



**Dullo & another v Azimio La Umoja One Kenya Coalition Party;
Madzayo & 2 others (Interested Parties) (Complaint E003 (NRB
'A') of 2023) [2023] KEPPDT 1357 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEPPDT 1357 (KLR)

**REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT E003 (NRB 'A') OF 2023
D. NUNGO, CHAIR, K.W MUTUMA, FM MTUWETA
& RUTH WAIRIMU MUHORO, MEMBERS
MARCH 14, 2023**

BETWEEN

FATUMA ADAN DULLO 1ST COMPLAINANT

JUBILEE PARTY 2ND COMPLAINANT

AND

AZIMIO LA UMOJA ONE KENYA COALITION PARTY RESPONDENT

AND

STEWART MADZAYO INTERESTED PARTY

LEDAMA OLEKINA INTERESTED PARTY

THE SPEAKER, SENATE OF THE REPUBLIC OF

KENYA INTERESTED PARTY

RULING

1. This matter arises out of the decision by the Respondent to remove the 1st Complainant from the position of Senate Minority Whip. Aggrieved by this decision, the Complainants filed a Complaint and Notice of Motion Application dated 20th February 2023, seeking to reverse the decision.
2. The 2nd Complainant (through the firm of Awele Jackson LLP whose legal representation by the stated firm is contested), the 1st Interested Party (through the firm of Awele Jackson Advocates LLP), and the 2nd Interested Party (through the firm of OG Law LLP) all filed Notices of Preliminary Objections to the Complaint and Application, claiming lack of jurisdiction by



the Tribunal. The Respondent (through the firm of Henia Anzala Advocates) also raised an objection to the Tribunal's jurisdiction at Paragraph 3 of their Replying Affidavit sworn by Junet Mohammed on the 27th February 2023.

3. Notably, when the matter came up for mention before this Tribunal, it was discovered that two separate firms claimed that they had instructions to represent the 2nd Complainant in this matter. Whereas a Notice of Change of Advocates dated 6th March 2023 had been filed notifying this tribunal that the 2nd Complainant had appointed the firm of Kamotho Njomo & Company Advocates to act for them in place of the firm of Awele Jackson Advocates LLP, the firm of Awele Jackson Advocates LLP informed the tribunal that they were contesting the change of advocates by the 2nd Complainant.
4. There being a dispute on representation of the 2nd Complainant, the Tribunal at the first instance, gave directions for the two contesting firms to resolve the issue of representation with their client amicably out of the tribunal. However, the firms had not yet reached a resolution when the matter came up before the tribunal for the second time. In consideration of the urgency of the matter, the Tribunal gave directions on the hearing of the preliminary objections on the 8th March 2023 and once again implored upon the 2nd Complainant to settle the contested issue of representation by the stated hearing date, failure upon which the two law firms claiming to have instructions to represent the 2nd Complainant would file their respective affidavits and documents demonstrating their respective instructions for the tribunal's consideration on the same date for hearing of the preliminary objections.
5. The preliminary objections were argued inter partes on 8th March 2023 at 2: 30 pm. In the interest of ensuring that the 2nd Complainant's right to a hearing on the preliminary objection was protected by whichever counsel that would ultimately be found to be properly on record, and noting that objection to jurisdiction was a matter of law, the tribunal granted an opportunity to both law firms of Awele Jackson Advocates LLP and Kamotho Njomo & Company Advocates to present oral submissions not only on the contested issue of the 2nd Complainant's representation, but also on the preliminary objections.
Submissions by Awele Jackson Advocates LLP on the Question of Representation (on behalf of the 2nd Complainant), and on the Preliminary Objection (on behalf of the 2nd Complainant and the 1st Interested Party)
6. In regards to representation of the 2nd Complainant, Mr. Awele submitted that his law firm was appointed to represent the 2nd Complainant in consonance with the provisions of Article 10.5 of *the constitution* of the 2nd Complainant. He relied on the Supplementary Affidavit that was sworn by Jeremiah Kioni on 1st March 2023 in his capacity as the Secretary General of the 2nd Complainant and his instruction letter annexed thereto. He contends that it is not in dispute that Jeremiah Kioni is still the Secretary General of the 2nd Complainant in light of the interim orders that were issued by the tribunal in another matter, being PPDT Appeal No. E001 of 2023, and that it is only the Secretary General of the 2nd Complainant that has the exclusive mandate under Article 10.5 of the Jubilee Party Constitution to commence legal proceedings on behalf of the party, instruct advocates representing the party and issue official communication on behalf of the party. Mr. Jeremiah Kioni in his stated affidavit denies authorizing the filing of the Complaint herein and maintains that he



- only instructed the firm of Awele Jackson Advocates LLP to represent the party.
7. In response to the Replying Affidavit sworn by Nelson Dzuya on 6th March 2023 filed by Kamotho Njomo & Company Advocates on behalf of the 2nd Complainant, it was submitted that neither the 2nd Complainant's Chairperson nor the 2nd Complainant's Deputy Secretary General had the authority to issue the communication that they purported to issue on behalf of the 2nd Complainant, and that the purported instructions issued to Kamotho Njomo & Company Advocates were a legality.
 8. With respect to the preliminary objection, Mr. Awele, on behalf of the 2nd Complainant and the 1st Interested Party, relied on their notice of preliminary objection which raised the following points of law:
 - i. THAT the Complaint and Application are non-suited for failure to exhaust mandatory preliminary dispute resolution mechanisms provided for under the Jubilee Party Constitution and/or the AZIMIO Coalition Agreement.
 - ii. THAT the Complaint and Application offend the mandatory provisions of section 40(2) of the *Political Parties Act* and section 9(2) of the Fair Administrative Actions Act.
 - iii. THAT in the alternative, the Complaint and Application are non-suited to the extent that the decision to remove the 1st Applicant as the Senate Minority whip was taken pursuant to Senate Standing Order No. 20(4). Pursuant to section 12(2) of the *Parliamentary Powers and Privileges Act*, 2017, the Tribunal Lacks jurisdiction to hear disputes arising from the discharge of the functions of the office of the minority leader.
 - iv. That the application and Complaint are otherwise an abuse of court process.
 9. The tribunal was invited to consider the preliminary objection within the confines of the Complaint and application as filed, and whilst taking into consideration the definition of a preliminary objection in the case of *Mukisa Biscuits Manufacturing Company limited v West End Distributors Limited* [1969] EA 696. It was argued that the Complaint raised two main disputes, one being that the 1st Complainant's right as a member of the Respondent had been infringed, and secondly, that the 2nd Interested Party, in communicating to the 3rd Interested Party violated the Standing Orders of Senate. On the first dispute, it was submitted that the 1st Complainant had annexed the Respondent's Coalition Agreement. The agreement was clear on the members of the Respondent and that the 1st Complainant was not a member of the Respondent. The 1st Complainant therefore had no locus to complain about actions of the Respondent, and that it is the 2nd Complainant that was a member of the Respondent and with the locus to complain.
 10. It was further submitted that even if the 1st Complainant had locus to complain to the Respondent, the 1st Complainant did not plead that she attempted to submit the dispute over her removal to the dispute resolution mechanism established in the coalition agreement, and neither did the 1st Complainant state anywhere that such a dispute resolution mechanism did not exist. Mr. Awele challenged the Affidavit that was placed on record sworn by Abdi Noor, claiming that the deponent to the subject Affidavit was not a party to the dispute and that it in fact gave rise to a new issue that should have been pleaded by the Claimants and not a stranger to the proceedings.
 11. The 1st Interested party and the Secretary General of the 2nd Complainant both aver in their respective affidavits that no dispute arising from the removal of the 1st Complainant from office has been raised



with the 2nd Complainant or the Respondent and is accordingly not ripe for resolution before the Tribunal.

12. With respect to the second dispute raised in the Complaint, that is, that the 2nd Interested Party, in communicating to the 3rd Interested Party, violated the Standing Orders of Senate, it was submitted that the 1st Complainant admitted in his pleading that there was a Parliamentary Group Meeting of the Respondent and that she did not attend the meeting. Counsel submits that the 1st Complainant approached the tribunal with a decision which had been made and communication issued to the Speaker, and that the tribunal no longer had authority under Section 12 of the National Assembly (Powers and Privileges) Act to deal in the matter.

Submissions by Kamotho Njomo & Company Advocates (on behalf of the 2nd Complainant) on the question of Representation and on the Preliminary Objection

13. As we had already pointed out, this tribunal listened to two parallel submissions on behalf of the 2nd Complainant.
14. Firstly, regarding representation, Mr. Njomo Advocate submitted that his law firm had the legal authority to represent the 2nd Complainant. He relied on the Affidavit sworn by the 2nd Complainant's National Chairman where it is averred that the appointment of the firm of Awele Jackson Advocates LLP is irregular as they never expressed interest to provide the party with legal services, and neither have they been retained to do as required. The National Chairman of the 2nd Complainant maintains that Kamotho Njomo & Company Advocates is the correct firm on record, and is better suited to secure the interests of the 2nd Complainant, having been formally instructed through a letter dated 4th March 2023.
15. Interestingly, through Mr. Njomo's law firm, the 2nd Complainant submitted that they are in opposition to the preliminary objections. They filed a replying affidavit opposing the same, and submit that while *the constitution* of the Respondent party provides for an internal dispute resolution mechanism, the same has never been set up. As such, the Complainants did not have a forum within the coalition to have the dispute concerning membership of Senate Committees resolved when it arose. However, the 2nd Complainant submits that the matter can be resolved expeditiously if the Respondent sets up the dispute resolution body/panel to consider the dispute at hand.

Submissions by OG Law LLP (on behalf of the 2nd Interested Party's) on the Preliminary Objection

16. Vide the 2nd Interested party's preliminary objection, he raises preliminary points of law in limine contending that this Claim should be struck out and or dismissed on the grounds that:
 - i. The Honourable Tribunal lacks jurisdiction to entertain this claim on account of Section 40(2) of the *Political Parties Act*, 2011.
 - ii. The issues herein are res-sub judice Senate proceedings.
 - iii. The Tribunal has no jurisdiction to challenge proceedings emanating from parliamentary standing orders.
17. Mr. Ouma Advocate submitted that a preliminary objection is determined based on pleadings and on the assumption that what is pleaded is true, and that there was no room for contesting a preliminary



objection through a grounds of opposition or an affidavit. He therefore raised issue with the grounds filed on behalf of the 1st Complainant and the Replying Affidavit on behalf of the 2nd Complainant.

18. Counsel submitted that the Complainants had not demonstrated any attempt at resolution of the complaint through the available internal mechanisms. According to Counsel, having brought the dispute under the umbrella of Azimio, it was incumbent upon the Complainants to show that they attempted to subject the dispute within Azimio but that the organ did not exist. It is further submitted that at the time the tribunal was moved, this dispute was already before the Senate and the Speaker was about to deliver a decision thereon. He submits that the matter was accordingly sub judice as Parliament had been moved to determine the same.
19. It is the 2nd Interested Party's further submission that the question of Senate leadership is determined by a vote and that this tribunal has no jurisdiction. The tribunal was also referred to section 12 of the National Assembly (Powers and Privileges) Act which prohibited the tribunal from handling the matter. Counsel relied on the authorities listed in their list of authorities.

Submissions by Henia Anzala Advocates (on behalf of the Respondent) on the Preliminary Objection

20. Whereas the Respondent did not file a Preliminary Objection, they have, within their Replying Affidavit, raised objections to the effect that the Complaint and Application are fatally defective and should be dismissed in limine for the following reasons:-
- i. This Tribunal does not have jurisdiction to hear and determine the Complaint and Notice of Motion.
 - ii. Article 16 of the Coalition agreement for the Azimio la Umoja One Kenya Coalition provides for dispute resolution mechanisms. The Complainants have not exhausted the dispute resolution mechanisms prior to invoking the jurisdiction of this Tribunal.
 - iii. The 1st Claimant is not a member of the Respondent, she therefore cannot institute and/or maintain any action against the Respondent. iv. The 1st interested party has immunity from civil proceedings pursuant to the provisions of Sec.12 of the *Parliamentary Powers and Privileges Act*.
21. Mr. Anzala submitted that section 40(2) of the *Political Parties Act* placed a burden on the Complainants to demonstrate that they had made an attempt to resolve the dispute internally within the party or coalition structures, and that it was not the party to demonstrate that there was no structure for internal dispute resolution within the party. He submitted that the burden would only shift to the party if the Complainants demonstrated the action they took.
22. Counsel referred the tribunal to Article 16 of the Respondent's coalition agreement which provides for a dispute resolution panel and that any party moving the tribunal can only come in form of an appeal against the decision of the panel. It was submitted that the dispute resolution panel only comes into play once the coalition is notified that there is a dispute. There is no pleading or evidence that the coalition was notified of a dispute in this case. Counsel referred to paragraph 7 of the replying affidavit of Abdi Noor- which recognized that coalition council can convene a dispute resolution panel expeditiously if requested to do so. Accordingly, the claim that a dispute resolution panel does not exist is erroneous.



23. It was further submitted on behalf of the Respondent that bearing in mind that the 1st Complainant admitted that the 1st Interested Party convened a Parliamentary Group meeting, it is clear the 1st interested party was not acting in his capacity as an official of the Respondent but as Senate Minority leader. The instant complaint is against actions taken by the 1st interested party in his capacity as a minority leader and consequently, section 12 of the National Assembly (Powers and Privileges) Act insulates the 1st interested party against any action.

Submissions by Chimera, Kamotho & Company Advocates (on behalf of the 1st Complainant) on the Preliminary Objection

24. The 1st Complainant raised the following grounds of opposition in response to the 2nd Interested Party's notice of preliminary objection:

- i. Section 40(2) of the *Political Parties Act*, 2011 is inapplicable as the internal dispute resolution mechanism does not in fact exist, and consequently the Honourable Tribunal has jurisdiction to entertain the 1st Applicant's Complaint.
- ii. The issues raised in the 1st Applicant's Complaint do not relate to Senate proceedings.
- iii. The issues raised in the 1st Applicant's Complaint do not relate to proceedings emanating from parliamentary Standing Orders.

25. The 1st Complainant also filed grounds of opposition to the preliminary objection by the 2nd Complainant/2nd Applicant and the 1st Interested Party as follows:

- i. The 2nd Applicant, being an Applicant in the Claim herein, is incompetent to raise this preliminary objection.
- ii. The 1st Applicant is not legally required to exhaust preliminary dispute resolution mechanisms provided under the Jubilee Party Constitution as the dispute subject of the 1st Applicant's Complaint is not a dispute between the 1st Applicant and Jubilee Party.
- iii. The preliminary dispute resolution mechanisms envisioned under Azimio Coalition Agreement do not in fact exist.
- iv. Section 40(2) of the *Political Parties Act*, 2011 and Section 9(2) of the Fair Administrative Actions Act are inapplicable as the internal dispute resolution mechanism does not in fact exist, and consequently the Honourable Tribunal has jurisdiction to entertain the 1st Applicant's Complaint.
- v. The issues raised in the 1st Applicant's Complaint do not relate to proceedings ***emanating from parliamentary Standing Orders.***

26. An additional replying affidavit was filed by the 1st Complainant, which was sworn by Abdi Noor, introduced as a member of the Respondent's Coalition Council. He deponed that Article 16 of the Deed of Agreement provides for the appointment of a Dispute Resolution Panel by the Coalition Council as a permanent mechanism. However, said Council has never convened to appoint the Panel.



That said, he expressed the Council's ability to constitute a dispute resolution panel if called upon to do so.

27. Mr. Owiso Advocate submitted that the preliminary objections were based on a misunderstanding of the dispute, which dispute was between the 1st Complainant and the Respondent, and between the 2nd Complainant and the Respondent. There was no dispute between the 1st Complainant and the 2nd Complainant and therefore there was no legal requirement to exhaust internal dispute resolution mechanism of the 2nd Complainant. As regards internal dispute resolution mechanism of the Respondent, counsel drew the tribunal's attention to the Affidavit sworn by Abdi Noor to the effect that no dispute resolution panel existed. He maintains that Abdi Noor's affidavit is properly on record and that the law allows a party to respond to a preliminary **objection by filing grounds of opposition or replying affidavit.**
28. Counsel confirmed that there was no notification of dispute to the dispute resolution panel or to the coalition. However, the 1st complainant should not be barred from moving the tribunal in such instances where the party did not have an internal dispute resolution mechanism. Based on Abdi Noor's confirmation that the dispute resolution panel can be constituted, this tribunal can refer the matter to the panel whilst issuing interim orders to protect the 1st complainant's interests.
29. He further submitted that the dispute at hand concerned party processes and not Senate processes and therefore section 12 of the National Assembly (Powers and Privileges) Act was inapplicable.

Issues, Analysis and Determination

30. We have reviewed the parties' pleadings and submissions on the preliminary objections and the contested question of representation by the 2nd Complainant and we have isolated the following key issues for determination: -
 - i. Whether the Tribunal has jurisdiction to hear and determine this matter?
 - ii. Which firm should represent the 2nd Complainant in this matter?
 - iii. What are the appropriate reliefs in the present circumstances? Whether this Tribunal has jurisdiction to hear and determine this matter?
31. The term, 'jurisdiction' is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take *cognizance of matters presented in a formal way for decision.*"
32. The place of jurisdiction is well settled in law. In the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) 1, Justice Nyarangi J held as follows:

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. **Jurisdiction must be acquired before judgment is given.**"



33. The definition and practical implications of jurisdiction were also discussed in the case of Phoenix of E.A Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR, where the court held:

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

34. Notably, this Tribunal is alive to the importance of the right to representation. Sacrosanct is the right that it is enshrined under Article 50 (2) of *the Constitution* of Kenya, 2010. However, as demonstrated above, jurisdiction is everything and it is what gives this Tribunal the power to hear and determine matters that are brought before it. Without jurisdiction, any orders made by this Tribunal amounts to a nullity ab initio. As such, before this Tribunal delves into the merits of the case including that of the 2nd Complainant’s representation, we must satisfy ourselves that we are **possessed of the jurisdiction empowering us to do so.**

35. The source and scope of jurisdiction has been effectively pronounced in the landmark Supreme Court case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the judges held that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution.*”

36. That said, the jurisdiction of this Tribunal emanates from both Constitutional and Legislative provisions. Article 169 (1) (d) of *the Constitution* of Kenya as read together with Section 40 of the *Political Parties Act*, 2011 (hereinafter “PPA 2011”), provides as follows: -

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.

37. Does the complaint herein fall under section 40(2) of the *Political Parties Act* thus requiring IDRDM prior to moving the tribunal? We note from the pleading that the Complaint is framed as a dispute between the 1st Complainant and the 2nd Complainant on one hand, and the Respondent coalition and Interested Parties on the other hand.

38. It is noteworthy that the 1st Complainant's grievance originated from the actions of the Respondent that consequently led to her being de-whipped. Bearing in mind that such impugned actions by the Respondent arise out of the coalition agreement, it is our considered view that the instant dispute falls within the scope of Section 40 (1) (e) of the PPA. As articulated by Section 40(2) of the PPA, the Tribunal can only adjudicate on such disputes once a party to the dispute adduces evidence of an attempt to subject the dispute to the internal dispute resolution mechanisms in the coalition agreement. This requirement is also referred to as the doctrine of exhaustion, and it mandates the aggrieved party/parties to adduce evidence of an attempt at compliance before the Tribunal can assume jurisdiction.

39. This tribunal has considered what amounts to an attempt at IDRDM in various cases.

In the case of John Mworira Nchebere & Others vs The National Chairman Orange Democratic Movement & Others (Nrb PPDT Complaint No. E002 OF 2022), the

Tribunal held that:-

“Our pre-amendment position that a party must demonstrate bona fides (an honest attempt) in pursuing IDRDM remains good law. Furthermore, the party to a dispute should also show, among others:

- a. The unavailability of the organ to resolve disputes;
- b. If the same is available; it is inoperative, fraught with conflict of interest, obstructive, in perpetual paralysis or subject to inordinate delays which may compromise the subject matter of the dispute;
- c. Reasonable time is afforded to the party to respond, constitute or activate an IDRDM organ and deal or determine the dispute;
- d. Due consideration should be given to the urgency and public interest in the subject matter of the dispute; and
- e. The reliefs sought should be proportionate, and if alternative remedies suffice to mitigate the harm likely to be suffered, the same should be considered. In essence, the utilitarian or proportionality of the process and remedies should be considered so as to achieve an equilibrium.

The foregoing list is by no means exhaustive, but is a useful compass for navigating the frontiers delimited by section 40 (2) of the *Political Parties Act*, 2011.”



40. In order to prove that IDRМ has been explored, the dispute does not require to be heard and determined to completion, rather an honest attempt at pursuing IDRМ should be demonstrated. This was held in the of Jeconia Okungu Ogutu & another v Orange Democratic Movement Party & 5 others, where the Court stated;

“Where there has been an attempt to refer to the IDRМ, this Tribunal becomes well seized **of the matter.**”

41. However, can the 1st Complainant in her personal capacity maintain a claim against the Respondent under the coalition agreement? We respond to this in the negative. The 1st Complainant is not able to directly present her dispute to the Respondent as she is not a party to the Respondent’s coalition agreement. She can only present such grievances to the Respondent through the 2nd Complainant who is a party to the Respondent. This position has been underscored in many decisions of this tribunal.

For instance, in PPDT Complaint No. 12 of 2021 Hon Senator Cleophas Malala vs. ODM & Others, the Tribunal observed as follows:-

‘...This Tribunal has previously taken the position that interests of individual members of political parties that have entered into a coalition agreement are within the protection of their respective political parties. Accordingly, such individual members can have their grievances in the coalition arrangement addressed through their political party vide the dispute resolution mechanisms provided for in the coalition agreement that their party has entered into..’

42. Similarly, in the case of PPDT Complaint No. 15 of 2020 Hon. Patrick Musili vs ODM & Others, we stated as follows:-

“...in order to determine whether the Complaint is or can be described as a partner in the said coalition we have looked at the NASA coalition agreement that is attached to the Complaint and was referred to by all the parties in the course of their submissions. Article 2 of the said agreement defines the parties to coalition as Amani National Congress; Forum for Restoration of Democracy-Kenya; Orange Democratic Movement; Wiper Democratic Movement. Article 7 of the said NASA coalition agreement provide for the decision making process including at the county level. It thus emerges that interests of the members of the various political parties that form the coalition are protected by their political party.”

The Applicant’s political party in this case is Amani National Congress (the 2nd Respondent). Save to associate themselves with the submissions of the Applicant, the 2nd Respondent neither stated nor demonstrated that they made any attempt to address the Applicant’s concerns through the mechanisms provided for in the Coalition Agreement. As we stated in the case of Patrick Musili already referred to above, it is an unfavorable approach to fail to sort out or attempt to sort out political party issues, which are largely negotiation issues, within the context provided for (such as the coalition documents), and **instead ask this Tribunal to act...**’

43. We have not been shown any attempts by the 1st Complainant to address her grievances through her party. The Complainants instead submitted that Section 40(2) of the PPA does not apply as the IDRМ envisioned under the Respondent’s coalition agreement does not in fact exist. The 1st Complainant, proceeds to explain that while Article 16 of the Deed of Agreement provides for the appointment of a Dispute Resolution Panel by the Coalition Council as a permanent mechanism,



the Council has never convened to appoint the said Panel. The 2nd Complainant through the firm of Kamotho Njomo & Company Advocates, advance the same argument, with both contending that the matter can be resolved expeditiously if the Respondent sets up the dispute resolution body/panel to consider the dispute the at hand. In essence, the Complainants cite lack of a dispute resolution organ as the main reason for not

pursuing IDRМ.

44. However, as demonstrated by case law, the burden first rests with the Complainants to demonstrate that they have made an honest attempt at IDRМ. We have considered the definition of an attempt at IDRМ as judicially underscored in the above cases against the present circumstances of this case and we find difficulty in finding in favour of the complainants. As we have already observed, a review of the Complainant's pleadings, affidavits and documents do not reveal that the 1st Complainant raised any concerns to her party or through her party over how the decision by the Respondent was made, either by letter, email or other means of communication. The 1st Complainant has not demonstrated that she approached the 2nd Complainant with her grievances with a view to having the 2nd Complainant address the same under the Respondent coalition agreement. Neither has the 2nd Complainant demonstrated that they notified the Respondent coalition of the disputeor **attempted to resolve the dispute within the coalition agreement.**
45. In addition, the Tribunal notes that the decision to remove the 1st Complainant was made on 14th February 2023 while the instant Complaint and Application were filed on 20th February 2023. This leaves a period of approximately six days in which no complaint was made to the coalition party. Coupled with the fact that both Complainants have expressed willingness to have the matter resolved at the party level, it is the Tribunal's conclusion that the Complainants' have not demonstrated an honest attempt to resolve this dispute within the coalition arrangement prior to moving this tribunal. This is in breach of Section 40(2) of the [Political Parties Act](#).
46. In PPDT No. 12 of 2018, Amani National Congress vs Orange Democratic Movement & Other, we struck out the Complaint for want of exhaustion of IDRМ within the NASA coalition agreement.
47. In Amani National Congress Party v Godfrey Osotsi & another [2021] eKLR, Mbogholi Msagha observed as follows:-
- ‘ ...Before I conclude I must observe that judicialisation of political disputes has become common place in our jurisdiction. It is highly recommended that all efforts must be applied to ensure that, internal dispute resolution mechanisms address such issues to the satisfaction of the parties such that, recourse to the courts of law is minimized. Alternative disputes resolution may enhance peaceful coexistence. To apply such systems may infuse collegiality in political parties where the players need one another from time to time even after serious fall outs...’
48. We cannot agree more with the positions articulated in the afore-going judicial**authorities and we find no reason to depart therefrom.**
49. Having found that there was no honest attempt at IDRМ, it is our view that the present Complaint and Application is premature and the Tribunal lacks jurisdiction to hear and determine the same. In consequence, the Tribunal will refrain from delving into questions of jurisdiction vis-à-vis senate proceedings/standing orders.



What are the appropriate reliefs in the present circumstances?

50. Having found that the Tribunal lacks jurisdiction, it follows that delving into the question of the 2nd Complainant's representation will be an exercise in futility. That **leaves us no option but to down our tools.**
51. In regards to costs which ordinarily follow the event, we are of the considered view that the circumstances of the case require each party to bear its own costs in the **interest of fostering party unity.**

Disposition

52. In light of the foregoing, we order as follows: -

- i) That the Complaint and Application herein be and is hereby struck out. ii) Each party to bear its own costs.

Dated and delivered at Nairobi this **14th** day of **March** 2023.

DESMA NUNGO.....

(CHAIRPERSON)

DR. KENNETH MUTUMA.....

(MEMBER)

FLORA M. MAGHANGA-MTUWETA.....

(MEMBER)

RUTH WAIRIMU MUHORO.....

(MEMBER)

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