



Odhiambo v The Odm National Elections Board & 3 others (Civil Appeal E043 of 2022) [2022] KEHC 3101 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E043 OF 2022
FA OCHIENG, J
JUNE 23, 2022**

BETWEEN

EDWIN OTIENO ODHIAMBO APPELLANT

AND

ODM NATIONAL ELECTIONS BOARD 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 2ND RESPONDENT

EUNICE RAHEL ACHIENG 3RD RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

(Being an Appeal from the ruling delivered by the Political Parties Disputes Tribunal in PPDTC No. E016 of 2022)

JUDGMENT

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 the South Sakwa Ward, on behalf of the Orange Democratic Movement Party.

1. The 3rd Respondent, Eunice Rahel Achieng was one of the candidates in the ODM primaries, for that position.
2. Being aggrieved, the 3rd Respondent lodged her petition at the ODM Appeals Tribunal.
3. After the Party Appeals Tribunal had heard the appeal, it nullified the nominations, and it directed that fresh nominations be conducted.



4. Instead of conducting fresh nominations, the Party and its National Elections Board issued a Direct Ticket to the 3rd Respondent.
5. The Appellant was aggrieved by the direct nomination of the 3rd Respondent. He therefore lodged an “appeal” at the Political Parties Disputes Tribunal (PPDT).
6. On 5th May 2022 the PPDT delivered its Judgment, after it had accorded consideration to the Appellant’s Complaint. This is what the Tribunal said;

“ 52. This Tribunal finds that the Complainant has satisfied, to the required Standards of Proof, in this matter, that the issuance of the Direct Nomination ticket to the 3rd Respondent, was not only illegal but contrary to the principles of Fair Administrative Action, and that the action failed to meet the requirements provided by Articles 27, 35 and 81 of the [Constitution of Kenya, 2010](#).

53. Our assessment of the facts as a whole, draws us to the inescapable conclusion that we must set aside the Direct Nomination exercise that resulted in the nomination of the 3rd Respondent, as well as nullify any and all certificates issued to both the Complainant and the 3rd Respondent.”

7. The Tribunal ordered the Party to conduct a fresh nomination; and it specified that such fresh nomination be conducted by way of universal suffrage.
8. The Appellant filed his Memorandum of Appeal dated 3rd June 2022, challenging the Tribunal’s Judgment dated 5th May 2022. The Grounds of the appeal are as follows;

“ 1. In assuming, determining and granting orders on an issue that was not the subject of appeal dispute, the Honourable PPDT misdirected itself in law and fact, thus violated the Appellant’s right to a fair hearing.

2. In nullifying the certificate of nomination of the Appellant as the ODM candidate for South Sakwa Ward, the Honourable Tribunal misdirected itself in law and fact.

3. In compelling the 1st and 2nd Respondent to conduct fresh nominations using universal suffrage as the mandatory method, the Honourable PPDT ignored the fact that ODM was in the original position in violation of the Appellant’s right to legitimate expectation that he would be the nominated candidate for South Sakwa Ward.”

9. On 7th June 2022 the parties appeared before me, for the purposes of Directions on how the matter would be handled by the Court.
10. The parties consented to the filing of a Cross-Appeal, by the 1st and 2nd Respondents. The parties also decided to canvass the Appeal and the Cross-Appeal through written submissions.
11. In the Cross-Appeal, the 1st and 2nd Respondents mounted a challenge against the Judgment dated 5th May 2022.



12. The grounds of the cross-appeal were set out as follows;
- “ 1. That the PPDT in denying the 1st and 2nd Respondents an opportunity to be heard and also to present documents and evidence, violated their right to a fair hearing and consequently issued orders that were prejudicial.
 2. That taking into account the Appeals Tribunal, in their decision of 20th April 2022, had directed a fresh nomination be undertaken, the PPDT fell into error by directing that fresh nomination could only be by way of universal suffrage.
 3. That further to Ground (2) above the Honourable Tribunal erred in law and fact, in any event, in failing to allow the 1st Respondent to exercise and carry out the fresh nomination using any of the nomination methods allowed in their rules.
 4. That the Honourable Tribunal erred in law and fact by failing to consider the oral submissions of the 1st and 2nd Respondents, thus arriving at a manifestly erroneous decision.”
13. Based upon those grounds of the cross-appeal, the 1st and 2nd Respondents asked this Court to quash and/or set aside the Judgment of 5th May 2022 in PPDT E016 of 2022;
- “ and reiterated in the Ruling of PPDT on the 5th June, 2022 in PPDT Misc. No. E002 of 2022”
14. The 1st and 2nd Respondents asked this Court to allow the 1st Respondent to carry out any repeat nominations for the South Sakwa Ward in a manner consistent with and allowed by the Party’s Election Rules.
15. When canvassing the cross-appeal, the 1st and 2nd Respondents acknowledged that on 26th May 2022 the PPDT cited the members of the National Elections Board for contempt, and directed them to purge the contempt by conducting the repeat nomination by way of universal suffrage.
16. Thereafter, the 1st and 2nd Respondents filed an application seeking the review of the Orders.
17. According to the 1st and 2nd Respondents their application for review was in relation to the orders made on 26th May 2022, and not in relation to the Judgment.
18. Although that is what the 1st and 2nd Respondents stated in their submissions dated 9th June 2022, a perusal of their Record of Appeal shows the cross-appeal was in relation to;
- “ the Judgement delivered by the Political Parties Disputes Tribunal in PPDT No. E016 of 2022, on 5th May 2022”
19. Nowhere in the cross-appeal, did the 1st and 2nd Respondents mention their alleged dissatisfaction with the Ruling delivered on 26th May 2022.
20. Indeed, whilst the Memorandum of Appeal makes reference to the Judgment delivered by the PPDT
- “ on 5th May, 2022 at 7.00p.m”; the Notice of Motion dated 28th May 2022 (through which the 1st and 2nd Respondents had sought review), referred to “ a Ruling delivered on Thursday 26th May 2022 at 6.00p.m.”



21. In other words, the Judgment that is the subject matter of the appeal before me was not delivered on 26th May 2022. On that date, PPDT delivered a Ruling; and the 1st and 2nd Respondents have not filed an appeal arising from a Ruling.
22. I find that the cross-appeal speaks for itself; that it is in respect of the Judgment dated 5th May 2022.
23. When canvassing the said cross-appeal, the 1st and 2nd Respondents made reference to their application dated 28th May 2022, and also to the Ruling delivered by the PPDT on 5th June 2022.
24. In my considered opinion, it was not open to the 1st and 2nd Respondents to seek to rely upon documents which had been filed after 5th May 2022, in their attempt to find fault with the decision rendered on that date.
25. The 1st and 2nd Respondents have sought to persuade this Court that it was impracticable to compel them to conduct universal suffrage within 72 hours from the date when the PPDT ordered them to do so.
26. The issue was the subject of the application for review of the Judgment. As the PPDT rejected the application for review, the only recourse that could then have been available to the 1st and 2nd Respondents was to lodge an appeal to challenge the Ruling dated 26th May 2022.
27. When a party has the option of either an appeal or review, he is obliged to make an election. And if he chooses to seek review, he cannot thereafter lodge an appeal in respect to the same issue.
28. As the 1st and 2nd Respondents had opted to seek review, it was not thereafter open to them to appeal against the decision. My said decision is informed by the fact that it is 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.
29. However, if, as the 1st and 2nd Respondents have said; their appeal was in relation to the Ruling dated 26th May 2022, that would imply that they were not challenging the Judgment dated 5th May 2022.
30. Effectively, that would mean that the said Judgment was not being challenged in this appeal.
31. If that be the case, it would imply that this Court could not quash or set aside the Judgment dated 5th May 2022, as sought by the 1st and 2nd Respondents.

Universal Suffrage

32. It is common ground that on 13th April 2022 the ODM Party held primaries. The system it made use of is universal suffrage.
33. The Appellant was declared the winner. However, the 3rd Respondent and one other contestant challenged the outcome.
34. The ODM Party Appeals Tribunal allowed the appeal, and it directed a fresh nomination exercise be carried out.
35. There cannot be any doubt at all, that when the Party Appeals Tribunal allowed the appeal and directed for a fresh exercise to be conducted, the certificate which had been issued to the Appellant was no longer valid.
36. Instead of carrying out a fresh nomination exercise by universal suffrage, the Party organs granted a Direct Ticket to the 3rd Respondent.



37. That action prompted the Appellant to lodge a Complaint at the PPDT.
38. It was the Appellant's case that when the 3rd Respondent was given a direct ticket, there was now a double nomination.
39. I find that there was no double nomination at all. I so find 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.
40. 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.
41. Whereas the PPDT made a pronouncement that it did
"..... nullify any and all certificates issued to both the Complainant and the 3rd Respondent.";
that pronouncement must be appreciated within context.
42. At paragraph 54 of its Judgment, the PPDT noted that the nomination of the Appellant had already been nullified by the Party's own Appeals Tribunal. Therefore, as the Appellant's nomination had already been nullified by the Political Party's Appeals' Tribunal, I find that 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.
43. In the circumstances, 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.
44. I hold that PPDT did not require to give a further hearing to the Appellant before clarifying the import of its Judgment.
45. The Party and its relevant organs had always been aware that they had the right to use any of the following methods in conducting its primaries;
- (a) Consensus among candidates, party and community representatives; or
 - (b) Direct nominations; or
 - (c) Delegates system through the electoral college system; or
 - (d) Universal Suffrage.
46. It is the party which made the choice to use the universal suffrage.
47. As the PPDT noted in its Judgment;
"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."



48. I am in complete agreement with those words of the PPDT. I would add that when a political party had decided to use universal suffrage, the members of the said party have been given the mandate to take an active and direct part in choosing the person who is to be nominated as the candidate.
49. 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.
50. It is ironical that the Appellant should find fault with the requirement that the repeat process be by way of universal suffrage, yet the Appellant had earlier moved the Court, to cite the 1st and 2nd Respondents for contempt, because they had not complied with the order to conduct universal suffrage.

Interested Party

51. The IEBC has submitted that the PPDT lacked jurisdiction to handle the matters, because the Party had already forwarded to it, the name of the 3rd Respondent as its candidate.
52. This was the first time that it was being indicated that the political party had forwarded the name of the 3rd Respondent to the IEBC, as the party's nominee.
53. Those facts were not made available to the PPDT.
54. Secondly, the issue of the alleged presentation of the 3rd Respondent as the party nominee was never an issue that was determined by the PPDT.
55. I find that the contention cannot be determined for the first time, by an appellate court. It is not a matter of law. It is a matter of both fact and law. Therefore, if any of the parties herein wished to have it determined, they would have first raised it before the PPDT. The Tribunal would then have made a determination. It is only thereafter, that the aggrieved party could have placed the issue before this Court for determination, on an appeal.
56. I decline to make any findings on that issue.
57. In the final analysis, I dismiss both the Appeal and the cross-appeal, on the grounds that they lack merit.
58. Each party will meet his or her own costs of the appeal and also of the cross-appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE 2022

FRED A. OCHIENG

JUDGE

