



**Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 others; Independent Electoral & Boundaries Commission (Interested Party) (Civil Appeal E314 of 2022) [2022] KEHC 3361 (KLR) (Civ) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3361 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL APPEAL E314 OF 2022**  
**JK SERGON, J**  
**MAY 30, 2022**

**BETWEEN**

**DEKA ALI KHALA ..... APPELLANT**

**AND**

**NATIONAL ELECTIONS BOARD ORANGE DEMOCRATIC MOVEMENT PARTY (ODM) ..... 1<sup>ST</sup> RESPONDENT**

**HUSSEIN WETYAN MOHAMED ABDIRAHMAN ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES S ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED PARTY**

*(Being an appeal from the decision of the political parties dispute tribunal in PPDT complaint no. E075 of 2022 (Hon. Desma Nungo (Chair); Hon. Flora Muteweta; Hon. Dr. Kenneth Wyne Mutuma)*

**JUDGMENT**

- 1) On April 20, 2022, Deka Ali khala, the appellant herein and a member of the Orange Democratic Movement Party (ODM) participated in the nomination exercise for the position of Member of the National Assembly, Mandera East Constituency and in the end she was issued with an official nomination certificate from the ODM party. Hussein Weytan Mohamed Abdirahman, the 2<sup>nd</sup> respondent herein was issued with a direct nomination certificate on April 22, 2022 as the ODM candidate for the same position i.e Member of the National Assembly, Mandera East Constituency.



- 2) The appellant felt aggrieved hence she filed a complaint with the Political Parties Disputes Tribunal (PPDT). ODM party, the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent and Independent and Boundaries Commission (I.E.B.C), the Interested party herein raised a preliminary objection challenging the jurisdiction of the PPDT to entertain the complaint and the failure by the appellant to exhaust the ODM Internal Dispute Resolution Mechanism (IDRM).
- 3) The 1<sup>st</sup> and 2<sup>nd</sup> respondent each denied there was any nomination by universal suffrage and averred that it was the decision of the ODM party to have direct nomination for the Member of National Assembly, Mandera East Constituency thus nominating the 2<sup>nd</sup> respondent as the most suitable candidate.
- 4) PPDT heard the dispute and came to the following conclusions:
  - i. That PPDT had jurisdiction to entertain the appellant's complaint
  - ii. That the nomination issued to the 2<sup>nd</sup> respondent was declared null and void because the same was issued contrary to principles of fair administrative action.
  - iii. That the procedure followed in arriving at the decision declaring the appellant as the winner for the nomination as the ODM candidate for Mandera East Constituency was not adequately explained.
  - iv. That an order was issued directing I.E.B.C not to accept nor register and or gazette the name of the 2<sup>nd</sup> respondent as a candidate for the position of Member of National Assembly, Mandera East Constituency on the ODM ticket.
  - v. ODM was ordered and directed to apply its constitutional provisions to expeditiously undertake fresh nominations to decide who between the appellant and the 2<sup>nd</sup> respondent is to be issued with the final nomination certificate within to confines of fair administrative action within 48 hours from the date of judgment.
  - vi. Each party to bear its own costs.
- 5) The appellant being aggrieved preferred this appeal and put forward the following grounds:
  - i. That the Tribunal erred both in law and fact in directing and ordering the 1<sup>st</sup> respondent to conduct a fresh nomination for Member of National Assembly, Mandera East Constituency.
  - ii. That The Tribunal erred both in law and fact in pegging its decision on the what it termed as lack of clarity on the manner in which the appellant was nominated and awarded nomination certificate to contest for the position of Member of National Assembly Mandera East Constituency.
  - iii. That The Tribunal erred both in law and fact in failing to hold that 2<sup>nd</sup> respondent is ineligible to contest for the position of Member of National Assembly Mandera East as a result of party hopping from the Jubilee party to the orange Democratic Movement Party.
  - iv. That The Tribunal erred both in law and fact in failing to grant the prayers as sought by the appellant in her complaint dated 9<sup>th</sup> May 2022 at prayers (a) to the effect that she was the valid nominee of the Orange Democratic Movement party as she had been validly nominated and awarded a nomination certificated dated April 20, 2022.



- v. That The Tribunal erred both in law and fact by failing to reconstitute the appellant to her previous position after having found that her nomination certificate was illegally and unlawfully revoked by the 1<sup>st</sup> respondent.
  - vi. that the Tribunal erred both in law and fact in failing to grant the appellant the costs of the proceedings after holding and finding that the 1<sup>st</sup> respondent had acted contrary to the Constitution of Kenya, 2010 and wrongfully and illegally revoked the appellant's nomination certificate.
- 6) ODM, the 1<sup>st</sup> respondent by way of cross-appeal challenged the jurisdiction of PPDT to hear and determine the complaint under section 40(2) of the Political Parties Act. The 1<sup>st</sup> respondent also argued that the complaint was filed out of time contrary to rule 8(1) and (4) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.
  - 7) This court gave directions to have the appeal and the cross-appeal to be disposed of by written submissions. At the time of writing this judgment, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the only parties which had filed their submissions.
  - 8) I have re-evaluated the case that was before the PPDT. I have further considered the written submissions and the authorities filed by the respondents. I propose to consider and determine both the appeal and the cross-appeal together.
  - 9) In the first ground, it is the submission of the respondents that the Political Parties Disputes Tribunal had no jurisdiction to entertain the appellant's complaint under section 40(2) of the Political Parties Act as read with rule 8 of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 and rule 12 of the ODM appeals Tribunal rules. It is argued that PPDT disregarded the directory provisions of rule 8 (1) and (4) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 divesting it of jurisdiction over matters filed after the April 27, 2022.
  - 10) It is argued that vide gazette notice no. 430 of 2022 dated January 20, 2022, IEBC set aside April 28, 2022 as the date of submission of names of the party candidates who have been selected to participate in the general elections. The respondents stated that the last date for filing of disputes before the Tribunal and for delivery of all judgments was April 27, 2022. They pointed out that the appellant did not seek for the enlargement of time to file her complaint out of time. They accused PPDT for purporting to enlarge time without a formal application or request for that purpose thus denying the respondents the benefit of a defence prescribed by law.
  - 11) The appellants further argued that the justification by PPDT for extending time is unreasonable and is bound to create a dangerous precedent and disharmony in the organization of the electoral calendar of the IEBC.
  - 12) They pointed out that under section 31(2A) of the Elections Act the nomination of candidates shall occur at least 60 days before the general elections and IEBC is given the discretion to determine and gazette any date before the 60<sup>th</sup> day when it shall require submission of candidate's names for nomination which in the instant case is gazette notice no. 430 of 2022 gazetted 28<sup>th</sup> of April 2022 as the appropriate date.
  - 13) This issue was raised before the Political Parties Disputes Tribunal. The Tribunal considered the rival arguments presented before it by the parties and came to the conclusion that the Elections Act and the Regulations were inconsistent and found that the provisions of the regulations are void to the extent of the inconsistency with the statute.



- 14) There is no dispute that the *Elections Act* sets out a timeline of at least 60 days to the general election. The general election date in this matter is August 9, 2022. Sixty days to the general election would therefore start running as from June 9, 2022. A complaint filed prior to June 9, 2022 would therefore fall within the statutory timelines. Rule 8 of the *Political Parties Disputes Tribunal (Procedure) Regulations of 2017* indicate that the last date for filing a dispute arising out of party primaries is at least one day from the date set by the commission as the date set for submission of the party candidates' names.
- 15) The IEBC issued a gazette notice giving deadline of April 28, 2022 for submission of names of party candidates to the commission. This means that the last day to file a complaint before PPDT should be April 27, 2022. It is clear that this timeline contradicts the one fixed by the *Elections Act*. The complaint giving rise to this appeal was filed on May 6, 2022.
- 16) The PPDT correctly interpreted the law and arrived at the right decision by rejecting the respondents' preliminary objection. The truth of the matter is that the PPDT did not, suo moto extend time within which a party should file a complaint before it.
- 17) What PPDT did is to address 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 cannot be faulted.
- 18) The second preliminary issue raised before the Tribunal is that the appellant failed to first exhaust the Internal Political Party Dispute Resolution Mechanism (IDRM) before approaching PPDT as required under section 40(2) of the *Political Parties Act*.
- 19) Upon considering the competing arguments, PPDT came to the conclusion that the appellant had made various attempts to approach ODM IDRM but the same was inoperative as of April 28, 2022 hence the appellant had no option but to approach PPDT pursuant to the provisions of section 40(2) of the *Political Parties Act*. In this respect the PPDT's decision cannot be faulted. The 1<sup>st</sup> respondents cross-appeal therefore lacks merit hence it's for dismissal.
- 20) The appellant put forward a total of six grounds of appeal which grounds may be summarized to four broad grounds.  
First, whether the Tribunal erred in concluding that there was lack of clarity on how the appellant was nominated and awarded a nomination certificate to contest the Mandera East Constituency and whether the Tribunal erred in failing to find her as validly nominated on April 20, 2022 and reconstitute her to her previous position.
- 21) Secondly, whether the Tribunal erred in ordering the 1<sup>st</sup> respondent to conduct a fresh nomination for Member of National Assembly, Mandera East Constituency.
- 22) Thirdly, whether the Tribunal erred in failing to hold that the 2<sup>nd</sup> respondent was and is ineligible to contest for the position of Member of National Assembly, Mandera East Constituency as a result of party hopping from Jubilee party to Orange Democratic Movement Party.
- 23) Fourthly, whether the Tribunal erred in failing to award the appellant costs.
- 24) On the first ground of appeal, it is the submission of the appellant that she was validly nominated as a Member of the National Assembly Mandera East Constituency in accordance with the ODM constitution and primary election rules hence the Tribunal erred in holding that there was no clarity in the manner she was nominated and awarded a nomination certificate on April 20, 2022.



- 25) According to the 1<sup>st</sup> respondent, the appellant's assertion that she was nominated by the party are misplaced and without any legal basis. The 1<sup>st</sup> respondent also argued that the Tribunal rightly found that there was in fact no evidence that the appellant has been nominated as alleged or at all.
- 26) The 2<sup>nd</sup> respondent on his part admitted that the appellant was issued with a nomination certificate and that the same was rescinded in favour of the 2<sup>nd</sup> respondent by the central committee at its meeting held on April 21, 2022.
- 27) The 2<sup>nd</sup> respondent further argued that the law does not provide that in direct nominations a party cannot revoke the nomination certificate issued. He also argued that the appellant was never at any point nominated to vie in the general election as the ODM flag bearer for member of Parliament, Mandera East constituency as per the ODM constitution and party primary and election rules.
- 28) The 2<sup>nd</sup> respondent stated that the Tribunal was right to state that there was lack of clarity on the manner in which the appellant was nominated. The 2<sup>nd</sup> respondent further stated that the orders issued by the Tribunal have already been implemented since there was no application for contempt hence this appeal has been overtaken by events.
- 29) I have carefully re-evaluated the evidence that were presented before PPDT (tribunal). It is the evidence of the appellant before the Tribunal that she participated in the party nominations conducted on April 20, 2022 wherein she was awarded a nomination certificate which has not been challenged.
- 30) The 1<sup>st</sup> respondent avers that voting by universal suffrage was not carried out in any electoral areas in Mandera County. The 1<sup>st</sup> respondent further stated that there was a public communique on the move to have direct nomination for Mandera East Constituency and that the appellant was aware.
- 31) The 1<sup>st</sup> respondent also averred that the appellant was issued with the certificate of nomination but was later rescinded in favour of the 2<sup>nd</sup> respondent in the best interest of the ODM Party. The 1<sup>st</sup> respondent urged the Tribunal to refer the dispute to the Political party to make a determination of its preferred candidate.
- 32) The 2<sup>nd</sup> respondent on his part told the Tribunal that the appellant had failed to tender evidence showing how SHE was nominated through direct nomination.
- 33) The PPDT considered the rival evidence and came to the following conclusions:  
First that the ODM party central committee was well within its mandate to direct nominations and select the strongest candidate to vie for the position of the respective electoral seat which process was used to give a direct ticket to the 2<sup>nd</sup> respondent.
- 34) Secondly, that there was no evidence to explain why there was no formal engagement with the appellant in arriving at the outcome and that there was no indication as to whether the complainant was provided an opportunity to make any representation around matters that would have a direct bearing upon her.
- 35) Thirdly that no evidence has been tendered before the Tribunal to show whether the certificate issued to the complainant was formally nullified.
- 36) Fourth that fair administrative action requires that a person affected by a decision be granted an opportunity to be heard and to be given reasons for any decision reached.



- 37) Fifth that the appellant has not adequately explained the procedure followed in arriving at her win and further that she did tender evidence showing that there were any primaries held by ODM therefore the circumstances under which the certificate was issued is unclear.
- 38) Sixth that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have controverted any suggestion that any party primaries in Mandera constituency were conducted through universal suffrage.
- 39) Having re-evaluated the evidence tendered before the Tribunal, it is clear that the Tribunal correctly pointed out that there was no clear evidence explaining the process used to issue the appellant with a nomination certificate. However, it should be pointed out that the issue which was in contention before the Tribunal is the nomination certificate issued to the 2<sup>nd</sup> respondent.
- 40) The nomination certificate issued to the appellant was not a subject of determination at the Tribunal. It is the appellant who had filed a complaint before the Tribunal seeking for inter alia an order of declaration that she was validly nominated and issued with the certificate of nomination dated April 20, 2022.
- 41) The appellant also sought for an order directing ODM to recall revoke and cancel any records showing that the 2<sup>nd</sup> respondent is the ODM candidate for Mandera East constituency. It is also apparent from the judgment of the Tribunal that the Tribunal found that there was no evidence indicating that the certificate of nomination issued to the appellant was rescinded. The Tribunal did not also 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.
- 42) I am convinced that 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 2<sup>nd</sup> respondent.
- 43) I have already set out the remedies sought by the appellant before the Tribunal. She applied for an order directing the 1<sup>st</sup> respondent to revoke, cancel and recall the certificate of nomination issued to the 2<sup>nd</sup> respondent.
- 44) It is apparent that the Tribunal granted the order sought. The appellant had also sought for an order to declare her as the only validly nominated ODM candidate for Mandera East Constituency by virtue of the certificate of nomination issued to her on April 20, 2022.
- 45) The Tribunal appears to have acceded to the request by the 1<sup>st</sup> respondent that it be given a chance to nominate its preferred candidate. The 1<sup>st</sup> respondent had clearly stated before the Tribunal that its preferred candidate was the 2<sup>nd</sup> respondent.
- 46) It is obvious that the 1<sup>st</sup> respondent if given a chance would quickly issue a fresh nomination certificate to its preferred candidate, the 2<sup>nd</sup> respondent, while the appellant still holds a valid nomination certificate.
- 47) The 1<sup>st</sup> respondent should not be allowed to have a second bite of the cherry and commit travesty of justice against the appellant. I find that the Tribunal erred by granting the 1<sup>st</sup> respondent the orders it sought through its submissions.
- 48) The second main ground which was ably argued before this court is whether it was right for the Tribunal to make an order directing the 1<sup>st</sup> respondent to conduct a fresh nomination for Member of National Assembly, Mandera East Constituency. While determining the first ground of appeal



hereinabove, I alluded about the second ground of appeal. The appellant is of the submission that the Tribunal erred when it ordered for fresh nomination to be undertaken by the 1<sup>st</sup> respondent.

- 49) The 2<sup>nd</sup> respondent is of the submission that the Tribunal correctly made an order subjecting the parties to a fresh nomination and further that the Tribunal rendered justice between the parties according to the law.
- 50) It is clear from the decision of the Tribunal that the Tribunal formed the opinion that there was no evidence to show that the certificate of nomination issued to the appellant was revoked. In page 15 line 4 of its judgment the Tribunal states in part as follows:
- “No evidence has been tendered before the Tribunal to demonstrate whether the certificate issued to the complainant was formally nullified.”
- 51) The record shows that the 1<sup>st</sup> respondent admitted issuing the certificate of nomination to the appellant. It also admitted that it issued another nomination certificate for the same seat to the 2<sup>nd</sup> respondent as its preferred candidate. The Tribunal found that the 1<sup>st</sup> respondent did not provide evidence that it nullified the certificate issued to the appellant though it purported to state that it rescinded the same.
- 52) In the circumstance of this case, the Tribunal erred by ordering fresh nominations to be done thus granting the 1<sup>st</sup> respondent a chance to issue its preferred candidate a certificate of nomination yet the appellant still possessed a valid nomination certificate which has not been revoked.
- 53) The third main ground of appeal is to the effect that the Tribunal erred in failing to find that the 2<sup>nd</sup> respondent was ineligible to contest as a member of National Assembly, Mandera East Constituency as a result of party hopping from Jubilee party to ODM party. The issue of party hopping was raised and argued before the Tribunal.
- 54) The 2<sup>nd</sup> respondent was able to tendered credible evidence indicating that the 2<sup>nd</sup> respondent had resigned from the Jubilee party and joined the ODM party within the statutory timeline stipulated under section 28A of the *Elections Act*, 2011. The 3<sup>rd</sup> respondent also presented evidence showing that the 2<sup>nd</sup> respondent is a registered member of ODM party. The Tribunal therefore cannot be faulted for coming to the conclusion that the 2<sup>nd</sup> respondent was and is eligible to contest as a member of the National Assembly.
- 55) The last ground of appeal is on costs. The appellant has urged this court to set aside the Tribunal’s decision not to award her costs and proceed to award her costs as a successful party. The record shows that the Tribunal directed each party to bear its own costs. The Tribunal did not attach any reasons in failing to award the appellant costs. There is no doubt that the appellant and the 2<sup>nd</sup> respondent are members of the 1<sup>st</sup> respondent. The IEBC and the Registrar of political parties are public bodies/offices.
- 56) I think a fair order in the circumstances of this matter is to direct which the Tribunal did, that each party meets its own costs. Though the Tribunal did not attach any reasons to its decision on costs, nevertheless it arrived at a fair decision.
- 57) In the end, the cross-appeal is found to be without merit. The same is ordered dismissed with each party bearing their own costs.
- 58) The appeal is partially found to be with merits. It is allowed thus giving rise to issuance of the following orders:



- i. The PPDT's decision directing the National Elections Board of the ODM party to conduct fresh nomination exercise for the Member of National Assembly Mandera East Constituency is set aside and is substituted with an order directing the ODM party to declare the appellant as the only validly nomination ODM candidate for Mandera East Constituency as per the certificate of nomination dated April 20, 2022.
- ii. Each party to meet its own costs of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY, 2022.**

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....for the Appellant/Applicant

.....for the Respondent

