



**Obongoya v Orange Democratic Movement Party & 2 others (Election Petition Appeal E007 of 2022) [2022] KEHC 12782 (KLR) (31 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12782 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
ELECTION PETITION APPEAL E007 OF 2022**

**PJO OTIENO, J**

**AUGUST 31, 2022**

**BETWEEN**

**PATRICK OCKOCHI OBONGOYA ..... APPELLANT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT PARTY ..... 1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY NATIONAL ELECTIONS  
BOARD ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

*(Being an Appeal from the Judgment of Political Parties Disputes Tribunal at Kakamega delivered on the 15th August 2022 in Complaint No. E015 of 2022)*

**JUDGMENT**

1. This Appeal challenges the decision or Judgment of the Political Parties Disputes Tribunal dated 15/8/2022 by which it reviewed its Judgment of 4.8.2022, set the orders therein given and substituted therewith an order dismissing the Appellant's Complaint.
2. The gist of the Complaint that was lodged and argued before the Tribunal regarding the Respondent's party list was that the Respondent flouted its own Constitution and Regulations on party list nominations for members of County Assembly, Busia County by sending to the Interested Party a fraudulent list not generated by the bona fide County Nominations Committee.
3. According to the Appellant, the County Nomination Committee comprised the following:-
  - (a) The sitting Governor, Hon. Sospeter Ojamong
  - (b) Member of ODM NC Busia County, Hon. Florence Mutua



- (c) Busia County Women representative, Hon. Florence Mutua
  - (d) Chairperson ODM disability wing, Mr. Ronald Obiero
  - (e) Chairperson ODM women league, Mrs. Angela Nafula
  - (f) Busia ODM chair youth league, Mr. James Anyango
  - (g) Patrick Ockochi Obongoya, the Appellant herein
4. It was the position of the Appellant before the Tribunal, and remains the position in this appeal, that the composition of the Committee remained so and that any other Committee was not more than a masquerade.
  5. In the Judgment dated 4.8.2022 the fulcrum of the decision was exactly the composition of the Committee. This is so because in its rendition, the Tribunal upheld the list adduced by the Appellant as the genuine list while noting that there were no Minutes of the National organ over the matter.
  6. It is that Judgment that provoked the application dated 5/8/2022 seeking review of the order, whose gist was that the decision was arrived at without access to important information being a letter dated 11.6.2022 and appointing seven (7) members of the County Nomination Committee, Busia County. Of note is that the Appellant was not recognized as a member of the Committee nor the chair of the Party County Coordinating Committee.
  7. The Tribunal by its decision of 13/8/2022 allowed the application and set aside the Judgment of 4/8/2022, allowed the Appellant to file Further Affidavit with corresponding leave to the Respondent to also file and serve Further Affidavit. That decision thus set the stage for rehearing of the Complaint which then culminated in the Judgment of 15/8/2022.
  8. In that Judgment the Tribunal found and determined that the Party County Nomination Committee had been constituted in a manner deemed best suited to realise the party agenda and the Constitution of the Committee was demonstrated by the Minutes of the Central Committee and communication of the County Nomination Committee's Chair asking that the Committee executes its mandate.
  9. On that basis the Tribunal found no fault with the nomination process and therefore dismissed the Complaint on the basis that the facts and information by the Respondent had not been controverted by the Appellant. It is that decision of 15/8/2022, and not that of 13/8/2022, which has provoked the current Appeal as disclosed in the ten (10) grounds of Appeal in the Memorandum of Appeal.
  10. Being a first appeal, the Court proceeds by way of a rehearing by which it is duty bound to re-appraise, re-examine and re-evaluate the entire material presented at the trial and to come to own conclusions, while always bearing in mind that it enjoys no benefit, the trial court enjoyed in listening to the parties testify, in this case present their evidence and arguments, enjoyed.
  11. The Court has eagerly considered the Record of Appeal in totality including submissions filed, in line with its mandate and obligations and discern the duty to be that it determines whether the Tribunal committed any error in the assessment of the evidence availed and thus reached a decision that is not informed by such evidence and the law so as to deserve being disturbed on appeal. In executing that task the court notes that even though the Appellant breaks down the grounds into ten, the Court takes the view that grounds 1, 3, 4, 8, 9 and 10 can be dealt with together with grounds 2, 5, 6 and 7 also being handled together. I consider this coalescence apt noting that the first group of grounds of appeal go to the merits while the second group fault the process taken by the Tribunal.



12. I purpose to start with the process and seek to establish whether the Tribunal acted properly when it sought to hear the Complaint for the second time; whether it did afford to the Appellant the right to a fair hearing or if it just dismissed the Complaint in a summary manner without addressing the preliminary issues in the grounds of opposition.
13. By the Ruling of 13/8/2022 setting aside the Judgment of 4/8/2022, the Complaint was resurrected from the grave of determined Complaint and it was the duty of the Tribunal to deal with it in a just, fair and timely manner. Once the Judgment of 4/8/2022 was set aside, the matter could only be heard afresh unless the Appellant thought otherwise, for which reason he had the option and right to withdraw it. It can however not be maintained in law, that the Tribunal had no jurisdiction to hear a Complaint pending before it.
14. Having set to hear the Complaint after the Ruling of 13/8/2022, the Tribunal not only gave parties the liberty to file additional Affidavits within set timelines but also a date within two days. The Appellant not only filed Supplementary Affidavit but also grounds of opposition which it sought to be dealt with before hand prior to the application.
15. The Court poses here and interrogates what the grounds of opposition contended and whether a party can file grounds of opposition to its own application. The court appreciates grounds of opposition to be the pleadings by a Respondent to application and setting out points of law, not facts, by which the application is resisted. In *Kennedy Otieno Odiyo & 12 Others –vs- Kenya Electricity Generating Co. Limited* [2010] eKLR the Court held and said of the grounds of opposition:-

“Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deposed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

16. Grounds of opposition are by Rule 14 of Order 51 only available to the Respondent and not an Applicant. Upto there, I would find that the documents filed by the Appellant to its Complaint was improperly filed for the Appellant cannot be seen to have opposed own application.
17. But, what was the tenure of the grounds of opposition filed by the Appellant? The Court has read the document titled, grounds of opposition and do consider same to have been arguments against the orders in the Ruling of 13/8/2022. The same was improperly filed because it was not open to the Court to entertain an application attacking its decision on review. The Court finds that the only available avenue for challenging an order made on review, is by way of an appeal. Not by review and definitely never by grounds of opposition.
18. The last point is whether, the parties were accorded a chance to argue their case. The Record of Appeal reveals that on the 15/8/2022, the matter proceeded as follows:-

“ 15/8/22

Teams virtual session vide video link

Bench: Hon. Milly Lwanga, Hon. Timothy Tororey and Hon. Lydia Wambui

Court Assistant: Edwin Chemjor

Parties:



Complainant – Muchiri and Omari for Complainant

Respondent – Juma for Respondent

Muchiri:

Pursuant to your direction of 13<sup>th</sup> August 2022, we have filed grounds of opposition dated 14<sup>th</sup> August 2022.

Juma:

I oppose the grounds of opposition as Order 51 is clear. The grounds are in the pleadings herein. I did not intend to file further document.

Omari:

The direction on filing of responses. We filed letter as our response must be in light of theirs. We ask that the response be on record as mistake was occasioned by ODM.

Juma:

On the grounds of opposition, we will deal with even pleadings are even on record.

We can thereafter proceed. We filed no reply as we would rely on what is on record.

Omari:

We want to proceed to the grounds before we can determine anything else.

**Tribunal:**

1. We will consider and read our ruling.
2. Decision of Tribunal read in open session.”
19. One gets the impression that the Tribunal had considered the matter before hand and had a decision by the time it sat to hear the parties. That may appear preemptive or indeed hurried, over and above the duty to be expeditious. However, owing to the pressure of time placed upon the Judiciary to handle matters expeditious, there is nothing that bars a Court, or indeed a Tribunal from considering a matter before hand coming up with a decision which is then relooked at after the parties address the Court. To that extent I find nothing untoward in the matter the Tribunal that dealt on the 15/8/2022. I see that to be the future of litigation on interlocutory matters going by the decisions delivered by the Supreme Court yesterday in the ongoing Presidential Elections Petitions.
20. The consequence of the foregoing finding is that there is no error in principle nor an injustice disclosed or demonstrated to have been visited upon the Appellant in the manner the matter was dealt with.
21. On the merits, even though many issues are raised, the centre of the dispute as pleaded by both sides is whether the list insisted upon by the Appellant was one generated by the Party organ mandated to conduct nomination for purposes of party lists. The material put before the Tribunal was in the rival Affidavits by the Appellant and the Respondents.
22. While the Appellant gave a list of the County Nomination Committee said to have sat and settled the list, the Respondent contended that the Committee was constituted by the National Elections Board and decision communicated by a letter of 11.6.2022 and was not constituted as asserted by the Appellant.



23. It is contended by the Respondents that it is the Committee constituted by the Elections Board which sat on the 13/6/2022 and compiled the list the Appellant considers fraudulent. The record reveals that by the Affidavit in support of the application for review, the Respondent availed to the Tribunal not only the Party Constitution but also the Minutes of the Central Committee made on the 2.6.2022, which mandated the National Elections Board to reconstitute the County Nomination Committees by inclusion of the Gubernatorial candidate as the person to convene the County Assemblies Party Lists Nomination Committees. It also exhibited a list of nominees which does not include the Appellant.
24. The determination of the Appeal must thus be whether the party list said to have been made by the Committee to which the Appellant was a member was the valid list. The Court finds that after the Committee was reconstituted, any other Committee that existed before then lost the legitimacy to compile the list and any list allegedly compiled by a Committee other than the one constituted by the National Elections Board cannot pass the test of legitimacy.
25. Of course there would be the question of the powers of the Central Committee and the National elections Board to constitute the County Nomination Committee in terms of the Party Constitution. That is however, a dispute that must be appropriately commenced in accordance with that Party Constitution and progressed as the constitution demands before it can be properly before this Court. I refrain from seeking to determine it in this determination.
26. Based on the foregoing analysis and finding, the conclusion that is inevitable is that the Appellant was never validly nominated and that the County Nomination Committee that had the mandate of the Respondent to compile its Party list for Busia County is the one constituted in terms of the letter by the National Elections Board dated 11.6.2022.
27. Accordingly, the Court finds no fault in the Judgment by the Tribunal dated 15/8/2022 which determined that the Respondent had not breached its own Constitution in compiling the Party list for Busia County. The Appeal thus lack merits and the same is dismissed.
28. However, considering that the Appellant is a member of the Party and said to chair its County Coordination Committee in Busia, I consider it in the interest of intra party harmony that I make no orders as to costs.

**DATED, SIGNED AND DELIVERED IN KAKAMEGA, ONLINE, THIS 31ST DAY OF AUGUST 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of**

Mr. Muchiri for the Appellant

Mr. Juma with Mr. Makokha for the Respondents

Mr. Mulama for the Interested Party

Court Assistant: Kulubi

