatsoever concerning rights, obligations and duties of any member of the party as against other members or the officials of the party without first availing himself of the remedies provided by the Party under the party constitution was prohibited. The Petitioners were obligated by their party constitution to have regard to the rules and regulations of the Party including their Party Constitution. They could not be permitted to violate their party constitution while at the same time insisting on litigating with other party members contrary to their own party constitution.

10. Having failed, neglected or refused to submit their grievance to the appropriate organs of the party or to file the relevant or necessary appeals against the alleged actions, inaction or decisions in this case or to pursue them to a logical conclusion or indeed to follow the due process of exhausting internal remedies available at the domestic forum, the Petitioners had failed to fulfil the conditions precedent for the commencement of the petition which therefore rendered the petition premature and incompetent.

11. It was important to stress that laws which prescribed that some procedural steps be taken to resolve a dispute before embarking on actual litigation were not and could not be treated or categorised as ousting the jurisdiction of the Court. Indeed, if such laws attempted to do so, they would be in conflict with the provisions of the Constitution. Such laws only afforded the body to which such disputes must be referred to in the first instance an opportunity to resolve the dispute if it could before a recourse was had to the court. In other words, they

served the purpose of preventing actual litigation in court where it was possible or desirable to resolve the dispute. The foregoing position, the Petitioner's counsel's argument invoking Articles 22, 48 and 165 of the Constitution collapsed.

12. A Party constitution was the charter of the party and bound all its members, including the Petitioners, Having voluntarily subscribed to membership of the party and agreed to be bound by the party constitution, the Petitioners could not be allowed to derogate from their vowed obligations to abide by the provisions requiring compliance with internal mechanisms for dispute resolution and rush to court. This was particularly so in the circumstances of the case where the Petitioners were alleging non- compliance with the party constitution by initiating and effecting changes of the officials without minutes or resolutions as required by the Party Constitution.

13. In so far as the Petitioners failed to comply with the internal dispute resolution mechanisms of the 1st Petitioner or failed to exhaust the available remedies in the domestic forum of the party, there was a failure to fulfil vital conditions precedent necessary for commencing this action. This rendered this action premature and incompetent and the court would be perfectly entitled to decline jurisdiction and strike out the Petition.

14. Jurisdiction was to a court, what a gate or door was to a house. That was why the question of a Court's jurisdiction was called a threshold issue. It was at the threshold (that is, at the gate) of the temple of justice (the Court). To be able to gain access to the temple (that is, the Court), a prospective litigant ought to satisfy the gatekeeper that it had a genuine cause to be allowed ingress. If he failed to convince the gatekeeper, he would be denied access to the inns of the temple. The gatekeeper, as vigilant as he always was, would readily intercept and query all persons who intruded into his domain. To be able to ventilate a grievance, a prospective litigant had to ensure that he addressed his complaint to the competent court. That was so that an incompetent court would have no jurisdiction to attend to his entreaty.

Order

Application allowed. Jurisdiction declined.

CHIERA ANDREW NDERITU V NJAU PETER WAIHINYA & ANOTHER
NAIROBI HIGH COURT CIVIL APPEAL E293 OF 2022

WA OKWANY, J

24TH JUNE 2022

Summary of facts

The appellant participated in the nomination exercise as the United Democratic Alliance Party (UDA) Member of County Assembly (MCA) for Pangani Ward in Nairobi in which the 1st Respondent emerged the winner. Aggrieved by the outcome, the appellant lodged a complaint with UDA's Electoral and Nomination Dispute Resolution Committee (EDRC) alleging that the EDRC did not render a conclusive verdict on the matter and instead referred it to the NEB for alternative measures. The dispute was, however, thereafter lodged in the PPDT which set aside the decision of the UDA- EDRC and declared the 1st Respondent validly nominated as the UDA ticket flag bearer for the position of Member of County Assembly (MCA) Pangani Ward. Aggrieved by the decision of the PPDT, the appellant filed the instant appeal seeking orders to set aside the aforementioned decision.

Issues:

1. Whether the Court could determine the quality of the nomination election which was not raised in the pleadings before the PPDT but was introduced in the submissions before the High Court.
2. Whether PPDT usurped the UDA National Election Board's mandate.
3. Whether the 1st Respondent was validly nominated as the UDA flag bearer for the MCA Pangani Ward.

Held:

1. The appellant's argument on the issue of the quality of the nomination election was an issue that was not raised in the pleadings before the PPDT but was introduced in the submissions. The introduction of the issue during submission denied the 1st Respondent the opportunity to substantively respond to it. Courts had taken the position that submissions could not take the place of evidence and that a claimant was required to prove his claim through evidence. The PPDT could

not be faulted in the event that it did not consider evidence that was introduced at the submissions stage.

2. The statement by the National Elections Board (NEB) that the quality of the nomination election was questionable and bound to affect the election results and had requested the Committee to issue appropriate order in the circumstances was a general statement on the quality of the nomination elections which the NEB found to be questionable. The NEB did not, however, tender tangible evidence to show the facts that it relied upon in arriving at the conclusion that the elections' quality was questionable. Furthermore, the NEB did not tender evidence to show how the alleged quality of the elections affected the results and if the alleged poor quality of elections could be attributed to the actions or fault of the 1st Respondent so as to justify the nullification of his nomination.

3. The EDRC did not make any findings on the validity of the nomination exercise or nullify the results before directing the Party on how to proceed. In the instant circumstances and considering the fact that EDRC did not nullify the results of the party nominations, the party had no basis for purporting to conduct fresh nominations. Therefore, PPDT was properly seized with the matter and it acted within its jurisdiction in determining the dispute.

4. The Tribunal was right in its holding that the appellant was unable to prove that the 1st Respondent was to blame for the chaos that arose in the polling stations. The evidence presented by the appellant did not meet the threshold of the standard and burden of proof expected in an election petition.

5. Needless to say, even assuming that it was established, as a fact, that there were instances that could lead to the conclusion that the quality of the nomination election was compromised, courts had taken the position that an election was ordinarily not a flawless process and that there were bound to be mistakes which could be overlooked as long as they do not affect the overall results.

6. Not only did the appellant fail to tender evidence to the required standard, to show that the 1st Respondent was responsible for the alleged poor quality of the nomination elections; the appellant also failed to prove the extent of the alleged flaws and how they affected the overall results of the elections.

Order

Appeal dismissed with no order as to costs.

DAVID AYOI V ORANGE DEMOCRATIC MOVEMENT & 4 OTHERS
NAIROBI HIGH COURT CIVIL APPEAL E014 OF 2022

JK SERGON, J.

1ST JULY 2022

Summary of facts

The appellant filed an appeal to the 1st Respondent's Appeals Tribunal to challenge the manner in which the party nominations were conducted and the subsequent issuance of the nomination certificate to the 3rd Respondent. The ODM Appeals Tribunal heard and determined the appeal in favour of the appellant by nullifying the nomination certificate issued to the 3rd Respondent, but the 1st Respondent issued the certificate to the 3rd Respondent. Aggrieved, the appellant filed a complaint before the PPDT challenging the nomination of the 3rd Respondent which ordered for fresh nominations. However, the 1st and 2nd Respondents still issued a certificate to the 3rd Respondent triggering an application by the appellant citing contempt of court. The Tribunal found that the officials were in contempt but later found that the Respondents were compliant and lifted the contempt orders. Consequently, the appellant preferred the instant appeal.

Issues:

1. Whether the 1st and 2nd Respondents purged their contempt as eventually determined by the PPDT.

2. What an order of fresh nominations refers to.

3. Whether the appellant's political rights were violated by the decision of the Political Parties Disputes Tribunal.

Held:

1. Once an election was nullified, there would be no election and one had to move back to the rules of the party to determine how the fresh nominations were to be done, unless the Court or Tribunal directed otherwise.

2. It was apparent that the 2nd Respondent convened a meeting in accordance with the party's constitution, with the party committee present, as well as the National Elections Board. Following the meeting, it became clear that consensus had failed, so they moved forward with the direct issuance of a nomination ticket in accordance with Rule 23 (2)(e) of the Party's Primaries Rules. There was no requirement to repeat the nomination by universal suffrage made as the order for the tribunal was for fresh nominations.

3. The decision by the 2nd Respondent's central committee to issue a direct ticket to the 1st Respondent constituted a fresh cause of action. Therefore, any party aggrieved by that decision should have first approached the party's IDRM pursuant section 40 (2) of the Political Parties Act.

4. In the prevailing circumstances, the 1st and 2nd Respondent had purged their contempt by conducting the nomination exercise afresh by direct nomination in compliance with the Tribunal's orders. The Tribunal found that by being asked to identify its candidate, the party was given the opportunity to decide its mode afresh after the nullification of the party nominations.

Order

Appeal dismissed. Each party to bear its costs.

David Ruong'o Okello v Peter Owera & another Nairobi
High Court Civil Appeal E352 of 2022

JK Sergon, J

6th June 2022

Summary of facts

The 2nd Respondent, Orange Democratic Movement Party (ODM), conducted its party nominations for Huruma Ward, Nairobi County where the 1st Respondent won and was thereafter issued with an interim nomination certificate. The appellant together with other aspirants filed a joint appeal to the 2nd Respondent's appeals tribunal to challenge the manner in which the party nominations were conducted and the subsequent issuance of the interim nomination certificate to the 1st Respondent. The ODM appeals tribunal heard and determined the appeal in favour of the appellant. The interim nomination certificate which was issued to the 1st Respondent was nullified and the issue of nomination was referred back to the 2nd Respondent. The appellant being aggrieved, proceeded to file a complaint before the Political Parties Disputes Tribunal to challenge the nomination of the 1st Respondent. The Tribunal heard the complaint and made orders striking out the complaint on the basis that it lacked jurisdiction to entertain the complaint since the appellant had failed to first approach the 2nd Respondent's internal dispute resolution mechanism (IDRM). The appellant was again aggrieved, and he preferred the instant appeal.

Issues

1. Whether the tribunal erred in consolidating Nairobi PPDT E059 with Nairobi PPDT 065 both of 2022.

2. Whether there was compliance with the provisions of section 40 of the Political Parties Act in regard to internal dispute resolution mechanism (IDRM).

Held:

1. A careful perusal of the Tribunal's record would reveal that parties actually consented to have the two complaints consolidated. The appellant was therefore

estopped from challenging what he had agreed to be done before the Tribunal. In any case, the appellant had failed to show the prejudice he suffered by the order of consolidation.

2. The decision by the 2nd Respondent's central committee to issue a direct ticket to the 1st Respondent constituted a fresh cause of action. Therefore, any party aggrieved by that decision should have first approached the party's IDRM pursuant section 40 (2) of the Political Parties Act. The appellant did not discharge the obligation. The Tribunal was therefore right to decline jurisdiction in the circumstances.

Order

Appeal dismissed. Each party to bear its costs.

R v Joseph Muriithi Njoka &3 others Kerugoya High Court Judicial Review E002 of 2022

RM Mwongo, J

1st July 2022

Summary of facts

The applicants Judicial Review application sought an order of certiorari to quash the decision of the IEBC DRC dismissing the ex parte applicant's complaint thereby disqualifying the ex parte applicant's candidature for the Member of County Assembly, Karumandi Ward and clearing the 3rd Respondent to contest for the Member of County Assembly Karumandi Ward. The order sought to be reviewed was the decision of the IEBC DRC where the IEBC found that it had no jurisdiction to intervene in political party disputes and dismissed the complaint. The dispute went to the PPDT which nullified the 3rd Respondent's party nomination certificate which he presented to the IEBC Returning Officer (2nd Respondent) who declined to clear him. Dissatisfied, he filed a complaint with the IEBC DRC which declined to clear the complainant, saying it lacked jurisdiction to determine the complaint relating to party dispute. This prompted the instant application.

Issues:

1. Whether the IEBC Returning Officer was at fault in not abiding by the PPDT orders.

2. What was the mandate or jurisdiction of the IEBC DRC.

Held:

1. The PPDT orders were not enforceable against the IEBC or the Returning Officer. Under section 39(1)(a) and (b) of the Political Parties Act (PPA), the jurisdiction of the PPDT was to determine the following types of disputes: disputes between members of a political party; and disputes between a member of a political party and the political party. Under section 41(3) PPA, the decision of the Tribunal was enforceable as an order of a Magistrates Court, obviously as against parties, and the Tribunal was granted the powers of the High Court to punish any acts amounting to contempt – also, obviously, as against the parties to the dispute.

2. The applicant's Party and the Party's Elections Board were the ones that were at fault and in breach of the PPDT orders. As such the proper action was for enforcement action through the PPDT to be invoked against those bodies.

3. The disputes concerning the Party nominations commenced as far back as 14th April 2022, with the party nominations, followed by the party internal dispute resolution mechanism, followed by the PPDT at Nyeri which issued orders on 20th May 2022. In the meantime, the time was ticking inexorably towards the gazetted nomination day by the IEBC, and the applicant ought to have taken note of that fact by seeking early enforcement of orders in his favour by the PPDT as against his party structures.

4. As far as the Returning Officer was concerned, he was not at fault in his actions, which he conducted entirely within the law and the gazetted guidelines.

5. Seven days after parties had provided the name of their nominee, the Commission gazettes the names. It was those persons who were then expected to attend the nomination day set by the IEBC to receive nominees and clear them formally. The IEBC's responsibility at this stage was to ensure that the nominees had the required legal and ethical qualifications and any other qualifications required by law. This was the nomination exercise conducted by the Commission when nominees of parties and independent candidates attended on nomination day.

6. The DRC would be acting ultra vires if it sought to disentangle or determine the dispute between UDA Party and its nominee party members as regards whose name should have been forwarded to the IEBC.

7. It was incumbent on the applicant to ensure its orders obtained from the PPDT had been enforced to enable the Commission to receive from the UDA its rightful nominee.

Order

Application dismissed with costs.

David Shimenga v Independent Electoral & Boundaries Commission & 3 others Kakamega High Court Judicial Review E008 of 2022

PJO Otieno, J

22nd July 2022

Summary of facts

A dispute was initially filed with the PPDT which was heard, and a determination rendered declaring the issuance of a nomination certificate for Ikolomani Constituency MP candidate on the 1st Respondents ticket to the 3rd Respondent illegal and null and void. Aggrieved, the 3rd Respondent applied for a review simultaneously with a Notice of Appeal to the High Court. The Tribunal found that there was demonstrated existence of new material it needed to consider before finally determining the application for review. However, before the review was determined, a cross appeal was filed by the ex parte applicant to the High Court and determined to the effect that the ex parte applicant be deemed the 4th Respondent's nominee and candidate for the position of Member of National Assembly for Ikolomani Constituency while the cross appeal was dismissed. While the matter was pending determination by the High Court, the PPDT acknowledged that proceedings before it had been stayed, and held that its decision on review was ready and had the effect of not disturbing the Judgment of 28th April 2022. The Tribunal then ordered that its decision be uploaded into the system and availed to the parties as and when they requested. That determination, even if not expressly unequivocal, was to the effect that the review application had been dismissed.

The 3rd Respondents then moved to the Court of Appeal which reversed the High Court decision and directed that the 3rd Respondent's application for review be remitted to the PPDT for expedited determination. The ex parte applicant subsequently filed the same dispute with the IEBC DRC which found that as at the date of the decision by the PPDT and 1st and 2nd Respondents, and its own, there was no order barring those Respondents from clearing the 3rd Respondent who had acted lawfully and the decision could not be disturbed. These led to the instant application contending that by the time the 1st Respondent cleared the 3rd Respondent, there was standing

the decision of 28th April 2022. Hence, the clearance was done contrary to a judicial order and therefore the finding by the Committee was equally irrational because by the time it was made, the Court of Appeal had remitted the dispute back to the Tribunal for the determination of the review application.

Issue:

1. Whether by the time the 2nd Respondent cleared the 3rd Respondent, there was a court order or decision that impeded such clearance.

2. Whether the decision being challenged was faulted or tainted by any irrationality, illegality or procedural impropriety.

3. Whether the 2nd Respondent violated any law as rules of procedure and if it acted within the confines of its legal mandate.

Held:

1. While the directions by the Tribunal of 14th May 2022 were by way of giving a road map on how to handle the review application, it went overboard in setting aside the decision of 28th April 2022. It was an overreach by the Tribunal, for the court wondered what other business the Tribunal would undertake by way of review once the decision sought to be reviewed had been set aside. That was a glaring error from which the court seized its mandate under Article 165 (6) of the Constitution, called up the proceedings before the Tribunal, culminating in the order of 14th May 2022; and by way of supervision directed that the orders were improperly and pre-emptily given and were thus set aside to enable the review application be dealt with on a level playing ground. That was improperly given because a tinker with the judgement and orders of 28th April 2022 could only be made after observance of the rules of justice and a fair hearing of the application on the merits.

2. The orders of 19th May 2022 by the Tribunal given with acknowledgement that the High Court had stayed the proceedings before the Tribunal were bad for not only having been given in disobedience of the High Court orders, but also evidently before the parties were heard on the alleged additional materials by way of evidence alleged by the 3rd Interested Party. The Court noted that the way the

Tribunal dealt with the matter on the two occasions was clearly injudicious and a manner that was not expected of a judicial authority. It was that injudiciousness that gave birth to the roller coaster that had undeservedly taken plenty of judicial time. Those orders were equally set aside for being irrational and clearly unjust.

3. The Court of Appeal had decreed that the Tribunal dealt with the matter in an expeditious way towards final determination. That decision by the Court bound the High Court and the Tribunal, hence neither should be seen to ignore or circumvent it. That order should have been observed and complied with in the spirit that electoral disputes must be dealt with timeously, regard being paid to the strict timelines and limited time towards the general elections.

4. Where a body of persons exercising judicial or quasi-judicial authority set to ignore a superior court's order, it exposed itself as irrational. When the irrational door was flung open, the court had to enter the room and call out such irrational conduct and action. In clearing the 3rd Respondent on 6th June 2022, when the High Court order was reigning and the Judgment of 28th April 2022 stood restored, the 3rd Respondent acted irrationally and the Court's tool in *Certiorari* was therefore called into action. The order of *Certiorari* therefore issued, quashing the decision of the 2nd Respondent dated 6th June 2022 clearing the 3rd Respondent, and issuing him with a certificate of nomination for Parliamentary Elections.

5. The decision by the Dispute Resolution Committee was equally irrational for it failed to appreciate the decisions that were existing as at the date the 3rd Respondent was cleared, inasmuch as it failed to appreciate and seek to facilitate the decision of the Court of Appeal directing that the review application be heard by the Tribunal.

6. The order for *Mandamus* was targeted to direct a body or person to perform its statutory duty and mandate. The order was however not available to the court to substitute its decision for that of the supervised body. In the circumstances of this matter, the Court had obscured that the decision by the Court of Appeal needed to be observed and complied with, rather than being ignored or circumvented.

7. To issue Mandamus would make any resort to the Tribunal to determine the review application superfluous and otiose. According to and in observance of

stare decisis and the law that a judicial body must take judicial notice of decisions by other bodies, if relevant to the matter before it, the Court recognized the decree by the Court of Appeal and the need to have it enforced. The relevance of that decision to the court could not be gainsaid. It was beyond refuting because the Court must be read to have said that the mandate to determine nomination dispute between a party and its member was with the Tribunal, which ought to be allowed to execute its mandate.

Order

Order of Certiorari to issue. Prayer of mandamus declined to enable the PPDT deal and determine the pending application for review. Costs to the ex parte applicants.

Deka Alikala v National Elections Board Orange Democratic Movement Party (ODM) & 3 others Nairobi High Court Civil Appeal E314 of 2022

JK Sergon, J

30th May 2022

Summary of facts

The appellant was issued with an official nomination certificate after participating in a successful nomination exercise for the candidate for Member of National Assembly Mandera East Constituency from ODM Party. Later, the 2nd Respondent was also issued with a direct nomination certificate as the ODM candidate for the same position. The appellant felt aggrieved hence filed a complaint with the PPDT. A Preliminary Objection was raised by the Respondents challenging the jurisdiction of the PPDT and failure by the appellant to exhaust the ODM Internal Dispute Resolution Mechanism. PPDT found that it had jurisdiction, that the nomination of the 2nd Respondent was null and void, that the procedure followed in arriving at the decision declaring the appellant the winner of nominations was not explained and an order to conduct fresh nominations was issued. Aggrieved by the decision, the appellant preferred an appeal.

Issues:

1. Whether the timelines within which to nominate candidates and gazette them before the election date had been adhered to in the circumstances.

2. Whether there was an inconsistency in the provisions of the Elections Act and the Political Parties Disputes Tribunal (Procedure) Regulations of 2017 in their provision of timelines required to submit Party candidate names.

3. Whether the nomination certificate issued to the 2nd Respondent through direct nomination was valid in the circumstances.

Held:

1. There was no dispute that the Elections Act had set out a timeline of at least 60 days to the general election within which submission of candidate names for nominations was to be done. The general election date was August 9, 2022. Sixty

days to the general election would therefore start running on June 9, 2022. A complaint filed prior to June 9, 2022 would therefore fall within the statutory timelines. However, rule 8 of the Political Parties Disputes Tribunal (Procedure) Regulations of 2017 indicated that the last date for filing a dispute arising out of party nominations is at least one day from the date set by the commission as the date set for submission of the party candidates' names.

2. The IEBC issued a gazette notice giving a deadline of April 28, 2022 for submission of names of party candidates to the Commission. This meant that the last day to file a complaint before PPDT should have been April 27, 2022. It was clear that the timeline contradicted the one fixed by the Elections Act. The complaint giving rise to the appeal was filed on May 6, 2022.

3. The PPDT correctly interpreted the law and arrived at the right decision by rejecting the Respondents' Preliminary Objection. PPDT did not, *suo moto* extend time within which a party should file a complaint before it but instead addressed its mind to the apparent inconsistency between the statute and the regulations and came to the conclusion that the complaint was filed before it within the statutory timelines. With respect, the PPDT came to the correct interpretation of the law, hence, it could not be faulted.

4. The Tribunal correctly pointed out that there was no clear evidence explaining the process used to issue the appellant with a nomination certificate. However, the issue which was in contention before the Tribunal was the nomination certificate issued to the 2nd Respondent.

5. The Tribunal did not issue an order revoking the appellant's certificate of nomination. Therefore, the finding by the Tribunal that there was no clarity as to how the appellant was issued with a certificate of nomination has no effect on the validity of the certificate issued to the appellant. The Tribunal erred when it failed to grant the appellant the remedies sought even after issuing an order nullifying the certificate of nomination given to the 2nd Respondent.

6. The Tribunal erred by ordering fresh nominations to be done, thus granting the 1st Respondent a chance to issue its preferred candidate a certificate of nomination, yet the appellant still possessed a valid nomination certificate which had not been revoked.

Order

Appeal partially allowed. PPDT order set aside. ODM to declare the appellant as the only validly nominated ODM candidate for Mandera East. Cross appeal dismissed with each party bearing its costs.

Edwin Otieno Odhiambo v ODM National Elections Board & 3 others Kisumu High Court Civil Appeal E043 of 2022

FA Ochieng, J.

23rd June 2022

Summary of facts

On 13th April 2022 the Appellant, Edwin Odhiambo, was declared the winner of the nomination exercise which had been conducted to elect the candidate who would vie for the position of Member of County Assembly for South Sakwa Ward, on behalf of the Orange Democratic Movement Party. The 3rd Respondent being aggrieved with the outcome lodged her petition at the ODM Appeals Tribunal which nullified the nomination, directing for fresh nominations to be conducted. However, the Party and its National Elections Board issued a direct ticket to the 3rd Respondent which subsequently aggrieved the appellant, leading him to lodge an appeal at the PPDT. The Tribunal found that the issuance of the direct nomination ticket was not only illegal but contrary to the principles of Fair Administrative Action and that the action did not meet the requirements under Articles 27, 35 and 81 of the Constitution and therefore ordered for fresh nominations through universal suffrage. Consequently, the instant appeal was filed as well as a cross appeal by the 1st and 2nd Respondents.

Issues:

1. Whether a party having prayed for review could subsequently appeal on the same issue.

2. Whether there was a double nomination in the circumstances.

3. What the implication of using universal suffrage in nominations was

4. Whether the High Court could determine an issue for the first time.

Held:

1. When a party had the option of either an appeal or review, he was obliged to make an election. If he chose to seek review, he could not thereafter lodge an appeal in respect to the same issue.

2. As the 1st and 2nd Respondents had opted to seek review, it was not thereafter open to them to appeal against the decision. It was in the Judgment dated 5th May 2022

that the PPDT ordered the ODM Movement Party to conduct a fresh nomination by way of universal suffrage, within 72 hours. However, if their appeal was in relation to the Ruling dated 26th May 2022, that would imply that the appeal was not challenging the Judgment dated 5th May 2022. If that be the case, it would imply that the Court could not quash or set aside the Judgment dated 5th May 2022, as sought by the 1st and 2nd Respondents.

3. There was no double nomination because when the Party's appeals tribunal had ordered a repeat of the nomination exercise, by necessary implication, the certificate which had been issued to the appellant stood revoked.

4. The very action of challenging the appellant's win, amounted to a challenge of the validity of the certificate which had been issued to him.

5. At paragraph 54 of its judgement, the PPDT noted that the nomination of the appellant had already been nullified by the Party's own Appeals Tribunal. Therefore, the pronouncement by PPDT was superfluous. Whether or not the PPDT made the pronouncement, the fact remained that the appellant's nomination had already been nullified.

6. When PPDT nullified the direct nomination of the 3rd Respondent, it deemed it prudent to make it clear that that of itself would not put the appellant back into the position he was in earlier. PPDT did not require to give a further hearing to the appellant before clarifying the import of its judgement.

7. When a political party had decided to use universal suffrage, the members of the party had been given the mandate to take an active and direct part in choosing the person who was to be nominated as the candidate.

8. If the PPDT or the Court were to determine that a nomination process had to be repeated, the members would have a legitimate expectation that they would, once again, be empowered to choose the candidate who would then fly the party flag in the elections.

9. The contention could not be determined for the first time, by an appellate court. It was not a matter of law. It was a matter of both fact and law. Therefore, if any of the parties wished to have it determined, they would have first raised it before the PPDT. The Tribunal would then have made a determination. It was only thereafter, that the aggrieved party could have placed the issue before the High Court for determination, on an appeal.

Order

Appeal and cross appeal dismissed. Each party to bear its costs.

Eric Wafula Wanyonyi V Gasper Mufutu & 2 Others
Kakamega High Court Civil Appeal E002 Of 2022

WM Musyoka, J

27TH May 2022

Summary of facts

The 1st Respondent and the appellant had participated in party nominations, conducted by the 2nd Respondent, for the position of Member of National Assembly for Kabuchai Constituency, for the party ticket of the 2nd Respondent. The appellant was announced winner which aggrieved the 1st Respondent and lodged a complaint with the Internal Dispute Resolution Committee of the 2nd Respondent. The dispute was determined to the effect that the appellant had not been validly nominated, and the nomination exercise carried out on 18th April 2022 was revoked and the certificate issued to the appellant was cancelled and a direction made that the 1st Respondent be issued with a nomination certificate, as he had fulfilled all the conditions. The Internal Dispute Resolution Committee noted that it did not order fresh nominations on account of time constraints. The 2nd Respondent did not adhere to the orders, thus prompting the 1st Respondent to move to file a complaint with the PPDT who found that the procedure had been followed and it did not find any fault with the internal party process to which the appellant and the 1st Respondent were subjected to. It was noted that the decision of the Internal Dispute Resolution Committee was not final, for there was provision for an appeal to the National Appeals Tribunal, and that the appellant did not present any material showing that he ever filed any such appeal against the decision of the Internal Dispute Resolution Committee. The Political Parties Disputes Tribunal was not persuaded that the appellant had won any appeal against the decision of the Internal Dispute Resolution Committee. It therefore directed the 2nd Respondent to issue a certificate to the 1st Respondent accordingly, hence the appeal.

Issues:

1. Whether the Internal Dispute Resolution Committee had the jurisdiction to handle internal election disputes for the 2nd Respondent.

2. Whether the appellant was served with the complaint that was before the Internal Dispute Resolution Committee.

3. Whether the Respondent presented a valid complaint before a fully quorate duly appointed National Appeals Tribunal within the timelines provided under the Election and Nomination Rules of the 2nd Respondent.

Held:

1. The constitution of the 2nd Respondent had provided for an internal dispute resolution mechanism under Article 23 while the Election and Nomination Rules for the 2nd Respondent had provided for disputes resolution at clause 22.0. From the two sets of provisions, it was clear, that the case by the appellant was that the internal dispute resolution mechanism that the 1st Respondent should have resorted to was the one provided for under the Election and Nomination Rules of the 2nd Respondent, and not the one provided for under the constitution of the 2nd Respondent. Both statutes provided for an internal dispute resolution mechanism.

2. The internal dispute resolution mechanism under the constitution of the 2nd Respondent was not designed to address disputes arising from elections and nominations. It was more about addressing complaints by members of the 2nd Respondent with respect to elected officials of the 2nd Respondents and officials serving in the National and County Governments elected on the ticket of the 2nd Respondent. That explained why Article 23 talked of complaints against the Governor, MPs, Senators and County Assembly representatives, and party officials at the national, branch, sub-branch, ward and polling station levels.

3. The procedure set out under Article 23 of the constitution of the 2nd Respondent was for the purposes of internal dispute resolution mechanism relating to disputes and complaints of that nature, and not elections and nomination disputes. The Internal Dispute Resolution Committee that heard and determined the claim by the 1st Respondent was the one contemplated under Article 23 of the constitution of the 2nd Respondent which was not the proper internal dispute resolution mechanism.

4. The internal dispute resolution mechanism that should apply with respect to elections and nominations was the one contemplated under the Election and Nomination Rules of the 2nd Respondent. This internal dispute resolution mechanism was provided for under Clause 22.0, and it covered disputes arising from elections for party officials and nominations for elections for positions in

National and County Governments, that is for the positions of President, Governor, Senator, Member of the National Assembly, Woman Representative and the County Assembly Representative. The procedure for resolution of such disputes was set out under Clause 22.0. Sub-clause 22.1 provided for the County Appeals Tribunal, which handled disputes arising from nominations of County Assembly Representatives and elections of officials at the County level and below. Sub-clause 22.2 provided for the National Appeals Tribunal, to handle disputes arising from nominations for elections to positions of President, Governor, Senator, Member of the National Assembly and Woman Representative and elections of national party officials for the 2nd Respondent. The internal dispute resolution mechanism that the 1st Respondent should have resorted to was that which was envisaged by Sub-clause 22.2.

5. Jurisdiction was everything. The internal dispute resolution mechanism that dealt with the complaint by the 1st Respondent was not the proper one, that was envisaged by Sub-clause 22.2, the National Appeals Tribunal. The 1st Respondent presented his case before the Internal Dispute Resolution Committee, which was created under Article 23 of the constitution of the 2nd Respondent, a body which did not have mandate to handle election disputes, but whose mandate was in respect of complaints against elected party officials and National and County Government officials elected on the ticket of the 2nd Respondent. To that extent, therefore, the Internal Dispute Resolution Committee lacked jurisdiction to entertain the dispute that was placed before it, and the decision it made was null and void for all purposes.

6. Being served with a hearing notice and with the complaint were two different things. The ruling did not state whether the appellant was ever served with the complaint, and the 1st Respondent had not provided any proof of service of the complaint on the appellant, whether personally or directly, or through post, or through email, or WhatsApp, or notice in newspapers of wide circulation. The Court was persuaded that there was a legitimate complaint by the appellant that he was never served with the complaint, for the 1st Respondent has not provided any positive proof of any service.

7. The 1st Respondent presented his complaint to the wrong forum, the Internal

Dispute Resolution Committee, established under Article 23 of the Constitution of the 2nd Respondent, instead of the National Appeals Tribunal under Sub-clause 22.2 of the Election and Nominations Rules of the 2nd Respondent. Secondly, the decision of the Internal Dispute Resolution Committee was by a panel of three, which was in keeping with Article 23 of the constitution of the 2nd Respondent, save that the 1st Respondent was before the wrong body.

8. The composition of the National Appeals Tribunal, according to Sub-clause 22.2, was a minimum of five members and a maximum of nine. Even if one were to presume that the Internal Dispute Resolution Committee, which handled the complaint by the 1st Respondent, was equivalent to the National Appeals Tribunal, which was not the case, it would have been non-quorate, as quorum was set at a minimum of five by Sub-clause 22.2, and not three.

9. Sub-clause 22.2 required that appeals be lodged with the National Appeals Tribunal within 48 hours of the announcement of results. For the complaints envisaged under Article 23 of the Constitution of the 2nd Respondent, there was no time limitation or stipulation for lodging of the complaints. According to the ruling of the Internal Dispute Resolution Committee, the complaint was received on 21st April 2022, the elections having been conducted on 18th April 2022. One could not tell whether it was done within 48 hours, as none of the parties had provided any evidence as to when the results were announced. Therefore, it could not be determined whether or not the complaint was lodged within the 48 hours envisaged under Sub-clause 22.2 of the Election and Nomination Rules of the 2nd Respondent.

Order

Appeal allowed. PPDT judgement set aside. Nomination of the appellant upheld. Appellants to have the costs.

Evelyne Kemunto Ontiri v United Progressive Alliance Party & 2 others Nairobi High Court Election Petition Appeal E002 of 2022

WA Okwany, J

9th June 2022

Summary of facts

The appellant offered herself for nominations as the 1st Respondent's Member of County Assembly for Manga Ward in Nyamira. However, the nomination was through direct nomination which was given to someone else. Aggrieved, the appellant lodged a complaint before the PPDT which upheld the Respondents' objection and held that the complaint was premature. Further, it lacked the jurisdiction and accordingly struck out the complaint thereby precipitating the instant appeal. An objection to jurisdiction was raised through a Preliminary Objection.

Issues:

1. Whether PPDT erred in finding that it lacked jurisdiction to entertain the appellant's complaint.

2. What constitutes a valid Preliminary Objection.

Held:

1. The validity of any Preliminary Objection was measured against the requirement that it ought to raise pure issues of law capable of disposing of a dispute at once. The court was therefore required to ensure that a Preliminary Objection was not based on factual matters that required proof through evidence.

2. A Preliminary Objection consisted of a pure point of law which had been pleaded, or which arose by clear implication out of pleadings, and which, if argued as a Preliminary Objection, could dispose of the suit. Examples were an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties were bound by the contract giving rise to the suit, to refer the dispute to arbitration.

3. UPA's Election and Nominations Rules, rule 18.8 allowed the Party to adopt direct nomination method while Rule 19 provided for disputes resolution and appeals tribunal. Contrary to the appellant's assertions, the UPA Election and Nominations Rules clearly provided for IDRM. The appellant was therefore required to file her complaint with the party's dispute resolution organ for their determination in the first instance before moving to the PPDT in the event she was not satisfied with their decision.

4. The appellant's undoing was her decision to bypass UPA's IDRM by filing the complaint to PPDT directly thereby contravening the clear provisions of Section 40 of the PPA on the Tribunal's jurisdiction.

5. PPDT made the correct finding that the Tribunal arrived at the right decision in upholding the Respondents' Preliminary Objection to its jurisdiction.

Order

Appeal dismissed. No orders as to costs.

Frederick Omondi Otieno v Oluoch Onyango Nelson and 2 others Migori High Court Election Petition 1 of 2020

RPV Wendoh, J

17th June 2022

Summary of facts

The Petitioner filed the instant election petition challenging the clearance of the 1st Respondent as a political candidate to vie for the Rongo Constituency, Parliamentary position under the ticket of the Jubilee Political Party. The Petitioner argued that: the 1st Respondent's clearance by the 2nd Respondent to run for the Rongo Parliamentary seat under the Jubilee ticket was marred with illegalities; that no statutory timelines were considered because by law, party hopping was no longer entertained and the Elections Act required the 2nd Respondent to have the parties' members register 120 days before elections.

On the other hand, the 1st Respondent filed a notice of Preliminary Objection on the jurisdiction of the court to determine the issues raised in the petition arguing that it was devoid of jurisdiction as the petition offended the provisions of Article 88 (1) and (4) (e) and (f) of the Constitution of Kenya, 2010 (Constitution).

Issues

1. What was the jurisdiction of the Electoral and Boundaries Commission Dispute Resolution committee vis-a-vis the jurisdiction of the Political Parties Dispute Tribunal in the adjudication of electoral disputes.

2. Whether the High Court had jurisdiction to hear and determine an electoral dispute where an aggrieved party had not exercised the available dispute mechanisms.

Held

1. Once a question of jurisdiction was raised in any dispute resolution forum, it behoved the sitting umpire to address it first as it was the lifeline of the court. Jurisdiction opened the gates to litigants to approach the court to articulate their cases. In the absence of jurisdiction, the decision which arose from the court,

was a nullity for it did not have the power and/or authority to hear the matter in the first instance. A court's jurisdiction to entertain a matter was not a mere procedural technicality but went to the very heart of the matter.

2. Article 88 (1) of the Constitution established the Independent Electoral and Boundaries Commission (Commission) which under sub-Article 4 was responsible for the supervising and conducting of elections. Under sub-Article 4 (e) of the Constitution as read together with section 74 of the Elections Act and section 4 (e) of the Independent Electoral Boundaries and Commission Act, which had similar wordings, the Constitution and the 2 statutes provided that the Commission was responsible for:-the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of results.

3. The IEBC Committee exercised original jurisdiction under section 74 of the Elections Act unlike the Political Party Dispute Tribunal which exercised appellate jurisdiction. Accordingly, in matters which purely fell within section 74 of the Elections Act and within the exclusive jurisdiction of the IEBC Committee, the Committee was not deprived of jurisdiction by the mere fact that the complainant did not lodge his complaint with the Party's Internal Dispute Resolution Mechanism. Whereas the PPDT and the IEBC had jurisdiction over electoral disputes, the Court had to interpret their jurisdiction in a manner that did not render one statutory tribunal redundant. The Court had to, in such matters, adopt a purposive interpretation of the respective electoral statutes. Therefore, to interpret their jurisdiction in a manner that gave leeway to parties to either bypass one or ignore decisions made by the other would militate against the purpose for which the two Tribunals were set up.

4. The PPDT dealt with disputes arising from party nominations and that was clear from its jurisdiction. The IEBC, on the other hand, dealt with nomination disputes that did not fall within the jurisdiction of the PPDT since appeals from the PPDT did not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate tribunal over the decisions

of the PPDT. That scenario would also imply that even where a decision of the PPDT had been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. That would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent.

5. Flowing from Article 88 (4) (e) of the Constitution and section 74 of the Elections Act) the Constitution and the Legislature set out to enact various laws on resolution of disputes relating to electoral matters and it was incumbent upon the political parties and their members to adhere to those procedures. There were a host of authorities that had held that when the Constitution or Legislature prescribed the manner in which a dispute should be resolved, that procedure should be adhered to. Therefore, all pre-election nomination disputes were to be resolved, in the first instance, by the Commission's Dispute Resolution Committee.

6. While it was true that the High Court had supervisory jurisdiction and the mandate to determine any electoral disputes under Article 105 of the Constitution, it could only assume jurisdiction on pre-election disputes either on appeal or judicial review from the decisions of the Political Parties Tribunal or the Commission's Dispute Resolution Committee. If the court were to assume jurisdiction in the instant matter, then the parties would be denied a right of appeal on the issue of nomination to the High Court.

7. Assuming that the question of the validity of a candidate being elected to a seat as the one before the instant court, was brought after the election period, the High Court had the powers to examine the nomination process as long as the issue of the candidate's nomination was not challenged before the Commission's Dispute Resolution Committee.

8. Although an election was a process and not an event, at each stage of the process there were specific mechanisms that had been put in place by the law to resolve any disputes which could arise. The doctrine of exhaustion of remedies required that an aggrieved party consider the first avenue to present his grievance before approaching another forum.

9. There was already a similar complaint before the Commission's Dispute Resolution Committee which fact was not controverted by the Petitioner. The foregone crystallised the position that the court by virtue of the provisions of Article 88 (4) (e) of the Constitution, section 74 of the Elections Act and section 4 (e) of the Independent and Electoral Boundaries Commission Act, was divested of jurisdiction to hear and determine the instant pre-election dispute which was a nomination issue. The Petitioner ought to have sought the appropriate remedy in the Commission's Dispute Resolution Committee in the first instance.

Order

Preliminary Objections raised by the 1st, 2nd and 3rd Respondents upheld. Petition dismissed; each party shall bear their own cost.

Fredrick Oduor William Odongo v Eliud Kimari Murimi & another Mombasa High Court Civil Appeal 72 of 2022 (Ruling)

JN Onyiego, J

3rd June 2022

Summary of facts

The appellant had been pronounced the winner for the nomination of ward representative for Member of County Assembly Mkomani Ward seat for the County Assembly of Mombasa. Subsequently, the 1st Respondent challenged the outcome by lodging an appeal at the ODM Appeals Tribunal, which nullified the nomination results and declared the 1st Respondent the winner. Consequently, the 2nd Respondent was directed to cancel the nomination certificate issued to the appellant and issue the 1st Respondent with a fresh one. However, this was not complied with, culminating in the 1st Respondent seeking the intervention of the PPDT. The Tribunal upheld the ODM Appeals Tribunal's decision, thus compelling the 2nd Respondent to implement the orders. This decision was equally not honoured, hence necessitating filing of contempt proceedings. Similarly, the 1st Respondent was found to have been duly nominated; thus, the IEBC was restrained from gazetting anybody else save for the 1st Respondent. Further, summons were to be issued to the ODM National Elections Board to show cause why they could not be committed to civil jail for contempt of the Tribunal's orders. Subsequently, the officials complied with the orders.

Later, the appellant moved to the High Court and filed an appeal as well as a Notice of Motion which was the subject of the instant proceedings seeking stay of execution of the judgement pending inter partes hearing.

Issues:

1. Whether stay of execution orders were available in the circumstances.

2. Whether the appellant was likely to suffer substantial loss if stay orders were not granted.

Held:

1. A party seeking stay of execution orders under Order 42 rule 6 (2) of the Civil Procedure Rules had to prove that he was likely to suffer substantial loss if the order was not granted; the application seeking such order had been filed within reasonable time and; security for due performance of the decree had been furnished.

2. The impugned judgement was delivered on April 29, 2022, and the application filed on May 26, 2022. Accordingly, the application was filed within reasonable time.

3. There was no loss likely to be suffered because the IEBC was yet to gazette the names of candidates. By June 10, 2022, when IEBC was expected to gazette the names of successful candidates, the appeal would have been determined and appropriate orders made. Thus, there was a remedy available.

4. As regards the appeal being arguable with high chances of success, it was not sufficient on its own to warrant stay in the absence of proof of likelihood to suffer substantial loss. The fact that there were strong grounds of appeal alone was not a ground to grant stay.

5. The appeal would not be rendered nugatory as the appeal would be fast tracked to beat the deadlines.

6. Regarding depositing security, none of the parties ever raised it; hence, it was not relevant in the circumstances.

Order

Application dismissed. Parties advised to fast track the appeal.

Fredrick Oduor William Odongo v Eliud Kimari Murimi & another

Mombasa High Court Civil Appeal 72 of 2022 (Judgement)

OA Sewe, J

14th June 2022

Summary of facts

The appellant and the Respondent were members of the Orange Democratic Party (ODM). They both applied to their party for nomination to contest the Mkomani Ward seat for Member of the County Assembly of Mombasa. The appellant emerged successful and was duly issued with an interim certificate of nomination. Aggrieved, the 1st Respondent lodged a complaint with the ODM Appeals Tribunal. The 1st Respondent claimed that he emerged the winner of the party nominations and that the appellant was irregularly issued with a nomination certificate. He contended that the appellant was duly served with the pleadings but chose not to attend the proceedings of the tribunal; and therefore, that the tribunal was justified in proceeding ex parte and upholding his appeal.

The decision of the ODM's Appeals Tribunal was ignored by the National Elections Board, the 2nd Respondent hence necessitating the intervention of the Political Parties Disputes Tribunal (PPDT) at the instance of the 1st Respondent. The PPDT granted orders in favour of the 1st Respondent. The said orders included a declaration to the ODM National Elections Board declaring that it was in contravention of the orders issued by the ODM Appeals Tribunal. The 1st Respondent thereafter filed an application for contempt before the PPDT based on the continued defiance on the part of the 2nd Respondent. The application was heard *ex parte* and the PPDT issued among others, a declaration declaring the 1st Respondent as the ODM nominated candidate for Member of County Assembly, Mkomani Ward.

The instant appeal was lodged a day after the scheduled date for the contempt proceedings against the officers of the 2nd Respondent. The appellant relied on among other grounds that the tribunal erred both in law and fact in allowing the complaint filed by the 1st Respondent and in arriving at the decision absent the participation of the appellant. The appellant thus prayed that his appeal be allowed and the decision of the PPDT be set aside or vacated.

Issues

1. Whether a party could appeal against an enforcement judgement of the Political Parties Disputes Tribunal without tackling the foundational judgement of a political party's appeals tribunal.
2. Whether an application for the setting aside an enforcement judgement of the Political Parties Disputes Tribunal could be brought up for the first time on appeal to the court.

Held

1. Being a first appeal, it was the duty of the court to re-evaluate the evidence adduced before the PPDT with a view of coming to its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses.
2. The right to fair hearing was sacrosanct as one of the non-derogable rights in Chapter 4 of the Constitution of Kenya, 2010. The appellant had the opportunity to take advantage of and fully exhaust the dispute resolution mechanisms provided for under internal party structures of the ODM party as well as under the Political Parties Act before approaching the court for relief.
3. The appellant jumped the gun, so to speak, in not adhering to the doctrine of exhaustion and in appealing the judgement of the PPDT, which was essentially an enforcement decision, without tackling the foundational judgement of the ODM Appeals Tribunal. Moreover, it was impermissible for the appellant to take up the issue of service for the first time on appeal in the manner that he sought to do.
4. The application for setting aside the *ex parte* decision of the PPDT ought to have been made to the PPDT itself pursuant to regulation 24 of the Political Parties Disputes Tribunal (Procedure) Regulations, as opposed to being brought up for the first time on appeal to the court.
5. The decision of the PPDT was in effect an enforcement decision. The judgement of the PPDT was largely in tandem with the judgement of the ODM Appeals Tribunal. Accordingly, it issued an order, among others, directing the 2nd Respondent to give effect to the orders of the ODM Appeals Tribunal. In the absence of a setting aside or review of the decision of the ODM Appeals Tribunal in the manner stipulated by law, there was no basis for the court to find fault with the decision of the PPDT on the merits.

Order

Appeal dismissed with each party to bear its own costs.

Fredrick Wafula Juma v Jubilee Party of Kenya & 2 others
Busia High Court Election Petition 2 'A' of 2022

J R Karanja, J

23rd June 2022

Summary of facts

The 1st Respondent in the spirit of harmonisation and consensus convened a meeting of the four candidates which resulted in the Petitioner being nominated and issued with the necessary Nomination Certificate and signed by the 1st Respondent's National Chairperson and the Chairperson of its National Elections Board. However, contrary to the Petitioner's expectation, his name was never forwarded to the 2nd Respondent. Instead, the name of the 3rd Respondent was. The Petitioner sought an explanation from the 1st and 2nd Respondents and confirmed that the name of the 3rd Respondent was indeed forwarded by the 1st Respondent for gazettement of the 3rd Respondent as the nominated candidate for the Office of Member of the County Assembly for Nambale township Ward. Being aggrieved by the turn of events, the Petitioner brought the instant petition contending that the change of his name to that of the 3rd Respondent was not communicated to him and was made maliciously, irregularly, illegally and in total contravention of the 1st Respondent's constitution and Nomination Rules and also, in contravention or violation of his Constitutional rights under Article 38 (2) and Article 88 (4) of Constitution of Kenya, 2010 (Constitution).

Issue

1. Whether the High Court, as opposed to the IEBC, the PPDT, or a political party's internal dispute resolution body, had jurisdiction to hear and determine election disputes arising prior to the declaration of election results.

Held

1. The Independent Electoral and Boundaries Commission was established under Article 88 (1) with responsibility for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. Such responsibility as specified under Article 88 (1) (4) and included the regulation of the process

by which parties nominated candidates for elections, the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results and the development of a code of conduct for candidates and parties contesting elections.

2. The jurisdiction of the Independent Electoral Boundaries Commission (IEBC) in relation to disputes relating to or arising from nominations was conferred by the Constitution cascading to the Elections Act. Parliament also enacted the Political Parties Act pursuant to Article 92 of the Constitution. The Political Parties Disputes Tribunal (PPDT) was established under section 39 of the Act and conferred with jurisdiction under section 40 to determine disputes between; Members of political party, member of political party and a political party, political parties, an independent Candidate and a political party, between coalition Partners and arising out of party nominations.

3. The instant dispute was in essence between a member of a political party and a political party i.e. the Petitioner and the 1st Respondent respectively over the party's nomination for the elective office of Member of the County Assembly for Nambale township ward. Such dispute fell under section 40 (f) of the Political Parties Act, hence within the jurisdiction of the Political Parties Disputes Tribunal (PPDT). The provision was introduced through the Political Parties (Amendment) Bill 2016, with the intention of addressing the challenge of concurrent jurisdiction with other bodies handling electoral disputes.

4. The first ports of call for disputes arising from the electoral process were the relevant Constitutional and statutory organs created for settlement of such disputes. The IEBC and the PPDT would come into mind for the purposes of the instant disputes. Their existence served to promote the Constitutional tenet of alternative dispute resolution mechanism which had the advantage of ensuring that the issues in dispute were heard and determined by experts in the area and that the dispute was resolved much more expeditiously and in a more cost-effective manner.

5. Besides the IEBC and the PPDT, an alternative first avenue would be the political party's internal dispute resolution body. In the circumstances, the

court could only be a second or even a third port of call-in election disputes arising prior to the declaration of election results and in exercise of its judicial review powers or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution or in the very least, in exercise of its appellate jurisdiction.

6. The doctrine or principle of exhaustion provided that whenever an Act of Parliament provided for a clear procedure or mechanism of redress, the same ought to be strictly followed.

7. The court had to divest itself of the jurisdiction to hear and determine the instant petition, which jurisdiction it never had in the first place, for reasons that the Petitioner failed to invoke and exhaust all or any of the dispute resolution mechanisms available through the 1st Respondents internal dispute resolution mechanisms, the 2nd Respondents Dispute Resolution Committee and the Political Parties Dispute Tribunal (PPDT).

Order

Petition dismissed with costs to all the three Respondents.

George Jalang'o Midiwo v Elisha Ochieng Odhiambo & 2 others Siaya High Court Civil Appeal 26 of 2022

RE Aburili, J

27TH May 2022

Summary of facts

The appellant participated in the nomination of Member of National Assembly for the Gem Constituency, where the 1st Respondent was declared the winner. Aggrieved, the appellant lodged a complaint before the ODM internal Dispute Resolution Mechanism, which dismissed the claim and upheld the nomination of the 1st Respondent as well as the nomination certificate issued. The appellant subsequently filed an application for review of the decision citing an apparent error on the face of the record and lack of consideration of crucial evidence. However, the tribunal upheld its earlier decision prompting the ODM Central Committee to convene. The Central Committee nullified the election of the 1st Respondent and ordered the NEB to issue a direct ticket to the appellant, whose orders were immediately effected. Consequently, the 1st Respondent moved the PPDT to challenge the decision. The PPDT found that the decisions of the ODM Appeals Tribunal were final and therefore the Central Committee had no power to review those decisions. Aggrieved by the decision, the appellant moved to the High Court and filed the instant appeal.

Issues:

1. Whether the Political Parties Dispute Tribunal had jurisdiction to determine a dispute arising out of party nominations before exhausting the IDRM.

2. Whether the Central Committee of the ODM Party had jurisdiction to sit on appeal of the two decisions rendered by the ODM Appeals Tribunal.

3. Whether the Central Committee in convening a meeting to consider the Party Appeals Tribunal decision was acting as a mediator.

4. Whether any of the Party Rules provided for another appeal or review of decisions of the Appeals Tribunal by the Central Committee prior to escalating the dispute to the PPDT.

Held:

1. For the Political Parties Disputes Tribunal to assume jurisdiction to determine the dispute as it did, there was the mandatory necessity that the disputants first and foremost resort to the Political Parties Internal Dispute Resolution Mechanism or an attempt at the same. Upon proof that attempts to resort to internal dispute resolution mechanisms were frustrated, they would then resort to the Political Parties Dispute Tribunal.

2. Invoking the IDRM was not an option but mandatory. Furthermore, each political party was mandated by statute to ensure that their constitutions made provision for internal dispute resolution mechanisms. In compliance with that requirement, Article 15 of the ODM Political Party Constitution made provision for such IDRM.

3. From the definition of mediation according to the Black's Law Dictionary and the minutes and resolutions of the Central Committee which had been filed in court, there was no semblance of a mediation process; instead, there was a decision made by the Central committee to review the decisions of the Party Appeals Tribunal on its own motion. There was no representation or requirement for appearances by the aspirants. None of those candidates were called upon to frame any issues for consideration by the Central Committee. The minutes did not reveal the person who was briefing the Central Committee on what had transpired during the Party nominations Nomination process to warrant intervention by the Central Committee.

4. The resolutions reached by the Central Committee and as placed before the Tribunal were never signed by anybody, yet they were an annexure to the affidavit sworn by the Executive Director of the ODM Party introduced before the PPDT. The resolutions were simply dated.

5. The Central Committee did not exercise any mediation function and none of the disputing parties appeared before it for mediation. The resolutions by the Central Committee, being unsigned, were not authenticated. In addition, the decisions of the ODM Party Appeals Tribunal were final and could only be challenged before the PPDT.

6. Although the appellant claimed that the Central Committee had jurisdiction to relook into the matter, in view of the complaints raised about the conduct of the nomination exercise, it should have involved all the parties in the dispute and accorded them an opportunity to be heard as required under Article 47 of the Constitution of Kenya 2010 and the Fair Administrative Actions Act. That was so because the resolutions affected the political rights and interests of the 1st Respondent, who already had received an interim nomination certificate, and therefore it was important that he was given an opportunity to be heard before any decision was made against him.

7. It was only the Party's Appeals Tribunal that was mandated to resolve disputes arising out of the Party's Party nominations and nominations. Any other organ or body purporting to engage in any dispute resolution as provided for in Section 40 (1) and (2) of the Political Parties Act or recalling of nomination certificate of a candidate by the Central Committee did so in excess of jurisdiction. Furthermore, according to Part V of the ODM Appeals Tribunal (Practice and Procedure) Rules, 2022 on decisions, review and consents, it was clear under clause 24(3) that the decision of the tribunal would be final.

8. If the party was aggrieved by the decision of the Appeals Tribunal, it had the opportunity to move to the PPDT to challenge that decision and not to sit on appeal of the Appeals Tribunal's decision through the Central Committee. The Central Committee acted ultra vires and in excess of jurisdiction when it purported to review the decision of the Appeals Tribunal and made a decision that suited the interests of the appellant and the Party. The Central Committee acted in vain and therefore its resolutions if any were all in vain and void *ab initio*.

9. Even if the appellant wished the court to believe that the action by the Central Committee was a disciplinary matter, he had not demonstrated where those disciplinary proceedings were held and who in particular was being disciplined in their absence, with a nomination certificate that had been issued by the Constituency Returning Officer through a democratic process being nullified and, in its place, a direct ticket issued to another aspirant.

10. Although the appellant complained that the PPDT erred in making a determination which had the effect of imposing a candidate on the people of Gem Constituency, from the material placed on the record including affidavits sworn by the appellant in support of his application for stay of execution of decree, it was the appellant who colluded with the other Respondents to deny the 1st Respondent his hard-earned victory in the Party nominations elections. That was evidenced from the material contradictions exhibited in the appellant's appeal and the affidavit and grounds in support of his application for stay of execution of decree pending the hearing and determination of this appeal.

11. Even if it was the case that there was communication to the 1st Respondent of an intended repeat nomination poll, which claim is denied by the 1st Respondent, and unsupported, from the court's assessment of the circumstances of this case, there was no jurisdiction vested in the Central Committee to review the decision of the Party's Appeals Tribunal, after the Appeals Tribunal had pronounced itself on the dispute that had been filed before it by the appellant.

12. Having so found, and having found that the Central Committee's minutes and resolutions were null and void ab initio, as the Central Committee lacked any semblance of jurisdiction to clothe itself with jurisdiction to purport to sit on decisions of the Party Appeals Tribunal, The 1st Respondent had, through the Appeals Tribunal, exhausted the IDRM and that therefore, any attempt to frustrate the decisions of the Appeals Tribunal as was in the instant case, had to be thwarted by none other than the PPDT.

13. As the Central Committee was barren of and bereft of any jurisdiction, as it was not a legally recognized internal dispute resolution mechanism for Party nominations other than if it was to play the role of mediation which it did not, and instead arrogated itself jurisdiction that exceeded that conferred on it by the Party constitution, that decision was hereby declared a nullity *ab initio*.

14. The PPDT did not err when it found and held that it had jurisdiction to hear and determine the 1st Respondent's amended statement of claim which was challenging the illegal and illegitimate resolutions made by the Central

Committee and the action taken by the 3rd Respondent, through its national Elections Board, of issuing the appellant with a direct nomination ticket for Gem Constituency Parliamentary seat. The 1st Respondent did not have to wait for a decision of a body which was not mandated to determine his fate in order for him to challenge the jurisdiction of that body. There was already mischief by the Party organs and therefore he had the right to seek for a remedy since the internal dispute resolution mechanisms had been exhausted.

15. An unsigned decision was no decision at all. A resolution was a decision, just as a judgement which was unsigned had no validity. The resolution was the basis for the overturning of the 1st Respondent's nomination. However, as the same was not signed, no validity could be attached to the resolution which was dismissed by the PPDT. An unsigned judgement, just like an unsigned pleading, had no legal validity. Since the appellant's foundational document was the unsigned resolution made by the Central Committee, it followed that all actions taken pursuant to that invalid document were invalid.

Order

Appeal dismissed. ODM Party Appeal Tribunal and all PPDT decisions upheld.

Gideon Nzioka Susa v Mahbub Musyoka Mueni & another
Nairobi High Court Election Petition Appeal E285 of 2022

J N Mulwa, J

7th June 2022

Summary of facts

The matter before the court was an appeal against the decision of the Political Parties Disputes Tribunal. The appellant argued that: the Tribunal erred in law and fact in failing to call for the proceedings before the National Elections Appeals Board and thereby formed an opinion devoid of the relevant evidence; and that the Tribunal erred in law and fact by failing to re-evaluate, reanalyse, and re-assess the proceedings and all evidence that had been placed before the National Elections Appeals Board (NEAB) of Wiper Democratic Movement Party and to determine whether the conclusions reached by the board were to stand or not.

On the other hand, the 2nd Respondent questioned the appellant's failure to subject himself to the repeat nominations, asserting that it was a waiver of his legal rights.

Issues

1. Whether failure by an appellant in an electoral dispute to provide materials, documents and evidence relied upon by the Political Parties Disputes Tribunal so they could be scrutinised and analysed by the court was a failure of duty by the appellant.

2. Whether failure by a candidate to subject themselves to repeat election nominations ordered by a tribunal or court was a waiver of his/her political rights.

Held

1. A *prima facie* case in a civil application included but was not confined to a genuine and arguable case. It was a case in which, on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been so infringed by the opposite party

as to call for an explanation or rebuttal from the latter. A *prima facie* case was more than an arguable case. It was not sufficient to raise issues. The evidence had to show an infringement of a right, and the probability of success of the applicant's case upon trial. That was clearly a standard which was higher than an arguable case.

2. Having considered the impugned PPDT's proceedings, the subject of the instant appeal culminating to the judgement dated May 5, 2022, and the grounds of appeal, summarised by the appellant. It was the duty of the applicant/plaintiff or appellant to provide the court or tribunal with all the materials, documents and concrete evidence for it to be able to scrutinise the same to arrive at a well-informed decision. It was never the duty of the court or tribunal to do so. To that extent then, the appellant failed to perform its duty and could therefore not fault the Tribunal for its failures.

3. It was on record that the complainant's, as well as the Respondent's cases before the NEAB were very well analysed; the facts as well as the rules and constitution of the Wiper Democratic Movement (WDM) in regard to Party Primary Nomination Rules, and the Constitution of Kenya, 2010 (Constitution).

4. Article 81(e) of the Constitution stated the mandatory elements for a fair, free and credible election which were; a) by secret ballot, b) free from violence, intimidation, improper influence or corruption, c) conducted by an independent body, d) transparent; and e) administered in an impartial, neutral, efficient, accurate and accountable manner. Article 38 provided that every citizen had a right to participate in a free, fair and regular election based on universal suffrage. At the end, it was the person alleging that the election was not fair, free and credible to prove the said allegations. That was only possible if the proceedings, the process and procedures were scrutinised.

5. The PPDT had considered the proceedings and findings of the NEAB to arrive at the decision it did. Therefore, the NEAB arrived at a fair, just and justifiable decision. The appellant's complaint against the PPDT was neither genuine nor arguable based on the materials placed before the PPDT. The appellant failed to show what rights, as a voter, were infringed by the Respondents at any one time.

6. The appellant willingly failed to participate in the fresh nomination exercise as directed by PPDT. He offered no explanation at all. It was no wonder that he could not lay any blame on the 1st Respondent who was declared the party's nominee, and whose name had since been forwarded to IEBC. Consequently, the appellant had failed to present before the court credible evidence and material facts to facilitate it to conclude that indeed his rights as a voter under the WDM umbrella were infringed.

7. The appellant was well aware of the PPDT's judgement, and the date set for the repeat nomination by the NEAB. If he had won fairly in the first round of nominations, it was not clear why he opted to boycott the repeat election nominations. He tendered no reason at all that the court was aware of, either by his affidavits or by his submissions. The conduct exhibited by the appellant was nothing less than a waiver of his rights as a voter.

8. The doctrine of waiver operated to deny a party his rights on the basis that he had accepted to forgo the same rights having known of their existence. All the parties having been accorded equal opportunity to exercise their political/ voting rights, the appellant could not be heard to argue that he should be granted the orders he sought by the instant appeal. The appellant had failed to persuade the court to set aside the PPDT's judgement.

9. The matter revolved around a political dispute with very strict timelines as set out by the IEBC. Section 1A and 1B of the Civil Procedure Act, and Article 159 of the Constitution mandated courts to facilitate just, expeditious, proportionate and affordable resolution of disputes. Parties were also obligated to assist the court in the efficient disposal of the cases before it.

10. A frivolous and scandalous case was an abuse of the court process; an applicant using the processes of the court in the wrong way, not for agitating a right but for other extraneous reasons. Therefore, the appellants' appeal lacked merit, was scandalous, frivolous, vexatious and an abuse of the court process.

Order

Appeal dismissed; each party bears own costs on the appeal.

JACOB OCHIENG OGUTU V ORANGE DEMOCRATIC MOVEMENT & 2 OTHERS NAIROBI HIGH COURT ELECTION PETITION APPEAL E274 OF 2022

JN MULWA, J

17TH MAY 2022

Summary of facts

The instant matter was an appeal from the decision of the Political Parties Dispute Tribunal (PPDT) where the appellant argued that the Tribunal erred in fact and law by failing to take into account sections 38E, F & G of the Political Parties Act which forbade the 1st and 2nd Respondents from changing the mode of nomination midway without notification to the Registrar of Political Parties and the candidates.

On the other hand, the Respondents argued that upon nullification of the first nomination by the National Elections Board, the entire exercise stood cancelled and the party was at liberty to take out a fresh nomination process in accordance with the Party's Constitution and Election Rules.

Issue

1. Whether a party's choice to change its mode of nomination of candidates, from universal suffrage to direct nomination, due to nullification of the first nullification process was a violation of a candidate's political rights.

2. Whether the PPDT had jurisdiction to hear and determine a nomination electoral dispute where the aggrieved party had not given evidence that he/she had exhausted a party's internal dispute mechanisms.

3. Whether the High Court had jurisdiction to hear and determine an appeal directly from a political party's internal dispute mechanism.

Held

1. Political rights were exercised through a political process involving many actors; the citizens and institutions. That was the process provided for

under the provisions of Chapter Seven of the Constitution of Kenya, 2010 (Constitution) titled "Representation of the People". Those provisions were operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011. It was therefore proper that political rights were realised within a structured process that took into account the larger interests of the society and the need for a free and fair election which was enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.

2. Section 40(2) of the Political Parties Act allowed parties to file their grievances before the Political Parties Dispute Tribunal where the Political Party had no active Internal Party Dispute Resolution Mechanism. On the part of the 1st Respondent (ODM), there was in place an active Internal Party Dispute Resolution Mechanism vide its Rules on party nominations. The 1st Respondent (ODM) had an organ, the Central Committee founded on rules 8(b) and 23(2)(e) at its Party Elections Rules on the matter of Direct Nominations through which the 3rd Respondent was issued with a Direct nomination certificate.

3. The appellant's argument that the cancellation of the nomination by universal suffrage, and referring the matter to the party organ for "appropriate action", and the issuance of a direct ticket to the 3rd Respondent was contrary to the ODM Party Nomination Rules, the Political Parties Act, and the Fair Administrative Action Act was not supported by any legal or factual submissions. The appellant did not point to any rule in the ODM's party election rules that the party contravened in issuing the direct ticket.

4. By referring the matter to the 2nd Respondent for "appropriate action" the PPDT was aware of the several ODM nomination rules and methods of nomination that it could have employed, and not necessarily issuing the direct ticket. In its wisdom and discretion, it decided on a direct ticket method upon consideration of circumstances pertaining to the nominations including, and not limited to timelines, economic and logistical issues.

5. The ODM National Election Board by dint of rule 23 had the mandate to decide which of the nomination methods suited it at the time in point. The PPDT in its judgement noted that when the Party (ODM) was directed to proceed in a

manner compatible with the party constitution, the Nomination and Election Rules, it was thus given an opportunity to decide its mode afresh after the nullification of the primaries held on April 22, 2022.

6. The PPDT was seized of those material facts and rightly rendered that the appellant had not exhausted the Internal Dispute Resolution mechanism before going to the PPDT for redress. That was supported under section 40(2) PPA.

7. Without first subjecting the complaint to issue direct party nomination certificate to the 3rd Respondent by the 1st and 2nd Respondents to the Internal Dispute Resolution Mechanism, PPDT had no jurisdiction, as it rightfully determined. On the matter of lack of notification by the 1st Respondent of the mode it was to use during the fresh nominations, the appellant had failed to establish and demonstrate that 1st and 2nd Respondents did not notify the Registrar of Political Parties and the candidates of its change of mode of nomination from Universal Suffrage to direct nomination.

8. The party complied with its election and nomination Rules, by sending notification through the 2nd Respondent's website and WhatsApp platform to all the relevant parties, that included the appellant. To that end, the court could not be invited to decide and direct the party on how it was supposed to communicate to the parties and other institutions. The 1st Respondent invoked its powers under Party's Constitution, Article 7.5 and rules 3.3 of its Nomination and Election Rules to issue the direct ticket to the 3rd Respondent. Once again, the appellant failed to find any fault in the use of the said rules in the subsequent nomination by the ODM Party.

9. There was nowhere where the appellant attempted, in any way or mode, to invoke the Internal Dispute Resolution mechanism of the 1st Respondent, to complain about the direct nomination of the 3rd Respondent during the 2nd/ fresh nomination process, after the first nomination by Universal Suffrage was nullified and set aside. It was a fresh process, not a repeat process. It was therefore misleading by the PPDT when it held that the impugned nomination and IDRM was conducted when there was no evidence of such an attempt to support this finding.

10. The PPDT Tribunal did not have jurisdiction to hear and determine the complaint. Had the complainant (now appellant) filed a complaint to the ODM Dispute Resolution Organ, registered and duly heard and determination rendered, such proceedings would have been provided to the court. If so, no evidence had been placed before the court, and the court could not act in a vacuum.

11. The High Court had no jurisdiction to entertain an appeal directly from the Internal Party Dispute Mechanism organ, unless it had also brought an appeal to the PPDT from which an appeal could be filed at the High Court. In the absence of compliance with the procedural requirements under the Political Parties Act, 2011, and the Amendments of 2022, it followed that the court too had no jurisdiction to entertain the appeal before it. The court had not been told that the appellant attempted, and if so, in what manner, to subject his dispute to the party dispute mechanism, so as to have reason to bypass it and approach the PPDT.

12. The dispute in the instant appeal fell squarely under the institutions that the Political Parties Act vested jurisdiction. The law required that the said mechanism be exhausted and only upon being dissatisfied would the complainant take the grievance to the Political Parties Tribunal. If still not satisfied, the party had a right of appeal to the High Court from which an appeal lay to the Court of Appeal. To do otherwise would in effect defeat the purpose of the mandate given to the various institutions provided under the law and the constitution.

Order

Appeal dismissed; each party to bear own costs.

Joel Nzuki v Francisca Kwamboka Kibagendi & another
Nairobi High Court Civil Appeal E349 of 2022

JK Sergon, J

7th June 2022

Summary of facts:

The 1st Respondent filed a complaint before the PPDT seeking inter alia the nullification of the certificate of nomination issued to the appellant for the position of Member of County Assembly for Kwa Njenga Ward. He claimed that the appellant was not eligible to participate in the UDA primaries as he had not resigned from employment. The Tribunal in its decision agreed with the 1st Respondent leading to a review application by the appellant which was heard and dismissed. Being dissatisfied with the decision, the appellant preferred the instant appeal.

Issue:

Whether the appellant made out a case for the grant of orders for review before the Tribunal.

Held:

1. The appellant's application for review before the Tribunal was based on discovery of new evidence which after exercising due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed. The appellant was therefore required to establish two tests. First, discovery of new evidence which was not within his knowledge. Secondly, the exercise of due diligence on the part of the appellant.

2. The record showed that the appellant had admitted that he was aware of the existence and the whereabouts of the evidence which had been in his house in Mwingi throughout the case before the Tribunal. The record of the Tribunal further showed that the appellant filed a replying affidavit on time, but he did not attach the letter of resignation which he averred was in his

house in Mwingi. The record did not explain why he could not produce it. The appellant therefore failed to prove the test of due diligence.

3. The Tribunal took into account the applicable principles in determining the appellant's application for review and came to the correct decision to dismiss it.

Order

Appeal dismissed. Each party to bear its costs.

John Millar Otieno v Lawrence Otieno Odhiambo & 3 others High Court at Nairobi Civil Appeal E328 of 2022

J K Mulwa, J.

June 3 2022

Summary of facts

On the 21st April 2022, pursuant to the ODM Party Nomination Rules, the party nominated appellant and issued him with a Direct nomination provisional certificate for the MCA position for Sarang'ombe Ward, Nairobi County. On the same day, the party issued a Notice for nomination of candidates by universal suffrage on the 22nd April 2022 for the same Ward. The appellant participated in the nominations by Universal Suffrage, but lost to the 1st Respondent. The appellant raised a complaint to the ODM National Elections Board (NEB) whereupon deliberations were held, and a decision to uphold the complainant's nomination was reached. Aggrieved, the 1st Respondent appealed to the PPDT which in its determination ordered the 3rd Respondent to issue the complainant the final nomination certificate and forward his name to IEBC. These orders led to the instant appeal.

Issues

1. Whether the ODM party and its NEB conducted two nomination exercises, and if so, which ought to take precedence.

2. Whether the ODM party and its NEB erred in undertaking two nomination exercises.

3. Whether the PPDT decision could be set aside and if the answer was in the affirmative, what orders commended themselves for issuing, in the circumstances of the appeal.

Held

1. The errors on the part of the Party and its NEB caused the confusion. No party in that case ought to be punished or benefit from the confusion or errors save for ODM and its NEB, to the exclusion of the appellant and the 1st Respondent.

2. The appellant who had been issued with the direct ticket held the party to fulfil its promise, and by practice, was under no obligation to heed to the notice to participate in the universal suffrage nominations before his direct ticket was either withdrawn or cancelled.

3. Whether served or not with notice that a dispute had been filed at the PPDT, it was not necessary for the appellant to defend himself. Nevertheless, the PPDT went ahead to issue adverse pronouncements or decisions against him, without proper investigation as to whether he was properly served with the notice of the institution of the complaint and the hearing date. That was another procedural flaw committed by the PPDT to the disadvantage of the appellant.

4. Taking into account the order of priority stated in rule 8 of the ODM Primaries and Nomination Rules, Direct Nomination method ranked high above Universal Suffrage. The party was well aware of the rules when it gave a direct ticket to the appellant. The Court was not persuaded that it was an inadvertent error when it ordered a second nomination by Universal Suffrage. Those errors should not have been visited upon the candidate who was given the direct ticket that dashed his legitimate expectation. No doubt then that the 2nd - 4th Respondents conceded and supported the appeal for setting aside the PPDT's decision.

5. The Party undertook a due diligence exercise on the appellant before handing him the direct ticket; unlike in the case of the 1st Respondent whose character during his service as the incumbent was wanting. Further, it was submitted that the 1st Respondent was no longer a member of the Party. Thus, had the PPDT interrogated those facts and submissions by counsel placed before it, it would have come to a different finding.

6. It was trite and settled that the court would not ordinarily interfere with the internal processes, procedures and dispute resolution mechanisms of a Political Party. Where there was a clear procedure for redress of any particular grievance prescribed under the Constitution or an Act of Parliament, that procedure should be strictly followed.

7. Direct and Indirect Nomination processes were well provided for in the ODM Party Nomination Rules. However, both could not be invoked at the same time, and as stated under Rule 8, Direct Nomination took precedence. There would be no basis at all to hold otherwise. The 2nd, 3rd and 4th Respondents supported the appeal obviously due to the errors they committed in conducting the two nominations at the same time, thus creating the confusion to the candidates, notably the appellant and the 1st Respondent.

8. The party processes and procedures on nominations ought to be followed. The PPDT decision, particularly Paragraph 64(d) where it directed a direct final nomination ticket to be issued to the complainant was out of place and misplaced. The PPDT had no authority or mandate to decide for the party what method it ought to use in the nomination exercise of its various candidates to the political positions. That fell under the jurisdiction of the party itself, guided by its nomination rules and its constitution. It was also outside the Court's mandate to direct the method the party ought to employ in the nomination exercises.

Order

Appeal allowed. PPDT judgement set aside. Dispute referred to the ODM Party and NEB to make a decision on the method of nomination.

John Ndirangu Kariuki v Samuel Mwangi Nganga & another Nairobi High Court Civil Appeal E359 of 2022

JK Sergon, J

20th June 2022

Summary of facts:

The appellant was a member of Jubilee Party of Kenya and he had filed a complaint before the Tribunal alleging that 2nd Respondent had conducted nominations by way of consensus which he participated in and was accordingly issued with a certificate of nomination to contest the position of MP Embakasi Central constituency. However, he later learned that the 1st Respondent had also been issued with a certificate of nomination for the same position. The appellant challenged the existence of the two nomination certificates before the 2nd Respondent's NEAT which delayed in delivering its determination, prompting the appellant to file a complaint before the Tribunal. The PPDT dismissed the complaint filed by the appellant and hence the instant appeal.

Issues:

1. Whether the Tribunal erred by not taking judicial notice that the 2nd Respondent had issued nomination certificates to all its candidates countrywide on April 22, 2022.

2. Whether PPDT was in error for failing to determine which of the two nomination certificates issued was valid.

Held:

1. The 2nd Respondent did not deny issuing two nomination certificates, one to the appellant and the other to the 1st Respondent. It was also not in dispute that the disputants appeared and participated in the consensus building process on April 18, 2022. If by March 25, 2022 the appellant had been issued with a nomination certificate, it would make no sense for him to appear for a consensus building process on April 18, 2022.

2. The Tribunal should have deemed the error on the dates as a typographical error. In other words, the error was not attributed to fraud or forgery on the part of the appellant. The court also took judicial notice of the fact that the 2nd Respondent issued to all its aspirants' countrywide with certificates of nomination on 22nd April 2022. However, the one issued to the appellant, though signed, was not dated by each signatory. Consequently, the Tribunal had erred in its findings over the issue. The appellant had given a plausible explanation on how he came into possession of the nomination certificate.

3. Both disputants were able to give plausible explanations on the process followed until the stage of issuance of the nomination certificates. The Tribunal critically examined the certificate of nomination issued to both disputants and faulted the one issued to the appellant but did not issue any order of cancellation.

4. The appellant was enjoined to tender credible evidence to impugn the certificate of nomination issued to the 1st Respondent, but he miserably failed to discharge that burden of proof therefore the certificate of nomination issued to the 1st Respondent could not be nullified since it was validly issued.

5. The Tribunal had no basis to issue orders nullifying the certificate of nomination issued to the 1st Respondent. The Respondent did not file any counterclaim with a view of beseeching the Tribunal to nullify the certificate of nomination issued to the appellant. In the absence of such a prayer the Tribunal could not issue orders to nullify the certificate given to the appellant. The Tribunal could not therefore be faulted in that respect. The Respondents did not also file any cross-appeal before the court to seek for such orders. Having failed to prove his complaint the Tribunal was right to dismiss the appellant's complaint.

Order

Appeal dismissed. Each party to bear its costs.

JUBILEE PARTY OF KENYA V PAUL BWIRE OUMA & 2 OTHERS
NAIROBI HIGH COURT ELECTION APPEAL E327 OF 2022

JN MULWA, J

7TH JUNE 2022

Summary of facts

The Respondent filed a complaint contesting the appellant's decision to nominate the 1st Interested Party as its candidate in the upcoming election for the position of Member of County Assembly (MCA), Umoja 1 Ward. He claimed that when he went to collect the certificate, he was informed that the nomination certificate had been issued to the 1st Interested Party whose name was forwarded to the IEBC. Upon hearing the complaint, the PPDT allowed the complaint declaring the internal process conducted by the Party was unlawful and thus null and void. Aggrieved by that decision, the appellant lodged the instant appeal.

Issues

1. Whether the Respondent demonstrated an attempt to subject the dispute to the Party's IDRM before filing the complaint in the PPDT.

2. Whether PPDT had jurisdiction to deal with the complaint after the Party had submitted the name of its nominee to the IEBC.

3. Whether the appellant procedurally nominated the 1st Interested Party as a candidate for the MCA position for its Party.

Held:

1. The Respondent had written a letter addressed to the appellant on the nominations for Member of County Assembly for Umoja 1 Ward, where he urged that the matter be addressed with utmost speed and requested to be furnished with the NEAT's decision that dismissed the 1st Interested Party's appeal filed. Notably, however, the letter elicited no response from the appellant despite the fact that the Respondent was its member and had paid the requisite fees to enable him take part in the nomination exercise. Therefore, this sufficed as an attempt to subject the dispute to the appellant's IDRM and thus the jurisdiction of the PPDT had been properly invoked.

2. The appellant could not be heard to be claiming that a dispute had not arisen that required the intervention of NEAT, yet it stated in its response to the Respondent's complaint in the PPDT that the complaint filed by the 1st Interested Party could not be pursued on 25th April 2022 when it was slated for hearing because a decision had already been made to nominate the 1st Interested Party. Clearly, the Respondent's complaint arose from the appellant's decision to nominate the 1st Interested Party.

3. Section 40(1) (fa) of the Political Parties Act was amended on 28th January 2022 by the Political Parties (Amendment) Act No. 2 of 2022 by deleting the words "party primaries" and substituting the same with "party nominations". There was therefore no doubt that the PPDT had jurisdiction to deal with the complaint filed by the Respondent as it was in respect to the nomination of the 1st Interested Party by the appellant.

4. The appellant was simply approbating and reprobating. On one hand, it denied sending the Respondent a text informing him of his nomination as its candidate for that position and on the other hand, it agreed that indeed, the 1st Interested Party lodged a complaint challenging the decision before the appellant changed its mind and gave the nomination certificate to the 1st Interested Party.

5. It sufficed to note that even after reversing its decision to give the Respondent the nomination certificate, the appellant did not communicate the same to the Respondent and declined to respond to the Respondent's letter of 27th April 2022 complaining about the same. Therefore, the PPDT correctly analysed the evidence placed before it before finding that the appellant had indeed nominated the Respondent as its nominee for the seat, but issued the nomination certificate to the 1st Interested Party which was unfair and unjustified in the circumstances.

6. There was no doubt that a political party reserved the right to choose the candidate to represent it in an election. However, such choice must be reached in line with the Party's Constitution and Rules, as well as in observance of a candidate's constitutional rights. In the instant case, the Respondent discharged the burden of proving his allegation that he was nominated by the

appellant before the appellant un-procedurally changed its mind and decided to issue the 1st Interested Party with the nomination certificate. There was evidence on record that the 1st Interested Party's complaint in the NEAT was dismissed for non-attendance and want of prosecution. What that meant was that the appellant's earlier decision to nominate the Respondent as its flagbearer for the subject seat was therefore upheld.

7. All the PPDT did was to affirm the Respondent's nomination, since there was no evidence that it had been cancelled in favour of the Interested Party. The PPDT, by its orders, did not purport to usurp the appellant's powers as claimed. The court could not therefore fault the PPDT for upholding the appellant's own decision.

8. No evidence was tendered that IEBC had since gazetted the 1st Interested Party to contest for the MCA seat for Umoja 1 Ward following the submission of his name by the appellant. As such, the appellant was ordered and directed to comply with the PPDT orders and decree with immediate effect.

Order

Appeal dismissed.

Jubilee Party & 2 others v Mark Ndung'u Nganga & another Kakamega High Court Civil Appeal E003 of 2022

WM Musyoka, J

22nd May 2022

Summary of facts

The complaint before the Political Parties Disputes Tribunal had been brought by the Respondent, who was a member of the 1st Appellant, arguing that the 1st Appellant had contacted him, and other eligible contestants, informing them that the 1st Appellant would issue party nomination certificates on Friday 22nd April 2022, at its headquarters. On that 22nd April 2022, according to the Respondent, the 2nd Appellant intimated to him, categorically, that there would be no nomination for the Member of National Assembly for Makadara Constituency, Nairobi County, on account of a political arrangement between the 1st Appellant and the Interested Party, to zone Makadara Constituency in favour of the Orange Democratic Movement Party. He was aggrieved hence the complaint was placed before the Political Parties Disputes Tribunal.

The case that the Respondent presented before the Political Parties Disputes Tribunal was that when the 1st appellant received his payment for nomination fees, he expected that he would participate in a nomination exercise. On the issue of jurisdiction, PPDT found that it had jurisdiction as there was evidence of an attempt to exhaust the IDRM. It further found that the Respondent had indeed paid nomination fees and had an expectation that a nomination process would be carried out by the 1st appellant and therefore that the Respondent was entitled to the nomination certificate and ordered for its issue.

The appellants applied for a review where it was determined that the scope of review is limited to; (a) discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant or could not be produced at time when decision was made. (b) to correct an apparent error on the face of decision. There is no new information availed before this tribunal that was not canvassed as part of hearing. This formed the subject of the appeal.

Issues:

1. Whether there was a discovery of new facts to warrant an application for review.

2. Whether PPDT had jurisdiction to review its decision against an error of judgement.

3. What the appropriate remedy was in the circumstances.

Held:

1. Review was granted on the basis of the grounds that were summarised in the ruling by the Political Parties Disputes Tribunal of 18th May 2022, that was, discovery of new evidence and error on the face of the record. From the application and the affidavit in support, there was no claim by the appellants that they had discovered any new facts or material that was not available to the Political Parties Disputes Tribunal on 16th May 2022.

2. There was no allegation that there was an error on the face of the record. The only reference to an error in the grounds on the face of the application was that the Political Parties Disputes Tribunal, by ordering issuance of a certificate to the Respondent, made a grave error, by usurping the role of 1st appellant, as there had been no nomination.

3. In the affidavit, there were two references to error. At paragraph 7, the Political Parties Disputes Tribunal made an error in directing issuance of a certificate as it had no jurisdiction in that regard. Paragraph 8 averred that the Political Parties Disputes Tribunal, having found that the 1st appellant had made an error in failing to conduct nominations, should have ordered a nomination exercise to be undertaken instead of directing issuance of a certificate. The references to errors in the application and the affidavit were not with respect to errors or mistakes on the face of the record, which could be corrected or rectified by way of review, but errors of judgement, which went to the core of exercise of discretion, for which review was not available, and for which the right remedy was appeal. Therefore, the appropriate remedy available to the appellants should have been an appeal to the High Court against the order of 16th May 2022.

4. Review was very narrow, it did not go to the merits of the decision or exercise of discretion or the substance of the decision, but had more to do with process. It was about discovery of new evidence, or errors relating to reference to or reliance on the wrong material or use of wrong figures, et cetera. What the appellants raised went to the merits of the decision. Discretion should have been exercised by the Political Parties Disputes Tribunal, to direct a conduct of a nomination exercise as opposed to directing issuance of a certificate of nomination.

5. The exercise of discretion, in that decision, between ordering a nomination to be carried out and a certificate of nomination to be issued, could not be a matter of an error on the face of the record, but that of an improper or inappropriate exercise of discretion.

Order

Appeal dismissed with costs.

JUSTIN B MUTURI & 4 OTHERS v DANIEL K MUNENE & 4 OTHERS
NAIROBI HIGH COURT CIVIL APPEAL E348 OF 2022

JK SERGON, J

6TH JUNE 2022

Summary of facts:

The PPDT delivered a judgement finding that the 1st- 5th Respondents (herein Appellants) Preliminary Objection and all other objections regarding the jurisdiction of the Tribunal were dismissed in their entirety. Further, it ruled that the purported coalition agreement between the 3rd Interested Party (herein 5th Respondent) and 1st Respondent (1st Appellant), on behalf of the Democratic Party of Kenya, was done without authority of the Party and was therefore null and void. Aggrieved by the decision, the appellants thus preferred the instant appeal.

Issues:

1. Whether the Tribunal had jurisdiction to hear and determine the complaint before it.

2. Whether the complaint determined by the Tribunal was filed outside the statutory period.

Held:

1. The Respondents had shown that they made attempts to have the complaint properly resolved before approaching the Tribunal. The Tribunal came to the correct decision to dismiss the appellants' first Preliminary Objection; therefore, it could not be faulted.

2. The Tribunal fell into error in overruling or in dismissing the Preliminary Objection. There was no application made before the Tribunal to extend time to file and admit the complaint out of time.

3. A preliminary point of law could be raised at any time of the proceedings. It was therefore wrong for the Tribunal to hold that the appellants' preliminary was raised too late in the proceedings.

4. The complaint was filed outside the 30 days prescribed by the regulations. It could not be said that the Preliminary Objection was a procedural technicality.

Order

Appeal allowed. Each party to bear its costs.

KEVIN ONDIEK V ABRARI MOHAMMED OMAR & ANOTHER

MOMBASA HIGH COURT CIVIL APPEAL 73 OF 2022

ACA ONGINJO, J

6TH JUNE 2022

Summary of facts

The Appellant/Applicant vide Notice of Motion application sought interim orders of stay of execution and implementation of the judgement rendered by the PPDT, pending the hearing and determination of the application and hearing and determination of the appeal. Pursuant to a judgement by the PPDT, the Tribunal allowed an appeal that had challenged the nomination of the applicant/appellant without hearing the appellant/ applicant. The Applicant/Appellant claimed he was not served with any pleadings/complaint; was never informed that the same was coming up for hearing; was never informed that an appeal had been lodged against him nor was he heard or presented any evidence in support of his case. He therefore claimed that he was condemned unheard and his certificate revoked by the PPDT.

Issue:

Whether the orders sought for stay of execution pending hearing and determination of the application and hearing of the appeal could be issued.

Held:

1. The applicant had not shown he would suffer substantial loss. He had not specified what substantial loss he would suffer if he had no proof he garnered more votes at the primaries than the 1st Respondent. The 1st Respondent had provided evidence to prove that the 2nd Respondents Appeals Board / Tribunal served all parties when he lodged his complaint, and a finding was made in his favour.

2. The applicant was issued with an interim certificate after garnering 142 votes against the 1st Respondents 563 votes and he decided to ignore summons from the Board of the party that allegedly issued him with the interim certificate. That was a display of impunity.

3. The 1st Respondent had proved that service was effected on the applicant and 2nd Respondent proceedings before the PPDT but they ignored the same. There was no evidence to contradict the fact that the applicant was served *via* WhatsApp on a mobile phone number that was registered in his name.

4. The 2nd Respondent, which issued the applicant with an interim certificate, was served and they acknowledged service. The applicant had not satisfied the threshold for grant of stay of execution which he acknowledged had timelines.

Order

Application dismissed with costs to the 1st Respondent.

Kevin Ondiek v Abrari mohammed Omar & another

Mombasa High Court Civil Appeal 73 of 2022

OA Sewe, J

14th June 2022

Summary of facts

The appellant, a member of the Orange Democratic Party (ODM), offered himself for nomination as an aspirant for the position of Member of County Assembly for Kongowea Ward in Nyali Constituency. The appellant averred that, after a competitive nomination process, he was declared the winner and was issued with an interim certificate of nomination. He claimed that he was unaware that, being aggrieved by that decision, the 1st Respondent, who was also a contestant for the same position, had lodged a complaint with the ODM's Appeals Tribunal.

The ODM Appeals Tribunal rendered its judgement in favour of the 1st Respondent. That judgement showed that no appearance was made by the appellant. The Tribunal was therefore persuaded by the uncontroverted submissions made by the 1st Respondent to the effect that he had won the nomination exercise. Consequently, the Tribunal allowed the 1st Respondent's appeal and ordered the 2nd Respondent to officially announce the 1st Respondent as the party's nominee for the Kongowea Ward. As the 2nd Respondent neglected to act on the order, the 1st Respondent approached the Political Parties Disputes Tribunal (PPDT), which endorsed the decision of the tribunal.

As the orders of the PPDT were similarly disobeyed, the 1st Respondent filed an application for contempt before the PPDT. That application was heard *ex parte* and determined in the 1st Respondent's favour, after the PPDT was satisfied that the Respondents were duly served. Aggrieved, the appellant lodged the instant appeal.

Issue

Whether a party could appeal against an enforcement judgement of the Political Parties Disputes Tribunal without tackling the foundational judgement of a political party's appeals tribunal.

Held

1. Being a first appeal, it was the duty of the court to re-evaluate the evidence adduced before the Tribunal with a view of arriving at its own findings and conclusions while giving due consideration for the fact that it did not have the

advantage of seeing or hearing the witnesses. The right to fair hearing was sacrosanct as one of the non-derogable rights enshrined in Chapter 4 of the Constitution of Kenya, 2010.

2. The recourse available to the appellant, granted his contention that he was never served, was to seek the setting aside of the judgement of the PPDT, pursuant to regulation 24 of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

3. The appellant had the opportunity to take advantage of and fully exhaust the dispute resolution mechanisms provided for under internal party structures of the ODM party as well as under the Political Parties Act before approaching the court for relief. That was in accord with the doctrine of exhaustion.

4. The appellant jumped the gun, so to speak, in not diligently adhering to the doctrine of exhaustion and in appealing the judgement of the PPDT, which was essentially an enforcement decision, and yet the decision of the ODM Appeals Tribunal remained intact for all intents and purposes. Moreover, it was impermissible for the appellant to take up the issue of service for the first time on appeal, since the court, in its appellate jurisdiction, was not the right forum for conducting first-hand factual inquiry as to whether indeed service was properly effected.

5. The appellant was not condemned unheard. He had an opportunity under the rules of procedure to present and argue his case and if indeed he was not notified, then he ought to have sought the setting aside or review of the impugned decisions before approaching the court on appeal on the merits.

6. The 2nd Respondent failed to comply within the 48-hour period; the 1st Respondent thereafter filed a complaint with the PPDT for enforcement purposes. The judgement of the PPDT was largely in tandem with the judgement of the ODM Appeals Tribunal. It accordingly issued an order, among others, directing the 2nd Respondent to give effect to the orders of the ODM Appeals Tribunal. In the absence of a setting aside or review of the decision of the ODM Appeals Tribunal aforementioned in the manner stipulated by law, there was no basis for the court to find fault with the decision of the PPDT on the merits.

Order

Appeal dismissed with each party to bear their own costs of the appeal.

Losikany James v Independent Electoral & Boundaries Commission Nairobi High Court Constitutional Petition E313 of 2022

AC Mrima, J

19th July 2022

Summary of facts

The Petitioner, a youth, applied to his political party for consideration for nomination to the County Assembly of Narok to represent the youth as a special interest group in accordance with Article 177(1) (c) of the Constitution. The Petitioner challenged the decision of the Respondent whose effect was that any youth who would be above 34 years within the term of the next Parliament ought not to be nominated to represent the youth as a special interest group. The Respondent filed a Preliminary Objection in response praying for dismissal for want of jurisdiction on the basis of the Constitution and statute.

Issues:

1. Whether the Preliminary Objection was sustainable in law.

2. Whether the Court had jurisdiction over the dispute.

Held:

1. The matter dealt with the interpretation of the Constitution which was the sole duty of the High Court courtesy of Article 165(3)(d) of the Constitution. Indeed, the issue raised was so pertinent as it bordered on the political rights of many Kenyans who were below the age of 34 years but would be over that age in the term of the next Parliament. It was a germane issue calling for the Court's interpretation of the requisite constitutional provisions.

2. In such a scenario, the PPDT and the DRC had no powers to interpret the Constitution. The most they could do, as quasi-judicial entities, was to apply the Constitution.

Order

Preliminary Objection dismissed with costs.

Marcos Kithuku Makau v Mohamed Adan Mohamed & 2 others Nairobi High Court Election Petition Appeal E001 of 2022

HI Ong'udi, J

8th June 2022

Summary of facts

The appellant, an aspirant vying for nomination for the position for Member of County Assembly (MCA) on the Wiper Democratic Movement Party challenged the outcome of the nomination exercise that saw the Respondent emerge the winner. Complaints arose and after consultations it was agreed that a repeat process be conducted through the delegates system in accordance with rule 23 of the nomination Rules. This was done by the Wiper Party, National Elections Board. The Respondent emerged the winner and he was issued with the Declaration of Winner Form and a certificate of nomination. Subsequently, the Respondent learnt that in an unexplained scenario, the party had issued another nomination certificate to the appellant who was a loser in the nomination exercise.

The Respondent followed up and did a complaint letter to the Party as well as a demand letter, which did not elicit a response. At the PPDT, it was found that the complainant was the duly nominated candidate. This necessitated the instant appeal.

Issue:

Whether PPDT had the requisite jurisdiction to hear and determine the dispute.

Held:

1. It would have been expected that the Wiper Party would explain how the two certificates came to be issued. Instead, they dwelt on their mandate of being the first ones to hear any dispute, before it escalated to the Tribunal. Since the appellant claimed to have been the winner he ought to have appeared before the PPDT to explain how he won and got the nomination certificate.
2. Besides claiming original jurisdiction to hear the complaint, the Wiper Party never responded to the Respondent's letters or guided him on the next cause of action. Therefore, the PPDT had jurisdiction to hear the matter in view of how the wiper party had handled the Respondent's matter.

3. After a keen scrutiny of the Respondent's certificate of nomination, which formed part of the annexures filed in court, it was noted that it was dated April 26, 2022 yet the nominations were said to have been conducted on April 28, 2022 which meant that the certificate was signed and issued before the nominations. This error was never noted or explained by the Party to the PPDT.

Order

Appeal allowed. PPDT judgement set aside, and Respondent's nomination certificate set aside.1st Interested Party to conduct fresh and transparent nominations.

Marcos Kithuku Makau v Mohamed Adan Mohamed & 2 others Nairobi High Court Election Appeal E001 of 2022

AC Mrima, J

8th July 2022

Summary of facts

The matter before the court was an appeal from the judgement and decree of the Political Parties Disputes Tribunal. Being dissatisfied with the decision, the appellant sought the following reliefs: a declaration that the nomination of the appellant was lawful and/or legal; an order compelling the 2nd Interested Party to gazette the appellant as the duly nominated candidate for the 1st Interested Party's Member of County Assembly for the Kwa Njenga Ward in Embakasi South Constituency; and costs of the appeal be provided for.

Issues

1. What was the applicable law on appeals to the High Court from the Political Parties Disputes Tribunal.

2. Whether failure to include a decree in a record of appeal rendered the record of appeal incomplete and incompetent.

Held

1. Appeals from the Tribunal to the High Court were provided for in section 41(2) of the Political Parties Act. The provision stated that an appeal would lie from the decision of the Tribunal to the High Court on points of law and fact, and on points of law to the Court of Appeal and the decision of the Court of Appeal would be final. The Political Parties Disputes Tribunal (Procedure) Regulations, 2017 also provided for appeals to the High Court as follows: a person aggrieved by a decision of the Tribunal could, within thirty days from the date of the decision or order, appeal to the High Court.

2. The law applicable to appeals before the High Court in civil matters would, with the necessary modifications, apply in appeals before the Tribunal. A

decision of the High Court would be final. Therefore, the applicable law on appeals to the High Court from the Tribunal was the Civil Procedure Act, Cap 21 of the Laws of Kenya (the Act) and the Civil Procedure Rules, 2010.

3. In the course of perusal of the record with a view to satisfy itself of its sufficiency, the Court did not come across any decree extracted from the judgement of the Tribunal either in the filed Record of Appeal or in the Tribunal file. Although the issue was not brought up by any of the parties, the court was duty bound to look into it since it related to how the jurisdiction of the court was invoked.

4. Once an appeal was lodged, a record of appeal was then filed. The contents of the record of appeal were provided for in Order 42 Rule 13(4) of the Rules. A record of appeal was essentially supposed to be complete with all necessary documents. From the reading of section 65(1) of the Act it was the decree or part thereof that was appealed from the subordinate court or the Tribunal, as in the instant case, to the High Court.

5. Under Order 42 Rule 13(4) of the Rules, a court could dispense with any document to be part of the record of appeal, except the memorandum of appeal, the pleadings and the judgement, order or decree appealed from and in appropriate cases the order giving leave to appeal. Third, the saving grace under Article 159(2)(d) of the Constitution of Kenya, 2010 was inapplicable in the instant case. That was because the provision only applied to matters relating to procedure or form and not the substance thereof as in the instant matter. Fourth, despite clear provisions on extension of time, the appellant never sought for any extension of time to file the decree, nor did it explain any difficulty in obtaining the decree.

6. The letter by the appellant's counsel dated May 25, 2022 to the Executive Officer of the Tribunal, which appeared on Page 119 of the Record of Appeal, only sought the proceedings and judgement. There was no request for the decree. Therefore, the record of appeal was incomplete and hence incompetent.

Order

Appeal struck out with costs.

Martin Mugo Maina v Registrar Of Political Parties & 2 Others Nairobi High Court Civil Appeal E303 Of 2022

JK Sergon, J

30TH May 2022

Summary of facts

The Interested Party was the complainant in the PPDT matter which consisted of several matters which were eventually consolidated seeking the same orders. He prayed for an order compelling the Registrar of Political Parties (1st Respondent) to delist the Interested Party as a member of Azimio la Umoja One Kenya Coalition Party (2nd Respondent). After considering the rival arguments, the Tribunal came to a conclusion that it had no jurisdiction to entertain the complaints and proceeded to order the striking out of the same, hence the appeal.

Issues:

Whether the Interested Party should be allowed to withdraw as a member of the 2nd Respondent.

Held:

1. It was alleged that some unauthorised officials executed documents binding the Interested Party as a party of the 2nd Respondent. It was clear from the material placed before the Tribunal and before the High Court that the issues raised by the appellant were in respect to failures and inactions by his own political party, the Interested Party.

2. Such issues fell squarely within the ambit of his Political Party's Internal Dispute Resolution (IDRM). It was also apparent that the grievance by the Interested Party revolved around its own procedures for joining and leaving the coalition, which issues faced within the Coalition's IDRM as specified in the coalition agreement.

3. Under the provision of Section 40 of the Political Parties Act as read with the Political Parties (Amendment) Act, it was mandatory for coalition political

parties to have IDRMs, which mechanism was the first port of call before a party could approach the Tribunal. It was apparent that the appellant did not demonstrate to the Tribunal that he attempted to obtain information pertaining to the coalition agreement under Article 35 of the Constitution of Kenya, 2010 as read with the Access to Information Act. Therefore, it could not lie in the mouth of the appellant and the Interested Party to claim that they were not aware of the contents of the coalition agreement.

4. With regard to the challenge of the validity or otherwise of the coalition agreement, those were the issues which ought to be resolved within the Coalition Internal Dispute Resolution Mechanism and the Interested Parties IDRM. In the circumstances of the instant appeal, it was clear that The Tribunal had no jurisdiction to entertain the complaints under Section 40 (2) of the Political Parties Act, therefore the Tribunal rightly ordered the striking out of the complaints.

Order

Appeal dismissed. Each party to bear its own costs.

Maurice Atieno Gari v National Elections Board (Orange Democratic Party) & 3 others NAirobi High Court Election Petition E003 of 2002

H I Ong'udi, J.

8th June 2022

Summary of facts

This was an appeal against the decision of the PPDT. The appellant and 4th Respondent were Orange Democratic Party (ODM) candidates contesting for nomination to vie Nairobi West Ward County Assembly seat in the general elections. The party nominations were held on 22nd April 2022 at Madaraka Primary School. The appellant was not satisfied with the voting process which he alleged was marred by irregularities, illegalities and non-compliance with the law. The party declared the 4th Respondent as the winner of the party nomination. He was again dissatisfied and challenged the nomination at the ODM Appeals Board and thereafter to the PPDT. Aggrieved with the decisions of the ODM Appeals Board and PPDT having upheld the nomination of the 4th Respondent, he resorted to a further appeal and hence the instant appeal.

Issue

Whether the alleged irregularities, illegalities and non-compliance with law rendered the nominations void.

Held

1. The legal parameter upon which a nomination election or an election for that matter could be nullified was where a party showed that the alleged irregularities affected the election result. This therefore meant that a party who sought to challenge the election / nomination result must prove its case.

2. No evidence was submitted to prove that there were forgeries and false documents as alleged. The appellant from the record alluded to the violence being instigated by the 4th Respondent's people. However, no evidence was adduced to that conclusion.

3. The 1st Respondent's officers did not in their affidavits state how the violence had affected the election result. It was also not shown that the cast votes were irregular, or the election process came to a complete halt defeating the election process in totality. The appellant admitted that the nomination voting process was conducted in accordance with the 1st Respondent's rules and only took issue with the cited alleged irregularities. The appellant had not proved his case against the Respondent to warrant nullification of the nomination results. In this regard the Tribunal's pronouncement was legally sound, and there was no reason to make this Court interfere with it.

Order

Appeal dismissed with costs. PPDT judgement upheld.

Mogendi Wilson Saiya v Independent Electoral and Boundaries Commission & 2 others Migori High Court Election Petition 5A of 2022

RPV Wendoh, J

15TH July 2022

Summary of facts

The appellant filed the appeal being aggrieved by the decision of the IEBC Dispute Resolution Committee and prayed that the ruling of the Committee be set aside and be substituted with an order directing the 1st Respondent to gazette the appellant's name as the 2nd Respondent's candidate for Kuria West Constituency for the National Assembly seat. The 1st Respondent's Dispute Resolution Committee had found that it lacked jurisdiction to hear and determine the complaint before it and that it was a dispute arising out of party nominations as contemplated under section 40(1) of the Political Parties Act, 2011.

Since the complaint was against the decision of the 2nd Respondent to nominate him, the appellant ought to have initiated the dispute to the internal Political Party Dispute Resolution Mechanism as stipulated under the section 40 (2) of the Political Parties Act as read with section 13 (2A) of the Elections Act. It was further deponed by the Respondents that the appellant did not file a complaint with the 2nd Respondent's Internal Dispute Resolution Committee or the Political Parties Dispute Tribunal; that after the appellant realised that he had failed to file a complaint with the 2nd Respondent's Internal Dispute Resolution Committee and the Political Parties Dispute Tribunal, he filed as an afterthought, a complaint before the 1st Respondent's Dispute Resolution Committee which had no jurisdiction to hear the matter; that the 1st Respondent through its Kuria West Returning Officer stated that the appellant's name had not been forwarded by the 2nd Respondent to the 1st Respondent.

Issues:

1. Whether the 1st Respondent had jurisdiction to hear and determine the complaint filed by the appellant.

2. Whether the 1st Respondent acted within the law in clearing the 3rd Respondent under the Orange Democratic Movement ticket as a nominee of the Kuria West Member of Parliament.

Held:

3. The Political Parties Dispute Tribunal (PPDT) had jurisdiction to hear and determine disputes arising from party nominations prior to the general elections. Section 40 (fa) of the Political Parties Act No. 11 of 2011 provided that the Tribunal had the jurisdiction to determine disputes arising out of party nominations. Section 40 (2) precluded the Tribunal from determining disputes which had not been heard and determined through the political party's internal dispute resolution mechanism in the first instance. In the event a party was not satisfied, then a right of appeal lay to the High Court on points of law and fact but on points of law only to the Court of Appeal.

4. It was not clear from the pleadings whether the candidates desirous of contesting the Kuria West Parliamentary seat under the 2nd Respondent's ticket were subjected to a popular vote or it was a direct nomination exercise. The court could not speculate which process was used.

5. If at all the appellant was convinced that awarding the nomination certificate to the 3rd Respondent violated his legitimate expectation of being the nominee for the Kuria West Parliamentary seat, he should have lodged his complaint with the 2nd Respondent's internal dispute resolution in the first instance.

6. The 3rd Respondent had put up a strong case by producing a certificate of nomination which showed that he was declared the winner to be the flag bearer of the 2nd Respondent's party ticket for the Kuria West Member of National Assembly position. Whether the ticket was issued through a voting process or direct nomination was still unknown. On that basis, since the 1st Respondent's Dispute Resolution Committee was confronted with names of two nominees claiming clearance under the same political party's ticket, it meant that the issue was one of nomination and hence an intra - party dispute. They should have been referred to the 2nd Respondent's Internal Dispute Resolution Mechanism created by the Rules made by the 2nd Respondent.

If dissatisfied with the decision of the tribunal, then the appellant would have appealed to the Political Parties Dispute Tribunal under Section 40 (f) (a) of the Political Parties Act. From the Political Parties Dispute Tribunal, the appellant would then move to the High Court. The 1st Respondent correctly declined to entertain the matter because it lacked jurisdiction. Therefore, the 1st Respondent lacked the jurisdiction to hear and determine the nomination complaint before it.

7. As was the norm in the political season, when a candidate had been cleared to vie on a particular political party, presentation of the nomination certificate was not a secretive affair. The occasion was ordinarily pompous with the supporters of the nominee celebrating the victory. Even if it was a quiet and secretive affair, the rumours of clearance of a particular candidate were always known. It was not clear why the appellant had to wait until the time when the 3rd Respondent was cleared to file a dispute. This was an afterthought. The appellant hoped that he would be issued with the nomination certificate, which promise did not come to pass.

8. The clearance of the 3rd Respondent by the 1st Respondent to vie for the Kuria West Member of Parliament under the 2nd Respondent's political party was procedural and in accordance with the law.

Order

Appeal dismissed. Appellant to bear costs.

Moses Odhiambo Ochele v Allan Gordon Ojuki & 3 others
Kisumu High Court Civil Appeal E037 of 2022

JN Kamau. J

13th July 2022

Summary of facts

On May 27, 2022, the court delivered a Judgement directing the 2nd and 3rd Respondents to conduct fresh nominations by way of universal suffrage within seventy two (72) hours of the date of the judgement and/or adopt any of the nomination methods set out in Rule 8 of the Orange Democratic Movement Party Primaries Election Rules as approved by the National Executive Committee held on February 12, 2021 with the consent of all the candidates who would be participating in the fresh nominations for East Kano/Wawidhi Ward. On June 16, 2022, the 1st Respondent filed a Notice of Motion seeking orders that the court cite the chairperson of the 3rd Respondent for contempt of the Judgment and Orders of the court issued on May 27, 2022, and commit them to civil jail and/or sentence them accordingly under the law. He also prayed that the Independent Electoral Boundaries Commission (IEBC) be barred from gazetting the appellant as the 2nd Respondent's nominated candidate for the position of Member of County Assembly East Kano/ Wawidhi Ward pending the hearing and determination of his present application. This formed the basis of the court's determination in the matter.

Issues

1. Whether an order for contempt of court could validly issue in the circumstances.

2. Whether due to the statutory strict timelines in elections the orders of court could be circumvented.

3. Whether the 2nd and 3rd Respondents right to a fair trial was violated by conducting the contempt of court proceedings through affidavit evidence and written submissions.

Held:

1. The purport of the order was that the first point of call for East Kano/Wawidhi Ward was for the nominations to be conducted by universal suffrage within seventy-two (72) hours from the date of judgement. Nomination by any of the other methods set out in Rule 8 of the 2nd Respondent's Party Primaries Nomination Rules was to be by consent of the participating candidates of East Kano/Wawidhi Ward. In other words, it was only the parties who could consent to dispensing with the nominations by way of universal suffrage and adopt other nomination methods provided in the aforesaid Rules.

2. If consent by the participating candidates was not arrived at, the only route for the nominations of East Kano/ Wawidhi Ward was to be by way of universal suffrage. There was no role of the Central Committee in issuing a direct ticket to the appellant herein in the event parties were unable to arrive at a consensus.

3. The court order was self-regulating and needed no further interpretation or action by the 2nd and 3rd Respondents. It was their purported attempt to interpret the court order in a manner that was not intended by the court that led to the filing of the contempt of court proceedings and thus put the entire process of gazettement of the candidate for Member of County Assembly for East Kano/Wawidhi Ward in jeopardy.

4. Notably, the 1st Respondent did not file a Supplementary and/or Further Affidavit to rebut the 2nd and 3rd Respondents' assertions regarding the efforts that were purportedly made to build consensus or whether or not the 2nd and 3rd Respondents in fact called for nominations under universal suffrage as was directed by the court. That notwithstanding, the 2nd Respondent's report was silent on the question of whether or not the 2nd and 3rd Respondents even attempted to conduct the party nominations by way of universal suffrage in the first instance as had been ordered by the court.

5. There was a lacuna as to what transpired between 27th May 2022, when the court delivered its judgement, and on 4th and 5th June 2022 when the consensus meeting was called. It was apparent from the Report that universal

suffrage was not a mode of nomination that was considered by both the 2nd and 3rd Respondents.

6. The issues of strict timelines of the 1st Interested Party and the popularity of the appellant, hence the adoption of nomination by way of issuing a direct ticket to the appellant, were immaterial because parties could not disobey orders on the ground that time was running out or because the appellant was best placed as a candidate to deliver the ticket for the 2nd Respondent in East Kano/ Wawidhi Ward.

7. The court was well aware that the nominated candidates for members of county assemblies were to submit their papers to the 1st Interested Party by June 7, 2022 and hence there was sufficient time for the 2nd and 3rd Respondents to have complied with its orders to conduct fresh nominations by way of universal suffrage.

8. The 2nd and 3rd Respondents did not comply with the court order of 27th May 2022, and they deliberately and intentionally disobeyed its court order and circumvented the court's orders to issue the appellant a direct ticket so as to lock out the 1st Respondent, an action that infringed on the 1st Respondent's fundamental and constitutional rights.

9. The 2nd and 3rd Respondents' decision to issue a direct ticket to the appellant was deliberate and intended for the reason that the terms of the court order were clear, they had proper notice of the court order and they acted in breach of the court order. It was not an accidental or unintentional disobedience as the 2nd and 3rd Respondents had submitted.

10. Due to the strict timelines, parties opted that the contempt of court application proceed by way of affidavit evidence and written submissions. The 2nd and 3rd Respondents were thus given full opportunity to present their cases through the affidavit evidence that they adduced and consequently, the contempt of court proceedings did not violate their right to fair trial as envisaged in Article 50 of the Constitution of Kenya, 2010 as they had contended.

11. The fact that the 3rd Respondent operated as a team was in the mind of the court irrelevant. The 3rd Respondent's Chairperson could not escape liability as she was in charge of managing the nomination exercise. The 2nd and 3rd

Respondents were artificial persons who could only comply with court orders through its officials who were natural persons.

12. Contrary to the 2nd and 3rd Respondents' assertions, it was they who had prejudiced the 1st Interested Party's preparation and the electorate of East Kano's participation in the elections for East Kano/Wawidhi.

13. Notably, whereas the court ordinarily had power to revoke any certificate issued by the 1st Interested Party as had been ably argued by the 1st Respondent, no such prayer was placed before the court for consideration. Therefore, the court could not grant such an order.

14. The 1st Respondent's Notice of Motion application that was dated June 15, 2022, and filed on June 16, 2022, was defective and incompetent having been filed by a counsel who was not properly on record.

Order

Application allowed. Previous interim orders set aside. *No order as to costs.*

National Elections Board v Kepher Ojil Odongo & another
Nairobi High Court Civil Appeal E317 of 2022

JN Mulwa, J

3rd June 2022

Summary of facts

The 1st Respondent wrote to the appellant expressing interest to contest for the Member of County Assembly (MCA) for Luanda South Ward Vihiga County on the ODM ticket. However, before the scheduled nomination exercise, the 1st Respondent filed a complaint before the PPDT claiming that there was rumoured to be carried out a direct nomination in favour of the 2nd Respondent. He alleged that he wrote to the appellant twice protesting the move and even raised an objection in a consensus meeting, but his letters elicited no response. The PPDT determined the complaint by allowing the 1st Respondent's complaint and ordering the appellant to conduct a nomination process within the provisions of rule 18 of the ODM Elections and Nominations Rules. Being aggrieved by the decision the appellant filed the instant appeal.

Issues:

1. Whether the PPDT had jurisdiction to hear and determine the 1st Respondent's complaint.

2. Whether the 1st Respondent had demonstrated an attempt to subject the dispute to the internal dispute resolution mechanism.

3. What was the effect of the 1st Respondent's gazettement as an independent candidate for the MCA Luanda South Ward.

4. Whether the PPDT had jurisdiction to hear and determine the 1st Respondent's complaint.

Held:

1. Rule 12(2) stated that the appeal filed in the party's Appeals Tribunal would take the form of an appellant's statement of appeal or Form AT2 whilst Rule 12(3) could be interpreted to mean that were party primaries or nomination of candidates were concerned, the decision of an election official was what set the party's appeal process in motion. That meant that there could not be a dispute capable of being appealed to the ODM Party's Appeal Tribunal in such instances unless and until an election official made a formal decision in respect to the process.

2. The 1st Respondent merely wrote letters to the party complaining about an alleged rumour that the appellant was considering granting the 2nd Respondent direct nomination to contest for the Member of County Assembly, Luanda South Ward on the ODM ticket. However, there was no evidence that a decision had formally been made in that regard by an election official. It was therefore safe to conclude that no dispute had arisen in respect to the ODM nominations or party nominations in the 1st Respondent's ward of interest as at the time the 1st Respondent filed the complaint in the PPDT.

3. The 1st Respondent did not produce any evidence of an appeal electronically lodged by himself in the ODM Appeals Tribunal *vide* a Statement of Appeal in the form envisaged under Rule 13 of the ODM Appeals Tribunal Rules or by his representative vide Form AT2 under Schedule 2 of the Rules. The 1st Respondent, being a life member of the ODM party, was bound by its rules and could not therefore purport to skip the party's laid down dispute resolution mechanism. The numerous letters written by the 1st Respondent to the party did not satisfy the requirement under section 40(2) of the Political Parties Act. Therefore, the 1st Respondent did not demonstrate that he made any attempt to subject any purported dispute to the internal dispute resolution mechanisms.

4. The 1st Respondent's complaint in the PPDT was un-procedurally and prematurely lodged. The PPDT erred by abrogating itself jurisdiction in the matter and by failing to find that there was no dispute between the parties capable of determination by the Tribunal. Further and in any event, courts

had held that the PPDT's role was limited to ensuring that the nomination method used by parties complied with the party's constitution and rules but not to dictate to parties which method to adopt.

5. The PPDT had no jurisdiction to entertain the complaint lodged by the 1st Respondent. The entire decision of the PPDT was thus a nullity *ab initio* and the orders made in its impugned judgement were incapable of being implemented.

6. Nothing had been presented before the court to show that the 1st Respondent lodged a fresh appeal in the party's Appeals Tribunal or a fresh complaint in the PPDT after the 2nd Respondent was given a direct nomination to contest for the MCA Luanda South Ward on the ODM Party ticket. What had been presented before the court by the appellant was a Special Issue of the Kenya Gazette Notice in which the 1st Respondent was listed as one of the independent candidates who had been cleared to contest the general election scheduled for August 9, 2022. This evidence had not been controverted by the 1st Respondent.

7. Even assuming that the 1st Respondent had successfully challenged the direct nomination of the 2nd Respondent in the PPDT, the fact that he had already been gazetted as contesting the subject seat as an independent candidate, barred him from participating in any nomination process conducted by the ODM party.

Order

Appeal allowed with no order as to costs.

Nevil Chemuku Napwori v Samuel Kagwanja Muchungu & Another Nairobi High Court Civil Appeal E346 Of 2022

JK Sergon, J.

6th June 2022

Summary of facts

This was an appeal against the decision of the PPDT. The appellant and 1st Respondent were both members of the 2nd Respondent, who had named the 1st Respondent as the party nominee for the position of Member of County Assembly, Gitothua ward – Kiambu County. The appellant, aggrieved by this decision, filed a complaint with the 2nd Respondent. Upon service, the 1st Respondent responded by stating that he would not be in attendance. The Party found merit in the complaint lodged and set aside the 1st Respondent's nomination certificate and ordered the issuance of a nomination certificate to the appellant. Subsequently, the 1st Respondent moved the PPDT who determined the complaint by setting aside the decision by the PPDT and nullified the nomination of the appellant. This decision hence prompted the instant appeal.

Issues:

1. Whether PPDT had jurisdiction to hear and determine the dispute before them.

2. Whether PPDT gave orders which were not sought in the dispute by ordering the issue of nomination certificate to the complainant (1st Respondent).

Held:

1. The appellant lodged a complaint against the nomination exercise conducted by the Party and a decision was rendered. It was apparent from the record that the 2nd Respondent's IDRM was approached, and therefore it could not be said that there was no attempt at IDRM. The complaint was properly before the PPDT and therefore the PPDT properly assumed jurisdiction pursuant to the provision of Section 40 (1) and (2) of the Political Parties Act.

2. The complainant had specifically sought from the Tribunal for the complaint to be subjected to a fair hearing. The Tribunal erred by granting an order which was not prayed for. Save for this ground alone, the Tribunal properly determined the complaint which, in case, was properly before it.

Order

Appeal allowed. PPDT judgement of 23 May set aside. Nomination certificate of appellant set aside. Complaint remitted to the 2nd Respondent's National Elections and Nominations Appeals Tribunal for fresh hearing and determination within 24 hours.

Nick Evance Okoth Ochola v Ted Marvin Odhiambo & 3 others Nairobi High Court Civil Appeal E384 of 2022

JK Sergon, J

20th June 2022

Summary of facts:

The appeal arose from the decision of the Political Parties Dispute Tribunal where the complaint was found to be merited and the 2nd and 3rd Respondents were ordered to submit the name of the 1st Respondent as their nominee to IEBC. The appellant having been aggrieved by the decision filed the appeal.

Issue:

Whether the Political Parties Dispute Tribunal had jurisdiction to determine the dispute filed before it.

Held:

1. With respect, the Tribunal correctly determined that it had jurisdiction as the complainant before them had demonstrated that he had attempted to invoke the 2nd Respondent's IDRM. It could not be said that the complaint before the Tribunal was time-barred. There was clear evidence that the complaint before the Tribunal was filed after the 1st Respondent attempted the 2nd Respondent's IDRM.

2. The appellant had not been cleared by IEBC to run as a candidate. The Tribunal had jurisdiction to enforce party rules by even ordering IEBC to remove the name of a person found to have been un-procedurally and illegally submitted to IEBC by a political party like in the instant case.

Order

Appeal dismissed. Each party to bear its costs.

ODM National Elections Board & another v John Ombewa Gare & 2 others Kisumu High Court Civil Appeal 44 & 45 of 2022 (Consolidated)

FA Ochieng, J

21st June 2022

Summary of facts:

The Tribunal had rejected the appellant's application for review of the orders to conduct fresh elections through universal suffrage for purposes of identifying the person whom the political party would nominate as its candidate for the position of Member of County Assembly 9MCA) West Sakwa Ward. The appellants had in the review application sought for extension of time to enable them comply as well as for the Tribunal to allow them to conduct the repeat nomination process in any other way. However, the Tribunal rejected the application and hence the instant appeal.

Issues:

1. Whether PPDT had jurisdiction to specify the method that must be used in the repeat primaries.

2. Whether the appeal, having been filed by an advocate who was not properly on record, was invalid.

Held:

1. It was not for the PPDT to dictate to the 2nd and 3rd Respondents the method to use in the party's nominations exercise. That was the preserve of the 2nd Respondent. The only rider was that the method employed had to be in conformity to the law and to the party's constitution and rules.

2. According to the provisions of section 38A of the Political Parties Act, a political party was entitled to make a choice whether to conduct party nominations by direct nomination or indirect nomination.

3. The party did make a choice to conduct its primaries through universal suffrage. It was the way in which that exercise was conducted that gave rise to the initial complaint.

4. When the PPDT ordered the party to conduct repeat primaries, the Tribunal was essentially saying that the process be conducted again. It was only after something had already been done, at least once, that when it was done again, it could be termed as a repeat.

5. The party and its Elections Board had chosen universal suffrage, in the first instance. Therefore, when the PPDT told them to conduct a repeat of the process, that could only be done using the process which they had initially chosen and utilised. By giving the order for repeat of the process, and making it clear that it be done through universal suffrage, the PPDT did not usurp the mandate of either the party or the party's elections board.

6. One of the contestants in that case had ceased to be a member of the political party whose nomination process had been disputed. He had decided to become an independent candidate. In those circumstances, the rules governing the party's nomination process were no longer applicable to him. More significantly, the independent party could not demand a repeat of the process, because whatever nomination process that would be conducted, would be without him.

7. There was no merit in the contention that it was the PPDT that chose for the political party the method for use in the nomination exercise. The choice had already been made by the political party and its relevant organs. The PPDT simply directed that the exercise be repeated.

8. The appeal had been filed by an advocate who was not properly on record. The issue of legal representation was vital, because it enabled the court and the opposing party to know who was the actual legal mouthpiece of a party.

9. He or she who had legal authority and mandate to take action on behalf of a party, literally stood in the stead of that party. His or her actions were binding upon the party. It was important that when the court or the opposing party was dealing with an advocate who represented the party, there was confidence that such an advocate could enter into binding discussions on behalf of his or her client.

10. The change of advocates did not, of itself, prejudice the other parties in the appeal. The issue of representation could be resolved through ratification, subsequent to the institution of the appeal process. However, in the

circumstances prevailing, where time was of the essence, the appeal was prosecuted before the issue of representation had been resolved but just because time was not available to enable the 2nd Respondent's advocate to resolve the issue was not a proper reason to ignore it.

11. Parties ought to be ever vigilant when dealing with cases which left little or no margin for error. They ought to strive to comply with the applicable law, in the first instance. Nonetheless, whilst non-compliance should ordinarily lead to the striking out of an appeal, the court opted to give consideration to the substantive issues raised.

12. If the 1st Respondent was so keen to reap the fruits of the Judgment, he could not simultaneously be heard to be seeking to challenge the very judgement whose fruits he wanted to harvest. If there was to be a repeat process for nomination, the necessary implication was that there was nobody who was, at the time, holding a valid nomination certificate.

Order

Appeals dismissed. Each party to bear its costs.

Omar Haji Salat v United Democratic Alliance & 2 others
Nairobi High Court Civil (Election) Appeal E499 of 2022

JK Sergon, J

18th July 2022

Summary of facts

The appellant was one of the contestants for the United Democratic Alliance (UDA) Party nominations for the position of Member of National Assembly, Eldas Constituency. He claimed that he attended an interview and subsequently was issued with a nomination certificate certifying him as the duly nominated candidate. Further, he averred that a party list of nominees bearing his name was forwarded to IEBC and that IEBC issued him with a certificate of registration for parliamentary elections and subsequently gazetted. Conversely, the 3rd Respondent states that he was nominated as the UDA flag bearer and that he was issued with a nomination certificate.

However, he averred that when he went to present his nomination papers, the Returning Officer, Eldas constituency turned him away and informed him that the IEBC had already cleared the appellant as the UDA candidate for Eldas constituency. Being aggrieved, the 3rd Respondent filed a complaint before the Political Parties Disputes Tribunal (PPDT) which was later withdrawn paving the way for the 3rd Respondent to file an appeal to the UDA-EDRC challenging the actions that led to issuance of a nomination certificate to the appellant. The Committee declined jurisdiction but later, on a review application noted that the 3rd Respondent was the valid UDA's nominee. Dissatisfied, the appellant filed a complaint to the PPDT where it was dismissed and the UDA-EDRC decision upheld. This prompted the appellant to file the instant appeal.

Issues:

Whether the UDA-EDRC and the PPDT had jurisdiction to entertain the Respondent's complaint and appeal.

Held:

1. The law had expressly provided that the only time the IEBC could assume jurisdiction over a dispute relating to the nominations was when the party nominations were over, and the nomination papers/certificates presented to the IEBC for clearance.

2. It was not in dispute that the 1st Respondent forwarded to the 2nd Respondent the party list of nominees bearing the name of the appellant and in turn the 2nd Respondent cleared the appellant and proceeded to gazette his name as the UDA candidate to contest as the Member of National Assembly for Eldas constituency in Wajir County. The 3rd Respondent in the circumstances should have approached IEBC DRC and not UDA EDRC. UDA EDRC erred in law when it entertained the 3rd Respondent's appeal because it had no jurisdiction.

3. PPDT erred in upholding the UDA EDRC decision which decision was made without jurisdiction.

Order

Appeal allowed. PPDT judgement and decree set aside and substituted with an order striking out and dismissing the decision of UDA-EDRC. Costs to be borne by the 3rd Respondent.

Oscar Oluoch Ouma v Independent Electoral & Boundaries Commission & 3 others Homa Bay High Court Constitutional Petition 1 of 2022

KW Kiarie, J

6TH July 2022

Summary of facts

The Petitioner sought orders for a declaration that the decision made by the Respondent through its Dispute Resolution Committee (DRC) violated the Petitioner's rights under Articles 19, 20, 24, 25, 38, 40, 47 & 50 of the Constitution and the same be quashed and set aside and a writ of Mandamus to issue compelling the Respondent to list the Petitioner as a candidate running for the position of MCA for South Kabuoch ward on an Orange Democratic Party (ODM) ticket for the August 9th general election. It was contended that the 2nd Interested Party (ODM) held a preliminary nomination in respect of South Kabuoch/Pala ward. Massive violence was reported. On May 1, 2022, the PPDT nullified the nomination of Oscar Aluoch Obote Auma as a nominee for South Kabuoch/Pala ward on account of violence and ordered a repeat. Subsequently, ODM granted the appellant a direct nomination certificate contrary to the order by PPDT to conduct fresh nominations by universal suffrage. Another dispute was filed, and the nomination of the Petitioner was nullified on grounds that the 2nd Respondent violated the orders of the PPDT. In its decision, the PPDT ordered fresh nominations by universal suffrage within 72 hours.

Issues:

1. Whether the petition met the constitutional threshold to warrant determination.

2. Whether PPDT had exceeded its jurisdiction by directing the mode of nominations to be applied by the political party.

Issues:

1. Whenever a party approached court with a constitutional petition, for it to be sustainable it had to satisfy some basic threshold. It had to identify the constitutional provisions that were alleged to have been violated or threatened to be violated and the manner of the violation or threatened violation. This ought to be done with some reasonable degree of precision.

2. The petition was pleaded with precision as required in constitutional petitions. Equally, the Petitioner had provided adequate particulars of the claims relating to the alleged violations of the Constitution. It was therefore properly placed before the court. It was the duty of the court to make a finding whether it was merited or not.

3. When the Tribunal ordered that the 2nd Interested Party's Election Board conduct fresh nominations through universal suffrage of its members, it exceeded its jurisdiction. The Political Parties Act had left it open to a political party to choose one of the two options to fulfil its mandate without direction from any quarter. The PPDT order of May 1, 2022 was null and void *ab initio* since it exceeded its jurisdiction.

Order

Petition allowed. PPDT orders quashed and set aside. A writ of mandamus to issue.

R v Independent Electoral and Boundaries Commission & 8 others Nairobi High Court Judicial Review E086 of 2022

AK Ndung'u, J

13th July 2022

Summary of facts

The applicants moved the court in an application seeking a declaration to issue that the 1st Respondents decision to decline jurisdiction to hear and determine disputes relating to nominations, upon IEBC's receipt of the name of a candidate nominated by a political party, was null and void ab initio for being in violation of Article 88 (4) (e) of the Constitution and section 13 of the Elections Act. The applicant averred that having complied with the party requirements they participated in Party nominations for the Member of County Assembly for Nyayo Highrise Ward in Langata which were marred with violence and no credible results were rendered. That notwithstanding, the 4th Respondent was issued with the certificate. Aggrieved, all the aspirants, save for the 4th Respondent, lodged a formal complaint to the ODM National Elections Board Chair objecting to the outcome and seeking a fair, credible process to be conducted which complaint elicited no response.They moved to the ODM Elections Appeals Tribunal where the nomination was annulled and a repeat nomination ordered, or in the alternative, that the Party employ any other formula for arriving at a party candidate for the ward seat pursuant to ODM constitution.

Despite serving the verdict on the National Elections Board, the 3rd Respondent, they still proceeded to award the party ticket to the 4th Respondent. Subsequently, the 2nd and 3rd Respondents challenged the decision before the PPDT who nullified the nomination of the 4th Respondent and directed fresh nominations, which decision was disregarded yet again. The applicants moved to the IEBC DRC who dismissed the complaint for want of jurisdiction. This led to the instant appeal.

Issues:

1. Whether the 1st Respondent through its Dispute Resolution Committee had jurisdiction to hear and determine the complaint before it.
2. In what instances could the jurisdiction of the IEBC DRC be invoked.

Held:

1. The dispute before the IEBC DRC was one between members of a political party and a political party which was covered by Section 40(1)(b) of the Political Parties Act. The applicants had initially invoked their party's IDRM and even went before the PPDT where it was directed that fresh nominations be conducted. Through their party, the 4th Respondent was issued with a direct ticket meaning the 2nd and 3rd Respondents complied with the order of PPDT to conduct fresh nominations save that they elected a direct ticketing method according to Rule 8 of the 2nd Respondent's Party and 3rd Respondent to conduct a repeat nomination exercise, or in the alternative, the Party was to employ any other formula for arriving at a party candidate for the ward seat, pursuant to ODM Constitution and rules thereunder, provided that the process was fair, credible, verifiable and accountable. The issue of fresh nominations was spent, the Party having elected to award the certificate to the 4th Respondent by direct ticket.

2. Given the clear intent of the legislature in section 40 (1) (fa) of the political Parties Act, it could not rightly be argued that disputes arising out of party nominations were intended to be commenced at the PPDT without having to first, submit such disputes to a party's IDRM. If that were the case, it would be tantamount to giving concurrent jurisdiction to several bodies, including the Independent Electoral and Boundaries Commission, which under Article 88(4) (e) of the Constitution was empowered to settle disputes relating to or arising from nominations. In order to realise the objective of the aforesaid amendment, which was to address the challenge of concurrent jurisdiction with other bodies handling electoral disputes, it was only proper that all disputes arising out of party nominations be commenced at party level. The legislature could have inadvertently failed to include paragraph (fa) under subsection (2) of section 40.

3. Under section 9 of the Political Parties Act as read with regulation 23 of the Second Schedule to the Act, every political party must have an internal party dispute resolution mechanism. Further, section 13 (2A) of the Elections Act required political parties to hear and determine all intra party disputes arising

from political party nominations within thirty days. That in essence implied that any form of dispute between members of a political party, including disputes arising out of party nominations, must first be placed before the party's IDRM, unless, and for good reason, the nature of the dispute was such that the party's IDRM could not grant the disputants or one of them a fair hearing.

4. Disputes under paragraphs (a), (b), (c), (e) and (fa) of section 40 should first be instituted before a party's IDRM. If a disputant demonstrated to the party's IDRM's satisfaction that the dispute ought to be heard and determined by the PPDT, the matter could thereafter be filed before the PPDT. The sieving mechanism provided by section 40(2) must be respected and safeguarded. To the extent that all disputes arising out of party nominations were disputes between members of a political party, then the party's IDRM ought to have been the first port of call. Hence, both the PPDT and the High Court did not err in their interpretation of section 40 of the Political Parties Act.

5. When a dispute arose regarding the second repeat nominations, the applicants ought to have invoked their party's IDRM before approaching the IEBC DRC. A fresh cause of action or dispute had arisen between the members of a political Party and the Party. The aggrieved Members first port of call was the Party's IDRM and IEBC DRC was spot on in declining jurisdiction.

Order

Application dismissed. Each party to bear its costs.

SHADRACK MACHANJE NAMUNYU & OTHERS V JOSEPH OUMA NDONJI & OTHERS NAIROBI HIGH COURT CIVIL (ELECTION) APPEAL E413, E414, E430 & E433 OF 2022 (CONSOLIDATED)

JK SERGON, J

1ST JULY 2022

Summary of facts

This was a determination of four appeals which were consolidated seeking to challenge the Ruling and Order delivered by the PPDT that it had the jurisdiction requisite jurisdiction to determine the contempt application. The contempt of court was filed by the 1st Respondent who sought, inter alia, orders that the chairman of ODM be cited for contempt together with the chairperson of ODM's National Election Board and a further order to nullify the nomination of the appellant and accept the 1st Respondent as the duly nominated candidate for ODM's Umoja 11 ward.

Held:

1. This being a nomination dispute, the proviso of Section 74(1) of the Elections Act would come into play, where IEBC would assume jurisdiction to entertain the dispute. The jurisdiction of the PPDT was clearly set out under the provisions of Section 40 of the Political Parties Act. The PPDT did not have jurisdiction to make a determination in respect to the dispute, in the absence of anything to indicate that internal dispute resolution mechanisms were undertaken firstly.

2. The allegations of contempt of the orders being quasi-criminal in nature were not proved to the required standard of proof.

3. In view of the proviso of Article 88(4)(e) of the Constitution, the Committee had jurisdiction to make a determination on the complaint as it did. There was nothing to suggest that the matter was res judicata or that the Committee acted in excess of its powers as alleged on appeal.

Order

Civil (Election) Appeal No. E413 of 2022 and Civil (Election) Appeal No. E414 of 2022 meritorious and are allowed, with costs to the respective appellants therein. The ruling and order delivered by the PPDT on 14th June 2022 in Tribunal Case No. E044 of 2022 set aside and substituted with an order dismissing the application dated 6th June 2022. Civil (Election) Appeal No. E430 of 2022 and Civil (Election) Appeal No. E433 of 2022 dismissed with no order on costs. The judgement delivered by the IEBC Committee on 20th June 2022 in Complaint No. 204 of 2022 upheld.

Shadrack Machanje Namunyu & others v Joseph Ouma Ndonji & others

Nairobi High Court Civil (Election) Appeal E413, E414, E430 & E433 of 2022 (Consolidated)

JK Sergon, J

18th July 2022

Summary of facts

This appeal and Nairobi HCCA Nos. E414, E430 and E433 of 2022 were ordered to be consolidated since they involved the same parties and arose from similar proceedings. The applicant submitted that there was an error apparent on the face of the record in that had the court considered the material on record it could have appreciated the fact that the Internal Dispute Resolution Mechanism (IDRM) with ODM was sought and thus the law was complied with. The applicant was emphatic that there were no elections and/or nominations conducted on 31st May 2022 in Umoja II Ward. Thus, the court was urged to review and set aside its judgement delivered on 1st July 2022.

Issues:

1. Whether the application before court qualified to be regarded as an application for review.

2. Whether the court misapprehended the facts and thus misapplied the law when it ordered for fresh nomination exercise to be conducted.

Held:

1. The application prima facie qualified to be regarded as an application for review. If it was true that the court misapprehended the facts of the case, then that was an issue in which a court could examine its record and make a determination whether or not to review its decision based on facts misrepresented. While examining such facts, a court would basically be perusing the record to see whether the error was apparent on the face of record.

2. The Internal Dispute Resolution Mechanism (IDRM) with the ODM party in respect of the nomination certificate issued to Shadrack Machanje Namunyu was sought as shown by the further affidavit filed before the PPDT which the Tribunal considered on its merits. It was therefore clear that the court made a factual mistake when it concluded that a fresh nomination was conducted on 31st May 2022 which required parties wishing to challenge the same to first approach the party IDRM.

3. A re-examination of the record revealed that the nomination certificate of 31st May 2022 issued to Shadrack Machanje Namunyu could not arise *vide* the judgement of PPDT of 14th May 2022, because the ODM party was barred from forwarding his name since he did not meet the requirements of the provision of regulation 15(5) (b) of the ODM Party Nomination Rules.

4. The court inadvertently failed to consider the further affidavit of John Ouma Ndonji (the applicant), which was filed before the PPDT. Had this court considered the aforesaid affidavit it would have arrived at a different conclusion.

Order

Notice of Motion allowed. Appeals dismissed.

Susan Nyambura Njuguna v John Karanja Gachingiri & 2 others Nakuru High Court Civil Appeal E063 of 2022

JM Ngugi, J

25th May 2022

Summary of facts

The appellant in the instant case filed the instant appeal praying that the court be pleased to make an order setting aside or discharging the orders of the Tribunal in its judgement delivered on May 6, 2022; and with its own finding that the 2nd Respondent's Electoral and Nominations Disputes Resolution Committee was indeed justified in cancelling the provisional certificate that had been issued to the 1st Respondent, and a declaration that the nomination exercise undertaken by the 2nd Respondent with respect to Njoro Ward, Nakuru Constituency on April 14, 2022 was not verifiable and unaccountable, and in the circumstance, an order be issued, directing the 2nd Respondent to conduct a fresh nomination exercise in accordance with its constitution.

Issue

Whether the difference in data between forms 43Bs and 6As was proof that the nomination results were tampered with and as such the process was null.

Held

1. On the question of alleged violations of the Fair Administrative Action Act and fair hearing standards by the Committee against the Cross-Appellant, the evidence available demonstrated that the Cross-appellant was duly served with the litigant's complaints and that he was accorded fair hearing. It was, further, his choice not to file any documents before the Committee.
2. The cross-appellant raised a novel argument for the first time. He claimed that he had a right to file a further internal appeal to the National Executive Committee of the 2nd Respondent by dint of Article 38 of the Constitution of the 2nd Respondent. The cross-appellant claimed that he attempted to file an appeal to the NEC but was met with intransigence necessitating his filing an appeal to the Tribunal. The court did not have on record the Constitution of

the 2nd Respondent to refer to – which was really a different way of stating that the issue ought to have been developed and documents submitted at the first two layers of the forums. In any event, the point raised by the cross-appellant – that he was denied access to a forum to appeal – was made moot by the fact that he later appealed to the Tribunal which took up his case.

3. The Tribunal was dismayed that the Committee proceeded to declare the appellant the winner after concluding, from the Committee's own analysis, that the nominations were marred by malpractices. The Tribunal also faulted the Committee for using the wrong standard to reach its verdict: "balance of probabilities" as opposed to "above balance of probabilities but not as high as beyond reasonable doubt" – the standard enunciated in Kenya by the Supreme Court in the *Raila Odinga* Case.

4. The analysis and conclusion of the Tribunal were correct only to the extent that there was little basis on the part of the Committee to reverse the results announced at the Constituency Tallying Centre in the face of Form 34B. However, as the Tribunal's own analysis showed, the Committee, as part of the Party, was the custodian of the other electoral materials – including the original Form 6As which the appellant claimed contained different results. It, therefore, behoved the Committee to call for and scrutinise those forms, especially to the extent that a valid foundation for challenging their credibility and authenticity had been raised. The fact that the Committee failed to do so fatally vitiated its own findings. However, it did not, *ipso facto*, improve the Tribunal's conclusions.

5. The choice to go by the results in the impugned Form 34B was problematic – not only because it was unsigned by the Returning Officer or the agents of the parties but because its credibility had been plausibly questioned by the appellant. It was also problematic to rely on that form because the Party failed to produce the other Forms 6As which provided the raw data which was entered into the Form 34B and in the face of credible demonstration by the appellant that in at least one polling station the numbers had been tampered with. It would be to treat the appellant less than fairly to close the Courts' eyes to this evidence where the custodian of the documents failed to bring them to light. The Tribunal erred in its third stated reason for ruling that the Cross-Appellant was validly nominated:

6. The appellant was clear right from the Committee stage that she was only able to produce four Form 6As because those were the only polling stations, she was allowed to take photos thereof with her phone. It was also true that the 2nd Respondent, as the owner and custodian of the electoral materials used during the nomination exercise had all the other Form 6As. While it was not clear why the 2nd Respondent did not make those documents available, it would be unfair to conclude that the appellant's case failed merely because the 2nd Respondent failed to make the material available. The appellant had made a case strong enough to require the 2nd Respondent to produce all the Form 6As for scrutiny. It was probable – going by the two legible Form 6As produced – that the data in those forms might have quantitatively affected the results of the elections.

7. The cross-appellant did not dispute that Wycliffe Kunga was a polling official. Neither did the 2nd Respondent which, of course, was responsible for employing and deploying the said Wycliffe Kunga as a polling official. Indeed, the party merely admitted that the "process was marred with irregularity. Therefore, the question of Wycliffe Kunga being a polling official was established; and was, indeed, unrebutted. The documentary evidence adduced by the appellant at the Committee stage that the said Wycliffe Kunga was actively campaigning for the cross-appellant was clear: he, indeed, was doing so. The conclusion, then, was that the nominations exercise was irregular if only for that reason.

8. After due consideration of the evidence about the extent, nature, and prevalence of irregularities, anomalies, failures, errors and omissions propagated by the 2nd Respondent and in its conduct that attended the nomination election for Member of County Assembly for Njoro Ward on a UDA ticket in the election held on April 14, 2022, it was clear that the election was conducted so badly that it was not substantially in accordance with the law as to elections. Based on the evidence produced, it was not possible to determine with certainty who the winner of the nomination exercise was.

Order

Appeal and cross-appeal partly allowed. Each party to bear its costs.

ZAKAYO ONGONDO OGUMA V GEOFFERY OTIENO OPIYO & 3 OTHERS KISUMU HIGH COURT CIVIL APPEAL E034 OF 2022

JN KAMAU, J

13TH JULY 2022

Summary of facts:

On May 27, 2022, this court delivered its judgement, directing the 1st and 2nd Interested Parties to conduct fresh nomination by way of universal suffrage within seventy-two (72) hours from the delivery of the judgement and only to employ any other nomination method with the consent of all the candidates who participated in the nomination exercise. In his Notice of Motion, the 1st Respondent sought orders that pending the hearing and determination of the application, an injunction be issued restraining the 3rd Interested Party from gazetting the name of the appellant as the 2nd Interested Party's candidate for the position of the Member of County Assembly for South Kasipul Ward in Kasipul Constituency within Homabay County. He also sought orders that the Chairperson of the 1st Interested Party and the 3rd Interested Party's Returning Officer for Kasipul Constituency, be held in contempt of court for wilful disobedience of the court judgement and orders issued on May 27, 2022, and upon being held in contempt, they be jailed for a period of six (6) months or such period the court may deem fit.

Issues:

1. Whether the application was a nullity in law as the 1st Respondent had sought leave to commence contempt of court proceedings contrary to the provisions of the law.

2. Whether the Chairperson of the 1st Interested Party was responsible for executing the court orders on behalf of the Party.

3. Whether an order for contempt of court could validly be issued in the circumstances.

4. Whether due to the statutory strict timelines in elections the orders of court could be circumvented.

5. Whether the court was *functus officio* in the circumstances.

Held:

1. A court could always dismiss an order that had been sought if it was not anchored on any provision of the law. Courts ought to exercise caution in dismissing matters in limine, especially where there were other substantive prayers that had been sought in an application that contained an order that had no basis in the law. The court therefore found that it was proper for it to determine the application on merit.

2. The court's interpretation of the use of the word "otherwise" in Rule 81.8 of the English Civil Procedure Rules envisaged many other modes how a person could be notified of judgement and order and that it was not only limited to notification by telephone and email. In fact, restricting the mode of how notification could be done in this technological era would be foolhardy as the means of electronic communication evolved with each passing day.

3. The appellant's submissions that no certificate was tendered in court in accordance with Section 106B of the Evidence Act were neither here nor there because when the Court delivered its decision on May 27, 2022, the parties were present personally or represented by counsel. Personal service was dispensed with as was contemplated under Rule 81.8 of the English Civil Procedure Rules and for all purposes and intent, the contemnor was deemed to have been duly aware and notified of the court's orders in her capacity as the 1st Interested Party's Chairperson, a position that she acknowledged she held, as she was ably represented by counsel.

4. Arguing that the 1st interested person Chairperson was a first among equals in the 1st Interested Party did not negate the fact that she was aware of the court orders. Being the Chairperson of the 1st Interested Party, that was charged with the duty of conducting the 2nd Interested Party's party nominations, she deliberately failed to comply with the orders. Arguing that the orders were not directed to her was splitting hairs as the 1st and 2nd Interested Parties were artificial persons who could only comply with court orders through its officials who were natural persons.

5. The purport of the order was that the first point of call for South Kasipul Ward, in Kasipul Constituency was for the nominations to be conducted by universal suffrage within seventy-two (72) hours from the date of judgement.

Nomination by any of the other methods set out in Rule 8 of the 2nd Respondent's Party Primaries Nomination Rules was to be by consent of the participating candidates of South Kasipul Ward, in Kasipul Constituency. In other words, it was only the parties who could consent to dispensing the nominations by way of universal suffrage and adopt other methods provided in the aforesaid Rules.

6. If there was no such consent by the participating candidates, the only route for the nominations of South Kasipul Ward, in Kasipul Constituency was by way of universal suffrage. The court order was self-regulating and needed no further interpretation or action by the 1st and 2nd Interested Parties.

7. There was no indication by the 1st and 2nd Interested Parties that they even attempted to conduct the party nominations by way of universal suffrage in the first instance as had been ordered by the court. The extract of the Minutes of the Central Committee on Consideration of the Report on Party Primaries held on Saturday May 21, 2022, at Emory Hotel, Nairobi City County were well before the court delivered its decision on May 27, 2022, a fact that was clearly stated by the 1st Respondent.

8. The issue of strict timelines of the 1st Interested Party and the popularity of the appellant herein hence the adoption of nomination by way of issuing a direct ticket to the Appellant herein was immaterial because parties could not disobey orders on the ground that time was running out and/or because the Appellant was best placed as a candidate to deliver the ticket for the 2nd Interested Party in South Kasipul Ward. Indeed, the court was well aware that the nominated candidates for members of county assemblies were to submit their papers to the 1st Interested Party herein by June 7, 2022, and hence there was sufficient time for the 1st and 2nd Interested Parties to have complied with its orders of May 27, 2022.

9. The court was persuaded that the 1st and 2nd Interested Parties' decision to issue a direct ticket to the appellant was deliberate and intended for the reason that the terms of the court order were clear, they had proper notice of the court order and they acted in breach of the court order. That was not an accidental or unintentional disobedience.

10. The 1st and 2nd Interested Parties disobeyed the orders of the 2nd Interested Party's Appeal Tribunal and the Political Parties Disputes Tribunal (PPDT) that had expressly directed them to conduct fresh nominations; where the legitimate expectation was by way of universal suffrage. Both the PPDT and this court's decision were clear that the nominations were to be by way of universal suffrage. It could not be that the 1st and 2nd Interested Parties had misunderstood all the orders directing them to conduct fresh nominations by universal suffrage at all stages. The 1st Respondent had proved to the required standard, which standard was higher than a balance of probability and below proof beyond reasonable doubt.

11. It was not clear if the appellant's name had been gazetted. Even if the same was gazetted, the same was contrary to the court orders of May 27, 2022, and ought not to be allowed to go unchallenged. Although courts should be slow to punish contemnors, they must not forget that elections in Kenya were so emotive and if no consequences attached to disobedience of court orders, there was potential of violence breaking out thus destabilising the Country.

12. It was important to maintain the integrity of courts hence the need to take action to ensure that the authority of the court was not frowned upon. Indeed, courts were called upon to safeguard the fundamental rights and freedoms of its citizens. It was for these reasons that the court found and held that failing to order the 1st and 2nd Interested Parties to purge their contempt of court was a breach of the 1st Respondent's political rights that were enshrined in the Constitution of Kenya.

13. Indeed, the appellant's rights stopped where the 1st Respondent's rights started. The fact that the court ordered fresh nominations by way of universal suffrage did not translate to the 1st Respondent's winning the nominations. That was a matter for the 2nd Interested Party's members to express their will as to who would be their representative in the County Assembly of Homabay. All that the court was called upon to do was to ensure that all the candidates for the position of Member of County Assembly of South Kasipul Ward in Homabay County were provided a level playing ground.

14. Courts had a duty to ensure that the electoral process was fair and complied with the law *ab initio*. The question of whether the appellant was validly nominated could only be dealt with before the elections were held. That was

not an issue that could be addressed after elections had been held because the jurisdiction of electoral courts was limited to the question of whether a candidate for whatever seat had been validly elected or not.

15. The 3rd Interested Party's arguments that the court was *functus officio* were not correct as contempt of court proceedings could only be filed after a court had issued an order or delivered a decision and the same was disobeyed by a party. The question of whether the decision had been complied with or perfected was a matter of evidence for determination by the court.

16. The 3rd Interested Party's Returning Officer for Kasipul Constituency could not be held to have been in contempt as the 1st Interested Party's role was to accept names of nominated candidates presented to them by respective political parties. The 3rd Interested Party was not in any way involved in conducting the 2nd Interested Party's party nominations and merely acted pursuant to the 1st and 2nd Interested Parties' directions as per the 2nd Interested Party's Nomination Rules.

17. The 1st Respondent's written submissions in support of his argument that he had demonstrated that he was entitled to injunctive orders restraining the 3rd Interested Party, its agents and employees from gazetting the name of the appellant as the 2nd Interested Party's candidate for the position of the Member of County Assembly for South Kasipul Ward in Kasipul Constituency within Homabay County was rendered moot for the reason that the orders had been sought pending the hearing and determination of the application. Its hands were tied by the nature of the proceedings that were placed before it and by virtue of how the orders had been drafted.

Order

Notice of Motion allowed. The chairperson of the 3rd Respondent held in contempt of court was fined Kshs. 200,000 and in default serve six months' imprisonment. Interim orders previously issued were discharged.

PART 3:

COURT OF APPEAL DECISIONS

Daniel K Munene & another v Justin B Muturi & 7 others
Nairobi Court of Appeal Civil Appeal E350 of 2022

M.S.A Makhandia, A.K Murgor & S Ole Kantai, JJ. A

22nd July 2022

Summary of facts

The 1st and 2nd Appellants were Director of Elections and member, respectively of the 7th Respondent (Democratic Party of Kenya), a political party founded in 1991. The appellants' complaints were that on 20th February 2020, the 7th Respondent held a special National delegates convention at the Bomas of Kenya where several resolutions were passed. These included the appointment of the 1st Respondent as the party leader of the 7th Respondent and that he would contest for the presidential seat on its ticket; and that the party would not engage in pre-election agreements and or coalitions but would only do so post-election. Those resolutions did not sit well with the appellants for the reasons that the 1st Respondent did not qualify to be a party leader in accordance with the party constitution as he had not been a member of the party for a period of one year preceding such election. Subsequently, and contrary to the resolution of the party, on 9th April 2022 the 7th Respondent entered into a coalition agreement with the 8th Respondent. The appellants thus prayed for the PPDT to declare that the coalition agreement between the 7th and 8th Respondents was null and void and equally, the appointment of the 1st Respondent, who had hardly been a member of the party for barely two months as party leader, face the same fate. The PPDT heard the dispute and overruled the Preliminary Objections and any other objections in entirety. It further ruled that the purported Coalition Agreement entered into with 8th Respondent by the 1st Respondent on behalf of 7th Respondent was null and void and finally that the appointment of the 1st Respondent as party leader of the 7th Respondent was equally null and void.

Dissatisfied with the decision of the PPDT, the Respondents filed an appeal against it in the High Court, which was allowed on the grounds that the Tribunal erred in overruling/dismissing the Preliminary Objection citing that it was filed out of time. Dissatisfied with the judgement, the appellants preferred the instant appeal.

Issues

1. Whether, based on the facts on record and the law, PPDT indeed had jurisdiction to hear the complaints placed before it.

2. Whether the High Court erred in upholding the Preliminary Objection.

Held

1. A dispute was only to be handled by PPDT once the internal dispute resolution mechanisms of the party had been invoked and exhausted and the complaint lodged within thirty days.

2. The PPDT in its considered view dismissed the Preliminary Objection raised and granted itself the jurisdiction to handle the complaint, notwithstanding the strict timelines given in the Act within which to lodge such complaints. Indeed, the provisions were couched in mandatory terms and there was no room for the exercise of discretion. Even if PPDT had discretion to extend time or waive the requirement, it could not do so suo moto. It had to be moved as appropriate.

3. Regulation 8.3 of the Political Parties Disputes regulations, 2017, that the appellants sought refuge in, was not of any use as it dealt with disputes relating to party nominations, which was not the case here. There was no record of application by the appellants seeking extension of time for the filing of the complaint. The appellants could not hide behind their own mischief of filing an incomplete record of appeal to argue that since the record was incomplete, the High Court could not reach the verdict that there was no application for extension of time. After all, they were the ones who prepared and filed the record. If indeed there was such an application, there would have been nothing easier for the appellants to say so loudly and authoritatively.

4. The High Court was right in holding that the PPDT erred in law in not considering and upholding the Preliminary Objections that were based on law. A Preliminary Objection was an issue of law which could be raised at any time of the proceedings, and any tribunal or court should have considered and dispensed with it first. Raising it late in the day could not be the reason not to deal with it and sweep it under the carpet as the PPDT purported to do.

5. Having filed the 1st complaint late, nearly two months after the discovery of the acts complained of and without seeking to extend the time, was a proper candidate for a successful Preliminary Objection. The omission could not be cured by Article 159 of the Constitution for it could not be invoked to confer jurisdiction where there was none. Jurisdiction was everything and it could not be relegated to a mere procedural technicality.

6. It was imperative that where IDRM existed outside courts, the same had to be exhausted before the jurisdiction of the courts was invoked. Courts ought to be the fora of last resort and the exhaustion doctrine was a sound one which served the purpose of ensuring that there was a postponement of judicial intervention in matters to ensure that a party was first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. That accorded well with Article 159 of the Constitution which commanded courts to encourage alternative means of dispute resolution.

7. Disputes arising out of party nominations between members of a political party or between a member of a political party and a political party, or between political parties or between coalition partners were already catered for under paragraphs a, b, c, and e of Section 40(1) of the Act. Such disputes were subject to Section 40(2) of the Act and must first be subjected to the IDRM before the PPDT took cognizance of them.

8. A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party dispute resolution mechanism was that the disputants would all be subject to the political party and therefore subject to such party's internal party dispute resolution mechanism. It was also instructive that under Section 9 of the Act as read with paragraph 23rd of the 2nd Schedule to the Act, it was a mandatory statutory requirement that every political party must have provision in its constitution and rules for internal party dispute resolution mechanism in accordance with Article 47 and 50 of the Constitution. Also noteworthy was Section 13(2A) of the Elections Act, No. 24 of 2011 that required a political party to hear and determine all intra party disputes arising from political party nominations within thirty days.

9. There could be disputes that fell outside the categories set out under paragraphs a, b, c, and e of Section 40(1) of the Political Parties Act that could be taken up directly by the PPDT. However, the dispute was between members of the political party and the political party and fell under Section 40(1)(b) of the Act and was required, under section 40(2) of the Act to be heard by the party's IDRM before the PPDT could take cognizance of it. There was ample authority for the proposition that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be followed.

10. The complaint regarding 7th and 8th Respondents entering into a pre-election pact ought to have been taken up first with the 7th Respondent's IDRM. It was thus premature for the appellants to have moved directly to PPDT without first exhausting the Party's IDRM. It mattered not that it was filed in time. As long as the appellants had not exhausted the party's IDRM, the complaint was premature and given the circumstances, it was doubtful whether the PPDT was clothed with the necessary jurisdiction to entertain the complaint.

Order:

Appeal dismissed. No order as to costs.

Loice Akoth Kawaka & another v Oscar Oluoch & 3 others
Kisumu Court of Appeal Election Petition Appeal 168 of 2022

P.O Kiage, H.A Omondi & F Tuiyott, JJ. A

29th July 2022

Summary of facts

The appellants were members of the ODM Party (2nd Respondent) who aspired to be nominated by their party for the Member of County Assembly (MCA) position, South Kabuoch Ward, Homabay County. Party nominations were conducted where the 1st Respondent was proclaimed the winner. Aggrieved by the outcome, the appellants moved to the PPDT which nullified the 1st Respondent's election on grounds that electoral violence had vitiated the party nominations and thus ordered a fresh election through a universal suffrage of its members within 72 hours. Subsequently, the 2nd Respondent opted to directly nominate the 1st Respondent as its candidate rather than conduct repeat nominations citing exercise of the discretion conferred to it by the ODM Party Primaries and Nomination Rules, 2021.

The appellants were once again aggrieved and moved the Independent Electoral Boundaries Commission (IEBC), (3rd Respondent), seeking nullification of that direct nomination, claiming that the nomination procedure was in defiance of the PPDT order. Consequently, the 3rd Respondent upheld the nullification of the Petitioner's nomination due to the failure of the 2nd Respondent to conduct nomination by way of universal suffrage.

As time ran out, the 1st Respondent being apprehensive of the imminent risk of his party having no candidate for the position of MCA yet he had been duly nominated, filed a constitutional petition before the High Court seeking that the decision made by the Respondent through its Dispute Resolution Committee (DRC) be nullified, set aside and a writ of mandamus be issued compelling the Respondent to list the Petitioner as a candidate. The High Court agreed with the 1st Respondent that PPDT exceeded its jurisdiction, as Section 38A of the Political Parties Act offered

a political party a choice on the method to use for nomination of candidates, and the 2nd Respondent had exercised the lawful procedural preference. The High Court therefore quashed the IEBC DRC decision on that ground. The appellants aggrieved by the findings preferred the instant appeal.

Issues

1. Whether IEBC had jurisdiction over the nomination dispute.

2. Whether the PPDT in exercise of its jurisdiction acted ultra vires its mandate.

3. Whether a nomination conducted in violation of the PPDT was void ab initio.

4. Whether the 1st Respondent was eligible for a direct nomination.

Held

1. Parties were bound by their pleadings, and a court could only determine issues that flow from the pleadings, yet the High Court purported to revisit the PPDT order and judgement, an issue which did not stem from the pleadings. It was apparent that the court framed and determined the issue afresh suo moto without inviting the parties to address it on the point. Generally, the law was that courts would only determine a case on the issues that flow from the pleadings and that judgement would be pronounced on the issues arising from the pleadings or from issues framed for court's determination by the parties. It was also a principle of law that parties were generally confined to their pleadings unless pleadings were amended during the hearing of the case.

2. The 1st Respondent's attempt to question PPDT's power (and not its jurisdiction) in his submissions was belatedly introduced in the submissions with no foundation in the pleadings. New issues could not be raised in submissions. The court thus erred in law by abandoning the pleaded dispute determining a fresh un-pleaded dispute, namely the jurisdiction of the PPDT over the initial party primary.

3. Among the key issues identified was that the 1st Respondent ought to have been automatically disqualified under ODM's Rule 17(1) (f) for use of violence, threats and intimidation by himself and his agents and the issue regarding his eligibility for a direct nomination under ODM's rules which barred perpetrators of violence from direct nominations. These issues were crucial for the proper determination of the dispute, and in failing to address and resolve them, the court erred in law.

4. Certainly, we could not fault the 1st Respondent's contention that the political parties had freedom on how to conduct party nominations, yet, we hasten to point out that such freedom was checked in by Section 38C of the Political Parties Act under which a registered member of a political party would be entitled to participate in the nominations conducted by the political party, and in particular, where there existed complaints by other candidates regarding machinery tampered with, manipulation through violence, and/or intimidation, so as to interfere with the electoral process or its results, the court would not hesitate to intervene in the interest of justice thereby vitiating such results.

5. In carrying out its mandate and safeguarding the rights of members of a political party to participate in the nominations conducted by their party, the PPDT must pay fidelity to Article 91(1) of the Constitution of Kenya, which required every political party to, *inter alia*, abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party, respect the right of all persons to participate in the political process, including minorities and marginalised groups, promote the objects and principles of the Constitution and the rule of law and subscribe to and observe the code of conduct for political parties.

6. Section 38E of the Act (which acts as a check valve), required a political Party to notify its members and the Registrar of Political Parties of the method it intended to use in conducting party nominations, which method would be in accordance with the party's nomination rules, so that once the party had chosen that it would conduct party nominations in respect to the position for MCA for South Kabuoch/Pala ward, by way of universal suffrage, it was

a method the Party members had chosen with regard to that position for the 2022 cycle of elections. The Party needed to keep that approach, for the sake of credibility, and a semblance of a level playing field. The 1st and 2nd Respondents did not deny that the decision to apply direct nomination was made without consulting the party members, and in particular, the other candidates who were vying for the position, so as to get a consensus.

7. Once the Appeals Tribunal ordered for fresh nomination process, which was reaffirmed by the PPDT, the 2nd and 3rd Respondents had no option but to repeat the nomination exercise that had first been adopted, without adopting the other nomination methods in their 2021 Rules, because such a decision was prone to creating disaffection, confusion and anarchy.

8. The trial Judge conflated the issue regarding power and jurisdiction of the PPDT. In exercising its mandate, the PPDT had both the jurisdiction and power to order any appropriate reliefs including a repeat election by universal suffrage, where it nullified an initial election that had been by universal suffrage. The High Court erred in holding that the PPDT exceeded its jurisdiction over party nominations and that it had no power to grant any appropriate reliefs under Article 23 and 91 of the Constitution.

Orders:

Appeal allowed. High Court judgement set aside. IEBC Dispute Committee's judgement revoking the 1st Respondent's nomination for being in defiance of the PPDT judgement and orders reinstated. No orders on costs.

Ochola v Odhiambo & 2 others; Independent Electoral And Boundaries Commission (Interested Party) (Civil Appeal E389 of 2022) (8 July 2022) (Judgement)

Neutral citation: [2022] KECA 598 (KLR)

Court of appeal at Nairobi

W Karanja, J Mohammed & K.I Laibuta, JJ. A

8TH July 2022

Summary of facts

The appellant and 1st Respondent were members of the 3rd Respondent, the Orange Democratic Movement (ODM). The two were aspiring candidates for the position of Member of County Assembly, (MCA) North Gem Ward, Siaya County. A nomination exercise was conducted on 13th April 2022, after which the 1st Respondent was issued with an interim nomination certificate by ODM. The appellant being dissatisfied by that decision moved to the ODM Appeals Tribunal on appeal, and upon hearing the complaint, the ODM Appeals Tribunal dismissed the appellant's appeal on 20th April 2022. Dissatisfied, the appellant filed an application for review at the ODM Appeals Tribunal, which application was dismissed on 25th April 2022, and subsequently, a nomination certificate issued to the 1st Respondent. The IEBC, thereafter, published a timetable for presentation of papers by the candidates and the 1st Respondent discovered that his name was missing and instead, ODM had forwarded the appellant's name to IEBC. He then moved the PPDT who upon hearing, found that it had jurisdiction and that the complaint before it was merited. The Tribunal thus ordered the 2nd and 3rd Respondents to forward to the IEBC the names of the 1st Respondent as the nominee for the position of MCA. On appeal to the High Court, the PPDT decision was upheld and subsequently, the appellant moved the instant court praying that the judgement of the High Court be set aside, and an order issued directing IEBC to accept the appellant's nomination papers as the duly nominated MCA candidate ODM Gem Ward.

Issues

1. Whether PPDT had jurisdiction to hear and determine the complaint before it in the circumstances.

2. Whether the process had transited from 'party primary' to 'nomination' before the PPDT dealt with it.

Held

1. There was no discernible dispute about the different roles that the two institutions, (PPDT and IEBC) played in the resolution of electoral disputes. The jurisdiction of the PPDT was spelt out in Section 40 of the Political Parties Act. On the other hand, the jurisdiction of the IEBC in the settlement of electoral disputes was spelt out under Section 74(1) of the Elections Act and was derived from Article 88(4) (e) of the Constitution and included disputes relating to or arising from nominations.

2. Section 40 (fa) of the Election Act was an amendment made by Act No. 21 of 2016 on 21st July 2016 with the objective of clarifying the concurrent jurisdiction with other bodies handling electoral disputes. The IEBC and PPDT therefore had their roles clearly demarcated and distinctively set out.

3. There was no oral evidence tendered either before the PPDT or the High Court. The matter was determined on affidavit, documentary evidence and the written submissions filed. Among the affidavits submitted to PPDT by the 1st Respondent was his affidavit stating how shocked he was to find his name missing in the IEBC timetable and instead replaced with the name of the 3rd Respondent who had not worn the primaries. The affidavit was presented before the PPDT that was seized of the matter. No other affidavit was filed to controvert those sworn assertions.

4. Surprisingly, the PPDT despite this averment and well aware that the appellant's name had been forwarded to the IEBC, went ahead to entertain the matter and clothe itself with jurisdiction even when there was evidence of submission of the nominee's name to the IEBC. That was a misdirection which rendered the finding by the PPDT an error of law, since it was based

on a misapprehension of the role of the 2nd and 3rd Respondents. The PPDT itself imported an erroneous definition or understanding of what amounted to nomination. Any complaint on the issue of nomination was a matter for the IEBC to determine and not the PPDT.

5. The nomination process in which the appellant and the 1st Respondent were involved had gone beyond the party nominations as the name of the appellant had been submitted to the IEBC. The jurisdiction of the IEBC to determine the dispute between the parties had been invoked in accordance with Article 88(4) (e) of the Constitution, which was to the effect that the Commission was responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

6. As at 27th May 2022, the appellant's name had been submitted to the IEBC as ODM's nominee. It therefore followed that the process had transited from party nominations to nomination as by law defined and that the jurisdiction to challenge the nomination lay with the IEBC.

Orders:

Appeal allowed, High Court judgement set aside and appellant deemed to have been validly nominated as the ODM's Party nominee for the position of Member of County Assembly, North Gem Ward, Siaya County. Costs of the appeal be borne by the 1st Respondent.

ODM National Election Board & another v Edwin Otieno Odhiambo & 2 others Kisumu Court of Appeal Election Petition Appeal (Application) E004 of 2022

P.O Kiage, M Ngugi & F Tuiyott, JJ. A

22nd July 2022

Summary of facts

The 1st Respondent had been declared the nominee for the position of MCA for South Sakwa Ward in an election conducted through universal suffrage. Unhappy with the outcome and alleging violence and other irregularities, the other candidates filed an appeal before the ODM Appeals Tribunal which succeeded and directed a conduct of fresh nominations. Subsequently, the Elections Board nominated the 2nd Respondent which aggrieved the 1st Respondent, leading him to file a complaint before the PPDT. The complaint succeeded and the PPDT directed the party to conduct fresh nominations by way of universal suffrage. There was delay in compliance prompting the 1st Respondent to cite the Elections Board and the Party for contempt. The PPDT granted the two contemnors 72 hours to purge the contempt, failing which a notice to show cause would be issued. The Elections Board did not purge it but instead moved the PPDT for a review of the orders, which failed. Subsequently, the 1st Respondent preferred an appeal against the PPDT, being dissatisfied with the way the issue was being handled. In the meantime, the Elections Board was granted leave to cross appeal. The High Court dismissed both the appeal and the cross appeal and was in agreement with the decision of the PPDT. This prompted the instant appeal.

Issues

1. Whether the High Court erred in law in upholding a decision by the Political Parties Disputes Tribunal (PPDT) directing the ODM National Elections Board to conduct a fresh nomination for the party nominee for the position of Member of County Assembly (MCA) for South Sakwa Ward through universal suffrage.
2. Whether a political party reserved the right to elect the nomination method it preferred for its nominees.
3. Whether a party, which had attempted a nomination by way of universal suffrage, but which attempt had for some reason aborted or was nullified, could carry out the repeat nomination directly.

Held

1. Section 38A was introduced via section 24 of the Political Parties (Amendment) Act No. 2 of 2022. The provision recognized that political parties, being akin to private clubs, must be given latitude to choose the method of conducting party nominations. The ODM Party Primary and Nomination Rules, which allowed the party to conduct nominations through either consensus, direct nomination or universal suffrage were no doubt consistent with the statutory provisions. There was no controversy that a party had unfettered discretion on the method to employ in conducting its party nominations.
2. While a party has a free hand to choose the method for party nomination, the party must notify its members and the Registrar of Political Parties of the choice as required by section 38E of the Political Parties Act. The provision underscored the need for members of a party, consistent with the public participation edict of the Constitution, to be fully informed of the method chosen and the dates and venues of a nomination. That demonstrated that, although the choice of method was at the discretion of the party, members of the party were not mere bystanders to the process.
3. The concept of legitimate expectation was entrenched in Kenya as espoused in the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR). The party had chosen that it would conduct party nominations in respect to the position for MCA for Sakwa West by way of universal suffrage. It was a promise to the party members that it was the chosen method in respect to that position for the 2022 cycle of elections and the party needed to keep the promise.
4. The first exercise having been nullified, then it would be expected that the repeat exercise would be by the same method, unless the party demonstrated that it was impossible to do a repeat in the same manner because of some intervening circumstances and the notification required by section 38E of the Act had been made, something the appellants did not succeed in demonstrating even in the application for review.

Order

Appeal dismissed with no order as to costs.

ODM National Election Board & Another v John Ombewa Gare & 3 Others Kisumu Court Of Appeal Civil (Election) Appeal E003 Of 2002

P. O Kiage, M Ngugi, & F Tuiyott JJ. A

22nd July 2022

Summary of Facts:

The 1st and 2nd Respondents were among the candidates' seeking nominations as ODM candidate for MCA-West Sakwa. The party held its primaries by way of universal suffrage and the 1st Respondent was declared the winner. The 2nd Respondent aggrieved by the outcome challenged the declaration before the Party Tribunal which allowed the appeal ordering fresh conduct of nominations which led to the direct nomination of the 2nd Respondent. Aggrieved by this decision, the 1st Respondent lodged a complaint with the Party and sought for a fresh nomination exercise. Previously, he had also lodged a complaint with the PPDT on the same issue, where PPDT set aside the nomination of the 2nd Respondent and ordered for fresh nominations by universal suffrage. The PPDT subsequently made an application requesting the PPDT to review its orders and allow it to conduct nominations through any other method provided for in the party constitution. The PPDT rejected the application, thereby triggering an appeal to the High Court which also met with the 1st Respondents appeal which were both dismissed. This prompted the instant appeal filed by the Party and the Elections Board.

Issues

1. Whether a possibility of review of the PPDT judgement and order was available in the circumstances.

2. Whether the PPDT had power to order the Party to hold fresh nominations by way of universal suffrage.

3. Whether there was a distinction between repeat elections and fresh elections.

Held:

1. The application for review was not made in good faith as there was no explanation why the Party and Elections Board had promised to comply with the order of the PPDT after the contempt order had been served upon them but later changed their mind citing impossibility of implementation.

2. Prior to moving the High Court on appeal, the appellants gave the impression that they were not aggrieved by the decision of the PPDT directing them to conduct the fresh nominations by way of universal suffrage, but rather, that given some circumstances, it was impossible to carry nomination in that way. In the application for review, the appellants did not question the correctness of the judgement but simply sought the indulgence of the PPDT to depart from the direction citing circumstances that allegedly made it impossible to comply. Clearly, the appellants would not be entitled to challenge the merit of the decision of 6th May 2022, and to do so was to approbate and reprobate.

3. Section 38A was introduced via section 24 of the Political Parties (Amendment) Act No. 2 of 2022. This provision recognized that political parties, being akin to private clubs, must be given latitude to choose the method of conducting party nominations. The ODM Party Primary and Nomination Rules which allowed the party to conduct nominations through either consensus, direct nomination or universal suffrage were no doubt consistent with the statutory provisions. There was no controversy that a party had unfettered discretion on the method to employ in conducting its party nominations. This had been affirmed time and time again by the courts.

4. The nomination exercise for the Party's candidate for the position of member of county assembly for West Sakwa Ward was in regard to the August 2022 election. Once it was found to have been botched, another nomination needed to be undertaken. As this would be a second exercise then it would at the same time be a fresh nomination because the previous nomination had been nullified by the Appeals Tribunal.

5. The exercise contemplated by the Party Tribunal was a repeat of the nomination exercise and therefore the High Court was right in holding that when the PPDT ordered for a fresh nomination by way of universal suffrage,

it was in effect ordering a repeat election. In particular, the court was right in finding that when the PPDT ordered the party to conduct repeat primaries, the Tribunal was essentially saying that the process be conducted again. One could not repeat something which had not yet been done. The first time when something was being done, could not be termed as a repeat. It was only after something had already been done, at least once, that's when it was done again, that it could be termed as a repeat.

6. While a party has a free hand to choose the method for party nomination, the party must notify its members and the Registrar of Political Parties of the choice as required by section 38E of the Political Parties Act. This provision underscored the need for members of a party, consistent with the public participation edict of the Constitution, to be fully informed of the method chosen and the dates and venues of a nomination. This demonstrated that, although the choice of method was at the discretion of the party, members of the party were not mere bystanders to the process.

7. Rule 6(m) in the Code of Conduct for Political Parties made pursuant to section 6(2)(e) of the Political Parties Act commanded political parties to respect, uphold and promote democratic practices through free, fair and credible party nominations. The three decisions of the Appeals Tribunal, the PPDT and the High Court sought to safeguard intra-party democracy in ODM for the nomination of a candidate for the position of MCA for West Sakwa. Intra-party democracy was not only good for the party but also for the nation's democracy.

Order:

Appeal dismissed with no order as to costs.

Orange Democratic Party Movement & another v Geoffrey Otieno Opiyo & 2 others Kisumu Court of appeal Election Petition Appeal (Application) E186 of 2022

M.S.A Makhandia, F Tuiyott & H.A Omondi, JJ. A

12TH August 2022

Summary of facts

This was an application for enlargement of time brought under rule 4 of the Court of Appeal Rules. Before counsel argued the application, the court urged counsel to reflect on a jurisdictional issue where by dint of rule 55 of the Rules, an application for enlargement of time to file a Notice of Appeal out of time was a matter to be heard by a single judge sitting on behalf of the Court and there would be doubt as to whether the Court, comprising of a three-judge bench had jurisdiction to hear the matter. However, counsel pressed on with the application.

Issue

Whether the court had jurisdiction to hear and determine an application for enlargement of time under rule 55 of the Court of Appeal Rules to file a Notice of Appeal.

Held

1. An application for enlargement of time was brought pursuant to rule 4 to be heard by a single judge. It seemed, however, that there would be occasions when a single judge matter could be heard by the Court. The proviso to sub rule 1 of rule 55 contemplated this. But as was explicit from the wording of the proviso, it would only be upon an adjournment by the single judge for determination by the Court. The proviso presupposed that the single judge would certify that they deemed the application, though a single judge matter, to be fit for determination by the Court. That could be in view of some public interest consideration or such other reason.
2. Where, like in the instant matter, the applicants were of a view that there was a special circumstance that would require an application for enlargement of time to be heard by the Court, then the applicants would first have to move a single judge for an order of adjournment of the application for determination

by the Court. In that event, it was incumbent upon the applicants to alert the Registrar of the Court that the matter ought to have been listed before a single Judge to enable them seek the appropriate certification or order from the single Judge. That avenue was available to the applicants, and they could not lean on the overworked provision of Article 159 (2) of the Constitution for an easy way out.

3. The applicants found themselves in the difficulty because of bringing an application which was the preserve of a single judge with one of the full Court in one motion, the latter being the application for stay, an unacceptable hybrid. Yet even if the court had jurisdiction to hear the application for enlargement of time, it would still have been inclined to disallow it.

4. The power of the Court granted by Rule 4 of the Court of Appeal Rules to enlarge time was discretionary. A discretion guided by well settled considerations being: the period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application was granted, the degree of prejudice to the Respondent if the application was granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties and whether the matter raises issues of public importance were all relevant but not exhaustive factors.

5. What amounted to inordinate delay depended on the circumstances of each case. There was a need for parties to electoral disputes to comply with timelines. Time was a crucial component in dispensation of justice, hence the maxim 'justice delayed is justice denied'. It was a litigants' legitimate expectation where they sought justice that the same would be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters had to be heard and determined. Time was of more essence in election matters where the people's sovereign power to elect their legal representatives was involved. It was with this recognition that the Constitution provided for the time frames within which election matters were to be heard and determined.

6. It was a plea that both the application and intended appeal be heard and determined well before 9 August, 2022. That was a herculean, almost impossible task, given that the application was filed just seven (7) days before the election date. It could not be any clearer that the delay was acutely inordinate in the circumstances.

Order:

Application struck out with costs on account of want of jurisdiction.

Zachary Nyayiemi Moturi v Charles Mong'are Geni & another Kisumu Court of Appeal Election Petition Appeal E002 of 2022

P.O Kiage, H.A Omondi & F Tuiyott, JJ. A

8th July 2022

Summary of facts

This was a second appeal arising from the judgement of the High Court of Kenya at Kisumu. Initially, the appellant had filed a complaint at the PPDT Kisumu, where he claimed that he had been declared the uncontested nominee of the Member of National Assembly for Wiper Party, there being no other contestants. NEC declared him the sole candidate for the Wiper Party and communicated the same to the 1st Respondent for purposes of issuance of nomination certificate to the appellant. However, he was later invited for further negotiations on the position by his Party. Being aggrieved by this, he registered his complaint with the 2nd Respondent, protesting the negotiations as being prejudicial to his political rights and interests. There was no response from the 2nd Appellant, and neither was the complaint addressed by the internal dispute resolution mechanism, which left him with no option but to seek pre-emptive remedies at the Tribunal. The Tribunal held that the appellant's legitimate expectation had been violated as he had been promised the certificate of nomination by the 2nd Respondent and had placed reliance on that promise. Further, there was no explanation of the 2nd Respondent's change of mind. Additionally, the Tribunal observed that once a reasonable expectation existed, the administrator was required to act in accordance with that expectation, which it violated by issuing a direct nomination to the 1st Respondent without any justification to the appellant. Thus, the Tribunal observed that whatever process was used had to take into account the interests of all parties involved, and the appellant's interest were not considered in the circumstances. The decision of the 2nd Appellant was thus quashed and declared the appellant as the duly nominated person and a certificate to issue immediately to that effect.

Subsequently, the 2nd Respondent sought to set aside this decision on grounds that it was never served by the appellant and that the appellant failed to initiate the

internal dispute resolution mechanism. The tribunal found that for purposes of service, the Party Organs and the Party are the same entity and that service upon one was considered as service on the Party itself as well as its constituent organs. The Tribunal also held that the Party was properly served including through the email address on its website which counsel confirmed belonged to the party. The Tribunal also held that the discretion of the Tribunal court to set aside could not be exercised without the 2nd Respondent demonstrating that it possessed a viable defence. Thus, the application had fallen way below the principles for setting aside judgement in default of appearance and defence. Aggrieved by this decision, the 1st Respondent appealed to the High Court, which on the issue of service found that the issue could have been resolved through cross examination of the process server. The willingness of the process server to undergo cross examination on the issue of service should have been made known to the Tribunal, which could have facilitated it. As matters stood, he had no basis upon which to make an informed decision on the disputed facts regarding whether or not the 1st Respondent had been duly served. Thus, the Court found that the appeal lacked merit with regard to issuance of service. The High Court further found that the Tribunal lacked jurisdiction to hear and determine the complaint as there was no record of exhaustion of the internal dispute resolution mechanism. This decision prompted the instant appeal whose main ground was that Civil Procedure Rules had listed mandatory documents that were to be filed in court before admitting a matter for appeal, in which respect, the appellant submitted that there was no appeal before the High Court as there was no notice of appeal or even a record of appeal.

Issues

1. Whether there was a competent appeal before the superior court.

2. Whether the letter was to invite the possibility of an internal dispute resolution mechanism or simply a protest letter declining the decision made by the 2nd respondent

Held

1. What was before the superior court did not contain the PPDT proceedings and annexures and in particular, the appellant's letter wherein the appellant

wrote to the 2nd Respondent in protest regarding the nomination of the 1st Respondent. The letter formed the bone of contention in this instant appeal.

2. The court did not expressly exclude the letter nor did the record show that the court was satisfied with the record before him and excluded certain documents on grounds that he did not consider them relevant, and if that was so, the reason for that exclusion was not recorded. Certainly, the omission could have been cured if both parties had agreed to proceed, and not raised any objection, but there is no indication of a definite consensus on that.

3. The Court, in upsetting the Tribunal's decision, made a fundamental error as it did not have the letter which was critical to the appeal and the determination thereafter. Indeed, given its centrality to the question of the PPDT's jurisdiction, it was a document of signal relevance that could not be admitted.

4. Section 40 of the Political Parties Act (now amended) required an aggrieved party to approach the Party's Internal Dispute Resolution Mechanism (IDRM) as the first port of call before approaching the Tribunal. All that was required was for one to demonstrate that they triggered the process and the same either failed, did not bear any fruit or was denied and/or ignored.

5. There was no format set as to the nature of the letter. It was enough for a party to say that it was dissatisfied, and in this regard, the letter, though directed to the 2nd Respondent, protested the nomination of the 1st Respondent to fly the 2nd Respondent's ticket for the Member of National Assembly, North Mugirango Constituency. The letter was not just a protest letter but a trigger to the IDRM process, and he should have been heard. It met the threshold of having attempted IDRM, which conferred upon the PPDT the requisite jurisdiction.

6. On the issue of service, the same was properly effected in consonance with the email address of the party as displayed on their website.

Order:

Appeal allowed.

PART 4:

CHIEF MAGISTRATE

COURT DECISIONS

JENNIFER LANOI NKOWUA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 4 OTHERS NAROK CHIEF MAGISTRATES COURT ELECTION PETITION E004 OF 2022

SM MWANGI, CM

28TH FEBRUARY 2023

Summary of facts

The petition arose out of the 3rd Respondent's political party (ANC Party) gender top up list of persons to serve as nominated members of the 4th Respondent. The Petitioner argued that the 2nd Respondent ought not to have been nominated for among other reasons; her name was never forwarded for nomination by the Narok branch of the ANC Party, she never applied to be nominated and was not a registered member of the party; the 2nd Respondent was not and had never been a resident or registered voter in Narok County; and that her nomination disenfranchised able residents and voters of Narok County.

The Petitioner sought among other orders; a declaration that the 3rd Respondent's political party (ANC Party) gender top up list with respect to nominations to the County Assembly of Narok ran contrary to the established tenets as to equality proportional representation of all wards, was undemocratic and lacked inclusivity; and that the court issues an order quashing and/or invalidating Special Gazette Notice Vol. CXXIV-NO. 86 of September 9, 2022 to the extent that it specified that the 2nd Respondent was validly nominated and/or elected member of ANC Party to the County Assembly of Narok.

Issues

1. Who bore the burden of proof in a matter challenging the validity of nomination to a county assembly based on a party's gender top up list.

2. Whether the Chief Magistrates Court, gazetted as an election court, had the jurisdiction to determine any consequential dispute regarding the gazetted nominations of election of candidates for the position of member of county assembly.

Held

1. The burden of proof lay on the Petitioner to prove that she deserved the orders which she was seeking. The Court had jurisdiction to hear election petitions arising from the election of a member of a county assembly by dint of Article 169 of the Constitution of Kenya, 2010 (Constitution) and section 75(1)(A) of the Elections Act after being designated and gazetted by the Chief Justice to determine election disputes.

2. Any consequential dispute regarding the gazetted nominations was shifted to the election court, thus affirming the mandate of the court to entertain and determine the instant dispute on whether the 2nd Respondent was validly and legally nominated or not.

3. The Petitioner appeared to have shifted the burden of proof to the 2nd Respondent to establish that she was validly nominated, after tendering the copy of records which showed that she was registered to vote in Kirinyaga County. She had not cited any provision of the law which stipulated that one could only be nominated in the county where she/he was registered to vote. She had also expressly stated that there were doubts on whether or not the 2nd Respondent was a member of ANC Party, but she did not take any steps to cast out those doubts by confirming from the party itself the actual position. Only the political party could tell when a person joined it and it was not about when the office of the Registrar of Political Parties was informed. That doubt could not therefore be resolved by the letter from the Registrar of Political Parties which the Petitioner was solely relying on.

4. Despite the Petitioner challenging the duration of the 2nd Respondent's membership in the ANC Party she had also not cited any legal provision which set out a minimum period which was required for a member to qualify for nomination. The Petitioner also never cited any specific provision of the Constitution or rule of the ANC Party which was not complied with to prove that indeed the party did not validly recommend the 2nd Respondent for nomination.

5. Section 7 of the County Government Act which the Petitioner argued bound the 3rd Respondent to ensure that in nominating members to the 4th Respondent the community and cultural diversity of Narok was reflected and further that there was adequate representation to protect the minorities in accordance with Article 197 of the Constitution seemed to favour the 2nd Respondent more than herself. Nowhere in her petition had she averred that she was from the minority or marginalised communities but she was insisting that only the residents and people registered to vote in the County of Narok should be nominated.

6. In the absence of any cogent evidence to prove that the nomination of the 2nd Respondent violated any provision of the Constitution, any electoral laws, the Constitution and the rules of the 3rd Respondent then the Petitioner had failed to discharge the burden of proof.

Order

Petition dismissed; costs were awarded to the Respondents.

Hellen Nairuko Katangie v Orange Democratic Movement Party & 4 others Narok Chief Magistrates Court Election Petition E005 of 2022

SM Mwangi, CM

20th February 2023

Summary of facts

The Petitioner filed the instant petition claiming that the 1st and 2nd Respondents breached their own Constitution and Party Nomination Rules in nominating the 1st and 2nd interested parties for Narok County Assembly gender top up list. The Petitioner submitted that as the 2nd Interested Party was previously nominated in the previous Narok County Assembly term she was not eligible for nominations again. She further stated that the 1st Respondent failed to adhere to some standards in nominating members of the county assembly party list which she submitted was pleaded and proved before the Political Parties Disputes Tribunal (PPDT). The Petitioner claimed that PPDT therefore directed the 1st and 2nd Respondents to reconstitute the list, but they did not stick to the same list which made the nominations be tainted with illegalities and irregularities.

The Petitioner sought among other orders: a declaration that the 1st and 2nd interested parties did not qualify to represent for nomination for gender top-up lists in County Assembly of Narok; and a declaration that to the extent that the Respondents failed to implement the judgement and decree of the PPDT, in nominating the 1st and 2nd interested parties, the same invalidated the nominations.

Issues

1. Whether the Chief Magistrates Court gazetted as an election court had the jurisdiction to determine any consequential dispute regarding the gazetted nominations of election of candidates for the position of member of county assembly.

2. Whether the Political Parties Dispute Tribunal could direct a political party to place the name of a person as number one on a party's gender top-up list.

Held

1. The court had jurisdiction to hear election petitions arising from the election of a member of a county assembly by dint of Article 169 of the Constitution of Kenya, 2010 (Constitution) and section 75(1)(A) of the Elections Act after been designated and gazetted by the Chief Justice to determine election disputes. Any consequential dispute regarding the gazetted nominations was shifted to the election court thus the court had the mandate to entertain and determine the instant dispute on whether the 1st and 2nd Respondents were validly and legally nominated or not.

2. The burden of proof lay on the Petitioner to prove that she deserved the orders which she sought. The Petitioner did not aver that the PPDT directed that she be placed as number one on the party top up list but that was inferred by the Respondents and the interested parties following her failure to be nominated. The order which was cited in the submissions did not direct that the Petitioner be placed as number one on the party top-up list but directed that the party in the exercise of its discretion should consider the Petitioner, being the top nominee from Narok South.

3. The order of the PPDT did not also direct the 1st Respondent to remove the 1st and 2nd interested parties from their respective numbers and that was informed by the fact that the PPDT could not interfere with the party's autonomy while exercising its discretion while nominating the members who it deemed fit to advance its interests in the county assembly.

4. In the absence of any evidence to prove that the nomination of the 1st and 2nd interested parties violated any provision of the Constitution, any electoral laws, the constitution and the rules of the 1st Respondent or failed to abide by the orders of the PPDT, then the Petitioner had failed to discharge the burden of proof.

Order:

Petition partly allowed; costs were awarded to the Respondents.

PART 5:

SUMMARY OF LAW REFORM PROPOSALS

	RELEVANT LAW	SHORTCOMING	RECOMMENDATION
	Regulation 8 Political Parties Disputes Tribunal (Procedure) Regulations 2017	While Regulation 8 provides that a dispute arising out of a party nomination must be determined no later than a day before the day determined by the IEBC for submission of names of party candidates (nomination), s 31 (2A) of the Elections Act allows for dispute resolution to run up until 60 days before the elections	Revise Regulations to align with timelines in section 31 (2A) Elections Act.
	Regulation 10 of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017	Provides for only two modes of service: (a) direct service; (b) advertisement in a newspaper of national circulation.'	Since the Tribunal has already ruled since 2017 that electronic service is acceptable in light of strict timelines, the Regulations need to be updated to align with the practice of the Tribunal.
	Regulation 34 of the PPDT (Procedure) Regulations	Inconsistency between Regulation 34 of the PPDT (Procedure) Regulations and s 41 (2) of the PPA. While the PPA is clear in section 41 (2) that there is a right of appeal to the High Court on matters of law and fact and on matters of law to the Court of Appeal, Regulation 34 indicates that the appeal to the High Court is final	The Regulations need to be amended to harmonise with the PPA.

	RELEVANT LAW	SHORTCOMING	RECOMMENDATION
	Section 25 Political Parties Act	Act is silent on how to distribute PPF where a party gains an uncontested seat in an electoral area.	It is recommended to amend the Act to clarify the position in law with respect to the distribution of the PPF in such cases.
	S 39 A Political Parties Act	The appointment of ad hoc members during every nomination period does not facilitate the creation of institutional memory.	It is recommended to consider amending the law to allow ad hoc members to serve on a need basis or make them eligible for future re-appointment.
	Section 40 (1) & (2) Political Parties Act	No specific reference to party list disputes. MoU is also silent on this jurisdiction. Jurisdiction in relation to party list disputes therefore appears to be by inference. Section 35 A(3) Elections Act only gives mandate to PPDT in relation to 'certification of party lists'.	Make specific reference to party list disputes as falling within mandate of PPDT.
	Section 41 (3) A and 41(4) Political Parties Act.	It is unclear which between the PPDT (Procedure Regulations) 2017 and the Civil Procedure Rules take precedence in case of conflict.	Specify hierarchy in the two sets of rules.

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