



**Midiwo v Odhiambo & 2 others (Civil Appeal 26 of 2022)  
[2022] KEHC 10679 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL 26 OF 2022  
RE ABURILI, J  
MAY 27, 2022  
PARTY PRIMARIES PRE-ELECTION DISPUTES APPEAL**

**BETWEEN**

**GEORGE JALANG'O MIDIWO ..... APPELLANT**

**AND**

**ELISHA OCHIENG ODHIAMBO ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ELECTIONS BOARD ORANGE DEMOCRATIC MOVEMENT  
PARTY ..... 2<sup>ND</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY ..... 3<sup>RD</sup> RESPONDENT**

*(Originating from Kisumu High Court Civil Appeal No. E029 of 2022  
and transferred vide an order made on 20th May, 2022 by J. Kamau J)*

**JUDGMENT**

**Introduction**

1. This appeal raises the question whether the Political Parties Disputes Tribunal (the PPDT) established under Section 39 of the *Political Parties Act*, (the Act) can hear and determine a dispute arising out of party primaries before such a dispute is heard and determined by the internal political party dispute resolution mechanism. The appeal also answers the question of how many levels of disputes resolution mechanisms exist within the Orange Democratic Movement (ODM) Constitution and whether the Central Committee established under Chapter 7 of the said Constitution is one of the organs in the ODM structure that is mandated to hear and determine Party Primaries disputes before such dispute can be escalated to the Political Parties Tribunal as established under the *Political Parties Act*, 2011.



## Background

2. Aspiring to vie for the position of Member of the National Assembly for the Gem Constituency in the general elections scheduled for the 9<sup>th</sup> August 2022, Dr. George Jalang’o Midiwo, the appellant and the incumbent Hon. Elisha Ochieng Odhiambo, the 1<sup>st</sup> respondent herein, sought nomination for that position by their Party, The Orange Democratic Movement Party, (ODM) political party, during that party’s primaries held on 13<sup>th</sup> April 2022.
3. In the said Party Primaries, Hon Elisha Ochieng Odhiambo triumphed and was declared the winner after garnering the highest number of votes cast by the electorate in their exercise of their democratic right to vote, and he was issued with an interim nomination certificate by the Gem Constituency Returning Officer.
4. Aggrieved by that outcome, the appellant herein Dr. George Jalang’o Midiwo lodged a complaint before the ODM Internal Dispute Resolution Mechanism, the Party Appeals Tribunal. In his statement of claim submitted to the tribunal of the ODM Political Party Appeals Tribunal, the appellant sought for the following orders:
  - a. a declaration that the ODM primaries for Gem Constituency Parliamentary seat held on 13<sup>th</sup> April 2022 be declared null and void;
  - b. a declaration for the cancellation of the provisional certificate issued to Hon Elisha Ochieng Odhiambo on the 13<sup>th</sup> April, 2022;
  - c. a declaration that the complainant Dr. George Jalang’o Midiwo was validly elected as the ODM Party nominee for the Gem Constituency parliamentary seat;
  - d. a declaration that the complainant be issued with valid nomination certificate to that effect;
  - e. a declaration that the National Elections Board-NEB do take disciplinary action against Hon. Elisha Ochieng Odhiambo for the election malpractices and irregularities caused on the 13<sup>th</sup> April, 2022 in Gem Constituency.
5. In support of that Claim, the appellant herein filed his own statement and affidavit and further affidavit and several affidavits sworn by his supporters, among them, his agents during the said party nomination elections process. He also filed documentation including the P3 forms and copies of photographs of some scenes and people and messages from a mobile phone and claimed in a nutshell, that the nomination exercise was marred with violence and malpractices.
6. The 1<sup>st</sup> Respondent herein Hon. Elisha Odhiambo Ochieng opposed that Claim and appeal and filed a response. He also procured affidavits of the presiding Officers and chief agent as well as his agents disputing all the allegations and depositions by the appellant, his agents and supporters.
7. After hearing the parties, the ODM Party Appeals Tribunal vide its judgment delivered in Tribunal Case No. 5 of 2022 on 20<sup>th</sup> April, 2022 at Kisumu chaired by Mr. Fredrick Orego with the membership of Ms Phyllis Chepkemoi and Ms Barbara Malowa dismissed the appeal /Claim by Dr. George Jalang’o Midiwo the appellant herein and upheld the election of Hon. Elisha Ochieng Odhiambo the 1<sup>st</sup> Respondent herein as the validly nominated ODM candidate for member of Parliament (National Assembly) for Gem Constituency. The ODM Appeals Tribunal also upheld the nomination certificate issued to the 1<sup>st</sup> Respondent herein by the Gem Constituency Returning Officer. The ODM Appeals Tribunal further ordered for service of the judgment upon the ODM Party National Elections Board for information and necessary action.



8. Following that decision of the ODM Party Appeals Tribunal, the appellant herein filed an application for review of that decision to the same ODM Party Appeals Tribunal. The review application was supported by an affidavit sworn by the appellant on 20<sup>th</sup> April 2022 comprising 18 paragraphs outlining the grounds for review. The main grounds for review were that:
  - a. the Tribunal in its earlier judgment of 20<sup>th</sup> April, 2022 dismissed the appeal on account of apparent error on the face of the record;
  - b. that the Tribunal did not consider crucial evidence which were not on record and could have made the Tribunal rule otherwise.
9. That application for review was vehemently opposed by the 1<sup>st</sup> Respondent herein Hon Elisha Ochieng Odhiambo. Of significance is that after The ODM Party Appeals Tribunal heard both parties to the dispute on the application for review of its earlier ruling, vide its ruling delivered on 24<sup>th</sup> April 2022, the Tribunal comprising the same panel members upheld its earlier decision made on 20<sup>th</sup> April 2022 and dismissed the appellant's application for review.
10. It is the above decision of 24<sup>th</sup> April 2022 which prompted the ODM Central Committee to convene on the Sunday of 24<sup>th</sup> April 2022 to consider the report of Party Primaries for Gem Constituency. The Central Committee was composed of ODM Party Officials among them, the Secretary General Mr. Edwin Sifuna, National Treasurer Hon. Timothy Bosire, National Organizing Secretary Hon. Ahmed Abdisalan, Director of Elections Hon. Junet Mohamed, Secretary for Parliamentary affairs (National Assembly) Hon. Gladys Wanga, Executive Director Mr. Oduor Ong'wen, Secretary for Political Affairs Hon. Opiyo Wandayi, Secretary for Youth Affairs Hon. John Ketorah and Secretary for Women Affairs Ms Beth Syengo. Also in attendance were the Chair, National Elections Board Ms Catherine Mumma and Secretary, National Elections Board, Mr. Abdullahi Diriye.
11. From the minutes of the Central Committee meeting, the members were briefed of the conduct of the Party Primaries where Hon. Elisha Ochieng Odhiambo was declared the winner and the subsequent complaint that was lodged with the Party's Appeals Tribunal.
12. The members of the Central Committee acknowledged the decision of the ODM Party Appeals Tribunal to uphold the election of Hon. Elisha Ochieng Odhiambo as the ODM Parliamentary candidate for Gem Constituency.
13. The Central Committee further considered complaints of alleged violence reportedly against the candidacy of Hon. Elisha Odhiambo in Yala Township Primary, Dienya Polling Centre and Kambare, Lihanda and Kagilo polling centres. The Central Committee also considered the information given to the Central Committee by the National Elections Board Chairperson, Ms Catherine Mumma to the effect that she had received death threats from Hon Elisha Odhiambo. The Central Committee finally resolved as follows, in its unsigned Resolution attached to the minutes of 24<sup>th</sup> April, 2022:
  1. That being a party that is predicated on social justice and equity, cases of violence within and outside the Party will never be condoned;
  2. That all members of the Party and in particular, aspirants for political office are bound by the Party's Code of Conduct and that any violation of the same is subject to Rule 17(1) (f) of the Party Primaries Nomination Rules;
  3. That having taken into consideration the conduct of the Party Primaries in respect to the Parliamentary seat and subsequent decision of the Appeals Tribunal, the Central Committee



invokes Rule 17(1) (f) of the Party Primaries and Nomination Rules powers to nullify the election of Hon Elisha Ochieng Odhiambo.

14. The Central Committee then further resolved as follows, in respect of Gem Constituency Member of Parliament elections:
  - a. The Party Primary election in respect to Gem Constituency, Siaya County as conducted on 13<sup>th</sup> April 2022 is hereby nullified;
  - b. That the National Elections Board (NEB) is hereby directed to proceed and issue a direct ticket in line with Rule 8 (b) of the Party Primaries Nomination Rules.
15. On the same day that is the 24<sup>th</sup> April, 2022, the appellant Dr. George Jalang'o Midiwo herein was issued with the nomination certificate for Gem Constituency Parliamentary elections (National Assembly).
16. It was that process of what the 1<sup>st</sup> respondent considered to be an attempt to circumvent the decision of the ODM Party Appeals Tribunal by the ODM Party and even before the resolution was made by the Central Committee reversing the decision of the ODM Party Appeals Tribunal both at the first instance and on a review application that prompted the 1<sup>st</sup> Respondent herein Hon. Elisha Ochieng Odhiambo to file a Statement of Claim before the Political Parties Disputes Tribunal (PPDT) at Kisumu which Claim is dated 22<sup>nd</sup> April 2022 and later as amended on 25<sup>th</sup> April, 2022 after the resolution nullifying his nomination and the issuing of the nomination certificate to the appellant herein.
17. The amendment made additional pleadings and prayers among them, that the claimant Hon Elisha Ochieng Odhiambo be deemed as the duly nominee of the 4<sup>th</sup> Respondent ODM Party for the position of the member of the National Assembly for Gem Constituency and that the Respondents who were Dr. George Jalang'o Midiwo, the ODM National Elections Board, ODM Appeals Tribunal and ODM Party to be jointly condemned to pay costs of the claim. Other amendments affected some parts of paragraph 38 of the initial claim which had by then been overtaken by events and paragraph 39 seeking an order that the NEB and ODM be directed to issue the Claimant with the nomination Certificate and uphold his nomination. Other amendments affected paragraphs 25 and 35 of the initial Claim and all these pleadings are contained in the record of appeal dated 13<sup>th</sup> May 2022.
18. It is worth noting that the Claim by Hon. Elisha Ochieng Odhiambo was filed with the ODM Party Appeals Tribunal Before the Central Committee made its unsigned resolutions of 24<sup>th</sup> April 2022 nullifying his nomination. Further, as the Ruling of the Appeals Tribunal was made on 20<sup>th</sup> April 2022, it is evident that the resolution by the Central Committee was made after the ruling dismissing the review application made by the appellant herein to the Appeals Tribunal was delivered on 20<sup>th</sup> April, 2022, and upon the 1<sup>st</sup> respondent learning that the appellant herein and the Party were in his view, up to some mischief to deprive the 1<sup>st</sup> respondent of his hard and merit earned victory as is demonstrated in the paragraphs below.
19. This court further observes from the Complaint by Hon. Elisha Ochieng Odhiambo that the dispute before the PPDT was lodged on account that the 1<sup>st</sup> Respondent herein had heard that the appellant herein had colluded with the NEB to conduct repeat nomination process of the Party Primaries, notwithstanding the finality of the decision made by the Appeals Tribunal that declared that the 1<sup>st</sup> Respondent herein was the duly elected candidate for the ODM Parliamentary (National Assembly) seat for Gem Constituency.



20. The 1<sup>st</sup> Respondent contended quite vehemently that since the Appeals Tribunal had not reversed its earlier decision that upheld the nomination of the 1<sup>st</sup> Respondent candidate, the NEB could not purport to conduct any other repeat Party Primaries as they had no such powers to do so. According to the 1<sup>st</sup> Respondent's claim, the NEB only put on hold the purported and hyped repeat Party Primaries after the 1<sup>st</sup> Respondent held a press conference on 21<sup>st</sup> April 2022 highlighting what he considered to be illegalities of conducting any repeat Party Primaries for Gem Constituency Parliamentary seat on 22<sup>nd</sup> April 2022.
21. From paragraph 35 of the Claim lodged by the 1<sup>st</sup> Respondent, he approached the PPDT on account that he believed quite apprehensively, that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents-NEB and ODM Party were determined to nominate the appellant herein Dr. George Jalang'o Midiwo as the Gem Parliamentary seat aspirant despite the appellant having lost at both the Party Primaries held on 13<sup>th</sup> April 2022 and the two decisions including the review ruling already rendered by the ODM Appeals Tribunal, which decisions were final as far as Internal Dispute Resolution Mechanisms was concerned; and that therefore, any other of those considerations allegedly being peddled by the appellant of his close relation with the Rt. Honourable Raila Amollo Odinga, including the filial relations between the appellant herein and the ODM Party leader and any promises allegedly made to the appellant by the said Party Leader pursuant to those relations were inconsequential.
22. The 1<sup>st</sup> Respondent further complained that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents were determined to violate the ODM Party's Constitution and Rules governing nomination of candidates.
23. The 1<sup>st</sup> Respondent further contended that under Rule 6 of the Appeals (Tribunal Practice and Procedure) Rules, 2022, the 3<sup>rd</sup> Respondent-ODM Appeals Tribunal had the exclusive jurisdiction to determine any dispute between aspirants arising from elections and nominations conducted by the 4<sup>th</sup> Respondent in the County and as such, the Central Committee of the Party does not have any powers to make any determination in matters relating to any dispute between aspirants arising from elections nominations conducted by the 4<sup>th</sup> Respondent.
24. The 1<sup>st</sup> Respondent further asserted that Rule 25(3) of the said Appeals (Tribunal Practice and Procedure) Rules, 2022, declares the finality of the 3<sup>rd</sup> Respondent's decision hence no organ of the Party including the Central Committee has powers to overrule the 3<sup>rd</sup> Respondent's decision in matters arising from elections nomination disputes.
25. The 1<sup>st</sup> Respondent asserted further that the appellant herein had exhausted all the remedies available to him challenging the Claimant's nomination and that therefore there was no reason why the 4<sup>th</sup> Respondent ODM Party could not issue the 1<sup>st</sup> respondent claimant with the Nomination Certificate.
26. The 1<sup>st</sup> Respondent urged the PPDT to uphold the decision of the ODM Party Appeals Tribunal and make the following orders:
  - a. to declare that the nomination of the 1<sup>st</sup> Respondent was conducted in a free, fair and transparent manner following the Appeals Tribunal's decision;
  - b. a declaration that the interim nomination certificate issued to the 1<sup>st</sup> respondent be recognized as legally, justly and rightly obtained;
  - c. that the claimant be issued with the final nomination certificate for the Member of Parliament for Gem Constituency and the ODM party be directed to submit the claimant's name to the IEBC for the position of Member of Parliament for Gem Constituency; and



- d. that a declaration be made that the claimant be deemed to be the duly nominee of the ODM Party for the Position of the Member of the National Assembly for Gem Constituency.
27. The above was the claim by the 1<sup>st</sup> respondent herein before the PPDT.
28. In response and opposing the above Claim by the 1<sup>st</sup> Respondent, the appellant herein filed a preliminary objection together with a replying affidavit and list of authorities all grounded on section 40(2) of the *Political Parties Act* on account that the 1<sup>st</sup> respondent's claim was premature, that the claimant had violated the doctrine of ripeness and exhaustion of remedies in that the claim was filed before the PPDT while the IDRMs processes were still ongoing namely, the review application. That the claim was before the PPDT before the review application was determined, citing Rules 17(5) of the ODM Party Primary Nomination Rules that allegedly allowed the Central Committee to make a decision on the nomination.
29. The appellant herein challenged the 1<sup>st</sup> respondent to indicate what decision was being challenged since the Party's IDRMs process was still ongoing before the Central Committee.
30. The 2<sup>nd</sup> to 4<sup>th</sup> respondents contended on their part, that the Central Committee having received complaints on the manner in which the Party Primary nominations were conducted in Gem Constituency, including alleged death threats to the NEB Chairperson Ms Catherine Mumma, the Party was compelled to subject the claimant who was the 1<sup>st</sup> Respondent herein Hon. Elisha Ochieng Odhiambo, to disciplinary mechanisms of the Party hence the decision of the Central Committee to recall the nomination certificate that had been issued to the complainant/ 1<sup>st</sup> respondent herein.
31. According to the 2<sup>nd</sup> to 4<sup>th</sup> Respondents, any candidate who is sponsored by the Party and misconducts self, contrary to the Party Rules and Regulations, the Party has power to discipline such a person hence the decision by the Central Committee made on 24<sup>th</sup> April 2022.
32. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents further contended that the legality or otherwise of the Central Committee's decision could not be litigated before the PPDT but before the Party IDRMs as a first port of call hence the dispute was not ripe for the PPDT to adjudicate upon.
33. After hearing all the parties to the dispute before the PPDT, the latter rendered its decision by way of a Judgment on 30<sup>th</sup> April 2022 after framing three main issues namely:
- a. whether the Tribunal had the requisite jurisdiction to entertain the complaint;
  - b. what orders should issue in the matter; and
  - c. who bears the costs of the matter?
34. In the decision of the PPDT, it found and held that it had jurisdiction to entertain the complaint before it and that the matter was ripe for determination by the PPDT, pursuant to section 40(2) of the Political Parties (Amendment) Act, 2021.
35. On what orders to make, the Tribunal held that the decisions of the Appeals Tribunal of the ODM party were final and that therefore the Central Committee had no power to review those decisions.
36. The Respondents were condemned to bear costs of the claim in favour of the 1<sup>st</sup> Respondent herein.

### **This Appeal**

37. It is that decision by the Political Parties Disputes Tribunal which the appellant herein, Dr. George Jalang'o Midiwo was aggrieved by and hence this appeal as filed before Kisumu High Court and was



subsequently transferred to this Court after directions were given on 20<sup>th</sup> May 2022 by Hon Lady Justice Jacklyne Kamau, on account of geographical jurisdiction of this court as the dispute arises from the constituency that is domiciled in Siaya County under the jurisdiction of the High Court at Siaya. The learned Judge also fixed this appeal for judgment delivery for on 27<sup>th</sup> May 2022.

38. In the appeal herein lodged on 4<sup>th</sup> May 2022 by way of a memorandum of appeal dated the same day, and which appeal has strict statutory timelines for its determination, the appellant sets out seven (7) grounds of appeal which I have reproduced below, urging this court to allow the appeal and make the following orders:
1. overturn and set aside the decision of the PPDT made on the 30<sup>th</sup> April 2022 and in its place, make an order dismissing the 1<sup>st</sup> Respondent's appeal with costs;
  2. make an order directing the ODM Party, National Elections Board (NEB) to proceed with the process of nomination of a candidate to run for the seat of Member of the National Assembly for Gem Constituency in line with the Party Constitution and its Party Primaries and Nomination Rules.
39. The grounds of appeal as contained in the said memorandum of appeal are as follows:
- a. the PPDT acted outside its mandate by making an order directing the ODM National Elections Board and the ODM Party to issue the 1<sup>st</sup> Respondent with a Nomination Certificate, an order which the Tribunal could not make;
  - b. that the PPDT usurped the powers, authority and mandate of the members of the ODM Party in the nomination of a candidate to contest in the seat of Member of National Assembly for Gem Constituency;
  - c. that the PPDT usurped the mandate and powers of NEB of the ODM Party in the nomination of the candidate to contest in the Gem Constituency parliamentary seat;
  - d. that the PPDT made orders in matters which had not been prayed for hence made orders outside the matters pleaded;
  - e. that the orders made by the PPDT amounted to imposing a person on a political party as its nominated candidate to run and contest in elections of a member of National Assembly of the Gem Constituency;
  - f. that the PPDT erred in addressing and dealing with matters exterior to the matters pleaded and hence stepped outside the pleadings;
  - g. that the decision of the PPDT is against the weight of the evidence.
40. My perusal of the grounds of appeal reveals that grounds 1, 2 and 3 are similar as they challenge the jurisdiction of the PPDT to entertain the claim filed before it. Ground 5 relates to an alleged imposition of a parliamentary candidate on the people of Gem Constituency by the PPDT. Grounds 4 and 6 are also one and the same as they challenge the PPDT's alleged determination of matters which were allegedly not pleaded in the claim by Hon Elisha Ochieng Odhiambo before the PPDT. Ground 7 stands alone.

#### **Delivery and receipt of this Appeal file from Kisumu High Court to Siaya High Court**

41. The appeal was canvassed by way of written submissions. Parties were also directed to file word documents of their submissions to the e-mail of this Court supplied to them by the Kisumu High



Court but only the 1<sup>st</sup> Respondent complied as directed by the High Court at Kisumu yet, owing to the short timeframe given for the determination of this appeal in view of this Court’s diary being fully engaged with pre fixed hearings and judgments for delivery before this file was received at 12.30am on 21/5/2022 at Siaya by the Deputy Registrar, it was necessary that the word format of the submissions be filed to aid the court in writing the judgment instead of retyping what the parties have filed in scanned pdf formats. Nonetheless, I have charred the midnight oil to ensure that the judgment is delivered on time and as scheduled by my sister Lady Justice Kamau, despite the file having been delivered for consideration by this Court past midnight on Sunday Morning.

### Submissions by Counsel for the Parties

42. Expounding on the grounds of appeal in the appellant’s memorandum of appeal and on the appellant’s written submissions dated and filed on 16<sup>th</sup> May 2022, Mr. Richard B. Onsongo, learned counsel for the appellant restated the grounds of appeal and the facts of the dispute herein between the parties and the impugned decision and reiterated the powers of the PPDT as stipulated in section 40 of the *Political Parties Act* No.11 of 2011.
43. It was argued that the *Political Parties Act* does not confer any power on the PPDT to order any political party to issue a nomination certificate to a specific individual.
44. Counsel for the appellant submitted that jurisdiction as defined in the Words and Phrases Legally Defined Vol.3, Butterworth, 1967, by John Beecroft Saunders is so central in judicial proceedings and is a well settled principle in law that a court acting without jurisdiction is acting in vain. Reliance was placed on the locus classicus case of *Owners of Motor Vessel Lillian “S” v Caltex Oil (Kenya) Limited* [1989] KLR 1 as expressed by Nyarangi JA, on the significance of jurisdiction.
45. Further submission was that an issue of jurisdiction is so determinative that it can be raised at any stage of the proceedings as was held by the Court of Appeal in *Jamal Salim v Yusuf Abdullabi Abdi & Another* CA No. 103 of 2016 [2018] eKLR inter alia: that, jurisdiction either exists or it does not and that it cannot be conferred by consent of the parties or be assumed on the grounds that parties acquiesced in actions which presume the existence of such jurisdiction. Further reliance was placed on the Court of Appeal decision in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR on the source of the court’s jurisdiction. Counsel for the appellant cited the holding in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012] eKLR.
46. Counsel for the appellant further argued that the 1<sup>st</sup> Respondent who was aware of the existence of the nomination certificate issued by the ODM Party on 24<sup>th</sup> April 2022 did not seek to have the said Nomination Certificate annulled, cancelled and or revoked, and or that neither did he seek to have the said Certificate recalled and or its operations be suspended. He further argued that the 1<sup>st</sup> Respondent sought to have the PPDT issue orders that could create a larger dispute than there was.
47. According to the appellant’s counsel, the 1<sup>st</sup> respondent did not, in his amended Statement of claim before the PPDT seek for an order that he is issued with a nomination certificate and that the only prayer that comes closer to that is at d) that: “The Claimant be and is hereby issued with the final nomination certificate as the 4<sup>th</sup> Respondent’s nominee for the position of the Member of national Assembly for Gem Constituency.”
48. Counsel submitted that without amending the prayers, the PPDT issued orders directing the ODM Party....“to forthwith issue the complainant the final nomination certificate to contest for the Member of the National Assembly for Gem Constituency, in any event within 24 hours of this order and to forward his name to the IEBC.”



49. Relying on the decision in *Galaxy Paints Co. Ltd v Falcon Guards Ltd* [2000] EA 885, where the Court held inter alia that the issue for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination; and that, unless pleadings were amended, parties were confined to their pleadings, as was held in *Gandy v Caspair* (1956)EACA 139 and *Fernandes v People Newspapers Ltd* (1972) EA 63, Counsel posed a question as to where the PPDT got the powers or authority and jurisdiction to issue the impugned order and in giving direction in the absence of pleadings on the issue. He maintained that the PPDT stepped outside the pleadings and made orders that were not prayed for.
50. In conclusion, the appellant's counsel submitted that they had demonstrated that the PPDT had no jurisdiction to descend into the arena of the Party Primaries/Nominations and usurp the powers / authority of the electorate, impose a person on the Party by taking up the powers of the Party nomination processes and procedures. He urged this court to allow this appeal as prayed in the memorandum of appeal with costs to the appellant.

### **The 1st Respondent's Submissions**

51. Only the 1<sup>st</sup> Respondent filed submissions opposing the appeal herein as the other respondents through the national Elections Board had filed another appeal No. Kisumu HC CA No. E031 of 2022 which was consolidated with this appeal but following their withdrawal of that appeal, only this appeal remained for determination.
52. In his submissions, the 1st respondent's Counsel Mr. Oruenjo framed four issues for determination as follows:
- i. Whether the PPDT had jurisdiction to hear and determine the Amended Statement of Claim dated 25<sup>th</sup> April 2022?
  - ii. Whether the PPDT could direct the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to issue a final nomination certificate to the 1<sup>st</sup> Respondent?
  - iii. Whether the 3<sup>rd</sup> Respondent's Central Management Committee had powers to discipline and/or disqualify a candidate?
  - iv. Whether the prayers sought should be granted?
53. As to whether the PPDT had jurisdiction to hear and determine the Amended Statement of Claim dated 25<sup>th</sup> April 2022, the 1<sup>st</sup> respondent submitted that the PPDT had jurisdiction to hear and determine the matter before it and also to grant the orders by virtue of Section 40 (1) and (2) of the [Political Parties Act](#) as amended in 2022.
54. The 1<sup>st</sup> respondent further submitted that the PPDT's jurisdiction was entrenched as the dispute was between the party and its members and that it arose from nomination exercise which had been determined. Reliance was placed on the case of [John Musakali v Speaker County Assembly of Bungoma & 4 others](#) [2015] eKLR where Justice E. C. Mwita while dismissing a petition before him held inter alia that internal disputes in political parties fall within the jurisdiction of the Political Parties Tribunal from which an unhappy party can appeal from.
55. On whether the PPDT could direct the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to issue a final nomination certificate to the 1<sup>st</sup> Respondent, the 1st respondent submitted that Rule 4(n) and Rule 47 (4) of the ODM Party Primaries and Nomination Rules 2022 mandated the 2<sup>nd</sup> Respondent to issue the 1<sup>st</sup> Respondent with



- a final nomination certificate upon the ODM Party Appeals Tribunal upholding the 1<sup>st</sup> Respondent's nomination.
56. The 1<sup>st</sup> respondent's Counsel further submitted that the winner is first issued with a provisional/ interim nomination certificate pursuant to Rule 47 (k) of the ODM Party Primaries and Nomination Rules 2022 and then with a final nomination certificate as per Rules 4 (n) and 47 (4).
  57. On whether the 3<sup>rd</sup> Respondent's Central Committee (hereinafter CC) had powers to discipline and/ or disqualify a candidate, it was submitted that the Central Committee did not have any powers to involve itself in the nomination exercise and as such, could not purport to nullify the elections or issue the Appellant with a nomination certificate hence the nomination certificate issued to the Appellant was null and void.
  58. The 1<sup>st</sup> respondent further submitted that the decision of the ODM Appeals Tribunal was final pursuant to Rule 25 (3) of the ODM Appeals Tribunal (Practice and Procedure) Rules, 2022 and that the ODM Appeals Tribunal was the only party organ that had exclusive jurisdiction to deal with disputes arising from nomination exercise pursuant to Rule 6 of the ODM Appeals Tribunal (Practice and Procedure) Rules, 2022.
  59. It was submitted that the 2<sup>nd</sup> Respondent and the Central Committee could not therefore nullify an election that had been conducted and its results upheld by the ODM Appeals Tribunal and that the 2<sup>nd</sup> Respondent could only invoke Rule 17 of the ODM Party Primaries and Nomination Rules and disqualify a candidate who is blamed by the ODM Appeals Tribunal to have caused violence after the ODM Appeals Tribunal orders for a fresh nomination which is not the case herein.
  60. The 1<sup>st</sup> respondent submitted that the CC and the 2<sup>nd</sup> Respondent had no powers to hear and determine any dispute arising from the Party Primaries to warrant any action leading to the issuance of the Appellant with a nomination certificate and further that the nomination certificate issued to the Appellant was invalid and could not be termed as one for purposes of the nomination process of the party.
  61. Finally, on whether the prayers sought should be granted, the 1<sup>st</sup> respondent submitted that the orders sought by the appellant could not be granted as the same are pegged on the illegal actions of the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents in executing the illegitimate resolutions of the Central Committee.
  62. The 1<sup>st</sup> respondent submitted that the decision of the ODM Appeals Tribunal which had the exclusive jurisdiction to hear and determine disputes arising from the nomination exercise was unchallenged as the Appellant did not file a claim challenging that decision which was the party's final decision and as such, the Appellant could not come before this court and pray for a fresh nomination exercise to be determined by the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents as there was no basis for such a request.
  63. The 1<sup>st</sup> respondent urged this court to dismiss the appellant's prayers and uphold the decision of the PPDT thus dismissing the Appellant's appeal with costs.

## **Determination**

64. I have carefully considered the grounds of appeal as contained in the memorandum of appeal, the pleadings and submissions before the ODM Party Appeals Tribunal as well as the two decisions of the said Appeals Tribunal. I have also considered the decision of the PPDT and the parties' counsel's respective arguments for and against the decision of the PPDT as per the written submissions and the cited case law. All other material including the Central Committee's minutes and unsigned resolution



have been given equal consideration. In my humble view, the issues that flow for determination in this appeal are:

1. whether the PPDT had jurisdiction to entertain the complaint filed by the 1<sup>st</sup> respondent herein;
  2. and therefore whether the 1<sup>st</sup> respondent had exhausted the IDRMs within the ODM Party as at the time that he filed the Claim before the PPDT, as amended;
  3. Whether the Central Committee of the ODM Party had jurisdiction to sit on appeal of the two decisions rendered by the ODM Appeals Tribunal;
  4. Whether the PPDT made orders that were not prayed for in the Statement of Claim by the 1<sup>st</sup> Respondent herein hence exceeding its jurisdiction further;
  5. what orders should this court make?
  6. who should bear the costs of this appeal?
65. I will determine issues Nos. 1, 2 and 3 together, issue 4 separately but interconnect it with the first 3 issues and the other issues will be determined separately as they are consequential issues.

Whether the PPDT had jurisdiction to entertain the complaint filed by the 1<sup>st</sup> respondent herein; and therefore whether the 1<sup>st</sup> respondent had exhausted the IDRMs within the ODM Party as at the time that he filed the Claim before the PPDT, as amended; and whether the Central Committee of the ODM Party had jurisdiction to sit on appeal of the two decisions rendered by the ODM Appeals Tribunal.

66. To determine the above issue which is quite loaded but touching on jurisdiction of the PPDT, the commencement point is that under Article 50 (1) of *the Constitution*, every person has a right to have any dispute resolved in an independent and impartial court or tribunal and a court of law cannot withdraw or limit that right, by dint of Article 24 of *the Constitution*.
67. However, before one approaches the forum for resolution of disputes, they must ensure that that forum is the appropriate forum. On the other hand, the forum so approached must also ensure that it has the jurisdiction to hear and determine the dispute brought before it.
68. Jurisdiction is such an important matter in every proceeding initiated before any court or tribunal and in every judicial or quasi-judicial determination. It is the master key to unlocking every first hurdle in judicial or quasi-judicial proceedings. Without jurisdiction, a court of law or tribunal would be engaging on its own romp if it attempts to determine the merits of any dispute before it.
69. Jurisdiction is conferred by *the Constitution* or other written law or both. No court of law or tribunal can arrogate itself jurisdiction that it is devoid of. Neither can any parties to a dispute consent to clothe the courts or tribunals with jurisdiction to entertain their dispute.
70. It follows that jurisdiction is the heartbeat of all judicial and quasi-judicial proceedings. It is for that reason that the Supreme Court in *Republic v Karisa Chengo* [2017]eKLR underscored the significance of jurisdiction and restated what has been said time and again that:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means.



If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

71. In *Public Service Commission & 4 others v Cheruiyot & 20 others* CA119 and 139 of 2017[consolidated] KECA [2022] judgment rendered in February 2022 by the Court of Appeal, the Superior Appellate Court had this to say about jurisdiction:

“Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on. The above cited treatise by John Beecroft Saunders held as follows:

“...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 draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

The Supreme Court *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows: “...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”

In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No 2 of 2011, the Supreme Court reiterated its holding on



a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

“(68). A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

72. From the above elaborate holding, it is clear that before any other determination is made in proceedings before any court or tribunal exercising judicial or quasi-judicial proceedings, it must first and foremost satisfy itself that it has the necessary jurisdiction to entertain the particular dispute placed before it.
73. In the instant proceedings which arose all the way from the ODM Party Appeals Tribunal through the Political Parties Tribunal, this court is called upon to determine whether the Political Parties Tribunal had the jurisdiction to hear and determine the dispute that was filed before it by the 1<sup>st</sup> Respondent herein and therefore whether the Political Parties Tribunal was correct in assuming jurisdiction to hear and determine the dispute which is impugned herein.
74. Akin to the above key issue is the assertion by the 1<sup>st</sup> respondent that he had already exhausted all the IDRMs established within the ODM Party and that therefore no other body or organ could purport to sit on appeal of the ODM Party Appeals Tribunal and reverse the decision of the Party Appeals Tribunal.
75. Jurisdiction of the Political Parties Tribunal is derived from section 40 of the *Political Parties Act* (PPA) which section stipulates that:
- (1) The Tribunal shall determine—
    - (a) disputes between the members of a political party;
    - (b) disputes between a member of a political party and the political party;
    - (c) disputes between political parties;
    - (d) disputes between an independent candidate and a political party;
    - (e) disputes between coalition partners;
    - (f) appeals from decisions of the Registrar under this Act; and
    - (fa) disputes arising out of party nominations.
76. Jurisdiction can be granted absolute or conditional. It is for that reason that even with the above clear statutory provision conferring jurisdiction on the PPDT, the said section 40 at sub section (2) of the *Political Parties Act* conditions jurisdiction of the Political Parties Tribunal with regard to disputes covered in (a), (b), (c), and (e), to have them first subjected to internal political party dispute resolution mechanisms. (emphasis added).
77. The subsection provides as follows that:
- (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.
78. The current dispute is between two members of ODM Political Party as well as between one member of the ODM Political Party arising out of Party Primary nominations and the Organ of the Party and



the Party as a corporate body. The dispute is therefore governed by Section 40(1)(b) (c) and (fa) of the [Political Parties Act](#).

79. For that reason, for the Political Parties Disputes Tribunal to assume jurisdiction to determine the dispute as it did in this case from the background that I have laid above, there was the mandatory necessity that the disputants first and foremost resort to the Political Parties Internal Dispute Resolution Mechanism or an attempt at the same and upon proof that attempts to resort to internal dispute resolution mechanisms were frustrated, they would then resort to the Political Parties Tribunal.
80. Accordingly, invoking the IDRMM is therefore not an option. It is mandatory. Furthermore, each political party is mandated by statute to ensure that their constitutions make provision for internal dispute resolution mechanisms. In compliance with that requirement, Article 15 of the ODM Political Party Constitution makes provision for such IDRMM.
81. In *Clerk Nairobi City County Assembly v Speaker Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties)* [2019] eKLR, it was held that:
41. The foregoing dispute relating to party nominations arising from decisions by the respective political parties under section 12(3) (c) of the [County Governments Act](#). The proponents of the Preliminary objection cited several precedents which are unanimous that nominations by political parties are not justiciable and they should be left, in the first instance, to the political parties' internal dispute resolution mechanisms and the PPDT where the need to escalate the same arises. In *Gabriel Bukachi Chapia Vs ODM & Another* (2017) eKLR the Court of Appeal held that:
- “In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.”
42. The foregoing judicial precedent binds this court and in my view, it is a good law which encourages alternative dispute resolution mechanisms as provided under Article 159 of [the Constitution](#) and also the doctrine of exhaustion. Although the dispute herein does not relate to party list for purposes of a general election, it is akin to that because it relates to nomination of party representatives in to the County Assembly Service Board through political parties' internal processes.
43. In view of the foregoing binding precedent, I am not persuaded by the decision of the House of Lords in *Anisminic Limited vs Foreign Compensation Commission & Another* (1969) 2 A.C cited by the petitioner. Consequently, I down my tools on the second aspect of the petition and strike out the petition in so far as it relates to the reliefs sought for and on behalf of the 3<sup>rd</sup> interested party and Hon. Okumu Elias Otieno. The issue of the party nomination is therefore referred to the respective political parties for resolution using the internal dispute resolution mechanisms within a period of 21 days in line with section 4 of the [Political Parties Act](#) so that the 2<sup>nd</sup> respondent board may be fully reconstituted...”
82. In *Musalia Mudavadi & 4 others v Angela Gathoni Wambura & 2 others* [2019] eKLR, the following observations were made:

“...I must however add that though this court in determining appeals such as the present one must have regard to Parliament's intention in creating the Tribunal, the court must also be alive to the fact that there may be situations where political parties may for their own reasons



refuse to set in motion their IDRMs when called upon to do so by aggrieved parties. If the court were to be confronted by such a situation, it would not be powerless and would be in a position to grant the aggrieved party a remedy that would best serve the ends of justice. Each case must however be considered on its own merits...”[emphasis added]

83. See also the decisions in *Clerk, Nairobi City County Assembly v Speaker Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties)* [2019] eKLR.
84. I have made an elaborate reference to the judicial pronouncements on the question of jurisdiction because in this case, not only is that issue being raised by one party, but by both the disputants with one challenging the jurisdiction of the PPDT and the other that of the Central Committee.
85. Section 40(2) of the *Political Parties Act* reproduced above lays out a specific procedure that must be followed by disputants to disputes enumerated in section 40(1), first by exhausting the internal dispute resolution mechanisms within the political party, during Party Primaries. This is what the Court of Appeal held in *Lilian Gogo v Joseph Mboya Nyamuthe & 4 others* [2017] eKLR held, citing with approval the cases of *Speaker of the National Assembly v Karume* [2008] 1 KLR 426 and *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning and another* [2016] eKLR.
86. Having laid the basis for the jurisdiction of the Political Parties Tribunal and the conditions attached thereto by statute and judicial pronouncements, I must answer the big question whether the Political Parties Disputes Tribunal had the necessary jurisdiction when it entertained and determined the Claim as amended by Hon. Elisha Odhiambo Ochieng.
87. The appellant herein asserts that the PPDT had no jurisdiction to entertain that claim because the Claimant who is the 1<sup>st</sup> Respondent herein had not exhausted the IDRMs provided for by the ODM Political Party Constitution and as mandated by section 40(2) of the *Political parties Act*. The appellant asserts further that as the Central Committee was seized of the matter after the Appeals Tribunal Ruling, then the Internal party mechanisms for resolving the dispute had not been exhausted to warrant the 1<sup>st</sup> respondent herein approach the Political Parties Disputes Tribunal.
88. On the part of the 1<sup>st</sup> Respondent, he contends that he had exhausted the IDRMs in that the ODM Party Appeals Tribunal having determined the dispute which was also subjected to the Review by the same Tribunal and Panel as analyzed above, there was no other avenue left within the Party Organs, where the 1<sup>st</sup> respondent could have sought any other remedy. Further, that the Central Committee which purported to deal with the dispute further, after the ODM Party Appeals Tribunal had made a decision which was binding, the said Central Committee had no such powers to do so hence the decision of the Central Committee was null and void.
89. The above rival positions bring out a secondary issue of whether the Central Committee of the ODM Party had any jurisdiction or power to recall the decision of the Party Appeals Tribunal and whether the Central Committee is one of the organs of the ODM Party, charged with the authority or is empowered to determine disputes as contemplated in the Party Constitution and section 40(1) and (2) of the *Political Parties Act*.
90. I must therefore first resolve this secondary issue because it is at the core of the jurisdictional question. To do so, I must identify the mandate of each of the relevant organs of the ODM Party that are responsible for resolving disputes set out in section 40(1) and (2) of the *Political Parties Act*.
91. The ODM Party Constitution as amended and adopted by the National Governing Council held on 31<sup>st</sup> October 2016 at the Bomas of Kenya was annexed to the 1<sup>st</sup> Respondent’s written submissions and



this court is grateful for that. Chapter 7 of the said Party Constitution establishes the Party Organs among them are the NDC, NGC, NEC, Central Committee and NEB. The Central Committee's composition is as stated above in this judgment. Its functions are stated to be as follows:

The functions of the Central Committee shall be to:

formulate policy for consideration by NEC;

- i. supervise the conduct of the Party's activities;
- ii. Nominate officials of the National Secretariat from amongst members of ODM for appointment by the National Executive Committee; (specify requirements for nomination to the National Secretariat e.g. be a party member)
- iii. propagate the ODM ideology and policies;
- iv. advise the Party Leader and the National Executive Council in the performance of their functions under this Constitution;
- v. implement the decisions of the National Executive Committee;
- vi. ensure that all organs of ODM function properly and implement the policies of ODM;
- vii. mediate on internal disputes affecting the Party;
- viii. prescribe rules and regulations for the functioning and operation of special organs and Caucuses; and
- ix. Perform any other function that may be assigned to it by National Executive Committee."

92. I have perused each of the functions of the Central Committee and what comes closer to resolving disputes is that of viii. mediate on internal disputes affecting the Party. In addition, at ix above, *the Constitution* of the Party gives the Central Committee the omnibus or general function of "Perform any other function that may be assigned to it by National Executive Committee."
93. The question is whether the Central Committee in convening a meeting of its members to consider the decisions of the Party Appeals Tribunal was acting as a mediator and if so, were the parties involved in the dispute called upon to engage in the mediation process? Secondly, assuming the matter in dispute fell in the category of any other function as may be assigned to it by the National Executive Committee, did the NEC assign to the Central Committee the function of sitting on the determination of the Party Appeals Tribunal and if so, did the NEC have the power to do so, in view of the clear provisions that the decisions of the ODM Party Appeals Tribunal shall be final?
94. It is not in dispute that the party primaries dispute was an internal party dispute that is resolvable by the established Internal Dispute Resolution Mechanisms (IDRM) before the same could be escalated to the Political Parties Disputes Tribunal.
95. Resolving the question of whether the Central Committee was acting as a mediator in the dispute after the Party Appeals Tribunal had already pronounced itself on the matter, I must delve into what the Central Committee did by way of its proceedings or minutes and the subsequent unsigned resolutions



which were annexed to the affidavit of the Executive Director Mr. Oduor Ongwén. But first things first. What is mediation? Mediation, according to Black's Law Dictionary 11<sup>th</sup> Edition, is defined as:

“a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”...Simply stated, mediation does not resolve a dispute, it merely helps parties to do so.”

96. From the above definition and explanation, in a mediation process, there must be the two disputing parties both involved and a third party trying to help them resolve that dispute. A mediator is not authorized to give out a judgment but acts as a mere facilitator who is neutral. The only people who resolve the dispute in mediation are the parties themselves. The outcome of mediation is not binding on any party who does not accept such a decision. The parties opting for mediation process have the opportunity to describe the issues, discuss their interests amicably, understand, provide each other with information, communicate and explore ideas for the resolution of the dispute.
97. In the instant case, the following is the minutes of the Central Committee “On the consideration of the report on party primaries held on Sunday 24<sup>th</sup> April 2022 at Emory Hotel, Nairobi City County had the membership of 9 as listed as being present and in attendance were MS Catherine Mumma the Chair NEB and Abdullahi Diriye the Secretary, NEB. The minutes record the following verbatim Under Minute 12/2022 on Reports on ongoing Party Primaries: (i) is in Gem Constituency. The parties were briefed of the conduct of the Party Primaries where Hon Elisha Ochieng Odhiambo was declared the winner and the subsequent complaint that was lodged with the Party's Appeals Tribunal.

The members acknowledged the decision of the Party's Appeals Tribunal to uphold the election of Hon Odhiambo.

The following instances were brought to the attention of the Central Committee as to where complaints of violence were reported against those perceived to be against the candidacy of Hon Odhiambo who had to live in fear:

- a. Yala Township Primary
- b. Dienya Polling Centre
- c. Kambare, Lihanda and Kagilo Polling Centres Further to this, the Chairperson of the NEB also informed the members that she has previously received death threats from Hon Odhiambo.

The members weighed in on this matter and resolved as follows:

1. That being a party that is predicated on social justice and equity, cases of violence within and outside the party will never be condoned.
2. That all members of the party and in particular aspirants for political office are bound by the Party's Code of Conduct and that any violation of the same is subject to Rule 17(1)(f) of the Party Primaries and nomination Rules.
3. That having taken into consideration the conduct of Party Primaries in respect to the Parliamentary seat and subsequent decision of the Appeals Tribunal, the Central Committee invokes Rule 17(1) (f) of the Party Primaries Nomination Rules powers to nullify the election of Hon. Elisha Ochieng Odhiambo.

Signed

Oduor Ongwen, EBS



Executive Director”

98. Thereafter, the following were the Resolution of the Central Committee in respect of Gem Constituency members of Parliament elections as stated in the annexure OO-2 to the affidavit of Oduor Ong’wen, the Executive Director:

“Following consultations of the central Committee of the Party, the following resolutions have been made:

1. That the Party primary election in respect to Gem Constituency, Siaya County as conducted on 13<sup>th</sup> April 2022 is hereby nullified.
2. That the National Elections Board (NEB) is hereby directed to proceed and issue a direct ticket in line with Rule 8(b) of the Party Primaries and Nomination Rules.

Dated this 24<sup>th</sup> day of April 2022.”

99. Following the above resolutions, which I have found were never signed, the National Elections Board-NEB issued a nomination certificate to Dr. George Jalango Midiwo, a certificate of elected ODM candidate for Member of the National Assembly for Gem Constituency Siaya County in the elections held on 24<sup>th</sup> Day of April 2022.
100. From the definition of mediation as given above, and having read the minutes and resolutions of the Central Committee, I find no semblance of a mediation process. What I find is a decision made by the Central Committee to review the decisions of the Party Appeals Tribunal, and on the Central Committees’ own motion. There was no representation or requirement for appearances by the aspirants. None of those candidates were called upon to frame any issues for consideration by the Central Committee. The minutes do not reveal the person who was briefing the Central Committee on what had transpired during the Party Primaries Nomination process to warrant intervention by the Central Committee.
101. I reiterate that the unsigned resolutions reached by the Central Committee and as placed before the Tribunal were never signed by anybody, yet they were an annexure-OO2 introduced before the PPDT as an annexure to the affidavit sworn by the Executive Director of the ODM Party, Mr. Oduor Ongw’en, EBS on 26<sup>th</sup> April, 2022. The resolutions are simply dated 24<sup>th</sup> April 2022.
102. The other function given to the Central Committee by the ODM Party Constitution as reproduced above is Perform any other function that may be assigned to it by National Executive Committee.” The question is whether the resolutions by the Central Committee as determined were such other functions assigned to the Central Committee by the National Executive Committee? I have perused the minutes of 24<sup>th</sup> April 2022 by the Central Committee. I do not find any reference to NEC assigning the Committee the function of reviewing the decisions of the Party Appeals Tribunal. The minutes simply state that the members were briefed on what had transpired during the Party Primaries for Gem Constituency Parliamentary election/nomination exercise.in addition, I do not find that a function of such omnibus or generalized nature could have been given to the Central Committee to imply or have the effect of reviewing the decisions of the Party’s Appeals Tribunal, which is a quasi-judicial body created by command of the law. In my view, that would only happen if there were no provisions making the decisions of the Party Appeals Tribunal Final as far as internal Dispute Resolution mechanisms are concerned and not otherwise.



103. The other question is, does any of the Party Rules provide for another appeal or review of decisions of the Appeals Tribunal by the Central Committee or any other organ of the ODM Party prior to escalating the dispute to the PPDT?
104. The appellant herein claims that the Party's internal dispute Resolution mechanisms were not exhausted before the dispute was escalated to the PPDT because as at the time when the 1<sup>st</sup> respondent filed his statement of claim before the PPDT, the Central Committee was still handling the issue and that the Central Committee has the power to determine the dispute as delegated to it by NEC. The 1<sup>st</sup> Respondent has argued in contention that the decision of the Party Appeals Tribunal was final and that no other organ of the Party had the power to sit on appeal of that decision, other than the PPDT. He maintains that any attempt to sit on appeal of the decision of the Appeals Tribunal is a nullity.
105. The PPDT in its impugned judgment rendered on 30<sup>th</sup> April 2022 found and held that it was properly possessed of the jurisdiction to entertain the dispute as the Appeals Tribunal had made final decisions which were now being sought to be enforced by the Political Parties Tribunal because the Party had attempted to frustrate the 1<sup>st</sup> Respondent by restarting the proceedings through the Central Committee which had no jurisdiction to sit on the decision of the Party Appeals Tribunal and annul the latter's decision.
106. As observed above in my discussion and posing of some rhetoric questions, I have found that the Central Committee did not exercise any Mediation function and none of the disputing parties appeared before it for mediation. I have further found that the resolutions by the Central Committee were not signed hence they are not authenticated. In addition, the decisions of the ODM Party Appeals Tribunal are final and can only be challenged before the PPDT.
107. From the elaborate pleadings in the record of appeal, although the appellant claimed that the Central Committee had jurisdiction to relook into the matter, in view of the complaints raised about the conduct of the nomination exercise, assuming the Central Committee had such jurisdiction which I find that it lacked, then it should have involved all the parties in the dispute and accorded them an opportunity to be heard as required under Article 47 of *the Constitution* of Kenya 2010 and the *Fair Administrative Action Act*. This is so because the resolutions affected the political rights and interests of the 1<sup>st</sup> respondent who already had received an interim nomination certificate and therefore it was important that he is given an opportunity to be heard before any decision is made against him.
108. The above notwithstanding, I have perused Rule 19 of the ODM Party Primaries Nomination Rules and I find that it is only the Party's Appeals Tribunal that is mandated to resolve disputes arising out of the Party's Party Primaries and nominations. Any other organ or body purporting to engage in any dispute resolution as provided for in Section 40 (1) and (2) of the *Political Parties Act* or recalling of nomination certificate of a candidate by the Central Committee herein does so in excess of jurisdiction and without jurisdiction.
109. Furthermore, Part V of the ODM Appeals Tribunal (Practice and Procedure) Rules, 2022 as adopted and approved at the Annual Delegates Convention held at Nairobi on 26<sup>th</sup> February 2022, on Decisions, Review and Consent, Clause 24(3) thereof is clear that The decision of the Tribunal shall be final.
110. I am therefore in agreement with the PPDT findings that if the party was aggrieved by the decision of the Appeals Tribunal, it had the opportunity to move to the PPDT to challenge that decision and not to sit on appeal of the Appeals Tribunal's decision through the Central Committee. I find that the Central Committee acted ultra vires and in excess of jurisdiction when it purported to review the decision of the Appeals Tribunal and made a decision that suited the interests of the appellant and the



Party. I further find that the Central Committee acted in vain and therefore its resolutions if any are all in vain and void ab initio.

111. Even if the appellant wished this court to believe that the action by the Central Committee was a disciplinary matter, the question is, where are those disciplinary proceedings and who in particular was being disciplined in their absence, with a nomination certificate that had been issued by the Constituency Returning officer through a democratic process being nullified and in its place, a direct ticket issued to another aspirant?
112. Article 8.3 of the ODM Party Constitution attached to the 1<sup>st</sup> Respondent's submissions sets out an elaborate disciplinary procedure yet none of those procedures or provisions were invoked by the Central Committee which did not even have the mandate to conduct any disciplinary proceedings.
113. Further, Article 8.4.12 is clear that the Disciplinary Committee shall afford a fair hearing to such member complained against with reasonable opportunity to defend him/herself against the charges or allegations made against him/her in accordance with Rules of Natural Justice.
114. Under Article 8.4.3, Recommendations of the Disciplinary Committee are made to NEC which has the power to penalize in the manner provided thereunder. This court is referring to these provisions of the ODM Party Constitution to remind the Party that it has got very good and elaborate mechanisms for handling of disputes and disciplinary matters.
115. Whereas the ODM Party has the prerogative to issue direct nomination tickets to candidates, the procedure for issuance of direct nominations is provided for under *the Constitution* and Party Primary Election Rules, 2021 at Clause 23 on Election methods. see page 35 of *the Constitution* and Party Primary Election Rules. In this case, no such procedure was alluded to or followed.
116. Although the appellant complains that the PPDT erred in making a determination which had the effect of imposing a candidate on the people of Gem Constituency, from the material placed on the record including affidavits sworn by the appellant herein in support of his application for stay of execution of decree dated 6<sup>th</sup> May 2022, I find that it was the appellant who colluded with the other respondents to deny the 1<sup>st</sup> respondent his hard earned victory in the Party primaries nominations elections.
117. This is evidenced from the material contradictions exhibited in the appellant's appeal and that affidavit and grounds in support of his application for stay of execution of decree pending the hearing and determination of this appeal.
118. In that application and supporting affidavit, the appellant claims that he was issued with a nomination certificate by the NEB following a repeat nomination polls that was ordered by National Elections Board and that after the 1<sup>st</sup> respondent declined to participate in the said repeat nomination exercise is when the NEB handed the appellant the nomination certificate as he was the only candidate for Gem Constituency. He also deposes that upon the NEB receiving the resolutions of the Central Committee, it scheduled fresh nomination polls. This is contrary to the CC Minutes and resolutions which simply directed the NEB to issue a direct ticket to the appellant.
119. In my view, it is those efforts to frustrate the 1<sup>st</sup> respondent's candidature that create situations where the PPDT would intervene even if the IDRMs were not exhausted by an aggrieved party, as was held in the case of *Musalia Mudavadi & 4 others v Angela Gathoni Wambura & 2 others* [2019] eKLR, that:

“...I must however add that though this court in determining appeals such as the present one must have regard to Parliament's intention in creating the Tribunal, the court must also be alive to the fact that there may be situations where political parties may for their own reasons refuse to set in motion their IDRMs when called upon to do so by aggrieved parties. If the



court were to be confronted by such a situation, it would not be powerless and would be in a position to grant the aggrieved party a remedy that would best serve the ends of justice. Each case must however be considered on its own merits...”[emphasis added]

120. I find that even if it was the case that there was communication to the 1<sup>st</sup> respondent of an intended repeat nomination poll which claim is denied by the 1<sup>st</sup> Respondent and unsupported, from my assessment of the circumstances of this case, there was no jurisdiction vested in the Central Committee to review the decision of the Party’s Appeals Tribunal, after the Appeals Tribunal had pronounced itself on the dispute that had been filed before it by the appellant herein.
121. I find and hold that the decision of the Appeals Tribunal was Final and that neither the appellant nor the Party itself could purport to appeal to the Central Committee to sit on the decision of the Appeals Tribunal. I further find that the only avenue that was available for the 1<sup>st</sup> respondent to ventilate his grievances as he was apprehensive and correctly so, that the Party was working behind the scenes with the appellant herein to deprive him of his sweet victory following elections wherein he was validly and overwhelmingly elected, and hand it over to the appellant, contrary to the will of the people of Gem Constituency and the decision of the Appeals Tribunal, was the PPDT.
122. Having so found, and having found that the Central Committee’s minutes and resolutions are null and void ab initio, as the CC lacked any semblance of jurisdiction to clothe itself with jurisdiction to purport to sit on decisions of the Party Appeals Tribunal, I further find and hold that the 1<sup>st</sup> Respondent had, through the Appeals Tribunal, exhausted the IDR and that therefore, any attempt to frustrate the decisions of the Appeals Tribunal as was in the instant case, had to be thwarted by none other than the PPDT herein.
123. Consequently, as the Central Committee was barren of and bereft of any jurisdiction, as it is not a legally recognized internal dispute resolution mechanism for Party Primaries other than if it was to play the role of mediation which it did not, and instead arrogated itself jurisdiction that exceeded that conferred on it by the Party Constitution, that decision is hereby declared a nullity ab initio.
124. As was correctly stated in the Motor Vessel *Lilian S’V Caltex Oil (K)* (supra):
- “A decision made by a court of law or tribunal without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.”
125. Further, as was observed by Lord Denning in *Macfoy v United Africa Co. Ltd* [1961] ALL E.R. 1169 that:
- “...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
126. The appellant also submitted that the 1<sup>st</sup> respondent who was aware of the existence of the Nomination Certificate issued by the ODM Party on 24<sup>th</sup> April 2022 did not seek to have the said Nomination Certificate annulled, cancelled and or revoked. That he did not seek to have the Certificate recalled and or operation be suspended, and that instead, the 1<sup>st</sup> Respondent sought to have the PPDT issue orders that could create a larger dispute than there was.



127. Having found that the Central Committee, a body that purported to annul the Nomination of the 1<sup>st</sup> Respondent had no power or jurisdiction to entertain any other proceedings that had been finalized by the Party Appeals Tribunal, any actions that followed done by the Central Committee are a nullity ab initio and are of no effect since it was no decision at all capable of being challenged. The null and void actions include the purported resolutions that are a nullity ab initio and the consequential annulment of the Nomination of the 1<sup>st</sup> Respondent as well as the purported issuance of a direct ticket dated 24<sup>th</sup> April, 2022 to the appellant herein by NEB.
128. I therefore find and hold that the PPDT did not err when it found and held that it had jurisdiction to hear and determine the 1<sup>st</sup> Respondent's amended statement of claim which was challenging the illegal and illegitimate resolutions made by the Central Committee and the action taken by the 3<sup>rd</sup> Respondent, through its national Elections Board, of issuing the appellant herein with a direct nomination ticket for Gem Constituency Parliamentary seat. In my view, the 1<sup>st</sup> respondent did not have to wait for a decision of a body which was not mandated to determine his fate in order for him to challenge the jurisdiction of that body. There was already mischief by the Party organs and therefore he had the right to seek for a remedy since the internal dispute resolution mechanisms had been exhausted.
129. On whether the PPDT made orders that were not pleaded or prayed for in the amended statement of claim filed by the 1<sup>st</sup> respondent herein, hence exceeding its jurisdiction, as earlier stated in the detailed background and body of this judgment, the 1<sup>st</sup> Respondent filed his statement of claim prior to the Central Committee making its determination in the form of some resolutions which I have found are null and void ab initio as the purported resolutions were made devoid of jurisdiction and as they were not signed, hence not owned by anybody despite being introduced in the proceedings before the PPDT by the 3<sup>rd</sup> Respondent's Executive Director by way of an affidavit. It is therefore deemed that there is no such resolution by the Central Committee, capable of being relied on as a foundational document to nullify the nomination certificate issued to the 1<sup>st</sup> respondent and in its place, issuing a direct ticket to the appellant herein. See the analogy given by the Supreme Court in CA No. 26 of 2018 in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR at paras 6-9. See also *Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others* [2019] eKLR citing with approval *John Elego & 103 others v Pressmaster Limited* [2018] eKLR. on the consequences of unsigned foundational documents.
130. I add that an unsigned decision is no decision at all. A resolution is a decision, just as a judgment which is unsigned had no validity. The resolution was the basis for the overturning of the 1<sup>st</sup> respondent's nomination. However, as the same was not signed, no validity can be attached to the resolution which was dismissed by the PPDT. An unsigned judgment, just like an unsigned pleading, has no legal validity. Since the appellant's foundational document is the unsigned resolution made by the Central Committee, it follows that all actions taken pursuant to that invalid document are invalid.
131. It is worth noting that after the Central Committee purported to make resolutions that annulled the decision of the Party Appeals Tribunal, it became necessary for the 1<sup>st</sup> Respondent to amend his statement of claim to challenge those so called resolutions as well as the inconsequential issuance of the direct Nomination ticket to the appellant herein.
132. Back to the question of whether the PPDT erred in issuing orders that were not sought or prayed for, it is first and foremost, important to appreciate the significance of pleadings in any judicial proceedings.



In *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR the Court of Appeal had this to say about pleadings and their importance:

“...as to whether the court has powers to grant an order not specifically pleaded in the pleadings, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.”

133. The Court of Appeal further stated as follows after considering the submissions in an appeal where the High Court dismissed a preliminary objection raised to the effect that there being no specific damages claimed in a suit that sought for an injunction and specific performance with an alternative prayer couched as: “Further or alternatively damages for breach of contract.” The Court of Appeal held that the court had nothing to determine on merit:

“In the pleadings, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant’s breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered an injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary. The fundamental question is whether the respondent made a specific prayer in its pleadings. The answer is in the negative, since the prayer was in the alternative. A prayer for damages must be specifically pleaded and particularized because the claimant has suffered as a result of the wrong that is complained of. There was no justification for a court to award damages for an alternative prayer as couched above.

This leads us to the conclusion that the appellant’s preliminary objections raised in the High Court were meritorious. We therefore set aside the order of Waweru, J. disallowing the same, and substitute therefor an order upholding the preliminary objection with costs to the respondent.”

134. With the above legal position in mind, to finally determine the issue of whether the PPDT made orders that were not prayed for or pleaded, I must revert to the pleadings and prayers by the 1<sup>st</sup> respondent in his amended statement of claim before the PPDT and the orders that the PPDT made.
135. I will commence with the orders made by the PPDT as impugned herein which are:
- a. The Complaint is allowed
  - b. The decisions of the 3<sup>rd</sup> Respondent are upheld-3<sup>rd</sup> Respondent was the ODM Party Appeals Tribunal



- c. the 2<sup>nd</sup> and 4<sup>th</sup> Respondents are hereby directed to forthwith issue to the complainant the final nomination Certificate to contest for the Member of National Assembly for Gem Constituency, in any event within 24 hours of this order, and to forward his name to the Independent Electoral and Boundaries Commission
  - d. The Respondents shall bear the Complainant's costs of this Complaint.
136. In the amended Statement of Claim dated 25<sup>th</sup> April 2022 filed to the PPDT, the 1<sup>st</sup> Respondent prayed for the following orders:
- a. A declaration that the decision of the ODM Appeals Tribunal that the nomination of the Claimant as the 4<sup>th</sup> Respondent's nominee for the position of the Member of the National Assembly for Gem Constituency is upheld
  - b. A declaration be and is hereby issued that the nomination of the Claimant was conducted in free and fair and transparent manner
  - c. A declaration that the interim nomination certificate issued to the Claimant by the 4<sup>th</sup> Respondent as legally, justly and rightly issued
  - d. The Claimant be and is hereby issued with the nomination certificate as the 4<sup>th</sup> Respondent's nominee for the position of the Member of the National Assembly for Gem Constituency
  - e. the 4<sup>th</sup> Respondent be and is hereby directed to forthwith submit the name of the Claimant to the IEBC as the 4<sup>th</sup> Respondent's nominee for the position of the Member of the National Assembly for Gem Constituency
  - f. The Honourable Tribunal be pleased to issue such further orders as it shall deem fit and just in the circumstances
  - g. The Respondents be condemned to pay costs of the Claim.
137. On the other hand, the Orders made by the ODM Party Appeals Tribunal which the PPDT was upholding in its final Orders and as prayed for by the 1<sup>st</sup> respondent herein are framed as follows at paragraph 28 of its judgment of 20<sup>th</sup> April 2022:
- a. The appeal by Dr. George Jalang'o Midiwo be and is hereby dismissed
  - b. The election of Hon Elisha Ochieng Odhiambo as the ODM Party candidate for Gem Constituency at the 2022 General elections be and is hereby upheld
  - c. The nomination certificate to Hon Elisha Ochieng Odhiambo by the Gem ODM Constituency Returning Officer be and is hereby upheld
  - d. This judgment be served upon the ODM Party National Elections Board for its information and necessary action.
138. Having carefully read and compared the above prayers sought by the 1<sup>st</sup> Respondent from the PPDT and the orders made by the ODM Party Appeals Tribunal alongside the orders made by the PPDT as impugned herein, I find that the appellant's lamentation is unfounded for reasons that the PPDT having upheld the decisions of the Appeals Tribunal made on 20<sup>th</sup> April and 24<sup>th</sup> April 2022 on review application as urged in prayer (a) of the Claim, it did not even have to make any other additional orders since the decision of the Appeals Tribunal is clear and unambiguous.



139. Prayers c, d and e are all combined in order No. c which is a consequential order as the PPDT was conscious of the fact that after an interim Certificate of nomination, upon any dispute being concluded in favour of the Claimant aspirant, a final nomination certificate would issue., and this is a fact that is well known to all the parties hereto. It is that final nomination certificate that shall be presented to the IEBC to gazette the validly nominated candidate. Further, the dispute having been finalized by the ODM Appeals Tribunal as confirmed by the PPDT, the only consequential order that the PPDT could make and which was prayed for was to order for a final nomination certificate and submission of the successful Claimant/aspirant's name to the IEBC. Furthermore, the only other order issued by the PPDT in addition to upholding the decision of the Appeals Tribunal was No. c that:

“The 2<sup>nd</sup> and 4<sup>th</sup> Respondents are hereby directed to forthwith issue to the complainant the final nomination Certificate to contest for the Member of National Assembly for Gem Constituency, in any event within 24 hours of this order, and to forward his name to the Independent Electoral and Boundaries Commission.”

140. As already pronounced above that the actions of the Central Committee are null and void ab initio and therefore any actions by NEB issuing the appellant a direct nomination ticket is null and void ab initio, it follows that the only valid decision which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein can implement is that made by the ODM Party Appeals Tribunal 20<sup>th</sup> April 2022 as upheld by the same Tribunal by its review decision made on 24<sup>th</sup> April and further upheld by the decision of the PPDT made on 30<sup>th</sup> April 2022.

141. In the end, and for all the above reasons, the order that commends itself to this court is that I find and hold that this appeal by Dr. George Jalangó Midiwo is devoid of any merit. I dismiss it on all the grounds of appeal and issues framed. I uphold the decision of the Political Parties Tribunal made on 30<sup>th</sup> April, 2022, upholding the decisions of the ODM Party Appeals Tribunal made on 20<sup>th</sup> April 2022, upheld on 24<sup>th</sup> April 2022 on review and further upheld by the PPDT on 30<sup>th</sup> April 2022.

142. On costs, Costs follow the event. The 1<sup>st</sup> respondent Hon. Elisha Ochieng Odhiambo shall have costs of this appeal, to be borne by the appellant herein Dr. George Jalangó Midiwo jointly and severally with the 2<sup>nd</sup> Respondent National Elections Board and the 3<sup>rd</sup> Respondent Orange Democratic Movement (ODM) Party, to be agreed between the parties or to be taxed but such costs shall not exceed Kenya Shillings Five Hundred Thousand (kshs 500,0000) should the need for taxation arise.

143. Parties to be supplied with certified copies of this judgment upon payment of the requisite fees.

144. This appeal file is closed. I so order.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT SIAYA THIS 27TH DAY OF MAY, 2022**

**R.E. ABURILI**

**JUDGE**

