



Grignon & another v Muli & another; Clerk to the Senate/Secretary Parliamentary Service Commission & another (Interested Parties) (Civil Appeal E1056 & E1081 of 2024 (Consolidated)) [2024] KEHC 12730 (KLR) (Civ) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12730 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E1056 & E1081 OF 2024 (CONSOLIDATED)
JN MULWA, J
OCTOBER 22, 2024

BETWEEN

AMB D. KOKI MULI GRIGNON 1ST APPELLANT

AZIMIO LA UMOJA ONE KENYA COALITION 2ND APPELLANT

AND

DR AUGUSTUS KYALO MULI 1ST RESPONDENT

POLITICAL PARTIES LIAISON COMMITTEE 2ND RESPONDENT

AND

**CLERK TO THE SENATE/SECRETARY PARLIAMENTARY SERVICE
COMMISSION INTERESTED PARTY**

PARTY OF NATIONAL UNITY INTERESTED PARTY

JUDGMENT

Background

1. There are two appeals for determination emanating from the Political Parties Tribunal (PPDT) judgment delivered on 18/09/2024.

By directions of the court taken by consent of the parties, the two appeals were deemed consolidated with Appeal No. 1056 of 2024 constituting the lead file.

2. The Appellant as reconstituted are Amb. Dr. Koki Muli Grignon as 1st Appellant Dr. Koki Muli and Azimio la Umoja one Kenya Coalition herein after referred to as respectively Azimio Coalition.



3. The 1st Respondent is Dr. Augustus Kyalo Muli (Dr. Augustus Muli); 2nd Respondent, Political (Political parties Liaison Commission) (PPLC), the 1st Interested Party is Clerk to the Senate/Secretary parliamentary Service Commission (PSC) while the 2nd Interested Party is Party of National Unity.
4. At all material times, Dr, Koki Muli and Dr. Augustus Muli were members of their respective political parties, Wiper Democratic Movement Kenya and National Liberal party respectively which parties are members of the Azimio Coalition.
5. It is common knowledge that for close to two years there has been no duly constituted Independent Electoral and Boundaries Commission (IEBC) selection panel for appointment of IEBC chairperson and commissioner.
6. By a letter dated 16/07/2024, the clerk/Secretary of PSC wrote a letter to Azimio Coalition with a request to competitively nominate three candidates from coalition. The process of such nomination is provided at Section 2B of the First Schedule to the IEBC (Amendment) Act 2024 and forward the said three nominees to the PPLC from the following clusters:
 - i. A party other than a parliamentary party or coalition of parties;
 - ii. A majority party or coalition of parties; and
 - iii. A minority party or coalition of parties.
7. On 26/07/2024, Azimio Coalition conducted an election at Kyaka Hotel in Machakos County for purposes of electing its representatives and the following candidates were declared elected:-
 - i. Evans Misati James – Non-Parliamentary Political Parties.
 - ii. Nicodemus Kipchirchir Bore – Majority Coalition
 - iii. Dr. Augustus Kyalo Muli – Minority Coalition.
8. On 27/07/2024, Azimio Coalition send the names of the elected nominees to the PSC for onward transmission to the president for appointment.
9. Unknown to Dr. Augustus Muli, the Minority Coalition nominee on the 26/07/2024 Azimio Coalition wrote to the PSC Secretary purporting to replace the name of Dr. Augustus Muli with the name of Dr. Koki Muli who had lost the election to Dr. Augustus Muli who garnered 16 votes against 7 votes by Dr. Koki Muli.
10. Prior to the election, the Registrar of political parties on 23/07/2024 issued a membership register of the Political Parties Liaison Committee (PPLC) of members eligible to participate and or vote in the election.
Upon notice for election being issued, two candidates offered themselves Dr. Augustus Muli and Dr. Koki Muli.
11. Following events stated at paragraph *para_99* above, on 29/07/2024 the PSC wrote back to the Azimio Coalition requiring it to change the forwarded names on grounds that it did not comply with the gender parity requirement. on the same day. The AZIMIO Coalition wrote back to PSC stating that there was no framework on achieving the two-thirds gender parity rule as it was a competitive process and it could not push political parties/members to express interest or participate in the process.
12. Upon the above, Dr. Augustus wrote to AZIMIO coalition to resolve the issue using the parties Intend Dispute Resolution Mechanisms (IDRM) within 24 hours but no action was taken. This forced Dr.



Augustus Muli to move to (PPDT) which complaint was registered as complaint No. E008 of 2024 – in Dr. Augustus Kyalo Muli Vs. Azimio la Umoja One Kenya Coalition party & Others.

13. The complainant, Dr. Augustus Muli raised the following grounds before the PPDT among others:-
 - a. That the on the date of election 26/07/2024 he was only elected as a nominee to represent the minority party or coalition of parties against Dr. Koki Muli.
 - b. That on the same date the 2nd Respondent (Political Parties Liaison Commission) (PPLC), without any colour or right the clerk to the senate/secretary Parliamentary Service Commission wrote to Azimio Coalition purporting to change the name of the complainant and replace it with the name of Amb. Dr. Koki Muli.
 - c. That on 27/07/2024 the Azimio Coalition communicated the names of the nominees to PSC for onward transmission to the president for appointment.
 - d. That on 29/07/2024, the PSC wrote back requesting Azimio Coalition to change the forwarded names on grounds that it did not comply with the gender parity requirements.
 - e. That on 29/07/2024, the Azimio Coalition wrote back stating that there was no framework on achieving the two thirds gender rule since it is a competitive process and that the interested party cannot push political parties/members to express interest.
 - f. That Dr. Koki Muli lost the election to the complainant and under Section 2B of the First Schedule to the Independent Electoral and Boundaries Commission (Amendment) Act, 2024 neither the Respondents or Interested Parties can alter the name of the complainant as a nominee.
 - g. That under Article 2(2) of the Constitution powers and functions of specific arms of government, offices and commissions can only be exercised by specific persons that the constitution has specifically assigned.
14. Dr. Augustus Muli therefore sought for orders:-
 1. That a declaration be issued that he was duly elected to represent the minority party/coalition of parties on 26/07/2024 to the IEBC selection panel.
 2. An order of certiorari to quash any list forwarded by the 1st Respondent under Section 2B of the First Schedule to the IEBC (Amendment) Act, 2024 to the president for appointment in absence of the complainant's name.
 3. Any other order the tribunal deems fit to grant.
15. In its Judgment dated 10/09/2024 the PPDT allowed the complaint and issued orders that:-
 - i. Dr. Augustus Kyalo Muli was duly elected on July 26th, 2024 to represent the Minority party / Coalition of Parties on the IEBC selection panel.
 - ii. An order of certiorari is hereby issued quashing any list forwarded by the 1st Respondent under Section 2B of the First Schedule to the Independent Electoral and Boundaries Commission (Amendment)
 - iii. Act, 2024 to the President for appointment that does not include the name of Dr. Augustus Kyalo Muli.



- iv. The 1st Respondent is hereby restrained from replacing or attempting to replace Dr. Augustus Kyalo Muli as the duly elected representative of the minority party/coalition of parties on the IEBC.
 - v. Each party to bear own costs.
16. It is this judgment and decree that precipitated filing of the two appeals Consolidated Appeals Numbers. E1056/2024 and E1081/2024 with E1056 of 2024 constituting the lead file.
17. The Appellant's grounds of appeal in Appeal no. E1056 of 2024 as stated as hereunder:-
- a. That the Political Parties Dispute Tribunal erred both in law and fact in hearing, determining and issuing orders affecting the 1st Appellant DR. KOKI MULI without affording her the right to be heard and the right to a fair trial under Articles 25, 27, 28, 47, 48 and 50 of *the Constitution* of Kenya, 2010 as read with the provisions of the Fair Administrative Actions Act and the rules of natural justice as further provided under the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights; and the International Covenant on Social and Economic Rights on the right to equality before the law and the right to a fair trial. The Tribunal, has made adverse findings, inferences and ultimately revoked the nomination of the 1st Applicant/Appellant DR. KOKI MULI in total disregard of the rules of natural justice and the rights and entitlements of a fair hearing and trial.
 - b. That the Political Parties Dispute Tribunal erred both in law and fact in dismissing the Appellants objections on the jurisdiction of the Tribunal's competence to hear and determine the Complaint before it pursuant to Section 40 of the *Political Parties Act* and in further contravention of the Fair Administrative Actions Act which demands the exhaustion of available remedies before a party invokes the Court's jurisdiction.
 - c. That the Political Parties Dispute Tribunal erred both in law and fact in dismissing the Appellants objections on the locus of the Complainant to institute and sustain the Complaint in regard to the nomination to the Independent Elections and Boundaries Commission Selection Panel.
 - d. That the Political Parties Dispute Tribunal erred in law and fact in its appreciation of the facts and evidence before it and the impugned decision herein is a nullity and contrary to the dictates of *the Constitution* of Kenya, 2010 and more so, it is unreasonable and against the tenets of legality and the principles of fair administrative action under Article 47 and Sections 4, 5, 6 and 7 of the Fair Administrative Actions Act namely.
 - a. The Tribunal has selected a stranger, to represent the Azimio La Umoja One Kenya Coalition, who's political party is not a parliamentary party, which slot is specifically reserved for a Coalition Political Party in the Independent Electoral and Boundaries Commission Selection Panel contrary to the provisions of Paragraph 1 (2) (b) (iii) of the First Schedule to the *Independent Electoral and Boundaries Commission Act* as amended by the Independent Electoral and Boundaries (Amendment) Act, 2024.
 - b. The Tribunal's decision is a nullity and contrary to the provision of Paragraphs 1 and 2 of the First Schedule to the Independent Electoral and Boundaries Commission (Amendment) Act, 2024 as read with the provision of Articles



27 and 47 of *the Constitution* of Kenya, 2010 which requires that not more than two-thirds (2/3) of the nominees are of the same gender.

- c. That the Tribunal has wrongfully and illegally usurped the role of the Azimio La Umoja One Kenya Coalition by substituting its decision and picking a stranger to represent Coalition through a slot specifically reserved for a parliamentary Coalition and Political Party.
 - d. That the Tribunal erred in law and fact by converting the dispute into an election Petition and making findings contrary to the rules of natural justice and further disregarding the evidence as submitted by the 2nd Appellant.
 - e. That the Political Parties Dispute Tribunal erred in law and misapprehended the facts and the law, while ignoring the evidence, issued Orders not sought, and reached an erroneous conclusion not founded in law and thus resulting to a violation of the Applicants/Appellants right to a fair hearing and trial.
18. For the above, the Appellant prays for the following orders namely;
- a. That the Appeal herein be allowed with costs.
 - b. That the determination dated 10th September; 2024 by the Political Parties Dispute Tribunal in Political Parties Dispute Tribunal Complaint No. E008 Of 2024; Dr. Augustus Kyalo Muli Vs Azimio La Umoja One Kenya Coalition Party And Others, be set aside, and declared null and void.
 - c. That a declaration does issue that the Judgment dated 10th September 2024 rendered by the Political Parties Dispute Tribunal is in contravention of Articles 25, 27, 28, 47, 48 and 50 of *the Constitution* of Kenya, 2010 as read with the Fair Administrative Actions Act.
 - d. The costs of the Complaint and this Appeal be awarded to the Appellants.
 - e. Any such other relief and remedy that the Honourable Court may deem just and appropriate to grant.
19. The Appellant's grounds of appeal in Appeal No. E1081 of 2024 are as hereunder:-
- a. That the Political Parties Dispute Tribunal erred in law and in fact in finding that the law does not require the three nominees of the Political Parties Liaison Committee to the Selection Panel for the recruitment of the Chairperson and Commissioners of the Independent Electoral and Boundaries Commission (IEBC) to comply with the two-thirds gender rule whereby not more than two-thirds of the nominees shall be of the same gender.
 - b. That the Political Parties Dispute Tribunal erred in law and in fact in failing to apply the provisions of *the Constitution* of Kenya, 2010 and the provisions of paragraph 1(2C) of the First Schedule to the to the *Independent Electoral and Boundaries Commission Act* (as amended by the IEBC Act, 2024) which provides that in nominating its nominees for appointment to the Selection Panel for the recruitment of the Chairperson and Commissioners of the Independent Electoral and Boundaries Commission (IEBC), the Political Parties Liaison Committee shall ensure that not more two-thirds of the nominees are of the same gender.



- c. That the Political Parties Dispute Tribunal erred in law and in fact in finding that there was no proper legal framework to address the question of gender parity in arriving at the nominees of the Selection Panel and thereafter proceeded to totally ignore the said legal provisions.
 - d. That the Political Parties Dispute Tribunal erred in law and in fact in failing to find that administrative procedures can be put in place to ensure that the issue of gender parity is complied with in arriving at the nominees of the Selection Panel.
 - e. That the Political Parties Disputes Tribunal erred in law and in fact in failing to issue orders that give effect to the provisions of *the Constitution* and the *Independent Electoral and Boundaries Commission Act* in relation to *the constitution* of the Selection Panel for the appointment of Commissioners of the IEBC.
 - f. That the Political Parties Dispute Tribunal erred both in law and fact in failing to appreciate the Appellant's submissions that the Tribunal lacked jurisdiction to entertain the dispute and issued orders affecting nominees of other nominating bodies other than the Political Parties Liaison Committee.
 - g. That the Political Parties Disputes Tribunal erred in law and fact by converting the dispute before it into an election dispute in total disregard of the evidence submitted before it by the Appellant.
 - h. That the Political Parties Dispute Tribunal erred in law and misapprehended the facts and the law, while ignoring the evidence, and issued Orders that violate *the Constitution* and are detrimental to public interest.
 - i. That the Political Parties Disputes Tribunal erred in fact and in law in arriving at conclusions that were inconsistent, detached and at complete variance with the evidence before it for consideration.
20. Appellants therefore pray that;
- a. That this appeal be allowed and the judgement and the consequential orders and/or declarations arising from the decision of the Political Parties Dispute Tribunal Complaint No. E008 of 2024 rendered on 10th September; 2024 in Dr. Augustus Kyalo Muli versus Azimio la Umoja One Kenya Coalition & Others be set aside and declared null and void.
 - b. That a declaration does issue that the judgement of the Political Parties Disputes Tribunal dated 10th September, 2024 in Complaint No. E008 of 2024 rendered on 10th September; 2024 in Dr. Augustus Kyalo Muli versus Azimio la Umoja One Kenya Coalition & Others is in contravention of Article 10 and 27 of *the Constitution* of Kenya as read with Paragraph 1(2C) of the First Schedule to the IEBC Act.
 - c. That the Complaint before the Political Parties Dispute Tribunal be dismissed with costs.
 - d. That the costs of the Complaint and this Appeal be awarded to the Appellant.
 - e. That the court be pleased to give any such further/other orders as it may deem fit and just.



Submissions

1st and 2nd Appellants Submissions (Dr. Koki Muli and Azimio Coalition)

21. The Appellants submitted that the decision by the PPDT is a nullity in totality as the Court rendered a decision affecting Dr. Koki Muli without affording her an opportunity to be heard. That it is uncontested that the 1st Respondent sought direct orders affecting Dr. Koki Muli and even made specific allegations against her. To the contrary, the 1st Respondent has now shifted the position and purported that the Azimio La Umoja Coalition was representing her. It was submitted by the Appellant's that the right to a fair trial and the right to be heard cannot be substituted and where specific allegations and orders are sought affecting a person, the person must be afforded an opportunity to be heard.
22. It is further submitted that the Tribunal erred in its interpretation of the question of jurisdiction and further ignored the arguments and authorities advanced by the Appellant on jurisdiction specifically, Section 40 of the *Political Parties Act* that it does not confer the Tribunal with open-ended jurisdiction over all and sundry, that the tribunal cannot exercise its powers in a vacuum and in the absence of express legislative authority and neither can the complainant cloth it with jurisdiction, citing the Supreme Court of Kenya in the case of S.K Macharia & Another vs KCB, *§ 2 Others, Supreme Court Application No. 2 of 2011*, (2012) eKLR, and Gatirau peter Munya V. Dickson Mwenda Kithinji & 2 Others [2024] eKLR
23. Further, the Appellants submitted that the reasoning by the PPDT is flawed as it purports to read into Section 40 to expand its jurisdiction to that which was never contemplated by the legislature.
24. On the doctrine of exhaustion, the Appellants submitted that the Tribunal erred in law in its interpretation of Section 40 and failed to consider the provisions of the Fair Administrative Actions Act and the evidence tendered before it stating that the import of Section 40 of the *Political Parties Act* is that for a party to properly invoke the jurisdiction of the PPDT, it must first exhaust the available mechanisms within its political party or coalition party as the case may be.
25. While relying on Article 16 of the Azimio La Umoja One Kenya Coalition Agreement, the Appellants submitted that the 1st Respondent never lodged any Complaint before the Azimio Coalition and neither did he formally trigger the above provisions to trigger the dispute resolution mechanism under the Azimio Coalition Agreement, stating that a mere demand letter from the Advocate does/did not constitute a Complaint in accordance with the provisions of Article 16 of the Azimio Coalition Agreement.
26. It was further submitted that a party must make frantic and genuine efforts towards exhausting available remedies and invoking the Internal Dispute Resolution Procedures of the party involved as per the parties Constitution and rules. The Appellants submitted that the PPDT erred in law in failing to address and consider the objections as to the question of locus in regard to the Complaint as raised by the Appellant. In this case, the 1st Respondent lacked the locus to institute and sustain the Complaint as its political party was the nominating body to propose names for consideration for nomination. The 1st Respondent did not nominate himself hence he could not raise a challenge to the nomination process.
27. Additionally, the Appellants submitted that the decision by the PPDT is tainted in illegalities and offends the provisions of Articles 47 and Sections 4, 5, 6 and 7 of the Fair Administrative Actions Act by selecting a stranger, to represent the Azimio La Umoja One Kenya Coalition, who's political party is not a parliamentary party, which slot is specifically reserved for a Coalition Political Party in



the Independent Electoral and Boundaries Commission Selection Panel contrary to the provisions of Paragraph 1 (2) (b) of the First Schedule to the *Independent Electoral and Boundaries Commission Act* as amended by the Independent Electoral and Boundaries (Amendment) Act, 2024.

1ST Respondent's Submissions (Dr. Augustus Muli)

28. On the issue of Jurisdiction of the Political Parties Tribunal, the 1st Respondent submitted that it is provided for under Section 40 of the *Political Parties Act*. It was submitted that the Dr. Augustus Muli is a member of the National Liberal Party which is a coalition party of the 2nd Appellant as shown in the list from the Registrar of political parties shared with Azimio Coalition prior to the impugned election, and that he attended its meetings, was recognized as a member until the time he participated in the election, won and the said results were not the outcome desired by the leadership of the Coalition Party.
29. It is therefore not in doubt that the Complaint that the 1st Respondent filed was squarely within Section 40 of the *Political Parties Act*, and was against Dr. Koki Muli as she was a candidate in an election which she lost and never challenged the outcome of the said election, which she ought to have respected.
30. It was further submitted that elections are so important that when a court or a tribunal is able to discern, it then should respect it citing the case of *Richard Otieno Muga v Orange Democratic Movement & 2 others* [2017] eKLR where Wakiaga J. observed as follows:-
- “In an election voting is a formal expression of will or opinion by the persons entitled to exercise the right on the subject or issue in question and that right to vote means a right to exercise the right in favour of reasonable motion or persons standing for election”
31. Dr. Augustus Muli further submitted that the issue of gender parity was raised as an afterthought and it can only be dealt with if a proper legal framework is put in place to achieve such a result. In addition, it was submitted that this had clearly been explained by the Azimio Coalition in its response dated 29th July 2024 and its elaboration that:-
- a. The process of an election cannot be predetermined especially if both male and female candidates subject themselves and are allowed to participate in the election.
 - b. Unless stipulated political parties cannot be compelled to forward the names of female candidates.
32. Dr. Augustus Muli in his supplementary written submissions dated 7th October 2024 further submitted that the provisions of Section 2C of the First Schedule to the Independent Electoral and Boundaries Commission (Amendment) Act, 2024 are to be read conjunctively with Sections 2B of the said schedule, citing the Supreme Court of Kenya opinion in the matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR.

2nd Respondent's Submissions - Political Parties Liaison Committee (PPLC)

33. The 2nd Respondent admits Jurisdiction of the PPDT and agrees that Dr. Augustus Muli had indeed attempted to resolve the dispute using the coalition's Internal Dispute Resolution Mechanisms but the same was never actioned upon by the coalition's prompting Dr. Augustus Muli to seek the intervention of the tribunal, further adding that it invoked the IDR of Azimio Coalition when it wrote to it for the same to be resolved.
34. It cited the case of *Omole v Mghanga & 2 others; Communist Party of Kenya (CPK) (Interested Party) (Complaint E024 (NRB) of 2022)* [2022] KEPPDT 965 (KLR) (10 May 2022) (Judgment)



where it was stated thus: "However, the Tribunal is conscious that the doctrine of exhaustion is not absolute and where it can be shown that the Claimant attempted to resolve the matter using the party's internal dispute resolution mechanism (IDRM) as was stated in *Rushila Akoth Odida & 2 others v Orange Democratic Movement (Complaint No 331 of 2017)*, para 13, foundations that dictated the amendments to Section 40(2) remains intact".

35. It was submitted by PPLC that equity does not help the indolent and as such, Dr. Koki Muli's failure to request for joinder at the PPDT proceedings cannot ostensibly be cured at the Appellate proceedings as held in the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR* wherein the court quoted the following passage from *Snell's Equity by John MC Ghee Q.C. (31st Edition)* at page 99:

"The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing."

36. It was further submitted that it is crystal clear that Dr. Augustus Muli was subjected to a transparent and competitive process in which he emerged the winner and hence has a legitimate expectation for the protection of his fundamental rights of political rights and Fair Administrative Rights as envisaged under Article 38 and 47 of *the Constitution* of Kenya, citing further the case of *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR*.
37. Additionally, Dr. Augustus Muli having been subjected to a free and fair election as a nominee to the IEBC selection panel, and by merit having been so elected as the nominee for the minority representative for the Azimio Coalition, there was legitimate expectation for Dr. Augustus Muli's name to be transmitted to the president for appointment.

Submissions by 1st Interested Party - (Clerk To The Senate/Secretary Parliamentary Service Commission (PSC))

38. This party submitted that it is evident that IEBC Act requires nominating bodies among them the Azimio Coalition to select nominees for appointment through a competitive and transparent process and also to ensure that not more than two-thirds (2/3) of the nominated shall be of the same gender citing Paragraph *para_1 1(2B and 2C)* of the First schedule to the IEBC Act.
39. It was further submitted that the Political Parties Disputes Tribunal (PPDT) erred in law and in fact by only considering the legal requirements for a transparent and competitive process and not the two-thirds gender principle which is equally a legal requirement, adding that the same way the Azimio Coalition was able to adhere to the requirement of transparency and competitive process through election, they could still come up with a mechanism to achieve the two-third gender requirement in its coalition of parties.
40. PSC further submitted that the two-thirds gender rule is a Principle introduced by *the Constitution* that it guarantees every person equality before the Law and freedom from discrimination quoting Article 27(8) that provides that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective and appointive bodies shall be of the same



gender, and the Court of Appeal in *Njenga v Judicial Service Commission & 9 Others* (Civil Appeal 234 of 2017) [2022] KECA 1429 (KLR) where the Court held as follows;

“Firstly, the two thirds gender principle is a constitutional directive. It is framed in imperative terms, and is a mandatory factor that the 1st Respondent should take into consideration when recruiting for the office of judge. The question of gender is as important as the one of competency.”

41. On whether the list forwarded for onward transmission to the President for appointment to the selection panel is legally compliant, it was PSC’s submission that the names did not adhere to the two-thirds gender rule as required by law.
42. On whether PPLC and the Parliamentary Service Commission should forward the list of nominees to the President for appointment to the selection panel despite not complying with the two-thirds gender rule principle, it was submitted that there is a likelihood of any person challenging the composition of the said selection panel as it will be non-compliant with the law, further adding that should that happen, PSC would be unable to recover the resources expended to facilitate the said panel, adding that Parliamentary Service Commission being a Constitutional Commission must ensure adherence to *the Constitution*. In this regard, it must ensure adherence to the two-thirds gender rule. Therefore, the Commission cannot forward a list that is not compliant with the law.
43. For the above, Parliamentary Service Commission submitted that in an attempt to cure the anomaly, the Political Parties Liaison Committee be directed to conduct fresh nomination/elections that is compliant with the law.

Issues For Determination

- a. Whether the PPDT had Jurisdiction to hear and determine Complaint No.E008 of 2024.
- b. Whether Dr. Augustus Muli was validly elected/nominated to the Independent Election Boundaries Commission selection panel.
- c. Whether PPDT erred in law and in fact in failing to consider the procedure of appointment of the panel by ignoring Part 1 & 2 of The 1st Schedule of the IEBC (Amendment) Act, 2024.
- d. Whether Dr. Augustus Muli’s Legitimate Expectation was violated by Azimio coalition.
- e. Costs

Analysis And Determination

Whether the PPDT had Jurisdiction to hear and determine complaint No. E008 of 2024

44. Section 40 the *Political Parties Act* provides for the Jurisdiction of the political parties’ tribunal thus—
 - (1) The Tribunal shall determine—
 - a. disputes between the members of a political party;
 - b. disputes between a member of a political party and the political party; (c) disputes between political parties;
 - c. disputes between an independent candidate and a political party;
 - d. disputes between coalition partners;



e. appeals from decisions of the Registrar under this Act.

45. The events that took place on the 26/07/2024 soon after the transparent and competitive process as stated earlier sadly changed the happy ending for Dr. Augustus Muli.

Without being repetitive, his name was communicated to PPLC by the Azimio Coalition for transmission to the President as the nominee for the minority cluster on 26/07/2024. However, the clerk to PPLC declined Azimio's invitation to forward the name for appointment, and by a letter of 27/07/2024 requested Azimio Coalition to replace Dr. Augustus Muli's name with another to comply with the gender parity rule in line with Section 2C of the First Schedule to the IEBC Amendment Act, 2024.

46. Without considering the ramifications of such actions, Azimio coalition complied and indeed replaced Dr. Augustus Muli's name with the name of Dr. Koki Muli, who had lost the election to Dr. Augustus Muli. All these events took place without his knowledge.

47. Evidence was tendered that soon after an attempt was made by Dr. Augustus Muli to invoke the Azimio Coalition IDRM by a letter dated 29/07/2024 Azimio coalition on its own also attempted its IDRM by its letter dated 29/07/2024 but no response was received. Time being of essence, Dr. Augustus Muli was forced to escalate the complaint to the PPDT.

48. As provided at Section 40 of the *Political Parties Act*, a party to a dispute must adduce evidence of an attempt to subject the dispute to IDRM. The court is satisfied that Article 16 of the Azimio Coalition Agreement that provides and demands that a party formally lodges a complaint with the Dispute Resolution panel, which hears and determines such a dispute.

49. It is evident that Dr. Augustus Muli formally lodged his complaint to Azimio Coalition when by his letter through his advocates, dated 29/07/2024 demanded the coalition to look into the dispute but instead, it replaced his name with that of Dr. Koki Muli and went silent on his request.

Faced with these events, Dr. Augustus Muli had to invoke the jurisdiction of the P-PDT for urgent redress. Suffice to cite the case of Richard Otieno Muga v. Orange Democratic Movement & 2 Others [2017] eKLR wherein Justice Wakiaga understood the importance and respect by all of results of an election that has been transparently and competitively conducted.

50. The election subject of these appeals was such case.

See also the case of Omole v Mghanga & 2 Others; Communist Party of Kenya (CPK) (Interested Party) (Complaint E024 (NRB) of 2022) [2022] KEPPDT 965 (KLR) (10 May 2022) (Judgment) where it was stated thus:-

“..... the Tribunal is conscious that the doctrine of exhaustion is not absolute and where it can be shown that a Claimant attempted to resolve the matter using the party's internal dispute resolution mechanism (IDRM).”

This observation was also stated in the case of Rushila Akoth Odida & 2 others v Orange Democratic Movement (Complaint No 331 of 2017), para 13 and formed foundations that dictated the amendments to section 40(2).

51. In the case John Mworira *Ncheber & Others v. The National Chairman Orange Democratic Movement & Others (Nrb, PPDT Complaint No. E002 OF 2022)* the PPDT set out certain specific guidelines for



determining what constitutes an attempt at IRDM in line with Section 40(2) of the *Political Parties Act* as follows:-

“Our pre-amendment position that a party must demonstrate on a fides (an honest attempt) in pursuing IDRDM remains good law. Furthermore, the party to a dispute should also show that, among others:-

- a. The unavailability of the organ to resolve disputes;
- b. If the same is available, it is inoperative, fraught with conflict of interest, obstructive, in perpetual paralysis or subject to inordinate delays, which may compromise the subject matter of the dispute.
- c. Reasonable time is afforded to the party to respond constitute or activate an IDRDM organ and deal or determine the dispute.
- d. Due consideration should be given to the urgency and public interest in the subject matter of the dispute and
- e. The reliefs sought should be proportionate, and if alternative remedies suffice to mitigate the harm likely to be suffered, the same should be considered. In essence, the utilitarian or proportionality of the process and remedies should be considered so as to achieve an equilibrium. The foregoing list is by no means exhaustive, but is a useful compass for navigating the frontiers delimited by section 40(2) of the *Political Parties Act*, 2011”.

52. See also Civil Appeal No. E630 of 2023 – Jeremiah Kioni, David Murathe & 2 Others vs. The National Disciplinary Committee of the Jubilee Party and 2 Others [2024] eKLR where this court discussed the matter of an attempt at IDRDM as envisaged at Section 40(2) of the *Political parties Act* exhaustively.
53. For the foregoing, the court is therefore satisfied that Dr. Augustus Muli attempted to invoke Azimio Coalition IDRDM mechanism and thus the PPDT was duly clothed with the requisite jurisdiction to hear and determine Complaint No. E008 of 2024.

Whether Dr. Augustus Muli was validly elected/nominated to the Independent Electoral and Boundaries Commission Selection Panel.

54. Mr. Malenya Advocate for Dr. Augustus Muli in advancing his position asserted that Dr. Augustus Muli was duly elected and that Dr. Koki Muli subjected herself to the election held on 26th July, 2024 conducted by the IEBC and never challenged the result.
55. At the PPDT, despite being aware of the proceedings, she failed to express her interest therein upto when judgment was delivered when she realized that her cup of tea had been snatched away from her, upon which she dashed to court seeking to be enjoined to the appeals proceedings post judgment. In the case of Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR, the Court held that:

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”.

Despite her obvious indolence and for ends of justice to be seen, this court by a ruling dated 3/10/2024 enjoined Dr. Koki Muli as an appellant in these appeals and has since participated as such;



56. Section 2 of the IEBC (Amendment) Act defines a parliamentary party as ‘A party or coalition of parties consisting of not less than five percent membership of the national assembly and senate.

As a matter of fact and without a doubt, the National Liberal Party is not a parliamentary party within the coalition. Section 2 of the IEBC (Amendment) Act, 2024 is specific that candidates to the IEBC Selection Panel were to be selected from specific clusters.

The Cluster from which Dr. Augustus Muli was nominated was the Minority Party or Coalition of parties. It is not a parliamentary party as it has no representation in the National Assembly. This material fact has not been controverted by any of the parties in these proceedings. Dr. Augustus Muli has opted to remain silent on the issue.

57. Indeed the Appellants submitted that the PPDT selected a stranger to represent Azimio Coalition, whose party is not a parliamentary party and which slot is specifically reserved for a Coalition Political Party in the IEBC selection panel.

Prior to the impugned election, Azimio Coalition held several meetings to find a way of circumventing the law with Dr. Augustus Muli being present as captured in at least minutes of such meetings. Knowing very well that the National Liberal Party was not a Parliamentary Party the Azimio Coalition cleared Dr. Augustus Muli to contest in the election. This in the courts view was malicious and illegal.

This contravention of law aspect alone disqualified Dr. Augustin Muli from being cleared by the Azimio Coalition to contest in the election of 26/7/2024 but instead, the coalition cheered him on and surprisingly, he garnered majority votes.

58. It is to be noted that the Azimio Coalition at all material times knew or ought to have known that National Liberal Party though a member of the coalition, had no representation in parliament and therefore was not a parliamentary party and clearing Dr. Augustus Muli to contest was an act in futility and dare say, was malicious and ill intentioned.

For this reason alone, the court finds that Dr. Augustus Muli was not validly nominated/elected to represent the Azimio La Umoja Coalition in the IEBC selection panel.

It is also worthy to state that once a candidate has been duly elected in a competitive election process, no one or body can purport to change or replace the name of such elected candidate with another as at its whim, PPLC purported to do. Only a Court of Law clothed with the necessary jurisdiction can reverse the election results upon being moved in that regard.

Whether the PPDT erred in law in failing to consider the procedure of appointment of the panel ignoring Part 1 & 2 of the First Schedule to the IEBC (Amendment) Act, 2024.

59. The Party of National Unity (PNU) contented that the gender parity requirement should be handled by the Political Parties Liaison Committee as envisioned under Section 2 of the First Schedule of the IEBC (Amendment) Act, 2024 and that PPLC’s decision cannot be referred to the minority coalition for dispute resolution even if the coalition had mechanism for such dispute resolution.

60. Parliament has not provided regulations or any mechanism guide or ensure the two third gender rule is complied with in a competitive election process. Indeed, the Appellants too added their voices by submitting that the tribunals decision was contrary to the provision of Paragraph 1 and 2 of the First Schedule to the IEBC (Amendment) Act, 2024 as read with provision of Article 27 and 47 of *the Constitution* of Kenya, 2010 which requires not more than two thirds (2/3) of the nominees are of the same gender. However, they did not attempt to provide a mechanism to achieve compliance.



61. Paragraph 2(C) of the IEBC (Amendment) Act, 2024 provides that -;

In nominating the persons under sub - paragraphs 2(a), (b) and (e) the respective nominating bodies shall ensure that not more than two thirds of the nominees are of the same gender.

62. Article 27 of *the Constitution* of Kenya provides-

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

63. Despite the duty to provide mechanisms or framework envisaged at (6) above, the state is yet to comply and until then it is difficult for anybody to attempt to do so, lest they are accused of discrimination. The legislation is in place but there are no mechanisms as per the provision of Article 27(6) of *the Constitution* of Kenya, 2010 to give effect to the operationalization of Paragraph 2(C) of the IEBC (Amendment) Act 2024.

64. To this end, the Court finds that failure by the PPDT to abide by the procedure of appointment of the panel set out in Part 1 & 2 of 1st Schedule to the IEBC (Amendment) Act, 2024 though was not intentional for lack of a framework in competitive election process. Pursuant to provisions of Article 27(4), Article 27(6) and Article 27(8) of *the Constitution* of Kenya 2010. The PPDT cannot be held at fault for the reasons stated. The blame falls squarely on parliament's shoulders.

Issues (d) And (e) Whether Dr. Augustus Muli's Legitimate Expectation was violated by Azimio coalition and Costs

65. On costs, the guiding principles are stated at Section 27(1) of the *Civil Procedure Act*. The general principle is that an award of costs shall be at the discretion of the court or judge and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid and further that such costs shall follow the event unless the court or judge shall for good reason otherwise order (emphasis added).



66. To grant costs or not is therefore an exercise of court's discretion. However, the court can depart from the general principle for good reason that includes the party's conduct prior or during the cause of litigation that has led to the litigation which but for the party's conduct might have been averted – see case of Stanley Kaunga Nkarichia V. Meru Teacher College (2020) Co. eKLR and ELC Appeal no 1 of 2019 Charles Muriu Mwangi v. Benjamin Makohka Nyongesa [2021] eKLR.
67. A successful party may be denied costs if it is proved that but for its conduct the action would not have been brought. Thus in determining the issue of costs, the court is entitled to look at, inter alia;
- a. Conduct of the parties;
 - b. Subject of litigation;
 - c. Circumstances which led to the institution of the suit, and
 - d. Relationship of the parties.
68. In respect to these consolidated appeals before the court, there is uncontroverted evidence that the chronology of events that led to the dispute between Dr. Augustus Muli and the Azimio Coalition which eventually roped in Dr. Koki Muli at the appeal level were all due to Azimio Coalition's conduct by its willful and intentional actions by ignoring the clear provisions of the IEBC (Amendment), Act 2024 .
69. Without unnecessary repetition, the Azimio Coalition's conduct at the preliminary stage prior to the 26/07/2024 election when it cleared Dr. Koki Muli of Wiper Democratic Movement and Dr. Augustus Muli of National Liberal Party to contest for the Minority Party Coalition of parties, leaves a lot to be desired as to its real intentions. This conduct led Dr. Augustus Muli to have a legitimate expectation that if he won, he would have his name communicated to the clerk/secretary of the PSC for forwarding to the President for appointment into IEBC Selection Panel.
70. Had the Azimio Coalition been keen to observe and comply with requirements as communicated to it by the Political Parties Registrar and the PPLC vide letters sent to it, it would have made a finding that Dr. Augustus Muli's party, National Liberal Party, was not a parliamentary party as it had no representation in parliament, and by that alone, ought NOT to have cleared Dr. Augustus Muli to contest for the prestigious position.
- It is common knowledge in Kenyan society that any election to any position, more so of a political nature is a very expensive exercise and emotive. To be robbed of a win is worse than outright lose.
71. The Supreme Court of Kenya in the case of Jasbir Singh Rai & 3 Others(2014) eKLR renders thus:-
- “The object of ordering a party to pay costs is to reimburse the successful party of amounts expended on the case. It must not be made merely as a penal measure Costs are a means by which a successful litigant is recouped for expenses to which he has put in fighting an action.”
72. Despite this litigation being of a public interest nature this court is persuaded due to its peculiar nature and circumstances to depart from the general principle that in a public- interest litigation are rarely



awarded to any of the parties. In the Supreme Court of Kenya case of Raila Odinga & 3 Others vs. IEBC (Petition No. 5/2013) (2013) eKLR; the court held that:-

“...if proceedings are brought to advance a legitimate public interest and contributes to a proper understanding of the law in question without private gain....then costs may not be awarded to the successful party”.

Similar holding were held earlier in the Harun Mwau & Others V. AG & Others [2012] eKLR, and in others thereafter.

73. For the foregoing the court holds the view that costs of these consolidated appeals must be awarded to Dr. Augustus Muli, to reimburse him of the monies he expended after he was cleared by the Azimio Coalition to contest for the position when it knew, or ought to have known that Dr. Augustus Muli lacked the requisite capacity to do so for reasons stated above. These costs shall be borne by the Azimio Coalition.

Disposition

74. The court finds merit in the consolidated appeals. They are allowed.

Consequently,

- a. The Political Parties Dispute Tribunal’s (PPDT) Judgment on complaint No. E008 of 2024 delivered on dated 10/09/2024 is hereby set aside and declared null and void.
- b. Costs of the consolidated appeals are hereby awarded to the 1st Respondent, Dr. Augustus Muli, in both Appeals No. E1056 of 2024 and E 1081 of 2024. The said costs shall be borne by the 2nd Appellant herein, Azimio La Umoja One Kenya Coalition.
- c. The court further directs and orders that Fresh Election for Minority Coalition Cluster for nominees to the IEBC selection panel be held in strict compliance with provisions of Sections 2(B) and 2(C) of the First Schedule of IEBC (Amendment) Act 2024, within 48 hours of this judgment/orders, and in any event not later than 3.00pm on 24/10/2024.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF OCTOBER 2024 AT 2.30PM.

JANET MULWA

JUDGE

