



**Kawaka & another v Ouma & 3 others (Election Petition Appeal
168 of 2022) [2022] KECA 728 (KLR) (29 July 2022) (Reasons)**

Neutral citation: [2022] KECA 728 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
ELECTION PETITION APPEAL 168 OF 2022
PO KIAGE, HA OMONDI & F TUIYOTI, JJA
JULY 29, 2022**

BETWEEN

LOICE AKOTH KAWAKA 1ST APPELLANT

ROSELINE AKOTH AWINO 2ND APPELLANT

AND

OSCAR OLUOCH OUMA 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

ORANGE DEMOCRATIC PARTY 3RD RESPONDENT

RETURNING OFFICER NDHIWA CONSTITUENCY 4TH RESPONDENT

*(An appeal against the Judgment and Orders of the High Court of Kenya at Homa Bay
(Waweru Kiarie, J.) dated 6th July, 2022 in Kisumu Election Petition No. 1 of 2022)*

REASONS

(Rule 34 (7) of the Court of Appeal Rules, 2022)

1. On 14th July, 2022, we heard the appeal herein, and due to the urgency in light of timelines on events related to the preparation for the forthcoming general elections to be held on 9th August, 2022, on the same day pursuant to Rule 34(7) of the [Court of Appeal Rules, 2022](#), we rendered an extempore judgment, allowing the appeal and setting aside in entirety the judgment and decree of the High Court (Kiarie, J.) dated 6th July, 2022. We reserved the reasons for the judgment to 29th July, 2022. We now give our reasons for allowing the appeal.
2. The appellants, Loice Akoth Kawaka, Roseline Akoth Awino, and Oscar Oluoch Ouma, the 1st respondent are all members of the Orange Democratic Party (ODM), the 2nd respondent, and aspired



- to be nominated by their party for the position of Member of County Assembly, South Kabuoch Ward, Ndhiwa, Homa Bay County, so as to contest in the forthcoming general elections to be held on 9th August, 2022.
3. On 14th April, 2022, the ODM conducted party primaries by universal suffrage, and proclaimed the 1st respondent as the winner, and therefore its nominee.
 4. Aggrieved by the outcome, the appellants herein appealed to the Political Parties Dispute Tribunal (PPDT), and on 1st May, 2022, the PPDT nullified the 1st respondent's election as the ODM party candidate, on grounds that electoral violence had vitiated the party primaries, the PPDT ordered thus:
 - a. We allow the appeal and set aside the declaration and nomination by the 2nd and 3rd respondents of the 1st respondent as the nominee of the Orange Democratic Movement Party (the 2nd respondent herein) for the South Kabuoch /Pala Ward Member of County Assembly seat for the August 9th General Election;
 - b. The 2nd and 3rd respondents shall conduct a fresh election of the 2nd respondent's nominee for Member of County Assembly for South Kabuoch/Pala Ward through a universal suffrage of its members, within 72 hours of this Order; this is to say, on or before 3rd May, 2022.
 5. Subsequently, the 2nd respondent opted to directly nominate the 1st respondent as its candidate, rather than conduct a repeat nomination by universal suffrage, citing exercise of the discretion conferred to it by the Orange Democratic Movement Party Primaries and Nomination Rules, 2021.
 6. The appellants were once again aggrieved and lodged a complaint with Independent Electoral Boundaries Commission (IEBC), the 3rd respondent, seeking nullification of that direct nomination, lamenting that there were no consultations with the other candidates; and the nomination procedure adopted by the 2nd respondent was in defiance of the PPDT order directing a fresh election by universal suffrage. Consequently, on 17th June, 2022, the 3rd respondent upheld the nullification of the petitioner's nomination due to the failure of the 2nd respondent to conduct nomination by way of universal suffrage.
 7. The said decision was rendered just before the 3rd respondent officially gazetted candidates who would appear on the ballots box, and the 1st respondent being apprehensive that there was imminent risk of their party having no candidate for the position of MCA yet he had been duly nominated directly, filed a constitutional petition before the High Court seeking:
 - a. A declaration that the decision made by the respondent through its Dispute Resolution Committee on the 17th day of June, 2022 had violated his rights under Articles 19, 20, 24, 25, 38, 40, 47 and 50 of Constitution, and the same be quashed and set aside.
 - b. A writ of mandamus do issue to compel the respondent to list the petitioner as a candidate running for the position of Member of County Assembly for SOUTH KABUOCH WARD on an ODM ticket for the elections slated for the 9th day of August, 2022.
 - c. Costs of the Petition be provided for.
 8. In his judgment, the trial Judge after considering the arguments presented, noted that the petitioner raised 4 issues for determination being, whether: the PPDT had powers to dictate the method to be used in the conduct of fresh nominations; the petitioner's direct nomination was in conformity with the law; the petitioner should be punished for the choices made by his party; and who should bear the costs of the petition. The learned Judge also noted that the 1st respondent raised two issues for determination namely whether: the nomination of the petitioner met the constitutional threshold and



the principles under election legislation in Kenya; and whether the petition met the constitutional threshold; whilst the 3rd and 4th respondents raised the issues whether: the Committee had jurisdiction over the complainants standing before it; the 1st respondent's direct nomination was in violation of a court order valid; the Returning Officer could validly clear the 1st respondent before resolving the objection filed against his clearance; the 1st respondent was automatically disqualified under ODM's Rule 17(1) (f) for his and his agents' use of violence, threats, and intimidation; and his eligibility for a direct nomination under ODM's rules barring perpetrators of violence from direct nominations.

9. The court determined that from the issues framed by the parties the only issue for determination was whether the petition met the constitutional threshold to warrant determination, as such the court felt no need to frame issues for determination. The court pointed out that the petitioner had identified, with a reasonable degree of precision the constitutional provisions alleged to have been breached.
10. The court noted that the party primary nominations held on 14th April, 2022, were marred with massive violence, leading to the nullification of the 1st respondent's nomination and a repeat nomination through universal suffrage being ordered; the 1st respondent's subsequently a direct nomination, once again nullified on the grounds of violation of the orders issued on 1st May, 2022.
11. The court agreed with the position advanced by the 1st respondent that the PPDT exceeded its jurisdiction, as Section 38A of the *Political Parties Act* offered a political party a choice on the method to use for nomination of candidates, and the 2nd respondent had exercised the lawful procedural preference.
12. In holding that the petition was merited, the High Court quashed the IEBC Dispute Resolution Committee (DRC) decision on the sole ground that the PPDT exceeded jurisdiction, stating as follows:

“When the Tribunal ordered [ODM] party's election Board to conduct fresh nominations by universal through universal suffrage of its members, it exceeded its jurisdiction. The *Political Parties Act* has left it open to a political party to choose one of the two options to fulfill its mandate without direction from any corner.”

13. The appellants were aggrieved with the findings of the High Court which they challenge on 4 grounds of appeal but they have narrowed them down to 3 issues as follows:

The High Court erred in law by: abandoning the issue of jurisdiction of IEBC over the nomination, and framing and determining a fresh un-pleaded dispute relating to the jurisdiction of the PPDT over the initial primary; whether in the exercise of its jurisdiction the PPDT had power to order a repeat by universal suffrage where the initial election was held by universal suffrage; whether the High Court erred in law by; making factual findings unsupported by the facts on record; and ignoring evidence pleadings and submissions

14. On the first issue, it is the appellants case that the pleaded dispute between the parties was whether the IEBC committee had jurisdiction over the nomination dispute in this matter and whether a nomination conducted in violation of the PPDT was void; that the jurisdiction of the PPDT over the initial dispute was never pleaded by any party; that parties are bound by their pleadings and a court can only determine issues that flow from the pleadings on record; and that in revising the PPDT judgment, the court erred, framed and determined issues suo moto, thereby violating the appellants' right to be heard on this question.



15. The appellants further submit that the 1st respondent's questioning of the PPDT's power (and not its jurisdiction), was unlawful, and resulted in the learned Judge confusing power and jurisdiction in determining the petition.
16. On this issue, the 1st respondent contends that the genesis of the dispute stemmed from the decision of the Political Parties Disputes Tribunal all through to the IEBC's Dispute Resolution Committee and finally the High Court, and as such, the High Court could not make a decision in isolation. The 1st respondent argues that the High Court properly invoked its supervisory jurisdiction by addressing the dispute from its roots, by determining the mandate of the PPDT reference being made and urges us to refer to Nairobi High Court Constitutional Petition No. 321 of 2022 - *Dennis Gakuu Wahome versus The Independent Electoral and Boundaries Commission*. The 1st respondent maintains that the High Court did not determine its own issues, rather it addressed the dispute by invoking its supervisory jurisdiction which may be by way of guiding the inferior court or tribunal as to the manner it ought to act in such instances. Drawing from the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR at paragraph 224, the 1st respondent invites us to take cognizance of the fact that elections are a process and not a voting day event, therefore the learned Judge could not make a decision in isolation as though the 1st respondent had approached it to invoke its original jurisdiction.
17. Taking this into consideration, the 1st respondent submits that the High Court properly invoked its supervisory jurisdiction by addressing the dispute from its roots through determining the mandate of the Political Parties Disputes Tribunal before delving into the merits and demerits of the Petition.
18. The 1st respondent contends that pursuant to the provisions of the Act, the mandate of the Political Parties Disputes Tribunal is limited, consequently, the Tribunal cannot police and micro-manage political parties on mundane matters such as the nomination method to use; that the 2nd respondent herein has various methods of conducting nominations and there was no reason why the Political Parties Disputes Tribunal directed the party to use a specific method, and should have left the party to choose their preferred nomination method.

The 1st respondent refers to the case of *Thomas Ludindi Mwachugu vs John Mruttu & Another* [2017] eKLR, where Lessit, J. (as she then was) stated:

“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...”

19. In urging us to uphold the High Court's findings that the decision made by the IEBC's Disputes Resolution Committee to nullify the nomination of the 1st respondent herein, based on the order of the PPDT was null and void ab initio since it exceeded its jurisdiction, the 1st respondent refers to the case of *Samuel Owino Wakiaga versus The Orange Democratic Movement Party & 2 Others* [2017] eKLR, which stated that:

“...from that moment on the first process of nomination ended and the second process of identifying a nominee begun pursuant to the orders of the NAT. The Central Committee which deliberated and identified a nominee ... does have power under ... its Constitution ... It is not the duty of the court to micro-manage parties and direct them on such mundane matters....”

20. Also cited is Civil Appeal No. E305 of 2022 - James Onyango Koyoo versus Hezron Otieno Mc'Obewa, where the court stated it was not for the PPDT to dictate to a political party on the



method to use in its nomination exercise, as that is a preserve of the party, that the PPDT's role stops at ordering repeat nominations, and it should leave the details of the method to the party and its members. The only rider being that the method employed must be in conformity to the law and to the Party's Constitution and Rules.

21. The 3rd and 4th respondents in supporting the appeal, submit that the High Court erred in law by making a determination on the decision of the PPDT, whereas the appeal before it was challenging the decision of the IEBC Dispute Resolution Committee of 17th June, 2022; that the learned Judge summarized the whole appeal to jurisdiction of the PPDT despite the fact that the appeal before him challenged the IEBC Dispute Resolution Committee decision of 17th June, 2022, and that the issue of the PPDT was never pleaded and as such the High Court's decision was wrong. The respondents further argue that the Judge did not address the issue of the jurisdiction of the committee, nor did he consider whether the committee took into consideration any erroneous facts or exceed its jurisdiction.
22. The 3rd and 4th respondents reiterate that the decision of the PPDT was never appealed against nor challenged before any court, so that as matters stand, the High Court went on a fishing expedition to fault the 3rd respondent for acts not within its mandate; that the learned Judge was bound to limit his judgement on the basis of the pleadings by the parties before him.
23. A perusal of the record reveals that the pleaded dispute between the parties was whether the IEBC Committee had jurisdiction over the nomination dispute in this matter; and whether a nomination conducted in violation of the orders by the PPDT was void ab initio. Needless to say, parties are bound by their pleadings, and a court can only determine issues that flow from the pleadings, yet the learned Judge purported to revisit the PPDT order and judgment, an issue which did not stem from the pleadings. It is apparent that the court framed and determined this issue afresh suo moto without inviting the parties to address it on the point. In that regard, this Court has in the case of *John Kamunya & another v John Nginyi Muchiri & 3 others* [2015] eKLR settled the law that:

“Generally the law as we know, it is that courts would only determine a case on the issues that flow from the pleadings and that judgment, would be pronounced on the issues arising from the pleadings or from issues framed for court's determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of the case.”
24. We concur with the appellants' submissions that the 1st respondent's attempt to question the PPDT's power (and not its jurisdiction) in his submissions was belatedly introduced in the submissions with no foundation in the pleadings, and we can do no better than echo the court in *Clips Ltd vs Brands Imports (Africa) Ltd formerly named Brand Imports Ltd* [2015] eKLR that: “new issues cannot be raised in submissions.” The trial Judge erred.
25. On this limb, we therefore hold that, the learned Judge erred in law by abandoning the pleaded dispute determining a fresh un-pleaded dispute, namely the jurisdiction of the PPDT over the initial party primary.
26. The appellants' argument that the High Court made factual findings unsupported by the facts on record and ignored evidence, pleadings and submissions, is linked to the observation that in his judgment, the learned Judge did not make a determination of the framed issues (which the court took cognizance of), yet these were crucial for determination of the dispute. It is submitted that the court ignored the evidence and submissions that the 1st respondent's nomination had violated a court order and had been made ultra vires Section 74 (without first resolving the objection). Further, that the court also ignored the argument that the 1st respondent was automatically disqualified by ODM's Rule 17(1)



- (f) because he had engaged in violence, threats, and intimidation. In support of this argument, the appellant refers to the case of *Julius Lekakeny ole Sunkuli v Gideon Sitelu Konchellab & 2 others* [2018] eKLR which pointed out that a judgment must identify issues whose resolution is vital, how those issues are resolved, so as to give an understanding why a certain decision was reached.
27. The 1st and 2nd respondents did not make any submissions on this limb, whilst the 3rd and 4th respondents supported the position taken by the appellant. We take note that the trial court in its decision clearly set out what each party's issues were; the learned Judge agreed that the issues framed before him were on the issues he had narrowed down and to which all parties were in consensus over. We have scoured the record and find with greatest respect to the learned Judge, he did not address any of the facts and issues raised by the appellants, and the 3rd and 4th respondents, except for the issue on the jurisdiction of the PPDT which, incidentally was not pleaded by any of the parties. We confirm that among the key issues identified was that the 1st respondent ought to have been automatically disqualified under ODM's Rule 17(1) (f) for use of violence, threats and intimidation by himself and his agents; also the issue regarding his eligibility for a direct nomination under ODM's rules which bar perpetrators of violence from direct nominations. These issues were crucial for the proper determination of the dispute, and in failing to address and resolve them, we hold that the learned Judge erred in law.
28. As to whether in the exercise of its jurisdiction the PPDT had power to order a repeat by universal suffrage where the initial election was held by universal suffrage the appellants submit that the High Court erred by conflating "jurisdiction" with "power" thus holding that the PPDT lacked jurisdiction to direct the nomination method to be used in conduct of a repeat of the party primaries, and concluding that in so doing the PPDT acted in excess of jurisdiction.
29. The appellants argue that the PPDT has both the jurisdiction and power to order any appropriate reliefs including a repeat by universal suffrage where the initial election had been by universal suffrage. That in any event, the High Court erred in law by conflating "jurisdiction" with "power" in holding that the "PPDT lacks jurisdiction" to direct a repeat of the party primaries through universal suffrage where the initial party primaries had been by universal suffrage. In seeking to justify the orders made by the PPDT, and confirmed by the IEBC's dispute resolution committee, the appellant relies on the case of *Henry Milimu Shililu v Orange Democratic Movement & 2 others* [2017] eKLR which quipped that:
- "Where the party machinery tampers with, manipulates and or interferes with the electoral process or its results, a court will not hesitate to intervene in the interest of justice thereby vitiating such results."
30. The 1st respondent contends that pursuant to the provisions of the Act, the mandate of the Political Parties Disputes Tribunal is limited, and the Tribunal cannot police and micro-manage political parties on the nomination method to use. Further, that the 2nd respondent herein has various methods of conducting nominations and there was no reason why the Political Parties Disputes Tribunal directed the party to use a specific method.
31. The rationale behind the court's finding was explained in its judgment to the effect that the provisions of Section 38A left it open to political parties to choose one of the two options, direct or indirect nomination, to pick its preferred candidate. Indeed, Section 38A of the *Political Parties Act* provides thus:
- 38A. Methods of conducting party nominations. A political party may conduct party nominations using any of the following methods:



- a. direct party nomination method; or
- b. indirect party nomination method.

There is certainly no dispute on the proposition that a political party has unfettered discretion on the method to employ in conducting its party nominations. This Court, in a decision rendered to a few days ago in Kisumu Election Petition Civil Appeal No. E003 of 2022 *ODM National Election Board and Anor v Hon. John Ombewa Gare and 2 Others* aptly described the difference between these two nomination processes as being “that direct party nomination is an election while the other is a selection.”

32. The contest revolves on the issue as to whether the PPDT in exercising its jurisdiction acted in excess, and trod on forbidden territory. At the onset, the 2nd respondent had decided that the party nomination for the position of Member of County Assembly for South Kabuoch/Pala Ward would be through universal suffrage and had it not been if the appellants had not challenged the outcome of that exercise, there would be no contestation on the method employed.
33. Upon the appellants challenging the outcome of that nomination, the issue was presented to the PPDT by virtue of its jurisdiction as provided under Section 40 of The *Political Parties Act*, and which includes determination of disputes between members of a political party; and once that jurisdiction has been exercised, there must be some directions given in resolving the dispute.
34. Certainly, we cannot fault the 1st respondent’s contention that the political parties have freedom on how to conduct party primaries, yet, we hasten to point out that such freedom is checked in by Section 38C of the Act under which “a registered member of a political party shall be entitled to participate in the nominations conducted by the political party”, and in particular, where there exists complaints by other candidates regarding machinery tampers with, manipulation through violence, and/or intimidation, so as to interfere with the electoral process or its results, then we certainly share the sentiments expressed in the *Henry Milimu Shililu v Orange Democratic Movement & 2 others* case (supra), that “the court will not hesitate to intervene in the interest of justice thereby vitiating such results.”
35. A scenario similar to the present case played itself out in *Orange Democratic Movement v Fredrick Okolla Ojwang & 2 others* [2018] eKLR ODM where the party’s officials had refused to comply with court orders to conduct a repeat election by universal suffrage as had been carried out previously, this Court held that by opting for a direct nomination, ODM was conduct of the party was tantamount to a flagrant disobedience as the orders left no room for the exercise of any discretion in their execution.
36. We concur with the appellants that in carrying out its mandate and safeguarding the rights of members of a political party to participate in the nominations conducted by their party, the PPDT must pay fidelity to Article 91(1) of the *Constitution* of Kenya, which requires every political party to inter alia:
 - a. abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party;
 - b. respect the right of all persons to participate in the political process, including minorities and marginalized groups;
 - d. promote the objects and principles of the Constitution and the rule of law; and
 - d. subscribe to and observe the code of conduct for political parties.



37. Once again, we echo the position taken by this Court in ODM National Election Board and Anor v Hon. John Ombewa Gare and 2 Others (supra) that Section 38E of the Act (which acts as a check valve), requires a political party to notify its members and the Registrar of Political Parties of the method it intends to use in conducting party nominations, which method shall be in accordance with the party's nomination rules, so that once the party had chosen that it would conduct party primaries in respect to the position for MCA for South Kabuoch/Pala ward, by way of universal suffrage, it was a method the Party members had chosen with regard to that position for the 2022 cycle of elections, and the Party needed to keep that approach, for the sake of credibility, and a semblance of a level playing field. The 1st and 2nd respondents do not deny that the decision to apply direct nomination was made without consulting the party members, and in particular, the other candidates who were vying for the position, so as to get a consensus.
38. Indeed, in the afore-cited case, this Court noted with approval the views expressed by Kamau, J. in *Moses Odhiambo Ochele vs Achan Ojuki Gordon & 2 others* Kisumu Civil Appeal No. E037 of 2022 that:
- “ 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.”
39. It is clear from the contested judgment that the trial Judge conflated the issue regarding power and jurisdiction of the PPDT. We agree with the appellants' submission that we have no doubt in our minds, that in exercising its mandate, the PPDT has both the jurisdiction and power to order any appropriate reliefs including a repeat election by universal suffrage, where it nullifies an initial election that had been by universal suffrage.
40. Consequently, we find that the High Court erred in holding that the PPDT exceeded its jurisdiction over party primaries and that it had no power to grant any appropriate reliefs under Article 23 and 91 of the Constitution.
41. On the issue of costs, whereas the decision to award costs is defended on the basis that costs follow the event, the 3rd and 4th respondents, drawing from the Supreme Court decision in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR contend that nomination and disputes relating to the registration mandate of the 3rd respondent are issues of public interest rather than personal interests of the IEBC and therefore condemning the 3rd respondent to pay costs was punitive rather than compensation to the successful party thus, defeating the essence of the judicial discretion of costs. Since the appeal has succeeded, we consider this issue as being moot.
42. We find that the learned Judge made a grave error in failing to address the issues raised, and the appeal succeeds in its entirety. This Court therefore sets aside the High Court's judgment and reinstates the IEBC Dispute Committee's judgment revoking the 1st respondent's nomination for being in defiance of the PPDT judgment and orders. We make no orders on costs.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

I certify that this is a true copy of the original

Signed

P.O.KIAGE



.....
JUDGE OF APPEAL
H.A. OMONDI

.....
JUDGE OF APPEAL
F. TUIYOTT

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JUDGE OF APPEAL
DEPUTY REGISTRAR

