



**Omondi v Orange Democratic Movement Party; Office of the Registrar  
of Political Parties (Interested Party) (Complaint E010 (KSM) of 2023)  
[2023] KEPPDT 1352 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEPPDT 1352 (KLR)

**REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL  
COMPLAINT E010 (KSM) OF 2023  
D. NUNGO, CHAIR, S MUSAU, MM YUSUF JIN & AA ABDIKADIR, MEMBERS  
NOVEMBER 29, 2023**

**BETWEEN**

**CAROLI OMONDI ..... COMPLAINANT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT PARTY ..... RESPONDENT**

**AND**

**OFFICE OF THE REGISTRAR OF POLITICAL PARTIES INTERESTED PARTY**

**JUDGMENT**

1. The Complainant is a fully paid up and life member of the Orange Democratic Movement (ODM) Party, the Respondent, and was elected in the 2022 General Elections as Member of Parliament (MP), Suba South Constituency, under the Respondent's party ticket.
2. On 6<sup>th</sup> September 2023, the Respondent issued a presser to the public that its National Executive Committee (NEC) had passed a resolution to adopt the recommendations of the Respondent's Disciplinary Committee (DC) to deem the Complainant to have resigned from the party having violated Section 14A of the *Political Parties Act* 2011 (the PPA), Article 11 of the Respondent's Constitution and the Respondent's Code of Conduct. This was as a consequence of complaints that had been filed against him that led to the disciplinary proceedings before the DC.
3. Aggrieved by the Respondent's acts, omissions, and the DC decision, the Complainant filed the instant Complaint challenging the DC decision, the procedure, and the mode of arrival at the said decision, on several grounds, as set out in the Complaint dated 11<sup>th</sup> September 2023 and all the pleadings and documents in support thereof. The Complainant accordingly seeks the following reliefs from the Tribunal:



- i. An order declaring the ODM Disciplinary Committee proceedings conducted by the Respondent as illegal and a nullity for offending the rules of natural justice and denying the Complainant an opportunity to be heard.
- ii. An order declaring the decision of the Respondent's Disciplinary Committee and the National Executive Committee to expel the Complainant as a member of the ODM Party incurably defective, incompetent, premature and incapable of being implemented for having being made without ratification of the National Governing Council.
- iii. An order declaring the proceedings and decision of the Respondent's Disciplinary Committee against the Complainant on the 24<sup>th</sup> of July 2023 as procedurally ultra vires and a violation of Articles 47 & 48 of *the Constitution* of Kenya 2010 and also Article 75(5) and (6) of the ODM constitution.
- iv. An order declaring that the Notices and proceedings presided over by the chairperson of the Respondent's Disciplinary Committee Prof. Ben Sihanya, are illegal as they were conducted by a person not qualified to hold the position of chairperson and are null and void ab initio.
- v. An order declaring that the Disciplinary Committee meeting convened on 24<sup>th</sup> July, 2023 and presided over by Prof. Ben Sihanya was not properly constituted and as such the National Executive Committee cannot adopt the Recommendations of the Disciplinary Committee which are unlawful and have no effect in law.
- vi. An order declaring the Disciplinary Committee meeting held on 24<sup>th</sup> July, 2023 infringed Article 47 and 50 of *the Constitution* of Kenya and failed to grant the Complainant a fair hearing and as such its proceedings are unlawful and devoid of any legal effect and the decision of the Disciplinary Committee to be struck out.
- vii. An order declaring that the Complainant has been discriminated against and his rights as provided under Article 27 of *the Constitution* of Kenya to the extent that he has been singled out for voting against the Finance Bill 2023. viii. An order declaring that the Complainant pursuant to the provision of Article 38, 117, and 122 of *the Constitution* of Kenya and as a representative of the people of Suba South had the individual right to vote for any motion in Parliament as he deems fit and that by voting in support of thr Finance Bill 2023 the Complainant did not violate any law.
- ix. An order declaring that the Respondent's failure to issue and serve the Complainant with the following documents including a) decision to charge, b) witness statements and names of witnesses, c) Disciplinary Committee proceedings, e) the Disciplinary Committee decision and f) the National Executive Committee minutes is a violation of Article 35 of *the Constitution* of Kenya.
- x. An order declaring the Complainant has not violated the provision of s.14A of the *Political Parties Act*, the Respondent's constitution or Rules or any other provision of law.
- ix. A Mandatory Injunction restraining the Respondent and their interested Party either by themselves, their employees, servants, agents, assigns and or any person whatsoever acting on their behalf and or under their instructions from removing the name of the Complainant from the register of the members of the Orange Democratic Party.
- ix. Any other order this Honorable Tribunal may deem fit for the end of Justice. xiii. The Cost of this suit be borne by the Respondent.



4. Together with the Complaint, the Complainant filed a Notice of Motion Application dated 11<sup>th</sup> September 2023 (the application), filed under certificate of urgency, and seeking, inter-alia: -
  - i. Conservatory orders staying the implementation of the decision of the Respondent's to expel and remove the name of the Complainant as a member of the ODM Party pending the hearing and determination of the application inter partes.
  - ii. Temporary injunction restraining the Respondent and Interested Party either by themselves, their employees, servants, agents, assigns and or any person whatsoever acting on their behalf and or under their instructions from removing the name of the Complainant from the register of the members of the Orange Democratic Party pending inter partes hearing and determination of this Application and Complaint filed herewith.
  - iii. Pending hearing and determination of this Application and Complaint filed herewith an order of temporary injunction be issued restraining the Respondent and Interested Party either by themselves, their employees, servants, agents, assigns and or any person whatsoever acting on their behalf and or under their instructions from removing the Complainant from any parliamentary committee that he presently sits or serves in parliament.
  - iv. Temporary injunction restraining the Respondent and Interested Party either by themselves, their employees, servants, agents, assigns and or any person whatsoever acting on their behalf and or under their instructions from removing the Complainant from any parliamentary committee that he presently sits or serves in parliament pending the inter partes hearing and determination of the Complaint.
5. The said application filed under certificate of urgency was placed before the Tribunal for directions, and upon consideration of the application ex-parte, the Tribunal issued orders to the following effect; -
  - i. That the Notice of Motion application dated 11<sup>th</sup> 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 11<sup>th</sup> September 2023 be served upon the Respondent and Interested Party within two (2) days of the date hereof.
  - iii. That the Respondent and the Interested Party 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 11<sup>th</sup> September 2023 be listed for mention on 26<sup>th</sup> September 2023 at 2.30pm to check on compliance and/or for further directions.
  - v. That in the interim and pending hearing and determination of this Application this Honourable Tribunal hereby issues interim conservatory orders staying the implementation of the decision of the Respondent to expel the name of Hon. Caroli Omondi as a member of the ODM party.
  - v. That in the interim and pending hearing and determination of this Application this Honourable Tribunal hereby issues a temporary order for injunction restraining the Respondent and the Interested Party either by themselves, their employees, servants, agents, assigns and or any person whatsoever acting on their behalf and or under their instructions from taking any measures and or removing the name of Hon. Caroli Omondi from the register of the members of the Orange Democratic Party.
  - v. That in the interim and pending hearing and determination of this Application this Honourable Tribunal hereby issues a temporary order for injunction restraining the Respondent either by itself, their employees, servants, agents, assigns and or any person



whatsoever acting on their instruction from removing Hon. Caroli Omondi from any parliamentary committee that he presently sits or serves in parliament.

6. On the 26<sup>th</sup> September 2023 when the application came up for hearing as scheduled, Counsel for the Respondent indicated that they would not be opposing the application and instead proposed that directions be issued on the hearing of the substantive Complaint in the interest of time. In rejoinder to the Respondent's proposal, the Interested Party stated that they shall remain neutral and will not be aggrieved by either position taken by the tribunal in consideration of the proposal.

Accordingly, the application was allowed with the concurrence of all parties.

7. In consideration of the proposal by all parties hereto to dispose of the Complaint by relying on pleadings on record and filing written submissions, the Tribunal directed parties to file written submissions on the Complaint and the matter was listed for mention on 9<sup>th</sup> October 2023 to confirm compliance. The Complaint was accordingly mentioned on 9<sup>th</sup> October 2023 when directions were given for hearing of the Complaint via viva voce evidence on the 31<sup>st</sup> October 2023. However, on the 31<sup>st</sup> October 2023 when the matter came up for hearing, the Complainant's Counsel requested for an adjournment which was allowed by the Tribunal and the matter was stood over for hearing on the 10<sup>th</sup> November, 2023.
8. During the hearing of the Complaint on 10<sup>th</sup> November, 2023, the Complainant was represented by Mr. Odera Advocate, the Respondent was represented by Mr. Alakonya Advocate, and the Interested Party was represented by Mr. Wakoko Advocate.

#### **The Complaint and Submissions.**

9. The Complaint is supported by various documents filed on behalf of the Complainant including the Complainant's Supporting and Further Affidavit, Written Submissions, List and Bundle of Documents on record, amongst other pleadings.
10. In crux, the Complainant avers that he held an official meeting with the President of the Republic of Kenya, H.E. Dr. William Samoei Ruto, C.G.H., and the Deputy President, H.E. Rigathi Gachagua, EGH at Statehouse in Nairobi, on 7<sup>th</sup> February 2023, in his capacity as MP Suba Constituency. This meeting was a follow up to a previous meeting that had been held between the President and various leaders from Nyanza region.
11. Pursuant to the meeting, the Complainant was served with the Notice to Show Cause (NTSC) letter dated 13<sup>th</sup> February 2023 asking him why he should not be subjected to disciplinary processes for his purported dalliance with party competitors for allegedly violating Section 14A of the *Political Parties Act* 2011, Article 11 of the Party Constitution and the Party's Code of conduct.
12. Attached to the Notice to Show Cause was another typed paper title "EVIDENCE". The said EVIDENCE had several irregularities which the Complainant noticed such as:
  - a. It did not bear any date to enable one ascertain when it was authored nor did it have any acknowledgement stamp by ODM
  - b. It did not bear the name of the author or state whether the author was a member of ODM as Hon. Mbadi had stated in the Show Cause letter.
  - c. It did not state or provide directly any act or omission that could be attributed to the Complainant save for only mentioning the visit to the Heat of State on 7<sup>th</sup> February, 2023.
  - d. There was no signature of any mark on the said document



- e. The alleged evidence merely alluded to generalities and ambiguous allegations not supported by any fact or evidence to prove the same.
13. The Complainant responded to the NTSC vide his email dated 15<sup>th</sup> February 2023. He did not receive any further communication or response to his email from the Respondent and also the Respondent did not supply him with the further and better particulars that he had requested for and he thought that the matter was put to rest.
14. Later on, the Complainant avers that around the 15<sup>th</sup> of February, 2023 he was removed from all ODM members' social media platforms including the ODM whatsapp group forum for communication, and he was never invited to any ODM parliamentary meetings after that, and never received any communication relating to any affairs of the Respondent.
15. On 15<sup>th</sup> June 2023, the Complainant received another NTSC letter dated 15<sup>th</sup> June 2023 raising a new complaint against him in relation to events in the Chamber on 14<sup>th</sup> June, 2023 as relates to voting on the Finance Bill 2023 wherein it was alleged that the Complainant had not followed the ODM and Azimio One Kenya Coalition position. He responded to the second NTSC through his letter dated 16<sup>th</sup> June 2023 denying the allegations made against him and requested Hon. Mwashushe Mwaruma to supply him with better particulars relating to the allegations of his "conduct in the Chamber." The Complainant's letter was delivered and receipt acknowledged, but no particulars were supplied to the Complainant as per his request.
16. Be that as it may, on 12<sup>th</sup> July, 2023 the Complainant was issued with a Notice to Appear for disciplinary hearing dated 10<sup>th</sup> July 2023, calling on him to attend a hearing before the DC on 18<sup>th</sup> July 2023. He responded to the notice stating that the notice was too short and that the hearing date was not convenient, and requested that the same be rescheduled. In response, the Respondent's DC Chairperson wrote a letter dated 18<sup>th</sup> July 2023 advising the Complainant that the case had been rescheduled for hearing on 24<sup>th</sup> July 2023.
17. It is the Complainant's case that on 24<sup>th</sup> July 2023 when the case came up for hearing, his lawyers were present and tried engaging with the DC but they were denied audience before the DC. In the result, the hearing proceeded in his absence and also in the absence of his lawyers. Thereafter, it is not until the 6<sup>th</sup> September 2023 when he learnt from the Press Statement issued by the Respondent that the Respondent's NEC had passed a resolution to adopt the recommendations of the DC to deem him to have resigned from the party.
18. The Complainant further avers that at the time of filing the Complaint and further to writing to the Respondent on 7<sup>th</sup> September, 2023, the Complainant was never served with the DC's Decision to Charge; the witness statements and names of witnesses; the disciplinary committee proceedings; the disciplinary decision; and the National Executive Committee Minutes.
19. The Complainant raised various issues for determination by this Tribunal, including the following:-
- i. Whether the Complainant acted in contravention of Section 14A (1)(c) of the *Political Parties Act* by meeting the President of the Republic of Kenya at State House, Nairobi or voting for the Second reading in favor of the Finance Bill, 2023?
  - ii. Whether the ODM in expelling the Complainant and not taking any action on other Members of the party including elected Governors, Senators, Members of Parliament, ECT has acted in discriminatory manner which is contrary to Article 27 of *the Constitution* of Kenya?



- iii. Whether the Respondent in failing to forward the mandatory required decision to charge to the Complainant is contrary to Rule 11(2) of the Disciplinary Committee Rules, 2022?
  - iv. Whether the Disciplinary Committee infringed on the Complainant the right to be represented by an Advocate of his choice at the Hearing of the Disciplinary committee contrary to Article 50(2) (g) of *the Constitution* and Rule 21(1) of the Disciplinary Committee Rules, 2022?
  - v. Whether the ODM Disciplinary committee has blatantly violated the principles of natural justice and denied the Complainant the right to be heard thereby infringing on Articles 47 and 59 of *the Constitution* of Kenya as read with Section 14A(2)(a) of the *Political Parties Act* and other provisions of applicable law?
  - vi. Whether purported decision by the NEC to expel Hon. Caroli from ODM is incurably defective, incompetent, premature and incapable of being implemented as it has not been ratified by the ODM-National Governing Council?
  - vii. Whether the ODM Disciplinary Committee was improperly constituted and was presided over by an unqualified person as the Chairperson who had been barred by Court from holding any political office as was held in the case of Ben Murumbi Sihanya & another vs Ethics and Anti-Corruption Commission; Registrar of Political Parties & another (Interested Parties) [2021] eKLR?
  - viii. Whether the Complainant is entitled to the prayers sought in the Complaint including costs?
20. On the first issue the Complainant relied on Article 4(2), 32, 33, 117, 122(1), 130(1) and 140 of *the Constitution* of Kenya, 2010 and Article 7(J) of the ODM constitution. The Complainant while relying on Section 60 of the *Evidence Act* averred that it's a matter of judicial notice that the 2022 Presidential Elections were conclusively determined and that the matter is now moot for the reason that the Supreme Court pronounced its Judgment on 5<sup>th</sup> September, 2023, which led to the swearing in of the current President, His Excellency Dr. William Ruto as the President of the Republic of Kenya.
21. The Complainant submitted that no evidence had been given by the Respondent to prove that he had attended a meeting convened by the UDA on the 7<sup>th</sup> of February, 2023 and 17<sup>th</sup> February, 2023 as alleged by the Respondent. The Complainant further submitted that not even the Respondent's annexure TM-8B was able to prove the same and that the allegation by the Respondent was unsubstantiated. The Complainant further submitted that "Maandamano" protests that were called by the Respondent were not mandatory for all party members and that no provisions under the ODM constitution or Code of Conduct expressly states that every member of the Respondent must participate in demonstrations and that in fact, Clauses 21 a, b & f prohibit "party members from engaging in violence, intimidation of any other person and vilification of others..." The Complainant posited that the decision not to participate in demonstrations was in conformity to his freedom of expression under Article 33, stating that as a matter of judicial notice, the demonstrations in Kenya always results in violence, loss of life, destruction of property and bodily injuries and the Complainant was not advocating for demonstrations but instead he was advocating for constructive dialogue pursuant to the provisions of Articles 7(1)(a), 2(c) & (f) of the ODM constitution.
22. With regard to the voting on the Finance Bill, 2023, the Complainant stated that the communique by the Respondent on its position on the Finance Bill, 2023, was specifically to the media and that because he was not a member of the media he did not receive the media briefing of 30<sup>th</sup> May, 2023. He



- also stated that he only voted on the Bill at its Second reading to have it as amended, but he never voted on it at the Third reading when the “actual legislation work is done”.
23. The Complainant also invited this tribunal to interrogate annexure TM-6 of the Respondent’s list of documents, which contained a list of 4 ODM Members who voted to support the Bill and 24 Members who were absent during the voting as submitted by the Secretary of ODM. It is the Complainant’s submission that no disciplinary action was taken by the Respondent against the members who voted in support of the Finance Bill by being absent from the Chamber and that the punishment itself was discriminatory since two members, namely, Hon. Passaris and Hon. Adan were punished to pay a fine only, while the Complainant was punished with expulsion from the party. The Complainant relied on the case of *Amani National Congress Party vs Godfrey Osotsi & Another* [2021]eKLR.
  24. On the second issue, the Complainant submitted that it was in the public domain that many members of the ODM party did not attend or participate in the demonstrations. The Complainant went forward to give examples of Hon. Hassan Joho and Hon. Junet who never participated in the demonstrations. He reiterated the violent nature of demonstrations in Kenya and how he was not in support of the proposed demonstrations but instead, that he was in support of constructive dialogue. The Complainant also submitted that no disciplinary action was ever taken against the other members for meeting the President and submitted that it was “pretentious for the Respondent to charge the Complainant with disciplinary proceedings for meeting the Head of State or his Deputy at their office.” The Complainant faulted the Respondent for discrimination and further posited that the Respondent never took any disciplinary action against the absentee members who did not vote for the Bill and that the Respondent only targeted the 4 members who voted yes and prayed that this tribunal finds the Respondent’s acts as discriminatory.
  25. On the third issue, the Complainant referred this Tribunal to the case of *Mary Yiane & 4 Others vs Jubilee Party & another* [2021] eKLR where the Complainant had not been furnished with the charge sheet and other documents provided by the Party Rules that were supposed to be furnished. The Complainant also relied on the case of *Republic vs Chuka University ex-parte Kennedy Omondi Waringa & 16 others* [2018] eKLR. While relying on these cases, the Complainant stated that by failure of the Respondent to issue a decision to charge contrary to Rules 11(2), (3), (4) and 17(3) of the DC rules, the disciplinary proceedings instituted against the Complainant are “fatally defective” and are null and void ab initio.
  26. On the fourth issue, the Complainant submitted that with the DC being aware of the Complainant’s absence and still denying his Advocate audience, the DC was in violation of the rules of natural justice as enshrined in Article 50(2)(g) of *the Constitution* of Kenya as read with Article 73(3), (5) and (9) of the ODM constitution and Rule 21(1) of the DC Rules.
  27. On the fifth issue, the Complainant, while reiterating that the DC violated the principles of natural justice and infringed on the Complainant’s rights under Article 47 and 50 of *the Constitution* of Kenya, 2010 as read with Section 14A(2)(a) of the *Political Parties Act*, referred this tribunal to the finding in the case of *Mary Yiane & 4 Others vs Jubilee Party & Another* [2021] eKLR where the Tribunal held that the expulsion of the Complainant from the party was a nullity and of no consequence in law as the Respondent violated Article 47 and 50 of *the Constitution* of Kenya.
  28. On the sixth issue, the Complainant yet again cited the provisions of Article 73(6) of the ODM constitution as read with Rule 26(7) of the DC Rules which provides for the mandatory ratification of the decision of the DC by two-thirds of the National Governing Council. The Complainant submitted that the Respondent admitted that the decision to expel the Complainant had not been adopted by the National Governing Council (NGC) and relied of the Respondent’s exhibit TM-11 which confirms



that the decision was made by the National Executive Committee and afterwards shared with the Interested Party for implementation without being ratified by the NGC. The Complainant also cited the provisions of Article 12(1)(b) of the ODM constitution which provides that “a member of the party shall cease to be a member; by a resolution of the National Executive Council and ratified by the National Governing Council.” As a consequence, the Complainant prayed that this Tribunal declares that the expulsion of the Complainant is a nullity on the ground of not following due process.

The Complainant also cited the case of Omega Enterprises (K) Limited vs Kenya Touris Development Corporation Limited & 2 Ors [1998] eKLR.

29. On the seventh issue whether the ODM Disciplinary Committee was improperly constituted and was presided over by an unqualified person who has been barred by the Court from holding any political office, the Complainant relied on the Court decision in Ben Murumbi Sihanya & Another vs. Ethics And Anti-Corruption Commission; Registrar of Political Parties & Another (Interested Parties) [2021] eKLR, which found that Prof. Ben Sihanya, the Chairperson of the DC, was barred from holding a political office while he was still a public officer, particularly, a lecturer at the University of Nairobi. According to the Complainant, it was improper for the DC Chairperson to sit in the DC hearing, and in the absence of the Chairperson, the DC faced a quorum hitch that rendered the DC improperly constituted.

### **The Respondent’s Response and Submissions.**

30. In response and opposition to the Complaint, the Respondent filed a Statement of Response, Witness Statement by Anthony Moturi signed on 5<sup>th</sup> October, 2023, List & Bundle of Documents, and Written Submissions, amongst other pleadings and documents that form part of the record before us.
31. It was the Respondent’s case that the Complainant being a member of the Respondent, and having subscribed to the ODM party’s constitution, party primary and nomination rules and the Code of conduct, had a duty to unequivocally adhere to party programs and policies and that he was bound to “promote and practice intellectual honesty in all his dealings” and “to avoid sycophancy and patronage”.
32. The Respondent further presented this Tribunal with the particulars of the Complainant’s misconduct as follows;
- i. On 7<sup>th</sup> February, 2023 the complainant attended a meeting with both the party leader and deputy party leader of the United Democratic Alliance party at statehouse Nairobi.
  - ii. On 17<sup>th</sup> March, 2023 the Complainant made public utterances dissuading members of the ODM party and its supporters under the supporters of the Azimio La Umoja One Kenya coalition party from participating in the nationwide peaceful protests and pickets called by the leadership of the ODM party.
  - iii. On 14<sup>th</sup> June, 2023 the Complainant voted for the passage of the Finance Bill 2023.
  - iv. The Complainant has subsequent to the foregoing made utterances in public rallies and in the media vowing to support and pursue the ‘development’ from the leadership of the UDA party in a manner that reasonably suggests sycophancy and patronage contrary to the ODM party code of conduct.
33. The Respondent went to further state that pursuant to Rule 6 of the ODM Party Disciplinary Committee (Practice and Procedure) Rules 2022, which allows for a person to make complaints to the party, Hon. Eddy Gicheru Oketch, via a letter dated 9<sup>th</sup> February, 2023, through his advocates, filed a complaint against the Complainant for purposes of having the Complainant being deemed to have





resigned from the party and his name struck out of the party member's register pursuant to Section 14A of the *Political Parties Act* for having violated the ODM Constitution.

34. Following the Complaint, the Respondent went on to issue a Notice to Show Cause (NTSC) letter dated 13<sup>th</sup> February, 2023 calling on the Complainant to answer to the Complaint. The NTSC enclosed a letter dated 9<sup>th</sup> February, 2023, that provided the particulars of the Complainant's offence for which disciplinary action was proposed.
35. The Respondent further posits that the complainant acknowledged receipt of the cause letter via email on the 17<sup>th</sup> February, 2023 and that via the said email, the Complainant acknowledged meeting with the UDA Party Leader. It is also the Respondent's averment that in the said letter, the Complainant went on to further "rudely dismiss the NTSC letter" and "purport to advise the party on rules of procedure".
36. It is further contended that the Chairperson of the ODM party requested for more particulars to the complainant as the evidence previously served on the Complainant was not sufficient to sustain a charge against him.
37. The Respondent went on to further introduce a new set of facts as follows;
  - i. The Respondent attached a YouTube video link. The video was presented by the Respondent to buttress its allegation that the Complainant together with other members of the ODM party held a meeting with other members of the UDA party leaders where the Respondent alleges they agreed to cooperate and work together in furtherance of the objectives of the UDA party that are in direct competition with the ODM party.
  - ii. That on a Sunday; which the Respondent emphasizes was not a working day, the Complainant allegedly while in the company of six other MPs met the Hon. Rigathi Gachagua whereupon they agreed to "cooperate" in furtherance of the UDA government's interests. The respondent corroborated this allegation using the statement of Hon. Tom Ojienda where he stated that "these are followup meetings to the one we had at State Lodge Kisumu.....politics and development go hand in hand and that is why we are looking for good will from the current government.  
It is not always about the law...."
  - iii. That on the 17<sup>th</sup> of March, 2023, the Complainant while in the company of six other MPs addressed the Press at Parliament Buildings and urged Kenyans and party members to keep off the planned public protests and processions that were scheduled for 20<sup>th</sup> March, 2023. The Respondent further cited the Complainant's words from a YouTube video recording, the link which was copied in the Respondent's response, thus "We want to categorically state that we will not be participating in the planned demonstrations. We equally urge our constituents to do likewise..."
38. The Respondent further referred this tribunal to Section 12(1) of the ODM Party constitution which provides that;
  - "A member of the Party shall cease to be such member:
    - (c) By accepting an office, subscribing to, or promoting activities of another Political party; or such other organization whose aim and objectives are in cooperation with or in conflict with those of ODM:"



39. The Respondent went on to further state that upon the chairperson being satisfied with the evidence provided by the Secretariat he proceeded to refer the matter to the DC after considering that he had a case to answer. It is also the Respondent's allegation that the Chairperson having considered the Complainant's response, concluded that the Complainant had not absolved himself and referred his matter to the DC vide the National Chairperson's letter dated 3<sup>rd</sup> July, 2023.
40. On the 10<sup>th</sup> July, 2023, the Chairperson of the DC, through a Notice to appear, notified the Complainant of the party's decision to charge him and issued summons to him to appear before it in person to defend himself. The Respondent states that the Notice to Appear set out the grounds of the disciplinary proceedings and required the Respondent to avail himself for hearing on the 18<sup>th</sup> of July, 2023 at 12.30PM at Chungwa House Nairobi on the charge of voting for the Finance Bill and on 19<sup>th</sup> July, 2023 at 12.45PM at Chungwa House on the charge of supporting policies of a rival political party amongst others. The Respondent states that the Chairman of DC enclosed in both Notices a copy of the complaint, the notice to show cause, a document titled Evidence-Hon. Caroli Omondi, and all the responses filed by the complainants to the notices to show cause. The notices also provided for the consequence of non-attendance by the Complainant.
41. The Respondent confirmed that the Complainant had sought an adjournment of the disciplinary hearing to the third week of August and that the DC Chairman responded on the 18<sup>th</sup> of July, 2023 informing the Complainant about the timelines within which matters should be decided by the DC. The Complainant was therefore given a fresh hearing date for 24<sup>th</sup> July, 2023 at 11.30 a.m.
42. The matter came up for hearing on the 24<sup>th</sup> of July, 2023 at 11.30 a.m. but the Complainant did not arrive at the venue on time. The hearing commenced at 1.17p.m and at about 1.35pm a group of 5 lawyers led by Nelson Havi stormed the hearing claiming to have instructions from the Complainant. This was despite the fact that the Complainant had communicated to the Respondent his inability to appoint Counsel via his letter of 23<sup>rd</sup> July, 2023.
43. The Respondent states that the DC gave the advocates audience in the absence of the Complainant, and they sought for a consolidation of the cases and an adjournment as well. The DC thereafter proceeded to give a ruling on the applications made.
44. The Respondent takes issue with the Complainant's absence stating that the notices to appear served on the Complainant had clearly stated the consequences of nonattendance and his advocates who allegedly appeared on his behalf "had nothing to show for it" and this forced the DC to proceed ex-parte taking into consideration the strict timelines within which the proceedings were to be concluded. The DC then considered the evidence adduced before it and the Complainant's response to the NTSC and found that the Complainant be deemed to have resigned from ODM and that the Respondent pursues the procedure of removing him from the ODM membership.
45. Following the hearing the ODM DC went on to present its report on the complaints against the Complainant to the NEC on 6<sup>th</sup> September, 2023, whereupon the NEC adopted the recommendations of the DC. The Complainant was afterwards informed of the said decision and provided with a copy of the decision on 11<sup>th</sup> September, 2023 upon applying for the same. The Respondent avers that it also served upon the Complainant all the summons, correspondences and communications from the disciplinary committee on Whatsapp and on Registered Post.
46. In response to the grounds or allegations of the Complaint which form the crux of the Complaint, the Respondent pleaded as follows;



- i. On the first ground, that the decision of the NEC to expel the Complainant was incurably defective, the Respondent pleaded that the allegation by the Complainant was premised on misapprehension by the Complainant of the National Governing Council's powers and that the NGC's failure to ratify a decision does not "ipso facto mean that the decision is unlawful" and that the such a decision would remain lawful if done with reasonable time.
- ii. On the second ground, that the Respondent violated the principles of natural justice and the Complainant's right to be heard, the Respondent, referred this Tribunal to the provisions of Part II, Rules 5 and 11 of the Disciplinary Committee (Practice and Procedure) Rules, 2022 and contended that the Complainant was sufficiently provided with the information needed letters dated 7<sup>th</sup> February, 2023 and 15<sup>th</sup> June, 2023 which the Respondent pleaded were attached to the cause letters. The Chairperson of ODM requested the National Secretariat under Rule 11(1) (c) of the Disciplinary Committee (Practice and Procedure) Rules, 2022, to furnish the Complainant with more information as to the Complaint to "assist in arriving at a decision", information which the Respondent stated was served on the Complainant via a letter dated 10<sup>th</sup> July, 2023 by the Disciplinary Committee, on 12<sup>th</sup> July, 2023. In the aforementioned letter, the Respondent pleaded that the aforesaid letter dated 10<sup>th</sup> July, 2023, the contained details of the complaints against him and the decision to charge. The Respondent contends that even after 12 days from the 12<sup>th</sup> of July, 2023 to the 24<sup>th</sup> of July, 2023 (when the disciplinary hearing was scheduled for an took place) the Complainant made no attempts at defending his matter or even putting in a rebuttal letter to the misconduct he was blamed of in the document titled "EVIDENCE". The Respondent faulted the Complainant for complacency in defending his matter.
- iii. On the ground that the Complainant was not denied his right to fair hearing, the Respondent's brought about the idea of the decision to charge being a mere "formal authorization" by the National chairperson of the commencement of disciplinary proceedings and that as a result it was immaterial for the Complainant's use in defending his matter. Additionally, citing rule 8 which provides for the Role of the Chairperson under the Disciplinary Committee (Practice and Procedure) Rules, 2022, the Respondent argued that the National chairperson is an "office" mandated to oversee the disciplinary process, and is distinct from the person that is Hon. John Mbadi. The Respondent further posited that when the National chairperson makes a decision to have a person charged it does not mean that the complaint emanated from him since his responsibility is to review complaints received and then make the decision to charge. The Respondent also highlighted the distinct and separate nature of the NEC from the National Chairperson in disciplinary proceedings.
- iv. In response to the issue of the infringement of the Complainant's right to representation, the respondent referred to a letter dated 22<sup>nd</sup> July, 2023 allegedly written by the Complainant where by a paragraph cited by the Respondent in its response stated that "I have equally not been able to identify and instruct a suitable Counsel to represent me due to the short notice of your summons....."

The Respondent therefore, based on the above, accused the Complainant of misleading the Tribunal and added that the Complainant's advocates were led by Nelson Havi and not Tom Ojienda and from his pleading in his Complaint the issue whether the Complainant appointed the mentioned advocates in in question.
- v. On the allegation that the Complainant was subjected to trial by ambush, the Respondent in its response commented that contrary to the Complainant's allegation, the Complainant was



served with all the documents he needed to rely on in the disciplinary hearing on the 24<sup>th</sup> of July, 2023 by the Respondent. vi. On the allegation by the Complainant that the Committee had not been properly constituted for the reason of Prof. Ben Sihanya being a part of it despite not holding a political office, the Respondent while referring to the case of Ben Murumbi Sihanya & another vs Ethics and Anti-Corruption Commission; Registrar of Political Parties & another (Interested Parties) [2021] eKLR, argued that the court’s decision in the case did not declare Prof. Sihanya prohibited from holding an office at the 1<sup>st</sup> Respondent’s offices that is, the Ethics and Anti-corruption Commission and the decision having been appealed against, the DC was properly constituted. The Respondent also contended that the Complainant willingly submitted to the jurisdiction of the DC and never raised a preliminary objection of the same and that raising the issue of the “improper” constitution of the committee was an “afterthought” and “of no legal consequence”.

- vii. On the allegation by the Complainant that he was not aware of the party position on the Finance Bill 2023, the Respondent averred that on the contrary, the Complainant was “fully aware of the nationwide protests with regards to the planned nationwide protests in opposition of the...Bill” and that the Respondent had instructed its members not to participate in the same. That communication on the ODM party’s stand was readily accessible to the Complainant by means such as press briefings and through the party Whips and not Whatsapp groups only and as such the Complainant should be put to strict proof.
47. The Respondent contends that the Complainant’s alleged freedom as an MP to participate in debate on any issues in Parliament including that of the Finance Bill, 2023, is one subject to limitation under Article 24 of *the Constitution* of Kenya, 2010 as read with the ODM Constitution and Section 14A of the *Political parties Act*, DC Rules and the ODM Code of Conduct. The Respondent’s contention was that the Complainant’s right to associate with persons of his choice was only limited to the extent that he cannot purport to ride on the good will of the members of his party but at the same time promote the ideologies and interests of another political party.
48. In response to the Complainant’s allegation that he did not violate Section 14A (1) (e) of the *Political Parties Act*, it was the Respondent’s defence that the allegation that the complainant promoted ideologies interests or policies of another political party “is a function of subjective political perceptions and assessments that only a political party ... is best placed to make”.
49. On the ground or allegation that the Respondent discriminated against the Complainant, it was the Respondent’s response that “it is not true”. The Respondent went on to further state that unlike the other leaders of the ODM party’s meetings with the President and Deputy President, the Complainant’s interactions were not limited to his official capacity for the reasons that the Complainant “repeatedly and openly supported....and advanced the interests .....of the Kenya Kwanza regime”. The Respondent went on to give an example alleging that the Complainant “urged the citizenry to shun protests against the high costs of living”.
50. It was the Respondent’s final averment that that the Complainant was lawfully deemed to have resigned from the ODM Party and is liable for expulsion as recommended by the NEC.
51. The Respondent raised three issues for determination by this Tribunal that is;
- i. Whether the Complainant by conduct is deemed to have resigned from the Party;
  - ii. Whether the disciplinary hearing was conducted according to the Law and Constitution of the Party;
  - iii. Whether the Complainant was granted a fair hearing;



- iv. Whether the Claimant should be awarded the reliefs sought.
52. On the first issue, the Respondent gave an account to the alleged misconduct by the Complainant of attending meeting of the UDA party, making public utterances dissuading members of the ODM party and its supporters from participating in the ODM initiated nationwide protests and voting for the passage of the Finance Bill, 2023 contrary to the Respondent's position as well as vowing to support the 'development' of the leadership of the UDA party in a manner that suggests sycophancy contrary to the ODM party code of conduct all on various dates. The Respondent while relying on the case of *Thuranira and 4 others vs Attorney General and 2 Ors ; Registrar of Political Parties and 3 Ors Interested Parties* (Petition E043,E057 and E109 of 2022) KEHC 482 (KLR) referred to the holding of the court where it was stated, it is not unconstitutional for a member of a political party to be deemed to have resigned so long as procedures for their expulsion are followed leading to their ultimate removal from the list of party members.
53. The Respondent also cited the provisions of Section 14A (1)(e) of the *Political Parties Act*, 2011 arguing that the provision provides that a member is deemed to have resigned from a political party if he "...promoted the ideologies, interests or policies of another political party..." The Respondent further submitted that the Complainant pursuant to Section 18(j) of the Party' Code of Conduct did not make any attempts at communicating his political differences with the party through constructive dialogue but instead "chose to blatantly go against party directives and out rightly supported the stands of the UDA party."
54. It was therefore the Respondent's submission that from the Complainant's conduct and the complaints issued against him on the 9<sup>th</sup> of February, 2023 and 15<sup>th</sup> June, 2023, the Complainant was therefore deemed to have resigned from the party thus calling for the commencement of disciplinary proceedings to concretize his resignation from the party and removal of his name from the register of members.
55. On the second issue, the Respondent relied on the case of *Republic vs Chaiman Advocates Disciplinary Committee and Another ex-parte Jafferson MS Nyagesoa* [2005] eKLR and submitted that the DC was right to proceed ex parte since the Complainant failed to appear despite notices and summons being given to him on the hearing date and even subsequent extensions being granted to him. The Respondent further cited the case of *Sani vs JSC (Cause 7of 2019)[2022] KEELRC 4000(KLR)* where it was held that unless the Complainant can demonstrate any procedural prejudice suffered due to the failure of any notices or summons issued on him, which the Complainant allegedly had not, then they still hold water and are proper. This was further to their submission that the Complainant was issued with proper notices to show cause on both the 9<sup>th</sup> of February, 2023 and 15<sup>th</sup> June, 2023 that according to the Respondent, disclosed the full details of the complaint and the Summons of 10<sup>th</sup> July, 2023 disclosed all the requisite details of the hearing in accordance with Rules 10 and 17 of the Disciplinary rules. The Respondent further submitted that the Summons met all the requirements under Section 14A (2) (a) of the *Political Parties Act*, 2011.
56. On the third issue, the Respondent recounted the facts of the case brought out in its Response and submitted that the procedure deeming the Complainant to have resigned and leading to his expulsion from the ODM party was procedurally fair and just.
57. The Respondent submitted as follows to support its arguments under the third issue on fair hearing;
- i. That pursuant to the provisions of Rules 5 to 11 of the DC Rules, the complaints against the Complainant were well spelt out in the letters dated 7<sup>th</sup> February, 2023 and 15<sup>th</sup> June, 2023 that were attached to the cause letters.



- ii. That the requisite documents and information were served upon the Complainant via the letter dated 10<sup>th</sup> July, 2023 on the 12<sup>th</sup> of July, 2023. This was as per the ODM chairperson’s request to the National Secretariat pursuant to Rule 11(1) of the disciplinary rules. Information which the Respondent submitted was all captured in the documents titled ‘EVIDENCE’ which according to the Respondent had internet links showing all occasions the Complainant engages in misconduct as well as the Hansard of the National Assembly of 14<sup>th</sup> June, 2023 that contained particulars of how he voted.
  - iii. That 12 days from the time the above information was served on the Complainant on 12<sup>th</sup> July, 2023 by the committee to the 24<sup>th</sup> of July, 2023 when the hearing took place, the Complainant neither rebutted to all the charges against him in the letters titled ‘EVIDENCE’ nor was he keen to attend the matter virtually for the hearing which took less than an hour.
  - iv. That the Complainant had more than enough time to defend his matter before the hearing on 24<sup>th</sup> July, 2023 and that he was properly informed by the chairperson of the timelines that the committee was limited in order to reach a decision pursuant to the provisions of Rule 19(3) of the Disciplinary Committee Practice and Procedure Rules, 2022 which as cited by the Respondent provides that “All proceedings before the committee in respect of a specific complaint shall be heard and determined not later than 30 days of the Committee receiving the Decision of Charge from the National Chairperson.”
  - v. That with regards to *the constitution* of the committee, the case of Ben Sihanya has an active appeal and as such, until the hearing and determination of the Appeal, the Respondent’s Disciplinary committee was properly constituted. The Respondent also submitted that the court in the Ben Sihanya case, did not declare the Petitioner was forthwith prohibited from holding an office in the Respondent’s political tribunal. As a result, while citing the case of Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] eKLR, the Respondent submitted himself to the committee’s jurisdiction as was constituted and never raised an objection as to the committee’s jurisdiction from 24<sup>th</sup> July, 2023 to when the decision was delivered.
  - v. That the Complainant was served with two Notices to appear dated 10<sup>th</sup> July, 2023 marked TM 8A and TM 8B in the Replying Affidavit on Anthony Moturi. vii. That failure by the NGC to ratify a decision does not ipso facto mean that the decision is unlawful. The Respondent submitted that the decision only becomes unlawful if the ratifying authority failed to ratify and that so long as the ratifying authority has not declined to ratify the decision, it remains lawful.
58. On the fourth issue, the Respondent submitted that the Complainant had not sufficiently demonstrated that their Complaint was merited and as such, prayed that this tribunal dismisses the claim with costs to the Respondent.

### **The Interested Party’s Response and Submissions.**

- 59. In response to the Complaint, the Interested Party filed its Replying Affidavit on record sworn by Joy Onyango on 19<sup>th</sup> September, 2023. The Interested Party did not file any submissions but relied on tier Replying Affidavit.
- 60. It is the Interested Party’s submission that the Complainant has not been aggrieved by the Interested Party. The Interested Party received a letter from the Respondent detailing the resolutions of the Respondent’s NEC meeting and requesting for the removal of the Complainant from the Respondent’s register of members in accordance with Section 14A of the PPA.



61. In line with the principles of fair administrative action, the Interested Party requested for documents in support of the disciplinary process that had been conducted by the DC against the Complainant. The same were furnished to the Interested Party and at the material time, the Interested Party appreciated the conservatory orders that this Tribunal issued. Accordingly, the Interested Party has not made any determination affecting the rights of the Complainant under Section 14A(4) of the PPA.

**Issues for Analysis and Determination.**

62. The tribunal has identified the following issues for determination.
- i. Whether there has been established a cause of action against the Interested Party / 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 Interested Party'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 Interested Party / Whether the Complaint is premature before the Tribunal.**

63. The Interested Party has submitted that they had not made a determination against the Complainant to warrant any cause of action against them. After the Interested Party received the Respondent's request to remove the Complainant's name from the register of the Respondent in accordance with the Respondent's NEC resolution, the Interested Party 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 Respondent's resolution and recommendation to deem the Complainant as having resigned. We have evaluated the pleadings and evidence and we note that neither the Complainant nor the Respondent has controverted this position.
64. 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 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent. Attendance to tribunal proceedings consumes considerable time and resources bearing in mind that the 2<sup>nd</sup> Respondent designates a legal officer to process the 2<sup>nd</sup> Respondent's responses and to appear in all tribunal hearings. It is unnecessary to subject the 2<sup>nd</sup> Respondent to the burden



and expense of defending disputes that are filed before the tribunal even where such disputes do not directly challenge the 2<sup>nd</sup> Respondent's actions and/or omissions..."

65. And in the case of PPDT Kisumu Complaint No. E007 of 2023 Prof. Tom Ojienda SC vs. Orange Democratic Movement Party & Another, in maintaining the above position, we in addition observed as follows:-

"...We remain of the considered view that where there is no specific complaint against the 2<sup>nd</sup> Respondent, it is unfair to cause them to appear in proceedings before the Tribunal. Ordinarily, notice of tribunal decisions can be issued to the 2<sup>nd</sup> 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).

66. Further in the case of Elisha Ochieng Odhiambo (supra) we also stated thus:-

"...Turning to the question whether the Complaint is premature for the reason that the Interested Party 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 Respondent's internal dispute resolution processes and not an appeal against any decision of the Interested Party. The 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 Interested Party 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 Interested Party 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 Interested Party 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 Interested Party under Section 40(1)(f) and be subject of the legal and procedural limitations of such an appellate process. The Respondent may in fact only participate in the appeal as an interested party and not a substantive party yet it is the Respondent's decision that aggrieves the Complainant. ..."

67. Noting that the facts in the Elisha Ochieng Odhiambo (supra) are similar to the facts and circumstances in the instant Complaint, we similarly 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.**

68. Rival arguments were made by parties as to whether the Complainant was expelled from the party or deemed to have resigned from the party. According to the Complainant's pleadings and submissions,





the Complainant was expelled from the party. The Respondent on the other hand maintains that the Complainant was not expelled from the party but was deemed to have resigned. The Interested Party informed the tribunal that the resolution that was forwarded to it deemed the Complainant to have resigned from the Respondent political party.

69. We start by making it clear that even though 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 are distinct.

70. 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...”



71. 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
72. In the instant case, we note that the first NTSC dated 13<sup>th</sup> February 2023 was premised on a complaint where the complainant invited the 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. On the other hand, with respect to the NTSC dated 15<sup>th</sup> June 2023, the DC Finding and Recommendation was that the Complainant be expelled from the party.
- In essence, the DC made the two recommendations in the two cases.
73. However, the two 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 resolution that the Interested Party alluded to.
- Accordingly, we find that the Complainant was deemed to have resigned from the ODM Party.
74. It has been submitted before us that since the Complaint was grounded on the pleading that the Complainant was expelled as opposed to deemed to have resigned, then the Complaint cannot stand and the same ought to be dismissed.
75. 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 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.
76. 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, it would be unjust to dismiss the Complaint that challenges the entirety of the DC proceedings and seeks prayers for nullification thereof on the sole basis that it made reference to an order for expulsion as opposed to ‘deemed to have resigned.’

### **Whether the Disciplinary Committee was legally constituted?**

77. 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.

78. The 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, that the matter is sub judice in light of the case pending before the Court of Appeal, and further that the issue could not be raised in these proceedings as it was not raised before the DC.
79. We have considered the Respondent's argument that the matter cannot be raised since it did not come up before the DC and we opine that the fact that the same was not raised before the DC does not bar the Complainant from raising it in these proceedings. In any event, the record reflects that both the Complainant and his Counsel did not participate substantively in the DC proceedings. We also do not agree with the Complainant that the mere fact that there is a pending appeal renders the matter before us sub judice. The Complainant has presented to the Tribunal a finding that is binding on the Tribunal and we find it difficult to assume the same in the absence of any contrary orders from the Court of Appeal.
80. 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 9<sup>th</sup> 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: -

34. It follows therefore the 1<sup>st</sup> 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...
37. 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*.
38. Following the above exegies, and in answer to issues (i) and (ii) above the court finds that the action by the Respondent in giving the 1<sup>st</sup> 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...”

81. 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.
82. 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.
83. 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.
84. 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?**

85. Article 47 of *the Constitution* provides on 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)
86. 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.
87. 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.
88. 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.
89. 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...”
90. 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.



91. 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.”

92. In *Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moiwo 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...”

93. 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. Is it 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 laws that the Respondent committed to observe and uphold.
94. We note that the disciplinary process against the Complainant was initiated vide a Notice to Show Cause (NTSC) dated 13<sup>th</sup> 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 but has facilitated to send mixed signals and cause unnecessary anxiety within the party membership and supporters...’
95. We note that the NTSC 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.



96. According to the Respondent, the NTSC was sent together with a letter from the law firm of Aguko, Osman & Company Advocates dated 9<sup>th</sup> February 2023 addressed to the Secretary General, ODM and the Chairperson ODM Disciplinary Committee. This is what the Respondent identifies as the complaint and it states;-

‘...on 7<sup>th</sup> 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...’

97. In essence, the single complaint in the letter dated 9<sup>th</sup> February 2023 relates to the allegation that the Complainant was on 7<sup>th</sup> 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 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

98. We have seen the Complainant’s response to the NTSC vide his email dated 15<sup>th</sup> February 2023. On 15<sup>th</sup> June 2023, the Complainant was served with another NTSC letter dated 15<sup>th</sup> June 2023 under the authorship of Sen. Johnes Mwashushe Mwaruma, the National Vice Chairperson, which NTSC states;-

‘...The party is in receipt of a complaint regarding your conduct in the chamber of the National Assembly on 14<sup>th</sup> June 2023 during the voting on the Finance Bill, 2023 whose particulars are well within your knowledge.

Your said conduct was a betrayal of the trust bestowed upon you by the party and more importantly by the people who elected you and in open violation of the sated position of the party and the Azimio Coalition on the matter.





99. Just like the earlier NTSC dated 13<sup>th</sup> February 2023, the NTSC dated 15<sup>th</sup> June 2023 was general and did not specify the complaint. The NTSC was instead allegedly served together with complaint dated 15<sup>th</sup> June 2023 signed by the ODM Secretary General, Hon. Edwin Sifuna. In the letter, Hon Sifuna presented a complaint to the effect that various party members defied the party position on the Finance Bill on 14<sup>th</sup> June 2023 at the National Assembly and called for disciplinary measures against them.
100. We have had sight of Complainant’s letter dated 16<sup>th</sup> June 2023 in response to the NTSC dated 15<sup>th</sup> June 2023 where he denied the allegations made against him and requested Hon. Mwashushe Mwaruma to supply him with better particulars relating to the allegations of his “conduct in the Chamber.”
101. There is no evidence on record to demonstrate that the Respondent responded to the Complainant’s request for particulars. Instead, we have seen a letter from the National Chairperson of the Respondent dated 3<sup>rd</sup> July 2023 addressed to Prof. Ben Sihanya, Chairperson, ODM DC. It is referenced ‘Transmittal of Disciplinary Matters for Action Against Hon. Prof Tom Ojienda, Hon. Gideon Ochanda, Hon. Caroli Omondi, Hon. Elisha Odhiambo, Hon. Paul Abuor, Hon. Mark Nyamita and Hon. Felix Odiwuor’. It reads:-

‘...The Office of the National Chairperson received Complaints against seven (7) members of Parliament alleging violation of the party Constitution and Code of Conduct.

On 9<sup>th</sup> February 2023 my office received a complaint from Sen Eddy Oketch dated of even date. Show cause letters were issued to the affected members and responses received. Despite a prima facie case being established against the seven (7) members, there was no sufficient information to sustain a charge. Guided by Rule 11(1)(c) of the ODM Disciplinary Committee (Practice and Procedure) Rules 2022, I instructed the National Secretariat to collect more evidence that will sustain a charge or charges.

Having reviewed the complaint, their individual responses to the show cause letters and the additional evidence gathered, I am persuaded that the said members have not absolved themselves of the complaints made against them.

Therefore, pursuant to Rule 11(1)(d) of the Party’s Disciplinary Committee (Practice and Procedure ) Ryules 2022, I hereby refer their cases to you to commit to disciplinary hearing. I have enclosed herewith the Complaint, the notice to show cause letters, the responses to the show cause letters and the additional evidence for your review and necessary action...”

102. From the evidence before us, the next communication that the Complainant received from the Respondent was the letter dated 10<sup>th</sup> July 2023 authored by Prof Ben Sihanya, Chairperson, DC, 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 19<sup>th</sup> 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...”

- 103. Vide a letter dated 17<sup>th</sup> July 2023, the Complainant acknowledged receipt of notice to appear dated 10<sup>th</sup> July 2023 and requested for the date to be rescheduled. The Chairperson of the DC responded to the request vide letter dated 18<sup>th</sup> July 2023 which rescheduled the Complainant’s disciplinary hearing to 24<sup>th</sup> July 2023 at 9.30am at a venue to be communicated in Nairobi County. The letter informed the Complainant of the strict timelines bearing in mind that the DC received the decision to charge on 3<sup>rd</sup> July 2023.
- 104. On 24<sup>th</sup> July 2023 when the matter came up, the transcribed proceedings at page 126 to 131 of the Respondent’s Bundle of Documents demonstrate that Mr. Nelson Havi Advocate appeared before the DC together with other lawyers to represent the Complainant. The relevant excerpt of the proceedings is produced below for ease of reference; -

“(A group walks in and take seats)

Nelson Havi: Mr. Chair and members of the tribunal, my name is Nelson Havi. I lead a team of five of us who are appearing on behalf of Caroli Omondi.

Prof Sihanya: yeah. Because of personal touch, we prefer that complainant, respondents as well as their representatives introduce themselves. It gives it that personal IDRMM touch.

Nelson Havi: we will start from this side

Adv Vera Lucy: I am Linda-Chebet

Sen Ojienda: Prof Ojienda

(inaudible introduction of the fifth advocate)

Prof Sihanya: there are usually many capacities in which one can call themselves a representative according to ODM constitution and rules. One is an advocate and there is also



the issue of next friend et cetera et cetera. So it would be very good to know what capacity one is representing another.

Nelson Havi: we are here in the capacity of advocates.

Prof Sihanya: advocates eh?

Nelson Havi: Yes

Prof Sihanya: ok, so complainants and the party, what do you say? .....

Nelson Havi: our representation on that [articular matter was, wjen we are appearing as advocates. We need not be members of ODM...(inaudible)

Prof Sihanya: ok, lastly there was an issue which can touch on facts but I don't want to touch on facts so I will leave it on the legal claim that both you and Senator Ojienda has said- let me call you advocates. Advocate is a more neutral title. Advocate Ojienda and Advocate Havi I think I have also stated something to the effect that you came in to execute instructions of adjournment and you know that's also another issue that can go into some facts which unless we establish representation we cannot go into because there are issues to be dealt with and if adjournment is being sought, were papers received – were the letters received, we don't want to go into that unless you want to answer that. That the relevant letters received by you but don't need to go into that. So those are some of the issues you can see the dilemma that we have. Those are matters of fact, matters of claimed misconduct that will need direct appearance as well as formal appointment.

Nelson Havi: Mr. Chair, if you rule that you require that be done in the manner which you have indicated we will definitely oblige but (inaudible)

Prof Sihanya: We appreciate. Anyone who has final word. Fine. We really appreciate your appearance here. Complainant being a member of the party and the party duly being represented- I mean here personally here and duly represented we-advocates we appreciate you coming obviously an important one in our country but we also know that there are rules in specific case by case (inaudible). So, the advocates are not firmly before us, properly before us so you may take your leave. Thank you.

105. From the foregoing it is evident that the Complainant's counsel was not allowed an opportunity to represent him substantively due to non filing of an appointment letter and further because their membership in the party was not established.
106. At the hearing, we note the proceedings held were two fold. The advocate of the Party referred to a meeting of 30<sup>th</sup> May, 2023 and the Finance Bill and prayed for expulsion of the Complainant from the Party. The complainant in the disciplinary hearing referred to the issue of associating with a political party that is not his sponsoring party and referred to a meeting of 7<sup>th</sup> February, 2023 and 17<sup>th</sup> February, 2023. It further refers to events of 17<sup>th</sup> March, 2023 and prayed that the member be found to have resigned from the political party and recommend that his name be expunged from the record of party membership.
107. It is evident from the proceedings that numerous issues that were not subject of the NTSCs were considered.
108. In a nutshell, we make the following observations from the record and evidence adduced as partly highlighted above;-



- i. 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 13<sup>th</sup> February 2023. We have highlighted the various complaints that came way after 13<sup>th</sup> February 2023 that were not captured in the subject NTSC dated 13<sup>th</sup> February 2023. 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.
- ii. 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 two NTSC issued to the Complainant fell short of this requirement. The 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.
- iii. The Respondent did not communicate with the Complainant after receiving his responses to the two NTSC. This is notwithstanding the request for particulars. Interestingly, the DC decision states that it found that the Complainant’s response was unsatisfactory but does not address itself to the request that the Complainant made for particulars thus acted in breach of Article 50(2)(j) of *the Constitution* and Section 4(3)(g) FAA Act.
- iv. The 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*.
- v. 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 encloses the complaint, the NTSC and evidence to the exclusion of any other document under Rule 11(2). Interestingly, the notice to appear states that it has enclosed ‘...the complaint,notice to show cause and part of the evidence and entirety of the evidence beingwithin your knowledge...” 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..
- vi. Whereas Rule 17(5) allows the DC to inform the parties to file such further documents, statements, information, legal arguments, etc, and further Rule 20(4) allows the DC to take evidence by affidavit, the DC did not consider any of these options yet it elected to proceed in the absence of both the Complainant and his legal counsel without taking into consideration that whereas the Complainant had responded to the NTSC issued, there were fresh complainants that were yet to be processed in accordance with the DC Rules.  
  
This was in breach of Article 47(1) of *the Constitution*, Section 14A(2)(b) of the PPA, Section 4(1) of FAA Act.



- vii. 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 selected Counsel of his choice and the DC instead qualified the Complainant's right to legal representation and introduced requirements of filing a letter or appointment that has not been prescribed in the DC Rules.
- viii. The Complainant was not informed of the Decision and the reasons thereof and only came to learn of the DC findings and recommendations on 6<sup>th</sup> September 2023 during a press statement that was issued by the Respondent to communicate the decision to the public. This was after the Respondent's NEC had already considered the DC's Findings & Recommendations, and forwarded the resolution ratifying the same to the Interested Party for implementation and/or execution. It is not until 11<sup>th</sup> September 2023 after the institution of the instant proceedings that the Complainant received formal communication of the decision from the 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 and Section 14A(2)(a) of the PPA.
109. 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.
110. 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]

111. 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...”

112. 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...”

113. 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.”

114. Similarly in PPDTTC 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 19<sup>th</sup> March 2019. From the record, there seems to be no reasoned decision but a record of the purported disciplinary proceedings and a verdict dated 19<sup>th</sup> 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...”

115. In light of our foregoing observations and the principles enunciated in the case laws referred to above, we reach the inescapable conclusion that the Respondent acted in breach of Article 47 and 50 of *the Constitution*, Section 4 and 6 of the *Fair Administrative Action Act*, Section 14A(2) of the PPA, 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 Interested Party’s implementation thereof is lawful.**

116. 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.

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

118. 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 2<sup>nd</sup> Respondent without subjecting the same to the NGC for ratification was in breach of Article 12 of the Respondent’s Constitution...”

119. Noting that deeming the Complainant to have resigned had the ultimate effect of cessation of the Complainant’s membership with the party, we have no reason to depart from our above observations. We accordingly find that the decision of NEC to adopt the recommendations of the DC and proceed to apply to the 2<sup>nd</sup> 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.**

120. Parties have made substantive submissions on this issue. We have already made a finding that the TNDC 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.
121. 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?.**

122. Taking into consideration the totality of the facts and circumstances in this case and in light of the foregoing, we find that the Complaint against the Respondent is merited and prayers sought therein are for consideration.
123. 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 Respondent. However, having joined the Interested Party in these proceedings without basis, the Complainant shall pay any costs incurred by the Interested Party.
124. In light of the foregoing, we are inclined to grant the following orders: -
- i. A Declaration be and is hereby issued that the Disciplinary Committee proceedings by the Respondent conducted against the Complainant on the 24<sup>th</sup> of July 2023 were unprocedural and in violation of the Complainant's right to a fair administrative action and fair hearing as per Article 47 & 50 of *the Constitution* of Kenya 2010, Section 14A(2) of the *Political Parties Act*, the *Fair Administrative Action Act*, Article 75(5) and (6) of the Respondent's Constitution as read together with the 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 Respondent convened on 24<sup>th</sup> July 2023 was not properly constituted and as such the National Executive Committee cannot adopt the Recommendations of the Disciplinary Committee which are unlawful and have 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 Hon. Caroli Omondi 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 Respondent and Registrar of Political Parties either by themselves, their employees, servants, agents, assigns and/ or any person whatsoever acting on their behalf and/or under their instructions from removing





the name of Hon. Caroli Omondi, from the register of the members of the Orange Democratic Party, on the basis of the illegal Disciplinary proceedings conducted on the 24<sup>th</sup> July 2023.

- v. Save for costs for the Interested Party which shall be borne by the Complainant, the Respondent shall bear the Complainant's costs of these proceedings.

### **The Dissenting Opinion of Abdirahman Adan (Member)**

125. 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.
126. 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.
127. 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.
128. 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.
129. 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?**

130. 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.
131. The Respondent's letter to the Complainant dated 11<sup>th</sup> September 2023 and referenced ODM/2023/182/009 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."
132. The Respondent's letter to the Interested Party dated 7<sup>th</sup> 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*."



133. The Interested Party, through her letter dated 11<sup>th</sup> September 2023 and referenced RPP/FRP/021 Vol. VIII (39), acknowledges receipt of the above referenced letter from the 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.”
134. Persuaded firmly by these documentations and the pleadings, I have no doubt that the impugned decision is the 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*.
135. I am unable to see any correspondence or document from the 1<sup>st</sup> Respondent to the Complainant, indicating that the 1<sup>st</sup> 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*.**

136. 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?**

137. Naturally, it behooves upon this Honourable Tribunal to next consider whether the Registrar of Political Parties has made a decision on the Respondent’s request to remove the Complainant from the register pursuant to the dictates of Section 14(A).
138. Fortunately, the Interested Party has answered this question in its Replying Affidavit dated 19<sup>th</sup> September 2023 by Joy Onyango. The Deponent attached the Interested Party’s letter evenly dated and referenced RPP/FRP/021 Vol VIII (13) addressed to the 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 Interested Party 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 Interested Party has yet to make this determination?**

139. Having considered this state of affairs, I am of the opinion that since the Interested Party 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.
140. 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.
3. A coalition agreement shall provide for internal dispute resolution mechanisms.”

141. 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.

142. In statutory interpretation, the specific always outweighs the general. Section 14A (3) to (5) of the *Political Parties Act* outweigh 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...”

143. 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.

144. In the premise, I would hold that since the Interested Party has yet to make its decision on the Respondent’s application under Section 14 (A) of the PPA, this Honourable Tribunal lacks any jurisdiction to consider the present Complaint.

145. 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.

146. In this instant complaint, the Registrar is yet to determine the 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.
147. 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.
148. 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 AliSupra*. 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.

149. 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 Interested Party 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**

150. 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. A Declaration be and is hereby issued that the Disciplinary Committee proceedings by the Respondent conducted against the Complainant on the 24<sup>th</sup> of July 2023 were unprocedural



and in violation of the Complainant’s right to a fair administrative action and fair hearing as per Article 47 & 50 of the Constitution of Kenya 2010, Section 14A(2) of the *Political Parties Act*, the *Fair Administrative Action Act*, Article 75(5) and (6) of the Respondent’s Constitution as read together with the 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 Respondent convened on 24<sup>th</sup> July 2023 was not properly constituted and as such the National Executive Committee cannot adopt the Recommendations of the Disciplinary Committee which are unlawful and have 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 Hon. Caroli Omondi 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 Respondent and Registrar of Political Parties either by themselves, their employees, servants, agents, assigns and/ or any person whatsoever acting on their behalf and/or under their instructions from removing the name of Hon. Caroli Omondi, from the register of the members of the Orange Democratic Party, on the basis of the illegal Disciplinary proceedings conducted on the 24<sup>th</sup> July 2023.
- v. Save for costs for the Interested Party which shall be borne by the Complainant, the Respondent shall bear the Complainant’s costs of these proceedings.

151. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) ON THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023.**

.....  
**HON. DESMA NUNGO HSC - CHAIRPERSON**

.....  
**HON. STEPHEN MUSAU - MEMBER**

.....  
**HON. MUZNA JIN - MEMBER**

.....  
**HON. ABDIRAHMAN ADAN ABDIKADIR - MEMBER**

