



ODM National Election Board & another v Gare & 2 others (Civil (Election) Appeal E003 of 2022) [2022] KECA 919 (KLR) (22 July 2022) (Reasons)

Neutral citation: [2022] KECA 919 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL (ELECTION) APPEAL E003 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 22, 2022**

BETWEEN

ODM NATIONAL ELECTION BOARD 1ST APPELLANT

ORANGE DEMOCRATIC MOVEMENT PARTY 2ND APPELLANT

AND

JOHN OMBEWA GARE 1ST RESPONDENT

TRUFOSA OSEWE ODINGA 2ND RESPONDENT

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

(Being an Appeal against the Judgment of the High Court of Kenya at Kisumu, (Ochieng, J.) dated 21st June, 2022 in HC Election Appeal No. E044 of 2022 Consolidated with HC Election Appeal No. E045 of 2022)

REASONS

1. In the end, the following holding by the Appeals Tribunal (the Party Tribunal) of the Orange Democratic Movement Party (ODM or the Party or the 1st Appellant) had to count for something;

“It is for this reason that we must affirm and defend the democratic right of a people to express themselves and for that expression to be acknowledged and respected.”
2. John Ombewa Gare (the 1st respondent or John) and Trufosa Osewe Ochieng (the 2nd Respondent or Trufosa) were amongst five other candidates seeking to be nominated as the ODM candidate for the Member of County Assembly for West Sakwa in the forthcoming National Elections. The Party held its primaries in respect to that position on 13th April, 2022 by way of universal suffrage. Trufosa



was aggrieved by the declaration of John as the winner and challenged the declaration before the Party Tribunal in Tribunal Appeal No. 13 of 2022.

3. In the statement of appeal filed before the Party Tribunal, Trufosa alleged various irregularities in the party primaries, details of which are unnecessary for the matter at hand. She then sought the following orders:

- “(a) An order that the Respondent did not win the nomination for Siaya County’s Member of County Assembly (MCA) which took place on Wednesday, 13th April, 2022 in respect of West Sakwa Ward, and his declaration as the winner is hereby revoked.
- (b) A declaration that the appellant was the winner of the nomination exercise for Siaya County’s Member of County Assembly (MCA) which took place on Wednesday 13th April 2022 in respect of Sakwa Ward.
- (c) In the alternative and without prejudice to the above prayers nullification of the party nomination for West Sakwa Ward and the Tribunal directs for repeat and fresh nomination.
- (d) An order directing the Respondent to meet the costs of this appeal and any damages caused, and any consequential costs to be incurred by the party.
- (e) Such other/further orders/relief as this Tribunal may deem fit and just to grant.”

4. In a decision dated 20th April, 2022, the Party Tribunal allowed the complaint and inter alia, ordered that “the National Elections Board to conduct fresh nominations for the West Sakwa members of County Assembly.” The meaning to be given to this order has dominated this controversy at its various stages. The Party took a view that it could conduct the fresh nominations through means other than universal suffrage and directly nominated Trufosa as its candidate. The Party has consistently maintained that as its nomination rules allows for nomination through several methods, namely; consensus, direct nomination or universal suffrage it was entitled to directly nominate Trufosa in the fresh nomination ordered by the Party Tribunal.

5. On this occasion John was the aggrieved. On 28th April 2022. He wrote to the Party complaining about the nomination of Trufosa and sought that a fresh nomination exercise be held at the “earliest opportunity” or in the alternative;

“The NEB do issue the (sic) John Ombewa Gare with the nomination certificate for the ODM Party for West Sakwa Ward having been nominated through universal suffrage.”

6. In a statement of complaint dated 27th April 2022 (a day before his letter to the party), John sought the intervention of the Political Parties Dispute Tribunal (PPDT) being PPDT/EDIT/2020 John Ombewa Gare –vs- The National Election Board, ODM, The National Chairman ODM and Trufosa Osewe Odinga for the same relief he had sought from the Party. After hearing the parties, the PPDT, in a judgment dated 6th May, 2022, set aside the nomination of Trufosa and ordered that fresh nomination be conducted by way of universal suffrage “within the next 72 hours.”

7. This was not to happen and John moved the PPDT through a motion of 14th May 2022 citing the chairperson of the Elections Board of the Party for contempt and in the alternative for him to be deemed as the duly nominated candidate for the West Sakwa Ward member of County Assembly.



This motion did not succeed principally because the PPDT found that the alleged contemnor had not participated in the Tribunal proceedings and that John had not furnished sufficient proof of service of the judgment and decree on the alleged contemnor. Instead, the PPDT ordered that: -

“The Respondents are to conduct fresh nominations for West Sakwa Ward Members of County Assembly within Kisii County in accordance with the judgment within 72 hours of the order.”

It should be noted that West Sakwa is in Siaya County and not Kisii County as erroneously stated in the above order.

8. On the same day as the order, the Party and its Elections Board filed a Notice of Motion requesting the PPDT to review its judgment of 6th May, 2022 to allow it conduct nominations through any other method provided for in the Party constitution, nomination and party primary rules other than by way of universal suffrage within 24 hours of making of the order. The Party and its Elections Board contended that it was practically impossible for them to plan and conduct nominations by way of universal suffrage in view of timelines issued by IEBC for submission of names of contestants. It gave various reasons for the supposed impossibility, amongst them that they were unable to obtain permission of the Cabinet Secretary for Education for the use of public schools as polling centers, or to hire IT election experts to prepare for the elections including cleaning the electoral system and recalibrating the polling equipment to ensure readiness for the election.
9. The PPDT did not think that the application met the requirement for review and in a decision dated 30th May, 2022 rejected it. That decision triggered an appeal to the High Court at Kisumu being Civil Appeal No. E044 of 2022. On his part, John filed Civil Appeal No. E045 of 2022 challenging the judgment of the PPDT delivered on 6th May, 2022. The two appeals were consolidated with Civil Appeal No. 44 of 2022 being the lead file.
10. In answer to the issues raised by the ODM Elections Board and the Party, the Ochieng, J(as he then was) held:
 - “(a) I am in agreement with my learned Sister, Kamau, J. The party and its Election 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.
 - (b) 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.”
11. For John, the substratum of his appeal was that in nullifying the “final” certificate of nomination issued to him alongside the “double” certificate issued to Trufosa, the PPDT, like the Party had done, breached his right to legitimate expectation. He beseeched the High Court to uphold his nomination and in solidarity with the Party and the Election Board took a view that the PPDT had no power to direct them to conduct the nominations exercise through universal suffrage.
12. The learned Judge had no difficulty in finding the cross appeal unmerited and held:
 - “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.”
13. The appeal before us is only by the Party and the Elections Board who invoked their right to appeal under section 41(2) of the *Political Parties Act*. Five grounds are raised:
- “ 1. That the Honourable Judge erred in law in failing to consider some of the grounds advanced by the Appellants seeking to review of the judgment delivered on 6th May, 2022 by the Political Parties Disputes Tribunal.
 2. The Honourable Judge erred in law in holding that the Political Parties Disputes Tribunal directed the Appellants to repeat the nomination exercise.
 3. The Honourable Judge erred in law in holding that the law does not allow the Appellants to apply any other mode of nominating a candidate other than the method applied in the first instance, in the event the nomination exercise is subsequently nullified.
 4. The Honourable Judge erred in law in finding that the Tribunal did not choose for the Appellants the method to apply in nominating the candidate for the position of member of County Assembly, West Sakwa Ward.
 5. The Honourable judge failed to consider the relevant law and submissions made before him and thus reached the wrong decision.”
14. Regarding the first ground, the appellants submit that in determining the application for review the PPDT failed to consider new evidence which proved that it was impossible for the Party to hold a fresh nomination by way of universal suffrage. It was argued that the learned Judge fell into error when he failed to consider the effect of the PPDT’s failure to consider the new evidence. We were told that the fact that the Ministry of Education had declined to grant the appellants permission to use schools as polling centers was a critical issue that should not have been ignored. Similarly, it was contended that the learned Judge failed to consider that nomination by way of universal suffrage required planning which involved recruiting polling clerks, reconfiguration of the polling gadgets and kits, and calling meetings with the contestants and agreeing on the modalities of conducting the nomination exercise which could not be undertaken within the timelines given by IEBC and the PPDT.
15. On the other grounds, the appellants argue that the Party Tribunal directed the appellants to conduct a fresh nomination as opposed to a repeat nomination. The appellants took the position that the PPDT fell into error by choosing for the Party the manner of conducting the fresh nomination. The learned Judge is faulted for finding that the PPDT did not choose for the appellant the method to use in conducting the exercise.
16. We were urged to find that, when the results of the nomination by way of universal suffrage held on 13th April, 2022 were nullified by the Party Tribunal on 20th April 2022, that marked the end of that cycle of the nomination exercise and as a result the appellants had an opportunity to choose which method to use in a subsequent fresh nomination. Reference was made to the decisions in Samuel Owino Wakiaga –vs- Orange Democratic Movement Party & 2 others [2017] eKLR, and High Court Election Appeals No. E274 of 2022 Jacob Ochieng Ogutu –vs- Orange Democratic Movement & 2 Others.
17. Section 38A of the *Political Parties Act* allows a political party to conduct party nominations through direct or indirect method. This Court was asked to give effect to the ODM primary and nomination



rules which allow for conduct of nomination through consensus, direct nomination or universal suffrage, and it was upon the appellants to choose the method that suited them, taking into account logistics, time and other obtaining circumstances. In this regard the decisions in High Court Misc. Application No. 1 of 2022 Michael Ojala Nyangi –vs- Hezron Okoth Onditi & Others and John Millar Otieno –vs- Lawrence Otieno Odhiambo & 3 Others High Court Civil Appeal No. E328 of 2022 were cited.

18. Somewhat strangely, John supported the appeal but in submissions filed on his behalf by counsel, he attempted to introduce into this appeal issues that were not raised by the appellants. It was apparent to us that he was urging an appeal he had not filed. In so far as the submissions fall outside this appeal, we do not find it necessary to rehash them.
19. The 2nd and 3rd respondents also supported the appeal. The 2nd respondent did not put forward any arguments while the 3rd respondent made similar arguments as the appellants. In addition, the 3rd respondent submitted that the role of the 2nd appellant was that of a main actor, and any error committed either by the 2nd appellant itself or those others tasked by it to play any part in the nomination exercise had to be rectified by the 2nd appellant itself in accordance with the constitution and the legal and regulatory provisions highlighted above. It was the 3rd respondent’s proposition that the PPDT had no jurisdiction to constrain the 2nd appellant to only one method of conducting nominations.
20. Under the provisions of section 41 (2) of Political Parties Act an appeal from the decision of the PPDT shall be to the High Court on points of law and fact and on points of law to this Court and the decision of this Court shall be final. The appeal before us should therefore be on points of law only. Yet it is common learning that issues of fact or evidence will sometimes be matters of law and in this regard the Supreme Court in Gatirau Peter Munya –vs- Dickson Mwenda Gitinji & 2 Others [2014] eKLR observed;

“(81) Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase “matters of law only”, means a question or an issue involving:

- a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;
- b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;
- c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal



would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.”

21. In the application for review before the PPDT, the appellants raised the following as reasons why they could not comply with the order for universal suffrage;
- a. That preparation for election by way of universal suffrage requires many days to plan, including officially seeking permission of the Cabinet Secretary for education to grant permission for the use of public schools as polling centers; officially seeking the support of the police for the elections; recruiting and training electoral officers; hiring the IT election experts team to prepare for the elections including the cleaning the electoral system and re-calibrating the voting equipment to ensure readiness to vote, meeting with aspirants to notify them to prepare for the elections.
 - b. That indeed upon learning of the decision of the tribunal the 1st and 2nd Respondents drafted a letter to the Ministry of Education and are still awaiting the response of the Ministry before we commence on the other activities even as the time of 72 hours is already running.
 - c. That the 1st and 2nd Respondents also wrote to the IT experts who developed the voting App for the party requesting their availability to assist in conducting the nomination exercise within 72 hours but they responded to indicate that they are not available.
 - d. The IT experts were hired on consultancy basis and getting them back would require to re-engage them after ample notice.
 - e. That without the availability of the IT experts it will be impossible to carry out the nomination exercise by way of universal suffrage since the operation of the system was deliberately confined to the knowledge of the 2 experts as part of the security measures.
22. The only evidence in support of those reasons was on the non-availability of the public schools. There was a letter written by the Party on 26th May 2022 to the Cabinet Secretary for Education seeking permission for use of public schools to conduct fresh nominations for Member of National Assembly for Bondo Constituency for Saturday 28th May 2022 and a prompt response dated 27th May 2022 from the Cabinet Secretary declining the request.
23. This is what the PPDT held in response to that evidence: -
- “21. It is our considered view that no new evidence, warranting a review has been submitted before us. Furthermore, we have only been supplied with various reasons as to why the 1st and 2nd Respondent Applicants have failed to comply with our orders. We are not convinced with the reasons set out for not being able to conduct the nomination as ordered. We hold that our role is purely to establish whether there is a basis for review. We do not think internal problems of recruitment and choice of mode of nomination is a matter that would warrant review of our orders. These are not matters which were never in the contemplation of the Applicants at the time of passing our decree, elections (sic) and that it has not been satisfactorily proved by the 1st and 2nd Respondent.”
24. While the High Court faithfully captured the complaint by the appellants that the Tribunal erred when it failed to take into account new evidence of materials facts which had been brought to its attention



(paragraphs 14 to 19 of the decision of the learned Judge), the learned Judge did not analyze the PPDT's decision in this regard. As an illustration of this failure the learned Judge did not interrogate the correctness or otherwise of the Tribunal's conclusion that "these are not matters which were never in the contemplation of the applicant at the time of passing our decree, elections(sic) and that it has not been satisfactorily proved by the 1st and 2nd respondent".

25. Having failed in that duty it falls on us to test the PPDT's decision. We start by returning to the statement of complaint filed by John before the PPDT. For emphasis, the respondents to that complaint were the Election Board, the Party and Trufosa.

26. Eight grounds upon which the complaint was presented are:

- “ 1. The Complainant avers that he is a Member of the ODM party and a registered voter.
2. That the Complainant herein participated in the ODM nomination exercise for West Sakwa Ward and was declared the winner and issued with an Interim certificate.
3. That ODM Party Disputes Tribunal nullified the nomination of the complainant and subsequently ordered for a repeat nomination exercise.
4. The 1st and 2nd respondents failed and or ignored to carry out fresh nomination exercise for West Sakwa as ordered by the party appeals tribunal at Kisumu Tribunal Appeal No. 13 of 2022.
5. The 1st and 2nd Respondents failed to comply with various tenets of law regarding carrying out fair, verifiable nomination elections in contravention of *the constitution*, the *political parties act* and ODM party primaries rules in issuing directly nominating the 3rd respondent.
6. The Respondent to utter disregard of the law went ahead to declare the 3rd Respondent as ODM party's duly nominated candidate for member of county assembly West Sakwa wards.
7. That in spite of the electoral malpractices, the 1st and 2nd respondent intend to submit the name of the 3rd respondent for the Gazettement by the Interested party as having been nominated in election held on 25th April 2022 which is misrepresentation of facts.
8. The 1st and 2nd Respondents have not conducted fresh nominations based on universal suffrage and have declared the 3rd respondent as duly nominated in unorthodox method.” (our emphasis)

27. It is evident that central to the complaint was that the Election Board and the Party had not conducted a fresh nomination based on universal suffrage. While the appellants did not participate in the PPDT proceedings, it is conceded by the two that the existence of the complaint and the judgment of the PPDT was brought to their attention on 19th May, 2022 when the application for contempt was served upon them.



28. In reaction to that application and attempting to avoid the censure of the contempt proceedings, Catherine Muyeka Mumma swore an affidavit on 23rd May 2022 in which she states:

“Now that the judgment and decree has been brought to my attention, granted sufficient time, I am willing to make all attempts to comply with the judgement and decree.”

29. On this date, just three days before making the application for review, the appellants do not state that it would be impossible to conduct nominations through universal suffrage. It was not explained or stated to the PPDT that as at 23rd May 2022, the appellants were not aware of the deadline set by IEBC for finalization of the nomination process being 30th May 2022 and therefore pressing timelines; the process of nomination by way of universal suffrage involved planning; there was need to seek permission for use of public schools as polling centers and hiring of IT experts to prepare for and run the elections. The appellants had been cited for failing to conduct nominations through universal suffrage and it is astonishing that they would be making a promise to comply with an impossibility. A party responding to an application for contempt is expected to do so with uttermost candour.

30. Once there was no explanation as to what had changed in just three days that made compliance unachievable, the application to review cannot be said to have been made in good faith and we find merit in the assertion by John, made in his reply to the motion for review, that it was an attempt by the appellants to avoid compliance with the Tribunal order. We would, just like the PPDT conclude that the application for review was for refusal.

31. As we turn to consider the next ground of appeal, we observe that prior to moving the High Court on appeal, the appellants gave the impression that they were not aggrieved by the decision of the PPDT directing them to conduct the fresh nominations by way of universal suffrage but rather, that given some circumstances, it was impossible to carry nomination in that way. We say so because in response to the application for contempt, Catherine Muyelia Mumma, on behalf of the appellant deposed:

“I humbly beseech this Tribunal to find that I am not in contempt its (sic) judgment and decree. Should that the judgment and decree has been brought to my attention, granted sufficient time, I am willing to make all attempts to comply with the judgment and decree.”

32. In the application for review, the appellants did not question the correctness of the judgement but simply sought the indulgence of the PPDT to depart from the direction citing circumstances that allegedly made it impossible to comply. Clearly, the appellants would not be entitled to challenge the merit of the decision of 6th May 2022 and to do so is to approbate and reprobate.

33. That would have been the end of the matter but for completeness we consider the grievance of the appellants that the PPDT erred in directing the party to hold the fresh nomination by way of universal suffrage, a direction upheld in the first appeal.

34. Section 38A of the *Political Parties Act* reads:

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.

35. In section 2 of the *Act*, a direct party nomination is defined to be a means by which a political party, through its registered members, elects candidates for an election. A direct party nomination allows



members of the party to make a direct election as to their candidates. Members fully and directly participate in choosing a party candidate. An indirect nomination on the other hand is a process by which a political party, through the use of delegates selected from registered members of the political party, interviews and selects its candidates for an election. The members do not participate directly, instead they delegate this role. A difference between these two processes is that direct party nomination is an election while the other is a selection.

36. Section 38A was recently introduced on 11th February 2022, via section 24 of the Political Parties (Amendment) Act No. 2 of 2022. This provision recognizes that political parties, being akin to private clubs, must be given latitude to choose the method of conducting party nominations. The ODM Party Primary and Nomination Rules which allow the party to conduct nominations through either consensus, direct nomination or universal suffrage are no doubt consistent with the statutory provisions. There is no controversy that a party has unfettered discretion on the method to employ in conducting its party nominations. This has been affirmed time and time again by our courts. For example, Thande J in Michael Ojala Nyangi states:

“The wording of the above provision is not couched in mandatory terms. The nomination methods for the 3rd Respondent are stipulated in Rule 23 of the ODM Party Primaries and Nomination Rules, 2021. As seen hereinbefore, it is the mandate of the 2nd Respondent to decide which of the nomination methods to employ taking into account the circumstances of each case. Accordingly, in picking its candidates for various seats, the 2nd and 3rd Respondents have the discretion to choose the method to use to pick a nominee for various seats.”

37. In this matter, ODM had decided that the party nomination for the position of member of county assembly for West Sakwa would be through universal suffrage and had it not been for the challenge of the exercise conducted on 13th April, 2022, there would be no contestation in this regard and that would have been the method employed.

38. When a challenge was mounted against that nomination and its outcome, the Party’s own Appeals Tribunal underscored the right of the members of the party to express themselves in that party nomination. The Appeals Tribunal held:

“We have noted, however, that both parties agree to the fact that indeed there were no results from Kapiyo Primary. No credible explanation has been rendered, as would be expected under the circumstances. We cannot turn a blind eye to this. We must turn our attention to examine the impact and/or prejudice suffered by the contestants, appellants and Respondent included by this omission. A process such as this, requires a clear manifestation of the will of the people. In selecting a person they prefer for representation in leadership. To prevent and/or fail to acknowledge this expression for a particular class of voters is a manifest infringement on the democratic right of this particular class of voters.

It is for this reason that we must affirm and defend the democratic right of a people to express themselves and for that expression to be acknowledged and respected.”

39. In the end, it made an order directing the Elections Board of the party to conduct fresh nominations. Learned Senior Counsel Ojienda passionately urged us to find that there is a distinction between a repeat nomination and a fresh nomination and that the party would have only been obliged to conduct another nomination through universal suffrage had the Party Tribunal ordered for a repeat nomination.



40. We, however think, with respect that this is a distinction without a difference. The nomination exercise held on 13th April, 2022 for the Party’s candidate for the position of member of county assembly for West Sakwa Ward was in regard to the forthcoming August 2022 election. Once it was found to have been botched, another nomination needed to be undertaken. As this would be a second exercise then it would at the same time be a fresh nomination because the nomination of 13th April, 2022 had been nullified by the Appeals Tribunal. Even Trufosa herself who moved for the nullification did discern a difference. In statement of Appeal prayer (C) is for;

“In the alternative and without prejudice to the above prayers, nullification of the party nomination for West Salewa Ward and the Tribunal directs for repeat and fresh nominations.”

41. We reach the conclusion that the exercise contemplated by the Party Tribunal was a repeat of the nomination exercise and we are unable to fault the learned Judge’s holding that when the PPDT ordered for a fresh nomination by way of universal suffrage, it was in effect ordering a repeat election. In particular, we endorse the following holding by the learned judge;

“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’s when it is done again, that it can be termed as a repeat.”

42. While a party has a free hand to choose the method for party nomination, the party must notify its members and the Registrar of Political Parties of the choice as required by section 38E of the Act;

38E. Notification of party nominations

(1) A political party shall, not less than ten days before the date of party nominations, notify the Registrar in writing of—

(a) the method it intends to use in conducting party nominations, which method shall be in accordance with the nomination rules of the political party;

(b) the date of the party nominations;

(c) the venue or venues for the party nominations; and

(d) the list of members of the party who wish to be nominated by the party.

(2) At least seven days before the date of the nominations, the—

(a) political party shall publish in the official website of the political party the dates and venues of the nominations; and

(b) Registrar shall publish in the Registrar’s website the dates and venues of the political party’s nominations.

43. This provision underscores the need for members of a party, consistent with the public participation edict of *the Constitution*, to be fully informed of the method chosen and the dates and venues of a



nomination. We think that this demonstrates that, although the choice of method is at the discretion of the party, members of the party are not mere bystanders to the process.

44. The concept of legitimate expectation is entrenched in Kenya (see the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR). The party had chosen that it would conduct party primaries in respect to the position for MCA for Sakwa West by way of universal suffrage. It was a promise to the Party members that it was the chosen method in respect to that position for the 2022 cycle of elections and the Party needed to keep the promise. The first exercise having been nullified, then it would be expected that the repeat exercise would be by the same method unless the Party demonstrated that it was impossible to do a repeat in the same manner because of some intervening circumstances and the notification required by section 38E had been made, something the appellants did not succeed in demonstrating even in the application for review. Just like the learned Judge, we identify with the view of Kamau, J in *Moses Odhiambo Ochele – vs- Achan Ojuki Gordon & 2 others* Kisumu Civil Appeal No. E037 of 2022 when she held:

“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.”

45. In his article “*Democracy within Political Parties: The State of Affairs in East and Southern Africa*”, Augustine T. Magolowondo observes:

“However, precisely because the main concern of political parties is to win elections, a normative approach to intra-party democracy, which emphasizes the educational and other beneficial effects of internal party democracy, seems to be more appropriate. If political parties are to be regarded as pillars of democracy and as a vital link between individual citizens and elected representatives, they must be democratic themselves (Magolowondo 2007; Teorell 1999). Political parties which are internally democratic are better able to aggregate and represent the interests of citizens, which in turn enhances the democratic system as a whole. Such political parties also serve as an arena where their members are able to learn and practice basic democratic tenets such as participation in decision making and choice of leaders, electoral competition and respect for the views of others. This, in turn, strengthens the political parties concerned. These benefits can then be transferred to other levels of society, thus strengthening the democratic system (Svasand 2009; Scarrow 2005). In other words, democracy within parties should be regarded as a valuable asset for democratic societies. A normative approach seems to be especially relevant in Africa’s emerging democracies, where it might assist in developing and deepening democracy.”



46. This rings true for present day Kenya. Indeed, Rule 6(m) in the Code of Conduct for Political Parties made pursuant to section 6(2)(e) of the Act commands political parties to respect, uphold and promote democratic practices through free, fair and credible party nominations. To change the rules of the game in a repeat nomination without good reason and without roping in or even notifying the membership is inimical to this commandment. In the end we have no doubt that the three decisions of the Appeals Tribunal, the PPDT and the High Court sought to safeguard intra-party democracy in ODM for the nomination of a candidate for the position of MCA for West Sakwa. Intra-party democracy is not only good for the party but also for the nation’s democracy. The law so decrees and the courts must uphold it.

47. We find no merit in the appeal and dismiss it but with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

