



Ochola v Odhiambo & 2 others; Independent Electoral And Boundaries Commission (Interested Party) (Civil Appeal E389 of 2022) [2022] KECA 598 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 598 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E389 OF 2022
W KARANJA, J MOHAMMED & KI LAIBUTA, JJA
JULY 8, 2022**

BETWEEN

NICK EVANCE OKOTH OCHOLA APPELLANT

AND

ODM NATIONAL ELECTIONS BOARD 1ST RESPONDENT

TED MARVIN ODHIAMBO 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 3RD RESPONDENT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION INTERESTED PARTY**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(J. K. Serگون, J.) dated 20th June 2022) in H.C.C.A No. E384 of 2022)*

JUDGMENT

1. The facts giving rise to the dispute to which the impugned judgment relates are that Nick Evance Okoth Ochola (the appellant) and Ted Marvin Odhiambo (the 1st respondent), were at all material times members of the 3rd respondent, the Orange Democratic Movement (ODM). The two were aspiring candidates for the position of Member of County Assembly, (MCA) North Gem Ward, Siaya County; and that a nomination exercise was conducted on 13th April, 2022 after which the 1st respondent was issued with an interim nomination certificate by ODM.
2. The appellant being dissatisfied by that decision moved to the ODM Appeals Tribunal on appeal and upon hearing the complaint, the ODM Appeals Tribunal dismissed the appellant's appeal on 20th



- April, 2022. Dissatisfied, the appellant filed an application for review at the ODM Appeals Tribunal which application was dismissed on 25th April, 2022.
3. The 1st respondent was thereafter issued with the final nomination certificate pursuant to the ODM Party Primaries and nomination Rules 2022, Rule 4(n) and Rule 47(4).
 4. On 23rd May, 2022 the Independent Electoral and Boundaries Commission (IEBC), the interested party herein, published a timetable for presentation of papers by the candidates and the 1st respondent discovered that his name was missing and that instead, ODM had forwarded the appellant's name to IEBC.
 5. Aggrieved by ODM's decision, the 1st respondent moved to the Political Parties Disputes Tribunal (PPDT) at Kisumu vide Complaint No. E029 of 2022, Ted Marvin Odhiambo vs. ODM National Elections Board, Orange Democratic Party Movement and Nick Evance Okoth.
 6. Upon hearing the parties, the PPDT delivered its judgment on 8th June, 2022 holding that it had jurisdiction to hear and determine the complaint. The PPDT also found that the complaint before it was merited and ordered the 2nd and 3rd respondents to forthwith, and not later than twenty-four (24) hours from the day of the judgment being 10.00am on 9th June, 2022 to forward to the IEBC the name of the 1st respondent as the 3rd respondent's nominee for the position of MCA North Gem Ward. In addition, the PPDT also ordered each party to bear their own costs.
 7. Dissatisfied with the outcome of the PPDT, the appellant elected to appeal the aforesaid PPDT's decision in the High Court at Nairobi in HCCA No. E384 of 2022:- Nick Evance Okoth Ochola vs. Ted Marvin Odhiambo, ODM National Elections Board, Orange Democratic Movement and the IEBC.
 8. In its judgment delivered on 20th June 2022, the High Court (Sergon, J.) upheld the PPDT's decision and also directed that each party bear their own costs.
 9. Dissatisfied with the High Court decision, the appellant appealed to this Court praying that his appeal be allowed; that the judgment and all consequential proceedings the High Court delivered on 20th June, 2022 be set aside; that the Court do issue an order directing IEBC to accept the appellant's nomination papers as the duly nominated candidate of ODM for the election of MCA, North Gem Ward, Siaya County; that such further or other orders be made as are just in the circumstances of this appeal; and that the costs of the appeal be awarded to the appellant.
 10. The appellant's appeal is anchored on 4 grounds set out in his Memorandum of Appeal dated 22nd June, 2022. The grounds of appeal are that the learned Judge erred: in finding that the PPDT had jurisdiction to entertain the complaint by the 1st respondent even after the appellants name had been submitted to the IEBC by the 2nd and 3rd respondents; in finding that nomination means presentation of nomination papers to the IEBC by a candidate of a political party; in failing to take cognizance of the decision of this Court in Civil Appeal No. E326 of 2022 - *Hussein Abdiraman vs Deka Ali Ichara & 4 others* which distinguishes between submission of names and nominations; and in failing to refer the dispute to the IEBC Dispute Tribunal which was properly seized of the dispute.

Submissions by Counsel

11. The appeal was heard by way of written submissions with oral highlights.

In support of the appeal, learned counsel for the appellant, Messrs Okong'o, Wandago & Co. Advocates filed written submissions and list of authorities dated 28th June, 2022, in respect of which learned counsel, Mr. Amos Wandago made oral highlights at the hearing of the appeal. Mr. Wandago



- submitted that the High Court found that the appellant's name had been forwarded to the IEBC on 27th April, 2022 which was within the strict timelines set by the IEBC in Gazette Notice No. 430 of 2022 dated 20th January, 2022, and that the IEBC published the list of candidates including the appellant on 23rd May, 2022. Counsel submitted that all parties conceded that the 1st respondent filed his complaint to the PPDT on 27th May, 2022 after he became aware on 23rd May, 2022 that the appellant's name had been forwarded to the IEBC by the 2nd and 3rd respondents.
12. Mr. Wandago submitted that the High Court erred in law and fact in finding that the PPDT had jurisdiction to hear and determine the complaint by the 1st respondent. Counsel submitted that the trial Judge misdirected himself in finding that the PPDT had jurisdiction to order the IEBC to remove the name of a candidate whose name had been submitted to the IEBC. Counsel further submitted that the jurisdiction to do so lies with the IEBC Dispute Tribunal.
 13. He emphasized that the trial Judge erred in holding that it is only after a candidate has been cleared by IEBC that IEBC is seized of the jurisdiction to entertain a complaint. Counsel referred us to the Court decisions in *Joseph Ibrahim Musyoka vs Wiper Democratic Movement Kenya & Another* [2017] eKLR and Civil Appeal No. E326 of 2022 Hussein Wenton Mohamed Abdirahmed -vs- Deka Ali Khala & 3 others (unreported) in support of his submissions and urged us to allow the appeal.
 14. In opposing the appeal, on behalf of the 1st respondent, Messrs Oruenjo Kibet & Khalid Advocates filed written submissions dated 28th June, 2022, in respect of which learned counsel, Ms. Komen, made oral highlights at the hearing of the appeal. Counsel submitted that the PPDT had jurisdiction to determine the complaint that was filed before it by the 1st respondent as pursuant to Section 40(1) and (2) of the *Political Parties Act* (PPA) as amended in 2022, the PPDT has powers to determine disputes between a party and its members as in the instant case. Counsel referred us to the authorities of PPDT No. E003 of 2022; Hon Elisha Ochieng Odhiambo vs Dr. Jalango Midiwo & 3 others and Siaya HCCA No.26 of 2022; Dr. Jalango Midiwo vs Elisha Ochieng Odhiambo (unreported).
 15. Counsel further submitted that the dispute between the appellant and the 1st respondent arose from the nomination exercise which had been determined and that the PPDT had powers to enforce final decisions of the political party including decisions emanating from the nomination exercise in the event that the party failed to abide by such decisions. Counsel went on to state that the forwarding of the 1st respondent's name to the IEBC following a successful nomination process is an administrative exercise as the ODM Appeals Tribunal had the final say on the issue of nomination. As such, the PPDT had jurisdiction to compel the 2nd respondent to follow its rules by ordering it to forward the 1st respondent's name to IEBC as was held in Siaya HCCA No.26 of 2022; Dr Jalango Midiwo vs Elisha Ochieng Odhiambo (unreported).
 16. Counsel submitted that Civil Appeal No. E326 of 2022 Hussein Wenton Mohamed Abdirahmed -vs- Deka Ali Khala & 3 others (unreported) had no relevance in this matter and urged us to dismiss the appeal.
 17. Ms. Phylis Kibaba held brief for Ms. Ochieng learned counsel for the 2nd and 3rd respondents and submitted that the 2nd and 3rd respondents would abide by the outcome of the appeal.



Determination

18. We have carefully considered the record of appeal, the written and oral submissions of counsel, the authorities cited and the law. As this is a second appeal, the mandate of the Court is to decide on matters of law only as set out in Section 41(2) of the PPA which provides as follows:

“(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 both the Court of Appeal and the Supreme Court.”

19. The issue of law that falls for our determination is jurisdictional. It is for us to decide whether, on the basis of the facts on record, the PPDT had jurisdiction to hear the complaint placed before it on 27th May, 2022 when it made the decision which was upheld by the High Court. The crux of this appeal is whether the jurisdiction lay with the PPDT or the IEBC.

20. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, the Supreme Court stated as follows:-

“A Court’s jurisdiction flows from either *the Constitution*, or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where *the constitution* exhaustively provides for the jurisdiction of a court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...”

21. In *Phoenix of E.A Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service* [2019] eKLR, this Court explained:

“In common English parlance, jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae”

22. Indeed, jurisdiction is everything and, without it, a court has no power to make any step. This was stated in the classic case of *The Owners of the Motor Vessel “Lilian” vs. Caltex Oil (Kenya) Ltd* [1989] KLR 1, where Nyarangi JA observed:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the matter before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



23. There is no discernible dispute about the different roles that the two institutions, the PPDT and the IEBC play in the resolution of electoral disputes. The jurisdiction of the PPDT is spelt out in Section 40 of the *Political Parties Act*, which provides as follows:

“40. Jurisdiction of Tribunal

1. The Tribunal shall determine –
 - a. disputes between the members of a political party;
 - b. disputes between a member of a political party and a political party;
 - c. disputes between political parties;
 - d. disputes between an independent candidate and a political party;
 - e. disputes between coalition partners; and
 - f. appeals from decision of the Registrar under this Act; fa. disputes arising out of party nominations.
2. Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.”

24. On the other hand, the jurisdiction of the IEBC in the settlement of electoral disputes is spelt out under Section 74(1) of the *Elections Act* and is derived from Article 88(4) (e) of *the Constitution*, and “includes disputes relating to or arising from nominations.”

Under Section 2 the *Elections Act*, “Nomination” means

“the submission to the Commission of the name of a candidate in accordance with *the Constitution and this Act.*” (Emphasis supplied).

25. Section 40 (fa) was an amendment made by Act No. 21 of 2016 on 21st July 2016 with the objective of clarifying the concurrent jurisdiction with other bodies handling electoral disputes. The IEBC and the PPDT therefore have their roles clearly demarcated and distinctively set out. The appellant submitted before the PPDT that the complaint before it had been brought after the submission of the name of the appellant to the IEBC as its nominee. The appellant urged that the complaint be struck out. The PPDT rejected that submission and stated as follows:-

“On the second limb of the challenge to this tribunal’s jurisdiction, we have previously made determination on the import of Regulation 8(1) of the regulations...The second part of Regulation 8(1) of the Regulations refers to a date which is a moving target as set by the Commission. We have previously declined to lock out parties from this Tribunal on that basis alone. In the same breath, we decline the invitation to lock out a party from the seat of justice on the basis of a date which is a moving target.”

26. A pertinent question is: had the process in this matter transited from ‘party primary’ to ‘nomination’ before the PPDT dealt with it? That is the question at the heart of this appeal. The PPDT and the High Court found no evidence to support the contention but the appellant contends that there was.



27. This Court in *Joseph Ibrahim Musyoki vs. Wiper Democratic Movement - Kenya & Another* (*supra*) stated as follows:-

“The basic rule, for the sake of certainty and finality is that:

...each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.” See *Malawi Railways Ltd vs. Nyasulu* [1998] MWSC 3.”

28. In his Complaint dated 27th May 2022 and filed with the PPDT, the 1st respondent stated that the appellant’s name had already been forwarded by the 2nd respondent to the IEBC and urged for an order barring the IEBC from receiving the appellant’s nomination papers as the ODM’s nominee for North Gem Ward Member of County Assembly pending the hearing and determination of the claim.

29. The 1st respondent repeated those averments in an affidavit sworn on the same day to support an application for interim relief which was granted. In the main prayers of his complaint, he sought for “an order barring the IEBC from receiving nomination papers of Ochola (the appellant herein) as the ODM’s nominee for North Gem Ward Member of County Assembly pending the hearing and determination of the claim.”

30. There was no oral evidence tendered either before the PPDT or the High Court. The matter was determined on affidavit, documentary evidence and the written submissions filed. Among the affidavits submitted to the PPDT by the 1st respondent was his affidavit sworn on 27th May, 2022 stating, *inter alia*, as follows: -

“8. On 23rd May 2022 the interested party published the time table for presentation of papers by the candidates and I was appalled to find that my name was missing. The 2nd and 3rd respondents instead forwarded the name of the 3rd respondent who did not win the primaries and his appeals to the ODM appeals tribunal were dismissed.”

31. This affidavit was in place before the PPDT that was seized of the matter.

No other affidavit was filed to controvert those sworn assertions. Surprisingly, the PPDT despite this averment and well aware that the appellant’s name had been forwarded to the IEBC, went ahead to entertain the matter and clothe itself with jurisdiction even when there was evidence of submission of the nominee’s name to the IEBC. We find that that was a misdirection which rendered the finding by the PPDT an error of law since it was based on a misapprehension of the role of the 2nd and 3rd respondents. As earlier observed, the PPDT itself imported an erroneous definition or understanding of what amounts to “nomination”. Any complaint on the issue of nomination was a matter for the IEBC to determine and not the PPDT.



32. In *Joseph Ibrahim Musyoki vs. Wiper Democratic Movement - Kenya & another* (*supra*) his Court observed as follows:-

“ ... the jurisdiction of IEBC in settlement of electoral disputes is spelt out under Section 74(1) of the *Elections Act* and is derived from Article 88(4)(e) of *the Constitution*. It “includes disputes relating to or arising from nominations.”

Under the Act, “Nomination” means “the submission to the Commission of the name of a candidate in accordance with *the Constitution* and this Act ... 29. It follows that the process had transited from party primary to nomination as by law defined and that the jurisdiction to challenge the nomination lay with the IEBC.” (Emphasis supplied).

33. This position was fortified in the recent case of Hussein Wenton Mohamed Abdirahmed -vs- Deka Ali Khala & 3 Others Civil Appeal No. E326 of 2022 (*supra*) where this Court succinctly pronounced itself as follows:

“Despite the generality of Section 41(2) of the *Political Parties Act*, the jurisdiction to determine disputes relating to nomination (at party primaries) of party members for election is reserved, either to the party’s internal dispute resolution mechanisms pursuant to section 38(i); or by reference to the Tribunal pursuant to section 40(1) (fa) of the Act; but, where a nominee’s name has already been submitted to the IEBC, and a dispute arises in that regard, then the process is deemed to have transited from party primaries to nomination and, accordingly, the jurisdiction to challenge the nomination lies with the IEBC pursuant to Article 88(4) (e) of *the Constitution*.”

34. The nomination process in which the appellant and the 1st respondent were involved had gone beyond the party primaries as the name of the appellant had been submitted to the IEBC. The jurisdiction of the IEBC to determine the dispute between the parties had been invoked in accordance with Article 88(4) (e) of *the Constitution* which stipulates that:

“(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
... ... (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results...”

35. The pleadings and affidavit evidence lead us to the inescapable conclusion that as at 27th May, 2022, the appellant’s name had been submitted to the IEBC as ODM’s nominee. It follows therefore that the process had transited from party primary to nomination as by law defined and that the jurisdiction to challenge the nomination lay with the IEBC. It is for those reasons that we find merit in this appeal.

36. The upshot is that we order and direct that:

- a) The appellant’s appeal be and is hereby allowed;
- b) The judgment of the High Court (J.K. Serگون, J.) delivered on 20th June, 2022 in HCCA No. E384 of 2022 be and is hereby set aside;



- c) The appellant be and is hereby deemed to have been validly nominated as the ODM's Party nominee for the position of Member of County Assembly, North Gem Ward, Siaya County; and
- d) The costs of this appeal be borne by the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

