



**National Elections Board (ODM) & 2 others v Mwai & another (Civil Case E286 of 2022) [2022] KEHC 10891 (KLR) (Civ) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E286 OF 2022**

**JK SERGON, J**

**MAY 20, 2022**

**BETWEEN**

**NATIONAL ELECTIONS BOARD (ODM) ..... 1<sup>ST</sup> APPELLANT**

**R/O BONDO CONSTITUENCY ..... 2<sup>ND</sup> APPELLANT**

**ODM PARTY ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOHN ADIWO MWAI ..... 1<sup>ST</sup> RESPONDENT**

**GIDEON OCHANDA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling delivered by the Political Parties Disputes Tribunal in PPDTC no. E019 of 2022 delivered on 28th April 2022)*

**JUDGMENT**

1. This is an appeal arising from the decision of the Political Parties Dispute Tribunal delivered on 5<sup>th</sup> May 2022. The background of this appeal can be discerned from the record of appeal.
2. On 13.4.2022 the 3<sup>rd</sup> appellant conducted its party primaries for Bondo Parliamentary National Assembly seat where the 1<sup>st</sup> and 2<sup>nd</sup> respondents participated. At the conclusion of the exercise, a provisional nomination certificate was issued to the 2<sup>nd</sup> respondent by the 3<sup>rd</sup> appellant.
3. The 1<sup>st</sup> appellant being aggrieved lodged an appeal before the ODM appeal's tribunal. The appeal was heard and dismissed.
4. Being dissatisfied, the 1<sup>st</sup> respondent filed a complaint before the Political Parties Disputes Tribunal (PPDT). The PPDT heard the complaint and rendered its judgment on 28<sup>th</sup> April 2022 whereby it



- annulled the declaration of the 2<sup>nd</sup> respondent as the ODM nominee of Bondo Constituency (National Assembly) seat.
5. The PPDT further ordered a repeat of the nomination exercise by universal suffrage by 1<sup>st</sup> May 2022. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants being aggrieved by the PPDT decision, filed an application dated 30<sup>th</sup> April 2022 before the PPDT seeking to have the orders issued by it to be reviewed.
  6. The PPDT heard the application for review and by its ruling delivered on 5<sup>th</sup> May 2022 it partially allowed the application and extended the date to conduct the repeat of the nomination exercise to 8<sup>th</sup> May 2022.
  7. Being aggrieved again, the appellant preferred this appeal against the orders issued on 5<sup>th</sup> May 2022 and put forward the following grounds on appeal.
    - i. That notwithstanding the finding by the tribunal on the legitimacy of the 1<sup>st</sup> respondent's primaries for the member of national assembly for Bondo constituency the tribunal erred in law and fact in requiring that the repeat primaries arising after the nullification be conducted by way of Universal Suffrage only.
    - ii. That in nullifying the aid primaries and directing that the repeat primaries could only be conducted in one form only (universal suffrage) the said tribunal erred in law and fact by sequestering the 1<sup>st</sup> respondent's political rights and consequently disregarded the provisions of the constitution of Kenya on political rights, the nomination and election rules of the Independent Electoral and Boundaries Commission (IEBC) and the political Parties Act.
    - iii. That the effect of the nullification being that the primary process was required to start afresh (from process of deciding on the method of election), the learned tribunal acted in excess of its jurisdiction by ordering for a repeat primary by way of universal suffrage only whereas the powers to elect party representatives are vested in either the people (voters) or by party through mechanisms set out in the party's constitution.
    - iv. That the learned tribunal erred in law and in fact by granting prayers that were not sought and further erred in law and fact in failing to appreciate, advance and enunciate the principles of review under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.
    - v. That the learned tribunal erred in law and in fact by disregarding the wishes of the people of Bondo Constituency and the political rights of the 1<sup>st</sup> respondent party and therefore violated the constitutionally protected democratic rights of the people of Bondo constituency.
    - vi. That the learned tribunal erred in law and in fact by delivering a ruling which was founded neither on facts presented nor in law.
  8. When the appeal came up for hearing this court gave direction to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the PPDT. I have also taken into account the rival written submissions plus the authorities cited.
  9. Though the appellant put forward a total of six grounds of appeal, those grounds may be determined by three main grounds vizly:-
    - i. Whether the PPDT erred when it partly allowed the application for review but then limiting the repeat nominations for the ODM Bondo Constituency to universal suffrage.
    - ii. Whether the complainant sought for a repeat of the nomination exercise by use of universal suffrage.



- iii. Whether the PPDT erred in not granting the orders sought for review.
10. On the first ground, it is the submission of the appellants that the PPDT erred by limiting the mode of repeat of the nomination exercise to that of universal suffrage. It is the submission of the appellants that after the first process of nomination was nullified, the second process was not mandatorily to be by universal suffrage. It is argued that the PPDT decision resulted in a limitation of the rights available to the 1<sup>st</sup> appellant's political party.
  11. The 1<sup>st</sup> respondent on the other hand is of the submission that the PPDT's decision cannot be faulted. This court was urged to find that this appeal is incompetently before this court by virtue of Order 45 rule 1 of the Civil Procedure Rules as read with Section 80 of the *Civil Procedure Act*. It is argued that a party cannot apply for both review and appeal from the same decree or order.
  12. It is not in dispute that this appeal seeks to challenge the decision of the PPDT to partially review its orders made on 28th April 2022.
  13. In determining an application for review, courts and tribunals exercise a discretion. It would appear the appellants are seeking for the second time to review the orders issued on 28.4.2022 by the PPDT vide this appeal.
  14. With respect, I do not think this is allowed in law. A party cannot apply for review and file an appeal at the same time. I agree with the 1<sup>st</sup> respondent that this is an abuse of the court process.
  15. I have already stated that this appeal seeks to challenge the PPDT's decision made on 5<sup>th</sup> May 2022. The decision arose out of an application for review. The appellant must discharge the burden of showing that the PPDT did not properly exercise its discretion. The appellants failed to discharge that burden but instead they have resorted to relitigate on the application for review in the guise of an appeal. In sum the appellants have failed to show that the PPDT proceeded on an erroneous basis in the exercise of its discretion.
  16. In response to the argument that the PPDT limited the rights of the 1<sup>st</sup> appellant to conduct repeat nomination to only universal suffrage yet there are other methods prescribed under the Political Parties Act, it is the submission of the 1<sup>st</sup> respondent that the PPDT appreciated the fact that the appellants messed up the primaries in favour of the 2<sup>nd</sup> respondent and could not be expected to mete out justice to the 1<sup>st</sup> respondent through any other means of identifying a candidate save for universal suffrage.
  17. It is not in dispute that the PPDT ordered for a repeat of the party nominations by way of universal suffrage. There is no doubt that the process of nomination which gave rise to the filing of this appeal was that of universal suffrage. The outcome was nullified by the PPDT for various reasons. There was an allegation that the results were not announced or made known to the parties.
  18. In the circumstances of this case, the PPDT was entitled to make the order. The nomination by universal suffrage was the best option to conduct the repeat primary nomination as opposed to the other methods in view of fact that the process was interrogated and the weakness identified by the PPDT.
  19. The second ground of appeal is whether the PPDT erred by granting a relief which was not sought. It is the appellants' submission that the PPDT made an order directing repeat of primary nominations by universal suffrage yet the order was not sought. I find no merit in the appellant's argument. The PPDT in dealing with such complaints has a very wide discretion to prescribe various remedies to address the circumstances of each complaint. The PPDT was right to grant the order even if the same was not specifically pleaded.



20. The final ground is whether the PPDT erred in not granting the orders sought on review. A careful perusal of the record clearly show that the PPDT properly exercised its discretion in determining the review application. The PPDT cannot therefore be faulted.

21. In the end, this appeal is found to be without merit. It is ordered struck out and dismissed but with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 20TH DAY OF MAY, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> Appellant

..... for the 2<sup>nd</sup> Appellant

..... for the 3<sup>rd</sup> Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

