



**ODM National Elections Board & another v Gare & 2 others (Civil Appeal
44 & 45 of 2022 (Consolidated)) [2022] KEHC 12101 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 44 & 45 OF 2022 (CONSOLIDATED)**

FA OCHIENG, J

JUNE 21, 2022

BETWEEN

ODM NATIONAL ELECTIONS BOARD 1ST APPELLANT

ORANGE DEMOCRATIC MOVEMENT PARTY 2ND APPELLANT

AND

JOHN OMBEWA GARE 1ST RESPONDENT

TRUFOSA OSEWE ODINGA 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

JUDGMENT

1. The tribunal had rejected the appellant's application for review of the orders which it had made on May 6, 2022.
2. The tribunal had ordered the appellants to conduct fresh elections for purposes of identifying the person whom the political party would nominate as its candidate for the position of Member of County Assembly (MCA) for West Sakwa Ward.
3. The tribunal had specifically directed that the fresh elections be conducted through the universal suffrage process.
4. The appellants had, in the application for review, sought an extension of time to enable them comply. Secondly, the appellants had asked the tribunal to allow them to conduct the repeat nomination process in any other way, rather than through universal suffrage.
5. Having given due consideration to the application, the tribunal rejected it.



6. Following the dismissal of the application dated May 26, 2022, the appellants filed the Appeal No E044/2022.
7. When the matter came up before the court on June 7, 2022, the parties agreed to have the appeal consolidated with Appeal No E045/2022.
8. The Appeal No E045 of 2022 was lodged by John Ombewa Gare, in order to challenge the Judgment which the Tribunal had delivered on May 6, 2022.
9. As far as John Ombewa Gare was concerned, he had been validly nominated as the ODM candidate for the MCA position in West Sakwa Ward. Therefore, when the tribunal granted orders for the holding of a fresh nomination exercise, the appellant held the view that the tribunal had granted orders on an issue which had not been before it.
10. John Ombewa Gare's nomination was set aside, and the tribunal reiterated that fresh nominations be conducted through universal suffrage.
11. John has come to the High Court asking that he be declared as the validly and duly nominated candidate for ODM for the MCA position in West Sakwa Ward.
12. Following the consolidation of the two appeals, the appellants are now the ODM National Elections Board and the ODM Party: whilst the respondents are now John Ombewa Gare; Trufosa Osewe Odinga and the IEBC.
13. The appeal was canvassed by way of written submissions.
14. The appellants submitted that the tribunal erred when it failed to take into account new evidence of material facts which had been brought to its attention.
15. The evidence and material alluded to by the appellants was the written communication between the ODM's National Elections Board and the Ministry of Education.
16. By a letter dated May 26, 2022 the Election Board wrote to the Minister of Education, requesting him to assist the Board to access the Primary Schools in Bondo Constituency, for purposes of conducting repeat primaries which were slated for Saturday May 28, 2022.
17. On May 27, 2022 the Minister for Education wrote back to the board, indicating that the ministry were unable to grant access to the schools, as had been requested.
18. In addition to the correspondence above-cited, the appellants drew the tribunal's attention to the process involved in planning for a nomination exercise by way of universal suffrage. They told the tribunal that the process entailed:
 - (a) Recruitment of polling clerks;
 - (b) Reconfiguration of voting gadgets and kits;
 - (c) Calling meetings with contestants and agreeing on the modalities of conducting the nomination exercise; and
 - (d) Engaging 2 IT experts as consultants, to conduct the exercise. The said experts were the only persons with knowledge of passwords to the system.
19. According to the appellants, if the tribunal had taken into account those factors, it would have reviewed its judgment, which had imposed a limited time for compliance with the universal suffrage.



20. The second issue raised by the appellants was that the Tribunal lacked jurisdiction to compel the appellants to utilize the universal suffrage, whereas the ODM party's nomination rules allowed for nomination through;
 - (i) Consensus;
 - (ii) Direct Nomination; or
 - (iii) Universal Suffrage.
21. According to the appellants; they had a right to choose any of the 3 systems for nomination.
22. In exercise of that right, the party said that it issued a direct ticket to the 2nd respondent, Trufosa Osewe Odinga.
23. In answer to the appeal, the 1st respondent expressed his consternation, that when the appellants were ordered by the tribunal to conduct repeat primaries through universal suffrage, they issued a direct nomination to the 2nd respondent.
24. In the understanding of the 1st respondent, by the time when the party and its National Elections Board issued the direct nomination to Trufosa, the party had not yet revoked the interim nomination certificate which had been issued to him. Therefore, that would constitute a double nomination.
25. The 1st respondent then filed his complaint with the PPDT on April 27, 2022. It is his case that The tribunal's judgment dated May 5, 2022, nullified both the certificate issued to him and the certificate issued to Trufosa.
26. The 1st respondent submitted that the tribunal had not been called upon to nullify his nomination certificate. He said that the tribunal had only been asked to nullify the nomination of Trufosa.
27. In the circumstances, John submitted that the party or its National Elections Board had condemned him without giving him an opportunity to be heard.
28. Obviously, when the rights of a party were adversely affected by the decision made by a public body, the said outcome could not be sustainable if the affected party had not been accorded a fair hearing before the public body made its decision.
29. In this case, John was declared the winner of the party primary. Therefore, he had a legitimate expectation that he would be the party candidate for West Sakwa Ward.
30. However, the law has provisions which enable persons to challenge the results of party primaries, if they believe that they have good reasons to mount such a challenge.
31. In this case, there was an appeal to the tribunal. The 1st respondent was an active participant in the proceedings of the said appeal.
32. When the tribunal rendered its decision, ordering that the party primaries be repeated, the expectations which the 1st respondent had earlier, were promptly extinguished.



Did the Tribunal have jurisdiction to specify the method that must be used in the repeat primaries?

33. In the case of *Michael Ojala Nyangi v Hezron Onditi & 3 Others* KSM Constitutional Misc Petition No 1 OF 2022, Mugure Thande J held that;

“..... it is not for the PPDT to dictate to the 2nd and 3rd respondents the method to use in the party’s nominations exercise. That is the preserve of the 2nd respondent.

The only rider is that the method employed must be in conformity to the law and to the party’s constitution and rules.”

34. Even in the case of *Thomas Ludindi Mwadeghu v John Mruttu & Another* (2017)eKLR Lesiit J held that;

“It is the duty of the party to decide; one, the process to use to come up with a nominee and; two, who would represent them.”

35. I concur with the legal position stated by those learned Judges.

36. In my understanding, which is informed by the provisions of section 38A of the *Political Parties Act*, a political party is entitled to make a choice whether to conduct party nominations by direct nomination or indirect nomination.

37. And in the case before me, the party did make a choice to conduct its primaries through universal suffrage. It is the way in which that exercise was conducted that gave rise to the initial complaint.

38. When the PPDT ordered the party to conduct repeat primaries, the said Tribunal was essentially saying that the process be conducted again.

39. One cannot repeat something which had not yet been done.

40. The first time when something is being done, cannot be termed as a repeat.

41. It is only after something has already been done, at least once, that when it is done again, that it can be termed as a repeat.

42. In the case of *Moses Odhiambo Ochele v Achan Ojuki Gordon & 2 Others*, Kisumu Civil Appeal No E037 OF 2022, Kamau J held as follows;

“61. 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.

62. The 2nd and 3rd respondents were already aware that universal suffrage was least preferred, but nonetheless adopted it in this case. Going further, the aforesaid rules, having been drafted in the spirit of the political parties Act and the *Constitution of Kenya 2010*, created a legitimate expectation of a participatory process, in that the past conduct of the 2nd respondent, employing universal suffrage in the impugned nomination exercise, created an expectation that a competitive and fair process would be adopted throughout the exercise.”



43. I am in agreement with my learned sister, Kamau J 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 utilized.
44. 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.
45. This situation is distinguishable from that which was in the case of *Michael Ojala Nyangi v Hezron Onditi & 3 Others*, Ksm Misc Constitutional Petition No 1 OF 2022.
46. I so hold because 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.
47. 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.
48. In my considered opinion, there is 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.
49. In a nutshell, I find no merit in the appeal.
50. As regards the 1st respondent's appeal, I note that it was filed by a Law Firm which had not been on record when the matter was before the PPDT.
51. The firm of Felix Oketch & Co Advocates represented the 1st respondent at the PPDT.
52. Pursuant to order 9 rule 5 of the [Civil Procedure Rules](#), the 1st respondent could have changed advocates either upon an application, with notice to all parties; or upon a consent being filed between the outgoing advocate and the proposed incoming advocate.
53. In a strict sense, therefore, the appeal before me has been filed by an advocate who was not properly on record.
54. There is a school of thought that holds the view that the failure to comply with order 9 rule 5 of the [Civil Procedure Rules](#) renders the appeal fatally defective. That is the position expressed in the cases of:
 - i. [Stephen Mwangi Kimote v Murata Sacco Society](#) [2018]eKLR; And
 - ii. [Phyllis Kariuko Njagi v Jane Waguama Njagi & Another](#) [2018]eKLR.
55. However, there is also another school of thought, which holds the view that an appeal ought not to be dealt a fatal blow simply due to the failure to comply with a procedural rule of legal representation.
56. In my considered view, the issue of legal representation is vital, because it enables the court and the opposing party to know who was the actual legal mouthpiece of a party.
57. He or she who has legal authority and mandate to take action on behalf of a party, literally stands in the stead of that party. His or her actions are binding upon the party. And it is important that when the court or the opposing party is dealing with an advocate who represents the party, there is confidence that such an advocate can enter into binding discussions on behalf of his or her client.
58. I appreciate that the change of advocates does not, of itself prejudice the other parties in the appeal.



59. I further appreciate that the issue of representation could be resolved through ratification, subsequent to the institution of the appeal process.
60. However, in the circumstances prevailing herein, where time was of the essence, the appeal was prosecuted before the issue of representation had been resolved.
61. But just because time was not available to enable the 2nd Respondent's advocate resolve the issue, is not a proper reason to ignore it.
62. Parties ought to be ever vigilant when dealing with cases which leave little or no margin for error. They ought to strive to comply with the applicable law, in the first instance.
63. Nonetheless, whilst non-compliance should ordinarily lead to the striking out of an appeal, I hereby, reluctantly, opt to give consideration to the substantive issues raised.
64. The 1st respondent had, in his original complaint asked, inter alia for a fresh nomination exercise for the West Sakwa Ward, for the ODM Party.
65. Having given due consideration to the matter, the Tribunal granted the prayer for a fresh nomination exercise.
66. The party and its Election Board told the PPDT that they took steps to try and comply with the Judgment. They wrote to the Minister for Education, seeking access to primary schools, to enable them undertake the process of universal suffrage.
67. The 1st respondent, on his part, relied upon the judgment and he asked the court to cite the party and the Election Board for contempt of court.
68. After filing the application for orders to cite the party and the Election Board for contempt, the 1st respondent urged the PPDT to find that those respondents were simply putting forward an excuse, to frustrate him from realizing the fruits of the judgments.
69. The PPDT had, in its judgment ordered for a repeat of the nomination exercise.
70. If the 1st respondent was so keen to reap the fruits of the Judgment, he cannot simultaneously be heard to be seeking to challenge the very judgment whose fruits he wanted to harvest.
71. If there was to be a repeat process for nomination, the necessary implication is that there was nobody who was, at the time, holding a valid nomination certificate.
72. I find absolutely no merit in the 1st respondent's appeal.
73. In the result, the 2 appeals herein are dismissed.
74. Each party will meet his or her own costs of the appeals.

DATED, SIGNED and DELIVERED at KISUMU

This 21st day of June 2022

FRED A. OCHIENG

JUDGE

