



ODM National Election Board & another v Odhiambo & 2 others (Election Petition Appeal (Application) E004 of 2022) [2022] KECA 737 (KLR) (22 July 2022) (Reasons)

Neutral citation: [2022] KECA 737 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
ELECTION PETITION APPEAL (APPLICATION) E004 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 22, 2022**

BETWEEN

ODM NATIONAL ELECTION BOARD 1ST APPLICANT

ORANGE DEMOCRATIC MOVEMENT PARTY 2ND APPLICANT

AND

EDWIN OTIENO ODHIAMBO 1ST RESPONDENT

EUNICE RAHEL OCHIENG 2ND RESPONDENT

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

(Being an Application for Certification of the Main Appeal for hearing on an urgent basis against the Judgment of the High Court of Kenya at Kisumu, (Ochieng, J.) dated 23rd June, 2022 in HC Civil Appeals Division Civil Appeal No. 43 of 2022)

REASONS

1. The single substantive issue raised in this second appeal is whether the first appellate court erred in law in upholding a decision by the Political Parties Disputes Tribunal (PPDT) which directed the ODM National Elections Board (The Election Board) of Orange Democratic Movement (ODM or the 2nd appellant) to conduct a fresh nomination for the party nominee for the position of Member of County Assembly (MCA) for South Sakwa Ward through universal suffrage.
2. Vincent Odhiambo Kanyangonda (Vincent), Eunice Rahal Achieng (Eunice) and Edwin Odhiambo (Edwin) were candidates for nomination for the position in the forthcoming 2022 national elections. The party decided that the nomination would be by way of universal suffrage. The Bondo Constituency Returning Officer for the party declared Edwin Odhiambo as the nominee in an election conducted for the nomination.



3. Unhappy with that outcome and alleging violence and other irregularities, Vincent and Eunice filed an appeal before the ODM Appeals Tribunal (the Appeal Tribunal) being Tribunal Appeal No. 4 of 2022. The appeal succeeded and one of the orders made by the Appeals Tribunal was a direction to the Elections Board to conduct fresh nominations for South Sakwa Member of County Assembly.
4. Seven days later, on 27th April 2022, the Elections Board directly nominated Eunice. This aggrieved Edwin who filed a complaint before the PPDT. The complaint succeeded and the PPDT directed the party to conduct a fresh nomination by way of universal suffrage. There was delay in compliance and Edwin successfully cited the Elections Board and the party for contempt. The PPDT granted the two contemnors 72 hours to purge the contempt, failing which a notice to show cause would issue. The Elections Board did not purge the contempt and instead, on 28th May 2022, moved the PPDT through a Notice of Motion for review of the orders of 26th May 2022, a Motion that failed.
5. On the other side, Edwin himself was unhappy about certain aspects of the PPDT judgment of 5th May 2022 and preferred an appeal against it being the appeal which is the subject of the proceedings before us. In the meantime, the Elections Board and the party were granted leave to cross appeal.
6. The cross appeal raised four grounds: -
 1. That the PPDT in denying the 1st and 2nd Respondents an opportunity to be heard and also to present documents and evidence violated their right to a fair hearing and consequently issued orders that were prejudicial.
 2. That taking into account that the Appeals tribunal and their decision of 20th April 2022 had directed a fresh nomination be undertaken the PPDT fell into error by directing that fresh nomination could only be by way of universal suffrage.
 3. That further to Ground (2) above the Honourable Tribunal erred in law and fact in any event in failing to allow the 1st Respondent to exercise and carry out the fresh nomination using any of the nomination methods allowed in their rules.
 4. That the Honourable Tribunal erred in law and fact by failing to consider the oral submissions of the 1st and 2nd Respondents thus arriving at a manifestly erroneous decision.
7. In a decision rendered on 23rd June 2022, Ochieng.J (as he then was) dismissed both the appeal and cross-appeal. Regarding the cross appeal- and in agreeing with the PPDT, the learned Judge held;

“48.I am in complete agreement with those words of the PPDT. I would add that when a political party had decided to use universal suffrage, the members of the said party have been given the mandate to take an active and direct part in choosing the person who is to be nominated as the candidate.

49. If the PPDT or the Court were to determine that a nomination process had to be repeated, the members would have a legitimate expectation that they would, once again, be empowered to choose the candidate who would then fly the party flag in the elections.”
8. As stated at the beginning of this decision, the single substantive issue in this appeal is whether the learned Judge erred in law in upholding the decision of the PPDT directing the party to conduct a fresh nomination by way of universal suffrage. But we must first dispose of one other minor ground raised; that the learned judge erred in law in holding that the cross appeal was lodged against the PPDT’s ruling of 21st May 2022 and not the judgment dated 5th May 2022 and consequently erred in his disposition.



9. We cannot agree. The clarity of mind of the learned Judge that the subject of the cross appeal before him was the judgment of 5th May 2021 is evident in the following passage of his decision;
- “19. Nowhere in the cross-appeal, did the 1st and 2nd Respondents mention their alleged dissatisfaction with the Ruling delivered on 26th May 2022.
20. Indeed, whilst the Memorandum of Appeal makes reference to the Judgment delivered by the PPDT
- “on 5th May, 2022 at 7.00p.m”.
- the Notice of Motion dated 28th May 2022 (through which the 1st and 2nd Respondents had sought review), referred to
- “..... a Ruling delivered on Thursday 26th May 2022 at 6.00p.m.”
21. In other words, the Judgment that is the subject matter of the appeal before me was not delivered on 26th May 2022. On that date, PPDT delivered a Ruling; and the 1st and 2nd Respondents have not filed an appeal arising from a Ruling.
22. I find that the cross-appeal speaks for itself; that it is in respect of the Judgment dated 5th May 2022.”
10. Back to the substantive matter. Learned senior counsel Ojienda, appearing for the appellant, urged us to find that the Appeals Tribunal directed the conduct of a fresh nomination exercise and not a repeat nomination. It being so the party could, consistent with section 38 of the *Political Parties Act* and its Election and Nomination Rules, choose which method to use in the fresh nomination exercise. The methods available being through consensus, direct nomination or universal suffrage.
11. Citing the decisions in High Court Election E274 of 2020 Jacob Ochieng Ojuki of Orange Democratic Movement & 2 others and High Court Misc. Application No. 1 of 2020 Michael Ojala Nyansi v Hezron Okoth Onditi & Others, it was contended that the PPDT had no authority or mandate to decide for the party what method to use in conducting its nomination.
12. All the parties to the appeal supported the appeal.
13. Our jurisdiction to entertain and determine this appeal is section 41(2) of the *Political Parties Act* which reads: -
- (2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.
14. The issue raised in this appeal is purely on a point of law and is squarely within the contemplation of the statutory provision.
15. In similar context, the same issue arose and similar arguments were made before us in Civil Appeal No. E003 of 2022 ODM National Elections Board & another v Hon. John Ombewa Gare & 2 others.
16. The answer we gave to the arguments apply in equal force to this matter and we cannot do any better than to, in extenso, reproduce our holdings in *ODM National Elections Board (supra)*.



17. In respect to a party's undoubted right to choose the method for party nominations, we held:-

“(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.”

18. On the question whether a party, which has attempted a nomination by way of universal suffrage but which attempt has for some reason aborted or is nullified, can carry out the repeat nomination directly, we held:

“(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 v Achan Ojuki Gordon & 2 others Kisumu Civil Appeal No. E037 of 2022....”

19. Clearly, the appeal is for dismissal. We do hereby dismiss it but with no order as to costs as it was not opposed.

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

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

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

