



**Ojienda v Orange Democratic Party & another (Complaint E007
(KSM) of 2023) [2023] KEPPDT 1274 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEPPDT 1274 (KLR)

**REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT E007 (KSM) OF 2023
D. NUNGO, CHAIR, S MUSAU, MM YUSUF JIN & AA ABDIKADIR, MEMBERS
NOVEMBER 29, 2023**

BETWEEN

PROF. TOM ODHIAMBO OJIENDA SC COMPLAINANT

AND

ORANGE DEMOCRATIC PARTY 1ST RESPONDENT

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT

JUDGMENT

The Judgment of Desma Nungo (Chairperson), Stephen Msau (Member) and Muzna Jin (Member)

Introduction

1. The Complainant is a Senior Counsel and a life member of the Orange Democratic Movement (ODM) party, the 1st Respondent herein. He was elected as Senator of Kisumu County in the August 2022 General Elections under the ODM Party ticket.
2. However, on 6th September 2023, the 1st Respondent issued a presser to the public to the effect that the 1st Respondent's National Executive Committee (NEC) had passed a resolution to adopt the Recommendations of the 1st Respondent's Disciplinary Committee (DC) to deem the Complainant as having resigned from the ODM party.
3. Aggrieved by the stated DC Recommendation, the Complainant filed the instant Complaint dated 11th September, 2023 (hereinafter referred to as the Complaint) wherein he seeks the following Orders from the Tribunal:
 - i. A declaration that the decision of the 1st Respondent to expel the Complainant from the ODM party is illegal, premature and incapable of being implemented for having been made without the ratification of the National Governing Council.



- ii. An order quashing the 1st Respondents decision to expel the Complainant from the ODM party.
 - iii. An order declaring the disciplinary proceedings by the 1st Respondent conducted against the Complainant on 25th July, 2023 unprocedural, unlawful and in violation of the right to a fair administrative action and fair hearing.
 - iv. A declaration that the disciplinary proceedings by the 1st Respondent conducted against the Complainant on 25th July, 2023 violated the *Political Parties Act*, the Fair Administrative Actions Act and Article 75(5) and (6) of the 1st Respondent's Constitution.
 - v. A declaration that the Committee of the 1st Respondent convened on 25th July, 2023 was not properly constituted.
 - vi. A declaration that by singling out the Complainant for disciplinary proceedings discriminated against the Complainant.
 - vii. A permanent injunction restraining the 2nd Respondent from removing the name of the Complainant from the register of members of the Orange Democratic Party on the basis of the illegal disciplinary proceedings conducted on 25th July, 2023.
 - viii. A permanent injunction restraining the 1st Respondent from interfering with, de-whipping or in any other manner attempting to remove the name of the Complainant from the register of the members of the Orange Democratic Party on the basis of the illegal disciplinary proceedings conducted on 25th July, 2023.
 - ix. Any other order that this Honourable Tribunal may deem fit
 - x. Costs of the suit.
4. The Complaint was filed together with a Notice of Motion Application dated 11th September, 2023 under Certificate of Urgency (hereinafter referred to as the first application) in which the Complainant sought the following orders:
- i. That the Application be certified as urgent and heard ex-parte in the first instance.
 - ii. That a conservatory order be issued staying the implementation and/or execution of the decision to expel the Complainant/Applicant from the 1st Respondent pending the hearing and determination of the Notice of Motion.
 - iii. That a temporary injunction be issued restraining the 2nd Respondent from effecting the decision to expel the Applicant from the 1st Respondent pending the hearing and determination of the Notice of Motion.
 - iv. That a temporary injunction be issued restraining the 1st Respondent from de-whipping the Applicant and/or removing the Applicant as a committee member of the County Public Investments Committee and the Security Committee pending the hearing and determination of the Application filed herein.
 - v. That a conservatory order be issued staying the implementation and/or execution of the decision to expel the Complainant/Applicant from the 1st Respondent pending the hearing and determination of the Complaint. vi. THAT a temporary injunction be issued restraining the 2nd Respondent from effecting the decision to expel the Applicant from the 1st Respondent pending the hearing and determination of the Complaint.



- vi. That a temporary injunction be issued restraining the 1st Respondent from de-whipping the Applicant and/or removing the Applicant as a committee member of the County Public Investments Committee and the Security Committee pending the hearing and determination of the Complaint.
 - vii. That the costs of this application be provided for.
 - viii. Any other order that the Honourable Tribunal may deem fit.
5. The first application was placed before the Tribunal for directions on 12th September, 2023. Upon consideration thereof, the Tribunal, in exercise of its discretion under Regulation 5(5)(g) as read together with Regulation 42(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 (the PPDT Regulations), granted the following interim orders ex-parte in the first instance:-
- i. That the Notice of Motion application dated 11th September 2023 be and is hereby certified urgent for consideration ex-parte in this first instance only.
 - ii. That the Complaint and Notice of Motion application dated 11th September 2023 be served upon the Respondents within two (2) days of the date hereof.
 - iii. That the Respondents to file and serve their response(s) to the Application within five (5) days of the date of service.
 - iv. That the Notice of Motion Application dated 11th September 2023 be listed for mention on 21st September 2023 at 2.30pm to check on compliance and/or for further directions.
 - v. That in the interim and pending the hearing and determination of this Application, this Honourable Tribunal hereby issues interim conservatory orders staying the implementation and/or execution of the decision of the 1st Respondent to expel the Complainant/Applicant, Hon. Prof. Tom Odhiambo Ojienda SC, from the Orange Democratic Movement Party.
 - vi. That in the interim and pending the hearing and determination of this Application, this Honourable Tribunal hereby issues an order of temporary injunction restraining the 2nd Respondent from effecting the decision of the 1st Respondent to expel the Applicant from the Orange Democratic Movement Party and/or removing the name of the Applicant, Hon. Prof. Tom Odhiambo Ojienda SC, from the register of members of the Orange Democratic Movement Party.
 - vii. That in the interim and pending the hearing and determination of this Application, this Honourable Tribunal hereby issues an order of temporary injunction restraining the 1st Respondent from de-whipping the Applicant and/or removing the Applicant, Hon. Prof. Tom Odhiambo Ojienda SC, as a committee member of the County Public Investments Committee and the Security Committee.
6. During the mention of the first application on 21st September, 2023, Counsel for the 1st Respondent, Mr. Ambala Advocate, indicated that the 1st Respondent would concede to the first application and pave way for the issuance of directions on the substantive Complaint in the interest of time. There being no objection by the Complainant and the 2nd Respondent, the first application was allowed in terms of prayers number 5, 6 and 7 thereof. Accordingly, after consulting with all the parties on their preferred mode of prosecution of the substantive Complaint, and balancing all interests, directions were issued to the following effect:-



- i. That the Respondents to file and serve their responses and all documents they intend to rely on in response to the Complaint within 7 days.
 - ii. Corresponding leave is granted to the Complainant to file and serve Further Affidavit if need be within 4 days of service
 - iii. Matter to be mentioned on 3rd October 2023 to check on compliance and for further directions as to the hearing of the Complaint.
7. On 3rd October 2023 when the matter came up for mention, the Tribunal established that not all parties had complied for various reasons that were explained. Taking into consideration the interest of all parties, the Tribunal allowed all parties more time to enable them comply and a hearing date was fixed for 24th October 2023.
8. However, on the 24th October 2023 when the matter came up for hearing as had been scheduled, Counsel for the Complainant, Mr. Nelson Havi Advocate, brought to the attention of the Tribunal that whereas he was ready to proceed, he had received instructions from his client to file a Notice of Motion Application dated 23rd October 2023 (hereinafter referred to as the second application) seeking orders for consolidation of the Complaint with other related Complaints. He accordingly sought for directions on the hearing of the second application. In light of this development and upon building consensus with all the parties on the way forward, it was agreed by consent of all the parties that the second application be deemed as withdrawn with no orders as to costs, and the Complaint was adjourned for hearing on 8th November 2023.
9. Pursuant to the directions of the Tribunal, the matter proceeded for hearing by way of viva voce evidence and cross examination of witnesses on 8th and 9th November, 2023. Parties also filed their written submissions as follows: -
 - i. The Complainant filed their written submissions dated 10th November, 2023
 - ii. The 1st Respondent filed their written submissions dated 14th November, 2023.
 - iii. The 2nd Respondent did not file written submissions but relied on their Replying Affidavit.
10. At the hearing of the Complaint, the Complainant was represented by Mr. Nelson Havi Advocate and Ms. Awuor Advocate. The 1st Respondent was represented by Mr. Ambala Advocate and Ms. Anyango Advocate, and the 2nd Respondent was represented by Ms. Ndwiga Advocate, holding brief for Mr. Wakoko Advocate.

The Complainant's Complaint and Submissions

11. The Complaint is as set out in the Complaint and the Affidavits and all documents that have been filed on behalf of the Complainant. The Complainant contends that on 7th February 2023, he visited H.E. Dr. William Samoei Ruto, C.G.H., and the Deputy President, H.E. Rigathi Gachagua, EGH at the State House in Nairobi, a meeting the Complainant states was in his capacity as the Senator of Kisumu and had nothing to do with politics.
12. Consequently, the Complainant was served with a notice to show cause letter dated 13th February 2023 purporting to ask him why he should not be subjected to a disciplinary process for his purported dalliance with party competitors and was accused of violating Section 14A of the *Political Parties Act* 2011, Article 11 of the Party Constitution and the Party's Code of Conduct. Annexed to the Notice to Show cause letter was a letter dated 9th February 2023 alleging that the meeting with H.E. Dr. William Samoei Ruto, C.G.H., and the Deputy President, H.E. Rigathi Gachagua, EGH, caused immense



- embarrassment, ridicule, anxiety, and disgust amongst the members of the 1st Respondent, and called on the 1st Respondent to have the Complainant deemed as having resigned from ODM under Section 14A of the Political Parties amongst other prayers as set out therein.
13. The Complainant responded to the Notice to Show Cause letter on 15th February 2023 explaining that the meeting was in an official capacity and further relied on Articles 130 and 131 of *the Constitution*. The 1st respondent did not revert to the same. Later, the Complaint came across summons for hearing addressed to him on 10th July 2023 on social media inviting him for a disciplinary hearing scheduled for 19th July 2023 at Chungwa House. Annexed to the summons was a document titled ‘Evidence’ with incidents amounting to the alleged misconduct.
 14. The Complaint wrote to the 1st Respondent on 17th July 2023 informing the 1st Respondent that he was yet to be served officially with the letter inviting him for a disciplinary hearing and requesting an adjournment to August 2023. The 1st Respondent reverted to the Complainant on 18th July 2023 stating that the 1st Respondent having received the Decision to Charge on 3rd July 2023, time had run out and the hearing would be conducted on the 25th July 2023 at a venue that was to be communicated.
 15. The Complainant appeared before the DC for the hearing of the complaint against him on 25th July 2023 together with his Advocate, Mr. Nelson Andayi Havi, who was denied audience on the ground that he was not a member of the ODM Party. The Complainant alleges the same violated Rule 21(1) of the ODM Disciplinary Committee (Practice and Procedure) Rules 2022 (the DC Rules), and further that the DC used a different Constitution from the one supplied to them in justifying its decision to deny the Complainant the right to legal representation
 16. The Complainant further alleges that at the hearing before the DC, he was ambushed with several other allegations that had nothing to do with the meeting held on 7th February 2023, and that he was not given ample time to express himself and respond unlike his counterpart, the accuser, Senator Eddie Muok, who was given ample time to prosecute his case against the Complainant.
 17. On 6th September 2023, the 1st Respondent issued a presser to the public to the effect that the 1st Respondent’s NEC had passed a resolution to adopt the Recommendations of the DC to deem the Complainant as having resigned from the ODM party. At the material time, the subject DC Recommendation had not been communicated to the Complainant who only learnt of the same from the 1st Respondent’s press release.
 18. The Complainant has raised, inter alia, the following issues for determination: -
 - i. Whether the Complainant was expelled from the ODM Party.
 - ii. Whether due processes were followed in the expulsion of the Complainant.
 - iii. Whether the ODM Disciplinary Tribunal was properly constituted.
 - iv. Whether the Complainant was denied legal representation.
 - iii. Whether the Complainant espoused the ideologies of another political party.
 - iv. Whether the Complainant was discriminated against.
 19. The Complainant relied on the ODM Constitution and the PPA and submitted that the ODM DC undertook a shambolic hearing against the Complainant without adequate legal representation, and forwarded its Findings and Recommendations to the 1st Respondent’s NEC for adoption and ratification. The Recommendation to deem him to have resigned was ratified and in the circumstances, it is the 1st Respondent who decided to force the Complainant to leave the party against his will and notwithstanding that the Complainant testified that he is a life member of ODM and has never



- at any point expressed any intention to quit the ODM party. The Complainant submitted that the action taken against him amounted to an expulsion as the 1st Respondent has not indicated before the Tribunal the process of deeming a member to have resigned.
20. On the second issue, the Complainant submitted that the 1st Respondent flagrantly disregarded the procedures set down by its own Constitution and Disciplinary Rules before expelling the Complainant from the party, and he set out the grounds of violation of the Complainant's right to fair administrative action and fair hearing as indicated from paragraph 14 to 57 of their submissions while relying on *the Constitution* of Kenya, the PPA, the ODM Constitution, the DC Rules 2022, and decided cases.
 21. On the third issue, the Complainant submitted that the DC that sat to hear the matter was improperly constituted as the DC Chairperson, Prof Ben Murumbi Sihanya, is prohibited by Section 12 of the PPA from holding that position as he is a public officer, and further relied on the case of *Ben Murumbi Sihanya & another v Ethic and Anti- Corruption Commission; Registrar of Political Parties & another (interested Parties) [2021] eKLR*.
 22. On the fourth issue, the Complainant submitted that the Courts have held that a person cannot be deemed to have resigned from a party based on mere assumptions. The specific words and or conduct must be set out in evidence before such a decision can be made. He relied on the reasoning and finding in case of *Civil Appeal 539 of 2016 Isaac Aluoch Polo Aluochier vs Gideon Moi & 3 others [2016] eKLR*.
 23. The Complainant further set out grounds in paragraphs 68-81 supporting that the official visit to the statehouse to meet H.E. Dr. William Samoei Ruto, C.G.H., and the Deputy President, H.E. Rigathi Gachagua, EGH, could not be deemed to be identifying with the ideologies of another political party.
 24. On the fifth issue, the Complainant relied on Article 38 of *the Constitution* of Kenya and submitted that the Complainant made a deliberate choice to be a life member of the 1st Respondent and by forcefully ejecting him out of the party under the disguise of Section 14A of the PPA when he has not wronged the party in any way violates his constitutional right.
 25. On the sixth issue, the Complainant relied on Articles 27(1),(4), and (5) of *the Constitution* of Kenya and stated that he was singled out for purposes of disciplinary processes for meeting with H.E. Dr. William Samoei Ruto, C.G.H., and the Deputy President, H.E. Rigathi Gachagua, EGH, to further the Complainant's development agenda for his County, yet several other leaders have met H.E. Dr. William Samoei Ruto, C.G.H. in his capacity as the Head of State and Government and none of them have been issued with notices to show cause.

The 1st Respondent's Response and Submissions

26. In response and opposition to the Complaint, the 1st Respondent filed their Response dated 29th September, Witness Statement and Bundle of Documents, Written Submissions, amongst other documents that they relied on.
27. The 1st Respondent has in his pleading provided a brief background of the utterances and conduct of the Complainant that projected that his allegiance, loyalty, and preference had changed from his sponsoring party, the 1st Respondent, to the rival formation, the UDA Party, and Kenya Kwanza coalition, which could only mean that the Complainant had resigned from the 1st Respondent Party and that his preferred party was thenceforth the UDA.



28. A notice to show cause letter was served on the Complainant on the 13th February 2023 which was received and responded to vide a response dated 15th February 2023. The 1st Respondent before rendering its Decision did further investigation and more additional facts came xto fore, as outlined in paragraph 5 (V) of the 1st Respondent's Response.
29. After the conclusion of investigations, the findings of the 1st Respondent were detailed in a document titled 'evidence: Tom Ojienda Prof' which was used to refer the Complainant's case to the DC pursuant to Rule 11(1)(d) of the DC Rules 2022.
30. The Complainant was invited to attend a disciplinary hearing vide a Notice to Appear dated 10th July 2023 and attached to this was the document titled 'Evidence: Tom Ojienda Prof'. However, an adjournment was granted to 25th July 2023 on the Complainant's request, and the Complainant was thus given a further 7 days, making a cumulative period of 15 days, to prepare his defence.
31. That the hearing proceeded on the 25th of July 2023 despite the Complainant making all possible efforts to derail and delay the hearing of the Complaint against him.
32. The 1st Respondent on addressing the issue of representation relied on Article 75(10) of the 1st Respondent constitution which provides that a member who is under disciplinary process is entitled to representation by him/herself in person or by a representative or next friend provided that they are members of ODM.
33. The Complainant later returned with their advocates who did not utter anything apart from introducing themselves and had the Complainant prosecute his case hence it is false to indicate that the Complainant was denied the right to a fair hearing.
34. The 1st Respondent maintains that the Complainant was given ample time to prepare his defence and was served with the evidence that would be relied on but was not keen on ventilating his defence. The 1st Respondent further submitted that the Complainant has no cause of action at all against it on the grounds illustrated in paragraph 12 of the 1st Respondent's Response.
35. The 1st Respondent has in their submissions identified the following issues for determination: -
 - i. Whether there was procedural fairness on the part of the 1st Respondent in the conduct of the Complainant's disciplinary process.
 - ii. Whether there was substantive fairness in the decision of the 1st Respondent to deem the Complainant to have resigned from the Party by dint of his conduct.
 - iii. Costs.
36. On the first issue, the 1st Respondent relied on the ODM Constitution and the Disciplinary Committee(Practice & Procedure) Rules 2022 while expounding on the procedures set out for fair and just resolution of complaints and any matters of discipline in the party and stated it is a requirement under Rule 13 of Schedule 2 of the [Political Parties Act](#) 2011.
37. The 1st Respondent relied on the witness statement of Anthony Moturi to illustrate how the party followed its internal processes to serve the Complainant with all documents necessary to conduct the disciplinary process
38. Further, the complainant admitted that he attended the hearing whose outcome was a true reflection of what happened. The 1st Respondent further indicated that the charges leveled against the Complainant were not generalized but were clear and precise with evidence being served and later produced during the hearing.



39. The 1st Respondent further stated that the Complainant at no point raised an objection against any issue as to the generalization of the charges or sought any clarity on the same, and that the Complainant was not expelled from the ODM party but was deemed to have resigned through his conduct.
40. It was further submitted that the Complainant was aware of the provisions of the ODM party constitution at Article 75(10) hence his right to legal representation was not denied.
41. On the issue of whether the Disciplinary committee was properly constituted, the 1st Respondent stated that the court in *Ben Murumbi Sihanya & another v Ethics and Anti-Corruption Commission; Registrar of Political Parties & another (interested Parties) {2021} eKLR* did not declare that the Chairperson of the 1st Respondent's DC was forthwith prohibited from holding an office at the 1st Respondent's DC, and further that the case is still active before the Court of Appeal.
42. On the second issue, the 1st Respondent relied on the case of *Daniel Chacha Chacha* when stating that as a legal requirement, an administrative body must also show as a fulfillment of the principles of natural Justice that the decision was based on logical proof and evidential material
43. It was submitted that the Complainant was served with the notice to show cause letter and he responded thereto and after consideration of the Complaint and response, the National Chairman of the party transmitted the matter to the DC for a disciplinary hearing and the Complainant was invited to appear for the disciplinary hearing.
44. During the hearing, the charges which had been served to the Complainant and spelled out clearly were read out to the Complainant. The DC consisted of members who had not taken part in lodging the Complaint and upon considering all the evidence being laid out, the DC made its Findings and Recommendations and forwarded the same to the NEC.
45. Accordingly, the 1st Respondent maintains that the DC Findings and Recommendations were sound in law, reasonable, and did not violate the Complainant's right to fair administrative action or any constitutional provisions as alleged or at all. That the onus is on the Complainant to show that the Decision he is complaining of is not grounded in law, and that it was unreasonable for the DC to come to such a conclusion.
46. On the last issue, it was submitted that costs are discretionary but always follow the event.

The 2nd Respondents' Response and Submissions.

47. The 2nd Respondent relied on their Replying Affidavit dated 19th September 2023. It is the 2nd Respondent's contention that the Complaint filed herein does not disclose any cause of action against the 2nd Respondent.
48. The 2nd Respondent avers that vide a letter dated 7th September 2023, the 1st Respondent made a request for the removal of the Complainant herein from the ODM register of members on account of having been deemed to have resigned from the 1st Respondent within the meaning of Section 14A of the *Political Parties Act* 2011. The 1st Respondent submitted to the 2nd Respondent an extract of minutes of its NEC Meeting of 6th September 2023 that included the said recommendation that the Complaint herein had been deemed to have resigned from the 1st Respondent.
49. Upon receipt of the 1st Respondent's letter, the 2nd Respondent responded thereto vide a letter dated 11th September 2023 wherein they requested for further documents relating to the disciplinary process from the 1st Respondent. The same were forwarded vide a letter dated 13th September 2023 and the 2nd Respondent acknowledged receipt thereof.



50. However, the 2nd Respondent appreciated the import of the conservatory orders issued by the Honourable Tribunal in the interim and did not therefore proceed to make any determination required under section 14A(4) of the *Political Parties Act* 2011 so as to affect the rights of the Complainant.

Issues for Analysis and Determination

51. Flowing from the parties' pleadings and submissions, the Tribunal has identified the following issues for determination.
- i. Whether there has been established a cause of action against the 2nd Respondent / Whether the Complaint is premature before the Tribunal.
 - ii. Whether the Complainant was expelled from the ODM Party or deemed to have resigned from the ODM Party.
 - iii. Whether the Disciplinary Committee was legally constituted?
 - iv. Whether the disciplinary proceedings violated the provisions of Article 47 and 50 of *the Constitution* as read together with Section 4 and 6 of the *Fair Administrative Action Act* and the ODM Party Constitution and the Disciplinary Committee (Practice & Procedure) Rules 2022?
 - v. Whether the decision by the National Executive Committee to adopt the recommendations of the Disciplinary Committee and seek the 2nd Respondent's implementation thereof is lawful.
 - vi. Whether ODM Disciplinary Findings and Recommendations were merited / Whether the Complainant's actions violated the ODM Party Laws.

Whether there has been established a cause of action against the 2nd Respondent / Whether the Complaint is premature before the Tribunal.

52. The 2nd Respondent has submitted that they had not made a determination against the Complainant to warrant any cause of action against them. After the 2nd Respondent received the 1st Respondent's request to remove the Complainant's name from the register of the 1st Respondent in accordance with the 1st Respondent's NEC resolution, the 2nd Respondent called for further documentation in support of the disciplinary process against the Complainant, which documentation were furnished. However, by the time the same were received, there was already in place an interim order that had been issued by the tribunal restraining them from implementing the 1st Respondent's resolution and recommendation to deem the Complainant as having resigned.
53. We have evaluated the pleadings and evidence and we note that neither the Complainant nor the 1st Respondent has controverted this position. There is no complaint that has been made against the 2nd Respondent. Accordingly, we agree with the 2nd Respondent that the the Complainant has not established any cause of action against the 2nd Respondent. It was therefore not necessary to join the 2nd Respondent in these proceedings as a substantive party.
54. In the case of PPDT Kisumu Complaint No. E005 of 2023 Elisha Ochieng Odhiambo vs. Orange Democratic Movement Party & Another, we observed as follows:-

“...The fact that the 2nd Respondent will be called upon to implement and/or execute orders of this Tribunal does not in itself justify such a joinder particularly where no specific complaint or allegation has been made against the 2nd Respondent. Attendance to



tribunal proceedings consumes considerable time and resources bearing in mind that the 2nd Respondent designates a legal officer to process the 2nd Respondent's responses and to appear in all tribunal hearings. It is unnecessary to subject the 2nd Respondent to the burden and expense of defending disputes that are filed before the tribunal even where such disputes do not directly challenge the 2nd Respondent's actions and/or omissions..."

55. We remain of the considered view that where there is no specific complaint against the 2nd Respondent, it is unfair to cause them to appear in proceedings before the Tribunal. Ordinarily, notice of tribunal decisions can be issued to the 2nd Respondent without requiring their substantive participation unless in cases where they have an interest to defend. We therefore have no reason to depart from our foregoing observations in the case of Elisha Ochieng Odhiambo (supra).
56. Turning to the question whether the Complaint is premature for the reason that the 2nd Respondent has not made any determination, we note that the instant case has been presented as Complaint in accordance with Section 40(1)(b) of the PPA as read together with the PPDT Regulations. It has not been framed as an appeal against any decision of the 2nd Respondent.
57. In the case of Elisha Ochieng Odhiambo (supra) we stated thus:-

"...Turning to the question whether the Complaint is premature for the reason that the 2nd Respondent has not acted on the request to remove the Complainant's name from the party register, we note that the instant case has been presented as a Complaint against the 1st Respondent's internal dispute resolution processes and not an appeal against any decision of the 2nd Respondent. The 1st Respondent conducted an internal party disciplinary process that led to the DC decision deeming the Complainant to have resigned pursuant to Section 14A(1)(e) of the PPA. This DC decision was then ratified by NEC and forwarded to the 2nd Respondent to remove the Complainant's name from the register of members of the Respondent. The Complainant is aggrieved by the subject DC determination deeming him to have resigned and its consequential ratification by NEC for want of compliance with Article 47 and 50 of *the Constitution*, Section 14A(2)(a) and (b) of the PPA, the Respondent's Constitution and DC Rules. This Tribunal has jurisdiction under Section 40(1)(b) of the PPA to hear and determine the instant Complaint. Section 14A(3), (4) and (5) of the PPA provides on processes that follow after a political party deems a member to have resigned. These include the notification issued to the 2nd Respondent to remove such a member's name from the register and the procedure that should apply. These provisions do not therefore oust the Tribunal's jurisdiction to hear and determine this dispute. To wait until the 2nd Respondent makes a determination on whether or not it will remove the Complainant's name from the register would in our opinion set the stage for the dispute to be transformed and narrowed down to an appeal against the decision of the 2nd Respondent under Section 40(1)(f) and be subject of the legal and procedural limitations of such an appellate process. The 1st Respondent may in fact only participate in the appeal as an interested party and not a substantive party yet it is the 1st Respondent's decision that aggrieves the Complainant. ..."

58. We have no reason to depart from our foregoing observations and we accordingly find that the Complaint is properly before the Tribunal.



Whether the Complainant was expelled from the ODM Party or deemed to have resigned from the ODM Party.

59. The Complainant has vide its written submissions isolated this issue for determination. As already highlighted above, the Complainant submitted that the purported DC Recommendation to deem him to have resigned was ratified by the 1st Respondent's NEC and in the circumstances, it is the 1st Respondent who decided to force the Complainant to leave the party against his will notwithstanding that the Complainant is a life member of ODM, and that he has never at any point expressed any intention to quit the ODM party. The Complainant accordingly argued that the action taken against him amounted to an expulsion, and that the 1st Respondent has not indicated before the Tribunal the process of deeming a member to have resigned.
60. The 1st Respondent on the other hand maintains that the Complainant was not expelled from the party but was deemed to have resigned. The 2nd Respondent informed the Tribunal that the resolution that was forwarded to it deemed the Complainant to have resigned from the 1st Respondent political party.
61. We have considered the parties' pleadings and it is appreciable that whereas it is arguable that both expulsion of a member from a political party and deeming a member of a political party to have resigned lead to the same outcome of termination of membership in a political party, the legal provisions governing the same under the PPA are distinct.
62. For instance, Section 14A of the PPA provides on when a member may be deemed to have resigned from a political party as follows: -

“(1) A person who, while being a member of a political party shall be deemed to have resigned from that party if that person—

- a. forms another political party;
- b. joins in the formation of another political party;
- c. joins another political party;
- d. in any way or manner, publicly advocates for the formation of another political party; or
- e. promotes the ideology, interests or policies of another political party.

(2) A political party shall, before deeming a member to have resigned under subsection (1)—

- a. notify the member that he or she has been deemed to have resigned from the political party and that the political party intends to remove his or her name from the list of its members; and
- b. afford the member a fair opportunity to be heard in accordance with the procedure set out in *the constitution* of the political party.

3. A political party which deems a member to have resigned from the political party shall notify the Registrar in writing of the member's resignation and



request the Registrar to remove that person's name from the register of members of that political party.

4. Upon the notification under subsection (3), the Registry may, where the Registrar is satisfied that the political party has complied with the procedure under subsection (2), remove the member's name from the register of members of the political party within seven days of the notification and notify the member in writing that he or she has ceased to be a member of that political party.
5. Where the Registrar is not satisfied in accordance with subsection (4), the Registrar shall refer the matter back to the concerned political party for reconsideration..."

63. On the other hand, Section 14B of the PPA provides on expulsion of a member from a political party as follows: -

- “(1) A person may be expelled from a political party if that person contravenes any of the provisions of *the constitution* of the political party.
- (2) A political party shall before expelling a member under subsection (1), afford such member a fair opportunity to be heard in accordance with the internal party disputes resolution mechanism prescribed in *the constitution* of the political party”

64. In the instant case, we note that the NTSC dated 13th February 2023 enclosed complaint that was presented vide a letter dated 9th February 2023 from the firm of Aguko, Osman and Company Advocates addressed to the Secretary General of the 1st Respondent and the Chairperson of the 1st Respondent's DC. The letter is referenced 'Deregistration and/or Expulsion of Hon. Prof. Tom Ojienda, SC, Hon. Gideon Ochanda, Hon. Caroli Omondi, Hon. Elisha Odhiambo, Hon Paul Abuor, Hon. Mark Nyamita, and Hon. Felix Odiwuor alia Jalang'o from Orange Democratic Movement Party membership.'

65. Vide the subject letter dated 9th February 2023, the said Legal Counsel for one Senator Eddy Gicheru Oketch, invited the 1st Respondent to deem the Complainant and others as having resigned from the party under Section 14A(1)(e) of the PPA, and initiate the process of having their name struck out of the party members register in accordance with the provisions of Section 14 (2) and (3) of the PPA, or in the alternative, commence necessary disciplinary action for purposes of having the Complainant and others expelled from the party if found culpable under Section 14B of the PPA. The DC considered the complaint and we note from the DC Finding and Recommendation that the DC recommended that the Complainant be deemed to have resigned.

66. The DC Findings and Recommendations were forwarded to NEC and from the record, NEC resolved that the Complainant be deemed to have resigned by dint of his conduct. This is the same resolution that the 2nd Respondent alluded to.

67. In light of the foregoing legal provisions and the facts of this case leading to the aforesaid NEC resolution that was submitted to the 2nd Respondent, we do not agree with the Complainant that the fact that the 1st Respondent forcefully deemed him to have resigned from the party should lead us to the conclusion that he was expelled from the party. Going by the wording of the NEC resolution that



was forwarded to the 2nd Respondent for implementation, we find that the Complainant was deemed to have resigned from the ODM Party.

68. Having so found, and bearing in mind that the Complainant raised the issue that the 1st Respondent did not demonstrate the procedure for deeming to resign under the ODM Constitution and the ODM DC Rules, we have gone ahead to holistically consider the complainant's pleadings vis a vis the responses. Our view is that whereas reference may have been made to expulsion as opposed to 'deemed to have resigned', and further whereas the tribunal was not pointed to express provisions on 'deeming to resign', we note that the DC proceedings referred to by the Complainant in his pleadings are the same ones that the 1st Respondent alludes to as having led to the decision deeming the Complainant to have resigned. The same DC proceedings are subject of challenge before us as evident from the reliefs sought in the Complaint.
69. We have further considered that in any event and from a reading of Section 14A and 14B of the PPA, both provisions on expulsion of a member or deeming a member to have resigned require due process whereby such a member is granted a fair opportunity to be heard in accordance with the party laws. The crux of the instant complaint revolves around due process in relation to the same DC proceedings alluded to by both parties. Accordingly, nothing stops the tribunal from inquiring into the Complaint with a view to establishing whether the 1st Respondent's decision to deem the Complainant to have resigned was arrived at in accordance with the law.
70. This is the same position we took in the case of Elisha Ochieng Odhiambo (*supra*) where we similarly stated as follows:-

“...We have holistically considered the Complainant's pleadings and our view is that whereas reference may have been made to expulsion as opposed to 'deemed to have resigned', we note that the DC proceedings referred to by the Complainant in his pleadings are the same ones that the 1st Respondent alludes to as having led to the decision deeming the Complainant to have resigned. These are the DC proceedings that are subject of challenge before us as is even evident from the reliefs sought in the Complaint.

We have further considered that in any event, from a reading of Section 14A and 14B of the PPA, both provisions on expulsion of a member, or deeming a member to have resigned, require due process whereby such a member is granted a fair opportunity to be heard in accordance with the party laws. The crux of the instant complaint revolves around due process in relation to the same DC proceedings alluded to by both parties. Accordingly, it would be unjust to dismiss the Complaint that challenges the entirety of the DC proceedings on the sole basis that it made reference to 'expulsion' as opposed to 'deemed to have resigned.'...”

Whether the Disciplinary Committee was legally constituted?_

71. The Complainant has challenged the legality of the composition of the DC that was Chaired by Prof. Ben Sihanya arguing that by virtue of the finding in ELRC Petition No. E055 of 2020, Professor Ben Murumbi Sihanya & Another vs. The Ethics and AntiCorruption Commission & 2 Others, Prof. Ben Sihanya illegally Chaired the DC and if it was to be so deemed, the rest of the DC members did not constitute quorum in accordance with the ODM party constitution and the DC Rules.
72. The 1st Respondent has opposed these submissions on grounds, inter alia, that there were no declaratory orders issued against Prof. Ben Sihanya on the question of his sitting as the Chairperson of the DC.



73. In the case of Elisha Ochieng Odhiambo (supra) where the same issue was raised, we stated thus:-

“...We have considered the record and we note that at paragraphs 34, 37 and 38 of the Judgment delivered by Mathews N. Nduma, J on 9th December 2021 in ELRC Petition No. E055 of 2020, Professor Ben Murumbi Sihanya & Another vs. The Ethics and Anti-Corruption Commission & 2 Others, the Court stated: -

“... It follows therefore the 1st petitioner is prohibited under Section 12 of the Political Parties Act, and Section 23 of the Leadership and Integrity Act to hold office in a political party...

34. Whereas a lecturer at an institution of higher learning enjoys academic freedom and is not barred from expressing his or her political opinion, such an officer is bound to relinquish his position if he is appointed or elected to an office in a political party. Holding the office of lecturer at a public university and at the same time holding an appointed office of Chairperson of a disciplinary committee in a dominant political party amounts to performing daily and/or continuous political activities that may be seen to compromise the political neutrality of the office of lecturer in a public university within the meaning of Section 23(2) of the Leadership and Integrity Act as read together with Section 12(1)(c) of the Political parties Act.

37. Following the above exegeses, and in answer to issues (i) and (ii) above the court finds that the action by the Respondent in giving the 1st petitioner the opportunity to elect to remain a lecturer at the University of Nairobi or opt to become the Chairperson of the Disciplinary Committee of Orange Democratic Movement was lawful, fair, just and in accordance with the Leadership and Integrity Act and did not violate any of the rights or freedoms of the petitioner set out in this petition or at all...”

It is clear that the High Court at paragraph 34 of the Judgment above made an express finding that Prof. Ben Sihanya is prohibited under Section 12 of the Political Parties Act, and Section 23 of the Leadership and Integrity Act to hold office in a political party. This is a finding that binds this Tribunal. We have not been shown any decision or order from the Court of Appeal setting aside or staying this finding and in the circumstances, our hands are tied...”

74. We maintain the same position as guided by the High Court determination and bearing in mind that the exclusion of the Chairperson of the DC would render the DC inquorate and in breach of Article 76(1) and (3) of the party Constitution as read together with Rule 12(6) of the DC Rules, we arrive at the inescapable finding that the DC was improperly constituted.

75. In the case of Republic vs. Chuka University ex-parte Kennedy Omondi Waringa & 16 Others [2018] eKLR, it was held that a tribunal or administrative body that makes its own rules must be prepared to adhere to those rules regulating the execution of its business and where it fails to do so, then the Court



will not hesitate to intervene to declare the actions or failure to adhere to those rules ultra vires. and could not in the circumstances render a valid determination.

76. And in the case of Republic vs. Kirinyaga University College & 2 Others ex-parte Isaya Kamau Kagwima [2015]eKLR, the Court declared a nullity an improperly constituted disciplinary hearing.
77. Taking into consideration the circumstances of this case and reasoning in the cited judicial authorities, we find that the Complainant did not appear before a duly constituted DC. Accordingly, the findings and recommendations against the Complainant arising from the impugned DC hearing and all consequential ratification by the Respondent's NEC are invalid and a nullity in law and we so declare.

Whether the disciplinary proceedings violated the provisions of Article 47 and 50 of *the Constitution* as read together with Section 4 and 6 of the *Fair Administrative Action Act* and the ODM Party Constitution and the Disciplinary Committee (Practice & Procedure) Rules 2022?

78. Article 47 of *the Constitution* provides on the the right to fair administrative action as follows, inter alia:
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.(Emphasis ours)
79. And Article 50(1) of *the Constitution* is express that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
80. Additionally, the *Fair Administrative Action Act*, 2015 at Section 4(3)&(4) details the ingredients of fair administrative action thus:
 1. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 2. The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - (a) attend proceedings, in person or in the company of an expert of his choice; (b) be heard;



- c. cross-examine persons who give adverse evidence against him; and
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

81. Section 7(2) of the *Fair Administrative Action Act*, 2015 provides grounds upon which a court or tribunal may review an administrative action. The grounds include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power.

82. The importance of the constitutional right of fair administrative action was appreciated in the South African case of *President of the Republic of South Africa & others v South African Rugby Football Union & others* (CCT16/98) 2000 (1) SA 1 where it was held that:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

83. In conducting review of disciplinary proceedings, the right to fair administrative action cannot be divorced from the right to fair hearing provided for under Article 50 of *the Constitution* even though the rights are distinct as observed by the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR.

84. In our view fair administrative action imports the principles of natural justice.

In *Onyango Oloo vs. Attorney General* [1986-1989] EA 456, it was held:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him,



and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decisionmaking body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

85. In *Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moiyo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004*, the Court expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances.Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a canon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated..."

It follows that this Court has the powers to interfere with the decision of the Respondent arrived at in the exercise of its statutory mandate where the Respondent's powers are not validly exercised. To make a decision adversely affecting the applicant without affording the applicant an opportunity of being heard is in my view such invalid exercise of power warranting this Court to interfere.

In my view the respondent broke all the procedural rules relating to fairness in its proceedings. It issued prejudicial orders on a mention date; it did not bother to confirm



whether its directions were complied with in order to ensure the fairness of the process; and it did not confirm whether the Applicant was duly notified at every stage of the proceedings. Accordingly, its decision cannot be allowed to stand...”

86. The right to fair hearing and fair administrative action and application of the rules of natural justice before the DC has been codified in Article 76 (3),(4),(5) and (6) of the ODM Party Constitution as read together with Rules 4, 13(2) and 20(2) of the DC Rules which enjoin the DC to uphold the constitutional and statutory tenets on the right to a fair hearing and fair administrative action. It is therefore inescapable to analyse the facts and evidence adduced by the parties in these proceedings with a view to establishing whether the disciplinary proceedings subject hereof were conducted in accordance with the law that the 1st Respondent committed itself to observe and uphold.
87. We note that the disciplinary process against the Complainant was initiated vide a Notice to Show Cause (NTSC) dated 13th February 2023 under the authorship of CPA Hon. John Mbadi, EGH, the National Chairperson. The NTSC states as follows;
- ‘...My office is in receipt of a complaint from a member of the party raising a plethora of issues the border on your general conduct as a member of the party and in specific your dalliance with party competitors.
- Your public display, conduct and general comportment not only violates section 14A of the *Political Parties Act* 2011, Article 11 of the Party Constitution and the Party’s Code of Conduct that you signed ut has facilitated to send mixed signals and cause unnecessary anxiety within the party membership and supporters...’
88. From a reading of the NTSC, our immediate observation is that the same does not specify or particularise the so called ‘plethora of issues’ complained about that allegedly border on the Complainant’s general conduct that violate Section 14A of the PPA and Article 11 of the Party Constitution and the Party’s Code of Conduct. The Complainant’s alleged public display, conduct and general comportment that allegedly violates the law has also not been specified.
89. According to the 1st Respondent, the NTSC was sent together with a letter from the law firm of Aguko, Osman & Company Advocates dated 9th February 2023 addressed to the Secretary General, ODM and the Chairperson ODM Disciplinary Committee.

This is what the 1st Respondent identifies as the complaint and it states;-

‘...on 7th February 2023 the members of the Orange Democratic Movement Party were treated to blatant and arrogant violation of the Party Constitution as read together with Section 14A(1)(e) of the *Political Parties Act* No. 11 of 2011 of the Laws of Kenya by the above mentioned party members. The said provision states

On the said day and the period before the aforementioned party members have shown close association with a different political party whereupon they have been captured by the media appearing together with both the Party leader and deputy Party leader of the United Democratic Alliance Party whose ideologies, interests and policies they have been promoting from within the Orange Democratic Movement Party.

It suffices to say that they actions do not only fly on the face of the entire legal framework governing political parties’ membership but have also caused immense embarrassment, ridicule, anxiety and disgust amongst the members of the Orange Democratic Movement Party and its party leadership at large...’



90. In essence, the single complaint in the letter dated 9th February 2023 relates to the allegation that the Complainant was on 7th February 2023 captured by the media appearing together with both the Party leader and deputy Party leader of the United Democratic Alliance Party whose ideologies, interests and policies the 1st Respondent claims the Complainant has been promoting from within the Orange Democratic Movement Party. The subject complaint letter made the following prayers;
- i. The Office of the Party Secretary General does proceed immediately to deem the Complainant and others as having resigned from the party under Section 14A(1)(e) of the PPA, and initiate the process of having their name struck out of the party members register in accordance with the provisions of Section 14 (2) and (3) of the PPA
 - ii. In the alternative, commence necessary disciplinary action for purposes of having the Complainant and others expelled from the party if found culpable under Section 14B of the PPA
 - iii. That pending action as prayed, the Complainant and others be recalled by the party from all parliamentary leadership positions and committees that they are serving in
91. We have seen the Complainant's comprehensive response to the NTSC vide letter dated 15th February 2023 where the Complainant stated thus: -

“... I am therefore a stranger to the allegations set out in the letter dated 9th February 2023 by Senator Eddy Gacheru Muok. Be that as it may, the complainant raises three issues: whether I have violated section 14 A (1) (e) of the *Political Parties Act* and the Party's Constitution and code of conduct? Whether I have caused immense embarrassment, ridicule, anxiety and disgust among the ODM membership and leadership and whether I should be deemed to have resigned from the ODM Party?

Whether I violated S14A (1) (e) of the *Political Parties Act* and the Party's
Constitution and code of conduct

This complaint is frivolous, malicious and amounts to nothing but witch hunts as: One, I was performing my duties of representation of Kisumu County under Article 96 of the Constitution of Kenya which provides that... In this case, I went to meet the President to further the development agendas for Kisumu County particularly; one, Flood control by building of dykes in Kabonyo and Gem Rae Schemes, two, completion of KisumuMamboleo Road, three, Establishment of AKADO TVET and four, completion of Rabour- chiga Road. Further, I met the President as the Head of State and not as the Party Leader of UDA. Indeed, there is no evidence annexed to this Complaint that I visited UDA offices or took part in UDA's activities. There is no evidence annexed to the complaint showing how this official meeting identifies with the ideologies of UDA.

Secondly, the complaint violates Article 27 of *the Constitution* of Kenya that prohibits discrimination and different treatment. There are several ODM members who have met President William Ruto in his capacity as the Head of State and Government. They include No explanation has been given for this differential treatment.

Thirdly, this complaint violates Article 32 and 36 of *the Constitution* of Kenya. Article 32 (1) of *the Constitution* of Kenya provides: Every person has the right to freedom of conscience, religion, thought, belief and opinion; Article 32(4) of *the Constitution* provides that: A person shall not be compelled to act, or engage in any act that is contrary to the person's belief or religion.' This complaint directly violates Article 32 of *the Constitution* as the complainant is purporting to compel me to resign from



ODM! More absurdly, this complaint is compelling me to identify with the ideologies of UDA which I do not identify with! Article 36(2) of *the Constitution* provides ‘A person shall not be compelled to join an association of any kind.’ This kind of complaint is unconstitutional and violates Article 36 (2) as it seeks to compel me to join UDA, a party that I have never wanted to join.

Lastly, this complaint violates Article 38 of *the Constitution* of Kenya which provides that: ‘Every citizen is free to make political choices.....’ The complainant is purporting to compel me to be a member of UDA in violation of Article 38 of *the Constitution*. The complainant cannot purport to make that choice for me. I made a choice to be a member of ODM and that choice remains to date.

From the foregoing, it is apparent that I have not violated section 14A (1) (e) of the *Political Parties Act* as there is no evidence that has been annexed to this complainant showing that I identify with the ideologies and interests of UDA. Further, there is no single provision in both the ODM Constitution and ODM Code of Conduct that prohibits its elected members from meeting the President of Kenya if the President was elected through a rivalling party. In the circumstances, there is no violation of either Party Constitution or the Code of conduct. What the complainant is trying to do is set the bar so low for the expulsion of its members and to have a subdued membership that does not have freedom of thought, conscience or opinion and the Party should not accept that invitation.

Whether I caused immense embarrassment, ridicule, anxiety and disgust among the ODM membership and leadership?

The complainant has demonstrated how meeting the President of the Republic of Kenya caused immense embarrassment, ridicule, anxiety and disgust among the ODM membership and leadership. More fundamentally, there is no provision of the ODM Constitution that provides that a member can be deemed to have resigned and/ or can be expelled from the group if he causes immense embarrassment, ridicule, anxiety and disgust among the ODM membership and leadership by taking a photograph with the Head of State merely because the President was elected by a rivalling Party.

Whether I should be deemed to have resigned from the ODM Party?

Article 12 (c) denotes that a party shall cease being a member of the Party by accepting an office, subscribing to, or promoting activities of another Political Party; or such other organization whose aims and objectives are in competition with or in conflict with those of ODM.

From the above explanation it is apparent that I met the President on a single occasion on the 7th of February 2013 to further the developmental agenda of Kisumu. No evidence has been tabled to show how this meeting transformed into identifying with the ideologies and interests of a rivalling party. I have also re-affirmed my commitment to the ODM Party and denounced any attempt by the complainant to compel me to join the UDA Party. I can’t therefore be deemed to have resigned from the ODM Party. More fundamentally, it is apparent that there is nothing in the complaint whatsoever to warrant my expulsion from this esteemed party.

Indeed I have been a faithful member of ODM Party. As a senior Counsel of the Bar, I have on innumerable occasions defended the ODM party, its interests and all its members in cases instituted against them on a pro bono basis. The cases include.....etc.

I have also taken part in several projects and events of the ODM Party including being the lead Advocate in the Dr. Ida Odinga Library, Research, Innovation and Resource Centre. I also undertook the Kisumu County Voter Registration Drive within 25 wards in Kisumu County with a bid of ensuring that we have the numbers for the



August 2022 General elections. I have also set up the Prof Tom Ojienda Foundation whose object is supporting children pursue education in line with Article 7 of *the Constitution*.

As the Senator of Kisumu County, I have spoken robustly in the Senate on matters affecting the residents of the stronghold of ODM Party on issues such as sugarcane farming and the sugar industry, health services, cage fish farming, rice farming in Kisumu County among others. It is therefore absurd that the Complainant would cast doubt on to my commitment to the ODM Party.

In conclusion, I have and continue to remain loyal to my party ODM. No complaint, no allegation or claim can change that...”

92. We note from the record that there was no communication to the Complainant in rejoinder to his stated letter dated 15th February 2023.
93. From the evidence before us, the next communication that the Complainant received, as per the Complainant’s statement, by chancing upon it on social media from the 1st Respondent, was the letter dated 10th July 2023 authored by Prof Ben Sihanya, Chairperson, ODM Disciplinary Committee, referenced ‘Notice to Appear for Disciplinary Hearing’ (hereinafter referred to as the notice to appear). The notice to appear reads;-

‘...The ODM Disciplinary Committee is in receipt of a complaint against you from the ODM National Chairperson citing gross violations of Article 11(1)(e) of the party constitution and code of conduct.

The specific complaints are that, contrary to the ODM Constitution, Code of Conduct and lawful decisions as well as *the Constitution* of Kenya 2010 and the relevant laws of Kenya, you have conducted yourself as follows;

- i. That you have openly associated with and supported policies of a rival political party.
- ii. That you have openly opposed lawful decisions made by party organs
- iii. That you betrayed the public trust bestowed upon you by party members
- iv. That by your conduct and general comportment, you promote the ideology, interests or policies of another political party. Therefore, you are in violation of Article 11(1)(e) of the Party Constitution and Code of Conduct as read together with Section 14A(1)(e) of the *Political Parties Act* 2011...

Therefore the ODM Disciplinary Committee pursuant to Article 75 and 76 of the ODM Constitution summons you to appear in person before the committee sitting on Wednesday 19th July 2023 at 8.30am at Chungwa House Nairobi.

Take note that disciplinary actions include reprimand. Censure, fine, suspension, expulsion, and/or any other sanction under *the Constitution* of Kenya, the Political Party Act, the ODM Party Constitution and all relevant laws, rules and regulation....

In conducting the hearing, the Disciplinary Committee will also be guided by the principles of fair administrative action, natural justice and due process....



We have enclosed herewith the complaint, notice to show cause and part of the evidence and entirety of evidence being within your knowledge...”

94. Vide a letter dated 17th July 2023, the Complainant acknowledged receipt of notice to appear dated 10th July 2023 and requested for the date to be rescheduled. The Chairperson ODM Disciplinary Committee responded to the request vide letter dated 18th July 2023 which rescheduled the Complainant’s disciplinary hearing to 25th July 2023 at 9.30am at a venue to be communicated in Nairobi County. The letter informs the Complainant of the strict timelines bearing in mind that the Committee received the decision to charge on 3rd July 2023.
95. The DC hearing proceeded on 25th July 2023 and the transcribed proceedings have been produced at pages 96 to 108 of the 1st Respondent’s Bundle of Documents. We have hereunder reproduced sections thereof that will inform our Judgment: -

“...Sen Ojienda: Chair we are ready to proceed, we have three counsels in Miss Awuor, Mr. Oruenjo and Dr. Miyawa. Chair I confirm that I have had to instruct these counsels out of abundance and I wish the record to reflect that this is an emergency. My counsel Nelson Havi has been rejected by the tribunal, by the committee you’ve rejected him and my counsel here, I am, my counsel here that has been assigned to me and we nevertheless ready to proceed with senator Eddy, Senator for Migori. Don’t use your phone Bana! Senator for Migori who is here and who is the complainant. We are ready, chair.

Prof. Ben Sihanya: Welcome Member Tom Ojienda and we agreed we are dealing withyou will have time to ask questions, yes so let start. Let’s go (silence the deep breath)

Sen Tom Ojienda: Chair is it; Chair may I raise an issue. Counsel who will raise the issue. Is the complaint the letter written? Is the complaint the letter written by Gad Aguko Advocate?

Sen Eddy Oketch: Are you asking me or asking the chair?

Prof. Ben Sihanya: can we have a response from the Secretary.

Tony Moturi: The complaint is as attached in the summons of 10th of July 2023.

Sen Ojienda: So what is the complaint? That’s why I am asking I want to know.....

Sen Eddy Oketch: That’s what I am raising, right?

Sen Ojienda: I’ll just ask the question again. Through the chair, is the letter dated 9th February 2023 (Silence) The one or there is another one? (Silence, Background consultation and pages turning) .

Prof Ben Sihanya: The basis of our being here is the letter of – the letter of July 10th 2023 of the Disciplinary committee that there was a complaint. The main basis of the complaint in the letter of 9th February 2023 but there are particulars or details which then is found in the entire bundle of documents which is based on section 14A etcetera and especially promoting ideology and interest or policies of another political party and Others be- being the main complaint but the rest are particulars and the evidentially material. We take this document or bundle of documents in totality. So can we proceed with the complaint?



(Silence)

Sen Eddy Oketch: Chair my name is Eddy Oketch Gicheru again. In the spirit of membership of ODM which ODM membership.....

Adv. Gad Aguko: Chair the document am referring to is there with the respondent. I can confirm that.

Prof. Ben Sihanya: Continue and we- continue

Adv. Gad Aguko: I'll move very fast. For instance, on 7th February 2023, the respondent committed his allegiance to the party leader of the UDA party, that is the United Democratic Alliance. Which is a rival party to ODM.

Sen Ojienda: Your.....

Prof. Ben Sihanya: Excuse me, Excuse me, Continue. We have agreed before that we hear everyone in silence.

Adv. Gad Aguko: On 17th of February, again while with the deputy party leader of the said UDA in the company of other members, the respondent uttered several words where he was echoing defiance to the ODM party and its leaders. The blatant defiance of ODM Party and its Leaders was not always about the law, he is quoted verbatim and the statement says as follows "The region should not be marginalized when its leaders can sort somethings out. Politics and development go hand in hand and that is why they are looking for goodwill from the current government." Now this is where I put the emphasis "It is not always about the law" so what the respondent was saying here he can flout the ODM constitution, the ODM rules, the *Political Parties Act* section 14A just because of whichever interest or whichever goodwill he was looking for from wherever and he can just defy the law. Also, it's necessary to point out when these statements were being said, this was on 17th February 2023. Here the respondent had actually been served with the initial complaint which was dated 9th and he had even written a response dated 15th of February 2023. So this is just another act of defiance even despite being notified by the party chat his association with the leaders of the United Democratic Alliance was in defiance of the Party position. He has also been associated with other rebellious members, Sorry to say, where a collection of six to seven members, they have been talking about a meeting which was scheduled for 20th March 2023, they collectively said that they were actually against demonstrations which were planned by the party. The Party leader had called for demonstrations which were supposed to begin on 20th March 2023 despite all the other members of the party agreeing to adhere with the position and members of both the senate and parliament having been whipped to attend, they said that they will blatantly not attend and that is disobeying the party position clearly- clearly fronting the ideologies of a rival political party which is in contravention of section 14A and that's all.

Prof Ben Sihanya: The party

Adv. Barbara Malowa: A few questions

Sen Ojienda: No no no! Chair, I must cross-examine the complainant first. You cant ask me a question. I have not presented; I have not done anything. You can't work that way.

Procedure if you start with the complainant, we ask them.....

Prof Ben Sihanya: Member Ojienda! Chair had ruled

Sen Ojienda: No



Prof Ben Sihanya: Listen to us

Sen Ojienda: I will not

Prof Ben Sihanya: Just listen, we had agreed on that and there was no contention

Sen Ojienda:...rules of the party, rules

Prof Ben Sihanya: Listen, all these are about the complaint, totality of the complaint. We go with that first.

Sen Ojienda: it is the...

Prof Ben Sihanya: And then when you are responding, you respond first

Sen Ojienda: No Chair

Prof Ben Sihanya: I have ruled. Member Tom Ojienda I have ruled and the party also is here and the Party adopts the complaint. That is why it was brought through the chair of the party.

Sen Ojienda: we must ask the complainant

Prof Ben Sihanya: you will Ask

Sen Ojienda: questions

Prof Ben Sihanya: you will ask!

Sen Ojienda: So the party can't.....

Prof Ben Sihanya: the party is going to ask questions then you will ask the complainant, that's the order.

Prof Sihanya: So we thank you for your own appearance and lastly is that you may, please make a minute-thirty seconds

Sen Ojienda: Chair,

Prof Sihanya: Talk to us about the process generally and if there are any documents that you want to avail after this, that is also ok within a space of two days.

Sen Ojienda: Chair, let me conclude

Prof Sihanya: Yes Please

Sen Ojienda: All your process is marred and all I was not served with the complaint, the decision to charge, notice to show cause letter, I have not been served with the show cause letter, I was denied the services of the advocate of my choice. I just want to set out this contrary to your own constitution. I have dealt with matters that were not part of the initial charge and responded to some of them. So that baba is even writing now which is ok, I have responded to them. Chair, I only pray that you supply us when finally you present to NEC all these documents. You supply us with copies of which then we can use them later in another processes but I remain a life member of ODM as I have said and I thank you because I know that you.....by the way, Chair was my classmate...(inaudible)

yes, thank you very much..."

96. We also highlight the DC Findings sections whereof have been reproduced



hereunder: -

“...DC Findings

The DC established that Hon Tom Ojienda:

1. Signed the ODM Code of Conduct and took oath to protect *the Constitution* of Kenya. Both documents have guidelines on how an ODM member should conduct themselves.
2. Said he understands what the laws demand of him.
3. Received the letter of invitation and evidence from the ODM Disciplinary Committee.
4. Did not deny or contradict the complainant’s evidence that
 - a. He made various statements against ODM’s position;
 - b. That he took MCAs to PS of Interior’s office;
 - c. In a number of occasions, he was in the company of those who made statements against ODM’s ideology, interests and policies, in his presence and publicly, but he never at all stood up to defend the Party against the pronouncements;
 - d. He did not support the ODM/AZIMIO demonstrations.
5. Admitted that:
 - a. He acknowledged that he had visited State House to seek development projects
and
 - b. He did not and does not support demonstrations.
6. Stated that he has no respect for any law or person he perceives to be a stumbling block to his access to whatever he wants.
7. Did not defend ODM constitution and Code of Conduct, ideology, interest and or policies as they were attacked in his presence.
8. Defied ODM’s party positions and decisions, interests, policies and/or ideology on various aspects and instead promoted and supported UDA/Kenya Kwanza’s positions, interests, policies and/or ideology;
9. By defying ODM party’s positions and decisions, he grossly violated Article 11(1)(e) of the ODM constitution and Section 14A (1) (e) of the *Political Parties Act*, 2011. This amounts to gross misconduct; and
10. By his conduct as evidence above, he is deemed to have resigned from the ODM party.

97. In a nutshell, we make the following observations from the record and evidence adduced in respect to the DC proceedings in totality as partly highlighted above;-



- i. Whereas Rule 10(2) of the DC Rules provide that the show cause letter shall state the alleged violation, offence or such other matter that the member is accused of, the NTSC issued to the Complainant fell short of this requirement. The 1st Respondent instead elected to annex the Complaint. In essence, the NTSC did not frame the offences appropriately together with the requisite particulars to enable the Complainant respond effectively. This was also in breach of Article 47(1) and 50(2)(j),(k) of the Constitution, Section 4(1) and 4(3)(a),(b) and (g) of FAA Act.
- ii. The 1st Respondent did not communicate with the Complainant after receiving his response to the NTSC.
- iii. The 1st Respondent's National Chairperson did not seek any further information and/or clarification from him in the course of the alleged further investigations in consonance with Rule 11(1)(c) of the DC Rules. We say so bearing in mind that the National Chairperson alludes to having undertaken further investigations which seem to have uncovered additional complaints not subject of the NTSC thus infringing on the Complainant's right to adduce and challenge evidence under Article 50(2)(k) of the Constitution.
- iii. Whereas Rule 17(3)(a) of the DC Rules make it mandatory for the summons to be accompanied by the documents referred to in Rule 11(2), the notice to appear did not enclose certain crucial documents including decision to charge and all evidence intended to be adduced. From a reading of the notice to appear' it expressly states that it has enclosed '...the complaint, notice to showcause and part of the evidence and entirety of the evidence being within yourknowledge...' The Complainant claimed that the document titled evidence initially served upon him not only had new complaints but also did not contain certain information relating to links. This was in breach of Article 47(1) and 50(2)(j),(k) of the Constitution, Section 4(1) and 4(3)(a),(b) and (g) of FAA Act..
- v. Whereas Article 50(2)(g), Section 4(5) FAA Act, Article 76(9) and Rule 21(1) of the DC Rules allows the Complainant to be represented by an Advocate of his choice, the Complainant was not allowed to have Mr. Nelson Havi Advocate to represent him before the DC. The reason for this was that Mr. Nelson Havi was not a member of the ODM party. There was a lot of discussion over the issue and the DC ruled that the Complainant is allowed to be accompanied by next friend or representative who is an ODM member, and each friend or member will need to prove that they have been appointed by the Complainant. This is notwithstanding the fact that the DC Rules that were provided to the Claimant were different from the Rules that the DC actually applied. The decision to disallow the Complainant to be represented by and advocate of his choice regardless of his membership of the 1st Respondent and the insistence on an appointment went against the said rules and regulations, as well as the rules of natural justice.
- vi. Whereas Rule 5(1) of the DC Rules is express that all proceedings before the DC shall be initiated by way of a complaint, there are certain proceedings that were held before the DC that fell outside the NTSC dated 13th February 2023. We further note from the DC Proceedings and Findings that whereas the DC Chairperson acknowledged that the main basis of the complaint is the letter of 9th February 2023, he stated that there are particulars or details found in the entire bundle of documents which is based on section 14A of the PPA and especially promoting ideology and interest or policies of another political party, and the DC confirmed that they would take the bundle of documents in totality. In the result, the hearing proceeded with the consideration of numerous issues that were not subject of the NTSC dated 13th February



2023 were considered. This was in breach of Article 47(1) and 50(2)(j),(k) of *the Constitution*, Section 4(1) and 4(3)(a),(b) and (g) of FAA Act. Examples of such issues are:

- a. Reference to events of 17th March, 2023, a date after the date of the Notice to Show Cause.
 - b. Reference to events of 16th September, 2022, which had not formed part of the Notice to Show Cause or its accompanying letter of Complaint,
 - c. Reference to attendance at demonstrations which had not formed part of the Notice to Show Cause or its accompanying letter of Complaint.
 - d. Reference to various statements that the Complainant allegedly made against ODM's position, and the allegations that in a number of occasions, he was in the company of those who made statements against ODM's ideology, interests and policies, in his presence and publicly, but he never at all stood up to defend the Party against the pronouncements
 - e. Allegations that the Complainant took MCAs to PS of Interior's office
- vii. The Complainant was not informed of the Decision and the reasons thereof and only came to learn of the DC findings and recommendations on 6th September 2023 during a press statement that was issued by the 1st Respondent to communicate the decision to the public. This was after the 1st Respondent's NEC had already considered the DC's Findings & Recommendations, and forwarded the resolution ratifying the same to the 2nd Respondent for implementation and/or execution. It is not until 11th September 2023 after the institution of the instant proceedings that the Complainant received formal communication of the decision from the 1st Respondent. We find it most unprocedural that DC did not communicate to the Complainant its decision on the same date yet the decision went to the root of affecting the Complainant's right under Article 38 of *the Constitution* of Kenya. Interestingly, the outcome was known by third parties even before he knew it. This was in breach of the Complainant's right under Article 47(2) as read together with Section 4(2) and 6 of the FAA Act.

98. We have further considered numerous judicial authorities touching on the observations we have made above. In PPDTc No. E003 of 2021 Sen. Mary Yiane & 4 Others vs. Jubilee Party & Anor, where we observed as follows:-

“...In another case of Republic vs. Chuka University ex-parte Kennedy Omondi Waringa & 16 Others [2018] eKLR, it was held that a tribunal or administrative body that makes its own rules must be prepared to adhere to those rules regulating the execution of its business and where it fails to do so, then the Court will not hesitate to intervene to declare the actions or failure to adhere to those rules ultra vires.

26. Based on the foregoing, we cannot see the party provisions that support the 1st Respondent's averments that the disciplinary process was in line with the party laws and procedures. In deed from our analysis, a disciplinary process would commence, as per the laws of the party, by way of a clearly laid out process that would leave no doubt of question in the mind of those engaged as to what was going on. Undoubtedly expulsion of a person from a party has serious implications, thus when an entity such as a political party outlines a clear process, more so the manner in which its membership will become aware



that such serious process has been initiated against them, then such process need be clearly initiated.

99. And in *Gathigia vs Kenyatta University Nairobi HCMA No. 1029/2007 [2008] KLR 587* the Court held:-

- i. if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed;
- ii. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue;
- iii. In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best.....;iv. The person accused must know the nature of the accusation made;
- v. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; [underlined parts our own]

100. In *Isaac Mwaura Maigua v Jubilee Party & 3 others [2021] eKLR (High Court Civil Appeal E248 of 2021)*, the High Court stated as follows:-

“ ... 48) It is a cardinal rule of natural justice that the right of a fair hearing can only be exercised, upon a party being granted more time to prepare his evidence to respond and controvert evidence that was produced during the disciplinary hearing 49) This court is satisfied that the appellant was not accorded a fair hearing notwithstanding the fact that the appellant did not apply for adjournment of the hearing of the disciplinary proceedings. The Tribunal therefore erred when it held that the appellant was granted a fair hearing. 50) It is apparent that on the face of it that the 1st respondent breached its Constitutional and its Disciplinary Regulations. It also goes without saying that the 1st respondent breached Articles 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*, 2015...”

101. In *PPDTC No. E004 of 2021 Godfrey Osotsi vs Amani National Congress*, which decision was upheld by the High Court in we stated:-

“...The Complainant is further aggrieved that his right to fair hearing was impaired by the Respondent who refused to afford him reasonable opportunity to access all records and information concerning the financial activities of the party so as to enable him to respond to the charges.....

In the case of *Dennis Edmond Apaa & 2 Others v Ethics and Anticorruption Commission & Another [2012] eKLR*, the court affirmed that the right to fair hearing includes the right to be informed in advance of the evidence upon which charges are based and to reasonable access to the same. The Tribunal is of the considered opinion that considering the gravity of the allegations, adequate provision and need not have been afforded the Complainant despite his failure to submit a written response within the short time allowed him. Indeed



we note from the record of the said disciplinary proceedings that another Member of the party was allowed time to present herself before the Committee at a future date...”

102. With respect to the question of failing to furnish the Complainant the decision and its reasoning in good time, in *Zahara Noor Ismail Duale v Orange Democratic Movement Party* [Complaint No 456 of 2017] para 11 the Tribunal held that: -

“... political parties are under an obligation to supply affected persons with reasons for their decisions, in order to assess whether these reasons are justifiable in an open and democratic society such as ours.”

103. Similarly in PPDTC No. E004 of 2021 *Godfrey Osotsi vs Amani National Congress*, we stated:-

‘...Whereas the Complainant alleges that the reasoned decision subject hereof was not availed to him despite having requested for the same, the Respondent argues that the subject decision was communicated to the Complainant vide the Respondent’s letter dated 19th March 2019. From the record, there seems to be no reasoned decision but a record of the purported disciplinary proceedings and a verdict dated 19th March 2019 signed by the Disciplinary Committee. The complainant avers that he only had sight of this record two months later when he was in the process of filing the instant proceedings. We agree with the Complainant that the right to be supplied with a decision under Sections 5(1)(d) and 6(1) of FAA Act is a substantive right intended to determine whether the decision was made in compliance with the law and to facilitate the right to review or appeal...”

104. In light of our foregoing observations and the principles enunciated in the case laws referred to above, we reach the inescapable conclusion that the 1st Respondent acted in breach of Article 47 and 50 of *the Constitution*, Section 4 and 6 of the *Fair Administrative Action Act*, Article 76 (3),(4),(5) and (6) of the ODM Party Constitution, and Rules 4, 13(2) and 20(2) of the DC Rules all which uphold the right to a fair hearing and fair administrative action.

Whether the decision by the National Executive Committee to adopt the recommendations of the Disciplinary Committee and seek the 2nd Respondent’s implementation thereof is lawful.

105. Having found that the DC processes were in breach of Article 47 and 50 of *the Constitution*, Section 4 and 6 of the *Fair Administrative Action Act*, Article 76 (3),(4),(5) and (6) of the ODM Party Constitution, and Rules 4, 13(2) and 20(2) of the DC Rules, we find this question moot.

106. Be that as it may, even if we were wrong in our determination, we have already observed that both deeming a member to have resigned and expulsion are actions that amount to cessation of membership with the party.

107. In that regard and in the case of *Elisha Odhiambo* (supra) we stated as follows:- “...We note that Article 12(1) of the ODM Constitution provides that one shall cease to a member of the Respondent “by a resolution passed by the National Executive Council and ratified by the National Governing Council.” It is not disputed that the NEC resolution was not ratified by the National Governing Council (NGC). Accordingly, the decision of NEC to adopt the recommendations of the DC and proceed to apply to the 2nd Respondent without subjecting the same to the NGC for ratification was in breach of Article 12 of the Respondent’s Constitution...”

108. We have no reason to depart from our above observations and we accordingly find that the decision of NEC to adopt the recommendations of the DC and proceed to apply to the 2nd Respondent to



remove the Complainant's name from the party register before ratification by the National Governing Council amounted to a breach of Article 12 of the Respondent's constitution.

Whether ODM Disciplinary Findings and Recommendations were arrived at in accordance with the law / Whether the Complainant's actions violated the ODM Party Laws.

109. Parties have made substantive submissions on this issue. We have already made a finding that the DC was improperly constituted and further that the disciplinary proceedings against the Complainant were conducted in breach of the law. Consequently, the same attracts an order for setting aside *ex debito justitiae*. Our finding under this issue is therefore inconsequential.
110. Further in any event, we are alive to the fact that a political party retains the right to discipline its member and we can only interfere with that right when due process is not complied with as was in this case. This does not mean that the party cannot institute fresh disciplinary proceedings against the Complainant if they so wish and provided there is legal compliance. If we elect to examine the legality of the DC decision in this judgment, we will have to scrutinize the evidence and get into the arena of the merits or otherwise of the charges. Should we do so, we may make certain statements that may prejudice or preclude the merits of the charges and the party's right to discipline the Complainant. We have accordingly elected not to make a finding under this issue.

What are the appropriate reliefs to grant?

111. Taking into consideration the totality of the facts and circumstances in this case and in light of the foregoing, we find that the Complaint is merited.
112. On the question of costs, it is well settled that costs ordinarily follow the event. This position is also codified in Regulation 43(2) of the PPDT Regulations. We find no good reason to depart from the same. Accordingly, the Complaint is allowed with costs to the Complainant, which costs shall be borne by the 1st Respondent. However, having dismissed the complaint against the 2nd Respondent, the Complainant is on the other hand condemned to pay costs incurred by the 2nd Respondent in defending these proceedings.
113. Upon consideration of the reliefs sought, we make the following orders;-
- i. An order be and is hereby issued declaring the disciplinary proceedings by the 1st Respondent conducted against the Complainant on 25th July, 2023 unprocedural, unlawful and in violation of Article 47 of *the Constitution* of Kenya, Section 14A of the *Political Parties Act*, Section 4 and 6 of the Fair Administrative Actions Act, Article 75(5) and (6) of the 1st Respondent's Constitution as read together with the 1st Respondent's Disciplinary Committee (Procedure) Rules and the rules of natural justice.
 - ii. A declaration be and is hereby issued that the Disciplinary Committee of the 1st Respondent convened on 25th July, 2023 was not properly constituted.
 - iii. A Declaration be and is hereby issued that the Decision of the Respondent's Disciplinary Committee and the National Executive Committee to deem the Complainant as having resigned was incapable of being implemented for having been made without ratification of the National Governing Council and as such a contravention of Article 12(1)(b) and Article 75(6) of the Orange Democratic Movement Party's Constitution
 - iv. A permanent order for injunction be and is hereby issued restraining the Registrar of Political Parties from removing the name of the Complainant from the register of members of the



Orange Democratic Party on the basis of the illegal disciplinary proceedings conducted on 25th July, 2023.

- v. A permanent order for injunction be and is hereby issued restraining the 1st Respondent from interfering with, de-whipping or in any other manner whatsoever attempting to remove the name of the Complainant from the register of the members of the Orange Democratic Party on the basis of the illegal disciplinary proceedings conducted on 25th July, 2023.
- vi. Save for costs for the 2nd Respondent which shall be borne by the Complainant, the 1st Respondent shall bear the Complainant's costs of these proceedings.

The Dissenting Opinion of Abdirahman Adan (Member.

- 114. I have been notified of the decision of the majority. With profound respect, I am, however, not in one with it and the final Orders they have proposed.
- 115. I have considered all the pleadings, evidence on record, and submissions of the parties. For reasons that shall shortly become apparent, I would, on my part, summarize them as follows.
- 116. The ODM Party has made a decision to deem the Complainant to have resigned from the party pursuant to Section 14(A) of the *Political Parties Act*. The procedural and substantive propriety of this decision has been challenged by the Complainant before this Tribunal. In accordance with the said Section 14(A), the ODM Party applied to the Office of the Registrar of Political Parties moving it to remove the name of the Complainant from its register. The Registrar is yet to determine the application by the ODM Party due to the conservatory orders that were issued by this Tribunal in this and related matters.
- 117. The Complainant has put a case before this Tribunal to find against the legality of the decision by the ODM Party for varying reasons. The ODM Party has refuted these assertions, and it holds that it acted within the law and justifiably. On its part, the Registrar of Political Parties states that the Complainant has no complaint against it as it is yet to determine the application by ODM due to the conservatory orders issued in this matter.
- 118. On my part, and this is the reason I depart from the majority, I do not find that this Tribunal has the requisite jurisdiction, at this stage of the emanating dispute, to handle the Complaint. Since I am not convinced of this Tribunal's jurisdiction in the instant complaint, and since any appeal from the pending decision by the Registrar would lie to this Tribunal, I do not venture to comment on any aspect of the legality or otherwise of the subject ODM decision.

What is the impugned decision complained about?

- 119. In my mind, the preliminary step to resolve this Complaint is to inquire as to what exactly is the impugned decision complained about. To do so, I have perused the parties' pleadings and documents supplied and come to the conclusions hereunder.
- 120. At paragraphs 33 & 34 of the Complaint dated 11th September 2023, the Complainant states as follows:
 - “ 33. The Complainant is heavily aggrieved by the decision of the 1st Respondent to remove his name from the register of the members of the 1st Respondent under the auspices of Section 14A through a fundamentally flawed process.
 - 34. It is against this background that the Complainant has sought the intervention of this Honourable Tribunal.”



121. In the 1st Respondent’s Disciplinary Committee Report titled ‘ODM/DCHN/0013/2023: Hon. Tom Ojienda...’ and dated 3rd August 2023 the Committee establishes that “Hon Tom Ojienda ...8. Defied ODM party positions and decisions ... 9. By defying... he grossly violated... and Section 14A (1)(e) of the *Political Parties Act*, 2011... 10. By his conduct as evidence above, he is deemed to have resigned from the ODM Party.” The Report recommends to the NEC that “1. [The Complainant], by dint of his conduct, be deemed to have resigned from the ODM Party...”
122. The 1st Respondent’s letter to the Complainant dated 11th September 2023 and referenced ODM/2023/187/009 by Oduor Ong’wen states, inter alia, that “the NEC had deliberated and adopted the report of the Disciplinary Committee where you were deemed to have resigned from the Party.” Attached to this letter, are excerpts of the referenced NEC minutes. In these minutes, it is indicated that the NEC recommended that the Complainant, among others, “by dint of their conduct be deemed to have resigned from the Party.”
123. The 1st Respondent’s letter to the 2nd Respondent dated 7th September 2023 and referenced ODM/2023/181/009 by Oduor Ong’wen states, inter alia, that “the purpose of writing this letter is... to communicate to you the resolution of NEC adopting the recommendations of the Disciplinary Committee finding the five members to be deemed to have resigned from the Party within the meaning of Section 14A of the *Political Parties Act*.”
124. The 2nd Respondent, through her letter dated 11th September 2023 and referenced RPP/FRP/021 Vol. VIII (39), acknowledges receipt of the above referenced letter from the 1st Respondent and states, inter alia, that “Section 14(4)(A) of the *Political Parties Act*, 2011 (PPA) requires the Registrar to determine compliance of the referenced party process with Section 14A (2) of the PPA before updating the party register.”
125. Persuaded firmly by these documentations and the pleadings, I have no doubt that the impugned decision is the 1st Respondent’s decision to deem the Complainant to have resigned from the ODM Party pursuant to the dictates of Section 14 (A) of the *Political Parties Act*.
126. I am unable to see any correspondence or document from the 1st Respondent to the Complainant, indicating that the 1st Respondent did expel the Complainant from the Party pursuant to Section 14 (B) of the *Political Parties Act*. Any such conclusion or insinuation would be a wrong conclusion of fact in my considered opinion.

Section 14 (A) of the *Political Parties Act*.

127. The next step would be to ask ourselves what are the statutory provisions in Section 14 (A) of the *Political Parties Act*. For this, I find it necessary to reproduce the entire section hereunder:

“ 14A. When a member may be deemed to have resigned from a political party

- (1) A person who, while being a member of a political party shall be deemed to have resigned from that party if that person—
 - a. forms another political party;
 - b. joins in the formation of another political party;
 - c. joins another political party;
 - d. in any way or manner, publicly advocates for the formation of another political party; or



- e. promotes the ideology, interests or policies of another political party.
- (2) A political party shall, before deeming a member to have resigned under subsection (1)—
- a. notify the member that he or she has been deemed to have resigned from the political party and that the political party intends to remove his or her name from the list of its members; and
 - b. afford the member a fair opportunity to be heard in accordance with the procedure set out in *the constitution* of the political party.
3. A political party which deems a member to have resigned from the political party shall notify the Registrar in writing of the member’s resignation and request the Registrar to remove that person’s name from the register of members of that political party.
 4. Upon the notification under subsection (3), the Registry may, where the Registrar is satisfied that the political party has complied with the procedure under subsection (2), remove the member’s name from the register of members of the political party within seven days of the notification and notify the member in writing that he or she has ceased to be a member of that political party.
 5. Where the Registrar is not satisfied in accordance with subsection (4), the Registrar shall refer the matter back to the concerned political party for reconsideration.
 6. Subsection (1) (c), (d) and (e) shall not apply to a member of a political party which enters or proposes to enter into a merger or a coalition with another political party.”

Has the Registrar of Political Parties made a decision under Section 14 (A) (4) & (5) of the *Political Parties Act*?

128. Naturally, it behooves upon this Honourable Tribunal to next consider whether the Registrar of Political Parties has made a decision on the 1st Respondent’s request to remove the Complainant from the register pursuant to the dictates of Section 14(A).
129. Fortunately, the 2nd Respondent has answered this question in its Replying Affidavit dated 19th September 2023 by Joy Onyango. The Deponent attached the 2nd Respondent’s letter evenly dated and referenced RPP/FRP/021 Vol VIII (13) addressed to the 1st Respondent that informs the Party that the office has received its documentation but is stopped by the conservatory orders issued by this Tribunal from deliberating further on the matter. Thus, I agree with Joy Onyango when she avers at paragraph 10 of her Affidavit that “the 2nd Respondent has therefore not made the determination required under Section 14A (4) of the *Political Parties Act*, 2011 as to affect the rights of the Applicant/Complainant.”



What is the import of the situation where the 2nd Respondent has yet to make this determination?

130. Having considered this state of affairs, I am of the opinion that since the 2nd Respondent is yet to make its determination under Section 14(A) (4) & (5) of the *Political Parties Act*, there are two major implications that significantly affect these proceedings.

131. The first is that this Honourable Tribunal's jurisdiction over the issue is ousted. The PPDT does not enjoy a broad and limitless judicial review jurisdiction. The jurisdiction of the PPDT is limited to matters provided under Section 40 of the *Political Parties Act*, to wit:

“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 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.

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.

2. A coalition agreement shall provide for internal dispute resolution mechanisms.”

132. In my considered opinion, two fundamental issues flow from Section 40(1)(f) of the PPA. One, there is an express statutory dictate providing an appellate jurisdiction over the Registrar's decisions to the PPDT. Two, the Registrar's decisions under the PPA enjoy statutory protection to the extent that they can only be appealed from to the PPDT and not reviewed by the PPDT. Both of these issues import legislative protection of decisions ringfenced by the Act to be in the Registrar's province from any immature interference by this Honourable Tribunal. In other words, I am effectively persuaded that where the *Political Parties Act* donates decisional power to the Registrar of Political Parties, this Honourable Tribunal cannot usurp that power until a proper appeal to a crystallized decision has been procedurally lodged before us.

133. In statutory interpretation, the specific always outweighs the general. Section 14A (3) to (5) of the *Political Parties Act* outweighs Section 40 (1) (b) in that the Complainant cannot assert that since “disputes between a member of a political party and the political party” fall under the general jurisdictional remit of the PPDT, then they are free to present a dispute regarding the ODM Party's



decision that is pending scrutiny and determination by the Registrar under Section 14A (4) & (5). On this, I would associate myself with the dicta by the Court of Appeal in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR at para. 44, to wit:

“We hasten to add that a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...”

134. Besides, the Doctrine of Ripeness informs us that absent a determination by the Registrar under either Section 14A (4) or (5) of the *Political Parties Act*, the decision by ODM remains abstract without any substantive import. Without ripeness, the subject complaint lacks justiciability. In my opinion, it would be wise under the Doctrine of Deference to hold this dispute in abeyance and await the Registrar’s determination.
135. In the premise, I would hold that since the 2nd Respondent has yet to make its decision on the 1st Respondent’s application under Section 14 (A) of the PPA, this Honourable Tribunal lacks any jurisdiction to consider the present Complaint.
136. The second implication, which I note is a close cousin of the first, relates to the doctrinal principle of exhaustion. This doctrinal principle, if I understand it correctly, provides that if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. Indeed, Justice Mrima in *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR held that the doctrine of exhaustion acts as a bar to a court’s jurisdiction.
137. In this instant complaint, the Registrar is yet to determine the 1st Respondent’s motion under Section 14 (A) of the PPA. That process ought to be foremost exhausted before the appellate jurisdiction of this Honourable Tribunal or the judicial review jurisdiction of the appropriate court of law can be triggered. I would also, for this doctrinal principle, hold that the Tribunal lacks jurisdiction to entertain the Complaint.
138. It is now settled that a Court cannot “arrogate to itself jurisdiction through the craft of interpretation.” The Court’s jurisdiction is donated by either *the Constitution* or Statute or both. And, a Court’s jurisdiction is not a matter of procedural technicality but one that goes to the root of the Courts’ adjudication process. If a Court lacks jurisdiction to entertain a matter, it downs its tools. And I would so down my tools and dissent.
139. Before I pen off, I must comment on what I firmly believe to be a jurisdictional misadventure by the majority. The majority dedicates only a single paragraph to this question. In it, the majority frames it as a question of whether the Complaint is premature and they proceed to note that “the instant case has not been framed as an appeal against any decision of the [Registrar] under Section 40(1)(f) of the PPA.” First, of course, it cannot ‘be framed’ as an appeal because the Registrar is yet to make its decision due to our conservatory orders. Secondly, the majority falls into the trap that the Court of Appeal has warned about in *Orange Democratic Movement v Yusuf Ali* Supra. Jurisdiction is not a matter of ‘framing’ or draftsmanship. It flows from the law and the substance of the complaint. The reality is, and I had hoped that the majority would have interrogated this, that Section 14A (2) of the PPA dictates what a political party must do before deeming a member to have resigned, i.e. (i) notify the member of its intention; and, (ii) afford the said member a fair opportunity to be heard in accordance with the procedure set out in the party’s constitution. A statutory responsibility is thereafter placed on



the Registrar under Section 14A (4) and (5) of the PPA to assess whether the party has complied with the procedure under Section 14A (2) of the PPA. This express donation of power to the Registrar is not one for confusion. The Registrar does not conduct a clerical task under Section 14A (4) and (5); rather, its statutory duty therein is quasi-judicial. What the majority have done is to usurp this mandate, and it is all the more precarious for this Tribunal to assert jurisdiction at this stage when any appeal from the Registrar's decision would lie to this Tribunal.

140. I would have ordered that (a) the Complaint be dismissed for lack of jurisdiction on account of the pending determination by the Registrar with no order as to costs; (b) the conservatory orders in this matter be vacated; (c) the 2nd Respondent be at liberty to determine the subject motion unless otherwise lawfully stopped; (d) parties be at liberty to thereafter apply. However, as the majority hold otherwise, the final Orders of the Honourable Tribunal shall be as proposed by the majority.

Final Orders of the Tribunal

141. Pursuant to the provisions of Section 39 and 41(3A) of the PPA as read together with Regulation 29 of the PPDT (Procedure) Regulations, 2017, the Decision of this Tribunal is determined by the Majority Opinion. Accordingly, upon consideration of the reliefs sought and the Majority Opinion, we make the following Final Orders;-

- i. An order be and is hereby issued declaring the disciplinary proceedings by the 1st Respondent conducted against the Complainant on 25th July, 2023 unprocedural, unlawful and in violation of Article 47 of *the Constitution* of Kenya, Section 14A of the *Political Parties Act*, Section 4 and 6 of the Fair Administrative Actions Act, Article 75(5) and (6) of the 1st Respondent's Constitution as read together with the 1st Respondent's Disciplinary Committee (Procedure) Rules and the rules of natural justice.
- ii. A declaration be and is hereby issued that the Disciplinary Committee of the 1st Respondent convened on 25th July, 2023 was not properly constituted and thus the decision of the National Executive Committee adopting the Recommendations of the said Committee is invalid and has no effect in law.
- iii. A Declaration be and is hereby issued that the Decision of the Respondent's Disciplinary Committee and the National Executive Committee to deem the Complainant as having resigned was incapable of being implemented for having been made without ratification of the National Governing Council and as such a contravention of Article 12(1)(b) and Article 75(6) of the Orange Democratic Movement Party's Constitution
- iv. A permanent order for injunction be and is hereby issued restraining the Registrar of Political Parties from removing the name of the Complainant from the register of members of the Orange Democratic Party on the basis of the illegal disciplinary proceedings conducted on 25th July, 2023.
- v. A permanent order for injunction be and is hereby issued restraining the 1st Respondent from interfering with, de-whipping or in any other manner whatsoever attempting to remove the name of the Complainant from the register of the members of the Orange Democratic Party on the basis of the illegal disciplinary proceedings conducted on 25th July, 2023.
- vi. Save for costs for the 2nd Respondent which shall be borne by the Complainant, the 1st Respondent shall bear the Complainant's costs of these proceedings.

142. Orders accordingly.



DATED AND DELIVERED AT NAIROBI (VIRTUALLY) ON THIS 29TH DAY OF NOVEMBER 2023.

HON. DESMA NUNGO HSC - CHAIRPERSON

HON. STEPHEN MUSAU - MEMBER

HON. MUZNA JIN - MEMBER

HON. ABDIRAHMAN ADAN ABDIKADIR - MEMBER

